ARE EUROPEAN SECURITY POLICIES LEARNING SOME LESSONS FROM UNITED STATES ON MIGRATION AND HUMAN RIGHTS?

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Abstract

European and American legal systems are quite different from the point of view of the security culture and the way in which policies and law interreact. This paper intends to analyze the way in which these different approaches could allow for the occurence of a new mixt concept in the area of migration and human rights.

Keywords: *migration, human rights, security, European Union*

1. The first major difference between Europe and the US: the culture of security. Consequences in terms of judicial check over the executive branch and admissibility of the balancing test between human rights and state security

If we compare American and European legal systems, there are some remarkable differences which essentially depend on the different way of dealing with two general issues: the culture of security and the relationship between politics and law. Paragraphs 1-2.2 examine these differences while paragraphs 3-4 suggest that they are slowly diminishing and European security policies are learning some lessons from the American approach to security.

Security is a core issue in US politics to such an extent that some related notions (imminent threat, continuing threat, etc.) are so widely interpreted that sometimes human rights are severely limited. For instance, some Guantanamo detainees "*who cannot safely be transferred to third countries in the near term* [...] *and who are not currently facing military commission charges*" are subject to continued indefinite detentions without charge or trial because their detentions "*remains necessary to protect against a continuing significant threat to the security of the United States*"[1]. In Europe, security is also a core issue but its goals are accomplished within a more

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[1] White House, "Plan for Closing the Guantanamo Bay Detention Facility," February 2016, https://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf, 1 and 4. Should the Periodic Review Board (an interagency body with representatives from several Departments), given current intelligence and other information, determine that a detainee is eligible for transfer or prosecution, then he would be out of this legal limbo: otherwise his continued indefinite detention for the sake of national security would continue.

comprehensive framework of values and interests in which human rights and the rule of law are equally important.

The first consequence that follows from such a difference affects the scope and content of the judicial check over the Executive Branch.

Judicial deference has been (and still is) a long-established doctrine throughout the political and legal history, culture, and tradition of the United States. Above all in cases of national security, foreign affairs and immigration the judicial power yields its competence to the executive and legislative powers.

In the area of immigration, deference "*is particularly powerful* [...] *because 'the power to expel or exclude aliens* [is] *a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' Shaughnessy v. United States ex rel. Mezei, 345 U.S. 2016, 210 (1953)*"[1].

Moreover, in the area of war-making, national security, and foreign relations "*the judiciary has an exceedingly limited role*" because courts cannot "*impermissibly draw* [...] *into the 'heart of executive and military planning and deliberation,' Lebron, 670 F.3d at 550, as the suit would require the Court to examine national security policy and the military chain of command as well as operational combat decisions regarding the designation of targets and how best to counter threats to the United States*". In one word, the Judiciary cannot hinder the ability of the Congress and the Executive "*to act decisively and without hesitation in defense of U.S. interests*"[2].

Of course, the limited judicial check does not mean that a state of war is "*a blank check for the President when it comes to the rights of the Nation's citizens*"[3] and political branches may "*switch the Constitution on or off at will and govern without legal constraints*"[4]. American judges have not abdicated their constitutional functions and Guantanamo decisions confirm it. Yet, as discussed below, the Guantanamo jurisprudence - when compared to the

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[1] U.S. Court of Appeals, *U.S. v. Peralta-Sanchez*, 868 F.3d 852 (9th Cir. 2017).

[2] U.S. District Court for the District of Columbia, *Nasser Al-Aulaqi et al. v. Leon C. Panetta et al.*, 35 F.Supp.3d 56 (2014), 34 and 36. See also U.S. Court of Appeals, *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (*en banc*), 200 (Congress and the President, not judges, should make the "*essential tradeoffs*" required to manage national security) and U.S. Supreme Court, *Johnson, Secretary of Defense, et al. v. Eisentrager, alias Ehrhardt, et al.*, 339 U.S. 763 (1950), 774 ("*Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security*") and 789 ("*It is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, wisdom, or propriety of the Commander in Chief in sending our armed forces abroad*").

[3] U.S. Supreme Court, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578 (1952), 587; see also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), p. 536.

[4] U.S. Supreme Court, *Lakdhar Boumediene, et al. v. George W. Bush, et al.*, 553 U.S. 723 (2008), p. 757.

bicentennial interpretation by US governments and courts of the relationship between power, law, and territory - seems like a "drop" of European-style functionalism in a "sea" of American-style formalism[1]. In the United States, in fact, protection of human rights and judicial check over the Executive Branch are more limited than in Europe.

In Europe there is no room for judicial deference. Primacy of law and judicial interpretation over politics is absolute and politics must defer to the considered opinion of the Judiciary, especially of the European supranational courts, i.e. the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

The second consequence that follows from the different culture of security concerns the admissibility of the balancing test between human rights and State security.

In the United States, the balancing test is allowed to such an extent that the extrajudicial killing in a foreign country of an American citizen who is a senior operational leader of al-Qa'ida is lawful if the US Government "*has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States*". According to the Attorney General, in fact, "*based on generations-old legal principles and Supreme Court decisions handed down during World War II*" and the global war on terror, the "*US citizenship alone does not make such individuals immune from being targeted*" and the government has the right to use lethal force "*to protect the American people from the threats posed by terrorist*" when capture is not feasible[2].

The balancing test is also applied in the expedited removal procedure, i.e. the process by which an alien can be denied entry and physically removed from the United States. In this case, the balance, inter alia, is between "*the nature of the private interest at stake*" (the claim for the Fifth Amendment due

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[1] On the relationship between power, law, and territory, see Kal Raustiala, *Does the Constitution Follow the Flag?* (New York: Oxford University Press, 2009); Paolo Bargiacchi, *Orientamenti della dottrina statunitense di diritto internazionale* (Milano: Giuffré Editore, 2011), pp. 262-75.

