
JUSTICE ACADEMY OF TURKEY

# LAW & JUSTICE Review

Year:5 • Issue:9 • December 2014

www.taa.gov.tr

ISSN 1309-9485

9




Veri Tabanlarında Taranmaktadır.

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## CONTENTS

# IRAQ AND THE CONCEPT OF INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS

*Irak ve Suçlar Bakımından Uluslararası Adli İşbirliği Konsepti*

**Prof. Anton GIRGINOV***

**ABSTRACT**

The academic study and practical improvement of the Iraqi mechanism for international judicial cooperation in criminal matters is a task of major significance not only for Iraq but for other countries as well, especially its neighbours. The most important forms of this cooperation are: extradition, rogatory commissions/letters rogatory, transfer of prisoners (sentenced persons) and transfer of criminal proceedings. The globalization witnessed today makes these forms necessary for the successful completion of an increasing number of criminal cases: legal proceedings and penal executions. This is why all countries in the world pay particular attention to the four mentioned forms and to international judicial cooperation, in general.

The chief subject of any such research is the complex legal framework (international instruments and domestic law) of Iraq for each form of international judicial cooperation. The aim is to identify the basic weaknesses of the Iraqi mechanism of cooperation and propose some improvements given the peculiarities of the aforementioned forms of cooperation. It is taken into consideration that international judicial cooperation is not only a matter of legality; this cooperation is also a matter of opportunity as well. Hence, it is within the discretion of the judicial body in charge of the case (prosecutor or court) to decide whether to resort to any form of international judicial cooperation or to obstain from requesting foreign countries.

Since Iraq is a Civil Law country it is expected to adhere to the tradition and principles of this type of law in the development of the legal framework for international judicial cooperation. Otherwise, it would be more difficult to overcome existing shortcomings and to modernize the Iraqi law in the area of this cooperation.

**Key Words:** cooperation, extradition, international, judicial, letter rogatory, request, transfer

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## INTRODUCTION

Nowadays, the fight against crime, especially terrorism, organized crime and corruption, is impossible without efficient international judicial cooperation in criminal matters. All countries in the world pay particular attention to it. Iraq and the other Arab countries are no exception. They have also been developing this important cooperation among themselves.

Basically, international judicial cooperation activities in Iraq are governed by Articles 352 - 368 of the Iraqi Criminal Procedure Code, bilateral treaties with foreign countries, such as Hungary, Iran, Turkey and the UK. Along with signing and ratifying bilateral treaties, Arab countries created multilateral agreements on International Judicial Cooperation in Criminal Matters going through different stages of development. While the 1983 Riyadh Arab Agreement for Judicial Cooperation regulates its classic forms, the 2010 Cairo Arab Convention to Counter Organized Crime across National Borders also brings into life some modern forms of international cooperation. Iraq is a party to these two regional agreements. Finally, Iraq is also a party to many UN conventions containing rules on international judicial cooperation in criminal matters, namely:the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances the UN Convention against Transnational Organized Crime the UN Convention against Corruption and others. But these universal instruments, though popular in Iraq, are rarely used by Iraqi authorities in the process of international judicial cooperation. This makes it necessary to find a way to enhance the Iraqi state mechanism for this cooperation.

## I. THE IRAQI LEGAL FRAMEWORK, IN GENERAL

1. The existing hierarchy of legal instruments on international judicial cooperation has not made it necessary to expressly establish any priority among them in the Iraqi law. Neither the Constitution of Iraq, nor the Iraqi Criminal Procedure Code provides any solution to cases of conflict between domestic law rules of Iraq and international agreements to which Iraq is a party. In particular, the Iraqi Constitution has no provision postulating, as for example Article 91 (2) of the Polish Constitution, or Article 10 (v) of the Tajik Constitution,

that in cases of conflict international instruments prevail domestic law[1]. This is a matter of interpretation with no guarantee of the final result. The only provision that touches in some way on the issue is in (Section 7 – Requests for Legal Assistance and Extradition of Criminals)**,** Article 352 of the Iraqi Criminal Procedure Code. It reads: "*In requests from foreign countries for legal assistance and in the extradition of accused and sentenced persons the rules stipulated in this Section of the Code will be followed in consultation with the regulations of international agreements and the principles of international law and the principle of reciprocity*". Obviously, consultations with international agreements do not necessarily result in establishing any priority over the rules of the Iraqi Criminal Procedure Code that regulate extradition and other forms of international judicial cooperation in criminal matters. Being a Civil Law country[2], that is to say theoretically recognizing the direct applicability and priority of international agreements rules, Iraq is nevertheless in need of a clear provision in this sense, such as Article 1 (3) of the German Law on International Legal Assistance in Criminal Matters: "*Provisions of international agreements, insofar as they have become directly applicable domestic law, have priority over the provisions of this law*". Alternatively, Iraq may introduce a rule to prescribe the subsidiary character of domestic law to international instruments, such as Article 1 (1) of the Law on Mutual Legal Assistance in Criminal Matters of Bosnia and Herzegovina: "*This Law shall govern the manner and procedure of mutual legal assistance in criminal matters (hereinafter: mutual legal assistance), unless otherwise provided by an international treaty or if no international treaty exists*".

Unlike the Iraqi law, 1983 Riyadh Arab Agreement on Judicial Cooperation contains a provision designed to solve cases of conflict between its rules and rules of bilateral agreements between parties to the Arab Agreement. As per

[1] See also Article 151 of the Constitution of Azerbaijan, Article 4 (5) of the Constitution of Bulgaria, Article 6 (2) of the Constitution of Georgia, Article 28 of the Constitution of Greece, Article 4 (2) of the Constitution of Moldova.

[2] The Iraqi criminal justice system follows the French model, in particular. The Penal Code of 1969 and the Criminal Procedure Code of 1971 are derived from the Egyptian and Syrian legal systems, which in turn derived from the French legal system.**Bassiouni, M C.**Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal, 23 September 2005, from:http://insct.syr.edu/wp-content/uploads/2013/03/Bassiouni.Postconflict-Justice-in-Iraq.2005.pdf.See also: http://www.loc.gov/law/help/legal-history/iraq.php.

its Article 68.B, if the provisions of the present Agreement conflict with those of any previous treaty between two or more contracting parties, the text most effectual shall apply. Thus, even though the Arab Agreement is to a large extent based on the Council of Europe instruments in the area of international judicial cooperation, it does not follow Article 28 (1) of the European [Strasbourg] Convention on Extradition or Article 26 (1) of the European [Strasbourg] Convention on Mutual Assistance in Criminal matters both postulating that their provisions shall, in respect of those countries to which they apply, supersede the rules of any bilateral treaties, conventions or agreements governing international judicial cooperation between any two Contracting Parties. Thus, the Riyadh Arab Agreement on Judicial Cooperation orders to choose from conflicting agreements the one that is likely to bring the better result rather than necessarily choose its own provisions.

2. Even though a Civil Law country, Iraq has no clear rule as to whether it shall consider incoming requests for international judicial cooperation (extradition requests, letters rogatory, requests for service of procedural documents) without any treaty with the requesting country. The quoted Article 352 of the Iraqi Criminal Procedure Code mentions the reciprocity principle (the typical extra-agreement condition for international judicial cooperation in Civil Law countries) but not as some separate condition for considering incoming international judicial cooperation requests, subsidiary to international treaty. There is no Article in the Iraqi law, such as Article 17 of the Act on Mutual Legal Assistance of Croatia or Article 457 (10 (i) of the Russian Criminal Procedure Code to introduce reciprocity as a separate condition for international judicial cooperation. Thus, the mentioned Russian Article reads as follows: "*The court, the public prosecutor, the investigator, the head of an investigatory body shall execute inquiries on the performance of the procedural actions, handed over to them in the established order, which have come in from the corresponding competent bodies of the foreign states in conformity with the international treaties of the Russian Federation and the international agreements, or on the basis of the principle of reciprocity*".

Even if a foreign country is ready to render international judicial cooperation

under the reciprocity principle, it would come upon some real difficulties. In case of an Iraqi extradition request, the requested foreign country shall be sure that the Iraqi authorities would honor the Speciality Rule, namely: the extradite shall not be proceeded against, detained, prosecuted, tried or punished for any crime committed prior to his/her surrender in respect of which extradition was not granted. The problem is that the Iraqi Criminal Procedure Code contains no such restricting provision.

Second, unlike the European Convention on Extradition, both Article 360 (2) of the Iraqi Criminal Procedure Code and Article 42 (3) of the Riyadh Arab Agreement on Judicial Cooperation require some evidence of the guilt of the fugitive whose extradition is wanted for his trial. This makes it more difficult to obtain extradition from Iraq. This is particularly valid for other Civil Law countries as they apply the so-called 'no evidence' standard in considering incoming extradition requests[3]. Such countries though are likely to reciprocate. Thus, when they receive an extradition request from Iraq these countries are likely, in turn, to require and inevitably consider to some extent the evidence collected by Iraqi investigating authorities against the wanted fugitive. Given the difficulties of Iraqi judiciary, such a way of cooperation, requiring evidence in addition, is not of benefit to Iraq. It puts Iraq in a worse position. Because evidence produced in Iraq is likely to be of lower quality than evidence produced in other countries, Iraqi outgoing requests for extradition would virtually be more often rejected for absence of necessary and trustful evidence than extradition requests coming from other countries.

Third, in some cases Iraq requests extradition in respect of crimes which carry the death penalty or this penalty has already been imposed on the wanted person. But it is well known that most countries deny extradition in respect of such crimes unless the requesting country, Iraq, gives assurance that the death penalty will not be imposed or if already imposed, it shall not be carried out. The problem is that the Iraqi law contains no provision to commute, on demand

[3] See also **Mylonaki, Emmanouela-Burton, T.:** Extradition as a tool in the Fight against Transnational Crime: a Holistic Evaluation, in "JURA", scientific magazine-University of Pécs, Law Faculty, 2011, No. 2, p. 175.

of the requested country, the death penalty into a less severe punishment[4]. Without such legal basis a foreign country would hardly accept existance any assurance for ruling the death penalty out. Further on, in such situations where the investigated crime carries the death penalty in the requesting many countries refuse to execute letters rogatory from that country. The death penalty poses the so-called danger to the *ordre public* or other essential interests of the requested country. Such a danger constitutes a legal impediment to grant the incoming request. Thus, according to Article 2.b of the European Convention on Mutual Assistance in Criminal Matters, legal assistance may be refused, if the requested party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* (public policy) or other essential public interests of its country.

Fourth, in some cases Iraq requests extradition for execution of punishments imposed *in absentia*. Most countries though are likely to deny extradition where the trial was held *in absentia* unless the requesting country, Iraq, gives assurance for re-trial. The problem is that the Iraqi law contains no provision to grant the convicted extraditee, on demand of the requested country, the right to re-trial. There is no such provision as Article 422 (1) (6) of the Bulgarian Criminal Procedure Code reading that:"*A criminal case shall be re-opened where: … extradition has been allowed in the case of sentencing in absentia where a guarantee has been provided by the Bulgarian state for reopening the criminal case in respect of the offence, in respect to which extradition has been allowed*".

Besides, Iraq may also request service of summonses, so that a material witness or expert witness would come to Iraq to testify in an Iraqi court. Such a request is likely to be denied. Any requested country would look for guarantees that the summoned person enjoys immunity. Such immunity is granted, for example, by virtue of Article 22 of the Riyadh Arab Agreement for Judicial Cooper-

[4] For example, there may be a provision in the law of the requesting country that "capital punishment shall not be imposed, and if already imposed shall not be put into effect with regard to a person extradited by a foreign country under such condition. In such case the capital punishment stipulated in the law or imposed shall be replaced by 30 years imprisonment". Prior to the abolishment of the capital punishment, Bulgaria had such a provision – Article 38 (3) of the Bulgarian Penal Code.

ation: "*Any witnesses or experts - regardless of their nationality - served notice to attend in the territory of any contracting party, and doing so voluntarily for this purpose before the judicial bodies of the requesting party, shall enjoy immunity of penal action against them, or arrest, or imprisonment on the basis of previous actions in their part, or in the execution of convictions made prior to their entry to the territory of the requesting party*". The problem is that if the request for service of summonses is done under the principle of reciprocity, then no international agreement is applicable. The immunity in question might be provided for only in the domestic law of the requesting country and if Iraq is this country, its law does not foresee any such immunity. Unlike Section 74 of the Hungarian Law on International Legal Assistance in Criminal Matters, for example, the Iraqi domestic law does not recognize anywhere the principle of *Salvus Conductus* (Latin: free passage), which grants such persons immunity from prosecution for previously committed criminal offences or serving previously imposed punishments.

It follows that in practice Iraq cannot obtain international judicial cooperation on any extra-agreement basis, including reciprocity. Presently, Iraq shall rely only on international agreements with requesting countries.

3. The main international partners of Iraq are the countries that are parties to the Riyadh Arab Agreement for Judicial Cooperation. This Agreement governs: extradition (Articles 38-57), international transfer of prisoners (Article 58-63), rogatory commissions/letters rogatory (Articles 14-21) and international summoning of witnesses and experts (Articles 22-24). The Agreement contains also rules on recognition and enforcement of foreign judgments which are not criminal; these judgments are pronounced in civil, commercial, administrative or personal status proceedings (Articles 25-37).

**II. THE IRAQI EXTRADITION LAW**

4. As in many other countries, extradition is regarded as the key form of international judicial cooperation for Iraq.

Being a Civil Law country, Iraq does not extradite own nationals. By virtue of Article 358.4 of the Iraqi Criminal Procedure Code, *"Extradition is not permitted*

*in the following circumstances: ... If the person requested is of Iraqi nationality".* Thus, only foreigners (foreign nationals and stateless persons) are eligible for extradition. Because Iraq and other Civil Law countries apply extraterritorially to their national criminal laws and therefore, can hold their nationals responsible for crimes committed in other countries as well, they do not need to extradite such nationals to these countries for prosecution, trial and punishment. Civil law countries can conduct the criminal proceedings against them in their own territories.

**Extradition – basic concepts**

***Common Law Countries –vs– Civil Law Countries***

| Criteria for comparison | Common Law | Civil Law |
|---|---|---|
| Extra-territorial applicability of substantive criminal law | No | Yes |
| Extradition of nationals, especially those who have committed criminal offences abroad | Yes | No |
| Evidence in support of the accusation/conviction required | Yes | No |
| Are court proceedings always necessary? | Yes | No |
| Country will extradite only under international treaty (and not under the conditions of reciprocity only) | Yes | No |

The Iraqi domestic law does not clarify which is the relevant moment to define the existence or non-existence of Iraqi nationality as an impediment to extradition abroad: the time of the commission of the crime in respect of which extradition is being sought or the time of the decision on the extradition request. The Riyadh Arab Agreement for Judicial Cooperation gives an answer to this question. According to Article 39 (2) of the Agreement, the nationality of the wanted person "*shall be determined as on the date on which the crime for which extradition is requested was committed".* Therefore, the nationality at the time of the decision is irrelevant. Extradition shall not be refused where the

wanted person acquires the requested country's nationality in the meantime. It is noteworthy that the European extradition law offers the contrary solution to the problem of the relevant time for determining nationality. It is more protective of own nationals. as per Article 6 (1) (c) of the European Convention on Extradition: "*Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognized as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph "a" of this article*", namely: to refuse to surrender the person.

Where extradition is refused on the grounds that the wanted person is a national of the requested country, it shall, at another request of the requesting country, submit the case to its competent judicial authorities in order that criminal proceedings may be taken. For this purpose, the files, information and evidence relating to the alleged criminal offence shall be transmitted by the requesting country to the requested country – see Article 39 (1) of the Riyadh Arab Agreement for Judicial Cooperation. This provision is basically the same as Article Article 6 (2) of the European Convention on Extradition.

5. Article 358 of the Iraqi Criminal Procedure Code provides for three other grounds for refusal to extradite. According to Point 1, *"Extradition is not permitted, if the offence for which the extradition is requested is a political or military offence under Iraqi law".* Obviously, this is a mandatory ground for refusal to extradite. It must be highlighted that Article 41 (2) of the Riyadh Arab Agreement for Judicial Cooperation reduces the scope of this ground for refusal. This Paragraph reads: "*In the application of the provisions of this Agreement, the following crimes, even when they have a political purpose, shall not be considered crimes of a political nature …:*

*(1) Assault on kings and presidents of the contracting parties or their wives or their ascendants or descendants.*

*(2) Assault on heirs apparent or vice-presidents of the contracting parties.*

*(3) Murder and robbery committed against individuals, authorities, or means*

*of transport and communications*".

According to Point 3 (i) of Article 358 of the Iraqi Criminal Procedure Code, "*Extradition is not permitted, … if the person who is the subject of the request for extradition is pending investigation or trial inside Iraq for the same offence,or if a verdict of guilty or not guilty has been passed on him..."* Obviously, under this provision both pending criminal proceedings and final judgment for the criminal offence constitute mandatory grounds for refusal. There is no justification though not to make any difference between these two legal grounds. It makes sense to mandatorily refuse extradition only where there is a final judgment for the criminal offence in respect of which extradition was sought. This is why under Article 41 only final judgment of the two grounds is a mandatory ground for refusal. It is an appropriate solution to situations of a final judgment because its existence indicates that presumably, all relevant facts have been legally ascertained and law correctly applied in the requested country. All further work on the case, including in the requesting country, would be redundant and there would be no point in assisting it.

But if the criminal proceedings over the alleged criminal offence are still pending in the requested country and there are also parallel criminal proceedings in the requesting country as well over the same offence (in respect of which extradition is being sought), then it is an open issue where the prosecution and trial of the wanted person would be more successful and his/her punishing, if found guilty, more useful. Obviously, it is not ruled out that the requesting country's judiciary be more successful. In such situations it would be wiser to extradite the person together with relinquishing the whole criminal case to the requesting country. In view of this, it would be better if the Iraqi legislation converts pending criminal proceedings into an optional ground for refusal to extradite.

Lastly, according to Point 3 of Article 358 of the Iraqi Criminal Procedure Code, "*Extradition is not permitted, … if the offence could be tried before the Iraqi courts in spite of occurring abroad*". *Per agrumentum a fortiori* (Latin: By argument from a stronger reason), this should also become an optional ground for refusal to extradite, if it is necessary to remain at all in the Iraqi legal frame-

work for extradition.

Point 3 of the abovementioned Article envisages the situation where criminal proceedings have not yet been instituted in Iraq, the alleged criminal offence was committed in a foreign country but the Iraqi Penal Code is extraterritorially applicable to the crime. This ground for refusal is a specific extension of the policy to expand the extraterritorial applicability of national criminal law.

There is some general belief that the more legislators expand the territorial applicability of national criminal laws and particularly, their extraterritorial applicability to serious criminal offences, the better it is for the fight against them[5]. In view of this, some experts argue that "the extent to which the courts of any state have powers to try cases committed outside its borders is obviously a key factor in any law's effectiveness in dealing with bribery involving international actors and therefore in combating bribery generally"[6].

There is no such dependency though: extended extraterritorial applicability of national criminal law to crimes of bribery and any other crimes as well does not necessarily lead to increased efficiency of the fight against them. In any case, the expanded territorial applicability of any domestic criminal law and its extraterritorial applicability, in particular, prepare the grounds for more investigations, prosecutions and trials outside the country where the crimes were committed and therefore, away from the territory where most evidence of the crimes may be found. That is why the legislative policy of empowering own criminal justice systems with competences over more serious crimes committed

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5 A symptomatic example of this policy was Article 10 (2) of the **Draft directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims**, repealing the EU FRAMEWORK DECISION 2002/629/JHA. Initially, the Article obliged Member States to establish extraterritorial jurisdiction over offences of human trafficking, if "*committed against one of their nationals or a person who has his or her habitual residence in the territory of that Member State*". Later, thanks to the opposition of 10 Member States (the author of this paper had the chance to prepare some arguments in support of their efforts), this rule became optional rather than mandatory. Luckily, no such text has been foreseen so far in the EU FRAMEWORK DECISION on combating terrorism(2002/475/JHA) and its Article 9 [Jurisdiction and prosecution], in particular, to impose any obligation or recommendation for resorting to the reality principle (passive personality sub-principle).

6 **Macauley, R.:** FIGHTING CORRUPTION, Incriminations, Thematic Review of GRECO's Third Evaluation Round, Council of Europe – Strasbourg, 2012, P. 47, point 47.

abroad does not always results in better serving justice. On the one hand, this policy assigns criminal justice systems of countries where the crimes were not committed and evidence of them can hardly found with the task of conducting such criminal proceedings over them which will rarely be successful. On the other hand, the policy in question, if not implemented with the necessary realism, hurdles extradition in respect of such crimes to the countries where criminal proceedings over them are likely to be more successful[7]. Specifically, those are the countries where the crimes were committed and in whose territory most of the evidence of them may be found. In view of this, it is recommendable that Point 3 of the abovementioned Article be deleted in full. Unless there is a criminal proceeding in Iraq that, in addition, seems to be more successful even though the crime has been committed abroad, the requested extradition shall not be denied. Otherwise, only the alleged offender, wanted for extradition, is likely to benefit.

**III. OUTGOING EXTRADITION REQUESTS**

6. The organization of outgoing extradition requests by Iraq is decentralized. local judges, in need of extradition for criminal cases, that are in charge of, prepare a petition for international search and provisional detention of the wanted fugitive and forward the petition to the Ministry of Interior. In turn, the Ministry circulates the petition through the channels for international police cooperation (most often, INTERPOL), if the technical requirements are met. The national Central Authority for international judicial cooperation (the Int'l Dept of the High Judicial Council, MoJ or General Prosecutor's Office) is not aware of the petition, let alone give any approval to its circulation. This authority learns about the existence of the petition, if the wanted fugitive is detained somewhere abroad in response to this petition.

In this case, the Central Authority cannot decide anything but dispatch an extradition request to the detaining country. Any petition for international

[7] See**Sahinkaya, Y.:** Extraterritorial Effect of the Right to Fair Trial: How to test the Flagrant Denial of Fair Trial in Extradition Cases under International Human Rights Law, in "Human Rights Review" (Ankara, Turkey), Vol. III, Issue 2, Dec 2013, p. 6. Also Бойцов, А.: Выдача преступников, Санкт-Петербург, 2004, с. 252, 661.

search and provisional detention contains a promise that if the wanted person is provisionally detained the petitioning country will send, within the period of the provisional detention, a formal extradition request for the person.

The petition reads: We have already made the decision to seek the extradition of this person. Please, put him in provisional detention because he is likely to run before the arrival of our formal extradition request for him. If a petition reads: Please, detain the person so that we have the time to decide what to do (whether to request his extradition or not), then no court in the world would issue a detention order. So, first of all, the requesting country must send a normal petition, with the promise to send, within the period of the provisional detention, a formal extradition request for the person. Second, the requesting country must keep its promise. Otherwise, the other country and many other countries as well, will not grant its future petitions and requests in this area.

The extradition process shall begin with the issuance and circulation worldwide of a petition for the international search and provisional detention of the fugitive as this detention is much more efficient and safer than the full detention produced on the basis of the formal extradition request. An international search is undertaken even where the country of his/her residence is known. Due to practical time constraints, this petition, unlike the formal extradition request, need not be in hard copy and through official channels (a formal written petition might otherwise take at least a week to reach the other country). Instead, the petition in question reaches the country where the fugitive resides in no more than 24 hours. This helps prevent his/her escape to a third country.

7. In any case, the centralized organization of outgoing extradition requests is more advantageous. Under this system local judges [or prosecutors where applicable], in need of extradition for the cases they are in charge of, do not prepare any petition for international search and provisional detention of their wanted fugitive. They are authorized only to propose to the national Central Authority initiation of proceedings for returning of the fugitive. Basically, such a proposal is considered if the interested judge also sends to the Central Authority the documents that will support the potential extradition request.

The Central Authority decides whether and when to take further action by preparing and forwarding the petition to the Ministry of Interior for circulating it through the channels for international police cooperation (most often, INTERPOL). In this way magistrates specialized in international judicial cooperation do the job. They can measure the risk of failure; they have more information on the potential requested country, both about its legal system and its cooperation practice with their own country: the potential requesting country; they are in a better position to communicate with the authorities of the other country.

There is also another remarkable advantage of having Central Authority for international judicial cooperation composed of lawyers (judges) specialized in this area. It is that these lawyers can control international searches of wanted fugitives. Otherwise, the job stays with police officers who make serious mistakes benefiting wanted fugitives as a result.

The basic mistake is that police officers assign on their own Interpol or any other international police channel to find only the location of the wanted person (as if s/he is a missing person). Where the whereabouts of a person sought are unknown, the police are usually eager to locate him/her abroad and request an international report of his/her location. However, specialized lawyers from Central Authorities do not allow police to do anything until all supporting documents for the future request are prepared. If the documents are prepared, a request for international location will not be necessary at all. Once the extradition file is ready with everything which might serve as supporting documents to the future official request for extradition, the next step is the preparation of a petition for an international search and arrest of the wanted fugitive.

Moreover, requests solely for international location of the fugitive are not only unnecessary. They are also risky for two main reasons:

• Police in other countries are not always careful with foreign cases. When checking the identity of the person sought, they may alert him/her that Iraq is interested in obtaining his/her extradition. This may cause the person to flee to another foreign country where his/her extradition to Iraq is less possible or impossible.

• Additionally, the request for international location only may be mistakenly understood as a petition for a provisional detention. Such mistakes are not uncommon and may be made not only by police but also by foreign courts. If, as a result of the mistake, the person is put under provisional detention pending the extradition request, all supporting documentation must be compiled in a very limited period of time, almost never exceeding 40 days. Iraqi authorities will most likely be unable to meet this deadline. Consequently, the term of detention will expire before the extradition request is received and the person will be released. The released fugitive obviously has no interest in waiting patiently for Iraqi authorities to prepare and send the fully documented request for extradition. Instead, it is more likely s/he to flee to a country more hostile to extradition. Besides, if this happens several times, with different persons sought, other countries are likely to reach the general conclusion that Iraqi authorities do not respect the right to liberty and human rights. Such a conclusion constitutes a sufficient ground for rejecting any future Iraqi request for extradition.

**IV. ROGATORY COMMISSIONS**

8. The other typical form of international judicial cooperation in criminal matters is the execution of rogatory commissions/letters rogatory (request for obtaining valid evidence from abroad). According to Article 355 of the Iraqi Criminal Procedure Code, "*if the judicial authorities of Iraq want to delegate the performance of a particular procedure to the judicial authorities of another country, the request should be submitted to the High Judicial Council of Iraq to be sent to the judicial authorities in that country using diplomatic channels. The legal procedure that is performed in accordance with this delegation will have the same legal effect that it would have if the procedure were carried out by the judicial authorities in Iraq*".

First of all, the word "delegation" is not the most appropriate though as it is likely to designate some temporary transfer of authority which does not happen, actually. A letter rogatory should solely request the performance of certain investigative actions. It should not just seek clarification of certain facts, even though relevant to the criminal case in Iraq. No one should ask for fact finding results as it remains his/her duty, let alone send a request to "carry out

all action necessary to get at the truth" and by doing this relinquish control over the investigation s/he is in charge of. The ultimate responsibility remains with competent judicial authorities of Iraq, namely: the investigating judges and criminal courts in charge of the respective criminal cases. In view of this, it would be wise to replace the words "want to delegate the performance of a particular procedure" with the words "want to request evidence through the performance of a particular investigative action".

• When, for example, interviewing (questioning) is requested, it should be stated in what capacity the individual is to be interviewed, i. e. as a suspect or accused, a material witness or/and an expert-witness), and the legal provision of Iraq determining his/her legal status attached. A list of questions or written interrogatory (questionnaire) should also be prepared. This list might be viewed in some countries as restrictive rather than indicative only. This issue should be determined in advance.

• If interception of telecommunications is requested the letter rogatory should also contain the following specific information: (i) a description, as precise as possible, of the telecommunication to be intercepted; (ii) an indication why the purpose of the request cannot be adequately achieved by other means of investigation; (iii) an indication that the interception has been authorized by the competent authority of the requesting country; (iv) an indication of the period of time during which the interception is to be effected.

*Second*, applicable law in execution of Iraqi letters rogatory creates serious confusion among practitioners in Iraq. There is no clear indication that the applicable procedure is the procedure of the requested country. This is why some Iraqi lawyers argue that they cannot accept evidence that has been collected in a way which is different from what the Iraqi Criminal Procedure Code prescribes.

It goes without saying that, on the one hand, there is no country in the world, including Iraq that has a domestic legal provision according to which it accepts executions of letters rogatory only if the execution has been done in accordance with its own law. Besides, there is no international agreement that a letter rogatory be executed only in accordance with the law of the requesting

country. So there is no rule to be violated.Moreover, all international treaties postulate that executions of letters rogatory shall be regulated by the law of the requested country, unless the two parties reach a different agreement for the particular case. Such are the treaties to which Iraq is a party as well. It follows that the law of Iraq obliges the Iraqi judiciary and the requested party both to apply the law of that party. If this legal obligation is disregarded, the Iraqi law is broken and the evidence produced is not admissible in any Iraqi court. On the other hand, given the serious number of hesitations over the issue of applicable law, it would be the lesser evil to expressly clarify in the Iraqi Criminal Procedure Code that letters rogatory are executed in accordance with the law of the requested country, unless a different agreement has been reached.

*Third*, temporary seizure of items as potential pieces of physical evidence is not yet regulated in Iraqi law.Generally, there is no way of asking, via Interpol or any other law enforcement agency, for a provisional seizure of a specific item (a car, a document) pending the arrival of a letter rogatory for its handover as physical evidence. There is no such form of international legal assistance, comparable to the provisional detention of a person sought for extradition. So the Iraq authorities cannot ask for any temporary detention (seizure) of an item in the territory of another country, let alone its direct handover/delivery to Iraq without any letter rogatory as such an item would never be admissible into valid physical evidence.

There might be, at least, one exception though (urgently in need of being legally regulated) based on the specific peculiarities of cyber crime and traces left behind. Given the volatile nature of electronic evidence, it would be wise to ask the other country to order or otherwise obtain the expeditious preservation of data stored by means of a computer system, located within its territory and in respect of which Iraq as a requesting country intends to submit a request for the search or similar access, seizure or similar securing, or disclosure of the data. Iraq should ask for a temporary preservation for a period not less than sixty days, in order to be enable to submit a formal request for rogarory commission for the search or similar access, seizure or similar securing, or disclosure of the data. Following the receipt of such a formal request, the data expectedly

continue to be preserved pending a decision on that request.

Additionally, the requested country may be asked also to notify Iraq if the track leads to a third country and provide sufficient information to the Iraqi authorities to further ask for assistance from the third country too. Thus, where, in the course of the execution of a petition to temporary preserve traffic data concerning a specific communication, the requested country discovers that a service provider in another country was involved in the transmission of the communication, this requested country is expected to expeditiously disclose to Iraq as the requesting country a sufficient amount of traffic data to identify that service provider and the path through which the communication was transmitted.

To guarantee the admissibility into evidence of such information it would be wise that the Iraqi legislator produces domestic rules for obtaining electronic evidence and particularly, rules enabling the dispatch of outgoing requests and the execution of incoming petitions for the expeditious preservation of data stored by means of a computer system in respect of which the petitioning country intends to submit a request for the search or similar access, seizure or similar securing, or disclosure of the data.

9. It is noteworthy that Iraq and the Arab world as a whole resort also to another means of collection of valid evidence from abroad. The means concerns oral evidence, in particular. Such evidence may be collected by consuls and/or other official representatives in receiving countries from own nationals in the same foreign countries. Thus, by virtue of Article 15 (2) of the Riyadh Arab Agreement on Judicial Cooperation, the legal framework for letters rogatory does"*not preclude granting permission to any of the contracting parties to hear the testimony of its nationals in respect of the cases referred to above directly through their respective consular or diplomatic representatives. Should a dispute arise over the nationality of the person to be heard, such nationality shall be determined in accordance with the laws of the requested contracting party*".

Besides, pursuant to Article 356 of the Iraqi Criminal Procedure Code, "*The investigative judge or court must request from the Iraqi Consul to take a tes-*

*timony or statement from any Iraqi person abroad and the request must be submitted by the Ministry of Justice with an explanation of the matters about which they wish to ask and the completed testimony or statement will be considered pursuant to the testimony or statement completed by an investigative judge*". Therefore, Iraqi judges are obliged to assign their consuls with the task of interviewing as witnesses or interrogating as suspects or accused any Iraqi who is in the territory of the same foreign country. However, such consul's activities constitute judicial work done in a foreign country and no country allows the performance of such work without the expressed permission by its judicial authorities. Under the law of the receiving country this specific work of the consul is dependent on the consent of that country. Otherwise, the consul would disrespect local law which is violation of Article 55 of the Vienna Convention on Consular Relations. Moreover, if the oral evidence is obtained in violation of law, it shall not be admissible in court. Hence, the whole operation is in vain. In view of this, the text of Article 356 of the Iraqi Criminal Procedure Code should be modified to read that the aforementioned judicial work of Iraqi consuls abroad is conditioned on a prior consent of the authorities of the receiving country.

**V. TRANSFER OF PRISONERS (SENTENCED PERSONS)**

10. Part VII (Articles 58-63) of the Riyadh Arab Agreement for Judicial Cooperation is entitled: 'execution of sentences against convicted persons in their own states'. Such a title though may cover any one or both of the following two forms of international judicial cooperation in criminal matters: recognition and enforcement of foreign criminal judgments, and international transfer of prisoners to the countries of their nationality. Actually, the title designates transfer. On the one hand, the recognition and enforcement of foreign judgments is regulated by Part V of the Agreement titled 'Recognition of Judgments Pronounced in Civil, Commercial, Administrative and Personal Statute Cases' and there is no mention there of any judgments pronounced in criminal cases. Obviously, the parties to the Agreement had no intention to extend this cooperation to criminal judgments. On the other hand, the aforementioned Part VII of the Agreement contains provisions that indicate international transfer of prisoners. Thus, Article 58 reads that a final criminal judgment "*may be enforced*

*in the territory of any other contracting party of which the convict is a national*". Besides, Article 63 prescribes that "*the contracting party where the sentence was imposed shall bear the costs of transporting the person convicted to the territory of the contracting party requesting the execution of the sentence...*" Finally, Article 58, "d" requires the prior consent of the victim.

Therefore, the foreign criminal judgment goes to the country of the convict's nationality.S/he is transported to that country from the country where the judgment has been rendered; inevitably, the judgment comes from this country too. Thus, in accordance with the will of the convict, s/he and judgment are carried together from the sentencing country, where the convict has necessarily started serving his/her punishment, to the country of his/her nationality. Those are basic peculiarities of international transfer of prisoners; they do not fit into the mold of recognition and enforcement of foreign criminal judgments at all. It goes without saying that in cases of recognition and enforcement of foreign criminal judgments the judgment also goes to another country but this is the country where the convict resides (usually, escaping justice) and not necessarily the country of his/her nationality. Besides, in cases of recognition and enforcement of foreign criminal judgments the convict, being already in the other country, does accompany the judgment: they are not carried together to the other country. This is why the convict could not have started, in general, serving his/her punishment in the sentencing country either.

The Iraqi Criminal Procedure Code does not provide for any procedure of international transfer of prisoners. There is no any other Iraqi domestic law to deal with the topic either and eventually support the implementation of the international legal framework for transfer of prisoners. Nevertheless, Iraq resorts in practice to this form of international judicial cooperation in criminal matters. This does not go without major difficulties though.

Because the text of Part VII (Articles 58-63) of the 1983Riyadh Arab Agreement for Judicial Cooperation is not sufficiently clear. Due to the absence of any domestic rules on transfer of prisoners in Iraq, this form of international judicial cooperation in criminal matters is often confused with extradition for execution of punishment. (even though this extradition is much closer to recognition and

enforcement of foreign criminal judgments). Both the extradition in question and the recognition and enforcement of such judgments finalize the delivery of justice. They both ensure the execution of a punishment imposed by bringing together the convict who is a fugitive, especially in extradition cases, and the judgment against him.

No such objective is achievable through transfer of prisoners as the convict and the judgment against him/her do not need to be brought together; they have been together as the offender is not a fugitive: in general, s/he was available during the criminal proceedings that resulted in the judgment against him/her. Hence, the transfer does not finalize the delivery of justice. Actually, it is a repatriation of the prisoner that, at most, brings about a more efficient pursuit of the goals of criminal punishment imposed on him/her and his/her re-socialization, in particular. For this purpose it is required that the transferee be a national of the country to which s/he is surrendered. At the same time, there is no requirement that the transferee shall not be a national of the surrendering country as in the cases of extradition from Civil Law countries, including Iraq. The prisoner might have dual nationality: be a national of both countries, including the surrendering. Nevertheless, s/he should be transferred to the other country of his/her nationality if his/her re-socialization is more achievable there.

Furthermore, both transferees and convicted (sentenced) extraditees are transported under convoy but their legal status is completely different. First of all, by the time of his/her transportation the transferee is not only a sentenced person; s/he is already a prisoner as well even though not designated as such in the texts of the Riyadh Arab Agreement for Judicial Cooperation. This person has necessarily been deprived of liberty in the surrendering country and his/her deprivation of liberty there may constitute only serving an imprisonment punishment. Therefore, s/he has commenced serving his/her punishment in the sentencing country. As a result, country of transferee's nationality to which s/he has been surrendered may execute only a remaining part of the punishment. While the convicted extraditee is in a different situation: this extraditee was solely a sentenced person in the surrendering country. S/he may have been

detained there for the extradition proceedings against him/her but could never have started the execution of the punishment for the crime in respect of which s/he was extradited (the service of a punishment for a different crime would substantiate his/her postponed extradition). Hence, the sentenced person may become a prisoner and commence serving his/her punishment only in the country to which s/he is surrendered.

Besides, the consent of the extraditee is no prerequisite for the extradition: it can only substantiate the application of a simplified extradition procedure. But when it comes to transfer, the consent of the transferee is necessary; the transfer procedure does not involve any dispute: both countries and the prisoner as well must agree on the transfer.

After the surrender the extraditee is protected by any Speciality Rule in the country to which s/he has been surrendered while the transferee does not enjoy any such a legal protection there. There is no Speciality Rule for him/her in the country of his/her nationality that has accepted him/her. The transferee may be prosecuted, tried and sentenced in the country of his/her nationality even for crimes committed prior to the surrender. S/he shall not be prosecuted, tried and/or punished there only for the crime which had brought him/her the punishment for which s/he was transferred. Because the foreign judgment imposing the punishment on him/her for this crime is recognized as own in that country it impedes any criminal proceedings against him/her over the same crime there.

11. It is not necessary that transferees serve in full their punishments in the countries of their nationality. A transferee may benefit from both, special amnesty/pardon or general amnesty.

In Europe each of the two countries, including the country of the transferee's nationality, may grant special amnesty/pardon[8] and general amnesty – Article 12 of the Convention on the Transfer of Sentenced Persons[9]. It is not the same

[8] Unlike special amnesty, pardon may be granted only after the imposition of the punishment. See, for example, Article 74 of the Bulgarian Penal Code and Article 160 of the Romanian Penal Code.

[9] Article 15 (2) of the Commonwealth of Independent States Convention on Surrender

in the Arab world. Article 61 of the 1983 Riyadh Arab Agreement for Judicial Cooperation authorizes only the sentencing country to grant the transferee special amnesty and general amnesty. The country of his/her nationality is never allowed to grant him/her any special amnesty. When it comes to general amnesty the country of the transferee's nationality may grant such an amnesty that also covers his/her crime but this country is obliged to notify the sentencing country. Under Article 61 (3) of the Agreement the sentencing country has the right to request that the transferred convict be returned to it to serve the remaining part of his punishment. Pursuant to Article 61 (4) of the Agreement, if no such request is submitted within 15 days of the date of notification, it shall be deemed that the sentencing country has disregarded the recovery of the transferee, in which case the general amnesty shall apply to him/her as well. Therefore, the country of transferee's nationality is allowed to benefit him/her by means of general amnesty but this amnesty may take effect only if the sentencing country does not oppose by taking the transferee back.

12. Lastly, neither the Iraqi Criminal Procedure Code, nor the Riyadh Arab Agreement for Judicial Cooperation contains any rule on the finalization of transfer proceedings. Moreover, none of these instruments provide even for any regulations on the finalization of the proceedings for recognition and enforcement of foreign criminal judgments either. Iraqi judicial authorities do not have any reliable rule that might be applied by analogy, at least, to ascertain the end of transfer proceedings. This is end after which the authorities of the sentencing country have no longer competence over the execution of the punishment but prior to this end the authorities of the sentencing country must always do their best to ensure the execution of the punishment.Usually, this end comes at the moment when the court of the transferee's country recognizes the foreign judgment sent to be enforced.

As a result, the sentencing country shall no longer enforce its judgment sent for this purpose to the transferee's country. However, if the foreign judgment sent is not considered by the judicial authorities of the country of the transferee,

of Sentenced to Imprisonment for the Further Execution of their Punishment [Moscow, 1998] also provides for the same.

as s/he was just pardoned on arrival and the authorities there simply disregard the judgment, or though considered, has not been recognized by them for any reason (e.g. the judgment is not compatible with the fundamental principles of their legal system), then the sentencing country retains its competence to enforce the judgment, regardless of location of the sentenced person. Certainly, if by that time the person is no longer in the territory of the sentencing country, its authorities should consider resorting to other forms of international judicial cooperation: for example, the extradition of the person (most likely, from a third country) or even the transfer of the case against him/her to his/her own country[10].

It is recommendable that Iraq introduces some rules in this sense to govern the conclusion of transfer proceedings and related transfer of competence over the execution of the punishment imposed on the transferred prisoner. Otherwise, the competent authorities are likely to be unpleasantly surprised sooner or later.

Regretfully, the Iraqi domestic law (the Criminal Procedure Code or any other law) contains no rules to govern this form of international judicial cooperation although most of its problems must be legally solved. In view of this, Bulgaria might be a good example of having such a domestic legal framework. It is Chapter thirty-six, Section I [Transfer of Sentenced Persons], Articles 453-462, of the Bulgarian Criminal Procedure Code[11].

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[10] The Ramil Safarov case might be a good illustration – see also **theEuropean Parliament resolution of 13 September 2012 on Azerbaijan [2012/2785(RSP)]**. **Ramil Sahib oglu Safarov** is an officer of the Azerbaijani Army who was convicted in Hungary of the 2004 murder of an Armenian Army Lieutenant during a training seminar in Budapest: Safarov broke into Margaryan's dormitory room at night and axed him to death while Margaryan was asleep.
In 2006, Safarov was sentenced to life imprisonment in Hungary with a minimum incarceration period of 30 years. After his request under the European Convention on the Transfer of Sentenced Persons, he was on August 31, 2012 surrendered to Azerbaijan where he was pardoned by the President in compliance with Article 12 of the convention but prior to any recognition of the Hungarian judgment. It is noteworthy that if the foreign judgment has not been recognized, it produces no legal consequences; therefore, there is nothing for pardoning.

[11] This Section reads as follows:
"***Article 453 Competent body***
*(1) The transfer of individuals sentenced by a court of the Republic of Bulgaria to the*

*purpose of serving their punishment in the state of which they are the nationals, and the transfer of Bulgarian citizens sentenced by a foreign court for the purpose of serving their punishment in the Republic of Bulgaria shall be decided by the Prosecutor-General in an agreement with the competent body of the other state, in the case where consent of the sentenced individual in writing is available.*

(2) A decision on the transfer of a sentenced individual may also be taken after service of his/her punishment has begun.

***Article 454 Transfer in the absence of consent by the individual***

*(1) The consent of a Bulgarian national convicted by a foreign court or of a foreign national convicted by a Bulgarian court shall not be required, where:*

*1. The sentence or a subsequent administrative decision of the sentencing state includes an expulsion (deportation) order or another act, by virtue of which the individual, following his/her release from an institution for deprivation of liberty, may not stay within the territory of the sentencing state;*

*2. Before serving his or her sentence the sentenced individual has escaped from the sentencing state to the territory of the state whose national he or she is.*

*(2) (2) In cases falling under para 1, item 1, before issuing a decision for transfer, the opinion of the sentenced person shall be taken into account.*

***Article 455 Setting the place, time and procedure for delivery and admission of the sentenced person***

*The place, time and procedure for delivery and admission of the convicted person shall be determined by agreement between the Prosecutor General and the competent body of the other state", etc, etc...*

PART VII - EXECUTION OF SENTENCES AGAINST CONVICTED PERSONS IN THEIR OWN STATES

**Article 58 Conditions of execution**

Penal verdicts passed in the territory of any contracting party which have become final may be enforced in the territory of any other contracting party of which the convict is a national, if it is so requested, subject to the following conditions:

(a) That the detentive sentence or what remains of it, or the executable part thereof, is no less than six months.

(b) That the penalty is for a crime where extradition does not apply in accordance with Article 41 of the present Agreement.

(c) That the penalty for the crime in the territory of the contracting party requested to execute is one of detention for no less than six months.

(d) That both the contracting party which had made the judgement and the person convicted consent to the execution request.

**Article 59 Circumstances in which execution may not be effected**

Penal judgements may not be executed in the following circumstances:

(a) When the penalty execution system of the contracting party requesting execution is inconsistent with the execution system of the contracting party where the judgement was pronounced.

(b) If the penalty has elapsed by prescription in accordance with the laws of the contracting party where the sentence was passed or that of the contracting party requesting execution.

(c) If the penalty is considered reformatory, disciplinary, one of controlled liberty, or secondary or supplementary in accordance with the laws and legal system of the contracting party requesting execution.

## V. TRANSFER OF CRIMINAL PROCEEDINGS

13.Sometimes, nationals of foreign countries commit crimes in the territory of Iraq. Unless the alleged offender enjoys some immunity, Iraqi judicial authorities usually launch criminal proceedings against him/her.

It is noteworthy that the Iraqi criminal proceedings against the foreign national who has escaped from Iraq might be accompanied with a request to the country of his/her nationality to institute criminal proceedings there against him/her. Because most countries recognize the principle of personality as a ground substantiating extraterritorial application of its criminal law[12], they would consider materials against its nationals, including materials from abroad. This option is very good, especially in cases where Iraq and the country of the alleged offender have an agreement providing for the obligation to consider requests to the other country for institution of criminal proceedings against its nationals. For example, such obligation is provided for in Article 21 of the Treaty on Legal Assistance between Iraq and Hungary, and Article 24 of the Treaty on rendering mutual legal assistance between Iraq and the former Soviet Union [still in force for Russia and some other former Soviet Union countries]. Even if this form of cooperation is not provided for in any international agreement with the other country, it is worth trying to bring the alleged offender to justice in this way. On the one hand, Iraq does not technically relinquish their case to the alleged offender's country. The Iraqi authorities remain in charge and can always prosecute, try and punish the alleged offender if s/he comes back, or request his/her extradition if s/he is not likely to come. On the other hand, Iraq additionally mobilizes the judiciary of the country of the alleged offender's nationality as well. This is the country where the alleged offender is most likely to

**Article 60 Execution of penalty**
Execution of penalties shall be carried out in accordance with the system in effect in the territory of the contracting party requesting such execution, provided that the period spent in remand and the part of the sentence already served for the same crime are deducted.
**Article 61 Consequences of general or special amnesty**
Both general and special amnesties issued by the contracting party which had passed sentence shall apply to the person convicted.

12 See Article 14 (2) of the Croatian Criminal Code, Section 7 (2)(i) of the German Criminal Code, Article 12 (2) of the Russian Criminal Code, Article 8 of the Serbian Criminal Code, Article 11 of the Turkish Criminal Code.

be found but also the country which is most likely to refuse his/her extradition to Iraq as s/he is his/her national. Therefore, this is the country where the alleged offender who has left the territory of Iraq is likely to be brought to justice.

14. There is another, similar form of international judicial cooperation which produces a wider and stronger effect. This is the transfer of pending criminal proceedings to another country. The requested country may be any country where the alleged offender is located, not necessarily the country of his/her nationality. Besides, the transfer in question involves the preservation of the validity of the evidence collected in the requesting country. Hence, once the requested country takes charge of the proceedings, its judicial authorities can use all evidence handed over with the case by the requesting country[13]. Thus, if somebody interviewed as a witness in the requested country has died later, his/her witness statement may be read out in the requested country's court[14]. Finally, the transfer of criminal proceedings is an international legal procedure whereby the requesting country relinquishes the case to the requested country. Once the requested country takes charge of the proceedings, the requesting country has, as a general rule, no longer jurisdiction over the case. There are exceptions though designed to rule out the possible shielding of the alleged offender from justice.

These advantages of criminal proceedings transfer make it a reliable alternative to extradition for trial. As in the case of extradition for trial, transfer results in putting together the criminal proceedings and the accused[15]. Extradi-

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13 Thisresult of preservation and acceptance of evidence is provided for in Article 89 of the Law on international legal assistance in criminal matters of Bosnia and Herzegovina. The Article reads: "*The investigative actions taken by the judicial authorities under the regulations of the requesting country shall have the same value as the corresponding investigative actions taken according to the regulations of Bosnia and Herzegovina, unless this is in contravention of the fundamental principles of the national legal order and the principles of international documents on the protection of human rights and fundamental freedoms*".

14 See, for example, Article 342 (1)(i) of the Criminal Procedure Code of Armenia, Section 251 (1)(ii) of the Criminal Procedure Code of Germany and Article 306 (1)(ii) of the Criminal Procedure Code of Ukraine.

15 Given the common idea of putting criminal proceedings and the accused together, the two forms of international judicial cooperation have many common prerequisites as well. One can see this in the 1990UN Model Treaty on the Transfer of Proceedings in Criminal Matters.

tion though carries the accused to the criminal proceedings while in the case of transfer the criminal proceedings are carried to the accused.

Moreover, it is always worth taking into consideration that extradition is rarely the only option and not necessarily the best. Thus, if the fugitive is a foreigner, his/her criminal offence is not significant (e. g. use of forged identity papers), efforts to obtain his/her extradition (generally, from a third country as his/her own would not extradite him/her) are not likely to be justified. Instead, it would be probably much more realistic to achieve justice by referring the case to the country of his/her nationality by sending all the materials to it.

The importance of transfer of criminal proceedings makes it necessary to precisely regulate this form of international judicial cooperation. The 1983 Riyadh Arab Agreement for Judicial Cooperation does not contain any provision for it. However, the 2010 Cairo Arab Convention to Counter Organized Crime across National Borders has a provision that envisages transfer of criminal proceedings. This is Article 29 which reads: "*States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offense covered by this Convention in cases where such transfer is considered in the interest of proper administration of justice, especially when it comes to multiple jurisdictions with a view to concentrating the prosecution*".

At the same time, there is not a single provision in the Iraqi Criminal Procedure Code or any other Iraqi law for this form of international judicial coop-

First, its Article 6 requires Dual Criminality, as for granting extradition. The Article reads: "*A request to take proceedings can be complied with only if the act on which the request is based would be an offence if committed in the territory of the requested State*". Second, according to Article 7 of the same UN Model Treaty, the requested transfer may be refused on the grounds of the nature of the offence. These grounds are similar to the grounds for rejection of extradition requests. Thus, the transfer the criminal proceedings is refused if the act is an offence of a political nature or constitutes a crime under military law only and therefore, is not a crime under ordinary criminal law.Third, one may request provisional measures similar to those in extradition cases. Pursuant to Article 12 of the UN Model Treaty, when the requesting State announces its intention to transmit a request for transfer of proceedings, the requested State may, upon a specific request made for this purpose by the requesting State, apply all such provisional measures, including provisional detention of the suspect and seizure of items found with him/her, as could be applied under its own law if the offence in respect of which transfer of proceedings is requested had been committed in its territory.

eration. This is a gap as one can identify a lot of issues that need solution by domestic law, such as: the central authority of Iraq for considering incoming requests and dispatching outgoing requests, the specific procedure for considering incoming requests, the subsidiary jurisdiction problem (necessary expansion of the requested country's jurisdiction to make the execution of the incoming request to take over the case possible), the competent national authority to hear and adjudicate the case. For this purpose Bosnia and Herzegovina with its similar structure might be a good example[16] of having such a domestic legal framework. It is Chapter IX of the Law on International Judicial Cooperation in Criminal Matters[17].

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16 See **Girginov, A.:**BiH – an example for Iraq? , in "New Europe", 2012 (25 Nov-01 Dec), No. 1008, p. 15.

17 It reads as follows:
"***CHAPTER IX. TRANSFER AND TAKEOVER OF CRIMINAL PROSECUTION***
*Article 83*
*Transfer of criminal prosecution to the foreign country*
*(1) If an alien having permanent residence in a foreign country committed a criminal offence in the territory of Bosnia and Herzegovina, all relevant criminal records may be transferred to that foreign country for the purpose of criminal prosecution and trial, unless the foreign country objects.*
(2) The transfer of the criminal prosecution and trial shall not be allowed if the alien may be exposed to unfair treatment, inhuman and humiliating treatment or punishment.
(3) Prior to filing an Indictment, a decision on transfer shall be rendered by the Prosecutor. Upon filing an Indictment and pending the assignment of the case to the Judge or the Panel in order to schedule the main trial – such decision shall be rendered by the Preliminary Hearing Judge on the proposal of the Prosecutor.
(4) Upon opening the main trial, on the proposal of the Prosecutor, the decision to transfer criminal prosecution shall be rendered by the Judge or the Panel before which the main trial is being held.
(5) The transfer may take place for the criminal offences falling within the Court's jurisdiction which carry a punishment of imprisonment for a term of up to ten years, unless otherwise stipulated by the international treaty or if there is no presumed reciprocity with that State, unless proven otherwise.
(6) If the aggrieved party is a national of Bosnia and Herzegovina, the transfer shall not be allowed if he objects, unless security has been provided for his/her property claim.
Article 84
Request to take over criminal prosecution from a foreign country
(1) A request for taking over criminal prosecution from the foreign country shall be submitted in the form of a Letter Rogatory.
(2) Unless otherwise foreseen by an international treaty, the Letter Rogatory must, inter alia, include personal information of the Suspect/Accused, his nationality, address, description and qualification of the criminal offence, and the reasoned grounds for transfer of the criminal proceedings to the requested State.
(3) The Letter Rogatory and its attachments shall be translated into the language of the

Finally, the Iraqi legislative authorities should proceed also with the creation of the domestic legal framework for recognition and enforcement of foreign criminal judgments envisaged in Article 38 of the 2010 Cairo Convention for the Fight against Organized Crime across National Borders[18]. Such a final step would close the circuit of international legal measures bringing the offender to justice and punishment. As the transfer of criminal proceedings is the alternative to extradition for trial, the recognition and enforcement of foreign criminal judgments constitutes the alternative to extradition for execution of punishment. The recognition and enforcement of foreign judgments results in putting judgment and convict together by carrying the former to the latter rather than the other way around as in the case of extradition for punishment[19].

**CONCLUSION**

Even the most up-to-date international legal instruments on international judicial cooperation, though directly applicable, are never sufficient to satisfactorily solve its difficult and delicate problems. It is always necessary that the

requested State, unless otherwise stipulated by an international treaty.
Article 85
Procedure upon Letter Rogatory by a national judicial body to take over criminal prosecution from a foreign state
(1) The national judicial authority's Letter Rogatory for taking over criminal prosecution from a foreign country, along with all records related to the criminal case, shall be sent to the Ministry of Justice of Bosnia and Herzegovina.
(2) If the case being the subject of transfer falls within jurisdiction of the Entity judicial authority, that is, the judicial authorities of the Brčko District of Bosnia and Herzegovina, the Letter Rogatory referred to in Article 84 of this Law and all of its annexes shall be forwarded to the Ministry of Justice of Bosnia and Herzegovina, through the Entity Ministry of Justice, or the Judicial Committee of the Brčko District of Bosnia and Herzegovina.
(3) Upon receiving the Letter Rogatory for taking over the criminal prosecution, the Ministry of Justice of Bosnia and Herzegovina shall forward the Letter and all criminal case records to the relevant authority of the requested State and ask the authority to provide the Ministry of Justice of Bosnia and Herzegovina with the feedback regarding the decision of the relevant judicial authority of the requested State on the Letter Rogatory", etc, etc...

[18] No such provision exists in the 1983 Riyadh Arab Agreement for Judicial Cooperation. Its Part V, entitled Recognition of Judgments Pronounced in Civil, Commercial, Administrative and Personal Status Actions (Cases) regulates the recognition and enforcement of such judgments only.

[19] See also **Vermeulen, G., W. De Bondt and C. Ryckman (eds.)** Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality, Maklu, 2012, p. 164.

rules of such instruments are also legislatively followed up on and eventually supported by appropriate domestic rules. Even the best international agreement (multilateral convention or bilateral treaty) cannot work in the absence of national legal frameworks for international judicial cooperation in criminal matters.

It is no easy task to build up such a national legal framework. First of all, it must be decided where to place this legal framework to fully cover the increasing number of forms of international judicial cooperation: in the Criminal Procedure Code to be regulated together with criminal proceedings, or in a separate law codifying the rules that govern only international judicial cooperation in criminal matters. Second, such a legal framework should not allow only for agreement-based cooperation. It must also enable extra-agreement cooperation as well, especially the one rendered under the reciprocity principle. Third, the legal framework should be enriched with rules which can fill out old and new gaps in the legal regulations of international judicial cooperation, such as the gaps opened by the need to efficiently tackle cyber crime. Fourth, the improvement in domestic law must be accompanied by measures for creating a better organization within the system of domestic bodies responsible for international judicial cooperation. Fifth, in any event it is recommendable that cooperating countries avoid the diplomatic channel as being sometimes too slow and also increasing the likelihood of misunderstanding. Instead, they should prefer contacts between their Justice Ministries, as provided for in Riyadh Arab Agreement for Judicial Cooperation, or even direct contacts between their judiciaries as it is in Europe.

The conclusions were made in 2012-2013 during the European Union Integrated Rule of Law Mission for Iraq, Baghdad (EUJUST LEX-Iraq).

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# LA VENTE D'UN ORDINATEUR PRÉINSTALLÉ: UNE PRATIQUE COMMERCIALE DÉLOYALE?

*Sale of Computers with a Pre-İnstalled Software: an Unfair Commercial Practice?*

*İşletim Sistemi Yüklenmiş Bilgisayar Satışı Haksız Ticari Uygulama Sayılır mı?*

**Yrd. Doç. Dr. Ebru AY CHELLI***

**RESUME**

La vente d'un ordinateur avec un système d'exploitation préinstallé pour les non professionnels est aujourd'hui généralisée. Elle ne laisse pas la possibilité du choix d'un logiciel concurrent ou de l'acquisition de la machine nue pour ceux qui possèdent déjà un logiciel d'exploitation.

Cette pratique engendre des recours auprès des juges de proximité contre les fabricants ou les vendeurs d'ordinateurs, afin d'obtenir le remboursement du prix des logiciels vendus préinstallés dans les ordinateurs. Les associations ou les consommateurs se fondent sur l'illicéité de cette pratique au regard du droit de la consommation. Les jugements récents français se prononcent du côté du consommateur, en sanctionnant cette pratique commerciale agressive «réputée déloyale en toutes circonstances» issue du paragraphe 29 de l'annexe I de la directive, donc sans avoir besoin d'apprécier les circonstances de la cause. Il en est autrement pour la Cour régulatrice qui n'a pas encore condamné cette pratique commerciale agressive «réputée déloyale en toutes circonstances». Il faudrait pour cela que le consommateur lui pose la question en ces termes, ce qui ne s'est pas encore produit jusqu'à présent.

**Mots Clés:** Vente liée. Logiciel. Pratique commerciale déloyale. Consommateur. Ordinateur pré-équipé d'un logiciel d'exploitation.

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**ABSTRACT**

Today, most of the sellers have developed a practice of selling computers for non-professionals with a pre-installed operating system, leaving no possibility of a choice of competing software or the acquisition of the bare machine for consumer who already own an operating system.

Consumer associations have been bringing actions against manufacturers or wholesalers before courts to obtain the refund of the cost of pre-installed software because they do not want to pay for a bundled product they have not ordered nor used. Associations base themselves on the illegality of that practice under consumer law. Late judgments pronounced in France are sanctioning this commercial practice as it is considered "in all circumstances unfair" as defined in article 29 of Annex I of the Directive, without needing to evaluate the circumstances of each dispute. Yet, the French "Cour de cassation" has not judged, until today, this practice as an "unfair practice deemed in all circumstances."

**Key Words:** Tide selling. Software. Unfair trade practice. Consumer. Pre-installed operating software. Open source software.

**ÖZET**

Günümüzde bilgisayarlar tüketiciye genellikle işletim sistemiyle birlikte satılmaktadır. Bu durum, tüketicinin bilgisayarı "çıplak" olarak veya rakip işletim sistemi ile birlikte satın alma hakkını ortadan kaldırmaktadır.

Uygulamada, tüketici dernekleri veya tüketiciler, bu tür satışın tüketici hukukuna aykırı olduğunu iddia ederek, işletim sistemine ödenen paranın iadesi için üretici veya toptan satıcıya karşı dava açmaktadırlar.

Fransız ilk derece mahkemeleri tüketicinin yanında yer almakta ve bu satışı 2005/29/EC sayılı Avrupa Konseyi Direktifi'nin I. Ek'in 29. Paragrafı'na göre "her halükarda haksız kabul edilen ticari uygulama" olarak nitelendirmekte ve olayın şartlarını incelemeye gerek görmeden hukuka aykırı bulmaktadır. Fransız Yargıtayı ise, tüketicinin hukuki problemi Yargıtay'a doğru olarak yansıtmaması nedeniyle, bu uygulamanın henüz "her halükarda haksız kabul edilen ticari uygulama" olduğu yönünde bir karar vermemiştir.

**Anahtar Kelimeler:** Bağlı satış, İşletim sistemi, Haksız ticari uygulama, İşletim sistemi yüklenmiş bilgisayar.

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Le consommateur qui achète un ordinateur chez un distributeur, se retrouve avec un ordinateur qui est déjà équipé d'un logiciel, le plus souvent de Microsoft. Le distributeur n'offrant aucune autre alternative au consommateur, ne laisse pas la possibilité du choix d'un logiciel concurrent ou de l'acquisition de la machine nue pour ceux qui possèdent déjà un logiciel d'exploitation.

La décision de la Commission Européenne[1], en droit de la concurrence, abordait cette question dans l'affaire Microsoft qui pratiquait la vente liée du lecteur Windows Media Player avec le système d'exploitation. La commission avait conclu que cette pratique constituait un abus de position dominante et que l'intérêt du consommateur communautaire était de voir étendre les gammes d'offres.

En droit de la consommation français, le code de la consommation interdit en son article L.122-1 la pratique commerciale de vente subordonnée. Ce principe posé clairement dans l'annexe I de la directive 2005/29/CE a été transposé dans le code de la consommation. La question de savoir si la vente d'un ordinateur pré-équipé d'un logiciel constitue ou non une vente liée se cristallise précisément sur le caractère loyal de cette pratique.

Pour être qualifiée de pratique commerciale déloyale, une telle vente doit remplir les deux conditions légales posées à l'article L. 120-1 du code de la consommation: d'une part, être contraire aux exigences de la diligence professionnelle et, d'autre part, altérer ou être susceptible d'altérer de manière substantielle, le comportement économique du consommateur normalement informé et raisonnablement attentif et avisé, à l'égard d'un bien ou d'un service.

Les décisions récentes des juges de proximités démontrent clairement une volonté d'assurer la protection des consommateurs. Récemment, les jugements des 10 et 9 janvier 2012 des juges de proximité de Saint Denis[2] et

[1] TPICE, 17 sept. 2007, aff. T-201/04: CCC 2007, comm. 279; Europe 2007, comm. 314, note Idot L.; Rev. conc. 4-2007, p. 78, obs. Prieto C.

[2] Jur. proximité Saint-Denis, Marty c/Société Samsung Electronics France, 10 janv. 2012, décision peut être consultée sur http://non.aux.racketiciels.info/media/document/Juge-

d'Aix-en-Provence[3] en attestent. Toutefois, ce dernier a été cassé le 5 février 2014 par la Cour de cassation. Même si présenté par certains comme un recul pour les droits des consommateurs, l'arrêt a été favorablement accueilli par une partie de la doctrine[4]. Dans ces espèces, les juges, après avoir rappelé que l'ordinateur et le logiciel sont des produits distincts (**I**), se fondent sur l'article 29 de l'annexe I de la directive 2005/29/CE, car une vente liée ne peut être interdite que si elle constitue une pratique commerciale déloyale (**II**).

**I. La réaffirmation par le juge de la distinction du matériel et du logiciel**

Dans les deux espèces, il s'agissait de consommateurs ayant acquis des ordinateurs portables équipés de logiciels préinstallés l'un de la société Lenovo France et l'autre de la société Samsung, qui n'ont pu obtenir de ces dernières le remboursement des logiciels qu'ils ne souhaitaient pas conserver. Refusant le contrat de licence d'utilisateur final (Cluf) des logiciels Microsoft Windows Vista Home Basic et Windows XP Edition ULCPC, ils demandaient respectivement la condamnation de Lenovo France et de Samsung France à leur payer les sommes de 404,81 € et 410 € au titre du remboursement des licences de l'ensemble des logiciels préinstallés sur leur matériel informatique.

A l'instar de nombreux autres jugements sur le sujet, les consommateurs soutenaient que la vente d'un ordinateur comportant des logiciels préinstallés caractérisait une vente liée. Ils postulaient donc que l'ordinateur et son logiciel préinstallé, notamment son système d'exploitation, ne constituaient pas un seul produit mais un lot.

Les fabricants arguaient au contraire que les consommateurs avaient acheté leur ordinateur en toute connaissance de cause et qu'ils n'ignoraient pas que le modèle qu'ils avaient acheté était destiné aux professionnels. Selon eux, le consommateur confondait «les ventes liées de produits distincts et

ment-Marty-Samsung-20120110.pdf, consulté le 26 juin 2014.

3 Jur. proximité Aix-en–Provence, Petrus c/Lenovo, 9 janv. 2012, décision peut être consultée sur http://no.more.racketware.info/media/document/Jugement-Petrus-Lenovo20120109.pdf, consulté le 26 juin 2014.

4 Grégoire Loiseau, cité par Frédéric Cuif, http://www.cuifavocats.com/Panorama-des-pratiques, consulté le 18 juillet 2014.

séparés et la vente de produits complexes d'un ensemble de composants indispensables à la définition du produit»[5]. La société Lenovo comparait cette situation à celle d'un acheteur de véhicule qui entendrait se faire rembourser le prix de ses pneumatiques souhaitant en installer lui-même d'autres qui lui conviendraient mieux.

Le juge de proximité d'Aix-en-Provence a répondu à cette comparaison classique à la voiture indissociable de ses pneus par une autre comparaison excellente, en indiquant qu' «il conviendrait plutôt d'imaginer un vendeur de voiture qui outre le prix de cette dernière y ajouterait celui obligatoire d'un chauffeur»[6]. Il ajoute qu'aucune contrainte technique ne s'opposait à ce que d'autres systèmes d'exploitation soient implantés à l'ordinateur et donc qu'il ne pouvait être imposé au consommateur d'adjoindre obligatoirement Windows Vista.

