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Content

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Euro-Crisis

Ing. Miroslav Paclík,[1] Robert K. MacGregor, MBA, and JUDr. Radka MacGregor Pelikánová, Ph.D., LL.M., MBA[2]

Undoubtedly, today's most discussed economic and legal topic is the financial crisis of the Eurozone. Obviously, it entails more than a local crisis, or one exclusively linked to the introduction of the Euro. Instead, this is a problem of the entire EU, with an impact upon the entire global society. Taking into consideration the complexity, dramatic impact, and the contradicting opinions about the crisis and potential solutions, it is instructive to briefly look at it´s history, causes and suggested cures, while including a short comparative exposure regarding the European and American approaches.

Brief history of the crisis of the Eurozone

The crisis began in the United States in 2007, leading to the greatest decline in economic activity since World War Two, and this on a global scale. In the Eurozone, Greece was the first member state heavily hit by the crisis, asking for financing from the sources of the EU and International Monetary Fund (IMF) in April, 2010. Ireland followed in November, 2010 and Portugal in April of 2011. Greece was threatened by the restructuring of it's debt, and potential state bankruptcy. Debts and tightening access to financial markets endangered additional countries – those extremely indebted include Spain, Italy, and Belgium.

The Euro and causes of the crisis

There are many divergent opinions from experts and commentators about the crisis, and the current problems of the Eurozone and their origins. Much of the blame is laid at the doorstep of the common currency and it´s fathers-creators.[3] According to one of them, Jacques Delors, the former Chairman of the European Commission, the idea of the single currency was not fundamentally wrong , but rather the functioning of the Eurozone has been, from it's beginning, wrong, i.e. the problem is in the manner in which the states of the Eurozone implemented the project of the common currency. The lack of centralized coordination is denoted as the cause of the current debt crisis and the launching pad of the helix of the unsustainable debt. Some economies of Countries in the Eurozone were weak in their basis, and others managed in a non equilibrated manner, which was overlooked by EU officials and State Ministers of finance who did not want to 'see, speak, or hear' any evils which would first have to be resolved. All countries of the Eurozone have to own up to their share of responsibility for the debt crisis, and the concerns about the survival of the Euro, i.e. *"everyone must examine their*

[1] Ing. Miroslav Paclík is a director of the patent information department at Úřad Průmyslového vlastnictví (Czech Industrial Property Office) currently completing his Ph.D. study at Metropolitní univerzita Praha.
[2] JUDr. Radka MacGregor Pelikánová, Ph.D., LL.M., MBA is an academic researcher and lecturer at Metropolitní univerzita Praha.

[3] BOOTLE, Roger. Europe has reached a watershed moment and leaders need to refocus. The Telegraph, May 6-7, 2012. Available on http://www.telegraph.co.uk/finance/comment/rogerbootle/9249466/Europe-has-reached-a-watershed-moment-and-leaders-need-to-refocus.html - It wasn't willed by the people but was rather thrust upon them by their leaders, without sufficient thought or preparation. They have created a monster which threatens to destroy the European economy – and with it, to threaten the world. The euro is not the sum total of Europe's ills. Things were going wrong before it was created. European leaders have been focused on utterly the wrong things.

conscience."[4] Interestingly, this obvious statement was made by someone very influential in the preparation and introduction of the Euro, and positioned to eliminate, or minimize most of the risks which such a challenging process produced. Admitting responsibility and searching one's conscience should start with fathers-creators, including Jacques Delors.

The Swiss economist and philosopher, Christian Marazzi, is convinced that the European crisis of public debt caused by the state debts of individual member countries deteriorated rapidly after the implementation of the measures to save banks in 2008. According to him, this leads to the conclusions that currency without a state can hardly function, that capitalism cannot be directed only by the market, and austerity measures *per se* will not take Europe out of the crisis. As a matter of fact, instead they may exacerbate the situation and lead to the crash of the Euro. There is no real European government, but merely management of savings measures and repressions. In reality, the gap between economically strong and weak countries, which were supported by the actions of the European Central bank (ECB), has only increased and the departure of Germany from the Eurozone is just a matter of time. It is suggested that the departure of Greece or Spain would not be enough to resolve the contradiction inside the central block of the EU, or the differences between Germany, which is focusing on Asian and South American markets, and France, which has been losing it´s economic power and political credibility.[5]

Another problem is that the EU cannot take fast action on problems as they develop , instead it undergoes long negotiations between member states, often ending without reaching an agreement or just in a compromise, short of any effective solution. European co-operation is to some extent similar to the international co-operation through G20. Undoubtedly, G20 is a great concept in theory which was embodied by a organization with a weak decision making capacity and even weaker enforcement faculty.[6] This same problem applies as well to the ECB. Individual Eurozone interventions are only implemented after lengthy negotiations with the various ministers of finance of member states.

[4] DELORS, Jacques, Interview: Euro would still be strong if it had been built to my plan. *The Telegraph*, December 2, 2011. Available on http://www.telegraph.co.uk/finance/financialcrisis/8932640/Jacques-Delors-interview-Euro-would-still-be-strong-if-it-had-been-built-to-my-plan.html - I get the impression from Mr Delors that he thinks Mrs Thatcher would have agreed with this view. She certainly would not have agreed, however, on the Delors version of what that co-operation should produce — the harmonization of most taxes, plans to deal with youth and long-term unemployment, and that social dimension for which he always called because "it is not just a question of money. I said all these things, but I was not heard. I was beaten." There was also a problem of "surveillance". The Council of Ministers should have made it its business to police the eurozone economies and make sure that the member states really were following the criteria of economic convergence. This did not happen. For a long time, the euro did remarkably well, Mr Delors argues, bringing growth, reform and price stability to the weaker members as well as the stronger. But there was a reluctance to address any of the problems. "The finance ministers did not want to see anything disagreeable which they would be forced to deal with." Then the global credit crisis struck, and all the defects were exposed. Whom does he blame most for this? He thinks that "everyone must examine their consciences". He identifies "a combination of the stubbornness of the Germanic idea of monetary control and the absence of a clear vision from all the other countries". What of his own country's role? Mr Delors patriotically declined to be drawn on this point, though I detect some dissatisfaction. He reminds me that he is, after all, speaking to an English not a French newspaper.

[5] MARRAZI, Christian, Neoliberalism is destroying Europe, The Guardian, September 14, 2011. Available on www.quardian.co.uk.

[6] WARNER, Jeremy. G20: don't expect any solutions from the international junketing in Mexico, The Telegraph, June 18, 2012. Available on http://www.telegraph.co.uk/finance/comment/jeremy-warner/9339838/G20-dont-expect-any-solutions-from-the-international-junketing-in-Mexico.html - For examples of the abject failure of international co-operation to find solutions, look no further than the G20 itself. A great concept in theory which seeks to engage the developing world in the idea of global governance, the G20 has turned out to be an utterly hopeless organization, capable of deciding little and implementing even less.

Some authorities maintain that there has been not one single crisis, but rather a triad of crises: (1) a banking crisis, (2) a crisis of public budgets, and (3) a monetary crisis. As such, a solution for one could have fatal consequences for one of the others, thus most conventional solutions are not suitable and an original solution needs to be applied.

The first mentioned is the banking crisis. The benefits of the financial integration and convergence have been considered with respect to EU regulation and deregulation policies. However, the desired improvement of the efficiency, performance and best practices has not taken place in an objectively satisfactory manner.[7] It seems that the banking crisis was caused by an over-relaxed monetary policy, inappropriate for the economic conditions of certain member states. The unlimited volume of cheap money inflated the credit bubble, which deflated with a bang in 2008. It is particularly a problem for Ireland and Spain, and also to a rather significant extent for Greece, wherein between 2003 and 2008 the volume of private sector credits doubled.

The second mentioned, the budgetary crisis, is related to the fact that, between 2002 and 2008, most states grew accustomed to relatively high incomes (since the growth was artificially stimulated by the bubble of bank credits), and thus, as well, to relatively high expenses, which further stimulated the growth. Even highly responsible Germany could not fully control its state budget. These two types of crises – budgetary and banking – reciprocally complete themselves and enforce themselves since the problematic banks then request state support (the best example is Ireland) and the problems´ of the state destabilize the banking sector (a good example is Greece). In Ireland, the state guarantee for the banking sector caused the de facto (not de jure, since it is not officially declared) payment incapacity of the government. In Greece, there occurred the threat that an officially declared payment incapacity would ratchet up the banking crisis with a deleterious impact on other countries in the Eurozone. The last mentioned, the monetary crisis, takes the shape of extreme deficits of the commerce and current payment balance of certain countries where the increase in the volume of money in the economy caused an increase in salaries and production expenses beyond a supportable limit. Typical examples for it are Portugal and Greece, and, to a significant extent as well, Belgium and Italy.[8]

Others feel the high savings rate in countries such as China, with their fixed exchange rate and foreign investments is part of the problem.[9]

[7] CASU, Barbara, GIRARDONE, Claudia. Integration and efficiency convergence in EU banking markets. *Omega,* October 2010, Volume 38, Issue 5, p.260-267. ISSN 0305-0483. Available on http://www.sciencedirect.com/science/article/pii/S0305048309000826 Evidence of financial integration and convergence are considered of importance in assessing the outcome of EU deregulation policies aimed at improving the efficiency and performance of banking sectors. This paper evaluates the recent dynamics of bank cost efficiency by means of data envelopment analysis (DEA). Borrowing from the growth literature, we apply dynamic panel data models (GMM) to the concepts of β-convergence and σ-convergence to assess the speed at which banking markets are integrating. We also employ a partial adjustment model to evaluate convergence towards best practice. Results seem to provide supporting evidence of convergence of efficiency levels towards an EU average. Nevertheless, there is no evidence of an overall improvement of efficiency levels towards best practice.

[8] KOHOUT, Pavel, Tři krize Eurozóny v roce 2011, srpen 2011, (cit. 2011-08-24). Available on http://www.penize.cz.

[9] CURRIE, Wendy; FINNEGAN, David; GOZMAN, Martin. e-Goverment as a regulatory response to the financial crisis: the case of the UK. European Journal of ePractice, N.11, March 2011, ISSN: 1988-625X. Available on www.Apracticejournal.eu.

In general, it is possible to summarize that the causes of the crisis, or possibly crises, of the Eurozone include, in the main, the following:

A long period of a well-balanced growth, stable prices, low interest rates;

- The government housing support program (USA);
- A relaxed monetary policy, the willingness to extend and accept loans;
- The excess of capital, the low cost of loans;
- The creation of a false impression that there was found a model without barriers;
- An excess of capital in the financial markets;
- The behavior of mortgage banks – boom products on the real estate market, the price bubble;
- The role of rating agencies;
- The bonus payment structure for managers and others, leading to unsafe loans, investments ;
- The underestimation and ignoring of risks;
- The failure of bank monitoring.

In sum the crisis (or the crises) dealt a blow to Europe´s integration.[10] Since the introduction of the Euro was not an economic, but rather an out-and-out purely political decision, it followed that the majority of states that entered into the Eurozone were not correctly prepared. This political mistake has had dire consequences also for many leading politicians who lost their posts due to the wrath of the electorate over the crisis, including France's President Sarkozy.

Solution of crisis

In 2010, the EU and its member states began trying to independently resolve the created crisis and it's related problems, starting with debt-ridden Greece, with the EU attempting to stabilize Greece's budget and to avoid the threat to the common currency. In particular, the reduction of Greek indebtedness through long overdue budgetary cuts has been implemented as an appropriate solution. These moves have been akin to pulling teeth, however, as even as late as September 19, 2012, Greece is still negotiating with the rest of the EU on budget cuts.[11]

The governor of the Czech National Bank, Miroslav Singer, has indicated two potential scenarios for the crisis solution – a solution within the Eurozone and a typical solution by the IMF. The solution within the Eurozone means restructuring debt and introducing and enforcing fiscal discipline. Yet

[10] ATKINS, Ralph. Crisis dealt blow to Europe´s integration. Financial Times. April 26, 2012. Available on http://www.ft.com/cms/s/0/6c30ac00-8fb2-11e1-beaa-00144feab49a.html#axzz27lVi HA00 - The financial crisis dealt a serious blow to Europe's financial integration and has even thrown it into reverse, the European Central Bank has warned, as it urged political leaders to back a eurozone-wide bank rescue scheme....Europe's economic integration took a significant leap forward with the launch of the euro in 1999, with some financial markets quickly converging. But since 2007, "the integration of pan-European financial services suffered a clear setback", the ECB said in a report released on Thursday... The lack of an adequate crisis resolution regime for banks was cited as one of the main factors that forced EU states to extend significant amounts of state support to banks. This amounted to around €1.6tn, or 13.1 per cent of EU gross domestic product, of public loans, capital injections and guarantees.

[11] WEARDEN, Graeme. Eurozone crisis live: Greece makes progress on cuts, and plans diplomatic building sale. Guardian, September 19, 2012, Available on http://www.guardian.co.uk/business/2012/sep/19/eurozone-crisis-japan-stimulus-spain-bailout - There are reports from Athens tonight that the Greek Government has made progress in agreeing to the cuts demanded by the troika. After another day of negotiations, the €4bn of outstanding cuts has apparently been whittled down to just €2bn.A government official said this evening that the troika has now agreed to €9.5bn of savings proposed by Athens.

competitiveness won't quickly be re-installed and it would be necessary to send an assistance package, entailing any number of dozens of billions of Euros from the strong economies of the Eurozone to the weak ones. Considering the small size of Greece (and, if necessary, Portugal) these steps seem politically do-able. The second solution is a classic recipe of the IMF, i.e. fiscal discipline, restructuring debt and devaluation of the currency. To aid in this scenario, some assistance would be desirable, perhaps in the form of support of the potentially 'new' Greek currency, the Drachma, from the ECB or European institutions (among others). Currently, we can observe an uncoordinated attempt regarding the first scenario, i.e. the maintenance of the Eurozone. However, in the same spirit we could witness an organized departure from the Eurozone, if given political willingness for it. Whichever method is selected should be done in a timely fashion, as continuing insecurities bring additional expenses. There remains the potential of events leading to other countries facing default. The roots of this crisis are embedded in the institutions of the Eurozone, which had supposedly been established to prevent just such happenings. Without better managed efforts of the Eurozone institutions, including the ECB, and member states of the Eurozone, the crisis could lead to other countries' economic collapse.[12]

German chancellor Angela Merkel, and French president Nicolas Sarkozy led intensive negotiations which resulted in January 2012, in the endorsement of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact or Fiscal Stability Treaty) designated as a treaty on budgetary responsibility. The goal of the Fiscal Compact is to reinforce national budgetary discipline leading to budgets in balance or surplus, and to coordinate the economic policies of the EU member states.

The Fiscal Compact is an important part of the legal framework of the EU, along with the Treaty on the EU and the Treaty on the functioning of the EU.[13] Considering the issue of budgetary discipline in member states, it is instructive to mention it´s provision regarding the commitment of the contracting parties regarding the strengthening of the economic pillar, the single currency, and their participation in the growth.[14] These should be achieved while observing determined criteria[15] and their breach is punished by a set course of action.[16]

[12] SINGER, Miroslav, lecture for Official Monetary and Financial Institutions Forum, London, June 28, 2011.

[13] Art.2 1. This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

[14] Art.1 1. By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion. 2. This Treaty shall apply in full to the Contracting Parties whose currency is the euro.

[15] Art.3 1. The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law: (a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus; …. with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices. The contracting Parties shall ensure rapid convergence towards their respective medium-term objective. …. (e) in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically.

[16] Art.5 1. A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be

The Fiscal Compact is one of the components of integration pursued by Mario Draghi, president of the ECB. Obviously, monetary union entails a higher degree of joint decision-making, economic integration, and political integration. Thus the national sovereignty in economic policy should respect it.[17] In a like manner, according to the IMF, the Eurozone countries should cede part of their authority by accepting the issuance of common debt in the form of euro bonds while addressing the issue of sizable risk of deflation.[18] To keep the Euro in place, oversight appears as a step in the right direction. It is definitely wise to have some control over how states set their national budgets. As a matter of fact, where states share a common currency this is a must, and should have been dealt with before the creation of the Euro. This addresses, to a degree, the previously raised concern about the impossibility of the existence of a currency without a state. Thus, the Fiscal Compact replaces to some extent a directive of a central state.

