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DOI:10.17265/1548-6605

US-CHINA LAW REVIEW

VOLUME 13, NUMBER 1, JANUARY 2016



DAVID PUBLISHING

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US-CHINA LAW REVIEW

VOLUME 13, NUMBER 1, JANUARY 2016 (SERIAL NUMBER 121)



David Publishing Company
www.davidpublisher.com

Publication Information:

US-China Law Review is published monthly in hard copy (ISSN 1548-6605) and online (ISSN 1930-2061) by David Publishing Company located at 616 Corporate Way, Suite 2-4876, Valley Cottage, NY 10989, USA

Aims and Scope:

US-China Law Review, a monthly professional academic journal, commits itself to promoting the academic communication about laws of China and other countries, covers all sorts of researches on legal history, law rules, legal culture, legal theories, legal systems, questions, debate and discussion about law from the experts and scholars all over the world.

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Editorial Office:

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Subscription Information:

Print \$520, Online \$320, Print and Online \$600 (per year)

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US-CHINA LAW REVIEW

VOL. 13

January 2016

NO. 1

THE LIMITATION OF ANIMAL PROTECTION FOR RELIGIOUS OR CULTURAL REASONS

*Olivier Le Bot**

The relationship between the animal protection and the respect of tradition is an important issue in Animal law. The question is examined from a perspective which is both empirical and comparative. The case-law of several countries and legal systems have been taken into account: United-States, Israel, Poland, Brazil, European Court of Human Rights, International Court of Justice. In the light of the courts decisions, it appears that, tradition tends to prevail over protection when a religious tradition is at stake. However, when a superior norm of protection is invoked, this usually leads to an overruling of a regulation or a legislation allowing mistreatment of animals.

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INTRODUCTION

Modern legislation concerning animal protection is justified by animals' sensitivity. Since the 19th century, we have been protecting

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animals because they are sensitive beings¹.

However, it is not because animals are recognized as sensitive beings that they benefit ipso facto from a protection. Indeed, various considerations may oppose their protection.

Economic considerations first: using or exploiting animals brings in money, a lot of money (for example, 75 billion euros per year, for the agri-food industry in France²); in order not to thwart these interests, we accept hens confined in cages where they can not even turn around; in short, we allow methods of animal farming that cause suffering to animals.

Recreational considerations may also run counter to respecting the sensitivity of animals (we use animals for entertainment, in bullrings, in zoos, in circuses, at Marineland or SeaWorld, etc.) and, because we have fun with them, we may deny their most fundamental ethological needs, for example, confining killer whales in a few cubic meters of water when they need to swim dozens of kilometres every day.

Among the reasons that can justify restrictions to animal protection (or animal welfare), we also find (and here the author comes to his subject) *social* considerations (in a broad meaning): tradition, culture, religion. We do that because we have always done that (it's tradition). Or, in our region, locality, culture, we do that (it's a local or cultural tradition). Or through our mystical—or non rational—vision of the world, we do that (it's a religious tradition).

The legislator may take position in two different ways when faced with animal abuse justified by tradition. Either it accepts the abuse, it legalizes it (it considers this abuse legitimate and, in this case, tradition prevails over protection); or it chooses to prohibit the abuse, considering that protection must prevail over tradition.

We could study, in detail, the considerations put forward by the legislator in either case to justify its choice. But it would be essentially a political or a sociological approach. We could also expose, in details, the cases when the legislator gives prevalence to tradition and cases when he gives prevalence to protection. But such a presentation would be static and would present a contingent character.

What is interesting for the jurist, is to know whether the legislator's choice can be contested. The legislator makes a political choice: giving

¹ At least in western countries. In India, protections are based on the intrinsic value of the animal (see S. L. Goodkin, *The Evolution of Animal Rights*, 18 COLUMBIA HUMAN RIGHTS LAW REVIEW 283 (1987)).

² Figures from the French Ministry of Agriculture and the National Institute of Statistics. Available at http://www.insee.fr/fr/themes/document.asp?ref_id=T10F181.

prevalence to animal protection or to tradition. Can this choice be questioned by the judge (on the basis of superior instruments)?

Let's consider the matter in its two dimensions.

I. FIRST DIMENSION: THE LAW FORBIDS ANIMAL ABUSE COMMITTED IN THE NAME OF TRADITION

A. *Legislation Which Protects the Sensitivity of Animals against Tradition Exists*

Question: can fundamental rights be invoked in order to make tradition prevail over this legislation? In other words, can someone invoke a fundamental right in order to bring the legal order in line with his or her vision of the world, in such a way, that he or she can freely inflict suffering on an animal, in the name of tradition?

This question is raised, very clearly, in two areas: ritual slaughtering and hunting with hounds.

B. *Ritual Slaughter*

Ritual slaughter, as ritual sacrifice, is a tradition, a very old tradition³. Both traditions cause suffering to animals. In order to drain the blood of the animal out of its body (so that, the animal is bloodless when it is eaten), it is slaughtered without prior stunning. It feels an intense pain between the moment bleeding starts and the moment the animal stops living.

The case-law that I have found is largely oriented towards a *protection* of those traditions⁴. The accomplishment of a rite is considered as a way of exercising freedom of religion. Consequently, it benefits fully from the protection granted to this freedom⁵.

³ Their origin dates, for Jewish and Muslims, to the first sacred texts (the Torah, the Koran) and, in some religions, corresponds to an ancestral practice (as the case, for example, in the Santeria religion, that will be further explored below).

⁴ The European Convention for the Protection of Animals kept for Farming Purposes of 10th May, 1979 also provides a specific derogation for the accomplishment of religious rituals. According to Article 13, "In the case of the ritual slaughter of animals of the bovine species, they shall be restrained before slaughter by mechanical means designed to spare them all avoidable pain, suffering, agitation, injury or contusions".

⁵ See, for example ECHR, June 27, 2000, Cha'are Shalom Ve Tsedek v. France, n° 27417/95, § 73: "Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (...). It is not contested that, ritual slaughter, as indeed its name indicates, constitutes a rite (...), whose purpose is to provide" that animals are "slaughtered in accordance with religious prescriptions". Thus this tradition is protected by Article 9 of the Convention, "since ritual slaughter must be considered to be covered by a right guaranteed by the Convention" (§ 74).

Three solutions can be mentioned.

The first one is the most protective of religion (and consequently, the less protective of animals). It recognizes a *right* to practice ritual slaughter. It is the option adopted by the constitutional court of Austria. In 1998, the court considered that, an obligation to slaughter animals *with* anaesthesia is unreasonable for Muslims or Jews⁶.

The situation is similar in Germany. In 2002, the court of Karlsruhe declared that, the law could not restrain the possibilities to practice ritual slaughter⁷. The law (the TSchG, §4) prohibits ritual slaughter. It establishes a general prohibition of ritual slaughter, ie without prior stunning. The law provides that, administrative authorities can exceptionally give permissions on one strict condition: when ritual slaughter is necessary to respond to the needs of the members of a religious community whose imperative rules prescribe ritual slaughter. In 1999, a Muslim butcher filed a lawsuit to an administrative Court after authorities had refused him permission to practice ritual slaughter. In 2002, the constitutional Court of Karlsruhe concluded to a violation of the butcher's freedom of work and of his customers' freedom of religion. For the Court, the law, which has an inferior value, cannot legally restrain these fundamental rights, because (as the Court underlines) the protection of animals does not have a constitutional value. The situation has not changed since 2002 when a constitutional goal of animal protection was introduced (Art. 20 a). In 2006, the Federal administrative Court considered that, the legislative provisions ruling ritual slaughter achieves an appropriate balance between freedom of religion and the constitutional aim of animal protection⁸.

A second solution seems less absolute: it is the solution adopted by the US Supreme Court. The Court was confronted with the matter from the ritual sacrifice perspective (it seems that, the issue of ritual slaughter has not generated decisions in constitutional litigation, probably because it is allowed by the law⁹). The precedent or the most important decision, named "Lukumi", was given in 1993¹⁰. Several ordinances from the city of Hialeah

⁶ VfGH 17/12/1998, B 3028/97; Available at www.icl-journal.com Vol 3 3/2009, 229, 231. M. Vašek, Available at

http://staatsrecht.univie.ac.at/fileadmin/user_upload/inst_staatsrecht/inst_staatsrecht_thienel/Vasek__Ritual_Slaughter.pdf. Here, an administrative authority convicted the applicant under the animal protection Act for having known and tolerated the ritual slaughter of 26 sheep on his farm. In the light of the Constitution, the law was interpreted as allowing ritual slaughter. As a result, the conviction delivered against the farmer was annulled by the constitutional Court.

⁷ BVerfG, 1783/99, January 15, 2002.

⁸ BVerwG 3 C 30/05, November 23, 2006.

⁹ See the Humane slaughter Act (P.L. 85-765; 7 U.S.C. 1901 et seq.).

¹⁰ USSC, June 11, 1993, Church of Lukumi Bbalu Aye, Inc. vs. City of Hialeah, 508 U 520.

were at stake. Those ordinances were adopted immediately after the setting up of a Santeria place of worship in the city (and they were clearly targeting the practice of ritual slaughter by its members)¹¹. In a decision mainly based on facts, the Supreme Court considered that, these ordinances were not neutral toward religion and that they targeted the Santeria Church.

The Court notes that, other practices inflicting pain to animals are not counteracted by local authorities, for example hunting with animals alive. It also underlines that, the considerations based on sanitary protection are not pertinent because “The city does not (...) prohibit hunters from bringing their kill to their houses” (544). As a result, the contested decisions were enacted not to protect animals but to counter a religion. The city prohibited a practice just because it was inspired by religious considerations. Therefore, the Court concluded that, there had been a violation of the freedom of religion¹². In this decision, the Court did not recognize a constitutional right to kill animals in accordance with a religious rite. It only censored discriminatory ordinances toward a religion¹³.

The third solution, which makes less concession to religion, corresponds to the European Court of Human Rights case law. It results from a decision of 2000, *Cha'are Shalom Ve Tsedek* against France¹⁴. The request had been made by a minority Jewish group (ultra-orthodox) who considered that, the majority group, having obtained from the authorities the agreement to practice ritual slaughter, were not slaughtering in a sufficiently traditional manner. The court rejected its request. It considered that, the European Convention on Human Rights does not recognize an individual right to practice ritual slaughter¹⁵. The Court of Strasbourg only recognizes a right to *consume* meat from animals slaughtered in accordance with a ritual proceeding. Since a believer may get such a meat, even by importing it, there is no interference with his freedom of religion. According to the

¹¹ Santeria (also known as Lukumi) is a syncretic religion of West African and Caribbean origin influenced by and syncretized with Roman Catholicism. This cult is essentially practiced in Cuba, Colombia and Venezuela.

¹² If the city's motivations had been other (i.e., if the city had been engaged in a sincere attempt of animal protection, in which the prohibition of ritual slaughter would have been only one aspect), then maybe those decisions would have passed the test of constitutionality.

¹³ A legislation or an administrative act that would target a religious practice as a laic one could thus be conform to the Constitution. See S. L. Doheny, *Free Exercise Does Not Protect Animal Sacrifice. The Misconception of Church of Lukumi Babalu Aye v. City of Hialeah and Constitutional Solutions for Stopping Animal Sacrifice*, JOURNAL OF ANIMAL LAW 121 (2006). Available at http://www.animallaw.info/articles/arus2journalanimallaw121.htm#_ftnref156.

¹⁴ ECHR, June 27, 2000, *Cha'are Shalom Ve Tsedek v. France*, n° 27417/95.

¹⁵ ECHR, June 27, 2000, *Cha'are Shalom Ve Tsedek v. France*, n° 27417/95, § 82: “the Court takes the view that the right to freedom of religion guaranteed by Article 9 of the Convention cannot extend to the right to take part in person in the performance of ritual slaughter (...)”.

Court, “there would be interference with the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it impossible for (believers) to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable”¹⁶. Thus the choice whether to forbid or not ritual slaughter seems to fall into the domestic margin of appreciation of each member State.

In any case, the general trend of the case law shows a strong protection of ritual slaughter and ritual sacrifice. A legislation or a regulation may be overruled if it prohibits the practice of ritual slaughter (Austria, Germany), if the prohibition targeted specifically a religious practice (USA) or if it prohibits the consumption of meat from animals slaughtered in accordance with a ritual proceeding (ECHR).

C. *Hunting with Hounds*

The question of a conflict, at the individual level, between tradition and protection, also appears in another area, namely hunting with hounds (which consists in chasing a wild animal with a pack of dogs till it is exhausted, and then encircling the animal; at that point, it is left to dogs or killed with a dagger or a spear). There again, a tradition is at stake¹⁷, and a tradition which provokes suffering for the hunted animal. It endures an important amount of stress throughout the chase and also the way it is killed is painful (whether the animal is left to the dogs or killed with a blade).

This is why, in the early 2000’s, Great Britain banned hunting with hounds¹⁸.

The compatibility of this ban with the European Convention on Human Rights was contested by hunters who invoked a breach of their traditions. In their opinion, this constituted a violation of their right to privacy. The applicants submitted more precisely that hunting with hounds was part of their *lifestyle* and, was protected as such by Article 8 of the convention.

¹⁶ ECHR, June 27, 2000, *Cha’are Shalom Ve Tsedek v. France*, n° 27417/95, § 80. This solution would condemn a prohibition to sell a meat coming from ritual slaughter. Such a proposal was made in Switzerland at the early 2000’s. A popular federal initiative was launched in 2002 “against ritual slaughter of animals without prior stunning” (March 12, 2002, FF 2002 2454). It aimed to prohibit the bleeding of animals without prior stunning, but also to forbid the import, commercialization and consumption of meat from animals that would not have been stunned. This initiative has not obtained the required number of signatures (October 26, 2003, FF 2003 5947).

¹⁷ An old tradition. Painting from the 15th century represents scenes of hunting with hounds (*see* *The Hunt in the Forest*, Paolo Uccello, 1460’s).

¹⁸ In Scotland, by the Protection of Wild Mammals Act adopted on February 13, 2002 and entered into force on August 1, 2002. In Britain and in Wales by the Hunting Act of 2004, applicable since February 18, 2005.

What was the answer of the Strasbourg's Court¹⁹? It said: "The Court accepts (...) that, the hunting of wild mammals with hounds had a long history in the United Kingdom; that hunting had developed its own traditions, rituals and culture; and, consequently, that it had become part of the fabric and heritage of those rural communities where it was practised". "for the individual applicants in the present cases, the Court accepts (...) that hunting formed a core part of their lives. It accepts therefore that, for various reasons, hunting came to assume a particular importance in the lives of these applicants". However, "the Court is unable to regard the hunting community as an ethnic minority (...). The inter-personal ties which are then created cannot be taken to be sufficiently strong as to create a discrete minority group. Finally, (...) the Court does not consider that, hunting amounts to a particular lifestyle which is so inextricably linked to the identity of those who practise it that to impose a ban on hunting would be to jeopardise the very essence of their identity".

It results from the two areas mentioned above (ritual slaughter and hunting with hounds) that, in the current state of the law, legislation protecting animals can be overruled in the name of tradition only if the fundamental rights contained in it are closely linked to the individual (ie are part of his religious identity or his personal identity). If so, the tradition of abuse can prevail over the legislation of protection.

Let's consider now the opposite hypothesis: when a public authority (legislative or administrative), concerned by tradition, decides that it should prevail over protection.

II. SECOND DIMENSION: THE LAW AUTHORIZES ANIMAL ABUSE ON THE BASIS OF A TRADITION

In the name of tradition, this authority admits restrictions to animal protection or animal welfare. On this point, we may observe that, the Treaty on the Functioning to the European Union specially provides a possibility to derogate to animal protection in the name of tradition²⁰. When such decision has been made, in the name of tradition, is it possible to challenge its legality (here again, by invoking superior norms)? The answer is different depending on whether or not a superior norm of animal protection exists.

¹⁹ ECHR November 24, 2009, *Friend and others v. The United Kingdom*, n° 16072/06.

²⁰ Article 13 TFUE: "In formulating and implementing, the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage".

A. *First Situation: A Superior Norm Protecting Animals Exists*

When such a norm exists, we observe that, animal abuse justified by tradition does not resist jurisdictional control.

They are materially incompatible with the norm of animal protection and, thus, the judge declares them invalid with no regard for the tradition that justified their enactment. All the examples that the author found come along these lines, whether the norm of protection is legislative, constitutional or international.

The first example, regarding opposition to a legislative norm, bring us to Israel. It is related to the question of foie gras, more exactly the force-feeding of geese and ducks to product foie gras. The question was submitted to the Israeli Supreme Court in 2001 by Noah, The Israeli Federation of Animal Protection Organizations. It was judged in 2003²¹. The Supreme Court had to determine whether force-feeding (*traditional* method) was contrary to the Animal Protection Act, which prohibits torture, cruelty and abuse to animals.

The issue at stake is the proportionality of the offence. Judges all agree that, force-feeding is torture, cruelty or abuse. But they had to determine whether the means were proportionate to the ends. This is where, in an underlying way, tradition interferes. Foie gras is presented as a luxury product. And this element is decisive to exclude the proportionality of the offence. To put it simply: force-feeding generates a *lot* of suffering for *little* pleasure. As a consequence, judges decided that, traditional force-feeding constitutes a violation of the Animal Protection Act. The regulation allowing force-feeding is thus declared void by the Supreme Court.

The second example relates to a contrariety with an international treaty. The norm of protection is the International Convention for the Regulation of Whaling (1946). This convention established an International Whaling Commission having the power to regulate whale hunting. In 1986, the Commission issued a moratorium banning whale hunting.

However, Japan keeps killing whales, invoking culture and tradition. This practice led Australia to file a lawsuit in the International Court of Justice. The Court handed down its judgement on March 31, 2014²².

As in the previous case, the conflict does not *legally* oppose tradition to protection. Indeed, since tradition does not constitute a ground admitted by the Convention to derogate to the ban on whale hunting, Japan put forward

²¹ Israeli Supreme Court, August 13, 2003, Noah vs. The Attorney General, H CJ n° 9232/01, IsrLR 512.

²² ICJ, March 31, 2014, Whaling in the Antarctic (Australia v. Japan).

another argument, constituting the only ground legally admitted, namely the pursuit of scientific research²³.

The International Court of Justice examined very carefully the arguments given by Japan in order to protect its programme of research on whales (called JARPA II²⁴). And, over dozens of pages, the Court refuted every element put forward by Japan, showing the incoherence of the programme: no limits of time are fixed; it is based exclusively on lethal method (ie, allegedly to learn about whales, they are killed when they should be observed in their natural environment); no real scientific production has come out so far; at last the programme does not cooperate with other national and international scientific programmes.

Consequently, the Court considers that, taken as a whole, JARPA II involves activities that can broadly be characterized as scientific research, but that “the evidence does not establish that the programme’s design and implementation are reasonable in relation to achieving its stated objectives”. The Court concludes that, the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not “for purposes of scientific research” pursuant.

Under the cover of scientific research, Japan actually pursues a commercial goal. Whale hunting, perpetrated exclusively in the name of tradition, is consequently prohibited, said the Court.

The third example refers to a violation of a norm of protection of constitutional rank. It brings us to Brazil. A very interesting decision was granted on this point on the basis of Article 225 of the Constitution, which prohibits cruelty to animals. This decision is doubly interesting for our subject. First, as the previous cases mentioned, it concerns a practice justified by tradition. Secondly (and it distinguishes this decision from the previous ones), it puts at stake *legally*, a conflict between two norms of equal value: a constitutional norm of protection on the one hand, and a

²³ Article VIII § 1: “Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted”. A second ground is also admitted by the International Whaling Commission regarding the “Aboriginal Subsistence Whaling”. This derogation is not justified by the defence of culture, in anyway not principally by it. As the name suggests, it aims above all to permit the survival of some populations (located in Greenland, Siberia and Alaska) by allowing them to kill whales to cover their nutritional needs in an inhospitable environment.

²⁴ Japanese Whale Research Program under Special Permit in the Antarctic.

constitutional norm of tradition on the other hand.

This decision, granted in 1997, concerns “*farra do boi*”, that we can translate as “Festival of the ox”²⁵. It’s a feast (we should rather say an “event”) which takes place in the state of Santa Catarina, in the south of Brazil. Animals are literally tortured, then killed, by villagers²⁶.

In 1997, a claim was registered against the state of Santa Catarina. The Federal Supreme Tribunal had to arbitrate between protection and tradition: between Article 225 of the Constitution, which prohibits acts of cruelty, and Article 215, which protects the expression of cultural rights²⁷. The Tribunal declared that, the state’s obligation to guarantee the full exercise of cultural rights, by encouraging the promotion and the diffusion of traditional events, does not exempt the state from also respecting Article 225 of the federal Constitution. As a result, the tribunal judged *farra do boi* as unconstitutional.

Similarly, a legislation of the state of Rio de Janeiro, which authorized cockfighting, was quashed in 2011 for violation of Article 225 of the Constitution²⁸. The federal Tribunal considered that, cockfighting does not represent a cultural event and, for this reason, is not protected by the constitutional provisions related to the protection of culture.

In light of these examples, we see that, legislation or regulations allowing cruel treatment of an animal in the name of tradition does not resist a superior norm of animal protection (even in the hypothesis whereby culture and tradition have a constitutional guarantee)²⁹.

Invoking a superior norm of animal protection is a powerful argument against animal abuses established or justified (at a lower legal value) by tradition.