Saisi du pourvoi le 5 février 2014[7], la Cour de cassation a partagé le point de vue du juge de proximité et a rejeté le moyen du fabricant Lenovo prétendant qu'un ordinateur constituait «*un produit composite mais unique*» et «*prêt à l'emploi*», en déclarant qu'«attendu qu'après avoir relevé qu'un ordinateur prêt à l'emploi se composait de deux éléments intrinsèquement distincts, une partie proprement matérielle et un logiciel destiné à le faire fonctionner selon les besoins de l'utilisateur.»

Le juge de Saint Denis a davantage détaillé son raisonnement en se rapprochant l'arrêt de la Cour d'appel de Versailles du 5 mai 2011[8]. Il a jugé que

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5 Jur. proximité Tarascon, 20 novembre 2008, X c/ Lenovo.

6 Le juge a repris partiellement la comparaison déjà formulée dans les forums des logiciels libres selon, laquelle: «Que diriez-vous si à l'achat de votre voiture, on vous imposait pour 20% de plus un chauffeur (alors que vous avez votre permis)? Imaginez votre tête quand vous vous rendrez compte que ce denier roule au milieu de la route (pour pas faire comme les autres), ne prend jamais les routes départementales (lui aussi), ne fait le plein que chez Shell (même si c'est moins cher ailleurs). Le comble du comble, c'est quand vous vous rendez compte qu'en plus il vous fait les poches et se renseigne sur votre famille», http://www.agoravox.fr/actualites/economie/article/vente-liee-attention-aux-amalgames-34393.

7 Cour de cassation, 5 février 2014, nº 12-25.748,

8 «Les ordinateurs sur lesquels a été installé le système d'exploitation sont composés de deux éléments répondant à des régimes juridiques différents et que le système d'exploitation était un logiciel indépendant du matériel en ce qu'il correspondait à un élément intellectuel relevant de la prestation de services, que cette indépendance était d'ailleurs

«l'ordinateur a une nature matérielle dès lors que la vente a pour effet d'opérer le transfert de la propriété du vendeur à l'acheteur, à l'inverse un logiciel est un ensemble d'instructions chargées dans la mémoire vive de l'ordinateur et qui a pour fonction la réalisation d'un traitement particulier. Il présente un caractère proche de l'immatériel, par ailleurs n'est concédé à l'acquéreur que sous la forme de licence et demeure la propriété de l'éditeur. Il a par ailleurs été jugé qu'«un logiciel avait la même nature juridique qu'une prestation de service».

D'autres jugements admettaient déjà que l'ordinateur et le logiciel constituaient des produits distincts. Le jugement du TGI de Paris[9] déclarait que le matériel informatique et les logiciels constituaient des éléments distincts dont les distributeurs devaient mentionner séparément les prix respectifs, dans le cadre de la vente des ordinateurs «pré-équipés» de logiciels d'exploitation et d'utilisation. En revanche, le choix de vendre des solutions «pré-équipées» ou «nues» relevait de la seule liberté commerciale du distributeur.

Une décision du 17 février 2011[10] déboutait la Société ACER en reconnaissant que le matériel informatique se composait de deux entités, d'une part l'ordinateur lui-même et d'autre part le système d'exploitation et les logiciels préinstallés. Le juge considérait ainsi que le système d'exploitation et les logiciels préinstallés ne représentaient que des opérations auxquelles l'acheteur n'était pas tenu d'adhérer. Il en concluait qu'«en imposant une procédure lourde de désinstallation des matériels en cause, la Société ACER ne respecte pas les termes de l'article L. 122-1 du Code de la consommation, l'impossibilité pour l'acheteur de ne pouvoir acquérir l'ordinateur seul s'apparentant dès lors à une vente liée».

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confirmée par la présence de systèmes libres dont l'utilisation s'était répandue», CA Versailles, 3e ch., 5 mai 2011, n° 09/09169, UFC Que Choisir c/ SAS Hewlett Packard France: JurisData n° 2011-009542; Contrats, conc., consom. 2011, comm. 203, obs. G. Raymond; «La vente d'un ordinateur pré-équipé de logiciels caractérise une pratique déloyale», Ph. Stoffel-Muck, Communication commerce électronique n° 11, Novembre 2011, étude 21.

9 TGI Paris, 1re ch., sect. soc., 24 juin 2008, Asso. UFC Que-choisir c/ Sté Darty, n° 06/17972, www.juriscom.net.

10 Jur. proximité Aix en Provence, 17 février 2011, RG n° 91-09-000573, Perrono c/ Acer Computer France.

Aussi, la juridiction de proximité de Toulouse a retenu le 20 mai 2011[11] que le matériel informatique et les logiciels étaient des éléments totalement distincts tant dans leur nature que dans leur régime juridique, le matériel faisant l'objet d'un contrat de vente qui conférait au propriétaire un droit absolu sur la chose vendue, alors que la fourniture d'un logiciel était une prestation de service qui ne conférait qu'un droit d'usage.

La notion de «produit unique», avancée par les constructeurs pour justifier à la fois la vente forcée des logiciels qu'ils préinstallent, mais également le refus du remboursement des seuls logiciels, paraît donc être enterrée par ces décisions.

La disparition de la notion de «produit unique» mettrait fin également à la référence faite au «consommateur moyen», celui-ci étant incapable, au regard de nombreuses décisions prises en ce sens, d'installer par eux-mêmes un système d'exploitation de leur choix. En effet, jusqu'à présent, l'application de l'article L. 122-1 du Code de la consommation était souvent mise à mal par les juges du fond. Pour justifier le refus d'application de l'interdiction dudit article, ils se réfèreraient à l'intérêt du consommateur «moyen» en précisant qu'il était «de l'intérêt du consommateur d'avoir un système d'exploitation pré-installé, dès lors qu'il n'est ni contesté ni contestable que pour la grande majorité des consommateurs il serait impossible ou pour le moins très difficile et sans doute onéreux de procéder à cette installation»[12]. Le Tribunal de grande instance de Paris[13] écrivait ainsi «il est parfaitement établi que la substitution de logiciel par un autre est une tâche particulièrement délicate qui est hors de portée du consommateur moyen qui représente l'immense majorité des acheteurs, la demande de produits "nus" étant à ce jour confidentielle». Autrement dit, selon eux, la majeure partie des consommateurs attend, dans l'achat d'un ordinateur, un produit prêt à l'emploi.

Mais d'abord, la Directive 2005/29/CE précisant dans son article 2 qu'«aux

11 Jur. proximité Toulouse, 20 mai 2011, Vermel c/ S.A. DELL, RG n° 91-09-000641.

12 TGI Paris, 24 juin 2008, CCC 2008, comm. 210, note Bosco D.; JCP G 2008, II, 10185, note Stoffel-Munck Ph.

13 Idem.

fins de la présente directive, on entend par: a) «consommateur»: toute personne physique qui, pour les pratiques commerciales relevant de la présente directive, agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale ou libérale», les juges doivent déjà rechercher si le demandeur avait fait l'acquisition de l'ordinateur pour ses besoins personnels ou professionnels. Ensuite, il doit rechercher, à l'instar de l'article L. 120-1 du Code de la consommation, si le consommateur est un consommateur moyen, c'est-à-dire, un «consommateur normalement informé et raisonnablement attentif et avisé, à l'égard d'un bien ou d'un service», soit les qualités d'un bon père de famille.

De plus, l'informatique a connu de tels progrès en termes d'ergonomie que la plupart des personnes sachant utiliser un ordinateur sont désormais capables d'installer eux-mêmes, en quelques clics de souris et de manière quasi-automatisée, le système d'exploitation et les logiciels de base de leur choix. En tout état de cause, pour un nombre de plus en plus élevé d'utilisateurs, avec l'avènement du web 2.0 et des solutions logicielles en ligne, le système d'exploitation ne sert plus qu'à lancer le navigateur. Le reste se passant en ligne, sans besoin d'installer de logiciels tiers.

Aussi, le logiciel libre est aujourd'hui fortement ancré dans notre vie numérique, aussi bien professionnelle que privée présentent dans les *smartphones*, très populaires, *Androids* ou les serveurs *Apache* qui sont majoritaires sur le marché[14] ou encore des box ADSL. Les logiciels libres sont utilisés au quotidien par le consommateur de marques telles qu'*Apple*, *Nokia*, *Google* ou *Oracle* qui sont de gros utilisateurs et pour certains, même contributeurs de logiciels libres. Ainsi, le consommateur «lambda» connaît déjà assez bien le logiciel libre et il est tout à fait à sa portée, sans qu'il soit nécessairement un *geek*. Il est aussi au courant que le choix opté pour un logiciel libre comme Linux ait des avantages tant au niveau économique qu'au niveau de la vie privée ou de la sécurité, le contrôle par l'ensemble de la communauté du contenu des logiciels rendant plus rares et plus éphémères l'apparition des failles de sécurité. Ces avantages sont confirmés, puisque de plus en plus de gouverne-

[14] http://httpd.apache.org.

ments commencent sérieusement à s'intéresser au concept de logiciel libre et les utilisent dans leurs institutions comme la France[15], l'Allemagne[16] ou l'Espagne[17], sans compter les pays en voie de développement pour lesquels la gratuité de ces logiciels constitue un atout supplémentaire.

D'ailleurs, comme le précise l'arrêt de la Cour d'appel de Versailles «selon une étude CREDOC, 41% des possesseurs d'ordinateurs avaient déjà acheté des logiciels en complément de ceux qui étaient pré installés puis vers l'installation de système d'exploitation choisi en raison d'un moindre coût»[18]. Selon la même étude, neuf fois sur dix, lorsqu'ils achètent un ordinateur, les consommateurs n'ont pas la possibilité de choisir un appareil «nu», car cette offre ne leur est tout simplement pas proposée. Or, une majorité de la population, -et deux tiers des acheteurs potentiels d'ordinateurs, souhaiteraient qu'on leur propose le choix entre plusieurs systèmes d'exploitation; seul un consommateur sur quatre se satisfait d'une offre liant l'achat d'un ordinateur à celui d'un système d'exploitation pré-installé[19].

La Cour de cassation clôt définitivement le débat sur cette question en censurant le 22 janvier 2014[20], un jugement de proximité[21] qui avait condamné un consommateur en décidant qu'il était un consommateur avisé en raison de son activité professionnelle directement liée à l'informatique. Ainsi, comme le soutenait l'avocat Général près la Cour de cassation, «plutôt que rechercher si celui qui invoque la protection de la directive est bien un consom-

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15 Par exemple, la Gendarmerie Nationale, le Ministère de l'agriculture, V. Assemblée Nationale, 23 mars 2004, p. 2273, Ministère de l'économie, V. Assemblée Nationale, 19 décembre 2006, p. 13283, Education nationale, V. Assemblée Nationale, 2 janvier 2007, p.139, et de nombreux universités.

16 La municipalité de Munich utilise SuSe, linux, http://www.muenchen.de/Rathaus/dir/limux/ueberblick/windowsabloesung.html, dernière consultation le 29 mai 2012.

17 Le Ministère des finances espagnol, http://logicielslibresetgouvernements.wordpress.com/2010/12/01/etat-actuel-des-logiciels-libres-dans-le-secteur-gouvernemental-dans-le-monde-part-1/, dernière consultation le 29 mai 2012.

18 CA Versailles, 3e ch., 5 mai 2011, n° 09/09169, UFC Que Choisir c/ SAS Hewlett Packard France: JurisData n° 2011-009542.

19 http://www.credoc.fr/publications/abstract.php?ref=C243, dernière consultation le 29 mai 2012.

20 Cass. 1ère civ., 22 janvier 2014, n° 13-81.013.

21 Jur. Proximité, Paris, 16 mars 2012, Guerby c/Darty.

mateur moyen, il faut d'abord établir que la pratique dénoncée présente les caractères d'une omission trompeuse, telle qu'elle est définie à l'article 7 de la directive». Selon la Cour, «qu'en statuant ainsi, alors que l'existence d'une omission trompeuse au sens de l'article 7 de la Directive doit être appréciée au regard d'un consommateur moyen, sans avoir égard aux qualités propres du consommateur ayant conclu le contrat litigieux, la juridiction de proximité a violé, par fausse application, le texte susvisé».

Ainsi, la distinction faite par certains auteurs[22] entre le consommateur «lambda» et «geek» n'existe plus, la technologie et l'informatique progressent mais le consommateur aussi.

**II. La vérification par le juge du caractère déloyal de la vente**

Depuis l'arrêt du 15 novembre 2011[23], la formule est claire: la vente d'un ordinateur pré-équipé est licite, sauf à prouver qu'elle est déloyale, agressive ou trompeuse. Le juge doit d'abord vérifier si la vente litigieuse fait partie de la liste noire des celles qui sont interdites «*en toutes circonstances*» listées à l'annexe I de la directive 2005/29/CE. À défaut de faire partie de cette liste noire, le juge dispose alors du pouvoir souverain d'apprécier «*au cas par cas*», en fonction des circonstances de la cause, si la pratique du professionnel est susceptible d'être considérée comme trompeuse ou agressive au regard des critères posés par la directive (articles 5 à 9 de la directive).

Dans les deux espèces du 9 et 10 janvier 2012, les consommateurs faisaient valoir que la pratique des fabricants constituait une pratique commerciale déloyale en toutes circonstances, car ils imposaient la vente des produits non demandés, prohibée par la Directive et par le Code de la consommation. Ils soutenaient subsidiairement, au cas où le juge ne retenait pas cette quali-

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22 J. P. Feldman, «Le consommateur est-il pieds et poings liés à son logiciel?», Contrats, conc., consom. N° 6, juin 2009, 39; Ph. Stoffel-Muck, «La vente d'un ordinateur pré-équipé de logiciels caractérise une pratique déloyale», Communication commerce électronique, n° 11, novembre 2011, étude 21.

23 Cass. 1re civ., 15 nov. 2011, no 09-11161: Contrats, conc. consom. janv. 2011, no 1, comm. 9, note M. Malaurie-Vignal; D. 2011, 2464, obs. X. Delpech; Gaz. Pal. 17 févr. 2011, p. 19, note G. Poissionnier, Pet. aff. 21 mars 2011, n° 56, p.8.

fication, qu'il existait une vente subordonnée déloyale[24].

Le juge de proximité de Saint Denis souligne très clairement et à juste titre que la pratique du fabricant Samsung constitue une pratique à la fois déloyale en toute circonstance et agressive, en ces mots: «Attendu que si un ordinateur requiert l'installation d'un système d'exploitation, pour l'accomplissement de la tâche que son propriétaire souhaite lui assigner, ce système ne saurait être, nécessairement celui qui est fourni par la société Microsoft, des logiciels alternatifs pouvant être installés par les propriétaires; Que si, comme le soutient la société Samsung, dans l'esprit de la majorité des consommateurs, un ordinateur est nécessairement vendu avec un système d'exploitation en l'espèce fourni par la société Microsoft, c'est en raison des pratiques des assembleurs; que ces agissements sont constitutifs de pratiques commerciales agressives. Qu'ainsi il convient de déclarer déloyale en toute circonstance à raison de son caractère agressif, la pratique consistant pour la société Samsung, à revendre un système d'exploitation acquis par ses soins sans que Monsieur Marty le lui ait demandé, et d'exiger le renvoi de l'ordinateur pour la désinstallation et le remboursement dudit système d'exploitation».

Le juge déclare ainsi que la pratique de Samsung, de fournir de logiciels non demandés, constitue un commerce déloyal en toutes circonstances.

Contrairement au juge de proximité de Saint Denis, le juge de proximité d'Aix-en-Provence procède à une analyse au cas par cas. Conformément à l'arrêt de la Cour de cassation du 15 novembre 2011, le juge d'Aix en Provence se réfère à la directive 2005/29/CE pour débouter la société Lenovo car elle impose au consommateur «d'adjoindre Windows Vista à un type d'ordinateur dont les spécifications propres mais uniquement matérielles avaient dicté son choix». Cela faisant, elle contraint l'article 29 de l'annexe de la directive qui dispose que constitue une pratique commerciale déloyale d'«exiger le paiement immédiat ou différé de produits fournis par le professionnel sans que le consommateur les ait demandés, ou exiger leur renvoi ou leur conservation, sauf lorsqu'il s'agit d'un produit de substitution fourni conformément à l'ar-

[24] V. blog de M. F. Cuif, http://www.cuifavocats.com/Petrus-c-Lenovo-la-fourniture-de, dernière consultation le 29 mai 2012.

ticle 7, paragraphe 3, de la directive 97/7/CE (fournitures non demandées)».

La décision donne raison au consommateur, car la pratique du fabricant est illicite au regard du Code de la consommation et de la Directive, mais sa motivation ne semble pas être claire sur les fondements textuels. C'est pour cette raison que la Cour de cassation la sanctionne le 5 février 2014. Elle répond au moyen de Lenovo critiquant l'appréciation des premiers juges quant à la déloyauté de la vente d'ordinateurs pré-chargés, en ces termes:

«Attendu que pour accueillir la demande de remboursement du prix des logiciels préinstallés et retenir ainsi l'existence d'une pratique commerciale déloyale, le jugement retient qu'un ordinateur prêt à l'emploi se compose de deux éléments intrinsèquement distincts, une partie proprement matérielle et un logiciel destiné à le faire fonctionner selon les besoins de l'utilisateur, qu'il ne pouvait être imposé à M. Petrus d'adjoindre obligatoirement un logiciel préinstallé à un type d'ordinateur dont les spécifications propres mais uniquement matérielles avaient dicté son choix;

Qu'en se déterminant ainsi, sans constater l'impossibilité pour M. Petrus de se procurer, après information relative aux conditions d'utilisation des logiciels, un ordinateur «nu» identique auprès de la société Lenovo France, la juridiction de proximité a privé sa décision de base légale du regard du texte susvisé».

Selon la Cour de cassation, pour que soit licite la vente d'ordinateurs pré-équipés de logiciel d'exploitation, le professionnel doit satisfaire à deux conditions. La première est d'informer le consommateur sur les conditions d'utilisation des logiciels; la seconde, d'offrir au consommateur, la possibilité d'acquérir le même ordinateur, mais sans les logiciels d'exploitation. Ainsi, la vente est liée si le constructeur ne met pas à la disposition du consommateur le même modèle d'ordinateur que celui acheté par le consommateur, mais sans logiciel.

Même si la Cour casse le jugement de proximité, l'arrêt marque une progression quant aux droits des consommateurs. Nous pouvons même en déduire qu'il impose aux distributeurs d'adapter l'objet de la vente en proposant

des ordinateurs nus, sans logiciels d'exploitation, chaque fois qu'ils font le commerce d'ordinateurs prêts à l'emploi.

La bataille judiciaire n'étant pas prête d'être terminée en France, qu'en est-il des droits nationaux non européens? Nous pouvons donner l'exemple de la Turquie dont les tribunaux se placent du côté des consommateurs. Les tribunaux et les comités d'arbitrage de la consommation se basent, en général, sur la distinction du matériel et du logiciel.

Dans une décision du 14 décembre 2009 du Tribunal des consommateurs d'Ankara, il a été jugé que «les consommateurs sont protégés au niveau national et international par les règlements comme le règlement de l'Union Européenne ou les lois nationales. Les droits fondamentaux des consommateurs sont le fondement de ces règlements. On compte parmi ces droits: le fait de correspondre aux nécessités principales du consommateur, la confiance du consommateur dans le produit, le libre choix du consommateur quant au produit, le droit à l'information du consommateur, le droit de demander la réparation du dommage subi. Ainsi, il est décidé que le demandeur ne peut être contraint d'acheter le logiciel pré-installé avec l'ordinateur portable. Le contraire constituerait une monopolisation contre le consommateur et multiplierait la concurrence déloyale.»

Plus récemment, le comité d'arbitrage de la consommation de la province de Buca, Izmir a décidé ainsi: «il découle du dossier que lors de la vente de l'ordinateur portable, le logiciel Windows a été vendu au consommateur par force pour un montant de 226 Livre Turque[25] alors que le logiciel ne constituant pas un élément intrinsèque de l'ordinateur portable, le comité accepte la demande du consommateur quant au remboursement du prix du logiciel.» Par la suite, le vendeur ne faisant pas opposition à la décision, celle-ci est devenue définitive.

**CONCLUSION**

Depuis 2008, les associations de consommateurs invitaient le gouverne-

[25] Approximativement 78 euros

ment français à agir contre ces pratiques. Dans un compte rendu du 6 juillet 2011 de la Commission des affaires économiques de l'Assemblée Nationale, des députés ont rejeté en commission, un projet d'amendement[26] visant à durcir la législation française en la matière, au motif que la disposition «*ne répond pas aux besoins des Français. Enfin, la vente séparée intéresse les geek, qui sont très informés: ils savent où et comment acheter des ordinateurs nus et le logiciel d'exploitation séparé qu'ils désirent*»[27].

Le député M. Tardy avait souligné dans son amendement n° 308 du projet de la loi, «la Cour d'appel de Versailles a rappelé le 5 mai 2011 que de telles pratiques s'apparentaient à des pratiques commerciales déloyales, tant par l'absence d'information du consommateur que par le fait que les constructeurs proposent des machines sans logiciels préinstallés aux clients professionnels tout en les refusant au grand public, ce qui est contraire aux exigences de la diligence professionnelle». Il considère du coup que le système de codes d'activation pourrait être l'issue parfaite: «Ces codes, à acquérir séparément, permettent aux professionnels de choisir leurs logiciels, choix qui est donc refusé sans raison valable aux particuliers. Un autre système a été mis en place pour les navigateurs Internet, suite à une demande de la Commission européenne». L'Assemblée Nationale a décidé le 4 octobre 2011 un retrait total des amendements[28].

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[26] Le Projet de loi renforçant les droits, la protection et l'information des consommateurs, n° 3508, déposé le 1er juin 2011.

[27] http://www.assemblee-nationale.fr/13/pdf/cr-eco/10-11/c1011085.pdf, p.20, dernière consultation le 29 mai 2012.

[28] V. http://www.assemblee-nationale.fr/13/cri/2011-2012/20120004.asp. Amendement n° 181 Rect.: L'article L. 122-1 du code de la consommation est complété par un alinéa ainsi rédigé: «La vente d'un ordinateur et de son logiciel d'exploitation doit faire l'objet d'une offre découplée. Un décret définit les modalités d'application du présent article». Mme Massat, Mme Le Loch, M. Gaubert, M. Brottes, Mme Got, Mme Erhel, M. Grellier, M. Le Bouillonnec, M. Peiro, M. Marsac, M. Jung, M. Boisserie, et les membres du groupe Socialiste, radical, citoyen et divers gauche,
http://www.assemblee-nationale.fr/13/amendements/3632/363200181.asp, dernière consultation le 29 mai 2012. Amendement n° 432 Rect.: Après l'article L. 113-3 du code de la consommation, il est inséré un article L. 113-3-2 ainsi rédigé: «Art. L. 113-3-2. – L'acheteur d'un ordinateur doté d'un logiciel préinstallé, et notamment le système d'exploitation, doit être clairement informé par le vendeur de la faculté ou non de renoncer, après achat, à la licence de ce logiciel, et, si cette faculté lui est offerte, des modalités et du montant du remboursement prévu par le fabricant. «Les modalités d'application du

Récemment, le problème avait été soulevé lors des débats du projet de loi Lefebvre mais les amendements proposés avaient été retirés à la demande du Gouvernement[29]. De même, lors des débats sur le projet de loi Hamon, des amendements visant à faire de la vente d'ordinateurs prêts à l'emploi une vente par lot, et à imposer une information du consommateur sur le prix des logiciels, ont été proposés par des sénateurs mais rejetés[30].

Aujourd'hui Microsoft vend par exemple son Office 2010, déjà pré installé dans l'ordinateur, avec une carte d'activation qui contient un numéro de série. Celle-ci permet d'activer Office 2010. Rien ne s'y opposant techniquement, pourquoi ne pas utiliser le même procédé pour le système d'exploitation? Même si nous ne pouvons pas imposer aux constructeurs des modèles économiques à appliquer, la justice semble aller dans le sens de la volonté des consommateurs.

♦♦♦♦

présent article sont définies par arrêté du ministre chargé de la consommation». M. Tardy et M. Fasquelle,
http://www.assemblee-nationale.fr/13/amendements/3632/363200432.asp, dernière consultation le 29 mai 2012. Amendement n° 308: Le dernier alinéa de l'article L. 122-1 du code de la consommation est ainsi rédigé: «La vente d'un ordinateur, de son logiciel d'exploitation et des logiciels applicatifs doit être découplée. Un décret définit les modalités d'application du présent article». M. Tardy,
http://www.assemblee-nationale.fr/13/amendements/3632/363200308.asp,dernière consultation le 29 mai 2012.

29 Amendement n° 432, projet de loi consommation, doc. AN n° 3632, non adopté.

30 V. débats Sénat, JO Sénat, débats du 11 septembre 2013, 77.

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**Sommaire**

# DRUG TRAFFICKING AS A TRANSNATIONAL CRIME*

*Uluslararası Bir Suç Olarak Uyuşturucu Ticareti Suçu*

**Dr. Mehmet Zülfü ÖNER***

**ABSTRACT**

The growth of economic interdependence among states, the development of rapid transport and communications systems, the vast increase in international trade, and the emergence of a global financial market have dramatically changed the context within which transnational crime operates. Transnational crimes have taken advantage of new opportunities provided by globalism.

Drug trafficking is a transnational phenomenon, and includes the production, processing, transportation and distribution of drugs, and the laundering of the profits derived from this activity. The drug trade is still expanding, both geographically and in terms of its products. Several important trends in the drug-trafficking industry have become evident in the last few years. More and more states are being drawn into the orbit of drug traffickers and transnational criminal organizations. Combating the illicit production and distribution of drugs has been traditionally regarded as principally a matter for law enforcement agencies. The globalization of criminal activities and the ability of narcotics trafficking to undermine the political and economic sovereignty of states have already made the illicit drug trade a significant security issue for many states and a primary strategic concern for the most seriously affected.

This article aims to make an analysis of drug trafficking and outline the dimensions of drug trafficking as a transnational crime. This study also focuses on a historical review of the international drug control system. In addition, this article discusses one possible means for bringing international drug traffickers to justice: the exercise of universal jurisdiction over persons accused of drug trafficking crimes.

**Key Words:** drug, drug trafficking, transnational crime, organized crime, universal jurisdiction, International Criminal Court.

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* This article has been written in Law School University of Sussex (The United Kingdom) with the support of The Scientific and Technological Research Council of Turkey (TUBITAK). The views which is expressed in this article reflect the views of the scholar.

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**ÖZET**

Devletler arasında ekonomik bağımlılığın artması, iletişim ve ulaşım sistemlerindeki hızlı gelişme, uluslararası ticaretteki büyük artış ve küresel bir finans piyasasının ortaya çıkışı uluslararası suç aktörlerinin davranışlarını ciddi ölçüde değiştirmektedir. Uluslararası alanda faaliyet gösteren suç aktörleri küreselleşmenin sağladığı bu yeni olanakları kullanmaktadır.

Uyuşturucu ticareti, imal, üretim, taşıma ve dağıtım ile bu süreçten sağlanan kârların ekonomik sisteme sokulmasını içine alan küresel bir sorun olarak karşımıza çıkmaktadır. Uyuşturucu madde ticareti, hem coğrafi hem de ortaya çıkardığı sonuçlar bakımından halen genişlemekte ve son yıllarda yasal olmayan uyuşturucu piyasasında oluşan yeni eğilimler belirgin hale gelmektedir. Günümüzde, uyuşturucu tacirleri ve uluslararası suç örgütleri giderek daha fazla devleti faaliyet alanlarına dahil etmektedir. Yasal olmayan uyuşturucu üretim ve dağıtımı ile mücadele, devletlerin güvenlik birimlerinin uğraştığı geleneksel, temel ve güncel sorunlardan biri olmaya devam etmektedir. Devletlerin ekonomik ve siyasi bağımsızlığını zayıflatan suç faaliyetinin küreselleşmesi ve uyuşturucu maddelerin dağıtım imkanları, yasal olmayan uyuşturucu ticaretini bir çok devlet için çok önemli etkileri olan bir güvenlik sorununa dönüştürmektedir.

Bu çalışma, uyuşturucu ticareti suçunu uluslararası bir suç olarak çeşitli yönleri ile incelemeyi amaçlamakta ve uyuşturucu maddeler ile ilgili uluslararası alanda oluşturulan kontrol sistemini açıklamaya çalışmaktadır. Çalışmada, ayrıca uyuşturucu ticareti suçlarının ve suçlularının uluslararası bir yargılamaya tabi tutulup tutulamayacağı konusu tartışılmaktadır.

**Anahtar Sözcükler:** Uyuşturucu madde, uyuşturucu ticareti, uluslararası (sınıraşan) suç, organize (örgütlü) suç, uluslarası yargılama, Uluslararası Ceza Mahkemesi

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## 1. INTRODUCTION

The evolution of globalization has fundamentally changed the context in which both legitimate and illegitimate businesses operate. Globalization is coupled with an ideology of free markets and free trade, as well as a decline in state intervention. According to advocates of globalization, reducing international regulations and barriers to trade and investment will increase trade

and development. But crime groups have exploited the enormous decline in regulations, the lessened border controls, and the greater freedom to expand their activities across borders and into new regions of the world. As a result, globalization has contributed to an enormous growth in crime across borders, as criminals exploit the ability to move goods and people[1].

Increased interdependence among countries and the globalization of financial networks have created global markets for both licit and illicit commodities[2]. A dark side of globalization has been the growth of transnational organized crime[3]. The somber side of globalization is a complicated network of illicit markets ranging from drug and arm trafficking to the smuggling of humans into slavery and prostitution. These illicit industries, or black markets, are the product of globalization, and they represent some of the gravest problems in all societies spanning the globe[4].

A number of landmark events have coincided with this shift: the creation of free-trade blocks such as the European Union and the 1986 North American Free Trade Agreement (NAFTA); the advent of the World Wide Web beginning in 1990; the collapse of the Soviet Union in 1991; and the commercialization of China (including the hand-over of Hong Kong on July 1, 1997). As the activities and interests of criminal organizations have become more global, they have begun to enter into strategic alliances with other criminal groups to gain access to new markets, and to take advantage of their brethren's unique criminal skills[5]. Illicit networks have leveraged the processes and new oppor-

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1 See Shelley Louise, ''The Globalization of Crime'', International Crime and Justice, Ed. Mangai Natarajan, Cambridge University Press, 2011, p.4.

2 The increase in international trade in illicit products and services parallels the growth in international trade more generally that accompanies the phenomenon of globalization. See Findlay Mark, ''The Globalisation of Crime'', Australian Quarterly, Vol. 71, No. 4, Jul. - Aug. 1999, pp.23-27.; Thomas Chantal, ''Disiplining Globalization: International Law, Illegal Trade and the Case of Narcotics'', Michigan Journal of International Law, Vol. 24, Winter 2003, pp.549-575.; Thomas Chantal, ''Globalization and the Reproduction of Hierarchy'', U.C. Davis Law Review, Vol.33, Summer 2000, p.1451.

3 See Scherrer Amandine, G8 against Transnational Organized Crime, Ashgate Publishing, 2009, p.30.

4 See Jenner Matthew S., ''International Drug Trafficking: A Global Problem with a Domestic Solution'', Indiana Journal of Global Legal Studies, Vol. 18, Issue 2, Summer 2011, p.902.

5 Richards James R.,Transnational Criminal Organizations, Cybercrime, and Money

tunities arising from globalization and capitalized on weak institutions and gaps in governance around the world to expand their enterprises. As more people take advantage of the freedom of movement and of widely available and less costly travel opportunities, as more goods and tens of thousands of containers cross international borders, it is harder for the authorities to detect the illicit consignment and the criminal.

One of the largest and most profitable of illicit industries is the market for illicit drugs. Estimated at over $500 billion a year, the illegal drug trade is an international business that has sustained itself for over forty years[6]. Consistently high consumer demand and appetite for drugs ensures an attractive and extremely lucrative market for the criminal to exploit. Porous borders and weak border controls in many countries contribute to the problem[7]. The various forms of transnational organized crime, particularly drug trafficking, pose a threat to the security and stability of states, undermining the rule of law and damaging their societies and communities.

## 2. THE RELATIONSHIP OF DRUG TRAFFICKING AND TRANSNATIONAL CRIME

### a. Transnational Crime

The degree to which the problem of transnational crime has become a truly global phenomenon during the past three decades is remarkable. Transnational crime became a principal threat around the world, and international drug trafficking is perhaps the most well known of these crimes[8]. Criminal

Laundering, CRC Press, 1999, p.1.

6 See Jenner, 2011, p.902.

7 See Bantekas Ilias & Nash Susan, İnternational Criminal Law, Third Edition, 2007, p.233. '' The post–1990 era, with the advent of globalised trade and physical movement of persons, witnessed an increase in organised crime, originating especially from the former Eastern bloc, necessitating a different approach to the problem. Two factors have generally contributed to the eruption of organised crime at the dawn of the 21st century: the emergence of 'weak' States and corruption.''.

8 The increase in transnational economic activity has made it easier to hide illicit transactions, products and movements because law enforcement agencies and customs officers are unable to inspect more than a small proportion of the cargoes and people coming into their territories. Illegal drugs have emerged as a global commodity of immense significance. It is likely that illicit drugs will become an even more significant commodity in the future. See

networks bribe government officials and take advantage of weak border security and ill-equipped law enforcement to facilitate their operations. Due to the enormous profits associated with drug trafficking, the illegal trade is also a way to finance other transnational criminal and terrorist activities[9]. In recent years, transnational crime has increased significantly because of the disintegration of the former Soviet Union, the collapse of the Berlin Wall, the elimination of border controls, and immigration from other parts of the world[10].

The term 'transnational crime' is commonly used by criminologists, criminal justice officials and policymakers, and one of the first major issues that researchers and practitioners tackled was defining transnational crime[11]. Addressing transnational crime is a challenge[12]. Not only is it complex, involving a widespread number of actors, but crime that crosses borders is a burgeoning phenomenon[13]. The term 'transnational crime' is in widespread use as a generic concept covering a multiplicity of different kinds of criminal activity[14]. Historically, the crime of slavery, piracy and smuggling has existed since antiquity. During the 1980s, transnational crime came to describe a much broader array of criminal activities, with an increase in attention to drug trafficking,

Williams Phil, ''Transnational Criminal Organisations and International Security'', Survival: Global Politics and Strategy, Vol.36, No.1, 1994, pp.96-113.

9 Strategy to Combat Transnational Organized Crime, Addressing Converging Threats to National Security, The United States, July 2011, p.6.

10 See Swanstrom Niklas, ''The Narcotics Trade: A Threat to Security? National and Transnational Implications'', Global Crime, Vol.8, Number 1, 2007, pp.1-25.

11 See Nadelmann, Ethan Avram, Cops Across Borders: Transnational Crime and International Law Enforcement, Harward University, Theses, 1987, p.9.

12 See Mueller Gerhard O.W., ''Transnational Crime: Definitions and Concepts'', Combating Transnational Crime, Concepts, Activities and Response, Ed. Williams Phil, Vlassis Dimitri, Psychology Press, 2001, p.13. ''It must be noted that the term 'transnational crime' did not have a juridical meaning then, and it does not have one now. It is a criminological term, under which may be lumped what is variously and differently defined in the penal codes of states, but with the common attribute of transcending the jurisdiction of any given state. We also observed then that, almost invariably, transnational criminality is organized criminality, although it is entirely imaginable that a single person can engage in transnational crime.''.

13 Parrish Austen L., ''Domestic Responses to Transnational Crime: The Limits of National Law'', Criminal Law Forum, Vol.23, Issue 4, December 2012, p.279.

14 Boister, Neil, ''Transnational Criminal Law?'', European Journal of International Law, Vol. 14, No. 5, 2003, p.954.; Jamieson Alison, ''Transnational Organized Crime: A European Perspective'', Studies in Conflict & Terrorism, Vol.24, Number 5, 2001, p.378.

smuggling of illegal aliens, arms smuggling, currency offenses, fraud and terrorism[15].

The definition of transnational crime has evolved, reflecting the increasing complexity and international nature of the phenomenon. The term 'transnational'[16] is used most often to mean the movement of information, money, physical objects, people, or other commodities across national boundaries, when at least one of the actors involved in the transaction is nongovernmental[17]. Various countries have different definitions of transnational crime depending on very different law systems and philosophies[18]. By definition, transnational crime is crime that violates the laws of more than one state[19], or transnational crimes are criminal acts or transactions that span national borders, thus, violating the laws of more than one country[20].

The term 'transnational crime' was first used at the Fifth United Nations (UN) Congress on Crime Prevention and the Treatment of Offenders in 1975 by the UN Crime Prevention and Criminal Justice Branch ''in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country''[21].

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15 See Felsen David & Kalaitzidis Akis, ''A Historical Overview of Transnational Crime'', Handbook of Transnational Crime and Justice, Ed. Philip Reichel, Sage Publications, 2005, pp.9-10.

16 Transnational crime entered the discourse of criminology in the 1970s at roughly same time that transnationalism entered the vocabulary of other social science. See Felsen & Kalaitzidis, 2005, p.4.

17 See Keohane R. & Joseph Nye, Transnational Relations and World Politics, Harvard University Press, 1971.

18 The concept of transnational crime, sometimes called international crime or multinational systemic crime, is more than an extension of domestic crime. Transnational crime is a social phenomenon involving people, places and institutions, which is also influenced by a variety of social, cultural, economic determinants. See Wang Peng & Wang Jingyi, ''Transnational Crime: Its Containment through International Cooperation'', Asian Social Science, Vol. 5, No. 11, November 2009, p.26.

19 See Boister, 2003, p.954. ''At its simplest, transnational crime describes conduct that has actual or potential transboundary effects of national and international concern''.

20 See Natarajan Mangai, Introduction, International Crime and Justice, Ed. Mangai Natarajan, Cambridge University Press 2011, p.25.; McDonald, W., Crime and Law Enforcement in the Global Village, Cincinnati, OH Anderson Publishing, 1997.

21 See Boister Neil, An Introduction to Transnational Criminal Law, Oxford University Press, 2012, p.4. ''An offence is 'transnational' if it satisfies one of a number of alternative conditions: (a) it is committed in more than one state; (b) it is committed in one state but

We can find a definition of transnational crime in Article 3 of the United Nations Convention against Transnational Organized Crime of 2000 (or Palermo Convention). Article 3(2) states that an offence is transnational in nature if it is committed in more than one state, if a substantial part of its preparation takes place in a state other than the one where it is committed, if it involves organized criminal groups active in more than one State, or if it has substantial effects in another state[22].

It is important to recognize that there is no consensus about the precise meaning of the term 'transnational crime'. It is different from international crimes, which are recognized by and can therefore be prosecuted under international criminal law, and domestic crimes that fall under one national jurisdiction. The United Nations (UN) has defined transnational crimes as offences whose inception, prevention and/or direct or indirect effects involved more than one country[23]. The UN has also identified 18 different categories of transnational crime. These are: money laundering, terrorist activities, theft of art and cultural objects, theft of intellectual property, illicit traffic in arms, sea piracy, hijacking on land, insurance fraud, computer crime, environmental crime, trafficking in persons, trade of human body parts, illicit drug trafficking, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public officials, and finally other offences committed by organized criminal groups[24].

Although organization is not a necessary condition of transnational crime,

a substantial part of its preparation, planning, direction, or control takes place in another state; (c) it is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or (d) it is committed in one state but has substantial effects in another State.''

22 See Illuminati Giulio, '' Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees'', Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings, Ed. Stefano Ruggeri, Springer-Verlag, Berlin Heidelberg 2013, p.19.

23 See Global Programme against Transnational Organized Crime, Results of a Pilot Survey of Forty Selected Organised Criminal Groups in Sixteen Countries, United Nations Office on Drugs and Crime, September 2002, p.4.

24 See Mueller, 2001, p.14. ''Serious discussion of the 18 categories is handicapped not only by the lack of precision in definitions, but especially by the difficulty of gauging the extent -or cost -of the criminality involved.''.

transnational crime is heavily associated with organized crime and terrorism[25]. A variety of definitions, several classification systems, models and typologies are developed to explain organized crime[26]. But, the term 'organized crime' has not been given satisfactory definition or description[27]. Like the meaning of organized crime, the definitions of terrorism also change over time and a different form of terrorism has emerged after World War II[28]. The growth of networks has strengthened the links between illicit markets in different commodities as well as relations between individual groups within the criminal world[29]. Even outside the organized-crime context, criminal activity now commonly transcends national borders[30].

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25 See Boister, 2012, p.6; Galeotti Mark, ''Introduction: Global Crime Today'', Global Crime, Vol. 6, No. 1, February 2004, p.3.; Spapens Toine, ''Macro Networks, Collectives, and Business Processes: An Integrated Approach to Organized Crime'', European Journal of Crime, Criminal Law and Criminal Justice 18, 2010, pp.185-215.; Jamieson, 2001, p.378.; Williams, 1994, p.96.

26 ''The term can be used to refer to certain types of more sophisticated criminal activities embedded, in one form or another, in complex illicit markets. Arms, drug, and human trafficking are often correlated with a set of 'enabling activities' such as (the threat of) violence, corruption, and money laundering.''. See Hauck Pierre & Peterke Sven, ''Organized Crime and Gang Violence in National and International Law, International Review of the Red Cross'', International Review of the Red Cross, Vol. 92, Issue 878, June 2010, p.409.

27 The European Council defines criminal organization in the first paragraph of Article 1 of Joint Action 98/733/JHA ''It means a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or by a more serious penalty.'' See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005PC0006,15.07.2014.

28 See Mei Leong Angela Veng, The Disruption of International Organised Crime, Ashgate Publishing Company, 2007, p.26. ''Different approaches should be adopted at different times in different societies and perhaps there is no need for an exact definition of organised crime....On one hand, the terrorists tend to shift to organised criminal activities in obtaining the necessary funding, on the other hand, the organised crime groups tend to resemble the cellular terrorist structures...Furthermore, with innovative development in technology, the tools and methods available to both organised criminals and terrorists have and are still changing. Cyberterrorism is one of the best examples.''.

29 Jamieson, 2001, p.380.

30 See Hall Tim, ''Economic Geography and Organized Crime: A Critical Review'', Geoforum, Vol. 41, Issue 6, November 2010, pp.841-845.; ''Now, Colombian drug cartels are operating in Western Europe; Russian gangstersn are operating in Eastern Europe, the United States, and Asia; the Chinese Triads dominate Asia and the west coast of the United States; and the Mexican criminal organizations dominate the world methamphetamine trade. Not only are these organizations operating globally, they are forming strategic alliances with each other, with rogue governments, and with terrorist organizations.'' See Richards, 1999, p.26.

Globalization and the resulting unprecedented openness in trade, travel, and communications has created significant opportunities for criminals to prosper and broaden their illegal activities by crossing borders[31]. Criminal law was inherently territorial and confined to use exclusively within a nation's borders, countries have begun to enact criminal laws that purport to regulate the conduct of foreigners abroad. Extraterritorial, unilateral, domestic law that punishes illegal conduct wherever it occurs has become a key response in the fight against transnational crime[32]. Many countries have a number of extraterritorial criminal laws in the world[33].

Transnational crimes harm a range of different private and public interests including security, human rights, social interests, religious beliefs, and morality[34]. These crimes pose a significant and growing threat to national and international security, with dire implications for public safety, public health, democratic institutions, and economic stability across the globe[35]. As a result, transnational crimes have been discussed as an international security issue and some state that these crimes are now emerging as a serious threat to national and international security and stability in their own right[36].

Some[37] argue that international society's concern with the upsurge in certain kinds of criminal activities within a state is considered legitimate because of the fear that these activities will have a knock-on effect in other states.

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31 Parrish, 2012, p.277.

32 The term extraterritoriality includes jurisdiction over a country's own nationals (nationality jurisdiction), over foreign conduct that causes harm within a state's border (effects jurisdiction or objective territoriality), over foreign conduct that threatens state security or interferes with the operation of government functions (protective principle), over foreign conduct where the victim is a national (passive personality), and over certain kinds of universally agreed upon crimes (universality). See Parish, 2012, p.280.

33 See Berman, Paul Schiff, ''The Globalization of Jurisdiction'', University of Connecticut School of Law Articles and Working Papers. Paper 13, 2002, available at. http://www.aals.org/profdev/civpro/berman2.pdf,15.07.2014.

34 See Boister, 2012, p.7.

35 Strategy to Combat Transnational Organized Crime, 2011, p.5.

36 See Boister, 2012, p.7.; McFarlane John , McLennan Karen, Transnational Crime: The New Security Paradigm, Strategic and Defence Studies Centre, Australian National University, 1996.

37 Dupont Alan, ''Transnational Crime, Drugs, and Security in East Asia'' Asian Survey, Vol. 39, No. 3, May - Jun. 1999, University of California Press, pp.433-455.

Firstly, transnational criminal activities can pose a direct threat to the political sovereignty of the state because they have the capacity to undermine and subvert the authority and legitimacy of governments. Fears about the criminal erosion of political sovereignty are echoed in a second and related concern about economic security. Thirdly, the growth in the coercive power of organized crime, if unchecked, has international security implications because large-scale criminal enterprise can subvert the norms and institutions that underpin global order and the society of states. Finally transnational crime has an important military and strategic dimension, which can take a number of different forms. Criminal activities, particularly those conducted on a large scale and involving significant international cooperation, have moved along the threat continuum toward the traditional concerns of the national security apparatus[38].

Besides domestic law, international society responded to the globalization of harmful conduct by beginning to develop suppression conventions in the 19th century[39]. The use of treaty law to establish international prohibition regimes is intended to minimize or eliminate the potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment[40]. In this context, transnational criminalization today rests upon assumptions about the legitimate political, social and economic interests of states, and assertions about the harm caused to these interests by the conduct criminalized.

Some argue that transnational crime is a rapidly growing phenomenon and, responding to this growth, 'transnational criminal law'[41] is probably the

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38 See Naylor R.T., ''From Cold War to Crime War: The Search for a New "National Security" Threat'', Transnational Organized Crime, Vol. 1, No. 4, Winter 1995, pp.37-56. Ciccarelli John, ''Crime as a Security Threat in the 21st Century'', Journal of the Australian Naval Institute, Vol.22, Issue 4, November/December 1996, pp.41-44.

39 Boister, 2003, p.955.

40 See Nadelmann Ethan A., ''Global Prohibition Regimes: The Evolution of Norms in International Society'', International Organization, Vol. 44, No. 4, Autumn 1990, pp. 479-526.

41 See ''Why Use the Term 'Transnational Criminal Law'?..the term 'ICL' implies a direct relationship between international society and the criminal in question, and in the indirect system there is none. A drug trafficker may break the law of a particular state, but he or she

most significant existing mechanism for the globalization of substantive criminal norms[42]. From this viewpoint, transnational criminal law is concerned with the treaty crimes excluded from the jurisdiction of the International Criminal Court. Unlike international criminal law, transnational criminal law does not create individual penal responsibility under international law. The individual penal responsibility under international criminal law has required a greater density of institutionalization than that required to suppress transnational crime. The establishment of the International Criminal Court, the application of absolute universal jurisdiction and the classification of crimes as international crimes are all institutional manifestations of the application of individual criminal responsibility to certain offences under international law. On the other hand, transnational criminal law is an indirect system of interstate obligations generating national penal laws. The suppression conventions impose obligations on state parties to enact and enforce certain municipal offences[43]. Transnational criminal law includes the rules of national jurisdiction under which a state may enact and enforce its own criminal law where there is some transnational aspect of a crime. It also covers methods of cooperation among states to deal with domestic offences and offenders where there is a foreign element and the treaties which have been concluded to establish and encourage this inter-State cooperation. These treaties provide for mutual legal assistance and extradition between States in respect of crimes with a foreign element[44]. Briefly, the aim of transnational criminal law is to suppress inter- and intra-state criminal activity that threatens shared national interests or values.

is not an international criminal and there is no international crime of drug trafficking. On the other hand, including this system within national criminal law obscures its provenance and the international obligations that exist to implement and enforce it.'' Boister, 2003, p.974.

42 See Boister, 2003, p.956.

43 Boister, 2003, p.962.

44 See Cryer Robert, Friman Hakan, Robinson Darryl & Wilmshurst Elizabeth, An Introduction to International Criminal Law and Procedure, 2nd Edition, Cambridge University Press, June 2010, p.6. "A similar terminological distinction between 'international criminal law' (criminal aspects of international law) and 'transnational criminal law' (international aspects of national criminal laws) can also be found in other languages, such as German ('Völkerstrafrecht' compared with 'Internationales Strafrecht'), French ('droit international pénal' and 'droit pénal international') and Spanish ('derecho internacional penal' and 'derecho penal internacional').".

It tries to achieve this aim through the suppression conventions projecting substantive criminal norms beyond the national boundaries of the state in which they originated[45]. Within this framework 'transnational criminal court' has been proposed to fight against transnational organized crime[46].

Lastly, according to some[47], until recently, there was not a clear distinction in the literature between international criminal law with its more restricted meaning and transnational criminal law. Transnational criminal law, with its focus on domestic criminal law and on inter-State cooperation in the sphere of criminal law, remains the body of 'international criminal law'.

**b. The United Nations Convention against Transnational Organized Crime**

The United Nations began a push towards dealing with transnational crime in the late 1990's. Since the early 1990s the UN General Assembly had detected the increase and expansion of organized criminal activity worldwide. In 1994, the World Ministerial Conference on Organized Transnational Crime adopted the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, which, inter alia, addressed the issue of convening a conference for the negotiation of a convention on the matter. By Resolution 53/111 the General Assembly established an Ad Hoc Committee for the purpose of elaborating a convention and three additional protocols[48]. In 1997, the United Nations Office on Drugs and Crime was established to provide knowledge and strategies on combating all issues related to drugs and crime, including terrorism, corruption, and human trafficking. Soon after the office was established debate began on several conventions dealing with the topics of the office. After a series of 11 sessions between 1999 and 2000, the United Nations Convention against Transnational Organized Crime (The Palermo Convention or CATOC) and two Additional Protocols were adopted

45 Boister, 2003, p.968.

46 See Boister Neil, "International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?", Criminal Law Forum, Vol. 23, 2012, No. 4, pp. 295-318.

47 See Cryer, Friman, Robinson & Wilmshurst, 2010, p.6.

48 The three additional Protocols are supplementary and subordinate to CATOC. See Bantekas & Nash, 2007, p.237.

in late 2000[49], while another one on firearms was adopted on 31 May 2001.

The Palermo Convention represents the first attempt to include in one single binding document all the concepts and measures necessary to fight organized crime on a global scale[50], and is one of the most relevant and acknowledged legal instruments currently in existence for the conceptualization of transnational organized crime. The declared purpose of the Convention is 'to promote cooperation to prevent and combat transnational organized crime'[51]. Among its provisions are the criminalization of participation in an organized crime group, action against a wide range of illicit trafficking activities, and measures to prevent and repress criminal penetration of the legal sector[52].

The Palermo Convention provides a broad spectrum of cooperation instruments, and sets out a range of measures to be adopted by states parties to enhance effective law enforcement. Among others, it is worth mentioning mutual assistance in the enforcement of coercive measures (arrest, seizure, confiscation); the rules for establishing jurisdiction over the offence and coordinating state actions in this respect; the improvement in mutual assistance in taking evidence and providing information; the establishment of joint investigative bodies; the conclusion of agreements on the use of special investigative techniques; and the establishment of channels of communications between the competent authorities[53]. In addition, it addresses the protection of witnesses and victims, data collection and exchange, training and technical assistance, and special investigative techniques[54]. Some argue that the Palermo Convention is the most important and comprehensive international instrument to combat organized crime[55].

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49 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Protocol Against the Smuggling of Migrants by Land, Sea and Air; and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. See Hauck & Peterke, 2010, pp.424-425.

50 See Betti Stefano, The European Union and the United Nations Convention against Transnational Organised Crime, European Parliament, Civil Liberties Series, 2011.

51 See Hauck & Peterke, 2010, pp.420-421.

52 Jamieson, 2001, p.385.

53 See Illuminati, 2013, p.19.

54 See Hauck & Peterke, 2010, p.423.

55 See Hauck & Peterke, 2010, p.423. '' ...Convention... is the most important and

The Palermo Convention establishes five distinct offences: (a) participation in organized criminal groups; (b) money laundering; (c) corruption; and (d) obstruction of justice[56]. Moreover, "serious crime" is defined in such a way as to include all significant criminal offenses. The reference to the commitment of serious crimes gives states considerable latitude in deciding whether to criminalize a specific form of conduct as being constitutive of an organized criminal group. As a result, states will be able to use the convention to address a wide range of modern criminal activity including trafficking and related exploitation as well as migrant smuggling[57]. In addition, the criminalization obligation addresses one of the key reasons for the existence of the Convention[58].

In 2003, the United Nations Convention against Transnational Organized Crime and Protocols Thereto entered into force, calling upon states to harmonize domestic laws regarding transnational crime and set up offices specifically designed to allow mutual crime investigations to cooperate between countries[59]. Also entering into force in 2003 was the United Nations Convention against Corruption, aiming to update, harmonize, and create laws regarding corruption to press states to detect and punish corrupt officials much more aggressively[60].

comprehensive international instrument to combat organized crime....As it obliges states to establish the aforesaid offences 'independently of the transnational nature or the involvement of an organized criminal group', its impact goes beyond improving and promoting international co-operation against transnational organized crime and thus helps to create 'a common language in the fight against organized crime' in general.'' .

56 See Bantekas & Nash, 2007, p.234.

57 See Gallagher Anne, ''Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis'', Human Rights Quarterly, Vol. 23, 2001, p.978.

58 See Gallagher, 2001, p.979. ''States parties will, however, be required to criminalize 1) participation in an organized criminal group, 2) laundering of the proceeds of crime, and 3) public sector corruption as defined under the convention. These offenses (along with "obstruction of justice") are also to be made subject to appropriate sanctions.''.

59 See http://www.unodc.org/unodc/treaties/CTOC/,15.07.2014.

60 See Watson Luke, Suppression of Transnational Crime and the Trade in Illegal Drugs, Old Dominion University Model United Nations Society, 2013, p.4. ''Unfortunately, in the states with the weak institutions that allowed the criminal outfits to flourish, criminals and corrupt officials are reticent to turn themselves in to authorities. The problem resides in the fact that transnational crime is still fought as domestic crime and the measures taken don't treat the causes of the criminal activities.''.

### 3. THE PROBLEM OF DRUG TRAFFICKING AND DRUG TRENDS

Humans have always used drugs (or psychoactive substances) for medicinal, social, religious, and nutritional purposes[61]. Drugs have been used throughout history by various cultures for various purposes. Consumption of, opium, marijuana, coca, and many other drugs originated in prehistory, archaeological evidence suggests that as far back as 2000 B.C., opium was used in Cyprus, Crete, and Greece for various ritualistic purposes. Drugs comprised an important trade item since the beginning of commercial interaction. Merchants, migrants, and conquerors introduced their culture's substances to others, thereby stimulating the traffic[62]. When European colonial powers established trade links and acquired territory in the Americas, Africa and Asia, they took advantage of the commercial possibilities of the new drugs they discovered being used by the societies they encountered, and they encouraged drug production and trade[63]. The supply of opium from India to China remains the classic example of such a situation. Scientific advances in the nineteenth century also meant that more hazardous substances were becoming available in the West. Morphine and later heroin were derived from opium, cocaine from the coca leaf and mescaline from the peyote cactus. The use of these drugs was initially approved by the medical profession on the basis of their apparent benefits, but disapproval followed as more rigorous studies showed few positive and many negative effects[64].

Drug trafficking is a global shared problem that brings threat to every country, and poses one of the most serious challenges to the fabric of society in the US, Western Europe and many drug-producing countries, which have also become consumers of their product[65]. International drug consumption

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61 Drugs have been used since ancient times, and their use has been well documented as a subject of social history. See Bulletin on Narcotics, A Century of International Drug Control, United Nations Office on Drugs and Crime, Ed. Sandeep Chawla, New York, 2009, p.3.

62 See McAllister William B. , Drug Diplomacy in theTwentieth Century, An International History, New York, 2000, p.9.; Goodman J., Lovejoy P., and Sherratt A. (eds), Consuming Habits: Drugs in History and Anthropology, Routledge, London, 1995, pp. 33-34.

63 See Nadelmann, 1987, p.60.

64 See Boister Neil Brett, The Suppression of Illicit Drugs through International Law, University of Nottingham, 1998, p.29-30.

65 See Williams, 1994, p.107.

has increased to some 230 million users of illicit drugs according to the United Nations Office of Drugs and Crime (UNODC)[66] and the production is increasing rapidly to satisfy this large number of illegal drug abusers. As a result of persistent demand worldwide, the global flow of drugs remains high. Drug trafficking is the most crucial and most dangerous phase of the illicit drug market, thousands of kilograms of illegal drugs cross international borders daily, leaving the hands of violent traffickers and entering the lives of drug dealers and addicts[67]. The illicit trade in drugs continues to have a devastating impact on the developing world, both economically and socially[68]. The drug trade has a direct effect on human, military, political and economic security, and the impact on the different aspects of security varies in different regions and states[69]. The social problems caused by the use of illicit drugs are difficult to quantify, but include health problems and the loss of peoples' participation in ordinary society[70].This problem has become one of the major criminal activities of organized crime groups that plan, operate and control the deals across national boundaries.

The recognition that drug trafficking is linked to other serious criminal

[66] See United Nations, World Drug Report 2012; Boister, 2012, p.50.; The United Nations Office on Drugs and Crime's (UNODC) yearly "World Drug Report" is one of the most comprehensive resources on the state of the global drug trade, and is also one of the few reports that attempts to calculate the total value of the global market. See Haken Jeremy, Transnational Crime In The Developing World, Global Financial Integrity, February 2011, p.3.

[67] See Jenner, 2011, p.902.

[68] Drug trafficking currently forms an integral component of several states' economies, threatens to undermine political and judicial systems, has become a leading cause of domestic crime, and is an increasing burden on states' health and welfare systems. Furthermore, issue of drug trafficking has become a friction point in relations among states, most notably those between the United States and a number of Latin American countries. See Sproule D.W. & St-Denis, Paul, ''The UN Drug Trafficking Convention: An Ambitious Step'', The Canadian Yearbook of International Law, Vol. 27, 1989, p.264.

[69] See Swanstrom, 2007, p.22.

[70] See Bantekas & Nash, 2007, p.239.

activity, including terrorism[71] and money laundering[72], has raised concern in the international community that trafficking has the potential to destabilize society[73]. It is clear that the drug trade is directly related to terrorism and separatism since these organizations are supported to an increasing extent by drugs[74]. In this context, the term 'narco-terrorism'[75] is used to describe the existence of drug cartels and drug trade within the terrorist groups. Furthermore, drug trafficking is considered the largest profit of transnationally operating crime groups. State weakness seems to be one of the more important reasons behind the increase in the successful transit and production of drugs. For example, without the weak states in Central Asia and Southeast Asia it would be much harder to move the drugs to their markets and produce them at a low cost[76].

The criminal networks have shown a high degree of flexibility in their choice of production states and transit routes, and they rely on the lack of political

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71 Some argue that the international traffic in illicit drugs contributes to terrorist risk through at least five mechanisms: supplying cash, creating chaos and instability, supporting corruption, providing cover and sustaining common infrastructures for illicit activity, and competing for law enforcement and intelligence attention. See Kleiman Mark A.R.,Illicit Drugs and the Terrorist Threat: Causal Links and Implications for Domestic Drug Control Policy, Domestic Social Policy Division, Congressional Research Service, 2004, p.1.; The U.S. Drug Enforcement Administration (DEA) reports that the number of designated foreign terrorist organizations (FTOs) involved in the global drug trade has jumped from 14 groups in 2003 to 18 in 2008, See Rollins John, Wyler Liana Sun, Rosen Seth, ''International Terrorism and Transnational Crime: Security Threats, U.S. Policy, and Considerations for Congress'', Congressional Research Service, January 5, 2010, p.2.

72 Money laundering is described as ''the process by which one conceals the existence, illegal source, or illegal application of income and then disguises that income to make it appear legitimate''. See Schroeder William R., ''Money Laundering: A Global Threat and the International Community's Response'', FBI Law Enforcement Bulletin, Vol. 70, Issue 5, May 2001 , pp.1-9.; Estimating Illicit Financial Flows Resulting From Drug Trafficking and Other Transnational Organized Crimes, United Nations Office on Drugs and Crime, Vienna Austria, Research Report, 2011, p.32.

73 See Bantekas & Nash, 2007, p.239.

74 Swanstrom, 2007, p.24.

75 Some consider the term too broad and may occasionally reflect political motives. By various definitions, narco-terrorism could be applied to a wide range of groups, ranging from guerrilla organizations to small, fledgling terrorist cells. Wagley John R., Transnational Organized Crime: Principal Threats and U.S. Responses, Congressional Research Service, March 2006, p.3.; Mei Leong, 2007, p.23.

76 Swanstrom, 2007, p.22.

and military cohesion and state incapability[77]. For example, when production moved to Afghanistan due to its instability and good environment for growing opium, transit routes changed from Iran and Pakistan towards Central Asia due to its instability and Iran's war against the drug trade[78].

Most illicit drugs are grown and processed in poor countries where economic opportunities are scarce, law enforcement is weak, and are sold or consumed developing countries[79]. For example, cocaine is produced in Peru, Bolivia, and Colombia, most of it is destined for the North American market[80]. It is estimated that cocaine is produced for export at $950 to $1,235 a kilogram and sold at the wholesale level in the United States for $10,500 to $36,000 a kilogram. Another example is heroin, a kilogram of heroin costs about $3,000 to produce, but it sells wholesale in the U.S. for $95,000 to $210,000[81].

Drug trafficking has four links[82]: production[83] of raw materials, refinement into the usable product, transportation[84] to the market, and wholesale and retail distribution[85], and there are mainly two types of drug trafficking: one is smuggling of illicit drugs through borders while the other one is when drugs are distributed within the nation. Illicit drugs transit through many state,

77 See Swanstrom, 2007, p.22.

78 Swanstrom, 2007, p.22.

79 Illicit drugs are cultivated, manufactured and supplied by individuals from economically poorer states because drugs represent valuable sources of income. See Boister, 1998, p.14.

80 See Dziedzic Michael J. ''The Transnational Drug Trade and Regional Security'', Survival: Global Politics and Strategy, Vol. 31 Number 6, 1989, pp.533-548.; Nadelmann, 1987, p.178.

81 See http://fpif.org/drug_trafficking_and_money_laundering/,15.07.2014.

82 See Boister, 2012, p.50.

83 'Production' is the agricultural seperation of opium, coca leaves, cannabis and cannabis resin form the plant, 'cultivation' includes with in its scope the unregulated, illicit, prohibted cultivation of the opium, poppy, coca bush, or cannabis plant, 'manufacture' means all process, other than production, by which the drugs are obtained and includes refining as well as the transformation of drugs into other drugs. See Boister, 2012, p.54.

84 'Transportation' involves the conveying drugs from one place to another by any mode through any medium, the 'import' and 'export' of drugs is the physcial transfer of drugs frome one State to another State, or from one terriroty to another terrritory of te same State. See Boister, 2012, p.54.

85 'Distribution' ensures that drugs move through the chain of suply form producer to consumer, 'purchase' the buying of of drugs for resale bot use, 'sale' the disposal of drugs for some consideration.See Boister, 2012, p.55.

and are distributed widely[86]. The international drug trafficking system is set up like a hierarchy, manufacturer of drugs would recruit people to smuggle drugs through borders, and then these drugs would be handed over to people known as drug dealers that would connect them to the buyers, the money made by the drug dealers would be used to pay the drug smugglers. The narcotics trade is strictly organized in different networks, controlling criminal activity in all steps from production to consumer markets. Through these networks, Afghanistan, as the primary producer of opium, is directly connected to Europe, Russia, China, Central Asia and Iran; the USA, China and Japan are directly connected to Southeast Asia, as the second largest producer of opium, and the USA to Latin America, as the largest producer of coca[87].

The impact of drug trafficking has not fallen equally on all regions of the globe. Cocaine started to create problems in North America and Europe towards the end of the nineteenth century. Heroin was first synthesized in 1874 by an English chemist, C. R. Alder Wright, and was rediscovered by the German pharmaceutical company Bayer in 1895 and marketed as a cough suppressant under the name of heroin as from 1898, quickly gaining market shares around the globe and emerging as the world's most dangerous drug in the twentieth century[88]. Most of the psychotropic substances or synthetic narcotics available today had not even been invented a century ago. Some of the most common these drugs were discovered in the beginning twentieth century, and in the years around the Second World War a number of new synthetic of the narcotics were developed. For example, methcathinone was first patented in Germany in 1928; LSD, prevalent through the 1960s and the 1970s, was first synthesized in 1938. Amphetamine and methamphetamine were synthesized earlier (1887 and 1888, respectively), but were not actively marketed before the 1930s. Since the 1980s the illicit manufacture and trafficking of amphetamine-type stimulants has increased[89].

According to the World Drug Report (2010), the international drug trade

86 See Boister, 2012, p.51.
87 See Swanstrom, 2007, p.3.
88 See A Century of International Drug Control, 2009, p.65.
89 See A Century of International Drug Control, 2009, p.135.

is centered on four main types of drugs: cocaine, opiates (heroin and opium), amphetamine-type stimulants (ATS), and cannabis. Some figures show that around 4 percent of the world's population takes illegal drugs, and five main commodities are dominant: opiates such as heroin (14 million users worldwide), cocaine (14 million), amphetamine-type stimulants (30 million), hallucinogens (25 million) and cannabis (140 million)[90]. The global consumption of cocaine, heroin, and amphetamine-type stimulant has grown dramatically over the past three decades[91].

Sources of drugs are spread around the world; briefly, cannabis is cultivated widely, but with concentrations in Africa and the Americas; Asia is the largest source of opiates; cocaine is produced almost exclusively in South America and synthetics are produced in Europe, Asia and North America. The most widely abused and heavily trafficked by volume is cannabis, which is consumed by at least 140 million people worldwide[92]. While cannabis is known to be transported illegally across borders, it is difficult to draw conclusions about the directionality of the flows between developing and developed countries. The production of cocaine and opiates takes place entirely in developing countries. Myanmar (Burma) and Afghanistan are the two major opium-growing countries, and Pakistan has emerged as a major processor of Afghan heroin. The Balkan and Northern routes are the main heroin trafficking corridors linking Afghanistan to the huge markets of the Russian Federation and Western Europe[93]. Heroin production was estimated to be 330 tons, with 90% being grown in the Golden Triangle and the Golden Crescent (Afghanistan, Iran, and Pakistan) regions and intended for a global market. While

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90 See Galeotti, 2004, p.2.

