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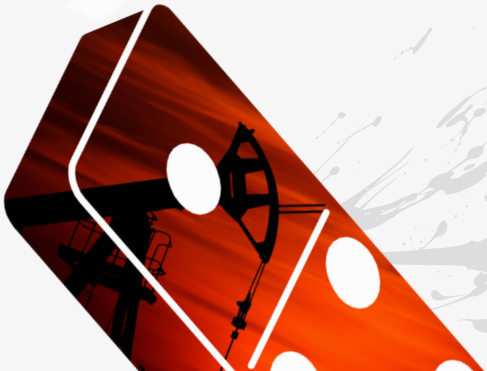
The EU asylum policy at the time of the Russia-Ukraine conflict

The (limited) capacity of the International Criminal Court to exert jurisdiction in Ukraine

Brain Draining Russia: Uno-Reversing the Migration Weapon

Ukraine



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SCHUMAN INSIGHT

UKRAINE

Italy is among the 39 countries that Wednesday the 2nd of March solicited the International Criminal Court (ICC) Prosecutor Karim Kahn to start a referral under **article 14 of the Rome Statute (1998)** for possible war crime committed in Ukraine by Russia from the 24th of February. Despite the 25th of February, the Prosecutor had already declared in his Statement the same intention of the states; the receipt of referral advanced by a large group of states represents a strong signal for the international community and the ICC, which can contribute to invoke the respect of the international humanitarian law. The Foreign Affairs Minister Di Maio indeed affirmed "I have just signed, together with other countries, the activation procedure of the ICC, to identify the existence of any war crimes in Ukraine"[1]. The response of the ICC Prosecutor, Karim Khan, currently on mission in Bangladesh, was quick: in his Statement, released the following day (25th of February), declared that: "I have been closely following recent developments in and around Ukraine with increasing concern[2]."

The Rome Statute of the ICC (1998) is the point of reference. Yet the Preamble states that: *Conscious that all people are united by common bonds, their cultures pieced together in a shared heritage* (that's why putting the censorship, then withdraw on the University course on Dostoevsky represented a huge mistake[3]) *and concerned that this delicate mosaic may be shattered at any time*[4].

[1] Smith E., Opening of Ukraine investigation should be a wake-up call to look again at ICC's budget, Coalition for the International Criminal Court, 07/03/22. Last access: 2022-03-19. https://www.coalitionfortheicc.org/news/20220307/opening-ukraine-investigation-icc-budget

[2] Khan K. A. A., Statement of ICC Prosecutor, Karim A. A. Khan QC, on the Situation in Ukraine, International Criminal Court, 25/02/22. Last access: 2022-03-19. https://www.icc-cpi.int/Pages/item.aspx?name=20220225-prosecutor-statement-ukraine

[3] Redazione ANSA, Paolo Nori: censura su Dostoevskij, ANSA, 02/03/2022. Last access: 2022-03-19. https://www.ansa.it/sito/notizie/cultura/libri/2022/03/02/paolo-nori-censura-su-dostoevskij_b184dfbb-54a8-4a05-9843-9365ab83f9c1.html

[4] Rome Statute of the International Criminal Court, 1998. Last access: 2022-03-19. https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf

We can certainly affirm that the Russian-Ukrainian conflict is troubling the already fragile international equilibrium and the world economies due to the outbreak of a war, the possible increasing risk of the violation of basic human rights and the disastrous economic effects.

Possible lack of jurisdiction (1): the right of veto

The ICC can start the exercise of jurisdiction only in these three cases:

1. UN Security Council Referral: the action of the ICC's Prosecutor is subjected to the Resolution adopted by all the "Big Five" Permanent Members of the Security Council (USA, Russian Federation, China, UK, and France). In this case it is impossible to act since the Russian Federation will put the veto on the Resolution[5].
2. State Party Referral: the ICC's Prosecutor starts a preliminary examination by request (Referral) of one of more member states which ratified the Rome Statute. However, in this case, the ICC's Prosecutor action is much more limited since is necessary that the serious crime is committed in the territory or by a Statute's member state[6].
3. Propio Motu Investigation: the ICC's Prosecutor can initiate a preliminary examination also by its own initiative (proprio motu)[7]. However, the timing for starting the procedure is longer compared to the State Party Referral initiative.

Ukraine's point in favor (1)

The fact that 39 countries, so a large group of states, have solicited the ICC's Prosecutor Karim Kahn to start a referral under **article 14 of the Rome Statute (1998)**, as well as representing a strong signal for the international community and the ICC, which can contribute to invoke the respect of the international humanitarian law, open for a third completely different scenario since the timing of international criminal justice will significantly be reduced. The Prosecutor does not need to get the approval of the Court judges for opening an investigation. Still, he can speed up the process, collect, store, and analyze the evidence.

Possible lack of jurisdiction (2): the crime of aggression

According to the Rome Statute, the crimes within the jurisdiction of the Court are four.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW,

Art. 5. Crimes within the jurisdiction of the Court

5 Aba-ICC project, How the ICC works. Last access: 2022-03-19. https://how-the-icc-works.aba-icc.org/
6 De Gregorio, Della Morte, Nonostante i limiti tra le armi il diritto non tace più, 05/02/2022, Domani. Last access: 2022-03-19. https://www.editorialedomani.it/idee/commenti/corte-penale-internazionale-crimini-ucraina-russia-cg1fcvvm
7 Ibidem.

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

a) *The crime of genocide;*
b) *Crimes against humanity;*
c) *War crimes;*
d) *The crime of aggression.*

The only problem that Ukraine can found is the lack of jurisdiction for the crime of aggression, better specified in the article 8 of the Rome Statute. The crime of aggression, after the Kampala's amendments in 2010 and active in 2018, can be traced at the article 15(4) bis:

The Court may, in ***accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar****. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years*[8].

So, Putin and/or his political and military leaders cannot be prosecuted for the crime of aggression since Russia is not part of the Statute, unless it gives its consensus, which is high improbable.

Ukraine's point in favor (2)

Despite neither Russia neither Ukraine (2000) have signed, but never ratified the Statute of Rome, they are placed outside the jurisdiction of the Court. However, Ukraine in 2014 activated the ICC Jurisdiction through the "Special Procedure" according to the article 12(3) of the Statute of Rome and according to the article 44 of the "Rules of Procedure and Evidence".

Article 12(3) Preconditions to the exert of jurisdiction.

(3) If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Art.44 Rules of Procedures and Evidence

Chapter 3. Jurisdiction and admissibility Section I. Declarations and referrals relating to articles 11, 12, 13 and 14

Rule 44 Declaration provided for in article 12, paragraph 3 1.

8 Rome Statute of the International Criminal Court, 1998. Last access: 2022-03-19. https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf

1. *The Registrar, at the request of the Prosecutor, may inquire of a State* ***that is not a Party to the Statute*** *or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3*[9].
2. *When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under* ***article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation*** […][10].

Ukraine's point in favor (2)

Ukraine already submitted two declarations in the past years, due to the possible crimes committed in three different areas: during the Maidan's protests, in Crimea and Donbass "committed by seniors officials of the Russian Federation and leaders of the terrorist organizations "DNR" and "LNR", which led to extremely grave consequences and mass murder of Ukrainian nationals[11].

1. The Declaration in **April 2014**, during the first Ukrainian crisis and concluded with the "Revolution of Dignity" with the purpose of:

Identifying, prosecuting, and judging the authors and accomplices of authors committed on the territory of Ukraine within the period 21 November 2013 – 22 February 2014[12].

The Statement was followed, few days after, by the starting of a "Preliminary Examination" that precedes the "investigation" phase.

2. The Declaration in **September 2015**, which states the acceptation of the jurisdiction and "for an indefinite duration"[13].

Despite this latter Declaration was concluded by the previous Prosecutor Bensouda, according to whom war crimes and crimes against humanity were committed, can still be considered pending. In fact, nothing prevents the current Prosecutor, as he already declared the 25th of February[14], to maintain open the same "Preliminary examination" and after quickly proceeding with the collection, storage and analysis of the

9 Rome Statute of the International Criminal Court, 1998. Last access: 2022-03-19. https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf
10 Rules of Procedures and Evidence of the International Criminal Court, 2019. Last access: 2022-03-19. https://www.icc-cpi.int/Publications/Rules-of-Procedure-and-Evidence.pdf
11 Declaration of the Verkhovna Rada of Ukraine, September 2015. Last access: 2022-03-19. https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf
12 International Criminal Court Registrar, 09/04/2014. Last access: 2022-03-19. https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf
13 Declaration of the Verkhovna Rada of Ukraine, September 2015. Last access: 2022-03-19. https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf
14 Khan K. A. A., Statement of ICC Prosecutor, Karim A. A. Khan QC, on the Situation in Ukraine, International Criminal Court, 25/02/22. Last access: 2022-03-19. https://www.icc-cpi.int/Pages/item.aspx?name=20220225-prosecutor-statement-ukraine

evidence, proceeding then with the "investigation" phase also for the new crimes, according to the article 15.3 of the Rome Statute:

Article 15, Prosecutor

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence[15].

Since the ongoing situation requires a quick response and since the numerous member states (39) asking for the opening of the Investigation[16], the passage from the Pre-Trial Chamber will be avoided[17].

Conclusions

In conclusion, we still don't know how the scenario will evolve, If the accusation of crimes against humanity, war crimes and genocide by numerous groups of states could facilitate or impede the peace process, above all now, during the timid negotiation phase we are living. Despite according to the art. 15 bis is not possible to persecute Putin or any other on the crime of aggression, the investigations for the first three serious crimes are still possible. The potential consequence of an arrest warrant for Putin or other authorities (so from those who give the order to those who execute) will impede from the movement in the 123-member state of the Statute and therefore, limiting their role in the international scenario. The hope is that the activation of the Court could work as a "deterrence" to invite Russia and other states which support it (ex. Belarus) to respect the international humanitarian law, since there is mounting evidence that Russia is committing "all-new suspected war-crimes" beyond the one committed in 2014.

15 Rome Statute of the International Criminal Court, 1998. Last access: 2022-03-19. https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf

16 Khan K. A. A., Statement of ICC Prosecutor, Karim A. A. Khan QC, on the Situation in Ukraine, International Criminal Court, 25/02/22. Last access: 2022-03-19. https://www.icc-cpi.int/Pages/item.aspx?name=20220225-prosecutor-statement-ukraine

17 International Criminal Court, Prosecutor Office, 01/03/22. Last access: 2022-03-19. Last access: https://www.icc-cpi.int/RelatedRecords/CR2022_01687.PDF

Democratic backsliding is a political science concept meaning "the incremental erosion of democratic institutions, rules, for the and norms resulting from the actions of duly elected governments, typically driven by an autocratic leader".[1] It is a phenomenon generally described as a regression[2] in democratic quality over time rather than a complete overturn of autocracy, which means rolling back liberal democracy, or movement away from democracy[3]. It does not necessarily mean a return to authoritarianism, but changes moving away from liberal democracy[4]. There are more obvious forms of backsliding such as restriction of political rights like freedom of expression and assembly, or undermining of civil society organizations through regulations and incentives[5]. To backslide, the government must assure a majority in free and fair elections so it becomes possible for them to change the rules of the game[6]. Another dimension of democratic backsliding is the undermining of the separation of powers, in other words, the undermining of the rule of law. This can happen through constitutional reform, or the executive taking control of instances that should belong to the legislative or judiciary powers instead[7]. These are the dimensions to explore when aiming to understand the backsliding of states as well as the role of the EU.

[1] Stephan Haggard, *Backsliding (Elements of Political Economy)*, (Cambridge: Cambridge University Press, 2021).
[2] Nancy Bermeo, "On Democratic Backsliding," *Journal of Democracy* 27, no. 1 (2016): pp. 5-19, https://doi.org/10.1353/jod.2016.0012.
[3] Elisabeth Bakke and Nick Sitter, "The EU's *Enfants Terribles*: Democratic Backsliding in Central Europe since 2010," *Perspectives on Politics* 20, no. 1 (2020): pp. 22-37, https://doi.org/10.1017/s1537592720001292.
[4] David Waldner and Ellen Lust, "Unwelcome Change: Coming to Terms with Democratic Backsliding," *Annual Review of Political Science* 21, no. 1 (November 2018): pp. 93-113, https://doi.org/10.1146/annurev-polisci-050517-114628.
[5] Elisabeth Bakke and Nick Sitter, "The EU's *Enfants Terribles*: Democratic Backsliding in Central Europe since 2010," *Perspectives on Politics* 20, no. 1 (2020): pp. 22-37, https://doi.org/10.1017/s1537592720001292.
[6] Elisabeth Bakke and Nick Sitter, "The EU's *Enfants Terribles*: Democratic Backsliding in Central Europe since 2010," *Perspectives on Politics* 20, no. 1 (2020): pp. 22-37, https://doi.org/10.1017/s1537592720001292.
[7] János Kornai, "Hungary's U-Turn," *Society and Economy* 37, no. 3 (2015): pp. 279-329, https://doi.org/10.1556/204.2015.37.3.1.

Democratic backsliding is a key challenge for the EU because democracy and the rule of law are core values. It represents a risk to the EU, as it might incentivize disintegration, and, among other things, threaten democratic legitimacy and judicial independence. The EU is thought to be a democratic institution that ensures the values defined in the Treaties. Developments in Hungary and Poland transformed reassurance into uncertainty. The rapid undermining of democratic institutions and governmental control of public outlets such as the Courts or media platforms transformed Hungary, as well as Poland, from what was considered a consolidated democracy into backsliding states. The EU had little capacity to deal with either case, though it has been more proactive with Poland.

Hungary's Fidesz was part of the European People's Party (EPP) when the first decisions undermining freedom of expression were made[8]. This happened as Fidesz took control of editorial boards and oversight organs, and the main opposition newspapers were taken over, creating a "Fidesz-loyal media empire"[9] and reducing media pluralism. PiS in Poland tried to do the same but without the same efficacy as Polish newspapers are foreign-owned. Hungary went further than this by attacking civil society[10], with the law of 2018 "Stop Soros" - getting Fidesz suspended from the EPP - setting measures undermining democracy and the rule of law in Hungary, such as restrictions of religious organizations, independence of universities, independence of the Courts[11].

The incidents in Hungary inspired PiS in Poland to follow in Fidesz's footsteps showing that backsliding is not an isolated event. In Poland, new laws instituted in 2016 limited access to public funds, and established the government-controlled National Institute for Freedom - which is attached to the PM's office - to distribute funds, among other things[12]. Along with this, both countries witnessed a strong attempt at taking control of the judiciary or at least taking control long enough to establish a stable advantage. In both countries, the governments used parliamentary procedures to decrease debate and scrutiny over new legislation[13]. In Fidesz's case, it was much more effective as the party had a two-thirds majority allowing the introduction of a new

[8] Milada Anna Vachudova, "Ethnopopulism and Democratic Backsliding in Central Europe," *East European Politics* 36, no. 3 (February 2020): pp. 318-340, https://doi.org/10.1080/21599165.2020.1787163.
[9] Elisabeth Bakke and Nick Sitter, "The EU's *Enfants Terribles*: Democratic Backsliding in Central Europe since 2010," *Perspectives on Politics* 20, no. 1 (2020): pp. 22-37, https://doi.org/10.1017/s1537592720001292.
[10] Elisabeth Bakke and Nick Sitter, "The EU's *Enfants Terribles*: Democratic Backsliding in Central Europe since 2010," *Perspectives on Politics* 20, no. 1 (2020): pp. 22-37, https://doi.org/10.1017/s1537592720001292.
[11] Maurits J. Meijers and Harmen Veer, "MEP Responses to Democratic Backsliding in Hungary and Poland. an Analysis of Agenda-Setting and Voting Behaviour," *JCMS: Journal of Common Market Studies* 57, no. 4 (July 2019): pp. 838-856, https://doi.org/10.1111/jcms.12850.
[12] Elisabeth Bakke and Nick Sitter, "The EU's *Enfants Terribles*: Democratic Backsliding in Central Europe since 2010," *Perspectives on Politics* 20, no. 1 (2020): pp. 22-37, https://doi.org/10.1017/s1537592720001292.
[13] Elisabeth Bakke and Nick Sitter, "The EU's *Enfants Terribles*: Democratic Backsliding in Central Europe since 2010," *Perspectives on Politics* 20, no. 1 (2020): pp. 22-37, https://doi.org/10.1017/s1537592720001292.

constitution to limit the power of the constitutional court and populated state institutions with its own representatives[14]. This was done under the pretense of a post-communist reform[15], and under the guise of transitional justice lacking during the process of democratization[16].

PiS was able to terminate the term of the President of the Supreme Court and lower the compulsory age for judges, resulting in the replacement of 40% of the Supreme Court judges[17]. PiS was also able to install its people in public positions. The law on the National Council of the Judiciary (NCJ) granted a parliamentary majority the right to appoint members[18]. The EU and the Venice Commission found the revised laws threatened judicial independence, and the European Court of Justice (CJEU) ruled that the NCJ lacked the independence to safeguard the independence of the judiciary[19]. In 2021, the Polish Court ruled that EU law was "incompatible with its constitution"; this is an attack on the principle of primacy of EU law[20]. In both cases of Hungary and Poland, there were deliberate acts of elected government officials to undermine liberal democracy[21]. This is recurrent in cases of backsliding if there are conditions allowing it. Fidesz and PiS qualify as populist parties, interpreting their mandates as the opportunity to exercise absolute power[22], meaning that whenever a leader has the option to take more for himself, he will. The EU's solutions to backsliding have proven to be fallible.

Backsliding in the EU

The EU's tools to deal with backsliding have increased over the years. The levels of potential effectiveness differ, but those considered more effective tend to include political, legal, and economic instruments. These are supposed to be especially effective if they are deployed side-by-side.

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[14] Elisabeth Bakke and Nick Sitter, "The EU's *Enfants Terribles*: Democratic Backsliding in Central Europe since 2010," *Perspectives on Politics* 20, no. 1 (2020): pp. 22-37, https://doi.org/10.1017/s1537592720001292.
[15] László Sólyom, "The Role of Constitutional Courts in the Transition to Democracy," *International Sociology* 18, no. 1 (2003): pp. 133-161, https://doi.org/10.1177/0268580903018001008.
[16] Monika Nalepa, "Transitional Justice and Authoritarian Backsliding," *Constitutional Political Economy* 32, no. 3 (2020): pp. 278-300, https://doi.org/10.1007/s10602-020-09315-5.
[17] Bakke and Sitter, "The EU's Enfants Terribles: Democratic Backsliding in Central Europe since 2010" 1-16.
[18] *Ibid.*
[19] R. Daniel Kelemen, "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union," *Government and Opposition* 52, no. 2 (September 2017): pp. 211-238, https://doi.org/10.1017/gov.2016.41.
[20]Jon Henley and Jennifer Rankin, "Polish Court Rules EU Laws Incompatible with Its Constitution," *The Guardian*, October 8, 2021, https://www.theguardian.com/world/2021/oct/07/polish-court-rules-that-eu-laws-incompatible-with-its-constitution.
[21] Nicola Lacey, "Populism and the Rule of Law," in *The Cambridge Companion to the Rule of Law*, ed. Jens Meierhenrich and Martin Loughlin (Cambridge: , Cambridge University Press, 2021), pp. 458-473.
[22] Nadia Urbinati, "The Populist Phenomenon," *Raisons Politiques* 51, no. 3 (2013): p. 137, https://doi.org/10.3917/rai.051.0137.

When Art. 2 TEU is violated, there is a tool in Art. 7 TEU to tackle rule of law backsliding[23]. It is a political procedure, whereby the Council can produce a statement indicating a clear risk of a serious breach of one of the Art. 2 TEU values by a Member-State. This is a mechanism known as naming and shaming to generate compliance with Art. 7 (1). In Art. 7 (2) the Council can declare a serious breach of those values if there is unanimity, excluding the state in question. If the Member-State is considered to be non-compliant with the values, unspecified sanctions can be applied, such as the suspension of voting rights in the institutions[24]. It is often noted that the Council failed to start the procedure when Hungary began to backslide, and Poland's vote could have still been in favor. Therefore this procedure is thought of as the exception rather than the rule and is not useful if two or more countries have backslid without previous consequences.

When it comes to legal tools, the Commission can initiate infringement proceedings against every Member-State failing to live up to the standard of the Treaties. Article 258 TFEU contains all the procedural steps the Commission should take when there are breaches of EU law, but it has not been used. However, the Commission has had some success when dealing with judicial independence and self-governance; in *Commission v. Poland*, 2019, the replacement of judges was deemed unlawful. When there is a breach of EU law stated by the CJEU, then the Court can order interim measures. It can also follow Article 260 TFEU in which the non-compliant EU Member-State is given financial sanctions to compel it to comply with the CJEU[25].