In June, 2012, an EU summit in Brussels set various measures to solve the crisis, including the Compact for Growth and Jobs,[19] the creation of a common monitoring organ to control Banks, allowing banks to be newly re-capitalized directly from the European stabilization mechanism (ESM), and permitting countries strictly observing the rules of the Fiscal Compact to use money from the ESM for buying bonds. In addition, preparations to begin a process for forming a reinforced budgetary and political Union were suggested.

Nevertheless, the situation and it´s solution by the mentioned instrument may be more complex. Recently, the German Constitutional Court preliminarily and conditionally approved the ratification of the pertinent Treaty establishing the ESM facilitating the famous project involving permanent Euro bailout funds (T/ESM). Angela Merkel considers it her victory, but it can be a Pyrrhic victory due to the need of the approval by the Bundestag and the setting of the EUR 190 billion cap. In addition, the very hot candidate for the aid, Spain, wants the ESM bailout program, but not the compulsory monitoring by the European Commission, ECB and IMF.[20] So do we have here

put in place and implemented to ensure an effective and durable correction of its excessive deficit.

[17] A.L.G. The ECB and the euro. Too central a banker? *The Economist – Charlemagne´s notebook*, September 7, 2012. Available on http://www.economist.com/blogs/charlemagne/2012/09/ecb-and-euro - In *fact, most of the piece set out Mr Draghi's vision for the economic and political integration of the euro zone. It is not just the currency that should be irreversible, he said, but also the whole "historic process of European unification". In his view, stabilizing the euro would require political integration that stops short of a full federation.*

[18] EWING, Jack. I.M.F. Warns of „Sizable Risk" of Deflation in Euro Zone. The New York Times, June 18, 2012. Available on http://www.nytimes.com/2012/07/19/business/global/imf-warns-of-sizeable-risk-of-deflation-in-euro-zone.html?_r=1&pagewanted=all - But the fund said that euro zone countries needed to go further, eventually issuing common debt and ceding some authority over their national finances. Germany and some other countries remain firmly opposed to common debt, so-called euro bonds, unless they have more control over spending by other euro zone countries. France and other countries favor euro bonds but have not been willing to give up control over their own budgets.

[19] Note: the EU should support growth with a fund of 120 billion Euros. Plus, the registered capital of the European Investment Bank was increased by 10 billion Euro.

20 DIETMAR HIPP, Dietmar, MÜLLER, Peter, PAULY, Christoph, REIERMANN, Christian. German Parties Offer Rival Interpretations of Euro Ruling. Spiegel, September 17, 2012. Available on http://www.spiegel.de/international/germany/unlimited-liability-legal-hurdles-ahead-in-effort-to-save-euro-a-856226.html - The German government is pleased with the recent decision by the country's Constitutional Court that gave the green light to ratify the permanent euro bailout fund. But the celebration may be premature. Some of the conditions set by the court could prove prickly for the government and its final ruling on the case could come with unpleasant surprises. For reasons of data protection and privacy, your IP address will only be stored if you are a registered user of Facebook and you are currently logged in to the service. For more detailed information, please click on the "i" symbol. … the justices state that German aid cannot be provided in the euro bailout program without the approval of the Bundestag, Germany's federal parliament. …the €190 billion ($249 billion) ceiling the court has stipulated as Germany's maximum possible liability under current provisions… The demand from the Karlsruhe court that the upper ceiling for German liability at the ESM be capped at €190 billion and that this requirement be made binding

a solid (neither temporal nor preliminary) solution and a willing candidate to take the benefit of it while duly observing all rules?

European v. American approach

Since the crisis emerged in the USA and has impacted the global economy, it is highly relevant to recapitulate the exchange of opinions about its causes and solutions presented during a discussion between the highly regarded and well-known expert on economy and finance, for a long time residing in the USA, Prof. Jan Švejnar, of the University of Michigan, and the vice-governor of the Czech National Bank, Luděk Niedermayer.

According to these experts, the USA crisis originated in financial markets due to the creation of the new financial instruments known as derivatives, the reduction of interest rates and the resultant boom in the real estate market, all accompanied by a failure of regulating mechanisms Added to this was a combination of high consumption and low production, the negative commercial balance and the low level of savings. Contrariwise, the situation in Europe deteriorated due to short-sighted fiscal policies oriented towards supporting demand and to so influence the growth of economies for political reasons, instead of the introduction of reforms leading to long term growth. The demand decreased in Europe, and so the crisis impacted even a number of other states. The impact of the financial crisis was the same in the USA and in Europe mostly due to their linking to the "complex financial structures". This fact was unwisely rejected by some politicians who had stated that a crisis on Wall Street could not have an impact on the states in central Europe.[21]

According to Prof. Švejnar, the handling of the crisis was different due to the different levels of integration of the states, different economic and social conditions, as well as the past experience from the great depression of the 1930's. The USA implemented a huge, one-time stimulus package, Europe dithered. In the USA, the slack in demand, by individuals and businesses, was taken up by increased demand from the Federal Government in the short term. The implementation of such radical measures is possible due to the dynamics of the American economy and its capacity to quickly grow. Although the first wave of panic was eliminated, the future is hardly predictable. Actually, even regarding the great depression the economists did not expect the grandeur which the crisis reached.

Considering the global feature of the crisis, Luděk Niedermayer suggests that we are all in "the same boat" with the rest of the world. He believes that in the future the world will not return to the reckless behavior of the bankers. The USA will have to focus less on consumption and more on production, while recognizing that any changes will influence production abroad, in China as well as in Europe. Prof. Švejnar feels that the ideal approach

under international law. …… Madrid's application at the ESM for aid would also be the prerequisite for the ECB to purchase the beleaguered country's sovereign bonds on the markets. There could be a few hitches here, too, however. Spanish Prime Minister Mariano Rajoy would love to receive aid from ECB chief Draghi, but he also doesn't want to submit to the usual conditions imposed in an ESM bailout program -- including monitoring by the troika, comprised of representatives of the European Commission, the ECB and the International Monetary Fund.

[21] ŠVEJNAR, Jan; NIEDERMAYER, Luděk, Diskuze na téma Evropské vs. Americké řešení krize, Café Therapy, konference Forum 2000, Praha, 12.10.2009

to solve the crisis consists in coordination efforts between the USA, Europe and Japan.

Conclusion

While tough austerity measures have served as the initial response to the crisis, an increasing number of voices are raised in support of spending on increasing competitiveness and employment. Also, many stress the need for reforming labor markets and pension systems and eliminating red tape that restricts entrepreneurism.

It should be noted that after the approval of the Fiscal Compact there took place two major events which had an impact on the further evolution and orientation of the EU and its fight against the crisis.

The first was the election in Greece, which threatened to void their agreements and commitments regarding the reduction of Greece's debts, and getting out of the Euro. Though the pro-bailout Government prevailed in the election, valuable time was lost that should have been used implementing savings measures, and it became apparent that the Greek government needed help on extending the EU and IMF's deadlines, softening some measures, etc.

The second event was the French presidential election, in which President Nicholas Sarkozy, a strong supporter of austerity moves, lost to the left candidate, Francois Hollande, who favors increased government spending. Many commentators suggest that this will not resolve many fundamental, imbedded problems, such as a shorter than average work week, early retirement, etc., which have served to put a brake on the French economy. Thusly, it will be interesting to observe the relationship between Germany and France – both countries play a key role in the resolution of the crisis and each of them has a conceptually different opinion about how to proceed.

In the Czech Republic there are also those demanding change and moving away from the cuts endorsed by the government. The support of governing parties has been declining and the Czech first minister, Petr Nečas, could join Sarkozy on the shelf. As well, the EU has notified the Czech Republic that, due to its massive fraud with EU money within the public sector, it will have to refund to the EU over one billion Euros, dramatically hindering any Czech efforts to revive the economy.

Perhaps the best solution for the crisis is a blend of the austerity measures combined with spending on efforts to grow the economy, plus labor market and pension reform. Dramatic efforts are needed in many states to eliminate massive waste and fraud. If wisely used, EU funds could truly support economic growth and improving competitiveness. While the evolution of the crisis is dynamic and it is almost impossible to predict in what stage and shape the economy of the EU member states will be in the near future, 2013 could well be the 'make or break' year for the continuance of the common currency.

In any event, if the EU wishes to "rise up and walk", it will have to have faster and much better coordinated efforts from its leadership than it has demonstrated in the last four years, or risk the demise of the euro. It appears that the status quo is

not sustainable, a change needs to occur. The restructuring of the Eurozone by a transfer of sovereignty and the general deepening of European unification are perceived as essential to end the crisis by some experts,[22] but others are very reluctant to continue the way from intergovernmental to the supranational. Thus [illegible] achieved by "*a strong economic growth, a convincing set of rules for the Eurozone*" and the presence of great and visionary leaders.[23]

Key words: financial crisis, crisis causes, crisis solutions, Eurozone, budget discipline, common currency, reforms, European funds, fiscal agreement.

Abstract: The financial crisis in the Eurozone has become the most widely discussed economic and legal topic in Europe for many decades. This article examines the opinions of several foreign and domestic experts on the causes of the emergence of the crisis. The opinion of Mr. Jacques Delors, the former chairman of the European Commission and co-creator of the Euro is among those covered. A section dedicated to possible solutions for the crisis introduces four articles of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, and presents four of the fundamental measures to deal with the crisis which were agreed upon at the EU Summit in Brussels in June, 2012. Because the crisis described here is not limited to Europe only, there is also a section covering the European versus American approach to its solution. This part covers opinions offered up at discussions by highly regarded experts, Prof. J. Švejnar and L. Niedermayer. The final section examines various views on resolving the crisis. Should it be by way of cuts only, or should spending to increase competitiveness and education be favored?

[22] HABERMANS, Jürgen, BOFINGER, Peter, NIDA-RÜMELIN, Julian. Only deeper European unification can save the eurozone. *The Guardian,* August 9, 2012. Available on http://www.guardian.co.uk/commentisfree/2012/aug/09/deeper-european-unification-save-eurozone - A discussion about the purpose and aim of the unification process would present an opportunity to broaden the focus of public debate, which has hitherto been confined to economic issues. The awareness that global political power is shifting from the west to the east, and the sense that our relationship with the US is changing, combine to present the synergetic benefits of European unification in a new light. In the postcolonial world the role of Europe has changed, .. Future projections backed by statistical data indicate that Europe is headed for further change, destined to become a continent of shrinking population numbers, declining economic importance and dwindling political significance. The people of Europe must learn that they can only preserve their welfare-state model of society and the diversity of their nation-state cultures by joining forces and working together. They must pool their resources – if they want to exert any kind of influence on the international political agenda and the solution of global problems. To abandon European unification now would be to quit the world stage for good.

[23] GRANT, Charles. The strategic consequences of the Euro crisis. Europe´s World, September 24, 2012. Available on http://www.europesworld.org/NewEnglish/Home_old/Article/tabid/191/ArticleType/articleview/ArticleID/21728/language/en-US/ Default.aspx - In Brussels, much energy has gone into building the new External Action Service, in the hope that it will foster a more coherent EU foreign policy. Let us hope that it does. But what would really improve the EU's global standing would be strong economic growth, a convincing set of rules for the eurozone and the perception that Europe has tough and far-sighted leaders.

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Austerity, Proportionality and Reasonableness: The Jurisprudence of the Czech Constitutional Court

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The implementation of austerity measures over the past several years in the Czech Republic has gone hand in hand with rapid legislative change implementing structural changes to the laws which regulate how individuals use public resources and how the state disburses public funds. These legislative changes have affected a variety of areas, including health care (the introduction of so-called regulatory payments that patients are obliged to pay upon visiting a health-care provider) and unemployment insurance (making the payment of unemployment insurance benefits to the unemployed conditional on participation by the unemployed person in community service programs). In a nation where many prominent politicians and ministers are economists, at a time of economic crisis and highly sensitive financial markets, austerity arguments have largely dominated policy and public discourse. Theoretical detailed legal analysis of the constitutionality of austerity legislation and of its impact on constitutionally protected rights and freedoms has been largely relegated to an *ex post* analysis undertaken by the Constitutional Court. Arguably, the current situation might be evidence of a largely wait-and-see approach that has been taken to the protection of basic rights and freedoms, given a potential unspoken presumption that short-term financial benefits of possibly unconstitutional austerity legislation may still make financial and market sense, regardless of whether a provision of a law might be held to be unconstitutional at some point in the future. The flip side of such an argument would presumably be a claim that the jurisprudence of the Constitutional Court makes it difficult to make assumptions about the likely result of constitutional proceedings. While the second argument has some general merit (in fairness, no court anywhere in the world is easily predictable), the arguments made publicly (and in submissions to the Constitutional Court) by Government and parliamentary majority leaders in support of the constitutionality of such legislation tend not to be framed with a high degree of sophistication in terms of arguments that are relevant from the perspective of constitutional analysis. Although the result of proceedings before the Constitutional Court may always be somewhat uncertain, the general framework for constitutional analysis is easily predictable based on the court's prior jurisprudence.

Based on prior jurisprudence, it is clear that the question of properly framing constitutionally valid objectives which will allow certain basic rights and freedoms of individuals to be limited in a proportional or reasonable manner is not as simple as stating that the objective is austerity. Nonetheless, even a potentially valid objective of preventing wasteful use of public resources must be closely linked to the actual measures that are implemented by way of legislation. Over-inclusive

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legislation especially (which *does* target wasteful use of resources, for example, but affects a larger circle of people than would be strictly necessary to attain a valid objective) tends to be the result (and the problem) when a higher immediate value is placed on rapid cost-cutting than fine-tuning legislation to ensure constitutionality. In practice, this does not mean that all or most of the austerity legislation that has been adopted has in fact been held, *ex post*, to be unconstitutional, but the general apprehension and uncertainty about how the Constitutional Court might decide in the future is likely less attributable to alleged unforeseeable decision-making by the court and more attributable to the political reality that constitutional requirements are simply not as relevant to the legislative process as economic requirements. This creates space for arguments to be put forward that publicly put in question the constitutionality of such legislation (regardless of whether and when a proceeding before the Constitutional Court is lodged).

Before turning to specific examples of constitutional checks on austerity legislation undertaken by the Constitutional Court, a brief excursion into the theoretical framework for evaluating the constitutionality of limits on basic rights and freedoms is warranted. The Czech Charter of Fundamental Rights and Freedoms ("Charter") expressly provides that certain basic rights can be limited by law. Article 41(1) of the Charter thus states that *"the rights specified in art. 26, 27(4), 28 to 31, 31(1,3), 33 and 35 of the Charter can only be relied upon to the extent that is stipulated by laws which implement these rights"*. In this regard, article 4(4) of the Charter provides that provisions which allow for basic rights and freedoms to be limited must be applied in a manner which preserves the substance and purpose of the rights and question and at the same time, such limits must not misused in order to attain other non-legitimate aims.

Where the Charter does not expressly provide for limitation of a basic right by ordinary law, the Constitutional Court has adopted and applied a standard approach used by courts in other Western democratic states – i.e. the Constitutional Court has defined its role as one in which it is called upon to find an appropriate balance, if not compromise, between the basic right and freedom of an individual on the one hand and a legitimate aim (that is beneficial to society) on the other hand. The Constitutional Court has repeatedly (in stable jurisprudence long predating the current age of austerity) explained the conditions that must be fulfilled for a limitation of an individual's basic right or freedom to be held to be constitutionally valid.

In case of any conflict between a basic right of an individual and a legitimate interest of the state (public interest) the Constitutional Court has stated clearly that it is necessary to weigh whether the public interest "*legitimizes a certain limitation of the private sphere of the individual.*"[2] This statement, in and of itself, indicates that individual basic rights and freedoms are susceptible to limitation, if a more important public interest outweighs them. Each such limitation must therefore be undertaken only in pursuance of such an interest which is connected to the protection of state interests or

[2] Constitutional court judgment no. 322/2001 Coll.

public interests which legitimizes the limitation of an individual's right or freedom. Identifying the existence of a *limitation* of a basic right and considering the existence of any *valid interest* which might outweigh such a limitation is therefore a key starting point not only for the Constitutional Court (when conducting an *ex post* analysis of constitutionality in the context of judicial proceedings), but should also be a key starting point for the lawmaker, when considering how to correctly frame draft legislation which results in *prima facie* limitations of basic rights and freedoms (which is almost every piece of draft legislation). As regards valid public interests, the Constitutional Court has found, for example, that state security interests represent an existential interest which may legitimize limitations of certain basic rights.[3] A general overarching definition of a valid public interest is difficult to formulate, although clearly we are dealing with interests invoking in some way the broad idea of a "greater good" (see also the approach taken by the Canadian Supreme Court in R. v. Oakes, as cited below). The Constitutional Court has noted that the legitimate interest and the associated limitation of the private sphere of the individual must be *necessary* in democratic society.[4] This reference to hard-core constitutional principles (democracy and rule of law to name but two) in evaluating the legitimacy of interests advanced as justifications for limits on basic rights and freedoms is in line with foreign jurisprudence as well; for example, the Canadian Supreme Court has stated that only a state interest which is pressing and necessary in a free and democratic state can legitimize a limitation of the private sphere of the individual.[5]

If the interest itself must be pressing and necessary in a free and democratic state, then it comes as no surprise that the jurisprudence of the Constitutional Court has concluded that the limitation in question must be closely connected to the legitimate aim in question and must not go beyond what is strictly necessary to attain such an aim. This is in line with the wording of article 4(4) of the Charter. The Constitutional Court has stated than in achieving an otherwise legitimate aim, the state may not, in relation to its citizens, act arbitrarily and must not adopt legislation which limits basic rights and freedoms beyond what is strictly necessary for the achievement of such an aim.[6] This is also called the requirement of *minimal encroachment* into basic rights, which ensures that even where a legitimate and pressing state interest is identified it cannot be invoked to justify (over-inclusive) legislation which limits individual's basic rights far more than is necessary for the attainment of such aim.