[2] U.S. Office of the Attorney General, "Letter to the Chairman of the Committee on the Judiciary of the United States Senate," May 22, 2013, https://www.justice.gov/slideshow/AG-letter-5-22-13.pdf. Capture is not feasible if it cannot be "*physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risks to U.S. personnel conduction a potential capture operation could be relevant*". See U.S. Department of Justice, "White Paper. Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force," no date, document leaked in February 2013, accessed November 19, 2017, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

process right to counsel) and "*the government's interest, including the additional financial or administrative burden*" the granting of such a right would impose on the government (costs of detention, government's lawyers, "*pay for the increased time the immigration officer must spend adjudicating such cases, distracting the officer from any other duties*", etc.)[1].

The *Peralta-Sanchez* ruling confirms previous case-law in holding that individuals facing expedited removal procedure under 8 U.S.C. § 1225 have no right to counsel or to a hearing before an immigration judge because they only "*have a limited interest at stake*" as they have not been, inter alia, present in the United States "*for some period of time longer than a few minutes or hours*". In other words, as discussed below, it is just a formalistic matter of time. In accordance with the formalism that characterizes the US legal system and its interpretation (see § 2.1), in fact, during the inspection and the expedited removal procedure, aliens are treated as if they were not within the United States for the purposes of applying some constitutional rights. In fact, an arriving alien, even if he has "*technically effected entry into the United States*", has a very limited interest in remaining (because he has established only a limited presence) compared to that of an alien already living in the United States and placed in a removal proceeding other than the one under § 1225. The consequence is that the former unlike the latter has no Fifth Amendment due process right to counsel. As time does *not* go by, the scope of human rights protection severely narrows while the "*presence of lawyers will inevitably complicate*" the procedure: human rights protection cannot thwart the government in pursuing its goal to exclude quickly aliens who are inadmissible and once again human rights must yield to national security[2].

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[1] U.S. Court of Appeals, *U.S. v. Peralta-Sanchez*, 868 F.3d 852 (9th Cir. 2017). Such balancing test was articulated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 219 (1976).

[2] The Executive Order 13767 issued by President Donald Trump on January 25, 2017 further enhanced the expedited removal procedure on the grounds that border security is "*critically important*" to national security and "*aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety*". See White House, "Executive Order 13767 of January 25, 2017, Border Security and Immigration Enforcement Improvements," *Federal Register* vol. 82, no. 18, 8793-97. See also Memorandum from John Kelly, Secretary of Homeland Security, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" (memorandum, February 20, 2017). Orders of expedited removal are issued by officials of several federal agencies (Customs and Border Protection, Immigration and Customs Enforcement, Citizenship and Immigration Services, etc.) who conduct (and usually complete within a matters of hours) the process and make determinations of individuals' claims of eligibility to remain in the United States completely and exclusively. If the individual applies for asylum or expresses a fear of persecution or torture or a fear of return to his home country, then the official must stay the process and refer him to an asylum officer for a credible fear determination. Pending such determination, he is detained.

In Europe, on the contrary, the balancing test between human rights and national security is not allowed. Even when the security risk posed by an individual is so high to threaten public order and national security, States cannot find a balance between their security risk and the real risk that fundamental rights might be infringed in case of extradition, return or removal to another State. The absolute prohibition against torture or cruel, inhuman or degrading treatment or punishment must be respected "*even in times of emergency or war*". The ban on the balancing test articulated by European supranational courts is always upheld, including when deportation orders are taken against those who play an active role in terrorist organizations and threaten national security[1]. The ban applies to everyone (including third-country nationals who illegally arrive at EU external borders or illegally enter and reside within the EU) regardless of his legal status (asylum-seeker, displaced person, migrant, suspected or sentenced person) and of the requested measure (return, removal, extradition, etc.).

To deny or grant the balancing test also affects the scope and content of procedural rights of the person concerned and powers of national and supranational courts.

In Europe, supranational courts strictly enforce and widely protect procedural rights and full judicial review is in principle guaranteed pursuant to Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR) and Article 47 (right to an effective remedy and to a fair trial) of the EU Charter of Fundamental Rights. In order to assess whether or not a trial or a remedy is fair, the effectiveness is the main criterion used by courts and not even the Security Council binding resolutions can displace the application and enforcement of human rights. In *Al-Jedda* ruling the ECtHR held that Security Council resolutions have primacy only if they are "*in line with human rights*" and that the ECHR is not displaced[2]. In *Kadi* judgment of July 2013, the ECJ held that EU regulations did not enjoy immunity from jurisdiction even if they are only designed to give effect with no latitude to

[1] ECtHR (Grand Chamber), Judgment of 15 November 1996, *Chahal v. the United Kingdom*, Application no. 22414/93; ECtHR (Grand Chamber), Judgment of 28 February 2008, *Saadi v. Italy*, Application no. 37201/06. Saadi, a Tunisian national already arrested in Italy on suspicion of involvement in international terrorism, had been sentenced to twenty years in prison for terrorist charges by a military court in Tunisia. Italy had issued a deportation order because "*the applicant had played an 'active role' in an organization responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad* [and] *consequently, his conduct was disturbing public order and threatening national security*". The deportation order was stayed by Italian courts and by the ECtHR.