Another possible procedure is for Member-States to go to Court when another Member-State has breached EU law. To do this, the Member-State needs to demonstrate the breach as set out in Article 259 TFEU. This is a political move for any Member-State, which can impede this action from being taken. Often Member-States prefer to ask the Commission to act in defense of the rule of law rather than themselves. Thus Article 259 TFEU has never been used[26].

Another possible tool is economic measures imposed on breaching Member-States. This could be done by connecting EU funds to rule of law compliance. This has been proposed by the

[23] Philip Levitz and Grigore Pop-Eleches, "Why No Backsliding? The European Union's Impact on Democracy and Governance before and after Accession," *Comparative Political Studies* 43, no. 4 (2009): pp. 457-485, https://doi.org/10.1177/0010414009355266.
[24] Ulrich Sedelmeier, "Anchoring Democracy from above? The European Union and Democratic Backsliding in Hungary and Romania after Accession," *JCMS: Journal of Common Market Studies* 52, no. 1 (October 2013): pp. 105-121, https://doi.org/10.1111/jcms.12082.
[25] Stephan Haggard, *Backsliding (Elements of Political Economy)*, (Cambridge: Cambridge University Press, 2021).
[26] Dimitry Kochenov and Laurent Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality," *European Constitutional Law Review* 11, no. 3 (2015): pp. 512-540, https://doi.org/10.1017/s1574019615000358.

Commission, but proposals like these generate backlash from Member-States because states want to avoid becoming a target of such measures[27].

The Commission also proposed the rule of law toolbox for monitoring the general compliance with the rule of law in all Member-States. It is not clear how this would work in practice, but it could be a functional way to protect the rule of law[28].

These are some of the tools the EU has at its disposal, however, they have often gone unused. It is difficult to start the process of defending EU values; the EU institutions often fall short of defending the rule of law, democracy, and other core values. The EU institutions and Member-States are afraid to act against another Member-State and scared to use the tools they have at hand due to the precedent it would set. Nonetheless, there must be more commitment, especially to the rule of law, and the EU legal order.

There has been more action toward halting backsliding in the current Commission and the EP after the EPP suspended Fidesz. Perhaps belatedly, all EU institutions have emphasized the importance of the rule of law even if in practice it is more difficult to enforce. The Commission has won two infringement actions against Poland before the CJEU regarding the Polish judiciary's independence. The Commission published the communication "Strengthening the rule of law within the Union. A blueprint for action", outlining the main avenues for promoting the rule of law and preventing further backsliding. This should be done in three parts: (a) promotion of a culture of the rule of law, (b) prevention of the rule of law problems, and (c) effective responses through EU level enforcement when national mechanisms falter[29].

Solutions for backsliding - conclusions

A stronger commitment to the values of democracy and the rule of law is necessary, not only from the EU institutions such as the EU institutions but also from the Member-States. If the commitment to democracy in the Member-States is real, it is up to the elected officials to comply with it and enforce it. The Commission could possibly monitor all Member-States' rule of law standards by applying economic sanctions whenever there is a breach; this would be the best solution in terms of a centralized EU response. Economic measures such as withholding funding seem to be the most compelling; if a politician does not have the means to continue the erosion

[27] *The EU's Rule of Law Toolbox*, *EdX* (KULeuvenX - RECONNECTx, 2021), https://learning.edx.org/course/course-v1:KULeuvenX+RECONNECTx+3T2021/home.
[28] *The EU's Rule of Law Toolbox*, *EdX* (KULeuvenX - RECONNECTx, 2021), https://learning.edx.org/course/course-v1:KULeuvenX+RECONNECTx+3T2021/home.
[29] COM(2019) 343 final.

of democratic institutions, they will not. This is a harsh measure, perhaps it could motivate anti-EU feelings, so other measures must be considered along with this one to lessen the blow. As mentioned before, conditions make the autocrat, not the other way around. Lastly, it would be important to have similar and complementary mechanisms in the EP and the Council. The 'Blueprint for Action' builds on this, advocating for strengthening cooperation in the institutions dedicated to protecting and promoting the rule of law and other EU values. Working together to provide a wider sense of purpose within the institutions meant to protect core values might create a sense of a 'mission' that will incentivize those who work within them[30]. This could help the monitoring of the rule of law in the Member-States, as more coordinated action would allow certain institutions to focus more on certain issues. This could also strengthen the dialogue between EU institutions and Member-States.

As for civil society, creating a stronger European identity by mobilizing local organizations and people could inspire citizens to uphold democracy, especially if cooperation is promoted between the EU and civil societies.

In summary, the problem with backsliding is, on one hand, the problem of political survival, and on the other, the issue of non-compliance. Those in power use their mandate to utilize everything for their own goals, whilst autocratic leaders and institutions actively choose to disregard rules for various reasons. This demonstrates that when it comes to backsliding, reacting is the most significant action that can be taken; it seems that the EU and Member-States have recently realized this.

[30] Ulrich Sedelmeier, "Anchoring Democracy from above? The European Union and Democratic Backsliding in Hungary and Romania after Accession," *JCMS: Journal of Common Market Studies* 52, no. 1 (October 2013): pp. 105-121, https://doi.org/10.1111/jcms.12082.

Last year's war on Gaza brought the Israeli-Palestinian conflict back on the international agenda, if only for as long as the fighting went on. Undoubtedly, it will be brought back again with the next escalation. While this cycle of events has been replicating since the failure of the Camp David II negotiations in 2000, and the subsequent second Intifada, Europe continues to promote the two-state solution, while lacking any substantial effort to push for a just and lasting peace, ignoring the fundamental shifts of the reality on the ground.

In the two decades after Camp David II, Israel has gradually implemented a One-state reality with 13 million Israelis and Palestinians in both Israel and the occupied territories living under Israeli's rule. Since 1967, Israel has established a complex legal framework around the occupation. Palestinians fall under Israeli military jurisdiction, unless they fall under the Palestinian Authority (PA) exclusive jurisdiction in Zone A and B of the Westbank as per the Interim Agreement (Oslo II). Israeli settlers, however, fall under Israeli civilian jurisdiction. Jurisdiction over the West Bank as a whole is exercised by the Israeli Supreme Court. But Palestinians in Gaza and the Westbank are bound to elect a president of the Palestinian Authority. Although the PA is usually perceived as a form of autonomous Palestinian government, it is merely a semi-governmental body installed by Israel following the Oslo Accords, to keep the Palestinian people in check while enabling Israel to effectively manage the occupation. It acts as somewhat of a subcontractor to the State of Israel, making it possible to maintain long-term control over the occupied territories without truly annexing or withdrawing from them[1].

Continuous escalation of the conflict - especially in the Gaza strip, with Hamas ruling since 2006 - secures international coverage and sheds light on the dramatic situation of the Gazan population, which has been in a state of siege since the Israeli withdrawal in 2005. The strip is one of the most densely populated places on earth and often referred to as the world's largest open-air prison.

[1] Gordon, Neve (2008): From Colonization to Separation. Exploring the Structure of Israel's Occupation, in: Third World Quarterly, 29 (1), 25-44. / Hever, Shir (2018): The Privatization of Israeli Security, London: Pluto Press.

Although it is no longer seen as occupied - the withdrawal from Gaza factually represents an end to the occupation of Gaza - experts dispute whether the occupation has effectively ended, as Israel has taken measures to seal off Gaza[2]. Thus, Israel retains air sovereignty, as well as control and surveillance of the land and sea borders in Gaza[3]. The latest perversity of this siege is a 20-foot high and 65 Km long fence around the Gaza Strip[4]. After the New York Times plastered the photos of the 67 children killed in the 2021 Gaza War on its front page, and social media platforms such as Twitter and TikTok broadcasted the massive destruction of infrastructure, the power asymmetry of both adversaries laid in plain view. Not only is Israel the world's largest per capita arms exporter, its sophisticated defence systems such as the Iron Dome System are unmatched, and its nuclear[5] arsenal secures Israel's status as a regional hegemon[6]. Yet Hamas is no existential threat to Israel, although this statement does not deny Hamas' ability or will to go to war and threat the lives of innocent people. However, seen as arms export is still a prospering business, this cycle of events also offers a unique selling proposition. Weaponry tested in the field sold by retired Israeli Generals secures billions in revenue.

While the international public grows more critical and conscious of the situation of Palestinians, the current diplomatic impact of European leaders is insignificant. Europe's last coordinated effort to secure a deal to accommodate the needs and wants of two people for the same land was the Quartet, an initiative set up in 2002 comprising of the US, Russia, Europe, and the UN with the aim of negotiating peace, supporting Palestinian economy and preparing for an eventual Palestinian statehood[7]. It was designed to keep the two-state solution alive, even while the circumstances on the ground have fundamentally shifted. That is not to assume that there has been unity among Europe's leaders when it comes to Israel and Palestine. Europe's division became obvious when Netanyahu unexpectedly approached Eastern European leaders such as the Polish Prime Minister Morawiecki[8] and Hungarian Prime Minister Orban[9], ignoring their questionable

[2] International Committee of the Red Cross (2012): Occupation and other Forms of Administration of Foreign Territory. Expert Meeting Report 4094. Genf: ICRC.
[3] Seidel, Gerd (2006): Die Palästinafrage und das Völkerrecht, in: Archiv des Völkerrechts, 44 (2), 121-158.
[4] Stop the Wall (n.d.): The Wall around Gaza, https://stopthewall.org/the-wall/#the-wall-around-gaza [10.02.2022].
[5] Jager, Avi (2021): The Transformation of the Israel Defense Forces, in: Naval War College Review, 74 (2), 13-36.
[6] Hever, Shir (2018): The Privatization of Israeli Security, London: Pluto Press.
[7] The Office of the Quartet (n.d.): About Us, http://www.quartetoffice.org/page.php?id=4e3e7y320487Y4e3e7 [10.02.2022].
[8] Yaron, Gil / Fritz, Philipp (2018): Yad Vashem setzt Netanjahu unter Druck, https://www.welt.de/politik/ausland/article178913186/Israel-Polen-Yad-Vashem-setzt-Netanjahu-unter-Druck.html [10.02.2022].
[9] Peters, Dominik (2018): Visegrad-Staaten und Israel. Rechte Freunde, https://www.spiegel.de/politik/ausland/viktor-orban-in-israel-benjamin-netanyahu-empfaengt-ungarns-premier-a-1219175.html [25.03.2022].

handling of historic responsibilities, alleged anti-Semitic sentiments or even the rule of law. Netanyahu's policy stance towards Europe was guided by realpolitik and can be interpreted as divide and rule. As decision-making in Europe's Foreign Affairs Councils is based on unanimity, the support of Visegrád countries enables Israel to successfully manoeuvre around critical Resolutions in the European Parliament and prevent coordinated action. It is part of a wider diplomatic effort to gather international support (such as the Abraham Accords), while securing no interventions in its handling of sensitive issues, such as settlement activities or dispossessions of Palestinians in East-Jerusalem. Settlements in the occupied territories, besides being a blatant breach of international law, are seen by the international community as a major obstacle for any peaceful agreement with the Palestinians and in the last decades rendered Palestinian statehood almost impossible. Critical voices from European leaders, however, are rare.

Germany's special relationship with Israel further strengthens its position in Europe, allowing for Israel to focus on security politics rather than diplomacy. Not only could Israel secure massive arms deals with Germany, among which is a dubious submarine-deal concerning the Netanyahu Cabinet[10]. A coverage by German newspaper *Spiegel* showed how Israeli associations tried to actively influence political agenda setting and policies with regards to the Boycott, Divestment, Sanctions (BDS) Movement. In a widely criticized resolution, the German parliament found BDS to be antisemitic, which consequently must be outlawed. It has been documented how Israeli groups such as Naffo approached members of parliament, financed travels and dinners and even donated money for election campaigns[11] in the weeks prior to the formulation of the resolution.

How successful these diplomatic efforts are can be seen by the sheer absence of international outcry in the light of Israel's designation of six Palestinian NGOs as terrorist organisations in October 2021, among them Defense for Children or Al-Haq. The European Commission is still only "looking into the issue"[12]. This move represents a demonstration of Israel's confidence in further oppressing Palestinian civil society and silencing critical voices, both within the country and abroad. Notably, Al Haq and other organizations are cooperating closely with the International Criminal Court on its investigation of possible war crimes committed by Israelis and Palestinians since 2014.

[10] The Associated Press (2017): Israel to probe German submarine purchase, https://www.defensenews.com/naval/2017/02/28/israel-to-probe-german-submarine-purchase/ [25.03.2022].
[11] Gebauer, Matthias / Müller, Ann-Katrin / Röbel, Sven / Salloum, Raniah / Schult, Christoph / Sydow, Christoph (2019): Lobbyismus im Bundestag. Wie zwei Vereine die deutsche Nahostpolitik beeinflussen wollen, https://www.spiegel.de/politik/lobbyismus-im-bundestag-wie-zwei-vereine-die-deutsche-nahostpolitik-beeinflussen-wollen-a-00000000-0002-0001-0000-000164871539 [10.02.2022].
[12] European Commission (2020): Answer given by High Representative/Vice-President Borrell. on behalf of the European Commission. Question reference: E-004982/2021, https://www.europarl.europa.eu/doceo/document/E-9-2021-004982-ASW_EN.html [10.02.2022].

The two-state-solution nowadays only exists as a diplomatic phrase in political narratives of the global north, at no cost to its political leaders. It serves no one, not even Israel. *Should there be a one-state solution*, which Israel is heading for, then the question will be: what kind of state will it be? Zionism seeks a Jewish state for a Jewish people, however there will not be a Jewish majority in one state from the river to the sea, if it at least seeks to become a democracy. Maintaining Jewish dominance is tantamount to establishing an apartheid state (which Amnesty International just recently claimed Israel has already been doing[13]). Europe should stop tricking the public and ridicule the Palestinians. By promoting the two-state-solution it lacks empathy, harms their credibility as a peace broker and publicly displays its ignorance of the Palestinian plight. The EU must treat settlement activity as what it is: a blatant breach of international law. It must condemn war crimes, the oppression of civilian voices, the illegal dispossession and destruction of Palestinian homes, arbitrary administrative detention, trials on children, targeted killings, and the de facto and therefore illegal annexation of parts of the West Bank, let alone the disastrous humanitarian situation of thousands of Palestinians in the occupied territories and Gaza. Being Israel's largest trading partner, Europe does have political leverage. In the long run, it can provide a diplomatic window of opportunity to bring Israelis and Palestinians back to the negotiation table: for example, as Beth Oppenheim suggested, by including Hamas[14]. European countries once managed to bring two vastly opposing groups together with the Good Friday agreement, that ended the decade long violent conflict in Northern Ireland. Therefore, a collective self-determination of both Palestinians and Israelis in one unified country is not an impossible proposition. In light of recent developments, it may eventually be the only solution securing peace and justice.

[13] Amnesty International (2022): Israel's apartheid against Palestinians: Cruel system of domination and crime against humanity, https://www.amnesty.org/en/documents/mde15/5141/2022/en/ [11.02.2022].
[14] Oppenheim, Beth (2020): Can Europe overcome its Paralysis on Israel and Palestine?, https://www.cer.eu/publications/archive/policy-brief/2020/can-europe-overcome-its-paralysis-israel-and-palestine [10.02.2022].

Introduction

The humanitarian character of the crisis triggered by the Russian invasion of Ukraine was quick to show. It urged, among several interventions, for the immediate implementation of mechanisms to guarantee the well-being of millions of displaced people, as well as the security of the Schengen Area. Thus, a number of measures were launched, including the first-time triggered Temporary Protection Directive, to handle the exceptional phenomenon. However, similar circumstances shed light on the limitations and deficiencies of the instruments that compose the Common European Asylum System.

The Common European Asylum System (CEAS)

In the year 1999, a package of regulations for the EU emerged in the form of the Common European Asylum System (CEAS). The choice to craft a cooperative attitude in the policy areas of asylum and migration rests in the fact that it allowed for establishing a harmonization of procedures and increased controls on migration flows, bypassing potential obstacles at the national level.[1] The first phase of establishing the CEAS dated from the year 1999 to 2005. In Tampere, in 1999, a meeting of the European Council led to the establishment of the Common European Asylum System, based on the Geneva Convention, aimed at defining shared standards and criteria for reception and asylum procedures.[2] During the first phase of the CEAS, between 1999 and 2005, six fundamental instruments were introduced with the main scope of harmonizing legal frameworks, namely the Dublin II Regulation, the EURODAC Regulation, the Temporary

[1] Christian Kaunert, Sarah Leonard, and Adrienne Héritier, "The Development of the EU Asylum Policy: Revisiting the Venueshopping Argument" (paper presented at the European University Institute), 4, https://www.eui.eu/Documents/RSCAS/Research/MWG/201011/10-27-Kaunert.pdf.
[2] European Parliament, "Tampere European Council 15 and 16 October 1999, Presidency Conclusions," 1999, https://www.europarl.europa.eu/summits/tam_en.htm.

Protection Directive, the Receptions Conditions Directive, the Qualification Directive and the Asylum Procedures Directive.[3]

On the other hand, the second phase of the evolution of the CEAS, from 2008 to 2013, focused on developing the System to intensify its functions in view of contemporary emergencies. Therefore, the Policy Plan on Asylum and a series of reforms on EU (European Union) laws on the matter, through the coming into force of the Treaty of Lisbon, were protagonists of this stage in the System's evolution.[4] The CEAS was further expanded in its fields of implementation, also thanks to the establishment of the European Asylum Support Office (EASO) in the year 2011.[5] The European refugee crisis in 2015 urged renewed action to fill in the gaps in the EU asylum system, leading to a further series of regulations introduced in the summer months of 2016 by the European Commission. In the same year, a shared agreement was achieved between the Parliament and the Council on proposals to reform existing instruments as well as on the establishment of an EU Asylum Agency (EUAA) in replacement of the European Asylum Support Office.[6]

Temporary Protection

The framework of the CEAS envisions, since 2001, the exceptional instrument of Temporary Protection,[7] which emerged shortly after conflicts in former Yugoslavia. The tool provides the criteria for granting "*in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection*".[8]
Thus, this measure is intended to be put into effect by the Council only in the event when the CEAS is unable to manage mass immigration and asylum procedures, thus attempting to mitigate overall pressure on the Member States.

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[3]European Commission, "Common European Asylum System", in *Migration and Home Affairs*, https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en.
[4] Ibid.
[5]Claudio Matera and Amanda Taylor, eds., *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies*, (The Hague: Centre for the Law of EU External Relations, CLEER Working Papers 2014/7), 69, https://euaa.europa.eu/sites/default/files/public/cleer-article-final-3.pdf.
[6]European Commission, "Common European Asylum System", in *Migration and Home Affairs*, https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en.
[7] Council of the European Union, "Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof," *Official Journal of the European Union,* L 212 , August 7, 2001, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0055&qid=1648223587338.
[8] Ibid., chap.1, art. 2.

The Temporary Protection Directive requires that individuals qualified for the status are granted a residence permit until the expiration of the instrument and are facilitated in the process of requiring necessary documents.[9] Moreover, Member States must allow refugees access to employment, with the consequent benefits deriving from national social security systems, during the protection. Additionally, beneficiaries of temporary protection should be guaranteed access to suitable accommodation and housing, to social welfare and medical care, if lacking necessary resources. Regarding underage people, Member States shall guarantee them access to the national education system, with equal conditions to nationals, and for the entire duration of the protection.

The crisis in Ukraine and the activation of the Directive

The Russian act of invasion of Ukraine occurred on 24 February 2022, triggering progressively more inhabitants to leave the invaded country and seek shelter abroad. By the first days of March 2022, one million people had fled Ukraine, whereas, a month after the outbreak of the conflict, the number reached almost 4 million people.[10] According to the data provided by the United Nations High Commissioner for Refugees (UNHCR), most of the refugees have chosen Poland as their first destination, whereas Romania holds the second place, followed by Moldova, Hungary and Slovakia.

European Union representatives immediately condemned the Russian aggression,[11] expressing high solidarity and willingness to accept people fleeing from Ukraine.[12] The flux induced by the conflict between Russia and Ukraine triggered the first concrete implementation of the Temporary Protection Directive, as the most relevant humanitarian response to the issue. A proposal was consequently advanced from the Commission to activate the Directive.[13] Subsequently, on 4 March

[9] Ibid., chap. 3.
[10] United Nations High Commissioner for Refugees, "Operational Data Portal: Ukraine Refugee Situation", Accessed March 30, 2022, https://data2.unhcr.org/en/situations/ukraine.
[11] European Commission, "Press Statement of President Charles Michel of the European Council and President Ursula von der Leyen of the European Commission on Russia's unprecedented and unprovoked military aggression of Ukraine", Brussels, February 24, 2022, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1321.
[12] European Commission, "Statement by President von der Leyen on further measures to respond to the Russian invasion of Ukraine", Brussels, February 27, 2022, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1441.
[13] European Commission, "Proposal for a Council Implementing Decision Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Directive 2001/55/EC of 20 July 2001, and Having the Effect of Introducing Temporary Protection", Brussels, March 2, 2022, COM(2022) 91 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0091&qid=1646384923837.