In addition, the limitation itself must generally satisfy the requirement of proportionality – i.e. the severity of the limitation must be proportional to the importance of the aim in question. Moreover, from the perspective of a constitutional claimant, the deleterious effects of the limit on him must not be out of proportion to the importance of the aim. While a certain aim may be legitimate and a law

[3] Ibid.
[4] Constitutional Court judgment no. Pl. ÚS 1/08, para. 92.
[5] R. v. Oakes, [1986] 1 SCR 103.
[6] Constitutional Court judgment no. 322/2001 Coll.

may do only what is necessary to attain it without being over-inclusive (or under-inclusive), the importance of the aim might pale in comparison with the severity of the limit, making the limit difficult, if not impossible, to justify in terms of the proportionality analysis. The jurisprudence of the Constitutional Court is in line with the European Court of Human Rights, which provides that legislation which limits a basic right *„must not only pursue a legitimate aim … [the right is] likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."*[7] This idea of proportionality rests on the premise that the European Convention for the Protection of Human Rights and Fundamental Freedoms *„…implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter."*[8]

Taken as a whole, the combined requirements of the pursuit of a legitimate aim with carefully drafted legislation which does not impair a basic right more than is strictly necessary, where the limit in question (and its impact on the individual's basic rights) is proportional to the aim, are generally referred to as a proportionality test. Similar language to describe the same principles was employed in the landmark judgement of the Canadian Supreme Court in the case of R. v. Oakes in 1986: *"At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party … must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be."*[9] The jurisprudence of the German Constitutional Court has also developed a very similar test of proportionality: „*The Court … ruled that any restriction of human rights not only needs a constitutionally valid reason but also has to be proportional to the rank and importance of the right at stake. The proportionality test is applied in three steps. The first question is whether a law or other government act limiting the exercise of a human right is capable of reaching its goal. The second question is whether it is indispensable to reach its goal. The third question is whether an adequate relationship exists between the human right limited by law, on the one hand, and the purpose which the restriction serves, on the other (adequacy or proportionality in a narrower sense)."*[10]

[7] Case relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium from 23.7.1968 (file no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64).
[8] Ibid.
[9] R. v. Oakes, [1986] 1 SCR 103.
[10] Grimm, D. "Human Rights and Judicial Review in Germany" in Beatty, D., ed. *Human Rights and Judicial Review: A Comparative Perspective* (Dordecht: 1994, Martinus Nijhoff) 267 at 275.

Returning to the jurisprudence of the Czech Constitutional Court, the court has noted that where the basic rights that are limited are economic, social and cultural, the legislator should be allowed greater latitude in selecting appropriate measures to implement legitimate aims which are in the public interest. This inclination towards judicial deference in cases where the rights involved are primarily economic interests is not specific to the Czech Republic. For example, the United States Supreme Court has held that in cases involving general economic legislation, the court will not grant significant review of legislative decisions, as the court has no institutional capacity to assess the scope of governmental ends in these areas; a law must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the limitation of a basic right, such as the right to equality treatment.[11] Indeed, the Constitutional Court has in fact developed a very similar doctrine of "reasonableness", in line with the U.S. approach. As mentioned above, Article 41(1) of the Charter states that *„the rights specified in art. 26, 27(4), 28 to 31, 31(1,3), 33 and 35 of the Charter can only be relied upon to the extent that is stipulated by laws which implement these rights"*. These rights are all listed in Chapter IV of the Charter dealing with economic, social and cultural rights. The Constitutional Court has held that these rights are only actionable to the extent that they are transposed into law. These laws which define (and limit) the scope of such rights do not necessarily need to be in strict proportionality to the aim which the legislator seeks to attain, i.e. the limits which are set do not need to be strictly necessary in democratic society, unlike limits to other basic rights which are guaranteed and actionable directly on the basis of the Charter.[12] Instead of the stricter proportionality test, the Constitutional Court has applied a less stringent test of reasonableness, akin to the rational basis or rational relationship test applied by the U.S. Supreme Court, as mentioned above. This test is fulfilled, where a law implements one of the rights specified in Article 41(1) of the Charter in a manner which *"seeks to attain a legitimate aim in a manner that is reasonable, even though the means chosen may not be the best, most appropriate, most effective or wisest."*[13] However, a law which would seek to limit the very existence of a social right (the so-called essential content of such a right) would never be held to be constitutionally valid.[14]

The Constitutional Court has applied this test of reasonableness to austerity legislation imposing regulatory payments on health care patients (nominal fees for visiting a family doctor, specialist, emergency room etc.). The aim of the legislation had been to motivate patients to only use the health care system when necessary and thus, to save costs of unnecessary doctor's visits. The court considered the constitutionality of this legislation in light of the basic right provided for in article 31 of the Charter, which states that "Everyone has the right to the protection of her health. Citizens shall

[11] See for example *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 368 [1980].

[12] Constitutional Court judgment Pl. ÚS 1/08, para. 92.
[13] Ibid.
[14] *Ibid*., para. 103.

have the right, on the basis of public insurance, to **free medical care** and to medical aids under conditions provided for by law." (emphasis added). The Constitutional Court noted, as follows: „*Before proceeding to the reasonableness test, the Constitutional Court considered the nature of social rights and their different nature, given by Article 41 par. 1 of the Charter. Analogously as in judgment file no. Pl. ÚS 2/08, it states that these rights "are not unconditional in nature, and they can be claimed only within the confines of the laws (Art. 41 par. 1 of the Charter) … Within these bounds the legislature has a relatively wide ability to regulate the implementation of individual social rights, including the possibility to amend them."*

For the foregoing reason, the Constitutional Court concluded that the reasonableness test in the case of social law is methodically different from a test that evaluates proportionality with fundamental rights, "because social-economic aspects play a much greater role here." The rationality test, especially in a situation where the Constitutional Court concluded that a …petition… could be denied for reasons of maintaining restraint, has a more orientational and supportive role here.

In combination with the requirements arising from Art. 4 par. 4 of the Charter we can describe 4 steps leading to a conclusion that a statute implementing constitutionally guaranteed social rights is or is not constitutional:

1) *defining the significance and essence of the social right, that is a certain essential content. In the presently adjudicated matter, this core of a social right arises from Art. 31 of the Charter in the context of Art. 4 par. 4 of the Charter*
2) *evaluating whether the statute does not affect the very existence of the social right or its actual implementation (essential content). If it does not affect the essential content of the social right, then*
3) *evaluating whether the statutory framework pursues a legitimate aim; i.e. whether it does not arbitrarily fundamentally lower the overall standard of fundamental rights, and, finally*
4) *weighing the question of whether the statutory means used to achieve it is reasonable (rational), even if not necessarily the best, most suitable, most effective, or wisest.*

Only if it is determined in step 2) that the content of the statute interferes in the essential content of a fundamental right should the proportionality test be applied; it would evaluate whether the interference in the essential content of the right is based on the absolutely exceptional current situation, which would justify such interference.

Thus, it follows from the nature of social rights that the legislature cannot deny their existence and implementation, although it otherwise has wide scope for discretion.

The essential content (core) of Art. 31, second sentence of the Charter is the constitutional establishment of an obligatory system of public health insurance, which collects and cumulates funds from individual subjects (payers) in order to reallocate them based on the solidarity principle

and permit them to be drawn by the needy, the ill, and the chronically ill. The constitutional guarantee based on which payment-free health care is provided applies solely to the sum of thus collected funds.

The Constitutional Court considers it determined that the purpose of the legislature's original intentions concerning regulation was an emphasis on such organization of the health care system as would ensure higher quality actual implementation of Art. 31, first sentence of the Charter, that is, the provision of health care at an adequate place and time and of better quality.

As indicated by the evidence presented, the fees introduced by the Act regulate access to health care that is paid from public insurance, whereby they limit excessive use of it; the consequence is to increase the probability that health care will reach those who are really ill. Thus, through the fees, the legitimate aim of the legislature is met, without the means used appearing unreasonable.[15]

The decision is an excellent example of how the legislator is given greater latitude in framing austerity legislation affecting primarily economic and social rights (only a reasonableness test is applied) than where austerity legislation affects other, more fundamental rights, of individuals.

An example of legislation adopted in the context of austerity measures which affects not only simply economic and social rights is Act no. 435/2004 Coll., on employment, which, as a result of amendments adopted in 2011, provides that a person shall cease to be entitled to unemployment benefits if he or she refuses to perform (unpaid) community service of up to 20 hours per week, if he or she had been registered as an unemployed person seeking work for more than 2 months and is offered the possibility of performing such service by the employment office. The aim of this legislation was several-fold: on the one hand, the government and the parliamentary majority claimed that it was seeking to ensure that unemployed individuals would maintain good work habits, by forcing them to perform unpaid community service as a precondition for continuing to obtain unemployment benefits. Secondly, the legislation was intended to filter out from the unemployment system persons who were not genuinely interested in obtaining work. Thirdly, the legislation was intended to prevent social exclusion of unemployed individuals. In its effects, the legislation brought economic benefits to the state since it created the obligation of unemployed persons to perform free community service, i.e. work which otherwise municipalities and other beneficiaries of such work would have had to finance from their budgets. At the same time, those individuals who did not comply with this requirement would stop obtaining unemployment benefits, which would reduce the state's expenses.

In its very recent decision no. Pl. ÚS 1/12, the Constitutional Court held that this legislation was a prima facie limitation on the very fundamental basic right not to be subjected to forced labour – i.e. the impact of this legislation adopted in the context of austerity measures was not simply economic, but the limitation affected a core human right. Such a limitation could only be justified if the requirements

[15] Pl. ÚS 1/08, see official English headnote published by the Constitutional Court, web: http://www.concourt.cz/view/pl-01-08

of proportionality were met (as opposed to the less strict reasonableness test). On the other hand, the right to be provided with material security from the state in case of unemployment (in art. 26 of the Charter) is one of those economic and social rights which can be limited and defined by law, where a less strict reasonableness test is applied. The Constitutional Court held that the very objectives which were put forward as legitimate aims for the legislation were for the most part not even susceptible of being attained by the legislation in question, i.e. the legislation did not actually promote these aims, and arguably was even counterproductive – neither of the two tests could be satisfied, in relation to the limits imposed on the economic right to be provided with material security in case of unemployment (reasonableness test) and the fundamental right to not be subjected to forced labour or service in article 9 of the Charter (proportionality test). The court held that there was no basis for supposing that unemployed persons would lose good working habits after a mere two months of unemployment. Moreover, the Constitutional Court found the idea absurd that good work habits could even be fostered and promoted by means of forcing an unemployed individual to perform community service for free and without any kind of protection that is available to employees (including occupational health and safety protections) – such a one-sided approach towards the concept of „good working habits“ denies the fact that good working habits are fostered in the context of a synallagmatic relationship in which both the employee and employer have to mutually perform obligations and respect each other's rights, and not a one-sided relationship where only the "employee" has unilateral obligations to perform work. Additionally, the Constitutional Court held that the claimed objective of preventing social exclusion was not only not attained, but in fact exacerbated by the legislation, since unemployed persons performing community work are often forced to wear vests with visible markings, much like convicted criminals who are sentenced to the punishment of community service, making the unemployed indistinguishable from convicts performing community service and thereby worsening any social exclusion already suffered. With regard to the objective of preventing misuse of unemployment benefits and ensuring that they would be disbursed only to those people actually willing to work, the Constitutional Court found that at the very least, this objective could be attained with legislation which was much less restrictive upon basic rights than the impugned legislation in question. Primarily, the fact that the obligation to perform community service could be arbitrarily imposed by the state upon any person who was unemployed for more than two months and who claimed unemployment benefits meant that the legislator made no effort to distinguish between those unemployed who had actually been misusing the system and who had actually been violating the rules relating to unemployment benefits (in relation to whom there might exist a legitimate question as to whether they were willing to "work" or not), and those who had always followed the rules.

Based on what has been discussed above and illustrated using the specific example of two

significant pieces of legislation adopted in the Czech Republic in the context of austerity measures, it is clear that not all basic rights and freedoms are absolute and it is also clear that the exact meaning and content of certain rights cannot be determined solely with reference to the Charter. It is also clear that the application of the relevant tests to check constitutionality of legislation, primarily the proportionality test and the reasonableness test, does imply a certain inherent uncertainty about how a judge may apply such a test to a specific new set of facts. Dissenting opinions attached to the judgements of the Constitutional Court provide an excellent example of the existence of differing opinions on how these tests should be applied to a concrete set of facts. Nonetheless, this does not liberate the legislator from seeking to carefully analyse whether legislation is constitutionally valid by seeking to apply the well-established framework of constitutional analysis, especially in the legislative phase, prior to the adoption of the draft legislation as law. If the Government and parliamentary majority are able to demonstrate to the Constitutional Court how every aspect of these tests had been carefully thought through in the context of the legislative process, with reference to carefully selected legitimate public aims, then legislation (including austerity legislation) stands a much higher chance of successfully passing constitutional scrutiny. On the other hand, the politics of cost-cutting and "preventing waste" of public resources tend to lend themselves to quick and over-inclusive legislation which effectively brings savings to the state, at the cost of infringing upon economic and social rights or other fundamental rights and freedoms.

This begs the question of whether the current economic crisis and the fast-paced nature of financial markets reacting to decisions taken by the state mean that detailed and time-consuming constitutional scrutiny and deliberations must become an afterthought, something for the Constitutional Court to do only once the markets have been pacified by cost-cutting legislation adopted in Parliament. Or is there still space for detailed public and parliamentary debate on constitutional matters, even in the face of budgetary constraints and pressure for austerity measures from the markets? The last several years provide us with examples of constitutionally unsound legislation that was adopted quickly, in the face of the need for austerity, while the Czech Republic managed to maintain an excellent market reputation for keeping a check on its public finances. The question for the future is thus whether the two seemingly conflicting requirements of detailed constitutional analysis prior to adoption of laws and quick economic action can somehow be reconciled in the course of the legislative process.

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Making Peace with the Peacemaking Missions: The Evergreen Question of the Accountability for Actions Taken on behalf of the United Nations during its Peacekeeping Operations

***Anita Soomro*[1]**

I. Introduction

The United Nations began its practice of peacekeeping missions with the establishment of the UN Truce Supervision Organizations after the Security Council's Resolution 50 of 1948, calling for a truce and cessation of hostilities in Palestine and ordering that the process of truce be supervised by the UN and its military observers – the UNTSO.[2]

Ever since, the United Nations has been pioneering its practice of peacekeeping operations into its current multidimensional form in which the peacekeeping missions are deployed not only for security reasons, but also to help facilitation of political processes or organization of elections in countries that are unable to do so on their own, engage in civilian protection, disbarment of former combatants, and various other acts necessary for the restoration of the rule of law and ensuring the respect of human rights in the area[3]. There have been 67 peacekeeping missions ever since 1948, and 15 of them are still active to this date.[4] Having involved hundreds of thousands of deployed uniformed and civilian personnel at a time in these increasingly interventionist operations, and having received a Nobel Peace Prize for its promotion of world peace[5], it should be in the UN Peacekeeping Forces' best interest to also ensure that the personnel involved in these operation set an example in following the rule of law and highest moral standards themselves. Unfortunately, that is not always the case, as seen in numerous cases of allegations of severe human rights abuse, sexual abuse, and other various kinds of severe misconduct incompatible with the principles of international law.[6][7] An interesting legal issue of who is primarily responsible for such violations – the personnel's deploying country, or the UN itself – thus arises.