[2] ECtHR (Grand Chamber), Judgment of 7 July 2011, *Al-Jedda v. the United Kingdom*, Application no. 27021/08.

one's black-listing mandated by the Security Council. The ECJ vindicated its own right to "*ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights*". Notwithstanding "*overriding considerations*" concerning the security of the EU or its Member States and the conduct of their international relations, in fact, such a judicial review remains "*indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned*"[1]. In *Abu Qatada* ruling, the ECtHR stayed the extradition to Jordan of a person wanted on terrorism charges due to the real risk that evidence obtained by torture might be admitted during the trial in violation of Article 6 of the ECHR[2].

2. The second major difference between Europe and the US: the relationship between politics and law. Consequences in terms of interpretation and application of the legal system

2.1. The American Formalism

The second major difference relates to the relationship between politics and law, i.e. how courts and governments interpret, apply and implement the rules of the legal system and the related circumstances of fact.

In the United States, the relationship is essentially imbued with formalism rather than with functionalism. In our reasoning the phrase "*US formalism*" means that legal interpretation is closer to the letter of the law (its literal interpretation) than to the spirit of the law (its teleological interpretation). Formalism often narrows human rights protection because sometimes it makes it possible to split the exercise of powers (especially abroad) by the government and the application of law. Formalism may indeed lead more easily to a strictly territorial (or intra-territorial) interpretation of the relationship between power, law, and territory, as shown, for instance, by the Indian Tribes and the Insular Cases decided by the US Supreme Court[3].

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[1] ECJ (Grand Chamber), Judgment of 18 July 2013, *European Commission & Council of the EU v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595-10 P, §§ pp. 97-98 and 125.

[2] ECtHR, Judgment of 17 January 2012, *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09. The Memorandum of Understanding between the United Kingdom and Jordan (on protection of Articles 3 and 5 of the ECHR) had to be amended by also including protection of Article 6.

[3] Indian Tribes were considered as "*domestic dependent nations*" living in a territory with respect to which "*though plainly sovereign American territory, Congress could draw intra-territorial distinctions*". Indian Territory was American "*as far as other sovereigns were concerned*" but remained foreign for the purpose of domestic law. Raustiala, *Does the Constitution Follow the Flag?*, 84-85. See also U.S. Supreme Court, *Cherokee Nation v. Georgia*,

The general political rationale behind this kind of formalism lies in the fact that the Constitution and, more generally, the law "*follows the flag*" (i.e. the exercise of powers by the government) but at times "*doesn't quite catch up with it*", especially in the case of extraterritorial exercise of that power[1]. Based on this premise, for a long time the Judiciary interpreted "*American law instrumentally, in a manner that generally enhanced the autonomy and power of the United States government*" when acting abroad, in order not to "*overly fetter the projection of American power, and American commerce around the globe*"[2]. Since the 1940s, the relationship between power and law has partially been reinterpreted by the courts, the formalism, and its rigid "*hermetic territorialism*", gave more way to the functional approach and the Constitution was more often able to catch up with the Flag when abroad[3].

As anticipated, the Guantanamo jurisprudence recognized some constitutional rights of foreign prisoners by taking a functional rather than a formal approach to the legal status of the continued American presence at Guantanamo. Piercing the veil of formalism (Guantanamo is abroad) and looking functionally at reality (the US exercises *de facto* sovereignty over the area), the Supreme Court recognized the US effective control and jurisdiction rather than the Cuban formal sovereignty and granted the Constitution's extraterritorial application. In any case, as anticipated, such jurisprudence on the relationship between power, law, and territory, is just a "drop" of European-style functionalism in a "sea" in which legal formalism is still the strongest tide as demonstrated by the three examples

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30 U.S. 1 (1831), 16-18. In the Insular Cases, Puerto Rico and other overseas territories were not regarded as being part of the United States for the purposes of applying the Constitution but "*foreign to the United States in a domestic sense*" although "*appurtenant and belonging to the United States*". See U.S. Supreme Court, *Downes v. Bidwell*, 182 U.S. 244 (1901), pp. 341-342. See also Christina Duffy Burnett and Burke Marshall (eds.), *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Durham: Duke University Press, 2001).

[1] It was the Secretary of War Elihu Root who said in relation to the Insular Cases that "*as neas? as I can make out the Constitution follows the flag – but doesn't quite catch up with it*". Philip C. Jessup, *Elihu Root* (New York: Dodd, Mead & Company, 1938), I, p. 348.

[2] "*The federal government sought maximum flexibility and efficiency* [...] *without the bringing along all the complex fetters of American legal rights* [so that] *the unusual restraints on governmental power that were built into the American constitutional order did not overly fetter the projection of American power, and American commerce, around the globe*". Raustiala, *Does the Constitution Follow the Flag?*, 61 and 67.

[3] The effects-based jurisdiction affirmed in *Alcoa* (U.S. Court of Appeals, *U.S. v. Aluminium Co. of America*, 148 F.2d 416 (2nd Cir. 1945)) paved the way for the "*murdering wives*" cases in which for the first time the Supreme Court applied the Constitution to US citizens committing crimes in a foreign country so as to avoid that individual rights (such as the trial by jury) could be "*stripped away just because* [those citizens happen] *to be in another land*" (*Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Kruger*, 351 U.S. 470 (1956). See also Detlev Vagts, "A Turnabout in Extraterritoriality," *American Journal of International Law* 76, no. 3 (July 1982): pp. 591-94.

set out below.