2022, the Council adopted the implementing decision.[14] The conditions for a mass influx and the criteria for application of the measure were recognized in the text of the Decision, emphasizing the overall objective to provide harmonization of rights, across the EU, for people fleeing the conflict. Thus, the instrument was triggered, granting temporary protection to "*Ukrainian nationals residing in Ukraine*" or "*nationals of third countries [..] who have been displaced from Ukraine on or after 24 February 2022, and who were benefiting in Ukraine from refugee status or equivalent protection before 24 February 2022*", as well as to "*family members of those persons, where their families were already in, and residing in, Ukraine at the time of the circumstances surrounding the mass influx of displaced person*s".[15]

The Decision left a margin of appreciation to the Member States in regards to possible extensions of temporary protection to "*stateless persons or nationals of third countries other than Ukraine residing legally in Ukraine who are unable to return in safe and durable conditions to their country or region of origin*", including short-term students and workers, and to "*additional categories of displaced persons above and beyond those to whom this Decision applies*", where they are displaced due to the same circumstances, and from Ukraine or the same regions referred to in the Council's Decision.[16]

It is worth mentioning that, regardless of the temporary protection measures, according to the 2018 EU visa regulations,[17] Ukrainians are allowed to cross external EU borders for up to 90 days within a 180-day period. Thus, individuals can travel freely within the EU territory, although they can apply for temporary protection in one Member State of their choice, and consequently enjoy the rights deriving from the Directive in the selected country.[18]

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[14] Council of the European Union, "Council Implementing Decision (EU) 2022/382 of March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection," *Official Journal of the European Union*, L 71/1, March 4, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.071.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A071%3ATOC.

[15] Ibid.

[16] Ibid.

[17] European Parliament and Council of the European Union, "Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 Listing the Third Countries whose Nationals Must Be in Possession of Visas when Crossing the External Borders and those whose Nationals are Exempt from that Requirement", *Official Journal of the European Union*, L 303/39, November 28, 2018, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1806.

[18] Council of the European Union, "Council Implementing Decision (EU) 2022/382 of March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection," *Official Journal of the European Union*, L 71/1, March 4, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.071.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A071%3ATOC.

Finally, the text identified the active role of Member States, coordinated by the Commission, in monitoring the situation and exchanging information about reception capacities and data.[19] The initial duration of the temporary protection instrument was designated as one year, with the possibility to extend it twice for six months.

Further initiatives

At the beginning of March 2022, other tools of intervention exploited by the European Commission included the "operational guidelines".[20] The first set of guidelines particularly targeted EU external bordering states in Central-Eastern Europe, while simultaneously aiming to preserve the Schengen area's internal security. In consideration of the mass influx and pressure on the Member States bordering Ukraine, the guidelines outlined a number of instructions to alleviate congestions and simplify logistic and bureaucratic matters, particularly through the operational support of the European Border and Coast Guard Agency (Frontex) and of the European Union Agency for Law Enforcement Cooperation (Europol). Among the guidance instructions, an easing of controls at the borders for vulnerable categories, including children, and the arrangement of emergency support lanes for humanitarian organizations to reach Ukraine, are mentioned. Moreover, the text suggests that the Member States establish "temporary border crossing points" in addition to official crossing passages, working outside opening hours as well.

An updated set of Operational guidelines for Temporary Protection[21] was launched on 21 March 2022, this time addressing all Member States in the direction of the application of the Temporary Protection Directive.

Further measures at the EU level included setting up a platform to share information with individuals seeking shelter from Ukraine, namely "Support for people fleeing Ukraine".[22] Most notably, a Solidarity Platform was established by the European Commission to monitor the

[19] Ibid.
[20] European Commission, "Commission Communication Providing Operational Guidelines for External Border Management to Facilitate Border Crossings at the EU-Ukraine Borders," *Official Journal of the European Union*, CI 104/1, March 4, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2022_104_I_0001&qid=1646422292305.
[21] European Commission, "Communication from the Commission on Operational Guidelines for the Implementation of Council Implementing Decision 2022/382 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection," Brussels, March 21, 2022, https://data.consilium.europa.eu/doc/document/ST-7439-2022-INIT/en/pdf.
[22] European Commission, "Information for People Fleeing the War in Ukraine", https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-solidarity-ukraine/eu-assistance-ukraine/information-people-fleeing-war-ukraine_en.

national implementation of the aforementioned Guidelines, and to harmonize the operational response of Member States, through the collection of data and information on national situations in regard to asylum and simplifying the provision of support instruments in coordinated action between the Member States, third countries hosting Ukrainians, EU agencies and Ukrainian authorities.[23]

Finally, on 28 March, the Justice and Home Affairs (JHA) Council set out a "10-Point Plan for stronger European coordination on welcoming people fleeing the war from Ukraine".[24] Among these, the setting up of an EU platform for registration of grantees of the temporary protection status, a system of mapping reception capacity and accommodation, and increased support to the Member States in terms of both resources and finances are particularly worthy of mention.[25]

The future of the EU asylum system in the face of crisis

The diaspora originated as a consequence of the Russian invasion of Ukraine, highlighting a need to further strengthen and expand the instruments available to the EU in exceptional circumstances. Not coincidentally, the International Centre for Migration Policy Development describes the Ukrainian crisis as the opportunity for an "unexpected renaissance" of the Temporary Protection tool.[26]

Indeed, the instruments that comprise the EU asylum policy are periodically recast and updated to address modern challenges, however lacking significant changes in the system, and with a high margin of appreciation left to Member States.[27]

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[23] European Commission, "Communication to the Commission: Approval of the Content of a Draft for a Communication from the Commission on Operational Guidelines for the Implementation of Council Implementing Decision 2022/382 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection," Brussels, March 17, 2022, https://reliefweb.int/sites/reliefweb.int/files/resources/communication-operational-guidelines-establishing-existence-mass-influx-displaced-persons-ukraine_en.pdf.

[24] European Commission, "Home Affairs Council: 10-Point Plan on Stronger European Coordination on Welcoming People Fleeing the War against Ukraine," Brussels, March 28, 2022, https://ec.europa.eu/commission/presscorner/detail/it/IP_22_2152.

[25] European Commission, "The 10-Point Plan: For Stronger European Coordination on Welcoming People Fleeing the War from Ukraine," https://ec.europa.eu/home-affairs/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine_en.

[26] Wagner, Martin, "The war in Ukraine and the renaissance of temporary protection - why this might be the only way to go," *International Centre for Migration Policy Development*, March 2, 2022, https://www.icmpd.org/blog/2022/the-war-in-ukraine-and-the-renaissance-of-temporary-protection-why-this-might-be-the-only-way-to-go.

[27] Giordano, Antonella, "EU Asylum Policy: the Past, the Present and the Future", *The New Federalist*, July 10, 2019, https://www.thenewfederalist.eu/eu-asylum-policy-the-past-the-present-and-the-

Already in September 2020, within the framework of the New Pact on Migration and Asylum, a proposal for a "Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum" was advanced by the European Commission.[28] The proposal recognizes some limitations in the existing Temporary Protection Directive as a means to grant immediate protection. More precisely, it states that an updated framework should be required to tackle the protection of displaced people from third countries in exceptional situations since "the Temporary Protection Directive no longer responds to Member States' current reality and needs to be repealed".[29]

Nevertheless, the instrument was activated, in reaction to the Ukrainian 2022 diaspora, albeit for the first time. The previous lack of use of the Temporary Protection mechanism rests on several facts. First, the measure requires a qualified voting majority within the Council to a proposal issued by the Commission. This did not happen, for instance, during the peak of the refugee crisis at EU borders in 2015, due to the presence of strong anti-migration voices. Moreover, intense disagreement revolved around the definition of "mass influx" and the risk of further encouraging flows as a consequence of the activation of a similar tool. Not to mention that the Directive also contains a "solidarity clause", connected to *burden-sharing* and refugee relocating systems, which was hardly tolerated by a number of EU Member States on other occasions.[30]

Conclusion

Despite its limitations, the Temporary Protection tool proves to be the most suitable instrument to handle the current influx from Ukraine to the EU, due to fast procedures to grant protection on a collective basis and for the short term. The exceptionality of the circumstances allowed for a widespread agreement on the activation of this instrument, previously the object of controversies due to divergent political attitudes. Nevertheless, the frequency of mass influxes in contemporary times underlines the need for suitable, renewed and improved mechanisms to effectively manage crises that require a fast and valid response.

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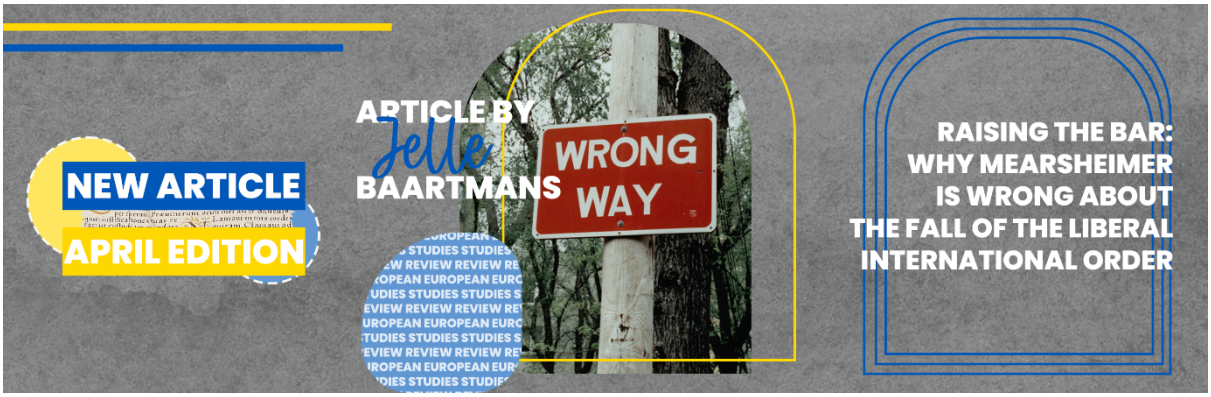
future?lang=fr#:~:text=During%20the%20first%20phase%20of,EU%3B%20and%20minimum%20standards%20on

[28] European Commission, "Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and *Force Majeure* in the Field of Migration and Asylum," September 29, 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0613&from=EN.

[29] Ibid., 10.

[30] Wagner, Martin, "The war in Ukraine and the renaissance of temporary protection - why this might be the only way to go," *International Centre for Migration Policy Development*, March 2, 2022, https://www.icmpd.org/blog/2022/the-war-in-ukraine-and-the-renaissance-of-temporary-protection-why-this-might-be-the-only-way-to-go.



Four years ago, famous international relations scholar John J. Mearsheimer wrote a paper called "The Rise & Fall of the Liberal International Order" for the Notre Dame International Security Center.[1] Mearsheimer adopts a pessimistic view of the future of the liberal international order, predicting that the rise of China and the resurgence of Russia on the international stage will result in a multipolar world, in which the international order will be realist, and no longer liberal. At most, what will remain is a bounded liberal order mainly centered in the 'traditional' West, meaning North America and Europe. Such a bounded order, Mearsheimer argues, would no longer be able to dictate its liberal agenda to the rest of the world. His paper has become highly relevant again after Russia's invasion of Ukraine. Was Mearsheimer right about the dark future for the liberal world order? While the scenario he foresees is by no means impossible, and developments in the international arena are hard to predict, there are some claims in his paper that deserve a critical look.

First of all, Mearsheimer tends to present a black-and-white view of the applicability of international relations theories. That is not just Mearsheimer. international relations in general is a discipline that draws clear borders between competing theories—mainly realism, liberal internationalism, and constructivist theories[2]—so as not to allow for overlap. Does that mean that no interplay exists between different theories ? Not necessarily—which is probably a constructivist argument in itself. Even if one acknowledges a realist world order, differences in state behavior are visible based on their strategic culture.[3] Some states react more offensively than others to similar (levels of) threat, and such differences cannot be explained by realist theory.

[1] John J. Mearsheimer, "The Rise & Fall of the Liberal International Order", (Notre Dame International Security Center, 2018)
[2] *See, for elaboration on these theories:* John Baylis, Steve Smith and Patricia Owens, *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2014, 6th edition).
[3] Jeffrey S. Lantis and Darryl Howlett, "Strategic Culture," in *Strategy in the Contemporary World*, edited by John Baylis, James J. Wirtz and Colin S. Gray, (Oxford: Oxford University Press, 2016, 5th edition): 84–101.

Therefore, the following statement by Mearsheimer might well be true theoretically, but its applicability on state behavior in practice might be rather limited:

> If the system is either bipolar or multipolar, the international order will be realist. The reason is simple: if there are two or more great powers in the world, they have little choice but to act according to realist dictates and engage in security competition with each other, which means there would be little hope of building a liberal international order. Ideological considerations, after all, would be subordinated to security considerations. That would be true even if all the great powers would be liberal states.[4]

While Mearsheimer contends that a realist world order means that security considerations prevail over ideological considerations, this says nothing about the ways in which states (strive to) achieve security in the modern world. Is liberal internationalism not one of the best tools to achieve security for the West? One could argue that building and institutionalizing a liberal and democratic world, as well as an integrated global economy, is the West's form of Realpolitik, its way of retaining and expanding its global power. In fact, Mearsheimer acknowledges this himself: for the U.S. "building institutions and encouraging trade and investment were consistent with a realist agenda."[5] In other words: a realist world order can go hand in hand with liberal values.

The counterargument could then be that these values only apply within a bounded, Western liberal order, while having no influence on the rest of the world. However, there is reason to believe that liberal values do not just work when spread by the superpower in a unipolar world. While Mearsheimer argues that in the case of a multipolar world "ideological considerations [...] would be subordinated to security considerations," there are certainly examples of idealistic breakthroughs in non-unipolar times. One example are the Helsinki Accords of 1975. They are even mentioned by Mearsheimer, be it under the header of "less significant security agreements."[6] But the Helsinki Accords were absolutely significant in some ways, even if it was only for the increased legal protection that it provided for dissidents in unfree states. The Helsinki Accords might have been a result of realist intentions—the 'three baskets' included at least some strategic benefits for all signatories—but altogether they can be regarded as a universal step forward for the rights of the individual.

[4] Mearsheimer, 4.
[5] Mearsheimer, 9.
[6] Ibid., 8.

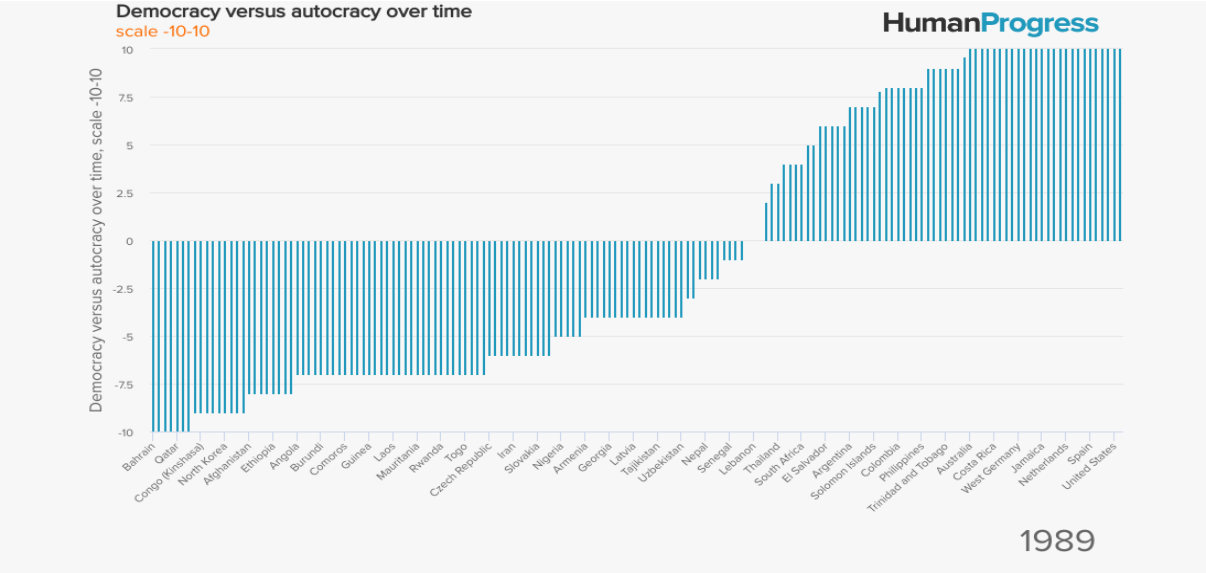
This brings us to another point, which is Mearsheimer's claim that the world is currently becoming a less liberal place and that Francis Fukuyama was wrong when he predicted 'The End of History' in 1989.[7] Mearsheimer formulates his claim as follows:

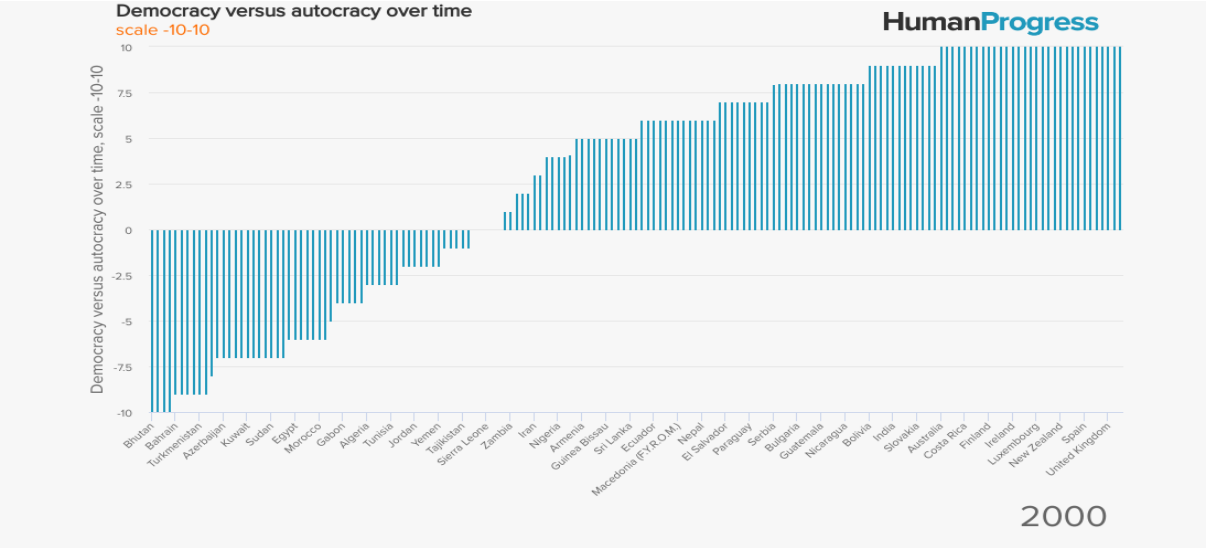
> It was widely believed [after the Cold War] that eventually almost every country in the world would become a liberal democracy, which led Francis Fukuyama to conclude that this might be the 'end of history'. [...] Few people expected that [the emerging order] would begin unraveling a few years into the new millennium, but that is what happened.[8]

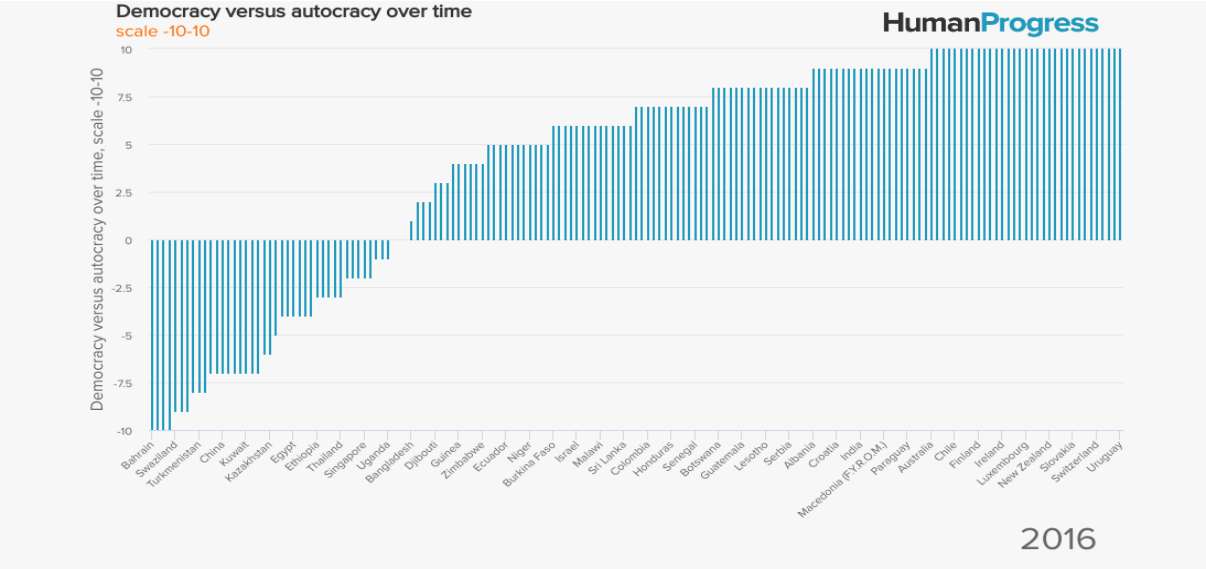
> The number of liberal democracies has been declining over the past decade, reversing a trend that once looked unstoppable.[9]

Mearsheimer is certainly not the only scholar who claims that Fukuyama was wrong. However, if one examines the statistics, Fukuyama appears to be more right than wrong and liberal democracy surely does not seem to be in decline. Data from different sources indicate that the world has become more and more liberal up until today. Below are three graphs by HumanProgress, in which all states of the world have been given a grade between -10 and 10, the former meaning fully autocratic, the latter fully democratic, and anything above 0 meaning rather democratic than autocratic. There is one for 1989, the time of Fukuyama's article, one for 2000, and one for 2016, the latest available.[10] Clearly, the world is still becoming more democratic—which is not a synonym of liberal, but they tend to go hand in hand.

