Romanian Journal of European Affairs

Vol. 15 No. 1
March 2015

Romanian Journal of European Affairs

Vol. 15, No. 1, March 2015

European Institute of Romania

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7-9, Regina Elisabeta Blvd., Bucharest, Code 030016, Romania
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DTP and cover design: Monica Dumitrescu

Print: Alpha Media Print, http://www.amprint.ro/

ISSN 1582-8271

Contents

Em*power*ed to Deliver: The Institutional Model and Implementation Arrangements under the EU-Ukraine Association Agreement 5
Andriy Tyushka

Labour Market Restrictions and Migrations in the EU: a Case of Ukrainian Migration 23
Tomáš Ducháč, Wadim Strielkowski, Anna Matušková

Crimea and the Russian-Ukrainian Conflict 35
Anton Bebler

South Stream Project and the Ukrainian Factor 55
Roxana Ioana Banciu

The Contribution of the European Court of Auditors to EU Financial Accountability in Times of Crisis 70
Maria-Luisa Sánchez Barrueco

Book Review: *Genocide: A Normative Account* 86
Scott Nicholas Romaniuk

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Em*power*ed to Deliver: The Institutional Model and Implementation Arrangements under the EU-Ukraine Association Agreement

Andriy Tyushka[1]

Abstract: *In the context of truly politicised and geopolitically discoursed public and academic debates around the pioneering and, at the same time, revolutionary EU-Ukrainian association deal, this article seeks to present a pragmatic law and politics view on one of the cornerstone issues in the newly launched EU association policy towards Ukraine, i.e. the institutional and implementation framework. It therefore explores possible modalities and the actually arranged implementation model of the EU-Ukraine Association Agreement, and assesses the strengths and weaknesses thereof. The challenges posed by the recent unduly 'flexibilisation' and postponement of the agreement's provisional application are analysed, and the procedural requirements for transitional implementation and full enactment are disclosed. Finally, the association's institutional engineering is given thorough legal and political scrutiny, that allowed to contend that the truly empowered institutional framework and selected implementation model are deemed to gear the process of political association and economic integration, yet these heavily draw on explicit conferral of dynamic powers and implicit integration-oriented functional rationale.*

Keywords: *European Union, Ukraine, association agreement, application, implementation model, institutional framework*

Introduction

The process of negotiating and concluding with Ukraine the first of the European Union's 'new generation' association agreements has been anything but an easy and smooth political development. The Agreement's economic and political weight, against the backdrop of highly politicised geopolitical narratives, but also its very comprehensive and complex legal nature are to a large extent responsible for such a procedural intricacy. To share Hillion's (2007) view, one has to reckon here with an inherent axiomatic peculiarity

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Acknowledgement: This research was supported by *Foundation College of Europe / Fundacja Kolegium Europejskie*, College of Europe (Natolin Campus), in the framework of a 2014 *Postdoctoral Research Fellowship granted by the ENP Chair.*

of EU's contractual links with the third countries: 'In EU external relations, the rule is almost as follows: the more ambitious the agreement, the more difficult its conclusion' (Hillion 2007: 177). In the case of the EU-Ukraine Association Agreement, the difficulty is not only reflected in negotiating and drafting the content of the agreement, it lies the more so in arranging the treaty's implementation framework and complying therewith.

The comprehensiveness and complexity of the newly concluded Association Agreement between the European Union and Ukraine quasi by default imply significant challenges for the effective implementation of the treaty – both in terms of its implementation modes and models (transitional implementation period, suspension clause, institutional implementation models), substantial and procedural implementation policies (legislative and regulatory approximation, institutional association policy) as well as legal effects (constitutional tolerance, direct applicability, direct effect, interpretation rules, dispute settlement mechanism).

The agreement involves moreover high implementation costs, especially as regards such policy areas as the internal market *acquis* transposition, customs regulations, environment policy, agriculture (and land reform) policy, and also transport, energy and nuclear safety policies. Significant institutional and personnel costs are also to be accounted for in the context of the agreement's effective implementation policy. In addition to these, in principle, anticipated challenges to the implementation of the EU-Ukraine Association Agreement, the process has been already formidably impeded by – earlier – unexpected Russian invasion in the Ukrainian peninsula of Crimea, its annexation and further aggression on the country's Eastern borderlands. This poses additional legal and political problems both for the territorial scope of the agreement's application, and the implementation arrangements themselves that become hostage of political gambling and blackmailing on the Russian side. Hence, not only rules of origin and the heavyweight part of the EU-Ukraine Association Agreement, the DCFTA, have grown therewith into the biggest concerns for the agreement's effective implementation – the very application and implementation model agreed according to the norms of international law between the parties to the agreement is being amended under pressure of the external factor. Recent postponement of the initially agreed provisional application[2] of the EU-Ukraine Association Agreement has already impeded the envisaged implementation arrangements and – should the latter ones be further neglected and forcibly 'flexibilised' under the external pressure – may have dramatic implications for the European Union's association politics with its Eastern neighbourhood as such.

Against this background, this article seeks to explore these allegedly tangled modalities of the association agreement's application, disentangle its implementation model, and assess the association implementing capacities of the envisaged institutional framework.

[2] In response to Russian calls and allegations, the EU and Ukraine agreed – following the Minsk trilateral ceasefire negotiations held in August 2014 – 'to propose additional flexibility' and thus delay the provisional application of the DCFTA part of the EU-Ukraine Association Agreement until 31 December 2015, cf.: European Commission (2014).

National policy coordination framework and association implementation model

The implementation of the EU-Ukraine Association Agreement poses perhaps the greatest challenge in view of the by far lacking comprehensive institutional support and the overall institutional policy and coordination model at the national level. In previous years, several attempts have been made to launch an institutional framework for the implementation of Ukraine's European integration strategy and the process of legislative approximation. Following the change of government in the wake of the 'Orange revolution', several advisory and executive bodies have been established since early 2005, including the State Department on the Adaptation of Ukrainian Legislation[3] within the system of the Ministry of Justice (abolished in 2011). The other – no longer active – bodies included the Bureau of European Integration at the Secretariat of the Cabinet of Ministers (the so-called 'Coordination Bureau' which has been substituted since 2012 by the Department of Association and Integration into the EU[4]) and the Department on Adaptation of Legislation at the Ministry of Justice (ceased to exist in 2011, due to the reorganization of executive agencies). The only still active national executive body in the domain of European integration and legislative approximation, that has survived the administrative reform of 2011, is the Coordination Council on the Adaptation of Ukrainian Legislation to European Union Laws ('Coordination Council')[5]. In addition, the Committee on European Integration[6] of the Verkhovna Rada is active in the parliamentary dimension of coordinating Ukraine's legislative approximation and integration policies.

Looking for an institutional policy and coordination model that would be best suited for the effective implementation of the EU-Ukraine Association Agreement, the Civic Expert Council set up within the Ukrainian part of the EU-Ukraine Cooperation Committee favoured the centralised executive model with a special status, out of four, in principle, available policy coordination models as described below (KAS 2012: 12):

- *Model A: 'decentralised'*, as it currently is (most functions in policy coordination will be the responsibility of the MFA);
- *Model B*: *'highly centralised'* or *'presidential'* (with the Department for European integration set up directly in the Presidential Administration as a centre of policy-making);
- *Model C*: *'centralised'* or *'Cabinet-based'* derived from the recent example of the Coordinating Bureau for European and Euro-Atlantic Integration (which operated as part of the Secretariat of the Cabinet of Ministers) and based on the premises of proven successful horizontal coordination pursued at the sub-level of the Government's apparatus; and
- *Model D*: *'a central executive body (CEB) with a special status',* a model that has been offered (though not eventually adopted) for the first time in 2008 within the implementation policy framework of the Ukraine's European integration strategy.

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[3] According to the Decree of the Cabinet of Ministers of Ukraine no.1742 of 24 December 2004 (invalid since 2011).
[4] Decree of the Cabinet of Ministers no.1202-2012-п of 26 December 2012.
[5] Established as per Decree of the Cabinet of Ministers no.1365 of 15 October 2004, amended as per Decree of the CMU no.338 of 30 March 2011. Cf., for the Coordination Council's working profile, <http://www.kmu.gov.ua/control/uk/publish/article%3Fart_id=223287414&cat_id=223281453>.
[6] Committee on European Integration of the Verkhovna Rada of Ukraine (website), <http://w1.c1.rada.gov.ua/pls/site2/p_komity?pidid=2369>.

The last model seems to be most promising also in view of the fact that precisely this pattern of institutional policy and coordination was chosen by EU accession candidates in the past. It also has been chosen by the recent associated neighbours of the EU in the east, namely Georgia and the Republic of Moldova. In Georgia, the State Ministry for European and Euro-Atlantic Integration[7] was set up on 17 February 2004. In Moldova, the Ministry of Foreign Affairs has become a CEB with a special status also in the area of Moldovan European integration policy, so as on 14 April 2005 it was reformed into the Ministry of Foreign Affairs and European Integration of the Republic of Moldova[8].

After a lengthy intra-institutional negotiation process in Ukraine, the 'centralised' or 'Cabinet-based' model (*model C*) has been chosen. On 13 August 2014, the Cabinet of Ministers of Ukraine established, with the Decree no.346[9], the *Government's Bureau for European Integration*[10] that would become the key coordination body within the national system of institutional and governmental coordination of the EU-Ukraine Association Agreement's implementation. The Bureau is structurally embedded within the Secretariat of the Cabinet of Ministers of Ukraine. On 21 August 2014, the *Governmental Committee* headed by the Prime Minister Arseniy Yatseniuk was established to guideline the coordination activities of the Bureau. On the same day, *European integration affairs deputy ministers* of the profile ministries directly related to the implementation of the EU-Ukraine Association Agreement, which also have set up earlier the national institutional framework for Ukraine's European integration[11], have been appointed[12]. Therewith, the creation of a renewed national executive system of policy coordination in the domain of Ukraine's European integration and implementation of the EU-Ukraine Association Agreement has been accomplished.

Implementation arrangements in flux: Challenging 'flexibilisation' of provisional application and transitional implementation

The EU-Ukraine Association Agreement aims inter alia at 'Ukraine's *gradual* integration in the EU Internal Market' [emphasis added] (Art 1 para.2(d) EU-Ukraine AA). Gradually, the establishment of the Deep and Comprehensive Free Trade Area, an integral part of the agreement and the envisaged economic integration of Ukraine in the European Union's internal market will also be achieved. In technical terms, such a 'gradualist' approach

[7] State Ministry for European and Euro-Atlantic Integration of Georgia (website), <http://eu-integration.gov.ge>.
[8] Ministry of Foreign Affairs and European Integration of the Republic of Moldova (website), <http://www.mfa.gov.md>. For details on Moldovan Law no.23 from 14.04.2005 on amendments to the law on government of 1990, cf.: <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=312229&lang=2>.
[9] Cf. Decree of the Cabinet of Ministers of Ukraine no. 346-2014-п of 13 August 2014.
[10] Press-release on the establishment of the Government's Bureau for European Integration, 13.08.2014, <http://www.kmu.gov.ua/control/uk/publish/article?art_id=247521935&cat_id=244274160>.
[11] Ministries setting up the national institutional framework for the implementation of Ukraine's European integration policy are Ministry of Foreign Affairs, Ministry of Justice, and Ministry of Economic Development and Trade, as defined by the Cabinet of Ministers, cf., <http://www.kmu.gov.ua/control/uk/publish/article?showHidden=1&art_id=230525707&cat_id=223236991>.
[12] Press-release of the Cabinet of Ministers of Ukraine, 21.08.2014, <http://www.kmu.gov.ua/control/uk/publish/article?art_id=247539437&cat_id=244276429>.

will be pursued through transitory implementation policy supported by the incremental legislative and regulatory approximation, with a transitional period of a maximum of ten years[13] and for some areas, even longer. The DCFTA and economic integration are therefore sought be implemented progressively in terms of both substantive provisions and procedural requirements.

On the one hand, customs duties on Ukraine's part have to be progressively eliminated, generally over the period of five to ten years, whereas the European Union obliged itself through the association agreement to eliminate the tariff barriers without any transitory period. Article 29 para.1 EU-UA AA determines that the parties shall reduce or eliminate customs duties on goods originating from their respective territories in accordance with the schedules set out in Annex I-A, pursuant to which the main transition period constitutes one to seven years and in some areas, also up to ten years. With some exceptions, almost 95% of the import custom duties will have to be eliminated, the rest – significantly reduced. In some cases, agreed by the Parties upon, the tariff rates quotas (TRQs) are applicable. Flexibility of the association agreement, as anchored particularly in the respective clause of Article 29 para.4 EU-UA AA, allows however to review these premises in a five-year term and accelerate or broaden the scope of the elimination of customs duties on trade within the EU-Ukrainian DCFTA. As regards exports, any customs duties thereon have to be eliminated, since Article 31 para.1 EU-UA AA prescribes that both the EU and Ukraine 'shall not institute or maintain any customs duties, taxes or other measures having an equivalent effect imposed on, or in connection with, the exportation of goods to the territory of each other'. Unlike the EU that is obliged to eliminate export customs duties immediately, Ukraine will enjoy a transitional period (in accordance with the Schedule included in Annex I-C to EU-UA AA) to phase out the existing customs duties or measures having equivalent effect[14]. Pursuant to Article 31 para.2 EU-UA AA, a *safeguard clause* may be deployed by Ukraine for export duties on certain kinds of goods as set out in Annex I-D, however with a strict observance of deadline periods for expiry of safeguard measures. This will provide time necessary for adopting Ukraine's economy and business for the market access of European goods.

On the other hand, gradual rapprochement in domains of DCFTA-related legislation and regulatory politics is reasonably dispersed within the decade-long timespan allowed for transitory implementation of the EU-Ukraine Association Agreement. As scrupulously calculated by Burakovsky and Movchan (2014: 130), the greatest approximation 'burden' falls to the third and tenth year's lot, with 68 and 56 normative acts to be approximated per annum, respectively. In respect to the policy domains, six areas will be 'burdened' by the legislative and regulatory approximation imperative at most, with thirty normative acts in average to be adopted in accordance with respective EU *acquis*. These six policy domains include industrial standards and regulation, financial services, agriculture, environment, transport, and social policy.

[13] Article 25 EU-Ukraine AA stipulates that 'The Parties shall progressively establish a free trade area over a transitional period of a maximum of 10 years starting from the entry into force of this Agreement [...]'... '[u]nless otherwise provided in Annexes I and II to this Agreement', as stated in the footnote to the Article.

[14] According to Article 31 para.2 EU-UA AA.

Hence, contrary to the contravariant discourse framed by the belief that Ukraine will have to painfully adopt all the EU rules and *acquis* immediately after entry into force of the association agreement, the treaty itself foresees a reasonably diversified transitional implementation period that, along with the flexibility elements and safeguard clauses, is meant to provide a strictly enforceable framework for the effective implementation of Ukraine's commitments under the association accord. It will be noted hereto as well that, ahead of the agreement's enactment, the Verkhovna Rada has already adopted many of EU *acquis*-conform laws which will provide advantage for the scheduled legislative and regulatory approximation process.

Provisional application, (full) enactment and implementation

Simultaneously ratified by the European Parliament and the Verkhovna Rada of Ukraine on 16 September 2014, the EU-Ukraine Association Agreement has entered a lengthy second stage of ratification where all the twenty-eight member states have to accomplish the process and present their national ratification instruments. In principle, one month after the Association Agreement is ratified by the last EU member state, it will enter into force (pursuant to Article 486 para.2 EU-UA AA). Apparently, the process of ratification may last for years and there is no guarantee that it will be completed successfully. Taking it into account, the parties have agreed to enable provisional application mechanism prior to the full enactment of the Agreement:

> '[...] the Union and Ukraine agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable' (Article 486 para.3 EU-UA AA).

This so-called provisional or interim (temporal) application was an expected and necessary measure to mitigate the adverse effects of the lengthy ratification procedure. Provisional application is either enacted by signing of an interim agreement or foreseen by a special provision in the body of the agreement's text itself, as a rule – in final provisions. The EU-Ukraine Association Agreement followed the second path and thus it rules out this mechanism by its Article 486 'Entry into force and provisional application' contained in the general and final provisions section. The activation of the mechanism is subject to approval or ratification by each of parties, respectively. Article 486 para. 4 EU-Ukraine AA stipulates that the 'provisional application shall be effective from the first day of the second month following the date of receipt by the Depositary' of 'the Union's notification on the completion of the procedures necessary for this purpose' *and* 'Ukraine's deposit of the instrument of ratification in accordance with its procedures and applicable legislation'. Thereby, the European Union owns the right to determine which parts of the Agreement will be provisionally applied. Consequently, the interim application of the Association Agreement does not technically require conclusion of a separate interim agreement per se[15], it only needed, on the part of the Union, an adoption of a written decision on the

[15] By contrast, the EU has signed (29 April 2008) the Interim Agreement on Trade and Trade-Related Issues along with the signing of the Stabilisation and Association Agreement between Serbia and the EU (SAA).

application of the agreement in the extent which explicitly falls within the scope of EU competences. Interim application can only be applied thus to the issues and areas covered by EU's exclusive competences – the issues falling within the scope of EU member states competences, such as area of freedom, justice and security, must undergo national ratification procedures for their enactment and further application. The DCFTA-related part of the Association Agreement as swiftly enabled by the Council's decision on provisional application (which was made simultaneously with the decision on the signing of the Agreement)[16] required thus only ratification by the Ukrainian Parliament. As observed Sushko et al. (2012: 10), '[t]ypically, ratification of an interim agreement is done within a period of up to six months from the date of its signing'. On 3 October 2013, shortly before the Vilnius Summit, European Commissioner for Trade Karel de Gucht made it clear that 'Ukraine can expect that almost 100% of the DCFTA part of the Association Agreement will be provisionally applied', which means that 'all relevant substance of the DCFTA comes into practice before the DCFTA is ratified by all the EU member states' (cf. EU Delegation to Ukraine 2013). Given that the Agreement has been non-typically signed in two attempts, first the 'political' part and then the 'economic' component of it, the provisional application mechanism has been also sanctioned by two decisions of the Council. The first decision of 17 March 2014 (2014/25/EU)[17] granted provisional application to the Preamble, Article 1, and Titles I, II, and VII of the EU-Ukraine Association Agreement, 'but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy', as stipulated by Article 4 of the Decision. The second Council's decision on the signing and provisional application of the EU-Ukraine Association Agreement made on 23 June 2014[18] granted provisional application to the remaining part of the treaty, its 'economic' heavyweight: Titles III[19] ('Justice, Freedom and Security'), IV ('Trade and Trade-related Matters'), V ('Economic and Sectoral Cooperation'), VI ('Financial Cooperation, with Anti-Fraud Provisions'), and VII ('Institutional, General and Final Provisions'), as well as related Annexes and Protocols.

Provisional application of the EU-Ukraine Association Agreement as described above is an intermediary measure enabling application of the treaty before its full and unconditional enactment. It has to be noted thereby that the agreement's provisions become applicable earlier than provided for in the treaty itself (through the reference passages 'date of entry into force of this Agreement'). Misinterpretation of the terms and misunderstanding of procedural law and politics in the context of EU-Ukraine Association Agreement may have serious repercussions for the treaty application and adjudication of related therewith claims, especially due to the anticipated problem with a fake 'retroactive effect'[20]. Guided by the legal certainty principle, the Association Agreement of the European Union with Ukraine has not been granted retroactive effect, but once entered into force (which can be

[16] Council Decision no.2014/669/EU of 23 June 2014. *Official Journal of the European Union*, 20.09.2014, L 278/6.

[17] Council Decision no. 2014/295/EU of 17 March 2014. *Official Journal of the European Union*, 29.05.2014, L 161/1.

[18] Council Decision no.2014/669/EU of 23 June 2014. *Official Journal of the European Union,* 20.09.2014, L 278/6.

[19] With the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party.

[20] *'Retroactive effect'* of law refers to extending, via rulemaking (including treaties along with legislation), the scope or effect of norms to matters that have occurred in the past, before adoption of the respective rule.

a several years later fait accompli) it will cover the preceding period, starting with the date from which the agreement will be provisionally applicable[21]. Article 486 para.5 EU-UA AA puts it in this regard in a clear way:

> 'For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the "date of entry into force of this Agreement" shall be understood to the "date from which this Agreement is provisionally applied" in accordance with paragraph 3 of this Article' (Article 486 para.5 EU-UA AA).

Within the period of provisional application, i.e. before the treaty enters into force, the EU-Ukraine Association Agreement is in principle subject to revision on the EU's part provided that the Court of Justice of the European Union is consulted thereupon and provided an adverse opinion on either formal or substantive validity of the agreement. Enjoying the jurisdiction to give preliminary rulings on the interpretation of the foundational treaties (Art 267(a) TFEU), i.e. the TEU and the TFEU, along with the jurisdiction to give preliminary rulings concerning 'the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union' (Art 267(a) TFEU), the Union's judiciary is obliged to exercise its jurisdiction upon the request or action brought by eligible litigants. Teleological interpretation of Article 19(3)(a-c) TEU, in conjunction with Article 218 para.11 TFEU, allows us to argue that it is, in principle, the Council, the Commission, the European Parliament or a Member State that may ask the Court to verify both the formal validity (compliance with the relevant adoption procedure) and the substantive validity (compliance with the *acquis communautaire*) of the EU-Ukraine Association Agreement. An adverse opinion of the Court will lead to the obligatory revision of the agreement before it can enter into force.

Once the consultation of the Court is skipped or overcome, and the treaty is ratified as provided for in Article 486 para.1 EU-UA AA, with notification procedure subsequently duly accomplished, the Association Agreement between the European Union and Ukraine shall enter into force with a one-month delay:

> 'This Agreement shall enter into force on the first day of the second month following the date of deposit of the last instrument of ratification or approval' (Article 486 para.2 EU-UA AA).

Complexity of the agreement's scope and its legal nature of a mixed agreement in the EU legal order with durable and far-reaching effects for EU's and Ukraine's legal systems within the framework of international law almost by default provides for complexity of the agreement's application and implementation both before its full enactment and thereafter.

First, a transitory implementation period has to be duly accounted for. As anticipated by Hillion (2007: 172) back in time when the specific content of both political and economic components of the EU-Ukraine deal was only negotiated, 'the FTA, and *a fortiori* a deep FTA, will not be put in place immediately after the new agreement enters into force' – it

[21] The requirement of provision of 'sufficient information' as regards the procedure of enacting EU law has actually been already fulfilled by the publication of the EU-Ukraine Association Agreement in the *Official Journal of the European Union* on 29 May 2014.

will certainly be subject to transitory implementation[22]. Such an implementation mode has been inherently provided for in the EU's recent Stabilisation and Association Agreements (SAAs) with the Western Balkan countries, as it also was put in effect for the earlier Europe Agreements with the countries of Central and Eastern Europe.

Second, in contrast to the spirit of the EU-Ukraine Partnership and Cooperation Agreement of 1994 that prescribed a 'best endeavour' modus operandi for the parties, the letter of the newly concluded Association Agreement between the European Union and Ukraine envisages strict compliance modus. Non-compliance may result in suspension of obligations or general non-execution of the agreement. Along with the principles of a free market economy (Article 3 EU-UA AA) that underpin the association relationship, Ukraine has committed itself, through this contractual association with the EU, to the democratic principles, including respect for human rights and freedoms (according to Article 2 EU-UA AA), that constitute 'essential elements' of the EU-Ukraine Association Agreement. Failed compliance or serious breach of essential elements of the EU-Ukraine association deal may (and in cases of a special urgency – also will) be followed by appropriate remedy measures procedurally determined in the so-called suspension clauses[23]. The Ukrainian suspension clause differentiates between non-compliance and non-fulfilment of obligations as grounds for evoking the suspension clause. Article 315 EU-Ukraine AA envisages suspension of obligations 'arising from any provision contained in the Chapter on the free-trade area' as a temporary remedy in case of *non-compliance*. *Non-fulfilment of obligations* under the EU-Ukraine Association Agreement will activate the general non-execution or suspension clause (anchored in Article 478 EU-UA AA), not applicable however in principle to the DCFTA matters that have to be ruled out by the aforementioned non-compliance suspension clause.