Interestingly, while there have been continuous efforts of the UN to introduce measures ensuring that its personnel is held liable on the individual

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[2] *The Background of UNTSO.* UNTSO official website. *http://untso.unmissions.org* (main page). Retrieved on October 29, 2012.

[3] What is peacekeeping? The United Nations official website. http://www.un.org/Overview/uninbrief/peacekeeping.shtml. Retrieved on October 29, 2012.

[4] In addition to those, the Department of Peacekeeping Operations also currently operates the United Nations Assistance Mission in Afghanistan (UNAMA) classified as a "special political mission."

[5] The Nobel Prize official website. http://www.nobelprize.org/nobel_prizes/p*eace/laureates* . Retrieved on October 29, 2012.

[6] Deen-Racsmany, Z. The amended UN model memorandum of understanding: a new incentive for states to discipline and prosecute military members of national **peacekeeping** contingents? J.C. & S.L. 2011, 16(2), 321-355 at 321.

[7] Halling, M., Bookley,B. *Peacekeeping in Name Alone: Accountability for the UN in Haiti.* Selected Works of Matt Halling. University of California, Hastings College of Law. 2008.

level,[8] the first international court ruling[9] dealing with the question of accountability for human rights violations in a UN administered territory by a state deploying the personnel was issued in 2007 - almost five decades after the beginning of the UN peacekeeping. It was the European Court of Human Rights' ruling on admissibility in *Behrami v. France*[10] (Behrami) and the admissibility of the related *Saramati v France, Germany & Norway*[11] *(*Saramati*),* both on May 31st, 2007, that seemed to strike down the possibility of attributing liability for damages to the states involved in the peacekeeping missions, and shift all the burden of responsibility on the United Nations. The ruling was immediately subject to heavy criticism for lack of clarity and inconsistence with the international law authorities, and thus when presented with a similar scenario in *Al-Jedda v United Kingdom,*[12] the ECHR took the relatively easiest way by neither affirming, neither overruling *Behrami*, yet distinguishing it from *Al-Jedda* in order to affirm UK's state responsibility.

This article will, after addressing the relevant tests for determining accountability under the UN operation available prior to the *Behrami* and *Saramati* ruling[13], discuss both *Behrami/Saramati* and *Al-Jedda* cases with the emphasis on the court's legal reasoning and then draw a comparison of both and attempt to assess the precedential influence of each on the accountability issue. Lastly, the article will try to finalize the picture by introducing currently relevant examples dealing with the accountability of Brazil, a country not susceptible to ECHR's jurisdiction, and discussing the current state of accountability of the UN itself. Finally, this piece attempts to conclude where all the previously mentioned authorities leave the question of peacemaking missions liability for the future.

II. Accountability prior Behrami and Al-Jedda

Peacekeeping Practice

Prior to *Behrami,* the evaluation of international responsibility during international peacekeeping operations mostly relied on an *ad hoc* manner.[14] As the Second Report on Responsibility of International Organizations [15] states, specially ever since the UN Congo operations in the sixties, the UN in practice assumed responsibility for damage resulting from its military peace operations, yet this was a part of its customary procedures without a clearly established legal basis.

Legal Opinions

For the legal scholars, the question of attributing accountability for such damages remained open to the circumstances, particularly the question of on

8 J.C. & S.L.2011, 16(2), 321-355 at 323. These measures were introduced especially after the widely medially covered scandals in the operation in Congo, and had the form of an internal comprehensive strategy addressing different categories of individuals involved in the peacekeeping operations (e.g. differentiating between the civil and military personnel – an important point for the troop contributing countries) and their potential liability.

9 Larsen, K. Attribution of Conduct in Peace Operations: 'The Ultimate Authority and Control' Test. The European Journal of International Law. 2008. 19 (3) 509 – 531 at 510.

10 Behrami v. France (Admissibility) (71412/01) (2007) 45.E.H.R.R. SE10 (ECHR).

11 Saramati v France, Germany & Norway , ECHR 31st May 2007.

12 Al-Jedda v. UK [2011] ECHR 27021/08.

13 This article will focus mostly on the Behrami ruling, for compared to Saramati, Behrami's ruling is the one that offers the most interesting insight into the court's analysis of the relevant legal problems. Saramati is mostly included because the close connection to the Behrami ruling, yet on its own it would not offer equally fruitful legal analysis.

14 Larsen, K.., E.J.I.L. 2008. 19 (3) at 512.

15 Special Reporter's Second Report on Responsibility of International Organizations (2004).

whom the responsibility for the command of the soldiers lied upon.[16] This is supported by e.g. Peck, claiming that the central question in determining responsibility for actions of the U.N. peacekeepers is resolved by determining which party – the state or the international organization - makes the political, strategic and operational decisions and thus has an effective command of the operation.[17] Similarly concurring analyses were pioneered e.g. by Amrallah, Schmalenbach, or Shraga.[18]

UN's Standing

Moreover, the fact that the UN statements related to accountability generally so far sought to distinguish the exact circumstances when the U.N. would be held solely accountable[19] indicates that the UN itself *de lege ferenda* hardly intended to conduct its operations in a manner completely legally freeing its subsidiaries of their responsibility for damages. In fact, since the UN authorities state that "the principle of attribution of the conduct on a peacekeeping force to the UN is premised on the assumption that the operation in question is conducted under UN command and control, and thus has a legal status of a UN subsidiary organ,"[20] it is apparent that in order to accept absolute responsibility for the mission, the UN puts a large emphasis on the proper legal subsidiary status of the operation, and would hardly intend to assume absolute responsibility in its numerous operations of different legal status. The UN's efforts to avoid absolute responsibility is also apparent in the 1996 Secretary General's statement that UN's combat responsibility in such actions should arise only once it holds "*exclusive command,"* [21]thus creating a high threshold for the attribution of absolute responsibility, and promptly leaving space for State responsibility anywhere where the State, even as a subsidiary, exercised part of the commanding functions itself.

Grounds for State Responsibility

In fact, in his report of 1996, the Secretary General continues to affirm legal grounds for potential state accountability by expressly stating that once the operations authorized by the Chapter VII[22] of the UN Charter are " conducted under national command and control, international responsibility for the activities of the force is vested in the State or States conducting the operation."[23] The UN and its committees continued to consistently pursue this view, and to give it an increasingly legally formal form by e.g. enshrining it into the Articles on the Responsibility of States for Internationally Wrongful Acts[24] ('ASR') adopted by the International Law Commission in 2001, and endorsed by the UN General Assembly (and hence effectively all the states potentially deployable for peacemaking missions) in 2002.[25] Articles 1 and 2 of the ASR clearly establish the state's liability for internationally wrongful acts due to an action or omission attributable to the state.[26] Article 4 ASR furthermore states that state's organ conduct is to

[16] Larsen, K.., E.J.I.L. 2008. 19 (3) at 513.
[17] Ibid, referencing Peck, The Un.N.and the Laws of War: How can the World's Peacekeepers be Held Accountable?
[18] Ibid, all referenced by E.J.I.L. 2008. 19 (3) at 513.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] United Nations Charter 1945 c.VII.
[23] Report of the Secretary General (1996), par. 17 *Referenced by Larsen.*
[24] Articles on the Responsibility of States for Internationally Wrongful Acts, endorsed by the UN GA res. 6/83 (28 Jan 2002).
[25] Larsen, K.., E.J.I.L. 2008. 19 (3) at 512.
[26] Ibid.

be interpreted as the conduct of the state itself as well, whatever the organ's position or character within the state are[27]. This however does not settle the issue of the state liability within the UN mission completely - for while state's armed forces are undoubtedly subject to this provision as a state organ, it is also argued that in peacekeeping operations the military personnel shall be viewed as an organ not representing its state, but completely at disposal of the UN.[28] Hence while these provisions should help as a background for giving some legal grounds for state responsibility, additional grounds aside from the state organ's presence in the operation would be needed.

Effective Control Test

The ASR Articles 6 and 8 provide the probably most straightforward tool for the final evaluation of the attribution of liability Providing that conduct of an organ serving at a disposal of one state by another shall be considered an act of former state if the organ's actions are under exercise of that state's governmental authority[29], Article 6 impliedly sets the ground for the test in Article 8. Article 8 specifies that a person or entity's conduct is attributable to the state if it is "under the direction or control of that State,"[30] and most importantly, in the related commentaries[31] establishes that such direction of control be assessed by the "effective control" test. This test, previously e.g. applied by the ICJ *Genocide* and *Nicaragua* cases.[32] There are many legal commentaries on the exact usage and form of the effective control test, and particularly whether it should be interpreted as an effective control over the specific harmful conduct creating the liability, or an effective control of the entity responsible for such conduct in general, yet the general debate seems to suggest that the latter should be the case.[33]

Concurrent Liability

Lastly, it is noteworthy that even the official UN commissions seemed to admit the possibility of concurrent liability of the UN and the state acting on behalf on it. As the International Law Commission's Special Report stated in 2004, "one could envisage cases in which conduct should be simultaneously attributed to an international organization and one or more of its members.[34]" Interestingly, the Special Report indicated a "paradigmatic example" of such situation: the NATO Yugoslavian bombing of 1999.[35] This bombing lead to an ECHR case *Bankovic and Others v. Belgium and Others,*[36] and while the Court declared it inadmissible on different grounds, it specifically withheld the analysis of "alleged several liability of the respondent States for an act carried out by an international organization of which they are members."[37] Thus it seems that although *Bankovic* concerned NATO's actions

[27] Ibid.
[28] Ibid.
[29] Larsen, K.., E.J.I.L. 2008. 19 (3) at 514.
[30] Art. 8 Articles on the Responsibility of States for Internationally Wrongful Acts, endorsed by the UN GA res. 6/83 (28 Jan 2002).
[31] Not within the article itself, though.
[32] Larsen, K.., E.J.I.L. 2008. 19 (3) at 514.
[33] Ibid at 515.
[34] Gaja, G., Second Report on Responsibility of International Organizations, ¶ 36, delivered to the U.N. Int. Law Commission, U.N. Doc. A/CN.4/541 (Apr. 2, 2004) (citing Letter from Hans Corell, U.N. Legal Counsel, to Václav Mikulka, Dir. of the Codification Div. (Feb. 3, 2004).; *Cross-referenced from Halling, M.*
[35] Ibid.
[36] Bankovic and Others v. Belgium and Others. 44 Eur. Ct. H.R. SE5, 92 (2001).
[37] Ibid. Cross-referenced from Halling, M.

before the UN Security Council authorization,[38] the Special Report's mention of *Bankovic* in this connection could still be interpreted as an implied *de lege ferenda* statement on this legal question, should the Court ever choose to face it and examine it again. Recognizing that such "dual attribution of conduct normally leads to joint, or joint and several responsibility,"[39] the Commission seemed rather open to the possibility of at least some extent of state liability.

III. Behrami v France; Saramati (ECHR)

Facts

Behrami: The case revolved around the actions – here in fact omissions – of the UN's civilian UNMIK and NATO-led military KFOR peacekeeping troops in Kosovo. In 2000, Mr. Behmari's two sons Gadaf and Bekim found an undetonated cluster bomb, a remained of the NATO bombardments in 1999. The bomb exploded, killed Gadaf and permanently blinded Bekim. On the grounds of the Article 2 (Right to Life) of the European Convention on Human Rights[40] and the French KFOR troop's alleged violation of it due to their failure to mark and safely detonate the bomb units in the area of which the troops were aware.[41]

Saramati: On grounds of an attempted murder suspicion, Mr. Saramati was lawfully arrested by the UNMIK and held in detention before a trial, and in less than a month the Supreme Court of Kosovo ordered his release. Nonetheless, he was subsequently detained by an order of a KFOR commander due to allegedly posing a security threat. This detention relied only on the KFOR's authority supposedly granted by the UN Resolution 1244, and lasted months. The applicant filed his claim against the respective European countries based on the nationalities of the KFOR commanders who ordered his detention, and alleged that they violated the Article 5 (Right to liberty and security) ECHR, plus that these states failed to fulfill their obligations of upholding their Convention human rights obligations towards the people of Kosovo.[42]

Ruling

The ECHR declared both suits inadmissible on the same grounds that the actions of the troops in question are attributable to the United Nations.

The case proved to be quite a hot potato for the court especially in terms of the third party interventions – seven European states[43] in addition to the ones directly involved intervened to argue its inadmissibility in front of the ECHR on the grounds of extraterritorial applicability of the Convention[44]. The UN, intervening with *Behrami* at the Court's request argued that the UNMIK were not accountable for the de-mining rather based on the factual evidence that they had not been provided the proper information from the KFOR[45], instead of legal arguments why individual state's accountability should prevail.

[38] Larsen, K.., E.J.I.L. 2008. 19 (3) at 510.
[39] Gaja, ibid. Cross-referencds from Halling, M.
[40] ECHR, Art. 2.
[41] Behrami v. France, par. 5-7.
[42] Saramati v France, Germany & Norway , ECHR 31st May 2007.
[43] Denmark, Estonia, Germany, Greece, Poland, the United Kingdom and Portugal.
[44] Behrami v France. Par 68.
[45] Behrami v France. Par 67.

Interestingly, the Court approached the ruling from completely different grounds. Choosing to avoid ruling on the applicability of Article 1 ECHR obliging the signatory states to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention,"[46] the court avoided interpreting the term jurisdiction within the framework of the state's extraterritorial involvement in Kosovo; a step taken most likely for the reasons that it would complicate the already existing ECHR case law on jurisdiction.[47]

The actual ruling consisted of the analyses of three main issues: establishing whether it was KFOR or UNMIK which had the mandate to de-mine in regards to the *Bahrami* dispute, ascertaining whether the UNMIK's failure to de-mine in *Bahrami* and KFOR's action of preemptive detention was attributable to the UN, and finally assessing the question of its own competence in *ratine personae* to rule on and review the actions and omissions attributable to the UN.[48]

As Milanovic points out, the analysis of the first issue came down to the Court entirely reinterpreting the applicant's submission for it to suit the structure of its analysis – for while Mr. Behrami filed his complaint against the KFOR, the Court determined that the UNMIK's mandate involved demining and KFOR's mandate under SCRC 1244 did not, the applicant's complaint applied to the UNMIK's conduct[49]. Hence the Court laid down its ground for the inadmissibility of *Behrami* based on the facts that UNMIK is a subsidiary body of the UN responding to it for all its actions; a completely new discourse not covered by the applicant's submission.

Yet the core of the Court's ruling lied in its dictum ruling that the neither of the conduct in question is attributable to any of the European states, for the peacekeeping missions acted under the delegation of the Security Council's powers. In establishing this delegation of power by the UN, the court did not use effective control test, yet repeatedly mentioned UN's 'ultimate authority and control,'[50] without a clarification why this test is more appropriate. Reasoning that the UN retains this ultimate authority, the Court relied on the following five factors elaborated on between paragraphs 136 and 141:

a) That the Chapter VII enables SC to delegate its power to entities

b) That the powers in question were delegable

c) That the relevant SCRS explicitly enshrined the delegation

d) That the relevant SCRS sufficiently defined its limits

e) That the leadership of the delegated entity had obligation to report to the SC.[51]

[46] ECHR Article 1.
[47] Milanovic, M., Papic, T. Case Comment - As Bad as It Gets: The European Court of Human Rights Behrami and Saramati decision and General International Law. International & Comparative Law Quarterly. 2009. 58 (2) 267 – 296 at 273.
[48] *Behrami v France.* Summary cross referenced from I.C.L.Q. 270.
[49] Milanovic, M., Papic, T. Case Comment - As Bad as It Gets: The European Court of Human Rights Behrami and Saramati decision and General International Law , I.C.L.Q. at 274.
[50] Behrami v France, par 134.
[51] Summary referenced from EJIL 19 (2008) at 522.

As critics such as Larsen point out, these relatively wide criteria would by no means establish attribution according to the effective control test, for out of these five, the obligation to report is the only mechanism of control[52], and the remaining rather deal with delegation as an act, but not the control of the delegated entity's action subsequent to the act. Nonetheless, concluding that for attribution to UN it sufficed that the troops operated under "delegated, and not direct command,"[53] the court declared the UN accountable for their actions.