91 See, UNODC World Drug Reports, 2010, 2012.

92 See Williams Jenny & Bretteville-Jensen Anne Line, ''Does Liberalizing Cannabis Laws Increase Cannabis Use?'', Journal of Health Economics, Vol. 36, 2014, p.22. '' Cannabis users account for 80% of the 200 million illicit drug users in the world. In countries such as the US, the UK and Australia, over 30% of the population have used cannabis and they have done so despite it being illegal.''.

93 The Balkan route traverses the Islamic Republic of Iran (often via Pakistan), Turkey, Greece and Bulgaria across South-East Europe to the Western European market, the northern heroin route runs through Tajikistan and Kyrgyzstan to Kazakhstan and Russian Federation. See The Globalization of Crime, A Transnational Organized Crime Threat Assessment, United Nations Office on Drugs and Crime, 2010, p.110.

opium cultivation and heroin production stabilized during the 1990s, the use and abuse of ATS soared, especially in North America, Europe, and East Asia[94]. The Colombian cocaine cartels have also diversified into heroin, and there is some evidence that heroin use is on the upsurge in the US[95]. During the 1980s, cocaine production doubled and heroin production tripled, creating 13 million cocaine addicts and 8 million heroin addicts globally. Peru and Bolivia are becoming leaders among cocaine producing countries[96]. Ninety percent of all the cocaine that is imported into the United States passes through Mexico, one-third of all the marijuana in the United States comes from Mexico[97]. Amphetamine-type stimulants are also produced and sold intraregionally across the world. Synthetic drugs are gaining in strength and since it is relatively easy to produce these substances this will increase the prevalence of narcotics in all states; we have seen evidence of this trend in Holland, China and Russia where numbers of users have increased significantly[98]. Precursor control is the only effective way of controlling amphetamine-type stimulants supply because there is no botanical raw material to target, and no geographical distance between areas of production and of consumption[99].

Patterns of drug consumption are constantly changing. According to the UNODC[100], the largest consumer region is North America (44% of total retail

94 Dupont 1999, p.438.

95 See Nadelmann, 1987, p.186.; See Kenney Michael, ''The Architecture of Drug Trafficking: Network Forms of Organisation in the Colombian Cocaine Trade'', Global Crime,Vol.8, Number 3, 2007, pp.233-259.; Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment, United Nations Office on Drugs and Crime, 2012, p.31.

96 Cocaine comprises at least two distinct drug products: powder cocaine on the one hand, and a range of cocaine base products, mostly falling under the heading of 'crack', on the other. The coca plant is indigenous to Peru and the Plurinational State of Bolivia, and these two countries produced most of the world's coca leaf. Colombia emerged as the world's largest producer of cocaine as of the late 1970s. See The Globalization of Crime, 2010, p.81.

97 See Jenner, 2011, p.905.; Nadelmann, 1987, p.181.

98 See Swanstrom, 2007, p.23.

99 While poppy cultivation and production are fairly easy to measure, the production of amphetamine-type stimulants is made in hidden laboratories. Getting an accurate idea of the number of laboratories and their capacity is close to impossible. See Emmers Ralf, ''International Regime-Building in ASEAN: Cooperation against the Illicit Trafficking andAbuse of Drugs'', Contemporary Southeast Asia, Vol. 29, No. 3, December 2007, p.510.

100 See UNODC World Drug Reports, 2010, 2012.

sales), followed by Europe (33%), although no region is spared. For example, the United States consumes about twenty-five times more cocaine than Colombia, even though Colombia produces about fifty percent of the world's cocaine[101]. Heroin consumption dramatically increased in Central Asia and East Africa in the 2000s, while, during the same time, cocaine usage increased in West Africa and South America and synthetic drug consumption increased in the Middle East and South Asia. In recent years, cocaine use has declined in North America and grown in Europe, whereas heroin use has stabilized or fallen in Europe but has increased in some transit countries.

The global value of the illicit drug trade is extremely difficult to calculate, and as a result estimates have varied dramatically[102]. The OECD estimates that the criminal drug industry costs its member states over $120 billion per year, with the USA alone accounting for $76 billion[103]. According to United Nations Office on Drugs and Crime (UNODC)[104], the global drug market is consistently estimated to be worth more than $300 billion[105] annually and drug trafficking is now the world's primary revenue source for organized crime[106]. The largest drug sales are related to cannabis, followed by cocaine and opiates. According to some figures, the retail value of the global cocaine market is $88 billion, and the retail value of the global opiate market is $65 billion, the retail value of the cannabis market is $141.9 billion, amphetamine-type stimulants market is around $44 billion[107]. At present, illegal drugs comprise an estimated near ten percent of world trade and exceed car production[108] as a proportion of the global economy[109]. Some estimated that the turnover of the global criminal

101 See Jenner, 2011, p.905.
102 See Haken, 2011, p.3.
103 See Galeotti, 2004, p.2.
104 See UNODC World Drugs Report 2005-2006.
105 See Kleiman, 2004, p.2.
106 See Robelo Daniel, ''Demand Reduction or Redirection? Channeling Illicit Drug Demand towards a Regulated Supply to Diminish Violence in Latin America'', Oregon Law Review, Vol. 91, 2013, pp.1227-1251.
107 See UNODC World Drug Reports, 2005-2010.
108 See Thomas, 2003, p.553.
109 See Michels Johan David, ''Keeping Dealers off the Docket: the Perils of Prosecuting Serious Drug-Related Offences at the International Criminal Court'', Source Florida Journal of International Law, Vol. 21, 2009, p.449.

economy is roughly estimated at one trillion dollars, of which narcotics may account for about half, illegal drugs are one of the world's largest traded sectors, with the global market estimated at $400-$500 billion a year[110].

## 4. INTERNATIONAL MEASURES TO CONTROL DRUG TRAFFICKING

The ultimate goal of the international drug control system is to limit the production, manufacture, export, import, distribution of, trade in, use and possession of the controlled drugs to exclusively medical and scientific purposes. Today, there is a higher level of international consensus in this field than ever before[111]. One hundred and eighty three countries, or 95 per cent of all United Nations Member States, are parties to the three international drug control conventions[112].

The roots of the international drug control system lie in the international reaction to the Chinese opium problem of the nineteenth and early twentieth century. This development followed three approaches: first, by confining the international drug trade to very small amounts only for medical and scientific purposes; second, by confining the manufacturing and then the agricultural production of drugs to the same purposes; third, by confining the consumption of drugs to the same purpose[113].

Drug control efforts have focused on both supply and demand reduction[114]. In the twentieth century, a sophisticated treaty regime was developed

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110 See Jenner, 2011, p.905.; Mueller, 2001, p.15.; McConville Molly, ''Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court'', American Criminal Law Review, Vol. 37, Issue 1, Winter 2000, p.77.; Thomas, 2003, p.553.; Galeotti, 2004, p.2.; Surrett William Roy, The International Narcotics Trade, An Overview of its Dimensions, Production Sources and Organizations, Congressional Research Service Report for Congress, 3 October 1988, p.1.; Dziedzic, 1989, p.533.

111 The efficiency of this international drug control system depends to a large extent, if not entirely, on three main pillars: the proper implementation of the provisions of the treaties at the national level; the collaboration of the Parties to these treaties in their implementation; and their cooperation with the international control organs.See Noll Alfons, ''International Treaties and the Control of Drug Use and Abuse'', Britsh Journal of Addiction, Vol.79, 1984, p.18.

112 A Century of International Drug Control, 2009, p.98.

113 See Boister, 1998, p.76.

114 It should be clear that a large number of factors may affect drug-using behaviours, including

by both the supply and the use of drugs for medical and scientific purposes and to suppress the non medicinal supply and the use of drugs[115]. Supply reduction policies aim to lower drug use by making drugs more expensive and difficult to obtain, and include limiting the availability of illegal drugs by eradicating crops, disrupting smuggling routes, and interdicting or seizing drugs at the border. Demand reduction policies include lowering drug use by changing the behavior of current or potential users, and focusing on reducing drug use through education about the negative consequences of drug use[116]. The criminalization and punishment of illicit drug production, supply and use, is considered crucial to these goals[117].

**a. Development of International Control System**

For nearly a century, illicit drugs have been trafficked from 'producer' to 'consumer countries', usually involving a number of criminal groups from countries along the trafficking chain[118]. International efforts to control drug trafficking were ongoing throughout the 20th century, and several international conventions sought to curtail illegal drug traffic through treaties and agreements in the first half of the twentieth century[119]. At the beginning of the twentieth century, millions of Chinese were addicted to opium, which was freely traded across borders at the time. China's attempts to unilaterally address the problem failed and it was not until the first international agree-

traditions, fashion, youth culture, technological progress (and thus drug availability), financial resources, mobility, ethnic links, stress factors (war, work, leisure time, etc.). All of these factors can strengthen or offset progress made in terms of drug control efforts by authorities at the local, national and international levels. See A Century of International Drug Control, 2009, p.133.

115 See Boister, 2012, p.50.

116 Supply interdiction attempts to stop the arrival of drugs at the market place, demand reduction targets the user or purchaser of drugs because it identifies them as the cause of the drug problem.See Boister, 1998, p.17.

117 See Boister, 2012, p.50.

118 One of the most typical forms of transnational crime is the illegal movement of drugs across one or more national frontiers. See Chawla Sandeep & Pietschmann Thomas, ''Drug Trafficking as a Transnational Crime'', Handbook of Transnational Crime and Justice, Ed. Philip Reichel, Sage Publications, 2005, pp.160-180.

119 See Fazey Cindy, ''International Policy on Illicit Drug Trafficking: The Formal and Informal Mechanism'', Journal of Drug Issues, Vol.37, Issue 4, 2007, p.758.

ments were reached that a solution became possible[120]. Pressure to prohibit all drug use except for approved purposes grew and finally bore fruit during the early twentieth century when the foundations of the international drug control system were laid[121].

The origins of drug prohibition lie in the international rejection of the Indo-Chinese opium trade. The trade flourished when European colonial powers and in particular Britain encouraged opium production in India for supply to China[122]. The formal development of a system of international law to control drugs began with the 1909 Shanghai Opium Commission. In 1909, the US president Theodore Roosevelt called together 13 countries to establish the International Opium Commission, which subsequently produced a range of resolutions which recommended the gradual suppression of opium smoking. Many had economic interests in the existing opium trade, including the UK, which traded Indian cultivated opium in China. Germany, Switzerland and the Netherlands were also reluctant because they were developing pharmaceutical industries and so had an interest in the continuation of opium production. Participants resolved to suppress opium smoking, limit its use to medical purposes, control its export and extend drug control to its harmful derivatives[123]. At the Shanghai conference it was agreed to limit opium use to medical purposes and to control its export and its harmful derivatives. The greatest accomplishment of the Shanghai Conference was that it created a global conscience and consensus on the issue of opium trafficking[124].

Signed in January 1912, the Hague Opium Convention restricted the trade in raw and prepared opium and provided for less extensive restrictions on manufactured drugs such as heroin and cocaine. The 1912 Convention invigorated drug control efforts in several countries. In the United States in 1913 it

120 See A Century of International Drug Control, 2009, p.1.
121 See Boister, 1998, p.30.
122 See Boister, 2012, p.51.
123 See Boister, 1998, p.31.
124 See Kiefer Heather L., Just Say No: The Case against Expanding the International Criminal Court's Jurisdiction to Include Drug Trafficking, Loyola of Los Angeles International and Comparative Law Review, Vol.31, Issue 2, 2009, p.158.

prompted the Congress to pass the Harrison Act[125], which is generally viewed as the foundation of twentieth-century United States drug policy[126].

The Agreement concerning the Suppression of the Manufacture of, Internal Trade in, and Use of Prepared Opium, was signed on 11 February 1925 and entered into force on 28 July 1926. It focused on opium-producing nations and stated that the signatory nations were "fully determined to bring about the gradual and effective suppression of the manufacture of, internal trade in and use of prepared opium." This Convention detailed the content of the Hague Convention, institutionalized the international control system and extended the scope of control to cannabis[127]. With respect to the control of legal drugs, the 1925 Convention enhanced the provisions in the 1912 Convention for domestic control of opium and applied the principle that drugs should only be manufactured for "medical and scientific" purposes[128].

Massive diversion of morphine in the mid-1920s evidenced a breakdown in the control system. The illicit drug traffic was being supplied by the pharmaceutical industry. The League called for a conference on the limitation of production in 1931. The conference adopted the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed at Geneva on 13 July 1931. The 1931 Convention elaborated the definition of controlled substances and allowed League experts to enlarge and modify the list of these substances. The 1931 Convention introduced a system of compulsory estimates aimed at limiting the global manufacture of drugs to the amounts needed for medical and scientific purposes and established a Drug Supervisory Body to monitor the operations of the system[129]. This treaty-based system was refined by the 1925 Geneva Convention and extended substantially through the 1931 Limitation Convention[130].

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125 See Boister, 2012, p.51.; Musto, David F., The American Disease, Origins of Narcotic Control, Yale University, 1973.
126 See A Century of International Drug Control, 2009, p.66.
127 See A Century of International Drug Control, 2009, p.70-71.
128 See Boister, 1998, p.34.
129 See A Century of International Drug Control, 2009, p.75.
130 See Boister, 1998, p.35.

Concerned over the expansion of drug markets, the League of Nations convened a conference in 1936, the main outcome of which was the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs[131]. This Convention was the first significant attempt to harmonize drug offences and provide for procedural cooperation against traffickers[132]. The 1936 Convention contained the first to call to penalize drug-related activities and to define related offences so that national penal systems could be harmonized to ease international cooperation. Also for the first time, the Convention dealt explicitly with drug-related crime committed abroad and extradition[133]. The convention contained specific provisions relating to law enforcement action and cooperation, and was designed to provide the necessary support in the area of criminal law for the licit drug control system, but did not enter into force, and then World War II began[134].

Thus, the agreements in the first half of the twentieth century gradually strengthened the medical controls in the trade of narcotics. Some argue that these early agreements sought neither to expand nor to eliminate narcotics production and trade, but rather to control it in accordance with "medical and scientific" concerns[135]. From 1946 onwards, the United Nations assumed the drug control functions and responsibilities formerly carried out by the League of Nations. The Lake Success Protocol of 1946 enabled the Conventions supervised by the League to be brought into the UN framework[136].

The first development of substantive international drug control law after the United Nation's assumption of authority was the 1948 Paris Protocol's extension of existing controls to new mainly synthetic drugs outside the scope of the 1931 Convention[137]. The 1948 Paris Protocol required Member States

131 See A Century of International Drug Control, 2009, p.77.
132 See Boister, 2012, p.52.
133 See Boister, 1998, p.43.; A Century of International Drug Control, 2009, p.78.
134 The 1936 Convention was designed to provide the necessary criminal law support for the system controlling licit trade, unfortunately, however it received little general support. See A Century of International Drug Control, 2009, p.77.; Boister, 1998, p.43.
135 Thomas, 2003, p.560.
136 See Boister, 1998, p.49.
137 See Boister, 1998, p.50.

to report information about any "medical and scientific" drugs not listed in the 1931 Convention that could have harmful effects or could be subject to abuse[138]. The Protocol also provided for the application of the 1931 Convention's controls to any drug deemed harmful by the World Health Organization[139]. After World War II, the United Nations assumed supervision of the international drug control system. The UN placed the system under Economic and Social Council (ECOSOC) control and created the Commission for Narcotic Drugs (CND) to replace the League's Advisory Committee as the central drug control organ.

The focus of reformers was still on the limitation of the production of opium. A draft protocol embodying a stock limits and estimates system was put to a conference in 1953 which concluded the Protocol signed at New York on June 23, 1953 for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of, Opium. The Protocol's strengths were that it established the principle of limitation of opium production, and it provided the Board with comprehensive enforcement powers[140]. The 1953 New York Protocol restricted the right to export opium to seven traditional opium producing countries[141] around the world.

**b. 1961 Single Convention on Narcotic Drugs**

By the mid-1950s the volume of the illicit traffic was growing and drug supply and consumption patterns were evolving rapidly. By 1961, there were nine international legal agreements on narcotic drugs, and their overlapping provisions were complex, and this was compounded by the fact that several countries had not signed and ratified all the treaties[142]. Finally, on the 30 March

138 The 1948 Synthetic Narcotics Protocol came into force on 1 December 1949. The application of the 1948 Protocol meant that 14 new substances were placed under İnternational control by 1951 and a further 6 by 1954. See A Century of International Drug Control, 2009, p.82.

139 See Thomas, 2003, p.560.

140 See Boister, 1998, p.51.

141 According to its article 6, only seven countries, Bulgaria, Greece, India, Iran, Turkey, the Union of Soviet Socialist Republics and Yugoslavia were authorized to produce opium for export. See A Century of International Drug Control, 2009, p.82.

142 A Century of International Drug Control, 2009, p.84.

1961, the Single Convention on Narcotic Drugs was adopted[143]. The Convention provides that Parties are required to limit the production of all drugs, including opium, exclusively to medical and scientific purposes. It provides for government control of opium cultivation, indirectly limits the number of opium producing states, and limits opium exports to authorized states[144].

The 1961 Convention is perhaps the most important of the drug treaties because it introduced a system classifying certain substances according to potential abuse and medical benefit[145]. This Convention includes the requirement that State parties should control and license individuals and commercial entities involved in the trade or distribution of licit drugs. It also unified in one document provisions that had previously been contained in a number of documents, including the 1936 Convention which had not come into force, it codified existing provisions into a coherent text, simplified the existing drug control machinery.

The objective of the 1961 Convention was to simplify the control machinery in order to increase the efficiency of international drug control efforts, and this led to the establishment of the International Narcotics Control Board[146]. The 1961Convention provides the INCB with a number of ways of forcing the Parties to comply with the provisions of the Convention, including requests for information and explanations, public declarations that a Party has violated its obligations and two embargo procedures, one recommendatory, the other mandatory[147]. Another objective of the Convention was the extension of the existing controls to include the cultivation of the plants grown as raw material for the production of natural narcotic drugs[148], as well as the prevention of

143 The Single Convention, adopted by the United Nations Conference in New York in March 1961, became effective on 13 December 1964. See Noll, 1984, p.18.

144 See Boister, 1998, p.53.

145 Aoyagi Melissa T., ''Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy'', Journal of International Law and Politics, Volume 37, Number 3, March 2006, p.577.

146 See A Century of International Drug Control, 2009, p.85.

147 See Boister, 1998, p.54.

148 The 1961 treaty continued to keep a tight rein on the production of opium and extended international controls to the production of poppy straw, coca leaf and cannabis. See A Century of International Drug Control, 2009, p.86.

non-medical drug consumption[149].

The 1961Convention consists of 51 articles, covering definitions of the substances under control, the framework for the operations of the international drug control bodies, reporting obligations for Member States, controls on production, manufacture, trade and consumption, and penal provisions. The key provision of the Convention is to be found in article 4: "The Parties shall take such legislative and administrative measures … (c) … to limit exclusively to medical and scientific purposes the production, manufacture, export, import distribution of, trade in, use and possession of drugs"[150].

This Convention provides a comprehensive control system covering all stages and activities from the cultivation of the raw material to the production, manufacture, export, import, distribution of, trade in, use and possession of narcotic drugs. Following its predecessor treaties, it is based on the general principle that all Parties to it shall take such legislative and administrative measures as may be necessary to give effect to and carry out its provisions within their own territories; to cooperate with other States in the execution of those provisions, and to limit the above-mentioned activities exclusively to medical and scientific purposes. It also anchored the drug control regime in a supply-reduction orientation more strongly than previous agreements by focusing on the drug producing countries. Furthermore, it strengthened the prohibitionist nature of the regime by completely proscribing the use of a range of psychoactive substances for non-medical purposes, including the plants that are the raw material for the production of narcotic drugs[151].

Drug use increased dramatically with the social and cultural changes of the 1960s, first in North America and then in Europe[152]. Further developments of the initiatives set out in the 1961 Convention were brought about through the measures of the 1972 Protocol. The Protocol consists of 22 amendments

149 A Century of International Drug Control, 2009, p.85.

150 See A Century of International Drug Control, 2009, p.84.; Chawla & Pietschmann, 2005, p176.

151 See Boister, 2012, p.52; Çevik Kürşat, Internationalisation of Turkish Law Enforcement: A Atudy of Anti-Drug Trafficking, PhD Thesis, University of Nottingham, 2013, p.70.

152 See Boister, 1998, p.57.

to the 1961 Convention. Its provisions strengthen the control measures originally provided for in the 1961 Convention and stipulate a number of additional measures to improve the international control of narcotic drugs[153]. Article 12 of the Protocol strengthens measures concerning the illicit cultivation of opium and cannabis under the 1961 Convention, in that parties are not only obliged to take measures prohibiting illicit cultivation, but also to seize and destroy plants used for illicit production.

Some[154] argue that the second half of the twentieth century saw the U.N. narcotics regime shift from an administrative model toward an increasingly prohibitionist one: the 1961 Convention on Narcotic Drugs marketing the beginning of this shift.

**c. 1971 Convention on Psychotropic Substances**

During the 1960s, stimulants such as amphetamines, hallucinogens such as LSD and depressant drugs such as barbiturates and tranquillizers became more widely available. In the mid-1960s, most countries imposed only minimal limitations on the distribution of amphetamines, barbiturates, tranquilizers and other synthetic, non-plant based drugs. The misuse of psychotropic substances became a truly global phenomenon, and the problems gained in intensity, restrictions were introduced in several of the developed countries. These drugs were not controlled by the 1961 Convention. In 1967 the International Narcotics Control Board (CND), the United Nations Legal Office and the World Health Organization (WHO) expressed the view that in order to control these psychotropic substances a new treaty would have to be negotiated[155]. In 1969, the CND adopted a draft convention, and a plenary conference held in 1971 in Vienna adopted the Convention on Psychotropic Substances, signed at Vienna, 21 February[156].

The 1971 Convention, also known as the 1971 Vienna Convention, consists of 33 articles, and adopts a range of preventative and prohibitive provisions,

153 This protocol entered into force on 8 August 1975. See Noll, 1984, p.18.
154 See Thomas, 2003, p.560.
155 See A Century of International Drug Control, 2009, p.90.
156 See Noll, 1984, p.19.; Boister, 1998, p.56.

and includes measures under which the parties will adopt strict measures for the control of the trade, manufacture and production of the listed psychotropic substances. Its control system was based on the 1961 Convention, though it also contained some innovations. The 1971 Convention placed a number of amphetamine-type stimulants, hallucinogens (such as LSD), sedative hypnotics and anxiolytics (benzodiazepines and barbiturates), analgesics and antidepressants under international control[157]. The manufacture, export and import of psychotropic substances is controlled through reliance on prohibition, strict supervision and licensing, and the international trade in psychotropic substances is controlled by the import-export authorization scheme[158].

According to article 8, a general system of licensing should be introduced for the manufacture, the domestic and international trade and the distribution of psychotropic substances[159]. Parties are also obliged to provide information to the INCB on their control systems including an annual report regarding the implementation of the convention, changes in their domestic law and reports on important cases of illicit trafficking and seizures[160]. The advertising of such substances to the general public was to be prohibited. Article 21 foresees a number of measures to fight the illicit traffic in these substances, including mutual assistance in the area of law enforcement and in the area of judicial cooperation.

The Convention established four different schedules for controlled psychotropic substances, based on two criteria: the potential therapeutic value of a substance and the potential risks related to its consumption[161].

The 1971 Convention provides for measures relating to the abuse of

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157 A significant number of other substances, forming part of these groups, were added in subsequent decades. See A Century of International Drug Control, 2009, p.91.; Aoyagi, 2006, p.578.

158 Boister, 1998, p.56.

159 See A Century of International Drug Control, 2009, p.91.

160 Boister, 1998, p.56.

161 Schedule I lists those substances that are prohibited, except for scientific and very limited medicinal purposes. Schedule II substances may have a strong abuse potential or be widely abused, but they also have properties suitable for generally recognized therapeutic use. Control of schedule III and schedule IV substances is less strict. See A Century of International Drug Control, 2009, pp.90-91.; Kiefer, 2009, p.161.

psychotropic substances including provision for rehabilitation and social re-integration (article 20), for cooperation against the illicit traffic (article 21) and for criminal sanctions in national law (article 22). It also took a more remedial line, emphasizing that non-legal means such as education, treatment and rehabilitation could also be important factors in the illicit control of drugs[162].

**d. 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances**

Despite efforts made over the previous decades, sharp increases in drug abuse occurred in many countries towards the end of the 1970s. Levels of drug production, trafficking and abuse remained high into the 1980s[163]. Illicit opium production in Burma continued at high levels, and Afghanistan emerged as an important illicit opium-producing country. Illegal coca-leaf production and resulting cocaine manufacture in the Andean region set a new record each year[164]. Cannabis production and consumption remained high, though some significant eradication had taken place in several countries of Latin America. In addition, the clandestine manufacture of psychotropic substances, notably the amphetamine-type stimulants, was increasing in North America, Europe and South-East Asia. The global influence of organized crime groups also increased throughout the 1980s[165].

In the 1980s, with the growth in the global consciousness of the dangers of the illicit traffic, the Commission on Narcotic Drugs studied the possibilities of launching a comprehensive strategy to reduce international drug abuse; this resulted, in 1981, in the formulation of the International Drug Abuse Control Strategy[166]. The status of the implementation of the Strategy was reviewed each year through reports of the Economic and Social Council[167]. The UN Gen-

162 See Boister, 1998, p.56.

163 By the early 1980s, the United States was pushing for further development of the international drug control system. The impact of growing drug use globally induced both developed and developing states to accept the American view. See Boister, 1998, p.61.

164 See A Century of International Drug Control, 2009, p.95.

165 See A Century of International Drug Control, 2009, pp.96-97.

166 A Century of International Drug Control, 2009, p.94.

167 See A Century of International Drug Control, 2009, p.94.

eral Assembly began a process of consultation in 1984[168] which resulted in the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[169]. The treaty was intended to supplement and to reinforce several earlier UN measures contained in the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, and the 1971 Convention on Psychotropic Substances[170].

The 1988 Convention, consisting of 34 articles, entered into force on 11 November 1990, and has proved to be a powerful and comprehensive instrument in the international fight against drug trafficking. The Convention complements the earlier drug conventions, which are largely concerned with building a global legal structure for the control of the licit production of drugs, because it is dedicated almost entirely to measures for the suppression of the illicit traffic. Some[171] argue that the 1988 Convention reflects the strongest punitive measures. Whereas the 1961 and 1971 Conventions consider drugs from a health perspective, the 1988 Convention deals explicitly with the drug market and distribution[172].

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168 The Assembly declared that the ''illegal production of, illicit demand for, abuse of and illicit trafficking in drugs impede economic and social progress, constitute a grave threat to the security and development of many countries and people and should be combated by all moral, legal and institutional means, at the national, regional and international levels''. See A Century of International Drug Control, 2009, p.95.

169 While preparation of the draft convention was going on, the UN Secretary General convened a ministerial conference in June 1987, the International Conference on Drug Abuse and Drug Trafficking. 161 Delegates from 138 states to the 1987 Conference approved a wide range of voluntary measures. The measures focus on four main areas: prevention and reduction of demand for drugs; control of supply; suppression of trafficking; and treatment and rehabilitation of addicts. See Boister, 1998, p.63-64.

170 See Gurule Jimmy, ''The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?'', Fordham International Law Journal, Vol. 22, Issue 1, 1998, p.79.

171 See Boister, 2012, p.56.; Aoyagi, 2006, p.579.; ''The 1961 Convention's "drug abuser" exception narrowed in 1988 to production only "for personal consumption," or otherwise to "cases of a minor nature. " Moreover, the 1988 Convention multiplied the number of offenses deemed criminal: Now not only were production, trade and conspiracy criminal, but knowing acquisition, possession, use, conversion or transfer of property derived the reform. By expanding the scope of the criminal and reducing the reach of the rehabilitative, the 1988 Convention shifted away from the administrative and toward the prohibitive mode.'' See Thomas, 2003, p.561.

172 See Jenner, 2011, p.917.

The preamble to the Convention has three separate strands, representing to an extent the different concerns of different states[173]. The first substantive provisions of the Convention are the definitions section which provides specific definitions of terms used in the substantive articles of the Convention or confirms definitions used in the earlier conventions[174].

The Convention requires the parties to take legal measures to prohibit, criminalize, and punish all forms of illicit drug production, trafficking, and drug money laundering, to control chemicals that can be used to process illicit drugs, and to cooperate in international efforts of these goals[175]. It also creates a framework for international cooperation to bring those persons who profit from drug trafficking to justice[176]. Each measure has been proven useful in dismantling drug trafficking groups, which are increasingly transnational in nature[177]. In practice, although sentencing differs widely, parties generally punish trafficking offences relatively heavily. Taking factors like the volume of the substances involved and the harmful potential of the particular class of drugs into account, supply is usually punished by periods of imprisonment or fines, or a combination of the two[178]. Some states apply tougher penalties to supply offences[179].

The 1988 Convention's most significant substantive feature is article 2, entitled Scope of the Convention, which asserts state sovereignty in the face of international obligation. According to article 2, paragraph 1, the purpose[180] of this Convention is ''to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic

173 Kiefer, 2009, p.161.
174 See Boister, 1998, p.65-66.
175 See Sproule & St-Denis 1989, pp.263-293:; Zagaris Bruce, ''U.S. International Cooperation Against Transnational Organized Crime'' Wayne Law Review, Vol.44, 1998, p.1409.
176 See Gurule, 1998, p.80.
177 See Chawla & Pietschmann, 2005, p177.
178 See Boister, 2012, p.57.
179 Drug supply offences are still sanctioned with the death penalty in 33 countries. Although there is no provision for the death penalty in the Convention of 1988, the Convention does not explicitly rule out its use. Human rights bodies have criticized executions for drug offences as a violations of international law. See Boister, 2012, p.57.
180 See Gurule, 1998, p.81.

drugs and psychotropic substances having an international dimension.". The Convention comprehensively addresses most aspects of the illicit drug industry in article 3. In article 3, paragraph 1 "The production, manufacture, extraction, preparation, offering … distribution, sale, ... delivery …, brokerage, dispatch, … importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of ... the 1961 Convention as amended [by the 1972 Protocol] or the 1971 Convention.".

The cultivation of the opium poppy, coca bush or cannabis plant for the purpose of producing of narcotic drugs contrary to the provision of the 1961 Convention are added to this list in article 3, paragraph 1. This list is basically the same as that found in the 1961 and 1971 conventions. However, the 1961 Convention obliged parties only to make such activities punishable offences, the 1988 Convention goes an important step further and compels parties to make them criminal offences[181].

Article 3, paragraph 2, stipulates that, "the possession, purchase or cultivation of ... drugs … for personal consumption" has to be established as a criminal offence. Some argue that this goes beyond the requirements of the previous conventions[182].

The Convention recognizes that, whilst drug trafficking is an international criminal activity, State parties should develop procedures in domestic law to identify, arrest, prosecute and convict those who traffic drugs across national boundaries. These measures include establishing drug-related offences and sanctions under domestic criminal law, providing for extradition in respect of those offences, providing for mutual legal assistance and co-operation on investigating and prosecuting those offences and establishing measures to seize and confiscate the proceeds from illicit drug trafficking. The Convention requires each party to enact far-reaching domestic laws providing for the "confiscation" defined as freezing, seizing, and forfeiting, of drug proceeds or instrumentalities used, intended to be used, or derived from

[181] See A Century of International Drug Control, 2009, p.99.

[182] See See Boister, 2012, p.59; Aoyagi, 2006, p.579.; A Century of International Drug Control, 2009, p.100.

proscribed drug trafficking activities[183].

A particularly innovative feature of the Convention is the introduction of controls set down on precursor chemicals[184] and equipment used to manufacture synthetic drugs[185]. Although trade in precursor chemicals for the manufacture of illicit drugs was established as a punishable offence under the 1961 Convention if considered a "preparatory act" under article 36, very few countries had implemented precursor legislation prior to the 1988 Convention. The 1988 Convention expanded the scope of the international treaties by adding to the drug schedules 'precursor chemicals' used for manufacture of illicit drugs to the list of controlled substances, and emphasized the importance of precursor control at the international level[186]. In article 12, the Convention went several steps further, establishing an international precursor control regime to be monitored by the International Narcotics Control Board.

The 1988 Convention developed additional mechanisms to increase efficacy in criminal enforcement, multiplied the bases for confiscation of narcotics materials and instruments, and allowed for and encouraged eradication of illicit crops[187]. Today the 1988 Convention is almost universally adhered to

183 See Gurule, 1998, p.80.

184 Parties are obligated to implement measures to monitor, label, and furnish information to other parties on chemicals that might be diverted for use in the illicit manufacture of narcotic drugs or psychotropic substances. See Sproule & St-Denis 1989, p288.

185 The production of heroin and cocaine relies on essential chemicals, which are used in the processing and refining of the drug. The production of synthetic drugs relies on precursor chemicals that become part of the resulting product. See Bantekas & Nash, 2007, p.244. Precursors are those chemicals which are necessary for the processing of raw materials into illicit drugs (such as acetic anhydride and hydrochloric acid for heroin processing) or those chemicals which form the basis for the laboratory creation of illicit drugs (such as pseudepedrine and ephedrine for amphetamine, methamphetamine, and ecstasy). See Fazey, 2007, p.771.

186 See Aoyagi, 2006, p.579.

187 One of the main characteristics of the 1988 Convention was the emphasis it placed on the prevention of money-laundering. Another money-related issue is the confiscation of proceeds derived from drug-related offences. Thus, the 1988 Convention is clearly designed to hit drug traffickers where it hurts them most, by depriving them of ill-gotten financial gains. While special provisions in the 1961 and the 1971 conventions dealt with extradition, their scope was widened to take into account the increase in criminal offences in the 1988 Convention. See A Century of International Drug Control, 2009, p.101-102.; See Gurule, 1998, p.81.

and has formed the basis for their anti money-laundering legislation for many countries[188].

The 1988 Convention covers "controlled delivery" [189], in article 11, in fact, the first endorsement of the practice of controlled delivery by an international convention[190]; previous conventions had emphasized only the seizure of drugs. It also provides for innovative law enforcement techniques such as interdiction of foreign flag vessels on the high seas. Due to the problems of establishing an effective framework of jurisdiction over drug trafficking at sea in international waters, article 17 of the Convention introduced a scheme whereby a party to the Convention may request the Flag State of Vessels permission to board, search and take appropriate measures against vessels suspected of trafficking drugs[191].

**e. Developments after 1988 Convention**

By the late 1990s, although some of the large drug networks had been neutralized, drug trafficking continued at a high level. The downward trend in drug abuse seen in the second half of the 1980s did not continue in the United States after 1992, and Europe also experienced major increases in drug abuse[192]. The changes following the end of communism in Central and Eastern Europe, such as the opening of trade, media and travel, also included increased drug consumption, especially among the youth. Drug abuse also emerged as a serious social problem in the end of communism in Eastern Eu-

188 United Nations Research Report, 2011, p.122.; Efforts to stop money laundering were part of the 1988 Convention, but both Financial Action Task Force (FATF) and the Security Council in 2001 and the General Assembly in 2006 have linked money laundering to terrorism, thus giving an added urgency, funding, and priority to anti-money laundering activities. See Fazey, 2007, p.772.

189 Controlled delivery defined as "the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances [and] substances in Table I and Table II … to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of the competent authorities" (art. 1 (g)), "with a view to identifying the persons involved" in drug trafficking offences and "taking legal action against them" (art. 11, para. 1). See A Century of International Drug Control, 2009, p.103.; Boister, 1998, p.67.

190 See Fazey, 2007, p.760.

191 See Bantekas & Nash, 2007, p.245.; Boister, 1998, p.67.

192 A Century of International Drug Control, 2009, p.105.

rope, and many developing countries, particularly in countries along the main transit routes[193]. Abuse of amphetamine-type stimulants was a serious problem in many countries of East and South-East Asia. Countries in Latin America started to become increasingly affected by cocaine abuse. Countries in Africa experienced ever-greater cannabis production and consumption, as well as diversions of licit psychotropics into parallel markets[194].

In 1993 The International Narcotics Control Board acknowledged that harm reduction had a role to play in a tertiary prevention strategy; however, the Board pointed out that such harm reduction programmes should not be carried out at the expense of, or be considered substitutes for, activities designed to reduce the demand for illicit drugs, and that they should not promote and/or facilitate drug abuse[195]. This response came in the form of the declarations and action plans agreed by Member States at a special session of the United Nations General Assembly in June 1998. The General Assembly unanimously adopted a Political Declaration and linked to it the Guiding Principles on Demand Reduction, as well as a number of measures to enhance international cooperation to counter the world drug problem[196]. In 1997, the UN reorganized and reestablished the Office for Drug Control and Crime Prevention (ODCCP) to better address drug trafficking and related crimes[197].

The Declaration on the Guiding Principles of Drug Demand Reduction adopted in 1998 by the General Assembly[198].This Declaration provides States with detailed principles on how to design their national strategies for demand reduction. The Action Plan on International Cooperation on the Eradication

193 A Century of International Drug Control, 2009, p.105.

194 See A Century of International Drug Control, 2009, p.105.

195 See A Century of International Drug Control, 2009, p.110.

196 In operative paragraph 1 of the Political Declaration, Member States reaffirm the "unwavering determination and commitment to overcoming the world drug problem through domestic and international strategies to reduce both the illicit supply of and the demand for drugs". See A Century of International Drug Control, 2009, p.106.

197 See Kiefer, 2009, p.162.

198 Paragraph 4, states that "The most effective approach to the drug problem consists of a comprehensive, balanced and coordinated approach, by which supply control and demand reduction reinforce each other... There is now a need to intensify our efforts at demand reduction and to provide adequate resources towards that end". See A Century of International Drug Control, 2009, p.109.

of Illicit Drug Crops and on Alternative Development [199] refers to a number of principles to be taken into account in the fight against drugs: shared responsibility, integrated balanced approach, full respect for sovereignty, territorial integrity, non-intervention in internal affairs, human rights, fundamental freedoms, sustainable human development.

The Action Plan against Illicit Manufacture, Trafficking and Abuse of Amphetamine-type Stimulants and Their Precursors adopted in 1998 by the General Assembly. This Action Plan consists of five sections, the first two of which deal with demand-related issues, the third with information technology (affecting both the demand and supply sides) and the last two with supply-related issues[200]. Like the other action plans (judicial cooperation, control of precursors, money-laundering, General Assembly resolution S-20/4C, resolution S-20/4B, resolution S/20-4/D respectively), the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem was adopted by the ministers and other government representatives following a review of developments since the special session of the General Assembly in 1998[201]. The Political Declaration makes a clear link to the new instruments to fight transnational organized crime and corruption as important tools for confronting the world drug problem[202].

It should be noted that the degree to which classical drug prevention has to be given priority over harm reduction, or vice versa, is still subject to heated debates among States today. Harm reduction[203] became prominent in the

199 General Assembly Resolution S-20/4E, See A Century of International Drug Control, 2009, p.112.

200 See A Century of International Drug Control, 2009, p.115.

201 See A Century of International Drug Control, 2009, p.124.

202 In paragraph 30, member states ''Acknowledge the entry into force of the United Nations Convention against Transnational Organized Crime and the Protocols thereto and the United Nations Convention against Corruption, recognize that those conventions and other relevant international instruments constitute valuable tools for confronting the world drug problem, and urge Member States that have not yet done so to consider taking measures to ratify or accede to those instruments''. See A Century of International Drug Control, 2009, p.128.

203 See Cook Catherine, Bridge Jamie & Stimson Gerry V., ''The Diffusion of Harm Reduction in Europe and Beyond'', Harm Reduction: Evidence, Impacts and Challenges, European

mid-1980s as a response to newly discovered HIV epidemics amongst people who inject drugs in some cities. While China, Japan, the Russian Federation, the United States and several other countries are in favor of traditional demand reduction efforts (prevention) in order to reduce demand, most European countries, as well as Australia and Canada, tend to support policies that also contain elements of harm reduction.

Finally, it should be noted that the international drug control system has tried to balance its two goals for a century: ensuring the supply of drugs for licit purposes, and suppressing the supply of drugs for licit use. On the other hand, drug supply and use for non-medical purposes are still a menace to the whole world, and there is growing pressure to reform the international drug control system and conventions[204].

**f. The United Nations System of Drug Control**

In addition to drafting international treaties for the control of illegal drug trafficking, the United Nation has also created a number of agencies with specific responsibilities in relation to the control of illicit drugs. The UN system of drug control includes the Commission on Narcotic Drugs, the International Narcotics Control Board, and the Office of Drugs and Crime.

The Commission on Narcotic Drugs (CND) was established in 1946 as an organ of the Economic and Social Council. The Commission enables Member States to analyze the global drug situation, provide follow-up to the twentieth special session of the General Assembly on the world drug problem, and to take measures at the global level within its scope of action. It also monitors the implementation of the Conventions and is empowered to consider all matters pertaining to the aim of the conventions, including the scheduling of substances to be brought under international control. Although there are 53 members of the CND, most other UN countries also attend its meetings as

Monitoring Centre for Drugs and Drug Addiction, 2010.; Hunt Neil, A Review of the Evidence-Base for Harm Reduction Approaches to Drug Use, Forward Thinking on Drugs, 2003.; Marlatt, G. Alan, Larimer Mary E., Witkiewitz Katie, Harm Reduction: Pragmatic Strategies for Managing High-Risk Behaviors, The Guilford Press, 2012.

[204] See Boister, 2002, p.61.

observers, creating a large, unwieldy formal annual meeting[205].

The International Narcotics Control Board (INCB) is the independent and quasi-judicial monitoring body for the implementation of the Conventions. It was established in 1968 in accordance with the 1961 Convention[206]. It had predecessors under the former drug control treaties of the League of Nations. The Board is in charge of controlling the international trade in narcotic drugs and for taking measures to ensure the execution of the provisions of the 1961 Convention[207]. The UN Fund for Drug Abuse Control was established in 1971 and is funded by State contributions. Its primary function is to provide professional and technical assistance to governments on law enforcement and social measures for drug control[208].

The United Nations Office on Drugs and Crime (UNODC) helps countries create the domestic legal framework to investigate criminal offences related to organized crime and prosecute offenders, and adopt new frameworks for extradition, mutual legal assistance, and international law enforcement cooperation. UNODC is a global leader in the fight against illicit drugs and international crime, and is one of the world's leading sources of reliable data, analysis, and forensic science services related to illicit drugs and crime. UNODC has 21 regional and field offices covering 150 countries[209].

The International Criminal Police Organization, better known as Interpol, is the oldest structure for assisting police cooperation in Europe. It developed from a meeting in I923 and was given its present name in I956[210]. Interpol currently has 184 member countries and the European region includes 44 separate states which account for 8o per cent of all the messages which pass through the organization each year[211].

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205 See Fazey, 2007, p.761.
206 See Fazey, 2007, p.762.
207 See Noll, 1984, p.21.
208 See Bantekas & Nash, 2007, p.245.
209 See Fazey, 2007, p.762.
210 See Fazey, 2007, p.764.
211 See Le Vy, Bell Peter & Lauchs Mark, ''Elements of Best Practice in Policing Transnational Organized Crime: Critical Success Factors for International Cooperation'', International Journal of Management and Administrative Sciences, Vol. 2, No. 3, Feb. 2013, pp.24-34.

Finally, in Europe the amount of legislation embracing both transnational organized crime and international police cooperation in criminal matters is extremely significant, and considerable number of legal instruments has been produced to fight organized crime effectively. Because of the rapid development of transnational organized crime in Europe[212], and also taking its alarming feature against democracy and rule of law into consideration, the European countries decided to set up the European Police Office[213] (Europol) as a Law Enforcement Organization which is involved in co-operation between Member States in preventing and controlling various forms of transnational serious crimes. In Europe, Council of Europe contribution is through the negotiation of international agreement such as the Convention on Extradition, the Convention on Mutual Legal Assistance, the Convention on the Suppression of Terrorism; but the Council also has a role in providing a forum for inter-governmental consultations such as the Pompidou Group on Drug Abuse. The European Drugs Unit (EDU) became operational on 16 February I994. The central function of the EDU is to analyze information on drug trafficking, money laundering and those involved in these activities, and to facilitate the exchange of intelligence between EU police forces and customs. The adoption of the EU Drug Strategy in December 2004 pointed to the existence of a larger political concern about drugs across the EU countries, beyond the different approaches of the member states. The measures prescribed for establishing joint policies include the enhancement of judicial cooperation in the area of combating drug trafficking and law enforcement and the strengthening of the Europol, Eurojust and other EU structures[214].

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212 Due to the inhomogeneous cultural background, tradition and education of the European people and also taking the dramatic social movement of criminality from the East to the West of Europe into account, this process seems to be intensified in the last years more than ever. See Magherescu Delia, ''Transnational Criminality in Europe and the Danger of its Movement from East to West'', Journal for Humanities and Social Affairs, Issue 1, 2011, pp.165-194.

213 The Europol has been established on 7 February 1992 and also regulated by the Convention based on the Article K.3 of the Treaty of the EU. See Mei Leong, 2007, p.82.; See Fazey, 2007, p.765.

214 The successive EU Drugs Action Plans are based on the same set of basic principles: a balanced approach to reducing the supply and demand for drugs and the founding values of the EU, which are respect for human dignity, liberty, democracy, equality, solidarity,

## 5. UNIVERSAL JURISDICTION OF DRUG TRAFFICKING

Drug trafficking is a problem of serious concern to all nations. Despite massive efforts to combat the drug trade, countries have been unable to effectively bring major perpetrators to justice[215]. In the present system of national prosecutions, sophisticated drug traffickers can take advantage of national differences, by basing operations in countries that are unwilling or unable to prosecute them. Countries that do wish to prosecute are frequently helpless because they cannot establish personal jurisdiction over suspected traffickers located outside of their borders[216]. The global drug trade destabilizes governments, corrupts officials, funds terrorist organizations, breeds large-scale organized crime, and results in significant loss of human life[217]. Moreover, the problem of drugs has taken on new dimensions because of the link among drug trafficking, terrorism and money laundering.

There are a multitude of reasons why drug traffickers may not be prosecuted. Differences in legal systems, law enforcement, and judicial practice can be a barrier to law enforcement cooperation. Firstly, states that are crippled by drug problems are often unable or unwilling to enforce their own drug laws, especially if organized drug trafficking groups are able to bribe or terrorize the

rule of law and human rights. See Irrera Daniela, ''The EU Strategy in Tackling Organized Crime in the Framework of Multilateralism'', Perspectives on European Politics and Society, Vol. 12, No. 4, December 2011, p.413.; In the United States, a number of agencies, coordinated mainly by the State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL), run anti-drug programs and initiatives. U.S. anti-narcotics efforts center primarily on foreign crop eradication and global narcotics interdiction. The State Department and other agencies help eradicate crops by providing foreign countries with equipment and supplies. INL manages the Andean Counterdrug Initiative (ACI), the primary U.S. program supporting counternarcotics and economic development in the Andean region. The U.S. Agency for International Development (AID) also funds a variety of anti-narcotics programs. Drug Enforcement Agency (DEA) agents cooperate with law enforcement agencies in 58 countries in activities such as bilateral investigations, institution building, and training. The Department of Defense (DOD) responsibilities include heading federal efforts to detect aerial and maritime drug trafficking toward the United States. See Wagley, 2006, p.10.

215 See Geraghty Anne H., ''Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems'', Florida Journal of International Law, Volume16, 2004, pp.371-403.

216 Geraghty, 2004, p.372.

217 Geraghty, 2004, p.375.

judiciary[218]. Despite the aggressive work of nations[219], many countries simply may refuse to prosecute or extradite[220] drug traffickers. Secondly, countries that cannot prosecute but that are otherwise willing to extradite drug traffickers may refuse to do so out of concern that the requesting country will impose harsh prison sentences or the death penalty[221]. Thirdly, states may also be unable to extradite drug traffickers if there is no extradition treaty between the state where the drug trafficker is present and the prosecuting state[222]. Numerous factors illustrate that extradition and prosecution under the existing patchwork of agreements are not working well. Furthermore, the domestic law and constitutions of some states prohibit the extradition of their nationals. Traditionally, a nation could either refuse to extradite its own citizens altogether or use its discretion regarding extradition. The "double criminality" and "specialty" doctrines can also frustrate extradition and prosecution efforts. Finally, drug traffickers caught on the high seas are more like pirates; there may be no country that is able to prosecute them[223].There

218 Geraghty, 2004, p.382.

219 See McConville, 2000, p.80. ''The current "prosecute-or-extradite" system functions through national prosecutions aided by ad hoc international cooperation...Bilateral and multilateral arrangements also exist to facilitate bringing alleged offenders to justice, such as extradition treaties, Mutual Legal Assistance Treaties (MLATs) and law enforcement and prosecutorial cooperation. The United States is actively involved in negotiating MLATs, extradition treaties, and executive agreements with countries around the globe...The International Criminal Police Organization assists courts in gaining custody of offenders by issuing "red notices" requesting the arrest of a suspect...European Union (EU) nations are now coordinating their law enforcement activities through an EU-based organization...''.

220 Extradition is the legal process and is the surrender by one state, at the request of another, of a person who is accused of or has been sentenced for a crime committed within the jurisdiction of the requesting state. See Barnett Richard J., ''Extradition Treaty Improvements to Combat Drug Trafficking'', Georgia Journal of International and Comparative Law, Vol. 15, 1985, p.285-315.; Zagaris Bruce, Peratta Julia Padierna ''Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers - 150 Years and Beyond the Rio Grande's Winding Courses'', American University International Law Review, Vol.12, Issue 4, 1997, pp.519-627.; Extradition has become recognised as a major element of international cooperation in combating crime, particularly transnational crimes such as drug trafficking and terrorism. See Griffith Gavan & Harris Claire, ''Recent Developments in the Law of Extradition'', Melbourne Journal of International Law, Vol. 6, 2005, p.33 et seq.

221 Geraghty, 2004, p.382.

222 Geraghty, 2004, p.382.

223 Tate, 2008, p.271.; Geraghty, 2004, p.383.; Fritch Charles R., ''Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction Over the Illicit Narcotics

is no question that the international drug trade creates serious human and financial costs worldwide. As a result, the international community has long searched for effective means of combating the drug trade. One possible tool that has been suggested, although never widely embraced, is to allow states to prosecute drug traffickers using universal jurisdiction[224].

**a. Jurisdiction under International Law**

There are five general doctrines authorizing the exercise of jurisdiction under international law: the nationality principle, the territoriality (or territorial) principle, the protective principle, the passive personality principle, and the universality principle[225]. The nationality principle grants states jurisdiction over their own nationals, the territoriality principle gives states jurisdiction over actions committed inside of their boundaries, it also allows states to reach conduct occurring outside of their borders if that conduct has substantial effects within their territory. The protective principle grants states jurisdiction over offenses directed against the security of the state, the passive personality principle authorizes states to exercise extraterritorial jurisdiction over acts against their nationals. Finally, the universality principle gives states the power to punish certain offenses recognized by the community of nations as of universal concern[226].

Universal jurisdiction is the right of a state to 'define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern' regardless of whether the prosecuting state can establish a connection with the perpetrator, victim, or location of the offense[227]. States

Trade and the Ninth Circuit's Unnecessary Nexus Requirement'', Washington University Global Studies Law Review, Vol. 8, Issue 4, 2009, pp.701-721.

224 See Geraghty, 2004, p.372.; McConville, 2000, pp.75-102.

225 See Boggess D. Brian,''Exporting United States Drug Law: An Example of the International Legal Ramifications of the "War On Drugs"'', Brigham Young University Law, 1992, pp.165-190.; Tate James A., ''Eliminating the Nexus Obstacle to the Prosecution of International Drug Traffickers on the High Seas'', University of Cincinnati Law Review, Vol.77, 2008, p.271.; Zagaris, 1998, p.1405.

226 See Geraghty, 2004, p.383.; Bennettt Allyson, ''That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act'', The Yale Journal of International Law, Vol. 37, 2012, pp.433-461.

227 Geraghty, 2004, p.377.; Some suggested that there are two traditional theoretical

may assert universal jurisdiction in cases where the nature of the crime is so egregious that it is in the interest of the entire international community to bring perpetrators to justice[228].

Universal jurisdiction empowers any state to exercise jurisdiction to prosecute a suspect wherever he is found, regardless of the location of his crime(s), his nationality, or any other contacts with the prosecuting state[229]. Therefore, universal jurisdiction would provide a remedy to some problems because it would provide for the prosecution of traffickers by any state. Some[230] suggested that universal jurisdiction would limit immunity from prosecution, make it more difficult to intimidate the judiciary, reduce the potential for escape after sentencing and provide much needed leverage in negotiations with traffickers, and better international cooperation may also make intelligence collection more effective.

There are two ways in determining whether a particular crime is subject to universal jurisdiction. Firstly, a crime can become subject to universal jurisdiction through the development of customary international law, as evidenced by domestic legislation, international agreements, and the commentary of international law scholars[231]. Customary law consists of the rules that emerge from the experiences of states over time as they try to resolve interstates problems. Customary rules became law when there was a conviction that ex-

rationales for universal jurisdiction. The first rationale is pragmatic because it provides a basis for jurisdiction when jurisdiction is hard to find. Under this theory, universal jurisdiction responds to the danger that no state will be able to establish jurisdiction by traditional means. The second rationale for universal jurisdiction is humanitarian. If a crime is considered heinous or detrimental to the world community, then any member of the world community has a right to prosecute that crime to ensure that perpetrators do not go unpunished. See Jordan Jon B., ''Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime'', Michigan State University DCL Journal of International Law, Vol.9, Issue 1, 2000, p.31.; Bassiouni M. Cherif, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice'', Virginia Journal of International Law Association, Fall 2001, p.81.

228 Geraghty, 2004, p.385.

229 Geraghty, 2004, p.372.

230 See Windle James, ''Afghanistan, Narcotics and the International Criminal Court: From Port of Spain to Kabul, via Rome'', European Journal of Crime, Criminal Law and Criminal Justice, Vol. 20, 2012, pp.297-314.

231 Geraghty, 2004, p.380.

pected behavior is opinio juris sive necessitates, a legal rule that it is necessary to obey[232]. Customary law is composed of two elements, an objective and a subjective. The objective element is made up of the uniform and continues practice of States with regard to a specific issue, and depending on its adherents, this may take the form of a universal or a local custom. The subjective element comprises a state's conviction that its practice on a particular issue emanates from a legal obligation, which it feels bound to respect[233]. Although international legislation may have shifted from customary law to an emphasis on treaty writing, customary law remains important and is often central to some important international court cases[234].

Secondly, countries may establish universal jurisdiction over an offense by treaty. The 1969 Vienna Convention on the Law of Treaties defines a treaty as '' an international agreement concluded between states in written form and governed by international law''[235]. Such treaties contain a requirement that state parties 'extradite or prosecute' offenders. State parties are required to assert jurisdiction over the parties whether or not they have any link with the suspect or with the crime[236]. With this general framework, the most direct means of establishing universal jurisdiction over drug trafficking is to provide for universal jurisdiction by treaty. The international community has long recognized the grave consequences of drug trafficking on the world's population. Beginning with the enactment of the International Opium Convention in 1912, states began a serious effort to combat the problems associated with drug trafficking on an international level[237]. This united effort has continued with the enactment of the Single Convention on Narcotic Drugs in 1961, the Convention on Psychotropic Substances in 1971, and the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988. The three

232 Henderson Convay W., Understanding International Law, 2010, p.58.
233 Bantekas & Nash, 2007, p.3.
234 Henderson, 2010, p.59.
235 The 1986 Viennna Convention extend the same definition to agreements between International Govrnment Organizations(IGO) and states or other IGOs. See Henderson, 2010, 65.
236 See Geraghty, 2004, p.381.
237 Geraghty, 2004, p.385.

existing treaties dealing with narcotic drugs and psychotropic substances and establish an important regime for international cooperation against drug trafficking. Each of these Conventions contain language that recognizes the seriousness of the global drug problem and the need for the international community to work together to bring traffickers to justice[238].

In the case of drug trafficking, the 1988 U.N. Convention against Illicit Traffic in Narcotic Drugs, marked a significant development in the international community's fight against international drug trafficking by explicitly recognizing illicit drug trafficking as an international criminal activity, and requiring each signatory state to establish legislation outlawing the production, possession, transportation, or distribution of listed narcotic drugs and psychotropic substances. The 1988 Convention additionally required signatory states to criminalize the following drug-related activities: money laundering; the acquisition, possession, or use of property knowingly derived from drug trafficking; the possession of equipment or materials used in producing or manufacturing narcotic drugs or psychotropic substances; and the conspiracy, participation, or aiding and abetting any of the above offenses[239].

Additionally, the 1988 Convention specified the instances in which the signatory states were required to establish jurisdiction over the covered offenses and furnished the power to confiscate all forms of property used in or derived from the covered offenses. The Convention also stipulated the widest measure of mutual legal assistance in the investigations, prosecutions, and judicial proceedings with regard to the listed criminal offenses[240]. Furthermore, the 1988 Convention permitted state parties to submit otherwise irresolvable disputes to the International Court of Justice.

The 1988 Convention strengthens the existing prosecute or extradite sys-

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238 See Geraghty, 2004, p.385.

239 See Gianaris William N., ''The New World Order and the Need for an International Criminal Court'', Fordham International Law Journal, Vol. 16, Issue 1, 1992, p.98.

240 This mutual assistance embraced the following procedures: the taking of evidence or statements from persons; service of judicial documents; searches and seizures; examination of objects and sites; providing bank, financial, and business records and documents; and identifying or tracing proceedings, property, instrumentalities, or other potential evidentiary objects. See Gianaris, 1992, p.99.

tem by providing that parties may use the treaty as a legal basis for extradition, and it also amends parties' existing bilateral extradition treaties to include all the offenses in the Convention[241]. Specifically, article 4, paragraph 2(b)[242] provides that any state may establish jurisdiction over a suspect when the suspect is within the territory of that state and where that state decides not to extradite the suspect to a third state[243]. Article 4, paragraph 3 of the treaty also provides that the convention ''does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.''. Thus, if a party's domestic law establishes universal jurisdiction over drug trafficking offenses, presumably the treaty does not preclude that exercise of universal jurisdiction[244].

On the other hand, some[245] argue that the 1988 Convention is limited in major respects and thus does not grant true universal jurisdiction. Firstly, the universal jurisdiction provisions technically apply only to states that are parties to the treaty. But, some argue that if the provision is so widely recognized as to have become customary international law, states may be bound by the treaty regardless of whether or not they are parties[246]. Secondly, it is not clear whether the 1988 Convention allows for universal jurisdiction where a party does not wish to prosecute a suspect within its own territory but wishes to extradite to a third state party, who would then prosecute on the basis of universal jurisdiction[247]. Thirdly, a state may not exercise universal jurisdiction

241 See McConville, 2000, p.88.

242 See ''...b) May take such measures as maybe necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when: i) The offence is committed by one of its nationals or by a person who has his habitual residence in its territory; ii) The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article; iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph c) iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.''

243 Geraghty, 2004, p.392.

244 Geraghty, 2004, p.392.

245 See McConville, 2000, p.88.

246 See Geraghty, 2004, p.393.

247 Geraghty, 2004, p.393.

unless it has explicit authority to do so either based on a treaty or based on customary international law[248]. The 1988 Convention recognizes this premise by stating that the ''The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.''. Finally, the 1988 Convention differs in a significant respect from treaties in that it establishes universal jurisdiction over other offenses[249]. Convention provides that a state where the suspect is found may prosecute under a universal jurisdiction theory; the language of the treaty is permissive rather than mandatory[250]. In other words, the state's constitution and domestic legislation must allow the prosecution, and if the state refuses extradition for any other reason, there is no requirement to prosecute[251]. These shortcomings in the 1988 Convention leave several gaps in the ability of states to prosecute suspected drug traffickers[252].

**b. Drug Trafficking and the International Criminal Court**

Following the conclusion of the Vienna Convention in 1988, the UN General Assembly adopted a resolution requesting that the International Law Commission address the question of establishing an international criminal court which would have jurisdiction over international offences including illicit trafficking in narcotic drugs across national frontiers. Trinidad and Tobago (lead a coalition of Caribbean and Latin American states) made a request to the UN General Assembly to explore the possibility of establishing an international court with jurisdiction over drug trafficking offences in 1989[253].

The UN responded positively to this and instructed the International Law

248 Geraghty, 2004, p.393.
249 Geraghty, 2004, p.393.
250 ''While Article 32(2) of the Convention confers jurisdiction on the International Court of Justice (ICJ) to settle disputes relating to treaty interpretation and application, several parties, including the United States, have declared themselves not bound by this article. Apparently, these parties do not desire to have their conduct towards compliance, or lack thereof, scrutinized by the ICJ. As the result, the ICJ has been denied jurisdiction under the compulsory jurisdiction theory.''. See Gurule, 1998, p.121.
251 See McConville, 2000, p.89.
252 See Geraghty, 2004, p.395.
253 See Kiefer, 2009, p.163.

Commission (ILC) to direct its attentions to the creation of such a court. Initially, it was assumed that drug offences as defined by the drug conventions would fall within the ICC's subject matter jurisdiction[254]. Further discussions on the criminalization of drug trafficking in international law took place in the course of the drafting of the Draft Code of Crimes against the Peace and Security of Mankind[255]. The ILC's 1991 Draft had included crimes created by the drug conventions, and they were included in all the drafts of the code up to and including the 1995 Draft Code. Over time, considerable opposition the inclusion of drug trafficking within the ICC's jurisdiction grew to. Some members of the ILC opposed their inclusion in the Code, and they were excluded from the 1996 Draft Code. The Preparatory Committee's draft provided that drug offences essentially meant any article 3(1) of the 1988 Convention's offence ''committed on a large scale and in a transboundary context''[256]. During the Draft Code deliberations, some states expressed the view that drug trafficking should be considered a crime against humanity while others argued that it would be better categorized as a crime against the peace, and some states even argued that drug trafficking should be treated as a crime of aggression[257].

At the beginning of the Rome Conference, drug trafficking was under consideration for possible inclusion on this list. Although the Draft Statute specifically included ''crimes involving the illicit traffic in narcotic drugs and psychotropic substances'' interest in a Court with jurisdiction over narcotics trafficking waned during the concluding days of the conference[258]. Despite support from some states[259] for the inclusion of drug offences, the gener-

254 See Boister, 1998, p.560.

255 See Kiefer, 2009, p.164.

256 See Boister, 1998, p.561.

257 The majority of states agreed that, "in view of its many characteristics, international illicit traffic in narcotic drugs clearly fell within the category of crimes against humanity, since it was directed against all the peoples of the world and its physical result was the destruction of human life in all countries." See these debates, Kiefer, 2009, p.167.

258 McConville, 2000, p.93.

259 Some delegates stated that particularly serious drug trafficking offences which involved an international dimension should be included, that these offences had serious consequences for the world population and that there was no unified system for addressing these crimes because of divergences in national laws. See Boister, 1998, p.565.

al consensus was that the issue of the inclusion of treaty crimes should be postponed[260]. Drug trafficking was not included in the final Statute; however, the parties adopted a resolution recommending that State parties consider reaching agreement on a definition and on including both drug trafficking and terrorism at a future review[261].

In 2002, the International Criminal Court (ICC) [262] came into existence, marking the end of over fifty years of elaborations to create a permanent global court to prosecute particularly heinous crimes of international significance. It has the ability to bring those accused of the most serious of criminal offences to justice those who will no longer be able to escape prosecution by hiding behind national legal obstacles which prevent their trial[263]. Currently, the jurisdiction of the International Criminal Court encompasses genocide, crimes against humanity, war crimes, and crimes of aggression[264].

Some[265] argue that despite the best efforts of nations to cooperate, prosecution under the current enforcement system fails to keep pace with the traffickers. International drug trafficking is a global problem; the International Criminal Court is a solution in need of problems. The jurisdiction of the Court

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260 See Kiefer, 2009, p.165.

261 See Bantekas & Nash, 2007, p.246.; Crawford, 1994, p.146.; Boister, 1998, pp.561-562. At the 1998 Conference, Caribbean states felt that drug offences should be included within the ICC's jurisdiction when committed: (a) on a large scale ( and) (or) in a transboundary context, (b) within the framework of an organised and hierarchical structure; (c) with the use of violence and intimidation against private persons, judicial persons or other institutions, or members of the legislative, executive or judicial arms of government, (thereby) creating fear or insecurity within a state or disrupting its economic, social, political or security structures or with other consequences of a similar nature; or d) in a context in which corrupt influence is exerted over the public, the media and public institutions. See Boister, 1998, p.566.

262 In July, 17, 1998, the Rome Statute was agreed upon by 120 nations. Some four years later, on July 1, 2002, the International Criminal Court (ICC) was established and of 2010, have ratified the Rome Statue. See Natarajan Mangai & Kukaj Antigona, ''The International Criminal Court'', International Crime and Justice, Ed. Mangai Natarajan, Cambridge University Press 2011, p.357.

263 See Schloenhardt Andreas, Transnational Organised Crime and the International Criminal Court-Towards Global Criminal Justice, Australian Institute of Criminology International Conference, Melbourne Australia, November 2004, p.1, available at. http://www.aic.gov.au/conferences/2004/index.html,15.07.2014.

264 See Bantekas & Nash, 2007, pp.381-390.

265 See Gianaris, 1992, pp.108-109.; McConville, 2000, p.76.

should expand to include international drug trafficking[266], and it would provide mechanisms for resolving jurisdictional disputes between nations and for extraditing offenders to the Court rather than to another sovereign nation. Because, unlike some other international crimes[267], drug trafficking is clearly transnational; its commission involves crossing national boundaries[268].

According to some, the current system of prosecuting international drug traffickers is inadequate, and many traffickers successfully avoid prosecution, lessening the deterrent effect of existing laws[269]. Inconsistency in sentencing across states is a strong argument for ICC jurisdiction over drug offences. Allowing the Court to exercise jurisdiction over drug trafficking would alleviate states' nationalistic and sovereignty concerns, as they will not be required to cede jurisdiction to a requesting state[270]. The legal advantages of including drug offences within the ICC's jurisdiction relate mainly to the inadequacies of the present system with respect to jurisdiction, extradition and mutual legal assistance[271].

Some advocates[272] of the inclusion of drug offences have argued that it

266 See McConville, 2000, p.76-79. ''First, the U.S. should support this proposal because it will mean a greater certainty of prosecution and punishment for suspected drug traffickers... Second, the Court would likely make international law enforcement more efficient and effective...Third, the United States should support the aggressive prosecution of drug trafficking in the Court because it would help reduce the quantity of drugs supplied to U.S. markets. Consequently, benefits flowing to the U.S. could include reductions in drug-related domestic crime, violence, and dependency.''.;Also see Lloyd Marshall B., ''Conflict, Intervention, and Drug Trafficking: Unintented Consequences of United States Policy in Colombia'', Oklahoma City University Law Review, 2011, Vol. 36, No.2, p.297.