Last but not least important, any irregularities or further 'flexibilisations' in response to whatever external factors and political distress with regard to Russia, trigger the perils of failure for the entire eastwards association politics of the European Union. Even though the delayed provisional application of the EU-Ukraine DCFTA as instigated in mid-September 2014 is justified by the EU as a 'symbolic act' and 'business as usual' meant to lessen tensions with Russia, 'appease' it and – what is even more ridiculous – 'accommodate' its interests, such a sacrifice of procedural legal stringency presents rather a bad bargain and dangerous precedent. To fully agree with Speck (2014), delaying the provisional application of the DCFTA is a mistake, since it 'gives Russia incentives to raise the pressure because it opens a large window of opportunity to prevent the DCFTA from entering into force' by whatever pressure means be those diplomatic, economic or military. Another side of the coin is the perilousness of an unduly precedent both in political and legal terms. Allowing Russia to partake in the EU's – bilateral – negotiations with any partner in the world undermines the very idea of bilateral agreements and the enshrined therein EU's conditionality policy

[22] For details on the scheduled transitional implementation period, especially in light of the legislative and regulatory approximation process, cf.: Burakovskyy and Movchan (2014: 130).

[23] Practice of EU association politics knows two types of suspension clauses – a general non-execution clause (aka *'Bulgarian clause'*) and an immediate suspension clause (aka *'Baltic clause'*), found respectively in EU's association accords with Bulgaria and the Baltic States. For a detailed comparative analysis of these two suspension clauses, cf. Elsuwege (2008: 116).

as well as its principles-based actorness. In addition to this 'principles-*lite*' conception of EU's international partner role, (further) European Union's concessions on the already concluded and half-way ratified international agreement, open a minefield for international lawyers and the association law itself. Political compromises have thus to be arranged and reached in future outside the stringent structure of EU-Ukrainian association law.

Em*power*ed institutional framework of the EU-Ukraine enhanced association

In addition to the national implementation model, the implementation of the EU-Ukrainian Association Agreement will be monitored and enforced by bilateral association institutions, as created by the agreement itself – the Association Council, the Association Committee, and specific Sub-Committees (as the Trade Committee or specialized Sub-Committee on Sanitary and Phytosanitary Measures, those on geographical indicators or trade and sustainable development) that make up a 'reinforced'[24] and genuinely em*power*ed institutional framework.

The EU-Ukraine Association Agreement establishes a powerful and multilevel institutional system devised to advance the implementation of this comprehensive contractual association. Although not involved in the EU's own institutional and decision-making arrangements, just as any kind of Union's association frameworks (Phinnemore 1999: 56-62), the envisaged institutional machinery of the EU-Ukrainian association will enjoy the full decision-making capacities with regard to association law, which – by definition – is part of the EU's legal system. Legal foundations for the institutional arrangement are laid down in treaty's Chapter 1 'Institutional Framework' of the Title VII 'Institutional, General and Final Provisions' (Articles 460 to 470 EU-UA AA). In principle, the treaty provides for a seven-level institutional setting, with five levels to be mandatory established right after the agreement's entry into force:

- *at the highest political level*, the annual Summits will provide overall guidance for the implementation of the agreement and be a forum for political and policy dialogue;
- *at ministerial level,* the Association Council will operate as a permanent body empowered to make legally binding decisions on all matters of association;
- *at senior executive level,* the Association Committee will operate as an assisting body to the Association Council, and act as a coordination body for (lower-level) sub-committees – special committees or bodies – that can be established by the Association Council and in certain cases also by the Association Committee;
- *at parliamentary level,* the Parliamentary Association Committee will operate as a forum for Members of the European Parliament and of the Verkhovna Rada of Ukraine;
- *at civil society level,* the Civil Society Platform will monitor the implementation of the EU-Ukraine Association Agreement and inform wider public in the EU and Ukraine thereabout.

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[24] If compared to the institutional framework of the EU-Ukraine PCA, cf.: Van der Loo et al. (2014: 11).

Annual *Summit* meetings[25] at the highest political level, involving the President of the European Council and the President of the European Commission on the EU's side and the President of Ukraine on the Ukrainian side, will provide 'overall guidance for the implementation of this Agreement as well as an opportunity to discuss any bilateral or international issues of mutual interest' (Article 460 para.1 EU-UA AA). The agreement does not preclude, in principle, either more frequent (in case of necessity) or shifted (due to certain particular constraints) Summit meetings. This institutional level has been actually established in the wake of EU-Ukraine PCA implementation and successfully maintained despite the fact that it was not an explicit treaty-induced institutional arrangement.

A counterfort of association politics will become however another institution introduced with the EU-Ukraine Association Agreement, the *Association Council*[26]. From the very beginning of negotiations on, then, the 'new enhanced agreement', Ukraine has been extremely interested in having the possibility to better influence policy-making in the European Union, as it anticipated it would be offered under the NEA and, later on, the EU-Ukraine Association Agreement. Although the association agreement in fact does not empower Ukraine with any voting rights in the decision-making system of the European Union itself, it will enjoy an *equal* with the EU right to make decisions within the association institutions, primarily the Associaiton Council. In this regard, one would also agree with Mayhew (2008: 35) that, as a matter of fact, 'through enhanced political dialogue, [Ukraine] also will have a better chance of both being informed about policy developments in the Union and of influencing those policy decisions before they are taken'. The Association Council will functionally share with the Summit level the task of channeling (regular) political and policy dialogue and act as a highest level of it in the meantime between the Summit meetings, at least this may have been implied with placing respective provisions on both institutions within the same Article 460 EU-UA AA that opens the institutional framework chapter of the agreement. Along with operating as a forum for regular political and policy dialogue, the Associaiton Council will perform three types of functions – control (supervisory)[27], monitoring[28] and conciliation (dispute settlement)[29]. In addition, it is entasked to periodically revise[30] and empowered to renew[31] the Association Agreement, including its Annexes, in light of its objectives and functioning. Article 461 para.2 EU-UA AA prescribes that the Association Council will meet at ministerial level 'at regular intervals, at least once a year, and when circumstances require'; at other levels ('all necessary configurations'), the Association Council will meet

[25] Article 460 para.1 EU-UA AA.

[26] Article 460 para.2, and essentially Articles 461 and 462 EU-UA AA.

[27] Article 461 para.1 EU-UA AA.

[28] Article 461 para.1 EU-UA AA. As part of the monitoring function, the Association Council shall serve, pursuant to Article 463 para.2 EU-UA AA, as a forum for exchange of information on European Union and Ukrainian legislative acts, both under preparation and in force, and on implementation, enforcement and compliance measures. Accordingly, it shall play a crucial role in legislative approximation process.

[29] Article 461 para.3 EU-UA AA.

[30] Article 461 para.1 EU-UA AA.

[31] Article 463 para.3 EU-UA AA. In view of the dynamic evolution of EU law (both secondary legislation and judge-made law) and the obligatory commitment of Ukraine to approximate its legislation with both the existing and future EU acquis (according to Art 153 para.2 EU-UA AA), the Association Council shall also serve – in the context of Article 463 para.3 EU-UA AA – as an institutional tool to ensure due account of the evolution of EU law.

on an ad hoc basis, determined by mutual agreement (flexible composition and negotiable agenda). At ministerial level, the Association Council will consist, pursuant to Article 462 para.1 EU-UA AA, of members of the Council of the European Union and members of the European Commission, on the one hand, and of members of the Government of Ukraine, on the other (fixed composition at senior political level). The institution will be chaired in turn by a representative of the EU and a representative of Ukraine[32]. Unlike the established under the EU-Ukraine PCA Cooperation Council that has been endowed with advisory mandate and thus allowed to adopt only recommendations, the Association Council will enjoy full decision-making capacities and thus is allowed to make both recommendations and decisions legally binding upon both parties[33]. The Association Council will adopt several kinds of decisions as follows: (a) on implementation of specific agreement's provisions[34], (b) on organisational and procedural issues[35], (c) on delegation of powers[36], (d) on extended institutional arrangement of the association[37], (e) on dispute resolution[38], and finally (f) on amendments and supplements to the agreement itself[39]. Notably, the institution will not be endowed with supranational powers, since the decisions of the Association Council will have to be taken 'by agreement between the Parties, following completion of the respective internal procedures' (Article 436 para.1 EU-UA AA), i.e. by consensus. Once adopted, the effect of decisions made by the EU-Ukraine Association Council might however be crucial for advancement of the association scope[40]. Similarly, through the decisions taken by the bilaterally established EU-Turkey Association Council[41], have been significantly developed – when compared to the original wording of the EC-Turkey Association Agreement ('Ankara Agreement') – particularly the legal regime of the movement of workers between the European Community and Turkey as well as the establishment of the EC-Turkey Customs Union itself.

An *Association Committee* established within the agreement[42] will be composed of representatives from both parties at senior civil servant level[43] and lead by rotating chairmanship[44].

[32] Article 462 para.3 EU-UA AA.

[33] Article 463 para.1 EU-UA AA.

[34] Cf., for instance, Article 18 para.2 EU-UA AA.

[35] Article 462 para.2 EU-UA AA.

[36] Article 465 para.2 EU-UA AA.

[37] Article 466 para.2 EU-UA AA.

[38] Article 477 especially paras 1 and 4 EU-UA AA.

[39] Article 463 paras 2 and 3 EU-UA AA.

[40] The precedent was set by the ECJ already in 1989, where the decision of the Greek Association Council was deemed to have direct effect (as further specified in the 1990 judgement in *Sevince* case) and constitute, along with the agreement itself, an integral part of the then-Community legal system, cf.: Case30/88 *Greece v. Commission* [1989] ECR3711, para.13; Case C-192/89 Sevince v. Staatssecretaris van Justitie [1990] ECR1-3461, para.14.

[41] In this regard, cf., for instance, Case 230/03 *Mehmet Sedef*, judgment of 10 January 2006. Cf. also: Opinion of Advocate General Bot in Case C-325/05 *Derin*, 11 January 2007.

[42] Article 464 para.1 EU-UA AA.

[43] Article 464 para.2 EU-UA AA.

[44] Article 464 para.3 EU-UA AA.

The Association Committee will, in principle, meet annually[45] and basically assist the Association Council in the performance of its duties[46]; specific functions and functioning modus of the Association Committee has to be determined by the Association Council[47]. Along with power to adopt (a) decisions on issues and in the cases provided for in the agreement[48], the Association Committee may also adopt (b) decisions in areas in which the Association Council has delegated its powers to it, including the power to take binding decisions[49].

Together with the Association Council[50], the Association Committee[51] enjoys the power to set up a *sub-committee*, established with the status of a 'Special Committee' or 'Special Body'. These sub-committees will be endowed with implementation and/or monitoring functions in various areas of bilateral association politics, for instance, on the matters of sanitary and phytosanitary measures, geographical indications, trade and sustainable development, economic and sector cooperation, etc. Meant to support the Association Committee in fulfilling its functions, sub-committees will not however prevent either party from bringing any matter directly to the Association Committee, including in its Trade Committee configuration[52].

A *Parliamentary Association Committee* established under the EU-Ukraine Association Agreement[53] will continue the tradition of regular inter-parliamentary exchange of views and operate in the composition of members of the European Parliament and of the Verkhovna Rada of Ukraine[54], chaired according to the principle of rotation[55]. Being informed, upon request, on the specifics of the agreement's implementation, as well as, in

[45] Article 465 para.1 EU-UA AA determines that '[t]he Association Committee shall meet at least once a year'. In addition, it shall meet at least once a year in its specific configuration as a Trade Committee (according to Article 465 para.4 EU-UA AA); a possibility of a combined meeting format is not ruled out, although it is neither explicitly provided for in the agreement itself. Given its duty to prepare the meetings of the Association Council, pursuant to Article 465 para.1 EU-UA AA, and the possibility of more frequent meetings of the latter one (i.e. 'when circumstances require', as ruled out by Article 461 para.2 EU-UA AA), there can be in principle more than two meetings of the Association Committee per year.

[46] Article 464 para.1 EU-UA AA.

[47] Article 465 para.1 EU-UA AA.

[48] Article 465 para.3 EU-UA AA. It shall be noted that, pursuant to Article 465 para.4 EU-UA AA, the Association Committee shall meet in a different configuration to address all issues related to Title IV (Trade and Trade-related Matters) of the EU-Ukraine Association Agreement. Acting in this specific capacity, it shall be referred to as a 'Trade Committee' (thus the Trade Committee is not a separate institution!) and is entitled to make decisions on implementation of trade and trade related provisions as stipulated by the following articles: Article 29 para.4, Article 44 para.15, Article 96, Article 106 para.3, Article 145 para.3, Article 147 para.3, Article 149 para.3 abs.3, Article 153, Article 154, Article 222 para.3, Article 326, Article 327 para.3, and Article 331 para.6 EU-UA AA.

[49] Article 465 para.2 EU-UA AA.

[50] Article 466 para.2 EU-UA AA. The Association Council is entitled to establish sub-committees (special committees or bodies) in *any* domain of EU-Ukraine contractual association.

[51] Pursuant to Article 466 para.3 EU-UA AA, the Association Committee may create sub-committees (special committees or bodies) *only* in the context and scope of Title V (Economic and Sector Cooperation) of the EU-Ukraine Association Agreement.

[52] Article 466 para.6 EU-UA AA.

[53] Article 467 para.1 EU-UA AA.

[54] Article 467 para.2 EU-UA AA.

[55] Article 467 para.4 EU-UA AA.

an obligatory way, on the decisions and recommendations of the Association Council[56], the Parliamentary Association Committee may make recommendations to this core association institution[57], in principle, on any matters of the association law and politics. Its activity can be supported by a respectively leveled sub-committee as established at the discretion of the Parliamentary Association Committee itself[58].

Remarkably, the association between the European Union and Ukraine is institutionally covered at a novel level of civil society participation. Drawing on the significant achievements of the multilateral Civil Society Forum[59] launched in 2009 in the framework of the Eastern Partnership, a *Civil Society Platform (CSP)* established with the EU-Ukraine Association Agreement[60], will serve as a forum for meeting, mutual information, exchange of views between representatives of Ukrainian and EU's organized society. Flexible in organizational[61] and operational[62] terms, the Civil Society Platform will become an effective locus of information circulation in both top-down[63] and bottom-up[64] directions. As such, it will keep Ukrainian and EU societies informed of the implementation of the association agreement and, at the same time, gather their input therefor. In the context of the latter function, the Civil Society Platform can make informed recommendations to the Association Council[65]. Activity of the CSP is notable in the overall context of the civil society cooperation that constitutes an integral part of EU-Ukrainian contractual association (as per Articles 443 to 445 EU-UA AA). Involvement of civil society will also be encouraged, pursuant to the agreement (Articles 421 and 438 EU-UA AA), in the context of Ukraine's policy reforms, but also social and cultural dialogue. It is worth noting that the EU-Ukraine Association Agreement also endows the Eastern Partnership Civil Society Forum[66] with advisory functions in the area of sustainable development of trade relations that have to be carried out without prejudice to the role of the Civil Society Platform[67] as established under Article 469 EU-Ukraine AA.

As revealed above, the institutional system of the EU-Ukraine association presents a genuinely upgraded and empowered functional and operational framework that covers distinct political, executive, parliamentary and civil society dimensions of association policy-making. Unlike the EU-Ukraine PCA-established bodies, the association institutions launched under the EU-Ukraine Association Agreement, will be endowed with full decision-

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[56] Article 468 paras 1 and 2 EU-UA AA.

[57] Article 468 para.3 EU-UA AA.

[58] Article 468 para.4 EU-UA AA.

[59] For more details on the *Eastern Partnership Civil Society Forum*, cf.: <http://www.eap-csf.eu>.

[60] Article 469 para.2 EU-UA AA.

[61] Except for the obligation to hold a rotating chairmanship (according to Article 469 para.4 EU-UA AA), the Civil Society Platform (CSP) is free to determine its composition (as regards Ukrainian part – on the EU's part these are representatives of the European Economic and Social Committee that have to be members of the CSP) and frequency of meetings (Article 469 para.2 EU-UA AA).

[62] Pursuant to entitlement granted by Article 469 para.3 EU-UA AA, the CSP is free to establish the rules of procedure on its own.

[63] Article 470 para.1 EU-UA AA.

[64] Article 470 para.3 EU-UA AA.

[65] Article 470 para.2 EU-UA AA.

[66] Article 299 EU-UA AA.

[67] Article 299 para.4 EU-UA AA.

making capacity, including the power of enforcement (through binding decisions), which will make them active and influential actors in implementation of the truly innovatory and enhanced association programme. To put it otherwise, contractual association between the EU and Ukraine will be advanced through the genuinely 'em*power*ed' institutional ensemble. Such an em*power*ed institutional machinery will make the integration-oriented association approach – which is herewith claimed to be followed by the EU's new association politics towards the countries in its eastern vicinity – workable in practice, similarly to how the European Economic Area institutions have done by now[68]. Under this angle, the institutional framework of the EU-Ukrainian association might be regarded to as an integration-oriented centre of bilateral decision-making. In a way, Ukraine, as well as the other two associated countries in the EU's eastern vicinity, will be granted therewith the possibility to not only import and implement the EU's *acquis* but also to develop it through shared spaces and practices of policy-making, even without the formal stake in the Union's internal decision-making machinery. Ultimately, participation in the EU's agencies and policies, as launched by the agreement, does not presuppose passive 'downloading' of the ready-to-use policy templates. Inclusion via networking, information sharing, and enhanced advocacy possibilities would thus facilitate the translation of 'joint ownership'[69] into the area of association politics as well as help mitigate the effects of still vibrant repercussions of 'exclusionism' for Ukraine, but also the Republic of Moldova and Georgia, as regards their so far neglected membership aspirations.

Conclusions

Given that the European Neighbourhood Policy, which provides the framework for the current new association policy of the EU, is itself conceived as a long-term policy, it will be acknowledged that the EU-Ukraine Association Agreement is deemed to create a durable contractual link, rather than present a time-limited deal prone to early and/or regular renegotiation, as for instance the 1994 Partnership and Cooperation Agreement. As such, it certainly required a strategically devised implementation framework and powerful institutional machinery. This article reveals that, after a lengthy intra-institutional negotiation process in Ukraine, the 'centralised' or 'Cabinet-based' model has been chosen to follow in order to effectively implement the EU-Ukrainian association deal. A renewed national executive system of policy coordination in the domain of Ukraine's European integration, legislative approximation and overall implementation of the EU-Ukraine Association Agreement has been established.

[68] Drawing i.a. on the imperative of application and implementation of the Agreement on the European Economic Area in conformity with current and future developments of EU law that has to be ensured by way of legally binding decision-making of the EEA institutions, Maresceau (2010: 3) qualifies the latter ones as *'integration-oriented elements'* of EU-EFTA association: 'Through common EEA institutions such as the EEA Council, the EEA Joint Committee and through specifically created EFTA institutions such as the EFTA Surveillance Authority and EFTA Court with as a main task to ensure that the EEA obligations are respected by the EFTA countries, an institutional machinery is available to make an integration-oriented approach workable in practice' (Maresceau 2010: 3).

[69] As introduced with the Commission's 2004 European Neighbourhood Policy Strategy Paper, cf: European Commission (2004: 8).

The complexity of the agreement's scope and its legal nature of a mixed agreement in the EU legal order, with durable and far-reaching effects for EU's and Ukraine's legal systems within the framework of international law, almost by default provides for complexity of the agreement's application and implementation both before its full enactment and thereafter. In the pre-enactment or provisional application phase, the current 'bad moves' such as postponement of agreement's provisional application, bear not only political and geopolitical consequences, but also trigger perilous developments towards legal *un*certainty, with straightforward implications for the agreement's legal effects, including problematic retroactivity of the EU-Ukrainian association law.

Conceived in mid-2014, the EU-Ukrainian association law and policy presents a domain of far-reaching economic integration and political association, short of EU membership, and a sample of sophisticated institutional engineering. Permanent monitoring and enforcement mechanisms, anchored in the complex legal drafting of the EU-Ukraine contractual association, will safeguard the respective level of alignment (in foreign and security policy, but also area of justice, freedom and security) and compliance (predominantly in DCFTA matters, but also in terms of general premises of the agreement – EU's principles and values shared with Ukraine). The institutions of EU-Ukrainian enhanced association, in contrast to the ones active under the previous PCA framework, will be endowed with a full-fledged decision-making power, including the power of enforcement through legally binding decisions. The very peculiarity of this reinforced and empowered institutional machinery is to be derived from their ability to further develop the association law and thus advance the level of integration beyond the scope determined in the agreement. This allows arguing that the developed implementation model, along with the conception and dynamic empowerment of the association institutional setting, are essentially relying on extensive integration-oriented elements. As such they are deemed to dynamically implement the EU-Ukraine association agreement, while advancing not only the very scope of the association law, predominantly through enabled rulemaking capability, but also mitigating the effects of exclusionism, through the inherent powers to advance the overall political association and economic integration framework, including the status of bilateral relationship between the European Union and Ukraine.

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Labour Market Restrictions and Migrations in the EU: a Case of Ukrainian Migration

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Abstract: *The thesis aims to estimate the future migration flows from Ukraine to the European Union. Based on the experience of previous EU enlargements and econometric modelling using the method of Ordinary Least Squares with fixed effects, multiple forecasts are created. The forecasts capture the likely development of migration flows in the event of abolishment of labour market restrictions as well as the case with pending restrictions.*

Our results show that migration flows are expected to be moderate, posing no threats to the stability of the labour markets of EU member states. The increase of migration due to accession to the EU is likely to be short-term, without substantial impacts in the long-run. Ukraine has large migration potential and is likely to supply the highest amount of labour migration amongst all former USSR countries.

Keywords: *international migration, migration potential, ordinary least squares with fixed effects, migration forecasts*

Background

The history of Ukrainian migrations is significantly shaped by the political development in the Eastern Europe. Waves of emigration appeared in the 19th and 20th century where noticeable groups of Ukrainians departed to the USA, Canada, or Australia. However, the largest Ukrainian diaspora can now be found in the Russian Federation.

After the collapse of the Soviet Union, Ukrainian economy suffered from hyperinflation: the inflation rate rocketed and exceeded 500% in 1995 and stabilized only by January 1998 to the point that the fluctuations reduced to tens of percentage points instead of hundreds (Sanderson and Strielkowski, 2013). Remaining ties to the Soviet Union were apparent in the structure of migration flows – most of the migrants were heading towards the Russian Federation. Regions such as Moscow and Saint Petersburg attracted Ukrainians mainly because of better income opportunities, same language, geographical proximity, demand for labour, and visa free access (Strielkowski and Weyskrabova, 2014). Nevertheless, it

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was hard to distinguish the true motivation for migration especially in the case of Ukraine. A significant stream of migrants going to the Russian Federation did so mainly due to ethnical reasons and therefore the amount of labour migration was difficult to separate (see Schimmelfennig, 2008; Shapovalova, 2010; Vass and Alexe, 2012; or Rausser and Strielkowski, 2013).

Migration in Ukraine has also been geographically biased. For population living in the Eastern part of the country and Crimea, the Russian Federation was their preferred destination whereas Western regions took advantage of the geographic proximity and searched for work in the EU. Ukraine has also experienced significant demographic decline caused by a sharp drop in the birth rate and the negative migration balance. According to data from the World Bank (2014), the total population decreased in the period 1991 to 2012 from 52 to 45.6 million.

Over 6.56 million Ukrainians were living abroad in 2010 which constituted nearly 15% of the whole population. There were only about 500.000 - 700.000 living in the EU (Eurostat 2014). The Russian Federation remains the number one destination with about 1-2 million Ukrainians living in the country. Other major destinations comprise Canada, USA (both with stocks of about 1 million), Moldova (660.000), Kazakhstan (550.000), Poland (300.000), Belarus (240.000), Italy, Czech Republic (both 200.000), Israel, Germany, Portugal (all three 150.000), Spain (100.000), Slovakia (60.000), and Turkey (35.000) (Bardak et al. 2011). A different source, a report by IOM (2011), mentioned stocks of about 3 million in the Russian Federation, nearly 3 million together in the USA and Canada, 600.000 in Moldova, 500.000 in Kazakhstan and 0.5 million elsewhere (IOM, 2011).

Extended migration profile of Ukraine (IOM, 2011) summarizes the post-Soviet period of Ukrainian migration by five main patterns of migration flows. The (1) return of Ukrainians back home, including (2) ethnic minorities persecuted after the World War II by the Soviet regime (Crimean Tatars, Mtskhetian Turks, Bulgarians, Armenians, Greeks and Germans), (3) emigration of other ethnic minorities (Jewish community, ethnic Germans and Russians, and others), (4) labour migration to Western Europe of both permanent and circular nature and both regular and irregular frequency, and finally (5) irregular transit migration to the West through Ukraine.

The economic incentives to migrate (domestic push factors) stem from both the level of living standard and high degree of economic divergence between Ukrainian regions. It varies from 20% above average to 37% below average of national per capita income. According to the IOM report (2011) economic disparities are not the only source of migration pressures but they have to be viewed as one of the main reasons for the current geographical distribution of migrants. The IOM report further stresses key factors influencing migration, such as EU border proximity, migration networks, and cultural ties. The document also cites a study performed by ETF in 2009 in which over 56% of the respondents agreed that the “prospect of higher salaries and improvement of living standard” is an important push factor. Interestingly, only 7% considered unemployment an important push factor.