IV. Al-Jedda v. UK (ECHR)

Facts

Al-Jedda's facts were largely identical to *Saramati*'s scenario. The applicant was detained by the UK military in Iraq as a terrorist suspect and kept in executive detention without any criminal charges or judicial proceeding or supervision. The UK drew its authority from the Security Council Resolution 1546 (2004), which just like Resolution 1244 applicable in the *Saramati* case did not expressly deal with military preventative detention, yet authorized the use of 'all means necessary'. However, in this case the letter from the U.S. Secretary of State asking specifically for the authorization of preventative detention confirmed that the Council apparently had such intent[54]. Mr. Al-Jedda challenged the detention in front of the British Courts on the grounds of Article 5 of the ECHR prohibiting preventative detention and the Human Rights Act 1998.

The House of Lords Ruling

Although the House of Lords ruling in *Al-Jedda* is merely a lower court's ruling obliged to follow the authority of the subsequent ECHR's *Al-Jedda v. UK,* it is still relevant for this discussion because the House of Lords's reasoning.

The lower courts did not even deal with the question of whether the UK forces' actions were attributable solely to the UN – Mr. Al-Jedda's claim was rejected on the basis of the supremacy of the UN Charter obligations to the ECHR. Yet with the *Behrami* ruling emerging before *Al-Jedda's* final appeal to the House of Lords, the House of Lords suddenly had to consider the rather bizarre impact of its authority. Were the HL apply *Behrami* here, they would effectively rule that all actions of the US and UK troops were attributable to the UN only. And as Lord Bingham stated, just like nobody had considered the Abu Ghraib torture scandal attributable to the UN,[55] "the analogy with the situation in Kosovo breaks down […] at almost every point."[56] He drew the distinction based on the three main differences that while the Kosovo UNMIK were established "on the behest of UN"[57], "operated under its auspices,[58]" and "a subsidiary organ of the UN,[59]" the UK troops in Iraq fit neither of those criteria, and thus "there was no delegation of the UN power in Iraq.[60]" With these factual differences as its main argument, the House

[52] Larsen, K.., EJIL 19 (2008) at 523.
[53] Bahremi v. France, par 129.
[54] R. (on the application of Al-Jedda) v Secretary of State for Defense [2007] UKHL 58 [2008] 1.AC.332 (HL) *Referenced by* I.C.L.Q. 289.
[55] Par. 23 R. (on the application of Al-Jedda) v Secretary of State for Defense.
[56] Ibid *Referenced by* EJIL 19 (2008) at 526.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.

employed the effective control test[61] and ruled in favor of Al-Jedda.

Numerous critics[62] noted this differentiation to be legally unconvincing, for it is unclear how these factual differences should influence the result of the effective control test, yet it is generally agreed that the House of Lord's approach of distinguishing *Al-Jedda* from *Behrami* was the best the House could do without criticizing *Behrami*, and thus ironically the House of Lords prepared the grounds for the ECHR ruling well.

The ECHR Ruling

Despite the House of Lords ruling, the UK Government insisted on applying *Behrami* and argued sole accountability of the UN. This time, the ECHR utilized the House of Lord's approach and ruled against the UK on the grounds of distinguishing *Al-Jedda* from *Behrami.*

The Grand Chamber's analysis was noteworthy particularly for discussing some points it completely omitted in *Behrami.* For example, when the Court stated it does not consider that under the Resolution, "the acts of soldiers within the Multi-National Force became attributable to the United Nations or – *more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations,"*[63] *by differentiating the question of national accountability for the purpose of this case from the general UN accountability, it admitted the possibility of concurrent accountability: dual attribution of the same conduct to both UN and state; something it has failed to mention in Behrami altogether.*[64]

The reasoning in the paragraph 84 where the court states it ratio decidendi that "the UN Security Council had neither *effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force*[65]*" also turned out to be a bit ironic for the critics, for the Court built this conclusion upon approving the House of Lord's choice to employ the effective test based on the International Law Commission's commentary of the Articles on the Responsibility of International Organizations.*[66] *Yet nowhere has the Court commented on the fact that its Behrami ruling completely ignored the ILC's commentary on this same point and its active efforts to apply it, nor that majority of the legal critics and Behrami commentaries called the Court out on failing to employ the Articles of Responsibility.*[67]

As to the norm conflict between the UN Resolution and the Convention, the Court addressed it in paragraph 102, expressing that "*in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights."*[68] *By asserting this presumption, the Court effectively granted itself future authority to adjudicate on the least Convention-conflicting interpretation of the Security Council Resolutions.*

[61] Par 21-22 R. (on the application of Al-Jedda) v Secretary of State for Defense.
[62] EJIL 19 (2008) at 526, I.C.L.Q at 296.
[63] Par. 80 Al-Jedda v United Kingdom [2011] ECHR 27021/08.
[64] Milanovic, M. *European Court Decides Al-Skeini and Al-Jedda.* Blog of the European Journal of International Law. July 7th, 2011.
[65] Par. 84 Al-Jedda v United Kingdom [2011] ECHR 27021/08.
[66] Ibid.
[67] Milanovic, M. *European Court Decides Al-Skeini and Al-Jedda.* Blog of the European Journal of International Law. July 7th, 2011.
[68] Par. 102 Al-Jedda v United Kingdom [2011] ECHR 27021/08.

*Interestingly, the Court demonstrated that the threshold of this newly created presumption shall be very high, since despite the US Secretary of State Powell's letters to the Security Council expressly discussing the option of security internment, the Court noted that these were listed among "*the 'broad range of tasks' which the Multi-National Force stood ready to undertake[69]", and therefore "the Resolution appears to leave the choice of the means to achieve this end to the Member States within the Multi-National Force."[70] Therefore by choosing to give the letter such a loose interpretation, the Court concluded "in the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multi-National Force […] comply with their obligations under international human rights law[71]," and that in this case there was no provision to the contrary. It thus demonstrated that the state accountability for upholding the Convention on Human rights will be held very highly.

The Grand Chamber further reinforced this principle by drawing the appropriate connection to the UN's mission to promote human rights, and reasoning that

"In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law,"[72]

and ensuring that a suspension of a particular human right for extreme cases of necessity always be explicit, and that such suspension is never merely presumptive. Especially with paragraph 102, the Court thus finally clearly stated its position about Resolutions-Convention norm conflicts, and put the long awaited human rights check system on the Security Council.[73]

Comparison

The difference between the two *ratia decidendi* above should be apparent and on its own requires little further discussion. Yet what deserves some further comparative attention is the way the courts chose to approach these cases, and the real life significance of the following decisions.

Court's Approach

It is indeed noteworthy to emphasize the difference between the ECHR approach towards the two largely similar cases within such a short time period**.** When comparing the outcome of *Behrami/Saramati* and *Al-Jedda,* one notices that the Court was especially in the first one rather fettered by the relevant political and policy considerations – like when in 2007, the ECHR completely omitted any analysis of the norm conflict. In *Saramati,* instead of analyzing the norm conflict between the Article 5 of the European Convention of Human Rights (prohibiting

[69] Par. 105 Al-Jedda v United Kingdom **[2011] ECHR 27021/08.**
[70] Ibid.
[71] Ibid.
[72] Par. 102 Al-Jedda v United Kingdom **[2011] ECHR 27021/08.**
[73] Milanovic, M. *European Court Decides Al-Skeini and Al-Jedda.* Blog of the European Journal of International Law. July 7th, 2011.

preventative detention)[74] and the UN Resolution 1244 allowing the use of "all means necessary,"[75] yet not specifically addressing the question of preventative detention, the Court does not even get to the substance of the question of the pre-emptive effect of the Resolution 1244.[76] Milanovic and Papic assert that this is not a surprising discourse, given that accepting the applicant's position and letting the Convention prevail over the Charter VII in this case would antagonize so many powerful states and create so severe interference with the whole peacekeeping system that as a consequence, the whole public order of the European Convention on the Human Rights could be by the diplomatic power of these states entirely displaced.[77]

Yet facing a whole different policy danger of largely pushing back the applicability of the Convention of Human rights in case it would extend the *Behrami* principle towards missions such as Kosovo, in *Al-Jedda* the Court's approach can be considered more human rights-activist, especially its paragraph 102 principle finally dealing with the norm conflict – probably the most influential part of the ruling. Yet while this part of the court's 'activism' was in fact quite necessary if the court intended the guard the principles of Convention – the 'constitutional instrument of European public order'[78] (just like it seemed to do with the ruling in *Behrami,* actually),[79] on other issues it remained silent to the point that some critics find troubling.

For example, as Milanovic points out[80], the Court also did not examine the "fundamental question of whether UNSCR 1546 *could have* prevailed over the ECHR even if it *did* satisfy the presumption.[81]" And even more importantly, aside from repeating the factual differences between the Kosovo and Iraq missions, the Court did not present a deeper analysis of how exactly the effective control or ultimate authority tests apply in *Al-Jedda*, and merely satisfied itself with stating the result that they yield.[82] This is on one hand understandable given the Court's policy interest in not overturning the *Behrami* ruling, yet on the other hand this evasiveness intensifies the notion that *Behrami* was a policy-required wrongly decided ruling, for the distinction between the tests and how they should be properly used is left non-clarified and as a considerable source of legal uncertainty for the future.

Lastly, one may find rather unfortunate the Court's tendency (as seen in both judgments) to overlook contrasting scholarly opinions and criticism without even challenging them with its own commentary. In *Behrami/Saramati,* ECHR not only disregarded important authorities on the question of attribution and UN legal forces status such as Seyersted, or the UN Charter commentary by Simma, but it even cited multiple scholars such as Wolfrum or de Wet who have a completely opposite standing on the

[74] ECHR Art.5. *Cross-referenced from* I.C.L.Q. 289.
[75] UN Resolution 1244.
[76] Milanovic, M., Papic, T. Case Comment - As Bad as It Gets: The European Court of Human Rights Behrami and Saramati decision and General International Law , I.C.L.Q. at 293.
[77] Ibid.
[78] As the court refers to it in *Behrami v. France,* par. 145.
[79] I.C.L.Q.at 296.
[80] Ibid.
[81] Ibid.
[82] Milanovic, M. *European Court Decides Al-Skeini and Al-Jedda.* Blog of the European Journal of International Law. July 7th, 2011.

question of attribution, yet that standing was omitted and ignored.[83] In combination with the Court's failure to acknowledge the vast scholarly criticism of *Behrami* in its *Al-Jedda* ruling, this shows a potentially very troubling tendency of insufficient openness towards criticism on controversial decisions, and deprives the rulings of a very valuable argumentative side they might gain if open to the challenge of contrasting concepts.

Consequences

While the *Al-Jedda* ruling carries out rather human-rights friendly consequences by affirming the possibility of the EU state liability in Iraq, it does not fix *Behrami's* vastly limiting impact on the Kosovo human rights protection. Numerous cases have been thrown out of the ECHR on the admissibility grounds under its precedent[84] and any similar future ones related to the Kosovo cases connected to the actions of UNMIK still hardly have a chance of a different outcome.[85] Consequently some compare Kosovo to the "black legal hole over which there is no independent human rights supervision" and "the only lawless land in Europe,"[86] for the affected civilians have effectively been cut from its only way to the only forum that could hear them. (It is argued that the European Union mission EULEX deployed subsequently after UNMIK should in fact, despite being covered by the Resolution 1244, be liable for its actions or omissions at the ECHR[87] since although it continues in UNMIK's work, its ties to the EU are effectively *and* legally stronger than the legal obligations it had towards the UN[88]– yet the ECHR has not faced a case to confirm or reject this theory).

Therefore it is good that the predictions of some about *Behrami's* impact on the situation in Iraq[89] did not come true. In these hopes, many European states have already opportunistically embraced the *Behrami* precedent and pressured the UN International Law Commission to enshrine the principle in its work on the Draft Articles on the Responsibility of International Organizations;[90] thus the *Al-Jedda* ruling came just in time as a good counterargument for the ILC, which was of course given its position on *Behrami* never in favor of such changes. While *Al-Jedda* does not solve the issue of state accountability for good, it is generally a step in a good direction from the perspective of human rights enforcement.[91] For had the court ruled otherwise, it would have completely erased the possibility of state accountability to the extent that might be hard to overturn in future – and as the favorite good old British legal saying goes, such a ruling might 'open the floodgates' to an unimaginable extent, only this time not the

[83] I.C.L.Q. at 288.
[84] E.g. Gajic v. Germany, Kasumaj v. Greece, Beric v. Bosnia and Herzegovina.
[85] Milanovic, M., Papic, T. Case Comment - As Bad as It Gets: The European Court of Human Rights Behrami and Saramati decision and General International Law , I.C.L.Q. at 295.
[86] Ibid.
[87] I.C.L.Q at 296.
[88] Muharremi, R. The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law. Max-Planck-Institut fur auslandisches offentliches Recht und Volkerrech. 2011.
[89] Farrior, S. Introductory Note to Behrami and Behrami v. France and Saramati v. France, Germany & Norway, European Court of Human Rights (31 May 2007).
[90] I.C.L.Q. 295
[91] Milanovic, M. *European Court Decides Al-Skeini and Al-Jedda.* Blog of the European Journal of International Law. July 7th, 2011

floodgates of new litigation, but floodgates of unaccountable injustice.

What's next? The issue of accountability in Haiti.

Since the ruling above serve as valid precedents only on the European continent, it will be interesting to see what persuasive role they will play worldwide. One might particularly expect interesting results from the possible new wave of cases dealing the UN's MINUSTAH's peacekeeping operation in Haiti.

Brazil and the Military Contingents Exception

It was alleged that since 2004 during the mission in Haiti, the largely Brazilian-commended MINUSTAH peacekeepers committed numerous gross human rights violations on the civil population of Haiti, such as a series of unlawful killings in the infamous Port-au-Prince slum raids,[92] rape and sexual violence, and more.[93]

The aggrieved ones had multiple options for pursuing justice. While prosecuting the individual soldiers would be in case of a criminal prosecution possible, it would likely yield very unsatisfactory results, for in individual proceedings it would be hard to establish a sufficient link with the individual soldiers, and even if the prosecution succeeded at that, the defendants as individuals would likely have little resources to pay for the connected civil damages.[94] Hence out of the two remaining possible options to either sue Brazil as the troop-conducting actor under UN, or to sue both Brazil and U.N. in concurrency, choosing the state of Brazil as a defendant is in fact the more plausible option[95] for two reasons. Firstly, the lawsuit of the UN would have to take place under the committee established by the SOFA,[96] and that has historically not proven like a very efficient process (as discussed below).

Furthermore, in this case Brazil would have a hard time searching for arguments against the admissibility of such a case, since even in *Behrami*, the Court cited and affirmed the International Law Commission's provision that a "state contributing military contingents to a UN peacekeeping mission is still liable for troop abuses."[97] There is no question that shall the relevant court find the provision applicable, the Brazilian-commanded MINUSTAH would fall under it. The proceedings against Brazil are still pending at the Inter-American Court of Human Rights, hence it will be interesting to what extent they will be effective.

Cholera Outbreak Case

Additionally, at the time that this article is in writing, another case concerning the UN's liability is gaining prominence and global media attention as the world anxiously awaits its development for over a year by now.

On November 3rd, 2011, the Bureau des Avocates Internationaux filed a Petition for relief[98] to the UN and its subsidiary MINUSTAH in the matter of their "[…] gross negligence, recklessness and deliberate

[92] Klein, N.. *"My date with Aristide Ousted Haitian prez reveals he was tossed because he refused to privatize"*. Now (magazine) 2005
[93] Halling, M., Bookley,B. *Peacekeeping in Name Alone: Accountability for the UN in Haiti.* Selected Works of Matt Halling. University of California, Hastings College of Law. 2008.
[94] Ibid.
[95] Ibid.
[96] As discussed more in detail below.
[97] *Behrami v. France*. Cross-referenced from Halling, M.
[98] Petition for Relief to MINUSTAH of November 3rd,2011.

indifference to the health and lives of Haiti's citizens"[99] allegedly causing the otherwise preventable cholera outbreak in Haiti in 2010.

The petition was not drafted to address the individual state's liability, for the Petitioners only requested that the UN establish a standing claims commission[100] pursuant to the SOFA[101] agreement between Haiti and the UN providing that such a commission be established in case the peacemaking mission commits any violation of the legal principles it is governed by in the SOFA itself or outside of it,[102] or causes any pecuniary and non-pecuniary damages. The so far medially presented evidence[103] against the MINUSTAH seemed rather persuasive, so shall the standing claims commission be established, the question of state's liability might not even become relevant.