What happens when such a norm does not exist? Is there a way of challenging a provision which, by derogating to a text on animal protection, admits cruel treatment to be imposed to an animal?

²⁵ STF RE, June 3, 1997, n° 153.531-8, DJU October 13, 1998.

²⁶ For days before *Farra do Boi* starts, oxen are starved; food and water are placed just out of the animals’ reach. The days-long festival begins when drunken villagers release the oxen and chase, punch, kick, and attack the animals with sticks, knives, whips, stones, bamboo lances, ropes, and anything else they can get their hands on. The torture escalates as the festival drags on. Eyes are rubbed with hot pepper and then gouged out; limbs are broken and tails are snapped and hacked off; in a number of cases, gasoline is poured on these animals and people set them aflame. Some animals escape into the sea and drown. Any ox who survives the torment are eventually killed, their flesh divided among the participants.

²⁷ “The State shall protect the expressions of popular, Indian and Afro-Brazilian cultures, as well as those of other groups participating in the national civilization process”.

²⁸ STF, June 26, ADI 1.856 Rio de Janeiro.

²⁹ See also, in India: Supreme Court, May 7, 2014, *Animal Welfare Board of India Vs. A. Nagaraja & Ors*, n° 5388 of 2014 & ors.

B. Absence of Superior Norm: The Question of a Differentiation

Here is the hypothesis: a legislative provision prohibiting in general animal cruelty exists, but, by derogation, allows some of them in the name of tradition.

Can we criticize the very principle of a derogation justified by tradition? Is this ground of differentiation admissible? Or, in legal terms, is it compatible with the principle of equality?

The French constitutional council decided, in 2012, that it *is* compatible with equality³⁰. Its decision was about bullfighting, a practice prohibited by law as constituting an act of cruelty, but a practice also allowed by law in the localities where a tradition of bullfighting can be established.

The roots of this exception are very old. During one entire century, in the name of tradition, the regions of bullfighting tradition have been rebelling against the law of 1850 prohibiting mistreatments on animals and refused to apply this legislation to bullfight.

To take into account this tradition, a century later, in 1951, the legislator, yielding to this situation, introduced derogation.

The constitutional council decided that, this legislative justification, based on *tradition*, was relevant to validate the exception provided for bullfighting.

This solution shows that, without a superior norm of protection, it is difficult to challenge the choice of the legislator to favor tradition over protection.

CONCLUSION

In the end, what comes out of this overview? What do superior principles of our legal orders, reveal of the relationship between tradition and protection in animal law? First, they reveal that, religious tradition benefits from an extremely high guarantee and is likely to call into question legislations prescribing prior stunning of animals. Secondly, they reveal that, beyond the question of ritual slaughter, the superior norms of protection tend to prevail on tradition, even when tradition has a legal value equivalent to the norm of protection, as is the case (for example) in Brazil.

To close this study, it should be noted the unity or in any case the link between the two dimensions of the topic (the tradition of animal abuse prohibited by law and the tradition of animal abuse accepted by law). To

³⁰ CC, dec. n° 2012-271 QPC, September 21, 2012.

underline this link, the author has chosen a telling example.

In May, 2013, a bill aiming at prohibiting the *sale* of foie gras was discussed before the Knesset (the Israeli parliament) (its production in Israel being forbidden since the 2003 decision previously mentioned).

What is interesting, is the reaction provoked by this initiative outside Israel. The Israel newspapers reported that, in France, a high representative of the Jewish religion expressed concerns about the bill. It addressed a letter to the Israeli Minister of agriculture, asserting that, the Israeli law prohibiting the sale of foie gras could jeopardize the practice of ritual slaughter in Europe. Actually, Israel does establish, through a law, that a tradition (a culinary tradition) cannot justify animal abuses. According to him, this law could be used in Europe (by animal activists) to argue that, another tradition (a religious tradition) cannot justify animal abuses too. If tradition is no longer a justification in one case, how could it be in another case?

Such a reaction reveals the link between both dimensions. Each new text favoring animal protection over traditions weakens the admissibility of tradition as a justification of the infringement upon animal rights.

A FEW CRITICAL REMARKS ON ART. 25/3/F OF THE ROME STATUTE

Igor Vuletić*

In this paper, the author discusses some possible future perspectives of Art. 25/3/f of the Rome Statute. This article regulates two core institutes of traditional substantial criminal law—an attempt and a voluntary abandonment of an attempt. This is considered to be a huge step in codification of general part of international criminal law since statutes of ad hoc tribunal did not have any such or similar provisions. Other authors in criminal law literature have already argued a lot about the interpretation of specific elements of this provision. Bearing that in mind, in this research, the author discusses the purpose or ratio legis of an attempt and abandonment of an attempt in the Rome Statute. At the same time, the focus is on the quest for changes and modifications of this provision de lege ferenda.

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INTRODUCTION

The Article 25/3/f of the Rome Statute regulates two of the core-institutes of substantive criminal law: attempt and voluntary abandonment of an attempt. The Statutes of *ad hoc* tribunals for former Yugoslavia and Ruanda do not contain any such or similar provisions. Only indirectly, some of the provisions regulating the crime of genocide contain several modalities of conduct and some of these modalities could be considered as criminal attempt or even as preparatory acts.¹

The Rome Statute, however, for the first time in the history of international criminal law regulates these institutes in a separate provision, similar to the majority of the criminal codes in the countries of Continental Europe.

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¹ See Art. 4 p. 3 (d) of the ICTY Statute and Art. 2 (d) of the ICTR Statute.

The structure of Art. 25/3/f has already been a subject of many scholarly debates. Several authors have given their comments on the essential elements of an attempt.² The focus of these discussions was mainly on the distinction between preparatory acts and an attempt, and the beginning of an attempt. Voluntary abandonment of an attempt, on the other hand, has been considerably neglected by the authors. Bearing this in mind, in this paper, we will try to contribute to these discussions by introducing a novelty, not only about an attempt but also about voluntary abandonment of an attempt.

The structure of the paper is the following: The first paragraph includes our remarks on legislative concept of criminal attempt in the Rome Statute. In the second paragraph, we deal with the problem of voluntary abandonment from criminal attempt in the Rome Statute. Finally, we will give our own suggestion of a possible model of future change of Art. 25/3/f. Our paper addresses primarily the creators of the Rome Statute. Nevertheless, we believe that, some of the given remarks could be useful to the judges of the International Criminal Court (hereinafter: ICC) as interpretative guidelines of Art. 25/3/f of the Rome Statute.

I. REMARKS ON THE ATTEMPT: MOVING TOWARDS A MORE COMBINED LEGISLATIVE APPROACH?

As already pointed out in the introduction, international criminal law in the period before the Rome Statute, did not regulate criminal attempt in a separate provision. However, in literature, there was a consensus that the law of attempts was a part of customary international criminal law and that, as such, it represented one of general principles of international criminal law.³ Although the ICTY prosecutors showed certain unwillingness to prosecute attempts to commit international crimes, there were many criminal procedures after the World War II which proved that, attempt is the part of international customary law.⁴ In that sense, Art. 25/3/f did not bring any revolutionary change into international criminal law. Instead, it only codified what was already recognized before in practice of *ad hoc* tribunals.

² For detailed analysis of Art. 25/3/f see f. e. KAI AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS, (Berlin: Duncker & Humblot 2002), § 20.

³ See GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 626 (2th ed., T.M.C. Asser Press 2009).

⁴ For details see ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON, & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 383 (Cambridge: Cambridge University Press 2010); see also HELMUT SATZGER, INTERNATIONAL AND EUROPEAN CRIMINAL LAW 244-245 (Baden-Baden: C. H. Beck-Hart-Nomos, 2012).

Prior to the regulation of a certain institute of criminal law, every legislator must define the purpose or *ratio legis* of such institute. This is very important because only a clear definition of *ratio legis* can set guidelines for interpretation of the concrete provision. This means that, the definition of *ratio legis* has not only theoretical, but also practical significance. The question of *ratio legis* is basically a question of *why* something needs to be regulated.

Now, we will put this question within the context of Art. 25/3/f of the Rome Statute. In the official explanation given by the International Law Commission (hereinafter: ILC), the attempt in the Statute is punishable due to two main reasons. First, it is considered that, there is “a high degree of culpability” attached to a perpetrator who attempted to commit a crime (the so-called *subjective* approach). Second, “the fact that an individual has taken a significant step towards the completion ... entails a threat to international peace and security because of the very serious nature of these crimes” (the so-called *objective* approach). This suggests that, ILC was guided by subjective-objective approach, bearing in mind the specific nature and seriousness of these crimes and the need for prevention at the earliest possible stage.⁵ But is this really the case? This brings us to our first working hypothesis and that is to find out which approach is truly accepted in attempt provision in the Rome Statute.

In the theory of criminal law, there are three possible approaches towards interpretation of *ratio legis* of criminal attempt: subjective, objective and subjective-objective. These approaches have been discussed in details in comparative literature. In this paper, we will give only a brief overview of these approaches.

The subjective approach emphasises the mental element of the attempt. To justify punishment for the attempt, subjective approach points out that, the perpetrator who attempted to commit the crime has the same *mens rea* (in Continental legal terminology that would be *intent* or *dolus*) as the one who actually managed to complete the crime. Whoever shot and missed obviously had the same intent to kill the victim as the one who shot and killed. Consequently, the attempt should be punished same as completed crime. Besides, the so-called impossible attempts (Ger. *der untaugliche Versuch*), such as shooting with an empty gun or at an already dead body without knowledge thereof, should be punished same as every other attempt.

⁵ For details of the ILC’s opinion and comment see Albin Eser, *Individual Criminal Responsibility (Art. 25 Rome Statute)*, *Transnationales Strafrecht/Transnational Criminal Law, Gesammelte Beiträge/Collected Publications* 463-464 (Albin Eser ed., Berlin: BWV—Berliner Wissenschafts-Verlag 2011).

The opposite approach is objective approach. It sees the essence of the attempt in objective element or *actus reus*. The attempt is punishable because the object (the victim) was endangered. However, one must admit that, such endangerment is significantly less than if the crime was completed. Consequently, in case of inchoate crimes, the court should always mitigate the sentence and the impossible attempt should not be punishable at all.

Finally, the third approach combines the two opposites and sees the purpose of the attempt in criminal will or *mens rea* that was carried out by endangerment of the object. Accordingly, this approach also favours mitigation of sentence (objective approach) but only as an option for the judge, not as a mandatory obligation (subjective approach). Besides, this approach recognizes the effect of impossible attempt (objective approach) but it also leaves it to the court to decide whether it will draw any privileges to the perpetrator of the impossible attempt (subjective approach). This approach is considered to be the modern one in criminal law.⁶ Further in this paper, we will adopt this approach and our suggestions *de lege ferenda* will be modelled on it.

Despite an official explanation given by the ILC mentioned above, we can object that, the text of Art. 25/3/f is founded on subjective-objective theory. That is easy to notice if one considers that, the Rome Statute does not predict the possibility of mitigation of a sentence, at least not *expressis verbis*. Moreover, it does not even regulate the institute of impossible attempt. These two features are two main requirements of the objective part of mixed subjective-objective approach. Consequently, we can give an answer to our first working hypothesis: Art. 25/3/f favours only the subjective approach, which is today considered to be obsolete and inadequate.⁷

It seems that, the subjective approach is also favoured in the jurisprudence of the ICC. In its Decision on the Confirmation of the Charges in *Katanga* case, Pre-Trial chamber I emphasizes the subjective element of the attempt by pointing to the following:

“The majority of the Chamber endorses the doctrine that, the attempt to commit a crime is a crime in which the objective elements are incomplete while the subjective elements are complete. Therefore, the *dolus* that embodies the attempt is the same as the one that embodies the consummated act.”⁸

⁶ For more about all three approaches see f. e. Claus Roxin, *Strafrecht. Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat*, 9-58 (München: Verlag C. H. Beck 2003), § 29.

⁷ See *supra* note 3, 32-45.

⁸ *Katanga, et al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, September 30, 2008, paras. 458-460.*

After analyses of *ratio legis* of the attempt in the Rome Statute, we are able to give our own remarks on how to improve this provision *de lege ferenda*. In our opinion, instead of favouring the subjective approach, the Rome Statute should consequently follow the idea given by the ILC and accept the mixed approach. This would certainly harmonize Art. 25/3/f in accordance with modern criminal codes in most countries of Continental Europe. This could be accomplished by introducing the *expressis verbis* possibility of mitigation of the sentence for the attempt as well as introducing the provision of impossible attempt. The possibility of mitigation of punishment is necessary if one wants to distinguish attempted from completed act. *A contrario* if there is no privilege for the attempt, it is not possible to estimate the gravity of these two stages of criminal offence. That is the main purpose of attempt provision in the general part.

Impossible attempt is a very important institute in criminal law recognized not only in Continental Europe, but also in Anglo-American law. *Fletcher* explains this legal figure on the example of the perpetrator who thinks that, a stump is the man he wants to kill and shoots at it or a perpetrator who puts sugar in his victim's coffee and he mistakenly believes that, the sugar is poison.⁹ In international crimes, impossible attempt would be possible in a case where for example a soldier would shoot a civilian who was already dead at the time of shooting.

Impossible attempt is important if one wants to implement a mixed, subjective-objective legislative model. As we have already explained, in cases of impossible attempt there is sufficient *mens rea*, but insufficient *actus reus*. If these two elements have the same gravity, the legislator has no other option but to make the principle distinction between possible and impossible attempt. There are two possible solutions: To regulate this situation as a ground for excluding criminal liability or only as a ground for mitigation or acquittal from punishment. Other solution is accepted in every modern European criminal code today. Of course, these legal effects are possible only if the perpetrator has acted by a huge lack of understanding that he cannot complete the act.

II. REMARKS ON THE ABANDONMENT OF CRIMINAL ATTEMPT: BROADENING THE SCOPE OF ABANDONMENT?

Voluntary abandonment from criminal attempt represents one of the core-institutes of general part of substantive criminal law. Article 25/3/f

⁹ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 146 (New York-Oxford: Oxford University Press 2000).

regulates this institute for the first time in the history of international criminal law.¹⁰ It regulates a situation in which the perpetrator completely voluntarily and without any force gives up his conduct in the attempt phase, although he is well aware that, there are no objective factors which could stop him from completing the act. His motives for such acting can be different: Remorse or pity, lack of interest, fear of consequences if he gets discovered later etc. The motive is not important and what is important is that, the perpetrator acts voluntarily and that his actions are not motivated by any obstacles which could prevent him from completing the act. Probably the best theory that enables the court to estimate when the abandonment is voluntary is the one developed by *Roxin*, who suggests the adoption of the «average perpetrator's logic» criterion. In that sense, the abandonment is voluntary only if it is not logical from the perspective of an «average» perpetrator. For example, it is not logical that, the rapist abandons the attempted rape only due to remorse towards the victim if he knows that, he cannot be discovered in any way because there are no witnesses and the victim has not recognised him.¹¹

Situations of voluntary abandonment from criminal attempt are quite rare because it is not often that, a perpetrator who acts with intent suddenly and without any objective reason changes his mind and even takes an effort to prevent the consequences of attempted criminal offence. Considering that, it is no wonder that, there has not been a single case of voluntary abandonment before the ICC. However, this institute is regulated in almost every Continental European criminal code and even some authors from England and Wales claim that, the defence of voluntary abandonment should be considered as part of the *common law*.¹² In English literature, there are only a few decisions mentioning which courts, although they did not recognize abandonment as a defence, have mitigated the punishment in such cases.¹³

¹⁰ Abandonment provision was implemented as a result of proposal of Japanese delegation. *See more* in WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT* 439-440 (Oxford: Oxford University Press 2010).

¹¹ Claus Roxin, *Strafrecht. Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat*, 383-386 (München: Verlag C. H. Beck 2003), § 30.

¹² *See* R. A. DUFF, *CRIMINAL ATTEMPTS* 66-75 (Oxford: Clarendon Press 1996); *see also* A. P. Simester, J. R. Spencer, G. R. Sullivan, & C. J. Virgo, *Simester and Sullivan's Criminal Law, Theory and Doctrine*, 342-343 (4th ed., Oxford and Portland: Hart Publishing 2010). For opposite *see* f. e. J. C. SMITH, & BRIAN HOGAN, *CRIMINAL LAW* 299-300 (6th ed., London-Edinburgh: Butterworths 1988); and WILLIAM WILSON, *CRIMINAL LAW: DOCTRINE AND THEORY* 543 (2th ed., Harlow: Pearson Education Limited, 2003).

¹³ *See* Mathias Brockhaus, *Die Strafrechtliche Dogmatik von Vorbereitung, Versuch und Rücktritt im europäischen Vergleich, Unter Einbeziehung der Aktuellen Entwicklungen zur 'Europäisierung' des Strafrechts*, 386-387 (Hamburg: Verlag dr. Kovač 2006).

A comparative overview shows that, different systems give voluntary abandonment more or less gravity. There are systems such as for example the German, Austrian, Swiss, French, Spanish or Russian systems, which regulate voluntary abandonment from criminal attempt as grounds for excluding criminal liability. On the other hand, some legislators have decided to leave criminal liability untouched and to solve the problem in the sphere of sentencing. Such systems usually predict a possibility of mitigating the punishment or, in some cases, releasing from punishment, but criminal liability remains. The examples of such systems in Europe exist in the Croatian, Serbian, Slovenian, Macedonian and Hungarian criminal codes. However, these systems are in minority and they are often characterised by the lack of systematic theoretical debate about voluntary abandonment in their criminal law literature.¹⁴

The leading theory about *ratio legis* of abandonment privilege in modern literature is the so-called «theory of the purpose of punishing» (Germ. *Strafzwecktheorie*), developed by Claus Roxin. This theory has the greatest number of followers in modern literature. The basic idea of this theory is that, in case of the perpetrator who has voluntarily abandoned his efforts to finish the attempt, there is no point to insist on conviction and punishment. Namely, criminal law conviction and punishment are based on the need for general and special prevention. That is the main justification of punishment and also of the criminal law system. If that justification fails, there is no ground for further criminal liability and any conviction or punishment will not be legitimate. Although this concept gives a relatively good explanation of the privilege, it is important to notice that, it is based on Roxin's specific concept of criminal conduct, according to which one of the constitutive elements of criminal conduct is the so-called «necessity of preventive acting».¹⁵

The creators of the Rome Statute obviously considered voluntary abandonment as an important legal institute since they regulated it as one of the grounds for exclusion of criminal liability. As already mentioned above, there are systems that regulate abandonment only in sentencing area, as a ground for mitigation or release from punishment. Legal regulation of

¹⁴ On comparative overview of voluntary abandonment in European legal systems *see ibid.* Details about the Serbian system can be found in Igor Vuletić, *Legal Regulation of Voluntary Abandonment from Criminal Attempt—German Solutions and Serbian Potentials*, INTRODUCTION TO GERMAN LAW 349-372 (Mirko Vasiljević & Vladimir Čolović eds., Belgrade: Institute of Comparative Law 2011).

¹⁵ *See Strafrecht. Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat*, 7 (München: Verlag C. H. Beck 2003), § 30. This theory is accepted, not only by the majority of German authors, but also by authors outside Germany. *See f. e.* Keiichi Yamanaka, *Betrachtungen über den Strafbefreiungsgrund des Rücktritts vom Versuch in Bernd Schünemann/Claus Roxin, Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* 787 (Berlin-New York: Walter de Gruyter 2001).

voluntary abandonment can be based on two main types of legislative approaches.

The first approach—we will name it *subjective*—emphasises the subjective component: voluntariness. The main characteristic of such a system is legal possibility of the so-called non-causal abandonment (see below). The second approach—we will name it *combined* or *subjective-objective*—gives equal value and gravity to both, subjective (voluntariness) and objective (abandoning the effort to complete the crime and/or preventing the consequence) components. These systems do not recognize the possibility of non-causal abandonment. Now, we can draw up the second working hypothesis in this paper: To define which type of legislative approach is implemented in the Rome Statute.

The creators of the Rome Statute have chosen quite an unusual model of “double” regulation of voluntary abandonment of criminal attempt. The first part of this regulation is in the second part of the first sentence of Art. 25/3/f.¹⁶ This is the so-called *implicit* or *negative* regulation of voluntary abandonment. Implicit definition has its role model in Art. 121-5 of the French *Code Pénal*. The second part of the regulation is the so-called *explicit* or *positive* model, which is contained in the second sentence of Art. 25/3/f.¹⁷ This provision was introduced at the insistence of Japan, Argentina and Germany, who claimed that, voluntary abandonment is one of the traditional institutes of criminal law that exists in most of developed criminal law systems in the world. Explicit definition is primarily based on the modified Siracusa Draft of 1996 and § 5.01/4 of Model Penal Code (hereinafter: MPC).¹⁸

This kind of double regulation of voluntary abandonment of criminal attempt is very atypical. Some authors claim that, it is an editorial error.¹⁹ The comparative overview for European countries shows dominance of explicit or positive regulation,²⁰ while negative regulation is accepted only

¹⁶ Art. 25/3/f., first sentence: “Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions.”

¹⁷ Art. 25/3/f., second sentence: “... a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.”

¹⁸ Katrin Schubert, *Der Versuch—Überlegungen zur Rechtsvergleichung und Harmonisierung*, 243 (Berlin: Duncker & Humblot 2005).

¹⁹ Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts*, 755 (Berlin: Duncker & Humblot 2002).