Today, the most pressing challenges in alleviating poverty are to reduce inefficiencies in the distribution of incomes, increase wages that are among the lowest in Europe, and increase access to education. Due to the unfavourable demographic evolution there is an increasing pressure building up on the pension system which in turn does not allow for reduction in payroll taxes. The Ukrainian labour market is also facing a number of challenges resulting from the transition from a centrally planned to a market economy. The market is characterised by a large public sector, low labour force participation, and lack of employment opportunities, especially for the highly educated (Shapovalova, 2010).

Although Ukraine predominantly remains a country of origin of labour migration leading both to the CIS and the EU countries, Ukraine has also become an attractive destination for labour migrants. Particularly immigration from Asia is on the rise (BMP 2011). Incompleteness is a common issue of migration statistics and so there is a fairly high chance that many of the migrants travel illegally and do not show up in any of the statistics.

Out of the three studied countries Ukraine collects the highest amount of received remittances. In 2012 Ukrainians working abroad sent home around 8.5 billion in current USD, which made up a total of 4.8% of the domestic GDP (The World Bank, 2014).

Theoretical framework

Most of the studies were focused on the 2004 wave of accessions. Both the research methodologies and results differed. The estimations of migrant flows range from 130,000 incoming to the whole EU per year to 3 million in the horizon of 10-15 years on from accession. Among the preferred destinations Germany is cited the most. An important fact is that the accession comprised 10 countries with the total population of over 70 million. If the highest numbers are taken into account the migration flows are estimated to be between 4-5% of the total population of acceding countries over a long-term period.

Looking at the available data from the receiving countries on migration flows from Poland, Romania, and Bulgaria it is possible to get an approximation of the magnitude of post-accession migration flows. Eight years after the accession, the migrant stocks of Poles living abroad in other member states increased by about 0.75 million. The major destinations were Germany, Spain, Italy, and the UK. In the case of Romania, 5 years after the accession, migrant stocks in Italy, Spain, Portugal, the UK, and Germany increased by over 600,000. Lastly, the number of Bulgarian migrants in Italy, Spain, Portugal, the UK, and Germany increased only by 80,000 based on the official statistics of Eurostat (2014). In the case of all three countries, the migration flows increase shortly after the accession but return to their original levels within 3-4 years.

Danzer and Dietz (2009) study temporary migration flows of five former Soviet Union countries and report high temporary labour emigration since 2004 for Moldova. Belarus and Ukraine were reported to face moderate outflows. The majority of these migrants headed to CIS countries, mainly the Russian Federation.

Coupé and Vakhitova (2013) estimate 1.5-2 million labour migrants within Ukraine, out of which more than half travel for work to the EU. The prevalent parts of the stocks are men who work in unqualified jobs, e.g. construction. The authors also comment on the current negotiations of a visa free regime between Ukraine and the EU. They claim that a large increase in migration flows is unlikely to happen even if negotiations are successful. Instead, they expect replacement of illegal migration by legal migration, shorter duration of labour migration, and more circularity.

Barbone et al. (2013) share the same prospects about the future migration from the Eastern countries. The simulations created in their study confirm that the possibility of massive immigration of workers from Ukraine, and other CIS countries is remote. The Russian Federation is likely to boost its demand for migrant labour force and is likely to "compete" for it with the EU. These estimations are made based on the demographic developments of the countries and are further limited by the predictability of the development of economic situations in the countries of origin. The authors suggest that dire economic situation is a key push factor driving migration.

Lastly, Fertig and Kahanec (2013) also reach optimistic conclusions. Estimating the migration flows using the models of post 2004 enlargement data, the authors expect modest migration flows in case of no liberalization of labour market restrictions, and only moderate increases in case of free labour market access. The increase is likely to occur right after the liberalization and is not predicted to last for much longer. Ukraine is likely to send the largest number of migrants due to its population size. The amount is estimated to be about 850,000 over a period of 10 years. However, even in the two preferred countries (Germany and Italy) the increase of migrants is predicted to be around 100,000 over the forecasted period.

Overall, data record a moderate increase in the migrant stocks of Poland, Romania, and Bulgaria in other EU countries, not supporting any fears of uncontrolled emigration. The forecasts for Ukraine in the migration literature also expect moderate migration flows.

The data

Our data are obtained from multiple online sources. Crucial statistics for the number of Ukrainian migrants with residence permits in the EU countries is retrieved from Eurostat online Migration database. This data file provides nearly complete data but it covers a rather short period – 5 years from 2008 to 2012. It covers statistics on migrants in all of the countries of the EU in addition to Norway, but excluding Croatia. The migration studies generally encounter problems of data availability but in this case most of the desired variables are available. The statistics for independent variables used in the regressions are obtained from the online database of State Statistics Service of Ukraine (2013). It is possible to construct a nearly fully balanced panel from 2008 to 2012 with 28 cross sections. The obvious limitation of the dataset is its restricted time dimension of only 5 consecutive time periods. The second drawback of the data is that migration figures do not report labour migration but all population with resident permits. Thirdly, migration statistics are known to be underestimated as they do not include illegal migration. All

of these facts make the interpretation of results harder. However, it is a common issue subjected to data availability.

The methodology and the theoretical model

The econometric model is based on previous research done in the field and derived from the works of Sjaastad (1962), Hatton (1995), Boeri and Brücker (2001), Alvarez-Plata et al. (2003), Glazar and Strielkowski (2010), and Strielkowski et al (2013). Focusing on the estimation of the dependence of migration on push factors the theoretical model is constructed in the following way:

$$umig_{it} = \beta_0 + \beta_1\, lnuwages_t + \beta_2\, lnuunemp_t + \beta_3\, umig_{it-1} + \varepsilon_{it} \qquad (1)$$

where $i = 1, \dots, 27$ and $t = 1, \dots, 5$, dependent variable $umig_{it}$ is the stock of Ukrainian migrants with residence permits living in country *i* in time t normalized by Ukrainian population in time *t*, $lnuwages_t$ is natural logarithm of Ukrainian average monthly wage in UAH in time t, $lnuunemp_t$ is natural logarithm of unemployment rate (in %) in Ukraine in time *t,* and ε_{it} is error term. The estimation process reveals significant group effects in the data, implying that constant terms across cross sections are not equal. The model is transformed to error-components model where the error term is split into country-specific and idiosyncratic error:

$$umig_{it} = \beta_0 + \beta_1\, lnuwages_t + \beta_2\, lnuunemp_t + \beta_3\, umig_{it-1} + + \upsilon_i + \varepsilon_{it} \qquad (2)$$

where υ_i are omitted group-specific effects. The model is then estimated using Fixed Effects within transformation to eliminate υ_i. This is achieved by including α_i dummy variables in the regression where each dummy variable equals to 1 for country *i* and 0 for the others for each time period. Group-specific effects are assumed to be correlated with the regressors. To account for possible serial correlation in the idiosyncratic errors, which causes bias in standard errors, the regression is run in the way that standard errors are adjusted for clustering. Based on the migration literature that uses similar variables in the research, such as Hatton (1995), Boeri and Brücker (2001), Glazar and Strielkowski (2010), Strielkowski et al. (2013), and Strielkowski et al. (2014), Ukrainian migration stocks in foreign countries are expected to be negatively correlated with average gross monthly wages, positively correlated with unemployment, and also positively correlated with lagged dependent variable because it represents network effects in the equation. Table 1 describes the outcome of the estimation.

Table 1: Migration model based on push factors: Ukraine (2008-2012)

	Estimate	Standard errors (cluster)	t-value	p-value
lnuwages	0.0840467	0.0445687	1.89	0.07
lnuunemp	0.2530514	0.1253847	2.02	0.054
$umig_{t-1}$	0.6415681	0.2423186	2.65	0.013
R^2 - within	0.3962			
N	105			

Source: own results

The results confirm the expected dependencies except for one variable – monthly wages. While the straightforward reasoning would suggest that higher earnings would lead to lower incentives for Ukrainians to migrate, the opposite is true. The positive relationship of the variables makes sense due to the high transactions costs of migration. In order for an individual or even whole family to be able to migrate a not negligible amount of funds is required to obtain necessary paperwork, pay for travel and moving expenses, or have enough cash to pay rent in the destination country. Therefore, positive and significant influence of wages shows that there exists a significant transaction cost barrier which needs to be overcome before a person achieves sufficient financial strength to migrate. The Ukrainian population is responding to domestic push factors. All of the variables used in the regression are significant, especially the lagged dependent variable serving as a proxy for network effects.

Having found a model with good fit for the explanation of Ukrainian migration the next step in the modelling is to provide forecasts. It is clear that the forecasting capability of the model is very limited due to the short time dimension of the available data, nevertheless it may offer revealing information for future decision making on migration policies of EU countries.

Empirical model: 3 scenarios of Ukrainian post-accession migration in EU

Following the obtained results, we are able to construct 3 different scenarios of what might happen to Ukrainian migration in Europe after EU accession: realistic scenario, optimistic scenario, and pessimistic scenario. The optimistic and pessimistic scenarios are not concerned with the number of migrants and are based on Ukraine's economic and political development.

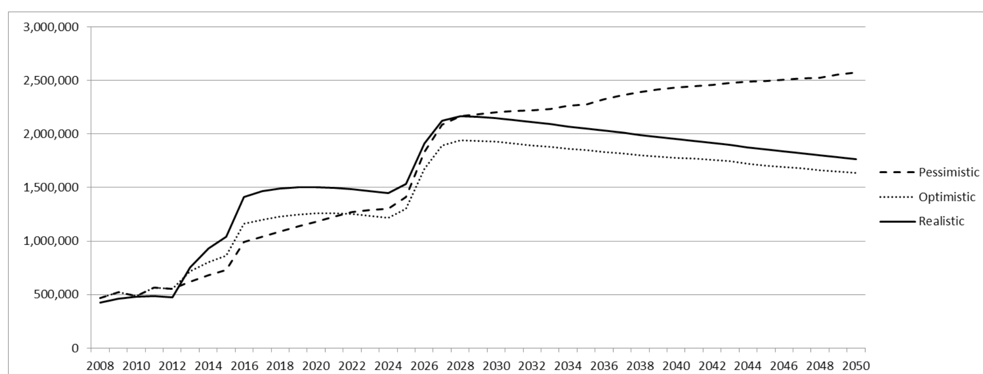
The optimistic scenario presumes favourable economic development, hence its name. It calculates with stable average wage growth rate of 6%, unemployment percentage equal to the average of unemployment rate in Ukraine in the period 2008-2012 minus 1 percentage point. Finally, as in the base model the dependent variable is normalized

by the domestic population of Ukraine, which is modelled to decrease annually at the speed of 0.7% (yearly average of population decrease over the period of 2008-2012). The forecasting period is from 2013 to 2050. Keeping in mind the effects of the regressors we see that an especially high wage growth rate leads to higher emigration in the long run, resulting in bigger stocks of migrants with residence permits in the EU countries. Under such circumstances the stocks reach 4.75 million in 2050 across the whole EU.

The realistic scenario counts with a stable average wage growth rate of 3%; unemployment percentage is equal to the average of unemployment rate in Ukraine in the period 2008-2012 with no bonuses or penalties. Both length of forecasting period and decrease of Ukrainian population is the same as in the previous case. Using these more sober assumptions the number of Ukrainians living in the EU in 2050 culminates at approximately 3.5 million.

Lastly, the pessimistic scenario working with a stable average wage growth rate of 0%, the unemployment percentage being equal to the average of unemployment rate in Ukraine in the period 2008-2012 plus penalty of 2% yields long run estimates of around 2.5 million residents with permits in the EU. Chart 1 displays yearly migration flows for the respective scenarios. It is worth noting that while the pessimistic scenario estimates the lowest migration in the long run, it presents quite high emigration flows in the very short run.

Chart 1: Number of Ukrainian migrants in the EU in 2008-2050 – 3 scenarios (27 EU countries and Norway, impact of accession)



Source: Own calculations

The total amount of migrant stocks in the EU in the long run based on the development of domestic economic incentives varies from 2.5 to 4.75 million. When taking into account that the total stocks are dispersed among 28 countries over 38 years such emigration does not constitute serious threats to the stability of labour markets of receiving EU countries.

The second and more problematic part of modelling is to derive the effects of the possible accession of Ukraine to the EU free labour market. Ukraine did not experience a similar event in its modern history and thus it is impossible to estimate the accession impact relying solely on Ukrainian data and empirical facts. If the country had had such an experience the model would have been expanded by a dummy variable capturing the period before and after the change. The estimated coefficient of the dummy variable could then be used to simulate the effect for future similar events. Since the mentioned approach is not feasible the thesis studies available data of the countries that joined the EU in past and tries to deliver estimates based on their experience.

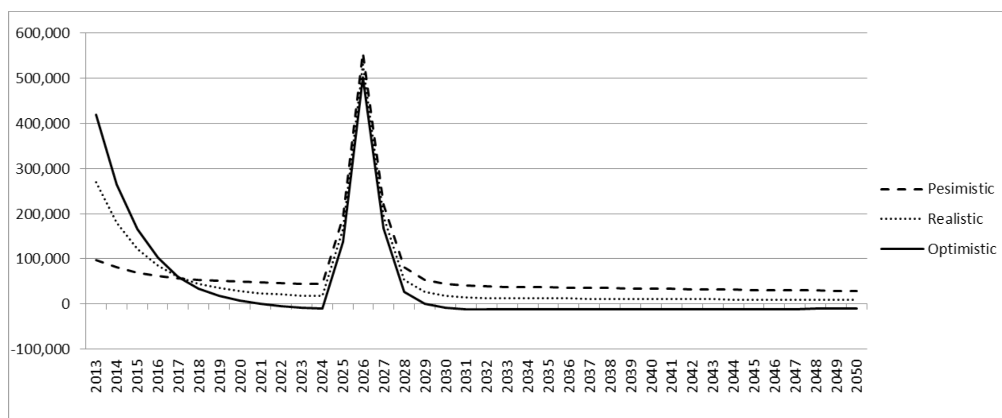
Migration data of Bulgaria, Poland, and Romania are used to attempt to quantify the possible impact of Ukrainian accession. These countries are chosen for multiple reasons. Each country underwent the accession process to the EU in recent history but not too recently. For these reasons migrant data are available both for the period before and after accession. Secondly, all of the countries have tradition of emigration and their population exhibit high migration potential. Thirdly, the countries are geographically close to Ukraine and in the proximity of the EU which makes them more comparable.

From the empirical data it is clearly visible and unambiguous that accession leads to increased emigration flows from new member states to the old ones. More specifically, relaxation of labour market restrictions causes the increase. The act of accession does not have such power. In the case of Bulgaria, Poland, and Romania it is apparent that for every top 5 EU destinations for each country the increase in migration flows occurs right after the abolishment of the restrictions. However, the effect is not huge and quickly dissolves. The biggest reaction occurs in the first two years after the lifting of the restrictions and then hastily diminishes. Generally, the migration flows return to their original level after 4 years and in many cases even further below. There are no visible increases in migration flows prior to the lifting of restrictions.

Therefore, last year´s value of migration flows before the lifting is taken as a benchmark value of normal migration flows. The following 4 years are observed and benchmark value is deducted. This effect is then summed up across 5 destinations for each country separately. As a result, we get the approximate value of shock for each of the 3 countries. Next, a variation in the level of shocks is narrowed down by normalizing the values of shocks to a domestic population. This eliminates the inequalities due to the population size. Once such normalized shocks are obtained, an arithmetic average is calculated to further narrow down a variation. Lastly, this generalized shock is normalized to the Ukrainian population and projected on the modelled migration flows and stocks in the previous exercise.

To model the shock, the accession date is set to the beginning of the year 2025. The date is considered to be the soonest possible date for the Ukrainian accession but in the light of the recent political developments it is hard to predict any future development. The shock is modelled for all 3 scenarios and is presented in Chart 2.

Chart 2: Number of Ukrainian migrants in the EU in 2013-2050 – 3 scenarios (27 EU countries and Norway, impact of labour market opening)



Source: Own results

In the long run, the effects of accession have marginal influence on the total number of Ukrainian residents in the EU 27 and Norway. When compared to the prediction in the absence of shock the range of resident migrant stocks shifts from 2.5 – 4.7 million to 3.2 – 5.6 million.

In sum, based on the evidence of previous accessions of countries such as Greece, Portugal, Spain, Poland, Bulgaria, and Romania migration flows tend not to exhibit long term patterns of growth or instability. Usually, there is a noticeable increase of emigration in the short run but it is always followed by a rapid rally of the trend or even below the original values. When the empirical observations are applied to the case of Ukraine, with the use of econometric modelling it is estimated that the potential accession would augment the total number of Ukrainian residents in the EU by about 0.8 million in the first 3 years after the accession across all member states. If member states were to exercise their right to postpone the opening of the free labour market by up to 7 years the proposed number would be scaled down. Ultimately, the long term equilibrium of the resident stocks is not significantly impacted by the accession but rather by the development of Ukrainian economy and other influencing factors.

The current military crisis in Ukraine presents quite a challenge for any prediction of future migration flows. The type of resolution of the conflict is likely to influence the migration. Nevertheless, in the light of up to date evidence hypothetical migration is not viewed as threatening.

Conclusions and discussions

In the case of Ukrainian migration in the EU, economic push factors were found to be significant in driving migration decisions. Availability of regional data for Ukraine made it possible to check migration potential of Ukrainian migrants. The results confirmed that the Ukrainian population is quite mobile and responding to the changes of domestic push factors. In the case of Belarus, a good fit of the model using economic variables was not found and therefore the effects of economic variables could not be statistically distinguished from zero. For Ukraine and Moldova three scenarios of development of migration flows were extrapolated using different growth rates of independent variables. The number of Ukrainian residence permit holders in the whole EU except Croatia but including Norway was estimated to rise from nearly 800,000 in 2012 to 2.5-4.7 million in 2050.

Additionally, based on the accession experience of Poland, Romania, and Bulgaria a migration shock was modelled in all scenarios to discover the influence of the EU accession on the migration flows. The accession to the EU free labour market would increase the long-term migrant stocks in the EU by 0.8 million for Ukraine. Such an increase would most likely happen in the short-run, not having any further influence on long-run migration flows.

Considering that the shock would be distributed among 28 EU countries over 3-4 years and would leave no long-term effects, it is safe to conclude that the worries of the massive immigration waves are not well-founded. From the economic point of view, migration to the EU is beneficial and leads to a higher GDP growth rate. The migration policies of European states should acknowledge the fact and not succumb to protectionist behaviour. Especially under unfavourable demographic trends which lead to the decline in young labour force groups.

In sum, the research provided enough evidence to support the claim that the accession of Ukraine to the EU would not lead to excessive migration flows endangering the labour markets of the EU member states. However, accession to the free labour market was observed to result in a short-term increase of migration flows. In the case of Ukraine expected influences of independent variables were calculated. Migration was found to be negatively correlated to average monthly wages and positively correlated to unemployment. Lastly, network effects came through as the most significant variables in regressions proving their key importance in the migration decisions.

Even though the modern datasets provide sufficient data for econometric modelling, panel data with longer time dimension would likely yield more precise results. Therefore, there is a need for future research to re-estimate the model with additional data. Finally, the explanation of migration using economic variables is only one of the possible approaches. A qualitative research should be done on the effects of language, distance, culture, or political climate.

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Crimea and the Russian-Ukrainian Conflict

Anton Bebler[1]

Abstract*[2]*: *The recent Russian-Ukrainian dispute over Crimea attracted wide international attention. The purpose of this paper is to explain its historic, demographic, legal, political and military strategic background, its similarities with and differences from other "frozen" conflicts on the periphery of the former Soviet Union, the roles of three main parties directly involved in the Crimean conflict, its linkage with secessionist attempts in Eastern and Southern Ukraine, wider international ramifications of the conflict and the ensuing deterioration of the West's relations with the Russian Federation.*

Keywords: *Crimea, NATO, Russia, Ukraine, conflict, separatists, Moscow, Sevastopol, international relations*

For the last four decades security on our continent has been burdened by armed violence and wars and has accompanied the disintegration of a number of states in the Eastern Mediterranean, the Western Balkans and the former Soviet Union. These developments resulted in the emergence on the political map of Europe of more than a dozen new and internationally recognized states. The most successful secessions of these new states occurred in parallel with the development of a group of failed states unrecognised or less than universally recognized by the international community, like Northern Cyprus, Transnistria, Abkhazia, Southern Ossetia, Nagorno Karabakh and later on Kosovo, that came to be treated in international relations literature as so-called "frozen" conflicts. With Kosovo moving out of this group, a newcomer appeared in the spring of 2014: the Russian-Ukrainian conflict over Crimea.

Like the other four "frozen" conflicts mentioned above, Crimea is geographically located on the Southern periphery of the former Soviet Union. Substantively, the newest conflict bears a number of similarities with the four other ex-Soviet cases. The ex-Soviet entities involved in these conflicts share a history up to two centuries-long of Russian imperialism and, subsequently, of Soviet communist rule. The Russian rule of these entities was preceded by up to three centuries of direct Ottoman rule or of strong dependency on

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[2] This article was submitted in an updated form to RJEA editors in January 2015.

the Sublime Porte. In the 18th and 19th centuries, following Russian victories in several wars against the Ottomans the five lands were militarily conquered by or ceded to and then annexed by the Russian Empire. Russian expansion in the Black Sea region and in the Caucasus had been opposed by the Western powers – Great Britain, France and Austria/ Austria-Hungary. This opposition began in the mid-19 century and resulted in a direct military confrontation, fought mostly on Crimea.

The immediate pretext for the Crimean War was the Russian occupation of two Danubian principalities Wallachia and Moldavia. In January 1854 the British and French fleets demonstratively sailed into the Black Sea. Following a Russian rejection of the British ultimatum to withdraw Russian troops from the principalities (territory that is today's Romania and Moldova), Great Britain and France declared war on Russia. In September 1854 almost one million Ottoman, French and British troops landed on Crimea and started a yearlong siege of the Russian stronghold Sevastopol. In January 1855 the Kingdom of Sardinia joined the coalition. The anti-Russian coalition suffered staggering losses of over 300 thousand soldiers, due mostly to disease. The Western powers and the Ottomans won the war against the Russian Army (which lost about 400 thousand soldiers) and achieved the destruction of the Russian Black Sea Fleet and of the fortress Sevastopol, as well as the military neutralization of the Black Sea. They failed, however, to dislodge Russia from Crimea. Austria's threat to join the coalition forced however the Russian government to withdraw its troops from the Danubian principalities. All of this happened in a geo-strategic environment very different from the present one. Almost 160 years later no one in the West even thought of undertaking a similar operation against the Russian Federation.

The newest conflict in and over Crimea has developed since 1991 along the porous ethnic, linguistic and cultural line within a young successor state of the Soviet Union, other than the Russian Federation. In Ukraine this line has separated a majority within the titular nation, on the one hand, and a considerable part of the strong Russian-speaking minority, on the other hand. This "Russian" population has constituted however a strong local minority or a regional majority in parts of that successor state – in Eastern and Southern Ukraine and on Crimea. This particularity explains why the conflict in Ukraine bears resemblance with the Serbian armed secessions in Croatia and Bosnia and Herzegovina in 1991-1992. In two other ex-Soviet cases – in Abkhazia and Southern Ossetia – the political divide has separated a titular majority non-Russian nation (the Georgians) from two minorities living in entities bordering the Russian Federation, whose members were massively given Russian passports. In four out of the five cases considered, the presence of the Russian Armed Forces on the territory of a legally independent successor state offered not only psychological comfort but also, when needed or feared, physical protection to separatists. This protection allowed the para states to carry out illegal referenda and to proclaim, and then subsequently defend, the secession. In the four cases, the separatists pleaded for and received the Russian Federation's protection. Crimea became legally an exception. Unlike in three other cases, it was promptly admitted and became reunited with the Russian Federation.

This exception can be chiefly explained by Russia's wider geo-strategic interests. Also, historically, for about 168 years, Crimea had been an integral part of imperial Russia and,

after 1921, of the Russian Soviet Federation. Psychologically, Crimea is much closer to the hearts of many Russians and particularly of the Russian military than any of the four other ex-Soviet territories. Transnistria's additional drawbacks are related to its territorial discontinuity with the Russian Federation and to the landlocked position and awkward configuration of its narrow strip of land on the left bank of the River Dnister. The main reasons for not also annexing Abkhazia and Southern Ossetia seem to be primarily diplomatic ones, the desire of the Russian government to mend its relations with Georgia and the fact that neither of the two populations belongs ethnically or culturally to the Russian diaspora.