[7]Francis Fukuyama, "The End of History?" *The National Interest*, no. 16 (1989): 3–18.
[8] Mearsheimer, 13.
[9] Ibid., 17.
[10] HumanProgress, "Democracy Versus Autocracy over Time," https://www.humanprogress.org/dataset/democracy-versus-autocracy-over-time/bar-chart/.

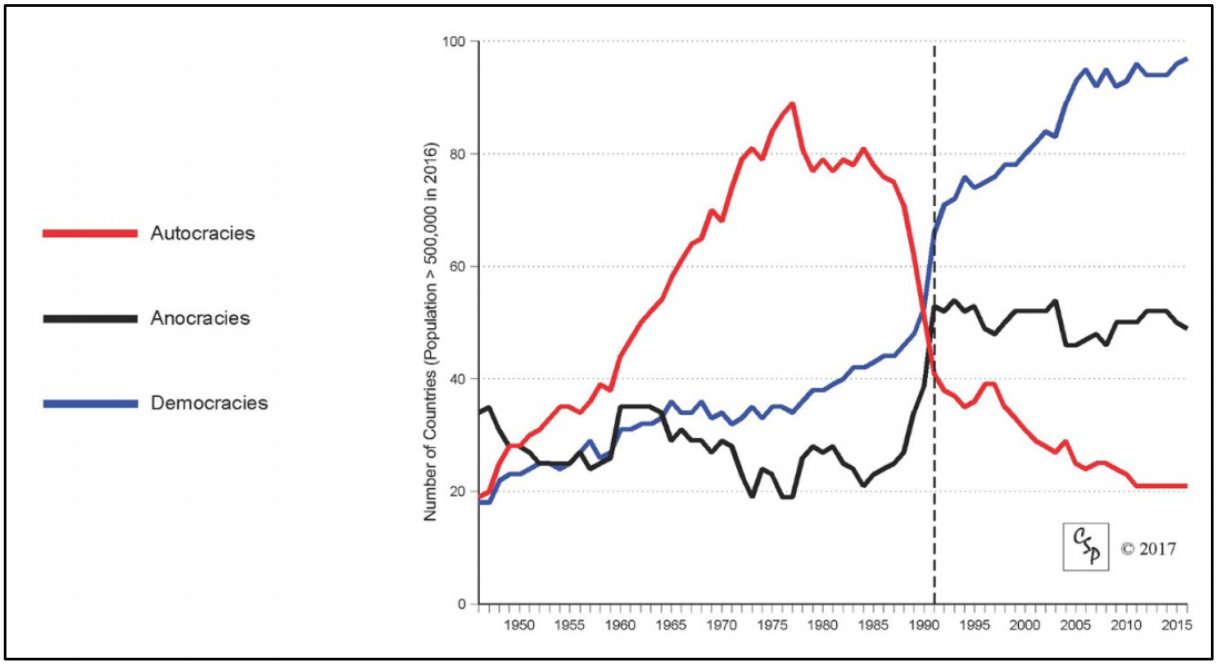






The Center for Systemic Peace shows the same trend. In its 2017 Global Report it categorized the

states in the world as either autocracies, democracies, or 'anocracies' (neither autocracy nor democracy; something in between).[11] The following graph again shows that democracy is still on the rise.



The most recent waves of democratization have been the Color Revolutions (in former communist countries in Eurasia) and the Arab Spring, of which some were successful in improving the state of democracy—at least somewhat—such as in Georgia, Tunisia and Ukraine. While these countries are not the most influential when it comes to world politics, sizable states such as India and Indonesia are nowadays also governed through democratic political systems. Of course, the main focus of Mearsheimer, i.e. the biggest challenger of U.S. hegemony, is China, which is far from a democracy—let alone a *liberal* democracy.[12] But one should not overlook an important global development: that the liberal 'threshold' has increased across the board over time, meaning that even today's autocracies provide more freedoms than they did some decades ago. Norberg sets out this argument for China:

> The Chinese people today can move almost however they like, buy a home, choose an education, pick a job, start a business, belong to a church (as long as they are Buddhists, Taoist, Muslims, Catholics or Protestants), dress as they like, marry whom they like, be

[11] Monty G. Marshall and Gabrielle Elzinga-Marshall, "Global Report 2017: Conflict, Governance, and State Fragility," Center for Systemic Peace (Vienna, VA, 2017): 31.
[12] Mearsheimer, "The Rise & Fall of the Liberal International Order".

> openly gay without ending up in a labour camp, travel abroad freely, and even criticize aspects of the Party's policy (though not its right to rule unopposed). Even 'not free' is not what it used to be.[13]

It is understandable that Mearsheimer presents the possibility of a non-liberal, non-democratic state like China becoming one of the world's new poles as a setback for the existing liberal democratic world order. But the progress of freedom within non-free states is equally important. This is a sensitive argument, because many people continue to suffer from authoritarian regimes nevertheless—whether it is the Ukrainians who are currently suffering from Russia's invasion of their country or the Uyghurs in China whose rights are infringed upon. But that should not keep us from being guided by statistics. For instance, using a robust measurement model, Fariss concluded in 2014 that globally, "respect for human rights has improved over time".[14] A quick look at the still growing list of states that have abolished the death penalty also sparks some optimism.[15] The same goes for the decriminalization of homosexuality.[16]

To conclude, a 'threshold' of individual rights and freedoms seems to exist that is still increasing. My main argument is that while Mearsheimer claims the liberal international order is declining, so far this is not visible in statistical trends. Across the board, democracy and liberal values appear still to be on the rise, even though the world might be heading towards multipolarity. Only time will tell whether Russia's cruel war in Ukraine and severe crackdown of internal opposition will initiate a reversal of this trend.

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[13] Johan Norberg, *Progress: Ten Reasons to Look Forward to the Future* (London: Oneworld, 2016), 144.
[14] Christopher J. Fariss, "Respect for Human Rights Has Improved over Time: Modeling the Changing Standard of Accountability," *American Political Science Review* 108, no. 2 (2014): 297–318.
[15] Wikipedia, "Capital Punishment by Country: Abolition Chronology" https://en.wikipedia.org/wiki/Capital_punishment_by_country#Abolition_chronology.
[16] Wikipedia, "LGBT Rights by Country or Territory: Timeline," https://en.wikipedia.org/wiki/LGBT_rights_by_country_or_territory#Timeline.

Introduction

A week before the outbreak of the war in Ukraine, the ECJ delivered two of the most eagerly awaited judgements in its history, if not for their expected final outcome, for their political significance. Sitting as full court and through live streaming given the importance of the judgement, on February 16th 2022 the judges confirmed the legality of the so-called "Rule of Law Conditionality Regulation"[1], thus rejecting the appeals lodged by Hungary and Poland in two "twin" cases.[2] However, despite the approval of the Union's most advanced tool to tackle democratic backsliding, the rulings have been criticized for limiting in scope the application of the Regulation, turning it into an idle threat for the infringing governments. Understanding the political background and the Court's reasoning will show the actual impact of the Regulation in the rule of law crisis and the current state of play in this challenge.

Background

The contested Regulation was originally proposed by the Commission in 2018 aiming to effectively tackle rule of law breaches in the Member States. However, the final version which was agreed upon by the Council and the Parliament appeared comparatively limited in scope, opting to rather focus on economic violations.[3] Nevertheless, the Regulation encountered strong criticism in Budapest and Warsaw who threatened to veto the adoption of both the Multiannual Financial Framework 2021-27 and the Recovery Package from the Covid-19 recession. On December 10th 2020, the European Council reached a compromised text –harshly criticized in the literature[4]– which *de facto* "froze" the applicability of the

[1] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I , 22.12.2020, p. 1–10.
[2] Judgment of the Court (Full Court) of 16 February 2022, *Hungary v Parliament and Council* (C-156/21), EU:C:2022:97; Judgment of the Court (Full Court) of 16 February 2022, *Poland v Parliament and Council* (C-157/21), EU:C:2022:98.
[3] Antona Baraggia and Matteo Bonelli, "Linking Money to Values: the New Rule of Law Conditionality Regulation and its Constitutional Challenges", *German Law Journal* (2021), https://ssrn.com/abstract=3878250.
[4] Alberto Alemanno and Merijn Chamon, "To Save the Rule of Law you Must Apparently Break It", *Verfassungsblog*, December 11, 2020, consulted on March 20, 2022, https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/. Kim Lane Scheppele and Laurent Pech, "Compromising the Rule of Law while Compromising on the Rule of Law", Verfassungsblog, December 13, 2020, consulted on March 20, 2022, https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/.

Regulation until the ECJ had ruled on its legality and the Commission had issued guidelines on how it intends to apply it.

Despite the non-binding nature of the European Council's conclusions, the Commission stuck to the agreement and did not trigger the mechanism once it entered into force in January 2021. The EU institution's "wait-and-see" approach has been denounced by MEPs on multiple occasions: first, through the adoption of three condemning Resolutions and then, by filing a still-pending action[5] before the ECJ under Art. 265 TFEU –failure to act– in October 2021.[6]

Meanwhile, in March 2021, the Polish and Hungarian governments brought two "twin" cases before the ECJ seeking to annul the Rule of Law Regulation under Art. 263 TFEU. On February 16th 2022, the ECJ delivered its judgements which, among other pleas, focused primarily on three central points: the use of the appropriate legal basis, the compatibility with Art. 7 TEU, and the consistency with the principles of legal certainty and conferred powers.

The Judgements

First, regarding the choice of the legal basis, the Court confirmed that Art. 322(1)(a) TFEU is the adequate instrument for the purpose of the Regulation. The reasoning of the ECJ stemmed from the interpretation that the Regulation's main aim is to protect the EU budget from potential rule of law breaches in the Member States that might affect the sound financial stability of the Union in a "sufficiently direct way"[7]. Thus, it is not intended to punish those violations *per se* but remains a rather economic Regulation.[8] Consequently, Art. 322 TFEU –regulating the adoption of financial rules for the implementation of the budget– represents the appropriate means to protect the financial interest of the EU.

This assessment of the Court is strictly linked to the reasoning on the respect of the principle of conferred powers –enshrined in Art. 5(2) TEU– and the importance of the Union's common values. In a seminal passage, the ECJ stressed that the values foreseen in Art. 2 TEU "define the very identity of the European Union as a common legal order" and consequently the EU should be able to defend it within the limits conferred to it by the Treaties.[9] Thereby attributing a preeminent status to the rule of law and the other principles contained in Art. 2 TEU, the Court established the principle of non-regression to the adherence

5 Action brought on 29 October 2021, European Parliament v European Commission (C-657/21), OJ C 11, 10.1.2022, p. 18–19.
6 Sonja Priebus, "Not Looking Up", Verfassungsblog, February 22, 2022, consulted on March 21, 2022, https://verfassungsblog.de/not-looking-up/.
7 Regulation (EU, Euratom) 2020/2092, Art. 4(1).
8 Hungary v Parliament and Council, paragraph 119.
9 Ibid., paragraph 127.

to the so-called Copenhagen criteria when stating that "those values cannot be reduced to an obligation which a State […] may disregard after its accession".[10]

The Court went on underlining the intertwinement between the EU budget, the Union's common values, and the principles of solidarity and mutual trust. Indeed, as the ECJ argues, the Union budget gives practical effect to the solidarity principle foreseen in Art. 2 TEU and enacts the mutual trust between the member states; the latter in particular is based on national governments' commitment to both their obligation under EU law and the values contained in Art. 2 TEU – including the rule of law principle.[11] It follows from this linkage that the sound financial management of the Union can be compromised by rule of law breaches in the member states. Therefore, the conditionality mechanism established by the Regulation falls within the principle of conferred powers.

Second, regarding the claim that the Regulation constituted a "parallel procedure" to Art. 7 TEU, the Court found that there is nothing to prevent the EU legislature from adopting secondary legislation relating to the values contained in Art. 2 TEU, as long as these procedures are different in terms of aims and subject.[12] By doing so, the Court dismissed the understanding of Art. 7 TEU as the only mechanism for the protection of the EU common values, thus contradicting the misleading interpretation set forth by the European Council's conclusions of December 2020.[13] Furthermore, the ECJ acknowledged that Art. 7 TEU and the contested Regulation have different subject matters and, more importantly, different purposes since the former aims to penalize breaches of Art. 2 TEU values whereas the latter has an explicitly protective nature.[14] Therefore, the Regulation is compatible with the procedure of Art. 7 TEU since it does not constitute a circumvention of it.

Lastly, Hungary and Poland –by claiming the Regulation was infringing the principle of legal certainty– argued that the value of the rule of law could not be interpreted uniformly at the EU level in view of the respect for the national identity of the member states foreseen in Art. 4(2) TEU. In answer to that, the Court had to elaborate on the principle of the rule of law. First and foremost, it underlined that Art. 2 TEU values are not mere intentions but rather "are an integral part of the very identity of the European Union"[15] thus ruling that the EU has its own constitutional identity of which rule of law is an integral part. Therefore, although the member states enjoy a certain degree of discretion, there cannot be different degrees of compliance with the principle in question.[16] The ECJ stressed that the concept of rule of law

10 Ibid., paragraph 126.
11 Ibid., paragraph 129.
12 Ibid., paragraph 168.
13 Laurent Pech, "No More Excuses", Verfassungsblog, February 16, 2022, consulted on March 21, 2022, https://verfassungsblog.de/no-more-excuses/.
14 Hungary v Parliament and Council, paragraphs 170-172.
15 Ibid., paragraph 232.
16 Ibid., paragraph 233.

has been extensively developed in the Court's case-law and has its source in the common values recognized and shared by the member states.[17] Thus, the Court concluded that Hungary and Poland are in the position to determine the requirements flowing from the rule of law concept with sufficient precision, thereby dismissing the claim on lack of legal certainty of the Regulation.[18]

Limited Scope

Despite these landmark statements, the Court's findings have been described as a "modest step forward"[19] in the battle against rule of law backsliding within the European Union. Why so? In contrast to the ambitious Commission 2018 proposal –which put the respect of the rule of law at the core of the legal text– the ECJ has stressed the mere economic nature of the Regulation, solely aiming to protect the EU budget and the sound financial management of the Union. For this purpose, the Court has stressed the need to establish a "genuine link" between the breach in question and the financial interest of the EU through a two-fold test[20] – as foreseen by Art. 3 and 4 of the Regulation. First, reasonable grounds for the adoption of measures should be established through the identification of national breaches of the principle of the rule of law. Second, it shall be established whether those breaches "affect or seriously risk affecting" the budget of the EU and its sound financial management. Furthermore, as stressed by the Court, the measures to be taken must be strictly proportional to the potential impact of the breach[21], and the Commission must comply with strict procedural requirements.[22]

Overall, these provisions greatly limit the scope of application of the Regulation and risk transforming the most advanced instrument designed by the EU legislators to tackle democratic backsliding into an "empty threat".[23] However, it is indisputable that the narrowing down of the Regulation to a financial tool and the high threshold represented by the genuine link were necessary steps that had to be taken by the Court to save the Regulation as a whole. Indeed, should a genuine link not be established by the Commission, a cut in funding under the Regulation would amount to a new form of sanction incompatible with EU powers – since the Treaties provide an exhaustive list of remedies against member

17 Ibid., paragraph 237.
18 Ibid., paragraph 240.
19 Anna Zemskova, "Rule of Law Conditionality: a Long-Desired Victory or a Modest Step Forward?: Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21)", EU Law Live, February 18, 2022, consulted on March 20, 2022, https://eulawlive.com/analysis-rule-of-law-conditionality-a-long-desired-victory-or-a-modest-step-forward-hungary-v-parliament-and-council-c-156-21-and-poland-v-parliament-and-council-c-157-21-by/.
20 Zemskova, "Rule of Law Conditionality".
21 Hungary v Parliament and Council, paragraph 271.
22 Ibid. paras 280-288.
23 Piotr Buras, "Why the EU's Rule of Law Mechanism Won't Resolve its Democratic Crisis", European Council on Foreign Relations, February 23, 2022, consulted on March 21, 2022, https://ecfr.eu/article/why-the-eus-rule-of-law-mechanism-wont-resolve-its-democratic-crisis/.

states' violations as well as the Art. 7 TEU procedure in case of infringements of Art. 2 TEU values. The compromise should thus be read in this light rather than from a completely pessimistic one.

What Now?

The Commission has promptly welcomed the issuing of the long-awaited rulings and, on March 2nd, it has published its policy guidelines for the implementation of the conditionality mechanism.[24] Nonetheless, it is very unlikely that it will wield the Regulation anytime soon for three main reasons. First, the EU institution has long been known –and condemned– for its appeasing stance towards Warsaw and Budapest, and given its reluctance to use enforcement mechanisms[25], it is reasonable to believe it will follow the same pattern. Second, the upcoming elections in Hungary on April 3rd will lead the Commission to beware of meddling with the election campaign. Last, the current war in Ukraine is demanding an extraordinary level of European unity and, at the same time, it is changing the public narrative of Poland "from zero to hero"[26] due to the country's active response to the events unfolding across its border.

On the other hand, it can be argued that these three points could trigger positive developments in the rule of law crisis. First, the Commission's inaction will ramp up the European Parliament's pressure – already expressed in the pending action– into considering new pressure tools such as cutting the budget of the Commission itself.[27] Second, the outcome of the Hungarian elections could also be decisive in the long run: if the opposition wins, we can expect the new government to take up a new democratic path and dialogue with the EU –as repeatedly announced by the opposition leader Márki-Zay[28]–, while should Orbán remain in power, the Commission will in all likelihood trigger the conditionality regime with no further delay. The reason why a firmer EU action towards Budapest can be expected is that corruption there is more systemic[29], while in Warsaw, although democratic principles are constantly violated, EU money is more properly administered –thus making the establishment of a "genuine link" more difficult.[30] Last, the strengthening of the EU unity *vis-à-vis* the war in Ukraine could also serve to remind Poland and

24 European Commission, "EU Budget: Commission Publishes Guidance on the Conditionality Mechanism", March 2, 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1468.
25 Carlos Closa, "The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance", Journal of European Public Policy 26, no.5 (2019): 696-716.
26 Jan Cienski, "Poland Goes from Zero to Hero in EU thanks to Ukraine Effort", Politico Europe, March 3, 2022, consulted on March 21, 2022, https://www.politico.eu/article/poland-goes-from-zero-to-hero-in-eu-thanks-to-ukraine-effort/.
27 Priebus, "Not Looking Up".
28 Makszimov Vlagyiszlav, "Márki-Zay: My Government Would Be 'Grand Prize' for the EU", Euractiv, October 15, 2021, consulted March 30, 2022, https://www.euractiv.com/section/elections/interview/marki-zay-my-government-would-be-grand-prize-for-the-eu/.
29 Kim Lane Scheppele, R. Daniel Kelemen, and John Morijn, "The EU Commission Has to Cut Funding to Hungary: The Legal Case", The Greens/EFA Group, July 7, 2021, consulted March 30, 2022, https://www.greens-efa.eu/files/assets/docs/220707_rolcr_report_digital.pdf .
30 Buras, "The EU's Rule of Law Mechanism".

Hungary of the benefits linked with the EU membership and the respect of its fundamental values; moreover, Russia's aggression should warn the Commission of the importance of the rule of law and that not defending it leads to catastrophic consequences.

To conclude, the analysis of the Court's rulings shows that the true potential of the Regulation will be determined by actions taken both at the EU and the member states' level. Furthermore, it seems that the real battle in the rule of law crisis will take place in other theatres and through different means, such as the Commission's decision to withhold EU funds from Poland.[31] Once again, the Commission stands as the kingmaker in the democratic backsliding challenge, and thus it should stand firm as the guardian of the Treaties, not settle for an unacceptable compromise with the infringing governments, and take up significant action to give practical use to the approved Regulation.