First example: in habeas corpus cases concerning indefinite administrative detention abroad of foreign nationals[1], the extraterritorial reach of the writ can be limited by "*practical concerns or obstacles*" that would make "*impractical or anomalous*" its issuing. The reality on the ground (i.e. the circumstances of fact surrounding the situation) is used for limiting the protection of human rights while in Europe, as discussed in § 2.2, it is interpreted instrumentally in a manner that broadens that protection. For instance, in *Eisentrager* ruling (German soldiers detained at Landsberg prison in post-war occupied Germany), the Supreme Court held that the need to "*transport the petitioners across the seas for hearing*" would have diverted the field commander efforts and attention "*from the military offensive abroad to the legal defensive at home*" and required allocation of human and economic resources: the right of habeas was denied to the prisoners for this reason too[2]. Even in *Al Maqaleh* decision (foreign nationals detained at US Military Base in Bagram, Afghanistan), the "*circumstances of fact surrounding*" the military base exerted a decisive influence in denying the habeas corpus to the prisoners stating that the armed conflict raging outside the walls of the base stripped away that constitutional right which had been instead granted to Guantanamo prisoners because Guantanamo is not in a theater of war and there is a peaceful situation[3]. Notwithstanding all the prisoners are in the same situation (namely under the complete and unfettered control of the detaining power), those held in Bagram are beyond the reach of the Constitution because, inter alia, troops "*are actively engaged in a war with a determined enemy*"[4]. The paradoxical consequence is that the scope of human rights protection depends on the formalistic assessment of factual circumstances.

Second example: in *Sale* decision the Supreme Court held that non-refoulement principle did not apply outside the national territory and government may return asylum-seekers provided they have not reached or crossed national border (for instance, in case of interdiction and return of asylum vessels on the high seas). The Court upheld the formalistic, textual interpretation of the word "*return*" in Article 33(1) of 1951 Refugee

[1] Paolo Bargiacchi, "Power, Law and Territory: Extraterritorial Application of the United States Constitution at Landsberg Prison in Occupied Germany, at Guantanamo Bay Naval Base in Cuba and at Bagram Airfield Military Base in Afghanistan," in *International Institutions and Co-operation: Terrorism, Migrations, Asylum*, eds. Giancarlo Guarino and Ilaria D'Anna (Napoli: Satura Editrice, 2011), pp. 495-540.

[2] U.S. Supreme Court, *Johnson, Secretary of Defense, et al. v. Eisentrager, alias Ehrhardt, et al.*, 339 U.S. 763 (1950), pp. 778-779.

[3] U.S. Court of Appeals, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), p. 107.

[4] U.S. Court of Appeals, *Al Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013), pp. 349-350.

Convention advanced by a Presidential Executive Order. Whilst conceding that such strictly territorial interpretation of Article 33(1) "*may even violate* [its] *spirit*", the Court however concluded that "*a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions*"[1]. Once again, the Supreme Court split the exercise of power (the Flag) and the application of the law (the Constitution).

Third example: diplomatic assurances are required by the US Government before transferring foreign nationals to countries whose human rights record displays a real risk of human rights violations. The US only gets the promise from the receiving State that "*appropriate humane treatment measures*" (a lower standard than full protection of human rights) will be guaranteed but there is no substantive assessment of the real risk of human rights violations occurring after the transfer[2]. The US only relies on the formal assurance offered by the receiving State and the seeking of such formal promise is the only legal requirement to abide by the human rights obligations.

2.2. The European Functionalism

In Europe, the general approach to these issues is different because European courts (especially supranational courts) assess the relationship between politics and law in functional rather than formalistic terms.

In our reasoning, the phrase "*European functionalism*" means that legal interpretation is closer to the spirit of the law (to its teleological interpretation) than to the letter of the law (to its literal interpretation). Functionalism often extends human rights protection also because it makes it almost always possible to link the exercise of powers (especially abroad) by governments and the application of law. Functionalism may therefore

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[1] U.S. Supreme Court, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), 183. The word "*return*" in Article 33(1) would only be "*referred to the defensive act of resistance or expulsion at the border rather than to transporting a person to a particular destination*". Anthony North, "Extraterritorial Effect of Non-refoulement," accessed November 19, 2017, http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-north/north-j-20110907.

[2] "*The United States coordinated with the Government of the United Arab Emirates to ensure these transfers took place consistent with appropriate security and humane treatment measures*". See U.S. Department of Defense, "Detainee Transfers Announced," Press Release No: NR-438-15, November 15, 2015, accessed November 19, 2017, http://www.defense.gov/News/News-Releases/News-Release-View/Article/628980/detainee-transfers-announced.

lead more easily to an extraterritorial interpretation of the relationship between power, law, and territory.

Whenever European judges are called upon to protect individuals against human rights violations committed by governments, as discussed below, they always apply the "reality on the ground test" and reject literal and formal interpretations of the law. The main consequence is that functionalism almost always links the Flag and the Constitution (ECHR, EU legislation, domestic laws, etc.) and States are usually held accountable for their actions wherever in the world (at home or abroad) those actions may have been committed or their consequences felt. It is no coincidence that personal and territorial models of jurisdiction are widely interpreted and applied so that almost anyone might fall within the jurisdiction of the States. For instance, the ECtHR is not far from recognizing that even the simple power to kill exercised abroad brings the victim under State jurisdiction. In *Jaloud* ruling, the Court stopped just one step before reaching that conclusion and only a "drop" of American-style formalism in a "sea" of European-style functionalism pushed the Court - at least for the time being - to still "*draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life yet in the second case there is not*"[1].