Yet the problem is that although the UN's own Independent Panel of Experts on the Cholera Outbreak in Haiti concluded[104] that the cholera's outbreak was a result of human activity and that the responsible pathogen's strain originated in South Asia (both pieces of strong circumstantial evidence pointing to the MINUSTAH peacekeepers) as far back as in May 2011, a full year and a half later the UN still has not established the appropriate standing claims commission to deal with the arising legal claims.[105] [106] All the claimants seeking relief directly from the UN thus have no forum to turn to. And since as e.g. the former assistant secretary-general for legal affairs at U.N. headquarters Johnson pointed out[107], the UN has so far never established such a committee under the SOFA, the question arises whether this case shall be the exception, or whether the claimants will be left without a forum. Then the remaining options would be to either sue the UN at the forum of the last resort in the U.S., or pursue the state accountability route. Given the vast extent of the damage for the state and the close previously demonstrated links to the behavior of particularly Nepalese peacekeepers and the outbreak, the state could attempt to pursue the state accountability direction and sue Nepal for the behavior in the ICJ, yet this is very unlikely.

Thus the legal outcome of the proceedings against the UN is particularly critical in this case. For if even despite the worldwide pressure resulting from the proportions of this tragedy, which has developed into the largest cholera outbreak in the world in recent years[108], the UN avoided any formal responsibility, an effective liability vacuum might arise – hardly a good precedent for the future.

While the formal result of this case is of great legal interest especially because of the immense proportions of the crisis and the possible multibillion

[99] Ibid, par. 1.
[100] Ibid, par. 102.
[101] Status of Forces Agreement (**SOFA**) Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti.
[102] Ibid.
[103] Studies referenced in: Lieberman, Amy. *Haiti Cholera Case Raises Questions About U.N. Accountability.* World Politics Review. 2011., and the Petition for Relief to MINUSTAH of November 3rd,2011.
[104] Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti. 2010.
[105] Lieberman, Amy. Haiti Cholera Case Raises Questions About U.N. Accountability. World Politics Review. 2011
[106] Boon, Kristen. *The Haiti Cholera Case against the UN.* Opinio Juris. http://opiniojuris.org/2012/10/26/the-haiti-cholera-case-against-the-un/. Retrieved on December 18, 2012.
[107] Ibid.
[108] Doyle, Mark. Haiti cholera epidemic 'most likely' started at UN camp - top scientist. BBC News. http://www.bbc.co.uk/news/world-latin-america-20024400. Retrieved on December 18, 2012.

dollar compensation at stake, many legal counsels involved still point out that the best Haiti can hope for is an out-of-court settlement.[109] Such is the reality of international law – regardless of the global legally sophisticated framework and governance it is trying to establish in the long run, in the reality of the international arena, the machinery of international law is often overran by the international relations and mediation. Indeed it would be great to gain a legal precedent for peacekeeping mission accountability, but one must wonder whether it is worth all the lives that the prolonging of the proceedings might effectively take meanwhile. On the other hand, while conceptually, a settlement may be seen as a quicker and more efficient remedy in comparison to the likely lagging, expensive and uncertain formal proceedings, one must still realize that this 'efficiency' is still quite an overstatement in the view of the thousands of infected patients that are dying as the proceedings are in an effective standby mode for a year.

Conclusion

Many more precedents will need to be set before the issue of where the accountability for actions during the UN peacekeeping missions falls will be completely clear. Despite the recent ECHR rulings, one should definitely not rush to the conclusion that all actions of a state on behalf of the UN are attributable to the United Nations solely. First of all, the exception that a state contributing military contingents should be liable for their actions lies untouched by the ECHR, so its practical applicability is still to be confirmed by case law. Secondly, the recent *Al-Jedda* ruling has definitely opened the door to state liability in a UN mission; however, the Court's choice to simply distinguish it from *Behrami* and thus leave *Behrami* as a notably weakened, yet still valid precedent leaves the ECHR case-law in a confusing stage. Only time will show whether *Behrami* will just disappear in history as a one-time slipup of the Court, or whether still will continue to attempt to invoke its authority and use the differentiation between *Al-Jedda* and *Behrami* in their favor in case of some future mission.

Finally, one must not forget that the ECHR is still only a regional court. Thus on the global level, the final word has not been said. The UN peacekeeping missions deploy personnel from far more countries from all over the world than the 47 ones falling under the ECHR jurisdiction, thus it is likely that the most important decision that we shall hear about the legal issue of state accountability is still about to come, most likely from the International Court of Justice. It is true that since no individuals may bring a claim to an ICJ, this hypothetical scenario would have to include one state suing another for its actions undertaken at a UN mission.

Understandably, taking such a legally aggressive cause of action is always a diplomatically delicate issue, and thus especially the weak states in the need of a UN peace mission might choose to pursue all other possible out-of-court dispute settlement methods. Nonetheless, with the increasingly interventionist tendencies of the UN,

[109] Cheng,T. (the co-director of the Institute for Global Law, Justice and Policy at New York Law School) quoted by Lieberman, Amy. *Haiti Cholera Case Raises Questions About U.N. Accountability.* World Politics Review. 2011.

one might still daresay that eventually, a case like this will be decided at the very global level. Yet given the prevalent opinion in the legal circles that *Behrami* was just a wrongly decided exceptional case, state accountability in the U.N. missions will hardly become an extinct concept – as much as the states which rejoiced over that ruling might have hoped for that.

Ultimately, more worldwide precedents and certainty in this area are definitely needed, for as long as the accountability issue remains the uncertain hot potato being thrown back and forth between the individual state actors and the UN, the resulting lack of definite routes towards redress for wrongdoings committed during the peacekeeping missions might not only ruin the reputation of such missions, but even override the very goodness of their purpose, as we can for example currently see in the unresolved tragically unfolding case of Haiti.

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United States v Julian Assange: Legal Issues Raised by the Electronic Publication of Previously Undisclosed Government Materials on the WikiLeaks Website

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In 2010 the WikiLeaks website released classified government information regarding the U.S. military activities in Iraq and Afghanistan together with U.S. classified diplomatic cables. Hereby, the site provided more than a glimpse into the U.S. foreign policy, provoking fury among U.S. public officials and immediate censorship attempts. Nevertheless, the U.S. government quickly discovered that prosecuting Julian Assange, the founder and public face of the WikiLeaks website, would be far more complicated than it seemed at the first glance.

Assange's prosecution raises a number of crucial legal issues, ranging from the existence and applicability of relevant U.S. legislation and its extraterritorial reach to constitutional implications of such prosecution. In this article, I will thoroughly examine each of these, arguing that there exists a large number of legal impediments, reducing the likelihood of a successful prosecution against Assange.

In order to develop this argument, this article has been structured into four chapters. First, it will provide a brief background, explaining what WikiLeaks actually is and which actions it undertook to provoke such fierce response from the U.S. government. Then, the U.S. legislation stipulating criminal liability for disclosure of classified information will be analyzed and its major drawbacks with respect to its applicability to the WikiLeaks case will be outlined. Third chapter will then address the crucial question whether the United States can or cannot exercise its jurisdiction over Assange, taking into account that he is a non-U.S. citizen currently residing overseas. Lastly, First Amendment implications raised by Assange's prosecution will be discussed in greater detail, as the question of whether his conduct may be held to be criminal would need to be considered from the perspective of constitutional protections.

1. Background

1.1. Wikileaks

WikiLeaks describes itself as a "not-for-profit media organization," which provides an anonymous way for sources to leak information to the public.[2] Representing a new model of investigative journalism, it states that its main objective is to improve transparency and thus create a better, more democratic society for all people.[3] For this reason, WikiLeaks publishes the original sensitive material alongside its news stories. The organization obtains the leaked information mostly electronically via a highly secured drop box, which together with the use of "cutting-edge cryptographic

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[2] WikiLeaks. "What is WikiLeaks?" available at http://www.wikileaks.org/wiki/WikiLeaks:About.

[3] *Id.*

technologies" allegedly ensures the sources' anonymity.[4]

The domain name WikiLeaks.org is registered at Dynadot,[5] a Californian limited liability corporation (LLC) functioning as an ICANN (Internet Corporation for Assigned Names and Numbers)-accredited domain name registrar and web host.[6] Although Julian Assange is the person mostly associated with WikiLeaks, the domain name's registrant is John Shipton, Assange's father whom he supposedly never met.[7] In general, the U.S. courts have referred to the website as to "an entity of unknown form,"[8] indicating that the WikiLeaks' official legal status remains unclear.

In July 2010, WikiLeaks posted on its website more than 91, 000 classified military documents related to the war in Afghanistan.[9] Prior to this event, the organization shared the material with some major newspapers, including the *New York Times*, the *Guardian* (Great Britain) and *Der Spiegel* (Germany). Unlike WikiLeaks, the newspapers reported that they had cross-checked and redacted the information.[10] Bradley Manning, a U.S. soldier, has been charged with multiple counts related to the passing of the classified documents to the WikiLeaks website. Having pleaded not guilty to most major offences brought against him, Manning is currently awaiting a military trial, which is scheduled to start on June 3, 2013.[11]

Subsequently, WikiLeaks released some 400,000 documents on the Iraq war, this time with names and locations redacted. Again, the organization gave advance access of the material to foreign traditional media.[12] Then, in November 2010, WikiLeaks started publishing a quarter-million classified American diplomatic cables, exposing the country's foreign policy, dated mostly within the last three years.[13]

Interestingly, the U.S. government was aware of the upcoming disclosure, as the WikiLeaks founder and Editor in Chief Julian Assange sent a letter to the U.S. ambassador to the U.K., Louis B. Susman, offering to consider any U.S. government's requests to withhold specific information that would, if published, "put individual persons at significant risk of harm."[14] The State Department Legal Advisor, however, responded that the U.S. government would by no means negotiate with WikiLeaks, since the website's possession of classified material is in itself illegal. Furthermore, in a letter to Mr. Assange's attorney, WikiLeaks were strongly advised to cease its activities and return all classified documents in its possession.[15] In response, Mr. Assange accused the U.S. government of adopting a "confrontational

[4] Id.
[5] WHOIS, http://www.whois-search.com/whois/wikileaks.org.
6 Dynadot, available at http://www.dynadot.com/.
[7] Giles Tremlett, "Julian Assange a great dissident, says his father." The Guardian (Jul. 2011), http://www.guardian.co.uk/media/2011/jul/15/julian-assange-father-interview.
[8] *Julius Baer & Co. Ltd., et al. v. WikiLeaks, et al.*, CV 08-0824 JSW (C.D. Cal.,15 Feb., 2008), at 1.
[9] Jennifer K. Elsea, *Criminal Prohibitions on the Publication of Classified Defense Information*, Congressional Research Service, Jan. 10, 2011, at 1.
[10] Jerome A. Barron, The Pentagon Papers Case and the WikiLeaks Controversy: National Security and the First Amendment, Wake Forest Journal of Law & Policy Vol. 1.1, 2011 at 64.
[11] Ed Pilkington, "Manning plea statement: Americans had a right to know 'true cost of war,'" The Guardian (28 Feb. 2013), available at http://www.guardian.co.uk/world/2013/feb/28/bradley-manning-trial-plea-statement.
[12] Barron, supra, at 65.
[13] Elsea, supra, at 2.
[14] Letter from Julian Assange, Editor in Chief, WikiLeaks, to Louis B. Susman, U.S. Ambasador to the U.K. (Nov. 26, 2010), available at http://documents.nytimes.com/letters-between-wikileaks-and-gov.
[15] Letter from State Department Legal Advisor Harold Hongju Koh, to Ms. Jennifer Robinson (Nov. 27, 2010), available at http://documents.nytimes.com/letters-between-wikileaks-and-gov.

approach", inferring his intent to proceed with publishing the materials once they have been cross-checked by the website and its partners.[16]

1.2. Government Stance

Following the release of the Afghan War documents, President Obama expressed his concerns about the disclosure of sensitive information[17] and his administration officially "condemn[ed] in the strongest terms the unauthorized disclosure of classified documents," as it has put individuals' lives and work at risk.[18] Other members of the U.S. government also expressed their strong disapproval with WikiLeaks' actions, including the U.S. Secretary of State Hilary Clinton, stating that it was "not just an attack on America's foreign policy interests, it [was] an attack on the international community."[19]

What is more, members of Congress called for criminal prosecution,[20] and Attorney General Eric Holder promised he would examine "every statute possible" to press charges against Assange.[21] Besides, the WikiLeaks scandal increased the demand for new legislation which would expressly outlaw publishing of sensitive information.[22]

After the WikiLeaks' releases, Swedish authorities issued a European arrest warrant for Assange based on sexual assault charges that had been filed against him, leading to Assange's arrest in December 2010.[23] Finding Assange to be a flight risk, the British court first denied his request for bail, yet this was eventually granted to him under the condition that he would live under curfew and wear an electronic tag.[24] In February 2010, Judge Howard Riddle approved a Swedish extradition request against which Assange appealed. The High Court in London; however, upheld the decision. In December 2010, Assange won the right to petition the Supreme Court to hear his case against extradition to Sweden;[25] nonetheless his attempt was dismissed by the Court in June 2012.[26]

Assange was given a two-week grace period, during which he entered Ecuador's embassy seeking diplomatic asylum. This was granted to him on 16 August 2012[27], and Assange has been sheltering in the embassy's premises ever since. Given the strong positions Ecuador and U.K. have taken on the matter, "a solution is not in sight at the moment,"[28] leaving Assange's future rather unclear.

[16] Letter from Julian Assange, Editor in Chief, WikiLeaks, to Louis B. Susman, U.S. Ambasador to the U.K. (Nov. 28, 2010), available at http://documents.nytimes.com/letters-between-wikileaks-and-gov.
[17] "Obama on Wikileaks: I'm Concerned."ABC News (Jul. 27, 2010), available at http://abcnews.go.com/Politics/video/obama-wikileaks-im-concerned-11260389.
[18] *Id.*
[19] David Jackson, "Obama Aides condemn WikiLeaks; Obama Orders Review." USA Today (Nov. 29, 2010), available at http://content.usatoday.com/communities/theoval/post/2010/11/obamas-team-faces-sensitive-diplomacy-over-wikileaks/1#.T0u6DvE7ohs.
[20] *See, e.g.,* U.S. Congress. Committee on the Judiciary House of Representatives. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks*. Hearing, 16 December 2010. 111th Cong., 2d sess. Washington: Government Printing Office, 2011.
[21] Michael A Lindenberger, "The U.S.'s Weak Legal Case Against WikiLeaks." TIME U.S. (Dec. 9, 2010), http://www.time.com/time/nation/article/0,8599,2035994,00.html.
[22] Jonathan Peters, "WikiLeaks, the First Amendment, and the Press." Harvard Law & Policy Review (2011), http://hlpronline.com/2011/04/WikiLeaks-the-first-amendment-and-the-press/.
[23] Barron, supra, at 67.
[24] *See, e.g.,* Karla Adam, "WikiLeaks founder Julian Assange allowed to continue extradition fight." The Washington Post (Dec. 5, 2010).
[25] *Id.*
[26] *See, e.g.,* "Julian Assange predicts 'up to a year' of living in embassy," BBC News (Aug. 31, 2012), available at http://www.bbc.co.uk/news/uk-19433294.
[27] *Id.*
[28] *Id.*

Still, in order to launch an extradition process against Assange (whether from the UK or Sweden), the U.S. government must first allege a criminal conduct, which will certainly not be an easy task. Scott Silliman, an expert on national-security, suggests that when seeking to prosecute the leakers, the U.S. government faces "one big hurdle after another after another."[29] Among these are in particular, the lack of American legislation that would explicitly outlaw publishing of classified documents, the exercise of the U.S. jurisdiction, and the strict constitutional scrutiny the Supreme Court would apply in Assange's criminal prosecution.

2. Legislation

Clearly, WikiLeaks' release of classified information may subject the individuals responsible for the website's content to civil liability. The published material contained detailed information about the U.S. covert agents, diplomats, military officials and many others, opening the possibility of numerous civil lawsuits. Nevertheless, this article's main focus lies on the public dimension of the release, rather than on the private one. For this reason, this chapter will concentrate solely on the legal analysis of Assange's possible criminal liability for the WikiLeaks' release.