The historic background of the conflict

Since antiquity and until 2014, the entire territory of Crimea or its parts were ruled by many other states and empires, by the Greeks, Bulgars, Scythians, Romans, Gots, Huns, Khazars, Kievan Rus, the Byzantine Empire, Venice, Genoa, Kipchaks, the Mongol Golden Horde, the Ottoman Empire, the Russian Empire, Soviet Russia, the Soviet Union, Germany, the Soviet Union again and Ukraine. In its long history, Crimea has only been an independent state for less than four decades.

The two leaders involved in the newest conflict over Crimea – Ukrainian President Petro Poroshenko and Russian President Vladimir Putin – both represent Slavic nations. However, the present dispute is about the territory of the peninsula bearing the name Krim or Krym, which in their closely related Eastern Slavic languages was derived from the Turkic word *qirim*. In the 13th century this name was given initially to the capital of a province ruled by the Tatar-Mongol Golden Horde. The more ancient Greek name of that land *Tauris/Taurica,* as well as the names of Sevastopol and of other old towns (Simpheropol, Feodosia etc.) and many toponyms, points to the most ancient recorded inhabitants of Crimea – the Tauris and the Greeks. Crimea became a colony of the Russian Empire in the late 18th century as a result of Russian victories in wars with the Ottoman Empire.

After outright annexation by Russia in 1783 Crimea was given a new name - the Taurida governorate. Numerous wars and the Russian imperial and later Soviet rule have dramatically changed Crimea - demographically, culturally, economically and politically. It had experienced mass summary executions, the exodus and expulsion of Muslim Tatars and Turks, the demolition or conversion of close to 1600 mosques and other Islamic monuments and the disbanding of all Islamic institutions. In the 19th and 20th centuries, the Russification of the Crimean population has been carried out through massive resettlement of ethnic Russians of already Russified subjects from central and northern Russia, through public schools and administration, obligatory military service, Orthodox Christianisation and later through Russian mass media controlled by the Soviet communist regime etc. By 1945 the entire Tatar, Greek and Bulgarian minorities were often brutally deported, Crimea's population almost fully Slavicised and mostly Russified. It is estimated that nearly half of the deported Crimean Tatars died during and immediately following the deportation to Central Asia. Unlike other deported minorities, the Tatars were for several decades banned from Crimea. Although legally rehabilitated in 1967 and since December

1991 they were allowed to return to their homeland, they still have not been compensated for the losses of life and property.

The legal status of Crimea from 1917 to 2014

Since the collapse of the Russian Empire, two revolutions in 1917 and the end of the Russian Civil War, the official name and the legal status of the peninsula has changed many times. The Russian *Bolsheviki* launched an initiative to replace the previously official imperial names of provinces and cities with new ones. As an expression of the new nationality policy, guided by a Georgian Joseph Dzhugashvili (Stalin), Malorossiya, for example, got the name Ukraine. As a friendly gesture towards Kemal Ataturk's Turkey, the previous official designation of the peninsula Taurida was replaced with a Turkic name, Krym. In October 1921, the Crimean Autonomous Soviet Socialist Republic was proclaimed as a unit of the Russian SFSR. The new name and autonomous status were related to the presence then of the still sizeable non-Russian minorities. In 1922, Crimea became incorporated into the Soviet Union and remained within the USSR until its dissolution in December 1991. The only exception was the period from late summer 1941 until spring 1944. Most of Crimea was then occupied by the Third *Reich* and from September 1, 1942 the territory was administered as the *Generalbezirk Krim* and *Teilbezirk Taurien*. In 1945, following the radical ethnic cleansing, Crimea was stripped of its pre-war autonomy status and became an ordinary *oblast* of the Russian SFSR.

Less than a year after the death of the dictator Joseph Stalin, in February 1954 the Praesidium of the Supreme Soviet of the USSR issued a decree transferring the Crimean *Oblast* from the Russian Soviet Federative Socialist Republic to the Ukrainian SSR. The transfer had been described by official communist propaganda as a symbolic brotherly gesture marking the 300th anniversary of Ukraine joining the Russian Empire. This momentous decree by the Presidium (and not a federal law and a constitutional amendment passed by the entire Supreme Soviet of the USSR) gave a very dubious legal cover to a decision actually made by the Politburo of the Communist Party of the Soviet Union (CPSU). The transfer of Crimea was said to have been prompted by the need to bring from Ukraine a large labour force and also water for irrigation. The decree however clearly violated Art. 14 and 18 of "Stalin's" constitution, which was still valid, that required a formal agreement between Soviet Socialist Republics for border changes. The Supreme Soviet of the USSR (and not the Presidium) could only confirm such an agreement, but not by itself but by passing a federal law and then a constitutional amendment to this effect. In the case of Crimea no such parliamentary procedure was initiated and duly carried out in the two parliaments, no relevant parliamentary sessions were held, no debates took place, no votes were taken and no agreement was adopted and signed. Moreover, the Crimean population was deprived of its right to give or deny its consent to the major status change. The transfer of Crimea to Ukraine was thus illegal even in Soviet terms, unconstitutional and clearly illegitimate.

The next status change of Crimea occurred during the process of dissolution of the Soviet Union in 1990-1991. After an all-Ukrainian referendum in February 1991, the Crimean

Oblast was upgraded again to the status of an autonomous republic, this time within Ukraine. In the summer of 1991, an attempted coup against Mikhail Gorbachev took place in Crimea, where the President of the Soviet Union was vacationing. The coup, its aftermath and the referendum on Ukraine's independence on December 2, 1991 actually sealed the fate of the USSR. At the latter referendum the population of the Autonomous Republic of Crimea was not consulted on whether they desired to remain in Ukraine after the dissolution of the USSR or alternatively to rejoin the Russian Federation. The Soviet Union was dissolved on December 8, 1991 at a meeting of the heads of the Russian Federation, Ukraine and Belarus. At that gathering in the hunting reserve Belovezhska Pushcha, the Russian leader Boris Yeltsin failed to request from his Ukrainian colleague, Leonid Kravchuk, Crimea's return to "mother" Russia.

On February 26, 1992, the Supreme Soviet of the Crimean ASSR, without the consent of Ukrainian authorities, changed the official name of the land into the Republic of Crimea. On May 5, 1992, the Crimean parliament proclaimed Crimea's independence and passed its first constitution. Under pressure from Kyiv the latter was amended on May 6, 1992 with a sentence on Crimea as part of Ukraine. On May 19, 1992, the proclamation of Crimean self-government was annulled by the Ukrainian Supreme *Rada* (parliament). As a *quid pro quo* Kyiv agreed to strengthen Crimea's autonomous status. Exploiting these increased legal prerogatives, the Crimean parliament established on October 14, 1993 the post of President of Crimea and granted the Crimean Tatars regular representation in the consultative Council of Fourteen. On March 17, 1995, the Ukrainian parliament annulled Crimea's constitution, removed President Yuriy Meshkov and abolished his office. The President was charged with anti-state activities and with promoting Crimea's secession from Ukraine and its integration with the Russian Federation.

Crimea's secession from Ukraine and its annexation by the Russian Federation

Since the break-up of the USSR, political tensions between the two neighbouring states - Ukraine and Russia - have continued on many issues. These included also those related to the status of Crimea, the division of the Soviet Black Sea Fleet between the two states, the basing rights of the Russian Black Sea Fleet in Sevastopol, the Russian use of military facilities on Crimea, and the number and status of the Russian military personnel on Ukrainian territory, etc. Since 1991, Moscow has undercover supported, controlled and often restrained the actions of Russian separatists on Crimea and has also maintained a sizeable contingent of its own civilian (FSB) and military intelligence (GRU) agents.

Russian contingency plans for annexation of Crimea have likely been prepared and regularly updated since, at least, two decades ago. In June 1993 the Russian State *Duma* adopted a resolution designating Sevastopol as Russian land. In 1996 a prominent Russian geo-strategist, Sergei Karaganov, wrote about a possible disintegration of Ukraine and the absorption of its parts by Russia.[3] Yulia Timoshenko, the former Prime Minister of Ukraine, publicly warned the West in 2007 of Russia's policy of destabilizing the Ukrainian

[3] Sergei Karaganov, *Russia and the Slav vicinity* in Baranovsky, V. (1997), p. 300.

government, particularly in Crimea.[4] At the session of the NATO-Russia Council in Bucharest in April 2008, Vladimir Putin reportedly mentioned the possibility of absorbing Eastern Ukraine and Crimea into the Russian Federation. In 2008, the Ukrainian Foreign Ministry protested against the mass distribution of Russian passports on Crimea as a "real problem" in conjunction with Russia's declared policy of possible military interventions to protect Russian citizens living abroad.[5] In August 2009, anti-Ukrainian demonstrations broke out in Crimea calling on Russia to act in the same way as it did in Southern Ossetia and Abkhazia during the war with Georgia in 2008.

The decision to annex Crimea at an opportune moment was probably made in 2008, soon after NATO at its Bucharest summit promised Ukraine (and Georgia) future membership in the Alliance. After Victor Yanukovich was elected President of Ukraine, the subsequent penetration of high governmental offices by Russian citizens, the increased financial dependence of Ukraine on Russia and the expanded cooperation between the two military-industrial complexes reduced the need for annexation. The situation changed abruptly on February 22, 2014 when President Yanukovich with a group of high Ukrainian officials closely connected to the Russian security services unexpectedly fled Ukraine, presumably out of fear for their lives. The temporary power vacuum, the state takeover by groups supported and some financed by the West, and the general confusion offered an ideal opportunity for the Kremlin to carry out the latest version of its contingency plans for annexing Crimea.

These plans were well executed on the military side and less so on the political side. Clashes between pro-Russian and pro-Ukrainian protesters broke out on February 26, 2014 in front of the Parliament building in Simferopol. During these clashes and at other rallies, the pro-Russian protesters were demanding the secession from Ukraine and asking for assistance from Moscow. In the early hours of February 27, masked armed individuals seized and locked up government buildings in Crimea, including the building of the Supreme Council. At a behind-doors emergency session of the Supreme Council, Sergey Aksyonov of the hitherto marginal Party of Russian Unity and himself a Russian from Moldova was appointed the new Prime Minister of Crimea. The Supreme Council also voted to hold a referendum on the status of Crimea. On February 28, 2014, a group of over 20 deputies submitted to the Speaker of the Russian State Duma a draft amendment to the constitutional law on admitting new subjects to the Russian Federation. The draft specifically justified the incorporation of parts of Ukraine into the Russian Federation on the grounds of alleged Ukrainian discrimination of national minorities. A day later, the *Qurultay* (Assembly) of the Crimean Tatars voted on the "Implementation of the Right of Crimean Tatar People to Self-Determination in Their Historical Territory-Crimea". With 212 votes for, one against and four abstained, it was decided to start political and legal procedures to restore the national-territorial autonomy of the Tatars on Crimea.

[4] *Foreign Affairs*, no. 3, 2007 and in *Rossia v globalnoy politike,* vol. 5, no. 3, 2007, pp. 104-105.
[5] "Federal Law on the State Policy in Regard to the Fellow Citizens Residing Abroad" (1999)

Launched into action on February 28, 2014, Russian forces, assisted by armed "self-defence" militias swiftly seized the strategically important Perekop Istmus, blocked or cut off most land, sea and air connections between Crimea and mainland Ukraine, took over all Crimean ports and airports, radio and TV stations, blocked and occupied all installations of the Ukrainian Army and Navy, and illegally expropriated practically all of their stocks of arms and ammunition. They also assisted and protected unlawful actions by Russian-speaking separatists and thus enabled Crimea's amputation from the Republic of Ukraine. The Crimean operation in 2014 bore in some respects resemblance to the German occupation of Austria (1938) and Soviet occupations of Western Ukraine, Bessarabia, Northern Bukovina (1940) and of Czechoslovakia (1968).

The military take-over of Crimea was obviously well-prepared, rehearsed in advance and professionally executed. Assembled for this operation were about 2,000 naval infantrymen (marines), stationed in and around Sevastopol, about 7,000 special troops brought to Crimea in early March mostly by air as well as about 15,000 troops transported by ferries to Kerch across the straits. These additional units came mainly from the Russian Southern Military District. At the time of occupation, the Russian operational headquarters, probably located in Rostov, had on its disposal on Crimea about 30,000 troops.[6] The forces participating in the Crimean operation were much better organized, trained and armed than the Russian units engaged in the war with Georgia were in 2008. This time they also used a novel tactic with an emphasis on the economy of effort. The Russian command actively engaged fewer than 10,000 assault troops, mostly on wheeled BTR-80 armoured personnel carriers. The masked "green men" were a hybrid between regular infantry and anti-terrorist police units having a secret chain of command and bearing no insignia or visible rank on their combat fatigues. All this was clearly designed to conceal the state identity of the invading force.

The easy success of the three week-long operation was to a large extent facilitated by three factors. The Russian marines were already legally stationed at Sevastopol, could well in advance reconnoitre the field, and acted unopposed by Ukrainian forces. The short distances to the most important strategic locations on Crimea, including Simpheropol airport, allowed for the quick insertion of air transported troops and the acquisition of targets. Thirdly, orders were given from Kyiv to the Ukrainian military personnel stationed in Crimea to not resist and to surrender all 190 military installations and all weapons. Thus, about 20,000 Ukrainian military personnel capitulated without a shot fired. Moreover, most of them switched their loyalty and opted to remain on Crimea. Most of the Ukrainian Navy was also captured by the Russian military without resistance. The Ukrainian commanding officers did not try to sail off with their ships and crews in order to reach mainland Ukrainian ports. Only a few of the serviceable aircraft of the Ukrainian Navy escaped the capture. The Crimean police personnel either failed to act or cooperated with the Russian Special Forces and Crimean separatists. Although the Russian Armed Forces *de facto* occupied Crimea, they did not establish a military occupation regime. International law namely prohibits an occupying power to create another state on the occupied territory or to annex it. Why President Vladimir Putin on March 4, 2014 publicly

[6] Adomeit Hannes (2014), p. 7.

denied the intention of Crimea's annexation remains a puzzle. One possibility is that an Abkhazia-like scenario was still considered by the Russian leadership.

The referendum on Crimea's reuniting with the Russian Federation was called on February 27, 2014, on too short a notice. The time pressure very probably did not allow for and, more importantly, the Crimean secessionist authorities and the Russian security personnel were not interested in updating the voters' registers and in preventing multiple voting, obviously by the proponents of secession. The referendum on March 16, 2014 reportedly passed peacefully and orderly but in several important respects did not conform to high democratic standards. The ballot contained two questions and only one positive response was considered valid:

1. Do you support rejoining Crimea with Russia as a subject of the Russian Federation?

2. Do you support restoration of the 1992 Constitution of the Republic of Crimea and Crimea's status as a part of Ukraine?

The ballot omitted two other possible choices – remaining part of Ukraine under the current constitutional structure or Crimea's independent statehood. The time shortage did not allow for a real and substantive public debate on such a momentous issue.

Immediately after the takeover on February 28, 2014, Russian security personnel shut off all Ukrainian television channels, imposed a tight blockade on the land border with the mainland Ukrainian territory, closed the Simpheropol airport's flights from Ukraine and thus prevented the diffusion on Crimea of Ukrainian printed media (which are still issued mostly in the Russian language). The population of Crimea was thus subjected to one-sided information and often outright disinformation by the Russian state-controlled mass media. The intense propaganda campaign, almost like that during the "Cold War" depicted the interim Ukrainian authorities in Kyiv as "fascists" or "neo-Nazi" who presumably threatened the Russian and Russian-speaking population with "genocide". Public harassment and intimidation of Crimean Tatars by the so-called "people's self-defence" forces and by unidentified men in military fatigues, as well as physical and verbal threats to Ukrainian opponents of secession were reported. Fifteen pro-Ukrainian journalists and activists were abducted, detained and ill-treated. The Russian authorities barred the return of Mustapha Dzhemilev, a leader of the Crimean Tatars and a member of the Ukrainian Parliament. One known Tatar protester was reportedly abducted, apparently tortured, and found dead. The referendum was held under the irregular conditions of Russian military occupation. The presence in public places of armed local Russian irregulars, of Russian Cossacks and even Serbian "Chetniks", as well as of masked "little green men" undoubtedly belonging to the Russian Armed Forces, certainly had an intimidating effect on the opponents of Crimea's secession.

According to the Crimean authorities, 81.36 percent of the registered voters took part in Crimea's referendum and 96.77 percent of them voted for its separation from Ukraine and for reuniting with Russia.[7] The official figures of the voters' participation and on the approval rate however could not be verified by impartial international observers and were

[7] The percentage of "yes" votes on Crimea was in 2014 by about three points lower than the official results of the Austrian plebiscite on *Anschlüss* in 1938.

probably artificially inflated in order to legitimise Crimea's incorporation into the Russian Federation. The OSCE Chairperson-in-Office, Didier Burkhalter, did not accept an invitation by Crimea's authorities to send ODIHR observers, citing the unconstitutional nature of the referendum. In addition, the invitation did not come from an OSCE participating state. Individually and selectively invited European observers stated that the referendum was carried out without violence and visible irregularities. The representatives of the Crimean Tatars denied the official results[8] reflecting the position of a presumed majority among Crimea's indigenous minority population who opposed the separation from Ukraine and boycotted the referendum. The main reason for this attitude was the painful collective memory of Russian colonialism and of the terror, deportation, harsh exile and collective discrimination in the 20th century, which were for many decades carried out by the Russian-speaking Soviet authorities. A good number of Crimean Ukrainians probably departed before the vote, abstained, or voted against the secession. The Ukrainian authorities refused to recognize the legality of the referendum and its outcome on constitutional grounds. This opinion was shared by the Council of Europe's Venice Commission and by a number of EU and NATO member states.

Despite numerous shortcomings of the referendum, it seems reasonable to assume that the Russian-speaking majority among the Crimean population generally favoured Crimea's secession from Ukraine and rejoining Russia. Their attitudes probably reflected the deep dissatisfaction with the state of economic and political affairs in Ukraine and with the widespread incompetence and rampant corruption in Kyiv and also in Eastern Ukraine. In these respects the feelings of the Crimean Russian speakers largely coincided with the feelings of many ethnic Ukrainians, and also those of the *Maidan* protesters. The very unwise bill - hastily passed by the Ukrainian Parliament - abolishing the official status of the Russian language was also aptly used by the Russian mass media propaganda to scare off all Russian speakers in Ukraine (N.B. The law was vetoed by the interim President and never went into effect). Most Russians on Crimea apparently did not want any longer to be a national minority in Ukraine, forced to learn and use another official language, Moreover, they were promised by the separatists, and indeed expected, a tangible improvement of their standard of living, including, at least, twice as high Russian wages and retirement benefits, etc. These factors help explain to a great extent the outcome of Crimea's referendum.

On March 17, 2014, Crimea declared its independence. The Sevastopol City Council requested the port's separate admission as a federal city. On March 18, 2014, a treaty on incorporating Crimea and Sevastopol was signed in Moscow. In only five days the "Constitutional Law on admitting to the Russian Federation the Republic of Crimea and establishing within the Russian Federation the New Constituent Entities the Republic of Crimea and the City of Federal Importance Sevastopol" was quickly railroaded through the Russian Federal Assembly, signed by the Russian President and entered into force. On April 3, 2014, Moscow renounced one-sidedly the agreements concerning the deployment of the Russian Black Sea Fleet on Ukraine's territory. According to these agreements, the Russian Federation had paid USD$530 million annually for the bases and wrote off

[8] http://ru.krymr.org/content/article/25309070.html

close to USD$100 million Ukrainian debt. The Russian government also discontinued a discount on the price of natural gas imported from Russia, which was linked to the basic agreements.

Three actors in the Crimean conflict

There have been three parties involved in the Crimean conflict: ***the Republic of Ukraine***, ***the Russian Federation*** and ***the Autonomous Republic of Crimea***. The involvement of each of these actors differed greatly from the standpoints of legality and legitimacy.

Ukraine was clearly a victim of an outside aggression as part of its internationally recognised state territory was occupied by the armed forces of a neighbouring state and subsequently annexed by the latter. The Ukrainian interim government however decided not to use the Ukrainian Army, Police and state security services to prevent the violation of Ukraine's territorial integrity and Crimea's separation. On March 19, 2014, it started withdrawing its personnel from Crimea. Ukraine's decision not to resist the occupation, to withdraw its personnel and protest only diplomatically amounted to Crimea's surrender to the Russian Federation, under duress. As a consequence of the conflict, Ukraine lost about three percent of its state territory, about five percent of its population and about 3.6 percent of its GNP. Also lost were a good part of Ukraine's territorial waters and of its exclusive economic zone, which potentially contains rich oil and gas deposits, considerable civilian and military state property, most of its military personnel stationed on Crimea, and practically the entire Black Sea Fleet (with the accidental exception of only one major surface combatant).

The second entity has been ***the Russian Federation***. On 1 March, 2014, the Council of Federation of the Federal Assembly of the Russian Federation unanimously approved the request by President Vladimir Putin to allow a "limited military contingent" of the Russian armed forces on the territory of Ukraine. This act was taken in a clear violation of Art. 2(4) of the UN Charter, which states that "all Members shall refrain … from the threat or use of force against the territorial integrity … of any state". It also violated the "Declaration on Principles of International Law" (1970), adopted by the UN General Assembly, which declared illegal any territorial acquisition resulting from a threat or use of force. The same applies to Principles 1-5 of the CSCE Helsinki Final Act (1975), to the "Treaty of Friendship and Cooperation between the Russian Federation and Ukraine" (1997), as well as to a number of other bilateral and multilateral interstate treaties and agreements which affirmed and guaranteed Ukraine's sovereignty and territorial integrity. At the same time, the Russian Federation rejected prior consultations with Ukraine and other states – guarantors of Ukraine's territorial integrity after, according to the Budapest Memorandum (1994), it became a militarily denuclearised state. The Russian Federation thus neglected its obligations under international law. The Russian Federation also violated the agreement between Ukraine and the Russian Federation on the status and conditions of the Black Sea Fleet of the Russian Federation on the territory of Ukraine from August 8, 1997, and extended in April 2010. This applies particularly to paragraph 1 of Article 6, which stated that the military units of the Black Sea fleet "operate in places of their dislocation

in accordance with the Russian law, respect the sovereignty of Ukraine, observe its laws and do not allow interference in the internal affairs of Ukraine." Paragraph 2 of Article 8 obliged the military forces of the Black Sea Fleet to "conduct exercises and other activities of combat and operational training within the training centres, landfills, positioning areas and dispersal areas, shooting ranges and, in restricted areas, in designated areas airspace in coordination with the competent authorities of Ukraine." The movements of Russian troops in February-March 2014 in Crimea were in no way coordinated with the competent authorities of Ukraine and the Russian forces left their places of dislocation in a clear violation of the agreement.

On the other hand, President Vladimir Putin and official Russian propaganda used the right of the Crimean people to self-determination in the form of secession as the chief argument to justify and legitimise the annexation.[9] Russia's much stronger historic claim to Crimea was also stated. Russia conquered Crimea and *de facto* possessed it much longer than Ukraine (for around 168 years vs. 60 years). In his Presidential address to the Federal Assembly on December 4, 2014, Vladimir Putin stressed the strategic importance of the peninsula also as "the spiritual source" of the Russian nation and state, citing the fact that Grand Prince Vladimir was baptized in Herson. According to Putin's claim, Crimea has had "invaluable civilisational and even sacral importance for Russia, like the Temple Mount in Jerusalem for the followers of Islam and Judaism".[10] Moreover, the reunification in 2014 was said to undo the unconstitutional and unjust separation of Crimea from Russia sixty years earlier and was achieved without known victims.

The annexation of Crimea has increased the territory, population, territorial waters, mineral and other natural resources of the Russian Federation. It allowed for an increase in Russian military capabilities by taking over most of the Ukrainian Black Sea Fleet, about 190 Ukrainian military installations, stocks of arms, ammunition and other equipment. By subsequently relocating additional strategic bombers TU-22 M3, missiles, heavy armour, air transported troops to Crimea and by improving the military infrastructure on the peninsula; the Russian Armed Forces have increased their power projection capabilities. The addition of one of the two *Mistral* amphibious assault ships, at present being built in France, if delivered, would further strengthen the Russian military presence in the Mediterranean. This has been already for some time one of Russia's strategic goals. On the internal political scene, President V. Putin's gamble on Crimea paid off as the annexation was met with overwhelming support by the Russian public and greatly boosted his popularity ratings. Concern for the Crimean Russians' national rights and well-being has likely been of secondary importance, although in justifying the annexation President Vladimir Putin mentioned the alleged Ukrainian assimilation pressures on the Crimean Russians and the recent "terror" suffered at the hand of Ukrainian ultranationalists. The annexation has, on the other hand, considerably burdened the Russian treasury in addition to the much heavier losses due to the falling prices of oil and to Western sanctions. Federal financial aid to Crimea is expected to be about **€** 2 billion annually, which does not cover the rise in wages and pensions in Crimea and the costs of adapting its financial, monetary

[9] N.B. Art. 5 of the Russian Constitution contains a provision for the right of the peoples to self-determination but does not confer to them the right to secede from the Russian Federation.