267 ''There is no settled definition of what constitutes an international crime, but a number of criteria have been suggested... The first of these is that the offence must find its source and definition in an international convention.... A second defining criterion of an international crime is the application of extraterritorial jurisdiction. ...A third criterion for classifying crimes as international is an international or transnational element and international steps against this conduct.'' See Boister, 1998, pp.23-24.

268 See McConville, 2000, p.77.

269 McConville, 2000, p.98.

270 See McConville, 2000, p.95.; Gianaris, 1992, p.110.

271 See Patel Faiza, ''Crime Without Frontiers: A Proposal for an International Narcotics Court'', New York University Journal of International Law and Politics, vol 22, No.4, Summer, 1990, pp.709-747.; Boister, 1998, p.566.

272 Boister, 1998, p.567.; ''...Accordingly, the call for an international criminal jurisdiction to address large-scale drug trafficking and drug related violence has come from States threatened by powerful drug cartels. In parallel, a court with jurisdiction limited to

would make for more predictable prosecution of unreachable drug barons than national prosecution. According to them the threats, bribery and influence of traffickers on judges and courts have a much stronger effect on national trials of traffickers than they would have at the international level. Such threats also have negative consequences for extradition requests and requests for mutual assistance. The ICC would provide a better quality prosecution and more effective punishment of such individuals. Furthermore, the Court would provide a strong symbolic and legal deterrent and enhance the rule of law by increasing the probability that international narcotics offenders will be brought to justice.

The Court would also reduce the international tensions currently generated when a state refuses to turn over an accused for prosecution by another state[273]. Moreover, the Court's diverse panel of independent judges would greatly reduce the current problems of biased national justice systems[274].

According to some, the Court would facilitate the discovery and evaluation of evidence located in different nations. The Court would encourage international cooperation through the establishment of a uniform international criminal code with a list of international crimes and punishments, and rights for the accused which all signatory nations would follow[275]. The Court would also provide a structural vehicle by which a nation could pursue a decision to prosecute suspected individuals, without that nation having to resort to unilateral actions to enforce its prosecutorial decisions[276].

Some[277] argue that international drug control has produced three distinct

international organized crime related to illicit drug trafficking was advocated in the U.S.'' See Evered, Timothy C., ''An International Criminal Court: Recent Proposals and American Concerns'', Pace International Law Review, Vol. 6, Issue 1, Winter 1994, p.135.

273 McConville, 2000, p.95.

274 The jurisdiction of the Court should expand to include international drug trafficking, complementary to the jurisdiction of nation-states, through an Optional Protocol to the International Criminal Court. See McConville, 2000, pp.94-100.

275 See Gianaris, 1992, p.111.

276 See Gianaris, 1992, p.111.

277 See Boister, 1998, pp.571-572. Boister argued that international organisations would begin to develop a draft international convention that focuses on the social and psychological realities that underpin drug use and supply. This convention would have two major facets.

kinds of law. The first phase, regulation of licit drug production, distribution and consumption was developed in the period 1913 to 1972. The 1961 Convention, 1971 Convention and 1972 Protocol are mainly concerned with this aspect of drug control. The second phase, the suppression of illicit drug related activities, began abortively with the 1936 Suppression Convention. Although a small number of provisions in the 1961 and 1971 Conventions and the 1972 Protocol concerned themselves with penal law, the chief instrument today is the 1988 Convention which is concerned almost entirely with the criminal suppression of illicit drugs. Finally, international drug control law appears to be moving into a third phase addressing the needs and problems of users, and the small number of optional provisions in the 1961, 1971 and 1988 Conventions and 1972 Protocol are insufficient. One way to solve this is to place more serious drug offences under the jurisdiction of the ICC; another is to make unqualified universal jurisdiction over these offences obligatory through a protocol to the 1988 Convention. Finally, within this framework, an 'international narcotics court' has also been proposed to deal exclusively with drug offenders[278].

**c. Arguments against Universal Jurisdiction over Drug Trafficking Offences**

There are some arguments against establishment of universal jurisdiction over drug trafficking offences. Firstly, exercise of universal jurisdiction would interfere with national sovereignty[279], and the current system is adequate to handle drug trafficking[280]. Some[281] countries based their opposition to the inclusion of drug trafficking on internal considerations of national sovereignty

First, it would focus on the social and psychological context of the user. The second facet of this new convention would be a focus on the socio-economic conditions of the supplier. Recognising the socio-economic roots of supply, the convention would have to be integrated within global developmental policy. See Boister, 1998, p.574.

278 See Patel, 1990, pp.709–747.

279 Some claim that some states like the United States favour the present indirect method of control over drug offences, because it suits them. On the other hand, states define crimes differently, impose different penalties for similar conduct, establish jurisdiction on different grounds, grant or refuse extradition using different procedures and on different evidence and base legal co-operation upon different forms of request. See Boister, 1998, p.18 and 570.; Evered, 1994, p.150.

280 See Kiefer, 2009, p.181.

281 See Schloenhardt, 2004, p.10.

and confidentiality. According to them, drug crimes were best dealt with bilaterally or regionally and these arguments centered upon the concern that the investigation of drug trafficking is a lengthy, expensive and complicated process, involving long-term planning and extensive intelligence gathering[282].

A second objection to the use of universal jurisdiction is that it would create conflict between states. Because, not all states are party to the drug conventions, hence the conventions do not establish the crimes universally. From this view point, drug conventions themselves do not establish universal jurisdiction over drug offences, they establish territorial jurisdiction and extend jurisdiction extraterritorially through versions of accepted jurisdictional principles like nationality and unusual jurisdictional principles like the effects principle[283]. Another concern with universal jurisdiction is the argument that there is no assurance that the prosecuting nations will apply fair standards of criminal procedure in adjudicating these cases[284].

A third objection is that drug-related crimes might trivialize the role of the International Criminal Court[285]. Because of this, the Court would not have sufficient resources to conduct the lengthy and complex investigations required to prosecute drug trafficking, and drug offenses would overload the docket of the Court[286]. Some believe that if the Court's jurisdiction extends beyond the

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282 See Arsanjani Mahnoush H., ''The Rome Statute of the International Criminal Court'', The American Journal of International Law, Vol. 93, No. 1, Jan. 1999, p. 29. ''The opposition was based on the fact that the nature of investigating the crimes of drug trafficking and terrorism, which requires long-term planning, infiltration into the organizations involved, the necessity of giving immunity to some individuals involved, and so forth, makes them better suited for national prosecution.''.

283 See Boister, 1998, pp.563-564.

284 Geraghty, 2004, p.398.; ''The Draft Code has its difficulties. These relate, inter-alia, to offence definition, criminal responsibility of, penalties imposed on, and due process safeguards for, perpetrators, and States' obligations to try and sanction or extradite suspects... A central issue is the nature of the court in terms of its relationship to national courts, the applicability of national law, substantive and procedural, including evidentiary rules, crime definition (e. g., where definitions were not accurately defined by treaty provision) and punishment.'' See Al-Mulla, Mohammed A. H. A., Evolution of an International System of Drug Control Law and Instrumentation and the Need for Reform: the Breadth and Depth of the Global Illicit Drug Problem, Ph. D. Thesis, University of London 1995, p.341 and 346.

285 See Crawford James, ''The ILC's Draft Statute for an International Criminal Tribunal'', The American Journal of International Law, Vol. 88, No. 1, 1994, p.146.

286 See Boister, 1998, p.568. ''In the Preparatory Committee it was argued that drug trafficking

"serious" or "core" crimes, trivial matters would swamp its limited resources[287]. Moreover, ICC's jurisdiction should not be extended to drug-related offences, because this jurisdiction would likely be a less effective measure than proponents have argued, and the extended jurisdiction might damage the ICC as an institution, by introducing possible corruption, as well as by harming its reputation[288]. Some[289] claimed that lack of consensus on drug trafficking could jeopardize the prosecution of crimes against humanity, genocide, war crimes, and crimes of aggression currently under the jurisdiction of the ICC. Perhaps more convincing is the argument that jurisdiction over drug trafficking would overwhelm the resources of an international criminal court.

Some posited that drug-related crimes lacked sufficient definition to be prosecutable under the Rome Statute[290]. The major problems with the definition and execution of drug offences are that the drug conventions are not self-executing and they define drug offences quite broadly. On the other hand, some of advocates of the inclusion of drug offences have argued that they should be redefined more narrowly in the ICC's statute in order to make it possible for the ICC to take jurisdiction[291].

According to some[292], despite the obvious harms caused by the drug trade, there is one major difference between the crime of drug trafficking and other crimes subject to universal jurisdiction based on the humanitarian rationale. From this viewpoint, the ICC's jurisdiction should not be extended to cover drug-related offences because international criminal law should be restricted

should not be included because these crimes were ... of such a quantity as to flood the court; the court would not have the necessary resources to conduct lengthy and complex investigations required to prosecute the crimes; the investigation of the crimes often involved highly sensitive information and confidential strategies; and the crimes could be more effectively investigated and prosecuted by national authorities under existing international co-operation arrangements.''.

287 See McConville, 2000, p.98.; ''One of the most persuasive arguments for not allowing the ICC to have jurisdiction over drug trafficking cases is the lack of ICC resources.'' See Kiefer, 2009, p.179.

288 See Michels, 2009, p.459.

289 See Kiefer, 2009, p.173.

290 See Crawford, 1994, p.146.

291 See Boister, 1998, p.564.

292 See Michels, 2009, p.451.

to conduct that violates internationally recognized human rights. So far, international criminal law has concerned itself with the most serious crimes of concern to the whole international community. These crimes constitute gross violations of internationally recognized human rights, such as the rights to life, liberty, property and the right to be free from torture. Drug trafficking or production itself does not infringe on human rights.

Finally, there is a serious debate over whether legalization or decriminalization of the drug trade could solve many of the world's drug problems. States can take one of three general approaches on drugs. Firstly, a punitive, prohibitive approach focuses on prosecuting and punishing those who use, possess or sell illicit drugs. Secondly, a harm minimization approach focuses on mitigating the harms caused by drugs, and decriminalization of possession for personal use, which removes drug-related conduct from criminal law, but maintains non-criminal sanctions. Thirdly, a legalization approach entails no legal prohibitions of any kind for drug manufacturing, sale, possession or use. Moreover, there are large discrepancies in the punishments that countries implement for drug trafficking violations. In some states, the quantity of drugs trafficked and whether there is an association with an organized crime group are factors in determining the severity of the penalty. In some states, these two factors are considered to be aggravating circumstances that warrant increased penalties, some countries are more severe and impose the death penalty for drug trafficking[293]. These differences in drug policies between states underscore the problems that arise when trying to determine which drugs should be illegal and under what circumstances. Different states have different views about how each substance ought to be regulated, and these different views imply discrepancies concerning the severity of drug trafficking offenses, if such activities are criminalized at all[294]. According to some, legalization and decriminalization approaches would be incompatible with complementary ICC jurisdiction[295]. In this sense, the humanitarian effects of drug trafficking are fundamentally different from those associated with universal

[293] See Kiefer, 2009, pp.175-176.
[294] See Kiefer, 2009, p.172.
[295] See Michels, 2009, p.456.

jurisdiction crimes, such as genocide or torture[296].

**CONCLUSION**

There has been a growing recognition that crime and criminal organizations have crossed jurisdictional boundaries. Crime networks have exploited expanding trade and financial markets, while benefitting from rapidly advancing technology, broadened international travel, and improved global communications. Transnational crimes are believed to most frequently originate in some regions around the world, but their effects are global. They have been linked with criminal groups in money laundering, counterfeiting, and other activities. It has become evident that the growing activities of transnational crime pose a serious threat worldwide in terms of national and international security, as well as political, economic, financial, and social disruptions.

Drug trafficking is a well known kind of transnational crime and has been the most pressing of all criminal justice issues for the past century. The illegal drug trade is estimated to be the second largest industry in the world today, outweighed only by the weapons industry. The United Nation estimates that global illicit drug users are set to rise by 25 per cent by 2050 and that the bulk of the increase is likely to come from the rapidly rising urban populations of developing countries. It has also had severe political and economic impacts on production, transit, and consumption countries, which are often closely related to widespread corruption. The size of and the violence associated with the illicit drug industry in countries such as Colombia or Afghanistan are destabilizing the security and institutions of these and other countries. The consequences of drug trafficking are appalling and, for the past century, states have widely agreed that they must work together to combat the evils caused by the international narcotics trade. The fundamental objective of the international measures is restricting the use of drugs under international control to medical and scientific use.

[296] See Geraghty, 2004, p.387. '' The reality is that the decriminalization argument is unlikely to succeed. Most countries, especially the United States, are steadfast in their belief that the drug trade should not be made legal, and have signed international agreements pledging to criminalize and prosecute drug trafficking.''.

Despite massive investments of time and resources, this international effort has not been easy. The drug trade is transnational in character and its impact, as well as its security consequences cannot be viewed as a national problem, but transnationally. The promise of prosecution has not always been an effective deterrent to drug traffickers, because they tend to operate beyond the reach of criminal jurisdiction. To deal effectively with the security implications of transnational drug trafficking, a collaborative multilateral approach is essential. Since International Opium Convention of 1912, a total of thirteen international agreements on drug control have been concluded along with ten international instruments on drug related issues. Today, the international law on drug trafficking contains a wealth of widely accepted mechanisms to prohibit the illegal manufacturing, transfer, sale, use, possession etc of drugs along with money laundering and corruption, as well as mutual legal assistance and judicial cooperation measures, extradition clauses, provisions on law enforcement cooperation, technical assistance and training, and prevention mechanisms.

There has been expansion of various forms of bilateral cooperation, including technical assistance in law enforcement and criminal law reform, bilateral treaties, and a series of informal working arrangements between law enforcement and the judiciary of a number of countries. These are all important in terms of attempts to overcome certain difficulties related to differences in legal systems otherwise precluding effective cooperation. However, despite increasingly bilateral networking, major gaps still remain. In the area of procedural legislation and law enforcement methods, there are still a number of divergences, ranging from a traditional difference between countries with mandatory and discretionary prosecution, through acceptance or denial of electronic surveillance, undercover agents and controlled delivery, to the granting or not of immunity to informants who disclose information on organized crime groups and their leaders. Differences in organizational structures and admissible methods and evidence still create problems in bilateral, regional and international cooperation.

Some consider that providing states with the ability to exercise universal

jurisdiction over drug traffickers would provide a tool that will help states in ensuring that traffickers are faced with a real threat of prosecution. According to this view, although there is some international treaty law conferring universal jurisdiction, that law is not comprehensive enough such that any state can prosecute drug traffickers wherever they are found. The current system is inadequate, and many traffickers avoid prosecution, allowing the International Criminal Court to exercise jurisdiction over drug trafficking would be a solution in need of problems. On the other hand, attempts to include drug trafficking into the International Criminal Court Statute were met by great opposition so that the final text of the ICC Statute restricts the Court's jurisdiction to genocide, crimes against humanity, war crimes, and crime of aggression alone. Opponents mainly cite that the current system is adequate to handle drug trafficking; drug offenses do not violate fundamental humanitarian principles or constitute exceptionally serious crimes of international concern; the Court would not have sufficient resources to prosecute these offences; and drug offenses would overload the docket of the Court.

In conclusion, it should be noted that the fight against drug trafficking as a transnational crime is not just a fight against crime. The production, trafficking and consumption of illicit drugs can be understood properly only if they are seen in their many different dimensions: political, social, economic and cultural. Strategies at the local, regional and international levels must be coordinated, and strategies to defeat this transnational threat will require effective co-operation among drug-producing and drug-consuming countries. This is essential because drug traffickers have developed a sophisticated capability to permeate state boundaries, as well as to shift their operations internationally in response to pressure originating in any single state. It would be a mistake only to focus on the production and transit regions when many of the problems are to be found in the consumer markets. To defeat drug trafficking is one of the greatest challenges facing the world in the twenty-first century.

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# LIFTING THE CORPORATE VEIL IN GROUP OF COMPANIES: WOULD THE SINGLE ECONOMIC UNIT DOCTRINE OF EU COMPETITION LAW SET A PRECEDENT?

*Şirketler Topluluğunda Tüzel Kişilik Perdesinin Kaldırılması: AB Rekabet Hukukunun "Single Ecomomic Unit" Doktrini Emsal Olabilir mi?*

**Alper Hakkı YAZICI***

**ABSTRACT**

Today, the limited liability, which became an indispensable principle in company law, may be criticised for unfair results it may cause. Although a company enjoys a separate legal personality, it operates under the will of its controllers. Whereas controllers are able to acquire company revenues through several ways, they can also externalise company debts thanks to limited liability. Therefore, it gives rise to an unfair pros and cons balance. When it comes to the group of companies works are getting more and more complicated. It is obvious that the abolishment of limited liability is impossible because of the economic advantages it brings about. In this regard, lifting the corporate veil seems to be the sole way to render justice.

**Key Words:** Company, limited liability, separate legal personality, lifting the corporate veil, veil-piercing, group of companies.

**ÖZET**

Günümüzde, sermaye şirketlerine hâkim olan sınırlı sorumluluk ilkesi sebep olduğu hakkaniyetsiz sonuçlar sebebiyle eleştirilebilmektedir. Ayrı bir tüzel kişiliğe sahip olmakla birlikte şirketler onu kontrol eden şahısların iradeleri dâhilinde faaliyet göstermektedirler. Bu kişiler şirketin elde ettiği kârı çeşitli yollardan temellük ederken, şirketin başarısızlığı halinde sınırlı sorumluluk ilkesini gerekçe göstererek şirket borçlarından kendilerini ayrıştırabilmektedirler. Dolayısıyla bir nimet – külfet dengesizliği bulunmaktadır. Şirketler topluluğu söz konusu olduğunda durum daha da karmaşık bir hal almaktadır. Sağladığı ekonomik avantajlar sebebiyle sınırlı sorumluluk ilkesinden tamamen vazgeçmek mümkün değildir. Bu ortamda, tüzel kişilik perdesinin kaldırılması yaklaşımı adaletin tesisi açısından mümkün olan tek imkân olarak göze çarpmaktadır.

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**Anahtar Kelimeler:** Sermaye şirketleri, sınırlı sorumluluk, tüzel kişilik, perdenin kaldırılması, şirketler topluluğu.

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## INTRODUCTION

Legal formations of business enterprises have followed a pattern in the past from unincorporated structures to one incorporated companies and eventually to groups of companies.[1] In the past, unincorporated enterprises were the most common form of conducting a business. These companies were, generally speaking, small sized single traders or partnerships which did not have any peculiarity with regards to liability. Thus, under these forms, the businessman or the entrepreneur himself bore the risk of carrying out business, being personally liable for the liabilities of the enterprise.[2]

At the end of the 19th century, a different form of enterprise emerged, in the form of incorporated business enterprise having a distinct legal personality separate from its shareholders and members. The distinct feature of this incorporation is called as the entity doctrine.[3] It was the outcome of a need for a new legal device which would facilitate large amounts of capital accumulation.[4] Therefore, the enterprise was supported by a large number of investors and thus has a greater capital power to carry out large businesses. In this regard, it was necessary to set a clear-cut barrier between corporate body and shareholders, lest investors should be reached by other stakeholders who would have rights or debts stemming from the operations of the business. Theoretically, in this structure, shareholders and management are separate and distinct from each other. For this reason, a less powerful shareholder con-

1 Antunes notes steps of this evolution as; unincorporate enterprise, single incorporated enterprise and polycorporate enterprise. See **J. E. Antunes**, "The Liability of Parent Corporations and their Directors, Paper Presented at the "Universidade Autonoma de Madrid"", February 27th 2004, p. 188.

2 Antunes 190

3 **D. Kershaw**, *Company Law in Context: text and materials*, Oxford: Oxford University Press, 2012, 30.

4 Antunes 191

sistently becomes less accountable for the enterprise's affairs.[5]

In the most recent development, the structure, unexpectedly, evolved into the "group of companies". These structures emerged with the authorization of companies to purchase or own the stock of other companies.[6] *Blumberg* argues that the limited liability for corporate groups is a historical accident rather than a deliberate choice.[7] The system of group of companies might also be seen as a derivative form of a single company, as natural persons are just replaced by corporate shareholders, however, the bottom idea of forming such a company is not quite the same as that of a single company, which is separation of legal personality from shareholders.[8] Parent companies, ultimately shareholders themselves, should not be expected to act like investor shareholders whose sole concern is to reap the fruits of their investments. Contrary to investor shareholders, parent companies actively interfere with the business of their subsidiaries. Therefore, the theoretical approach valid for single companies, which has also proved to be successful in practice, actually does not work properly when it comes to group of companies.

Today, it is generally accepted that group of companies ought to be considered differently from single company forms because this is a structure that prioritizes group interests over the affiliated company interests. Thus, a group of companies can roughly be referred as those consisting of separate legal personalities having common economic purposes as an enterprise.

In this regard, as a remedy to the anomalies stemming from the limited liability designed for the single corporation, a different approach has been proposed for group of companies. This approach is based on the view that the entire group should be held liable for the liabilities of the affiliated companies. The rationale for this approach is that debts are born due to the business af-

5 Antunes 192

6 **P. I. Blumberg**, *The law of corporate groups: tort, contract, and other common law problems in the substantive law of parent and subsidiary corporations*, Boston: Little, Brown, 1987, 55.

7 Blumberg 56

8 *Dine* notes the conceptualisation of group of companies as the nexus of contracts in the UK, which is actually extension of the approach developed for single company. See **J. Dine**, *The Governance of Corporate Groups*, Cambridge University Press, 2006, 43.

fairs of the subsidiary though; this entity does not have the ability to operate out of the group's policies. More precisely, the subsidiary in theory has a legal capacity to act independently, but in reality it cannot use it contrary to the instructions set out by the parent. Accordingly, a new approach, considering this reality, has been devised, the purpose of which is to treat the group of companies as one economic entity and attribute all liability to this entity. The theories, more or less defending this approach, are called under different terms: enterprise liability, identification of companies as well as single economic unit doctrine.[9] In this essay, the term of "*single economic unit/entity*" is preferred, because of the reason that the focal point of the study is the EU competition law and English company law, which are more familiar with this terminology.

The single economic unit approach can either be a source for a legislation dealing with the liability questions within the group structures or an argument for veil piercing and imputation of liability. In this essay, the veil piercing aspect of the theory has been studied predominantly. In this regard, the effects of the theory in the case law of the EU courts on competition law and of English courts on the companies have been studied. As an early conclusion it can be stated that the European Court of Justice (ECJ) effectively makes use of "single economic unit" doctrine in its decisions. The ECJ, contrary to the English Courts, is not occupied with the technical boundaries drawn by the incorporation and as a matter of fact, considers the economic reality as well.[10]

## I. LIFTING THE CORPORATE VEIL

The veil piercing is a response to separate legal personality, rather than to

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9 **K. Vandekerckhove**, *Piercing The Corporate Veil*, Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2007, 380; *Ottolenghi* has also described this approach as "Extending the veil" where group of companies is held as one body. See **S. Ottolenghi**, "From Peeping Behind the Corporate Veil, to Ignoring it Completely" The Modern Law Review, Volume 53, Issue 3, pages 338–353, May 1990, p. 347; The term of enterprise liability, developed by US scholars, proposes liability for all the components of the group. See **S. Tully** (ed), *International Corporate Legal Responsibility*, 2012, Kluwer Law Int, p. 29.

10 **J. Dine and M. Koutsias**, *Company Law*, Palgrave Macmillan, 7th edition, 2009, 26.

the principle of limited liability, and thus, it poses an exception to entity law doctrine.[11] In this regard, lifting the corporate veil is a term describing the procedure of ignoring separate legal personality of a corporate body to reach the person or persons behind the corporate structure. Thus, veil is used as an idiom to define corporate personality which hides the shareholders underneath.[12] Often, the term "piercing the corporate veil" is also used as an alternative. Other terms are used to define the same situation as well such as penetrating, peeping, extending, ignoring etc.[13] In this essay, the terms 'lifting the corporate veil' and 'piercing the corporate veil' are often used interchangeably.

**A. WHY IS VEIL PIERCING NEEDED?**

Major features of the business corporation are;

(1) Separate legal personality,

(2) limited liability,

(3) shared ownership by investors of capital,

(4) delegated management under a board structure,

(5) transferable shares.[14]

A Limited Liability Company has its own assets and debts and in case of insolvency, its members naturally have no liability for the company's debts. Thus, members or shareholders of the company only risk their capital investments in the company. No doubt, this creates a secure environment encouraging investors to start up their own business or to channel their savings to already available companies.[15] Therefore, limited liability is a welcoming development from an economic point of view as it increases the economic ef-

11 Kershaw 47

12 **B. Pettet**, "Limited Liability – A Principle For The 21st Century" Current Legal Problems, 1995, V.48, Part: 2, 136

13 **B. Hannigan**, *Company Law*, Third Edition, Oxford University Press, 2012, 45

14 **H Hansmann and R Kraakman**, "The End of History for Corporate Law", International Center for Finance Working Paper No. 00-09, 2000, 1.

15 Pettet, 142

ficiency of the capital which may otherwise lie idle.[16] In this context, we can easily draw the conclusion that people would not be highly motivated to make investments if they bear the risk of losing their personal assets such as their houses or cars. In sum, it encourages risk taking.[17]

The economic advantages arising from limited liability have always overshadowed the objections based on moral values. First of all, limited liability enables shareholders to externalize the risk of failure of business enterprise. However, someone must take over that risk. Under the current circumstances, it can roughly be stated that the risk has been transferred to the creditors, which is criticized for being unjust, immoral and conducive to the creation of an environment which is open to abuse.[18]

As far as involuntary creditors, especially tort creditors, are considered, the limited liability gives rise to even more controversial consequences. This is because contractual creditors are, at least, in a position to monitor risks more effectively and take pre-emptive measures against a probable failure. Furthermore, some would have the ability to turn this disadvantage into an advantage by imposing higher interest rates for the risk.[19] On the other hand, involuntary creditors are deprived of these opportunities and unfortunately carry the full risk of insolvency.[20] This implication of limited liability may unreasonably encourage hazardous business activities which would be risky for people likely to suffer from tortious acts.[21] Moreover, the same outcome is also valid for the creditors who do not have a position to negotiate as they are the weaker party in the contractual relationship, such as employees.[22] As a result, limited liability creates a business environment less secure for weak and potentially involuntary creditors in the event of insolvency because pow-

16 **J. H. Farrar,** *Farrar's company law* / John H. Farrar, Brenda Hannigan; with contributions by Nigel E. Furey and Philip Wylie. London: Butterworths, 1998, 80.

17 **A. Dignam and J. Lowry**, *Company Law, Core Text Series*, Oxford: Oxford University Press, 2012, 48

18 Pettet 142, 146, 147

19 Dignam&Lowry, 49.

20 Pettet 153

21 **H Hansmann and R Kraakman**, "Toward Unlimited Shareholder Liability for Corporate Torts", 100 Yale L. J. 1879, 1990 – 1991.

22 Dignam&Lowry, 49

erful creditors can easily negotiate and dictate their own conditions to debtor companies.[23]

The fact that the principle of limited liability is almost indispensable for obvious reasons does not account for its absolute immunity. That is, veil piercing might be regarded as a balancing factor which can be resorted by the judiciary in certain circumstances. Accordingly, while limited liability can be maintained as a general principle, veil piercing can be kept at disposal as a usable tool against the probable unwanted results of limited liability. Nevertheless, one of the drawbacks associated with veil piercing is uncertainty. In other words, it is not very possible to determine the scenarios and rules where veil piercing should be applied beforehand.[24] As a result, courts do not apply veil piercing in a systematic way. It is a legal procedure lacking a predefined systematic approach. Nonetheless, *Farrar*'s list would be beneficial to outline the most significant categories where veil piercing may take place. These are as follows:

1) Agency;

2) Fraud;

3) Group enterprises;

4) Trusts;

5) Tort;

6) Enemy;

7) Tax;

8) The companies legislation;

9) Other legislation.[25]

As can be seen, group structures are indicated as an independent cause for veil piercing. The author describes this category as looking upon a group of companies as a single economic unit.[26] In the following sections we will specifically study this category. However, it does not mean that other causes

[23] Dignam&Lowry, 49; Hannigan, 57.
[24] Dignam&Lowry, 34
[25] Farrar, 69,70.
[26] Farrar, 73.

mentioned above are not applicable to group of companies. They are potentially applicable as well.

## B. LIFTING THE CORPORATE VEIL IN GROUP OF COMPANIES

### 1. GROUP OF COMPANIES AS A CONCEPT

Today, group of companies are getting more and more economic significance throughout the world. These structures consist of several companies classified into parents and subsidiaries. It may be simply in the form of a parent and its subsidiary or a parent with several subsidiaries. More complex group structures where companies are organized in a multi-tiered way are also possible.[27]

Group of companies are categorized, regarding the interrelation of the companies, as conglomerate, vertical and horizontal groups.[28] Conglomerate groups are formed by companies whose businesses are not commercially relevant to each other. Each subsidiary operates in its own distinct business sector.[29]. Horizontal groups are made up of companies tied up with each other with small cross-shareholdings. There is no controlling parent or another superior corporate body to coordinate or enforce group relations. Coordination is achieved by constant meetings on a regular basis between the directors who are also engaged with each other.[30] The companies covered by this type of groups carry out businesses at the same level, such as manufacturing or distribution.[31] Vertical groups are, however, based on the concept of corporate control. These structures are organised under a principal parent or holding company.[32]

The basic concept in the formation of the group of companies is "corporate

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27 **D. K. Avgitidis**, *Groups of Companies, The Liability of the Parent Company for the Debts of its Subsidiary*, Athens – Komotini, 1996, 73 – 77.

28 Avgitidis 70, 71.

29 Avgitidis 70

30 Dine, 40.

31 Avgitidis 71

32 **M. Andenas and F Wooldridge**, *European Comparative Company Law*. 1st ed. Cambridge: Cambridge University Press, 2009. *Cambridge Books Online.* Web. 05 August 2014. http://dx.doi.org/10.1017/CBO9780511770494, p. 448.

control". Corporate control can be exerted in various ways, such as intercorporate stock ownership, cross-shareholding, concentration of voting rights, contractual ties, common management or directorship agreements, shareholding agreements etc.[33]

## 2. RATIONALE OF LIFTING THE CORPORATE VEIL IN GROUP STRUCTURES

As mentioned beforehand, limited liability has been criticized to be immoral and unfair in some respects. When it comes to group of companies, the immorality of the issue is more obvious because some legitimizing factors, such as economic efficiency, cannot be observed in group structures.[34]

The introduction of group structures has concomitantly brought about new implications apart from the conventional issues caused by the principle of limited liability. First of all, it would be beneficial to note that a parent company, which is ultimately a shareholder, cannot be considered as an ordinary investor shareholder because it has the ability to intervene in the business operations of its subsidiaries. Moreover, group structures make it possible for companies to organize their business in a multi–tiered fashion, which leads to limit the limited liability even further.

To illustrate, consider a sole trader, Mr. A, who decides to carry on his business of shoe production and sales under a corporate body to make use of limited liability. He starts up a new company, company X, where he is the sole or majority shareholder and transfers the business to this company. Thus, as he ceased to be the owner of the shoe business, he cannot be held liable for the debts of the company. Therefore, the separate legal personality of the company enables him to place a barrier between him and the creditors who could initially resort to Mr. A's personal assets if he maintained to operate as a sole trader. By starting up a limited liability company, he limited the risk of failure to the amount of his share capital. If he were to limit his responsibility even further, he could have organized the business in the form of a group of

[33] Antunes 196, and see footnote 31: Author describes *control* as an elusive concept and finds it difficult to make a satisfactory definition capable of embracing all its possible origins, mechanisms, forms and effects.

[34] Antunes 204.

companies by asset partitioning.[35] He could have set up separate companies for each operation of the company X, for instance, company A for the supply of leather, company B for the production of shoes and company C for marketing the products. Thus, he would have been able to place a second barrier between him and the creditors. If one of the subsidiaries were to become insolvent, for example subsidiary company A, the creditors selling leather to this company, under the current circumstances, would not have been able to claim the responsibility of other group members. Furthermore, the insolvency and winding up of the subsidiary concerned would not interrupt the operations of the enterprise because a new subsidiary replacing company A could be set up immediately. [36]

To sum up, if the business is carried out by the one corporate body, parent company X could not evade from the liability arising from its purchase of leather which is used for shoe production. Besides, if company X failed to pay its debts, creditors may seek to collect from Mr. A's personal assets through veil piercing. However, structuring the same business under the umbrella of group of companies creates dramatic consequences. Asset partitioning and dividing the business into separate subsidiary companies effectively makes it possible for the parent to avoid liability for the debts stemming from its subsidiaries' activities even if they conduct business for a common purpose. Similarly, where groups of companies are in question, no one asks about the liability of natural persons behind the veil. As a result, group structures practically provide natural persons with a second veil or barrier against creditors.[37]

The reason for these strange results is the application of the principle of limited liability initially designed for a single company to a group of companies as well.[38] Limited liability has been designed for a model where the shareholder is the ultimate investor and at the same time the separation of corporation from its shareholders is necessary for the protection of the investor. On the other hand, investor shareholders are supposed to be not very careful about

[35] Hannigan, 56.
[36] Dignam & Lowry, 50.
[37] Dignam & Lowry. P. 50
[38] Antunes 199

the management of the company as their only concern would be to reap the fruits of their investments. Therefore, the single company model contemplated a clear cut disengagement of management from shareholding.[39]

With the emergence of groups of companies, this design applied, automatically and unthinkingly, to group structures, although the components of the group carried out the complementary parts of the same business under a common enterprise. It gave rise to the creation of limited liability tiers. That is to say, ultimate investors are protected from the parent company liability which is protected from the subsidiary liability, so the ultimate investors are protected from the subsidiary liability with a second shield, the parent.[40] As their only concern is to reap the fruits of their investments, investor shareholders are not supposed to be very careful about the management of the company. Therefore, the single company model contemplated a clear cut disengagement of management from shareholding. However, when it comes to the group of companies, assumptions of entity law doctrine do not work because the corporate shareholder, more precisely the parent, is not a mere investor; rather, it is the controller of affiliate companies. Accordingly, a group of companies carries out the function of a common economic enterprise under different legal personalities. Hence, these structures involve a very basic controversy: unity as an enterprise, plurality as a legal corporation.[41]

The tension or controversy between these features gives rise to some implications different from the ones caused by single company issues. That's why, in some areas of the law, such as taxation and accounting, group of companies are treated, to some degree, as a single enterprise rather than a unification of separate legal personalities. As far as the question of intragroup liability is concerned, some jurisdictions are dealing with the issue in this regard and introducing statutory provisions in relation to the imposition of subsidiary

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39 **H Hansmann and R Kraakman**, "What is Corporate Law? THE ANATOMY OF CORPORATE LAW: COMPARATIVE AND FUNCTIONAL APPROACH, R. Kraakmann, P. Davies, H. Hansmann, G. Hertig, K. Hopt, H. Kanda, and E. Rock, Oxford University Pres, pp. 1-19, 2004. Available at SSRN: http://ssrn.com/abstract=568623, p. 11

40 Blumberg, 685.

41 *Antunes* defines it as a controversy between diversity (multiplicity of legal entities) and unity (unity of economic enterprise). See Antunes 158, 199, 200.

liability to the group members. For a great many of others which are not providing a distinct legal regime for groups of companies, the only way to resolve the question of intragroup liability seems to be the veil piercing.[42]

## II. SINGLE ECONOMIC UNIT DOCTRINE OF THE EU COMPETITION LAW

### A. Overview

Subject of the competition rules, namely articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and the 139/2004 EC Merger Regulation which are handling the anti-competitive acts, is "undertaking or union of undertakings". The Article 101 of the Treaty provides anti-competitive agreements between undertakings whereas Article 102 takes care of abuse of dominant position. The meaning of undertaking is same at the application of both provisions.[43]

What exactly means by undertaking is not defined in TFEU. As such, it was developed by the case law of European Court of Justice (ECJ). According to the case law, the definition of undertaking; "encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed".[44] Therefore, it may be implied that a functional approach, focused on economic rather than legal identity, is adopted by the EU courts.[45] Hereunder, every actor, natural or legal person, engaged in an economic activity, can be a subject of the competition rules of the EU.[46] Naturally, companies are also encompassed by this definition.

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42 Blumberg, 106

43 **A. Jones**, "The boundaries of an undertaking in EU Competition Law", [2012] 8(2) European Competition Journal 301-331, p. 302.

44 **S. M. Colino**, *Competition Law Of The EU And UK*, New York, 2011, p. 21; Case C-41/90 *Höfner and Esler v Macrotron GmbH* [1991] para. 21. Further see Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, para. 40.

45 **V. Rose and D. Bailey**, *Bellamy & Child, European Union Law of Competition*, Oxford University Press, 7th Edition, 2013, p. 94.

46 **A. Ezrachi, *EU*** *Competition Law, An Analytical Guide to the Leading Cases*, Third Edition, Hart Publishing, Oxford, 2012, 1, 2; **A. Jones and B. Sufrin,** *EU Competition Law: Text, Cases, and Materials*, fifth edition, Oxford: Oxford University Pres, 2014, 128.

**B. SINGLE ECONOMIC UNIT DOCTRINE**

One of the consequences of functional approach based on the economic activity is "single economic unit" doctrine. According to this view, an undertaking might be comprised of a sole or a group of persons who can be either legal or natural. In this regard, group of companies may be deemed to be an undertaking if they constitute an economic integrity.[47]

When it comes to the group of companies, the major criteria to look for to determine whether there is a single entity is the "decisive influence" of the parent on the subsidiary companies. Decisive influence test has been developed by the case law and has practically become an entrenched rule as it is qualified as a part of the settled case law in almost every concerning decision of the European Courts.[48] If the subsidiary company does not have an economic autonomy or independence, even if it has a separate legal personality, it is presumed to be a part of the same undertaking.[49] Accordingly, whether the subsidiary decides independently upon its own conduct on the market, or carries out, in all material respects, the instructions given to it by the parent company shall be examined.[50] In doing this, particularly the economic, organisational and legal links between those legal entities as a whole should be regarded.[51]

Decisive influence test has two components:

1) Ability to exercise decisive influence and

1) Actual exercising of it.[52]

Therefore, first it must be established that the parent is able to exercise

47 Sufrin: 138

48 **J. Joshua, Y. Botteman and L. Atlee**, "You Can't Beat the Percentage" – The Parental Liability Presumption in EU Cartel Enforcement, The European Antitrust Review, 2012, 5.

49 Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071 paragraph 290.

50 See Case 48-69. Imperial Chemical Industries Ltd. v Commission of the European Communities, 14 July 1972, para: 132 – 137

51 97/08 P - Akzo Nobel and Others v Commission ECLI:EU:C:2009, para: 58

52 **K. Hofstetter and M. Ludescher**, "Fines against Parent Companies in EU Antitrust Law" *Setting Incentives for "Best Practice Compliance"* World Competition,Volume 33, No. 1 March 2010, 4.

decisive influence over the subsidiary. On this ground, the economic and legal links between them need to be considered.[53] As such, the shareholding stake of the parent would be the primary determinant. It was held that a 51 percent shareholding of the parent in a subsidiary was sufficient to consider them as a single economic unit in the judgment of *Commercial Solvents Corporation v Commission.*[54] On the other hand, minority shareholding may provide parent companies with decisive influence over the subsidiaries as well. It is stated in the paragraphs 182 and 183 of the *Fuji Electric System Co Ltd. v. Commission* as follows:

"… a minority interest may enable a parent company actually to exercise a decisive influence on its subsidiary's market conduct, if it is allied to rights greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary's market conduct..."[55]

The second limb of the decisive influence test is the actual exercising of the influence. It is not sufficient for the Commission to only establish the ability of decisive influence. In addition to this, it is also required to demonstrate actual exercising of the decisive influence. However, this should not be interpreted so strictly. It would be sufficient to establish that the parent actually affects the market conduct of its subsidiary and determines its commercial policy. Thus, it is not necessary to establish that the parent interferes with the day-to-day management of the subsidiary.[56] Correspondingly, it is not decisive to demonstrate that a specific instruction of the parent gives rise to the anticompetitive conduct of the subsidiary.[57]

To sum up, the burden of proof lies with the Commission and it ought to

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53 Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, para: 135.

54 Cases 6 and 7-73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities, 6 March 1974, para: 6.

55 Case T-132/07, *Fuji Electric System Co Ltd. v. Commission* 12 July 2011, para: 182 – 183.

56 **M. Olaerts and C. Cauffman**, "Química: Further Developing the Rules on Parent Company Liability" (October 14, 2011). Maastricht Faculty of Law Working Paper No. 2011/33. Available at:http://ssrn.com/abstract=1944053, p. 12.

57 Joshua, Botteman and Atlee, 6; *Fuji Electric System* para: 181.

demonstrate that the group of companies forms a single economic unit on the basis of factual evidence. In doing this, the Commission has to demonstrate the decisive influence of the parent. However, when it comes to groups involving wholly-owned subsidiaries, matters are changing dramatically. Settled case law has developed a rebuttable presumption about wholly-owned subsidiaries. According to this, if the parent owns 100 per cent shareholding of the subsidiary, directly or indirectly, the decisive influence test is deemed to be achieved.[58] Therefore, the Commission is not required to establish the decisive influence of the parent and thus the existence of a single economic unit. Conversely, the parent should rebut the presumption by proving that the subsidiary in question has autonomy and thus the companies do not form a single economic unit and that they should not be seen as an undertaking altogether. The same is also valid for those companies where parent has *de minimis* amount less than 100 per cent.[59]

"In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary … and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary...In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market."[60]

The ECJ clarified in its *AKZO* decision the doubtful points which *Stora* decision had raised as to wholly-owned subsidiaries. In *Stora,* the Court implied

58 Ezrachi, 24
59 Jones&Sufrin, 143
60 Akzo, para: 60,61.

some additional conditions such as the supervision of the business policy of the subsidiary in addition to 100 percent shareholding.[61] However, the *AKZO* decision, as can be seen in the paragraph above, clearly indicated that decisive influence is deemed to be available as a presumption where wholly-owned subsidiaries are in question. Therefore, we can imply from the *AKZO* decision that group structures consisting of wholly-owned subsidiaries are automatically held as a single economic unit and as such the Commission only needs to demonstrate this fact.

A natural consequence of the single economic unit doctrine is the imputation of the liability on the part of the subsidiaries towards the parent. As far as groups of companies are considered, the Commission has discretion to impose fine on the subsidiary, on the parent or on both of them jointly or severally.[62] Within the scope, the Commission may impute liability to any of the group members at its discretion and as far as multi-tiered groups are concerned, it may attribute the liability to the ultimate controlling parent company or others in the group hierarchy, jointly or severally.[63] In this regard, the holding company is often considered to be the indirect controller. In a recent judgment, *General Química and Others v Commission*, the attitude of the European Courts towards multi-tiered structures was well demonstrated:[64]

"In the light of those considerations, it cannot therefore be excluded that a holding company may be held jointly and severally liable for the infringements of EU competition law committed by a subsidiary of its group whose capital it does not hold directly, in so far as that holding company exercises decisive influence over that subsidiary, even indirectly via an interposed company…In such a situation, the holding company, the interposed company and the last

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61 **J D. Briggs and S Jordan**, "Developments in the law: the presumption of shareholder liability and the implications for shareholders in private damages actions and otherwise", Global Competition Litigation Review, 2009, p. 4; Colino, 21; Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission* (2002)

62 *Commercial Solvents para.* 41: "the two companies must be deemed an economic unit and that they are jointly and severally responsible for the conduct complained of."

63 **W. Wils**, "The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons", European Law Review, 2000, 9.

64 C-90/09 P - General Química and Others v Commission 20 January 2011, para: 84 – 87.

subsidiary in the group form part of the same economic unit and, therefore, constitute a single undertaking for the purposes of EU competition law."

### C. CRITISISMS OVER SINGLE ECONOMIC UNIT DOCTRINE OF THE EU COMPETITION LAW

Single economic unit doctrine is criticized in some aspects. First it is claimed that the presumption about wholly owned subsidiaries is not fair because the subsidiaries may enjoy economic independence from the parent somehow. As such, there is actually no reason to embrace such a presumption and the Commission should be required to establish that those companies are forming a single economic unit as in the case of not wholly owned subsidiaries. For this reason, it is not fair to reverse the burden of proof. [65]

It is also argued that the rebuttal of the presumption is nearly impossible in reality considering the modern industrial group structures as it is natural for a parent company to exercise influence in determining the commercial policy of its wholly-owned subsidiary. [66] The following paragraph from the opinion of the advocate general involves the examples given by the Commission for the rebuttal of the presumption. These are, actually, restricted to very exceptional circumstances:

"The Commission correctly mentions the following examples in this regard: (a) the parent company is an investment company and behaves like a pure financial investor, (b) the parent company holds 100% of the shares in the subsidiary only temporarily and for a short period, (c) the parent company is prevented for legal reasons from fully exercising its 100% control over the subsidiary."[67]

It is also stated that considering the fact that the EU is bound by the Europe-

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65 In AKZO case advocate general criticizes the Court of First Instance as it follows the *AEG* and *Stora* judgments closely and applies only the rebuttable presumption of the exertion of decisive influence recognised by the Court of Justice, See Opinion Of Advocate General Kokot delivered on 23 April 2009, para: 66

66 Hofstetter&Ludescher, 5

67 Opinion Of Advocate General Kokot delivered on 23 April 2009, footnote 67; Joshua, Botteman and Atlee, 7; Briggs& Jordan, 2.

an Convention on Human Rights (ECHR) as a result of the Lisbon Treaty 2009, maintaining this presumption infringes the ECHR because the fine imposed by the Commission is, in essence, a criminal charge and it must be applied in accordance with article 6 of the ECHR, namely right to a fair trial. Moreover, this kind of a presumption foils with the presumption of innocence. [68]

**D. CONCLUSION**

The single economic unit doctrine is an approach based on economic reality. In order to prevent the abuse of facilities provided by separate legal personality, groups of companies are considered as a single unit to the extent of their organizational integrity. This approach makes it possible to attribute subsidiary liability to the parent. It is the decisive influence test which is used to determine the presence of a single economic unit. Accordingly, if the parent is able to and actually exercises decisive influence on the subsidiary, they are deemed to be a single economic unit. On the condition that the group is comprised of wholly owned subsidiaries, decisive influence is deemed to exist as a presumption. This is an original feature of this doctrine. If the group is held as a single economic unit, group members can be held liable jointly or severally.

**III. SINGLE ECONOMIC UNIT DOCTRINE IN COMPANY LAW**

**A. OVERVIEW**

Under what circumstances a parent company can be held liable for the debts of the subsidiary – the issue of intra-group liability – is one of the most unresolved controversial issues of modern company law.[69] Many different approaches have been put forward to deal with this issue. Some of them depend on a statutory groundwork while others do not. Some are conservative in nature whilst others may be seen as revolutionary. In this context, perhaps the first approach which deserves to be cited is the traditional *entity law approach* because it is still the prevailing one all around the world.[70]

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68 For a detailed analyze with regard to human rights aspects see **M. Bronckers and A. Vallery**, "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law", 2011, 34 W.Comp. 4.

69 Antunes 201.

70 Antunes 201

Entity law approach reflects the traditional mindset towards the principle of limited liability. According to this, the liability of a subsidiary cannot be extended to the parent because these entities are distinct legal personalities.[71] Hence, it is remarked that the separate legal personality must be maintained as a rule. However, only in the most exceptional cases the legal personality of a group member may be disregarded.[72] These exceptional cases are indicated as "sham", "agency", "conduit" etc. where the parent has utmost domination over the subsidiary.[73]

Being too conservative and exceptional, this approach is criticized for offering restricted and unprincipled solution to intra-group liability issues. It does not have consistent answers to the questions such as how to distinguish normal cases from the most exceptional cases.[74]

As it can be observed, the entity law approach strictly maintains the principle of limited liability in a traditional sense and does not bring about a comprehensive solution to the intra-group liability problem. On the other hand, there is a revolutionary approach challenging the conventional discretion of entity law approach; the single economic unit approach. [75]

**B. SINGLE ECONOMIC UNIT DOCTRINE AS A CAUSE FOR LIFTING THE CORPORATE VEIL**

As a rationale for veil piercing in groups of companies, this theory argues that the members of a group should be held as one economic unit as a legal response to the factual anomalies caused by the application of limited liability in groups of companies. For many commentators, single economic unit cases are the most concrete veil piercing cases because they lack any sort of statutory basis.[76]

71 Antunes 201
72 Antunes 201
73 Blumberg 106.
74 Antunes 203
75 Antunes 201.
76 Vandekerckhove, 380.

## 1. SINGLE ECONOMIC UNIT DOCTRINE IN ENGLISH COMPANY LAW

*a) Overview*

In relation to liability matters, groups of companies are not subject to any statutory provision in the English company law. For this reason, the topic becomes purely a matter of veil piercing issue under the jurisdiction devised by the English courts. Accordingly, we will study the workings of the single economic unit doctrine in English veil piercing. First of all, the meaning of group of companies in the English law has to be examined briefly.

*b) Group of Companies*

There is not any provision in the Companies Act 2006 (CA 2006) which directly encompasses the structure of "group of companies". Yet, there are two provisions applicable to groups of companies in the Act: s. 1159 and s. 1162 of CA 2006. [77] The former defines the terms of *subsidiary* and *holding company* whilst the latter deals with the group accounts and defines the terms of *parent* and *subsidiary undertakings* within this context.[78] In this regard, s. 1159 of CA 2006 would be a proper starting point to find out what is meant by group of companies in English company law.

According to the definition in CA 2006 s. 1159, corporate control is the tying factor in forming a group of companies. The most common ways of setting control are indicated in CA 2006, s 1159(1). First, in the CA 2006, s. 1159(1) (a), holding the majority of voting rights is noted. Second, CA 2006, s. 1159(1) (b) suggests that controlling the board of directors amounts to control of the company as well. And third, CA 2006, s. 1159(1) (c) encompasses the situation where corporate control can be exerted indirectly as a consequence of an agreement with other members.[79] Moreover, CA 2006, s. 1159(2) describes the meaning of a wholly-owned subsidiary which is also possible to be a part

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77 These provisions are partly as a result of the EU influence. See **A, Daehnert**, "Lifting the corporate veil: English and German perspectives on group liability", International Company and Commercial Law Review, 2007, p. 3.

78 **Boyle & Birds'** company law / editors, John Birds ... [et al.]; consultant editor, A.J. Boyle, Bristol: Jordans, 2011, 71.

79 Hannigan, 18.

of group of companies. The definition in the CA 2006 s 1159(1)(2) suggests several variations in relation to group of companies. Hence, a group may be formed simply by a parent and subsidiary or subsidiaries. Further, it might be structured in a multi-tiered way involving sub-subsidiaries.[80]

Meanwhile, it should be noted that terms of *holding company* and *parent company* are used interchangeably. However, there is a little difference in nuisance. Former is generally used for those whose sole function is to control the operations of subsidiaries. On the other hand, the latter has a broader meaning. The *parent company* carries out its own trading activities in addition to being a holding company for its subsidiary. Within the system of the CA 2006, the term *parent company* is used with regards to company accounts whereas that of *holding company* is used for other issues in relation to group structures.[81] Still, in this essay these terms are used interchangeably but the term of parent is preferred.

Lastly, regarding the intra-group relations L.J Roskill's remarks in *Albacruz v Albazero* may be helpful to find out the widespread understanding in the English jurisdiction:[82]

"…each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law"

*c) Characteristics of veil piercing in the English company law*

The English company law approach to entity law doctrine is known to be too conservative since the very beginning. The landmark judgment of *Salo-*

80 Hannigan, 18.

81 **Gower & Davies**: Principles of Modern Company Law, by Professor Paul Davies (Author, Editor), Professor Sarah Worthington (Author), Sarah Worthington (Editor), Ninth Edition, Sweet&Maxwell, 2012, 248.

82 *Albacruz (Cargo Owners) Respondents v Albazero (Owners) Appellants* House of Lords [1977] A.C. 774; see **F.G. Rixon**, "Lifting The Veil Between Holding And Subsidiary Companies", Law Quarterly Review, 1986, 4.

*mon v Salomon*[83] suggests an absolute separation of legal personality of the company from its members. Notwithstanding, courts, at times, exceptionally challenging this rigid approach, have lifted the corporate veil to impute the liability of company to a member of it. In this regard, some conclusions can be drawn on the legacy of veil piercing in the English company law.

First, the jurisdiction of veil piercing drawn by the English courts is narrow and used exceptionally. The rationale behind this approach may be the fear of decreasing the effective use of the limited liability company.[84] Secondly, corporate veil is lifted as much as it was considered necessary. That is to say, veil piercing is an exceptional procedure and should only address the particular wrongs stemming from the separation of corporate personality. Thereby, a total disregard of the corporate personality has not been accepted. For example, if a company is used to evade from the implementation of an obligation arisen from a contract, the court would order the implementation of that particular obligation rather than totally disregarding the legal personality.[85]

On the other hand, even though veil piercing is an exceptional course of action, it is not limited to circumstances where an alternative remedy does not exist. Accordingly, there is no requirement of necessity to pierce the veil.[86]

*d) The "Single Economic Unit" approach in English case law*

Single economic unit doctrine, explained in previous chapters, also had a repercussion in English case law in relation to veil piercing in groups of companies. Similarly, the single economic unit approach in English law suggests the inappropriateness of the strict entity law approach of *Salomon* for group structures. Thus, considering the economic reality, it is argued that courts ought to allow veil piercing in groups of companies more readily because

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83 *Salomon v Salomon & Co Ltd* [1897] A.C. 22.

84 Hannigan 46

85 Hannigan 46; see *Faiza Ben Hashem v Abdulhadi Ali Shayif* 22 September 2008 para 164: "…the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes."

86 Antonio Gramsci Shipping Corporation & Others v Oleg Stepanovs [2011] EWHC 333 (Comm), para: 21. Hannigan 46

these companies carry out their businesses as a group, raise capital as a group and accordingly should be treated as a group. [87]

Especially, Lord J Denning's contribution to this literature is undeniably noteworthy. In the landmark case of *DHN Food Distributors Ltd v Tower Hamlets LBC*[88] his notes started the great discussion over the single economic unit approach. This is actually not a classic veil piercing case aiming to impute liability. The group of companies in consideration consisted of a parent, DHN Food Distributors Ltd and two wholly-owned subsidiaries, DHN Food Transport Ltd and Bronze Investments Ltd. The vehicles used in the business were owned by the subsidiary DHN Transport whilst Bronze Investments Ltd possessed the premises where the business was conducted. The directors were the same in the case of each company. Due to the compulsory purchase order of Tower Hamlets London Borough Council (Council) for the premises, the parent and the two subsidiaries went into voluntary liquidation. The acquiring authority contended that the owner of the premises, Bronze Investments Ltd, was entitled to its value, but not entitled to compensation for disturbance because it had no business. On the other hand, the parent DHN distributors and subsidiary DHN transports suffered from the disturbance but were not entitled to compensation because they did not have any interest in the land. In short, if the business, premises and the vehicles used in the business had been found under the same ownership, compensation for both disturbance and premises would have been payable according to the rules of Land Compensation Act 1961. [89] The decision of The Lands Tribunal which upheld the contention of Council was reversed by the Court of Appeal on the basis of single economic entity.

Lord Denning M. R. noted that subsidiaries involved were wholly-owned, and thus, it indicated that every movement of subsidiaries could be controlled by the parent.

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87 Hannigan, 55.

88 *D.H.N. Food Distributors Ltd. (In Liquidation) v Tower Hamlets London Borough Council*, Court of Appeal, (1976) 32 P. & C.R. 240

89 Rixon, 1.

"These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says… This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company D.H.N. should be treated as that one."

The conclusions we can draw from this case are too limited to outline the single economic entity approach of the English law. *DHN* suggests three options with respect to veil piercing: first, complete control; second, lack of subsidiaries with independent business interest; and third, need for a just solution.[90] In the case at hand, the integration level of the group is nearly absolute; subsidiaries are wholly-owned, directors are same, facilities of each company are used for the same business activity, the parent is capable of making legal transactions which are also binding for subsidiaries etc. If the group was less integrated and the subsidiaries at least were not wholly-owned, what the result would have been is not clear. That is to say, it hasn't been evidently revealed whether corporate control is sufficient to refer a group of companies as a single economic entity or if the degree of control is a determinant factor. On the other hand, due to the nature of the case, imposition of liability was touched upon in no means. Consequently, the *DHN* case does not give us a comprehensive definition of a single economic unit approach, which is a significant flaw as such.[91]

The reaction of the House of Lords to the single economic unit raised in the *DHN* appeared two years later. In *Woolfson* v *Strathclyde Regional,* the House of Lords robustly rejected the single economic entity approach suggesting that the Court of Appeal inappropriately applied veil piercing which is only justifiable when a company is a mere *façade* concealing the true facts.[92]

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90 Kershaw, 64.

91 **T. K. Cheng**, "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines", 34 B.C. Int'l & Comp. L. Rev. 329 (2011), http://lawdigitalcommons.bc.edu/iclr/vol34/iss2/2, 390.

92 *Woolfson* v *Strathclyde Regional Council* 1978 S.C. (H.L.) 90. see Lord Keith's remarks.

As compared to *Woolfson* v *Strathclyde Regional*, the landmark *Adams* v *Cape Industries plc* judgment may be considered as a slight progress because it at least recognized the single economic unit "nominally". However, in practice, it did not bring about any considerable change.

The companies considered in the case were Cape, an English parent company whose business was mining and marketing asbestos, Capasco, an English subsidiary for world wide marketing, and NAAC, a US marketing subsidiary of Cape. Cape and its two subsidiaries were sued by hundreds of people before the Texas court for personal injuries caused by business operations involving asbestos. Cape and Capasco denied the jurisdiction of the Texas court. Meanwhile, Cape shut down NAAC and formed other subsidiaries instead to minimize its presence in the USA under the pretext of reorganization. Later, it sold its asbestos business, thereby leaving no assets in the United States. As a result, claimants sought to enforce the judgment in England against Cape's assets. [93] Herein, the significant issue was to determine whether Cape was present in the US through its US subsidiaries or not. In this regard, the court examined the possibility of veil piercing. [94] The scenarios, whether the parent and subsidiaries formed a single economic unit or were the subsidiaries a mere façade or agents of the parent, were comprehensively discussed by the court. [95] In relation to the single economic entity approach, the court maintained the same stance it had taken in the previous cases. In this regard, LJ Slade propounded the strict entity law approach without paying any attention to the distinctive position of the group of companies. He ruled:

"…the court is not free to disregard the principle of Salomon v. Salomon merely because it considers that justice so requires. Our law, for better or worse, recognizes the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

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93 Dignam&Lowry, 37; **S Griffin**, "Holding companies and subsidiaries - the corporate veil", Comp. Law. 16, 1991.

94 Dignam&Lowry, 37

95 Dignam&Lowry, 37

When it came to the assessment of Single Economic Entity approach proposed in *DHN* he went on:

"In the light of the set-up and operations of the Cape Group and of the relationship between Cape/Capasco and N.A.A.C. we see the atrraction of the approach adopted by Lord Denning M.R. in the D.H.N. case (1976)…

In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J. that the observations of Robert Goff L.J. in *Bank of Tokyo Ltd. v. Karoon (1987) A.C. 45 (at p. 64)* are apposite:"

"(Counsel) suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically he said they were one. But we are concerned not with economics but with law. The distinction between the two is in law fundamental and cannot be bridged"."

So, in the *Adams v Cape,* the court confirmed once again the approach, attaching superiority to legal formalism over economic reality. Although the court acknowledged the attraction of L.J Denning's approach, considering the relationship between group members, it rejected to accept the single economic entity approach as veil piercing ground for liability imputation purposes. However, it was admitted that a single entity approach may be allowed in circumstances where the interpretation of a statute or a document justifies the treatment of a parent and subsidiary as a single entity. [96]

On the other hand, as observed by *Dignam*, in recent years some decisions have started to appear suggesting a more realistic view towards liability issues in group structures.[97] In this regard, the decisions of *Beckett*[98] and *Chandler* v *Cape*[99] may be referred to as examples of a new perspective diverting away from the strict entity law approach. In *Beckett* L.J. Maurice Kay declined the

[96] Gower&Davies**,** 218; Dignam&Lowry, 39.
[97] Dignam&Lowry, 43
[98] *Beckett Investment Management Group Ltd & ors v Glyn Hall & ors*, Court of Appeal (Civil Division), [2007] EWCA Civ 613
[99] *Chandler v Cape Plc*, [2012] EWCA Civ 525.

strict entity law approach, stating that he did *not feel inhibited by a purist approach to corporate personality* and demonstrated tacitly his sympathy with L.J. Denning's view:

"The answer is, I think, the law today has regard to the realities of big business. It takes the group as being one concern under one supreme control"[100]

As for *Chandler v Cape plc,* it is basically a case of attribution of tortious liability of the subsidiary to the parent. Facts in this case are quite similar to the ones in *Adams v Cape.* Mr. Chandler is an employee of the wholly-owned subsidiary of Cape plc, Cape Building Products Ltd, and has suffered personal injuries as a result of the asbestos operations of the employer subsidiary. As the subsidiary ceased to exist, the injurer sought to attribute the liability to the parent company, claiming that the parent had an influence over the subsidiary's health and safety policy. In this regard, the Court of Appeal considered whether or not Cape owed a direct duty of care to the employees of its subsidiary to advise on, or ensure, a safe system of work for them as a principal issue. The judgment that found Cape liable for its subsidiary's act on the basis of the concept of common law of assumption of responsibility was upheld by the Court of Appeal. In a sense, the imposition of liability to the parent in a group structure on the grounds that the parent has control over its subsidiary's safety policy can be considered as an achievement of LJ Denning's single economic entity approach. Nevertheless, it seems a little optimistic, especially considering the following Lady Justice Arden's statement: [101]

"I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company."

In fact, as far as tortious liability of the subsidiary is considered, the unjust results of the entity law approach in a group of companies are rather more

100 *Littlewoods Organisation Ltd v Haris* [1977] 1 WLR 1472
101 *Chandler v Cape Plc*, para: 69

apparent when compared with the cases involving the subsidiary's liability stemming from contractual debts. [102] First of all, tort victims, in other words involuntary creditors, do not have an opportunity to assess the risks associated with the business and insure themselves beforehand. [103] Opinions go to an extreme, such that *Hansmann* and *Kraakmann* have proposed the total abolishment of limited liability in tort cases involving groups of companies on the grounds that limited liability provides incentives to show excessively risky behaviour. [104] Herein, limited liability enables a parent to externalize liability which may arise from the risky nature of the business. For instance, the parent may form several undercapitalized subsidiary companies and assign them the risky operations of the group enterprise, such as mining. In case of an accident in the mine, the injured employees can only resort to the assets of the subsidiary under the current strict interpretation of the limited liability doctrine, which is apparently unjust. [105] Considering the recent *Cape* judgments, we can conclude that the issue is handled from the point of culpability on the part of the parent company. Accordingly, it has been examined whether the parent can directly be held liable or not. [106] In this regard, the issue has not been taken into account from the perspective of imputation of liability and veil piercing procedure.

Although the *Beckett* and *Chandler* decisions are assumed to be a sign of growing tendency to LJ Denning's single economic entity approach, [107] it is obvious that there is still a long way to go. Particularly, some recent judgments have blatantly attacked L. J. Denning's approach, for instance *Linsen Interna-*

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102 Hannigan, 57

103 Dignam&Lowry, 43

104 **H Hansmann and R Kraakman**, "Toward Unlimited Shareholder Liability for Corporate Torts", The Yale Law Journal, vol: 100, 1991, pp. 1879 – 1934.

105 **P. Muchlinski**, "Limited liability and multinational enterprises: a case for reform?" Cambridge Journal of Economics 2010, 34, 915–928, 257; Pettet, 154: "if a person loses his health and livelihood and obtains a tort judgment against an insolvent company and the judgment is then unsatisfied, is it really an adequate answer to tell him that the shareholders are immune from liability because overall that is beneficial to the community?"

106 **L. Sealy and S. Wortington**, *Sealy and Worthington's Cases and Materials in Company Law*, Oxford University Press, Oxford, 2013, p. 55; Muchlinski, 258.

107 Dignam&Lowry, 43

*tional Ltd v Humpus Sea Transport Pte Ltd*,[108] have indicated that a strict entity law approach still maintains its entrenched position within the English jurisdiction. Assessment of the court may be helpful to make some deductions for the purpose of our research. In this judgement, the single economic unit was categorically rejected as being a veil piercing cause. In return, a *façade* company and fraud were noted as proper veil piercing tests.

"…In other words it is not enough to show that a company or a group of companies is closely controlled by an individual or a family or by a holding company. If the element of control were sufficient in itself, the English courts would have accepted the concept of the "single economic unit" which, as I will demonstrate later in this judgment, has been consistently rejected by our courts. The claimant who wishes to pierce the corporate veil must show not only control but also impropriety, in the sense of misuse of the company or the corporate structure to conceal wrongdoing."[109]

On the other hand, the judgement has some interesting points with regards to corporate control. In the judgment, the court evidently signified that the close relationship between the group members does not indicate the existence of a single economic unit. In this regard, the following facts were not found justifiable to disregard the separate corporate personalities of the group members:

- Commonality of directors,[110]
- Control of management,[111]
- Even further, management of the ultimate parent,[112]
- Common finance.[113]

This is probably the strictest attitude to take against the single economic unit theory in favour of entity law doctrine.

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108 *Linsen International Ltd v Humpus Sea Transport Pte Ltd* High Court of Justice Queen's Bench Division Commercial Court , [2011] EWHC 2339 (Comm)
109 Linsen para: 19
110 Linsen para: 38
111 Linsen para: 39
112 Linsen para: 40
113 Linsen para: 41

*e) Agency vs. Single Economic Unit*

As noted above, an *Agency* and a *Single Economic Unit* are held under different veil piercing categories by the judiciary and scholars. Agency, as a veil piercing ground, implies that if a company is acting as an agent for another person, similar to the relationship between agent and principal, corporate veil maybe pierced.[114] Yet, these arguments are similar in a sense that both may result in the identification of the parent and its subsidiaries as a single unit. In fact, in some cases, for instance in the *Smith, Stone & Knight v Birmingham Corpn*, [115] it appears that the courts have used the terms *Agency* and *Single Economic Unit* interchangeably. [116] Substance of this case is quite similar to that of the *DHN* case and Atkinson J. held the subsidiary as an agent of the parent. He suggested the following criteria for the test of agency relationship:

(a) Were the profits treated as profits of the parent? (b) Were the persons conducting the business appointed by the parent? (c) Was the parent the head and brain of the trading venture? (d) Did the parent govern the venture; decide what should be done and what capital should be embarked on the venture? (e) Did the parent make the profits by its skill and direction? (f) Was the parent in effectual and constant control?