²⁰ Positive regulation is, for example, accepted in criminal codes of Germany, Switzerland, Spain, Austria, Russia, Croatia, Serbia and Denmark. See Matthias Brockhaus, *Die Strafrechtliche Dogmatik von Vorbereitung, Versuch und Rücktritt im Europäischen Vergleich, Unter Einbeziehung der Aktuellen Entwicklungen zur «Europäisierung» des Strefrechts*, 139-275, 399-415 (Hamburg: Verlag Dr. Kovač 2006).

in the French, Belgian and Luxemburg law and it is considered to be outdated.²¹ Negative regulation assumes that, criminal attempt is constituted of one positive element—*beginning of an attempt*—and one negative element—*missing of voluntary abandonment*.

We think that, negative regulation in the second part of the first sentence should be deleted. It is unnecessary and it only causes confusion, especially in terms of legal effect of voluntary abandonment on accomplices. Namely, the Rome Statute regulates voluntary abandonment as one of the grounds for excluding criminal liability («*shall not be liable for punishment*»). If one interprets voluntary abandonment as a negative element of an attempt, this means that, abandonment excludes the mere existence of attempted criminal offence. If that is the case, then the consequence is that, due to the accessoriness principle, not only the perpetrator who abandoned, but also the accomplices who did not abandon or did not even want to abandon, must also be excluded from criminal liability.²² This is a paradox and untenable solution. If A shoots at B and then changes his mind and calls an ambulance and saves his life, there is no reason to privilege C who was A's aider or abettor (because he gave him a gun) and did not have anything to do with A's abandonment. To avoid such interpretations, we suggest deleting the second part of the first sentence of Art. 25/3/f and keeping only the positive formulation from the second sentence.

Furthermore, positive regulation from the Statute is only partially successful, because it neither regulates non-causal abandonment nor says anything about the abandonment of the accomplices. Non-causal abandonment is a situation where a person tries to abandon the effort to commit the crime but somebody else (or something else) prevents the consequence. For example, A shoots at B, leaves the place of crime but then changes his mind and returns to help B. When he arrives, he sees that, someone else has already called an ambulance and that B has been medically treated. In this case, the damage is prevented, only not by the perpetrator's contribution but by someone else's contribution. These cases are recognized as cases of voluntary abandonment in several European legal systems.²³ Moreover, cases of non-causal abandonment are also mentioned in Anglo-American literature. In his book, *Criminal Attempts* Duff discusses

²¹ See *supra* note 8, 193-196, 198-199.

²² Same Vlado Kambovski, *Dobrovoljni Odustanak od Izvršenja Krivičnog Djela*, 45 (Skoplje: Faculty of Law 1974).

²³ See for example § 24/1 of the German Criminal Code, § 16/2 of the Austrian Criminal Code, Art. 23/3 of the Swiss Criminal Code and Art. 35/2 of the Croatian Criminal Code.

an example of “Mr. Grant” who puts the bomb into an airplane and sets the timer so that the bomb explodes in the air. Then he changes his mind and tries to disable the bomb but someone else had already done it or the bomb had exploded on the ground while the airplane was still empty. Duff points out that, these situations have to be taken into consideration by the court.²⁴

If we take the above mentioned elements of voluntary abandonment into consideration, we can answer our working hypothesis: Art. 25/3/f accepts a mixed approach. This is easy to conclude if one bears in mind that, the Statute does not regulate the possibility of non-causal abandonment. Moreover, we can notice that, the Statute allows abandonment in a very narrow scope because it does not regulate the possibility of abandonment for accomplices.

We approve of the legislative approach, which favours non-causal abandonment because we believe that, the emphasis should be on a subjective component—*voluntariness* of the abandonment. Voluntariness demonstrates rejection of original criminal intent and justifies the privilege for the perpetrator. Only the perpetrator who voluntarily rejected his original intent (*dolus*) to commit the crime can be excluded from criminal liability. From the objective point of view, it is sufficient that consequence was prevented. Non-causal abandonment should, therefore, be a part of future abandonment provision in the Rome Statute.

The abandonment of accomplices raises specific issues, which is why it should also be regulated in the Statute. All the above mentioned systems that accept the positive approach at the same time predict a provision regulating this question. The most common legislative solution is to predict that, the accomplice who wants to abandon, should prevent others from finishing the attempt. Such provisions can be found for example in the German, Austrian, Swiss, Croatian and Serbian criminal codes. The German law goes even further when it recognizes the possibility of non-causal abandonment of accomplices. That is the case in which, for example, A wants to abandon armed robbery, so he leaves the crime scene and calls the police but then finds out that somebody has already called the police and that the police has arrived and prevented the rest of the robbers from escaping (see § 24/2 of the German Criminal Code). In our opinion, the best solution is to add another sentence in Art. 25/3/f regulating abandonment of accomplices. We suggest to use the German provision as a role-model and to allow the possibility of non-causal abandonment of accomplices. This is consistent to our opinion that voluntary abandonment is characterised by its

²⁴ R. A. DUFF, *CRIMINAL ATTEMPTS* 66-75 (Oxford: Clarendon Press 1996).

specific subjective nature—rejection of original criminal intent.

III. DRAFT OF THE FUTURE ART. 25/3/F

In order to give our own original contribution to this debate, we will offer our own draft of the future structure of Art. 25/3/f of the Rome Statute. We will then explain on each of the suggested changes. According to our idea, the future provision of Art. 25/3/f of the Rome Statute should be as follows:

(1) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur. An attempt may be punished more leniently than the completed act. If the perpetrator, due to huge lack of understanding, fails to recognize that, the attempt could not possibly lead to completion due to the nature of the object on which, or the means with which it was to be committed, the court may withhold punishment or in its own discretion mitigate the punishment;

(2) However, a person who voluntarily abandons the effort to commit the crime or otherwise prevents the completion of the crime or puts an effort to prevent them and the crime does not occur for other reasons, shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose. An accomplice who voluntarily prevents others from completing the crime or puts an effort to prevent them, and the crime does not occur for other reasons, shall not be made liable.

The suggested provision has two subparagraphs. We think they are necessary if one wants to clearly distinguish between these two institutes of criminal law. The attempt is defined in subparagraph (I) in the same way as before only without the abandonment as its negative element. The second sentence predicts the possibility of mitigation of punishment as a potential privilege to the perpetrator. The third sentence introduces the institute of impossible attempt into the Rome Statute due to a huge lack of understanding and it is identical to § 23/3 of the German Criminal Code (Germ. *Strafgesetzbuch*, hereinafter: StGB). Such structure of this article is consistent with subjective—objective approach as proclaimed by the ILC.

Abandonment is regulated in subparagraph (II) and based mostly on § 24 of StGB. The same as in StGB, the new provision predicts the possibility of non-causal voluntary abandonment for a single perpetrator as well as for the accomplices. It is emphasized that, the abandonment must be taken voluntarily. These changes express the acceptance of subjective approach towards the regulation of this core institute of criminal law. This solution

follows modern trends in criminal law.

CONCLUSION

In this paper, we have given a brief overview of Art. 25/3/f of the Rome Statute. This article regulates the institutes of attempt and voluntary abandonment of an attempt. The mere existence of such a provision represents a huge progress in international criminal law because earlier statutes of *ad hoc* tribunals did not contain any similar provisions.

However, we think that, there is a lot of space for further progress of international criminal law in this area. We strongly believe that, the creators of the Statute did not use all potentials of these two institutes.

As for regulation of criminal attempt, we think that, the ideas of modern subjective-objective approach have not been completely adopted in the Statute. It is still necessary to introduce possible mitigation of punishment and to regulate impossible attempt. We think that, a good legislative model for these changes can be found in § 23 of the German StGB.

As for voluntary abandonment from criminal attempt, we think that, double (positive and negative) regulation is confusing and unnecessary. Negative regulation is outdated and it has been abandoned in most of developed European criminal law systems. Therefore we believe that, the Rome Statute should keep only positive regulation. Moreover, it should expand the scope of this institute by introducing the possibility of non-causal abandonment and by regulating the abandonment of the accomplices. One must not forget that, voluntary abandonment represents positive and socially acceptable behaviour because it demonstrates rejection of criminal attempt. That is why the emphasis should be on the subjective component—voluntariness of the abandonment. In this sense, we think that, the good legislative model for these changes can be found in § 24 of the German StGB.

We advocate German legal solutions mostly because legal regulation of the attempt and voluntary abandonment has been a great challenge for German authors for the past forty years. In German literature, there are many monographs, dissertations and numerous articles on almost every possible problem aspect of these two institutes. Some of the most famous names of the German criminal law theory have written a lot about this issue. The result thereof is that, German literature and jurisprudence can be used also for the interpretation of the Rome Statute in this field of criminal law.

STATE AS A SUBJECT OF INTERNATIONAL LAW

Aneta Stojanovska-Stefanova & Drasko Atanasoski***

State boundaries are endpoints to where sovereignty lies within a country. The authorities within it regulate the relations inside and the nature of its international positions. The highest authority, which does not recognize any other form of higher power is sovereignty. Considering that the law, especially the international, is an active matter open to interpretation, although the basic features of a country are clear, yet there are two types of states divided to a de jure- existing under law and de facto-existing in reality, based on the matter whether and which of the characteristics of statehood they own.

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INTRODUCTION

The state as a subject of International law as a general notion is defined through its four basic characteristics:

- Population;
- Territory;
- Government and;
- Sovereignty.

The entirety of all citizens living within a certain territory, separated from other territories, which are subordinate to the government and have an established relationship with the state through legal connection-citizenship is called population.

The territory is an area separated from other areas by border, where a certain population lives and where a certain authority extends.

State boundaries are endpoints up until the sovereignty of a state

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extends.

The authority within a country regulates the relations in the state and the nature of its international positions.

The highest authority, which does not recognize any other form of higher power is sovereignty¹.

The characteristics of a modern state, the way it is recognized nowadays are shaped by Peace Treaty of Westphalia², according to which the state is constituted by three main features, territory, population and sovereignty, i.e., absolute power for governing over them³. In order to have a better understanding of the process of recognition and various specifics that have occurred throughout history, the attention must be paid to the terms *sovereignty* and *statehood* first, and thereto sovereignty refers to how a state acquires it as well, and later on the manners through which countries recognize the existence of another state⁴.

I. CONCEPTUAL DEFINITION OF SOVEREIGNTY

Sovereignty denotes supreme and independent authority over certain territory and its *population*. This type of interpretation which is a part of a broader definition regarding the notion of state, plays a significant role in each aspect of the international relations and international law because it indicates that, no one else, referring to another state, has no right to impose and implement laws on the territory of a sovereign state. According to which, the law of using force aiming law enforcement depends solely on the governing organ, meaning the Government, the Presidents or a divided sovereignty between both institutions. Hence, if a state acquires sovereignty recognized by other states, they acknowledge its governing over a certain territory and population and withdraw the possibility to interfere the state internal matters they have recognized.

Sovereignty is generally divided into:

- Internal and;
- External.

Internal sovereignty is determined by the state organ with the authority

¹ WILLIAMS, GOLDSTEIN, & SCHFRITZ, CLASSIC READINGS OF INTERNATIONAL RELATIONS 82 (Belmond, California: Wadsworth Publishing Company).

² PEACE OF WESTPHALIA, ENCYCLOPEDIA BRITANNICA. Available at <http://www.britannica.com> (last visited July, 2013).

³ *The Crisis of the Sovereign State and the "Privatization" of Defense and Foreign Affairs* (Heritage Foundation). Available at <http://www.heritage.org> (last visited April, 2012).

⁴ DIPLOMATIC RECOGNITION (Wikipedia) Available at <http://www.wikipedia.org> (last visited July, 2013).

for exercising the power, while external sovereignty depict the role of the state as a sole in the international community, and the attitude towards the state as to the bearer of rights and obligations in relation to other states in international law.

Considering the significance of the term sovereignty, the importance and role of the decision whether a country will be internationally recognized or not is becoming clear, as well as the necessity of each territory and people aspiring to become state to provide the conditions for acquiring sovereignty.

II. FIVE MANNERS TO ACQUIRE SOVEREIGNTY

Sovereignty is generally acquired in five manners, out of which four are being recognized by the international law⁵.

The first manner is through settling to “no man’s land” or land on which no one had previously claimed rights for sovereignty, or if it was under possession previously and this possessor has withdrew their sovereign rights over the country, thus removing the obstacles for a new or another country to realize its sovereignty over that territory.

The second manner is connected with the first and anticipates attaining of sovereignty, through the same exercise for a longer period on the territory without another state disputing that right.

Separation is the third manner through which the sovereignty can be attained, but it needs to be conducted in accordance with the state in which this separated territory has been part of. Thus the transfer of the rights from one to another sovereign is made in such way, most often through agreement, so the modern trends and arousing of the idea for self-determination impose the new sovereign to gain the consent from the population whose territory requests sovereignty before acquiring it. Such case represents the uniting on Eastern and Western Germany which was occupied by four countries—USA, France, Great Britain and Soviet Union. All of them have given a consent for implementation of this process and withdrew the sovereign right over its part from the German territory for which the citizens has expressed themselves positively.

The fourth one out of the mentioned five methods nowadays is not considered as a legal manner for attaining the sovereign, because it is based for acquiring what is announced as illegal by the United Nations, and as such is considered in its Charter that has been signed and ratified by each member state.

⁵ Aneta Stojanovska, *Process and Methods for Recognition of States*, ANNUAL YEARBOOK—LAW FACULTY 267 (@-ri Avgust-Stip: Goce Delcev University-Stip 2009). ISSN 1857-7229.

The fifth and the final type for setting the right for sovereignty over certain territory concerns if it is established as an additional part of already existing territory, through a manner of natural growth such as sedimentation or volcanic activities.

III. TERMS “DE JURE” AND “DE FACTO” RECOGNITION OF STATES

Considering the fact that, the law, especially the international law is an active matter open for interpretation even though the basic characteristics in one state are clear, yet there are two types of states divided into: *de jure*-existing according the law and *de facto*- existing in reality, based on the fact which of the statehood features they own⁶.

De jure states are those that are fulfilling some of the conditions of statehood but not all three. As an example can be considered, a country that has a territory and a population but not full sovereignty over them. Also a good example could be a government in exile as well, or government under which the international community has the right to exercise sovereignty over a territory and a population but because of the occupation can not exercise that right, as is the case with the governments of the Baltic states in the period during World War II, while their territories were under Nazi occupation, they are recognized by the countries of the alliance as their legitimate rulers, role which *de facto* was taken over after the release. Another specific example of recognized sovereignty in the absence of territory in some way but not completely *de jure* state but rather as *de jure* government is the sovereignty dealing with “the organization” known as the Sovereign Military Order of Malta.

This “organization” had an authority in Malta in the past, but after the expulsion of its members from the island, they continue to exist in Rome. Interestingly, the Order is recognized as sovereign by many countries, a situation that reflects the fact that, it has established diplomatic relations with 103 states and 6 entities that are subject to international law, including the European Union whereby they have responded with reciprocity that have established diplomatic relations with the Order. Apart from diplomatic relations, the Sovereign Military Order of Malta has few buildings in the city of Rome that, the Italian Government has granted their extraterritorial status which means that, within the territory/facilities, the law is implemented by the Order, and not by Italy, and this is a status reserved exclusively for the embassies of countries. In addition the United Nations does not register the Order of Malta as “a non-member”, but as an entity that

⁶ *Ibid*, at 268.

has received a valid invitation to participate as an observer in the organization. Apart from these typical state features “the organization” has its own army, which is part of the Italian Army, however flying the flag and under the command of the Order; it also has coins that have rather collectors than a symbolic role and uses postal stamps, although not everywhere yet accepted by a number of European and world countries.

De facto state is considered the one that is an entity owning a territory and a population and sovereignty, but which lacks a legitimate recognition by a number of other states. This usually happens if a de facto state has been part of another country previously that opposes and denies its sovereignty. Here lies the tangent point between the characteristics of statehood and the need for their recognition as legitimate by other, already existing countries. There are many examples of de facto countries in the world including Taiwan, which the People’s Republic of China considers it as part of its territory even though there is no real sovereignty over it, as is the case of Somaliland and Somalia, to some extent Kosovo and Serbia etc.

IV. RECOGNITION OF STATES IN INTERNATIONAL LAW

The Institute “recognizing the states” is common and very important legal institution within the International Law initially, because of the political circumstances which are determining it⁷. Up until now, there is not precise rule according to which one state becomes internationally recognized, and has the right of statehood and right to participate as single with the other states from different international organizations⁸. There are some attempts made in order to establish certain universal criteria for acquiring the aforementioned statuses and possibilities but none of them has succeeded to be affirmed as a relevant and respected by all the states in the world. There are two theories that study this matter⁹. The first one is the *Declarative Theory* of statehood, originating from the conference held in Montevideo¹⁰, which is best put in the sentence “the political existence in one state is independent from its recognition by other states”.

According to this theory for acquiring statehood, and thus the involvement of the state in international law as its subject, the following four element must be included: territory, population, sovereign power and

⁷ LJ. D. FRCKOSKI, V. TUPURKOVSKI, & V. ORTAKOVSKI, INTERNATIONAL PUBLIC LAW 58 (Tabernakul, Skopje 1995).

⁸ Additional information at: Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, (Praeger Publishers 1999).

⁹ Additional information at: H. Lauterpacht, *Recognition of States in International Law*, YALE LAW JOURNAL (New Haven Conn. 1944).

¹⁰ Additional information at: *Montevideo Convention on Rights and Duties of States*, (1933).

ability to manage the previous three. Going back to the beginning of this text, it can be seen that, the largest part of the definition is taken from the Treaty of Westphalia, which means that, it is not a novelty in international law, but an existing criteria which although recognized it is not fully accepted and implemented free from discrimination.

International law includes *Constitutive Theory* of statehood. It examines the state recognition by other states as instrumental in acquiring statehood and status of a subject of international law to a new country. The aspects that are covering this theory, which although not formally accepted worldwide but can be considered as realistic are beautifully depicted in the thought of Oppenheim (L. Oppenheim) that says “International law says that, a state does not exist until it is recognized by other, but at the same time, it does not exist until it acquires recognition.”

It can be concluded that, the acquisition of independence and international legal subjectivity of a state is formally dependent on its international recognition, which is based on the will of other countries.

Sublimating the declarative positions of states as for this subject and reality of the foregoing, it can be concluded that, the recognition of a state as a sovereign entity and relevant international law is open to interpretation, there are no rules in this field and any existing state recognized a new state on its own discretion and in accordance with its national interests, while not obligatory adhering to certain customary norms in international behavior.

V. THE RULES OF INTERNATIONAL ORDER AND RECOGNITION OF STATES

After noting that, the recognition of states in international law is a matter of political decision, lets consider the methods by which it is awarded¹¹. Seemingly with the classification of the de jure- states and de facto-states, both models exist as methods of recognition. *De jure* recognition means having a formal legal act—a diplomatic note, law or declaration, often in the legislature or by the government or head of state, which through an official document is published on a recognition by one state over another¹². This method is ambiguous and is not free for interpretation.

The second method, de facto implies the establishment of political, economic and other types of relations.

The differences between the first and second lies in the formal legal document which results with rights and obligations, which in the first case is present, and but not in the second one.

¹¹ 35 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 975-990 (Cambridge University Press 1986).

¹² 4(1) EUROPEAN JOURNAL OF INTERNATIONAL LAW 66-71 (1993).

De facto recognition is often used in order to avoid disruption of bilateral relations with another state, but also to implement actual recognition of the state. The manners of relations between two states that can be seen as steps towards recognition are: the establishment of diplomatic relations, the visiting of head of state at the country which requires recognition, bilateral agreements between both countries and the recognition of the passports of this country that is recognized by the existing state. Seen throughout the history there are cases in which diplomatic communication between the two countries have been necessary, one of which is not recognized internationally, as is the case in the establishing of the dialogue between the United States and the Palestinian independence movement, which, to avoid sending an informal message for recognition, the existing state explicitly states that, its activities do not imply to recognition of the state which due to certain reasons temporarily establishes relations with that state. A similar example is the relationship of Taiwan by a number of countries. While officially recognized and has diplomatic relations with only 23 countries, unofficially in Taiwan there are research offices and cultural centers and trade associations covered by the United States, Australia, Britain, France and many other countries.

According to the doctrine introduced in the thirties of the twentieth century by Mexican Minister of Foreign Affairs, Genaro Estrada, except previous two methods of recognition of states introduces a third one. What's the difference? If the policy of the state is to perform legal recognition, it means that, at any unconstitutional change of the government within the state, it must come up with a statement that expresses positive or negative attitude in terms of recognizing the new government¹³.

The advantage of this policy is the possibility of revising the attitude towards other countries at any unconstitutional change, but it means interfering in its internal affairs through the approval or disapproval of the changes. The policy of tacit recognition is a balance between the other two doctrines and according to it, the state is not obliged to assess new government of another country, but if it is willing, may confirm or withdraw the recognition. The third doctrine, which is most frequently used nowadays, refers to recognizing states rather than governments. Thus if the first state has recognized the state where unconstitutional change of government occurred, they will not review the decision for recognition based solely on the change of the regime. The advantages of this policy are far lower administrative and bureaucratic procedures through the political changes that are taking place worldwide. However there are deficiencies which are

¹³ Aneta Stojanovska, *Process and Methods for Recognition of States*, ANNUAL YEARBOOK—LAW FACULTY, 272 (2-ri Avgust-Stip: Goce Delcev University-Stip 2009). ISSN 1857-7229.

consisted of leaving room for maneuver, in case there is a real need to review cooperation with the country in which the change occurred.