European functionalism also makes circumstances of facts surrounding human rights violations irrelevant for the courts. Human rights may be infringed by a policeman patrolling the peaceful streets of London as well as by a soldier during security operations carried out in the occupied Iraq in the aftermath of the war. In the latter case, it is also irrelevant whether the violation occurred within a military base under the exclusive control of a State or in the whole region for whom the State had assumed authority and responsibility for the maintenance of security[2]. Judicial assessment of "*surrounding circumstances*" is therefore one of the greatest differences between American formalism and European functionalism: they weigh too much for American judges (and habeas corpus is denied to Bagram

[1] ECtHR (Grand Chamber), Judgment of 20 November 2014, *Jaloud v. The Netherlands*, Application no. 47708/08. On the contrary, in 2015 the London High Court held that "*whenever and wherever a Contracting State purports to exercise legal authority or uses physical force*" the victim always falls within its extraterritorial jurisdiction: see Judgment of 17 March 2015, *Al-Saadoon & Others v. Secretary of State for Defence* [2015] EWHC 715 (Admin), §§ 95 and 106. In 2016, however, the UK Court of Appeals disagreed with the High Court and preferred leaving "*for the Strasbourg court to take this further step, if it is to be taken at all*": see Judgment of 9 September 2016, *Al-Saadoon & Others v. Secretary of State for Defence* [2016] EWCA Civ. 811, § 70.

[2] ECtHR (Grand Chamber), Judgment of 7 July 2011, *Al-Skeini and Others v. The United Kingdom*, Application no. 55721/07.

prisoners) and they weigh too little for European judges (and the result is *Al-Skeini* case-law).

As a general rule, in Europe, situations concerning human rights are always assessed on a case-by-case basis and with regard to the existing reality on the ground in order to detect any possible real risk of human rights violations for individuals.

The main consequence of the judicial application of the "reality on the ground test" is that - in case of return, extradition, and removal - the test rules out any probative value to the fact that the receiving State is party to relevant international human rights treaties[1]. Given that functionalism prohibits formalistic and literal interpretations of human rights rules and concepts, the sending State must always demonstrate that the receiving State is a "*safe country*", i.e. a country where human rights are generally and consistently protected and there are no substantial grounds "*for believing that there was a real risk that the applicants would be subjected to treatment contrary to Article 3*" (Prohibition of torture, inhuman or degrading treatment or punishment) of the ECHR[2]. The safe country test also applies to EU Member States because there is no presumption they would respect fundamental rights only because are members of the EU[3].

Against this background, furthermore, it is no coincidence that diplomatic assurances offered by receiving States to European sending States almost never pass the "reality on the ground test" even if a memorandum of

[1] In the cases concerning Tunisia and Libya, the Court observed that "*the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where* [...] *reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of ECHR*". See ECtHR (Grand Chamber), Judgment of 23 February 2012, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, §§ 128 and 136.

[2] According to Article 38(1) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, a State is "*safe*" when "*(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention*".

[3] ECtHR (Grand Chamber), Judgment of 21 January 2011, *M.S.S. v. Belgium & Greece*, Application no. 30696/09; ECtHR, Judgment of 21 October 2014, *Sharifi and Others v. Italy & Greece*, Application no. 16643/09; ECJ, Judgment of 21 December 2011, *N.S. v. Secretary of State for the Home & M.E. and Others v. Refugee Applications Commissioner and Others*, Joined Cases C-411/10 and C-493/10.

understanding is in place between the States[1]. US-style generic and thin assurances are never allowed by European courts and a substantial case-by-case assessment is always required: assurances may only be accepted if they are enough "*detailed*", "*reliable*" and "*specific*" and provide "*individual guarantees*" that the person, if returned, "*would be taken charge of in a manner adapted to*" his personal situation[2].

Lastly, European functionalism recognizes the extraterritorial scope of the non-refoulement principle. In line with the UN High Commissioner for Refugees (UNHCR) advisory opinion, "*the decisive criterion*" for applying the principle is whether asylum-seekers "*come within the effective control and authority*" of the State wherever it happens including interdictions at sea[3]. Such an interpretation is consistent with the overriding humanitarian object and purpose of the principle and perfectly matches the European teleological approach to human rights legal instruments.

3. Narrowing the Gap between Differences: an American Model for European Security Policies?

The analysis carried out so far shows, on one hand, that the US formalism often facilitates the splitting up between the extraterritorial exercise of powers by the government and the application of law and, on the other, that the European functionalism almost always makes that power fall under the law's rule. It goes without saying that scope and content of human rights protection as well as the overall security model vary depending on the chosen approach.

In the United States, formalism is still the main methodology and legal ideology in assessing facts and circumstances and interpreting and

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[1] The British Court of Appeals denied any probative value to the Memorandum of Understanding between the UK and Libya which contained written diplomatic assurances and held that in deportation and extradition cases "*it still remained the duty of the signatory State to determine what risks the deportee would be exposed to upon return even with a memorandum being in place*". See Judgment of 9 April 2008, *AS & DD (Libya) v. Secretary of State for the Home Department and Liberty*, [2008] EWCA Civ. 289.

[2] «*Swiss authorities were obliged to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together* [...] *Without detailed and reliable information* [...] *the Swiss authorities did not have sufficient assurances* [and in case of return] *there would accordingly be a violation of Article 3 of the Convention*". ECtHR (Grand Chamber), Judgment of 4 November 2014, *Tarakhel v. Switzerland*, Application no. 29217/12, §§ 120 and 122.

[3] UNHCR, "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol," Geneva, January 26, 2007, § 43, accessed November 19, 2017, http://www.unhcr.org/4d9486929.pdf.

applying rules and procedures of domestic and international legal systems and there is no meaningful convergence towards the European functionalism.

In Europe, instead, perhaps a process was set in motion through which the gap between the two sides of the Atlantic Ocean is slowly narrowing with the European side coming a little bit closer to the American one in terms of management of security threats. What is probably changing in Europe is the way of dealing with those two general issues we mentioned above: the culture of security and the relationship between politics and law.