[10] Presidential Address to the Federal Assembly, URL: http://eng.kremlin.ru/transcripts/23341, accessed 12.12.2014.

and legal systems. The total of needed investments in transport (including a long bridge across the Kerch Strait), electricity and gas, in the new border infrastructure, and other additional expenses, could well exceed €60 billion. The Kremlin is apparently resolved to absorb these and other, notably external political, costs for the achieved geo-strategic gain in the ex-Soviet space, in the Black Sea area, in the Mediterranean and, as it sees it, in competition with NATO and the European Union.

The third entity has been ***Crimea and Sevastopol***. In the framework of Ukrainian constitutional and legal order, the holding of the referendum on March 16, 2014 and the declaration of secession was clearly illegal and unconstitutional. Article 73 of the Constitution of Ukraine prescribes: "Alterations to the territory of Ukraine shall be resolved exclusively by the all-Ukrainian referendum". However, most declarations of independence have been unconstitutional, including the declaration of USA in 1776 and, more recently, Kosovo's declaration in 2008. The International Court of Justice, in its opinion issued in July 2013, concluded that the Kosovo declaration did not violate the norms of international public law. President Vladimir Putin and the leaders of Russian separatists in Crimea and Eastern Ukraine used the Kosovo example to justify their actions. There have been indeed several similarities between the Kosovo and Crimea cases. Russian officials and propaganda have however consistently omitted very important differences. The Russian-speaking population of Crimea has not experienced anything similar to the protracted repression by the Ukrainian authorities, massive and grave violations of human rights and fundamental freedoms, the *de facto* abolition of Crimea's autonomous status, massive discrimination and firing of Russians from the public sector, mass displacement and expulsion from Crimea of several hundred thousand Russians and several thousand deaths. Prior to its separation from Ukraine, Crimea and the ethnic Russians, as no other Russian minority in ex-Soviet republics, had enjoyed in Ukraine a very considerable autonomy and protection of human rights and fundamental freedoms. Although there was no need, unlike in Kosovo, to apply on humanitarian grounds the "responsibility to protect", the majority among the population of the Autonomous Republic of Crimea nevertheless claimed and, with decisive outside assistance, like in Kosovo, realized its right to self-determination. Whether it was entitled to exercise this right is a debatable legal proposition.[11] The facts are that this right was flatly denied to it by the Soviet Communist authorities in 1954 and neglected by Russian and Ukrainian leaders in 1991. Moreover, the Russian-speaking majority in Crimea has relatively peacefully expressed and exercised this right, in conformity with principle 8 of the Helsinki Final Act. The two sizeable minority communities (Ukrainians and Tatars) apparently acquiesced to the desire of the Russian-speaking majority. These facts confer a measure of legitimacy to Crimea's secession and to its reunification with the Russian Federation.

The abrupt separation from Ukraine has created a number of serious problems for Crimea due to its high dependency on Ukraine for water, electricity, rail and road connections to the mainland among other things. Crimea lost about two thirds of its budget revenue, which used to come from the Ukrainian central budget. The separation also

[11] William W. Burke – White. *Crimea and the International Legal Order*, Survival, vol. 56, no. 4, August-September 2014, pp. 65-80.

entailed the loss of about 70 percent of all tourists from Ukraine while Russian and other tourists might not substitute the loss soon and to a high degree. Many Crimean companies became deprived of their access to European markets. The Crimean authorities have faced huge problems with issuing new citizenship, ownership and property documents, as Ukraine blocked access to the central registries and the Crimean government did not have its own records. The replacement of the Ukrainian *hrivna* as currency with the Russian *ruble* has created additional disturbances in the economy and for the Crimean population. An important motivation for secession – the expected rise in the standard of living – has not, so far, materialized as the wage earners and pensioners started receiving their income in *rubles* recalculated on the official exchange rate from *hrivnas*. Members of the Ukrainian and Tatar minorities have also experienced pressures, dismissals and threats from Russian nationalists.

Crimea and the civil war in mainland Ukraine

The annexation of Crimea encouraged the Russian-speaking separatists in Eastern and Southern Ukraine who apparently hoped that Moscow will repeat the same scenario. The mass unrest, anti-Kiev demonstrations, tearing down Ukrainian state symbols and hoisting up Russian national flags, breaking-in and occupying numerous official buildings took place in April 2014 in a number of Ukrainian cities. In Kharkov, Donetsk, Lugansk and Odessa "People's Republics" were proclaimed. Numerous Crimean Russians have presumably also participated in these events. Russian, Chechen and other non-Ukrainian "volunteers" from the Russian Federation's territory and other countries have constituted, according to some estimates, over a third of the insurgent forces. Their Southward advance toward Mariupol and the Azov Sea was obviously intended to shorten the distance and make easier communication between Crimea and the Donetsk republic.

There have been however considerable differences between Crimea and "Novorossia" as the Eastern part of the Republic of Ukraine has been frequently called in the Russian mass media and occasionally also by Russian politicians. "Novorossia" and particularly the area of Donbass has been much more closely economically and energy-wise connected with and more important to the Russian Federation than Crimea. "Novorossia" contains a somewhat lower percentage of ethnic Russians but together with numerous other Russian-speakers (including many ethnic Ukrainians) they constitute a strong regional majority. Unlike Crimea "Novorossia" has been legally part of Ukraine since 1918, with only one exception during the Second World War. The flare-up of unrest and subsequently of violence in the Donbass area had however a different origin. It expressed regional grievances against Kyiv centralism, the defence of Russian language rights and strong opposition to Ukrainian ultranationalists and "fascists" who "staged a soup in Kyiv". High representatives of US and EU did a great disservice to Ukraine's integrity when they openly and uncritically supported (and US reportedly also financed) one side in the internal conflict which included also armed Ukrainian ultranationalists and neo-fascists. This ill-advised Western policy aggravated the conflict and contributed to the development which seriously threatened and perhaps ruined also mainland Ukraine's territorial integrity. The unrest in "Novorossia" has quickly deteriorated from the seizures of state institutions to

clashes with the Ukrainian forces which degenerated into a full-fledged civil war. In it heavy conventional weapons (tanks, armoured personnel carries, artillery and rockets) have been used by both sides, while helicopters and fixed-wing aircraft by the Ukrainian Army only and international humanitarian law gravely violated, mostly by the Ukrainian side.

The insurgents have enjoyed moral and political support from the Russian Federation and received critically needed economic, logistic, humanitarian, information, intelligence and other kinds of assistance, particularly since the Ukrainian government removed its offices and stopped payments of all salaries, retirement benefits etc. to the areas controlled by the insurgents. The insurgents seized considerable stocks of arms, munitions and captured many heavy and often obsolete conventional weapons from the Ukrainian forces. According to Ukrainian and NATO sources some plain-close Russian security personnel has advised and guided the insurgents. The Russian side has rather unconvincingly denied the reports on a flow of sophisticated arms across the Russian border but not the participation of Russian citizens as "volunteers" on the side of insurgents. Unlike in Crimea however no complete units of the Russian Army have been verifiably observed.

Following several meetings between the Presidents of Russia and Ukraine, with OSCE's facilitation and with Ukraine's former President L. Kuchma chairing, an agreement was reached in September 2014 in Minsk. It allowed for a truce and the stabilization of armistice lines, an exchange of prisoners and considerable reduction of shelling and missile attacks. In the four following months there were nevertheless recorded about 1 300 victims of violence. By January 1, 2015 the civil war in Ukraine affected more than five million of its inhabitants, caused more than 4 700 deaths (recorded by the UN and OSCE plus probably several thousand of unrecorded deaths), more than ten thousand wounded, over a million internally displaced persons and refugees and a huge economic damage.

A very different course of events in territorially undefined "Novorossia" will very probably lead to a different outcome of the conflict than in Crimea. The highest Russian officials, including President V. Putin, publicly spoke in favour of reintegrating the Donbass area into Ukraine's "common political space". They are also on record favouring Ukraine's federalization and a wide autonomy of the predominantly Russian-speaking regions. These statements and the lack of open and massive military intervention across the Ukrainian border indicate Moscow's real strategic intentions, which apparently exclude a legal annexation of "Novorossia" and an Abkhazia-like model of secession. These intentions seem to be (1) the creation of (a) Russian autonomous region or republic(s) legally within Ukraine but which will continue to be closely economically, culturally and politically linked to the Russian Federation; (2) ideally barring forever Ukraine's entry into NATO or, at least, preventing the extension of the North Atlantic Treaty Area into the predominantly Russian-speaking areas in Eastern and Southern Ukraine. The *Republica Srpska* in Bosnia and Herzegovina comes close to a model presumably favoured by Moscow.

The "liberation" of Crimea and crushing the rebellion in South Eastern Ukraine is beyond Kiev government's capabilities while the Ukrainian nationalists' hopes that the West's sanctions against Russia will resolve the problem are utterly unrealistic. The termination of hostilities and normalization in mainland Ukraine could result from a political solution

only. This solution will be by necessity a compromise affecting Ukraine's state structure, the relations between its central institutions, regions and national minorities, as well as Ukraine's economic, security and foreign policy orientations between the West and Russia. The renunciation of non-alignment by the less than fully representative Ukrainian Parliament on December 23, 2014 threw an additional roadblock to national reconciliation and peaceful termination of the Ukrainian civil war. In Moscow's eyes it fully justified its decision to reacquire Sevastopol and Crimea. It also hardened the determination of Russian-speaking insurgents (called "terrorists" by the Ukrainian authorities). The new law could be viewed, on one hand, as an emotional and unwise gesture, or, alternatively and less probably, as a bargaining chip to be exchanged for the restoration at least juridical of mainland Ukraine's territorial integrity.

Conflicts in and related to Ukraine and the international community

The conflict over Crimea and Sevastopol has developed in an international environment which, apart from the two directly involved states, included other important actors. These have been the European Union, NATO, OSCE, UN, USA, Germany, France, Poland *et.al*. The Russian leadership has for many years openly opposed Ukraine's integration into the economic, and hence also political, "West" and in particular the possibility of its NATO membership. This Russian position has been well known but regularly ignored by Western leaders who insisted on every European state's legal right to decide on its association with other states freely, including on membership either in EU or NATO. The high representatives of the Soviet Union and of its legal successor – the Russian Federation – officially recognized this right of all European states in several documents, including the "Charter of Paris for a new Europe" (1990). However, in practice the implementation of this abstract legal right depends on and is conditioned by a number of internal political and wider geopolitical, also limiting, considerations.

In his keynote speech at a joint session of the two chambers of the Russian Parliament on March 18, 2014, President Vladimir Putin clearly stated the geopolitical rationale for the annexation of Crimea. NATO's presence in close proximity to Russia's Southern borders, "directly in front of the Russian house", "on Russia's historic territories" remains to President Putin and to the Russian elite utterly unacceptable. The sheer possibility of Ukraine's membership in NATO has been viewed by Putin as an acute threat to the security of Southern Russia. In order to not be "lost in the near future", Crimea needed to be under "a strong and steady sovereignty…" which "could be only Russian".[12] President Vladimir Putin's statement expressed the primary motivation of the Russian leadership – the annexation prevented Crimea's conceivable inclusion into the North Atlantic Treaty area. The Russian actions in 2014 related to Ukraine and Crimea were thus largely – if not primarily – conditioned by EU and NATO enlargement into the ex-Soviet space. To a considerable but critical extent, Crimea's straightforward annexation was a consequence of the decision by the US administration under George W. Bush to offer Ukraine (and Georgia) NATO membership. Other members of the Alliance unwisely succumbed then

[12] Kremlin. "Address by President of the Russian Federation", 18 March 2014, http://eng.kremlin.ru/news/6889

to American "friendly persuasion" and agreed to include the promise of membership in the conclusions of the Bucharest summit of 2008. This promise was not preceded by a careful examination of its medium and long-term security and political consequences and of the Alliance's ability to bear their burden. A "misguided strategy" by the USA and NATO has been to a large extent responsible for the crisis in and partial disintegration of Ukraine.[13] The promise, despite having neither a date nor inclusion into the Membership Action Plan, was repeated in NATO's later documents. Although the promise did not entail Art. 5 as guarantee, it has morally implied that the states to whom was promised membership would not be left "cold in the rain" if their territorial integrity and sovereignty were to be grossly violated. Yet, Ukraine in 2014 and earlier Georgia in 2008 were in fact effectively punished by the Russian Federation while NATO basically stood by. It certainly has not increased the Alliance's credibility. In September 2014 NATO indirectly admitted the mistake when the Wales Summit Declaration did not repeat the promise to Ukraine.

Moscow's action on Crimea expressed its defiance of NATO's further enlargement into Russia's backyard. It could be more generally understood as renunciation of the balance of power in the Euro-Atlantic area formed after the end of the "Cold War" and as a demand for a redefinition of legitimate "zones of interest" in Europe. It could be also taken as a stern warning to other ex-Soviet republics to behave, for instance, to Kazakhstan and Azerbaijan.

The occupation and annexation of Crimea has provoked a vivid reaction in the international community, in the form of diplomatic protests, declarations and resolutions passed by international organizations among other things. On March 27, 2014 the UN General Assembly adopted a resolution on Ukraine's territorial integrity. The resolution condemned the annexation of Crimea, declared the referendum "non-valid" and appealed to the international community not to recognize changes in the status of Crimea. A majority of one hundred UN members supported the resolution while 11 voted against it. The vote showed the Russian Federation's considerable diplomatic isolation. Understanding and support for its action were expressed by states such as North Sudan, Syria, Zimbabwe, North Korea and by four Latin American countries. Among the ex-Soviet republics, only states highly dependent on Russia, namely Armenia and Belarus, voted in Russia's favour, while Ukraine and Georgia understandably condemned the Russian action. The annexation put a large group of 58 states (including the BRICS members China, India, Brazil and South Africa) into a delicate situation. While supporting the principle of territorial integrity of member states they for various reasons did not want to condemn the Russian Federation and decided to abstain.

Active condemnation of Russia's action was expressed in the strongest terms by a number of EU and NATO members, including those from Eastern Europe. It was shared also by many non-aligned states who, as a matter of principle, oppose any infringement on the territorial integrity of member states. On April 1, 2014, the foreign ministers of NATO member states condemned the annexation of Crimea and qualified it as illegal and illegitimate. They also approved a number of measures negatively affecting NATO's

[13] John J. Mearsheimer, Why the Ukraine Crisis is the West's Fault, *Foreign Affairs*, September-October, 2014, URL: http://www.foreignaffairs.com/articles/141769/john-j-mearsheimer/why-the-ukraine-crisis-is-the-wests-fault (12.09.2014)

relations with the Russian Federation. On September 5, 2014, leaders at the NATO Summit in Wales called on the Russian Federation to "reverse" the annexation of Crimea and declared the suspension of all practical, civilian and military cooperation and the freezing of the activities of the bilateral forum, the NATO-Russian Council. The ministers also decided to assist Ukraine with advisory team, to support Ukraine's defence reforms and to boost NATO's collective defence posture by demonstrative deployments of its assets in land, air and sea configurations within the North Atlantic treaty area geographically close to Ukraine and the Russian Federation. The United States and later the European Union added to these measures economic and political sanctions targeting among others, a group of prominent Russian and Crimean personalities.

The conflict over Crimea and the related conflict in Eastern Ukraine raised the fears of escalation to a hot war between Ukraine and the Russian Federation. The shooting down, probably by Russian rebels, of the Malaysia Airlines flight 017 on July 17, 2014, which killed three hundred innocent civilians, further sharpened the political confrontation between EU, USA and NATO, on the one hand, and the Russian Federation, on the other. The confrontation has worsened the general political climate in the Euro-Atlantic area. Some aspects of the confrontation and of the Western sanctions bore resemblance with the "Cold War" period. The conflict over Crimea and its further ramifications have had a number of other negative international effects. The substantive breach by the Russian Federation of its obligations to Ukraine under the Budapest Memorandum (1994) certainly weakened the nuclear non-proliferation regime. The conflict also brought the US-Russia talks on anti-ballistic defence and on other strategic issues to an end, although they were already in deep troubles. Russian non-compliance with its obligations of notification and the international observation of large movements of troops in border areas harmed the system of Confidence and Security-Building Measures (CSBM) under the OSCE Vienna Documents (1990, 1994). The Crimean conflict heightened the sense of insecurity in states bordering on the Russian Federation, particularly those having within their borders Russian minorities. These states are most concerned with the possible resurrection of Russian neo-imperialism, while the former Soviet republics with a new, narrower version of L. Brezhnev's doctrine of "limited sovereignty". The Crimean affair has also reduced the possibility of de-escalation in several "frozen" conflicts on the ex-Soviet periphery, e.g., over Transnistria.

The application of EU and US sanctions raised the question of their objectives, effectiveness and consequences. The true objectives of the sanctions have never been clearly stated. These could be: a) a restitution of Crimea to Ukraine, b) the termination of Moscow's support to the insurgents in Eastern Ukraine and exerting pressure on them to desist and return to Kyiv's rule c) to force Moscow to agree to further EU's and NATO's enlargement into the post-Soviet space, d) to effect a regime change in the Kremlin and "shackle" the disobedient Russian "bear".

President Putin apparently firmly believes in the latter.[14] Washington's hostility to Russia has been evident, according to him, already earlier and Crimea and the Ukrainian crisis were used only as a pretext. It is an irony that US initiated and still presses for sanctions

[14] News conference of Vladimir Putin, December 18, 2014.

against Russia while having openly admitted the failure of its own sanctions applied for 50 years against incomparably smaller, weaker and much more vulnerable Cuba. The war of sanctions economically harms Europe as well, but not US. Most importantly they are not likely to achieve any of the above-stated objectives. This is certainly true of the prohibition of military exports due to the near self-sufficiency in arms of the second largest exporter of weapons world-wide. In addition this ban is to be applied to new contracts only. It is clear, that no kind and no intensity of international sanctions will ever return Crimea to Ukraine. In this particular sense, the application of economic sanctions by the European Union is pointless. They have had no educational or deterrent effect and no discernible positive impact on the developments in Eastern Ukraine. The absence, so far, of a direct and massive military intervention by the Russian Army could not be attributed to them. The Crimean scenario has not been repeated for a number of other reasons. An open and massive Russian invasion would have caused an all-out war between Russia and Ukraine, with catastrophic consequences. Although probably quickly victorious on the battlefield, the Russian forces would face the prospect of waging for many years bloody anti-guerrilla warfare, similar to that in Western Ukraine in 1945-1949. The human, political and economic costs of a massive invasion and of the protracted occupation of Eastern Ukraine would far outweigh any possible gains for Russia. On the other hand, Moscow politically cannot and will not allow a military defeat of the insurgents in Eastern Ukraine. Generally, sanctions often provide results contrary to those intended. The war of sanctions already strengthened the autocratic elements of Vladimir Putin's regime and slowed down or stopped internal political and economic reforms in Russia favoured by the West.

There have been many commentaries and a number of proposals on how to deal with the conflict related to Crimea and Ukraine. Some commentaries revive the spirit of the "Cold War" depicting President Putin as a new Hitler and presenting Russia's behaviour as a threat to the very foundations of international security, international law and liberal West. Much more realistic commentaries, on the other hand, admit the mistake made by NATO and propose that the Alliance assures Moscow that it will not draw Ukraine into its membership (H. Kissinger, Z. Brzezinski). Some proposals demand that Russia, in exchange for normalisation of relations, recognizes Ukraine's sovereignty over autonomous Crimea (i.a. H. Kissinger). Another suggestion was made by M. O'Hanlon and J. Shapiro requesting a repeated and binding referendum on Crimea, this time under international supervision.[15] The same authors propose some other conditions for gradual lifting of sanctions: a verifiable removal of Russian "volunteers" from Eastern Ukraine, Russia's guarantee of mainland Ukraine's territorial integrity, the termination of NATO's enlargement and making Ukraine's relations with EU compatible with its membership in the Eurasian Economic Union.

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[15] N.B. A representative public opinion poll conducted by OSCE could be more palatable to Moscow. O'Hanlon, Michael, Shapiro, Jeremy. *Crafting a win-win-win for Russia, Ukraine and the West*. Washington Post. URL: http://www.washingtonpost.com/opinions/crafting-a-win-win-win-for-russia-ukraine-and-the-west/2014/12/05/727d6c92-7be1-11e4-9a27-6fdbc612bff8_story.html (accessed 07.01.2015)

Crimea covers 26,200 square kilometres and had in 2007 about 2.3 million inhabitants. In terms of its territory and/or population, Crimea is thus larger than each of the five small members of the European Union (Luxemburg, Estonia, Slovenia, Cyprus and Malta), not to mention the five internationally recognized mini-states (Liechtenstein, Monaco, San Marino, Holy See-Vatican, Andorra) and the five unrecognized or less than universally recognized but *de facto* existing states or state-like entities in Europe. According to the last Ukrainian census held in 2001, 58 percent of Crimea's population were ethnic Russians, 24 percent ethnic Ukrainians and about 12 percent Crimean Tatars. The actual number and percentage of Russians were probably higher than the official Ukrainian count. There is no current data on the additional influx of Russian military, security and civilian personnel since March 2014 and on the considerable number of inhabitants (mostly Ukrainians and Tatars) who have left Crimea.

The Republic of Crimea and the federal city Sevastopol are today *de facto* parts of the Russian Federation constituting the Crimean Federal District and part of Russia's Southern Military District. On April 11, 2014 a new constitution was adopted by the Republic of Crimea. Most of the international community, however, does not recognize the annexation by the Russian Federation and considers the Autonomous Republic of Crimea as still belonging to Ukraine. On April 15, 2014, the Ukrainian Parliament declared Crimea and Sevastopol "occupied territories" while Ukraine's Prime Minister, Arseniy Yatsenyuk, solemnly declared several times that "Crimea has been, is and will be Ukrainian". In December 2014 his government discontinued all rail connections to Crimea, thus disconnecting it from Ukraine. Dmitri Medvedev, the Russian Prime Minister, on the other hand, declared the present status of Crimea a non-negotiable "closed chapter".[16] The political and legal stand-off between Ukraine and the Russian Federation will undoubtedly continue creating an additional "frozen" conflict in Europe.

[16] Dmitri Medvedev, *Rossia i Ukraina*, Nezavisimaya gazeta, December 15, 2014.

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South Stream Project and the Ukrainian Factor

Roxana Ioana Banciu[1]

Abstract*[2]*: *The paper seeks to develop an analysis of the South Stream project in view of the Ukrainian crisis. We cannot put aside the internal factor as Ukraine is facing serious internal issues such as corruption and instability, therefore Russia's invasion of Ukraine can not be simply ignored in this pipeline project. The article uses mostly facts that happened throughout last years, as well as for and against declarations in the case of the South Stream project and its mother Russia. When we hear about South Stream, we think of Russia and since 2007, this pipeline has encouraged Putin's faith in energy superpower. A good point to start with was to gather all declarations since then and cover all actions that regard the South Stream game. In Russian foreign policy for the South Stream race, Soft Power was used more than enough and it has recently made room for Hard Power, which is the Ukraine never ending episode. Insights of the South Stream story have been lately related both softly and hardly, this is the reason why I have chosen to analyse both sides in order to complete the energy landscape.*

Keywords: *Ukraine, European Union, pipeline, South Stream, Gazprom, crisis*

"No foreign policy - no matter how ingenious - has any chance of success if it is born in the minds of a few and carried in the hearts of none." [3]

(Henry A. Kissinger)

Taking a trip back in time, we can understand better the story of the project. Particularly, in 2007, Russia started a project of maximum amplitude and implication, in order to supply gas mainly for South-East Europe, via The Black Sea. The project consists mainly of a gas pipeline that will pass through the Black Sea, thus establishing a direct and reliable connection between the world's largest natural gas reserves and Europe's energy markets.

The South Stream project aims at the diversification of gas supply infrastructure routes for the safety of reliable and stable Russian natural gas supplies for the European Union.

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[2] This article was submitted to the RJEA editors in 2014.

[3] Energy Diplomacy quotes, available at http://www.brainyquote.com/quotes/authors/h/henry_a_kissinger.html#4OrKkj82gjPUbmbR.99, accessed on the 1st of June 2014, 13:00

The four shareholders of the South Stream Transport AG international joint-venture are OAO Gazprom, with 50% of shares, followed by Eni S.p.A. (20% of shares), EDF (15%), and Wintershall Holding GmbH (15%) – a BASF subsidiary. These are some of the world's leading energy companies that are active among the whole energy value chain, in electricity and natural gas.[4]

Fig. 1 South Stream Route[5]

The project consists of two types of pipelines, offshore and onshore. The first segment is a 900 km offshore pipeline from the Russian shore in Anapa, passing the Turkish Exclusive Economic Zone of the Black Sea at a depth of 2000 m and exiting on the Bulgarian coast near Varna. From here begins the onshore segment, crossing Serbia, Hungary, Slovenia, until reaching Italy; additional branches for Croatia, Bosnia and Herzegovina are also included.