31 Zosia Wanat, "Poland Hit with Record €1M Daily Fine in EU Rule-of-Law Dispute", Politico Europe, October 27, 2021, consulted on March 22, 2022, https://www.politico.eu/article/poland-record-1-million-euros-daily-fine-eu-rule-of-law-dispute/.

Introduction

By 2022, the European Union (EU) has awarded candidate country status to five states; Albania and North Macedonia, whose accession negotiations have yet to start due to several vetoes, Turkey, whose negotiations have effectively come to a standstill due to its human rights and rule of law violations, Montenegro, which aims to be ready to join the EU by 2025, and Serbia, which under the leadership of President Vučić moved increasingly further away from the EU and closer to Russia. Bosnia and Herzegovina and Kosovo were promised the prospect of joining when they are ready and are seen as potential candidates.[1]

Due to the Russo-Ukrainian war, Ukraine, Georgia and Moldova are now seeking 'fast track' EU membership despite having struggled to implement the necessary reforms. Such a move does not seem feasible at the time, especially since the European Council, which ultimately takes the final decision, already stressed that such a process will have to take place through the traditional procedure. Enlargement policy thus necessarily focuses on the EU's strategic backyard in the Southeast of the continent. In the revised enlargement methodology of February 2020, which is a renewed enlargement strategy and aims at providing a credible EU perspective for the Western Balkans, the European Commission confirms that in times of increasing global challenges, the firm and merit-based prospect of full EU membership remains a geostrategic investment in a stable, strong and united Europe. Such a prospect is deemed a key tool to promote democracy, rule of law and fundamental rights.[2] Indeed, the prospect of full EU membership, accompanied by the economic and political benefits of the stabilization and association agreements, remains by far the strongest tool to align the policies of the Union's neighborhood with its own interests.

[1] European Commission. *European Neigbourhood Policy and Enlargement Negotiations status* (Brussels: European Union, 2022). Accessed March 17, 2022 from https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/negotiations-status_nl.
[2] European Commission. *Enhancing the accession process – A credible EU perspective for the Western Balkans* (Brussels: European Union, 2020). Accessed March 17, 2022 from https://ec.europa.eu/neighbourhood-enlargement/enhancing-accession-process-credible-eu-perspective-western-balkans_en.

EU objectives and the Chinese Challenge

Such a stance has increasingly been undermined by rising Russian and Chinese influence in the region. By taking advantage of local vulnerabilities such as fragile state institutions, weak civil society or elite capture, and through investments and economic development within the framework of the Belt and Road Initiative (BRI), China attempts to exert its influence over this strategic regional entry point into one of its major export markets. By using debt traps, such as the controversial highway project in Montenegro, that create networks of patronage and corruption, the challenge that China poses goes beyond mere economic competition. Its debt traps and rising economic involvement enable the country to seize strategically important infrastructure or to strong-arm states to align with Chinese foreign policy objectives related to Taiwan or the treatment of the Uyghurs in Xinjiang. Serbian president Vučić has proved this strategy to be quite effective when he issued a statement praising China and declaring to turn to the country.

Although the size and intensity of linkages in trade, foreign direct investment (FDI) or EU grants instead of Chinese loans - which must be repaid and are thus less valuable to recipients - clearly favor the European Union, China's presence in the region, mainly through infrastructure financing, obstructs EU norm diffusion in political, economic and security terms. Its agreements - lacking conditionality, transparency, accountability and proper checks and balances - require lower domestic adjustment costs compared to EU funding which is conditional upon good governance and environmental standards or fundamental rights.[3]

Chinese involvement in the region also enables Western Balkan states to balance between several great powers which in turn weakens EU leverage and increases the bargaining power of candidate countries in accession negotiations. Increasing political and economic linkages with China have already frequently been used by Serbia - possessing candidate country status - to balance against the EU.[4] China could thus be "*on the cusp of acquiring real leverage over policy choices, political attitudes, and narratives in some parts of the Western Balkans*." This is especially problematic as these states might one day join the EU.[5]

[3] Erik Brattberg, Philippe Le Corre, Paul Stronski and Thomas De Waal. "China's influence in Southeastern, Central and Eastern Europe: Vulnerabilities and resilience in four countries," *Carnegie Endowment for International Peace,* (2021). Accessed March 17, 2022 from https://carnegieendowment.org/2021/10/13/china-s-influence-in-southeastern-central-and-eastern-europe-vulnerabilities-and-resilience-in-four-countries-pub-85415

[4] Wouter Zweers, Vladimir Shopov, Frans-Paul van der Putten, Mirela Petkova and Maarten Lemstra. "China and the EU in the Western Balkans – a zero sum game," *Clingendael,* (2020). Accessed March 17, 2022 from https://www.clingendael.org/sites/default/files/2020-08/china-and-the-eu-in-the-western-balkans.pdf.

[5] Vladimir Shopov. "Decade of patience: how China became a power in the Western Balkans," *European Council on Foreign Relations,* (2021). Accessed March 17, 2022 from https://ecfr.eu/publication/decade-of-patience-how-china-became-a-power-in-the-western-balkans/

Although such behavior is not at all limited to the Western Balkans, it is especially harmful to the EU when it takes place in its own neighborhood. It directly contradicts the EU's objectives to spur reform in line with EU norms and values through its enlargement policy, to align the region's policies with EU interests and to promote democracy and the rule of law. And still, completely blocking Chinese economic involvement would not be an option as it also brings additional investment and hard-needed economic development to the region. Attempts to stop this would be inefficient and unrealistic at best.

Drivers of EU influence in the Western Balkans

The EU seems to have no choice but to respond to the Chinese lack of conditionality without compromising on its own high standards. Since the introduction of the BRI in 2013, China has primarily used economic investments in its foreign policy and presented itself as a 'lending-power'. Such an approach has also been applied to the Western Balkans and came at a time when EU member states began to lose interest in the region as enlargement fatigue grew. In addition, and despite years of talks and cooperation, the socio-economic development gap between the Western Balkans and the EU stubbornly persisted which has provoked widespread disappointment.[6] Such a context renders other (Chinese) alternatives, that require lower domestic adjustment costs, more attractive. Whereas the answer to increasing competition with China cannot be to lower EU standards, the Union does have the possibility to provide more operational support to Western Balkan states to meet the sometimes extensive bureaucratic demands of EU funding procedures, thereby leveraging these economic benefits more effectively.

Furthermore, the Union should not underestimate its strongest tool, namely its way of life. A free and democratic European Union is a far more attractive model of society for the region than the authoritarian People's Republic of China. Despite Chinese attempts to foster an image of a well-intentioned partner by building schools and setting up academic exchanges and Confucius institutes, the EU has far more leverage in this field as major cultural and behavioral differences between Chinese actors and Western Balkan populations persist.[7] Some authors, however, argue that Beijing's wider political, social and cultural initiatives should not be underestimated as China is moving on to a new stage of engagement with the Western Balkans. Increasing Chinese tourism to the region or the rise of Chinese cultural centers that have a wider portfolio than Confucius

[6] Stephanie Fenkart. "China's influence in the Western Balkans: partnership or confrontation," *International Institute for Peace,* (2021). Accessed March 17, 2022 from https://www.iipvienna.com/new-blog/2021/9/21/chinas-influence-in-the-western-balkans-partnership-or-confrontation

[7] Wouter Zweers, Vladimir Shopov, Frans-Paul van der Putten, Mirela Petkova and Maarten Lemstra. "China and the EU in the Western Balkans – a zero sum game," *Clingendael,* (2020). Accessed March 17, 2022 from https://www.clingendael.org/sites/default/files/2020-08/china-and-the-eu-in-the-western-balkans.pdf.

institutes is a clear indication of this. Rising engagement also seems successful in terms of controlling the media narrative as the various agreements between China and Western Balkan states rarely receive negative coverage in regional media outlets.[8]

Engagement with the EU has remained a process that primarily focuses on national elites. This complicates exposing the concrete negative effects of certain Chinese agreements at the local level. The EU should thus be clearer about the concrete benefits of EU membership (and about the negative side-effects of certain Chinese agreements) for ordinary people such as the decision to reduce roaming charges between the EU and the Western Balkans. Again, the statement of Serbian President Vučić is a striking example as the EU, at that time, announced it would provide Serbia with 112 million dollars in aid - far more than China - but without a significant media campaign or considerable coverage in regional media outlets. Although the EU cannot be perceived as being blackmailed by Serbia, it could certainly better exploit such initiatives to increase domestic support at the local level.[9]

Another drive of EU influence in the region is a credible membership perspective. The revised enlargement methodology of February 2020 has been promising in this regard and boosts the credibility of accession as it confirms the prospect of membership for the entire region while at the same time emphasizing that such a move will have to be merit-based. The EU will provide additional predictability if it remains committed to generating stronger political reflections about the achievements of Western Balkan states.[10]

In the past, the EU refrained from important infrastructure projects in the Western Balkans. This was problematic as the lack of socio-economic convergence between the region and the EU, reinforced by delays in the accession process, are major incentives for Western Balkan states to look to third actors. Nevertheless, the Union has shown that it is ready to meet the demand for economic development through its recent Economic and Investment Plan which is set to mobilize up to €30 billion of investment in the form of grants, preferential loans and guarantees.[11]

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[8] Vladimir Shopov. "Decade of patience: how China became a power in the Western Balkans," *European Council on Foreign Relations,* (2021). Accessed March 17, 2022 from https://ecfr.eu/publication/decade-of-patience-how-china-became-a-power-in-the-western-balkans/

[9] Stephanie Fenkart. "China's influence in the Western Balkans: partnership or confrontation," *International Institute for Peace,* (2021). Accessed March 17, 2022 from https://www.iipvienna.com/new-blog/2021/9/21/chinas-influence-in-the-western-balkans-partnership-or-confrontation

[10] European Commission. "*Remarks by Commissioner Olivér Várhelyi at the press conference on the revised enlargement methodology."* Press release, February 5, 2020. Accessed March 22, 2022 from https://ec.europa.eu/commission/presscorner/detail/en/statement_20_208

[11] European Commission. "*European Commission launches €3.2billion investment package to advance sustainable connectivity in the Western Balkans."* Press release, February 25, 2022 from https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1362.

Vast institutionalized and political linkages of the Union with the region – contrary to China's informal government-to-government approach to dealing with every country on an individual level – are another major driver of EU influence. These linkages could enable the Union to set up a framework of conditions under which China is allowed to operate in the region. Such a framework could then make it perfectly clear when Chinese involvement hinders EU induced reforms, norm diffusion and thus merit-based accession. If managed effectively, Chinese efforts to meet the development needs in the region, especially in terms of infrastructure financing, would thus not necessarily pose a problem and could even be a lever for EU influence. The Union, therefore, has no choice but to adopt a pragmatic approach and enhance cooperation with China in line with its Global Strategy's concept of principled pragmatism.[12]

Conclusion

Contrary to its policies of the past, the EU can no longer afford to ignore its own strategic backyard, especially if these states might one day become part of its decision-making process. It is not too late to secure EU influence in the Western Balkans given the vast economic, institutional and political ties with the region. Whereas the EU has no choice but to accept that China is in the region to stay, it should not compromise on its norms and values in its response to the Chinese lack of conditionality.

A pragmatic partnership with China, especially for infrastructure needs in the region, embedded in a strong framework of conditions and accompanied by sufficient EU leverage, in the form of a merit-based membership perspective or financing opportunities, might be the best way of addressing the socio-economic development gap and maintaining EU influence in the region.

[12] Stephanie Fenkart. "China's influence in the Western Balkans: partnership or confrontation," *International Institute for Peace,* (2021). Accessed March 17, 2022 from https://www.iipvienna.com/new-blog/2021/9/21/chinas-influence-in-the-western-balkans-partnership-or-confrontation

Introduction

On 17 May 2021, a border incident took place in Ceuta, a Spanish city on the North African coast surrounded by Morocco. More than 8,000 people swam across the Spanish-Moroccan border as the Moroccan authorities relaxed its surveillance. The Spanish authorities were overwhelmed by the situation since they could not count on the support of their Moroccan counterparts. Two days later, in the early hours of May 19, the Moroccan government gave express orders to control the transit of migrants. A few hours after the arrival of the first migrants, Spain had approved 30 million euros in aid to Morocco.

This relaxation of border surveillance was a retaliation by Morocco in the midst of a diplomatic crisis between Rabat and Madrid. Although the trigger seemed to be the transfer of the Polisario Front leader, Brahim Ghali, to a Spanish hospital, there was already a climate of tension due to the lack of response from Spain following the US recognition of Morocco's sovereignty over Western Sahara[1].

This is yet another example of how Morocco has played its cards strategically, putting irregular migration on the political agenda in order to increase its power in relations with neighboring states. This article will examine the origins of the inclusion of migration on Morocco's agenda, the shift in the country's migration policies and trends, and Morocco's relations with the European Union in this regard.

Migration trends in Morocco

Morocco was initially a sending country. However, in the 1990s, as a result of a series of circumstances, Morocco's migratory profile changed, and the country came to play three roles: as

[1] White House. "Proclamation on Recognizing The Sovereignty Of The Kingdom Of Morocco Over The Western Sahara". National Archives and Records Administration. https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-sovereignty-kingdom-morocco-western-sahara/.

a sending, transit and destination country. Its proximity to the European continent - less than 15 km from Spain - has made it the gateway to Europe. Although Spain is one of the countries chosen by both Moroccan and sub-Saharan migrants to settle, many choose it as a transit country to French-speaking countries. Its role as a transit country will be key to explaining power relations with neighboring countries.

Spain's accession to the European Economic Community in 1986 and the consequent growth of the Spanish economy favored the flow of Moroccan seasonal workers. Its incorporation also led to the regulation of migration with the first Law on Foreigners in response to concerns about the lack of migration control at the time[2]. In 1991, the Schengen Agreement came into force, allowing free mobility between EEC countries, which made migration issues European rather than just national in nature. A visa requirement was introduced for Maghrebi citizens in Spain, and in 1999 the SIVE (Integrated System of External Vigilance), a surveillance system between the border between Spain and Morocco, was established.

There was also a growing flow of sub-Saharan migrants wishing to reach the EU via Morocco and an increase in migration from West African countries (Sierra Leone, Liberia, Nigeria, Ivory Coast) to North Africa due to civil wars and economic recession. Many of these migrants intended to continue their journey to Europe via Ceuta and Melilla or the Mediterranean route. Although a physical fence had been in place in the cities of Ceuta and Melilla since the 1970s in response to an outbreak of cholera on Moroccan soil, during the 1990s the Spanish government installed temporary structures to contain irregular immigration and reinforced them, as collective attempts to jump them became more frequent. In 2005, several incidents drew international attention to the practices of Moroccan authorities in dealing with mass jumps. It emerged that Moroccan authorities were abandoning migrants planning to cross to the other side, in the Sahara Desert. In total, an estimated 14 people died at the border -11 of them shot by the Moroccan authorities- and 24 died in the Sahara Desert[3].

[2] Government of Spain. *Ley Orgánica 7/1985, de 1 de Julio, sobre Derechos y Libertades de los Extranjeros en España.* 1985.
[3] Federación de Asociaciones de SOS Racismo del Estado Español. *Informe Frontera Sur 1995-2006: 10 Años De Violación De Los Derechos Humanos.* 2006.
https://sosracismo.eu/wp-content/uploads/2016/06/Informe-Frontera-SUR-1995-2006.pdf.

In terms of data, the number of irregular migrants crossing through Morocco increased between 2000 and 2006. The dangerous Canary Islands route became active at that time as well, with almost 40,000 people arriving on the Canary Islands' shores in 2006[4].

Has migration always been part of Morocco's political agenda?

Irregular migration was introduced into Morocco's political agenda in 2003. This shift was not only a response to the transformation of migration flows, but also to a change in national priorities.

Poor relations between Morocco and Spain reached their peak with the Perejil Island conflict in 2002, following a series of disagreements over fisheries and agriculture and Morocco's refusal to readmit third-country nationals despite having signed a readmission agreement with Spain in 1992. However, the European Council had announced at a meeting held in Seville in June 2002, the need to reconsider relations with states that did not cooperate sufficiently in the fight against irregular immigration[5]. Morocco therefore changed its approach in this field.

In this context and in the aftermath of the 2003 terrorist attacks in Casablanca -which justified the adoption of paternalistic measures to protect national security - the "Law n°02-03 relative to the entry and stay of foreigners in Morocco and to irregular emigration and immigration" came into force in November 2003[6]. This law criminalized, for the first time in the country's history, irregular migration, and its assistance. The insignificant number of irregular immigrants in the country at the time[7], suggests that this law was not a response to a social problem, but a strategic decision to increase Morocco's power.

Meanwhile, in 2003 the EU implemented the Eurodac database, a fingerprint directory of asylum seekers and migrants apprehended at the external border, which has been criticized by human rights associations for violating fundamental rights[8]. The first joint European initiative against illegal immigration at sea was also launched: Operation Ulysses, a collaboration between patrols

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[4] Ministry of the Interior, Government of Spain. *Balance of the Fight against Illegal Immigration*. 2007. http://www.interior.gob.es/documents/10180/1209647/Balance+de+la+lucha+contra+la+inmigraci%C3%B3n+ilegal.pdf/ebd49ee1-155d-4807-b505-5e0696eaed4a.

[5] European Union: Council of the European Union. *Presidency Conclusions.* 21-22 June 2002. https://www.refworld.org/docid/3f4e45154.html

[6] National Legislative Bodies / National Authorities, Maroc. *Loi n° 02-03 relative à l'entrée et du séjour des étrangers au Royaume du Maroc, à l'émigration et l'immigration irrégulières.* 2003. https://www.refworld.org/docid/3ae6b4ed5c.html

[7] Barros et al. *L'immigration irrégulière Subsaharienne à travers et vers le Maroc.* 2002. https://www.researchgate.net/publication/242474563_L'immigration_irreguliere_Subsaharienne_a_travers_et_vers_le_Maroc

[8] Andrea Dernbach. "Eurodac Fingerprint Database under Fire by Human Rights Activists*". EURACTIV*. 2015. https://www.euractiv.com/section/justice-home-affairs/news/eurodac-fingerprint-database-under-fire-by-human-rights-activists/.

from Spain, Great Britain, France, Italy, and Portugal to block the entry of irregular immigrants as a preliminary step to border control.

Cooperation between the EU and Morocco began to yield results at the end of 2005 and the arrival of irregular migrants on Moroccan soil between 2006 and 2010 dropped to its lowest level since 1990. This was also influenced by the extension of the fences in Ceuta and Melilla to a height of 9 meters, significantly reducing the chances of success for migrants. The increased difficulty in accessing the EU through Morocco caused routes to shift southwards towards Mauritania and Senegal, as well as further east along the Mediterranean coast.

In addition, Morocco improved its diplomatic relations with the EU and other African countries by acting as a mediator. This was to its advantage, as it had left the African Union in 1984 over the Western Sahara and had distanced itself from African politics. In addition, the conditions of treatment and transport of migrants improved after the 2005 incident in the Sahara Desert, which had led to a decline in the country's reputation. Morocco's position was strengthened in 2008 with the granting of Advanced Status in 2008, which included several security, political and economic agreements with the EU.

At the end of 2010, migration flows increased again due to the beginnings of the Arab Spring and the political, economic and social situation in the countries of the sub-Saharan area, which continued to be a push factor for the entry of irregular migrants into Morocco.

Aligned with the new migration policy, Morocco signed a Mobility Partnership with the EU in 2013 together with other North African countries. Among the areas addressed in the agreement was the effective fight against irregular migration.

Despite Morocco's image washing in the early 2010s, migrants' rights continue to be undermined[9]. Like many international organizations, the Archbishop of Tangier, Santiago Agrelo, condemned in an open letter the inhumane treatment of sub-Saharan migrants by Moroccan security forces[10]. Moreover, there is an additional obstacle to monitoring the situation: organizations such as

[9] Human Rights Watch. *"Abused and Expelled. Ill-Treatment of Sub-Saharan African Migrants in Morocco*". July 15th 2015.
https://www.hrw.org/report/2014/02/10/abused-and-expelled/ill-treatment-sub-saharan-african-migrants-morocco.
[10] *Carta abierta del Obispo de Tánger*. August 2nd 2018.
https://www.apdha.org/cadiz/carta-abierta-del-obispo-de-tanger/

Amnesty International[11] and migrants' rights activists, such as Helena Maleno[12], have been expelled from the field while investigating these abuses.