In the United States, there is no one statute that criminalizes the disclosure of classified documents. Yet, there exist several statutes protecting various types of information.[30] The information leaked out by the WikiLeaks' website in 2010 falls presumably under the category of information related to the national defense, and is thus covered by the Espionage Act of 1917, 37 U.S.C. §§ 793 – 798. Nevertheless, it should be noted that despite its classified status, some of the disclosed government material "does not fall under the express protection of any statute."[31]

The U.S. Congress passed the Espionage Act shortly after the country entered the First World War with the intent to punish those who would jeopardize America's national defense.[32] So, the Act made it a crime to "obtain[] information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation" punishable by a fine, imprisonment of a maximum of ten years, or both.[33]

Although the Espionage Act's object was reportedly not to limit the constitutional rights and liberties of the U.S. citizens, it has been criticized for having exactly such an impact.[34]

On another point, the Espionage Act is often described as being "vague" and "over-broad."[35] Section 793 in particular has been referred to as the most unclear of all the federal espionage statutes, providing the courts with almost no guidelines for forging new rules for the disclosure

[29] Jones Ashby, "U.S. Faces Hard Bid to Prosecute Leakers." The Washington Post (Dec. 1, 2010), http://online.wsj.com/article/SB10001424052748703404304575647212732917330.html.
[30] Elsea, supra, at 4.
[31] *Id.*
[32] Robert D Epstein, "Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act." *Commlaw Conspectus*. Vol. 15 (2007), at 483.
[33] 18 U.S.C. § 793.
[34] Epstein, supra, at 483.
[35] *See, e.g.,* Epstein, supra, at 484.

of national security related information.[36] For this reason, the Act's applicability on the WikiLeaks' case has been extensively questioned.

The Espionage Act was applied to the press for the first time in 1988 in *United States v. Morison*.[37] Morison, a national intelligence officer working at the Naval Intelligence Support Center (NISC), mailed "Top Secret" satellite photos of Soviet naval preparations to a magazine called *Jane's Defence Weekly*.[38] The photos were subsequently published in the magazine and the *Washington Post*,[39] as a result of which the U.S. government launched a criminal prosecution of Morison under the Espionage Act, Section 793.[40] The Court ruled that the government may use the Section 793 of the Act to prosecute government employees who leaked classified information to the media,[41] leaving open the possibility for the government to prosecute journalists for such conduct as well.[42]

It was first in 2006 in *United States v. Rosen* where the court found that an individual other than a government employee may face charges under the Espionage Act for disclosing classified information. [43] Nonetheless, Judge Ellis ruled that for such prosecution to be successful, it would have to be proven that the information, if disclosed, is "potentially harmful to the United States and the defendant must know that the disclosure of the information is potentially harmful to the United States.[44]

It is this "specific intent requirement"[45] what is deemed by many scholars as the biggest obstacle to Assange's prosecution under the Espionage Act. Arguably, Assange had a reason to believe that the information disclosed by the WikiLeaks website could be used to harm the United States or to a foreign nation's advantage. Yale law professor Stephen Carter asserts that Assange can hardly pretend not to have intended to disseminate sensitive national defense information to people who were not entitled to posses it.[46] Furthermore, Carter suggests that Assange's actions satisfied the criterion of "willfulness" established by *Hartzel v. United States*.[47] There the Court ruled that a person acts willfully under the statute when he or she acts "deliberately and with a specific purpose to do the acts proscribed by Congress."[48] Following this decision, Assange would encounter difficulties when claiming that he was unaware of any potential harm.

On the other hand, there is evidence of him contacting the State Department, offering to withhold information that might endanger individuals mentioned in the documents leaked, yet the Department refused to cooperate. Unfortunately, it is only the letters between Assange and the U.S. ambassador that are available to us. To date, no further information

[36] Emily Posner, "The War on Speech in the War on Terror: An Examination of the Espionage Act Applied to Modern First Amendment Doctrine." *Cardozo Arts and Entertainment Law Journal* (2007), at 721.
[37] Epstein, supra, at 497.
[38] *United States v. Morison*, 844 F.2d 1057 (1988) at 1061.
[39] Id.
[40] *Id.* at 1060.
[41] *Id.* at 1070 – 1073.
[42] Epstein, supra, at 498.
[43] See generally United States v. Rosen, 445 F. Supp. 2d 602 (2006).
[44] *Rosen*, 445 F. Supp. 2d at 641.
[45] *Id.*
[46] Carter, Stephen. "The Espionage Case Against Assange." *The Daily Beast* (Dec. 1, 2010), available at http://www.thedailybeast.com/articles/2010/12/01/julian-assange-should-espionage-act-be-used-against-him.html.
[47] Id.
[48] *Hartzel v. United States*, 322 U.S. 680 at 322.

regarding the manner, in which the parties approached the documents' review, was released, leaving the letters entirely out of context. Possibly, Assange's only reason for contacting the U.S. administration was to attempt to escape liability for any harm caused by the release. Yet it could also be the case that he had already carried out an extensive review of the classified information and contacted the ambassador to gain an absolute certainty that no harm would be done. Until more information is available, one can only speculate about the extent to which the correspondence proves or disproves the allegations that Assange knowingly intended to harm the United States.

There exists statutory authority, other than the Espionage Act, to criminally prosecute those who retain or disseminate classified documents, namely 18 U.S.C. § 1030 (a), § 641, § 952 or U.S.C. § 421 – 426. Nevertheless, these statutes are almost exclusively used to prosecute government employees with access to the material. As a matter of fact, the Congressional Research Service stated that it is not aware of a single case, in which a publisher was prosecuted for publishing information obtained through an unauthorized disclosure by a government official.[49] This is apparently because publishers are not expressly covered by the statutes, and therefore they can be prosecuted only if their conspiracy with the accused government official is proven.

Applied to the WikiLeaks case, in order to be able to criminally prosecute Assange under the above mentioned statutes, the U.S. government would have to prove, for example, that he conspired with the military official Bradley Manning who has been accused of unlawfully leaking the classified material. Considering the means by which the WikiLeaks website obtains the material it publishes – a highly secured electronic drop box – finding evidence that would demonstrate collaboration between the two seems to be a rather difficult task.

3. Jurisdiction

3.1. Extraterritorial Reach of the Statutes

Julian Assange is an Australian national currently residing at the Ecuadorian embassy in the United Kingdom. As already mentioned, the domain name WikiLeaks.org was registered under the name of Assange's father whereas its nominal address was re-registered in 2008 as Nairobi in Kenya.[50] Due to these facts, there is no direct jurisdictional link between the United States and Assange or the WikiLeaks website as such. Consequently, should the U.S. government launch criminal prosecution against Assange or WikiLeaks; there would be an element of exercising extraterritorial jurisdiction.

Even though there is no express indication that the Espionage Act is meant to be applied extraterritorially, the U.S. Congress did not restrict the Act's application to conduct which occurred on the geographic territory of the United States.[51] As a result, the courts have been willing to apply it to overseas conduct of American citizens, leaving a question whether the Act could be applied to foreigners' actions taken outside the States open.[52]

[49] Elsea, supra, at 12.

[50] WHOIS, http://www.whois-search.com/whois/wikileaks.org.
[51] *See United States v. Zehe*, 601 F. Supp. 196 (1985).
[52] Elsea, supra, at 12.

Arguably, the only case to address this question is *United States v. Zehe* (1985). There the Court ruled that an East German citizen could be prosecuted under the Espionage Act[53] for the acts of espionage against the United States committed in Mexico and the German Democratic Republic.[54] Espionage poses a threat to the country's national security, and so the court held that the Act may be applied extraterritorially to both citizens and noncitizens, provided that the noncitizen "actively sought out and obtained or delivered defense information to a foreign government or conspired to do so."[55]

There may not be sufficient evidence proving that Assange played an active role in retaining the classified material. Nonetheless, the facts clearly indicate that he actively participated in publishing the documents on the WikiLeaks website. By doing so, Assange undoubtedly made the information available to foreign governments, and thus satisfied the threshold requirements for the Act's extraterritorial application established by *Zehe*. As a consequence, despite being a foreign national, residing outside of the United States, Assange could be prosecuted under the Espionage Act for committing a crime of espionage.

3.2. Extradition Issues

Assuming that a foreign national's conduct oversees may be prosecuted under the Espionage Act; there still exist legal impediments to such prosecution, mostly with respect to the suspect's extradition to the United States.[56] Extradition is traditionally a matter of treaty or reciprocity under public international law, whereas the United States have got extradition treaties with over a hundred of states of the world.[57] In addition, the U.S. has entered into several multilateral agreements that also provide a legal basis for extradition. In particular, the U.S. is a party to the Extradition Agreement between the United States and the European Union, which entered into force in February 2010.[58] The U.S. – EU extradition treaty's provisions are implemented by means of bilateral agreements concluded between the U.S. and each of the Member States. These agreements then supersede the earlier treaties between the United States and individual Member States.[59]

Specifically, the United States share an extradition treaty with both Sweden and the United Kingdom. In brief, the U.S. – Sweden extradition treaty appears to be notably stricter than the U.S. – U.K. treaty, which goes way beyond the requirements set by the EU. Hence, one may conclude that the U.S. government has greater chances of having Assange extradited while he is still residing on the territory of the United Kingdom. Should this conclusion be correct, Assange's eagerness to remain in the U.K. is more than striking.

Apart from listing crimes for which a person may be extradited, most modern extradition treaties also

[53] Under § § 793 (b), 794 (a) and 794 (c).
[54] *Zehe*, 601 F. Supp. 196 (1985) at 201.
[55] *Id*.

[56] Extradition is to be understood as the "formal surrender of a person by a State to another State for prosecution or punishment." (Restatement (Third) of Foreign Relations Law of the United States § 475 (1987).
[57] Michael John Garcia, "Extradition To and From the United States: Overview of the Law and Recent Treaties." *Congressional Research Service* (2010) at 1.
[58] *Id*. at 2.
[59] *Id*. at 3.

contain exceptions in a form of specific types of offences for which extradition may or even must be denied.[60] Usually, purely military and political offences would be excluded as legitimate grounds for an individual's extradition. Whereas the relatively recent military crimes exception has been used only occasionally, causing almost no disputes, the political offence exception has proven to be rather troublesome.[61]

The main drawback of the political offence exception lies in the breadth of its interpretations. Traditionally, the provision forbade extraditing a person for committing a crime or an offence of a political character. Nevertheless, the modern extradition treaties seem to have extended the traditional definition by prohibiting any prosecution, which is "politically or discriminatorily motivated."[62]

The U.S. courts distinguish between a "pure" and a "relative political offence." A pure political offence is to be understood as an "act[] aimed directly at the government," yet it does not possess any element of a crime.[63] On the contrary, a relative political offence refers to an "otherwise common crime[] committed in connection with a political act."[64] Together with treason and sedition, espionage has clearly fallen under the category of a pure political offence,[65] being therefore recognized as un-extraditable. [66]

Still, the question remains whether such recognition applies only to "classic" espionage cases, or also to an unauthorized disclosure of classified information. Even if the later assumption is correct, the U.S. government will still be able to launch an extradition request for Assange to face other criminal charges. Nevertheless, if the charged conduct is "deemed to have been committed in furtherance of an act of espionage", the request might be refused.[67]

Provided that the charged offence is not considered as purely political, then the U. S. government may pursue a dual criminality approach. Accordingly, the United States could seek Assange's extradition under the following two conditions; (1) the applicable (i.e. U.K., Swedish or Australian) extradition treaty contains dual criminality provisions, (2) and the requested state recognizes espionage, respectively the unauthorized disclosure of classified information, as a criminal offence under its domestic laws.[68]

4. Constitutional Implications

4.1. First Amendment

Even if Assange was extradited to the United States, his criminal prosecution would have to comply with the U.S. Constitution which, among other things, protects the right to access government information and to freely express opinions regarding the functioning of the government.[69] This right belongs not only to American citizens, but also to all persons subject to the U.S. jurisdiction.[70] In other terms, should Assange be brought before U.S. courts, his criminal

[60] *Id.* at 7.
[61] Id.
[62] *Id.* at 8.
[63] *Quinn v. Robinson*, 783 F.2d 776 (1986) at 793.
[64] *Id.* at 794.
[65] *Id.* at 793.
[66] Elsea, supra, at 15.
[67] Id.
[68] *Id.* at 16.
[69] Elsea, supra, at 17.
[70] U.S. Const. amend. XIV

liability would be considered from the perspective of the constitutional protection of free speech.

Specifically, the First Amendment states the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The freedom of speech and press guaranteed by the First Amendment is, however, not absolute. In fact, it has been restricted for compelling reasons, including national security and necessary state regulations.[71] That being said, the Supreme Court has generally adhered to the principle that the vital importance of the First Amendment assures its "preferred position" in respect to other constitutional values.[72] This obliges the Court to apply "close judicial scrutiny" in cases when First Amendment rights have been limited.[73]

Following the release of classified information, the House Judiciary Committee held a hearing discussing the legal and constitutional issues raised by the WikiLeaks' actions. There, several witnesses suggested that a criminal prosecution of WikiLeaks would raise fundamental questions regarding freedom of speech journalists have enjoyed.[74] Particularly, Louie Gohmert, current Representative of Texas, asserted that the WikiLeaks' conduct "resurrected an age-old debate on First Amendment protections afforded to media publications."[75] Similarly, Kenneth Wainstein, a former Homeland Security Advisor by President George W. Bush, argued that demonstrating that the WikiLeaks website is "fundamentally different from other and real media organizations" is crucial for overcoming constitutional concerns in a potential criminal prosecution.[76] Based on these testimonies, it would appear that it is of vital importance for constitutional purposes to determine whether Assange and WikiLeaks are part of press or not.

In reality, however, when analyzing a criminal prosecution of the WikiLeaks' publications this issue is far less important. The First Amendment protects all speakers' right to free expression, at times based on the Speech Clause, at others based on the Press clause. It has been suggested that the Press Clause is to be interpreted independently from the Speech Clause to afford the media special constitutional protection. Nonetheless, reading the Clauses together as a single guarantee the Supreme Court decisions indicate that "the press enjoys no First Amendment privileges or immunities beyond those afforded to the ordinary citizen."[77]

Additionally, whether Assange and WikiLeaks are part of the press or not would matter for legal purposes only in case that Assange sought to claim a federal reporter's privilege. This would allow him

[71] Louis Fisher, *Constitutional Rights: Civil Rights and Civil Liberties*. Vol. 2 of American Constitutional Law, 2nd ed., 1995, at 563.
[72] Jerome A. Barron & C. Thomas Dienes, *Constitutional Law*. 3rd ed., 1991, at 226.
[73] *Id.*
[74] *See generally* The Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks, Hearing before the H. Comm. on the Judiciary, 111th Cong. (2010).
[75] The Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks, Hearing before the H. Comm. on the Judiciary, 111th Cong. (2010) at 3.
[76] *Id.* at 4.
[77] Barron & Dienes, supra, at 273.

(under a specific array of circumstances) to refuse to testify about his sources provided that he would be able to prove that he was engaged in investigative journalism.[78]

The constitutional standard to be applied depends also on the type of restriction the government chooses to impose. When the government only indirectly limits freedom of expression by means of "content-neutral" laws, the degree of judicial scrutiny will be lower.[79] This is because such laws are aimed at regulating the expression itself regardless of the message conveyed. On the other hand, government regulations of the content of the speech (i.e. of what is being said) demands substantial justification.[80] Criminal prosecution of the publication of the classified information falls into the latter category, and therefore the Court would impose a heavy burden of justification on the government.

Generally, two main standards have been applied for content-based restrictions; strict scrutiny and clear and present danger test (whereas the latter can be understood as a form of strict scrutiny designed specifically for limitations on freedom of expression).[81] As each standard has been applied in a variety of First Amendment cases, it appears to be difficult to predict which one would be preferred in a criminal prosecution of WikiLeaks or Assange. For this reason, each standard will be discussed in the following chapters whereas one should take into account that either is applicable in our case.[82]

4.2. Strict Scrutiny

In general, the Supreme Court applies the most stringent constitutional standard – "strict scrutiny" – when restricting speech on the basis of its content.[83] This means that it may uphold a content-based restriction only if it is (1) carefully tailored to serve a "compelling state interest"[84] and it is the (2) "least restrictive means to further the articulated interest."[85] In addition, it is the government who bears the burden to prove that the state interest is sufficiently compelling.