Initially, the route options included passing through Romania's territory, but Romania did not want to take part in the project. In fact, there are suspicions that the project is just a masked attempt of Russia to enforce its influence and deepen the economic interdependence of the European states towards Kremlin, which was also a presumed reason for Romania's decline. Zeyno Baran sums up the situation in his research paper, *Security Aspects of the South Stream Project*: "Russia is clearly not moving in a pro-Western direction; instead, as the recent Georgian crisis has demonstrated, it is reasserting itself as a great power that can

[4] Zeyno Baran, *Security Aspects of the South Stream Project*, Center for Eurasian Policy Hudson Institute, October 2008
[5] "Rusia lanseaza constructia gazoductului South Stream", Hot News, available at http://economie.hotnews.ro/stiri-energie-13763564-rusia-lanseaza-constructia-gazoductului-south-stream.htm, accessed on 13 April 2014, 15:00

challenge the post-Cold War world order. The EU must carefully assess any new strategic energy project that will increase Russian influence (and leverage) over the continent.''[6]

The fact that this project will bypass Ukraine's economic exclusive zone, is a good marker of Russia-Ukraine disastrous marriage that seems to monopolize and affect the international map. Being re-routed through the Turkish waters, the project enjoys Turkey's support for accomplishing its road to Europe.

Even though attention can be drawn upon the possibility of the project as expansion of Russian soft power, one must also take into account the numerous advantages that the project entails.

First of all, it meets the EU growing demand for natural gas, consolidating Europe's energy security: "South Stream Offshore Pipeline will increase the security of supply of natural gas to Central and South-Eastern Europe as it creates a direct supply route and provides additional capacities. The system will contribute to European energy security in a safe, reliable, and environmentally responsible way and will help the EU member states to meet their CO2 reduction targets.''[7] Therefore, it will cover an important part of the European Union's natural gas import gap, making for approximately 10% of the total EU 2020 gas consumption, and providing energy for almost 30 million European households.[8]

Second, the alternative of natural gas takes into account the environmental issue, being the most climate-friendly, efficient, and abundant fossil fuel. Also, the project has been engaged in protecting the Black Sea environment and cultural heritage: "South Stream Transport AG will perform environmental, socioeconomic, and cultural heritage surveys to evaluate the baseline conditions of the offshore route. This will also allow us to assess the significance of potential impacts associated with project activities.''[9]

Third, it will be an important economic opportunity not only for Russia, but for all the partners, by the huge number of workplaces it will create as well as opportunities for contractors, and attraction for foreign investors.

Last, but not least, it is offering an alternative route to the existing ones from Russia. This role of diversifying routes is played very well by South Stream and no matter what it takes; the project will survive despite all energy wars.

Planning, licensing and construction of international pipeline investments require generally a multiple year long time frame, depending on the scale, the number and the commitment of the participants and the technology. During the planning phase, the technical, commercial and financial feasibility of the project is to be examined and the parties must agree on the plans and make investment decisions. On the technical side, the length, capacity and the different geological features of the route strongly influence the timeline of the project.

[6] Zeyno Baran, *Security Aspects of the South Stream Project*, Centre for Eurasian Policy Hudson Institute, October 2008, p. iii

[7] "South Stream project", available at http://www.south-stream-offshore.com/media/documents/pdf/en/2012/12/ssttbv_fact-sheet-south-stream-project_38_en_20121206.pdf, accessed on 13 April 2014, 20:00

[8] Idem

[9] Ibidem

The South Stream project was firstly announced on 23 June 2007, when Eni CEO Paolo Scaroni and Gazprom Vice-President Alexander Medvedev signed a memorandum of understanding. The memorandum contained the initial plans for the pipeline, with a planned capacity of 31 billion cubic metres (bcm), beginning in Beregovaya, Russia, and crossing the Black Sea to Varna, Bulgaria. Some 900 kilometres beneath the Black Sea were in discussion, reaching a depth of more than 2000 metres — the deepest sub sea pipeline ever constructed.

Fig. 2 South Stream project timeline[10]

By 24 April 2010, other memorandums were signed with the rest of the partners, EDF and Wintershall Holding GmbH, in the meantime having conducting also feasibility studies. The studies were finished in 2011, accelerating the decision for the final investment for 2012. Thus, although the construction was scheduled to start later, in 2013, it started on 7 December 2012.

December 31, 2015 is the date when Gazprom has scheduled the launch of the pipeline, but the partners hope to complete the project earlier if it is possible. However, the onshore section holds a risk of unexpected circumstances, which may mean a delay of the project. After this date, the extension of pipeline capacity and installation of pump stations will take place in order to continuously increase the pipeline capacity up to 63 bcm until 2018. Although this deadline is considered feasible, it is challenging especially because of the high number of involved parties.

However, there have been some events in Ukraine that shook the project in the past months. In order to better understand the phenomenon, an overview will clear up the whole picture.

[10] "South Stream pipeline", available at http://www.south-stream-offshore.com, accessed on 13 April 2014, 11:00

Over the past few years, Ukraine stood out as a very important region for both Europe and Russia, as it links them energetically and also represents a great target for each part's interests. We can say that all these years, Kiev's relationship with Moscow has been growing as a geopolitical and geoeconomic battlefield, in which Russians seek total control of Kiev's decisions. The past events in Ukraine and the ousting of president Yanukovich in February, after the street riots and the Vilnius decision in November 2013 lead to a negative position towards South Stream.

As for the Ukrainian factor in the development and future of South Stream, it is important to mention that Russia and European Union broke some ideological and strategic barriers in order to gain influence and pursue their own interest. Following the Vilnius decision, the triangle Russia-EU-Ukraine was constantly strained, and this had a domino effect on the South Stream pipeline, In this game, EU has constantly been turning some poisonous narrows and it is obvious that neither part wants to draw back in this battle for Ukraine, but it is also obvious that South Stream is as powerful as a fortress and fights back all possible attacks.

Particularly, Ukraine occupies a strategic position in the Wider Black Sea Area and in Central Europe. The strategic value of this position is determined by political, military and economic landmarks. A special relationship can be established between the strategic value of Ukraine in the context of Eastern and Central Europe and the economic and energy security of the continent. Even if they are classical and alternative to the European Union the economic and political value of the energy routes, highlights once again the importance of an independent Ukrainian state on the international arena. Obviously, Ukraine has great potential for development, including a market growth opportunity greater than the average large areas of the Black Sea area. This country behaves as a major consumer of energy and the main transit country for natural gas pipelines from the Russian Federation to EU.

In order to understand the present situation between Russia and Ukraine, concerning South Stream, we first have to look at the past issues. The origin of Russia-Ukraine gas disputes has its kernel in the Soviet period, when Ukraine was part and parcel of USSR and the pipeline system that supplied Europe with Russian gas was on Ukrainian land. Due to the small prices of internal Soviet gas and due to the subsidizing prices employed in the former Soviet Republics after the dissolution of USSR, many Central and East European countries developed inefficient internal industries. While Russia strived to raise the gas price for the former Soviet Republics, Ukraine took advantage of the fact that 80% of the gas exports to Europe move across its territory and used this transit monopoly to keep gas prices low for Kiev[11].

Gas disputes and several conflicts between Moscow and Kiev appeared in 1990 and 2000, reaching its peak on January 1, 2006, when Gazprom cut supplies to Ukraine because of the failure to reach an agreement for a proper market of Russian gas. At that time, Russia was accused of trying to punish Ukraine for attempting to withdraw from Moscow's sphere

[11]Andres, Richard B. and Michael Kofman and Micah J. Loudermilk, "Solutions for Russian-Ukrainian Gas Brinksmanship", *Journal of Energy Security*, March 2011, available at http://www.ensec.org/index.php?option=com_content&view=article&id=287:thinking-about-solutions-for-russian-ukrainian-gas-brinksmanship&catid=114:content0211&Itemid=374, accessed on 30 May 2014, 12:00

of influence and to strengthen ties with the European Union and NATO[12]. A short time afterwards, the head of Gazprom tried to maintain its company reputation worldwide by blaming Ukraine for all gas turmoil that might affect European consumers in the future. Since then, Ukraine continued to receive gas at a lower price than European consumers and the gas volumes distributed to these consumers weren't damaged in any way by these disputes until 2009. At that point in time, Kiev found itself at a terrible turning point when Russia decided to cut gas supplies to Ukraine starting with January 1, 2009. The reason was a simple one: Ukraine did not fulfil its payment at the end of 2008 for the gas supplied up to then.

Furthermore, Ukraine started to withdraw gas "reportedly needed to fuel the compressor stations on the transit pipelines moving the gas across Ukraine to European consumers with amounts reaching an average of 22 million cubic meters per day".[13] As prosecution, Russia also minimized transit volumes and supplied additional volumes to the European market, using other pipelines, but these extra volumes weren't enough to counterbalance the losses scored up to then.

Immediately after cutting the gas supplies in Ukraine, Vladimir Putin, in a meeting with the head of Gazprom Aleksei Miller, taking place on 6 January 2009, blames Kiev for stealing the gas of European consumers, who conscientiously bought and paid for the supplies.[14] According to Putin, the gas sent from the Russian gas company to the territory of Ukraine for the Western partners, "certainly cannot be considered contraband".[15]

In turn, speaking about the situation in the Balkan area, Miller said that Ukraine has covered the supply of Russian gas in this direction. Also, Miller added that Gazprom supplies the gas transportation system of Ukraine with the necessary volume of gas to the West, which is optimised to the maximum taking into consideration the fact that gas flows in the Yamal-Europe direction: "As for the gas supply to the border of Russia and Ukraine, we serve gas based on requests from customers, minus the volume of gas that Ukraine had stolen from Russia".[16]

As a consequence, many European natural gas importers had their business halted, even the main importer countries - such as Germany, France and Italy, and perceived as threatening the decrease of gas supply.

Below there is a map that shows the major damage produced by the gas crisis as more than 15 countries across Central Europe have been hit by the shutdown of Russian supplies. (See Fig. 3)

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[12] Paskhaver, Peter, "The Ukrainian Political and Economic Readiness for Integration into the European Union", May 2006, available at http://www.stern.nyu.edu/cons/groups/content/documents/webasset/con_043281.pdf, accessed on 30 May 2014, 12:00

[13] Ebel, E. Robert,"The Geopolitics of Russian Energy, Looking Back, Looking Forward", *Center for Strategic & International Studies*, (July 2009, Washington, DC), available at http://csis.org/files/publication/090708_Ebel_RussianEnergy_Web.pdf, accessed on 30 May 2014, 12:00, p. 10

[14] "Putin: Ukraina ukrala gaz u evropeiskih potrebiteli, kotorie za nivo zaplatili.", *Korrespondent,* January 6, 2009, available at http://korrespondent.net/world/russia/702079-putin-ukraina-ukrala-gaz-u-evropejskih-potrebitelej-kotorye-za-nego-zaplatili, accessed on 30 May 2014, 13:00

[15] Idem

[16] Ibidem

Fig. 3 Countries affected by crisis[17]

After 13 January 2009, the gas flow started again but only for European consumers, bypassing Ukraine. However, as Russia accused Ukraine of blocking the gas transit, later on the Ukrainian President explained that a multiple pipeline system does not allow transportation in a specific direction.[18] More than that, the Ukrainian President Viktor Yushchenko said that Kiev is ready to ensure the transit of Russian gas to West if Moscow fully resumes fuel supplies to the Russian-Ukrainian border: "It demeans national pride, it demeans the honour of the state, where dozens of voices repeat that Ukraine committed a theft, without doing a single step to prove it in the context of arbitration, and to establish the truth through the courts. And that's why we insist on the purpose of a European

[17] "Russia gas 'flows back to Europe'", *BBC News,* 13 January 2009, available at http://news.bbc.co.uk/2/hi/europe/7825476.stm, accessed on 30 May 2014, 13:00

[18] "Виктор Ющенко: Украина не может качать то, чего нет", *BBC Russian* , 15 January 2009, available at http://news.bbc.co.uk/hi/russian/international/newsid_7832000/7832291.stm, accessed on 30 May 2014, 13:00

Commission, whose aim should be to achieve an assessment of why it happened and who is to blame. Allocate a separate question - in terms of unpleasant comments as a citizen, as President: Ukraine behaved especially in accordance to the unauthorized selection of the Russian gas"[19].

In order to solve gas disputes, on January 17, 2009, Russia and Ukraine held a summit where a number of agreements were reached. In particular, it was decided for the first time that Gazprom will sell fuel to Naftogaz Ukraine without any intermediary - for 10 years. In addition, the Ukrainian side has agreed to buy Russian gas at a price that takes into account a 20% discount from the European side[20]. According to Prime Minister Yulia Tymoshenko, who was holding talks with her Russian counterpart, the respective contract would avoid future difficulties with the transit and gas supply as the process of establishing the price of gas would be predictable: "This is definitely an item and Ukraine's energy independence and I pledge for our normal relations".[21] In addition, Tymoshenko said that Ukraine will resume gas transportation to Europe immediately after the Gazprom begins to pump it into the gas transportation system of the country, assuring that Ukraine will respect its payment deadlines. At the same time, Vladimir Putin said that signing a contract with Ukraine does not require additional control over the transit of Russian gas.[22]

Strategically speaking, Russia has used its natural gas exports to put pressure on Ukraine. Some of the objectives were preventing Ukraine to join NATO and the EU, and fighting to get international support for the South Stream pipeline, considered to be another purpose to gain possession over the Ukrainian transit pipelines. The Russian Federation conducts a complex political relationship with Ukraine. For Moscow, Ukraine's accession to Euro-Atlantic structures would, among other things, signify the loss of any possibility to take full control over the strategic energy route in EU. In order to prevent this nightmare scenario, Russian policymakers employ various methods of action like blackmail combined with economic benefits; direct and indirect political interference in internal affairs; discouraging Ukraine's partners, such as Georgia, Azerbaijan, Turkmenistan, Kazakhstan and also European countries; encouraging energy cooperation between the Russian Federation, Turkey, Bulgaria, Romania, Serbia, Hungary, Austria; growing special energy relations with Germany, France and Italy, countries with important role in Europe.

Another intention of Moscow was to diminish public support for pro-Western leaders of the Orange Revolution in Ukraine in order to help restore a pro-Russian leadership in Kiev. From the perspective of its customers, the dispute has reduced Europe's confidence, both in Russia as a supplier, after the dispute in 2006, and in Ukraine as a reliable transit country, prompting a renewed interest in pipeline projects that will bypass Ukraine. And here is where South Stream project was revealed.

Following the disputes between Russia and Ukraine, the European Union renewed energy security discussions and declared its objectives to seek stable sources of energy, thus focusing on North Africa and Central Asia. Russia took advantage of this panic of energy

[19] Idem

[20] Gazprom i Naftogaz zaklucili kontrakt na postavki gaza", Lenta ru, January 19, 2009, available at http://lenta.ru/news/2009/01/19/contract/, accessed on 30 May 2014, 14:00

[21] Idem

[22] Ibidem

consumption to push on more political and economic support for South Stream, which will pass under the Black Sea, in competition with Nabucco (a pipeline linking directly Europe with Central Asia, bypassing Russia). The purpose of this project is obviously to bypass Ukraine.

Considering the South Stream project as a way of disciplining Ukraine and other transit countries, Vladimir Putin was convinced in 2009 that "diversification of our hydrocarbons will increase their stability and reliability. It will discipline, including our partners in transit [...] I very much hope that our main transit partner - Ukraine - will perform its contractual obligations in accordance with the contract signed in January 2009. If transit countries will fulfil their obligations, there will not be any problems from our side." [23]

Some declarations make clear the fact that Ukraine feels left behind after the 2006 and 2009 consequences, and strives to overpass the crisis and reset its relation with Russia. In 2010, Yanukovych predicted a decrease of gas transit through Ukraine as the South Stream pipeline will be launched. He pointed out the difference in gas supplies registered since 2007 when Ukraine pumped 125 billion cubic meters of gas to its gas transportation system, while in 2009 this amount decreased by 20%[24].The winner of the first round of elections in Ukraine said that Ukraine should thus compensate the loss from minimizing gas transit through its pipeline: "Within five years, if these two pipeline are build (North Stream and South Stream), we will lose another 50-60 billion cubic meters and we will stay like a dog in the manger for this pipeline"[25]. He further on stated that Ukraine should take part in the construction of the South Stream pipeline: "I will raise the issue of Ukraine's participation in the consortium for the construction of the North Stream and South Stream".[26] Yanukovych also convinced the press that Ukraine should thus defend its national interests in the energy sector. In particular, he believes that Ukraine should receive guarantees from Russia and the European Union for pumping annually a certain volume of gas through its gas transportation system.[27]

A significant pressure on Russia's South Stream project was felt also in 2011, when President Viktor Yanukovych, speaking at the 8th Yalta Annual Meeting, proposed to implement South Stream on Ukraine's territory: "South Stream must go on land to the south of Ukraine: this project is much cheaper than 25 billion euros as South Stream is evaluated today. Ours will be 5 times cheaper. We offer our partners in Europe and Russia flexible approach to cooperation".[28] An answer to this offer came immediately, as Gazprom apparently did not have to think long. Gazprom's Deputy chairman Valery Golubev said that the construction of South Stream, which is supposed to be laid from

[23] "Putin hocet distiplinirovati Ukrainu i grozit opiate ostaviti Evropu bez gaza, Polit, November 11 2009, available at http://polit.ru/news/2009/11/11/discipline/, accessed on 30 May 2014, 14:00
[24] Idem
[25] Ibidem
[26] "Ianukovici: Ukraina daljna stroiti i Iujnii i Severnii potoki"", Korrespondent, 20 January 2010, available at http://korrespondent.net/business/1038197-yanukovich-ukraina-dolzhna-stroit-i-yuzhnyj-i-severnyj-potoki, accessed on 30 May 2014, 14:00
[27] Ibidem
[28]"Iujnii Potok ": suhoputnii variant Ianukovicia ", INTERFAX, September 16th 2014, available at http://www.interfax.ru/business/208151, accessed on 30 May 2014, 14:00

Russia to Europe under the Black Sea, is not economically feasible through the territory of Ukraine: "It would be possible to navigate through Crimea, to go further in Yalta - the Black Sea, but what's the point when you can just go directly".[29]

Another historical crossroad in Russia-Ukraine-EU triangle was the **Vilnius point** in November 2013, when Ukraine, under Russian pressure, refused to sign the Association Agreement with EU and closed the EU door after several months of negotiations between Brussels and Kiev to try solving the case of the imprisoned opposition leader Yulia Tymoshenko. This refusal sparked the anger of pro-European opposition, leading to massive protests in Kiev reminding of the Orange Revolution in 2004. The post-Vilnius tensions in Ukraine reached a boiling point and degenerated into street confrontations, abuse of authority and violence, amid organizing massive protests in urban environments, especially in the capital and in the west. Clashes have already resulted in deaths and hundreds of people injured.

This is, in a nutshell, the strained political landscape of the past several months, captured in a picture which can evolve in any direction, including escalating violence and splitting the society between pro-European (Western and Central regions) and Russian-speaking people (major industrialised centres in the East).

Located in a significant geopolitical corner of the continent, measuring a game of power among different blocks of interest, Ukraine is now a high stake for both Russia and the West. After scoring high on the international scene in 2013, Putin has been facing a situation of losing control over Ukraine. The President of the Russian Federation had a successful 2013 year in foreign policy as he blocked the last minute military intervention of U.S. in Syria. More than that, Putin has brought Iran to the negotiating table and shocked the party leaders at the European Summit Vilnius as four of six Eastern Partnership member states have turned towards Russia, giving up the Association Agreement. To understand the foreign policy of Ukraine under President Viktor Yanukovych, we must take into account that since his accession to power in 2010, he leads the government and the majority in Parliament. Therefore, Kiev's decision at Vilnius can be seen as the *survival strategy* of Yanukovych regime and Russia will continue its attempts to draw Ukraine into the Customs Union.

Shortly after Vilnius Summit in November 2013, Ukraine had a decisive influence over South Stream, as every step of the way Russia had to face many attacks pointed by EU and US. The first obstacle was at the beginning of December 2013 when the European Commission accused the South Stream project of not complying with EU law and Third Energy Package standards, accusations that will be withdrawn at the end of January 2014. More details on this issue will be presented in the next chapter. Further on, in mid-December, after a meeting in Moscow with Viktor Yanukovych, Putin promised to lend Ukraine $ 15 billion in purchases of bonds issued by the Finance Ministry in Kiev in 2013 and 2014, and to reduce the price of gas by one-third to keep the former Soviet Republic on

[29] "Ianukovici predlojil prolojiti Iujnii Potok cerez Ukrainu", 16th September 2011, available at http://www.newsru.com/finance/16sep2011/yanuk.html, accessed on 30 May 2014, 14:00

the Russian orbit.[30] As protests went on and sanctions on Russia intensified, Putin changed his mind after annexing Crimea to Russia and announced through his spokesman, Dmitri Peskov that "the prospective of reducing the price of gas to Ukraine in exchange for using the Black Sea Fleet base no longer exists"[31]. This decision was explained by the fact that the Ukrainian side did not comply with the agreement signed in December, which provided not only the price cut, but also the debt repayment of Naftogaz. Accordingly, March 7 was the deadline set for the payment of gas supplies in February and Ukraine did not pay for Russian gas supplies in February, consequently the debt rose to 1.89 billion dollars: "It means that Ukraine has ceased to pay gas. We cannot deliver gas for free. If Ukraine will not adjust arrears, there is a risk to go back to 2009 crisis"[32]. Therefore, on 4 March 2014, the Chairman of Gazprom - Alexey Miller in a meeting with Russian Prime Minister Dmitry Medvedev announced that starting with April 2014, Gazprom will cancel discount on gas supplies to Ukraine.

Also, later in April 2014, there were EU attempts to freeze the construction of South Stream pipeline. This decision could be the first serious sanction against Russia. The European Commission President Jose Manuel Barroso in a meeting with Bulgarian politicians warned Bulgaria to be very careful as there are people in Bulgaria who are Russian agents, who tried to lobby for a bilateral agreement with Kremlin.[33] At that moment, Brussels considered South Stream project, which is built on huge contracts with oligarchs close to Putin, as a dead project, although its plans for construction are still alive.[34]

Further attempts on freezing the pipeline continue in May, when the European Commission requested the suspension of the South Stream pipeline project. As a response to this pressure, Vladimir Putin declared that South Stream could consider bypassing EU: "If we continue to have any problems regarding South Stream and Brussels constantly puts a spoke in South Stream's wheel - we will consider other options - through countries that do not belong to the EU. Just give the EU another transit country. Why Brussels is doing this, I do not understand. But we are confident, to realize these projects - the South Stream and North Stream".[35]

Since April 1, Russia cancelled all Ukrainian gas discounts, bringing a raising price of $485 per thousand cubic meters. In addition, Ukrainian authorities have repeatedly underlined that new prices are too high and stated that they are ready to extinguish the debt, but under the condition that the price will return to the level of 268.5 dollars[36]. In

[30] "Ukraina i Rossia: bratzkie obiatyia opasno krepciaiut ", UNIAN, 17 December 2013, available at http://www.unian.net/politics/864706-ukraina-i-rossiya-bratskie-obyyatya-opasno-krepchayut.html, accessed on 30 May 2014, 14:00

[31] "Peskov ni vidit osnavanii dlia skidok na gaz dlia Ukraini", RIA Novosti, 25 March 2014, available at http://ria.ru/economy/20140325/1000973996.html, accessed on 30 May 2014, 15:00

[32] "Gazprom prigrozil ustanavit postavki gaza na Ukrainu",NEWS Ru, March 7 2014, available at http://www.newsru.co.il/finance/07mar2014/gaz8020.html, accessed on 30 May 2014, 15:00

[33] "ES mojet zamorazit stroitelstvo Iujnovo Potoka ", *Ekonomichnaia Pravda,* 8 April 2014, available at http://www.epravda.com.ua/rus/news/2014/04/8/436418/, accessed on 30 May 2014, 15:00

[34] Idem

[35]"Putin: RF mojet rasmotrivati marshruti Iujnovo Potoka v obhod Evrosoiuza ", *RIA Novosti,* 24 May 2014, available at http://ria.ru/economy/20140524/1009176187.html, accessed on 30 May 2014, 16:00

[36] " Putin ne ponimayet, pochemu RF dolzhna snizit' tsenu na gaz dlya Ukrainy", *RIA Novosti,* 24 May 2014, available at http://ria.ru/economy/20140524/1009167281.html, accessed on 30 May 2014, 17:00

this respect, Putin reported that "our Ukrainian partners stopped regular payments since July last year. Now we hear that we need to reduce the gas price. And why should we? Contract is not provided." Pointing out some facts, Putin revealed the following: "I present real facts: in good times we gave discounts of $100 per thousand cubic meters as payment for our fleet base in Crimea. I suppose that someone does not recognize the fact that Crimea democratically joined the Russian Federation and for some reason it refuses to recognize people living in the country to self-determination. Let's not go into that part of the problem."[37]

Regarding the construction of the Bulgarian section of South Stream, with a length of 541 kilometres, due to begin this summer, an assertive move took over the press at the end of May 2014 when Jose Manuel Barroso warned the Bulgarian Prime Minister Plamen Oresharski that Bulgaria will be sanctioned if it does not conform with European rules: "I told the Council of Europe that some agreements that have been discussed and continue to be discussed in relation to South Stream, are not complying to EU rules. We will, of course, act in this regard. And today I informed about the Prime Minister's intentions over this aspect. It is a must that our domestic market rules are respected."[38] This measure is seen as one of Russia's punishment for abuses in relation to Kiev, after the annexation of Crimea and maintaining a tension of possible civil war in eastern Ukraine. Alexei Miller answered roughly to Barroso's move: "The European Commission cannot stop the construction; nobody can forbid us to build something. And our answer is very simple. Already in December next year, the first marine gas pipe will go through the Black Sea to Bulgaria and to the European Union."[39]

In addition, the Russian Energy Minister Alexander Novak said in May that the aggravation of the situation around Ukraine emphasizes the importance of the project South Stream. However, in mid-May the company South Stream Transport BV, operator of the offshore section of South Stream, entered into all contracts necessary to begin construction in the fall of 2014.The winner of the tender for the construction of the South Stream gas pipeline in Bulgaria declared *Stroytransgas consortium* consisting of the Russian company *Stroytransgaz*[40], controlled by Russian billionaire Gennady Timchenko[41].