It is noteworthy to see that these arguments can also be put forward for the justification of a single economic unit. In fact, whether the term *agent* was used consciously with reference to the Agency argument is dubious as Atkinson J. also described the company as "the agent or employee, or tool or simulacrum". Therefore, the criteria indicated in *Smith, Stone & Knight* may also be taken into account while examining whether or not the parent and the subsidiaries form a single economic unit.

Apart from this, the agency principle would have a narrower application, given the approach adopted in *Adams v Cape*. Unlike *Smith, Stone & Knight*,

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114 **L. Gallagher and P. Ziegler**, "Lifting the corporate veil in the pursuit of justice", Journal of Business Law, 1990, p. 294.

115 *Smith Stone & Knight Ltd. v Birmingham Corpn* [1939] 4 All ER 116

116 Avgitidis 183

the court straightforwardly applied the agency principle in *Adams v Cape*, which has made it quite difficult to establish an agency link between the parent and the subsidiary, save for an express agency agreement. [117] On the other hand, interference only in the day-to-day management of the subsidiary was referred to as an indicator of Agency linkage. [118] In *Atlas Maritime,* Staughton L. J. illustrates the conservative approach of the English law very well: [119]

"The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry, and perhaps elsewhere. To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine."[120]

On the other hand, the single economic unit is a distinct approach unique to the groups of companies and it may have a group liability aspect as well

*f) Conclusion*

The single economic unit doctrine was put forward by L. J. Denning for unjust outcomes of the strict application of the principle of the entity law doctrine. He has simply suggested that priority should be given to economic reality rather than legal formalism if necessary for justice. However, the effect of this view has been weaker than it should've been. L. J. Denning's proposal could have been assessed more comprehensively. It has been categorically rejected on the ground that the mere existence of a group of companies is not sufficient to hold it as a single economic unit. It is true, but the cases in question did not merely concern group structures; the subsidiaries involved were at least the ones that were wholly-owned. Especially, from the last case referred above, *Linsen*, it can easily be concluded that the single economic entity is not seen as a category for veil piercing. The court in its decision has apparently stated that domination or decisive control is not sufficient to

117 Dignam&Lowry, 38
118 Kershaw, 70
119 Gower&Davies, 223
120 *Atlas Maritime Co. S.A. v Avalon Maritime Ltd.* 1991 WL 837902

pierce the veil. Some supplementary elements, such as fraud, façade use of the company etc., are needed as well.

## IV. CAN THE EU COMPETITION LAW APPROACH SET A PRECEDENT?

The idea that groups of companies should be treated, especially in liability issues, under a different regime, is gaining increasing support. It is clear that the current limited liability approach, which was essentially developed in view of the single company, does not square with the group of companies and this *status quo* is not sustainable. Therefore a new model, peculiar to the functioning of groups of companies, needs to be devised. [121]

The rationale behind the thought of imputation subsidiary liability to corporate parent is the assumption of common group strategy. In other words, in a group structure, a subsidiary legally has an independent legal personality, however, may not have a managerial independency. Thus, the interests of the subsidiary company may be subordinated for the group or the parent company benefit.[122] As such, the business decisions may be taken in line with the priorities of the group as a whole or considering the parent company. Similarly, business operations may be structured to increase wealth of the group or the parent to the detriment of subsidiary companies. In such a case, creditors and other shareholders of the subsidiaries are likely to be put in a disadvantaged position for the benefit of the parent company. Therefore, it would be claimed that these disadvantaged stakeholders should be answerable by the parent company in the event of failure of the subsidiary.[123]

The dominance of the parent enables it to manipulate the group enterprise and subsidiaries at its discretion. It can divide its business into separate parts and can establish a poorly capitalized subsidiary for each of them. Furthermore, it can also use its control to undercapitalize these companies through asset stripping or transferring from one subsidiary to another in accordance with the enterprise priorities. Moreover, it may wind up the subsid-

121 Avgitidis, 115
122 Avgitidis, 71
123 Gower&Davies, 244.

iary if necessary for higher group benefits insofar as the parent is not charged with a burden of sufficiently capitalize its subsidiaries.[124] It would be claimed that these kinds of acts are likely to be caught by *fraud* or *façade* company categories; however, it is not always the case. In *Re Southard Ltd* L. J Templeman put the it briefly as;

"English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary"[125]

As noted above, English courts have rejected veil piercing on the grounds that the existence of group of companies does not account for the presence of the single economic unit. It is true that the mere existence of group of companies does not mean they form a single economic unit. But, on the other hand, the reality of economically integrated group of companies can not be ignored. The rigid approach of English courts does not make any distinction as to the integration level within the group.

The single economic unit approach does not cover all types of group structures. It concerns only those groups that are unified under the common business strategy of the parent company which exerts corporate control over the subsidiaries at a level of decisive influence. Under such a structure, limited liability is likely to be abused against the creditors of the subsidiaries because the benefit of the group or parent is prioritized over that of the subsidiary. For this reason, the integrity level of the Group, uniformity in the application of the group policies and common business strategy should be taken into account first. Thus, the groups of diversified businesses, namely the conglom-

[124] **J. M. Landers**, "A Unified Approach To Parent, Subsidiary, and Affiliate Questions in Bankruptcy", 42 U. Chi. L. Rev. 589 1974-1975, 608.

[125] *In re Southard & Co. Ltd*, [1979] 1 W.L.R. 1198

erate groups, may not be included in this category of integrated groups, and thus, in the scope of the single economic unit doctrine. [126]

Obviously, a parent's dominance over its subsidiaries creates a very insecure business environment for the creditors of the latter. This situation concomitantly brings about an intra-group liability problem, namely the problem of imposition of subsidiary liability. For a solid and comprehensive solution to the intra-group liability problem, the revival of the single economic unit doctrine, which was first proposed by L. J. Denning, is required since the current categories of veil piercing, such as façade, fraud or agency are far from doing this. In this scenario, the European experience in the competition cases could be beneficial in outlining this theory again.[127]

In the light of research carried out so far, the following points can be considered as the controversial issues regarding single economic unit doctrine:

1. Scope and qualification of *corporate control*: Whether the degree of the control should have a significance or not? That is to say, is the mere existence of group structure supposed to be held sufficient to consider it as a single economic unit or should there be something more than this? Does it need to be exercised actually or would potential control be sufficient? Furthermore, does it need to have any extra quality such as bad or good control?

2. In case of group of companies involving wholly-owned subsidiaries, is it necessary to adopt some presumptions about corporate control?

3. Group liability: provided that the group is a multi-tiered one consisting of corporate parent and a number of subsidiaries and one of the group members became insolvent, whether the liability on that particular member can be attributable only to its corporate shareholder or would it be possible to attribute liability to the top holding parent or other subsidiaries within the group structure, jointly or severally?

[126] Gower&Davies, 244 supra note: 89.
[127] Boyle & Birds, 75, 76.

### A. CORPORATE CONTROL

Like every majority shareholder, parent company exercises control over its subsidiary. In fact, the parent's control generally goes beyond that of a typical majority shareholder because the parent's power does not only derive from mere shareholding; it also has a managerial control over its subsidiary. Therefore, the parent has an ability to govern its subsidiary directly or indirectly by virtue of centralized managerial organisation of the group. [128]

As we remember, the EU competition law approach does not consider bare control to be sufficient. In order to hold a group of companies as one single unit, corporate control must amount to a level where the parent can exercise decisive influence over the subsidiary. As a result of this control, the subsidiary does not have an economic autonomy to take its own strategic business decisions. This is a proper test because if mere corporate control were to be held sufficient, all groups of companies would be deemed as a single economic unit; consequently, it amounts to the indirect removal of limited liability within a group of companies, which does not square up with the exceptional feature of the veil piercing. Therefore, the degree of corporate control and whether it has reached to a level of decisive influence should be assessed to determine the managerial integrity of the group structure. In this regard, the distinction made by *Grundmann* would be helpful to detect what sorts of groups are covered by this theory. With regard to economic independence, group of companies can be divided into two; first are the groups comprised of economically independent subsidiaries; second are the ones with economically dependent subsidiaries. [129] As *Avgitidis* puts it in his empirical study, typical group structure predominantly involves wholly-owned subsidiaries and the whole group is governed under a centralized managerial organisation, which subordinates the subsidiaries' interests and managerial autonomy. [130] Actually, the economic (in)dependence of the subsidiary in fact needs to be assessed on a case-to-case basis. Exceptionally, there would be a

[128] Avgitidis, 81

[129] **S. Grundmann and F. Möslein**, *European Company Law; Organization, Finance and Capital Markets*, Antwerpen; Oxford: Intersentia, 2007. 628

[130] For the findings of the survey See Avgitidis, 72 et.

group structure where the parent does not exercise its corporate control decisively. For example, subsidiaries may have broader autonomy in horizontal and conglomerate groups, or the parent may only be an institutional investor whose only concern is to make profit from the shares of the subsidiary. [131] These cases are out of the scope of the single economic unit approach.

Provided that the business affairs of group members are organized from one centre – parent or holding company – and subsidiaries do not enjoy managerial autonomy, such a group could be considered to be highly integrated. These subsidiaries operate like the units or departments of the same company. [132] Accordingly, in this kind of a group structure, controlling power of the parent company is at a decisive level. Likewise, activities such as asset stripping and transferring between group members or common use of physical facilities, buildings, vehicles, employees or commingling of assets, insufficient capitalisation of the subsidiary, permanent need for financial support of the parent, interlocking of directorships, extensive economic integration, the utilisation of group reputation, financial dependence, administrative dependence and manipulation of the assets can be highlighted as some indicia demonstrating the domination of the parent. This listing can be extended further but it is obvious that every case needs to be assessed on its factual basis.[133] In short, it should be emphasized that if the parent's controlling power is so great as to render the subsidiary unable to take important business decisions autonomously, this would imply the existence of a single economic unit, and thus it would justify veil piercing within the group of companies.

Furthermore, the second part of the decisive influence test of the ECJ is important to distinguish economically dependent subsidiaries: the actual exercise of the decisive influence. In this regard, mere presence of dominance is insufficient. The actual use of influence should be established on the factual

131 Avgitidis, 278

132 Grundmann& Möslein, 628

133 D. Brodie, "The enterprise", *Enterprise Liability and the Common Law*. 1st ed. Cambridge: Cambridge University Press, 2010. pp. 55-65. *Cambridge Books Online.* Web. 06 August 2014. http://dx.doi.org/10.1017/CBO9780511778711.006, p. 62; Blumberg, 186; Avgitidis, 285

body of evidences. To illustrate, in such a case, akin to *DHN* or *Cape v Adams*, where the single economic unit argument is raised, the court should be required to examine whether or not the parent gives instructions over strategic management matters of the subsidiaries as well as ensures the application of these instructions. Although some commentators set forth that the control is required to be exercised in the daily operations of the subsidiary, parent's exercise of control in strategic decision making processes of the subsidiary should be taken sufficient.[134]

Moreover, it is also argued that the decisive control must have been used for the benefit of the group or the parent company and to the detriment of the subsidiary in question. In other words, the control should be able to be qualified as "bad".[135] Otherwise, the subsidiary's liability should not be imputable to the parent. This view argues that the structural approach is too far-reaching and it gives rise to automatic and general liability of the parent. For this reason, a behavioural approach should be developed, which attaches importance to the concrete acts of the parent rather than structural factors, such as dominant shareholding.[136] This approach, in effect, would result in the examination of culpability of the parent or its wrongful conduct.[137] The single economic unit approach moves from the idea that the parent decisively controls its subsidiaries in effect, and thus, it should be liable for its affiliates' acts. In addition to this assumption, if bad control is adopted as a condition, it means the repetition of current mindset and we would make no headway. On the other hand, it would cause the externalisation of tort cases.[138] Further, it would be difficult for the claimants to prove the parent company's damaging management especially considering the multi-tiered vertical group structures where the parent exercises its control indirectly. Accordingly, the ECJ's test of existence and actual exercise of decisive influence is considered fine and could be taken as a precedent.

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134 Cheng, 408
135 Avgitidis, 281
136 Vandekerckhove, 539
137 Brodie, 62.
138 **M. Dearborn**, "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups" 97 Cal. L. Rev. 195 2009, p. 248.

**B. WHOLLY-OWNED SUBSIDIARIES**

Wholly-owned subsidiaries require a distinct consideration because the only rationale for establishing a wholly-owned subsidiary would be asset partitioning. Therefore, some significant benefits of the limited liability, such as raising equity capital, trading of shares on public exchanges etc. are not available in this case. [139] It is clear that 100 percent shareholding only serves the purpose of transferring the risks of the enterprise to the creditors. [140] In this regard, the realistic approach developed by the EU competition law is justifiable. As mentioned above, 100 percent shareholding is held as a rebuttable presumption of a parent's decisive influence over its subsidiary.

In English company law, 100 percent shareholding has been a subject of discussion as to whether the company becomes an agent of the shareholder. Both *Salomon v Salomon* and *Gramaphone & Typewriter Co Ltd v Stanley*[141] evidently have stated that 100 percent shareholding does not demonstrate a *per se* agency relationship. The same is also valid for group of companies; it is argued that a wholly-owned subsidiary is not *per se* an agent of the parent. [142]

When it comes to the English company law, whether a presumption similar to the one applied by the ECJ should be adopted or not is controversial. Prof *Schmitthoff* suggests two presumptions regarding agency argument. First, if the subsidiary is a wholly-owned company, it should be deemed as the agent of the parent as a consequence of a conclusive presumption. Second, if it is not a wholly-owned company but the parent has a majority shareholding, then it should be held as an agent by virtue of rebuttable presumption.[143] Contrary to this, *Muchlinski* proposes that the 100 percent shareholding should only give rise to a rebuttable presumption. [144]

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139 **K. Hofstetter**, "Parent Responsibility for Subsidiary Corporations: Evaluating European Trends", International and Comparative Law Quarterly / Volume 39 / Issue 03 / July 1990, pp 576 – 598, p. 577; Gower&Davies, 244

140 Avgitidis, 274

141 *The Gramophone And Typewrıter, Lımıted V. Stanley*, 1853 (16 & 17 Vict. c. 34), Sched. D.

142 Hannigan, 41, 42

143 Avgitidis, 276

144 Muchlinski, 254

If a presumption similar to the ECJ's presumption of decisive influence had been adopted in English veil piercing cases, the results of some controversial cases, most notably the *Cape v Adams*, would have been different. In *Adams v Cape* the Court of Appeal interestingly refused to equate 100 per cent shareholding with control of the parent on the grounds that the subsidiary had the ability to enter into its own contracts without the need to seek Cape's approval whilst it admitted the overall control of the parent over the subsidiary's policy directives.[145] In short, the court sought for a control exercised on the day-to-day operation of the subsidiary. Obviously, how realistic an approach was adopted by the court is doubtful.

To sum up, such a rebuttable presumption would give rise to fairer results. Accordingly, contrary to the *Salomon* approach, the groups consisted of wholly-owned subsidiaries ought to be automatically held as single economic unit as a consequence of the rebuttable presumption to be adopted.

### C. PROBLEM OF GROUP LIABILITY

To whom the subsidiary's liabilities would be imputable is an important question of the single economic unit doctrine. As we recollect, the ECJ ruled in a series of competition cases that the parent, direct or top holding company, and sister companies within the group would jointly and severally be liable for the subsidiary's liabilities. The rationale behind group liability is the argument that the group as a whole is engaged in a business enterprise, under a common control and common equity ownership, thus, entire group assets should be available to the claimants. As such, the liabilities of the subsidiary can be imposed on the components of the group; sister subsidiaries or the parent company.[146] This is actually a natural consequence of veil piercing on the basis of single economic unit. When the entire group is deemed as one entity, all its assets become available to the creditor who cannot be satisfied with the assets of the subsidiary in consideration.

Hereunder, it is arguable that the single economic unit approach is not

[145] Griffin, 3.
[146] Blumberg, 161

required to be confined with the imputation of subsidiary liability to the parent.[147] Therefore, the liabilities can also be transferred to sister subsidiaries depending upon the integration level of the businesses of the companies concerned.[148] For example, in a group of companies, all the subsidiaries are conducting different parts of one unified business, for example a group similar to the one in the *DHN* case, and thus the business affairs of the group members are highly relevant to each other, the liability of a subsidiary can laterally be imputable to a sister company. Contrary to it, it is argued that in group structures involving subsidiaries engaged in different business activities, for instance a conglomerate group structure, lateral imputation should not be possible.[149]

Actually, the integration level of the group business should be assessed in the first step of the examination; establishing whether the companies exist in the form of a single economic unit. When it is established that the group can be held as a single economic unit, the court must have the discretion to impute liability to the group members jointly and severally or on *pro rata* basis. The group's liability and the imputation to group members other than the parent have actually never been discussed within the English jurisdiction and there is no any existing case regarding this approach.

This question is particularly significant for groups engaged in hazardous business processes which may give rise to tortious liabilities. In case of mass tort litigation, the assets of the parent company may not be sufficient to meet all claims. In such a case, the assets of the entire group must be available to ensure a sufficient capital fund to satisfy claims.[150]

To summarise, the group liability approach developed by the ECJ with regard to competition cases are viable and can be held as a precedent in veil piercing cases as well. Moreover, it would be proper to require that the liability can be imputable on the condition of insolvency of the actual debtor

147 Cheng, 403
148 Cheng, 405
149 Cheng, 405
150 Muchlinski, 266

subsidiary company. Consequently, it would ensure that creditors should first recourse to their debtor. As a result of the creditor's attempt, if it is found out that the subsidiary is insolvent, then the creditor can initiate a veil piercing litigation against the other group members. Thereupon, the court must have full discretion so as to determine the scope of the imputation, considering the financial status of the group members, in accordance with the facts of the case

## CONCLUSION

It is obvious that the present approach within the English jurisdiction towards the intra-group liability problem is not consistent with the business reality and gives rise to unjust results. In veil piercing cases, the single economic unit doctrine drawn by the European Courts would be beneficial to create a more effective approach to this problem. The main features of this doctrine, decisive influence test, presumption of dominance regarding wholly-owned subsidiaries and group liability, may be adopted with some modifications.

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# DUTY OF CARE INCUMBENT ON THE CONTRACTING STATES WITH REGARD TO THE DETENTION OF ILL AND HANDICAPPED PERSONS UNDER THE CASE-LAW OF THE EUROPEAN COURT ON HUMAN RIGHTS

*Avrupa İnsan Hakları Mahkemesi Kararlarında Üye Devletlerin Hasta ve Engelli Olan Hükümlü ve Tutuklulara Karşı Özen Yükümlülüğü*

**Başar YILMAZ* – Ömer Taha ÖZKAN****

**ABSTRACT**

The European Court of Human Rights examines the condition of detention of ill and handicapped persons under Article 3 of the Convention. This examination is mainly based on the principle that the Contracting States owe a duty of care against these persons. This article aims to provide for a general overview of the case-law of the ECHR on detention cases involving these categories of persons. The case-law does not require from the Contracting States release of the ill or handicapped detainees. However detention conditions should be reasonably adapted to ill and handicapped persons and the appropriate medical care should be provided to them during their detention.

**Key Words:** Detention conditions - ECHR- ill and handicapped persons -duty of care-medical care in prison

**ÖZET**

Avrupa İnsan Hakları Mahkemesi, hasta veya engelli olan hükümlü ve tutukluların içinde bulundukları tutukluluk koşullarını, Avrupa İnsan Hakları Sözleşmesi'nin 3. maddesi kapsamında incelemekte ve bu incelemesinde de üye devletlerin bu durumda olan mahkûm ve tutuklulara karşı özen yükümlülüğü altında olduğu prensibinden hareket etmektedir.

İşbu makale, Avrupa İnsan Hakları Mahkemesi içtihadının, üye devletlerin özen yükümünün kapsamına dair genel bir incelemesi olma amacını taşımaktadır. Mahkeme içtihadı, hasta veya engelli tutukluların salıverilmesini şart koşmamakla beraber,

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tutukluluk koşullarının bu kişilere göre makul ölçülerde adapte edilmesini ve bu kişilere cezaevinde de uygun tıbbi yardım sağlanması gerektiğini belirtmektedir.

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**INTRODUCTION**

Conditions of detention or treatment of individuals in a place of detention may amount to inhuman or degrading treatment in the scope of Article 3 of the European Convention on Human Rights.

Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture, inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour[1]. In recent years, the Court had an approach to consider Article 3 issues arising out of detention as "degrading" treatment. In some serious violations, conditions of detention can even amount to inhuman treatment in some contexts[2]. In the scope of this problematic, "detention" can be a detention on remand[3] or following a criminal conviction rendered by a competent domestic court[4]. Also in cases of detention pending deportation[5] some violations of the prohibition of degrading treatment were established.

Treatment is considered to be "degrading" within the meaning of Article 3 when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.[6] The public nature of the treatment may be a relevant or aggravating factor in assessing whether it is "degrading" within the meaning of Article 3.[7]

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1 *Labita v. Italy [GC],* no. 26772/95, § 119, ECHR 2000-IV.
2 *Raninen v. Finland*, 16 December 1997, *Reports of Judgments and Decisions* 1997VIII
3 *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002VI.
4 *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004VII
5 *Dougoz v. Greece*, no. 40907/98, ECHR 2001II
6 M.*S.S. v. Belgium and Greece* [GC], no.30696/09, § 220, ECHR 2011, and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 202, ECHR 2012).
7 *Inter alia*, *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26; *Erdoğan-Yağız v. Turkey*, no. 27473/02, § 37, 6 March 2007; and *Kummer v. the Czech Republic*, no. 32133/11, § 64, 25 July 2013).

In order for treatment to be "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment[8]. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that the execution of detention on remand in itself raises an issue under Article 3. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity[9] and that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. For ill and handicapped persons, the state of health and the severity of the handicap of the detained person should be taken into account in assessing the compatibility of detention conditions[10].

First of all, it is appropriate to set the principle arising out of the case-law of the European Court of Human Rights. Article 3 cannot be interpreted as obliging Contracting States to release a detainee on health grounds or to transfer him to a civil hospital rather than detaining him in prison facility.

The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured[11].Although the Convention does not include a specific provision on that point, this positive obligation was set out by the case-law of the European Court of Human Rights.[12]

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8 V. v. the United Kingdom [GC], no.24888/94, § 71, ECHR 1999-IX; *Ilaşcu and Others v. Moldova and Russia* [GC], no.48787/99, § 428, ECHR 2004VII; and *Lorsé and Others v. the Netherlands*, no. 52750/99, § 62, 4 February 2003).

9 See for explanation of the principle of dignity on constitutionallaw, Marie-Luce PAVIA, Le Principe de dignité de la personne humaine: un nouveau principe constitutionnel, in Les droits et libertés fondamentaux, 4è edition, Dalloz, 1997, pp. 99-115.

10 See *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000XI.

11 seeJacobs, White and Ovey, The European Convention on Human Rights, 5th edn (2010) at.197; *Kudła*, cited above; and *Popov v. Russia*, no. 26853/04, § 208, 13 July 2006).

12 Frédéric Sudre, Droit européen et international des droits de l'homme, 10è edition,

Therefore, Contracting Parties owe a general duty of care to detainees. That obligation to ensure human dignity by avoiding any inhuman or degrading treatment of detainees comprehend adapting the detention conditions for ill and handicapped persons (I) and providing requisite medical care during detention (II).

**I. Adaptation of detention conditions for ill and handicapped persons**

When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant[13]. The length of the period during which a person is detained in the particular conditions also has to be considered[14]. The Court must take account of three factors in particular in assessing whether the continued detention of an applicant is compatible with his or her state of health where the latter is giving cause for concern. These are: (a) the prisoner's condition; (b) the quality of care provided; and (c) whether or not the applicant should continue to be detained in view of his or her state of health[15]. But more specifically, adapting the detention conditions for ill and handicapped persons means on the one hand taking into consideration the applicant's state of health to arrange suitable detention conditions (A) on the other hand to assess the appropriate judicial measure for such detainees (B). The adequate medical care to be given to the detainees in such conditions will be dealt with later in Title II.

**A. Consideration of the applicant's medical condition for detention conditions**

The conditions of detention of a person who is ill must ensure that his or her health is protected, regard being had to the ordinary and reasonable demands of imprisonment. Although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees or place

Presses universitaires de France, 2011, p.341.

13 See *Dougoz v. Greece*, cited above, § 46.

14 See, among other authorities, *Alver v. Estonia*, no. 64812/01, § 50, 8 November 2005.

15 See *Farbtuhs v. Latvia*, no. 4672/02, § 53, 2 December 2004, and*Sakkopoulos v. Greece*, no.61828/00, § 39, 15 January 2004.

them in a civil hospital, even if they are suffering from an illness which is particularly difficult to treat. It nonetheless imposes an obligation on the State to protect the physical wellbeing of persons deprived of their liberty. The Court cannot rule out the possibility that in particularly serious cases situations may arise where the proper administration of criminal justice requires remedies to be taken in the form of humanitarian measures[16]. The Court has already held that the detention of an elderly sick person over a lengthy period may fall within the scope of Article 3[17]. Furthermore, the Court has held that detaining a person suffering from tetraplegia in conditions inappropriate to her state of health amounted to degrading treatment. It should be reiterated that, in the case of mentally ill persons, regard must be had to their particular vulnerability or their inability[18].

**B. Assessment of the appropriate judicial measure for ill and handicapped persons**

Although there is no obligation for national authorities to release a detainee for health grounds, Contracting States should consider other judicial measures is an appropriate judicial measure for an individual whose his state of health is certainly incompatible with detention.

In *Tekin Yildiz v. Turkey*[19], the applicant, who had been sentenced to a prison term, embarked on a prolonged hunger strike while in detention which culminated in his developing Wernicke-Korsakoff syndrome. His sentence was suspended for six months on the ground that he was medically unfit, and the measure was extended on the strength of a medical report which found that his symptoms had persisted. In the light of the results of the next examination, his sentence was suspended until he had made a complete recovery. The applicant was arrested on suspicion of having resumed his activities and

16 See *Matencio v. France*, no. 58749/00, § 76, 15 January 2004, and *Sakkopoulos*, cited above, § 38.

17 See *Papon v. France* (no. 1) (dec.), no. 64666/01, ECHR 2001VI; *Sawoniuk v. the United Kingdom* (dec.), no.63716/00, ECHR 2001VI; and Priebke v. Italy (dec.), no.48799/99, 5 April 2001).

18 See *Aerts v. Belgium*, 30 July 1998, § 66, Reports 1998-V; *Keenan*, cited above, § 111; and *Rivière v. France*, no. 33834/03, § 63, 11 July 2006).

19 *Tekin Yıldız v. Turkey*, no. 22913/04, 10 November 2005

was sent back to prison. All the medical examinations carried out before the applicant was sent back to prison had confirmed the initial diagnosis of Wernicke-Korsakoff syndrome. The applicant's state of health had been consistently found to be incompatible with detention.

The applicant's situation, which had been aggravated by his return to prison and subsequent detention, had attained a sufficient level of severity to come within the scope of Article 3. The Court ruled that the domestic authorities who had decided to return the applicant to prison and detain him for approximately eight months, despite the lack of change in his condition, could not be considered to have acted in accordance with the requirements of Article 3. The Court considered that the suffering caused to the applicant, which had gone beyond that inevitably associated with detention and the treatment of a condition like Wernicke-Korsakoff syndrome, had constituted inhuman and degrading treatment.

In *Sławomir Musiał v. Poland*[20]– the Court ruled that the State is required to secure applicant's transfer to a specialised institution and, generally, to secure appropriate conditions of detention for prisoners in need of special care.

In this case, the applicant had suffered from epilepsy since early childhood and had also been diagnosed with schizophrenia and other serious mental disorders. He had attempted suicide and received in-patient treatment in a psychiatric hospital. In 2005 he was arrested on suspicion of robbery and battery and was thereafter detained in various remand centres without psychiatric facilities. His condition continued to require psychiatric supervision. On several occasions he was taken to a psychiatric hospital for emergency treatment following hallucinations and suicide attempts. He was twice admitted to psychiatric units for periods of several weeks for observation. In his application to the European Court, he made various complaints about the detention facilities, including of overcrowding, insanitary conditions, infestation and a lack of recreational facilities. The applicant further complained of inadequate medical care and treatment for someone in his condition and submitted that

[20] *SławomirMusiałv. Poland*, no. 28300/06, 20 January 2009

he should have been held in a proper psychiatric institution instead of a detention facility.

The Court stated that the conditions – overcrowding, limited access to exercise and recreation, poor hygiene and sanitary facilities – were not appropriate for ordinary prisoners, still less for a person with a history of mental disorder and in need of specialised treatment. Detained persons suffering from a mental disorder were more susceptible to a feeling of inferiority and powerlessness. Accordingly, increased vigilance was called for when reviewing compliance with the Convention in such cases. The very nature of the applicant's psychological condition had made him more vulnerable than the average detainee and his distress, anguish and fear may have been exacerbated by his detention in unsatisfactory conditions. Above all, the authorities' failure during most of the applicant's time in detention to hold him in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward had unnecessarily exposed him to a risk to his health and must have resulted in stress and anxiety. In sum, the inadequate medical care and inappropriate conditions in which the applicant was held had clearly had a detrimental effect on his health and well-being. Owing to its nature, duration and severity, the treatment to which he was subjected was qualified by the Court as inhuman and degrading.

Also, in two recommendations (R(98)7 and Rec(2006)2) of the Committee of Ministers of the Council of Europe stressed the need for prisoners whose mental health is incompatible with detention in prison to be held in suitably equipped facilities. While the recommendations are not binding on member States, the European Court has in recent judgments[21] drawn attention to the importance of complying with them.

**II) Providing the appropriate medical care during detention**

The Contracting States owe duty of care towards ill and handicapped detainees. To fulfil this duty of care, national authorities, should in most, cases

[21] *Rivière v. France*, 11 July 2006, Information note no. 88; and *Dybeku v. Albania*, 18 December 2007, Information note no. 103.

provide an effective and accurate medical assistance (A) which may sometimes bring into question the necessity of compulsory medical intervention (B).

**A. Requisite medical assistance from the Court's Perspective**

The European Court of Human Rights examines the domestic authorities' responsibility to provide requisite medical assistance to the detainees under the positive obligations of Article 3.[22]

Even in its early case-law the Court has examined the conditions of detention and the treatment of detainees under the heading of inhuman treatment, recently such complaints are generally considered from the stand point of degrading treatment.[23] If the lack of the adequate medical assistance gives rise to a medical emergency or causes severe or prolonged pain on the applicant, it may amount to inhuman treatment.[24] However absence of requisite medical assistance causing solely stress and anxiety on the applicant may itself amount to degrading treatment.[25]

In *Slyusarev v. Russia*[26] the Strasbourg Court unanimously found a violation of Article 3 concerning the failure of the Government to provide detainee with defective eyesight with glasses. The applicant suffered from medium-severity myopia. During his arrest, the applicant's glasses were damaged and subsequently confiscated by the police. Notwithstanding their awareness of his problems with his eyesight, it had taken the authorities two and a half months to return the glasses. Accordingly, being without his glasses for several months have caused him considerable distress in his everyday life and given rise to feelings of insecurity and helplessness. Given the degree of suffering it had caused and its duration the Court considered it degrading treatment.

State must ensure that a person is detained in conditions which are com-

22 Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights, 2nd edn (2009) at.191; *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002 IX.
23 Harris, O'Boyle and Warbrick, at 79
24 *Pilčić v. Croatia*, no. 33138/06, 17 January 2008
25 *Sarban v. Moldova*, no. 3456/05, 4 October 2005; Harris, O'Boyle and Warbrick, at 97
26 *Slyusarev v. Russia*, no. 60333/00, 20 April 2010

patible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.[27]

Accordingly certain detainees, inter alia, suffering from a mental disorder[28] or serious illness[29], the disabled[30], the elderly[31] should be provided with particular medical facilities suited to their needs.[32]In *Kaprykowski v. Poland*[33] the applicant suffered from severe epilepsy marked by frequent (daily) seizures, encephalopathy and dementia. Throughout his incarceration a number of doctors stressed that he needed specialised psychiatric and neurological treatment. It was a matter of concern that, during most of that period, he was detained in ordinary detention facilities or, at best, in a prison hospital. Given his personality disorder, he had not been able to take autonomous decisions or go about more demanding daily tasks. That had to have caused him considerable anxiety and placed him in a position of inferiority vis-à-vis other prisoners. His continued detention without adequate medical treatment and assistance had therefore constituted inhuman and degrading treatment.

Likewise in *Ghavtadze v. Georgia*[34] the Court observed that during his detention the applicant had been hospitalised three times when he had successively presented symptoms of acute viral hepatitis C, scabies and tuberculosis pleurisy.

According to a medical opinion given by a specialist in infectious liver diseases, the hepatitis C virus affecting the applicant was developing fast and the progress of the disease in difficult conditions had caused immunodeficien-

27 *Dybeku v. Albania*, no. 41153/06, 18 December 2007
28 see *Kudła*, cited above; and *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001III
29 see *Mouisel*, cited above, and *Matencio v. France*, no. 58749/00, 15 January 2004; and *Sakkopoulos v. Greece*, no. 61828/00, 15 January 2004
30 see *Price v. the United Kingdom*, no. 33394/96, ECHR 2001-VII
31 see *Papon v. France*, no. 54210/00, ECHR 2002VII
32 see*Dybeku*, cited above.
33 *Kaprykowski v. Poland*, no. 23052/05, 3 February 2009
34 *Ghavtadze v. Georgia*, no. 23204/07, 3 March 2009

cy. The Court held that the lack of appropriate medical treatment and, more generally, the detention of a sick person in inadequate conditions could, in principle, constitute treatment contrary to Article 3. In this case the Georgian authorities had failed in their positive obligation to protect the applicant's health but also to administer sufficient appropriate medical treatment for his viral hepatitis C and tuberculosis pleurisy. The Court further held that it was not compatible with Article 3 of the Convention for a detainee to be hospitalised only when his symptoms had reached their peak, then sent back to prison, where he would receive no treatment, before he had been cured. The Court also pointed out that the number of cases pending against Georgia concerning the lack of medical treatment for detainees suffering from contagious diseases revealed a systemic problem.

The Court considers that detainees should be provided with the "requisite medical assistance".[35] Article 3 imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. However the Court accepts that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public.[36]

In *Makharadze and Sikharulidze v. Georgia*[37] the applicant died of pulmonary tuberculosis while serving a prison sentence. The Court found a violation because of the State's failure to provide effective treatment to a prisoner suffering from multidrug-resistant tuberculosis. The Court held that during his sentence the applicant was examined regularly by doctors and received conventional anti-tuberculosis treatment and a suitable diet. However, the core issue of the case was not the absence of medical care in general, but rather the alleged lack of adequate treatment for a very particular type of disease – multi-drug resistant tuberculosis – which caused the applicant's death. It noted that effective treatment of multi-drug resistant tuberculosis depended on the existence of at least three basic factors, namely access to early and accu-

35 *Kudła*, cited above, para 94; and*Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001IV
36 *Khudobin v. Russia*, no. 59696/00, § 93, ECHR 2006XII (extracts)
37 *Makharadze and Sikharulidze v. Georgia*, no. 35254/07, 22 November 2011

rate diagnostic tests, the availability of all classes of second-line drug and clinicians with special proficiency in treating the multi-drug resistant strain. The treatment given to the first applicant had been deficient on all three counts.

Furthermore in the *McGlinchey and Others v. the UK*,[38] Ms McGlinchey had a history of heroin addiction and was asthmatic, was convicted of theft and sentenced to four months' imprisonment in December 1998, and died in hospital in January 1999. While in prison she manifested heroin-withdrawal symptoms, had frequent vomiting fits and lost a lot of weight. With regard to the complaints that not enough had been done, or done quickly enough, to treat Ms McGlinchey for her heroin-withdrawal symptoms, the Court found that during two days even she was vomiting repeatedly during that period and losing a lot of weight, but she was not seen by a doctor. The nursing staff did not find any cause for alarm, however, or consider it necessary to call a doctor. The Court found that the prison authorities had failed to comply with their duty to provide her with the requisite medical care.

However in *Fedosejevs v. Latvia*[39] the Court found the applicant's allegation of lack of antiretroviral therapy for HIV infection inadmissible. In the *Fedosejevs* case the applicant, suffering from HIV and Hepatitis C infection, complained that he did not receive adequate treatment in prison, in particular for his HIV infection. The Court observed that the applicant was subjected to a specific blood test which was carried out every two to six months by doctors at a specialised centre for infectious diseases. On every occasion the doctors recorded that the CD4 cell count had not yet dropped below the relevant threshold for commencement of antiretroviral treatment according to the WHO recommendations. Accordingly, the Court concluded that the national authorities had ensured proper medical supervision of the applicant's HIV infection.

As regards the issue of releasing a detainee on health grounds, Article 3 cannot be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain

[38] *McGlinchey and Others v. the United Kingdom*,no. 50390/99, ECHR 2003V
[39] Fedosejevs v. Latvia (dec.), no. 37546/06, 19 November 2013

a particular kind of medical treatment.[40]It nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.[41]

Thus in *Mouisel v France*[42] the Court held that the applicant's continued detention, especially from diagnosis of his disease onwards, had amounted to inhuman and degrading treatment holding that required medical treatment for the applicant justified releasing him on parole. Similarly, in *Tekin Yıldız v Turkey*[43] the Court having observed that the state of health of the applicant, who was suffering Wernicke-Korsakoff syndrome, had been incompatible with detention; it held that the applicant's detention had constituted inhuman and degrading treatment.

**B. Compulsory medical intervention**

With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit of no derogation.[44] A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading.[45] This can be said, for instance, about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision, for example to force-feed, exist and are complied with.[46]

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40 *Kudła*, cited above, §§ 91 and 94

41 see, *mutatis mutandis*, *Aerts v. Belgium*, cited above; and *Kudła*, cited above, §§ 79, 91 and 94

42 *Mouisel*, cited above,

43 *Tekin Yıldız v. Turkey*, cited above.

44 *Mouisel*, cited above, § 40

45 *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244

46 *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006IX; and*Nevmerzhitsky v. Ukraine*, no. 54825/00, § 94, ECHR 2005-II.

In *GennadiyNaumenko v. Ukraine*[47] the applicant alleged that he had been wrongfully forced to take medication when he was serving his prison sentence. The Court notes that the applicant's medical file indicates that he was psychopathic, had suicidal tendencies and was prone to aggression. The Court reiterated that domestic authorities were required to protect the health of prisoners. No matter how disagreeable, therapeutic treatment could not in principle be regarded as contravening Article 3 of the Convention if it was persuasively shown to be necessary. The Court observed that he had been put on medication to relieve his symptoms. The Court could not have determined from the evidence of witnesses and the applicant's medical file that whether the applicant had consented to the treatment. The Court further saw no reason to question the description or dosage of the substances that were administered or to suspect that he been given other substances. Nor was there anything to suggest that the treatment had caused the applicant to suffer from side effects. The Court did not, therefore, have sufficient evidence before it to establish beyond reasonable doubt that the applicant had been forced to take medication in a way that contravened Article 3 of the Convention.

However in *Jalloh v. Germany*[48], in a case of forcible administration of emetics to a drug-trafficker in order to recover a plastic bag he had swallowed containing drugs, the Court found a violation. Police officers observed tiny plastic bags in the applicant's mouth. Suspecting that they contained drugs, the police officers arrested him. As he refused to take medication to induce vomiting, four police officers held him down while the doctor inserted a tube through his nose and administered a salt solution and also injected emetic by force. As a result the applicant regurgitated a small bag of cocaine. The Grand Chamber held that the German authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will. They had forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out had been

47 *Naumenko v. Ukraine*, no. 42023/98, 10 February 2004
48 *Jalloh,* cited above.

liable to arouse in the applicant feelings of fear, anxiety and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure had entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this had not been the intention, the measure was implemented in a way which had caused the applicant both physical pain and mental suffering. He had therefore been subjected to inhuman and degrading treatment contrary to Article 3.

However in *Herczegfalvy v. Austria*[49] the applicant had been forcibly administered food and neuroleptics, isolated and attached with handcuffs to a security bed during the weeks. The Court emphasized that patients confined in psychiatric hospitals calls for increased vigilance. The Court held that forced medical intervention is justified to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for the medical authorities they are therefore responsible.

Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision.[50]

A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health.[51]

Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 of the Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. Thus, the Convention institutions have found on several occasions that the taking of blood or saliva samples against a suspect's will in order to investigate an offence did not breach these Articles in the circumstances of the cases examined by them.[52]

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49 *Herczegfalvy,* cited above.
50 *Jalloh,,*cited above.
51 *Ilijkov v. Bulgaria*, no. 33977/96, 26 July 2001
52 *X v. the Netherlands*, no. 8239/78, Commission decision of 4 December 1978, Decisions

However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence in issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect's health. Moreover, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention[53]. Lastly in *Julin v. Estonia,*[54] the applicant, a convicted prisoner, was confined to a restraint bed for nearly nine hours following the struggle with prison officers. The Court reiterated that restraint should never be used as a means of punishment but only to avoid self-injury or serious danger to others or to prison security. While the applicant's behaviour appeared to have been aggressive and disturbing, it was doubtful that, as the sole occupier of his cell, he posed a sufficient threat to himself or others as to justify such a severe measure and there was no indication that the authorities had given any consideration to using alternative measures. Most importantly, even if the applicant's initial confinement was justified, the Court was not persuaded that the situation had remained as serious for nearly nine hours. Regard being had to the great distress and physical discomfort the prolonged immobilisation must have caused him, the level of suffering and humiliation the applicant endured could not be considered compatible with Article 3.

and Reports (DR)16, pp. 187-89; and *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006.

53 *Peters v. the Netherlands*, no. 21132/93, Commission decision of 6 April 1994, DR 77-B; *Schmidt*, cited above; and *Nevmerzhitsky*, cited above, §§ 94 and 97.

54 *Julin v. Estonia*, nos. 16563/08, 40841/08, 8192/10 and 18656/10, 29 May 2012

**CONCLUSION**

Essentially there are three particular elements that should be taken into account when assessing the compatibility of the applicant's health with his detention: the medical condition of the prisoner, the quality of the medical care provided during detention and whether or not the applicant should be kept detained or whether another judicial measure should be applied in his or her case.

The Court examines the domestic authorities' responsibility to provide requisite medical assistance to the detainees under the positive obligations of Article 3. Even in its early case-law the Court has examined the conditions of detention and the treatment of detainees under the heading of inhuman treatment, recently such complaints are generally considered from the stand point of degrading treatment.

Governments must ensure that the manner and method of the execution of the measure do not subject a detainee to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured. Accordingly certain detainees should be provided with particular medical facilities suited to their needs.

However, Article 3 cannot be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable them to obtain a particular kind of medical treatment. It nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. On the other hand, the Court accepts that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public.

With respect to medical interventions to which a detained person is subjected against his or her will, a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The Court must nevertheless satisfy

itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision exist and are complied with. Moreover, another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision. The last relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health.

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# ABSORPTION CAPACITY OF THE EUROPEAN UNION: IS THERE STILL SPACE FOR NEW MEMBER STATES?

*Avrupa Birliği'nin Sindirme Kapasitesi- Yeni Üye Ülkelere Halen Yer Var mı?*

**Berrin DINGAZ KOŞAR***

**ABSTRACT**

Enlargement is one of the most powerful policy tools of the European Union.1 With the help of this tool the EU is expanded from six original Member States to the current twenty eight. The achievement of the EU is awarded with Nobel Peace Prize in 2012. Nonetheless, there is still high controversy between politicians, academics as well as EU citizens over future enlargement of the European Union. Some asserted that the EU has reached the limits of its absorption capacity whilst some others support future enlargement. This article tries to analyse the concept of *''absorption capacity''* as well as to answer whether the EU can absorb new member states?

**Key Words:** Absorption capacity, accession, enlargement, criteria,

**ÖZET**

Genişleme, Avrupa Birliği'nin en güçlü politika araçların biridir. Bu araç sayesinde başlangıçta altı üye devletten oluşan Avrupa Birliği yirmi sekiz üye devlete genişlemiştir. Avrupa Birliği'nin başarısı 2012 yılında Nobel Barış ödülü ile ödüllendirimiştir. Ancak, Avrupa Birliği'nin gelecekteki genişlemesi konusunda halihazırda politikacılar, akademisyenler ve de Avrupa Birliği vatandaşları arasında tartışmalar yaşanmaktadır. Bazıları, Avrupa Birliği'nin gelecekteki olası genişlemesini desteklerken bazıları Avrupa Birliği'nin sindirme kapasitesine ulaştığını iddia etmektedir. Bu makalede Avrupa Birliği'nin sindirme kapasitesi analiz edilerek Avrupa Birliği'nin yeni üye ülkeleri sindirip sindiremeyeceği cevaplandırılmaya çalışılacaktır.

**Anahtar Kelimeler:** Sindirme kapasitesi, katılım, genişleme, kriter

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1 Communication From the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2012-2013, Brussels, (2012), p.3, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf accessed on: 11.08.2014

**What is the '*absorption capacity*'?**

Considerations on the capacity of the EU to take new Member States first started to rise when former communist Central and Eastern (CEECs) countries knocked the door of the EU with desire of joining the club after the collapse of the Soviet Union. As rightly argued by *Hjelmesæth*early, until the '*big bang'* enlargement, enlargements of the EU did not cause any discussions on the absorption capacity.[2] Until 1990s, enlargement process went remarkably well and did not lead major controversies in the EU.[3] The considerations on the ability of the EU to operate within an enlarged EU turned out to be a discourse on absorption capacity in the Copenhagen Summit.[4].

The notion of absorption capacity was first mentioned in the Copenhagen Summit conclusions in 1993. Prior to the Copenhagen Summit, the only provision that regulates accession of the new Member State to the EU is Article 49 of the Treaty of European Union.[5] This provision refers that any country which respects the values referred to in Article 6 of the EU, which are human dignity, freedom, democracy, equality, the rule of law and respect for human rights and commits to promote these values can apply for the membership of the EU. Nonetheless, the desire of former communist countries to join the club prompts the EU to set up additional criteria called '*Copenhagen Criteria'*. According to *Marktler,* in the previous enlargement waves, more than three Member States at once had never been accepted, therefore; the fundamental decision had to be made.[6]

In 21-22 June 1993, the European Copenhagen Council set up political, economic and legal criteria which must be satisfied by each country, which seeks to become the member of the EU, prior to accession.[7] According to

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2 Ida Hjelmesæth, *'Making sense of Absorption Capacity within the EU: A study of the Concept, History, Clarification, Assessment'* , published by I. Hjelmesæth, (2007), p.24.

3 *Ibid* , p. 37.

4 Adam Lazowski, 'It Works! The European Union in the Wake of 2004 and 2007 Enlargements', (2010) , T-M-C Asser Press ,p. 19.

5 Consolidated Version of the Treaty on European Union, OJ [2002] C 325/5.

6 Tanja Marktler, 'The Power of the Copenhagen Criteria' p.344, available at http://www.cyelp.com/index.php/cyelp/article/view/23 accessed on 11.08.2014.

7 *See*, 'European Councıl in Copenhagen 21-22 June 1993 Conclusions of the Presidency' SN

these criteria the applicant country must have stable institutions that guarantee democracy, the rule of law, human rights and respect for and protection of minorities as well as have a functioning market economy and capability to accept Union aquis. In the Presidency Conclusions the concept of absorption capacity first time referred at the EU level as *'the Unions capacity to absorb new Member States, while maintaining the momentum of European integration, is an important consideration in the general interest of both the Union and the candidate countries*'.[8] *Gidişoğlu* claimed that at that time the manner of the Commission is highly enthusiastic about the enlargement project.[9] Therefore, he argued that the Commission does not seem so much concerned about the absorption capacity.[10] Indeed, bsorption capacity was not included to the list of criteria but was inferred as a 'reminder' to the existing members that they need to continue with internal reforms and integration in preference to a new criterion for accession.[11]

The European Council meeting in Luxemburg on December 1997 decided to open accession negotiations with the some of the CEECs countries[12] which satisfied the criteria of membership.[13] Two years later at the Helsinki Summit, for the remaining countries the negotiations were decided to open.[14] On 1 May 2004, ten countries which are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia officially joined

180/1/93 REV 1 available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf accessed on 11.08.2014

8 *Ibid,* p.13.

9 Sercan Gidişoglu, 'Understanding the ''Absorption Capacity'' of the European Union', INSIGHT TURKEY Vol.9 Number 4, p. 127

10 *Ibid,* p. 128.

11 See, Select Committee on European Union Fifty-Third Report (2006) paragraph 147, available at: http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/273/27307.htm accessed on: 11.08.2014.

12 These countries are, Poland, Czech Republic, Hungary, Slovenia, Estonia and Cyprus.

13 See, 'Luxembourg European Council 12 and 13 December 1997 Presidency Conclusions', available at: http://www.europarl.europa.eu/summits/lux1_en.htm accessed on 29.04.2013.

14 See, ' Presidency Conclusions Helsinki European Council 10 and 11 December 1999', available at
http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/ACFA4C.htm accessed on 11.08.20134.

the EU while Bulgaria and Romania admission was left to the year 2007. The '*big bang'* enlargement of 2004 has posed a serious danger on EU institutional mechanism of turning them into an ineffective '*Tower of Babel',* but fortunately '*it works'.*[15] The Commission declared the big bang enlargement as a success story especially in terms of its successful economic outcomes for both the new Member States and the EU.[16] It was stated that the big bang enlargement increased security and stability in Europe as well as provide economic benefits.[17] Nonetheless, after the big bang enlargement, public support for future enlargements has started to decline.[18] Contrary to the new Member States positive manner, old Member States were in general more sceptical about future EU enlargement project.[19] *Gidişoğlu* attributed the existence of public scepticism to the belief that this enlargement happened too quickly and prematurely.[20] He claimed that the EU citizens desire to wait a long period before any future enlargement to '*digest*' the 2004 enlargement.[21]

In the 2005 Enlargement Strategy Paper, the Commission emphasized the importance of public support to sustain the enlargement policy by acknowledging the public concern about the enlargement of the EU.[22] After a long silence since the Copenhagen summit, the Commission again referred absorption capacity by saying that '*the pace of enlargement has to take into consideration the EU's absorption capacity'.*[23] The Commission defined the

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15 Lazowski (n4), p. 20.

16 See, European Commission, 'Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2006 – 2007 Including Annexed Special Report on the EU's Capacity to Integrate New Members', COM (2006) 649, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/com_649_strategy_paper_en.pdf accessed on: 11.08.2014.

17 *Ibid,*p.4.

18 Michael Emerson &SenemAydın& Julia De Clerck-Sachsse&GerganaNoutcheva, 'Just What is This ''Absorption Capcity'' of the European Union? CEPS, No.113 (September, 2006), p. 4. available at: http://www.ceps.be) accessed on: 11.08.2014.

19 *Ibid,* p. 5.

20 Gidişoğlu (n9), p.134.

21 *Ibid* , p.134.

22 European Commission, 'Communication from the Commission 2005 Enlargement Strategy Paper' COM (2005) 561 Final, p.3, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0561:FIN:EN:PDF accessed on: 11.08.2014.

23 *Ibid,* p.3.

absorption capacity as '*the capacity to act and decide according to a fair balance within its institutions; respect budgetary limits; and implement common policies that function well and achieve their objectives.*'[24] Thus, debate on absorption capacity revived.

In March 2005, in its plenary session, the concept of absorption capacity was extensively discussed by the European Parliament. Enlargement Commissioner Oli Rehn admitted that future enlargements must take into account the absorption capacity of the EU.[25] Yet, he referred the absorption capacity as a ''consideration'' in future enlargements but not a formal accession criterion. [26] MEP Doris Pack of EPP-ED Group said that EU will reach its boundaries when Bulgaria, Romania and Western Balkans join the EU; therefore, for all other countries the relations should be carried on according to the instruments of neighbourhood policy.[27] On the other hand, MEP Cecilia Malmstrom from ALDE Group supported future enlargement by saying that '*if we fix the EU's borders today, we will prematurely limit the spreading of democracy*.'[28] The Socialists believed that EU must remain open for further enlargements, yet the basis of the Nice Treaty for future enlargements is insufficient.[29] Indeed, certain provisions in the Nice Treaty implicitly limited the size of the EU to 27 Member States.[30] After all these discussions, the EU Parliament published its 3 February 2006 Report on the Commission's 2005 Enlargement Strategy Pa-

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24 *Ibid,* p. 3.

25 EuroActiv.Com, 'Enlargement is Recognised by the MEPs as one of the EU's Most Powerful Policy Tools, but a New Report Focusses Attention on the Union's Absorption Capacity and Urges the Creation of a Multilateral Framework as a Stepping Stone to Full Membership' (2006) available at: http://www.euractiv.com/enlargement/ep-seeks-clarity-unions-absorpti-news-216116 accessed on: 11.08.2014.

26 Select Committee on European Union Fifty-Third Report, (n11) paragraph 145.

27 EuroActiv.Com, 'Enlargement is Recognised by the MEPs as one of the EU's Most Powerful Policy Tools, but a New Report Focusses Attention on the Union's Absorption Capacity and Urges the Creation of a Multilateral Framework as a Stepping Stone to Full Membership' (2006), (n25)

28 *Ibid.*

29 *Ibid.*

30 Kristin Archick,Vincent L. Morelli 'European Union Enlargement', 19 February 2014, Congressional research Service p. 4. Available at: http://fas.org/sgp/crs/row/RS21344.pdf accessed on: 19.08.2014.

per.[31] EU Parliament referred the absorption capacity as '*one of the conditions for the accession of new countries*'.[32] Different than the Commission's definition, the Parliament included geographical concept to this notion.[33] Thus, the concept gained a new dimension and a new question appeared on determining the EU's geographical borders. French President Nicolas Sarkozy who strongly supported the idea of geographical limits of EU enlargement project held that '*EU must have borders. Not all countries have a vacation to be in Europe'.*[34]

In June 2006, during the EU Council meetings, the discussions on absorption capacity have reached its peak.[35] The president of the Commission, Josè Barroso, has said that after the entry of Bulgaria and Romania, there must be a cease in the enlargement process.[36] He concluded that '*we are not in position to further integrate Europe without further institutional reform and there are limits to our absorption capacity*'.[37] The Chancellor Schüssel, by emphasizing the importance of the financial dimension of that concept, said that the concept also has a cultural aspect.[38] French President Jacques Chirac defined the absorption capacity as financial and political capacity that the latter concerned the views of the population.[39] French right and left wingers altogether opposed future enlargements without substantial institutional reforms, strong budget and the consent of European people.[40] On the other hand, the

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31 See, European Parliament, 'Report on the Commission's 2005 Enlargement Strategy Paper', available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2006-0025&language=EN accessed on: 11.08.2014.

32 *Ibid.*

33 Emerson &Aydın&Clerck-Sachsse&Noutcheva (n18), p.4.

34 Gidişoğlu (n9),p. 11.

35 Emerson &Aydın&Clerck-Sachsse&Noutcheva (n18), p 2.

36 Hjelmesæth (n2) p.45 cited to Dan Bilefsky, 'Barroso says EU must stop expansion'. International Herald Tribune, 25 September 2006 available at: http://www.iht.com/articles/2006/09/25/news/unio.php.

37 *Ibid.*

38 Euroactiv.com ''EU Cements 'Absorption Capacity' As the New Stumbling Block to Enlargement'', (2006) available at: http://www.euractiv.com/future-eu/eu-cements-absorption-capacity-new-stumbling-block-enlargement/article-156179 accessed on 11.08.2014.

39 *Ibid.*

40 Ali Toksabay Esen, 'Absortion Capacity of the EU and Turkish Accession: Definitions and Comments', Tepav Policy Brief, (2007), p.5, available at: http://www.tepav.org.tr/upload/files/1252667182r9668.Absorption_Capacity_Of_The_Eu_And_Turkish_Accession_Defi-

Swedish Prime Minister defined himself as '*dead against'* any new barriers by saying that it is not the duty of newcomer countries to take the responsibility of the absorption.[41] At the end of the day, the EU Council Meeting concluded that the pace of enlargement has to take into consideration the EU's absorption capacity and invited the Commission to prepare detailed report on all aspects of EU's absorption capacity.

During these discussions were continuing between the politicians, scholars harshly criticised the term absorption capacity as being vague, ill-defined, politically charged, misleading and dishonest.[42] It was claimed that the term is frequently being used in political debate with other two ill-defined terms which are '*enlargement fatigue'* and '*EU's final borders'*.[43] It was warned that this term can turn into dangerous tool for those who wants Turkey to keep out of EU or stop enlargement altogether.[44] Indeed, the discourse on absorption capacity has caused uncertainty on people and politicians of the countries willing to join the EU.[45] They began to think whether it is matter if they work hard.[46] The EU will not let them to join anyway.[47] As Oli Rehn warned that people and politicians of Turkey and Western Balkans are following the debates *'like the devil reads the bible'* and doubts on their accession is already causing erosion on their supports for the reforms that necessary for their membership.[48] Hence, the phrase sends misleading message about the EU itself as well as lends itself to derision[49]. Due to the discussions on absorption

nitions_And_Comments.pdf accessed on: 11.04.2014.

41 EuroActiv.com (n38).

42 *See,* Frank Vibert, ''Absorption Capacity'': The Wrong European Debate', 20 June 2006, available at: http://www.opendemocracy.net/democracy-europe_constitution/wrong_debate_3666.jsp accessed on: 11.08.2014.; Gidişoğlu (n9), p. 126; Emerson &Aydın&-Clerck-Sachsse&Noutcheva (n18),p.1; Hjelmesæth (n2),p.9.

43 Emerson &Aydın&Clerck-Sachsse&Noutcheva (n 18) 1.

44 Katinka Barysch,'Absorption Capacity- The Wrong Debate', 09 November 2006, available at: http://www.cer.org.uk/insights/absorption-capacity-%E2%80%93-wrong-debate accessed on: 11.08.2014.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 Select Committee on European Union Fifty-Third Report, (n11) paragraph 133

49 Guillaume Durand & Antonio Missiroli, 'Absorption Capacity: Old Wine in New Bottles?', (2006) European Policy Centre, available at: http://www.isn.ethz.ch/isn/Digi-

capacity, the EU was likened to '*Communist era toilet paper… tougher and less absorbent than ever.'*[50] On the other hand *Amtenbrink* takes a different point of view and asserts that setting up absorption capacity as criterion entails '*opportunities'*.[51] He acknowledges that this criterion poses risks in terms of introducing new boundaries on the accession[52]. But he urged that such a stipulation based on the EU's capacity may promote the decision makers to take necessary acts as well as encourage Member States to provide sustainable institutional framework for further enlargements.[53] *Schockenhoff* concluded that the concept of absorption capacity is not preventing further enlargements, but to aim greater acceptance of EU's citizens, strengthen its capacity as well as advancing its global competitiveness and so enhance its own capacity to accept more Member States.[54]

On 8 November 2006, following the request of the European Council, the Commission annexed Special Report on the EU's capacity to integrate new members to Enlargement Strategy Paper 2006-2007.[55] Interestingly, the Commission exchanged the term absorption capacity with the term '*integration capacity'*[56]. The Commission held that *'integration capacity is about whether the EU can take in new members at a given moment or in a given period, without jeopardizing the political objectives established by the Treaties.'*[57] The Commission stated the duty of EU to '*maintain its capacity to act and decide according to a fair balance within institutions, respect budgetary limits, and*

tal-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=25239 accessed on: 11.08.2014.

50 *Ibid.*

51 Fabian Amtenbrink, 'On the European Union's Institutional Capacity to Cope with Further', p.130. in: S. Blockman and S. Prechal (eds.), '*Reconciling the Deepening and Widening of the European Union*' (2007), The Hague: T.M.C. Asser Press pp. 111-131.

52 *Ibid, p.* 130.

53 *Ibid, p.* 130.

54 Andreas Schockenhoff, 'Enlargement: Six Tests for the EU's Absorption Capacity', (2006), available at: https://infoeuropa.eurocid.pt/files/database/000038001-000039000/000038513.pdf accessed on: 11.08.2014.

55 *See,* European Commission Enlargement Strategy and Main Challenges (2006-2007) (n16), Annex I, pp17-24.

56 Gidişoğlu(n9),p. 138.

57 European Commission Enlargement Strategy and Main Challenges (2006-2007) (n16), p.17.

*implement ambitious common policies that function well and achieve their objectives'.*[58] It was affirmed that the concept of integration capacity is first of all functional concept as well as economic but not preliminarily a political or cultural.[59] The Commission stressed that in order to ensure smooth integration, for each enlargement the integration capacity must be taken into account.[60] In addition it was declared that widening of the EU will be proceeded alongside with the deepening of the EU.[61] In addition, three main components of integration capacity were offered which of these are; first ensuring the EU's capacity to maintain the momentum of the European integration, second ensuring candidate countries fulfil the rigorous condition and third better communication[62]. In terms of the element regarding the EU capacity o maintain the momentum of the EU integration, the Commission states the requirement of institutional changes and budgetary adjustments as well as the assessments of impact of enlargement on common agriculture, energy and common foreign and security policies. With regards to the duty of the EU to ensure that candidate countries are fulfilling their obligations, the Commission underlined the importance of the application of strict conditionality during the pre-accession phase and the role of the Commission to monitor the process as well as establishing dialogue. In terms of establishing better communication, the Commission emphasized the significance of providing democratic legitimacy and to prepare the citizens for future enlargements

In conclusion, according to Commission's definition it seems that the concept of absorption capacity requires efforts of both Member States and candidate countries and consists of three pillars which are economic, political and institutional.[63] Nonetheless, the definition given by the Commission is criticised as not being precise.[64] *Avery* called the absorption capacity as '*undefina-*

58 *Ibid,* p.17.
59 Gidişoğlu,(n9), 138-139.
60 European Commission Enlargement Strategy and Main Challenges (2006-2007) (n16), p.19.
61 *Ibid,* p.17.
62 *Ibid,* p. 18.
63 Gidişoğlu (n9), p. 139.
64 House of Lords European Union Committee, 'The Future of Enlargement', 10th Report of Session 2012–13, p.45, available at: http://www.publications.parliament.uk/pa/ld201213/

*ble flying object'* by pointing out that the definition given by the Commission neither approved nor disapproved by the Council.[65] It was claimed that the concept can be used to veil further enlargement for other reasons like the concept of enlargement fatigue.[66]

**Current Capacity of the EU to Absorb New Member States**

In 2002, Member States adopted the Treaty of Nice to prepare the EU for further enlargement. The Nice Treaty introduced some institutional reforms to ensure effective functioning of EU.[67] Nonetheless, some criticised as it failed to achieve set up long term institutional arrangements.[68] Indeed, the provisions of the Nice Treaty implicitly limited the size of the EU with 27 Member States. Inadequacies of the Nice Treaty for further enlargements were affirmed by the Commission itself. The Commission held that Nice Treaty did not envisage institutional measures for the EU more than 27 Members.[69] Therefore, the prerequisite of the EU before further enlargement must be to decide the framework and the content of the institutional reforms. The draft constitution envisaged some institutional changes, yet it was rejected by the French and Netherland voters. The Treaty of Lisbon which came into force in 2009 seeks to regulate the institutions and decision making processes of the EU to enable the EU functioning effectively.[70] *Lazowski* noted that the original preamble of the Lisbon Treaty shows that EU itself fails to meet its absorption capacity criteria.[71] Yet it was changed in the final version of the Lisbon Treaty.

ldselect/ldeucom/129/129.pdf accessed on:11.08.2014.

65 *Ibid,* p. 45.

66 *Ibid,* p. 63.

67 See, Dr. Nils Meyer-Ohlendorf, 'EU-Enlargement- A Success Story?', pp.1-29. Available at: http://www.ecologic.eu/download/projekte/200-249/221-02/221_02_gruene_eu_erweiterung.pdf accessed on: 11.08.2014.

68 Lazowski(n4), p. 21.

69 European Commission Enlargement Strategy and Main Challenges (2006-2007) (n16), p. 21.

70 See, Kristin Archick& Derek E. Mix 'The European Union's Reform Process: The Lisbon Treaty', 22 February 2010, Congressional Research Service, available at: http://fpc.state.gov/documents/organization/139287.pdf accessed on: 11.08.2014.

71 The original preamble of the Lisbon Treaty refers that: 'Desiring to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice of adopting the institutions of the European Union to function in an enlarged Union' Source: Lazowski (n4) p. 20.