As a special form of recognition could be considered also the so-called “Collective recognition of states” that can occur through common acceptance of membership of a country in the regional and universal international organizations, through common acceptance of the declaration at the international conference or through a formal procedure in the bodies of the international organization.

The recognition of a state internationally is depicted through its membership in the United Nations (UN)¹⁴. With the membership at this world organization, every dilemma about the independence and sovereignty of any country is being eliminated. That is so because becoming a member of this international institution is necessary to achieve the recognition of the five member states of the Security Council, such as the US, Russia, China, Britain and France, and without their decision (resolution), it is not possible to achieve membership.

But it is important to point out that, there is no requirement (in the UN Charter) which obliges Member States, upon the acceptance of a new state membership in the UN, to establish “full political and legal recognition” through the establishment of bilateral diplomatic relations¹⁵.

CONCLUSION

The entirety of all citizens living within a certain territory, separated from other territories, which are subordinate to the government and have an established relationship with the state through legal connection-citizenship is called population. The territory is an area separated from other areas by border, where a certain population lives and where a certain authority extends. State boundaries are endpoints up until the sovereignty of a state extends.

The authority within a country regulates the relations in the state and the nature of its international positions. The highest authority, which does not recognize any other form of higher power is sovereignty.

The Institute “recognizing the states” is common and very important legal institution within the International Law initially, because of the political circumstances which are determining it.

¹⁴ Further information at: HANS Kelsen, *THE LAW OF THE UNITED NATIONS*. Available at <http://www.un.org>.

¹⁵ LJ. D. FRCHKOSKI, V. TUPURKOVSKI, & V. ORTAKOVSKI, *INTERNATIONAL PUBLIC LAW* 61 (Tabernakul 1995).

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A STUDY OF HEDGE FUND REDEMPTION AND ITS BANKRUPTCY IMPLICATIONS

Ye Li*

This research paper will focus on the legal realities of redemption of funds, the fraudulent conveyances and possibly bankruptcy implication for investors in hedge funds. This paper will also attempt to clarify the current state of these legal issues, and what will be the aggregate result of developed law in the area and hence its implications for hedge fund investors.

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INTRODUCTION

Hedge funds have become a hot topic of great media scrutiny, buoyed by the veil of secrecy that cloaks much of their actions. The primary concern amongst investors and speculators centered on being able to get their money *in* to hedge funds, lucrative high growth potential funds that have used leveraged maneuvers in recent years to yield tremendous returns.¹ This activity was made possible largely by cheap credit, which seemed for a period to be in endless supply. Highly secretive fund managers were able to use these market conditions to their advantage, leveraging their way into status as the current golden boys of Wall Street.² However, with the rapid change of market sentiments, for the first time in years, the question on the minds of speculators and institutional investors alike is not how to get

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¹ Jenny Anderson, *Atop Hedge Funds, Richest of the Rich Get Even More So*, N.Y. TIMES, May 26, 2006, at C2.

² Boyson Nicole M., Stahel Christof W., & Stulz René M., *Is There Hedge Fund Contagion?* (March 13, 2007). “Wall Street’ is used in the colloquial sense, as it should be noted that, the vast majority of hedge fund managers conduct their business via computer from plush locales such as Greenwich, Connecticut.”

money in to the hottest hedge funds, but how to get it out.³

Because of their extreme leveraged positions, many hedge funds are susceptible to downturns, and even total collapse. This does not mean that hedge funds are going away; it simply means that some will fail. Getting money out of these funds is of special legal consequence now, as the climate is shifting toward such a desire that has not been examined in much detail. This is compounded in the case of insolvency, which brings up questions related to the fraudulent conveyance statute, and at what point a hedge fund is considered insolvent under the fraudulent conveyance statute.⁴ The market players who have their money in hedge funds range from the rogue speculator, to the mighty institutional investors such as large pension funds and university endowments. A year ago, the hedge fund machine seemed to be an unstoppable force, but now, the prospects of large Wall Street investment banks may hinge on the viability of their flagship hedge funds.⁵

With buyouts now being renegotiated and debt lingering in the air on hanging deals, it is easy to decry the plight of the hedge fund.⁶ It is impossible to say if the credit squeeze will continue, or if so, whether fund managers will be able to devise new methods for turning quick return. Regardless of the path the market will take, it is now apparent that, hedge funds are not the invulnerable fortresses in which the rich can generate massive returns with relatively low risk.

With risk spread throughout the market by quants and funds of funds, exacerbated by the copycat nature of the hedge fund business, many legal implications come to the foreground in terms of getting money out of these funds, and exposure to risk in cases of fund bankruptcy. Hedge funds will likely to continue to grow in power. Some funds will fail, but such is the nature of capital markets. This does not mean that, hedge funds will all be in trouble; on the contrary, hedge funds will continue to play an increasingly important part in the global economy.

The high number of funds, coupled with the fact that, funds deal with extreme leverage, means that some funds will fail. The current credit crisis will not cripple the hedge fund by any means, but what it does is show that, funds acting in extreme leverage can be vulnerable to market conditions. For the sake of investors, who will continue to pour money into these funds, it is essential that, we examine the prospects of getting money out of these funds,

³ Jeff D. Opdyke, & Eleanor Laise, *Investors Mull How to Get Out of Hedge Funds: Market Turmoil Highlights Notoriously Tricky Rules For Redeeming Shares*, WALL STREET JOURNAL, Aug. 15, 2007, at B1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

and what happens in insolvency cases.

People now want to know how they can get out of these funds, whether they are still solvent or have become insolvent. Lawyers for wealthy investors and speculators will have to be prepared to address such questions from clients, who are understandably worried and want to avoid the proverbial run on the hedge fund bank.⁷ This paper will not address issues of hedge fund regulation, nor make arguments for registration and transparency standards to be implemented in much the same way mutual funds are regulated.⁸ Instead, this paper will examine the legal realities of redemption of funds, fraudulent conveyances and bankruptcy implication for investors in hedge funds.

I. THE LEGAL STRUCTURE OF HEDGE FUNDS

Unlike mutual funds, which are highly regulated, hedge funds are not required to redeem investors' assets within seven days from the date on which it receives a notice for redemption from an investor, and may take illiquid positions without limitation and may engage in leveraged transactions with greater freedom.⁹ The legal structure of a hedge fund largely depends upon who its investors will be, though all investors in funds must be financial qualifications that certify them as having sufficient assets to bear the risk of investing in a hedge fund.¹⁰

For the purpose of managing the assets of persons residing in the United States, a hedge fund is ordinarily organized as a limited partnership.¹¹ By purchasing an interest in the partnership, an investor becomes a limited partner of the partnership.¹² Thus, the terms, including redemption of funds, will be contained in the partnership agreement.¹³ Depending on the laws of the state in which the general partner will maintain its office, the hedge fund manager will organize the general partner as a limited liability company, corporation or limited partnership.¹⁴ In certain cases, however, the manager will form two entities, one entity to serve as the general partner and the other entity to serve as a management

⁷ See *Supra* note 3.

⁸ For such arguments, see: Douglas L. Hammer et al, U.S. REGULATION OF HEDGE FUNDS 1 (2005).

⁹ *Id.*

¹⁰ *Implications of the Growth of Hedge Funds*, SEC STAFF REPORT 78. Available at <http://www.sec.gov/news/studies/hedgofunds0903.pdf>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

company.¹⁵

For the purpose of managing the assets of persons residing outside of the United States, an offshore fund is ordinarily structured as a corporation and organized in a tax haven jurisdiction.¹⁶ The jurisdiction in which the fund is organized often depends on the countries in which investors reside and the type of entity the sponsor desires to form.¹⁷ Also, certain jurisdictions, such as the Cayman Islands, have a well-developed regulatory system for organizing and maintaining investment funds but are more expensive than other jurisdictions, such as the British Virgin Islands, which do not have as extensive a regulatory scheme.¹⁸

Often, the manager of an offshore fund forms a corporate entity to provide advisory services to the fund.¹⁹ This entity serves as the investment manager of the fund.²⁰ If the hedge fund manager already manages the assets of a domestic partnership through a single corporate entity, the general partner of the partnership may also serve as the investment manager of the offshore fund.²¹ If the sponsor is managing the assets of a partnership through two corporate entities, the entity serving as the management company of the domestic partnership will ordinarily serve as the investment manager to the fund.²²

II. LESSONS LEARNED FROM LTCM CASE

In order to understand the current issue with hedge fund insolvency and redemption issues, it is essential to look at the first manifestations of similar events. The recent collapse of two large Bear Stearns funds is not the first time a high profile hedge fund has defaulted. The infamous demise of Long Term Capital Management (LTCM) in 1998 set the precedent for actions in hedge fund insolvency, and serves as a framework for understanding the proceedings that will ensue in future hedge fund meltdowns.²³ The LTCM episode raises some issues involving the U.S. Bankruptcy Code.²⁴ The first

¹⁵ Douglas L. Hammer et al, U.S. REGULATION OF HEDGE FUNDS 1 (2005).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Alistair MacDonald, *A Hedge Haven Makes Its Rules Even Lighter*, WALL STREET JOURNAL, Sep. 29, 2007, at B1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Supra* note 10.

²³ *Statement on Long-Term Capital Management and the Report of the President's Working Group on Financial Markets*, THE FINANCIAL ECONOMISTS ROUNDTABLE, Oct. 6, 1999. See Franklin R. Edwards, *Insolvency Law and Financial Stability in OTC Derivatives Markets*, WORKING PAPER, March, 2003.

²⁴ *Id.*

involves clarifying the ability of certain counterparties to exercise their rights with respect to closeout, netting, and liquidation of underlying collateral in the event of the filing of a bankruptcy petition without regard to the Bankruptcy Code's automatic stay.²⁵

These provisions, which the President's Working Group on Financial Markets urged Congress last year to expand and improve, are generally recognized to be important to market stability.²⁶ They serve to reduce the likelihood that, the procedure for resolving a single insolvency will trigger other insolvencies due to the creditors' inability to control their market risk.²⁷ In other words, this protects the market from the systemic problem of "domino failures."²⁸

Nevertheless, in certain circumstances, a simultaneous rush by the counterparties of a defaulting market participant to replace their contracts could put pressure on market prices.²⁹ To the extent that the default was due to fluctuations in market prices in these contracts, this pressure might tend to exacerbate those fluctuations, at least in the near term.³⁰ This problem could be significant where the defaulting debtor had large positions relative to the size of the market. The possibility of a debtor defaulting during volatile markets where the debtor had large positions relative to the size of certain markets, was the specter created by the potential default of the LTCM Fund.³¹

In the highly volatile markets of September, 1998, the failure of the LTCM Fund would have left a number of creditors with open market positions subject to extreme volatility.³² Termination of those contracts would have required counterparties to replace contracts that, they held with the LTCM Fund in the relatively near term.³³ However, had termination not been available to the LTCM Fund's counterparties in the bankruptcy process, the uncertainty as to whether these contracts would be performed would have created great uncertainty and disruptions in these same markets, coupled with substantial uncontrollable market risk to the counterparties.³⁴ The inability to exercise closeout netting rights could well have resulted in

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Coy Peter, & Wooley Suzanne, Failed Wizards of Wall Street, BUSINESS WEEK, Sep. 21, 1998.

³² *Id.*

³³ Franklin R. Edwards, *Hedge Funds and the Collapse of Long-Term Capital Management*, 13(2) THE JOURNAL OF ECONOMIC PERSPECTIVES 189-210 (Spring 1999).

³⁴ *Id.*

an even worse market situation if the LTCM Fund had filed for bankruptcy than the exercise of such rights in this situation.³⁵

Why was Federal Reserve intervention necessary? The intervention of the Federal Reserve to head-off the insolvency of LTCM raises a serious systemic concern that still exists and is not widely understood. Further, this systemic concern is not specific to hedge funds but arises out of the pervasive use of derivatives by financial market participants. The fundamental reason that the Federal Reserve intervened in the LTCM case is that, bankruptcy law in the United States (and in most other countries) does not treat derivatives counterparties as it does all other creditors. Specifically, current U.S. bankruptcy law exempts derivatives counterparties from the normal operation of the Bankruptcy Code, and in particular from the automatic stay provisions of the Code.³⁶

As a consequence, had LTCM been unable to meet its obligations and filed for protection under Chapter 11, its derivatives counterparties could still have, and certainly would have, immediately terminated their contracts with LTCM, resulting in the "... abrupt and disorderly closeout of LTCM's positions which would [have] pose[d] unacceptable risks to the American economy."³⁷ Only the intervention of the Federal Reserve in arranging a creditor-bailout enabled LTCM to avoid a bankruptcy filing, which would have triggered the immediate liquidation of its positions.³⁸

In principle, the same result could have been achieved without the intervention of the Federal Reserve, had the Bankruptcy Code not exempted LTCM's derivatives counterparties from the automatic stay provision of the Code.³⁹ In that case, a bankruptcy filing by LTCM would have "stayed" LTCM's derivatives counterparties, as well as its other creditors, and would have resulted in a court-supervised creditor-workout of LTCM's positions.⁴⁰ As subsequent events have shown, it was clearly in the joint interests of LTCM's creditors, to avoid a "fire sale" of LTCM's positions and to facilitate a creditor "work-out" by putting in more capital and reorganizing the ownership structure of LTCM.⁴¹ Many economists argue that, had the

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Coy, *supra* note 19.

³⁸ See Edwards, *supra* note 21.

³⁹ *Id.*

⁴⁰ *Statement on Long-Term Capital Management and the Report of the President's Working Group on Financial Markets*, THE FINANCIAL ECONOMISTS ROUNDTABLE, Oct. 6, 1999. See Franklin R. Edwards, *Insolvency Law and Financial Stability in OTC Derivatives Markets*, WORKING PAPER, March, 2003.

⁴¹ *Id.*

bankruptcy code allowed this, there would have been no need for the Federal Reserve to intervene.⁴²

Ironically, the potential destabilizing role that bankruptcy law played in the LTCM crisis was the result of series of changes in the Bankruptcy Code made by the U.S. Congress, in order to reduce the likelihood of systemic instability in off-exchange derivatives markets.⁴³ The rationale for exempting “derivatives securities” contracts from the automatic stay provisions of the Bankruptcy Code is that, this exemption is necessary to maintain the liquidity and stability of derivatives markets to prevent the “insolvency of one commodity or security firm spreading to other firms and possibly threatening the collapse of the affected market.”⁴⁴ Congress believed that: “The prompt liquidation of an insolvent’s position is generally desirable to minimize the potentially massive losses and chain reaction of insolvencies that could occur if the market were to move sharply in the wrong direction.”⁴⁵

In interpreting the scope of the exceptions to the Bankruptcy Code, the bankruptcy appellate panel for the Ninth Circuit cited the comments of Senator Dole, during the Senate discussion on the amendment to Section 362 of the Bankruptcy Code: “It is essential that, stockbrokers and securities clearing agencies be protected from the issuance of a court or administrative agency order which would stay the prompt liquidation of an insolvent’s positions, because market fluctuations in the securities markets create an inordinate risk that, the insolvency of one party could trigger a chain reaction of insolvencies of the others who carry accounts for that party and undermine the integrity of those markets.”⁴⁶

In retrospect, it seems clear that, had LTCM’s derivatives counterparties not been exempted from the automatic stay provisions of the Bankruptcy Code, there would not have been either an “... abrupt and disorderly close-out of LTCM’s positions ...” or an “... unwinding [of] LTCM’s portfolio in a forced liquidation ...,” and there would have been no need for the Federal Reserve to intervene to prevent a “... seizing up of markets ... that could have potentially impaired the economies of many nations, including our own.”⁴⁷

The major systemic risk issue raised by the near-collapse of LTCM is whether recent revisions to the bankruptcy law in the United States, and

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *Id.*

other countries have created another source of financial instability in financial markets by enabling a counterparty run on the positions of a financially-stressed counterparty.⁴⁸ As LTCM illustrated, a “counterparty run” has the potential to result in a systemic liquidity shortage, with uncertain and potentially damaging economic effects.⁴⁹ It is notable that, some recent academic papers have argued that, a “fire sale” of financial assets can cause or exacerbate liquidity shortages, resulting in systemic illiquidity with the potential to cause runs and threats to overall capital markets.⁵⁰

III. HEDGE FUND REDEMPTION APPROACH AND EXIT STRATEGY

If getting out of funds were simple, lawyers would not need to be intricately involved, nor would heavily invested individuals be so worried over the prospects of getting their money out. Hedge funds, however, have notoriously tricky rules regarding such exits, even though it would seem to be a simple matter of a clause in the partnership agreement.⁵¹ Exiting from a hedge fund can be far more complex than selling a stock or a mutual fund.⁵² Redemption policies vary widely. Most funds will redeem your money only at the end of a calendar month, or the end of a quarter. And you generally must provide written notice in advance that you intend to redeem money. The notice period is often 30 days to 60 days, but some funds require as many as 90 days or more.⁵³ Rules for redeeming money from a hedge fund are generally laid out in the limited-partnership agreement.⁵⁴

The long notice period means that, investors might not see their money for weeks, or even months, in which time markets might shift dramatically.⁵⁵ Also, fleeing funds now won't help avoid losses already booked. And troubled funds may freeze the ability of investors to redeem their money to keep from having to dump assets at falling prices, as Bear Stearns did recently with its Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Fund.

For investors trying to gauge their own situation, the key challenge is

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ Jeff D. Opdyke, & Eleanor Laise, *Investors Mull How to Get Out of Hedge Funds: Market Turmoil Highlights Notoriously Tricky Rules For Redeeming Shares*, WALL STREET JOURNAL, Aug. 15, 2007, at B1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

knowing what your hedge fund owns.⁵⁶ Hedge funds typically have just a limited number of investors, often no more than a few hundred, so your chances of talking to someone that matters are pretty good.⁵⁷ This is particularly true if you have a large amount of money invested, especially the case with large institutional investors who are sure to get a receptive ear from fund management. If a fund is being inundated with calls, it might set up a conference call aimed at explaining the current situation to all investors at once.⁵⁸ Investors can also review quarterly “13F” filings, in which hedge-fund managers with more than \$100 million in certain public securities must disclose those holdings to the Securities and Exchange Commission.⁵⁹ But these filings may not be useful to look inside some of the quant funds that are now stumbling, because such funds can make thousands of trades a day.⁶⁰

If investors think that, there is a problem brewing or already present with their fund, they should make their redemption quickly to avoid a traffic jam.⁶¹ Overall, the industry comprises roughly 6,000 to 8,000 U.S. hedge funds that manage about \$1.5 trillion in assets.⁶² Still, investor nervousness goes beyond the hardest-hit funds that invest in subprime mortgages and make use of quants. The anxious investor attempting to reach those in fund management kind of call has been common in recent months, where funds from smaller, rogue capital groups have posted large losses, but also the most highly reputable of funds, such as Goldman Sachs flagship Global Alpha fund have posted double digit drops.⁶³

Investors who successfully withdraw money from a struggling hedge fund may still be at risk. If a hedge fund fails, in some cases, a bankruptcy trustee or other investors may sue investors who have already redeemed money and try to force them to pay that money back into the fund.⁶⁴ The trustee could argue that, the hedge fund did not value its assets correctly and that investors withdrew more money than they were entitled to, the lawyers

⁵⁶ Andrew Ross Sorkin, *Redemption Day: Will Hedge Fund Investors Bolt?* NEW YORK TIMES. Available at <http://dealbook.blogs.nytimes.com/2007/08/15/redemption-day-will-hedge-fund-investors-bolt/> (last visited October 17, 2007).

⁵⁷ *Supra* note 37.

⁵⁸ *See id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See* Sorkin, *supra* note 43.

⁶² Grace Wong, *Hedge Fund Redemption Shock: Investors Looking to Cash Out This Fall May be Met With Unpleasant Surprise*, CNNMONEY, Aug. 27, 2007. Available at http://money.cnn.com/2007/08/23/markets/hedge_fund_redemptions/index.htm?section=money_topstories (last visited October 20, 2007).

⁶³ *See* Opdyke, *supra* note 37.

⁶⁴ *Id.*

say.⁶⁵ This concept may well apply to some of the fund failures right now, because some funds involved with, say, subprime-mortgage-related securities may have a hard time valuing their assets and could wind up in bankruptcy. “It’s the Hotel California syndrome, you can check out anytime you like, but you can never leave.”⁶⁶ Investors need to read hedge fund offering documents and limited-partnership agreements carefully to understand redemption rules.⁶⁷ Individual investors rarely read this language, and given the success of hedge funds in recent years, the efforts of the wealthy have all been focused on finding ways to get their money *in* to these funds, which tantalize with the potential for enormous return.

In some cases, funds may impose a penalty on investors who try to withdraw money without giving proper notice or require longer redemption notice periods for investors who want to take out money at year end.⁶⁸ In some cases, investors have negotiated in advance special agreements with hedge fund managers known as a “side letter”, which may allow the investor to redeem money more quickly than other investors in the fund.⁶⁹ The viability of securing this type of agreement with the fund manager is not likely to be equally shared by all hedge fund investors, even though individual investments in these funds are substantial. Often, such agreements are reserved for very large institutional investors such as endowments and pension funds.⁷⁰

Some funds will on occasion waive the redemption period, allowing anxious investors to exit early, but this sort of policy is very dependent on the given fund, as many funds are run very differently than others.⁷¹ Specifically, funds controlled by large investment banks will generally conduct themselves differently than individual funds that have no reputation outside the specific fund to be accountable to.⁷² As is evident from the turmoil resulting from the collapse of two large Bear funds, fund insolvency reflects extremely poorly on the credibility of an institution as a whole, something the large investment banks are well aware of in the current market. Regardless of fund management and these factors that may affect operation style, investors should be advised to be very active and vocal in their involvement with the fund manager. If an investor is thinking of

⁶⁵ *Id.*

⁶⁶ See Wong, *supra* note 52.