In terms of migration trends over the last 10 years, arrivals by small boats on Spanish coasts were less than 10,000 per year until 2015. From 2016 onwards, there has been a potential increase in arrivals that reached its peak in 2018 with more than 57,000 throughout Spanish territory. Although it seemed that the Atlantic route had been deactivated after the most critical year, 2006, at the end of 2019 there was an upturn in arrivals of small boats in the Canary Islands, reaching over 20,000 people in 2020 and also in 2021. As of 15 March 2022, a total of 7,254 people had reached Spanish territory by sea, 65.77% more than in the same period in 2021[13].

Morocco uses its power following Turkey's lead

The EU has given considerable power to Morocco, as it has to Turkey. Indeed, both countries have used this power on the geopolitical playing field to pursue their interests, as has been seen recently.

Morocco's enormous coercive power allows it to retaliate instantly when the EU, and specifically Spain, displeases the Maghrebian State. In February 2017, following the ECJ's ruling on Western Sahara's distinct identity in December 2016, Morocco allowed thousands of sub-Saharan migrants to cross the border. This had also happened in 2014, when Spanish police intercepted King Mohammed VI's yacht in the waters of Ceuta.

Although future EU-Moroccan relations are uncertain - migration flows are influenced by multiple factors - a definitive statement by the Spanish president may provide clues as to what relations between Spain and Morocco will be like. During an energy crisis, Pedro Sánchez sent a letter to the Moroccan King endorsing his proposed political model for Western Sahara, in a departure from both his party's political programme and the approach adopted by Spain in recent decades.

The letter was not published by the Spanish authorities but leaked to the Moroccan press. The repercussions were not long in coming: Algeria, Spain's main gas supplier and supporter of the Polisario Front, has already expressed its disapproval. In a press release, the Spanish government justified this change of policy by announcing "a new stage in relations with Morocco based on

[11] Amnesty International. "*Amnesty International staff members expelled from Morocco".* 2015. https://www.amnesty.org/en/latest/news/2015/06/amnesty-international-staff-members-expelled-from-morocco/
[12] EuroMedRights. "Morocco: Harassment Against Helena Maleno Must Stop!". 2021. https://euromedrights.org/publication/morocco-harassment-against-helena-maleno-must-stop/
[13] Data from the Ministry of the Interior, Government of Spain. http://www.interior.gob.es/prensa/balances-e-informes/2021

mutual respect, compliance with agreements, the absence of unilateral actions, transparency and permanent communication"[14].

Turkey is using similar tactics to control relations with the EU. The landmark agreement between the EU and Turkey in 2016 was set up with the aim of reducing pressure on European borders. Disagreements between Brussels and Ankara have led to the borders being relaxed and migrants being able to reach European territory, where they have been repelled even by force. Once again, migrants are being used as political pawns.[15]

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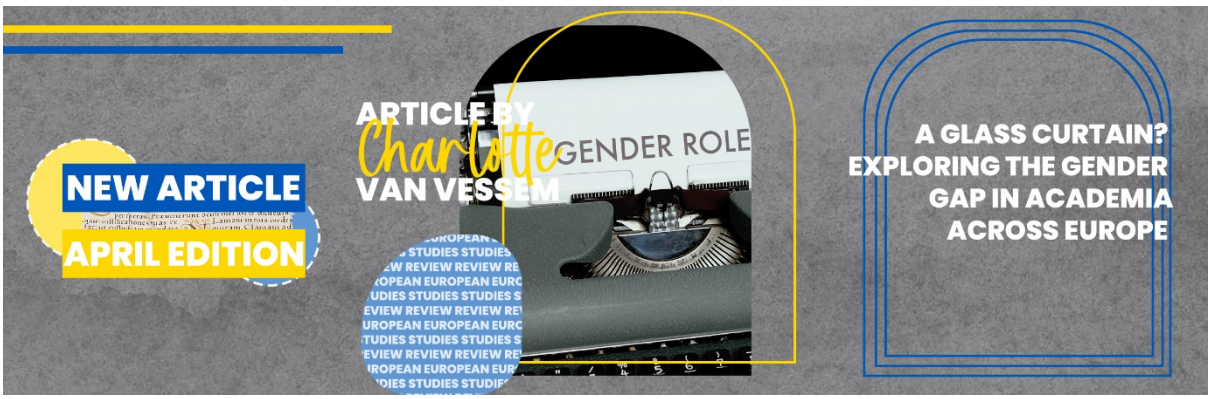
[14] Francisco Carrión. "Anatomía De Un Despropósito De La Diplomacia Española." *El Independiente*, March 22nd, 2022.
https://www.elindependiente.com/internacional/2022/03/21/anatomia-de-un-desproposito-de-la-diplomacia-espanola/.
[15] Katy Fallon and Ans Boersma. "'There Is No Future': The Refugees Who Became Pawns in Erdoğan's Game." *The Guardian.* May 8th, 2020.
https://www.theguardian.com/global-development/2020/may/08/erdogan-turkey-refugees-pawns-game.



Introduction

In January 2022, the Dutch news site NOS published that a quarter of the postdoctoral researchers at Dutch universities was female,[1] in accordance with a report published by UNESCO.[2] "A milestone", according to the Dutch Network of Women Professors (LNVH): in the twenty (20) years of the LHVN's existence, the number of female postdoctoral researchers increased by just as many percentage points.[3] While this increase might be a reason for celebration, the current situation is not: the same report concluded that women have less job security and lower salaries than their male counterparts. With a score of twenty five point eight percent (25.8%) of female researchers, the Netherlands ranks lowest of all European countries, next to France (twenty seven percent 27%) and Germany (twenty eight percent 28%).[4] The Nordic countries, often seen as the leading nations in gender equality and female labor participation, only receive average scores, with none of them reaching the fifty percent (50%) mark. Despite their (increasing) focus on gender equality, Western European countries seem to perform poorly in academic equality, especially when compared to the Eastern European universities. Among the highest-ranking countries are North-Macedonia (fifty two point three percent 52.3%), Latvia (fifty two point two 52.2%), Serbia (fifty percent 50%) and Bulgaria (forty nine percent 49%).[5] Furthermore, these regions are some of the only places breaking the infamous "glass ceiling". The highest levels of female university rectors can be found in the same region as mentioned in the UNESCO report: countries such as Latvia, North-Macedonia and Serbia score among the highest of Europe, leaving Western

1 Nationale Omroep Stichting (NOS). 2021. "Kwart hoogleraren op Nederlandse universiteiten nu vrouw." NOS. Accessed March 15, 2022. https://nos.nl/index.php/artikel/2408765-kwart-hoogleraren-op-nederlandse-universiteiten-nu-vrouw

2 UNESCO UIS. 2019. "Women in Science." UNESCO Institute for Statistics. Accessed March 15, 2022. http://uis.unesco.org/en/topic/women-science

3 Landelijke Netwerk Vrouwelijke Hoogleraren (LNVH). 2022. "LNVH." WOMEN PROFESSORS MONITOR 2021. Accessed March 15, 2022.https://www.lnvh.nl/monitor2021/EN.html

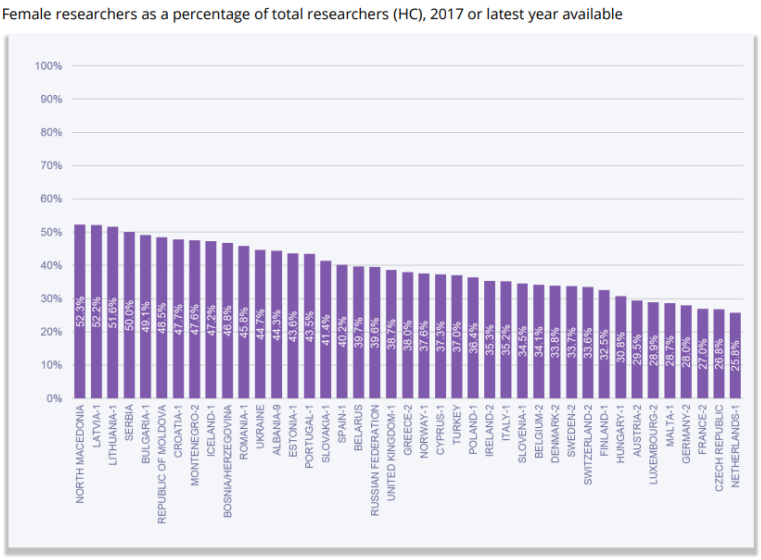
4 See Figure 1.

5 Ibid.

European universities far behind.[6] Beyond the difference in the amount of female postdoctoral researchers and rectors, there is also a noticeable difference in female academic authorship between Eastern and Western Europe. According to the latest data from the Leiden Ranking, which tracks the performance of universities worldwide on a wide range of topics, female researchers in Eastern Europe publish more articles than their Western counterparts[7] [8] (ironically, despite its aim to provide insights on academic progress and development, the Leiden Ranking only added gender as a variable in 2019, and only in one field, that of academic authorship[9]).

Is there such a thing as a "glass curtain" dividing European universities, or are women in academia facing similar issues across the continent? This article explores the barriers for women in academia and aims to discover if there are tangible differences between Eastern and Western European universities.

Figure 1. Participation of female researchers in Europe



Notes:-1 =2016, -2 = 2015, -9 = 2008.
Source: UNESCO Institute for Statistics, June 2019.

East-West differences in academic traditions

6 Kasymova, Nazokat. 2021. "Despite gains, women still highly outnumbered by men as university leaders." European University Association. Accessed March 20, 2022.https://eua.eu/news/645:despite-gains,-women-still-highly-outnumbered-by-men-as-university-leaders.html
7 CWTS Leiden Ranking. 2019. "CWTS Leiden Ranking 2019." CWTS Leiden Ranking - Ranking 2019. Accessed March 20, 2022. https://www.leidenranking.com/ranking/2019/list
8 Guglielmi, Giorgia. 2019. "Eastern European universities score highly in university gender ranking." Nature. Accessed March 15, 2022. https://www.nature.com/articles/d41586-019-01642-4
9 CWTS, "CWTS Leiden Ranking 2019".

To answer these questions about the present situation, we might need to turn to the past. The Eastern-European countries that perform well on the UNESCO and Leiden Ranking are mostly former Soviet states. According to sociologist Hana Havelková, this might be a key factor in the academic gender equality in former USSR countries.[10] While universities in Eastern Europe were established largely by Western-oriented elite, the institutes underwent drastic transformations during the Soviet era, opening up from elite men to the general population of the USSR.[11] Where women in (primarily) the Russian Empire were mostly excluded from public life and education, with only limited women's education in the form of "'finishing schools" for the upper classes, this changed significantly after the establishment of the USSR.[12] Free and open education to all those that qualified created an increase in female students: on average women outranked men in secondary and primary education in the 1960s.[13] In Western Europe, such a swift change never occurred, and women's participation in higher education continued to increase slowly over the decades. Another difference between East and West in the 20th century is one that is deeply connected to the east-west ideological differences of capitalism and communism, and the role of government intervention. Where Western states saw individual liberties as paramount and government intervention as undesirable, the governance model of the Soviet Union was built on government intervention that extended to almost all aspects of life. This might explain the difference in reactions towards government measures to improve gender equality, such as gender quotas: the USSR implemented various quotas, such as a thirty percent (30%) quota for the Supreme Soviet[14], besides radically breaking with past practices (in the case of opening universities), while Western countries continue to struggle with the concept of imposing gender quotas up until today.[15]

However, there are two remarks to be made regarding this explanation. First, despite its focus on equality and quotas, the Soviet Union was a largely male-dominated society, with women being

10 European Union. 2004. "Report on women scientists in Central and Eastern Europe shows women still 'misused by society'." CORDIS. Accessed March 18, 2022.https://cordis.europa.eu/article/id/21525-report-on-women-scientists-in-central-and-eastern-europe-shows-women-still-misused-by-society
11 Dixon, Simon. 2012. The Modernisation of Russia, 1676-1825. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511818585
12 Ibid.
13 Ratliff, Patricia M. 2012. "Women's education in the U.S.S.R.: 1950–1985." In Women's Higher Education in Comparative Perspective, edited by Sheila S. Slaughter and Gail P. Kelly, 17-30. Dordrecht: Springer Netherlands. 10.1007/978-94-011-3816-1_2
14 Tartakovskaya, Irina. 2011. "Equality and quotas in Russia - Interview with Irina Tartakovskaya." Gunda-Werner-Institut. Accessed on March 23, 2022.https://www.gwi-boell.de/en/2011/02/14/equality-and-quotas-russia-interview-irina-tartakovskaya
15 Ellena, Silvia. 2022. "Member states end 10-year deadlock on EU's plan for women's quota on corporate boards." EURACTIV.com. Accessed March 27, 2022.https://www.euractiv.com/section/economy-jobs/news/member-states-end-10-year-deadlock-on-eus-plan-for-womens-quota-on-corporate-boards/

pushed into a double role of worker and housewife.[16] [17] The USSR never saw true gender equality: while the first eras seemed to strive for a radical equal position, Stalinist policies reinforced existing gender roles.[18] [19] Secondly, explanations concerning the USSR are explanations of the past; separate nations with different political systems have taken the place of the Soviet system. While the Soviet influence might be visible in the approximately equal amounts of female and male academics, it cannot fully explain the contemporary, unequal, situation.

"Misused by society": views on women's academic participation

Despite the high positions on rankings, female academics in East-Central European countries are not on equal footing with men. The majority of the women employed in universities are part of the lowest ranks in the university.[20] Women receive lower pay, less promotion, work more hours for less favorable contracts, and while in some fields women may publish more than men, their research is underfunded.[21] [22] These problems are similar in Western European universities: studies show that women in academia work more hours but earn less than male colleagues.[23] An often-raised explanation of the gender gap in academia is that of the popular research fields in which men and women tend to specialize; men are in the majority in the fields of natural science, which is well-funded, while women form the majority in the less well-funded social sciences.[24] [25] However, this cannot explain why women, in all of Europe, "get stuck" in the lower ranks of the academic hierarchy.[26] Despite the amount of female bachelor and master students, women working in academia get less promotions: with each step on the academic career ladder, the number of women decreases considerably.[27] While there is a higher percentage of women in academic leadership positions in certain Eastern European countries, there is still an overwhelming majority of male

16 Clements, Barbara E., and Viola Lynne. 1995. "Daughters of Revolution: A History of Women in the USSR." The Russian Review 54, no. 2: 310-310. https://doi.org/10.2307/130953

17 Engel, Barbara A. 2004. Women in Russia, 1700-2000. Cambridge: Cambridge University Press.

18 Ibid.

19 Tartakovskaya, "Equality and quotas in Russia".

20 European University Institute. 2017. "Gender Comparisons" European University Institute. Accessed March 19, 2022. https://www.eui.eu/ProgrammesandFellowships/AcademicCareersObservatory/CareerComparisons/GenderComparisons

21 European Union, "Report on women scientists".

22 Nationale Omroep Stichting (NOS). 2016. "'Vrouwelijke hoogleraren lopen miljoenen mis.'" NOS. Accessed March 15, 2022. https://nos.nl/artikel/2130029-vrouwelijke-hoogleraren-lopen-miljoenen-mis

23 NOS, "Kwart hoogleraren vrouw".

24 European Union, "Report on women scientists".

25 European University Institute, "Gender Comparisons".

26 European Union, "Report on women scientists".

27 European University Institute, "Gender Comparisons".

leadership in all of Europe, regardless of the scientific branch. [28] It appears that across the European continent, women in academia face similar struggles, remaining "misused by society", as stated by Havelková.[29]

However universal some barriers may be, there appears to be an East-West difference in the value that is placed on an academic career. What seems to be specific to the case of Eastern European universities, is that academic careers are less valued that in Western Europe. Since the beginning of the 21st century, men have left the academic world in favor of higher-paying employment in the private sector, leaving academic positions open for women.[30] This might explain higher levels of female academic participation.

In Western Europe, university careers are less profitable than private research companies, but the prestige of a university career remains high. In turn, the old boy's networks and glass ceilings remain in place, barring entrance to capable women.

Conclusion

To reiterate, this article sought to explore differences in barriers for women in academia between Easter and Western European countries and universities, as universities in Eastern Europe receive higher scores than Western European universities regarding female academic participation, female academic leadership and female academic authorship. The main differences between Eastern and Western European academia can be found in their respective backgrounds: the countries that score high on gender equality are former Soviet states. Experience with gender quotas as well as academia being a less elite career option seem to be the main factors of difference between the East and the West. However, most of the prevailing barriers for women in academia can be found in all European countries: there is not a single country in which women outrank men in position, participation or authorship. Barriers of lower salary, less favorable contracts and funding and a lower chance of promotion prevail all over the continent. While a glass curtain might not truly exist in European academia, the glass ceiling remains in place - albeit with cracks in certain places.

28 Kasymova, "Women outnumbered by men".
29 European Union, "Report on women scientists".
30 Guglielmi, "Eastern European universities score high in CWTS".

Introduction

The title of this article refers to the question at the heart of a recent Court of Justice of the EU (CJEU) Advocate General ("AG") opinion, which although not legally binding, is instructive of the EU's stance on state enforced monolingualism. This opinion came in response to the Latvian Constitutional Court query as to whether it was lawful to require that Latvian be used as the sole language in third level education.

2021 marked the 40th anniversary of the European Parliament's Resolution on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities.[1] Language has typically been seen as linked to national sovereignty and identity,[2] and, thus, is socially and politically very sensitive in most Member States.[3] As a result, the EU legislature and EU Courts have consistently adopted a rather cautious, diplomatic and pragmatic approach to language regimes, especially when it comes to imposing obligations on Member States.[4] In the preamble to the resolution, the Parliament emphasised its determination to "bring about a closer union among the peoples of Europe *and* to preserve their living languages, drawing on their diversity in order to enrich and diversify their common cultural heritage."[5]

National measures that impact the use of a national language can have further ramifications and may obstruct the freedom of movement within the EU. In this case, the Latvijas Republikas Satversmes tiesa (Latvian Constitutional Court) asked the CJEU whether national legislation which, subject to some exceptions, requires institutions of higher education to offer courses only

[1] Resolution of 16 October 1981 (OJ 1981 C 287, p. 106).
[2] In more detail and with further references, see van der Jeught, S., *EU Language Law*, Europa Law Publishing, 2015, pp. 55-77.
[3] Cf. Opinion of Advocate General Kokott in *Italy v Commission* (C 566/10 P, EU:C:2012:368, point 2).
[4] See, with references to case-law, Opinion of Advocate General Bobek in *An tAire Talmhaíochta Bia agus Mara, Éire agus an tArd-Aighne* (C 64/20, EU:C:2021:14, points 74 and 79).
[5] *European Charter for Regional or Minority Languages*, preamble.

in the official national language (Latvian) was compatible with EU law. This question arose in circumstances where Article 4 of the Latvijas Republikas Satversme (Constitution of the Republic of Latvia, "the Latvian Constitution") provides, *inter alia*, that "the official language of the Republic of Latvia is Latvian".

This case study provides an overview of the current legislation requirements in Latvia, and a breakdown of the arguments raised by the Latvian lawmakers, which were initially presented before the Latvian courts. It then outlines the questions posed to the CJEU, seeking judicial interpretation, and an assessment of the AG's opinion on the matter. The protection and promotion of a cultural cornerstone, such as language, is a concept which is central to the EU, and is something that almost all Member States can relate to. The EU is comprised of a myriad of cultures and languages, and it is important to evaluate how the CJEU might treat the promotion of one national language at the expense of all other languages. This case note is also illustrative of the danger that monolingualism can pose in a connected Europe, and how there may be elements of discrimination in a policy that ultimately limits the use of other languages in private institutions. The lessons learnt from Latvia's questions to the CJEU are impactful for all EU Member States.