Analysts urged that the Lisbon Treaty could remove the obstacles that hinder the enlargement of the EU beyond 27 Member States and simplify enlargement to the Western Balkans and Turkey.[72] However, some believes that there are many difficulties remain as the source of gridlock.[73]

In the light of the above mentioned discussion currently there is no consensus on the precise dimensions of the absorption capacity. All the same, we chose to briefly mention about current capacity of the EU with regards to its institutions, budget, public opinion and geopolitics:

In terms of the decision making procedure, the process is working well and it is expected that this continue after relatively small enlargements.[74] With the Lisbon Treaty the areas subject to qualified majority voting were increased.[75] Moreover, the problem about weighting Member States votes seems to be resolved by double majority voting.[76] Indeed, the acceptance of the membership of Croatia in July 2013 proves the EU's capacity to absorb small countries. The Commission in its 2014 Report stated the Croatias' accession as an example of the transformative power and stabilising effect of the enlargement process as well as the EU's soft power.[77] But, the big enlargement such as the accession of Turkey could probably affect the balance of decision making within the EU.[78] Assuming a double majority system of voting, Turkey and Germany which would have %14.5 of the vote each be able to block proposals with a third large country.[79] Especially, the requirement of unanimity voting

72 Archick& Mix (n70), p.6.
73 *Ibid*, p. 6
74 House of Lords European Union Committee (n64),p. 47.
75 See, Advisory Council on International Affairs, 'The EU's Capacity for Further Enlargement', No.71, July 2010, p.14, available at: http://www.aiv-advies.nl/ContentSuite/upload/aiv/doc/webversie_AIV_71eng(1).pdf accessed on: 11.08.2014.
76 *Ibid*, p.14.
77 European Commission, '' Communication From the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2013-2014'', Brussels, 16.10.2013, p. 1 available at:http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf accessed on: 11.08.2014
78 *Ibid,* p.14.
79 Sami Andoura, 'European Union's Capacity to Absorb Turkey' (2005) Egmont European Affairs Program Paper, p.8, available at: http://aei.pitt.edu/9306/1/EU-Turkey.pdf accessed on: 11.08.2014.

in the Common and Foreign Policy issues may result in blockage in the event of accession of countries which have different interests.[80] Therefore, further enlargement requires revising the decision-making procedure.[81]

With regards to institutions, it is difficult to estimate the costs of further enlargement on the EU institutions.[82] But currently the size of the Commission seems as a major problem.[83] To take a decision in a body which will be more than 30 members requires more efforts and given rise to coordination problems.[84] In terms of EU Parliament, which composed of 751 members after Croatia's accession, its size is perceived as an obstacle to democratic and effective processes.[85] In addition, allocation of seats between large and small countries gives rise to the considerations on the accession of large countries.[86] In that regard, the accession of Turkey with its large population gives rise to concerns. In the event of Turkey's accession Turkey would have 82 seats which is equal with the seats of Germany.[87] In terms of European Court of Justice, expansion of the EU as well as extension of the ECJ's powers with the Lisbon Treaty to the Area of Justice, Freedom and Security forces the capacity of ECJ.[88]

In terms of the budgetary capacity of the EU it is estimated that small countries like Western Balkans have a small impact on EU budget, but big countries have significant budgetary consequences especially related to CAP and structural funds expenditure.[89] In 2012, one of the major struggle of the EU is the financial crises. The sovereign debt crises and the danger of financial collapse of some Member States fuelled the concerns about future enlargements.[90] The crisis in the Eurozone results in strengthening the budgetary measures in

80 *Ibid,* p.14.
81 *Ibid p.* 15.
82 House of Lords European Union Committee (n64).
83 Advisory Council on International Affairs (n75), p. 15.
84 *Ibid,* p. 15.
85 *Ibid,* p. 15.
86 *Ibid,* p. 16.
87 Andoura (n79), p.8.
88 Ibid, p.17.
89 *Ibid,* p. 20.
90 Steven Blockmans, 'The Prize is more Peace: The EU should Consolidate its Enlargement Process', (2012) CEPS, p.1, available at: http://www.ceps.eu/book/prize-more-peace-eu-should-consolidate-its-enlargement-process accessed on: 11.08.2014

the Member states.[91] Furthermore, the crisis exacerbated debate in the United Kingdom regarding its future role in the EU.[92] The financial crises weakened the leading role of the UK in the EU and thus last year David Cameron in his speeches referred the possible withdrawal of the UK from the EU.[93]

In terms of public support of the EU for future enlargements, in general public support decreased when compared with the 2008 results.[94] Public opinion of the EU changes according to a potential candidate state. Whilst %80 people of Europe support the membership of Norway and Switzerland, only %30 people desire the membership of Turkey, Albania and Kosovo.[95] The public opinion against the admission of Turkey, Albania and Kosovo is interpreted as public opposition to the countries which have different religion and cultural tradition.[96]

In terms of the geopolitical dimension of the EU, with the membership of Turkey EU will be border with the Middle East and South Caucasus. Turkey's experience and knowledge about the region as well as close ties with these countries could be benefit for the EU.[97] On the other hand, instability and conflicts in these areas expose risks and requires effective foreign and security actions.[98]

The discourse on absorption capacity caused doubts on future enlargements of the EU, yet the enlargement process itself has continued.[99] Before commencing to analyse the current situation on accession negotiations, it would be helpful to give brief information on how the accession negotiations process itself proceeding. Accession negotiations are decided to open by the

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91 Advisory Council on International Affairs (n75), p. 12.
92 Blockman (n90), p. 2.
93 Is UK's withdrawal from EU a show?, 28 January, 2013. Available at: http://english.peopledaily.com.cn/90777/8110700.html accessed on: 11.08.2014.
94 See, Danilo Di Mauro Marta Frail, 'Who Wants More? Attitudes Towards EU Enlargement in Time of Crisis Authors', available at: http://www.eui.eu/Projects/EUDO/Documents/2012/Spotlight4.pdf accessed on: 11.08.2014.
95 *Ibid,* p. 2.
96 *Ibid, p.* 2.
97 Advisory Council on International Affairs (n75), p. 23.
98 Ibid, p. 23.
99 Durand &Missiroli (n49).

Council after taking the positive opinion of the Commission on the ability of the applicant to meet the criteria of membership that declared in article 49 TEU and Copenhagen criteria.[100] Accession negotiations proceeded on the basis of acquis which consist of chapters each of which comprise different areas.[101] When the applicant country fulfils its obligations necessary for closing the chapter as well as accepts the draft common position that prepared by the Commission and adopted unanimously by the Council the relevant chapter decided to be closed.[102] When the negotiations are completed for all chapters the process comes to end with the signature of Accession Treaty between Member States and the applicant country.[103]

In the light of the above mentioned process, the accession negotiations have started with Turkey and Croatia in 2005. The accession negotiations with Turkey are still continuing. But currently, 17 chapters of the accession negotiations remained blocked due to the Cyprus problem. There is high concern on whether the EU can absorb Turkey.[104] With regards to Western Balkan countries, the relations between the Balkan countries and EU proceeded according to the Stabilisation and Association process. In that regard, Croatia joined the EU in July 2013 as the 28 th Member State. Croatia is the first country to accomplish the Stabilisation and Association Process. Macedonia became a candidate country in December 2005. Despite the positive recommendations of the Commission the accession negotiations have not yet opened.[105] In 2008 Montenegro and in 2009 Serbia and Albania applied for full membership. In June 2012 accession negotiations are opened with Montenegro. Albania is declared to make good progress and the Commission suggests that the Council should grant the status of candidate country, but it is not granted a candidate status yet.[106] In June 2013, the European Council decided to open accession

100 Europa, 'The Accession Process for a new Member States', available at: http://europa.eu/legislation_summaries/enlargement/ongoing_enlargement/l14536_en.htm accessed on:28.04.2013

101 *Ibid,*

102 *Ibid,*

103 *Ibid*

104 *See,* Andoura (n79),

105 *See*, European Commission Enlargement Strategy and Main Challenges 2012-2013 (n1)

106 *See,* European Commission Enlargement Strategy and Main Challenges 2013-2014 (n77),

negotiations with Serbia.[107] Bosnia-Herzegovina and Kosovo are considered to be potential candidate countries. The lack of political will of Bosnia- Herzegovina to implement the reforms is seen as hampering the progress.[108] With regards to Kosovo, the Council authorised the opening of negotiations for a Stabilisation and Association Agreement between the EU and Kosovo.[109] Kosovo which confused the general EU public with regards to its status still cause different views between Member States.[110]

In addition to Western Balkans and Turkey, Iceland applied for full membership in 2009 and accession negotiations are still continuing. Moreover, in Eastern Europe Ukraine and Moldova, in South Caucasus Georgia and Armenia expressed their long term ambitions for accession to the EU.[111] Among those, currently Ukraine's situation is highly problematic since the 2014 Ukrainian Revolution in February 2014.[112] On the other hand, two advanced democracies of Western Europe Norway and Switzerland could easily join the EU if they wish.[113]

Among all those countries Turkey deserves close examination since Turkey's membership has become inseparably intertwined with the discourse on absorption capacity.[114] Turkey and EU relations date back to 1959 when Turkey applied for associate membership to the EEC which resulted in signature of Ankara Agreement in 1963. However, following years the relations disrupted especially due to 1971 and 1980 coup d'état in Turkey. In 1987 Turkey officially applied for membership and in 1999 Helsinki European Council recognised Turkey as a candidate country. *Esen* claimed that discussions on absorption capacity revived when Turkey's accession process were in the spotlight.[115]

p. 1

107 *Ibid,* p. 1

108 *Ibid,* p. 1

109 *Ibid,* p.1

110 Blockmans, (n90), p.2.

111 Emerson &Aydın&Clerck-Sachsse&Noutcheva (n18),p. 10.

112 For detail information about Ukraine- European Union Relations See, http://en.wikipedia.org/wiki/Ukraine%E2%80%93European_Union_relations Accessed on: 14 August 2014

113 Emerson &Aydın&Clerck-Sachsse&Noutcheva (n18), p. 10.

114 Esen (n40),p. 1.

115 *Ibid*, p. 1.

He asked why absorption capacity has not been addressed against 12 new Member States as well as Croatia but suddenly recalled in the wake of Turkey's accession process.[116] It has been widely argued that the term absorption capacity can be used as a shield behind which those who wants to keep out Turkey from the EU could hide.[117] Indeed, the term absorption capacity for the first time used in a Negotiation Framework in a Turkey's case.[118] The third paragraph of Negotiation Framework for Turkey 3 October 2005 which officially starts accession negotiations with Turkey refers '*the Union's capacity to absorb Turkey'*. In general, the idea of Turkey's full membership generates scepticism around the EU. Some concerns about Turkey's population, which is estimated above 70 million, and argued that Turkey's full membership would disrupt institutional balances in the EU whilst some opposes Turkey's membership for economic concerns[119]. Some does not consider Turkey as a European country by emphasizing the European identity as a component of absorption capacity such as Sarkozy who cynically stated that '*if Turkey were European, we would know it'.*[120] Some particularly concerned about Turkey's predominantly Muslim population as stated by the French Prime Minister Raffarin '*do we want the river of Islam to enter the riverbed of secularism?''*[121]Hence, Turkey is considered to be '*too big, too poor and too Muslim'* for being the part of

116 *Ibid,* p. 3.

117 Select Committee on European Union Fifty-Third Report (n11), paragraph 146.

118 See, European Commission 'Negotiating Framework for Turkey', 3 October 2005, Luxemburg, pp. 1-2 available at: http://www.avrupa.info.tr/fileadmin/Content/Downloads/PDF/M%FCzakere%20%C7er%E7evesi.pdf accessed on: 29.04.2013. The 3. paragraph says that: Enlargement should strengthen the process of continuous creation and integration in which the Union and its Member States are engaged. Every effort should be made to protect the cohesion and effectiveness of the Union. In accordance with the conclusions of the Copenhagen European Council in 1993, the Union's capacity to absorb Turkey, while maintaining the momentum of European integration is an important consideration in the general interest of both the Union and Turkey. The Commission shall monitor this capacity during the negotiations, encompassing the whole range of issues set out in its October 2004 paper on issues arising from Turkey's membership perspective, in order to inform an assessment by the Council as to whether this condition of membership has been met.

119 *See,*Senem Aydın Düzgit&Hakan Altınay&Seyla Benhabib&Cem Özdemir& Jean Francois Leguil-Bayart, ' Seeking Kant in the EU's Relations with Turkey', (2006), TESEV Publications, pp.1-31.

120 Ibid, p.4.

121 *Ibid,* p.4.

EU.[122] It was clearly stated by the governing party UMP that '*EU cannot absorb Turkey for cultural, geographic, budgetary and institutional reasons*'.[123] Based on the above mentioned considerations the 'privileged partnership' rather than full membership put forward as a solution by the Conservative and Christian-Democrat groups of the European Parliament.[124] During his presidency Sarkozy together with Angela Merkel emphasized their objection to full membership of Turkey by asserting its potential dangers on the effectiveness of the EU.[125] Nonetheless, some considers Turkey's membership advantageous in terms of its military capacity.[126] Mr. Howitt MEP asserted that '*Europe needs Turkey'* regarding migration and economic dynamism.[127] During the presidency of the Greek Cyprus, Turkey declared to boycott the Cyprus presidency which is a logical consequence of the non-recognition of Republic of Cyprus by Turkey.[128] Within this gloomy atmosphere the Commission has launched the Positive Agenda on 17 May 2012.[129] On the other side of the same coin, the discourse on absorption capacity against Turkey curbs the enthusiasm of the Turkish people to join the EU. According to the recent pools, only a quarter of respondents favour the EU, while 66 percent have negative view towards the EU.[130] 58 percent of Turkish citizens' favourable view, which exists before the accession talks started, has dropped to 27 percent in 2007 and has not improved since.[131]

In general, it is noted that the enlargement process is likely to be slow

122 Esen (n40), 4.
123 Düzgit&Altınay&Benhabib&Özdemir&Leguil-Bayart,(n119), p.9.
124 *Ibid*, p.4
125 See, Şaban Kardaş, 'Merkel and Sarkozy Call for Privileged Partnership Angers Turkey', 13 May 2009, available at: http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=34983&no_cache=1#.U-joX-N_vWA accessed on: 11.08.2014.
126 Select Committee on European Union Fifty-Third Report (n11), paragraph 151.
127 House of Lords European Union Committee (n64), p. 48.
128 Szymon Ananicz , 'Cyprus presidency and Turkey's Relations with the European Union', (2012), Centre for Eastern Studies, Issue 82, p.1 available at: http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?lng=en&id=152746 accessed on: 11.08.2014.
129 *Ibid.*
130 Menekşe Tokyay, ''Pool Reveals Need for EU-Turkey Co-operation '', Ses Türkiye, 12 August 2014, available at: http://turkey.setimes.com/en_GB/articles/ses/articles/features/departments/national/2014/08/12/feature-01 accessed on: 14/08/2014
131 *Ibid.*

down as it was called by *Dr Tannock* MEP '*painfully slow'*.[132] It took 8 years for Croatia to become a full member of the EU. The Commission in its report stressed the accession negotiations' more rigorous and comprehensive style than the past.[133] With regards to Western Balkans, high adoption costs and region's post conflict legacies and long-standing bilateral issues.[134] Despite their internal political instability and low democracy levels it is believed that their accession cannot pose a serious burden on the EU due to their small size.[135] Indeed, total population of these countries is almost 18 million which is smaller than the population of Romania.[136] In this respect, the benefits of their inclusion of the EU in terms of providing peace and political stability throughout the continent is believed to be higher than the potential costs of their admission.[137] Nonetheless, the latest speech given by new European Commission president Jean-Claude Junker demonstrates that there would be no new members of the EU in the next five years.[138] In his speech on July 2014, he stressed the need to be 'a break from enlargement' since the rapid expansion of the EU to 28 members.[139]

**Conclusions**

Many EU politicians and citizens are cautious about further EU enlargement.[140] It seems that the absorption capacity criterion will play an important role in the future enlargements. Officials increasingly state that the future enlargement must take into consideration the integration capacity of the

132 House of Lords Report (n64) p.41.

133 European Commission Enlargement Strategy and Main Challenges *2013-2014* (n77), *p. 2*

134 House of Lords Report (n64) p.41.

135 Milenko Petrovic, 'Investigating the Limits of EU Eastern Enlargement: Politics, Geography or ''Absorption Capacity?'', (2006) , National Centre for Research on Europe, University of Canterbury, p.10 available at: http://www.jhubc.it/ecpr-porto/virtualpaperroom/114.pdf accessed on:11.08.2014.

136 *Ibid,* p. 11

137 *Ibid*, p. 11.

138 BBC News Scotland Politics ' Scottish Independence: Jean- Claude Junker not referring to Scotland ', 15 July 2014, available at: http://www.bbc.com/news/uk-scotland-scotland-politics-28311938 accessed on: 24.07.2014

139 *Ibid.*

140 Archick, Morelli (n30),p.12.

EU.[141] In this respect, first, all dimensions of the concept of absorption capacity should be defined as clear as possible in order to prevent the usage of this notion as an excuse for rejecting the membership application. In addition, pros and cons of the future enlargements should be carefully assessed and if theEU is taking serious the future enlargements, necessary measures should be taken to increase and strengthen the capacity of the EU to absorb new member states. On the other hand, countries willing to join the EU should take necessary actions to robust their institutional framework by taking into account this criterion seriously.

It should not be forgotten that new countries not only constitute a burden to the EU but also make contributions with regards to their budgetary, economic or military resources.[142] As rightly argued by Vibert, who criticised the discourse on absorption capacity namely rejection of the benefits of EU membership while assuming its benefits as a '*scarce resource'*, the EU membership offers '*network values*[143]*'*. Where the term absorption capacity is used to highlight the potential cost of enlargement, it should be noted that not enlarging also has its cost.[144] In that regard, as well as considering its capacity to absorb new Member States, the EU must ask itself whether it can deal with the consequences of not integrating.[145]

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[141] *Ibid,* p. 15.

[142] Select Committee on European Union Fifty-Third Report (n11), paragraph 151.

[143] Esen (40), p.3 cited to Frank Vibert, ''Absorption Capacity'': The Wrong European Debate', 20 June 2006, available at: http://www.opendemocracy.net/democracy-europe_constitution/wrong_debate_3666.jsp accessed on:11.08.2014.

[144] Advisory Council on International Affairs (n 75), p.41

[145] *Ibid,* p. 41.

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# THE CRITIQUE OF COMMON AGRICULTURAL POLICY OF THE EUROPEAN UNION

*Avrupa Birliği Ortak Tarım Politikasına Yönelik Eleştiriler*

**Gökhan SERTÖZ***

**ABSTRACT**

The European Union was formed generally as a response to the devastating effects of the Second World War and it was believed that under the roof of the European Union, political unity would prevent further wars and it would stabilise the economic situation. At this point, along with consolidating the European industries, such as coal and steel, the EU also had to plan how to integrate its agricultural policies. This integration process was also envisaged to be used a model for other European policies in other sectors.

In this study, one of the most controversial policies of the European Union, Common Agricultural Policy, will be examined, as regards its historical background, the main problematic areas, and why reforming CAP policies remarkably is necessary.

**Key Words:** EU Common Agricultural Policy Reforms, Critism of CAP, Historical Progress of CAP

**ÖZET**

Avrupa Birliği genel olarak 2. Dünya Savaşının yol açtığı yok edici etkiye bir cevap olarak kurulmuş ve Avrupa Birliği çatısı altında gerçekleştirilecek bir ekonomik birliğin daha sonraki savaşları engelleyeceğine, ülkelerin ekonomik durumlarını stabilize edeceğine inanılmıştır. Bu noktada, kömür ve çelik gibi Avrupa endüstrilerini birleştirmenin yanında, Avrupa ülkelerinin tarım politikalarının da birbirine entegre edilmesi planlanmıştır. Bu entegrasyon sürecinin de diğer sektörlerdeki Avrupa politikaları için de bir model oluşturması öngörülmüştür.

Bu çalışmada, Avrupa Birliğinin en tartışmalı konularından birisi olan Ortak Tarım Politikası, tarihsel süreç, temel problemli alanlar ve bu alanda neden kapsamlı bir reforma ihtiyaç duyulduğu başlıkları altında incelenecektir.

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## INTRODUCTION

The European Union was formed generally as a response to the devastating effects of the Second World War. It was believed that a political unity would prevent further war and it would stabilise the economic situation, which at that time was very severe. The economic developments of the Union, in fact, became like an engine and brought Europe closer with goals of unity and harmony. Along with consolidating the European industries, such as coal and steel, the EU also had to plan how to integrate its agricultural policies. Of course, agriculture is one of the most important issues for any country.

The Common Agricultural Policy (the CAP), was developed out of the 1957 Treaty of Rome. It is of interest to note that it was the first common policy; and it outlined the implementation of general rules that Member States should adhere to. Also, the CAP was to be used as a model for European policy in other sectors.[1] The main objectives of its policy were described under Article 39. It had its basis in alleviating the food shortages in the post war years, protecting farmers' income and increasing the strength of agriculture, which employed a great number of people across Europe at that time and unifying the different policies of the countries under the Union. [2] To do this it aimed to "increase agricultural productivity", "ensure a fair standard of living for the agricultural community", "stabilize markets" and "ensure ...supplies reach consumers at reasonable prices" [3]

The CAP has remained one of the most central policies of the EU. It has impacted on the policies and the general politics of the E.U. It has been a controversial matter both at institution level and in public opinion. This is because, despite being subjected to a number of reforms, it has not been able to be contained and properly managed in response to changes in the European

1 Agraa-El,M Ali, The European Union Economics and Policies, Cambridge University Press, Cambridge, 2007, page 46-47

2 Varol Sinan, Dunden Bugune Ortak Tarim Politikasi ve AB Tariminin Yonetim Yapisi, http://www.zmo.org.tr/etkinlikler/abgst03/08, (Accessed 05.07.2013)

3 European Union Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the Euopean Community, Official Journal of the European Union, (2006), online at: http://eurolex.europe.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:00331 . (Accessed 05.07.2013)

Union. A central problem is the management of its budget; it has consumed a huge part of the general EU budget in the past and still continues to suck in finances like a black hole. The subsidies which support farmers have led to problems – international organizations want to decrease this form of protectionism and high food prices have meant that consumers pay too much for their food. Other issues remain problematic for the CAP, such as Fraud in the meat industry and environmental issues.

Although it can be argued that it has certainly achieved a big part of its aims; that is, the stability of Europe and maintaining the wealth of Europe, it must change in order to be financially viable in the uncertain economic climate of Europe**.**

In this essay I will critique the Common Agricultural Policy. Firstly, historical progress of Common Agricultural Policy will be considered, Secondly, the main problematic areas of the CAP will be evaluated, After this system failures will be examined and finally, some conclusions about the negative sides of the Common Agricultural Policy will be drawn.

**1. HISTORICAL PROGRESS OF THE COMMON AGRICULTURAL POLICY**

The CAP has its roots in 1950s Western Europe, whose countries had been devastated during the years of the Second World War, and where agriculture had been destroyed and food shortages had occurred.[4]

This policy was a milestone of the European Economic Community (EEC) established by the 1957 Treaty of Rome, signed by France, West Germany, Italy, the Netherlands, Belgium and Luxembourg,[5] which aimed to ensure food security, and supports farmers and the agricultural sector by creating a common market as well as harmonizing the economic policies of the six founding states.[6]

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4 The Common Agricultural PolicyA partnership between Europe and Farmers, European Commission Luxembourg: Publications Office of the European Union, page 4, http://ec.europa.eu/agriculture/cap-overview/2012_en.pdf, (Accessed 05.07.2013)

5 Economic History Association, http://eh.net/encyclopedia/article/stead.cap(Accessed 05.07.2013)

6 Hill B.,Farm Incomes ,wealth and agricultural policy,3rd hants: Ashgate Publishing Ltd,2000,

The objectives of the CAP, specified in Article 39 of the Rome Treaty , were as follows;

1. to increase agricultural productivity; by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

2. thus to ensure a fair standard of living for fort he agricultural community ,in particular by increasing the individual earnings of persons engaged in agriculture;

3. stabilize markets;

4. to assure the availability of supplies;

5. to ensure that supplies reach consumers at reasonable prices.[7]

In order to achieve these goals, the founding states established the European Agricultural Guidance and Guarantee Fund (EAGGF) in 1962, to finance a price support system and to enable the common organization of agricultural markets in the European Community .[8] This Fund consisted of two distinct sections namely Guidance and Guarantee. The Guidance section of the EAGGH focused on the improvement of production and financed developments in rural infrastructure to help farmers and territories within the European Union.

The Guarantee Section mainly funded the expenditures relating to the development of common agricultural markets. These expenditures were composed of intervention measures to stabilize the market, price compensation and export subsidies when the price of European Union farm products determined by the Cap was higher than third countries prices.[9]

The CAP is mainly based on three principles; a single market, preference for products grown in the European Community, and financial solidarity.

page 2

7 HR-Net Hellenic Resources Network,http://www.hri.org/docs/Rome57/Part3Title02.html, (Accessed 06.07.2013)

8 Mcdonalds F, Dearden S,European Economic Integration, Longman Publishing, 1999, page 282

9 Hennnis M, Globalization and European Integration,Rowman&Littlefield Publishers,2005,-page 41

These principles can be briefly explained as follows:

The Single Market: On the basis of this principle, agricultural products can move freely across borders without tariffs or restrictions in the internal market of the European Union.

Community Preference: According to this principle, community products have priority within the European Union geographical limits; in other words, the EU's agricultural products must be protected from fluctuations in the world market and lower priced imports and exports from third countries, would be prevented.

Financial Solidarity: This principle means that, all expenditure of the Common Agricultural Policy shall be funded by European Union Budget.[10]

**2. CAP REFORMS**

During the existence of the Cap, its policy instruments and legal framework have been adapted to meet changing economic and political conditions.[11] If we examine the CAP Reform process, we can recognize that the first reform attempt was the Mansholt Plan in 1968. His proposal put forward the opinion that market and price policy alone would not be sufficient to overcome the structural problems of the agricultural sector.[12] A solution had to be must be sought as 5 million hectares of land should not be cultivated in order to assure the supply and demand balance. Mansholt also noted that the aim of the Plan was to encourage nearly five million farmers to give up farming as well as remove small farmers from the land and to consolidate farming into a larger, more efficient industry .[13] Although this proposal was not accepted, a modified version of this reform provided a basis of other reforms of the CAP.[14]

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10 P. Pezaros, An Introduction To The Common Aricultural Policy: Principles, Objectives And Orientations, http://ressources.ciheam.org/om/pdf/c29/CI020491.pdf, page 4, (Accessed 06.08.2013)

11 Artis M, Nixson F, Oxford University Press, Oxford, 2007, page 87.

12 Supra fn 6, page 40.

13 Common Agricultural Policy, wikipedia, http://en.wikipedia.org/wiki/Common_Agricultural_Policy, (Accessed 06.08.2013)

14 http://www.avrupa.info.tr/Files//File/PressPacks/AgricultureFair/otp.pdf, (Accessed 06.08.2013)

Despite the declaration of various Commission papers mentioning the need for reform, no really remarkable policy changes occurred until the 1980's[15].

Since the beginning of the 1980's the creation of specific imbalances lead to new problems. These problems centred especially on the high budgetary expenditure needed to meet the requirements of the CAP and on the vast increase of surplus production.[16]. Because of the aforementioned reasons, reform in the CAP became necessary.[17]

The second significant reform in the Common Agricultural Policy in 1992 was the MacSharry Plan. The necessity for reform of the Cap by the European Comunity was realized in order to prevent the collapse of the GATT Uruguay Round negotiations. The aims of this reform were to accomplish the rural development ,environmental objectives and fairer distributions of support for farm incomes as mentioned in the 1985 Green Paper. A core element of reform was cuts in supported prices for certain key products (cereals, oil seeds, beef) and in order to compensate farmers for lost revenue , system of direct payments was introduced. The McSharry reform also consisted of a series of financial incentives such as early retirement ,reforestation and protection of the environment. Due to overcompensation for the price cuts, the 1992 reform was unsuccessful in easing the pressure of agricultural spending on the budget. [18]

In July 1997, the European Commission (EC) proposed a comprehensive document known as "Agenda 2000" which included recommendations for further reform of the CAP. This reform package intended to prepare the European Union for the expected enlargement. The reform proposal constituted a follow up to the MacSharry reforms. The main elements of this reform were;

• A reduction in support prices in order to bring the price of EU agricultural products closer to world price

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15 Ingersent ED., Rayner A J, Hine C H,Reform of the Common Agricultural Policy,1998, page 2

16 Supra 7 page 11

17 Grant,W The Common Agricultural Policy, The Development of the Common Agricultural Policy, 1997 Mc Millan Press London page 75.

18 Nello S The European Union 'Economics polies,and history 2009 Mcgraw –hill page 295.-296

• An increase in direct compensation payments for some products

• An enhanced policy on environment

• The introduction of a ceiling which was put on the budget to reassure taxpayers that CAP costs would not run out of control.

• New rural development measures[19]

In accordance with the aims of Agenda 2000 with regard to sustainable agriculture and rural

development,[20] The Council of Agricultural Ministers of the European Union (EU) reached agreement, on 26 June 2003, on a reform of the Common Agricultural Policy (CAP), based on the Commission proposals presented on 23 January 2003. The new reform which was also called the Fischler Reform took a step further, providing the possibility of transforming most of the direct payments into a more decoupled "single farm payment." The reform also emphasized environmental concerns, animal welfare ,and food security.[21] Moreover, the Fischler Reform reinforced rural development policy with enhanced EU financing and reconfiguring all precautions into a Single Rural Development Regulation covering the period 2007-2013.[22]

## 3. CRITISM OF COMMON AGRICULTURAL POLICY

### 3.1. FRAUD

It is impossible to discover precisely the real amount of fraud concerning the Common Agricultural Policy, since the only recorded frauds are those detected ones by competent authorities.[23] According to Professor Klaus Tiedemann an independent expert, the loss from the budget through fraud and improper use of funds constituted approximately 7- 10 % of the European

19 Agenda 2000 CAP Reform Proposals and Food Security in the Developing World http://iatp.org/files/Agenda_2000_CAP_Reform_Proposals_and_Food_Secu.htm, (Accessed 06.07.2013)

20 Analysis of the 2003 CAP Reform http://www.oecd.org/dataoecd/62/42/32039793.pdf, (Accessed 16.08.2013)

21 Skogstad G, Verdun A, The Common Agricultural Policy, Policy Dynamics in a Changing Context' Routledge 2010 page 38

22 Supra 15 page 301

23 Supra fn 14, page page 99.

Union budget .[24] In 1992, the European Commission affirmed that a minimum of 219 million pounds was wasted in fraud. On the other hand, members of the European Parliament's Budget Community argued that the real amount of financial loss might be almost 4 billion pounds.[25] However in contrast to popular belief, the Court of Auditors 1993 annual report did not include a figure regarding the prevalence of fraud.[26]

Although there are many types of fraud committed under the Common Agricultural Policy, the usual types of Cap fraud are related to the manipulation of aims or procedure, including; false declaration of the point of arrival (to get higher export subsidy) false declaration of quality or type of goods ,and requests for subsidy payments on products which do not exist [27]

It is widely accepted that the entire complexity of the CAP has led to fraud and created difficulties in detecting the true levels of fraud.

### 3.2. ENVIROMENTAL IMPACT

During the first 25 years since the formation of CAP, environmental problems have not played an important role. However, due to the fact that the majority of EU's territory began to be used for agricultural purposes, environmental problems increased and started to receive public attention.[28]

The CAP has encouraged intensive farming, regional and farm level concentration, and larger scale of production. As results of these processes, the environment has been badly damaged. For instance, between the 1978 and 1990 the variety of plant species in farmland declined by an estimated 30 percent and between 1970 and 1990 the number of species of farmland birds fell to 24 from 28.[29]

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[24] Hillyard Mick Economic Policy and Statistic, House of Common Library, Research Paper 95/40 ,1995 page 1.

[25] Consumers in Europe Group,The Common Agricultural Policy,How to Spend 28 billion in a year without makinganyone happy, Pamphlet,London,1994, page.8

[26] Supra 21 page, 3.

[27] Brendan Quirke,Fraud against European Public Funds,edited by P. C. van Duyne in , Cross-border crime in a changing Europe, Nova Science Published, 2001,page 146.

[28] Sinan Varol,Supra fn 2.

[29] Supra fn 15 page 154.

If we take Denmark as an example, the population of 22 species of Danish farmland birds fell by 36 per cent between 1990 and 2008. Moreover farmland has become more homogenous and many hedges have disappeared in this country.[30]

Therefore, at the European level, a Single European Act provided that 'environmental protection requirements shall be a component of the Community's other policies' Subsequently, in 1991, The Commission reflection paper stated that intensive production lead to abuse of nature, water pollution and land impoverishment. This paper suggested adaptation of measures in order to encouraged farmers in the use of environmental friendly methods.[31]

Additionally, set–aside schemes have caused some problems for the environment and wildlife. This policy has not been successful in reducing to level of output and in contributing to environmental policy aims.[32]

In the current functioning of the CAP, farmers have to respect the environment ,food safety and animal welfare standards. Failure in these requirements would led to a reduction in the direct payment amount. [33]

After 50 years under the Cap, Europe is facing important environmental problems due to intensive farming. Agriculture in Europe today is excessively dependent on fossil fuels and does not consider the limitation of water and land resources. Agriculture is one of the major contributors to biodiversity loss, nitrogen pollution, climate emissions and damage to soil quality throughout the Europe. It is argued that in order to address these challenges steps must be taken to transform EU farming as a whole in accordance with environmental realities, rather than only focusing on small areas.[34]

### 3.3. IN VIEW OF WORLD TRADE AND INTERNATIONAL RELATIONS

30 Fourth Country Report Denmark, January 2010, http://www.cbd.int/doc/world/dk/dk-nr-04-en.pdf (Accessed 17.08.2013)

31 Supra fn 17,page 206.

32 Supra fn 25,page 17.

33 A history of successful change, http://ec.europa.eu/agriculture/capexplained/change/index_en.htm (Accesed 05.07.2013)

34 http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvfru/writev/greening/m33.htm, (Accesed 05.07.2013)

Cap policy does not observe the boundaries of the EU with regards to its effect. The protection provided by the Cap has a tendency to depress world prices .Countries are which located outside the EU have also felt the negative impact of the Cap. Subsidised export of food from the EU causes destabilisation of world market prices. Barriers to imports into the EU create disadvantage for non EU farmers.[35]

In order to reduce the Cap impact on World trade, the Uruguay round of multilateral trade negotiations was launched by the World Trade organization in 1986. A number of limitations and obligations were accepted by the EU at the end of the negotiations. In relation to the obligations established during these negotiations export subsidies were decreased, domestic support reduced, market access ensured as well as sanitary and phytosanitary measures taken in the European Union.[36]

### 3.4. LAND PRICES

The impact of Cap subsidies on land prices is comparatively reasonable when we compare it to other factors.[37]

Due to Cap, the inflated land prices increased asset values for land owners but this rise led to an increase in farm operating cost. Additionally, inflated land prices made it difficult for successful farmers in terms of growing their businesses. Higher land prices stood for higher rents for tenant farmers. Production subsidies became capitalised into land values and rents and, as a result, tenant farmers gained less benefits from the Cap. [38]

In 2003, in the concept of re-organization of the Cap, it was adopted that farm subsidies would be determined as a fix set of payments per farm called the single payment scheme. Under this regime, the farmer is entitled to an annual payment dependent on the amount of the payment entitlement and

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35 Thurston Jack, How to reform the Common Agricultural Policy,The Foreign Policy Center, 2002,page,17-18

36 Supra fn 15,page 175,176,177.

37 Reform the Cap, Harvest a Beter Europea, http://www.reformthecap.eu/blog/land-markets, (Acessed 05.01.2014)

38 Supra 35,page 19

eligible hectares he possesses.[39]

### 3.5. EXCESS PRODUCTION

If the price on the free market falls below the guaranteed minimum price, farmers and traders are given an option to sell their products to EU Agencies. This mechanism is called intervention buying. The reason lying behind the system is raising the market price to at least the agreed minimum. Nevertheless if the market price remains at or below the guaranteed minimum, then the products have to be sold at a loss or held in the stores.[40] The implementation of this system led to " butter mountains", "wine lakes", "beef wars".[41]

Due to excessive production, when the EU can not find a suitable export market or where it is impossible to store the surplus food, the surplus is simply destroyed as a solution, For instance, 600.000 tonnes of peaches and nectarines, 24.500 tonnes of cauliflowers, 120.000 tonnes of tomatoes, 320.000 tonnes of apples were destroyed in 1990.[42]

Agricultural production is increasing in every year in the EU, because of the Common Agricultural Policy. Technological advancement and using stronger fertilisers and chemical pesticides have resulted in a remarkable increase in yields. This can be seen as a significant step for a developing agricultural economy, but the Common Agricultural Policy has been encouraging the rise of productivity, irrespective of the cost to taxpayer and consumers demand for the product. In addition to this, the long term effects of intensive methods on the quality of food, the land or the environment will be seen in the near future. [43]

### 3.6. SOCIAL IMPACT

Shares of Agricultural subsidies have been distributed unequally and wealth has accumulated in specific areas. The price policy in the Cap, led to this proportionate distribution due to the fact that Cap favoured northern

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39 Johan Swinne, Pavel Ciaian Study on the Functioning of Land Markets in the EU Member States ,Common agricultural report final report ,CEPS, page 112 , Brussels

40 Supra fn25,page 6

41 Supra fn,17,page 102-103

42 Supra fn 25,page 7.

43 İbid 10.

products and rich producers.[44]

The close connection between output level and subsidy means that large farms receive a large proportion of Caps support; According to the OECD 2001 Report the largest 2% of farms get 24% of all direct payment while the smallest 60% of the farms receive only 10%.[45]

Theoretically the poorer members of the community with larger agricultural sectors must have a priority in the Cap as stated in the definition of the Common Agricultural Policy yet the areas with the lowest family farm incomes are also those in which alternative or supplementary income opportunities are most restricted. Therefore the Cap as a common policy must be implemented with a greater emphasis on regional and social cohesion in agri-rural policy.[46] However as it can be seen from the abovementioned data the policy failed to achieve this aim.

### 3.7. LOW-INCOME FAMILIES AND JOB LOSSES

It is argued that much of the Cap spending does not benefit farmers at all. Low income families were damaged by regimes of subsidising and storing unwanted food. According to the study, the misallocation of resources because of the Cap had caused the EU 40.000 jobs in the manufacturing sector. [47]

### 3.8. HIGH PRICES AND TAXES

The Cap system has been criticized by consumer and tax payer groups due to its significant burden on them. The Cap's budget historically has been made up of around one half of the entire EU budget, though as a proportion this has diminished to around 42 per cent today. It is alleged that because of the Cap, cheaper imported food becomes more expensive because of tariffs and quotas. Higher food prices also create some additional costs to the taxpayers

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44 Agriculture and Rural Development, http://ec.europa.eu/agriculture/funding/index_en.htm, ,(Accessed 05.08.2014)

45 Supra fn 35.page 19

46 The shape of the common agricultural policy Post 2013 June 2010,http://www.bmwassembly.ie/publications/submissions/CAPPost2013.pdf, (Accessed 15.08.2013)

47 Supra fn 25,page 16

by increasing the amount paid in Social Security benefits[48]

**CONCLUSION**

In conclusion it must be stated that the CAP needs to be revised. Many of the aims of the original policy are not being met. Perhaps a new set of criteria is needed. Currently, the agriculture sector has a very large and complex structure; farming methods, income levels, natural resources and competitiveness make the organisation difficult to manage.

One argument is that the agricultural system is no longer advantageous to both consumers and farmers. Because of pressures on policy makers from international reforms, environmental groups and so on the focus has moved from farmers. The management of policy has become too bureaucratic and too removed from local farming community issues. Consumers also suffer because of artificially high food prices.

It is also imperative that European agricultural policy remains competitive in a changing world environment. It must be strong in order to face further international pressures and it must adapt to global market developments.

Further reforms are on the agenda of the EU, as a consequence of external pressures from outside and those within the Union.

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[48] Lee Rotherha ,How the Common Agricultural Policy costs families nearly £400 a year, http://www.taxpayersalliance.com/cap.pdf, (Accessed 15.01.2014)

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# THE DANCE OF CRIMINOLOGY WITH POLICY MAKERS AND WIDER PUBLIC

*Kriminolojinin Politikacılarla ve Geniş Halk Kitlesiyle Dansı*

**Hüseyin BATMAN***

**ABSTRACT**

Almost every day people read some crime news that attracts their attention and they see screaming headlines. Some critical criminologists, such as Greenberg and Qinneys hold the state in other words, Government responsible for controlling crime. In parallel with this idea, people think of the government as being in the service of their country and community.

This essay will initially focus on the role of policy makers that are expected to bring effective solutions to social problems such as crime and the reaction of the public against crime prevention policies. Secondly; some examples will be given to try to explain the reasons why criminology is sufficiently relevant to both policy makers and the wider public including information about the different approaches of some criminological theories. Finally, the essay will reflect upon the personal opinions of some policy makers regarding crime and policies. This essay will also provide some statistical information about the crime rate over the world.

**Key Words:** Government, Crime, Policy Makers, Prison Population, Incarceration, Public.

**ÖZET**

İnsanlar neredeyse her gün dikkatlerini çeken suç'la ilgili bazı haberler okumakta ve haykıran başlıkları görmektedir. Greenberg ve Quinneys gibi bazı eleştirel Kriminologlar devleti bir başka değişle hükümeti suç'u kontrol etmesi konusunda sorumlu görmektedir. Bu düşünceye paralel olarak insanlar hükümeti kendi ülkesinin ve halkının hizmetinde olan şeklinde düşünmektedir.

Bu makale başlangıçta suç gibi sosyal sorunlara karşı etkili çözümler getirmesi beklenen politikacıların rolüne ve suç önleme politikalarına halkın gösterdiği reaksiyona odaklanacak; ikinci olarak Kriminolojinin neden yeterli olarak politika yapanlar

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ve daha geniş halk kitleleriyle ilgili olduğunu, bazı Kriminolojik teorilerin farklı bakış açılarını içeren örnekler vererek açıklamaya çalışacak;

Sonuçta ise bazı politikacıların suç ve politikalar ahkkındaki kişisel düşüncelerini yansıtacaktır. Bu makale aynı zamanda dünya üzerindeki suç istatistikleri ile ilgili bilgi sağlayacaktır.

**Anahtar Kelimeler:** Hükümet, Suç, Politikacılar, Cezaevi Populasyonu, Hapsedilme, Halk.

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Policy makers in every country worry about pathologically violent offenders and horrifying crimes (Tonry, 2004, p.18). It can be questioned whether this is true or not, since the feelings of people are real and political leaders should answer them in a proper way, if they want to gain credibility. When politicians don't respond to this question honestly, they may not be able to have the trust of the people (Donnison, 1998, p.19). Moreover, people are aware of crime, and pay attention to this social problem because it is publicized very often and "crime is everywhere" (Canter & Youngs, 2009, p.5). Almost every day people read some crime news that attracts their attention and they see screaming headlines announcing ill-famed trials (Barnes & Teeters, 1960, p.4). Some critical criminologists, such as Greenberg and Qinneys hold the state in other words Government responsible for controlling crime (Poynting, 2008, p.122). In parallel with this idea, people think of the government as being in the service of their country and community. Even if we cannot remember all their names, what we know is that in Britain twenty cabinet ministers are collectively responsible for taking important decisions on behalf of British People (Fulcher & Scott, 2007, p.580). This essay will initially focus on the role of policy makers that are expected to bring effective solutions to social problems such as crime and the reaction of the public against crime prevention policies. Secondly; some examples will be given to try to explain the reasons why criminology is sufficiently relevant to both policy makers and the wider public including information about the different approaches of some criminological theories. Finally, the essay will reflect upon the personal opinions of some policy makers regarding crime and policies. This essay will also provide some

statistical information about the crime rate over the world.

**Responsibility for Crime**

Dealing with crime is seen as a duty for the police (Faulkner, 2000, p.82). It can be questioned the reliability of this idea, but it is clear that this idea has started changing and dealing with crime has become the responsibility not only of the police but also some institutions such as Civil Society Organizations, Universities etc. Responsibility for crime is referred firmly on criminals, either individually for the particular offences they have committed, or collectively, as if they were a different group who are outside normal or legitimate society (Faulkner, 2000, p.82). It can be argued that the reason for crime may stem from different social factors such as poverty, unemployment. In Today's world policy makers and the public usually prefer to keep the criminals in prisons instead of rehabilitating them into society regardless of thinking about the economic costs. There are now at least 9 million people who are being held in penal institutions throughout the world (Barlett, 2005,p.10). Half of which are incarcerated in the US(2.03m), China(1.51m) and Russia(0.86m). The world's population is 6.2 billion, which means that the world prison population rate is approximately 145 per 100,000 citizens. The international trend of increasing prison populations has continued well through the turn of the century and shows no tendency of abating (Barlett, 2005, p.10).

**Crime and Financial Problems**

The crime problem does not only cause social problems, but also creates financial problems (Sutherland, Cressey & Luckenbill, 1992, p.15). For example;"according to national survey of 60.000 American households conducted in 1981, the direct economic loss to victims of personal crimes such as assault, rape, robbery and household crimes (burglary, auto theft) was $10.9 billion." This estimate includes the value of cash and property damage, and medical care required by victims, but it excludes the salary loss that the harm may have entailed (Shenk and Klaus 1984 as cited in Sutherland, Cressey & Luckenbill, 1992, p.15). Over the past several decades, the United States has emerged as the leading example and advocate of the get-tough approach to

crime. Since 1965, US crime control expenditures have grown from $4.6 billion to over $100 billion and the rate of incarceration in the United States is now one of the highest in the World (Danziger, 1996 as cited in Beckett, Western, 2000,p.15). The prison population in the US effectively quadrupled between 1980 and 2002 (US Department of Justice 2004).

The US currently has the highest incarceration rate in the world with 701 prisoners per 100,000 of the national population. This is five to eight times that of similar industrialised countries, such as Canada and parts of Western Europe. With about 5 per cent of the world's population, the US holds a quarter of the world's prisoners. Would the policy makers or the federal government wish to spend a lot of money for crime prevention unless they got support from the public? It can be argued whether it is true or not but it is clear that the budget is approved by the members of national assembly in democratic countries such as the UK, the US and parliament members represent people.

The UK has one of the highest rates of incarceration in Western Europe with 109 persons in prison for every 100,000. In 2005, there were more than 75,000 people in prison in England and Wales, double the number of 42,000 in 1991 (Knepper, 2007, p.128). In the UK, confining one prisoner for one year in an English prison costs £36,000 (Coyle,2005, p.xi). In the UK there are about 75,000 prisoners so reducing the population of prisoners from 75,000 to 50,000 would allow to the UK save £900 million per year Tonry, 2004, p.80). The resulting imprisonment rate of 85-95 per 100,000 population would then be ordinary by European standards a bit higher than those in Scandinavia and about the same as those in France, Germany and Italy, as well as the other most populated counties in the EU.

So there is no specific reason why English imprisonment rates should be the highest of the large European countries (Tonry, 2004, p.80). It can be considered that sometimes policy makers and members of the public may give priority to keeping criminals in prisons instead of rehabilitating them into society regardless of the fiscal burden.

In Europe, the Netherlands took the lead in reducing prison populations and the incarceration rate fell from 100 prisoners per 100,000 just after the Second World War to approximately 20 in 1975 (Knepper, 2007, p.144). Much scholarly attention focused upon the post-war years during which the Dutch prison population fell from 6700 to 2350 between 1950-1975, or from 66 to the extraordinarily low rate of 17 per one hundred thousand inhabitants (Rutherford, 1996, p.59). However, the past few years have seen changes in this scenario.The model welfare states have displayed a disturbing enthusiasm for conventional crime policies of policing and imprisoning. In the Netherlands, Pakes (2005) reports, use of imprisonment has increased dramatically (Knepper, 2007, p.144). The rate of imprisonment reached a low point in the 1970s at about 25 imprisoned per 100,000; by 2005 that rate was about 85 per 100,000 (Pakes, 2005). The police and prosecution service has been expanded and continues to grow. Pakes argues that whilst tolerance continues to inform policy areas such as euthanasia and prostitution, it no longer informs matters of criminal policy generally (Knepper, 2007, p.144). It can be argued that these statistical results force the policy makers and the public to monitor the crime issue. The more important point is that crime might be *the tip of the iceberg* of rebelliousness and the signal of complete breakdown (Melossi, 2008, p.201). It can be considered that if the crime is the tip of iceberg of the deep social and economic problems, policy makers should read and interpret these signals very carefully. Otherwise it might be threatening both for them and for the wider public.

**Efforts of Some Governments to Bring Solutions to Crime**

Crime is a dynamic concept, and new developments produce new forms of crime (Pakes & Pakes, 2009, p.21). As the crime poses many varied problems, some countries (such as the UK, the US, Australia, Denmark & Turkey) feel obliged to form some units in order to bring a concrete and applicable solutions to this malaise. In 1957, the British Parliament brought criminology inside the operations of government by establishing the Home Office Research Unit. Forming of a criminological research body within the Home Office during the 1950s was effective to the institutionalization of criminology (Cohen,

1981; Jupp, 1996 as cited in Walters, 2003, p.45). Apart from the UK, in the United States there are some criminological research units but the most influential one is the National Institute of Justice (NIJ), which is within the United States Department of Justice (Walters, 2003, p.59). The NIJ which was created in 1968 is currently the largest funding body for academic criminological research among all US government departments (Walters, 2003, p.59). Moreover in Australia, there are five leading criminological research units within federal and state levels of government: the Australian Institute of Criminology (AIC) in Canberra, the New South Wales Bureau of Crime Statistics in Sydney, the Criminal Justice Commission in Brisbane, the South Australian Office of Crime Statistics in Adelaide, and the National Centre for Crime and Justice Statistics in Melbourne (Walters, 2003, p.64).

In Denmark, The Danish Crime Preventive Council was founded in 1971 and it has steadily broadened its scope and gained widespread recognition (Kyvsgaard, 2003, p.254). As to Turkey, Crime Prevention Research Centre was founded in 2007. These examples reveal thatthe Governments and automatically the policy makers pay attention to the crime problem in order to answer the needs and expectations of the public. Policy makers usually try to find a solution to the hottest problems of a society such as crime, because "policy- makers in every country worry about pathologically violent offenders and horrifying crimes" (Tonry, 2004, p.18).

We can see some examples over the world. During the 1970s and 1980s partisan conflict on law and order became intensely heated. Margaret Thatcher's 1979 election victory owed much to the prominence she gave to the issue, and for most of the 1980s the Conservatives attacked Labour relentlessly on crime, gaining considerable electoral advantage (Downes, 1983). The parties began to converge in the late 1980s. The Conservatives, embarrassed by the huge rise in recorded crime, moved to a more nuanced approach (Reiner, 2006 as cited in Newburn & Rock, 2006, p.24).

The first Thatcher government had announced that it would revive the short, sharp shock in detention centre regimes for young offenders. In the event, William Whitelaw proceeded with an experiment involving random

allocation to two tough institutions and two regular detention centres (Rutherford, 1996, p.106). Family Support Policies in 1993, in the UK, the idea of family-centred crime policy received support from some unexpected sources. Tony Blair when he was Shadow Home Secretary insisted that Labour had to acknowledge the importance of family. Responding to John Major's back to basics speech at the Conservative party conference, Blair insisted that there was a need for pro-family policies. I think the current debate about parenthood, families, and crime is important to people like me, he said, ...[because] *it gives us the opportunity to restate some fundamental principles in a way that actually has some meaning for ordinary people in Britain today* (Blair, 1993as cited in Knepper, 2007, p.108).

The new Government's approach to the problems of crime and justice had been expressed while Labour was in Opposition by the slogan "Tough on crime, tough on the causes of crime"(Faulkner, 2000, p.84). It is Crime and Disorder Act, passed in July 1998, is based on prevention and support for people in difficulty, combined with the coercion of those who do not comply and reform of the youth justice system. The Government recognizes that problems of crime cannot be dealt with in isolation from wider questions of social and economic policy in areas such as employment, education, health and housing (Faulkner,2000, p.84). Tony Blair coined the famous phrase "Tough on crime, tough on the causes of crime" which has dominated New Labour thinking on law and order ever since. This linked firm treatment of offenders-being tough on crime with the more traditional labour concerns with social and economic conditions-being tough on the causes of crime (Hale, Hayward,Wahidin & Wincup, 2005, p.427). Moreover; New Labour sought to impose central control by establishing the national Youth Justice Board to monitor the youth justice system and the provision of youth justice services.

At the local level, again reflecting the search for joined-up solutions, *Youth Offending Teams* were established in all areas in 2000. Their two main roles were to coordinate the provision of youth justice services locally and to carry out the functions specified for them in the LA youth justice plan (Hale et al., 2005, p.441).

In the United States**,** Robert Kennedy's department of Justice developed a crime-focused program that highlighted crime as a model problem for federal solution. While Kennedy's approach had elements that anticipated both the Great Society strategies of Lyndon Johnson and the law and order campaigns waged by Richard Nixon and George Wallace. In 1968 Kennedy fused this with a prosecutorial sensibility fashioned in highly stylized battles with mafia suspects and their lawyers and a comfort speaking as the people's seeker of justice that was unique in his period (Navasky, 1971 as cited in Simon, 2007, p.50). Moreover; the spectacular defeat of Michael Dukakis in the 1988 Presidential election led the Democratic Party to rethink many of its public positions, not least that around crime and justice. Paralleling the remodelling of the Democratic Party after 1988, the Labour Party in the United Kingdom also sought to dump its various hostages to fortune (Downes and Morgan, 1997 as cited in Reiner, 2006, p.232, 233).

**Some Criminal Politicians**

From time to time, the policy makers who are supposed to deal with crime are found to be corrupt themselves. In the US, congressmen have frequently been linked with corruption and other illegal activities. Some of their presidential administrations are remembered mostly for the graft and corruption that characterized them. This is notably true of the Grant and Harding eras. During the World War II, a congressman was sent to prison for graft in connection with war contracts; two went to prison for demanding "kickbacks" ofpaychecks from their employees; still another served time in prison for income tax evasion and, strangely enough, was re-elected by his constituents at the next election (Barnes & Teeters, 1960, p.39).

Apart from this, we can see different examples from different parts of the world.The most common crime that is associated with politicians is embezzlement. Mohammed Suharto who was the President of Indonesia between 1967-1998 is estimated to have allegedly embezzled $ 15-35 billion, Ferdinand Marcos who was the President of Philippines between 1972–1986 is estimated of funds allegedly embezzled US$5 to $10 billion; and Mabutu Sese who was the president of Zaire between 1965–1997 is estimated to have al-

legedly embezzled US$ 5 billion(Political news, n.d.). In Egypt, Hosni Mubarak who ruled his country in the last 30 years has been under arrest as he has been accused of embezzling funds and ordering his forces to shoot anti-government demonstrators (bbc news, 2011).

In Iraq, the US military worked hard to ensure oil pipeline security, but ironically, millions of dollars meant to protect the pipelines were embezzled by Iraqi parliamentarians and channelled to insurgents who attacked the same pipelines. A member of the Iraqi National Assembly was indicted for corruption in this case. In another case, a former Iraqi defence minister was charged with corruption for misspending $1.3 billion in military contracts (Spector, 2012, p.3).

In addition to that the former president of Tunisia Zine El Abidine Ben Alihad to leave his seat and flee after public protests and accusations of embezzling money. In Libya, the former president Muammar Gaddafi was not lucky enough. He was killed by a soldier after the long lasting public protests. It can be said that crime and criminology is very close to the policy makers, they can be heroes if they keep crime levels down, but on the other hand they can also be tainted by corruption and become criminals themselves.

It should not be surprising to see these examples, the reason why some policy makers involve in crime may be changeable. Big financial and business interests looking for lush contracts, or desiring to secure freedom from public regulation, or to receive tax reductions, or rebates, often align themselves with friendly politicians (Barnes & Teeters, 1960, p.40). This is done by paying ‘protection’ money, stuffing ballot boxes, intimidating independent voters, by discouraging political reformers with threats and violence, and otherwise aiding the political machines, but always for a price. For their services, racketeers want a free hand in operating whatever vice seems lucrative (Barnes & Teeters, 1960, p.40). Briefly if the politicians keep the door open for dirty relations, being involved in crime will not be accident for them.

People can experience petty corruption on a daily basis and know that it exists but may have only suspicions about grand corruption at higher levels,

involving larger sums of money, power, and influence. Secrecy tends to be even more prevalent when it comes to grand corruption. Citizens may believe that there is widespread collusion, extortion, kickbacks, and outright theft of public funds and resources at high levels, but they often cannot prove it. The mass media can pursue investigative reports to track down evidence of misdeeds, and police and prosecutors can also seek evidence through more official means. The basic underlying causes of public sector corruption are identifiable: they generally originate in low-risk, high-gain situations where there are few control mechanisms, minimal accountability for the actions of public officials, and limited transparency (Spector, 2012, p.5).

**Bulger& Baby P Cases**

Crime and criminology can also be shown to be visible in all aspects of public life. For example; the Bulger case provided the strongest possible evidence to an already worried public that there was something new and terrifying about juvenile crime (Newburn, 1996 as cited in Muncie, 1999, p.6).

Individual TV images, such as that of an 11 year old in a balaclava mask being arrested after crashing a stolen car, galvanized politicians of all parties, the police judges and magistrates to demand more effective measures to deal with young offenders. Indeed just 10 days after the Bulger murder, the Home Secretary announced plans to establish a new network of secure training units for 12-15 year old offenders (Muncie, 1999, p.6). The Prime Minister also promised a crackdown on bail bandits whereby those committing further offenses whilst on bail, would be automatically remanded in custody (Muncie, 1999,p.6). The second example can be given from a very famous case which is known as the Baby P case that took place in The UK a few years ago. The public showed an extraordinary reaction to this case and the Government had to take action.

“In a further response to the Baby P child abuse scandal, the government today committed £58 millionto plans for recruiting more top quality social workers in England” (Guardian News, 2009). In these two different examples, it is very clear that policy makers shape their policies according to the reaction of the public. It can be also considered that as long as the public maintains its

own strong sensitiveness towards crime and criminal acts, policy makers will feel obliged to make some new amendments accordingly.

In conclusion; it would not be wrong to say that there are no simple or straightforward solutionsto crime, just as there are no simple or straightforward explanations of it.Crime has become a major area of public policy and political debate, and to politicians and public commentators alike, it is often seen as a sign of underlying problems in society. Politicians prior to the 1970s avoided crime as a political issue as they did not want to associate themselves with a problem that appeared unsolvable (Knepper, 2007, p.16). In the last two decades of this century some policy makers such as Blair, Clinton etc.have changed their attitude towards crime. Millions of people have to live together, their lives will be more pleasant and peaceful if measures are taken by policy makers to prevent people killing or physically attacking others, walking into their houses and taking things away, or smashing up another's car. Thus, the harmony of the relations between policy makers and the public is crucial. In the current era, high crime rates have come to be expected, part of a complex of fear, anger, and resentment.

Therefore the anxiety of policy makers should not be surprising, as the crime might be threatening to policy makers and the public if it is not kept under control. Policy makers and the people saw the result of the big public protests in some Arabic countries such as Tunisia, Egypt and Libya in 2011. From the author's perspective these incidents may be used as an example of wider public powers over the policy makers.

The second message that can be drawn from these incidents is that when policy makers commit crime instead of dealing with it, the reaction of the people becomes more powerful as we saw in Tunisia, Egypt and Libya in the near past**.** Finally, some people can continue to argue that Criminology is insufficiently relevant to policy makers and wider public. However, as crime and criminology are dynamic subjects, policy makers and the wider public will feel obliged to monitor these topics very closely in order to feel safe and secure. The reason for this is simple "no community is immunized from crime".

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# SUPPLEMENTARY PROTECTION CERTIFICATES IN EU LAW: A COMPENSATION MECHANISM AND TURKEY'S POSITION

*Avrupa Birliği'nde İlaç Patentlerinin Tamamlayıcı Koruma Belgeleri; Bir Telafi Mekanizması ve Türkiye'nin Pozisyonu*

**İlhami GÜNEŞ***

**ABSTRACT**

Thus patent protection is valid for 20 years, when it needs to receive a patent for a product in the pharmaceutical sector said term can not be used effectively. Authorised European Union Bodies adopted Regulation No 1768/92 and Regulation No 1610/96 to establish a system for supplementary protection for pharmaceuticals. Factors such as the patent application acceptance process, administrative requirements, extensions to the product development process and, especially, the need for authorisation to put products on the market impact on the effective patent protection period. In the pharmaceutical and agricultural chemicals sector, the requirement for lengthy testing in order to determine whether new pharmaceuticals or pesticides and herbicides are effective and safe, reduces the effective patent protection period.

**Key Words:** supplementary protection certificate, active ingredients, patent protection

**ÖZET**

Patent koruması yasal olarak 20 yıl süreyle geçerli olmakla birlikte, ilaç sektöründe ürünlerin patentlenmesi söz konusu olduğunda, bu süre tam anlamıyla kullanılamamaktadır. Avrupa Birliği'nin yetkili organları, 1768/92 ve 1610/96 Sayılı Tüzüklerle tamamlayıcı koruma sistemi kurmuştur. Patent başvurusunun kabulü süreci, idari zorunluluklarla ürün geliştirme sürecinin uzaması ve özellikle pazara giriş izni gerekmesi gibi sebepler, verimli patent koruma süresini etkilemektedir. İlaç ve tarım kimyasalları sektöründe, yeni ilaç veya böcek ve bitki öldürücü, tarım kimyasalının verimli ve güvenli olup olmadığı uzun testler sonucu anlaşılabildiğinden verimli patent süresi kısalmaktadır.

**Anahtar Kelimeler:** Tamamlayıcı Koruma Belgeleri, etken madde, patent koruması

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## I. INTRODUCTION

The exclusive right granted by a patent is not indefinite and, although it is restricted to a statutory period of twenty years, it is very difficult, indeed virtually impossible, in certain areas of industry for protection to be made to commence at the same time as the commercialisation of the patented product - however much the patent holder may wish for this.

Most countries envisage a statutory trial period for pharmaceuticals before they are placed on the market. Factors such as the patent application acceptance process, administrative requirements, extensions to the product development process and, especially, the need for authorisation to put products on the market impact on the effective patent protection period. In the pharmaceutical and agricultural chemicals sector, the requirement for lengthy testing in order to determine whether new pharmaceuticals or pesticides and herbicides are effective and safe reduces the effective patent protection period. This lengthy testing and registration process may last as long as eight years.

In the pharmaceutical sector, the cost of bringing a new product to the market may be as high as 800 million dollars, a substantial amount of which is spent on clinical testing[1].

The European Commission has adopted directives in the area of human and veterinary medicaments. Certain delays frequently occur before products are brought to the market. When a pharmaceutical is under patent, the patent protection period is reduced and the benefit that may be made of it is frustrated.

The Supplementary Protection remedy affords supplementary protection that may be granted in the case of patents obtained particularly in the fields of human pharmaceuticals, plant protection products and veterinary medicaments. A Supplementary Protection Certificate is a *sui generis* industrial

[1] **KATZKA, Catherine**; "Interpretation Of The Term "Product" in EU Council Regulations 1768/92 and 1610 /96 on Supplementary Protection Certificates", Journal of IP Law, 2008, Vol. 3 No: 10, p. 250.

property right. The aim of such certification is to enable the pharmaceutical industry to obtain effective patent protection. It facilitates the conducting of clinical studies and testing, and the obtaining of authorisation to put products on the market[2].

Supplementary Protection starts on expiry of the relevant patent protection period. This type of right may be obtained for various biological active substances in human or veterinary medicaments and plant protection products, as well as derivatives. It extends the monopoly rights period for compositions with one or more of active substances or active substances that are patented protected.

There is a general debate on product definitions in Supplementary Protection Certificates, and on the subject of patent protection and supplementary protection certificates. Supplementary protection certificates may be obtained for national and European Patents.

**II. RELEVANT EU LEGISLATION**

SPCs sit on the boundry between of patent law and administrative-regulatory law- law, but knowledge of patent law principles and the local regulatory law is also required. SPCs were created and are governed by fallowing EU regulations:

• EU Council Regulation No 1768/92 concerning Medicinal Products and EU Parliament and Council Regulation No 469/2009 of 6.05.2009 concerning the Supplementary Protection Certificate for Medicinal Products.

• EU Council Regulation No 1610/96 concerning Plant Protection Products

• EU Council Regulation No 1901/2006 concerning Medicinal Products for Paediatric Use[3]

[2] **BENTLY, Lionel-SHERMAN, Brad**; Intellectual Property Law, 2002 Oxford New York, p. 551.

[3] **KUIPERS, Gertjan/DOUMA, Tjibbe/KOKKE, Margot**; "European Union: Recent Developments Regarding Patent Extensions (SPCs And Pediatric Extensions), Bio-Science Law Rewiev, Vol 12, Issue 4 BSLR

## III. PURPOSE OF THE SYSTEM

The basic aim of adopting these certificates is to encourage innovative efforts such as patents. Most countries provide for a regulatory framework for the testing of pharmaceuticals prior to them being placed on the market. That is why the European Union introduced the above mentioned regulations. Often, there will be substantial delays prior to the product coming on the market. Clearly where a pharmaceutical is the subject of a patent, this reduces the effective term of protection and often would make its exploitation uneconomic[4]. The normal twenty-year duration of patents undergoes a *de facto* reduction in the pharmaceutical sector. Depending on the type of patent, the *de facto* protection period may vary from thirteen years under molecule patents, to between fourteen and sixteen years under other patents. Justice thus demands an extension of this nature if the patent holder is to derive effective benefit from protection.

## IV. CONDITIONS FOR OBTAINING A SUPPLEMENTARY PROTECTION CERTIFICATE

### 1. Criteria

The protection provided by an SPC extends to the 'product' covered by the authorisation and any use of that product as a medicinal product that has been authorised before expiry of the SPC. The product is defined as the 'active substance' (in the case of plant protection) or 'ingredient' (in the case of medicinal products) for which approve has been gained.[5] Supplementary Protection Certificates are intellectual property rights that are based on and similar in nature to patents. According to EU Parliament and Council Regulations 1768/92 and 469/2009:

*(i)* The patent protecting the product must still be in force.

(*ii)* The product must have a valid approval or authorisation to be placed on the market.

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4 **TRITTON, Guy**; Intellectual Property in Europe, 2002 London, p. 177.

5 **BENTLY, Lionel-SHERMAN, Brad**; Intellectual Property Law, 2002 Oxford New York, p. 533.

*(iii)* The product must not yet have been the subject of a supplementary protection certificate.

*(iv)* The authorisation to place the product on the market must have been granted for the first time.

The above-mentioned regulations apply in all EU Member states. However, Supplementary Protection Certificates are only valid on a country-by-country basis in the country where they have been obtained.

The basic patent may by itself be a patent for a process to obtain a product or products. It may protect a preparation, defined as being a solution or mixture consisting essentially of two or more substances, at least one of which is an active substance, for a plant protection product. The subject and scope of the supplementary protection is the same as that of the basic patent and is also subject to the same limitations and obligations. So it is important to define a few terms here. Basic patent means a patent protecting *(i)* a product as such, *(ii)* a process to obtain a product or *(iii)* an application of a product. Product means the active ingredient or combination of active ingredients of a medicinal product. And medicinal product means the substance presented for treating or preventing disease in humans[6].

The term "active substance" or "active preparation" is construed to mean a substance for which authorisation to enter the market has been obtained and which is protected by patent, and generally its closest derivatives, particularly in the form of an ester or a salt. However, this is with the proviso that the active substance in question is not a new active substance. The Supplementary Protection Certificate covers one product/patent only. A separate Supplementary Protection Certificate must be additionally obtained for each individual product.

It has been suggested that the most appropriate interpretation of the definition of a product protected by a basic patent is that protection will be con-

[6] **KUIPERS, Gertjan/DOUMA, Tjibbe/KOKKE, Margot**; "European Union: Recent Developments Regarding Patent Extensions (SPCs And Pediatric Extensions), Bio-Science Law Rewiev, Vol 12, Issue 4 BSLR

ferred on the active ingredient however formulated and for any therapeutic use covered by a marketing authorisation granted before expiry of the certificate[7].

**2. Entitlement**

The owner of the basic patent and his successors are also entitled to obtain a Supplementary Protection Certificate. Even if this is not clearly stipulated in the Regulation, according to the prevailing view, there is no absolute requirement for the applicant to be the holder of the authorisation to enter the market. However, if a licensee has obtained authorisation, application may be made on behalf of the patent holder for Supplementary Protection. Certain problems may arise if other persons have obtained process patents containing novelty and inventive steps for the same active substance. According to the Regulation, if a product is already the subject of a Supplementary Protection Certificate no additional SPC be issued. If a party holds a process patent and, after having obtained authorisation to market the product, acquires a supplementary protection certificate, the other patent holder may not obtain a Supplementary Protection Certificate even if he relies on an antecedent right.

Even though the Regulation has not made specific provision concerning the status of existing licences, as it is stated in Article 5 of the Regulation that the certificate is subject to the same limitations and the same obligations as the basic patent, it is accepted that licensees will also benefit from the period protected by the certificate[8].