In times of growing terrorist threats and unprecedented irregular migration flows, there is an increasing securitization of European politics and legislation and some States, rightly or wrongly, are wondering whether the highest level of human rights protection afforded by European courts in the last decades is still "sustainable" with respect to the need of defending their own security from these new threats.

The increasing securitization is also confirmed by: *a*) the amendment or suppression of some fundamental principles of European integration (EU citizens no longer undergo a minimum check when crossing a EU external border and the reintroduction of border controls within Schengen is no longer a truly exceptional measure)[1]; *b*) the massive-scale data collection, treatment and analysis to identify previously unknown likely suspects and to create general assessment criteria for criminal profiling (see, for instance, EU Directive 2016/681 on the use of passenger name record for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime); *c*) the renewal and enhancement of EU return policy to make it more effective on the basis of principles (wider use of accelerated, swifter and simplified procedures, of presumptions and inadmissibility grounds, of detention, etc.) and goals (curbing abuses of asylum

[1] Since April 2017, EU Member States are obliged to carry out systematic and enhanced checks against relevant databases on all persons, including EU citizens, at all external borders (air, sea and land borders), both at entry and exit. By 2020, should also be operative both the ETIAS (European Travel Information and Authorization System), an automated system to determine who will be allowed to travel to Europe by cross-checking visa-exempt third country nationals' information against all IT-system (Schengen Information System, Europol and Interpol's databases, etc.), and the EES (Entry-Exit System), an automated system to reinforce border check procedures for all non-EU nationals admitted for a short stay in the Schengen area (EES will register name, type of travel document, biometrics and date and place of entry). Lastly, on September 2017, the European Commission proposed to update the Schengen Borders Code to adapt the rules for the reintroduction of temporary internal border controls and better tackle new security challenges such as terrorist threats. Time limits for internal border controls will be prolonged to a maximum period of two years in order to respond to evolving and persistent serious threats to public policy or international security.

procedures, preventing and combating irregular migration, etc.) which are similar to those of the US's return policy[1]; *d*) the enhanced cooperation with non-EU States to prevent and manage irregular migration, including the possible establishment of processing centers funded by the EU in African countries (Libya, Chad, Niger, etc.) to identify refugees and hold and turn back migrants. The externalization or offshoring processing policy echoes the widely criticized Australian policies of regional resettlement and increases the risk of violations of international human rights law and of the EU turning a blind eye to that reality.

As anticipated, the latest European policies of securitization underpin a different way of dealing with security and with the relationship between politics and law. All of this has far-reaching legal consequences and serious implications. In fact, the political quest for more security also involves the limitation of the judicial check and a more formalistic approach to interpreting and applying the European legal systems. In other words, it involves two legal solutions that are typical of the US approach to security issues and threats.

As regard to the limitation of the judicial check (especially of the ECtHR), for different reasons but with the same goal of better protecting their own security, States such as France, Ukraine and Turkey derogated from the obligations under the ECHR according to Article 15 (also the UK might soon derogate from these obligations). Furthermore, the ECHR system will be amended by Protocol no. 15, once in force, and an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation will become part of the ECHR. It will be then clearer that "*the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions*" and to apply and implement the Convention[2]. The reform will shift the present balance between national courts and ECtHR in favor of the former also because the States, rightly or wrongly, believe that the legal understanding of the ECHR as a "living instrument" has gone too far in that it expanded rights and freedoms too much beyond what the framers of the Convention had in mind in 1950[3].

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[1] European Commission, "EU Action Plan on return," COM(2015) 453 final, Brussels, 9.9.2015; Id., "Communication on a more effective return policy in the European Union – A Renewed Action Plan," COM(2017) 200 final, Brussels, 2.3.2017.

[2] "Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms," CETS No. 213, Explanatory Report, § 9, http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

[3] In the UK, the ever-expanding reach of the Convention in violent combat scenarios rather than only in peacetime was termed as a "*judicial diktat*" and a "*form of judicial imperialism*" putting at risk the British armed forces. See Richard Ekins and Jonathan Morgan and Tom

In other words, derogations, reforms and the States' attitude suggest that in times of increasing security threats the European States feel a degree of unease with the present balance of power between governments and supranational courts and are looking for a different judicial framework in which national courts might apply more often the margin of (national) appreciation than the (international) "living instrument" understanding.

As regard to a more formalistic approach to interpreting and applying rules and procedures, several policies and provisions recently proposed or adopted in the field of migration seem to distance themselves from the European functionalism (and the related "reality on the ground test") and get a little bit closer to the American-style formalism. After all, this shift is almost inevitable once simplification and swiftness of asylum and return procedures and cooperation with third countries become key instruments of the European migration and return policies.

On the one hand, in fact, simplification and swiftness sit uncomfortably with that thorough and careful examination of situations concerning asylum-seekers and migrants required by the "reality on the ground test" and are more easily secured by literal than teleological interpretation of the law. On the other hand, the enhanced partnership with African countries requires a greater reliance and respect for other nations' sovereignty, assurances and commitments[1]. Partnership inevitably allocates and distinguishes competencies, tasks, duties and responsibilities between counterparts and this may weaken the European goal to uphold and promote its own values "*in its relations with the wider world*" (Article 3(5) of

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Tugendhat, *Clearing the Fog of Law – Saving our armed forces from defeat by judicial diktat* (London: Policy Exchange, 2015). More in general, the application of ECtHR jurisprudence in the UK law was considered as undermining not only "*the role of UK courts in deciding on human rights issue*" but also the "*sovereignty of Parliament, and democratic accountability to the public*" because Section 3(1) of the Human Rights Act requires "*UK courts to read and give effect to legislation in a way which is compatible with Convention rights as far as it is possible to do so*". As a result, the Conservative Party wants the ECtHR to be no longer binding over the UK Supreme Court and become an advisory body only so as to find "*a proper balance between rights and responsibilities in UK law*". A new British Bill of Rights and Responsibilities should accordingly replace the present Human Rights Act and the "*formal link*" between the British courts and the ECtHR should be broken so that "*the UK courts, not Strasbourg, will have the final say in interpreting Convention rights, as clarified by Parliament*". As of November 19, 2017, The Guardian's website displayed Conservatives' eight-page strategy paper "Protecting Human Rights in the UK - The Conservative Proposals for Changing Britain's Human Rights Law," London, October 2014, https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document (quotations at 4-6).