⁶⁷ See Opdyke, *supra* note 37.

⁶⁸ *Id.*

⁶⁹ See Wong, *supra* note 52.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Opdyke, *supra* note 37.

putting money into a fund, especially given the large amounts in question, they should be very persistent on securing contractual language that allows for clear and investor-friendly redemption, if at all possible.

IV. REDEMPTION RELATED ISSUES AND FRAUDULENT CONVEYANCE STATUTES

As hedge funds are susceptible to collapse given their extreme leveraged positions, investors must be very aware of what fund managers are doing with money if matters go south. Issues of fraudulent conveyances have raised their head in these situations, and although these would appear likely to be the rogue funds without huge assets, no fund is immune from this line of questioning. Specific questions of law that must be examined are: how the fraudulent conveyance statute relates to redemption requests, and determining what is the definition of insolvency under the fraudulent conveyance statute.

The basic definition of insolvent, to the lay individual, means the inability to pay debts. Under traditional legal definition⁷³, a corporation is solvent if, and only if, it is able to pay all its debts, as and when they become due and payable (s95A of the *Corporations Act*). The *Bankruptcy Act*, however, refers to the debtor's ability to pay debts "from his or her own money" (s122(4)(c)), as did older versions of corporate insolvency legislation.⁷⁴ A recent decision suggests a corporation will not be required to be able to pay debts from its own moneys to demonstrate solvency.⁷⁵

In bankruptcy proceedings, a trustee is chosen to administer the debtor's estate in a fair and orderly manner.⁷⁶ Generally speaking, for bankruptcy purposes, the estate is comprised of those assets of the debtors in which the debtor's creditors have an interest.⁷⁷ The trustee is given the power to set aside or "avoid" certain transfers of the debtor's assets out of the estate that unfairly place assets beyond the creditor's reach.⁷⁸ Such a transfer of the debtor's assets to a third party, with the intent to prevent creditors from reaching the assets to satisfy their claims, is called a

⁷³ Refers to *American Legal Conception of Insolvency* as provided by the CORPORATIONS ACT.

⁷⁴ See THE BANKRUPTCY ACT (122(4)(c)).

⁷⁵ Under the Bankruptcy Code, insolvency exists when the sum of the debtor's debts exceeds the fair value of the debtor's property, with some exceptions. It is a balance sheet test. 11 USC § 101(32).

⁷⁶ *Id.*

⁷⁷ 11 USC § 544(b) allows trustees to employ applicable state law to recover fraudulent transfers. The time period under the UFTA is in most cases four years before action is brought to recover—UFTA § 9.

⁷⁸ This is done through the mechanism of avoidance of the transfer. 11 USC § 548.

“fraudulent conveyance”.⁷⁹ This is also referred to commonly as a “fraudulent transfer”, and for the purposes of this legal issue, the terms can be considered synonymous.⁸⁰

There are two types of fraudulent transfers in bankruptcy law. The first, actual fraud, involves the intent to defraud creditors, the other, sometimes called constructive fraud, involves a transfer, which is made in exchange for grossly inadequate consideration.⁸¹ Actual fraud is committed when a transfer is made within one year before the date of the filing of a bankruptcy petition, and is made with the intent to hinder or defraud a creditor.⁸² Actual fraud requires proof of intent from the person challenging the transfer. Of course, a debtor intending to defraud his creditors will not be overt about his intentions to do so.⁸³

Therefore, courts have set forth circumstances which indicate the intent to defraud.⁸⁴ Some examples of these circumstances are actual or threatened litigation against the debtor, retention of possession or control of the property, transfer of substantially all the debtor’s assets, transfer to a newly created corporation, and a special relationship with the person to whom the property is transferred.⁸⁵ These are only factors to be considered in determining whether a person intended to defraud a creditor, and whether they do in fact prove the debtor’s fraudulent intent is to be determined on a case by case basis.⁸⁶

One of the most important badges of fraud for purposes of assessing a fraudulent conveyance is the debtor’s insolvency, or solvency, before and after the conveyance in question. Most state statutes and other laws do not clearly define solvency or show how to measure solvency.⁸⁷ The principle issue is whether assessment of solvency includes in the debtor’s assets those assets that are exempt from creditors such as homestead property, annuities and retirement funds. Computation of solvency under Bankruptcy law

⁷⁹ 11 USC § 548(2); UFTA § 4(a)(2).

⁸⁰ *The Uniform Fraudulent Transfer Act*, which is available in PDF format at: <http://www.stcl.edu/rosin/ufta84.pdf> (last visited October 18, 2007). As of June, 2005, 43 states and the District of Columbia had adopted it. The UFTA is preceded by the Uniform Fraudulent Conveyance Act, which initially sought to codify and standardize law in the area for the ease of commercial law across the state.

⁸¹ *See id.*

⁸² 11 USC § 548(2); UFTA § 4(a)(2).

⁸³ *See*, e.g., *Nisenzon v. Sadowski*, 689 A.2d 1037 (R.I. 1997); *Cellar v. Holley*, 9 Ohio App. 2d 288 (1967); *Larrimer v. Feeney*, 411 Pa. 604 (1963).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See Moody v. Security Pacific Business Credit, Inc.*, 971 F.2d 1056, 1064 (3d Cir.1992).

⁸⁷ *Id.*

excludes exempt assets; the tax code definition includes exempt assets.⁸⁸ For example, Florida Statute 726.103⁸⁹ states that, “a debtor is insolvent if the some of the debtor’s debts is greater than all of the debtor’s assets” or secondly, the debtor is generally not paying his debts when due.⁹⁰ The first part of the Statute’s definition does not specify whether exempt assets are considered, and therefore, the second test of debt payment becomes most important.⁹¹

Under the UFTA and Bankruptcy Code, different bases of valuation may be appropriate depending upon the circumstances, and different methods of determining value on any particular basis may be appropriate depending upon the business engaged in by the debtor and other factors.⁹² For a debtor which is a business enterprise, valuation on the basis of continuation of the business by the debtor as a going concern ordinarily would be the appropriate basis of valuation if, at the time as of which the valuation is made, it reasonably would be expected that, the enterprise will continue as a going concern.⁹³ In such a case, appropriate values may be ascribed to goodwill and to non-assignable licenses, franchises, contracts and rights.⁹⁴ Often it would be appropriate not to attempt to determine the value of separate assets and debts, but rather to determine only the “enterprise value” representing the aggregate difference between the debtor's assets and debts.⁹⁵

Enterprise value should be determined by methods appropriate under the circumstances which can include the capitalization or discounted cash flow methodology.⁹⁶ Even if it is appropriate to value on a liquidation basis, this may mean carving up the company into smaller going concern units rather than a piecemeal forced liquidation.⁹⁷ In any event, the GAAP balance sheet, while a starting point for the analysis, is not dispositive of value.⁹⁸

⁸⁸ See *Vadnais Lumber Supply, Inc. v. Byrne* (In re *Vadnais Lumber Supply, Inc.*), 100 B.R. 127, 131-32 (Bankr. D. Mass. 1989).

⁸⁹ Florida code is used here as it reflects a great deal of code provisions of this regard, though it is not meant to serve as the definitive source of code.

⁹⁰ See *supra* note 88.

⁹¹ *Id.*

⁹² See Committee Comment 1 (1993) § 5102.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *Vadnais Lumber Supply, Inc. v. Byrne* (In re *Vadnais Lumber Supply, Inc.*), 100 B.R. 127, 131-32 (Bankr. D. Mass. 1989), discussing the proper standard of valuation to be applied in the determination of solvency under the Bankruptcy Code, appears to be an example of what is intended by the UFTA.

As set forth in *Vadnais Lumber*, the proper standard of valuation is the value of the business as a going concern, not the liquidation value of its assets less its liabilities, provided that, the business was a going concern at the time of the transfer. On the other hand, liquidation value is appropriate if, at the time of the transfer, the business is so close to shutting its doors that a going concern standard is unrealistic. In *Vadnais Lumber*, the court found that, although the business was weak after the transfer, the debtor was still able to continue its business operations without a bankruptcy for some period of time.⁹⁹

A reasonable construction of UFCA §4 indicates that, it not only encompasses insolvency in the bankruptcy sense, but also includes a condition wherein a debtor has insufficient presently salable assets to pay existing debts as they mature.¹⁰⁰ If a debtor has a deficit net worth, then the present salable value of his assets must be less than the amount required to pay the liability on his debts as they mature. A debtor may have substantial paper net worth including assets which have a small salable value, but which if held to a subsequent date could have a much higher salable value.¹⁰¹ Nevertheless, if the present salable value of assets is less than the amount required to pay existing debts as they mature the debtor is insolvent.¹⁰²

V. BAYOU BANKRUPTCY SCENARIO

Risks to hedge fund investors may now linger even after they have redeemed their interests in the funds. Such a notion of risk long after exit seems unlikely, but if the receiver, acting as Chapter 11 manager of the defunct Bayou hedge funds, ultimately prevails in actions to recover \$140 million from investors who withdrew from the funds within two years of bankruptcy filings.¹⁰³ According to a February 23, 2007 decision by a

⁹⁹ See also, *Moody v. Security Pacific Business Credit, Inc.*, 971 F. 2d 1056, 1076-69 (3d Cir. 1992); *In re Taxman Clothing Co.*, 905 F. 2d 166, 169-70 (7th Cir. 1990) (under Bankruptcy Code avoidance action going concern value is proper method for determining solvency unless business is on its deathbed).

¹⁰⁰ *Id.*

¹⁰¹ Though inability to meet obligations does not conclusively establish insolvency under the UFCA, courts have found this to be a reliable indication of insolvency where there is little direct evidence of a debtor's assets and liabilities. See, e.g., *Nisenzon v. Sadowski*, 689 A. 2d 1037 (R.I. 1997); *Cellar v. Holley*, 9 Ohio App. 2d 288 (1967); *Larrimer v. Feeney*, 411 Pa. 604 (1963).

¹⁰² Peter Lattman, *Bankrupt Bayou Wants Its Money Back*, WALL STREET JOURNAL, May 30, 2007, at B1. See also compilation of court documents related to the Bayou liquidation. Available at <http://www.bayoucymanliquidation.ky/committee.htm> (last visited October 17, 2007).

¹⁰³ Diya Gullapalli, *Fund Track: Buyout Boom Helps Some Investors*, WALL ST. J., Feb. 23, 2007, at C1.

bankruptcy judge in the U.S. Bankruptcy Court in the Southern District of New York, denying the motions to dismiss in 95 separate lawsuits against the redeeming investors, the complaints stated enough to make a prima facie case to recover both principal and “profits” as fraudulent conveyances under federal and state law.¹⁰⁴

What the plaintiffs know about the operations of the Bayou hedge funds over their nine-year history is derived largely from the criminal complaints against the principal organizers Samuel Israel III and Daniel Marino and their guilty pleas.¹⁰⁵ Israel and Marino, who are currently awaiting sentencing, admitted to lying to investors in the Bayou hedge funds by sending the investors regular reports that contained fictitious rates of return on trading and inflated net asset values in order to conceal losses.¹⁰⁶

The facts in the criminal actions, largely parroted in the complaints against the redeeming investors, were accepted as true by the court in denying the dismissal motions.¹⁰⁷ However, whether the profits each investor received were “fictitious” and the hedge funds were insolvent or rendered insolvent at the time, each of the redeeming investors were paid must still be developed by the plaintiffs from a reconstruction of books and records and proven at trial.¹⁰⁸ It is estimated that, the non-redeeming investors of four domestic funds and one offshore fund are owed \$250 million before distributions from a victims’ fund set up by the U.S. Department of Justice to compensate these investors for their losses.¹⁰⁹ There is currently more than \$106 million in the victims’ fund from assets seized and collected by various state and federal agencies.¹¹⁰

The plaintiffs hope to make up some of the shortfall for the non-redeeming investors from those who redeemed in whole or in part before the collapse, notwithstanding the fact that, none of the redeeming investors are accused of having participated in the fraud. Those efforts have been vigorously opposed by the defendants who sought dismissal of the lawsuits collectively based on a decision in the Second Circuit Court of Appeals that insulates payments from recovery on an intentional fraudulent conveyance theory when such payments are made to satisfy an antecedent debt.¹¹¹

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See* Lattman, *supra* note 88.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Diya Gullapalli, *Fund Track: Buyout Boom Helps Some Investors*, WALL ST. J., Feb. 23, 2007, at C1.

¹¹⁰ *Id.*

¹¹¹ *See In re Sharp International Corp.*, 403 F.3d 43, 56 2d Cir. 2005.

The defendants argued that, they fit within the *Sharp* protections because they had existing claims for rescission or restitution against the hedge funds based on the fraudulent inducement to invest that were satisfied with the redemption payments.¹¹² The defendants also attempted to rebut the contention that, the hedge funds were operated as a massive Ponzi scheme on the grounds that operations had none of the characteristics of a classic Ponzi scheme: there were no promises of unrealistic or high returns, Bayou had substantial business operations, and the redeeming investors were not paid out by late investors in the hedge funds.¹¹³

The ramifications of this decision are clearly not positive for the investor community. It leaves investors with significant uncertainty even after they have redeemed their investment from a fund as they continue to be exposed to risk of loss, if only the cost of litigation, should a situation such as Bayou arise.¹¹⁴ The possibility of such occurrences is certainly a negative in the eyes of large investors, particularly scrutinized institutional investors. Furthermore, the general negative light under which hedge funds are portrayed is exacerbated by such activity, meaning that, the actions in liquidation by other funds will be highly scrutinized, and transfers will have to clearly pass the test to not qualify as fraudulent, or face likely court intervention.

The U.S. Bankruptcy Court for the Southern District of New York denied a motion to dismiss made by investors who had redeemed their interests in three Bayou hedge funds in the two years prior to the bankruptcy filing.¹¹⁵ The bankruptcy trustee sought to clawback payments made to these investors pursuant to the “fraudulent conveyance” provision in the Bankruptcy Code that permits clawback of payments made by a debtor with intent to defraud other creditors.¹¹⁶ The three Bayou hedge funds are alleged to have significantly inflated their net asset values and to have utilized a fictitious accounting firm to “audit” their returns starting in 1999, before the fraud was uncovered and the Bayou funds collapsed in 2005.¹¹⁷

During 2003-2005, investors who redeemed their interests in the Bayou funds received redemption proceeds based on the false inflated NAVs

¹¹² Peter Lattman, *Bankrupt Bayou Wants Its Money Back*, WALL STREET JOURNAL, May 30, 2007, at B1.

¹¹³ *Id.*

¹¹⁴ Diya Gullapalli, *Fund Track: Buyout Boom Helps Some Investors*, WALL ST. J., Feb. 23, 2007, at C1.

¹¹⁵ *See id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

reported by the Bayou funds.¹¹⁸ The court ruled that, the redemption payments are subject to clawback under the fraudulent conveyance statute and thus denied the investors' motion to dismiss.¹¹⁹ It further ruled, however, that the redemption payments received by the investors may be subject to a good faith defense but that more evidence is needed to determine whether the good faith defense is available to these investors.¹²⁰

CONCLUSION

Dealings in extreme leverage mean that, there will be volatility. With risk spread throughout the market by quants and funds of funds, exacerbated by the copycat nature of the hedge fund business, many legal implications come to the foreground in terms of getting money out of these funds, and exposure to risk in cases of fund bankruptcy. Hedge funds will likely to continue to grow in power. Some funds will fail, but such is the nature of capital markets, compounded by leveraged positions.

This does not mean that, hedge funds will all be in trouble; on the contrary, hedge funds will continue to play an increasingly important part in the global economy. Hedge funds, along with private equity, oil money from the Middle East and Asian Central banks, have been noted to be the big players for the future of the global economy.¹²¹ The more hedge funds there are, the more they become integral to our capital market system, and the higher percentage of daily trade volume they will occupy. This also means that, by sheer numbers, more funds will invariable collapse. The legal system must be prepared to deal with these collapses. Also, the economy and its investors need to realize that collapse of funds is bound to happen, but that these will not mean that, many funds will not continue to yield amazing return.

Fund collapse will not be a regular phenomenon, but will happen on occasion, likely as a result of market conditions that expose the risk of dealing with positions of extreme leverage. Investors in these funds should be very aware of the partnership agreement provision or corporate organizational provision that governs the withdrawal of funds. Those who have money in hedge funds should be cognizant of the fact that, unlike mutual funds, hedge funds do not have mandatory seven day withdrawal

¹¹⁸ Peter Lattman, *Bankrupt Bayou Wants Its Money Back*, WALL STREET JOURNAL, May 30, 2007, at B1.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ WALL STREET JOURNAL article on *Future of Powerful Financial Institutions*. Available at <http://online.wsj.com/article/SB115862648061466997.html> (last visited October 6, 2007).

provisions, and because of the secretive nature of hedge funds, it is often hard to get answers on exact policy. Because fund collapse has not been in the forefront of concern in recent years of great leveraged success, it is important that, legal issues be examined for future reference, especially given the massive amounts of capital being pooled into hedge funds.

Fraudulent transfers come into the forefront of legal concern in the case of insolvency of funds, or even in liquidation attempts prior to complete insolvency. Because hedge funds manage such vast amounts of capital and can often be in positions of sizable risk, quick actions and dispersal of funds, coupled with redemption requests in quick succession, can lead to problems mirroring the proverbial run on the bank.

The Bayou collapse brings together all of the legal issues related to redemption requests, fund insolvency, fraudulent transfers and the ugly prospect of transfer liability.¹²² During 2003-2005, investors who redeemed their interests in the Bayou funds received redemption proceeds based on the false inflated NAVs reported by the Bayou funds.¹²³ The court ruled that, the redemption payments are subject to clawback under the fraudulent conveyance statute and thus denied the investors' motion to dismiss.¹²⁴ It further ruled, however, that the redemption payments received by the investors may be subject to a good faith defense but that more evidence is needed to determine whether the good faith defense is available to these investors.¹²⁵ This evidence will be expensive and time-consuming to collect, and is the type of work that generates high legal fees and is going to frustrate those with money in funds, regardless of ultimate outcome.¹²⁶

The events of *Bayou*, as well as the Bankruptcy Court treatment of the Bear Stearns funds to this point, provide a template by which to analyze the possibilities for future developments in the area.¹²⁷ Important to recognize is that, *Bayou* represents the legal ramifications for what is possible if the fund managers are willing to engage in fraudulent conduct. This will not always be the case in the event of collapse. With Bear Stearns' collapse, this type of behavior is less likely to occur. However, the ramifications of Bayou demonstrate that, this type of conduct is possible, and given that large, respected funds are susceptible to collapse, the complete range of legal consequences must be considered in order to fully advise investors what they could possibly be forced to deal with.

¹²² *Supra* note 98.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Supra* note 105.

¹²⁶ *Id.*

¹²⁷ *Id.*

Fraudulent transfer situations present nightmare for the elite, asset rich investors who generally engage in hedge fund speculation, likely giving rise to liability that they never thought possible when putting their money into a hedge fund. Even if no fraudulent transfers occur, it is imperative that investors recognize their rights with respect to redemption, be that if they simply want to redeem funds for fear of downswing, or in cases of insolvency.

THE SEARCH FOR CONSENSUS AND UNANIMITY WITHIN THE INTERNATIONAL ORGANIZATIONS

Christian Guillermet Fernández & David Fernández Puyana***

Consensus is a process of non-violent conflict resolution. Everyone works together to make the best possible decision for the group. All concerns are raised and addressed, until all voices are heard. Since proposals are not the property of the presenter, a solution can be made cooperatively. Reaching consensus on a proposal does not mean that, everyone is in agreement¹. Consensus decision making is a creative and dynamic way of reaching agreement between all members of a group. Instead of simply voting for an item and having the majority of the group getting their way, a group using consensus is committed to finding solutions that, everyone actively supports, or at least can live with. At the heart of consensus is a respectful dialogue between equals. It is about helping groups to work together to meet both the individual's and the group's needs. Consensus is looking for "win-win" solutions that are acceptable to all, with the direct benefit that everyone agrees with the final decision, resulting in a greater commitment to actually turning it into reality. Consensus seeks to synthesize the wisdom of the group unity: everyone has a piece of the truth². The recent adoption by 195 States of the "Paris Agreement" in the context of the 2015 United Nations Climate Change Conference is a "good example" of consensus.

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¹ Guillermet Fernandez C., & Fernandez Puyana D., *The 70 Anniversary of the Creation of the United Nations: Giving Peace a Chance*, 2(4) CADMUS 26 (State of California (USA): World Academy of Art and Science, April 2015).

² Guillermet Fernandez C., & Fernandez Puyana D., *op. cit.* 1, 27.

INTRODUCTION

This paper will analyse the historical roots of consensus decision making. In particular, the elaboration of this type of decision making process by the three main religions (i.e. Christian, Muslim and Jewish) and indigenous peoples will carefully be analysed. Both the Haudenosaunee Confederacy and the Hanseatic League decisively influenced this approach in some legal systems.