The Latvian law on higher education institutions

Article 5 of Latvia's Augstskolu likums (Law on higher education institutions) of 2 November 1995[6] provided that the role of higher education institutions was to promote and develop the sciences and the arts. The likums "Grozījumi Augstskolu likumā" (Law amending the Law on higher education institutions) of 21 June 2018[7], amended this legislation as follows: "The study programmes of higher education institutions and colleges shall be implemented in the official language."[8]

There were four limited exceptions where a course may be pursued in a foreign language, including if it was an EU-language and did not account for more than one fifth of the credits for the course of study, or where it was essential to the course, such as linguistic and cultural studies or language courses.[9]

Facts, national proceedings and the questions referred

[6] Latvijas Vēstnesis, 1995, no 179.
[7] Latvijas Vēstnesis, 2018, no 132.
[8] *Law on higher education institutions, S.56(3).*
[9] *Law on higher education institutions, S.56.*

The Latvijas Republikas Satversmes tiesa (Latvian Constitutional Court) received an application by 20 members of the Saeima (Latvian Parliament).[10] They argued that the provisions restricted the independence of private higher education institutions and the academic freedom of their teachers and students. They also maintained that the contested provisions restricted the right of higher education institutions to engage in commercial activities and to provide higher education services in return for payment, thereby infringing their property rights.[11]

The contested provisions also undermined the right of establishment and the freedom to provide services recognised in Articles 49 and 56 TFEU, and also the freedom to conduct a business enshrined in Article 16 of the Charter of Fundamental Rights of the European Union ("the Charter").[12] The case was determined, and Latvian legislation amended the restrictions. However, the Constitutional Court chose to refer two questions to the CJEU for a preliminary ruling.[13]

The questions referred

The Latvian Constitutional Court essentially asked whether national legislation, which, subject to some exceptions, requires institutions of higher education to offer courses only in the official national language is compatible with EU law.[14] With regards to educational activities, the CJEU has held that courses provided by educational establishments financed by private funds constitute "services" for the purposes of EU law.[15] Consequently, national laws that govern those activities must, as a matter of principle, comply with the rules of the internal market, and, more specifically, with the rules on the free movement of services.[16]

In this case study, the provisions applied both to public and private Latvian higher education institutions, meaning that there was a requirement that they comply with the provisions on the free movement of services.[17]

Articles 49 and 56 TFEU

[10] Opinion of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20, p.4, para.14.
[11] *Ibid*, p.4, para.15.
[12] EU Charter of Fundamental Rights, Article 16, "Freedom to conduct a business".
[13] Opinion of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20, p.4, para.19.
[14] *Ibid*, p.6, para.38.
[15] See, for example, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C 622/16 P to C 624/16 P, EU:C:2018:873, paragraph 105 and the case-law cited). See also Opinion of Advocate General Bobek in *Kirschstein* (C 393/17, EU:C:2018:918, points 52 to 59).
[16] See, most recently, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C 66/18, EU:C:2020:792, paragraphs 160 to 163 and the case-law cited).
[17] See judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C 66/18, EU:C:2020:792, paragraphs 160 to 163 and the case-law cited).

The referring court asked the CJEU to assess the compatibility of the contested provisions with EU law by referring to Articles 49 and 56 TFEU. Regarding the purpose behind the provisions, the AG felt that in the present case, the CJEU may limit its analysis to Article 49 TFEU, freedom of establishment. On the face of it, the legislation introduces a restriction to the right of establishment, as, per case law, any measure which prohibits, impedes or renders less attractive the exercise of the freedom of establishment must be regarded as a restriction on that freedom.[18]

The contested provisions make it more difficult for certain undertakings established abroad to relocate to Latvia or to open some other place of business in Latvia.[19] Many foreign higher education institutions would be unable to use a – probably significant – part of their administrative and teaching staff in Latvia due to this language requirement. In addition, foreign higher education institutions are precluded from offering a more diversified and competitive range of services, such as courses taught in other languages, despite there being a significant demand for those.[20]

Justification

A restriction on the freedom of establishment is permissible only if it is justified by an overriding reason in the public interest and it is proportionate, and the Member State must establish that both of these conditions are met.[21] The Latvian Government explained that it wished to protect and promote the use of the official language of the State, as this is considered part of its national identity,[22] invoking Article 4(2) TEU.

Article 4(2) TEU requires the EU to respect the national identity of Member States, both political and constitutional.[23] Therefore, the objective of promoting and encouraging the use of language constitutes a legitimate interest which may justify a restriction on one or more freedoms of movement.[24] Nevertheless, Article 4(2) TEU does not justify any and all measures and makes clear that it can only be invoked with regard to *core* constitutional elements of a Member State.

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[18] See, inter alia, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C 66/18, EU:C:2020:792, paragraph 167 and the case-law cited).
[19] Opinion of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20, p.10, para.75.
[20] See, by analogy, judgment of 5 October 2004, *CaixaBank France* (C 442/02, EU:C:2004:586, paragraphs 12 to 14).
[21] See, to that effect, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C 66/18, EU:C:2020:792, paragraphs 178 and 179 and the case-law cited).
[22] Opinion of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20, p.10, para.78.
[23] See the recent judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'* (C 490/20, EU:C:2021:1008, paragraph 54).
[24] See, to that effect, judgments of 12 May 2011, *Runevič-Vardyn and Wardyn* (C 391/09, EU:C:2011:291, paragraph 87), and of 16 April 2013, *Las* (C 202/11, EU:C:2013:239, paragraph 27).

The AG was cognisant of the fact that whether a legal instrument is justified in protecting national identity is something that the individual Member State courts are much better equipped to determine. However, "the obligation for the EU to 'respect' Member States' national identities cannot be tantamount to a right of a Member State to disregard EU law at its convenience".[25] Here, however, the AG did not believe the Court should reach a conclusion on the proportionality of the contested provisions. National identity is normally the result of the history, culture, and socio-political characteristics of a specific country. It may not be an easy task for a supranational court to fully grasp the importance of a given element of national identity. The competent national courts were best placed to determine whether the national measures at issue met the proportionality test.[26]

The applicants & the Commission

The argument put forward by the applicants in the original case was multi-faceted. It claimed that the linguistic regime for higher education institutions was stricter than the equivalent regime applicable to primary and secondary education institutions.[27] This was seen as unreasonable by the applicants in the main proceedings and the Commission,[28] as if a state wanted to promote a language, surely this should have its roots in primary and secondary education rather than higher education.

Further, there were exceptions to the provisions, where the Stockholm School of Economics in Riga and the Riga Graduate School of Law could teach in other languages, which appeared to have no objective basis in reason. The AG saw merit in these arguments, and further noted that the measures themselves appeared fundamentally flawed. Promoting one language, here Latvian, did not require sacrificing all other languages.

In addition, the AG believed that the contested provisions created a *discrimination* based on *language*, a form of discrimination prohibited under Article 21(1) of the Charter, to the detriment of non-nationals employed (or employable) in the sector of higher education. Language requirements for

[25] Opinion of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20, p.11, para.86.
[26] See, for example, judgment of 2 June 2016, *Bogendorff von Wolffersdorff* (C 438/14, EU:C:2016:401, paragraph 78).
[27] Opinion of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20, pp.12-13, para.99.
[28] *Ibid*, pp.12-13, paras.99-100.

the access to some economic activity may often give rise to *indirect* discrimination based on *nationality*, since they are more easily fulfilled by local professionals than by foreign professionals.

Furthermore, the AG noted that the European Union is required to respect "language diversity" under Article 22 of the Charter and Article 3(3) TEU. However, this "diversity" is twofold: it can apply to national languages, but it can also apply to *minority languages*. Here, this minority consideration was important, because of the existence of a large Russian-speaking minority in Latvia. Protection of minority languages is a value enshrined in several provisions of EU primary law (including Article 2 TEU and Article 21(1) of the Charter) and in numerous international instruments which the European Union and/or the Member States have signed.[29] This last point was *a fortiori* true, given that there was an exception provided for teaching European Union languages in education, among which Russian is not included.

The AG found that the objective of monolingualism is not in the interest of the Member States, nor of the European Union. This might, they argued, create "27 monolingual (or bi- or trilingual) 'islands' within the European Union. That is probably not the diversity and richness we desire to promote in an 'ever closer union' among the peoples of Europe".[30]

Article 16 of the Charter

In its request for a preliminary ruling, the referring court also asked the CJEU whether the contested provisions were compatible with Article 16 of the Charter. That provision, entitled "Freedom to conduct a business", provides that "the freedom to conduct a business in accordance with Union law and national laws and practices is recognised".[31]

The AG felt that such an assessment was neither necessary nor appropriate, largely due to the overlap with Articles 49 and 56 TFEU. These are, at least to a certain extent, a manifestation of the freedom enounced in Article 16 of the Charter. The Court has consistently held that an examination of the restrictions introduced by national measures from the point of view of Articles 49 and 56 TFEU also covers possible limitations of the exercise of the rights and freedoms laid

[29] Among others, see Article 27 of the International Covenant on Civil and Political Rights (adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 23 March 1976).
[30] Opinion of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20, p.14, para.116.
[31] EU Charter of Fundamental Rights, Article 16, "Freedom to conduct a business".

down in, *inter alia,* Article 16 of the Charter, so that a separate examination of the freedom to conduct a business is generally not necessary.[32]

Conclusion

In conclusion, the AG proposed that the CJEU answer the questions referred for a preliminary ruling by the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia) as follows: National legislation which, in order to develop and promote the State's official language, requires, subject to some exceptions, institutions of higher education financed essentially by private funds to offer courses only in that language, is compatible with EU law provided that it is suitable and necessary to achieve the stated objective, and strikes a "fair balance between the interests at stake".[33] For now, we must wait to see if the CJEU judgment will agree with the AG's opinion on this matter.

[32] See, to that effect, judgment of 20 December 2017, *Global Starnet* (C 322/16, EU:C:2017:985, paragraph 50 and the case-law cited).
[33] Opinion of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20, p.15, para.117.

Introduction

Data governance has become a prevalent topic among European organizations as they move towards the future of a continent encompassed by data. Data and the insight that can be leveraged are quickly becoming one of the major assets at the disposal of modern businesses.[1] These organizations are facing a paradigm in which they must balance the competitive advantage and value drivers provided by their data analyzing capabilities with their profound obligation to protect the integrity of the data from those to whom they have been entrusted (fig 1).[2] The data governance strategies employed by large, multinational European enterprises will set the foundation upon which future governance policies and practices are based for decades to come (Interview B). With respect to the latter, this paper aims to offer a perspective on how seven multinational organizations with a presence in the EU and which can be considered to be industry leaders in their fields, interact with their data and the compliance considerations entailed through semi-structured interviews (Appendix 1). The primary aim is to understand how different data requirements within these companies' business models decide the practices that they employ in relation to data governance (Appendix 4). This paper will provide an overview of the methodology used to gain further insights into this topic. Furthermore, the organizations' data governance programmes will be explored through their relationship with data and the training that they provide to support compliance, in addition to the architectures in place to maintain data security (Appendix 3). Finally, the paper will investigate the challenges presented to these organizations in relation to data governance with respect to balancing EU regulatory concerns with operational standards in

[1] Abraham, R., Schneider, J. and von Brocke, J. 'Data Governance: A Conceptual Framework, Structured Review and Research Agenda.' *International Journal of Information Management,* 49, (2019): 850., Al-Ruithe, M. Benkhelifa, E. and Hameed, K. 'A Systematic Literature Review of Data Governance and Cloud Data Governance.' *Personal and Ubiquitous Computing,* 23, no. 2, (2019): 431.
[2] Abraham, 'Data Governance: A Conceptual Framework': 850., Al-Ruithe, 'Data Governance and Cloud Data Governance': 431.

an ever-evolving business environment owing to remote working and other cyber-security concerns.

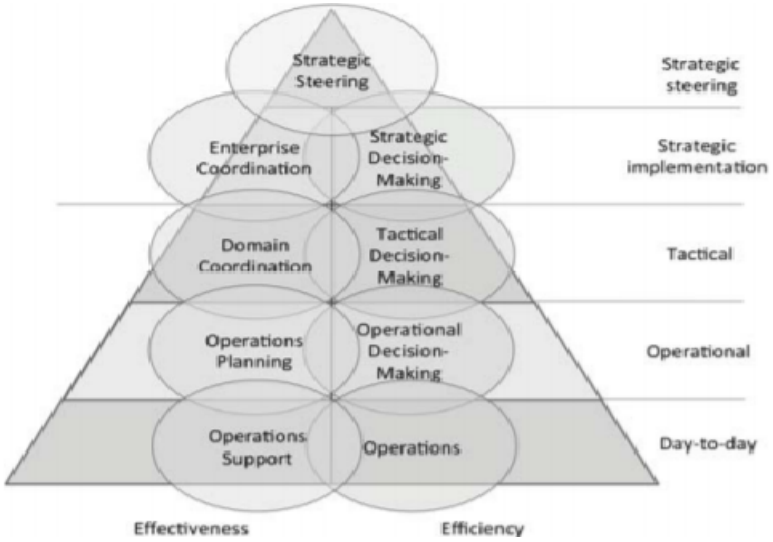


Fig 1. The Data Governance Pyramid. Data governance and the compliance entailed is not passive but rather plays an active and explicit role at all levels of the business model. Korhonen, J. Melleri, I. Hiekkanen, K. and Helenius, M. 'Designing Data Governance Structure: An Organizational Perspective.' *GSTF Journal on Computing,* 2, no. 4, (2013): 12.

Methodology

The questions that feature in this paper's interviews were primarily shaped by consultation with the academic literature. The research team identified a gap in the literature in which a comparative study of multinational organizations' relationship with data with respect to governance is underrepresented, especially in a European context.[3] These gaps in knowledge formed the basis for the constructed schedule of questions (Appendix 2). The sample of interviewees was determined by identifying large organizations with several branches in different countries or legal jurisdictions that leverage large quantities of data as part of their business model (Appendix 1). The main caveat was that they needed at least one branch operating within a region subject to GDPR. The anonymous interviews were conducted over MS Teams and a transcript was devised thereafter. The interviews were semi-structured by design, this allowed the researchers to keep the interview on topic while also allowing the participant to add additional information when necessary.[4] Thematic analysis was used to map the themes and insights extracted and the codes

[3] Koltay, T. 'Data Governance, Data Literacy and the Management of Data Quality.' *IFLA Journal,* 42, no. 4, (2016): 311-312., Von Grafenstein, M. Wernick, A. and Olk, C. 'Data Governance: Enhancing Innovation and Protecting Against its Risks.' *Intereconomics,* 54, no. 4, (2019): 231-232.
[4] King, N. Horrocks, C. and Brooks, J. *Interviews in Qualitative Research*. California: Sage Publishing:, 2019: 41.

were then synthesised with findings from the desk research, identifying the dynamics of these organizations' data governance strategies.

Organizational Data Governance Programmes

In this paper, data governance refers to the policies and mechanisms enforced by an organization to ensure accountability of data throughout its lifecycle, including gathering, storage, accessibility, and deletion.[5] However, these definitions fail to consider how an organization's relationship with its data determines the regulations and procedures by which it is governed.[6] Although Company A utilises data in its capacity as a hedge fund administrator to ensure legal compliance for functions like anti-money laundering, it neither produces nor leverages the data to support its business model (Appendix 4). This places the onus on the hedge fund itself to ensure that it has been correctly accounted for, stored and scrubbed.[7] To this effect, it can be best described as a processor of data. In contrast, Company D can be regarded as a controller of their data owing to their practices which are based on mining data to support business strategies (fig 2; Appendix 4).

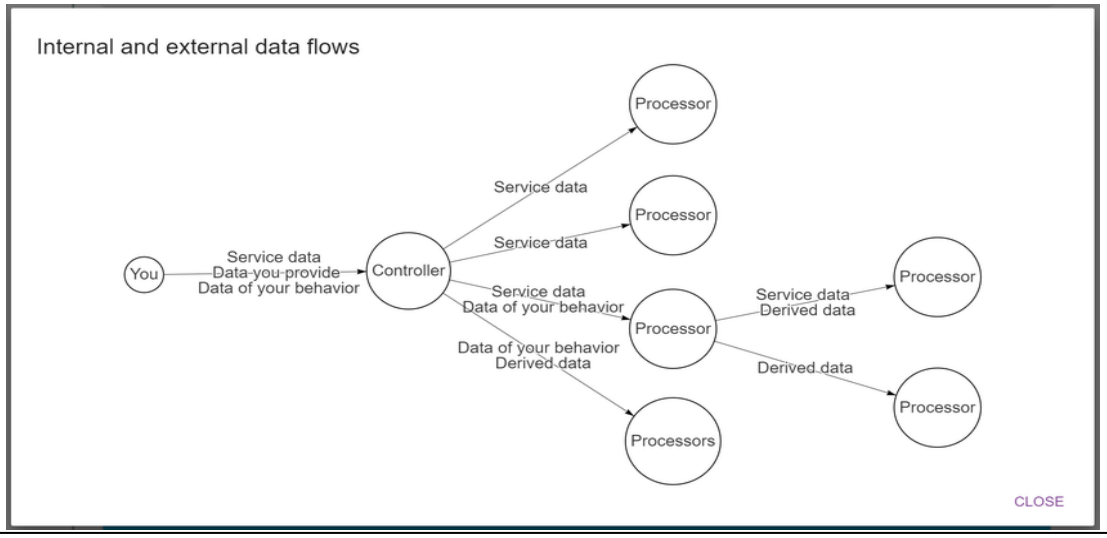


Fig 2. Controllers versus processors of data. Evidently, they are both interconnected however the organisation's relationship with the data has an impact on the dynamics of governance that they must comply to. Therefore, it is imperative that organizations are explicit with regards to their relationship with the data in a European context. P. Raschke, O. Drozd, A. Kupper and S. Kirrane. 'Designing a GDPR-Compliant and Usable Privacy Dashboard.' *In: 12th Symposium on Privacy and Identity Management: The Smart Revolution,* Ispra, Italy, September 4-8 2017: 13.

[5] Korhonen, 'Designing Data Governance Structure': 11., Engels, B. 'Data Governance As The Enabler of The Data Economy.' *Intereconomics,* 54, no. 4, (2019): 217.
[6] Elouazizi, N. 'Critical Factors in Data Governance for Learning Analytics.' *Journal of Learning Analytics,* 1, no. 3, (2014): 212.
[7] EDBP. 'EDPS Joint Opinion 1/2021 on The European Commission's Implementing Decision on Standard Contractual Clauses Between Controllers and Processors.' *EDBP,* 18, no. 7, (2021): 1-11.

Therefore, the argument could be made that data ownership plays a key role in the dynamics of data governance within these organizations. However, it should be appreciated that an organization can have entirely different relationships with data depending on its role within an organization's business model. For example, it is evident from Company B that they are the processor in relation to client data regarding the medical equipment that they manufacture. This is because they leverage data generated by other businesses or entities as opposed to collecting or modifying it themselves. In contrast, they may also be considered to be the controller of their HR data, such as financial or medical information pertaining to their employees.[8] This highlights how data governance is not a set of policies applied to all facets of the business, but rather is measured in relation to the organization's relationship with the data, while also meeting regulatory and operational requirements.[9] This concept is further implied by other mechanisms employed by these organizations like training and phishing tests.[10] These mechanisms are similar across all organizations, as reflected by Company A, which provides training modules to all employees in contact with data, while also providing focused training for specific departments, including InfoSec or Anti-Money Laundering. In comparison, Company B makes credentials in data governance a prerequisite for any job applicant who will be handling data. Likewise, these organizations have dedicated significant resources to designing a data governance architecture that ensures security, integrity and quality with how all stakeholders interact with data, across all processes and levels of the business.[11] This also applies to Company E which has a company-wide, closed-circuit proprietary security portal with embedded firewalls and technology back-ups to ensure that data can be easily exchanged across branches, while being protected from hacking attempts or breaches.[12] Building on this, it is evident from a regulatory standpoint that an organization's governance structure is based on their relationship with data; the argument could be made that these organizations still input significant resources into data governance to counteract the challenges faced in relation to data security.

[8] EDBP, 'Standard Contractual Clauses Between Controllers and Processors': 1-11.
[9] Khatri, V. and Brown, C. 'Designing Data Governance.' *Rightslink of The ACM,* 53, no. 1, (2010): 149.
[10] J. Ladley. *Data Governance: How to Design, Deploy, and Sustain an Effective Data Governance Program.* Massachusetts: Academic Press, 2019: 22.
[11] T. Breaux and T. Alspaugh. 'Governance and Accountability in the New Data Ecology.' *In: The IEEE Fourth International Workshop on Requirements Engineering and Law,* Trento, Italy, August 30-31 2011: 5-6., R. Seiner. *Non-Invasive Data Governance: The Path of Least Resistance and Greatest Success.* New Jersey:, 2014: 5.
[12] K. Wende. 'A Model for Data Governance: Organising Accountabilities for Data Quality Management.' *In: 18th Proceedings of The Association for Information Systems AIS Electronic Library,* Toowoomba, December 5-7 2007: 417.

Discussion

Data Governance and Operations

A central issue highlighted by Company C is balancing organizational efficiency in relation to regulatory concerns pertaining to data governance (Appendix 5).[13] This is mirrored in an observation by Company A which discussed how different types of data are subject to different legislation and regulations. This compliance includes records regarding fund history, which they are required to keep for five years after a client ceases their contract. This procedure is carried out to satisfy criteria set out by the EDPB and IRS.[14] However, they must delete financial information regarding employees who left the company immediately due to GDPR.[15] Furthermore, there is a paradigm at play in which any data that is kept on the company's servers or their cloud storage that is not generating value for the business is inefficient (Appendix 5). However, there is still legislation that must be adhered to, as presented by Company G.[16] This emphasises that the organization must be explicit with regards to their relationship with the data as the distinction impacts both organizational efficiency and monetarily because deleting data prematurely may benefit a company monetarily through negating storage costs but also decrease the efficiency by which they need to operate as they delete valuable data (Company A). However, keeping data on servers may provide valuable information with which they can make business decisions but this will often lead to high storage costs and potential data governance violations if there is no clear value to storing this data long-term (Company A).