[1] European Commission, "Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration," COM(2016) 385 final, Strasbourg, 7.6.2016.

the Treaty on European Union) and to "*develop a special relationship with neighboring countries* [...] *founded on the values of the Union*" (Article 8(1)). In fact, the more the EU relies on cooperation and assurances from third countries, the less it can command respect for absoluteness and universality of human rights standards. After all, outsourcing human rights protection inevitably lowers these standards and it might eventually lead Europe to turn a blind eye or claim no liability for violations occurring abroad.

In other words, managing irregular migration by relying on simplified and accelerated procedures and cooperation with third countries materialises the risk of lowering human rights standard and formalism and literal interpretation and application of the law might allow Europe to shirk its responsibilities while pursuing the final goal of strengthening security.

A number of recent developments in the field of migration support these findings and submissions.

First example: in September 2015, the European Commission proposed the establishment of an EU common list of safe countries of origin which includes Turkey and Balkan countries[1]. Whilst continuing to be assessed on an individual case-by-case basis, applications for international protection lodged by nationals of safe countries would also be fast-tracked for allowing faster returns if refused. The fear is that the safe-country assumption will actually make the assessment of the application too fast and cursory and the need for faster returns will prevail over the effective protection of human rights. In this respect, it is thought-provoking the Action Plan on measures to support Italy in reducing migratory pressure presented by the European Commission on July 2017. The Commission, in fact, urges Italy to develop "*a national list of 'safe countries of origin', prioritising the inclusion of the most common countries-of-origin of migrants arriving in Italy*"[2]. With this recommendation, the Commission reverses the logic of the list of safe countries: third countries should be included on the list following a thorough and careful assessment of their being "*safe*" but in this case the inclusion depends only on the fact that certain countries are the most common countries-of-origin of migrants arriving in Italy. In doing so, however, the true objective of the list becomes to reduce migratory pressure and protect European security at any cost while it should be the

[1] European Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purpose of Directive 2013/32, and amending Directive 2013/32/EU," COM(2015) 452 final, Brussels, 9.9.2015.

[2] European Commission, "Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity," SEC(2017) 399, Brussels, 4.7.2017, § 2 at 4.

other way around, namely to reduce the abuses of the asylum system (clearly unfounded claims, subsequent applications, etc.) after a careful assessment of the human rights situation in foreign countries.

The case of Nigerian nationals is a telling example. In 2016, Nigeria was one of the most common countries-of-origin of migrants arriving in Italy and the recognition rate of asylum application lodged by its nationals (more than 47,000) was so low (8% in the first three quarters) that the abuse of the asylum system is seemingly clear. At the same time, however, the International Organization for Migration "*estimates that 70% of the Nigerian women and children who arrived in Italy in 2015 and the first five months of 2016 were victims of trafficking*"[1]. The difference between these two data exposes a failure in the asylum system notwithstanding Italian authorities would apply ordinary asylum procedures which require careful and thorough examination of the application. If Nigeria were included in the list of safe countries, accelerated and streamlined asylum and inadmissibility procedures would then apply and the risk of not being able to identify a victim of trafficking would become considerably greater.

Second example: in March 2016 the EU and Turkey issued a joint statement ("*EU-Turkey Statement*") in order to have all irregular migrants crossing from Turkey into Greek islands returned to Turkey[2]. It is quite clear the formalistic approach towards interpretation and application of the Statement. The European Council and the Commission deny any binding value to the Statement because it would be a simple press communiquée setting only political commitments[3]. Such an interpretation of the Statement runs counter to the reality on the ground given that the content of its "*action points, thereby enumerating the commitments to which the parties have consented*", to the active involvement of EU Institutions in its implementation and relevant international law suggest that it is an

[1] GRETA, "Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking on Human Beings," GRETA(2016)29, published on 30 January 2017, § 15. GRETA stands for Group of Experts on Action against Trafficking on Human Beings.

[2] "EU-Turkey Statement," 18 March 2016, Press Release 144/16, accessed November 19, 2017, http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/EU-Turkey-statement/.

[3] Some Members of the European Parliament have described the whole situation as a "*farce*" and accused other EU Institutions of switching tactics by calling "*statement*" what was previously called and truly is an "*agreement*" in order to exclude the European Parliament from the legislative process of negotiation. See Nikolaj Nielsen, "EU-Turkey deal not binding, says EP legal chief," *EU Observer*, May 10, 2016, https://euobserver.com/justice/133385.

international binding agreement[1]. Furthermore, the ECJ dismissed any action for the annulment of the Statement on the ground of its lack of jurisdiction. Whilst qualifying the Statement as a binding international "*agreement*", the ECJ held that it "*cannot be regarded as a measure adopted by the European Council*" (or by the EU) but by the EU Member States in their own capacity[2]. The thin and somewhat ambiguous distinction drawn by the ECJ between EU agreement and EU Member States agreement reveals a formalistic approach to the reality that it would have been unthinkable just a few years ago in Europe.