Additionally, an assessment about the rule of unanimity accepted by the League of Nations will also be studied, in the context of the debate about the efficiency of this rule held at the Permanent Court of International Justice and the Hague Conference for the Codification of International Law. They concluded that, resolutions or instruments on questions affecting the well-being of humankind as a whole could not be adopted against the will of some other States.

Finally, a reflection about consensus building within the United Nations, and in particular the Security Council, the General Assembly and the Human Rights Council will be provided, concluding with an emphasis that, the adoption of resolutions by consensus is the clear tendency and practice at the United Nations. In fact, some intergovernmental organizations, specialized agencies and social movements have expressly accepted consensus in their respective rules of procedures and have also concluded that, the term “consensus” refers to an established practice under which every effort is made to reach without vote an agreement that is generally accepted.

I. HISTORICAL ROOTS OF CONSENSUS DECISION MAKING

One of the most widely cited historical roots for consensus decision-making is the Quakers traditions and to a lesser extent, the Anabaptists of which perhaps the best known descendents are the Mennonites³.

Consensus as a decision-making formula has served the Jewish communal system throughout much of the 20th century. In understanding the term “consensus”, we find the following core definition: “the collective opinion by most of those concerned.” Rela Mintz Geffen, in 1997, acknowledged that, consensual decision-making was one of the core “constitutional principles” that served to define the Jewish experience in

³ See Available at <https://rhizomenetwork.wordpress.com/2011/06/18/a-brief-history-of-consensus-decision-making/>.

America⁴.

Ijmā is an Arabic term referring to the consensus or agreement of the Muslim community basically on religious issues. Various schools of thought within Islamic jurisprudence may define this consensus to be that of the first generation of Muslims only; or the consensus of the first three generations of Muslims; or the consensus of the jurists and scholars of the Muslim world, or scholarly consensus; or the consensus of all the Muslim world, both scholars and laymen⁵.

Another common reference in the quest for consensus decision-making's heritage are indigenous peoples. Many peoples from different parts of the globe are cited. The Haudenosaunee Confederacy are frequently mentioned (sometimes referred to as the Iroquois League—the name given to them by the French). The confederacy still exists today⁶.

In 1987, the U.S. Senate formally acknowledged, in a special resolution, the influence of the Haudenosaunee Great Law of Peace on the U.S. Constitution, as follows:

“Acknowledges the historical debt of the United States to the Iroquois Confederacy, and other Indian nations for their demonstration of democratic principles and their example of a free association of independent Indian nations”⁷.

Other indigenous peoples are quoted as using consensus, for example African Bushmen. Usually, this seems to be defined as a system of decision-making in which a council of elders makes decisions based on a consensus of the wider community⁸. This form of decision making process still is applied in many African countries.

The Hanseatic League is another example of a group that utilizes strong elements of what we understand to be consensus in their governance structure. The League was “an economic alliance of trading cities and their merchant guilds that dominated trade along the coast of Northern Europe. It stretched from the Baltic to the North Sea and inland during the Late Middle Ages and early modern period (c. 13th-17th centuries)”⁹.

⁴ Windmueller S., *Consensus as a Symbol of Jewish Citizenship*, SH'MA 5 (October 2003).

⁵ Omar Farooq M., *The Doctrine of Ijma: Is There a Consensus?* (2006).

⁶ NATIONAL MUSEUM OF THE AMERICAN INDIAN, HAUDENOSAUNEE GUIDE FOR EDUCATORS 3 (Smithsonian Institution 2009).

⁷ Senate Resolution 76—100th Congress, (1987-1988).

⁸ Hitchcock R. K., *Communities and Consensus: An Evaluation of the Activities of the Nyae Nyae Development Foundation and the Nyae Nyae Farmers Cooperative in Northeastern Namibia*, NYAE DEVELOPMENT FOUNDATION AND NEW YORK (New York, Windhoek, Namibia: Ford Foundation 1992).

⁹ Windmueller S., *Consensus as a Symbol of Jewish Citizenship*, SH'MA, 5 (October 2003).

The European Union follows the historical example of the Diet of the Hanseatic League about the rule of consensus¹⁰. In particular, Art. 16.4 of the European Union's Treaty of Lisbon decrees that, "except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus".

II. THE RULE OF UNANIMITY IN THE PRACTICE OF THE LEAGUE OF NATIONS

The Hague Peace Conferences supported the traditional doctrine of unanimity, but disguised them "by the fiction of quasi-unanimity", which recognized as unanimously accepted a proposal receiving a substantial majority of the votes cast. Certain proposals of the Proceedings of the First Hague Conference were adopted unanimously with the exception of two votes—United States and Great Britain—and one abstention—Portugal—¹¹.

At the close of World War I, the Treaty of Versailles established the League of Nations which stipulates in Article 5 of its Covenant, the unanimity rule for all decisions of the Council or Assembly except as otherwise expressly provided in the Covenant. Consequently, voting in the League of Nations was normally based on the so-called unanimity rule¹².

Under the League Covenant, the Council was governed by the unanimity rule except in procedural matters, and this proved a serious handicap, particularly when the Council was acting under Article 11 of the Covenant. It was possible for a member of the Council, accused of threatening or disturbing the peace, to prevent any effective action under this Article by the interposition of its veto, as happened in the case of Japanese aggression in Manchuria in 1931, and the threat of Italian aggression in Ethiopia in 1935¹³.

The Permanent Court of International Justice stated that, the rule of unanimity was "in accordance with the unvarying tradition of all diplomatic meetings or conferences" and noted that, in the Council of the League, "observance of the rule of unanimity is naturally and even necessarily indicated"¹⁴.

Additionally, the Permanent Court also added in regards to the organs

¹⁰ MILLER P., VANDOME A. F., & J. MCBREWSTER J., CONSENSUS DECISION MAKING (Alphascript Publishing 2009)

¹¹ Jessup P. C., *Parliamentary Diplomacy*, 89(I. 13) RECUEIL DES COURS, official review from the International Law Academy 242 (1956).

¹² Rosenne, SH., *United Nations Treaty Practice*, 86(II) RECUEIL DES COURS 312 (1954).

¹³ Goodrich, L. M., *From League of Nations to United Nations*, 1(1) INTERNATIONAL ORGANIZATION, 11 (Feb. 1947).

¹⁴ Advisory Opinion concerning Article 3, Paragraph 2, of the *Treaty of Lausanne (Frontier between Turkey and Iraq)*, B(12) 29-30 (1925).

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of the League of Nations that, “in a body constituted in this way, whose mission is to deal with any matter within the sphere of action of the League or affecting the peace of the world, observance of the rule of unanimity is naturally and even necessarily indicated Moreover, it is hardly conceivable that, resolutions on questions affecting the peace of the world could be adopted against the will of those amongst the members of the Council who, although in a minority, would, by reason of their political position, have to bear the larger share of the responsibilities and consequences ensuing therefrom”¹⁵.

When the Hague Conference for the Codification of International Law met in 1930, the President of the Conference (Heemskerck, the Netherlands) stated that, “we should maintain the principle that, we must adopt unanimous resolutions and that unless we do so, we cannot have any codification of international law”¹⁶. On the other hand, While Politis (Greece) agreed that, “it was undoubtedly the wish of all to take unanimous decisions and also added that, no State or minority group of States will be permitted at this Conference to prevent the majority from embodying the results of its deliberations in a diplomatic instrument”¹⁷.

Proponents of consensus and unanimity consider it to have many advantages over majority voting, because it cultivates discussion, participation and responsibility, and avoids the so-called “tyranny of the majority”. However, the drawback is a lengthy and difficult decision making process¹⁸.

The so-called unanimity rule has been much criticized. Critics often tend to lose sight of that fact that, the League was an association of independent states and must proceed by the way of unanimous compromise and not by majorities imposing decisions on minorities. No state today will put itself in the position of being legally compelled to take action or commit its national policy by a vote of foreign powers¹⁹.

A text is said to be adopted by consensus when all the members of the organ tasked with taking the decision give their tacit consent. No voting takes place. Consensus differs from unanimity which is an explicit agreement, resulting from a vote in which all members cast a vote. In

¹⁵ *Publications of the Permanent Court of International Justice*, B (12), 29.

¹⁶ *Acts of the Conference for the Codification of International Law*, PLENARY MEETINGS, L.N. Doc. C. 351.M.145.1930.V.14, at 21 (1930).

¹⁷ *Op. cit.*, at 16.

¹⁸ Mossel E., & Tamuz O., *Making Consensus Tractable*, GOOGLE EUROPE FELLOWSHIP IN SOCIAL COMPUTING 1 (October 2013).

¹⁹ Howard-Ellis C., *The Origin, Structure & Working of the League of Nations*, 124-125 (Boston: Houghton Mifflin Company 1929).

summary: a consensus is obtained without voting when no one opposes the decision, and unanimity is when everyone agrees and votes in favour of the text.

III. APPROACH TO CONSENSUS BUILDING WITHIN THE UNITED NATIONS

The main change introduced into the United Nations since 1945 was the abolition of the unanimity rule and the decentralization and dissipation of the functional competence, through various organs, with a residuary and coordinating power of control in the General Assembly's exclusive competence over the United Nations budget²⁰.

The substitution of majority decisions for unanimity in the drafting of international conventions will have far-reaching consequences. This issue was discussed by the General Assembly in its fifth and sixth session on the subject of reservations to multilateral conventions, and it also relevant that, the International Court of Justice has drawn its attention to this aspect as follows:

“The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations”²¹.

If the unanimity rule in the past led to a tendency to overplay the unattainable high standard, which had as a consequence that, agreements could be watered-down by representing the minimum to which all States would or could agree, the abolition of unanimity was perceived as an example of progress and democracy. However, this abolition led to other consequences, such as, firstly, it did not make easier the work to draft worth-while conventions having universal effects and secondly, it resulted in a multiplication of reservations going to the root of the agreements. Consequently, the question raised is whether the price of the abolition of unanimity was not too high²².

As was the practice prior to the First World War, the text of a multilateral convention has to be adopted by unanimity. Unanimous consent as regards the admissibility of reservations was the logical concomitant of the unanimity rule applying to the establishment of the text of multilateral conventions²³.

In the context of a proposal (E/CN.9/L. 110) on the rules of procedure

²⁰ Rosenne SH., *United Nations Treaty Practice*, 86(II) RECUEIL DES COURS 313 (1954).

²¹ *Reservation Case*, REPORTS 1951, 22 (I.C.J.).

²² Rosenne SH., *United Nations Treaty Practice*, 86(II) RECUEIL DES COURS 313 (1954).

²³ Sinclair I., *The Vienna Convention on the Law of Treaties*, 56 (Manchester University Press 1984).

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of the World Population Conference, the President of the Conference wanted to know whether the decisions on important matters related to the substance should be adopted, if possible, by consensus.

In 1974, the Director of the General Legal Division at the Office of UN Legal Affairs made a statement about the use of the term consensus in the United Nations practice in the following terms²⁴:

“No plenipotentiary conference under United Nations auspices had included in its rules of procedure a provision on consensus, partly due to the fact that it was somewhat difficult to arrive at an exact definition of consensus, and partly because the objective which was usually sought, namely, that every effort should be made to achieve a consensus before a vote was taken, could better be achieved by simply an understanding at the beginning of the conference. In United Nations organs, the term ‘consensus’ was used to describe a practice under which every effort is made to achieve unanimous agreement; but if that could not be done, those dissenting from the general trend were prepared simply to make their position or reservations known and placed on the record”.

The consensus system assures that, decision-making as a multilateral negotiation of a legal instrument will not be dominated by the numerical superiority of any group of nations. Since it is difficult to obtain acceptance of voting systems that, overtly recognize the differences in nations’ importance, the consensus approach permits the maintenance of an egalitarian procedure which in practice may assure that, multilateral negotiations reflect the real geopolitical power of the participating nations²⁵.

It follows that, consensus decision making is “an attempt to achieve an agreement of all the participants in a multilateral conference without the need for a vote and its inevitable divisiveness”²⁶. In other words, it is an agreement of all taken unanimously by means other than voting and consequently, “the effort to achieve consensus ... protects the interests of those who risk becoming permanent minorities at each institution”²⁷.

Consensus decision making as a mode of procedure became popular in the 1970s, as a result of the growing number of independent states taking an active part in international politics. These large number of independent states were welcomed to take part in the international organizations through the encouragement of an “international governance of many” or

²⁴ Summary of a statement made at the 311th meeting of the Population Commission, on March 6, 1974.

²⁵ Buzan B., *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 327 (1981).

²⁶ BERRIDGE G. R., *DIPLOMACY: THEORY AND PRACTICE* 24 (3rd ed., Basingstoke: Palgrave Macmillan 2005).

²⁷ Kahler M., *Leadership Selection in the Major Multilaterals*, 24 (Washington: Institute for International Economics 2001).

multilateralism which was linked with the principle of “the sovereign equality of states”²⁸.

A. *Security Council*

Since the three vetoes by Russia and China over Syria in 2011 and 2012, and the inability of the Security Council to find a solution to the conflict, there has been a common perception that the Council is divided. Likewise, following the war in Iraq in 2003, the Council was viewed as having become badly fractured. However, looking at decisions adopted, the Council is actually divided on just a limited number of issues and otherwise largely operates by consensus²⁹.

Presidential statements require consensus, and press statements are issued only with the agreement of all 15 members. All sanctions committees, with a few exceptions, and working groups also operate by consensus. Resolutions, which are put to a vote, are the only Council outcome that can be adopted with or without the unanimity of the Council. Most resolutions, however, have been adopted by consensus: 93.5 percent of those adopted since 2000 to December 15, 2013. Contrary to public perceptions, this is a noticeable increase from 88.9 percent in the 1990s, a period when the Security Council was viewed as highly active, and comparatively more effective and less divided due to the end of the Cold War³⁰.

Consensus in Council decision-making seems to be the preferred mode even during years that generated bitter feelings among members. Despite recent divisions on Syria or prior to and following the 2003 Iraq war, consensus resolutions during these periods still prevailed at levels above 92 percent. Thus, it seems that, either the Council looks at the merits of each situation instead of allowing divisions on specific issues to permeate into its other work, or it makes a more concerted effort to at least appear united on other fronts³¹.

B. *General Assembly*

Each of the 193 Member States in the Assembly has one vote. Votes

²⁸ Kahler M., *Multilateralism with Small and Large Numbers*, MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 295 (J. Ruggie ed., New York: Columbia University Press 1993).

²⁹ *In Hindsight: Consensus in the Security Council*, SECURITY COUNCIL REPORT (New York, January 2014).

³⁰ *In Hindsight: Consensus in the Security Council*, SECURITY COUNCIL REPORT (New York, January 2014).

³¹ *Op. cit.* 30.

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taken on designated important issues—such as recommendations on peace and security, the election of the Security Council and Economic and Social Council members, and budgetary questions—require a two-thirds majority of Member States, but other questions are decided by simple majority³².

During the Cold War, the United Nations was very divided, and it was difficult for resolutions to pass with more than 60%-70% support of the members. Following the end of the Cold War, the United Nations has increasingly tried to work toward consensus, where many resolutions are adopted unanimously by all voting members. In recent years, an effort has been made to achieve consensus on issues, rather than deciding by a formal vote, thus strengthening support for the Assembly's decisions.

Additionally, it should be noted that, the rule of consensus has been included in the Rules of Procedure of the General Assembly in its Article 104 with regards to financial issues, as follows:

“The Special Committee considers that, the adoption of decisions and resolutions by consensus is desirable when it contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations. It wishes, however, to emphasize that, the right of every Member State to set forth its view in full must not be prejudiced by this procedure”.

Unlike decisions regarding treaties and conventions, in which the system of reservations is applied by States, the adoption by consensus of Declarations on peace matters by the General Assembly has been a clear tendency since the creation of the United Nations.

In particular, it should also be recalled that, the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples of 1965, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict of 1974, Declaration on the Participation of Women in Promoting International Peace and Co-operation of 1982 and the Political Declaration on the peaceful resolution of conflicts in Africa of 2013, were adopted by consensus. Neither the Declaration on Preparation of Societies for Life in Peace of 1978, the Declaration on the Right of Peoples to Peace of 1984 nor the Declaration and Programme of Action on a Culture of Peace of 1999 were adopted by the General Assembly with the opposition of regional groups.

Finally, it should also be noted that, most of Declarations, Rules and Guidelines on human rights adopted by the General Assembly since 1945 were adopted by consensus. In particular, the General Assembly has adopted around thirty Declarations in different fields of human rights, such as

³² See Available at <http://www.un.org/en/ga/about/background.shtml>.

children rights, racial discrimination, persons with disabilities, women, enforced disappearance, development, among others, after all different regional groups reached relevant agreements³³. Only three important Declarations on human rights were adopted with some opposition, such as Declaration on the Right to Development³⁴ or Indigenous Peoples³⁵, or abstentions, such as the Universal Declaration of Human Rights³⁶. But the rest of Declarations have been adopted by consensus.

Most of the declarations contain political statements only and thus have no binding effect in international law. However, the General Assembly has often adopted declarations which, although non-binding, have influenced the development of international law or in some cases have been regarded as reflecting customary law on the relevant topic. For this reason, the consensus or unanimity in the decision making process within the General Assembly has been critical in order to advance international law, and reflect

³³ Declaration of the Rights of the Child, United Nations Declaration on the Elimination of All Forms of Racial Discrimination; Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples; Declaration on the Elimination of Discrimination against Women; Declaration on the Rights of Mentally Retarded Persons; Declaration on the Protection of Women and Children in Emergency and Armed Conflict; Declaration on the Rights of Disabled Persons; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Political declaration on Africa's development needs; United Nations Declaration on Human Rights Education and Training; Political declaration of the high-level meeting of the General Assembly to commemorate the tenth anniversary of the adoption of the Durban Declaration and Programme of Action "United against racism, racial discrimination, xenophobia and related intolerance"; Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases; Political Declaration on the peaceful resolution of conflicts in Africa; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Political Declaration on HIV/AIDS; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); United Nations Rules for the Protection of Juveniles Deprived of Their Liberty; Basic Principles for the Treatment of Prisoners, The protection of persons with mental illness and the improvement of mental health care; Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities; Declaration on the Protection of All Persons from Enforced Disappearance; Standard rules on the equalization of opportunities for persons with disabilities; Declaration on the Elimination of Violence against Women; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; Declaration and Programme of Action on a Culture of Peace; Millennium declaration; United Nations Declaration on the New Partnership for Africa's Development; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

³⁴ 1 Vote against and 8 Abstentions.

³⁵ 4 Vote against and 11 Abstentions.

³⁶ 8 Abstentions.

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the existence of a particular customary law among all States.

C. Human Rights Council

In accordance with Article 4 of the Rules of Procedure, the Council applies the rule of majority of votes for the adoption of resolutions and decisions. However, it should also recalled that, the “United Nations Human Rights Council: Institution-Building”³⁷ establishes that, the search for consensus plays an important role in the negotiation process. In particular, Article 127 indicates that:

“The sponsors of a draft resolution or decision should hold open-ended consultations on the text of their draft resolution(s) or decision(s) with a view to achieving the widest participation in their consideration and, if possible, achieving consensus on them”.

Consensus in the decision-making process has had an important effect in the works of the Council since its inception. Most of resolutions are adopted by consensus, representing around 82% of the totality of them.

The most controversial resolutions are those related to country situation, notably, Belarus, Syria, Israeli settlements in the Occupied Palestinian Territory, right of the Palestinian people to self-determination, Iran, North-Korea, the occupied Syrian Golan.

Additionally, the Council has widely worked on topics, which have not been supported by all Council members, such as foreign debt, right of peoples to peace, international solidarity, integrity of the judicial system, non-repatriation of funds of illicit origin, the promotion of a democratic and equitable international order, the use of remotely piloted aircraft or armed drones in counter-terrorism and military operations, promotion and protection of human rights in the context of peaceful protests, unilateral coercitive measures, right to development, mercenaries and sexual orientation and gender identity.

D. Other Intergovernmental Bodies, United Nations Agencies and Social Movements

In the disarmament affairs, all resolutions are adopted by consensus. In fact, in the rules of procedure of the Conference of Disarmament, the rule of consensus is compulsory for the adoption of resolutions.

³⁷ UNGA Resolution 5/1, INSTITUTION-BUILDING OF THE UNITED NATIONS HUMAN RIGHTS COUNCIL (June 18, 2007).

In addition, many conventions and treaties on disarmament operate through the rule of consensus among all countries. In particular, the Chemical Weapons Convention specifies in its Article 18 that, "... decisions on matters of substance should be taken as far as possible by consensus". In addition, the Anti-Personnel Mine Ban Convention regulates in Article 6 that, "... the Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach a decision by consensus". The Arms Trade Treaty also indicates in Article 17.2 that, "the Conference of States Parties shall adopt by consensus its rules of procedure at its first session". Finally, the Rarotonga, Pelindaba and Bangkok treaties also specify that decisions shall be taken by consensus.

The principle of consensus has been adopted by the Association of South East Asian Nations (ASEAN), Executive Committee of International Monetary Fund (IMF), General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO), North Atlantic Treaty Organization (NATO) and Organization for Security and Cooperation in Europe (OSCE)³⁸.