**3. Lifetime of a Supplementary Protection Certificate**

The additional and supplementary protection certificate has been devised to compensate for the time lost by virtue of regulatory procedures imposed on the manufacture and sale of such products. On the other hand, a supplementary protection certificate normally has a lifetime of five years, and this may be extended to at most five and a half years depending on the applicable approval process for the market entry of clinical data compiled where human

7 **TRITTON**, p. 179.
8 EC Regulations, 469/2009, Art. 5.

medicinal products are concerned. The certificate takes effect at the end of the lawful term of the basic patent[9].

**4. Exploitation of a Supplementary Protection Certificate**

The Supplementary Protection Certificate is accepted by all European Union Member states under the relevant Regulation. However, as it has no unified effect, application must be made for a certificate on a national basis. The rights granted under an SPC are subject to the same limitations and obligations as applied to the basic patent. An SPC will therefore be subject to licenses of right if the patent would have been subject to such a licence prior to its expiry[10].

There exist mechanisms with regard to Supplementary Protection Certificates in all European Union member states. However, separate application needs to be made in each country. A Supplementary Protection Certificate is valid only in the country in which it is obtained[11].

**5. European Court of Justice's Decisions**

European Court of Justice takes important decisions on the interpretation of Regulation No 469/2009. In practice there are problems in establishing what is meant by the terms "product, active ingredient and combination of active ingredient". The European Court of Justice, in its interpretation of the term "product", has consistently defined this as "active substance or active ingredient".

Certain decisions assume importance for Supplementary Protection Certificate strategy: In the *Eli Lilly v. HGS* decision, it refrained from a broad interpretation in the matter of protection under a valid basic patent. A product may be defined specifically enough such that the claims are in functional

9 Art. 13/1 EC Regulation No: 469/2009 of the European Parliament and the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (codified verison)

10 **BENTLY-SHERMAN,** p. 54.

11 **KATZKA, Catherine;** "Interpretation Of The Term "Product" in EU Council Regulations 1768/92 and 1610 /96 on Supplementary Protection Certificates", Journal of IP Law, 2008, Vol. 3 No: 10, p. 651.

terms. In *Actavis v. Sanofi* and *Georgetown II,* on the other hand, it was stated that it is possible for a separate Supplementary Protection Certificate to be obtained for each basic patent. The Court has also, in these decisions, made assessments regarding the duration of Supplementary Protection Certificates. The Court has established a new criterion for the issuing of Supplementary Protection Certificates: If the Supplementary Protection Certificate is inconsistent with the purpose of Regulation No 469/2009, it can be refused[12].

### V. Patent Exploitation and Supplementary Protection Remedy in Turkey

Within the pharmaceutical sector's competitive research environment, leaving aside the difficulty in obtaining a patent, the administrative problems in ensuring that a patent effectively serves to its holder make Supplementary Protection Certificates necessary. At the same time, according to the Competition Authority's latest reports, it takes an average of seven months for generic medicines to enter the market in Turkey once the patent protection period expires. This period can be as short as four months in the case of commercially successful medicines.

As Turkey is not yet a member of the European Union, it is not bound by EU legislation on Supplementary Protection Certificates. This means that there are no mechanisms in Turkey enabling applications for Supplementary Protection Certificates to be applied for and obtained.

However, according to the Competition Authority's reports, since it has been ascertained that the potential lost patent life incurred for administrative authorisation reasons by patent-holder pharmaceutical companies is fairly insignificant, there is no need for a supplementary protection period[13]. However, this matter falls within the realm of domestic political preferences.

### VI. CONCLUSION

Supplementary protection is key to the pharmaceutical industry and has

[12] **KALDEN, Rian**; "Latest Case Law Concerning SPC",17. European Judges Symposium.

[13] **GÜLERGÜN C. Emin/KARAKOÇ H. Deniz/ HATİPOĞLU C. Atalay**; 27.03.2013 Tarihli Rekabet Kurumu Sektör Araştırma Raporu, (Sector Research Report of Competition Board) p. 223. www. rekabet.gov.tr

now been made more easily available by the CJEU[14]. It is very important for Industry because, up to 80 % of the total revenue for a major pharmaceutical product can be generated in the supplementary protection certificate system[15].

However issues remain. Until 2012 there was uncertainty surrounding the application of SPCs to combination products. Two important decisions of the CJEU[16] namely *Medeva*[17] and *Novartis v. Actavis*[18], have clarified these difficult issues and provide a reasonably workable solution to those who wish to obtain and enforce SPC protection for vaccines and other combination products. From case law it can be inferred that the CJEU refrains from opening a path to evergreen patents and on the other hand attaches importance to the therapeutic effect of excipients in combination product. Even if protected by a basic patent, a product must fall within the scope of the claims either expressly or implicitly but then the claim must necessarily and specifically be understood to relate to the product.

From the comments made on the Eli Lilly case it is clear that CJEU needs to consider reform on the issue.

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14 **KUIPERS, Gertjan/DOUMA, Tjibbe/KOKKE, Margot**; "European Union: Recent Developments Regarding Patent Extensions (SPCs And Pediatric Extensions), Bio-Science Law Review, Vol 12, Issue 4 BSLR

15 **KALDEN, Rian**; "Latest Case Law Concerning SPC",17. European Judges Symposium, p. 2.

16 Court of Justice of the European Union

17 C-322/10; www.curia.europa.eu

18 C-442/11: www.curia.europa.eu

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7-www.curia.europa.eu

# THE AMENDMENTS TO THE COMMON FOREIGN AND SECURITY POLICY OF THE EUROPEAN UNION BROUGHT ABOUT BY THE LISBON TREATY

*Avrupa Birliğinin Ortak Dış ve Güvenlik Politikasına Lizbon Anlaşması ile Getirilen Yenilikler*

**Nurullah TEKİN***

**ABSTRACT**

The European Union acquired legal personality in the Lisbon Treaty. This strengthened its foreign policy identity and allowed the EU to be party to international treaties. The analogy often drawn is that these changes have enabled EU Member States to 'speak with a single voice' in relations with foreign nations and organizations. Indeed, the Treaty was signed in order to make the Common Foreign and Security Policy more democratic, transparent and effective, and to enhance the role of Europe as a visible actor on the international stage. This was to be achieved by bringing together Europe's external policy instruments, both when developing and deciding new policies.

As regards the future conduct of EU foreign policy, the Treaty of Lisbon introduced three major institutional innovations, namely the roles of The High Representative of the Union for Foreign Affairs and Security Policy and the President of the European Council as well as a new body - the European External Action Service.

**Key Words**: The Treaty of Lisbon, The Common Foreign and Security Policy, External Action Service, the Common Security and Defence Policy, The High Representative of the Union, External Relations, The Court of Justice of the EU

**ÖZET**

Avrupa Birliği, Lizbon Antlaşması ile birlikte tüzel kişilik kazanmıştır. Bu durum, AB'nin dış politika kimliğini güçlendirmiş ve onun uluslar arası sözleşmelerin bir tarafı olabilmesi yolunu açmıştır. Getirilen değişikliklerle AB ülkeleri, dış devletler ve kuruluşlarla olan ilişkilerinde tek bir ağızdan konuşmaya, ortak hareket etmeye başlamıştır.

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Aslında Lizbon antlaşması, bu hususla ilgili, Ortak Dış ve Güvenlik Politikasını daha demokratik, şeffaf ve etkili hale getirebilmek ve AB'nin uluslar arası arenada daha görünür bir aktör olabilmesi için imzalanmıştır. Bu, yeni politikalar üretilmesi ve geliştirilmesi sırasında Avrupa'nın dış politika araçlarının bir araya getirilmesi ile başarılmıştır.

Lizbon Antlaşması, AB'nin dış politikasının yürütülmesi ile ilgili üç önemli kurumsal yenilik getirmiştir. Bunlardan ilki; Birlik Dışişleri ve Güvenlik Politikası Yüksek Temsilcisinin rolü, ikincisi; Avrupa Konseyi Başkanının görevleri, sonuncusu ise; yeni bir kurum olan Avrupa Dış Eylem Servisi ile ilgilidir.

**Anahtar Kelimeler**: Lizbon Antlaşması, Ortak Dış ve Güvenlik Politikası, Dış Eylem Servisi, Ortak Güvenlik ve Savunma Politikası, Birlik Yüksek Temsilcisi, Dış ilişkiler, Avrupa Toplulukları Adalet Divanı

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## I. INTRODUCTION

The Treaty of Lisbon entered into force on 1 December 2009. The European Community was replaced by the European Union (EU) which succeeded it, taking over all its rights and obligations. The Treaty on European Union (TEU) kept the same name, whilst the Treaty establishing the European Community (TEC) became the Treaty on the Functioning of the European Union (TFEU). The EU acquired legal personality in the Lisbon Treaty. This strengthened its foreign policy identity, enabling the EU to, for example, be party to international agreements. Further, it paved the way for the EU Member States to speak with one voice in international organizations and institutions[1].

Since the 1950's there have been strenuous attempts made to coordinate the various foreign and security policies of the European community. It was only after the Maastricht Treaty came into effect in November 1993 that these disparate, mostly informal consultative methods, were solidified under an institutional framework - what would become known as the Common Foreign

[1] EPLO Briefing Paper 1/2012, Common Foreign and Security Policy structures and instruments after the entry into force of the Lisbon Treaty, online at: http://www.eplo.org/assets/files/2.%20Activities/Working%20Groups/CSDP/EPLO_Briefing_Paper_1-2012_CFSP_After_Lisbon.pdf, accessed on: 30.03.2014

and Security Policy (CFSP)[2]. This became the second pillar of the embryonic union, with intergovernmentalism at its heart.

The Treaty of Lisbon introduced fundamental changes to the CFSP. Firstly, it amalgamated the two roles of High Representative for the CFSP (created under the Amsterdam Treaty) and the External Affairs Commissioner into a single High Representative of the Union for Foreign Affairs and Security Policy (HR for FASP). Secondly, it established the European Union External Action Service (EEAS), partially by seconding parts of European Commission or Council departments to the new organisation[3]. This effectively brought diplomatic missions within the remit of the High Representative.

The Lisbon Treaty also introduced strategic guidelines for the activities of the Common Security and Defence Policy (CSDP), mostly reflected in mechanisms for the introduction of 'permanent structural cooperation'. For the first time, the terms 'common solidarity', 'common defence' and issues regarding data protection, were provided for[4].

The main objective of this essay is to analyse the amendments and innovations to the CFSP brought about by the Lisbon Treaty. Firstly, the origins and development of this policy will be briefly examined. Secondly, institutional reforms (namely the HR for FASP, the permanent President of the EC and the EEAC) will be discussed. Thirdly, special jurisdiction of the Court of Justice of the European Union (CJEU) in this matter will be explained. Finally, this essay will attempt to summarise alterations to the CSDP, an integral part of the CFSP.

## II. THE ORIGINS AND DEVELOPMENT OF COMMON FOREIGN AND SECURITY POLICY

The CFSP manages EU Member States' attempts to proceed in a unified way on foreign policy and security matters. In recent years, it has received a great deal of attention as the EU has attempted to constitute an independent

[2] Babic Jelena, *The Common Foreign and Security Policy of the European Union After the Lisbon Treaty*, Western Balkans Security Observer, No: 17, 2010, p. 3-4, (pp. 3-12)
[3] supra note 2, p. 4-5
[4] supra note 2, p. 5

role for itself[5].

The Treaty of Rome primarily focused upon economic issues and did not include provisions concerning foreign policy. Two early attempts to create a common foreign and security policy failed - these being the European Defence Community and the associated European Political Community, which failed in 1954, and the so-called 'Fouchet Plan', with respect to political co-operation and defence policy, which collapsed in 1962[6].

Following 'The Davignon Report[7]' presented in 1970 at the Luxembourg summit, the Member States tried a consultative approach, discussing the main international policy problems outside the existing European Community institutions, through what was then called 'European political co-operation'. "In 1986, the Single European Act formalised this political co-operation, according to which the high contracting parties endeavoured jointly to formulate and implement a European foreign policy"[8].

Today's CFSP has its origin in the European political cooperation established between the member states of the European Economic Community. The CFSP was negotiated in Maastricht in 1992 and embodied in the TEU document. Its aims included: safeguarding the common values, basic interests, independence and integrity of the EU; universal strengthening of the security of the Union; preservation of peace; the promotion of European cooperation and the consolidation of democracy, the rule of law and respect for human rights and freedoms. In 1993, when the Maastricht Treaty came into effect, the EU as such, and most notably the Council, incorporated the CFSP into Title V of the former TEU. This treaty provided the institutional scaffold for all sub-

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5 *Common Foreign and Security Policy*, online at: http://www.civitas.org.uk/eufacts/download/EX.3.CFSP.pdf, accessed on: 29.03.2014

6 Piris Jean-Claude, *The Lisbon Treaty: A legal and Political Analysis*, Cambridge University Press, 2010, p. 240

7 This report recommended that Member States should endeavour to speak with a voice on international policy problems, a proposal that was approved by all six member states. It culminated first in European Political Cooperation and then in the CFSP in 1992. (*Davignon Report*, online at: http://www.cvce.eu/content/publication/1999/4/22/4176efc3-c734-41e5-bb90 d34c4d17bbb5/publishable_en.pdf, accessed on: 02.04.2014)

8 Supra note 6, p. 240

sequent sculpting of the CFSP of EU Member-States.

"The Council was empowered to adopt, by unanimity, legal acts called 'common positions' and 'joint actions' which bound the Member States. The CFSP was still led by the Council's six-monthly Presidency, and the Commission remained, as under 'political co-operation', 'fully associated with the work'. In 1999, The Amsterdam Treaty took a further step with the creation of the office of High Representative for the CFSP, who was to 'assist the Council in CFSP matters... in particular through contributing to the formulation, preparation and implementation of policy decisions"[9]. It defined certain changes directed to better safeguard the coordination of foreign and security policy.

The Lisbon Treaty was responsible for a few, but significant, changes which made the CFSP more cohesive. The Treaty sought to reinforce the role of the EU in the international arena. The changes introduced by the Treaty aimed to make the CFSP of the EU more coherent and to expand its area of visibility[10].

The legal relationship between the CFSP and other types of EU external activity has been considerably amended by the Lisbon Treaty. In this context, Article 40 TEU, which replaces old Article 47 TEU, states: "The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter".

As can be seen from this provision, it protects both CFSP competences and those of the EU under the TFEU. It can therefore said to rationalise the external actions available to the EU, which have, hitherto, been neither coor-

9 Supra note 6, p. 240-241

10 *The Lisbon Treaty: a comprehensive guide, Common Foreign and Security Policy,* online at: http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0025_en.htm, accessed on: 02.04.2014

dinated nor mutually reinforcing. Indeed whilst previous Treaty versions have attempted to achieve consistency via constitutional mechanisms, the Treaty of Lisbon has 'built an institutional bridge' encompassing the President of the EC and the HR for FASP assisted by the EEAS[11].

## III. INSTITUTIONAL REFORMS

The Treaty of Lisbon introduced three major institutional innovations, nominally the HR for FASP, the President of the EC and the EEAC pertaining to the future implementation of the EU foreign policy. The next three sub-sections will elaborate on the possible role and functions of these institutions and describe how they could contribute to strengthening the consistency of European foreign affairs and integrating the EU's external representation[12].

### A. THE HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY

The HR for FASP is a central institutional reform introduced by the Lisbon Treaty, together with the permanent President of the EC[13]. It has its roots in the Constitution for Europe - as the original name of EU Minister for Foreign Affairs implies[14]. The duties of the former European commissioner for external affairs are now with the HR, who is also the Vice President of the European Commission. Since the HR is commissioner and representative of the Council, the position is described as a 'double-hat' or 'double-hatted[15]' structure. The HR also presides at the Foreign Affairs Council at the Council of EU[16]. This holder of this post is responsible for the important role of ensuring harmony

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11 Eeckhout Piet, *EU External Relations Law*, Oxford University Press, 2011, p. 166 and 181

12 Gaspers Jan, *The quest for European foreign policy consistency and the Treaty of Lisbon*, Humanitas Journal of European Studies, Volume: 2, No: 1, 2008, p. 21, (pp. 19-53)

13 The position is currently held by the UK's Federica Mogherini, who was appointed on 30 August 2014.

14 Biondi Andrea, Eeckhout Piet, and Ripley Stefanie, *EU Law After Lisbon*, Oxford University Press, 2012, p. 285

15 Marangoni Anne-Claire, *One Hat too Many for The High Representative – Vice President, the Coherence of EU's External Policies After Lisbon*, EU External Affairs Review, July 2012, p. 4, (pp. 4-17)

16 Laursen Finn, *The EU's Lisbon Treaty: Institutional Choices and Implementation*, Ashgate Publishing Limited, 2012, p. 46

between EU institutions and between the institutions and Member States[17]. More clearly, it provides, and strengthens, efficient coordination and cooperation among the Member States in order to ensure the consistency of the Union's external actions[18].

It is now clear that the competencies of the HR for FASP are much broader than those of her pre-Lisbon predecessor. According to provisions of the TEU, the powers of the HR for FASP can be summarized as follows:

The first power is to make proposals. Article 18(2) TEU provides that the HR shall contribute proposals for the development of the CFSP. In the same vein, Article 30(1) states that the HR may refer any question concerning the CFSP to the Council. The second power is to preside at the Foreign Affairs Council. Part of that power includes the right to convene extraordinary Council meetings in an emergency situation[19]. The Chair's role is not delineated, but it is assumed to be important, insofar as the Chair is responsible for the agenda[20].

The third power concerns implementation and supervision. On this point, Article 18(2) of the TEU already provides that the HR "shall conduct the Union's [CFSP]". Likewise, Article 27(1) indicates that the HR "shall ensure the implementation of the decisions adopted by the European Council and the Council". A fourth power concerns consistency of action. Article 18(4) observes that since the HR is also one of the Commission's Vice- Presidents, as such, it is incumbent on the holder of the office to exercise responsibility for the Commission's role in external relations - this duality aims to ensure consistency[21].

Finally, the last power is related to the external representation of the EU concerning the CFSP, and co-ordination of external activity by the Member States. Article 27(2) provides that the HR shall represent the Union for CFSP matters, and that "he shall conduct political dialogue with third parties on the

17 Margaras Vasilis, *Common Security and Defence Policy and the Lisbon Treaty Fudge: No Common Strategic Culture, No Major Progress*, EPIN Working Paper, No:28, 2010, p. 2
18 See Article 18/4 of the TEU
19 See Article 27 and 30 TEU
20 Supra note 11, p. 493
21 Supra note 11, p. 493-494

Union's behalf and shall express the Union's position in international organisations and at international conferences."

As can be seen from the provisions of the TEU, this is a wide range of powers and duties. There are serious queries as to whether one person could ever manage all such responsibilities. Nevertheless, the HR is supported by the EEAS[22].

A comparison between the current, and former, HR is pertinent here. It can easily be seen that while the previous HR was destitute of funds and did not act to remove bureaucratic obstacles, the current HR now has access to adequate financial support and a diplomatic service. In addition, the HR prior to Lisbon was responsible to the Council but not to the Commission, which always led to controversy. In order to settle the conflict, the current HR is now placed between those institutions. Thus, though "...the new top job represents a structure facilitating discourse and organization in CFSP, it has not yet turned into a leadership beyond that. This might also be the case, because the initiative for agenda-setting was not yet to be used because of several recent international problems that did appear on the agenda on their own. Consequently, the new function holders are pretty occupied solving these problems first"[23].

Regardless of the criticism, the new position of the HR for FASP is clearly an answer to stinging criticism, as previously noted, to address the ineffectiveness of the pillar structure and the separation of the issue areas, and thus, the irrational nature of representation in international relations[24]. In this light, the "....double hat and double role in some way mirrors the unity of the supranational (Commission) and intergovernmental (Council) logic of the Union; it combines in one person the European and the Member States' lines of interest. The responsibility of ensuring the 'consistency of the Union's external action' precisely describes what the Treaty of Lisbon is aiming at: the Union

[22] Supra note 11, p. 494
[23] Supra note 16, p. 47
[24] Koehler Kateryna, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, Caucasian Review of International Affairs, Volume: 4, 2010, p. 67

shall be perceived as one unit, speak with one mouth, and implement consistent policies in external matters[25]."

**B. THE PRESIDENT OF THE EUROPEAN COUNCIL**

One of the most important changes provided by the Lisbon Treaty concerns the formal introduction of the EC as one of the EU's integral institutions and the introduction of the status of the President of the EC. It should be noted that the EC defines the EU's general political directions and priorities[26]. In regard to CFSP, this means in connection with Article 26/1 of the TEU: "The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions". Hence, the EC, generally, but also with regard to CFSP, retains its fundamental role of delineating guidelines[27].

The introduction of the position of President of the EC influences European foreign policy. Before the Treaty of Lisbon came into force, the Head of State or Government of the Member State that held the Presidency of the Council of Ministers also kept a chairmanship during the meetings of the EC. However, this situation was not explicitly regulated in the Treaty. "The Presidency of the Council of Ministers rotates every six months between the Member States in an order defined by the Council, and all positions related to the Presidency also rotate[28]."

According to the reforms of the Lisbon Treaty, the first 'permanent' President of the EC is elected by a qualified majority for a term of two and a half years that can be renewed once[29]. In case of an obstacle or grave wrongdoing, the EC can end his term of office in line with the same procedure. While holding this position, the President of the EC cannot perform any other duty on a

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25 Pernice Ingolf, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, Columbia Journal of European Law, Volume: 15, No: 3, 2009, p. 399 (pp. 349-407)

26 See Article 15 of TEU

27 Supra note 16, p. 48

28 Supra note 24, p. 68

29 Donald Tusk was elected by the members of the European Council as the second permanent President of the EC on 30 August 2014.

national level[30].

The EC, in CFSP area, determines the requirements for the application of qualified majority vote. This genuinely indicates an intergovernmental predominance in this field and constitutes a gain of power for the EC. The institution explicitly includes the interests of Member States and, therefore, encourages them to exert a stronger effect on community policies. At the same time, it is incumbent on the EC to ensure the consistency of the Union's external activity by using this new competency[31].

A comparison of the responsibilities of the President of the EC to those of the HR, makes it clear that the tasks of the former are more ambiguous, though there are substantial overlaps. On one hand, the President should make an effort to find a compromise among the Heads of States and Governments in the EC, while on the other; he should not be swayed by the interests of any Member State to ensure the of the Union's objectives, to which all member states have committed themselves[32].

The EC President also plays a role in the control of the CFSP. Article 15(5) TEU states that the President "shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy". It is not entirely clear what the phrase 'at his or her level and in that capacity' means. Thus, it remains uncertain in the Treaty to what extent the competencies are separated within the area of 'external representation of the Union'[33].

"The advocates of the reforms proclaimed in the Treaty of Lisbon claim that a 'certain competition' between these two functions within the foreign-policy dimension of the EU only make the (double) voice of Europe louder in the international arena. The function of the President of the EC particularly

30 Supra note 2, p. 6
31 Supra note 16, p. 48
32 Wessels Wolfgang and Bopp Franziska, *The Institutional Architecture of CFSP after the Lisbon Treaty: Constitutional Breakthrough or Challenges ahead?* Challenge – Liberty and Security, Research Paper No: 10, 2008, p. 29, (pp. 1-31)
33 Supra note 6, p. 208

becomes important in the light of ensuring the continuity of the work of the EC and an improved communication with the European Commission and the member states presiding over the Union over a six-month period. However, the overlap between the duties of the President and the HR is, for the time being, a less important issue. It is much more important that the two bodies reach a clear and joint position on the international policy issues in order to represent the Union with more confidence on the international level[34]."

**C. EUROPEAN EXTERNAL ACTION SERVICE**

The third and final major institutional reform introduced by the Lisbon Treaty regarding EU foreign policy is the establishment of the EEAS. The creation of the EEAS is of vital importance in order to ensure the consistency and visibility of the EU's external relations and the strengthening of its role as an international actor[35]. In this regard, according to the Presidency report, the EEAS "should play a leading role in the strategic decision-making"[36]. Considering the extent of duties and the responsibilities of the HR, the establishment of the EEAS was an indispensable step to ensure the capacity of the HR to carry out his or her tasks[37].

It should be pointed out at this juncture that the Treaty of Lisbon does not provide for a clear-cut authority, as it lays more emphasis on procedure and some limited organizational aspects. The relevant Article 27(3) states the following: "In fulfilling his or her mandate, the High Representative shall be assisted by a European External Action Service. This service shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organization and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting

34 Supra note 2, p. 7

35 Supra note 12, p. 32

36 *Presidency Report to the European Council on the European External Action Service*, Council of the European Union, 14930/09, Brussels 23 October 2009, p. 4, online at: http://register.consilium.europa.eu/pdf/en/09/st14/st14930.en09.pdf, accessed on: 01.04.2014

37 Supra note 24, p. 70

the European Parliament and after obtaining the consent of the Commission." The EEAS will work in cooperation with the diplomatic services of the Member-States[38].

As for the scope of the EEAS, it "should be composed of single geographical (covering all regions and countries) and thematic desks, which will continue to perform under the authority of the High Representative the tasks [previously] executed by the relevant parts of the Commission and the Council Secretariat[39]." The composition of the EEAS may likewise contribute to a higher degree of coherence in the EU's external relations. The Service is thought to play a 'unique role' and should be 'a service of a *sui generis* nature' that is separate from the Commission and the Council Secretariat[40]. However, although the HR and the EEAS can prepare initiatives, Member States make the final decisions and the Commission also has a role in the technical implementation[41].

Predictions abound. An optimistic view is that the EEAS will become the essential first contact for EU and national officials. The obvious advantage is that the arrangement facilitates efficient information exchange, whether this be political, or related to strategic domestic or foreign policy planning in EU institutions and/or national foreign ministries. Presumably, the outcome would be a degree of policy harmonisation, and thus, a clear step towards 'consistency' in European foreign policy[42].

**IV. SPECIAL JURISDICTION OF THE COURT OF JUSTICE**

The role of the CJEU relating to EU foreign policy measures has always been tied to special conditions. Prior to the Lisbon Treaty, the TEU had, by necessity, excluded the Court from applying its jurisdiction to rule on foreign policy. Nevertheless, there have been instances where the CJEU has ruled to define the 'demarcation' between the CFSP and EC Treaty provisions.[43] Similar

38 Angelet Bruno and Vrailas Ioannis, *European Defence in the wake of the Lisbon Treaty*, Egmont - The Royal Institute for International Relations, 2008, p. 26
39 Supra note 36, p. 3
40 Supra note 36, p. 6
41 Supra note 24, p. 70-71
42 Supra note 12, p. 33
43 See Case C-91/05 Commission v Council [2008] ECR I-3651

decisions have also been made, such as those covering measures connected to economic sanctions, and disputes concerning the acceptability of measures which enable foreign policy decisions. Despite this, the Court's ordinary jurisdiction is considered to apply to disputes concerning use of the EU budget to fund particular foreign policy measures[44] and to disputes which involve the access to certain documents[45].

The CJEU and the General Court thus have limited jurisdiction regarding the CFSP. After the entry into force of the Lisbon Treaty, the issue has been definitively addressed by Article 275 of the TFEU, which explicates the basic rule that the Court "shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions". But, "the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of [the TEU's foreign policy provisions]."

This leads to two observations. First, the jurisdiction of the Court to rule on issues neither completely encompassed by the CFSP or other Treaty provisions merely confirms the tangible jurisdiction it (the Court) had already asserted before the Lisbon Treaty. Secondly, the Court now appears to have the jurisdiction to rule on the legality of the primary acts of policy which enable sanctions against natural or legal persons in the first place. This even applies to additional legislative measures (from Article 215 of the TFEU) used to apply such sanctions. There is much debate on whether this is true in practice, but there are a substantial amount of cases before the Court which address this very point[46].

Nevertheless, most critics are agreed that Article 275 of the TFEU is both innovative and of greater clarity. Now, the CJEU is capable of hearing actions

44 See Case T-231/04 Greece v Commission [2007] ECR II-63
45 See Case T-14/98 Hautala v Council [1999] ECR II-2489
46 Supra note 6, p. 263

in favour of the annulment of CFSP decisions providing for restrictive measures against natural or legal persons. Previously, before the Lisbon Treaty, the Court's jurisdiction was hamstrung since it was limited to regulations adopted under Articles 60 and 301 of the EC Treaty (i.e. articles which sought to enable common CFSP policies). Article 275, paragraph two, however, extended the Court's jurisdiction to hear annulment actions involving CFSP acts which entailed restrictive measures against natural or legal persons. There are some exceptions to the Court's jurisdiction, including, for example, actions in damages or preliminary rulings cases[47].

In summary, it is clear that the powers of the Court have been moderately expanded, particularly with regard to ensuring better protection of the rights of individuals. In its new form, Article 40 of the TEU, expressly formulated to protect areas where EU institutions exercise power from possible interference from CFSP decisions, nevertheless also protects the CFSP itself from interference from acts adopted under the former first pillar. Thus, the jurisdiction of the Court to 'monitor compliance' with article 40 of the TEU is extended to control of the latter. The second paragraph of Article 275 of the TFEU also grants jurisdiction to the Court to review 'the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of the CFSP Chapter' – that is, as part of action against terrorism and country-specific sanctions regimes[48].

## V. COMMON SECURITY AND DEFENCE POLICY

As mentioned earlier, the EU's security and defence policy is an integral part of the CFSP, set out between in Article 42-46 of the TEU. This policy enables the EU to adopt an operational policy, drawing on civilian and military capability. As Schmidt notes; "the function of the European security and defence policy is to make the common foreign and security policy operational. One of the motives for the drafting of the Treaty of Lisbon was to enhance the coherence and effectiveness of the Union's external action and in particular

[47] Supra note 11, p. 498
[48] Supra note 6, p. 263

to provide the EU with the military capability to implement its civilian aims and objectives[49]."

The Treaty of Lisbon introduced remarkable alterations in security and defence. One of the first changes was related to terminology: the European Security and Defence Policy (ESDP) was renamed the Common Security and Defence Policy (CSDP). According to the Lisbon Treaty, the CDSP includes the progressive framing of a common Union defence policy that will lead to a common defence policy, assuming the EC itself takes such a decision unanimously[50].

One of the most significant innovations is defined in Article 42(7) of the TEU and refers to the 'mutual assistance clause': where a member state is the victim of armed aggression on its territory, the other Member States have an obligation of aid and assistance. The Treaty specifically attempts to enhance cooperation among states and increase the potential of the EU to fulfill duties (with regard to the fight against terrorism, peace-keeping missions, conflict prevention and strengthening international security) that are undertaken outside the EU's borders[51].

The most interesting addition is the principle of 'permanent structured cooperation' among the member states on defence policy issues. The criteria were set in advance and refer to the military capabilities of the Member States[52]. This cooperation is intended for Member States that wish to become a part of the European military armament programme and are willing to put their combat units at the Union's disposal[53]. Thus, the effectiveness and efficiency of the EU's external action depends on the Union's relationship with its Member States[54].

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49 Schmidt Julia, *Common Foreign and Security Policy and European Security and Defence Policy After The Lisbon Treaty: Old Problems Solved?* Croatian Yearbook of European Law and Policy, Volume: 5, 2009, p.240, (pp. 239-259)

50 See Article 42/2 of the TEU

51 Supra note 2, p. 10

52 See Article 42/6 and 46 of the TEU

53 Supra note 2, p. 11

54 Supra note 48, p. 240

Title VII of the TFEU also outlines how each member state should aid and assist another member state which is the victim of a natural or man-made catastrophe. This principle of the Treaty, known as the 'the solidarity clause', amounts to mutual assistance in the case of terrorist attacks[55]. "The need for common solidarity was repeated also in the European Defence Strategy, which emphasises again the significance of one of the fundamental EU objectives, stressed in the Treaty of Lisbon once more – the contribution to the global security and the building of a safer and better world"[56].

**VI. CONCLUSION**

This essay has attempted to analyse the major amendments regarding CFSP introduced by the Lisbon Treaty. It has summarised the development of this policy. Thereafter, it has examined the role of the three chief posts which steer the EU's foreign policy and then the jurisdiction of the Court of Justice on this issue. Finally, the essay has considered the security and defence policy of the EU.

After the adoption of the Lisbon Treaty, the EU acquired legal personality. This strengthened its foreign policy identity and allowed the EU to be party to international treaties. The analogy often drawn is that these changes have enabled EU Member States to 'speak with a single voice' in relations with foreign nations and organizations. Indeed, the Treaty was signed in order to make the CFSP more democratic, transparent and effective, and to enhance the role of Europe as a visible actor on the international stage. This was to be achieved by bringing together Europe's external policy instruments, both when developing and deciding new policies.

As regards the future conduct of EU foreign policy, the Treaty of Lisbon introduced three major institutional innovations, namely the roles of High Representative of the Union for Foreign Affairs and Security Policy and the President of the European Council as well as a new body - the European External Action Service. While it is true that the Lisbon Treaty is a step in the right

[55] See Article 222 of the TFEU
[56] Supra note 2, p. 11

direction and that there are limited, but reasonable, pragmatic changes to utilise for further development, it is also true that the Treaty has not brought revolutionary changes in terms of creating a more coherent European foreign policy and defragmenting the Union's external representation.

This is because many of the problems that beset the CFSP remain unaddressed by Lisbon. Mainly, how willing are Member states to surrender foreign policy decisions to un-elected European officials? Secondly, to what extent does the CSDP actually successfully augment existing international cooperation, particularly with the US through NATO and the UN? Thirdly, just how effective is the CFSP when Member states rarely, if ever, agree?

That the Lisbon Treaty fails to answer these three questions should give cause for legitimate pessimism. There are no grounds to think that the EU's presence in international affairs will become more significant after Lisbon, nor that its relevance will be enhanced. In this regard, there is a real danger that the Lisbon Treaty will come to be seen as a very modest reform indeed.

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# PRIVILEGED PARTNERSHIP: AS AN ALTERNATIVE WAY TO THE TURKEY'S EUROPEAN UNION MEMBERSHIP BID*

*Türkiye'nin Avrupa Birliği Üyeliği Talebine Alternatif Olarak: İmtiyazlı Ortaklık*

**Özgür BEYAZIT****

**ABSTRACT**

Only fourteen chapters out of thirty-five chapters have been opened whereas only one chapter has been officially closed over more than eight years period of time in the accession negotiation process of Turkey with the EU which began in practice in December 2006. Although Croatia started to its accession negotiation process simultaneously with Turkey she became the member of the EU in July 2013 completing the accession process. These facts caused the decrease in the public support to the EU membership as well as serious decrease in the possibility of the full membership in general meaning.

At this point, it needs to seek for an answer the question whether it is reasonable to sustain another form of the relation with the EU apart from the full membership. This paper, which aimed at this purpose, deals with the 'Privileged Partnership' proposal which has been brought forward in the several occasions by the Member States such as France and Germany that are strictly against Turkey's membership. The applicability of such a model in practice, the other models under the title of this topic and what extend the proposed Privileged Partnership model may reconcile the interests of both parties, Turkey and the EU, have been addressed.

**Key Words:** Privileged Partnership, accession negotiation process, gradual membership, full membership

**ÖZET**

Türkiye'nin AB'ye tam üyelik için 2006 Aralık ayında fiilen başlayan müzakere sürecinde aradan geçen sekiz yıldan fazla zamana rağmen otuz beş müzakere faslından sadece on dört başlık açılmış olup müzakeresi tamamlanan fasıllardan ise sadece biri resmi olarak kapanmıştır. Türkiye ile aynı tarihte müzakerelere başlayan Hırvatistan

* Çalışma, 15 Eylül 2014 tarihinde Essex Üniversitesi Avrupa Birliği Hukuku bölümüne Yüksek Lisans tezi olarak sunulmuştur.

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ise 2013 yılının Temmuzunda müzakereleri tamamlayıp AB'ye tam üye olmuştur. Bu durum AB'ye üyeliğe ilişkin Türk toplumunun desteğinin azalmasına genelde de tam üyelik ihtimalinin azalmasına neden olmuştur.

Gelinen bu noktada AB ile ilişkilerin tam üyelik dışında bir yolla sürdürülmesinin makul olup olmayacağı sorusuna cevap aranmalıdır. Bu maksadı taşıyan çalışma, Fransa ve Almanya gibi Türkiye'nin üyeliğine katı bir şekilde karşı çıkan ülkeler tarafından müteaddit defalar dillendirilen 'imtiyazlı ortaklık' konusunu ele almaktadır. Böyle bir modelin fiilen gerçekleştirilme ihtimali, bu konu altında tartışılan diğer modeller ve tasarlanan imtiyazlı ortaklık modelinin Türkiye ile AB'nin çıkarlarını ne derecede bağdaştırılabileceği üzerinde durulmuştur.

**Anahtar Kelimeler:** İmtiyazlı ortaklık, müzakere süreci, kademeli ortaklık, tam üyelik,

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## INTRODUCTION

Turkey's relationship with the European Union (EU) for its membership bid has become a very complex and disputed topic for both factions for over a period of almost fifty years. A vast geographical size, rapidly growing population, unbalanced wealth distribution and historical, cultural as well as the religious heritage of Turkey can be listed as the primary arguments of contention in this debate. On the other side, the absorption capacity and boundaries of the EU have constituted problems which have to be solved from the Union's side.

The accession negotiations with both Turkey and Croatia were begun simultaneously in thirty five chapters almost eight years ago, late in 2006 with the intention of full membership of the EU. The latter became a member of the EU in July 2013 whereas Turkey has only been able to open the negotiations in fourteen chapters. Because of the blockages in many chapters, Turkey's patience has almost exhausted. Turkey's chance of success in the process within a reasonable duration is decreasing day by day. Taking into account all the indicators i.e. the negative discrimination against Turkey in comparison to the other accession candidates and the definition of the negotiations as an 'open-ended process' by the Commission, the process could be interpreted as

a stringent one for Turkey, not letting it get away nor getting in. Moreover, the declaration of the referendum by several Member States combined with the rejection of the EU Constitution was another barrier in this matter. An aura of negativity surrounding the Turkish government and public has resulted in the slowing-down of the EU reforms and democratization process[1], and full membership of the Union seems to be rather unrealistic now since the Turkish accession process has virtually lost all of its credibility.

It is high time now to contemplate the probable results of the accession negotiations and to consider whether there are other alternatives available instead of full membership status for the benefit of Turkey in case of failure of the process. Within this context, the idea of 'Privileged Partnership' expressed by Germany, Austria and France is a remarkable option, although it has neither been formally proposed to Turkey and nor been discussed in the European Council.

The European Economic Area Plus, the Extended Association Membership and the Gradual Membership proposals constitute other ways of partnership with the EU worth to be discussed in lieu of regular membership, taking into account the Custom Union as an example of successful implementation a sort of partnership. Proposed alternatives are worth considering since international relations are based upon national interests rather than emotions and resentments.

## I. AN OVERWIEW OF TURKEY'S MEMBERSHIP BID

### A. Becoming a Member of the EU

The EU membership requires countries to internalize democratic principles that are beyond the electoral democracies. Applying for the EU membership, the candidate countries voluntarily put themselves under an obligation to establish democracy to a full extent and to respect human rights. This support, of course, does not mean that the EU intuitions would construct a democratic structure directly in the candidate countries; in fact, it means that

[1] Uğur, Mehmet, 'Open-Ended Membership Prospects and Commitment Credibility: Explaining the Deadlock in EU–Turkey Accession Negotiations', (2010), *JCMS*, 48 (4), p. 985.

the candidacy process contributes towards Europeanizing the candidates by following the guide.[2] Although similar conditions can be observed in some candidates, every candidate has to follow a unique path. For example, consider Turkey's case; it is unlike the Central and Eastern European Countries (CEEC) in the sense that instead of establishing democratic institutions, Turkey should democratize its already existing institutions.[3]

There is a designated particular procedure from candidacy to membership where there is no guarantee of success for the candidate countries in the accession process. As per Article 49 of the Treaty on European Union (TEU) 'any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union.' In principle, to initiate accession negotiations, the degree of development of a candidate country in terms of economy and democracy is one of the conditions apart from a location in the geographical area of Europe. These conditions for membership are listed in the commonly named Copenhagen Criteria, which requires the 'stability of institutions, guaranteeing democracy, the rule of law, human rights and respect and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; acceptance of the Community *acquis*: ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.'[4]

**B. A Brief Summary of Turkey's EU History**

Turkey has gone through a very long and bumpy road for the EU membership which began in 1959 with the application for an associate membership to the EEC. There are four milestones in this adventure: the 1963 Ankara Agreement; the 1995 Custom Union; the 1999 candidacy status; and the 2005

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2 Tunkrova, Lucie, 'Democratization and EU Conditionality' in *The Politics of EU Accession-Turkish challenges and Central European Experiences*, Lucie Tunkrova and Pavel Saradin (eds), (Routledge: Oxon, 2010), p. 34

3 Tunkrova, p. 35.

4 Retrieved from http://europa.eu/scadplus/glossary/accession_criteria_copenhague_en.htm; Also see, European Council in Copenhagen, June 21 and 22, 1993, Conclusions of the Executive, Point 7. A (iii), http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf , (last visited on 2 July 2014).

accession negotiations.

In September 1963, the Ankara Agreement was signed, aiming at the establishment of a functioning Customs Union between Turkey and the EEC. After reestablishment of stability following the military coup in 1980, Turkey applied for full membership in the EEC in 1987 yet it was kindly refused the status for several reasons. The suggestion was that the country should consider re-applying when the time and conditions became more convenient. In 1995, the Custom Union agreement was signed and came into force in 1996, ending the first phase projected in the Ankara Agreement.

Turkey has constantly kept looking for a membership in the EU with very high expectations at government level.[5] In 1997 at the Luxemburg Summit, Turkey was considered as eligible to become a member, however the candidate status was not given because improvement of the democratic conditions and human rights issues were some remarkable criteria still to be solved by Turkey within a reasonable time period. That disappointment was relieved after two years at the Helsinki Summit in 1999 by providing a candidate status to Turkey. By means of the provided candidate status, the membership which was envisaged unclearly in the Ankara Agreement has become a concrete possibility based on the Helsinki conclusion. Turkey had the Council's promise that the negotiations will be initiated as soon as the Copenhagen criterion are fulfilled,[6] The Helsinki Summit is basically a pre-acceptance stage of the view that Turkey is a geographically as well as a mentally European state, contrary to the objections. The fact is that it has never been mentioned or hinted in any official documents that Turkey's location or identity is an obstacle to the

5 Right after the Custom Union Agreement former Prime Minister Tansu Çiller had said in an interview that 'Turkey will be member state of the EU at the latest 1998', *Hürriyet*, 7 May 1995.

6 Schimmelfennig, Frank; Engert, Stefan and Knobel, Heiko, 'Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey', (2003), *JCMS*, 41 (3), p. 506-507; As an additional note, Javier Solana who was the former EU's High Representative for Foreign and Security Policy reports that, when Turkey was declared as a candidate country at Helsinki Summit Turkish leaders hesitated since they thought that the conditions would be too tough. See, Solana, Javier, 'Reset Turkey-EU Relations', (2011), online available at: http://www.project-syndicate.org/commentary/reset-turkey-eu-relations, (last visited on 4 July 2014).

membership.[7]

Before commencing the negotiating process, the Commission prepared a report under the name of '*Issues Arising from Turkey's Membership Perspective'* on the possible impacts of Turkey's accession to the EU in 2004. The quoted passage from the report provides the Union's perception of this relation:

*Accession of Turkey to the Union would be challenging both for the EU and Turkey. If well managed, it would offer important opportunities for both. The necessary preparations for accession would last well into the next decade. The EU will evolve over this period, and Turkey should change even more radically. The acquis will develop further and respond to the needs of an EU of 27 or more. Its development may also anticipate the challenges and opportunities of Turkey's accession*.

*...Turkey's accession would be different from previous enlargements because of the combined impact of Turkey's population, size, geographical location, economic, security and military potential, as well as cultural and religious characteristics.*[8]

Turkey underwent a long and rapid moving reform process voluntarily in the years 2001-2004 without the enforcement of the EU believing that fulfilling the objective criteria, the EU would honour the contract.[9]

Turkish politicians have perceived that the EU bid would help Turkey self-development and on one occasion former EU Affairs Minister Egemen Bağış said: *'even if there was no such negotiation process, Turkey should have done these structural reforms and legal arrangements for high quality state*

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7 Diez, Thomas, 'Expanding Europe: The Ethics of EU-Turkey Relation's', (2007), *Ethics & International Affairs*, 21 (4), p. 419.

8 Commission of the European Communities, '*Issues Arising from Turkey's Membership Perspective*' Commission Staff Working Document, Brussels, 6.10.2004, SEC(2004) 1202, COM(2004) 656 final, p. 4, online available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/issues_paper_en. pdf. (last visited on 27 July 2014).

9 Zilidis, Paschalis, 'Turkey and European Union: Problems and Prospects for Membership', (2004), *Thesis*, p 100, online available at http://www.dtic.mil/dtic/tr/fulltext/u2/a424737. pdf. (last visited on 12 July 2014).

*service, for increased democratic standards and for peace and welfare of our own citizens*.'[10]

Turkey has been in the process for so long that her patience is now coming to a limit. After eight years of the commencement of the accession negotiations, the situation still reveals such an annoying picture that the former Prime Minister Recep Tayyip Erdoğan has stated in January 2013 that Turkey would prefer to join the Shanghai Co-operation Organization rather than the EU if the stalemate in the negotiation talks continue and Turkey will not wait for the EU membership till 2023 – the 100th anniversary of the foundation of the Turkish Republic.[11]

**C. Turkey's Importance for the EU**

Although most of its land is geographically located in Asia, Turkey is more connected to the western civilization regarding its domestic and international interactions since the very beginning of its foundation. Apparently, being a secular country and endeavouring to establish and develop the requirements of a modern country, it should has become a member of the EU once it had fulfilled the political and economical criterion.[12]

From the EU's perspective, Turkey's membership has been seen as a strategic-political decision since the very beginning. Although the 1963 Ankara Agreement was aimed at establishing concrete economic and political ties between Turkey and Europe, the initiation of accession negotiations have been continually delayed mostly because of Cyprus problems and military coups or interventions. Nevertheless, Turkey's importance has remained important for the West after the Cold War since the danger of terrorism arose in the Middle East as well as for the purpose of stability.[13] Likewise, due to the CEECs' membership in the eastern enlargements of the EU, relations with Turkey have

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10 *Today's Zaman*, 8 April 2009.

11 'Erdoğan's Shanghai Organization Remarks Lead to Confusion, Concern', *Today's Zaman*, 28 January 2013.

12 Hughes, Edel, *Turkey's accession to the European Union - The politics of exclusion?*, (Routledge: Oxon 2011), p. 15.

13 Quaisser, Wolfgang and Wood, Steve, *EU Member Turkey? Preconditions, Consequences, and Integration Alternatives*, (Forost: München, 2004), p. 19.

encompassed security concerns as well.[14] At this point, divergence of the connection with Turkey and CEECs regarding the EU relations must be stressed upon. As Helene Sjursen claims, the EU is a values-based community and the key here is the presence of a kinship with respect to expansion. Thus, the Eastern enlargement can be justified on the grounds of 'a duty to overcome the division of Europe' so that east and west Europe consist of two parts of the same entity. When it comes to the justification for enlargement up to Turkey, it is different since Turkey is considered as an 'important partner' rather than a 'natural insider' as the CEECs were.[15] This argument also explains why Poland has received more direct and indirect recourses in the EU processes as compared to Turkey and why Turkey has been excluded from massive eastern enlargement.

Both proponents and opponents of Turkey's accession agree upon the view that the EU should keep its relations and the processes alive with Turkey as long as possible in order to save her from both economically and morally negative developments in the region.[16] Therefore the relations have continued in spite of the fluctuations and delays up today.[17]

José Manuel Durão Barosso, the former President of the Commission outlined how the EU sees Turkey in his speech delivered in 2008:

'*As regards foreign and security policies, Turkey already plays an important*

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[14] Sayın, Ayşe '*A Content Analysis of the Security Dimension of the Turkish Accession to the European Union*', (Master Thesis, Middle East Technical University, Ankara, 2008), p. 73, online available at http://www.belgeler.com/blg/1guh/a-content-analysis-of-thesecurity-dimension-of-the-turkish-accession-to-the-european-union-avrupa-birligine-turkkatiliminin-guvenlik-boyutunun-icerik-analizi, (last visited on 27 July 2014)

[15] Sjursen, Helene, 'The Question of Legitimacy and Justification in the EU's Enlargement Policy', (2002), *JCMS*, 40 (3), p. 509.

[16] Akçakoca, Amanda, '*EU-Turkey Relations 43 Years on: Train Crash or Temporary Derailment*?', (2006), EPC Issue Paper No. 50, p. 13.

[17] Even if EU and Turkey relations undergone a concession, there has been always a consensus in favour of supporting Turkey in its reform programme. In May 2012, due to the blockages accession negotiations had almost stopped the EU initiated a 'positive agenda' agreeing on to carry on the negotiations informally as a preparation process to formal ones. See, Karakaş, Cemal, 'EU–Turkey: Integration without Full Membership or Membership without Full Integration? A Conceptual Framework for Accession Alternatives', (2013), *JCMS*, 51 (6), p. 1057.

*role side by side with the EU. Turkey enjoys fruitful relations with all parties in the Middle East, is engaged in a dialogue with Iran, knows well the Balkans and plays a crucial role in the Iraq neighbours initiative. The EU and Turkey cooperate to make the world more safe and secure. Turkey is a key partner for Europe on foreign and security policy. Its responsibilities can only increase in the future, to address the challenges of our common neighbourhood.*

...

*Energy is a third example of our interdependence. Turkey is a major partner for energy supplies to Europe from Central Asia and the Middle East. The Baku-Tbilisi-Ceyhan pipeline is a major step towards increasing security of supplies and mobilising Caspian oil reserves. In the light of the challenges that the European Union faces, regarding diversification and security of energy supplies, Turkey-EU co-operation is certainly set to grow further in the coming years*.[18]

Inferred Barroso's statements and other similar clues, the main arguments on Turkey's membership from the EU perspective can be listed as follows:[19]

• Fast growth of both the population and the economy.

• Young labour force which can help maintain the welfare system in the ageing EU.

• Geopolitical location between the Balkans, Middle East, Asia and Africa that might contribute to EU in gaining leverage in the region. By the way, the EU can secure energy transfer areas as well as it has become independent from Russian's energy market.

• Accepting a Muslim country can help the dissemination of a moderate version of Islam in other countries.

• Military capacity of Turkey is significant in the development of the EU's defence and security systems.

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18 Barroso, José Manuel Durão, 'Winning Hearts and Minds: The EU/Turkey Partnership', (press release), SPEECH/08/191.

19 MacMillan, Catherine, *Discourse, Identity and the Question of Turkish Accession to the EU*, (Ashgate: Farnham, 2013), p. 88.

**D. Substantial Obstacles in Turkey's Membership**

Many obstacles can be listed under this title towards Turkey's membership; however this paper intends to touch upon only the hindrances which have become a Gordian knot and their short to midterm solutions are very small possibility. The obstacles to be mentioned justify the argument why Turkey should try other alternatives.

**1) Cyprus Problem**

The Cyprus debate deserves to be mentioned under a particular title apart from our general discussion because of the scenario that if Turkey eliminates the Cyprus problem, the accession process will continue, and only the hesitations of Germany and France would remain. However Turkey regards the Cyprus issue as an internal matter that it would give up whereas the Greek Cyprus, on the other hand would never capitulate. Some of the facts detailed below indicate that the Cyprus issue will be under discussion for a long time to come.

In 2004, the solution was almost realized by convincing the Turks with Kofi Anan's plan who used to be UN Secretary General at the time. It was thought to be a significant opportunity for both sides to solve the gangrened problem. However, knowing that Cyprus would be an EU member anyway, people of the Greek Cyprus side voted against the Anan Plan since they considered that they had nothing to lose.[20] In the end, as ironically expected, Cyprus joined the EU in the same year 2004, leaving the co-operated Northern Cyprus aside.[21] Nevertheless 'Yes' votes of North Cyprus contributed into temporary elimination of the Cyprus obstacle for Turkey. According to the 2004 Regular Progress Report for Turkey, Turkey was admitted to have fulfilled the political criteria, and commencement of the accession negotiations was recommended. The European Parliament voted for Turkey's accession negotiation on 15th of December 2004 and accepted with 407 for to 262 against.

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[20] Sözen, Ahmet, 'The Cyprus Question in Turkey-Eu Relations' in *The Politics of EU Accession-Turkish challenges and Central European Experiences,* Lucie Tunkrova and Pavel Saradin (eds), (Routledge, Oxon, 2010), 72-89, p. 72.

[21] Sözen, p. 80.

It was perceived that the EU membership would be a positive contribution towards the solution in terms of its values over the period of 90s and early 2000s. The EU role might have been very progressive towards the unification of the Island. However the EU did the opposite, accepting the divided Cyprus while suspending the process for the other part of the Island.[22] Apperantly it was meant to shift the burden of finding a solution to the problem from both sides to the Turkish Cyprus side.[23]

Following the accession to the EU, Greek Cyprus vetoed two draft regulations for opening up a direct aid of 259 million Euro the north side which was prepared on the EU Council's decision on 26 April 2004 owing to the support of the Anan Plan.[24] This attempt was a clear sign of the future of resolution process in the Island. Cyprus Problem is now almost a prerogative condition, used unfairly to gain progress in the EU negotiation talks and to open many chapters. According to Mette Buskjaer Christensen 'this policy continues to increase problems by allowing Greece to show inflexibility in the resolution of the dispute'.[25]

Turkey keeps failing to extend the Additional Protocol to the Custom Union Agreement to the Cyprus. Therefore the EU Commission recommended suspending 8 of the 35 chapters in November 2006. This result was not 'a trade dispute but rather is a direct consequence of the protracted conflict on the island of Cyprus'.[26]

In Ibrahim Gambari's presence, who is the UN Undersecretary General for Political Affairs, South and North Cyprus leaders agreed upon continuing the negotiations in July 2008. The negotiations sustained on the basis of reunification on a bizonal and bicommunal federation and an equality policy regarding the UN Security Council resolutions. In February 2014, negotiations were

22 Sözen, p. 81.
23 Hughes, p. 88.
24 Sözen, p. 82
25 Christensen, Mette Buskjær, 'EU-Turkey relations and the functioning of the EU', (2009), *Danish Institute for International Studies*, p. 12, online available at http://accesstr.ces.metu. edu.tr/dosya/ christensen.pdf, (last visited on 21 July 2014).
26 Hughes, p. 88.

renewed in order to settle the conflict and the leaders of both sides, Nicos Anastasiades and Derviş Eroğlu, released a joint declaration showing good intention.[27] Although both sides have positive intention, the problem has not reached any remarkable conclusion so far. Besides, despite to the Turkish support in the negotiations, Turkey has been criticized for not showing a concrete attitude in normalizing the relations with the Greek Cyprus.[28]

Very recent news has come from the ECtHR ruling on 10 May 2014 that Turkey has to pay 90 million Euros compensation to the Greek Cyprus for the results of 1974 military intervention in the Island. Turkey's former Foreign Minister Ahmet Davutoğlu said that the ECtHR's ruling is 'neither binding nor carries any value for Ankara'. He also complained about the inappropriate timing of the judgment, saying 'such a decision will affect the psychological atmosphere of the comprehensive negotiations on the island. It's not correct if there is such a sanction; this is going to affect the peace negotiations in Cyprus. It's going to the psychological atmosphere negatively'.[29]

After all, it would still be a question mark if the Cyprus problem were to be solved. Turkey could have completed the negotiations successfully. Philipp Böhler, Jacques Pelkmans and Can Selçuki having these suspicious argues that 'Although the Cyprus problem has a paralysing effect on the process, once there is the salvation of the problem, there is little reason to expect that once that issue is resolved, Turkey would eagerly and happily embrace the demanding EU political, institutional and economic *acquis* in all the chapters'.[30]

Apparently, from both the Turkish and the EU perspectives, the Cyprus problem is the only concrete barrier standing in Turkey's membership. However, taking a middle-ground position, one can **claim** that the Cyprus Problem is the only concrete cause for Turkey as well as the EU not to continue accession talks.

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27 'Joint Declaration: final version as agreed between the two leaders', *Cyprus Mail,* 11 February 2014.

28 Hughes, p. 102.

29 *Hürriyet Daily News*, 12 May 2014.

30 Böhler, Philipp; Pelkmans, Jacques and Selçuki, Can, 'Who remembers Turkey's pre-accession', (2012), CEPS Working Paper No. 74, p. 20.

**2) Public Fear in the Member States Against Turkey**

According to the membership procedure, having adoption of all *acquis*, all chapters will be provisionally closed. Following this procedure, the Accession Treaty will be prepared by the Commission to be submitted to the European Parliament for ratification. At this stage, unprecedentedly France and Austria have declared that they will carry out referendums regarding the membership of Turkey. Due to this fact, the achievement of the membership or the final result of the process is not only in Turkey's hands but also crucially in the hands of those member states' public.[31]

Turkeys' accession to the EU has become the most debated case among the member states. In the past, UK's membership had been a challenging case for the EU; especially France had opposed strongly to the UK as she currently does against Turkey's membership.[32] The obvious fact is that even though Turkey has some supporters, these members do not have enough power to convince the rest. While at the same time, many governments are still keeping their opinions against further enlargement after Bulgaria, Romania and Croatia's membership.[33] It should also be noted that public support in the member states for Turkey's membership is very low and it is further decreasing. According to the results of an official survey conducted by the Commission in 2010; only 30% of the EU citizens are in favour of Turkey's membership as compared to the results of another survey held in 2008 which got a result of 31%. Furthermore, there is more support for Ukraine, Montenegro, Serbia and Macedonia than Turkey.[34]

After Helsinki when Turkey's EU accession had become a predictable fact, the public support begins to decline gradually in the member states in gen-

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31 Müftüler-Baç, Meltem, 'Turkey's Accession Negotiations with The European Union: The Long Path Ahead', in, *Turkey-European Union Relations: Dilemmas, Opportunities, and Constraints*, Meltem Müftüler-Baç and Yannis A. Stivachis (eds), (Lexington Books, Plymouth, 2008), p. 120-121.

32 Schneider, Christina J, *Conflict, Negotiation and European Union Enlargement*, (Cambridge University Press: Cambridge, 2009), p. 187.

33 Schneider, p. 187.

34 *Eurobarometer 74*, Autumn 2010; Public Opinion in The European Union, Fieldwork: Publication, p. 62.

eral. Owing to the successful fifth enlargement which was very difficult, EU's public sympathy for future enlargements including Balkan countries has escalated. However Turkish membership has become the least popular among all possible future EU enlargement processes.[35] Due to this fact, Turkish accession can be differentiated from previous enlargements on the basis of least public support.[36] From the Turkish perspective, many delays, blockages as well as annoying statements from the EU leaders have caused a decline among the general public and as a result, the EU bid has become less attractive.

Ali Güney summaries the main reasons for the EU public fear as follows: 'The historical psychological legacy that the Ottoman Empire left behind in countries once a part of the Empire; vast population of Turkey, and Turkish youth that might flow to Europe in case of a possible membership; the fact that Turkey is predominantly a Muslim country, and perception of Islam as a threat –especially after 9/11 incident in 2001. In conclusion, the perceptions of the EU regarding Turkey are shaped both by its own current problems as well as the problems that Turkey is considered to bring in its "backpack" if it were to become a member state'.[37]

Whimsically, xenophobia and nationalism has gained so much popularity that the rightist political parties have received remarkable public support in several European Countries such as France, Italy, Germany, Austria Denmark and the Netherlands, which has negatively affected the public support for Turkey's membership.[38] It is shocking to hear racist statements from the politicians of extremely democratized, tolerate and human rights respecting countries.[39] However, this problem should not be considered as EU's official

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35 Ruiz-Jiménez, Antonia M and Torreblanca, José I, 'European Public Opinion and Turkey's Accession Making Sense of Arguments For and Against', (2007), EPIN Working Paper No. 16, p. 23.

36 Karakaş, Cemal, 'Gradual Integration: An Attractive Alternative Integration Process for Turkey and the EU', (2006), *EFAR,* 11 (3), p. 311.

37 Güney, Ali, 'Turkey and the New Europe: Challenges and Opportunities during the Accession Negotiations', in *Turkey-European Union Relations: Dilemmas, Opportunities, and Constraints*, Meltem Müftüler-Baç and Yannis A. Stivachis (eds), (Lexington Books, Plymouth, 2008), p. 138.

38 Christensen, p. 10.

39 See as a sample of racist claiming made by Dutch politician Greet Wilders in his Parlia-

approach towards Turkey since none of the EU Institutions officially discuss Turkey's cultural and religious divergence as a remarkable barrier apart from some marginal arguments. Therefore Turkey should concentrate on its image, reforming labour laws so as to bring human rights in line with the EU standards as well as resolving the problems of freedom of expression, and many other defects wait for attention.

The rejection of the treaty for EU membership via a constitutional process in France and the Netherlands strengthened the opponents of Turkish accession.[40] Austria and France have already given the referendum signal to Turkey in December 2004. In the same way, other countries are planning to schedule referendums that are considered as another discriminatory process against Turkey. In a situation as mentioned, seeking alternatives other than full membership might be beneficial for Turkey.[41]

Turkey has a massive and growing population of seventy six million which is another problem with the EU regarding the weight in decision-making mechanism of the EU. Moreover, it has a psychological effect on the EU citizens as well. This situation particularly annoys the locomotives of the Union such as Germany and France which are bigger members. If Turkey joins the EU, it will be the second largest member after Germany in terms of number of population.

Cemal Karakaş classifies the three main reasons behind the EU public's fear against Turkey's membership:-[42]

1) The fear of an unlimited freedom of movement for persons and workers, especially given the challenging labour market and problems of social integration in Europe;

2) The fear of having to make transfer payments of thousands of millions

ment elections company, online available at: http://www.euractiv.com/sections/eu-elections-2014/wilders-election-strategy-shambles-after-rac ist- remarks-updated-301109, (last visited on 2 June 2014).

40 Palmer, john, 'Beyond EU Enlargement-Creating a United European Commonwealth', (2008), SEI Working Paper No 104, p. 3.

41 Karakaş, Gradual Integration, p. 317.

42 Karakaş, Gradual Integration, p. 311.

of Euros from the EU's structural and agricultural funds;

3) And the fear of overextending the EU's institutions, on the one hand due to Turkey's size and its influence on the institutions, and on the other due to the primarily nationalist political culture in Turkey, which could make consensus-finding in the various bodies difficult.'

**3) Enlargement Capacity of the EU**

In 1993, after the Copenhagen Summit and with the creation of 'Copenhagen Criteria', the capacity of the EU to absorb new members was stressed for the first time in an official document as follows: '*The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries*.'[43]

The notion of absorption capacity was introduced as a general problem to be solved; however it is not difficult to notice that the capacity problem has been created as an excuse merely for Turkey's exclusion from the Union. For instance, Austrian Foreign Minister catered to a question if the Balkan countries' membership would create a capacity problem. Her answer was that the population of the three Balkan countries was around twenty-for million, which is less than Belgium, Luxemburg and Holland. By reasoning, this approach will produce an opposite conclusion for Turkey, having a seventy-five million population, even if success in accession negotiations is achieved.[44]

The future enlargement projects which probably include Balkan countries will be more difficult for the Union since the challenge will be their inclusion with the establishment of democracies in the conflict zones rather than the absorption capacity issue. Due to this fact, a new approach was developed by the EU. In its report the Commission claimed for a different management way to cope with the problem stating that:

*Countries aspiring to join the Union must demonstrate their ability to*

[43] European Council Meetings, Conclusions of the Presidency – Copenhagen, p. 13.
[44] Güney, p. 146.

*strengthen the practical realisation of the values on which the Union is based at all stages of the accession process. They have to establish and promote from an early stage the proper functioning of the core institutions necessary for democratic governance and the rule of law, from the national Parliament through Government and the judicial system, including the courts and public prosecutor, and law enforcement agencies*.[45]

It has become more challenging to join the EU since the first enlargement which included Ireland, the UK and Denmark. Every Treaty deepening the EU partnership has increased the regulations to be adapted by the candidate states. The EU has managed the enlargement process attentively since the beginning; however, after Brussels Summit in 2006, the absorption capacity of the Union has become the most serious issue for future enlargements. It was stated in the conclusions of the Summit that:

The pace of enlargement must take into account the capacity of the Union to absorb new members. The European Council invites the Commission to provide impact assessments on the key policy areas in the Commission's Opinion on a country's application for membership and in the course of accession negotiations. As the Union enlarges, successful European integration requires that EU institutions function effectively and that EU policies are further developed and financed in a sustainable manner.

According to the conclusion, the main objective of concern of absorption capacity is to provide a safe and functioning integration, free from any sort of side effects of accession, to the new member states.[46] Another problem is that after enlargement rounds, every newcomer brings its own perspective to the Union, thus preserving the ability to make common policies in all areas while at the same time respecting the different perceptions of all the members and reaching a common solution to problems of the Union becomes more chal-

[45] European Commission, 'Enlargement Strategy and Main Challenges 2012-2013', Communication from the Commission to the European Parliament and the Council, Brussels, 10.10.2012, COM(2012) 600 final, p 4, online available at: http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri= COM:2012:0600 :FIN:EN:PDF, (last visited on 2 June 2014)

[46] Christensen, p. 3-4.

lenging.[47] An author reveals his opinions in an optimistic way regarding the enlargement, *'It is very difficult but not impossible to envisage an EU with over forty Member States. Only by making a success of the current enlargement will the EU be able to contemplate future new members***.'**[48]

The absorption capacity concern has also been reflected solidly in the negotiating framework for Turkey 'in accordance with the conclusions of the Copenhagen European Council in 1993, the Union's capacity to absorb Turkey, while maintaining the momentum of European integration is an important consideration in the general interest of both the Union and Turkey…'[49]

In a recent interview Sylvie Goulard told that:

*It had been known since Copenhagen 1993 that the accession of Turkey with a massive population would be a problem. However we failed to admit and explain it to the Turks frankly. In fact, Turkey's efforts would not be sufficient; the EU must have prepared itself to absorb Turkey as a member.*[50]

Obviously, the purpose of the concept is to draw up the EU's borders and determine the threshold countries such as Russia, Ukraine, Moldova and Belarus which have been differentiated from the other groups, Balkans and Turkey. Taking the problem into account, the EU looks for variable and flexible solutions for each group. In other words, the stage of the integration must be designated in a foreseeable future. Some of these potential candidate countries are away from realising any requirements to start the negotiations. Despite the long negotiation process with the countries on the other side, like Turkey, the EU still feels unprepared to cope with their full membership. Considering the existing situation, Wolfgang Quaisser and Steve Wood propose

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47 Kerikmae, Tanel and Roots, Lehte, 'EU Enlargement as a Never Ending Story – Reasons for Changing Thoeretical Paradigm', (2012), p. 7, online available at: http://www.bergfiles.com/i/bf5294e6a5h32i0, (last visited on 3 June 2014).