The formalism underpinning the Statement is also demonstrated by the generic and undetailed assurances that returns take place "*in full accordance with EU and international law*" (Turkey, for its part, assures the respect of human rights once irregular migrants are returned), that "*all migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement*", and that "*any application for asylum will be processed individually by the Greek authorities*". This kind of diplomatic assurances (not even binding according to EU Institutions) are much more similar to the formal ones sought by the US Government than to the substantive ones required by the ECtHR in *Tarakhel* decision. It seems equally formalistic the behavior of the Commission insofar as it laconically responds to the criticism of human rights violations[3] by confirming that returns "*are carried out strictly in accordance with the requirements of EU and international law, and in full respect of the principle of non-refoulement*" and that the situation in the Turkish centers "*complies with the required standards*"[4]. Political and legal ambiguities surrounding the EU-Turkey Statement raise

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[1] "*As noted by the International Court of Justice, international agreements 'may take a number of forms and be given a diversity of names' (Qatar v. Bahrain, para 23)* [...] *What matters is not the form, but the 'actual terms' of the agreement and the 'particular circumstances in which it was drawn up'* [...] *The case-law of the ICJ demonstrates that atypical instruments, such as the minutes of a meeting or a 'joint communiqué' (i.e. a statement), may actually be international agreements*". See Mauro Gatti, "The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)," published on April 18, 2016, accessed November 19, 2017, ejiltalk.org /the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/, at 3.

[2] ECJ, Order of 28 February 2017, *NF v. European Council*, *NG v. European Council*, *NM v. European Council*, Joined Cases T-192/16, T-193/16, T-257/16, par. 71-72.

[3] The Statement "*raises several serious human rights issues relating to the detention of asylum seekers in the Greek islands, the return of asylum seekers to Turkey as a 'first country of asylum' or 'safe third country' and the Greek asylum system's inadequate capacity to administer the asylum process*". Moreover, the returns to Turkey may not meet the requirements of EU and international law as regards, in particular, the safe third country requirement. See Council of Europe (Parliamentary Assembly), "The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016," Report of the Committee on Migration, Refugees and Displaced Persons, Doc. 140128, April 19, 2016, §§ 3.2-3.3.

[4] European Commission, "Fifth Report on the progress made in the implementation of the EU-Turkey Statement," COM (2017) 204 final, Brussels, 2.3.2017, § 2, at 5.

doubts on the true objectives of European States and Institutions. The Statement seems to be a political *escamotage* and a legal shortcut to institutionalizing the US-style scant diplomatic assurances, avoiding a strict application of EU and international law and achieving at any cost the goal of halting irregular migration flows.

4. Conclusions

Differences between the US and European approaches to security still exist. The gap is however narrowing insofar as Europe is increasingly adopting US-style attitudes and policies in dealing with the culture of security and the relationship between politics and law. All of this is causing a legal identity crisis given that formalism and limited judicial check are far from European legal culture and tradition.

Following decades of strong and wide protection of human rights in any situation, the States and the European Commission are seeking for a new and different balance between human rights and security. It is almost like the States and the Commission are nowadays ready to trade some political idealism and legal functionalism in the field of migration and human rights for more political pragmatism and legal formalism in the field of security. Derogations and reform of the ECHR and Schengen systems, the revised and enhanced return policy, the controversial legal nature and paternity of the EU-Turkey Statement and the increasing reliance on cooperation and assurances from third countries are emblematic clues of the European renewed approach to security. Even if Europe has substantially stayed true to a high standard of human rights protection for the time being, the quest for more security through less judicial control and more legal formalism might eventually lead to instability within the European legal cultures and systems.

Should the formalistic approach of governments clash with the functionalist approach of courts in the near future, there would be the risk that the former might not be so willing to settle the dispute with the latter. The first testing ground might be the lawfulness of enhanced cooperation with third countries in the field of migration. European Institutions and governments have been accused of complicity in abuses committed in Libya against migrants[1]: should a European supranational court uphold

[1] See, inter alia, Nikolaj Nielsen, "EU accused of complicity in Libya migrant abuse," *EU Observer*, September 7, 2017, https://euobserver.com/migration/138932. As of November 19, 2017, UN News Centre's home page displayed the news "Libya's detention of migrants 'is an outrage to humanity', says UN human rights chief Zeid," November 14, 2017, http://www.un.org/apps/news/story.asp?NewsID=58084.

these charges, how would governments react? Would they respect and implement the ruling as it always happened in the past or would they take a critical and challenging stance as the Visegrad States did in the *affaire* of mandatory relocation of asylum seekers decided by the ECJ against their interests[1]?

It is too early to draw a conclusion but courts and governments should agree on a new balance between security and human rights so as to avoid, on the one hand, any kind of institutional conflicts and, on the other hand, the risk that European governments would sooner or later start following more closely some US policies (hearsay evidence[2], expedited removal procedures, enhanced interrogation techniques, etc.) which, right or wrong in that legal culture, are however far away from the European one in terms of a "*decent respect to the opinions of mankind*" and to... human rights.

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[1] ECJ (Grand Chamber), Judgment of 6 September 2017, *Slovakia and Hungary v. Council*, Joined Cases C-643/15 and C-647/15. The Visegrad Group is formed by Poland, Hungary, Slovakia and Czech Republic.

[2] See, for instance, the UK proposals to reform "*the rules for introducing hearsay evidence in criminal trials without requiring a separate determination at the end of submission of all evidence to determine if the submission was justified*". Paul Stephan, "International law as a wedge between the common and civil law," in *The Common Law and the Civil Law Today – Convergence and Divergence*, ed. Marko Novaković (Wilmington: Vernon Press, forthcoming).

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