It should be noted the extension of the International Labour Organization (ILO) system to certain of the Specialized Agencies, which expressly rejected the decision-making process adopted by the United Nations³⁹. It is significant to stress that, the undesirable features derived from the abolition of unanimity in 1945 by the United Nations are less in evidence in the ILO Conventions. The ILO system was partially extended to certain of Specialized Agencies, notably United Nations Educational, Scientific and Cultural Organization (UNESCO), Food and Agriculture Organization (FAO), World Health Organization (WHO) and International Civil Aviation Organization (ICAO), which has permitted them a more satisfactory progress at the technical, legal and functional level⁴⁰.

In accordance with Article 28 of the Rules applicable to the Governing Body of the International Labour Office, the agenda of each session is determined by a tripartite screening group, which will take the decisions, to the extent possible, by consensus. If there is no consensus, the issue will be referred to the Officers.

The ILO understands consensus as the following:

"... The term 'consensus' refers to an established practice under which every effort is made to reach without vote an agreement that is generally accepted.

³⁸ Movsisyan M., *Decision Making by Consensus in International Organizations as a Form of Negotiation*, 1(3) 21-ST CENTURY 78.

³⁹ Rosenne SH., *United Nations Treaty Practice*, 86(II) RECUEIL DES COURS 313 (1954).

⁴⁰ Rosenne SH., *op. cit.* 39, 315.

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Those dissenting from the general trend are prepared simply to make their position or reservations known and placed on the record ...⁴¹.

The rule of consensus is also applied in the procedure for the elaboration, examination, adoption and follow-up of declarations, charters and similar standard-setting instruments adopted by the General Conference of UNESCO. In particular, stage 3 indicates that, “the declaration, charter or similar standard-setting instrument shall be adopted by a resolution of the General Conference. Every effort shall be made to adopt the declaration, charter or similar standard-setting instrument by consensus”⁴².

A “good example” of consensus is the recent adoption by 195 States of the Paris Agreement in the context of the 2015 United Nations Climate Change Conference, COP 21 held in Paris (France), from November 30 to December 12, 2015. With the following words pronounced by Laurent Fabius, Minister of Foreign Affairs of France “I do not see any objection in the room, I declare the Paris Agreement on Climate Change adopted”, consensus was achieved by all States.

The feminist and anti-nuclear movements of the 1970s are often credited with the pioneering of consensus as many activists know it today. Ethan Mitchell cites 4 US-based organisations—the Federation of International Communities, the American Friends’ Service Committee, the Clamshell Alliance and Food Not Bombs⁴³.

The consensus process has also been used within political movements, non-profit organizations, intentional communities and worker cooperatives. Recently, consensus decision-making is being embraced by government entities and corporations (i.e. Mitsubishi, Levi Strauss & Co., and Starbucks)⁴⁴.

CONCLUSION

The roots of the consensus decision making process can be found in the three main religions (i.e. Christian, Muslim and Jewish) and indigenous peoples. The Haudenosaunee Confederacy, the Hanseatic League and Bushmen have all decisively shaped some legal systems, namely the United States of America and European Union and still continue influencing in many African countries.

Additionally, the League of Nations stipulated in Article 5 of its

⁴¹ Article 46, *Rules Applicable to the Governing Body of the International Labour Office*, (Geneva: International Labour Organization 2001).

⁴² Adopted by the General Conference at its 33rd session, *33 C/Resolutions*, 141-2.

⁴³ *Op. cit.* 3.

⁴⁴ *Op. cit.* 3.

Covenant the unanimity rule for all decisions of the Council or Assembly except as otherwise expressly provided in the Covenant. The Permanent Court of International Justice concluded that, resolutions or instruments on questions affecting the well-being of humankind as a whole could not be adopted against the will of some other States. Additionally, the President of the Hague Conference for the Codification of International Law stressed in 1930 that, the international community should adopt unanimous resolutions and that unless we do so, we cannot have any codification of international law.

Despite abolishing the unanimity rule in 1945, the adoption of resolutions by consensus has continued to be the clear tendency and practice at the United Nations since its inception. In 1974, the Director of the General Legal Division at the Office of UN Legal Affairs concluded that, every effort should be made to achieve a consensus before a vote and that, this term was used to describe a practice under which all efforts are made to achieve unanimous agreements.

Because of the inability of the United Nations to find a solution to some conflicts and problems, there has been a common perception that, States are divided in the main UN bodies, namely the Security Council, the General Assembly or the Human Rights Council. However, looking at decisions adopted, the United Nations is actually divided on just a limited number of issues and otherwise largely operates by consensus. In particular, most of the Declarations on peace matters and human rights adopted by the General Assembly since 1945 have always been adopted by consensus.

Finally, important intergovernmental organizations, specialized agencies and social movements have expressly accepted consensus in their respective rules of procedures and have also concluded that, the term “consensus” refers to an established practice under which every effort is made to reach without vote an agreement that is generally accepted.

In conclusion, the consensus system assures that, decision-making regarding a legal instrument recognize the differences among nations and also permits the maintenance of an egalitarian procedure which in practice may assure that, multilateral negotiations reflect the real geopolitical power of all participating nations.

POSITION AND ROLE OF THE AMBASSADORS ACCORDING TO VIENNA CONVENTION AND LAW ON FOREIGN AFFAIRS OF THE REPUBLIC OF MACEDONIA

*Aneta Stojanovska-Stefanova**, *Drasko Atanasoski*** & *Katerina Stojanovska****

The Vienna Convention on Diplomatic Relations, Consular Relations, Representation of states and their relations with international organizations of universal character, as well the Convention on Special Missions which codifies the modern diplomatic law, with its diverse, elastic solutions enabled the states to use combinations of numerous possibilities of collection of functions and offices, in the target of the rational use of its diplomatic-consular network and of the networks of other countries.

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INTRODUCTION

Vienna Convention on Diplomatic Relations adopted in 1961, contributed a lot to culmination on diplomatic and consular functions, allowing the diplomatic missions to perform consular functions. In fact Article 3, paragraph 2 of the Convention provides that: “Nothing in the

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present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission". This provision fills the Vienna Convention on Consular Relations, adopted in 1963, which in Article 3 specifically stipulates that: "consular functions can perform the diplomatic missions in accordance with the provisions of this Convention". In the Article 70 of the Convention states that, its provisions "the provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission" and that, the names of the members of diplomatic missions which are designated for consular departments of the mission or are otherwise certain to perform consular functions, will be appointed by the Ministry of Foreign Affairs of the receiving State or by other authority that will be determined by the relevant ministry. With the same article of the Vienna Convention on Consular Relations, is finally solved one practical question about the status of the members of the diplomatic missions who perform consular functions, which over the years has been the subject not only of academic discourse, but also of serious different opinions in the proceeding of codification of the diplomatic law: if those persons have the right of privileges and immunities as members of diplomatic missions, i.e. according to the rules of the Vienna Convention on diplomatic relations or as members of consular relations. After a series of serious discussions of the Vienna Convention on Consular Relations, it is adopted that, privileges and immunities of the members of diplomatic missions who perform consular functions stipulated in compliance with the Vienna Convention on Diplomatic relationships for performing of consular functions such persons do not lose the privileges and immunities as members of diplomatic missions, by which finally an end is put to the views of individual countries that the performing of consular functions by members of diplomatic missions is related to the denial of the diplomatic status and their deepening by the status consulate members, with extremely reduced privileges and immunities.

I. FOREIGN POLICY AND DEVELOPMENT OF DIPLOMATIC RELATIONS OF THE REPUBLIC OF MACEDONIA

Republic of Macedonia promotes its national values and interests through foreign policy—on bilateral and multilateral plan. European and Trans-Atlantic integration is a vital interest for long-term stability, security and prosperity of the Republic of Macedonia. The Republic of Macedonia is committed to fulfillment of five foreign-policy priorities: NATO membership and a date for the beginning accession negotiations for full

membership in the European Union, abolition of visas for Macedonian citizens, overcoming of the issue of the name difference imposed by our southern neighbor and reinforcement of the economic and public diplomacy. Republic of Macedonia has fulfilled all the criteria for NATO membership and has implemented the necessary reforms. In the declaration of the NATO Summit in Bucharest, our commitment to the values and operational activities of NATO and the progress in the reform process was clearly acknowledged. Due to the opposition of the Republic of Greece, the invitation for NATO membership, the Alliance will send after finding a mutually acceptable solution to the issue about the difference over the name of the Republic of Macedonia, for which talks have been holding under the auspices of the United Nations. The membership of the Republic of Macedonia in NATO will mean long-term stability and security not only for the Balkans but for the Euro-Atlantic region as a whole and the beginning of the finalization of the concept of a Europe, whole, free and at peace. In the relations with the European Union, the main commitment of the Republic of Macedonia is to start negotiations for accessions as soon as possible and to this end the Government and state institutions work devotedly to the fulfillment of the priorities of the Accession Partnership from 2008. We expect that, during 2009, our efforts and achievements to be evaluated by European Commission recommendation to start accession negotiations, followed by appropriate decision by the European Council. The Republic of Macedonia expects early and successful termination of the dialogue on visa regime liberalization with the European Union. In relation to the established significant progress in meeting of the conditions of the Roadmap for visa liberalization, we expect at the beginning of 2009, from the European Commission to initiate a legal proceeding in the Council of EU to lift the visa regime for Macedonia and the entry into force of the visa-free regime during 2009. Republic of Macedonia participates constructively and actively in the negotiation process under the auspices of the Special Representative of the UN Secretary-General, Ambassador Matthew Nimetz to overcome the irrational issue imposed by the Republic of Greece concerning the difference about the name of our country. Republic of Macedonia is continuously engaged in finding a mutually acceptable solution that would not infringe on the Macedonian national identity, language and culture. Republic of Macedonia is committed to continuously strengthening of the strategic partnership with the United States and developing of comprehensive partnership relations with member states of the EU and NATO, whereupon pays particular attention to the relations and cooperation with other important actors on the international stage, primarily with the

Russian Federation and the People's Republic of China. In the relations and cooperation with the neighboring countries, a good-neighborliness and friendship and readiness for comprehensive cooperation in many areas of mutual interest is promoted. Good neighborly relations as one of the priorities in the foreign policy represent original determination, an instrument for enhancing of the mutual trust and simultaneously, a complementary factor on the accession road of the Republic of Macedonia towards EU and NATO. Establishing of comprehensive cooperative relations with all countries in the immediate and wider neighborhood—both at bilateral plan and within regional initiatives and projects through participation in the existing initiatives for regional cooperation in the entire region of South East Europe, represents an active contribution of the Republic of Macedonia in the creation of relations of security, stability and cooperation in Southeast Europe. Republic of Macedonia is continuously engaged in promoting and further enrichment of the relations with democratically committed countries with which it has to great extent traditionally good and developed relations. Republic of Macedonia actively participates in the work of all relevant international organizations, as in global level—UN and of specialized agencies, WTO, and in regional organizations—OSCE, Council of Europe etc., as the most effective way of protecting of the world peace and security from the global threats of nowadays: terrorism, proliferation of weapons of mass destruction, organized crime, the preservation of a healthy environment, dealing with economic and social issues (non-) respect for human rights and more. The promotion of economic potentials and investment opportunities in the Republic of Macedonia, as well the development of active external economic policy is aimed at intensifying and qualitative enhancement of the bilateral economic relations with the countries of the region, Europe and the entire international community. On the basis of the importance of the national identity and values of the Macedonian people for the sovereignty, independence and security of the state, the Republic of Macedonia attaches great importance to the promotion of the national, cultural and spiritual identity outside the borders of the Republic of Macedonia. Concern for the position of the Macedonian communities living outside the national boundaries and for improvement of the legal status, and treatment of the Macedonian national minority in other countries, according to the international treaties and the concluded bilateral treaties and agreements, represents one of the most important foreign policy goals. Republic of Macedonia participates in peacekeeping missions (UN, NATO, EU) in support of peace, security and stability. Presently, Macedonia contributes

with about 240 people in international operations or about 3.5% of its own military forces. Republic of Macedonia participated with its troops in Afghanistan (ISAF), Iraq (Iraqi Freedom), Bosnia and Herzegovina (ALTHEA) and Lebanon (UNIFIL), and also provides logistical support to KFOR in Kosovo. Regarding the participation in international missions led by NATO, Republic of Macedonia received the highest marks from NATO, which sees our country as a stable military partner to the Alliance¹.

The process of recognition of the Republic of Macedonia started in 1992. Since then until today, diplomatic relations with 170 countries have been established. Our country has established diplomatic relations with about 170 countries worldwide, and under its constitutional name, is recognized by over 130 countries including three permanent members of the Security Council—USA, Russia and China. Republic of Macedonia before exactly 22 years ago became the 181st full member of the United Nations. This act confirmed the will of the Macedonian people after the referendum on September 8, 1991 for a sovereign and independent Macedonia. Because of the opposition and pressure from Greece, which does not accept our constitutional name, the registration in the world organization was made under the interim reference Former Yugoslav Republic of Macedonia².

II. RESPONSIBILITIES OF THE AMBASSADORS IN ACCORDANCE WITH VIENNA CONVENTION AND THE LAW OF FOREIGN AFFAIRS OF THE REPUBLIC OF MACEDONIA

Vienna Convention on Diplomatic Relations from 1961, signed in Vienna on April 18, 1961 came into force on April 24, 1964.

A. *In Accordance with the Vienna Convention the Diplomatic Officers Enjoy the Following Rights and Obligations*

Free movement and travel throughout the territory of the receiving State;

Right of free communication with the Government of the sending state, through including diplomatic couriers and installing of wireless transmitters, but only with the consent of the receiving State;

The receiving State shall protect the diplomatic official in the performance of his function who possess an official document of his status;

¹ Available at <http://www.mfa.gov.mk/default1.aspx?ItemID=263>, Ministry of Foreign Affairs of the Republic of Macedonia, opened on July 27, 2012.

² Available at <http://mrt.com.mk/node/22051>, Macedonian Radio Television, opened on August 25, 2015.

Diplomatic officials who possess an official document that confirms their status are not subject to any form of arrest or detention and the receiving State shall take all necessary measures to protect his person;

Shall guarantee inviolability of the private residence and protection of the premises of the mission;

Diplomatic officers enjoy immunity from criminal prosecution;

Immunity does not prevent the receiving State for his extradition to the sending State;

On the entry into the receiving State, the baggage of the diplomatic official and his family is exempt from inspection;

The diplomatic officials begin to use the privileges and immunities from the entrance to the receiving State until its abandonment;

In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country;

The diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity;

The receiving State is obliged in case of armed conflict to protect the premises of the mission;

B. Pursuant to the Law on Foreign Affairs (“Official Gazette of the Republic of Macedonia” No. 46/06 and 107/2008)

According to Article 26 of the Law:

The Embassy and Liaison Office besides the functions stated in the Vienna Convention on Diplomatic Relations, perform the following functions:

Represent and plead the Republic of Macedonia in the receiving State;

Protects the interests of the Republic of Macedonia and its citizens and legal entities and perform consular and legal affairs;

Promotes and develops the relations and overall cooperation between the Republic of Macedonia and the receiving State for the interests of the Republic of Macedonia;

Participate in the negotiations with the government of the receiving State and other state institutions;

Monitor the internal and external position and activity of the receiving State and shall inform the Ministry about that, which forward the information to the President and;

Notify the authorities, institutions and public of the receiving State

about the positions and the development of the Republic of Macedonia;

Monitor the current economic policy of the receiving State and regularly inform the Ministry that, forward information to the competent institutions in the Republic of Macedonia and;

Promote Republic of Macedonia on economic plan in the receiving State and present the opportunities and advantages of investing in coordination and cooperation with the economic promoters from the Republic of Macedonia located in the receiving State, with the Agency for Foreign Investments of the Republic of Macedonia and the ministers in charge of foreign investments.

Embassy and Liaison Office develop their work on political, economic, security, cultural, scientific-technical, informational and other field.

The Embassy and Liaison Office devote special care to the status and human rights of the Macedonian people in the neighboring countries and to the citizens of the Republic of Macedonia.

According to Article 35 of the Law:

The head of the diplomatic and consular missions shall perform the following duties:

Organize the work of the diplomatic and consular mission, classifies tasks and undertakes measures in relation to matters within the jurisdiction of the mission;

In accordance with the regulations takes care for the fulfillment of the rights and obligations of officers in the mission;

Decide for financial and material operations of the mission within the budget of diplomatic and consular missions and;

Perform other duties in accordance with the regulations and instructions of the Minister.

According to Article 48:

Besides the duties of diplomatic and consular officers stipulated in this law, the Ambassador shall be obliged to:

Act in accordance with the established foreign policy of the Republic of Macedonia;

Contributes to the strengthening of the relations with the receiving State or international organization and;

Manages with the mission in which he was appointed;

Act in accordance with the instructions and directions of the Minister.

CONCLUSION

The analysis of the activities of the holders of the foreign policy of the

Republic of Macedonia indicates the conclusion that, in the process of exercising of its own foreign policy priorities, our country in the past years from its independence until today is guided by the fundamental tenets of the constitution, and the laws and principles of the activities in the states in the United Nations.

The objectives of the foreign policy of the Republic of Macedonia in the past years have been carried out by the office holders who were elected in free, fair and democratic elections, but they have remained substantially unchanged. However, in view of the characteristics of the individuals who carried out these functions over the years, differences are observable.

The development of democracy in the independent states that, were created after the fall of communism in Eastern Europe had a great influence on this, the approach in duty performance from the aspect of ideological and political profile and of course, the global changes taking place in the international community.

The Republic of Macedonia in the implementation of foreign policy is guided by the respect of the Charter of the United Nations, resolving conflicts, disputes and open-issues between the countries peacefully, adherence to the international and legal principle for invariability of the borders, respecting of the policy for promotion of the body on Human rights and freedoms, supporting of the disarmament efforts and ban on all weapons of mass destruction, support for the promotion of the international economic relations in conditions of economic globalization.

The Institute of International Recognition is one of the instruments for developing of the cooperation with other countries based on mutual interests. This institute "recognition of States" is known from the League of Nations and the United Nations. The legal effects of the recognition of states are limited if they are limited only to a declaratory act, but they can be both constitutive and more serious, if they are followed with the establishment of other legal and economic pressures, such as isolation or boycotts.

It is important to emphasize that, the recognition of the states has no direct connection with the establishment of diplomatic relations, namely it can happen the state to be recognized, but not to establish diplomatic relations with it, while the reverse is not possible, since the establishment of the diplomatic relations implies recognition of that country.

PROVISION OF NURSING CARE WITH OR WITHOUT THERAPEUTIC COMMUNICATION INTERVENTION

Treslova Marie & Pekara Jaroslav***

This paper acquires with provision of therapeutic communication in nursing in The Czech Republic. The survey sample was composed of two groups of 249 nurses and 169 patients from 7 hospitals in South Bohemia in Czech Republic. Results of qualitative and quantitative survey show the lack of necessary skills of therapeutic communication for provision of quality professional nursing care concerning prevention of unpleasant feelings connected with hospitalization which could lead to anger, aggression and violence. Also that patients and nurses are aware of the need for these skills which support patient's well-being (balance), coping with aggressive behavior, identification of stress and depression and the emotional support. The most frequent communication skills is to give and to obtain information from patients and the less skills provided and missed by the patients respondents is "to react more to what they say (48.0%), to have more time for them (33.1%) and to listen to them more (25.1%). On the other hand, the conditions and the environment don't offer possibilities for the nurses to spend required time with the patients. Also education of nurses, historical and cultural factors and theirs influence have to be taken into the account. Implementation of therapeutic communication as the obvious criteria of professional quality in nursing care is necessary. Discussion with educational institutions, managers, ministry authorities and insurance companies is one way for improvement of this situation.

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INTRODUCTION

It was expected that, historical changes of the last 25 years will bring improvement into the professional nursing. But the care is still not comparable with countries in which development of this discipline was not interrupted due to the political system. There are very good educated and skilled technical nurses, but there is a big gap between theory and practice in

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the field of psychosocial nursing interventions in Czech Republic. We apprehend that, nursing should relieve and contribute to man, who is the center of nurse's work and who finds himself in the unknown environment with a feeling of failure or threat. This is the reason why we intensively pay attention to what patient experiences and what the nurse can do with and how she/he can use professional interventions to save the patient from unpleasant and uneasy experiences. Therapeutic communication is not explicitly defined in Czech nursing. Therefore there is a question how nurses intervene in case of stress situations to prevent aggressive or violent behavior of patients, caused by the new—unknown environment, procedures and provided care in the hospital. EU recommendations of nursing competences can be found in the Tuning project (Tuning Educational Structures in Europe)¹, which also says that, the nurse should use a range of communication techniques to support patient well-being (balance), should be able to cope with aggressive behavior, identify stress and depression and give emotional support. This is of course underpinned with the holistic approach of nursing philosophy² that is to meet all man needs included the psychosocial. So far though, nursing practice in Czech Republic does not fulfill this theoretical and ethical approach which is characteristic for this profession stated in ICN Code of Ethics for Nurses, or nursing process and nursing interventions in a satisfactory manner.

I. METHODOLOGY

Quantitative method in the form of self-constructed questionnaire based on the theory of therapeutic communication was used. Data were analyzed with SPSS 16 statistics program. Significance level of 5% and high significance of 1% were chosen, to which correspond p-values smaller than 0.05 and 0.01, respectively. This means that, of the p-level is smaller than 0.05, the hypothesis on independence does not apply as the dependent is hereby significant Semantic differential³ was used to find out how nurses tend to necessity, usage and effectivity of therapeutic communication using pairs of antonym adjectives on a 7-grade scale. The survey sample was composed of two groups of 249 nurses and 169 patients from 7 hospitals in South Bohemia in Czech Republic. The aim of the study was to find, what is

¹ *Tuning Educational Structures in Europe*. Available at <http://odur.let.rug.nl/TuningProject/>, <http://www.relint.deusto.es/TuningProject/index.htm>.