48 Cameron, Fraser, 'The ENP three years on: where from – and where next?', (2007), The European Policy Centre, Brussels, p. 7.

49 Negotiating Framework, Luxembourg, 3 October 2005, p. 1, online available at //ec.europa.eu/enlargement/pdf/turkey/st200-02_05_tr_framedoc_en.pdf., (last visited on 1 June 2014).

50 Gürsel, Seyfettin and Dedeoğlu, Beril, *AB-Türkiye: Üyelik Yerine Özel Statü Tasarımının Analizi,* TUBITAK, Project no. 107K208, 2010, p. 77.

another solution apart from the full membership. She proposes that Turkey can be the first example for the EU to develop a flexible interpretation of relationship or partnership that may also serve as a model for other strategic partners.[51]

The concept of absorption capacity gained significance after several events, namely the EU's 'big bang' enlargement of 2004, the failure of the Constitutional Treaty in 2007 and the controversial decision of the accession of Bulgaria and Romania to the EU. Public dissatisfaction in the last enlargement contributed to the failure of the EU Constitution Referendum in France and the Netherlands, and similar growing concerns about future enlargements, in particular for Turkey directed several member state governments, mainly France and Germany, to objection on the future enlargements based on the EU's 'absorption capacity'. Nevertheless, some members such as Britain, Poland and Sweden revealed a more positive approach, arguing that the EU should be open instead of introducing new barriers to potential candidates.[52]

The European Parliament's resolution on the Commission's 2005 Enlargement Strategy Paper included a special emphasis on the absorption capacity, requiring that the Commission submit a report by the end of the year 'setting out the principles which underpin this concept'[53] and a 'broader spectrum of operational possibilities', so-called a 'close multilateral relationship' with both the prospected candidates and other countries without full membership prospects. The European Council at its June 2006 meeting concluded that it 'will be important to ensure in future that the Union is able to function politically, financially and institutionally as it enlarges, and to further deepen the Europe's common project.' The European Council ignited another debate at the next meeting 'on all aspects of further enlargements, including the Union's capacity to absorb new members' and called for the Commission to issue a special report on 'all relevant aspects pertaining to the Union's absorption

51 Quaisser and Wood, p. 50.
52 Schimmelfennig, Frank, 'Enlargement and Integration Capacity: A Framework for Analysis', (2014), MAXCAP Working Paper No 1, p. 7.
53 European Parliament 2006

capacity', as well as the 'perception of enlargement by citizens'.[54]

In 2006-2007 enlargement strategy, the Commission modified the term 'absorption capacity' to 'integration capacity'. The Commission designated 'three main components: institutions, common policies and budget. The Union needs to ensure that its institutions continue to act effectively, that its policies meet their goals and that its budget is commensurate with its objectives and with its financial resources.' Regarding the institutions, the Commission emphasised the need for a new institutional solution 'by the time the next member is likely to be ready to join'.[55] Furthermore, the Commission stated its commitment to better the prerequisites for the sufficient preparation of the candidate states in order to facilitate the integration. The commission also stressed on better communication with the candidate countries. The European Council has endorsed the strategy document aiming at ending the policy debate on the EU's integration capacity. [56]

Turkey, with a seventy-five million population will be the second most influential member in the EU regarding decision-making procedure. Therefore, a frequent objection often brought forward is that geographically and culturally, Turkey is not a European country. This opinion expresses the emotions of the original members that how a latecomer can have such huge power in the decision mechanism.[57]

## II. DISCUSSIONS ON PRIVILEGED PARTNERSHIP

### A. In General

The previous titles aimed at presenting Turkey's state of play in the EU membership bid and assessed the existing problems standing in the way of full membership. Privileged Partnership has been an unofficial tentative project in some member states' leaders mind to establish a special relationship with Turkey in the EU instead of accepting it as a regular member or cutting all ties with it rigidly.

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54 Schimmelfennig, p. 7.
55 Schimmelfennig, p. 7.
56 Schimmelfennig, p. 8.
57 Güney, p. 145.

If Turkey fails to reach the final stage in the accession negotiation process, the EU institutions will most probably search a way to preserve the relations within the context of a Privileged Partnership. Turkey has never given this formula and consideration and is only demanding equal treatment with other candidates, at least for now. Furthermore, the EU bodies have not discussed this issue officially nor have had any resolution up to now. In order to review the stagnated process, the Council offered closer cooperation by establishing working groups in eight chapters in December 2011. The main target was to get both sides working on the blockage, save for important chapters, and when the blockage is eliminated, the process will be accelerated.[58]

From the EU institutional aspect, over the years 1997-2004, accession membership was the only option, however after 2004, phrases such as 'open-ended' and 'cannot be guaranteed' were mentioned in official documents of the report. In the final declaration in December 2007, the EU Council used the word 'partnership' instead of 'membership' as an indicator of new period in the relationship.

Because the Privileged Partnership offer has not yet gained a formal shape, it needs to be discussed as per leaders' statements, studies of foundations and academic studies in order to assess whether or not it is an applicable project.

**B. The Origins of Privileged Partnership Offer for Turkey**

The term 'Privileged Partnership' has been frequently used to give a new shape to Turkey's relationship with the EU and as an alternative to the full membership since 2002 by August Winkler[59], until formally proposed in 2004. Yet the origin of the concept dates back to 1957 to describe the relationship between the European Economic Community and Morocco.[60] The term has

58 2012 Regular Progress Report on Turkey, European Commission, p. 5.

59 Winkler, Heinrich August, 'Wir erweitern uns zu Tode', (2002), *Die Zeit*, 46 (7), p. 6.

60 Research in Morocco*, Taking About Governance European Community Aid: Policy and Practice on Governance and Democracy*, (Report commissioned by One World Action : London, 2006), p. 19.

also been used for the relationship with Russia in 2003[61], and also used in a similar way for the proposed relationship with Israel in 2004.[62] In fact, Privileged Partnership has become a short definition of the relationship of the EU with countries such as Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Serbia and Kosovo.[63]

After many debates and controversies over the Cyprus issue and objections made by some countries over Turkey's admission, the 'Negotiating Framework' for Turkey was agreed on 3rd October 2005 by the EU Council, opening formal accession negotiations. However, to satisfy all member states, the language of the framework was changed slightly to attain dramatic conclusions for the first time. The negotiations would be 'open-ended', which means full membership could not be guaranteed even if the negotiation talks are concluded successfully. The articulated words 'open-ended' have made a great contribution for a common understanding of stance taken by some countries including Germany, Austria and France, which strictly opposed towards granting Turkey a regular membership.

Copenhagen Summit in 2002 stimulated Turkey to accelerate the reform process over the years 2002 to 2004. Seeing the aspiration of Turkey, panicked Germany and France began to speak more vocally on the Privileged Partnership issue[64]. The most comprehensive suggestions on the topic were made in two articles penned by Dominique Giuliani who is the head of Robert Schumann Foundation, and French politician Jajques Toubon.[65] Extensive trade policy, strengthening the principle of state of law, control over illegal migration and control over the seas consist main sub-titles of the Privileged Partnership. Establishment of an organization between the EU and Turkey for the Bosporus, contribution for the development of Turkey and the composi-

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61 http://english.pravda.ru/news/world/31-05-2003/50292-0/#.U_u7isV5PW8, (last visited on 16 July 2014)

62 http://euobserver.com/foreign/17914, (last visited on 16 July 2014)

63 http://euobserver.com/enlargement/21163, (last visited on 2 June 2014).

64 Various terms have been used to explain the membership in the second chamber such as: Privileged Relation, Special Agreement, Alliance of Partnership and Cooperation, Agreement of Partnership, and Privileged Cooperation. See, Gürsel and Dedeoğlu, p. 2.

65 *Le Figaro*, 24 November 2004.

tion of a common external and security policy are other remarkable proposals. At this point, considering Turkey's geopolitical location, Turkey could be a unique country in the region as long as it stays away from any block or group including the EU. A peaceful convergence of Cyprus is another purpose of the solution.[66]

Valéry Giscard, who was President of France (1974–1981) as well as a significant name in the right-wing politics can be assumed as the father of the Privileged Partnership thesis. In an interview with Géopolitique in April 2002, he claimed that the members of the EU have never contemplated granting full membership status to Turkey but on the other hand, they never expressed their opinions, clearly assuming Turkey would fail to fulfil the criteria or could take a very long time in doing so. Giscard argued that Turkey's membership might change the Union's uniqueness, therefore the EU Authorities must keep in mind a specific agreement project, and a close relationship with Turkey similar to that with Ukraine must be institutionalized by the EU.[67]

Privileged Partnership is, in fact, based on 'better than nothing' phrase. Very primitive and classical apprehensions in religious, identical, cultural and geographic divergence feed the justification to propose a Privileged Partnership to Turkey. Paul Kubicek suggests that Turkey is not a country more European than Ukraine[68]. Leaving Turkey aside may endanger dramatic reforms which are made in the way of EU bid. Stabilization in Turkey is very important for the region as it directly affects the EU's security concerns. Thus finding a solution to this problem is very crucial for the Union.[69] Thus, Paul argues that a Privileged Partnership offer would be the best option.

Over the process of Turkey's accession, three main alternatives were proposed instead of full membership; privileged partnership, gradual membership and some permanent derogation in several policy areas which have not

66 Gürsel and Dedeoğlu, p. 17.

67 Lannes, Sophie, 'Entretien avec le Président Valéry Giscard d'Estaing: l'Europe met la Turquie en porte-à-faux', (2000), *Géopolitique,* No. 69, pp. 5-8.

68 Kubicek, Paul, 'Turkish Accession to the European Union', (2007), *World Affairs*, 168 (2), p. 69.

69 Gürsel and Dedeoğlu, p. 46.

been applied in other candidates' processes. However, up till now, a consensus regarding the aforementioned proposals has not been reached.[70] Report no. 279 presented to the French Senate which was prepared by Robert Del Picchia and Hubert Haenel became the first remarkable attempt in proposing a Privileged Partnership to Turkey[71]. The report suggests a formula expanding the Custom Union into the services. By taking these steps, three out of four freedoms of the Union, excluding the free movement of persons would be implemented, targeting economic integration. However the report fails to mention anything about the probable problems that will arise with Turkey's involvement only in three freedom areas in a Union which has become a single market rather than a common market over the integration process. The report also doesn't introduce the details and extension of the proposed Privileged Partnership.

An academic study was carried out by Robert Schumann Foundation[72] in December 2006,[73] publishing the brochure no: 38 named 'The Privileged Partnership, an alternative to membership' aiming to be a meaningful study in the Privileged Partnership proposals by suggesting mixed commissions between Turkey and the EU, as opposed to full membership. Representatives from both sides would meet to work on different issues.

Excluding the emotional and identical objections to Turkey, some academicians assert that the technical and institutional concerns and risks must be taken into consideration as well. Wolfgang Quaisser and Steve Wood assert that 'previous experiences cause serious doubts about the EU's reform capacity and the magnitude required could plunge the EU into a deep crisis that paralyses it for years'. They also contemplate a direct connection with the constitutional referendum that if the constitution is rejected by the member states, the Turkish membership would be facing further delays. On the other

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70 Schneider, p. 187.

71 http://www.senat.fr/rap/r03-279/r03-2791.pdf, (last visited on 4 June 2014).

72 Goulard, Sylvie; Guttemberg, Zu; Scharping, Rudolf; Altomonte Carlo; Defraigne, Pierre and Delattre, Lucas, *Le partenariat privilégié, alternative à l'adhésion*, (Robert Schuman Foundation Publishment no. 38, 2006), online available at: http://www.robert-schuman.eu/fr/doc/notes/notes-38-fr.pdf, (last visited on 30 June 2014).

73 That date is also beginning of accession talks with Turkey.

side, several transitional periods and expected restrictions on free movement of people as well as delayed integration into disbursement programs would be on the road of the accession process.[74]

Main objections can be summarised in four titles

1. Turkey can never meet the requirements of membership.

2. Turkey is not a European state, but a neighbour of Europe.

3. Turkey and Europe have different cultures and values.

4. Turkey's population is large and poor; therefore the cost of membership is high.[75]

**1) The Reasons for the Offer**

The membership process of Turkey regarding the developments in the last twenty years proves that Turkey's EU bid has very different dynamics, treatments and facts unlike any other previous or existing candidate countries. The obvious fact is that even if Turkey meets the Copenhagen Criteria, and completes the accession negotiations, the membership cannot be the precise destination, taking into account the restless opposition parties and referendums that will be held in the member states. On the other side, having a young and increasing population, growing economy, dynamic military power and a large market, Turkey could not be left on her own fate. Loosening the ties with Turkey may also mean that the EU has closed its doors to different cultures and religions opposite to its multicultural character. The geopolitical location of Turkey urges a large number of countries to keep good relations with Turkey. That is to say that the EU has not had a common understanding in admitting or leaving Turkey aside. Therefore, from the perspective of certain member states, the Privileged Partnership could be the best alternative, being a third alternative or a plan B for Turkey.

The stimulation for the Privileged Partnership offer is the economic reason which is in the benefit of the EU to create a market area going beyond the

[74] Quaisser and Wood, p. 50.
[75] Gürsel and Dedeoğlu, p. 2.

current borders of the Union. The second reason is the security of the EU for which Turkey can be a buffer zone between Europe and Asia. The Privileged Partnership has been perceived to eliminate the dangers of illegal immigration and terrorism stemming from the Middle East by keeping Turkey out of the membership. The third reason is that due to the energy transitional route of Turkey, the EU can be able to control the energy lines through Turkey, even by proposing an amendment in the Montreux treaty.[76]

The other explanation is the absorption capacity of the EU which has been mentioned under previous titles. The notion of absorption capacity has accompanied the Privileged Partnership which can be interpreted in a way that the notion has been created in order to justify the Privileged Partnership proposal. On several occasions, opposition voices against Turkey have preferred to use the absorption capacity argument, which is an official concept as mentioned in the 1993 Copenhagen summit, instead of the Privileged Partnership.[77]After the big bang enlargement in 2004, mostly including the CEECs, resulting in negative economic effects, the term 'enlargement fatigue' came into use. The cost of the enlargement has given a lesson to the EU due to which there is hesitancy in further enlargement. Turkey's situation with a large population and a comparatively backward economy urges the EU to think twice before reaching a conclusion. The 'no votes' in Dutch and French referenda on Constitutional Treaty is also an indication of the gravity of the problem.[78]

**2) What would the Privileged Partnership Cover?**

The differences between 'full membership' and 'Privileged Partnership' need to be clearly laid down. The Turkish side has given zero chance to Privileged Partnership by claiming for all or nothing in its statements. Hence, whatever is in Turkey's government mind regarding the context of Privileged

[76] Gürsel and Dedeoğlu, p. 51.

[77] Gürsel and Dedeoğlu, p. 51.

[78] It is argued that the Member States which support the Privileged Partnership offer followed two different reason can be considered in two way, 1) Turkey has not been wanted in the EU as a regular member: France 2) Turkey has not been wanted absolutely outside the EU: Germany. See, Içener, Erhan, 'Privileged Partnership: An Alternative Final Destination for Turkey's Integration with the European Union', (2007), *Perspectives on European Politics and Society*, 8 (4), p. 415.

Partnership is incomprehensible. Also there isn't an example of the implementation of Privileged Partnership with any other candidate country in the past save for some sort of a bilateral special partnership. There is no written code laid down the rules and principles for Privileged Partnership as well. Thus the academic question must be 'What may Privileged Partnership cover?' or instead 'What does Privileged Partnership cover?'

At this point, taking a look at the most prominent supporter of the idea might help in partial illumination over the idea. Angela Merkel in her speech in Turkey in 2004 asserted that adapting a common foreign and security policy would not be difficult as the strategic interests of both the parties are common to a very large degree. She stressed that Turkey must continue its integration with the EU, however full membership is impossible for Turkey from the very beginning of the process. Even if Turkey completes twenty seven – twenty eight out of thirty five chapters, it would never be offered full membership but the Privileged Partnership.[79]

Karl-Theodor Zu Guttenberg is a politician of CSU and the current Minister of Defence in the second Merkel cabinet. He has defined three core elements of a possible partnership. The first element is improving institutional cooperation and instead of Turkey's access to the European Economic Area, using the economic area's structures and institutions as a model and expanding cooperation in the Association Council. He adds that an EU-Turkey Committee should be established in order to adopt and monitor the implementation of the EU legislation applicable in the Privileged Partnership. Secondly, he touches upon the policy areas. He is supportive of expanding the existing Customs Union by establishing an unlimited exchange of goods in a free trade area. Among the 'four basic freedoms' of the EU, free movement of services is supposed to be the starting point. He also rejects free movement of workers and only foresees easing visa regulations. In line with Merkel, he proposes that the only area of membership in the EU structures is in European Foreign Security and Defence policy.[133]

[79] http://news.bbc.co.uk/1/hi/world/europe/8593026.stm, (last visited on 21 July 2014).

**C. A Few Criticisms to the Privileged Partnership Offer**

As a result, the Privileged Partnership offer is delimited with economic and security areas. Therefore the obligations to be fulfilled are alleviated as a result whereas the benefits have become vague. These attempts to bring Turkey in line with Moldova or Ukraine on the EU front wastes all of Turkey's efforts in the EU path over the period of past forty years.

A small number of authors are pessimistic on the Privileged Partnership offer, perceiving it as a leverage for full membership. On the other side, however, Privileged Partnership probably will cause a slow-down in the reform process which is already important for Turkey's stabilization in both economic and democratic aspects. Furthermore, Privileged Partnership process might spirit off the Turkish People's support for the EU membership which has been decreasing over the past few years.[80]

Obviously, the envisaged special partnership fails to explain the interests of Turkey if it adopts the *acquis* concerning economic and financial chapters such as fishery, common trade, agriculture policies etc. without being a member of the EU. Especially, the logic behind the adoption of these *acquis* without any participation in the decision-making mechanism of related EU institutions has yet to be clarified. The question 'why does Turkey need to stick to the EU without membership?' must be answered in order to justify any study regarding the Privileged Partnership. From the Turkish perspective, answers to the both questions must be contemplated deeply with all possibilities and side effects.

**D. Privileged Partnership in the EU Official Documents**

It should be very clear that none of the EU official documents include any conclusion or decision on the notion of Privileged Partnership.

According to the EU official documents;

1) The issue has been discussed since 2004.

[80] Gürsel and Dedeoğlu, p. 47.

2) None of the documents however have directly or clearly referred to the Privileged Partnership

3) A relationship between EU and Turkey apart from the membership could be considered only when Turkey's fails in fulfilling the criteria or in case of EU's absorption capacity problem.

4) The notions that have been used instead of Privileged Partnership are; open-ended accession negotiations, absorption capacity of the EU and strengthened ties in case failure.

**1) Approach of the Commission**

On the escalation of the debates over the Privileged Partnership issue, Oli Rehn, who is the former member of the Commission responsible for enlargement stated 'only full membership is in our minds' in a speech held in December 2004.[81] After that, in November 2006, Rehn stressed again that the membership was the ultimate result.[82] Nevertheless it needs to be referred to Jean-Claude Juncker who is the new president of the EU Commission and contrarily stated in his opening speech to MEPs in Brussels on 15 July 2014 that the EU would not accept any new members in next five years 2019.[83] Obviously, his words can be interpreted to ascertain that the approach towards Turkey during the next five years would not be positive.

**2) Approaches in the EU Parliament**

EU Parliament is the only institutional body where Privileged Partnership

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81 Rehn, Olli, 'EU and Turkey on the threshold of a new phase", European Parliamentary Plenary Session: Turkey debate', *European Commission*, Speech/04/538, Strasbourg, 13 December 2004.

82 Rehn, Olli, 'Le processus d'adhésion de la Turquie à l'UE', *European Commission*, Speech/06/747, Conférence sur la Turquie et l'UE, Helsinki, 27 November 2007.

83 'In the next five years, no new members will be joining us in the European Union. As things now stand, it is inconceivable that any of the candidate countries with whom we are now negotiating will be able to meet all the membership criteria down to every detail by 2019. However, the negotiations will be continued and other European nations and European countries need a credible and honest European perspective.' See, Juncker, J Cloude, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change', p. 20, online available at: http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf, accessed on 20 July 2014.

has been discussed. However any position or decision has not been agreed upon regarding this matter. In the Parliament, centre-right MEPs had proposed a way to aim at Privileged Partnership[84]i.e. by strengthening neighbourhood relations and developing the notion of a 'European Economic Area Plus' in order to achieve economic integration excluding free movement of the people.

'2004 Regular Report and the recommendation of the European Commission on Turkey's progress towards accession', prepared by Christian Democrat Camiel Eurlings, and presented on 3rd December 2004 to the EU parliament was a report which can be related to Privileged partnership.[85] It proposed that restrictions could be adopted in some areas, particularly in the free movement of persons under the sub-heading G; open-endedness of the negotiations under the sub-title H; referring to the 1993 Copenhagen Summit, problems with the absorption capacity of the Union were mentioned under the sub- heading N.

Taking into consideration the report, the Parliament stressed in its resolution on accession negotiations of Turkey on 15 December 2004 'the opening of negotiations will be the starting point for a long-lasting process that by its very nature is an open-ended process and does not lead "a priori" and automatically to accession; emphasises, however, that the objective of the negotiations is Turkish EU membership but that the realisation of this ambition will depend on the efforts of both sides; accession is thus not the automatic consequence of the start of the negotiations'.[86] Due to the open-ended nature of the negotiations, the EU would not provide direct or a priori membership. In a normal case, Turkey would have been admitted to the EU if the accession negotiations in thirty-five chapters were completed successfully. Following this resolution, three different reports have been prepared emphasising the absorption capacity of the EU. A fourth report which was prepared by Elmar

84 Gürsel and Dedeoglu, p. 3.

85 On the 2004 regular report and the recommendation of the European Commission on Turkey's progress towards accession, (COM(2004)0656 - C6-0148/2004 - 2004/2182(INI)).

86 Art 63, European Parliament resolution on the 2004 regular report and the recommendation of the European Commission on Turkey's progress towards accession (COM(2004)0656 - C6-0148/2004 - 2004/2182(INI)).

Brok, is important because of its criticism of the Commission failing to 'provide a sufficiently in-depth analysis of the issues which need to be resolved before the Union can proceed with further enlargements'. It is also stressed in the report that assigning a date for the final accession should be avoided.[87] The Parliament urged the Commission to provide a more precise definition of 'reinforced Neighbourhood Policy' and to specify in detail what this type of relationship would involve.

To sum up, the EU Parliament has handled the notion of Privileged Partnership in two ways; by promoting the neighbourhoods policy and the European Economic Area and by excluding free movement of persons.

**E. Turkey's Approach Towards Privileged Partnership Offer**

Concrete reasons can be listed why Turkey could be proposed Privileged Partnership by the EU; however the need for a reasonable explanation why Turkey should accept the offer still exists. There is a presumption that cutting the ties is not a good option in Turkey's favour, thus Turkey would accept the Privileged Partnership if it were not granted full membership.

Although Turkish politicians have stated that Turkey would never accept a result other than full membership, this paper defends the option that a Privileged Partnership offer must be accepted if the negotiations were to fail or Turkey's membership got a 'no' vote in a referendum held in one or more member states. That is to say that the 'all or nothing' option supported by Turkish politicians would not be in Turkey's interests.

The overall trend in Turkey towards Privileged Partnership can be summarized as follows[88]:

• Privileged Partnership offer is interpreted as an expression of bad intention of some members

• only defence rhetoric has been developed in order to rebut the arguments that turkey cannot/should not join the eu

[87] See the title 2, 6 and 13, 38 of the report 'on the Commission's Communication on the Enlargement Strategy and Main Challenges 2006–2007 (2006/2252(INI)).

[88] Gürsal and Dedeoğlu, p. 88.

• the discussions held on the topic whether privileged partnership is more beneficial for turkey then quitting the eu have not been sufficient enough

• further possibilities and options have never been taken into account if the accession negotiations fail with the EU.

On the basis of the evidence currently available, it seems fair to suggest that Turkey would have two options if it were denied membership by the EU. The first alternative; establishing a private relationship with the EU, which is in this case a Privileged Partnership; the second alternative is to conduct the relations independently.

Can Turkey achieve a vast scale sustainable economic integration without being a member in the EU Council, Commission and the Parliament which are the fundamental organs of the Union except for the limited representation in some decision-making process?

The problems arising from this question can be divided into three main parts:

1) Conflicts of interest between Free Trade Agreements made by the EU with third countries and the Custom union

2) Conflicts of interest stemming from the adoption of the chapters in protection of environment and public procurements.

3) Turkey, economically integrated with the EU but outside the Monetary Union, could become inconvenient for the EU regarding probable unfair competition arising from exchange difference.

**III. PROPOSED MODELS OF PRIVILEGED PARNTERSHIP**

As it was mentioned before, Privileged Partnership is not an envisaged model in any of the EU legislation. Besides, owners of the proposal have never suggested a specific model contemplating the details of the notion In fact, there are many alternative partnership models discussed contemporarily but this paper limits the discussion to only four models which are applicable in Turkey's case.

**A. The Study of Robert Schuman Foundation**

The academic study which was carried out by Robert Schumann Foundation can be regarded as an attempt to materialize the Privileged Partnership offer in minds. Within the context of this study, brochure no: 38 was prepared in December 2006,[89] called 'The Privileged Partnership, an alternative to membership' by Sylvie Goulard, the former president of the foundation of 'European Movement' in France – which is known for the rhetoric against Turkey's membership –, Rudolf Scharping the former president of the Social Democrat party, Zu Gutteberg, Carlo Altomonte, Pierre Defraigne and Lucas Delattre[90]. The brochure aimed at becoming a meaningful document in the Privileged Partnership process by suggesting mixed commissions between Turkey and the EU as opposed to the membership. Representatives from both sides would meet to work on different issues.

The brochure mentions main problems with Turkey: agriculture in Turkey is infertile because of under-production and over-employment, which means that it may bring an unnecessary burden on the Common Agriculture Budget. Regional Economic disparities and a very low per capita income in Turkey as compared to the EU may result in a transfer of a large portion of the Cohesion Funds to Turkey. The unemployment rate comprises of another danger for the EU Labour Market.[91]

The Brochure suggests establishing institutional ties between the EU and Turkey in the Economic and Security-Defence areas. The Custom Union should be expanded over the agriculture and services; however Turkey must not be excluded from the Common Agriculture Policy. Turkey could decide whether it will be inclusive of the Euro zone or not. Nevertheless, Turkey is suggested not to be involved in the convergence policy institutionally.

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89 That date is also beginning of accession talks with Turkey.

90 Goulard and others, p. 12.

91 Turkey received positive feedback in the 2013 regular progress report for Turkey regarding the unemployment rates which is 8.8 % (see p. 18, online available at: http://www.abgs.gov.tr/files/strateji/tr_rapport_2013_en.pdf). However, regarding the issue date of brochure unemployment rate was 10.3 % in 2005 Progress report proving the future estimations in the brochure are rebuttable.

Generating a special general fund mechanism to provide fiscal support to Privileged Partners is another considerable proposal. This fund would not only target Turkey's Privileged Partnership, but would also cover other prospected partnerships such as Ukraine.

According to this plan, Turkey would remain outside of the decision-making bodies of the EU, whereas the cooperation would be sustained by consuls at the government and parliament level. When it comes to the Security and Defence areas, Turkey would be included in a joint decision-making mechanism since the nature of issue does not leave any other option.

The study also suggest other options to the Privileged Partnership that the given membership could be weakened by imposing permanent derogations in certain designated areas such as free movement of people or common agriculture policy. The ultimate aim of the study can be said is to seek interim remedies in order to create an 'intermediate statute' to come through the probable all or nothing stalemate. Any solution would be much better than a last minute rejection.

**B. European Economic Area Plus**

Norwegian citizens considering that the EU was never a prominent option for the future of their country rejected EU membership in the second referendum held in 1994. Nevertheless, in the same year, due to the excellence of Norwegian economy, the EU signed an agreement with Norway, creating a European Economic Area (EEA) in order to involve Norway in the Single Market. Norway adopted all *acquis* related to the Single Market and four freedoms (almost 80% of all *acquis*) with some exceptions and derogations in sensitive areas such as agriculture and fishery. The most significant benefit for Norway was that it would expand its seafood products to the EU market with free entrance.[92] Later on, Iceland and Lichtenstein have also joined the EEA and this partnership is now called European Economic Area Plus (EEA+).

[92] Atilgan, Canan and Klein, Deborah, 'EU Integration Models Beyond Full Membership', (2006), Brochure series published by the Konrad-Adenauer-Stiftung e.V., Working Paper No. 158, p. 7

According to the terms of this partnership, third states must be consulted in the decision-making process in integrated areas without casting a vote. These countries make financial contribution only for the related programs within the integrated areas as per the agreement of 1st May 2004.

Although this notion arose from the political upheavals and inconsistencies in Ukraine and Georgia, the applicability of EEA+ to any other state seems problematic. EEA third states had already carried the conditionality for EU's full membership. When it comes to probable candidate countries to the EAM such as Ukraine, Belarus, Moldova, Georgia and Azerbaijan, they are far from adopting the *acquis communautaire* considering the state of play in their political and economic situations.[93]

German Christian Democrat MEP Elmar Brok, on the demand of the EU Parliament, prepared a report in 2005 named 'A new expansion strategy for the EU' in order to seek solutions apart from membership and to establish relationships beyond the European Neighbourhood Policy with countries which are not suitable for the membership of the EU.

The Parliament adopted the report on the future EU enlargement strategy within the context of EEA+ in March 2006. The report envisaged the establishment of a 'Europe-wide free trade zone and stronger co-operation in the area of EU foreign and security policy with European third states and potential accession candidates'. Mentioned possible EEA+ countries in the report are Norway, Ukraine, Albania, Montenegro, Croatia, Bosnia, Belarus, Serbia, Macedonia, Kosovo and – if accession negotiations fail – Turkey. Financial aids and consultation rights have been proposed as incentives to cope with the adoption of related *acquis*.[94]

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93 Cameron, Fraser, 'EEA Plus? Possible institutional arrangements for the European Neighbourhood Policy Fraser Cameron', (2005), EPC Commentary, p. 12.

94 For more information see, Brok, Elmar, 'Eine neue Erweiterungsstrategie für die EU', (2005), *Die Politische Meinung*, No. 433, online available at: http://www.kas.de/dbfiles/dokumente/ diepolitische_meinung /7_dokument_ dok_pdf_7682 _1.pdf., (last visited on 29 July 2014)

**C. Extended Associate Membership**

The Extended Associate Membership (EAM), as an alternative to the full membership was introduced in 2004 by researchers Wolfgang Quaisser and Steve Wood at the Institute for East European Studies in Munich. The essence of the proposal is based on extending the European Economic Area (EEA), including the Custom Union as well as widening and deepening of cooperation on trade and economic policies. According to the authors, in spite of the several limitations and restrictions, particularly the free movement of people and workers, the EAM would be a satisfying alternative to full membership.[95]

This model requires adoption of large parts of the *acquis communituarre*. Turkey and other EAM countries would be granted observer status in the EU Council with consultation without any involvement in the decision-making procedures. In order to accomplish institutional interactions, EAM countries would have to send a sufficient number of personnel to the EU Institutions.[96]

The concept of an 'Extended Associated Membership' is an attractive model and it could be evaluated under the title of 'Privileged Partnership'.

EAM includes[97]:

• Absolute participation in the 'European Economic Area Plus' (EEA+) incorporating the internal market by applying all regulations. Nonetheless, certain sectors could be excluded for instance; a restriction might be applied in the labour market.

• Participation in the EU Council to present opinions without voting. EAM members would have the right to consultation in determination of trade negotiations.

• Financial Support Programs in the structural and cohesion policy areas, particularly fastening rural development by excluding the Common Agriculture Policy (CAP).

• A special chamber of the European Court of Justice to be established to

95 Quaisser and Wood, p. 50.
96 Karakaş, EU-Turkey, p. 1068.
97 Quaisser and Wood, p. 50 – 55.

deal with the legal matters of the EAM. The EMU might be exempted in the beginning but will have participation later

• Borders to be designated by the EU, referencing the cultural and geographical justifications by amending Article 49 of the EU-Treaty that 'any European state can apply for membership in the EU'. The suggested amendments leave Turkey aside of the EU membership both geographically and culturally. In fact this articulation would keep Turkey outside of the EU's geographical borders similar to North Africa or Ukraine. Another solution could be introduced in the form that the EAM may be considered as an obligatory transitional integration level before the final stage, i.e. full membership.

The EAM member countries would join the EU Internal Market with the required conditions of *acquis* and unified competition rules by applying the previously designated restrictions. Bringing in line the national systems with *acquis* will bring about a financial burden on the candidate countries. At this point, the cohesion programs and aids would make the EAM more attractive. Enlarged Council meetings would be held with the participation of the EAM countries that means that a 'wider Europe' would decide on related issues. Although the EAM countries would not cast a vote, they could express their opinions and proposals on policies in order to put pressure on the core member states.[98]

Cemal Karakaş has criticized this model on the basis that it does not treat Turkey as a candidate country, citing the context of Article 49 (TEU) by offering integration without membership.[99]

The EAM goes beyond the EEA+, envisioning stronger integration by establishing political structures and greater commitments through the EU Financial Commitments.

**D. Gradual Integration**

There is an indisputable fact that, any alternative form of partnership to the full membership will not be attractive to a European country which is eligi-

[98] Quaisser and Wood, 53
[99] Karakaş, EU-Turkey, 1068

ble to join the EU. Without a membership, partnership under pressure results in lesser effectiveness and conditional leverage. Thus, any other association model can only be attractive if it is an intermediate model before full membership. Due to this fact, the perceived EAM or Privileged Partnership, which propose a partnership without membership might be seen as unattractive or unacceptable from a potential candidate country.[100]

The notion 'Gradual Integration' was introduced by Cemal Karakaş who works with the Peace Research Institute-Frankfurt in his article 'Gradual Integration: An Attractive Alternative Integration Process for Turkey and EU' in 2006. Gradual Integration is aimed at ensuring that the applicant country in question is 'fully anchored in the European structure through the closest possible bond' – entirely in the spirit of the Council Resolution on Turkey. The resolution is applied by inter-linking institutions more strongly and by incremental political integration.'[101] Canan Atilgan and Deborah Klein interpret gradual integration as 'The benefit of gradual integration is the creation of incentives for a policy of democratization due to a dynamic and conditioning process. The prospect of full membership also makes this model attractive for the countries involved. Thus, it could represent a long-lasting and clearly defined integration alternative.'[102]

Karakaş's proposal briefly is that Turkey would join the EU in three phases by participating in the institutions and decisions without having the right to veto. After every accomplished phase, Turkey would participate in the related institutions' decision-making mechanism. After the completion of the third phase, Turkey would become a regular member of the Union with the same statute. Unlike the other status, Turkey will be treated as a candidate country, as opposed to a third country. Actually, a gradual membership is advantageous for both sides. Turkey will adopt the *acquis* and accomplish institutional and economic development with the right to vote and the EU will be away from

100 Emmanoudilis, Janis A, 'Alternatives between Full Membership and Non-Membership – Fata Morgana or Silver Bullet?', (2008), Paper for the conference of The EU and its Neighbours: In Search for New Forms of Partnership, p. 10; Quaisser and Wood, 51

101 Karakaş, Gradual Integration, p. 321.

102 Atilgan and Klein, p. 8.

the apprehensions of Turkish blockading and vetoing. In this way, fear among the EU citizens might subside by observing in practice whether the accession process of Turkey is dangerous for the future of the EU. If everything goes as it is expected, Turkey will become a full member at the end of the last phase.[103]

The notion of gradual integration was originally proposed in different terms as a 'various geographic' or 'two speed Europe' in order to fasten a deepening process. Only prepared and volunteered members would participate in further deepening of economical or political fields.

The concept of 'two- speed Europe' many times misperceived as 'two- tier Europe however, the meaning is quite different. Piris describes the two-speed Europe as 'closer cooperation among some Member States, pursuing objectives that are common to all EU Member States, as they are actually and precisely the objectives aimed at by the EU treaties. The idea is that the members of a smaller group would be both able and willing to go ahead immediately, while this would not be possible for all. The other Member States, each of them travelling at its own speed, would follow later. The differentiation between Member States would be temporary.'[104]

First concept to the two-speed Europe has been proposed by French and German politicians but criticised by UK ones since 1974. The aim is to create so-called 'hard core group' in order to achieve closer cooperation for proceeding faster the than rest of the Member States. These core members will remain in the EU and abide by the *acquis.* The problems to be solved with this proposal are several. For instance whether this core group states would establish different institutions and compose their legislation or would use existing EU institutions. Another question is how to decide the areas to for closer cooperation.[105]

The second concept is mostly known as 'variable geometry', and the main differentiation from the first concept is that the groups would be composed

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103 Karakaş Gradual Integration, p. 312-313.

104 Piris, Jean-Claude, *The Future of the Europe - Towards Two Speed EU?*,(Cambridge University Press: Cambridge, 2012), p. 6 – 7.

105 Piris, p. 66- 67.

case-by-case instead establishing a fix group of members.

In fact, the expectation to follow the same goals at the same pace from all the 28 members would not be realistic. Therefore, the most significant advantage of multi-speed integration is that the speed of deepening is independent of consensus of all member states. A sui generis model has been proposed to obviate Turkey's problematic EU process, inspired by this multi-speed model.[106]

Success of the gradual integration model relies on the mutual consensus of both sides in implementation of the related political and economic reforms. Karakas has also suggested some possible areas to be integrated; promoting the Custom Union by free movement of goods, capital and services, and enabling a strict visa process for Turkish businessmen; closer cooperation in the common foreign and security policy; and a closer cooperation in justice and home affairs in order to combat international crimes.

Throughout the integration process, Turkey should first harmonize its national law with the *acquis communautaire*. However, the main difference with normal candidacy is that in this case, Turkey would only adopt the *acquis* concerning the ongoing phase of the integration.[107] The gradual integration process has been divided into three parts from the lowest to the highest integration steps. Each step is dependent upon the accomplishment of the previous step by implementation of the requirements, which means it is not an automatic stepping into the next phase. The EU may suspend the process, just like in case of regular accession negotiations, in case any infringement of conditions occurs, which is a card up the EU's sleeve as well as it is an incentive for Turkey to keep itself motivated.[108]

If provided that Turkey fulfils all the requirements in the phases, it would be able to cast a vote in the related integrated areas in order to justify the implementation of political integration. Turkey's vote would be counted as equal to the rest of the member states. However, the right to vote would not be

106 Atilgan and Klein, p. 9.
107 Karakaş, Gradual Integration, p. 321.
108 Karakaş, Gradual Integration, p. 322.

granted to Turkey in order to relieve the concerns over the theoretical danger that Turkey may change the route of the EU by blockading. Limited participation in the decision-making process on the other hand, would assist Turkey in becoming familiar with the EU's operations.[109]

The duration of accomplishment for each step cannot be designated beforehand, but an approximate date might be planned by mutual agreements. Determination of whether the conditions of the steps have been fulfilled or not must be according to an objective criterion agreed beforehand otherwise it may be the case that the candidate may remain in a stage for years and years due to political reasons such as demography, security policy or cultural and identical divergences. The prospect of membership in a gradual integration is more intensive as compared to Privileged Partnership.[110]

Turkey may also join the EU Parliament, and Commission committee meetings, or other EU institutions work as an observer by means of existing legislation of the EU regarding the issues within the context of the next stage.[111]

Parties may decide the fields for integration after assessing the most advantageous ones. As a concrete example, the Customs Union could be a good starting point since it can be considered as a political agreement in the pursuit of the EU membership process which has made a significant contribution in deepening the relationship between the EU and Turkey.[112] However, the Custom Union makes Turkey dependent on the EU without involving it in the decision making process of the EU.[113] Another significant criticism is that by means of the Customs Union, the EU has become such an important trade partner of Turkey that it will not gain any significant benefit if Turkey becomes a member of the EU. In addition to this, Turkey has not been provided an increased foreign investment, better market access to the EU and third countries and

109 Karakaş, Gradual Integration, p. 322.
110 Karakaş, Gradual Integration, p. 323.
111 Karakaş, Gradual Integration, p. 324.
112 Hughes, p. 28.
113 Ulgen, S and Zahariadis, Y, 'The Future of Turkey Trade relation: Deepening vs Widening', (2004), Centre of European Policy Studies, EU-Turkey Working Papers No 5, p. 3.

has also not been granted further deepening of the EU as it was expected.[114]

The aim of the Customs Union was to open the way towards full integration by becoming leverage in the long road of the EU membership.[115]

Existing Customs Union rules are applicable only for industrial goods and agricultural products. However services, unprocessed agricultural products and textiles are excluded; meaning that the Customs Union covers only 30% of the goods produced in Turkey in order to protect EU's domestic economy from Turkish competition. Stefan Karuss argues that 'Turkey concluded the Customs Union to affirm its affiliation to Europe; Ankara's interests were more of a political nature than economic.'[116]

Turkey had already adopted a high portion of the related *acquis communautaire*, especially in the areas of customs and trade policy (competition, and the protection of intellectual, industrial and commercial property). Although Turkey has vested a significant part of its national sovereignty, it cannot join the decision-making process of the EU institutions as it makes the Custom Union undemocratic for Turkey. [117]

The first stage of probable integration might be in easier areas on both sides such as education, culture and research, or due to their importance, foreign and security policy might also be included. The cost of the integration is lesser in comparison to the classic candidacy process which is beneficial for supports. The EU may also apply special support programmes. At the second stage, both factions could deepen the integration in selected areas, in particular, expanding the Custom Union into the common market by abolishing the existing obstacles. On the same hand, other new areas such as financial control and cooperation in international crimes could also be involved in the integration process. This

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114 Eder, Mine, 'Implementing the Economic Criteria of Eu Membership: How Difficult is it for Turkey' in *Turkey and the European Union: Domestic Politics, Economic Integration and International Dynamics*, Ali Çarkoğlu and Barry Rubin (eds), (Frank Cass: London, 2003), p. 228.

115 Rumford, Chris, 'From Luxembourg to Helsinki: Turkey: The politics of EU Enlargement and Prospects for Accession', (2000), *Contemporary Politics*, 6 (4), p. 335 -337.

116 Krauss, Stefan, 'The European Parliament in EU External Relations: The Customs Union with Turkey', (2000), 5 EFA Rev, p. 225.

117 Karakaş, Gradual Integration, p. 325.

can be achieved by removing all the barriers and obstacles for foreign investors in Turkey in additional sectors and by allowing freedom of establishment and transnational exchange of services, so that it might boost the Turkish Economy. After achieving accomplishment in the previous steps, the parties could develop the common market into an internal market, partially as the third stage. At this stage, the EU should treat Turkey as an equal partner in the exchange of commodities, goods and services. The EU would probably leave aside the free movement of persons and workers. Nonetheless, an agreement must be signed for the limited access of workers to meet EU's labour needs. [118] That is to say the three stages of the integration are as follows:[119]

STAGE 1: Process: Incremental integration of Turkey into the EU structure

STAGE 2: Sectoral adoption of the *acquis communautaire*, joint decision-making power for Turkey in the Council for already integrated areas

STAGE 3: Full right to joint decision-making in the Council

*A comparison of the advantages and disadvantages of the proposed Gradual Integration from the author's perspective is given below:*[120]

| **disadvantages** | **advantages** |
|---|---|
| The prospect of full membership | No automatic accession |
| Turkey can jointly determine the degree of integration | The EU can jointly determine the degree of integration |
| Participation in decision-making processes by casting vote | No right to veto |
| The deepening of the Customs Union could decrease Turkey's trade deficit. | |
| Gradual Integration buys extra time: Turkey can continue its process of democratization and consolidation and enter into a broad dialogue with the EU public, with the chance to aid the integration of Turks living in Europe and to reduce fears *vis-à-vis* Islam. | Turkey is largely excluded from the EU's agricultural and structural funds. There will be no freedom of movement for persons and workers. |

[118] Karakaş, Gradual Integration, 327
[119] Karakaş, Gradual Integration, 322
[120] Karakas, Gradual Integration, 328

The gradual integration model proposes participation in the Council's decision-making mechanism. In Turkey's case, there wouldn't be any Turkish MP in the EU Parliament. However, after the dramatic changes in the Lisbon decision-making system of the EU, the Council and the Parliament are now on an equal footing. Nevertheless, the representation of Turkey in the Council works could help in influencing the EU institutions which is more democratic for Turkey as compared to other proposals such as Privileged Partnership or the EAM.

## IV. SEVERAL DIMENSIONS OF THE PROBABLE PRIVILEGED PARTNERSHIP

The Privileged Partnership statute is based on establishing a strategic partnership between the EU and Turkey. Since the issue has not gained formality, we have to take into account some planned unofficial studies. The partnership can include matters such as controlling illegal migration, controlling the seas and creating a special organization for the Bosporus, external relations policy and military defence, energy and environmental issues by signing special agreements or including Turkey within the existing EU policy.

### A. Defence

Charles Grant proposes the establishment of 'Security Partnerships' in the area of the Common Foreign and Security Policy (CFSP). The EU should discuss the common interests in related foreign policies with the prospected partner in order to share common interests. According to this proposal, the security partner should:

'(i) send a small team of diplomats to be based on the Council,

(ii) be asked to join in when relevant subjects are discussed within the EU,

(iii) send a senior diplomat to the Political and Security Committee and its foreign minister to the meetings of the General Affairs and External Relations Council (GAERC), when the agenda includes a topic covered by the Security Partnership,

(iv) attend relevant working groups and committees, and

(v) participate in ESDP operations not only through sending troops or other personnel but also by taking part in the management of operations. However, not being member of the EU, the *security partner* would – according to Grant – have to leave the room when the Union takes a decision. After the EU has decided on a common policy, the *security partner* would have the right to sign up to it – or not'.[121]

Especially, France sought applicable ways for the involvement of Turkey in the European Security and Defence Policy (ESDP) during its EU presidency in the second half of 2008. The EU has already had cooperation with the NATO in terms of the *Berlin Plus* agreement. However, Turkey has the right to block this cooperation. Furthermore, the strengthening of Turkey's role in the ESDP could support the idea of a Privileged Partnership which is the most proclaimed alternative concept claimed by the French government persistently.[122]

Giuliani and Goulard believe that the first priority of the Privileged Partnership is signing a strategic defence agreement between the EU and Turkey since the Privileged Partnership is a political and strategic partnership before anything else. Turkey's geopolitical location is directly related to its importance and it is what urges the EU to find a third way.[123] As a different opinion, Kramer argues that 'defence and security' are the only arguments that make the PP with Turkey attractive. In fact, being a member of NATO, Turkey does not need to establish a security and defence policy with the EU as long as she has not been offered a chair in the European Security Council.[124]

In fact, preventing the threats from potential countries by virtue of buffer zone countries contradicts EU's 'good neighbourhood policy' which covers bordering countries and requires developing a good trade relation with them but at the same time keeping them outside of the Union. Helping to establish

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121 See for further detailed explanation, Grant, Charles, 'Europe's Blurred Boundaries: Rethinking Enlargement and Neighbourhood Policy', (2006), Centre for European Reform (CER), pp. 66-72, online available at http://www.cer.org.uk/sites/default/files/publications /attachments/pdf/2011/p _696_boundaries_grant_29-881.pdf., (last visited on 19 July 2014).

122 Emmanouidilis, p. 19.

123 Gürsel and Dedeoğlu, p. 82.

124 Gürsel and Dedeoğlu, p. 82.

stability in these countries will eliminate any potential against the EU. If Turkey gets tied to the Union with Privileged Partnership, this responsibility will be passed on to Turkey on behalf of the EU. On the other side, the problematic countries might have felt abandoned and on their own. This policy failed in Ukraine and Georgia since the EU abandoned them and left them on their own.[125] If Turkey becomes an EU member, the prevention of possible threats can be assured by establishing the stabilization as a result of having direct borders with the EU, just like the EU succeeded in the Balkans.

Turkey's military capacity is ranked fourth in the EU after the UK, Germany and France, and is tenth in the world overall. With regards to the number of soldiers, Turkey is first in the EU and second in the NATO after the United States.[126] This significant military power makes Turkey attractive for the EU in the aim of becoming a global power. However, the EU's unification is based on economic reason rather than a military one. Considering the Lisbon Treaty, the EU does not need a stronger military power owing to the NATO. Furthermore, the EU is comprehended as a 'soft power' which relies on mediation, crisis management, and assistance for development and democratization and preventive interference.[127]

The EU has not implemented a particular policy targeting to enlarge its military power in order to be another pivotal power in the world. On the contrary, the EU has preferred to solve the military problems through UN's peace keeping missions and NATO's actions. Besides, EU's treaties never include any Provision referring member states' military power. The Privileged Partnership is aiming to affiliate Turkey to a common external and security policy and to integrating Turkish military power with the EU. By doing so, Turkey will not be a threat to the EU.

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125 Gürsel and Dedeoglu, p. 103.

126 http://www.globalfirepower.com/available-military-manpower.asp., (last visited on 4 August 2014); Ayrıca Bkz. Ek.7.

127 Nye, S Joseph, *Soft Power: The Means to Success in World Politics,* (PublicAffairs: New York, 2004), p. 78.

**B. Energy**

Turkey is sort of a buffer zone dividing backward and developing countries from Europe as well as an energy transitional region since it is located at the connections of Middle East, Caucuses and Middle Asia, and being at a crossing of watersheds of the Mediterranean Sea, Black Sea and Khazar Sea. This location explains why the EU at least needs to maintain a Privileged Partnership relationship with Turkey.[128]

The role of Turkey in the energy transfer in the region as well as the advantages regarding alternative energy possibilities, need to be scrutinized. 50% of EU's energy requirements – a number that is increasing steadily – come from overseas countries, and mainly from Russia. The EU aims to vary its energy roads to create alternative ways to Russia as a mid and long term policy. Turkey is one of the alternative energy transmission routes for EU.[129]

Russia comes first in the world with 25% of all the production of natural gas. 35% of this amount is exported to the EU.[130] This is why the EU considers Turkey as an alternative way to Russia in the transfer of natural gas which is even more than petrol carriage. Today, approximately 10% of the natural gas transfer is made via pipe lines, and it is expected to go up to 20% by 2030. Majority of the transfer will be done via maritime at 80%. Turkey will continue to play its important role in both maritime transport and pipe lines. However the importance of Turkey in energy transportation has several drawbacks such as:

• Although the amount of energy that comes via Turkey is important, but it is not vital for the EU. The dependence on Turkey varies in the EU member states since Turkey's route only affects Belgium, Luxembourg, Spain, Portugal, Ireland and the UK which are not able to import energy via Russia.[131]

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128 Gürsel and Dedeoglu, p. 99.

129 Barysch, Katinka, 'Turkey's Role In European Energy Security' (2007), Centre for European Reform, online available at: http://arsiv.setav.org/ups/dosya/24478.pdf, (last visited on 2 August 2014).

130 BP Statistical World Review of Energy, June 2009

131 BP Statistical Review of World Energy, June 2009, http://www.bp.com/liveassets/bp_internet/turkey /turkey_ turkish/STAGING/local_assets/downloads_pdfs/e/EnerjiRaporu_2009.pdf

• The lines passing through Turkey cannot be a replicable alternative with Russia. New suppliers such as Azerbaijan, Iran, Turkmenistan, Egypt and the Gulf states are not reliable suppliers due to risk of instability. Furthermore, most of these countries cannot set up an energy export policy without Russia's consent. These conditions make Turkey crucial in midterm energy transfer but not in long-term. Therefore it could be suggested that the Privileged partnership offer aims to keep Turkey with the EU until the 2020s.

Another issue is the potential of alternative energy sources in Turkey. The EU Council announced in 2007 that carbon dioxide emissions will be decreased by 20% by the year 2020. Today the EU is responsible for one sixth of the world's total carbon emissions.[132] It was estimated that the total energy consumption of the world will increase threefold by 2050 which means that the EU's dependence on energy import would increase by 65%.[133]

These estimations have urged the EU to take serious measures in seeking alternative energy sources. The Commission prepared and presented a report to the Council within the context of the Package for Energy and Climate Changes in order to develop a policy regarding the production of green energy.[134] According to this report, priority will be given to natural energy resources such as water, wind, solar, thermal, photovoltaic, geothermal and wave power resources. Knowing that 65% of the renewable energy could be met by the candidate and the EAM countries, the EU plans to sign special agreements with the Mediterranean Countries in order to raise this amount up to 100%. In green energy rankings, Spain comes first whereas Turkey is at the second number while only 16.5% of the rest is in the EU member states. This also explains why the EU seeks a relationship with Turkey.[135]

However, it is doubtful that Turkey will use its energy geopolitics in line

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132 Schreyer, Michaele and Erene, Lutz Mez, *Yenilenebilir Enerji için Avrupa Topluluğu*, (Heinrich Böll Stitung Foundation Publication: Istanbul, 2009), p. 19

133 Schreyer and Erene, 20

134 Presidency Conclusion *European Council Action Plan: Energy policy for Europe*, Council of the European Union, 8/9 March 2007, online available at: http:www.consilium.europa.eu/ueDocs/cms_ Data/ docs/pressData /en/ec/93135.pdf

135 Schreyer and Erene, 27-28

with EU's will without having a full membership target since renewable energy investments require a great amount of investment. This renewable energy case is much related to the chapter on the environment that may cost Turkey 50 billion Euros. If Turkey carries out these investments, affording the estimated costs in order to bring inline its energy and environment criterion with the EU criterion, EU companies will become advantageous in comparison to third countries. Regarding the question that why Turkey would establish bilateral relations with the EU member States, the answer is that the Privileged Partnership offer should provide an explanation about what benefits Turkey will receive in return for cooperating with the EU in the renewable energy sector.[136]

**C. Trade**

The Custom Union is in the implementation phase between the EU and Turkey since 2006. Yet an unbalanced situation against of Turkey still continues since the free trade agreements which were signed between the EU and third countries do not include Turkey automatically, whereas the third countries may trade with Turkey as per the signed Free Trade Agreements (FTA) without the need of any further additional agreement. Nonetheless, Turkey has individually signed FTAs with many of these third countries. However, some of the countries like Mexico, Algeria and South Korea which have signed an FTA with the EU avoid signing similar agreements with Turkey due to the fear of insufficient capability of competition in Turkish products.[137] The EU may sign other FTA's as well with China or India in the future that would definitely endanger Turkey's trade rates with the EU. These risks make the sustainability of the Custom Union questionable from the Turkish perspective. If Turkey stays outside the EU for a while, the Custom Union might be replaced with FTA. Therefore, the envisaged partnership should cover the FTA problem, introducing a reasonable solution for both parties.

[136] Gürsel and Dedeoğlu, p. 104.

[137] *State of Play in the Accession Negotiations in The Foreign Trade Agreements of the European Union* (TUSIAD Publications: Brussels, 2009).

**D. Migration**

Turkey is a very huge country in terms of both population and surface area which is also a cause of opposition against Turkey in the EU. As being comparatively lesser developed, it is feared that a great number of people would migrate to the EU from Turkey if the free movement of the persons is provided. Considering this reason, the Privileged Partnership offers and other alternative solutions suggest excluding the free movement of persons.

In order to know the Turkish people's wish to migrate to the EU, a research was conducted in Turkey in 2007.[138] The people were asked whether they would prefer to live in an EU-15 country or not. The 6.5% of interviewees said 'yes', which is the highest rate in the EU. Regarding language, culture and accommodation problems, the response changed and the number of 'Yes' went down to 0.3% that is the lowest rate in the EU. There is an inverse proportion between a EU member Turkey and a non-member Turkey in the numbers of estimated migration until 2025. If Turkey becomes an EU member, achieving relevant social and economical developments, 2.1 million people are estimated to migrate to the EU. If Turkey fails in its membership process, this number goes up to 2.7 million people. With regards to the interpretation of these figures, it may be concluded that a Privileged Partnership excluding free movement of people cannot be a solution in preventing migration from Turkey to the EU. Poland, which is very similar to Turkey in terms of population and qualification of its people, was the most feared candidate regarding migration numbers, yet only 290.000 Polish people had migrated to other EU countries until 2008.[139]

The EU had implemented restrictions on the CEECs for the free movement of persons in order to prevent labour migration after they have entered the EU. However, only Germany and Austria had sustained these restrictions by the year 2006. Each member state applied different restriction methods, for

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138 Erzan, Refik; Kuzubaş, Umat and Yıldız, Nilüfer, 'Immigration senarios:Turkey-EU', in *Turkish Immigrants in the European Union: Determinants of Immigration and Integration*, Kemal Kirişçi and Refik Erzan (Eds), (Routledge: London, 2007), p. 112.

139 Lanzieri, Giampaolo, 'Population and social conditions', (2008) in *Statistics in Focus*, Eurostat No. 81.

example Denmark denies accommodation request for those who cannot get a job in six months whereas Belgium treats the migrants according to the branch of work. EU has not had a common policy regarding the condition of people coming from outside the EU; each member applies its own rules. This is to say that a member state may impose restrictions on another member state's citizen as well as it may implement indirect rules preventing uncontrolled migration. Due to this fact, the EU does not need to establish a Privileged Partnership with Turkey in order to stop probable migration from Turkey.

Moreover, Turkey is a transit country for illegal immigration. Therefore, nowadays Turkey and the EU are working on involving Turkey in the Frontex. Besides, the EU has also signed a memorandum of understanding with Turkey within the context of Frontex in May 2012.[140] Furthermore, the EU is about to sign a re-admission agreement with Turkey in return for some facilities for providing visa to Turkish citizens. This means that the EU is about to solve the illegal migration problem without needing to establish a partnership with Turkey.

**E. Unfair Competition Arises From Ratio of Exchange**

The envisaged privileged partnership does not suggest that Turkey will join the Euro Zone. The difference in exchange rates between the TL and the Euro will probably invite unfair competition for the sake of Turkish products. It should be taken into account that Turkey has never been unilaterally involved in the Euro Zone without being a member of the EMU. As long as this consistency remains, the problem of an unbalanced exchange rate must be solved for the sake of EU firms. The only, but doubtful, solution has been proposed by Heinz Kramer which says that the unbalanced and asymmetrical economic power of the EU will overcome the unfair competition problem arising from exchanges rates.[141] Actually, the best solution is to include Turkey in the EMU so that Turkey would be obliged to comply with the EU's financial policy. However, France has blocked the 17th Chapter of the Economic and Monetary

[140] *Hürriyet Daily News*, 30 May 2012.
[141] Gürsel and Dedeoğlu, p. 96.

Policy claiming that this chapter is opening the way for the EU, which irreversibly means that participation in the European Monetary Union without a membership has a very low chance. Nevertheless, within the context of the Privileged Partnership offer, Turkey may be given the right to join without the right to veto. To sum up, leaving Turkey aside from a common monetary policy in the contemplated economic integration would change the balance of competition power towards Turkey's firms, especially against the east European countries; Moreover, there does not seem to be any exact solution to this problem.

**F. Costs of the Implementation of Acquis Communitiare**

Majority of the views aiming to establish a partnership with Turkey within the context of Privileged Partnership propose that Turkey must adopt the related chapters of *acquis communitiare* to deepen the economic and political integration into services and agriculture. The adoption of *acquis* means implementation of the EU criteria and standards which requires a significant amount of investment in areas where Turkey's economy is lagging behind the standards. These areas are supposed to be protection of the environment, public procurements, agriculture and social-syndicate rights.

Most of the Turkish firms are reluctant to apply EU standards because it gives rise to unfair competition against the EU companies due to low margin of the costs. For example, the estimated cost to both Turkey's and the private sector's budgets for the adoption of the chapter is fifty nine billion Euros.[142] The 27th Chapter regarding the environment was opened to negotiation in 2009 but there hasn't been any remarkable progress. Any further progress in this chapter is also not expected as long as the membership is blurred.

Although in the screening meeting, report for the 19th Chapter: 'Social policy and Employment' was approved, it has not been opened yet since the related bill amendments had been objected by the private sector representatives. Cengiz Aktar who is the head of the EU relations at the Bahçeşehir

[142] *Environment Operational Program*, (Ankara, 2007), online available at: http://www.ipacevre.gov.tr /Belgeler/EOP.pdf. (last visited on 15 August 2014)

University, argues that this chapter is very much related to open-endedness of the negotiations and that the Turkish employers assert that 'Why should we comply to the EU rules which are detrimental for Turkey if we never become a member state?'. Since the government could not find a satisfying counter-argument, the 19th chapter is still pending. [143]

Similar problem may arise from public procurements. The EU will demand from Turkey to bring the national legislation in line with the *acquis* in order to open public procurements to the EU companies. The fact is that the Turkish Government never prefers to put advantageous competition position of national companies in jeopardy in the national market. Most probably, Turkey will not amend the related national laws before membership is promised.[144]

When it comes to agriculture, it is considered the most difficult and even impossible part of the chapters to be integrated. Expansion of the Custom Union to agriculture will probably be required by the EU during the negotiations. Furthermore, the contemplated Privileged Partnership proposals include similar requirements from Turkey. Very similar to Poland's agriculture, the majority of the farmers in Turkey are families instead of large scale professional farmers, which causes a need to protect the national agriculture since the efficiency is lower as compared to that of the EU.[145] Due to the difference in the agricultural productivity, there are two ways in agricultural integration: the first method is to provide fiscal support to some products by the EU funds, to which the EU is against any subversion principally. The second method is to keep agricultural integration with limited products such as fruits and vegetables but to which the Mediterranean Sea countries may object. Considering both options and the comparatively lower level modernization of agriculture in Turkey, it will be problematic for both processes: the full membership or the Privileged Partnership.

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143 Aktar, Cengiz, 'Avrupa Sosyal Şartında Anayasal Sosyal Haklar', Presentation in the Symposium held in Marmara University, 15-19 Ekim 2009.

144 Gürsel and Dedeoğlu, p. 94.

145 Akder, Halis and Cakmak, Erol, *DTÖ ve AB'deki Gelişmeler Işığında 21. yüzyılda Türkiye Tarımı*, (TUSIAD publishing: Istanbul, 2005), p. 26.

**CONCLUSION**

This paper is an attempt to show throw some light over the alternative EU membership models to full membership within the context of the Privileged Partnership which is in the minds of many of the EU Member States, and has particularly been voiced by many French and German politicians on several occasions. On the other side, Turkey's EU membership bid is losing its creditability day by day.

The main problem with this research is that none of the EU legislation includes any model other than full membership except for allowing the EU to plant strong relations with other countries. Therefore Privileged Partnership neither has any legal ground setting a framework nor any unanimity between the Member States to be proposed. In addition to this, there is no example of the implementation of an alternative partnership model to a country sharing similar conditions with Turkey. Regarding this situation, this study has dealt with a few sample models which have been discussed and proposed by academicians and foundations and it has been analysed if they are applicable to Turkey or not.

The EU would most probably prefer to keep the relations with Turkey at the highest level either in case of failure in accession negotiations or in case of majority of 'no votes' in the countries conducting a referendum. Turkey's politicians have already declared that Turkey would not accept any model partnership other than full membership. Turkey is right in having resentment against the EU which stems from unequal treatment and double standards. However, considering the current scenario, the finalization of accession negotiations successfully is on a knife's edge. Thus Turkey needs to scrutinize all possible options in order to find a path to follow that is in the best interests of the nation.

Taking into account the previously mentioned partnership models, namely European Economic Area Plus, Privileged Partnership Model prepared by the Robert Schuman Foundation, Extended Association membership and Gradual Membership, Turkey may be convinced only for the gradual membership

model since it eventually leads to full membership.

Probable Privileged Partnership has been focused under the title 'Several Dimensions of the Probable Privileged Partnership' from the economic perspective as that there will be a very significant relation between the level of integration and Turkey's firms' superiority in competition with the EU firms in the designated Privileged Partnership model depending on how much integration is proposed. The farther is the integration level, the better would be the competition ability of Turkey or vice versa. Getting distanced from EU's patterns of *acquis* regarding environment, social rights, public procurements, exchange rates etc. can be interpreted in terms of financial advantages. Turkey, entering the single market in terms of the Privileged Partnership, will have extra competition power against the EU firms which fully complies with the costly EU *acquis*. Due to this fact, many member states, particularly the Eastern European States might be against the Privileged Partnership proposal. On the other hand, a closer integration without membership would put Turkey into a disadvantageous position before the EU member States. Therefore, in order to realize a Privileged Partnership model, Turkey and the EU would have to compromise on this issue.

A Privileged Partnership cannot be perceived without at least limited participation in the decision-making mechanism. However, the existing EU legislation does not cover a limited participation therefore a new legislation process would be inevitable. Another problem may arise in the management of the EU when full members and limited members work together. Even in the current situation, some members can disagree with the majority. But the fear of alienation from the EU induces these opposition members to comply with the majority's decision. When it comes to the Privileged Partner, it may act more independently when objecting to the common views without having the same sort of fears.

To sum up, Turkey has three applicable options; first it could sustain the negotiations as long as possible in order to wait for unfavourable situation changes in the EU. The second option is that the end of the EU tunnel that Turkey is travelling would be blurred if the first option is implemented by Tur-

key. Therefore Turkey should now start to struggle for the implementation of the gradual membership model which is more beneficial for Turkey because of the promise of EU membership and due to the probable problems with the application of the other models. The third option is valid only in the failure of the implementation of the previous two options. Turkey should seek a way to prolong the relationship within the context of private agreements which comply with Turkey's interests and are similar to the Custom Union.

This paper would like to direct its last words toward the EU. Its approach towards Turkey's membership is that Turkey should bring every required condition in line with the EU standards in order to be accepted by the EU. Apparently, the EU's expectations can never be fulfilled by Turkey since there is a direct proportion between Turkey's attitude and the EU's attitude. That is to say that if the EU comes one step forward, Turkey does the same or vice versa. Arguing that if the EU proceeds accession notations despite Turkey's deficiencies, as it did for the CEECs, Turkey most probably would bring its pattern in line with the EU standards sooner or later which is not an over optimistic idea.[146] Regarding the envisioned Privileged Partnership option, the opinions of Germany and France aiming to sustain the relationship without a membership is not applicable in practice. Therefore the gradual membership model is a more realistic approach in comparison to the Privileged Partnership and more beneficial in both side's interests.

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[146] The fact is that by means of the accession process many official institutions have been improved however, several reform and harmonizing law packages political culture has not changed much. Especially human rights issues remained state centred. Due to the security reason Protection of the state is still overriding issue against people's human rights. Thus EU membership has a key role balancing the challenge between securitization and desecuratization labour as argued by Rabia Polat. See, Polat, Rabia K, 'How far away from politics of fear? Turkey in the Accession Process', in *The Politics of EU Accession- Turkish challenges and Central European Experiences,* Lucie Tunkrova and Pavel Saradin (eds), (Routledge: Oxon, 2010), p. 68, 69

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