Data Governance & Jurisdiction

As these organizations by and large have several branches around the world, the interviews raised challenges regarding the dynamics of data governance across different legal jurisdictions. This can be viewed across US federal and state laws in addition to GDPR, which applies to branches and clients in the EU plus the regulatory concerns regarding organizations operating within Chinese jurisdiction.[17] As noted by Company A, because they are only the processor of data and operate in several different legal jurisdictions, their data governance is largely based on the client's

[13] Ladley, '*Data Governance':* 22.
[14] Ibid: 38-39.
[15] Ciriani, S. 'The Economic Impact of the European Reform of Data Protection.' *Communications & Strategies,* 97, (2015): 46., Goddard, M. 'The EU General Data Protection Regulation (GDPR): European Regulation That Has a Global Impact.' *International Journal of Market Research,* 59, no. 6, (2017): 703-705.
[16] Wende, 'A Model for Data Governance': 420.
[17] Al-Badhi, A. Tarhini, A. and Khan, A. 'Exploring Big Data Governance Frameworks.' *Procedia Computer Science,* 141: 181-182., Avgerou, C. and Li, B. 'Relational and Institutional Embeddedness of Web-Enabled Entrepreneurial Networks: Case Studies of Netrepreneurs in China.' *Journal of Information Systems,* 23, (2013): 331.

specifications such as where they are based and where their funds are legally situated. However, processors are also more susceptible to change than controllers in this regard, as observed by Company B who discussed that if a client based in the USA began engaging with the branch based in Ireland, the processor must retroactively conform to their data governance strategy to comply with GDPR. Thus, data governance can be regarded as a living document and should be structured and deployed as such.[18]

Effective Data Governance Strategies

This thesis has been largely justified by the Covid-19 pandemic in which the majority of these organizations' employees are required to work from home. This has resulted in comprehensive reforms in organizational data governance policies (Companies A & D). These changes have impacted both controllers and processors of data and have seen a rise in the deployment of remote-access portals, VPNs, and virtual interfaces. This is to maintain data integrity despite the absence of traditional data governance protocols, including on-site servers and document disposal services to prevent data breaches such as the mechanisms employed by Companies E and F. In addition to hardware and software updates to improve data governance, the interviews also observed changes in the fields of human development. For example, Companies A and B have increased training regarding data governance in a largely virtual capacity. Additionally, Companies B and G have increased phishing tests to ensure that employees who control and process data do not allow complacency to seep into business operations when working from home. Despite the clear challenges presented by the pandemic in relation to data breaches and other security concerns, it also affirms Elouazizi's outlook that data governance has the potential to play a crucial role in organizational culture.[19] Henceforth, it is not simply a list of procedures that limit the capacity of the business or its employees. To this effect, it can be argued that data governance is heavily influenced by the organization's relationship with the data.

Conclusion

In conclusion, this paper affirms that organizational data governance policies and procedures in Europe are influenced by the organization's relationship with the data, including its role as a controller or processor. It also considers the surrounding factors, such as the organizational environment and disruptive external factors like the Covid-19 Pandemic. The issues raised in this

[18] Ladley, '*Data Governance':* 47., M. Robol, M. Salnitri, and P. Giorgini. 'Toward GDPR-Compliant Socio-Technical Systems: Modelling Language and Reasoning Framework.' *In: IFIP Working Conference on The Practice of Enterprise Modelling,* Leuven, Belgium, November 20-21 2017: 241-243.
[19] Elouazizi, 'Critical Factors in Data Governance': 214.

paper were largely based on the perspectives provided by interviews with stakeholders affiliated with large, multinational organizations that use data in their business strategies. Regarding the dynamics of data governance, it is evident that whether an organization processes or controls the data within their business strategy has a major influence on the regulations by which it is governed. The differences can be subtle and subject to minor changes, such as engaging with a client based in a GDPR compliant country. Therefore, it is imperative that these organizations align stakeholders at all levels in relation to data governance. As discussed within the paper, this is often facilitated by extensive training for employees who will be leveraging or processing data in business operations. This process is also facilitated by a suite of supporting architecture like VPNs, portals and firewalls. Furthermore, as evidenced by the recent pandemic, data governance is a process that is continuously evolving. This is maintained by remote-access security architecture, phishing tests and extensive training. Therefore, with respect to the interviews and literature presented in this paper, the argument has been made that data governance is largely based on organizational relationships with the data such as their business model and organizational environment.

Appendix 1: Company Overviews

Company	Description
A	Multinational Hedge Fund Administrator based in Europe
B	US-Owned Medical Equipment Manufacturer with factories in the EU.
C	Multinational Computer Hardware and Software Manufacturer
D	Asian Technology Company operating in the EU
E	Multinational E-Payment Platform
F	Australian AI Development Company based in Ireland
G	Multinational Technology Development Company

Appendix 2: Schedule of Questions.

1. Who is responsible for data governance?

2. What mechanisms are in place to ensure data quality, integrity and deletion?

3. What courses or training is available for employees to ensure compliance?

4. Please explain the data life cycle in terms of data management, hardware and software.

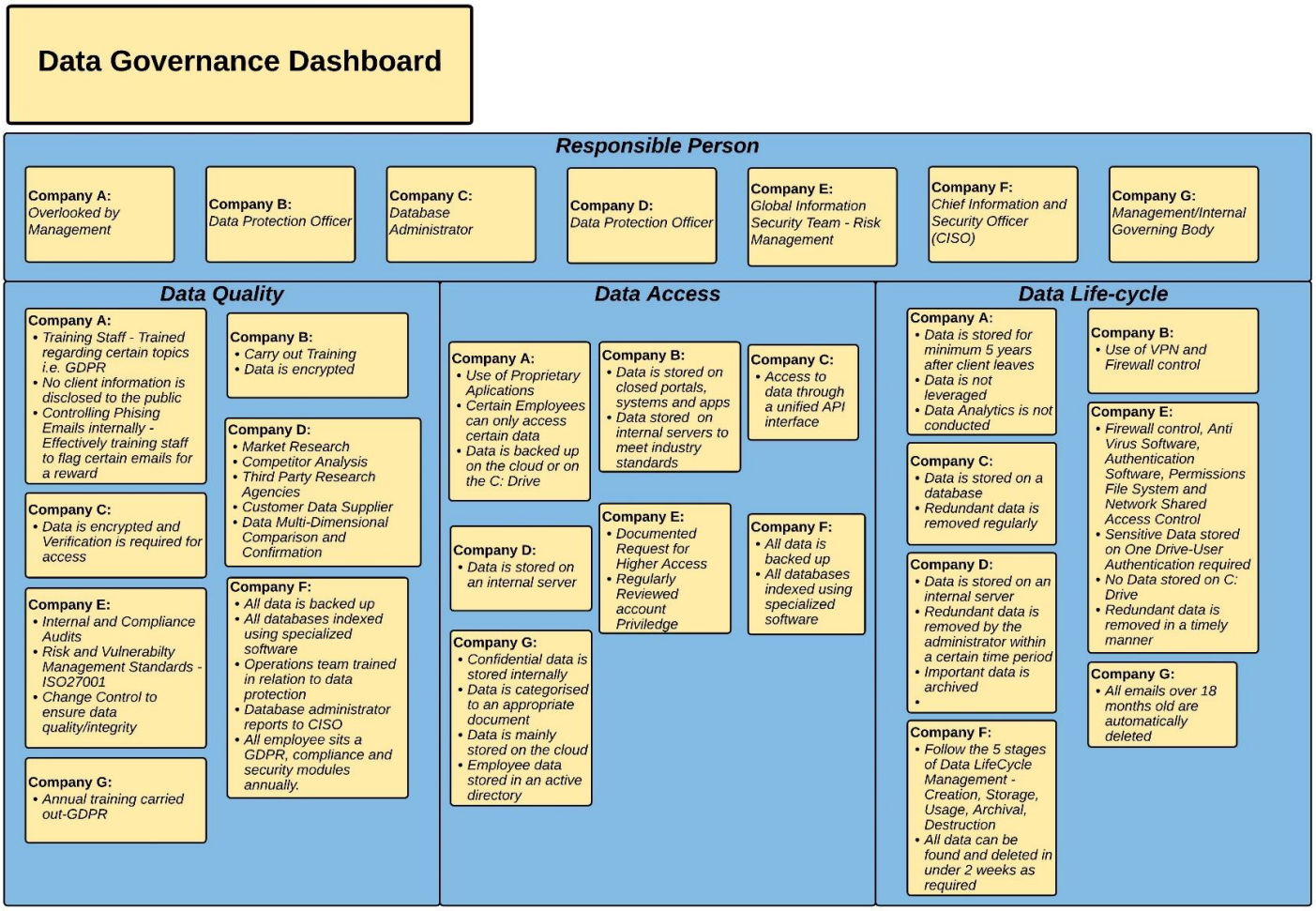
5. How do you ensure GDPR compliance?

6. What factors do you use to assess the success of data compliance policies?

7. Are there any other considerations that you apply for international branches in relation to data governance?

8. How have the dynamics of your data governance procedures, architectures or mechanisms changed since the pandemic began?

Appendix 3: Data Governance Dashboard



Appendix 4: Data Governance Matrix

	Concepts	**DPO**	**GDPR Training**	**Focused Training**	**Phishing Tests**	**Cloud Data Storage**	**On Site Data Storage**	**Use of VPN/ encryption to access data**
Company								
A			x	x	x	x	x	x
B		x	x	x	x	x	x	x
C		x					x	x
D		x		x	x	x	x	x
E				x		x	x	x
F			x	x	x		x	x
G			x	x	x	x	x	x

Appendix 5: Khatri & Brown Matrix

Company	Tag	Data Principles	Data Quality	Metadata	Data Access	Data Lifecycle
A		•[20]	•[21]	•[22]	•[23]	•[24]
B		•[25]	•[26]	•[27]	•[28]	•[29]
C		•[30]	•[31]	•[32]	•[33]	•[34]
D		•[35]	•[36]	•[37]	•[38]	•[39]
E		•[40]	•[41]	•[42]	•[43]	•[44]
F		•[45]	•[46]	•[47]	•[48]	•[49]
G		•[50]	•[51]	•[52]	•[53]	•[54]

Matrix Legend

•Excellent data governance, an example to peers within their industry.

• Compliant with data governance legislation but have capacity for improvement.

• Substandard data governance policies and practices.

[20] Data Principles: Data Protection Committee & Company Board.
[21] Data Quality: Security Portal, VPN's & GDPR Compliant.
[22] Metadata: Processor of Data, HR Data Controller, Generally Structured Data, GDPR Compliant.
[23] Data Access: Access Privileges, CRM & Passwords.
[24] Data Lifecycle: GDPR Training, Focused Training, Data Deletion, Servers, AWS & Curation.
[25] Data Principles: DPO & Data Protection Committee & Company Board.
[26] Data Quality: Security Portal, GDPR Training & Data Quality Reviews.
[27] Metadata: Controller & Processors of Data & Different Legislation Per Region.
[28] Data Access: Usernames, Passwords & API.
[29] Data Lifecycle: GDPR Training, Focused Training, Data Deletion, Servers, AWS & Curation.
[30] Data Principles: Data Steward, Database Administrators & Data Compliance Solicitor & Company Board.
[31] Data Quality: Security Portal.
[32] Metadata: Controllers of Data, Control Both Structured & Unstructured Data.
[33] Data Access: Username & Password Privileges.
[34] Data Lifecycle: Data Encryption, Servers and Deletion.
[35] Data Principles: DPO.
[36] Data Quality: Third Party Audits & Security Portal.
[37] Metadata: Controller of Data. Don't need to be GDPR Compliant, Leverage Both Structured & Unstructured.
[38] Data Access: Strict Access Privileges & Change Passwords Every 30 Days.
[39] Data Lifecycle: Data Deletion, Archiving, GDPR Training & Phishing Tests.
[40] Data Principles: Global Information Security Team & Risk Management Committee.
[41] Data Quality: Internal & External Audits.
[42] Metadata: Paperless Data Policy, Processor of Data.
[43] Data Access: Access Privileges, CRM & Passwords.
[44] Data Lifecycle: Paper Disposal, Security Portal & Data Deletion.
[45] Data Principles: Chief Information Security Officer.
[46] Data Quality: GDPR Compliance Protocols.
[47] Metadata: Different Legislation Per Region & Operations and Regulatory Balance.
[48] Data Access: Non-Disclosure Agreements, Privileges & Passwords.
[49] Data Lifecycle: On-Site Servers, AWS, GDPR Training & Phishing Tests.
[50] Data Principles: Collective Responsibility & Individual Managers.
[51] Data Quality: N/A.
[52] Metadata: N/A.
[53] Data Access: Usernames & Passwords Changes Every 30 Days.
[54] Data Lifecycle: GDPR Training, Testing, Deletion & AWS Back-Ups.

The War in Ukraine, or the "Special Military Operation" as the Kremlin puts it, reached a sad milestone with the now infamous bombing of Mariupol's maternity hospital. Millions of Ukrainians had to uproot their lives. Over four million have now crossed into EU territory, with many others set to flee as the war continues to drag on.[1] So far, *"Wir schaffen das"* made a reappearance on the political front.[2]

The instrumentalization of irregular migration has become the preferred weapon of choice for the likes of Putin, Erdogan, and even the Moroccan leadership whenever the need arises to cajole the EU into dialing down its stances. Lukashenko even brazenly flew thousands of migrants over to punish the likes of Warsaw and the Baltics for their leading role in the 2020 sanctions push against his regime.[3] A mere uptick in migrant crossings is enough to engineer a repeat of the 2015 far-right surge and fracture the political equilibrium within the EU.[4]

Despite small incremental steps taken toward tackling the EU's susceptibility to these hybrid threats, progress on the new migration pact has progressed at a snail's pace.[5] The issue at heart is the so-called "solidarity clause." The V4-led group has taken an unyielding stance on any form of obligatory solidarity in terms of burden-sharing, pitting it against the Mediterranean frontline states who view the matter as an absolute non-negotiable. Whether the French Presidency of the Council can make good on its lofty promise to close the migration chapter remains to be seen. For now, the EU's inability to resolve the deadlock on the

[1]UNHCR. *Ukrainian Refugee Situation.* (29 March 2022). https://data2.unhcr.org/en/situations/ukraine

[2] Ada, Petriczko. "For this border crisis, Poles extend a warm welcome, unlike last time". New York Times. (8 March 2022). https://www.nytimes.com/2022/03/08/world/europe/ukraine-refugees-poland-russia.html

[3] Steve, Rosenberg. "Belarus's Lukashenko tells BBC: We may have helped migrants into EU". BBC. (19 November 2022). https://www.bbc.com/news/world-europe-59343815

[4] Judy, Dempsey. "Lukashenko Uses Migrants to Exploit Europe's Vulnerability". Carnegie Europe. (09 November 2021). https://carnegieeurope.eu/strategiceurope/85735

[5] Billy, Perrigo. "European Leaders Say They Made a 'Breakthrough' Deal on the Migrant Crisis. Here's What They Agreed To Do". Time. (29 July 2018). https://time.com/5326429/eu-migration-deal-breakthrough-summit-brussels-merkel/

Dublin reforms leaves it very much exposed to the continued instrumentalization of refugees at its borders.

Bypassing the issue of burden-sharing, the EU member states have turned to fortify Fortress Europe as a "quick" fix to reduce the EU's susceptibility to irregular migrant flows. Doling out cash in exchange for gate-keeping services, rolling-out fences and barbed wires, and even the scrapping of the maritime aspect of Operation Sophia will not bring irregular migration to a halt, nor will an impenetrable Fortress Europe deter immigrants from making the journey.[6] On the contrary, migrants have shown their willingness to endure the mainstreaming of the anti-migrant sentiment, along with a societal downgrade of professions, all for the sake of a hypothetical chance at a better life in Europe. Their conviction to endure all obstacles to reach the EU reflects the strength of the magnet-like pull of our "European Way of Life." Like it or not, irregular migration will remain a given for Europe.

And behind that power of attraction lies an opportunity for Brussels to exploit, specifically against Putin. You see, the Kremlin is grappling with a far greater problem; Russia is teetering at the brink of a demographic crisis. The numbers aren't pretty: in 2021 alone, the Russian population shrank by nearly one million.[7] The migrant influx of a mere 300k wasn't nearly enough to soften the blow. Adding this number to existing data from the World Bank, the Russian population is just an inch away from hitting the demographic lows of the 2000s.[8]

With a population already in free fall, the War in Ukraine has aggravated the already precarious demographic situation. Within mere days, the West and its allies unleashed an economic onslaught that fractured much – if not the entirety – of Russia's socio-economic fabric, catapulting it back into the 1990s.[9] Moscow, which had prepared a war chest of over $600b, was utterly unprepared for the geoeconomic onslaught on its economy. Its $600b war chest is rendered inaccessible, which in turn left the Russian Central Bank incapable of propping up a crashing rubble. Even more unexpected, however, is the cross-sectoral exodus of global brands. Corporate giants such as Heineken, Goldman Sachs and BP have all

[6] Dempsey. "Lukashenko Uses Migrants to Exploit Europe's Vulnerability"

[7] Hanna, Hodgetts. "In een jaar daalde het aantal Russen met bijna één miljoen". Trouw. (13 October 2021). https://www.trouw.nl/buitenland/in-een-jaar-daalde-het-aantal-russen-met-bijna-een-miljoen~bea78d61/

[8] World Bank. *Population, total - Russian Federation.* The World Bank Group. https://data.worldbank.org/indicator/SP.POP.TOTL?end=2020&locations=RU&start=1985

[9] Christina, Wilkie. "Putin's invasion of Ukraine will knock 30 years of progress off the Russian economy". (14 March 2022). https://www.cnbc.com/2022/03/14/putins-invasion-of-ukraine-will-knock-the-russian-economy-back-by-30-years.html

announced plans to abandon the - 140-million strong market. With millions of Russians rendered jobless and tens of millions more cut off from the international economy, Putin's war of aggression gutted decades of economic progress.

With the standard of living – which was already in decline for years – set to decline at an even faster rate, tens of thousands – some sources even put the number as high as 200k – have already sought sanctuary in countries such as Georgia, Israel, and Turkey.[10] The younger and more-educated generations make up the largest chunk of those who went into exile – a particularly worrisome trend for a country where almost half of the younger generation (15-29) are willing to pack their backs.[11] To them, life in exile is preferable to a life in which they feel robbed of a good chunk of their future by the actions of the Kremlin.[12]

With the War in Ukraine turning into a liability – politically and economically – any prolonging of the conflict constitutes a serious long-term security risk for the Kremlin. Any further actions by the EU, and by extension its partners, must therefore seriously consider leveraging their power of attraction to attract the young and educated fleeing Russia. For one, there is a moral obligation towards the Russian people.[13] There is no denying that the life of the average Russian has taken an immense hit. The EU must therefore facilitate ways of entry for those wishing to flee the rampant oppression and/or economic onslaught. Economically, playing the migration card reflects a major economic boon for the EU as it means adding well-educated people into its own economic base.

Such a move could also prove helpful to maintain the West's united front in face of any prolonging of the conflict. After a consecutive barrage of far-reaching sanction packages, the West's unison on sanctions risks unraveling as the EU emerges as its weakest link. Citing the economic costs, Berlin, Budapest, and Vienna have balked against the very notion of a Russian hydrocarbon ban. By shifting the focus on draining Russia of its future generations, the national capitals can sidestep the issue and somewhat save face on the international stage.

[10] Rayhan, Demytrie. "Russia faces brain drain as thousands flee abroad". BBC News. (13 March 2022). https://www.bbc.com/news/world-europe-60697763

[11] Anton, Kardashov. "Record Number of Russians Want to Emigrate – Gallup". The Moscow Times. (4 April 2019). https://www.themoscowtimes.com/2019/04/04/record-number-of-russians-want-to-emigrate-gallup-a65092

[12] Ruth, Michaelson & Pjotr, Sauer. "'We can't see the future': Russians fleeing war seek solace in Istanbul". The Guardian. (24 March 2022). https://www.theguardian.com/world/2022/mar/24/russians-fleeing-war-seek-solace-in-istanbul

[13] Eugene, Rumer. "Russians fleeing Putin need our help". Politico Europe. (29 March 2022). https://www.politico.eu/article/russians-fleeing-putin-need-our-help/

If sanctions have set the Russian economy back by at least three decades, the EU could very well go the extra mile and rob it of the same equivalent of its future.[14] After all, the ruling clique had no issue robbing its people's future.

[14] Demytrie. "Russia faces brain drain as thousands flee abroad".

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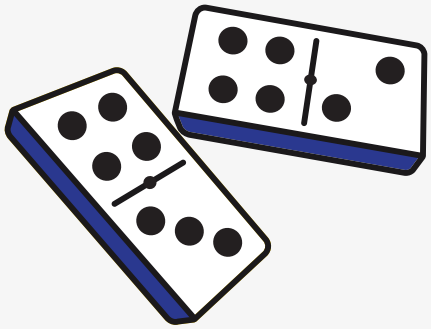


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