² BERMAN A., & SNYDER S., KOZIER AND ERB'S FUNDAMENTS OF NURSING (New Jersey: Pearson 2012). ISBN 13: 978-0-13-802461-1.

³ CHRÁSKA M., METODY PEDAGOGICKÉHO VÝZKUMU (Praha: Grada Publishing 2007). ISBN 978-80-247-1369-4.

the position for therapeutic communication in nursing care from the point of view of both nurses and patients; what skills of therapeutic communication the patients are missing; what obstacles nurses meet when providing therapeutic communication.

II. RESULTS AND DISCUSSION

Therapeutic communication is not explicitly defined in Czech nursing. To describe the term therapeutic communication, we searched in the foreign sources mostly. We understand the therapeutic communication as the “tool” (skill) or intervention for seeking the way to cope with obstacles connected with health prevention, support, disease, and also with dying. When thinking about the term therapeutic communication, we can consider a few opinions as follows: Rossiter⁴ defines this term and says that, “therapeutic communication is health promoting (p. 127)”. WHO generally describes “health” as well-being (balance). This indicates the aim and intended effect of therapeutic communication. Other authors define this communication as “patient orientated interactive process, including verbal and nonverbal behavior as indivisible and integral part of patient recovery⁵ s.9”. Also Joseph & Worsley⁶ deal with the patient-oriented inter-personal approach.

It is logical that, hospitalized patients experience stress, uncertainty, the loss of safety and autonomy to a great degree.^{7,8} Such exposure can lead a person to reactions far from reasonable, to an agitated state or aggressive behavior and possible violence. However, in these circumstances, such behavior should be recognized as a natural defense. When symptom as intense questioning, asking for favor, information, restlessness, agitation; changes in speech (speed, adequacy, voice, loudness) anger are detected the nurse should indicate nursing diagnoses as Anxiety; Defensive Coping; Fear; Decisional conflict, High risk for violence.^{9, 10} For these diagnoses,

⁴ Rossiter CH. M., *Defining “Therapeutic Communication”*, 25 JOURNAL OF COMMUNICATION. 127-130 (2006).

⁵ Jones J. S., Fitzpatrick J., & Rogers V. L., *Psychiatric-Mental Health Nursing: An Interpersonal Approach* (New York: Springer 2012). ISBN 978-0-8261-0563-9.

⁶ Joseph S., & Worsley R., *Person—Centered Psychopathology: A Positive Psychology of Mental Health* (Roos-on-Wye: PCCS Books 2005). ISBN 978 18980 59 691.

⁷ Smiar N., & Papenberg W., *Don't Throw Petrol on the Fire! The Essential Connection between Assertive Communication and Safety in the Violent Crisis*, IN PROCEEDINGS OF THE 7TH EUROPEAN CONGRESS ON VIOLENCE IN CLINICAL PSYCHIATRY 335-337 (Dwingeloo: Kavanah 2012).

⁸ KŘIVOHLAVÝ J., *PSYCHOLOGIE NEMOCI* (Praha: Grada Publishing 2001). ISBN 80-247-0179-0.

⁹ Herdman T. H., *NANDA Ošetřovatelské Diagnózy: Definice & Klasifikace: 2012-2014 = Nursing Diagnoses : Definitions and Classification: 2012-2014* (Praha : Grada 2013). ISBN 978-80-247-4328-8.

¹⁰ CARPENITO L. J., *HANDBOOK OF NURSING DIAGNOSES* (5th ed., Philadelphia: Lippincott Comp 1993). ISBN 0-39755054-5.

appropriate interventions should be use as Use calm, reassuring approach; Assess psychological response to situation and availability of support system; be available to listen to patients feelings; Assist patient to properly express and relieve anger in appropriate ways; Encourage expression of feelings.¹¹

The results of our survey show that, even though nurses are unfamiliar with the term therapeutic communication to a high degree (59.0%) and they have not met it in practice (78.3%), they are aware of specific interventions such as listening (75.1%) and observing (43.8%). How can they answer like this when they are not familiar with the term? On the other hand, they think that, giving explanations (73.1%) comes under therapeutic communication while questioning is not seen as an effective therapeutic skill (35.7%). Burnard¹² and Crawford, et al.¹³ mention listening and questioning as fundamental for therapeutic communication that is to lead a person through the uneasy situation. So there is no way how to provide professional nursing care without therapeutic communication skills. To ensure that, the respondents will be clear about the term therapeutic communication we inserted a short explanation after a few introductory questions. 77.5% nurses think that, patients need therapeutic communication and 78.8% think that, therapeutic communication belongs to nursing care. The semantic differential showed inclination of respondents—nurses to the positive adjectives showing effectivity, usage and necessity of therapeutic communication on the 7-grade scale.

Nurses mentioned the reasons for not providing therapeutic communication such as the lack of time (26.9%) also that, the patients do not know about this possibility (25.7%) and 45.8% nurses don't know whether patients require therapeutic communication. How the nurses know their patients then? Could it be called professional care or quality care when the interventions meeting psychosocial needs are inadequate? The lack of time is also underpinned with the lack of personnel and immoderate documentation. Even if they would be skilled the actual conditions don't allowed the provision of therapeutic communication.

Empathy should be one of the nursing characteristic attitude and skill. It is obvious that, the experience of patients differs from nurse's daily routine. We wanted to find out patients opinion and experience with

¹¹ McCLOSKEY J. C., & BULECHEK G. M., *NURSING INTERVENTIONS CLASSIFICATION (NIC)*. (St.Louis: Mosby-Year Book 1992). ISBN 0-8016-6701-1.

¹² BURNARD P., *EFFECTIVE COMMUNICATION SKILLS FOR HEALTH PROFESSIONALS* (Cheltenham: Nelson Thornes Ltd. 2001). ISBN 0 7487 3312 4.

¹³ Crawford P. Brown, B., & Bonham P., *Communication in Clinical Settings*, FOUNDATIONS IN NURSING AND HEALTH CARE (Andover: Centage Learning EMEA 2006). ISBN 978-0-7487-9716-5.

therapeutic communication provided by nurses. Patient respondents stated that their need for therapeutic communication is very strong (16.7%) or strong (51.9%). They experience that, the reason for nurses communicating with them is to inform them (42.3%) and to obtain information (34.3%). Only 21.1% patients stated that, the reason for communication is to find out what worries them, and 10.9% to encourage them. Clearly, information given could sooth uncertainty and anxiety of the patient in many situations, it is however up to the nurse to reason whether more communication skills are needed in each particular case.¹⁴

The same as nurses, patients see their lack of time of (52.7%) as an obstacle for application of therapeutic communication by the nurses. Nevertheless patients would like the nurses to react more to what they say (48.0%), to have more time for them (33.1%) and to listen to them more (25.1%). These answers prove the importance of the mentioned fundamental therapeutic communication skills stated in ¹⁵ Nursing Interventions Classification. To be able to listen the proper environment and conditions are necessary (calm, with no rush, sit down, not showing that there are other tasks to be done etc.). To listen however, the nurse needs time to recognize what could be “hidden” behind the words the patient expresses.

Statistically, the hypothesis that, preoccupation of nurses is according to the patients bigger obstacle to realization of therapeutic communication than their own bashfulness to ask the nurse for deeper conversation ($p = 0.046$) was confirmed in case of respondents—patients up to 45 years of age and hospitalized up to one week. For the respondents older than 45 years and hospitalized more than one week, this hypothesis was not verified. Also the hypothesis that, nurses use therapeutic communication to provide information more often than other characteristic skills was not verified (listening $p = 0.018$; questioning $p = 0.016$). The hypothesis that, the obstacle for therapeutic communication is the shortage of time that nurses can spend with each patient was verified ($p = 0.046$).

In the context of historical and cultural tradition, work with feelings and their impact on the quality of care or agitation, aggression differs from western countries. The expression of feeling or the will to ask the question: “Would you like to talk about it?” is not natural or common still. More often directive approach is used to obtain or to give information to be able to ensure and provide required administrative process.

¹⁴ RUBENFELD M. G., & SCHEFFER B. K., CRITICAL THINKING IN NURSING: AN INTERACTIVE APPROACH (Philadelphia: Lippicott Company 1995). ISBN 0-397-55099-5.

¹⁵ MCCLOSKEY J. C., & BULECHEK G. M., NURSING INTERVENTIONS CLASSIFICATION (NIC) (St.Louis: Mosby-Year Book 1992). ISBN 0-8016-6701-1.

CONCLUSION

Obtained results brought the facts about the reality in Czech nursing practice regarding unsatisfactorily applied nursing skill—therapeutic communication. Although it is theoretically tangible and according of many authors, it is the key nursing skill, there is not much space for its realization in practice. The findings show that, therapeutic communication provided by nurses is needed and useful. Most important and effective skills of therapeutic communication are missing, especially listening, questioning and arranging the effective environment. The radical obstacle is the lack of time seen both from the nurses' and from patients' points of view. Therefore, during qualification education as well as lifelong learning of nurses, more attention should be paid to the area of therapeutic communication. Also to open discussion with managers, ministry authorities and insurance companies about including therapeutic communication as the obvious criteria of professional quality in nursing care is necessary.

THE FUNCTION PRESIDENT OF THE REPUBLIC OF MACEDONIA AND LEADING OF THE MACEDONIAN FOREIGN POLICY

Aneta Stojanovska-Stefanova & Drasko Atanasoski***

The latter principle of the fundamental values of the constitutional order of the Republic of Macedonia is respect of the generally accepted norms of international law. Namely, with the belonging of the international community, each state as a unitary and federal falls under the authority of the rules or standards of behavior that are built in that community. Foreign policy and international relations of each country are conditioned with its internal policy and with the basic features of the political system. Besides, the principles and objectives of the foreign policy and international relations are expression and effect of its internal politics, i.e. the basic social relations that determine the physiognomy and character of the basic political institutions, and the content and purposes of the political decisions. Chapter VI of the Constitution of the Republic of Macedonia is dedicated to the issue whereby clearly and unequivocally is indicated that, for proper functioning of the democratic state, it is important how the internal as well as the issues of the international relations are regulated.

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INTRODUCTION

With the Law on Foreign Affairs¹ precisely are defined, the responsibilities of authorities for performing of the foreign work. With the same prescriptive in details normatively is determined, the whole process of creation, establishment and implementation of the foreign policy, as well as the relations between the authorities conducting foreign affairs and the state

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¹ Law on Foreign Affairs, Official Gazette of the Republic of Macedonia 46/06.

government authorities, in the exercising of the foreign affairs, which reduces the possibility of overlapping or dysfunction. Characteristic of the Law on Foreign Affairs of the Republic of Macedonia is that, besides the traditional approach towards creating such a norm, it emphasizes the role of the Assembly of the Republic of Macedonia.

Also, by the law, it is determined the jurisdiction, structure and operation of the Ministry of Foreign Affairs, which before the adoption of the law was governed by one member of its competence and the Law on the organization and operation of the state administration authorities, i.e. some members in the same law for competences of the management authorities. The great part of the matter for the essential elements of the organization and work of the Ministry before the adoption of the law were moved by-laws.

Furthermore, the law defines the diplomatic and consular representations that Republic of Macedonia can open abroad, and the procedure and conditions of appointment of the head of the diplomatic-consular office. More precisely is determined the procedure for revocation of the heads of the missions, and their duties, responsibilities and relations with the authorities for performing of the foreign works. Determined are specific duties and diplomatic-consular officers working in diplomatic-consular offices.

The Law on Foreign Affairs in Article 2, precisely determines and delimits the terms *foreign affairs* and *foreign policy*.

The term “*foreign affairs*” refers to actions performed by the competent authorities of the state government and the state government management in the exercise and protection of the rights and interests of the Republic of Macedonia in the international relations with the countries, international authorities, organizations and communities.

While the term “*foreign policy*” refers to political objectives and activities of the Republic of Macedonian relations with countries and with international authorities, organizations and communities that protects the interests of the Republic of Macedonia in the international relations and protect the interests of its citizens and the legal entities registered in it.

In determining the term head of state or President meet in more terms.

“The head of the state is the authority that represents the state in the country and abroad, namely, it represents the state unity and independence, whereupon it is not important whether it is a monarch or head of state in the country in the republican establishment, as regardless of whether it is for independent or collective body.”²

² FRCHKOSKI LJ. D., TUPURKOVSKI V., & ORTAKOVSKI V., INTERNATIONAL PUBLIC LAW 186 (Tabernakul, Skopje 1995).

The term head of state means the authority that has significant powers, but is not a holder of the supreme, legally unlimited power, which belongs to the principle of the Constituent and/or legislative body.³

Another group of theorists define the head of state, as an individual or corporate body who embodies the political community and the long duration of the state, and performs ceremonial functions related with the representing of the country at home and abroad.⁴

The procedure for the election of the President of the Republic of Macedonia is regulated in the Articles 80 and 81 of the Constitution of the Republic of Macedonia⁵ and the Electoral Code.⁶

The President of the Republic of Macedonia is elected by direct and immediate elections, by secret ballot, for a period of five years.⁷ For President of the Republic, a same person can be elected mostly twice. The secondary election is not necessarily to proceed to the previous term, as is the case (e.g., NB) with the Constitution of Slovenia from 1991.⁸

The powers of the President of the Republic of Macedonia in the execution of the foreign affairs are defined in Article 5 of the Law on Foreign Affairs, according to which the President of the Republic of Macedonia: represents the country in the international relations, in accordance with the international law and its responsibilities; participates in the creation of the foreign policy in cooperation with the Government, through the establishment of general guidelines on the foreign policy, including issues of the international relations with implications on security and defense of the country; monitors the implementation of the foreign policy and the results and any disagreements with other bodies for foreign affairs performing, can inform the Assembly; gives suggestions and participates in the pose of views on some foreign-policy matters within its competence, including the security and defense aspects arising from the international relations; appoints and dismisses by decree ambassadors and representatives of the Republic of Macedonia abroad, in procedure determined by this Law; gives consent to the issuance of agreement of the head of foreign diplomatic office and accepts the credentials and revoked

³ BAJALDZIEV DIMITAR, INTRODUCTION IN LAW-FIRST BOOK 92 255 (Evropa 1999).

⁴ MAKLIN IAN, CONCISE OXFORD'S DICTIONARY FOR POLITIC 385 (Skopje: Publishing House MIAN 2002).

⁵ Constitution of the Republic of Macedonia, Official Gazette of the Republic of Macedonia 52/91.

⁶ Electoral Codex, Official Gazette of the Republic of Macedonia 40/06.

⁷ GLIGOROV KIRO, MACEDONIJA IS EVERYTHING THAT WE HAVE 160 (Skopje: Publishing House TRI 2001).

⁸ SHKARIKJ SVETOMIR, COMPARATIVE AND MACEDONIAN CONSTITUTIONAL LAW 619 (Matica Makedonska Skopje 2004).

letters of the foreign diplomatic representatives, in the procedure established by this law⁹.

I. PERSONAL ACCOUNTS OF THE FORMER PRESIDENTS OF THE REPUBLIC OF MACEDONIA IN THE AREA OF FOREIGN POLICY

The President of the Republic of Macedonia, as one of the pillars of the governance, holds executive powers, which mostly are focused in the hands of the Government. The relations of the Head of State with the Government and the Assembly are intertwined. Namely, the major powers in the field of the international relations, the President of the country performs in coordination with the Government and the Assembly of the Republic of Macedonia, and also should be noted that owns means of control over them, through the right to request to attend at the parliamentary session, right to veto acts adopted by the Assembly, the right to participate in the scheduled parliamentary session, and so on.

In the mandate of the first President of the Republic of Macedonia, Kiro Gligorov formally and factually were established the foundations of the Macedonian foreign policy. President Gligorov in the formulation of foreign policy priorities of the Republic of Macedonia began from the basic conclusion, according to which in world frames even stronger swing takes the globalization and in the regional frames in the integration process. In his mandate, the President Gligorov established four key foreign policy priorities, first, the existence of the road to acquire and preserve with peaceful means the independence of the Republic of Macedonia, second, the Republic of Macedonia to become a factor and condition for stability and peace in the Balkans, and not “apple of discord”, third, to reject war and violence and to promote the European idea in the Balkans and fourth, to build relationships of equality with the neighboring countries and fifth, acceptance of the principles of moderation and realism in the conduct of the foreign policy. In the relations with the neighboring countries, the President Gligorov promoted the policy of equidistance which included readiness for a good cooperation with all neighbors, because it ensures the independence, territorial integrity and peace and security in the Balkans.

The second president of the Republic of Macedonia, Boris Trajkovski, left the concept of equidistance, formulated by his predecessor, and dedicated to strengthening the relations between the Republic of Macedonia and the United States, and the establishment of relations of Macedonia’s

⁹ Aneta Stojanovska, *Constitutional-Legal and Political Aspects of the Foreign Policy, with Special Retrospection to Republic of Macedonia*, MASTER THESIS, 28.

integration into the European Union. The President Trajkovski considered that, the politics equidistance reflects the reservation and that this concept is indefinite, so hence he devoted himself to building internal Balkan cooperation which is complementary to the Euro-Atlantic integration. In this regard, the President Gligorov formulated the basic tenets to which he adhered to in performing the function: first, the Republic of Macedonia as a young country on its way to full integration in the international policy faces many challenges, secondly, the developmental internal and external processes require clearly defined, precise, well-coordinated and patient-driven foreign policy, third, the success in the foreign policy is closely related to the success in the internal politics, fourth the unanimity and coordination in the implementation of the foreign policy represent a condition without which is not possible, achieving the smallest purposes.

The third President of the Republic of Macedonia Branko Crvenkovski, in the part of the conducting of the foreign policy started from three basic settings, first, for further intensify and development of the relations of the Republic of Macedonia with neighboring countries, secondly, further upgrading of the strategic friendship of the Republic of Macedonia with the United States of America and third, continuing of the efforts for integration. According to the President Crvenkovski, the European Union integration of the Western Balkan countries at the same time is and the stabilization of the region, and closing of the historical chapter of mutual confrontation and conflict¹⁰.

II. CURRENT MACEDONIAN PRESIDENT AND HIS VENTURE IN THE FOREIGN POLICY

The fourth and current President of the Republic of Macedonia prof. Gjorge Ivanov, PhD, regarding the part of conducting of foreign policy, has established continuity of the fundamental goals of his predecessors, first, the European Union is unfinished project without the integration of the region, the Euro-Atlantic membership and policy of openness to all, the President Ivanov underlined them as leading points in the foreign-policy strategy of the country, stressing that, he will work dedicated to strengthening and deepening of the mutual trust and friendship with the countries from all over the world, especially in the economic and cultural spheres. Second aspect of the Macedonian foreign policy, which the President Ivanov has emphasized is the development of good neighborly relations and the contribution to the Macedonian stability and prosperity of the region. The third postulate to

¹⁰ *Ibid*, at 30.

which the President Ivanov adheres is for firmly existence of the Republic of Macedonia in the way of regional cooperation, based on the principle of equality. President Ivanov is a leading expert in the field of civil society and among the very firsts to introduce systematic research of this area in the Macedonian academic society. He was a consultant to prominent think-tanks and research centers. Generations of leaders have passed his training in political management. Professor Ivanov is one of the co-founders of the first Macedonian political science journal “Political Thought”. He is founder of the first Political Science Association in independent Macedonia. Ivanov is also one of the founders of the Institute for Democracy, Solidarity and Civil Society, a renowned Macedonian think-tank which has helped shape the political landscape in Macedonia and served as guide to many young talents in the politics. Although never a party member, Professor Gjorge Ivanov was active in designing the reform policy of the political party VMRO-DPMNE, the party that supported his presidential nomination at the 2009 elections.¹¹

CONCLUSION

The term head of state means the authority that has significant powers, but is not a holder of the supreme, legally unlimited power, which belongs to the principle of the Constituent and/or legislative body.

The procedure for the election of the President of the Republic of Macedonia is regulated in the Articles 80 and 81 of the Constitution of the Republic of Macedonia, and the Electoral Code.

The President of the Republic of Macedonia is elected by direct and immediate elections, by secret ballot, for a period of five years. For President of the Republic, a same person can be elected mostly twice.

We could conclude that, the powers of the President of the Republic of Macedonia in the execution of the foreign affairs are defined in Article 5 of the Law on Foreign Affairs, according to which the President of the Republic of Macedonia: represents the country in the international relations, in accordance with the international law and its responsibilities; participates in the creation of the foreign policy in cooperation with the Government, gives suggestions and participates in the pose of views on some foreign-policy matters within its competence, including the security and defense aspects arising from the international relations; appoints and dismisses by decree ambassadors and representatives of the Republic of Macedonia

¹¹ President of the Republic of Macedonia Dr. Gjorge Ivanov, *Available at* <http://president.mk/en/president/biography.html> (last visited August 8, 2015).

abroad, in procedure determined by this Law; gives consent to the issuance of agreement of the head of foreign diplomatic office and accepts the credentials and revoked letters of the foreign diplomatic representatives, in the procedure established by the law.



US-CHINA LAW REVIEW

VOLUME 13, NUMBER 1, JANUARY 2016

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Tel: 1-323-984-7526, 323-410-1082; Fax: 1-323-984-7374, 323-908-0457

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