Going back to Ukraine-EU-Russia triangle, we can say that regardless of gas prices, Kiev has no money to pay the duty, which is now extending up to 3 June. In fact, Gazprom may suspend gas supplies to Ukraine, if Kiev does not pay its debts. Solutions came out as Europe expressed its interest to help the Ukrainian debt as on 30 May, the EU Commissioner Oettinger testified that EU needs the Ukrainian pipeline as neither North Stream nor South Stream can solve the present problems of 2014: "It is our job to pay Gazprom directly. But

[37] Idem

[38]" Barrozu predupredil o reaktsii EK pri narushenii norm ES "Yuzhnym potokom ", *RIA Novosti,* 28 May 2014, available at http://ria.ru/world/20140528/1009639069.html, accessed on 30 May 2014, 17:00

[39]" Miller: Nam nikto ne mozhet zapretit' stroit' «Yuzhnyy potok» ", *Vzgliad,* 31 May 2014, available at http://www.vz.ru/news/2014/5/31/689386.html, accessed on 31 May 2014, 11:00

[40] "Stroytransgaz" - one of the companies that came under sanctions in connection with the situation in Ukraine.

[41] " Miller: Nam nikto ne mozhet zapretit' stroit' «Yuzhnyy potok»", *Vzgliad,* 31 May 2014, available at http://www.vz.ru/news/2014/5/31/689386.html, accessed on 31 May 2014, 11:00

we need to help Kiev pay the debt."[42] EU announced that it will allocate 2 billion dollars financial assistance to Ukraine, but "it is Kiev's own decision how specifically it will pay the money for the gas."[43]

In conclusion, South Stream will not be disturbed by any Ukrainian crisis and the problems between Moscow and Kiev will not affect the implementation of the project. More than that, gas disputes between the two countries will not come to an end as both parties need one another for different high purposes. It is possible that 3 June will be prolonged and Russia's interest is to keep close ties with the former Soviet Republic and counterattack Brussels. Additionally, European Union has also an important mission to support Ukraine even if that requires paying Kiev debts. Now, after signing an Association Agreement with EU, Ukraine has a big price on its head and Europe is confident that by helping Ukraine in a moment of despair, it can sign an Association Agreement and make Brussels the second mother care of Kiev.

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[42] "Yevrokomissar: Ukraina gotova 29 maya zaplatit' "Gazpromu" $2 mlrd.", *War and Peace,* 27 May 2014, available at http://www.warandpeace.ru/ru/news/view/90820/, accessed on 31 May 2014, 11:00

[43] Idem

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The Contribution of the European Court of Auditors to EU Financial Accountability in Times of Crisis

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Abstract*[2]*: *Financial accountability, as the obligation of public institutions to explain the way in which they manage public funds before the citizens or their representing fora, is undoubtedly linked to systemic legitimacy in any political system, especially in times of economic harshness. Within the European Union, the institution embodying financial accountability is the European Court of Auditors (ECA). This paper represents a critical appraisal of the contribution of the ECA to restoring trust among European citizens. After recalling the theoretical link between financial accountability and legitimacy, a section highlights the particularities of financial management in a system of multilevel governance as the EU. The ECA's institutional setup is then revised, in order to pinpoint potential gaps in its design that would reduce its effectiveness as the EU financial watchdog. Finally, attention is brought to the increased involvement of the ECA in solutions aimed at coping with the financial crisis. Recent developments show that the ECA is fully embarked in an institutional strategy to help cope with the financial and legitimacy crisis in the European Union.*

Keywords: *financial accountability, public management, systemic legitimacy, European Union*

JEL Classification: *K00*

I. Introduction

"The European Court of Auditors is an audit institution that is unique in the world – every bit as unique and inimitable as the European Union itself. Succeeding in carrying out the ECA's mission should not just be an internal challenge facing the Court. It should be the wish of every EU citizen that the ECA carry out its mission par excellence."[3]

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[2] This article was submitted to RJEA editors in 2014.

[3] Former Member of the ECA and current Vice-President of the Polish supreme audit institution Jacek Uczkiewicz, 'The Court as I remember it, the Court as I see it', in European Court of Auditors, *Reflections. 35th Anniversary of the European Court of Auditors,* Luxemburg, 2014, p. 40.

The ECA was established as a European Community institution by the Treaty of Brussels of 22 July 1975[4] and was promoted to the status of EU institution by the Maastricht Treaty[5]. Its headquarters are in Luxembourg. Since its inception, the ECA has claimed to be the "financial conscience" of the European Union[6]. The ECA is entitled by the Treaty to watch over sound financial management of EU funds in a twofold way: *ex ante* through its consultative function in the course of legislative reform and *ex post* through audit of the EU budget implementation.

This paper examines the role of the European Court of Auditors as a supranational audit institution in providing solutions that help alleviating the effects of the severe economic crisis that has hit Europe since 2008. This crisis, the worst since the Great Depression of the 1930s, has urged audit institutions to take on new challenges in order to strengthen financial accountability, which is acknowledged as a complementary dimension of legitimacy in any political system.

This paper is structured around three main parts. Firstly, section II aims at conceptualising financial accountability and the link between financial accountability and legitimacy from the European Union perspective. Section III then concisely explains the basic features of financial management in the EU, with a particular focus on various shortcomings that arise from the difficulties to establish sound budget management in a multilevel governance system as the European Union. Initiatives put in place by the ECA are then revised in Section IV, in order to ascertain the contribution of this institution to better accountability in a post-crisis scenario. The final section summarizes the main conclusions of the paper and suggests paths for further research.

II. Financial accountability and legitimacy in the European Union

Neither the fragile external action, nor the lack of consistency of EU policies embodies the archenemy of the European integration process. If something can really undermine the long-lasting project of an "ever closer union among the peoples of Europe"[7], it is certainly the existing lack of ownership among European citizens as regards common institutions. It is now widely accepted that the EU can aspire at enjoying some kind of democratic legitimacy even in the absence of a coherent polity[8], but scholars have identified different dimensions of legitimacy throughout time. Friedrich Scharpf coined the terms *input* and

[4] Treaty amending certain financial provisions of the Treaties establishing the European Economic Communities and of the Treaty establishing a single Council of the European Communities, signed in Brussels on 22 July 1975, in force since 1 July 1977, OJ L 359 of 31 December 1977.

[5] Article G.6 of the Treaty on European Union, signed at Maastricht on 7 February 1992, OJ C 191 of 29 July 1992.

[6] This expression was coined by Hans Kutscher, the President of the European Court of Justice, at the swearing-in ceremony of the first European auditors in 1977.

[7] Preamble of the Treaty establishing the European Economic Community (TEEC), signed in Rome on 25 March 1957, http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf .

[8] Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', *Journal of Common Market Studies*, vol. 44, no. 3, 2006, pp. 533–62; Robert O. Keohane, 'Accountability in world politics', *Scandinavian Political Studies,* vol. 29, no. 2, pp. 75-87 at 78.

output legitimacy[9]. EU's legitimacy lay for a long time in its ability to govern "for the people", namely, to provide citizens with solutions to problems related to the economy and the internal market *(output legitimacy)*. As accusations of democratic deficit soared in the eighties, the focus of public opinion shifted from *output legitimacy* towards concerns that the EU system was not governed by the people *(input legitimacy)*. Filling the gap proved arduous and it unfolded throughout several reforms of the constitutional treaties. The citizens' initiative represents the most specific feature of deliberative democracy in the EU nowadays[10].

Yet another type of democratic legitimacy was singled out by Laffan under the label of *systemic legitimacy*[11]. Systemic legitimacy brings to the fore the efficiency of the structures, rules and processes of accountability, with a view to increasing citizens' trust in the functioning of the political system[12]. Theoretical frameworks on legitimacy have generally failed to pinpoint indicators of EU performance that might help measuring gains and losses of citizens' trust, as well as anticipating the consequences whenever a crisis of the model breaks out[13]. The economic crisis that bursted in 2008 provides a good example of it.

The link between accountability and democratic legitimacy in the European Union is emphasized in periods of crisis[14]; yet accountability proves to be an elusive concept. For all definitions, we recall the one proposed by Bovens *"a social relationship between an actor and a forum in which the actor explains his conduct and gives information to the forum, in which the forum can reach a judgment or render an assessment of that conduct, and on which it may be possible for some form of sanction (formal or informal) to be imposed on the actor"*[15]. This definition provides a clear framework suitable to any kind of accountability because it focuses on the relationship between the actor and the forum. However, the term "public accountability" is more often used to refer to the set of constitutional controls on the executive[16]. Financial accountability, in turn, has traditionally lagged behind in scholarly attention[17]. This trend is being slowly reversed in

[9] Friedrich Scharpf, 'Problem-solving effectiveness and democratic accountability in the EU', Max-Planck-Institut für Gesellschaftsforschung Working Papers, no. 1, 2003, available from http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp01-4/wp01-4.html (accessed 31 July 2014).

[10] Oana - Măriuca Petrescu, 'Strengthening the Idea of "By Citizens, for Citizens" in the Context of the European Citizens' Initiative – Brief Analysis of Initiatives –', *Romanian Journal of European Affairs*, vol. 14, no. 2, 2014.

[11] Brigid Laffan, 'Auditing and accountability in the European Union', *Journal of European Public Policy*, vol.10, no. 5, pp. 762-777 at 763.

[12] Maria-Luisa Sánchez-Barrueco, '*The 2012 Financial Regulation: Building the cathedral of EU legitimacy?*', in CKS e-book 2014, pp.842-860.

[13] Erik Jones, 'Output Legitimacy and the Global Financial Crisis: Perceptions Matter', *Journal of Common Market Studies*, vol. 47, no. 5, pp. 1085–1105 at 1091.

[14] For instance, after the 1999 collective resignation of the Santer Commission, the Prodi Commission whole-heartedly embraced accountability in its 2001 White Paper on Governance, COM (2001) 428 final, 25 July 2001.

[15] Mark Bovens, 'Analysing and assessing public accountability. A conceptual framework', *European Governance Papers (EUROGOV),* nº C-06-01, 2006, available from http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf (accessed 31 July 2014).

[16] Carol Harlow, *Accountability in the European Union*, Oxford University Press, New York, 2002, p.7.

[17] Staffan I. Lindberg, 'Mapping accountability: core concepts and subtypes', *International Review of Administrative Sciences,* vol. 79, no. 2, 2013, pp. 202-226.

the wake of the economic and financial crisis. Pressure on public finances in all Member States has prompted the EU to provide assurances that its institutions are mobilising and spending their resources even more wisely on behalf of its citizens and taxpayers.

III. Breaches of financial accountability in the legal framework of EU budget management

The basic features of budget management and financial control in the European Union are examined in this section, as a means of paving the way for analysis on the contribution of the ECA to better financial accountability. It is worth noting that articulating a consistent model of financial control in a multilevel management environment has posed difficulties from a constitutional viewpoint. Therefore, a number of shortcomings in financial accountability stem directly from the legal framework itself.

Cipriani notes that the specific features of the EU budget have weakened the link between the Community budget and the European taxpayers. Two false ideas have arguably spread among EU citizens. On the one hand, that European "funds 'grow on trees' and that they therefore constitute a kind of 'manna' to be taken advantage of"[18]. On the other, that the Brussels bureaucratic system is a monstrous pitfall in which moneys are squandered without control. Both harmful perceptions undermine trust on the system as a whole and trigger broad public frustration. According to Neyer, traditional mechanisms of institutional engineering, such as further expanding the competences of the EP or opening additional doors to transparency, are not the key to redressing such frustration. On the contrary, the EU should provide a truly accountable management of shared funds which is accordingly communicated to the average citizen[19].

Budgetary implementation starts with the adoption of the annual budget by the Parliament and the Council, following a complex procedure enshrined in articles 314 to 316 of the Treaty on the Functioning of the European Union (TFEU)[20]. The fundamental scheme has remained unchanged from the outset. Member States designed the Community budget to respect the principle of budgetary equilibrium, meaning that the organization's running costs should always be financed by its revenues and not by debt. Budgetary equilibrium is a well-established principle that applies also to national institutions. The fundamental difference at the EU level lies in the fact that the principle of budgetary equilibrium has always enjoyed constitutional guarantees in the European Union, enshrined with binding force in the Treaty[21], whereas it remained a bare principle at the national level. The lack of legal constitutional measures to ensure a balanced budget ("golden budgetary rule" or, following the German expression, "debt brake") led several governments to accept ever growing public deficit as normal. In the wake of the economic

[18] Gabriele Cipriani, '*The responsibility for implementing the Community budget*', CEPS Working Papers, no. 247, 2007, p.18.

[19] Jürgen Neyer, 'Justice, not democracy: legitimacy in the European Union', *Journal of Common Market Studies*, vol. 48, no. 4, 2010, pp. 903-921 at 907.

[20] Treaty on the Functioning of the European Union, signed in Lisbon on 17 December 2012, OJ C 306 of 17 December 2007.

[21] Article 199 TEEC, currently 310.1 TFEU.

crisis, however, budgetary balance was advocated by many as a key factor to capping the sovereign debt and therefore recovering sustainability and stability in the euro zone. It is the reason why article 3 of the Treaty on Stability, Coordination and Governance (TSCG), also known as the European Budgetary Pact or "fiscal compact"[22], now imposes the "golden rule" to its signatory parties. Hence the introduction of budgetary balance in many national constitutions or similar legal measures, the legality of which can be referred to the Court of Justice (ECJ)[23].

Further to the constitutional principle of budgetary balance, Member States have legally prevented the European Union from entering into budgetary deficit through the imposition of annual financial ceilings grouped in a seven-year financial framework also known as the Multiannual Financial Framework (MFF) or the 'financial perspectives'. The MFF thus provides assurances to national treasuries that the European institutions will not engage in activities for which not enough money has been budgeted. However, the MFF also serves an often hidden goal: that of allowing EU institutions to pursue effective policies over a relatively long timeframe by means of strengthening the predictability of EU revenues. According to article 312 TFEU, the MFF is enacted in the form of a regulation proposed by the Commission, then adopted by the Council by unanimity, following assent of the European Parliament (EP). Under such procedure, Member States hold stiffly the key to deciding the priority areas for EU expenditure in the upcoming years; therefore, negotiations are tough before reaching agreement. The MFF currently in force covers the 2014-2020 period[24].

Beyond the treaties, the Financial Regulation (FR) is the main rule governing the adoption and management of the EU budget. The "financial bible" of the EU was adopted in 1977, and has been subject to two major revisions since then. The first reform was enabled by Council Regulation 1605/2002[25] and represented an attempt to regain citizens' trust on financial accountability following the collective resignation of the Santer Commission in 1999. More recently, the FR has been revamped through Regulation 966/2012 of the EP and the Council[26].

Budgetary management is the task of the European Commission, following Articles 17 TEU and 317 TFEU. The Commission executes the budget "on its own responsibility" but not on its own. Four different methods of managing the EU budget are identified (Article 58.1 FR): centralised (by the Commission), shared (by national administrations),

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[22] Treaty On Stability, Coordination and Governance in the Economic And Monetary Union, signed in Brussels on 2 March 2012, http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf. To date, all Member States but the United Kingdom and the Czech Republic have ratified the Treaty.

[23] Laura Gómez, 'El Tratado de Estabilidad, Coordinación y Gobernanza dentro del nuevo marco condicional de cohesión social en la Unión Europea', *Revista de Derecho Comunitario Europeo,* vol. 16, no. 42, 2012, pp. 521-541; Alberto De Gregorio, 'El Derecho de la Unión y el Tratado de estabilidad, coordinación y gobernanza en la Unión Económica y Monetaria', *Revista española de derecho europeo*, no. 45, 2013, pp. 27-60.

[24] Council Regulation (EU, EURATOM) no 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ L 347 of 20 December 2013.

[25] Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248 of 16 September 2002.

[26] Council Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, OJ L 298 of 26 October 2012.

decentralised (by third countries) and joint with international organisations. Interestingly enough, the lion's share of the EU budget (some 76%, according to the Commission estimates[27]) is implemented by national authorities under shared management. The legal design devised by the Treaty results in a clear asymmetry of respective rights and obligations of the Commission and Member States. To put it bluntly, whereas the Commission executes directly only a meagre 22%, it is held accountable for sound financial management of the EU budget in its entirety. Since the Commission has not been endowed with power to subject national payments to *ex ante* authorization, but can only carry out *ex post* controls in Member States, national authorities are not portrayed as fully responsible for financial accountability, but rather as mere bystanders that "cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management" (Article 317 TFEU).

Taking into account that the bulk of EU expenditure is managed at the national level, the EU legal framework contains a system of checks and balances in the form of specific obligations that bind Member States when implementing EU funds, but it leaves room for breaches in accountability that jeopardize the protection of the EU's financial interests.

The legal framework does require Member States to carry out regular checks to ensure correct management, to prevent irregularities and fraud and to recover funds wrongly paid under Article 59.2 FR, but the system does not embrace a model of 'shared responsibility'. It does not follow a 'delegation' logic either, contrary to what Article 61 FR suggests. Under a delegation model, the Commission would hold fundamental responsibility while wielding power to precise the implementing tasks of Member States and supervise the use of funds. This is missing in the EU framework for budget management. The Commission provides general orientations in the form of handbooks, before the funds are spent by national authorities; however, neither exploratory visits nor *ex ante* authorization for the appropriations of funds are carried out on a regular basis. Once the funds have been spent, the model establishes a presumption of sound financial management unless the Commission finds out evidence of committed irregularities during regular checks or on-the-spot audits. In practice, the Commission relies on national authorities' own statements on the legal and regular use of funds. Accordingly, the framework for internal control of budget management, which should be guaranteed by the Commission as the ultimate manager, is far from optimal.

The lack of ownership among national authorities as regards EU funds is therefore a source of concern. In a true system of shared management, the internal audit service of the Commission would play the role of the internal control on the national authorities, just as the relevant department in the government as regards the national budget. But this is not the case: national authorities distrust the Commission's audits as yet another 'external control' adding up to that carried out by the ECA. Answering stiff pressure from the EP, several Member States started to issue "national declarations" in the late 2000s. A "national declaration" is a statement of assurance issued by the national finance minister, in support of the legality and regularity of the underlying transactions implemented in that Member State. In turn, the national supreme audit institution assesses the declaration.

[27] http://ec.europa.eu/budget/budget_glance/how_managed_en.htm.

So far, the Council has blocked all attempts at introducing a legally binding obligation to issue national declarations. They thus remain voluntary (Article 59.5 FR). Only four Member States (Netherlands, Denmark, United Kingdom and Sweden) release national declarations on a regular basis. Whether these declarations produce a noticeable improvement in the level of financial accountability, through increased transparency on the use of EU funds, remains subject to discussion[28].

It seems fit to bring attention to gaps in the legal framework of recovery of funds unduly spent or revenues not perceived at the national level. It should be noted that undue payments or revenues not perceived are not forcefully intentional or fraudulent, but may well result of a wrong interpretation of the complex legal framework. Essentially, every payment unduly authorized by a national authority must be recovered from the beneficiary, in order to protect the EU financial interests and to allow the Commission to get acquitted of its responsibility. It might happen, though, that the beneficiary is not in a position to reimburse the money. Should this occur, the Member State would be obliged to cover the loss to the EU budget by its own means. In practice, however, the recovery procedure shaped by the Financial Regulation represents a lengthy mechanism which allows for a belated restoration of budgetary balance, if any (Article 80.4 FR)[29].

When the Commission questions the compatibility of a national financial measure with the EU legal order, it may adopt a decision imposing financial corrections on that State, meaning that a variable share of its expenditure will be excluded from EU financing. However, two features reduce the effectiveness of the financial corrections procedure as a mechanism for safeguarding financial accountability in the EU.

The first shortcoming stems from the lack of a coherent regulatory framework to cope with irregularities in the national implementation of EU funds. A myriad of specific sectorial rules governing shared management in the main fields of EU expenditure contain procedures for financial corrections[30], which may give rise to differences in the scope and

[28] House of Commons (Public Account Committee), Financial Management in the European Union, 32nd Report, Session 2008-2009, 15 June 2009, http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubacc/698/69802.htm2009.

[29] A final sentence in Article III-407 of the late Treaty establishing a Constitution for Europe referred to the FR the regulation of "the control and audit obligations of the Member States in the implementation of the budget and the resulting responsibilities". That expression is missing in 317 TFEU.

[30] Among other, Articles 99 and 100 of Council Regulation (EC) N° 1083/2006 of 11 July 2006, laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, OJ L 210, of 31 July 2006; Articles 97 and 98 of Council Regulation (EC) N°1198/2006 of 27 July 2006 laying down general provisions on the European Fisheries Fund, OJ L 223, 15 August 2006; Article 44 of Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General Programme ´Solidarity and Management of Migration Flows, OJ L 168, 28 June 2007; Article 46 of Decision 573/2007/EC of 23 May 2007 of the European Parliament and the Council establishing the European Refugee Fund (ERF III) for the period 2008 to 2013 as part of the General Programme Solidarity and Management of Migration Flows, OJ L 144, 6 June 2007. Most recently, Article 55 of Regulation (EU) No 223/2014 of the European Parliament and of the Council on the Fund for European Aid to the Most Deprived, 11 March 2014, OJ L 72 of 12 March 2014.

intensity of the Commission's oversight. The Commission has only recently adopted a decision establishing basic guidelines on the financial corrections procedure[31].

Additionally, it must be highlighted that procedures unfold over a long timeframe, a feature that severely weakens the effectiveness of this procedure as a dissuassive mechanism for national authorities. Indeed, the Commission pursues irregularities in Member States and menaces them with financial corrections. Former Commissioner Dacian Cioloş noted earlier in 2014 that net financial corrections imposed in the framework of EU agriculture policy alone amount to around 1 billion euro per year[32]. What he failed to acknowledge is the fact that these funds are not automatically reimbursed to the EU budget. In practice, the implementation procedure of financial corrections often gets trapped in legal quagmires between the national authorities and the Commission throughout a long time-frame, let alone if the matter is referred to the ECJ. The amount of funds whose recovery is deemed impossible should not be underestimated[33]. The ECA recently denounced that, whereas financial corrections would have tripled between 2011 and 2012, the rate of recovery remained essentially constant[34].

A system in which financial irregularities can be committed but proper punishment luckily arrives several years afterwards cannot contribute to dissuade wrongful or unlawful behaviour among national authorities. Some of them might even be inclined to include potentially ineligible grant payments in their accounts and wait for the Commission's financial corrections to arrive, as the UK National Audit Office once pointed out[35]. Overall financial accountability and legitimacy of the EU suffer as a result.