The Court is thus required to run a form of proportionality test, considering, inter alia the ends and the means of the restriction at stake. That is to say, it needs to answer the following two questions. First, is the interest substantial enough to justify a limitation of freedom of speech? For example, avoiding an offence or spread of a bad idea is by itself not considered as a compelling interest.[86] Similarly, an under-inclusive legislation which fails to regulate all speech involving the interest implies that the interest is of insufficient importance.[87]

Second, the Court has to determine whether the means advance the given interest. In other terms, the restriction may be neither too broad (i.e. covering a large amount of expression that does

[78] Jonathan Peters, "WikiLeaks, the First Amendment, and the Press." Harvard Law & Policy Review (2011).
[79] Barron & Dienes, supra, at 227.
[80] *Id.*
[81] Peters, "WikiLeaks, the First Amendment, and the Press." *Harvard Law & Policy Review* (2011), available at http://hlpronline.com/2011/04/WikiLeaks-the-first-amendment-and-the-press/.
[82] *Id.*
[83] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny,* 144 U. Pennsylvania L. Rev. 2417 (1997), avilable at http://www2.law.ucla.edu/volokh/scrutiny.htm.
84 See e.g., Sable Communications of California v. Federal Communications Commission, 492 U.S. 115 (1989).
[85] Id.
[86] Volokh, supra.
[87] Id.

not implicate the interest) nor two narrow (i.e. incapable of covering the extent of expression that harms the interest).[88] Besides, the Court would also strike down a restriction if there were less restrictive means (e.g. a better drafted legislation) available to the government.[89]

Applying the strict scrutiny doctrine to the WikiLeaks' case raises more than one question. Should the U.S. government launch a criminal prosecution against Assange or the WikiLeaks website, they would most likely claim that punishing the release of classified information is in the interest of national security, and "no governmental interest is more compelling than the security of the Nation."[90] To further support their claim, the government might also point to the ongoing wars in Iraq and Afghanistan. As stated in a groundbreaking case from WWI, *Schenck v. United States* (1919), "[w]hen a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."[91]

Hence, the first part of the strict scrutiny constitutional standard – demonstrating the state's compelling interest – would be probably met. Nevertheless, do the means indeed advance this interest? In other terms, is the charging statute, in our case the Espionage Act, the least restrictive means to further national security? Before we address this question, it seems appropriate to briefly review the "vagueness" and "over breadth" doctrines.

The First Amendment requires a special clarity in both civil and criminal legislation, which burdens the freedom of expression. Consequently, if the language of such law is unclear and indefinite, it may be attacked as facially invalid or invalid.[92] Similarly, a statute regulating the First Amendment may be held void on the basis that it is considerably overbroad, reaching randomly constitutionally protected and unprotected activity.[93]

As already mentioned, the Espionage Act has been widely criticized for being overbroad. For instance, a former special assistant to the Attorney General Abbe David Lowell stated that "[b]ecause of its breadth and language, [the Espionage Act] can be applied in a manner that infringes on proper First Amendment activity," including "newsgathering to expose government wrongdoing."[94] Such statements could be used as evidence to demonstrate that the Act does not satisfy the second part of the proportionality test; the "least restrictive means." The greater the gap between the government interest and the statute restricting First Amendment rights, the lower is the likelihood that the government restriction will be upheld.[95]

4.3. Tests

Whether the government may burden the First Amendment right to free expression also depends

[88] Id.
[89] Id.
[90] *See Haig v. Agee*, 453 U.S. 280 (1981) citing *Aptheker v. Secretary of State*, 378 U.S., at 509.
[91] *Schenck v. United States*, 249 US 47 (1919) at 52.
[92] Barron & Dienes, supra, at 232.
[93] Id.
[94] Judson O. Littleton, Note, Eliminating Public Disclosures of Government Information from the Reach of the Espionage Act, *86 Tex. L. Rev.*, 889 (2008), at 904.
[95] Peters, supra.

on the severity and proximity of the danger the speech presents. This principle is to be traced back to WWI cases, which upheld the Espionage Act.[96] Specifically, in *Schenck* the Supreme Court articulated the "clear and present danger" test for the first time by stating the following; "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[97]

Thus, Charles Schenck, the general secretary of the American Socialist Party, and others were convicted for printing and distributing 15,000 leaflets that opposed the war draft. These were supposed to have caused insubordination in the U.S. military forces and obstructed the recruitment and enlistment of soldiers. [98] The government did not present any evidence that citizens resisted the draft in response to the leaflets. Nevertheless, the Court decided that in wartime the speech should be scrutinized more carefully than in "ordinary times".[99]

Soon thereafter, the Court convicted two German newspaper publishers for publishing articles that criticized the war and the draft in *Frohwerk v. United States*.[100] Similarly, *in Debs v. United States* (1919), the Court upheld the conviction of a Socialist Party leader Eugene V. Debs for making a public speech, in which he openly opposed the war.[101] In both cases, the Court applied the clear and present danger test, convicting speakers for criticizing war efforts under the Espionage Act. Neither in the first, nor in the later case a proof was found that the speech would invoke harm. Still, in the early days of the Act the Court was willing to restrict any expression, which could potentially pose a danger to the United States.[102]

A major breakthrough in the development of the clear and present danger doctrine occurred in *Adams v. United States*. There the Supreme Court upheld a conviction of a group of Russian immigrants, who circulated leaflets, criticizing the United States for sending military forces to Europe after the Russian Revolution.[103] The Court did so despite the fact that the speech was not aimed at the war as such, but rather at government operations in general.[104] In his dissenting opinion, Justice Holmes argued that the immigrants' speech did not pose any "immediate danger" to the U.S. citizens.[105]

By the 1960s, the Court has taken a more speech protective approach, ensuring American citizens broad expression rights unless the government could prove that the particular speech incited to "imminent lawless action."[106] In *Brandenburg v. Ohio* (1969) the Court reversed a conviction of a Ku Klux Klan leader who participated in a KKK rally that included clearly racist and anti-Semitic phrases. The Court found, however, that for the government to be able to restrict such expression

[96] Emily Posner, "The War on Speech in the War on Terror: An Examination of the Espionage Act Applied to Modern First Amendment Doctrine." *Cardozo Arts and Entertainment Law Journal* (2007), at 723.
[97] *Schenck*, 249 US 47 (1919) at 52.
[98] *Id.* at 53.
[99] *Id.* at 52.
[100] See generally Frohwerk v. United States, 249 US 204 (1919).
[101] See generally Debs v. United States, 249 U.S. 211 (1919).
[102] Posner, supra, at 724.
[103] See generally Abrams v. United States, 250 US 616 (1919).
[104] Id.
[105] *Abrams v. United States*, 250 US 616 (1919) at 628.
[106] *Brandenburg v. Ohio*, 395 US 444 (1969) at 447.

imminent harm and the speaker's direct incitement must be proven.[107]

One should note that the *Brandenburg* case took place when the U.S. enjoyed a time of peace, and therefore it remains rather unclear whether it overruled the clear and present danger test established in 1919. Provided that the Court heard the Assange or WikiLeaks case, it would have to determine whether the imminent danger doctrine is the new standard to be applied also in a time of war, or only in peacetime.[108]

In general, constitution restraints on free speech are considerably stricter during wartime than at the times of peace. Arguably, the United States have a long history of overreacting to wartime threats by going too far in restricting civil liberties, with the most recent example being the Bush administration.[109] In reaction to the September 11th attacks, President Bush declared an open-ended war on terror, as a result of which the executive branch of the U.S. government has been afforded greater powers to "protect" the nation in wartime.[110]

In light of these developments, a number of scholars suggested that the U.S. government could exercise its war time powers to limit the freedom of speech,[111] which would significantly help the U.S. build its case against Assange. Theoretically, if the United States were still fighting the war on terror, they could restrict the freedom of expression in a manner similar to *Schenck* and other WWI cases. Applying such logic seems, however, extremely dangerous. Although Obama administration has been reluctant to use the term "War on Terror," the U.S. "Overseas Contingency Operation" remains in place with no determinable end in sight.[112] Hence, the government temporary encroachment of freedom of expression (or even civil liberties in general) could become indefinite.

Additionally, ten years after the attacks the government's exercise of wartime powers would be inadequate and only hardly justifiable. Justice Holmes, the very author of the danger test, admitted that a "war opens dangers that do not exist at other times."[113] Nonetheless, he clearly pointed out that "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion."[114]

4.4. Pentagon Papers

Concerning a possible prosecution of a publisher for releasing information leaked by a government employee, the most relevant case to be discussed is *New York Times CO v United States*, also known as the "Pentagon Papers" case.[115] This began in 1967 when Secretary of Defense Robert McNamara asked the Rand Corporation to prepare a top secret study on the U.S. military involvement in the Vietnam War. Once compiled, the study

[107] *Id.* at 444.
[108] Emily Posner, "The War on Speech in the War on Terror: An Examination of the Espionage Act Applied to Modern First Amendment Doctrine." *Cardozo Arts and Entertainment Law Journal* (2007), at 726.
[109] *Id.* at 731.
[110] Id.
[111] *See, e.g.,* U.S. Congress. Committee on the Judiciary House of Representatives. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks*. Hearing, 16 December 2010. 111th Cong., 2d sess. Washington: Government Printing Office, 2011.
[112] Al Kamen, "The End of the Global War on Terror." The Washington Post (March 24, 2009), http://voices.washingtonpost.com/44/2009/03/23/the_end_of_the_global_war_on_t.html.
[113] *Abrams*, 250 US 616 (1919) at 628.
[114] Id.
[115] Elsea, supra, at 21.

amounted to forty-seven volumes, reviewing thoroughly the U.S. foreign policy towards Indochina.[116]

Two years later, Daniel Ellsberg[117] and another Rand employee copied the classified documents, and then gave them to the *New York Times*. Subsequently, *Times* started publishing excerpts from the material. In response, Attorney General John Mitchel sent a telegram to the *Times*, asking the newspaper to immediately cease publishing the secret information and return the documents to the Department of Defense. *Times* refused, as a result of which the government requested a temporary restraining order. This was promptly granted by the federal district court on the grounds that the harm possibly inflicted upon the U.S. government's interest exceeded any temporary harm potentially caused by not publishing the material.[118] Additionally, it should be noted that this was the first time a federal judge restrained a newspaper from publishing information subject to public discussion.[119]

As expected, the case swiftly reached the Supreme Court, which announced its decision only two weeks after the *Times'* article had been released. Highlighting the unprecedented nature of the case, the nine Supreme Court judges delivered their diverse opinions, which ranged from First Amendment absolutism,[120] over the rule of law theme[121] to the complete "executive's constitutional primacy" in foreign affairs[122].[123] They did, however, reach a 6-3 conclusion that the government did not meet the heavy burden to justify the restraint.[124] Justice Stewart nicely captured the Court's view by stating the following. "[W]e are asked to prevent the publication … of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people."[125]

The Court's decision in the "Pentagon Papers" is to be perceived as a clear victory of the freedom of the press over the government's national security interest. The per curiam opinion amounting to mere twenty six lines became a famous decision in one of the greatest First Amendment cases.[126] Undoubtedly, the holding in "Pentagon papers" has been of vital importance for the later cases resolving the tension between the press and the government interest.

In brief, several notable parallels can be drawn between the "Pentagon Papers" and WikiLeaks cases, yet these are "hardly exact".[127] Therefore, whether the Court hearing the Assange's case would give preference to freedom of speech over the government's national security interest as it did forty years ago remains a matter of speculation. I

[116] Geoffrey Stone, "Government Secrecy vs. Freedom of the Press." *Harvard Law & Policy Review*. Vol. 1 (2007), at 197.
[117] A former Defense Department official and supporter of the Vietnam War (Jerome A. Barron, *The Pentagon Papers Case and the WikiLeaks Controversy: National Security and the First Amendment*, Wake Forest Journal of Law & Policy Vol. 1.1, 2011 at 49).
[118] Stone, supra, at 198.
[119] *Id.*
[120] Justices Black, Douglas, and Brennan
[121] Justices Stewart, Marshall, and White
[122] Justices Harlan and Blackmun and Chief Justice Burger
[123] *See generally* Barron, supra.
[124] See generally New York Times CO v United States, 403 US 713 (1971).
[125] New York Times CO v United States, 403 US 713 (1971) at 730.
[126] Barron, supra, at 61.
[127] Barron, supra, at 73.

would personally incline to agree with Professor Stone, who suggested that the Supreme Court would use "roughly the same standard" in criminal prosecution of WikiLeaks or Assange, as it did in "Pentagon Papers."[128]

Since the "Pentagon Papers," the First Amendment doctrine has developed in two directions. On the one hand, government employees seem to have been offered less protection in cases where they leaked sensitive information.[129] For instance, in *Snepp v. United States* (1980), the U.S. government successfully prosecuted a former CIA agent for turning over his book containing sensitive information about the U.S. involvement in Vietnam for publication.[130] Similarly, a former CIA employee Philip Agee was not granted a full constitutional protection due to national security and foreign policy considerations at stake.[131]

On the other hand, the Supreme Court appears to have been reluctant to prosecute private citizens for transmitting classified information, even if obtained unlawfully by a third party. In *Landmark Communications, Inc. v. Virginia* (1978) the Court held that a Landmark newspaper, the Virginian Pilot, could not be punished for publishing truthful information regarding confidential proceedings of the Review Commission, which investigated a state judge's misconduct.[132] More recently, in *Bartnicki v. Vopper* (2001), the Court ruled that a radio station could not be held liable for broadcasting tapes illegally obtained by a third party on the basis that the information published was of public importance and the radio station did not participate in its interception.[133]

On the basis of the aforementioned case law, WikiLeaks' release of the classified material is likely to be constitutionally protected under the First Amendment, as long as the published information is considered of public significance and the site cannot be proven to have participated in its acquiring. Nonetheless, the notion of "public significance" appears to be rather troublesome and requires further clarification.

The leading case on this subject is *New York Times CO v. Sullivan* (1964). There, the *New York Times* was sued by a public official for publishing an advertisement criticizing several U.S. southern areas for hindering civil rights demonstrations.[134] The Court, however, expanded the constitutional protection of freedom of the press, ruling that a public official may not recover damages for a defamatory statements, even if erroneous, unless he or she can prove that the publisher acted with actual malice – "that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." [135] The Court argued that even an "erroneous statement is inevitable in free debate, and that it must be protected [for] the freedoms of expression […] to have the breathing space that [it] need[s] to survive."[136]

This brings us back to the question regarding the manner, in which the WikiLeaks website

[128] Peters, supra.
[129] Emily Posner, supra, at 727.
[130] Snepp v. United States, 444 U.S. 507 (1980).
[131] *Haig v. Agee*, 453 U.S. 280 (1981) at 308.
[132] Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) at 834.
[133] *Bartnicki v. Vopper,* 532 U.S. 514 (2001) at 541.
[134] *New York Times CO v. Sullivan*, 376 US 254 (1964) at 256 – 7.
[135] *Id.* at 280.
[136] *Id.* at 272.

approached the documents' review. Did Assange, as the site's Chief Editor, indeed carry out an extensive control of the documents? Unfortunately, we are missing this crucial piece of information, which leaves us incapable of deciding whether his actions were malicious, and so unprotected by the First Amendment.

On another point, *Sullivan*'s ruling highlighted the need to keep a public debate open and ensure it has sufficient "breathing space." Consequently, a critique of public officials' conduct would be less protected than information regarding national security. The next question to be put forward is therefore whether the information contained in the leaked documents was truly as dangerous as suggested by the U.S. government or whether it was rather unpleasant in the meaning of the light it could shed on U.S. public officials.

Conclusion

Although the U.S. government could theoretically launch a criminal prosecution of Julian Assange, they would need to rely on an incoherent bundle of legislation, the most applicable of which being the Espionage Act – a piece of a century old, overbroad legislation that was never meant to be applied against members of the press. Actually, the Act could serve as a legal basis for the prosecution only provided that the U.S. government is capable of proving Assange's "specific intent." This, however, remains highly speculative given the lack of information regarding the parties' approach towards the documents' review.

Despite being a foreign national residing overseas, the U.S. could possibly exercise their jurisdiction over Assange based on the ruling in *Zehe*. There, the Court ruled that the Espionage Act may be applied extraterritorially to non-U.S. citizens, should they deliver defense information to a foreign government. Undoubtedly, Assange met this condition when he actively participated in posting the classified material on the WikiLeaks' website. Still, the question remains, whether the U.K., respectively Sweden would extradite him, as his offence might well be considered as a political one, not to mention the diplomatic relations at stake, which now involve Ecuador as well.

Lastly, even if the U.S. government could successfully launch a criminal prosecution against Assange, this would with greatest probability fall under the constitutional protection of freedom of expression, especially if following the Supreme Court's ruling in the "Pentagon Papers" case. In addition, recent developments in the First Amendment doctrine illustrate the Supreme Court's reluctance to prosecute private citizens for publishing classified information, even if this was obtained unlawfully by a third party. What is more, the Court has been traditionally very protective of the public debate, allowing open critique of public official's in the name of democracy. We can only speculate as to whether the First Amendment doctrine will keep its strength, considering the new challenges of modern technology.