The economic crisis is the worst since the Great Depression of the 1930s. It originated at the national level, due to unreasonable practices in public procurement and ill-advised links between the public and private spheres; therefore, the contribution of budget management at the EU level to the global economic crisis is statistically irrelevant. Nevertheless, only the gullible believe now that the crisis was a question of fate. Most analysts affirm that the main risks would have been detected, had proper assessment of the convergence criteria laid down in the Growth and Stability Pact been carried out. A firmer attitude of audit institutions before deviations in public management might have avoided,

[31] Commission Decision of 19 December 2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under sharedmanagement, for non-compliance with the rules on public procurement, C(2013) 9527.

[32] Answer given by Mr Cioloş on behalf of the Commission to the question for written answer E-013204/13 to the Commission by Patricia van der Kammen, 8 January 2014, OJ C237 of 22 July 2014, p.160.

[33] A practical example may well illustrate this. Following on-the-spot audits in the Spanish tomato sector in early 2004 as regards funds implemented in 2003, the Commission opened a confirmation clearance procedure against this Member State which ended with a decision containing financial corrections in April 2007. By then, four years had been spent in to-ing allegations and fro-ing replies, a Conciliation body in-between, before the final decision was issued. Spain then sought annulment of the decision by the Court of First Instance in June. The General Court confirmed the Commission's decision in its ruling of 28 October 2010 (Case T-227/07 *Spain v. Commission* [2010] 28 October 2010). Yet over €4 million remain subject to recovery more than ten years after the funds were unduly spent.

[34] European Court of Auditors, 2012 Annual Report, OJ C 331 of 14 November 2013, point 1.19.

[35] A national department would have included a provision of £72.9 million in its accounts for 2007-8 to cover ineligible funds, aware that it would be subject to correction sooner or later. National Audit Office, Financial Management in the EU, Report by the Comptroller and Auditor General, HC 349 Session 2008-2009, 27 March 2009, point 13.

or at least reduced the dimension of several bail-outs. As always, audit institutions feel compelled to reduce the negative impact on financial accountability caused by breaches in budgetary management. However, new salient challenges have emerged as a result of the management of the euro crisis. All across Europe, citizens are demanding effective oversight of the accuracy of macroeconomic statistics provided by governments and private sector entities, as well as transparent accountability of the way in which financial assistance has been spent.

The crisis has thus created new challenges for supreme audit institutions. A report jointly published by several audit institutions (including the ECA) pinpointed five new areas in need of their contribution[36]: a) audit of sustainability of public finances with a particular focus on fiscal transparency, in order to press political authorities to consider long-term fiscal stability when taking short-term decisions; b) audit of governments' implicit guarantees for large financial groups, to prevent their risks becoming systemic; c) audit of the operations of the central banks aiming at financial stability, within the new regulatory and supervisory framework, to help parliaments ensuring accountability; d) better international coordination and cooperation, to prevent the perverse effects of fragmented accountability in a globalised scenario; and e) devising accounting standards that contribute to transparent and reliable financial reporting by executive authorities. The next section will precise the ECA's contribution to restoring trust in EU financial management.

IV. The contribution of the European Court of Auditors

An honest appraisal of the ECA's contribution to restoring trust in EU financial accountability in the aftermath of the economic crisis can only be accomplished on the basis of its own marge of manoeuvre. We will thus offer a synthesis of ECA's competences and powers (a) before delving into its specific initiatives (b).

a) The competences of the ECA

The Treaty endows the ECA with audit and consultative powers.

First and foremost, the ECA must carry out the 'external control', under article 285 TFEU. The results of audit on the accounts of all revenue and expenditure of EU institutions and agencies (article 287.1 TFEU) are reflected in an Annual Report and several special reports every year, which are taken note of by the Council and the Parliament in the framework of the discharge procedure (Article 319 TFEU).

The trigger of the ECA's audit power lies in the origin of the funds as Union's funds, the ECA can then follow the money downwards to the very last recipient, unlike other national accounting offices and courts of auditors whose powers are defined *ratione personae* (i.e. they can control the funds of sole national public administrative bodies, regardless of where they come from). In the framework of its audit power, the ECA carries out frequent on-the-spot missions both in its fellow European institutions and in Member

[36] Riksrevisionen (Swedish supreme audit institution, coordinator), The causes of the global financial crisis and their implications for Supreme Audit Institutions, Stockholm, October 2010, available from http://www.intosai.org/uploads/gaohq4709242v1finalsubgroup1paper.pdf (last accessed 31 July 2014).

States. In the latter case, it must liaise with national audit bodies; therefore, no room is left for surprise inspections. Article 287.3 TFEU calls for cooperation with national authorities "in a spirit of trust while maintaining their independence". Although the ECA benefits from an extended right of access to national files according to Article 287.3 paragraph 3, it can neither impose penalties should local authorities refuse to cooperate, nor bring the non-compliant State before the ECJ, for it lacks standing to initiate an infringement procedure (article 260 TFEU) and it hinges on the Commission's will in this regard. This is but an example of the lack of adaptation of judicial remedies to an institution created two decades after the Treaties of Rome were signed[37]. Fortunately, the ECA has been reassured by the Commission and the ECJ when a Member State has refused to release information relevant for a specific audit[38].

Two are the main insufficiencies suffered by the ECA to fulfil its audit role: the lack of sufficient human resources and its consultative nature. Firstly, the ECA faces a long-standing work overload that the Parliament and the Council seem unwilling to redress, even less under current economic conditions. As a result, the ECA does not ensure a thorough audit of budget implementation of the whole EU budget and the European Development Fund. Instead, extensive control only targets policy areas prone to irregularities, according to samples. On the other side, the Court remains a consultative body, despite its name. The results of ECA's audits strengthen the diffuse system of oversight on the Commission as the manager of EU funds. However, the ECA's reports remain prisoner of the attention paid by the controlled bodies, on the one hand, and the Parliament and the Council, on the other. For obvious reasons, the Council is not keen to name and shame Member States in which financial irregularities are committed, but deviates attention towards the Commission's responsibility as regards internal control.

In the framework of its consultative function, the ECA takes part in the legislative procedure through non-binding opinions which aim at improving the legal framework of budgetary management. In doing so, it contributes to rooting out financial irregularities long before they are committed. The underlying philosophy builds on the ECA's privileged place to detect, through its audit function, which flaws should be corrected as regards EU budget management. However, this function is shaped in a non-binding fashion, thus hampering the likeliness of a significant impact of ECA's opinions in the final text adopted by the Legislative authority. Consultation to the ECA may be compulsory or voluntary, but no clear boundaries between them are set in the Treaty[39]. As a result, the Council has failed to consult the ECA every now and again[40].

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[37] Maria-Luisa Sanchez-Barrueco, *El Tribunal de Cuentas Europeo. La superación de sus limitaciones mediante la colaboración institucional*, Madrid, Dykinson, p. 119.

[38] See notably Judgment of the Court (Grand Chamber) of 15 November 2011, European Commission v Federal Republic of Germany, C-539/09.

[39] Article 322 TFEU establishes an obligation to consult the Court before adopting "the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts". Furthermore, the ECA must be consulted prior to reform of the regimes applicable to own resources, responsibility of financial actors, and the fight against fraud or protection of the EU's financial interests, according to the Treaty. Finally, the ECA is given a say on the financial regulations of the EU's various agencies, depending on the relevant constituent act.

[40] However, the ECA has never brought an action for annulment before the ECJ for lack of consultation.

b) Lessons learned and new initiatives adopted by the ECA in the framework of the economic crisis

At the June 2012 European Council, the Member States tasked the Herman van Rompuy, as President of the European Council, to draft a document setting a roadmap towards a genuine economic and monetary union (EMU). The report, prepared in close collaboration with the presidents of the Commission, the Eurogroup and the European Central Bank (ECB) was eventually submitted at the December 2012 European Council[41]. The roadmap identifies three stages in the development of a true EMU and five building blocks. The last one refers to "Democratic Legitimacy and Accountability" which contains calls for new contractual agreements that help guaranteeing adequate accountability of the ECB and the Single Resolution Board within the new framework of the banking union, as well as parliamentary oversight at the pertinent level according to the principle of subsidiarity. No explicit mention was made to the ECA; however, on the occasion of an event commemorating the 35th anniversary of that institution in September 2013, its president picked the glove up and expanded on the potential role of the auditor under the new framework[42]. He seized the opportunity to claim changes in the role of auditors. Specifically, providing the citizens with effective accountability for results would require firmer steps towards evaluation of public policy performance (value-for-money audit) instead of the current focus on legality and regularity. As President Van Rompuy has recently affirmed, *"the focus has to be above all on results. We need to show how this money is making a difference for citizens across Europe. That's why the growing emphasis in the Court's work on performance auditing is to be encouraged and developed. Because it helps politicians and policy makers answer the two key questions they continually ask themselves: first, is the money allowing us to achieve our agreed objectives and second, could we do it more efficiently? At the end of the day, I'm convinced it's above all through results that we will convince citizens".*[43] Accordingly, a core challenge for the ECA in the coming years will be the definition of adequate indicators to measure performance in complex budget management areas, such as youth employment or research and development, which have received a boost under the 2014-2020 Multiannual Financial Framework. For the time being, the ECA has fixed, as a key priority, the improvement of its own capacity to carry out performance audits[44].

We examine now the increasing role acquired by the ECA in the framework of the new financial regulatory framework. The new economic governance is as new for the ECA as it has been for the rest of institutions. Structural changes within the institutions have thus been necessary to cope with the new challenges. A special team composed of trained auditors from within and outside the Court has been recently set up[45]. Three issues

[41] Herman Van Rompuy, Towards a genuine Economic and Monetary Union, 5 December 2012, available from http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf (last accessed 31 July 2014).

[42] Vítor Caldeira, Speech at the Conference on European governance and accountability, 13 September 2013, ECA/13/26.

[43] Keynote Speech by President of the European Council Herman Van Rompuy at the closing event of the celebration of the 35th anniversary of the European Court of Auditors, Luxembourg, 12 September 2013, EUCO 183/13.

[44] Vítor Caldeira, Presentation of the ECA 2014 Annual Work Programme to the European Parliament Committee on Budgetary Control, Brussels, 18 March 2014, ECA/14/09.

[45] Ibid.

advance the involvement of the ECA in this domain, namely: its participation in the Board of Auditors of the European Stability Mechanism as of 2012, its close examination of the European Banking Authority in May 2014, and accountability of the Single Resolution Board established in July 2014.

The ECA lacks specific powers regarding the European Stability Mechanism (ESM) that superseded the temporary European Financial Stability Facility (EFSF)[46] from October 2012 on[47], due to the intergovernmental nature of the funds that feed the ESM, completely apart from the EU annual budget. Nevertheless, the ECA will have a relevant impact on the accountability of this financial facility through the ESM Board of Auditors, for the ECA appoints one of the five members of this body which, in turn, fulfils a chairing role, under Article 30 of the ESM constitutive treaty.

Secondly, the ECA published in May 2014 a Special Report on the establishment of the European Banking Authority (EBA)[48] which shows its willingness to stay involved in all processes and mechanisms that may have an impact on the new financial regulatory framework. In this case, the ECA's audit was aimed at assessing *"whether the Commission and EBA had satisfactorily carried out their responsibilities in setting up the new arrangements for the regulation and supervision system of the banking sector and to examine how successfully those new arrangements were functioning"*. As a result, six recommendations for improvement were made to the EBA and the Commission, which were generally accepted by these two bodies.

The Single Supervisory Mechanism (SSM) was established in 2013[49] to ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, and that those credit institutions are subject to supervision of the highest quality. A further step forward, earlier in 2014, has been the launching of a Single Resolution Mechanism (SRM) to harmonise the rules relating to the consequences of failure of cross-border banks[50]. Eventually, the EP and the Council

[46] The European Financial Stability Facility (EFSF) was created by the euro area Member States following the decisions taken on 9 May 2010 within the framework of the Ecofin Council. The EFSF's mandate is to safeguard financial stability in Europe by providing financial assistance to euro area Member States within the framework of a macro-economic adjustment programme, http://www.efsf.europa.eu/about/index.htm.

[47] Following the amendment of Article 136 TFEU on 25 March 2011 by the European Council (Decision 2011/199/EU, OJ L 91, 6 April 2011), the Treaty allowed the creation of a stability mechanism that could be *"activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality"*. The European Stability Mechanism was thus created by means of an international treaty (Treaty establishing the European Stability Mechanism, Consolidated version following the accession of Latvia http://www.esm.europa.eu/pdf/ESM%20Treaty%20consolidated%2013-03-2014.pdf). Despite its obvious link with the EU, the ESM presents the legal nature of an international organization.

[48] European Court of Auditors, Special Report: European banking supervision taking shape — EBA and its changing context, SR 05/2014, adopted on 14 May 2014.

[49] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

[50] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

adopted on 15 July 2014 a regulation that sets uniform rules and procedures to be applied by the SRM[51]. A Single Resolution Board (SRB) is created and entrusted with a centralised power of resolution of banks and other financial entities covering varied and essential tasks. The SRB will become fully operational by 1 January 2015 and will have its headquarters in Brussels. Interestingly enough, Article 45 of Regulation 806/2014 provides a basic framework for the accountability of the decisions adopted by the SRB, and the ECA features among the EU institutions that will examine the SRB's annual report on the performance of its tasks. It should be noted, however, that accountability of the SRB will not be carried out directly by the ECA, but by the EP, the Commission and the Council. Regulation 806/2014 remains silent as to the exact role of the ECA and the new interinstitutional relations that the new mechanisms will originate. Since the legal framework of the SRB assimilates it to an EU agency –safe the necessary divergences due to the nature of its tasks – we assume that the ECA will draw an annual report on the activities carried out by the SRB that will in turn be handed in to the European Parliament for political oversight and accountability.

This brings to the fore the need to recast the interinstitutional relations between the EP and the ECA. Although the EP remains the natural client of the ECA in the EU institutional framework, mutual relations are usually channelled through the COCOBU (Committee for Budgetary Control, following the French acronym). It seems that this committee is not performing as expected as liaison agent between the ECA and the EP. A former member of the ECA went so far as to affirm that the committee had become "a kind of firewall between the Parliament and the Court"[52], which prevents the ECA from reaching other committees. However, a structure that allowed the Court to work in close contact with expert committees *ratione materiae* would improve planning and coordination of the financial audit and the political control. Taking into account the new involvement of the ECA in the supervision of activities linked to the banking union, for which the COCOBU is not specifically competent, the ECA has great interest in building mutual trust and new links with other committees, and more notably with ECON (Committee for Economic and Monetary Affairs), competent in the field of financial supervision.

A final challenge that remains unsolved points at international coordination and cooperation between the ECA and the SAIs of the Member States. As mentioned above, proper accountability cannot be achieved in a multilevel governance system if each supreme audit institution does not carry out effective oversight of funds managed in its Member State. Additionally, uniform accountability across Europe requires effective coordination between the SAIs and the ECA.

The lack of common standards for auditing the execution of the EU budget at European and national level is clearly a major gap hampering international cooperation. There have

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[51] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30 July 2014.

[52] Jacek Uczkiewicz, 'The Court as I remember it, the Court as I see it', in European Court of Auditors, *Reflections. 35th Anniversary of the European Court of Auditors,* Luxemburg, 2014, p. 40.

been several initiatives to fix this shortcoming, the most relevant of which is the Bonnici Working Group, but discord among Member States keeps this issue in deadlock[53].

Recent times have witnessed greater awareness among SAIs of their role in countering the financial crisis. Therefore, a number of initiatives have been launched. For instance, the Contact Committee (the body that groups both the ECA and SAIs) has established two task forces to analyse ways for improving current arrangements. The first one deals with the Commission proposal to develop government accounting frameworks in the EU by introducing European Public Sector Accounting Standards; whereas the second one reflects on the new tasks and roles of the external public audit function following reform of the EU economic governance[54].

V. Conclusions

The economic and financial crisis that haunts Europe since late 2007 has put a great stress on EU institutions, which have been forced to adapt their internal structures to new paradigms and create new bodies to cope with challenges that were unknown to date. This paper has placed the European Court of Auditors at the centre of institutional adaptation and has explored the way in which this institution is, slowly but firmly, getting involved in the new framework for economic governance. The research question required devoting attention to the specific features of financial management in the European Union, which is a multilevel governance system in which rights and responsibilities are not fairly shared between the Commission and national managing authorities. The insufficiencies detected in the procedures for internal control and recovery of funds missed at the national level highlighted the need for more effective involvement of national audit institutions in the financial accountability of EU funds implemented at the national level, as well as greater coordination with the ECA. However, the ECA itself is prisoner of its own institutional shortcomings as a technical and consultative body, which prevent it from provoking a more relevant impact. The economic crisis widened the breaches in accountability and weakened, in turn, the citizen's trust in the legitimacy of the financial management architecture at the EU level. As shown in the last section of this paper, the ECA has put in place new institutional strategies which represent its contribution to a post-crisis paradigm in which proper accountability before the European citizen is placed at the centre of the public debate. Only time will tell if these new challenges are met.

[53] Jacek Uczkiewicz, 'The Court as I remember it, the Court as I see it', in European Court of Auditors, *Reflections. 35th Anniversary of the European Court of Auditors,* Luxemburg, 2014, p. 40.

[54] Vítor Caldeira (President of the ECA), Speech at the 150 year anniversary of the Romanian Court of Accounts, Bucharest, 6 June 2014, ECA/14/23.

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Genocide: A Normative Account, by Larry May, Cambridge University Press, 2010, 296 pp., ISBN: 978-0-521-12296-2

Book Review by **Scott Nicholas Romaniuk**[1]

Abstract: *Academics studying genocide are required, amid the exigency of predicting and preventing further instances of this crime, to extend their efforts so as to connect with policy makers, provide vital information, respond to particular instances of genocide or state-inspired genocidal campaigns, and prompt a political will to intervene at any stage in this crime. May*[2] *starts by placing genocide studies in the normative foundation of this discipline. In this work, which stands as the fourth volume of a broader project that assesses the "conceptual and normative underpinnings of this 'crime of crimes'", genocide is treated as the most serious of all international crimes. May calls for additional work to be performed to include other forms and conceptualizations of genocide such as cultural genocide and ethnic cleansing. The book outlines the fundamental concepts behind the crime, its study, and the discipline, while offering a unique presentation of "special problems of genocide". It also considers steps that should be taken forward with the view of facilitating reconciliation. May refers to war as the final response to genocidal situations, not the first, stating that, "there are situations where there is not unambiguous groups of victims". Thus, humanitarian intervention, as a viable approach to mitigating acts of genocide, is still difficult to justify.*

Keywords: *genocide, humanitarian intervention, Rwanda massacres*

The study of genocide as an exceptional academic discipline still faces scores of challenges irrespective of its attempts to build upon critical knowledge and understanding amid the exigency of predicting and preventing further instances of this crime. Consequently, academics working in this discipline are required, to an overwhelming degree, to extend their efforts well beyond the ivory tower so as to connect with policy makers in government positions, provide vital information about crimes against humanity, respond to particular instances of genocide or state-inspired genocidal campaigns, and bring about the creation of a political will to intervene at any stage in this crime. Presently, however, a rather poor track record has been displayed within the paradigm of genocide studies when it comes to prohibiting genocides on multiple levels and in all categories of intensity and scale.

In order to make a rare contribution to the many debates stemming from the field of genocide studies, May starts by placing the inherent problems of this discipline within

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the context of its normative, moral, and international criminal law foundations. Originally conceived of as what he describes as a paper-length project, this work stands as the fourth volume of a much broader project that brilliantly and cogently assesses the "conceptual and normative underpinnings of this 'crime of crimes'" (p. 1). Genocide is treated as the most serious of all international crimes, yet May considers genocide no less serious than other international crimes, and calls for additional work to be performed in continuing to change and broaden the status of these studies. The ultimate aim of these efforts should be the inclusion of other forms and conceptualizations of genocide such as cultural genocide and ethnic cleansing while the list of protected groups should also be expanded so that others like gender and political groups are included.

This book is comprised of thirteen concise chapters developed in order to fit neatly into categories that cleanly outline the fundamental concepts behind the crime, its study, and the discipline as engaged with actual cases. The latter section of the work offers a unique presentation of "special problems of genocide" that connects with some of the problems that have surfaced as a result of reasonably attempting to assuage the motivation of perpetrators of past acts. It also considers steps that should be taken forward with the view of facilitating reconciliation. Examining a case of genocide trials brings a range of problems to the fore when it comes to tackling complicity in the grander processes of reconciliation, especially in war-torn societies such as Rwanda.

In the first and second parts, May takes a look at the type of groups that have been and can be harmed during different stages of genocidal campaigns. This part concerns itself primarily with group identification while taking into consideration nominalist approaches and various kinds of nominalism. The views of some of the first nominalist philosophers like William of Ockham and the prominent nominalist political philosopher Thomas Hobbes are used to construct accounts of constituent groups. The Holocaust serves as a strong mechanism for analysis of genocide for how it acts as a dominant example of a paradigm case of genocide, and given that, "those for drafting the Genocide Convention, which occurred only a few short years after the end of the Second World War, were similarly and strongly influenced by the Holocaust" (p. 79).

The third and fourth parts confront genocidal acts and illustrate multiple modalities of the crime, including acts of cultural genocide, acts of ethnic cleansing, varieties of collective intent, the ties between individual and collective intent, and revisions of the mental element of the crime of genocide. May produces a lively discussion that merges ideas that are inadequately connected. Elements of motive and intent are two such striking examples of those ideas ultimately surfacing a fleet of questions with respect to how and to what extent individual motive can be considered an element in the collective nature of the crime, and how the severity of punishment might fit various motives that are part of the overall crime and production of large-scale killing.

Multiple fields of legal complicity and the examination of difficult cases (Rwanda) set the basis for exploring actions that should be undertaken against various levels of perpetrators of genocide. "Complicity," according to May, "is a vague concept in criminal law as well as in common parlance, but the vagueness of this concept is in my view an important part of its meaning" (p. 158). This leads to May's address of various styles of complicity and

how one's (in)actions are fused to the responsibility of another in the execution of a crime of this nature. In this vein, May states that, "a distinction among those who are present, at least in a constructed way, which is very useful in genocide cases, distinguishes between those who aid or abet, on the one hand, and those who are merely present, on the other" (p. 159). Assistance, here, is a contentious component of the overall debate as measures of assistance are called into question for determining criminal liability "for what the principle does" (p. 159).

The final part of this work centres on what the author refers to as "special problems of genocide" (p. 223). In doing so, an exploration is made of humanitarian intervention, and the specific intervention that took place while the Rwandan massacres were sweeping. Consideration is given to the supposed limits of intervention as a form of defence against genocide. As demonstrated in the previous part and taken steps further in the final chapters, May refers to war as the final response to genocidal situations, not the first, stating that, "there are situations where there is not unambiguous groups of victims, because of the very widespread complicity that exists in many genocides" (p. 238). Thus, humanitarian intervention, as a viable approach to mitigating acts of genocide, is still difficult to justify despite what some might currently believe.

The discussions presented in this work are essentially continuations of previous deliberations in earlier volumes. This should be summoned when reading the volume. The analysis deals exclusively with issues related to the Rwandan genocide and might be considered lacking in dimension given the fact that swathes of complementary instances of genocidal campaigns exist with which the examination in this work can be buttressed. Notwithstanding other cases that could well be used as part of this study, those drawn upon in the Rwandan context are useful for providing a contemporary enlightenment of what the author refers to be as "robust political reconciliation," which raises interesting points for the reason that, "the two ethnic group affiliations did not match up with victim and perpetrator groups in the society" (p. 267). Rwanda also shows the inherent difficulty in undertaking and guiding reconciliation processes through successful and positive ends, particularly in war-ravaged societies because there can sometimes be no clear view of which sides should be reconciled with.

A praiseworthy note should be made on May's methodology. The approach is clearly outlined at the beginning of this work, and reference to preceding sections and chapters are frequently made as the volume progresses. It therefore presents a positive overlay of points of view, argumentation, and potential objectives. None of the chapters should be considered limited in discussion; rather, appreciable depths of concentration are given to the many roots of genocide and how these roots sprout variable measures, acts, and definitions. While the argument can be made that further examination of Rwanda does not necessarily signify a fresh approach to genocide studies, the issue of humanitarian intervention is a timely one and a notable instance of this form of relief can be contrasted with another. May has compiled a volume that addresses questions and objections to the study of genocide as it fits neatly into a specific category of scholarship and practice. As such, the work will lend itself promisingly to multiple academic disciplines while demonstrating a clear-cut approach to a topic that is constantly changing and presents intricate puzzles to academics and practitioners alike.

Rien ne se crée sans les hommes. Rien ne dure sans les institutions.

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ISSN 1582-8271