The Application of International Law in Macedonia

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1 Introduction

The concept of an international society exists

> when a group of states, conscious of certain common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions. (Bull 1995, p. 13)

This concept emphasises the importance of principles of international order, such as state sovereignty and non-intervention, but also acknowledges the commitment of states in protecting values such as justice, free trade and human rights. The theory recognises that there is a conflict between the order provided by states and various aspirations for justice. However, scholars take two different positions on the issue of resolving this tension: the pluralist and the solidarist view.

Pluralists argue that order is always prior to justice, and that justice is only possible within the context of order, but never at the price of it. Solidarists, in contrast, look at the possibility of overcoming this conflict by recognising the mutual interdependence of the two concepts. Their main focus is on individuals as the principal holders of rights and duties in international relations and the realisation of individual justice.

The values that states commit themselves to acknowledging and promoting are enshrined in international legal documents, whereas the order states provide is regulated by domestic legal documents. This paper looks at the position of international law in the Macedonian legal system and the scope of its application by the

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S. Rodin, T. Perišin (eds.), *Judicial Application of International Law in Southeast Europe*, DOI 10.1007/978-3-662-46384-0_10

Macedonian judiciary. It identifies achievements and challenges, and provides an analysis and recommendations on how international values can be applied and achieved at home.

2 The Position of International Law in the Macedonian Legal System

In realising the values that states commit themselves to in international relations and which are evoked with the adoption of international legal documents, two preconditions are necessary. First of all, states need to be democratic and adopt a domestic legal framework that will provide the basis for the realisation of internationally agreed rights, freedoms and values, as 'without good written legal acts, moving in the right direction will be difficult to be achieved' (Blankenagel 1996, p. 57). Secondly, states need to build an effective mechanism for implementation of the legal framework (domestic and international) as 'even the most brilliant legal texts provide no guarantee for adequate implementation' (ibid).

Since its independence from federal Yugoslavia in 1991, the Republic of Macedonia has undergone serious constitutional reforms which have encompassed the adoption of a democratic political system and acceptance of the 'justice for all' concept (Kambovski 2008). This has been coupled with the signing and ratification of all international legal documents that envision the protection of human rights, but also other values such as free trade and environmental protection. The Constitution of the Republic of Macedonia has been developed in a 'laboratory' rather than by state institutions, which means the country has been privileged to learn from the best constitutional practice in democratic Western societies, and selectively copy modern constitutional models, terminology and concepts (Weruszewski 1992, p. 191). As such, it has adopted a liberal democratic approach towards human rights and freedoms.

In addition, the Constitution of Macedonia regulates the position of international law in the legal order of the country and thereby sets out an important basis for the application of international law in Macedonia. Article 118 of the Constitution stipulates that international agreements that are ratified and in accordance with the Constitution are an integral part of the domestic legal order and cannot be changed or derogated with laws. Given that ratification is needed for an international legal act to be transformed into the national legal system, one might conclude that in Macedonia there is a dualistic approach to the incorporation of international acts in national law. From the dualistic perspective, international and national law represent two separate levels. Hence, a transformation act into the national legal system is needed (Amrhein-Hofman 2003).

The Constitution also stipulates the hierarchy of domestic and international general legal acts. Emphasising the unity of the Macedonian legal system, Article 51 also regulates that the Constitution is the supreme legal act. To this effect, 'all

laws and other general legal acts promulgated in the Republic of Macedonia must comply with the Constitution, and all other regulations must comply with the laws and the Constitution of the Republic of Macedonia'. In this respect, international treaties and other international legal acts that are transformed into the Macedonian legal system through a ratification act adopted by the Parliament have equal treatment as domestic legal acts, although the Constitution stands above them in the hierarchy.

The Constitution of the Republic of Macedonia explicitly specifies the incorporation of international legal sources within the national legal system. For example, Article 8 on the basic values of the constitutional order of the country regulates the fundamental human rights and freedoms recognised by international law and determined by the Constitution (paragraph 2), and respect for the generally accepted norms of international law (paragraph 12). Although it seems that the Constitution mirrors the European Convention for Human Rights (ECHR) in terms of guarantees for human rights and freedoms, it also regulates numerous (26 reservations) legal limitations of the same. Treneska-Deskovska (2008) categorises these limitations into two groups: (1) legal reservations that allow room for the human rights and freedoms determined by the Constitution to be further regulated in detail by other domestic legal acts, e.g. this is the case with the rights of foreigners (Articles 29 and 31); the right to marriage and family life (Article 40); the right to defend the country (Article 28); and the right to labour relations (Article 32); and (2) legal reservations that allow for an internationally recognised human right or freedom determined by the Constitution to be limited by a domestic law, e.g. this is the case with the right to freedom (Article 12); the right to movement and housing (Articles 26 and 27); the right to freely assemble (Article 28); the right to property (Article 30); the right to form a union and the right to strike (Articles 37 and 38).

The dualism in the legal order of the Republic of Macedonia is once again demonstrated in Article 98 of the Constitution, which regulates the application of domestic laws and international legal acts by the judiciary: 'the courts decide, on the basis of the Constitution, the laws of the country and international agreements that are ratified and in compliance with the Constitution of the Republic of Macedonia'. The only law in domestic jurisprudence that makes a reference to direct application of the rights stipulated in an international legal document, including the decisions of an international court, is the recently adopted Civil Liability for Defamation and Libel Act (Official Gazette (OG) No. 143/2012). Article 2 (paragraph 2) of this act stipulates that 'limitations on freedom of speech are regulated by this law in accordance with the European Convention for Human Rights and the practice of the European Court of Human Rights (ECtHR)'. Furthermore, it reaffirms the primacy of the ECHR over domestic laws in specific situations. Article 3 stipulates:

> if the court by applying the provisions of this law cannot resolve a certain issue that is related to responsibility for defamation or libel, or it determines that there is a legal loophole or conflict of this law with the ECHR, based on the principle of primacy, the

court will apply the provisions of the ECHR and the legal position of the ECtHR as expressed in its judgments.

The authorised Agent of the Republic of Macedonia in front of the ECtHR in an interview with the authors made it clear that this formulation was adopted 'on purpose to encourage Macedonian courts to apply the ECHR and the decisions of the ECtHR directly rather than to apply the mirror provisions of the same that have been integrated into domestic laws' (interview with Bogdanov 2013), the latter being the predominant strategy in the application of international law by the judiciary, as fourth chapter will demonstrate.

2.1 The Position of International Agreements in the Macedonian Legal System

On the basis of succession, the independent Macedonia inherited from the former federal Yugoslavia membership of certain international organisations (such as the IBRD, World Bank, IFC, IDA, and MIGA (OG 23/93)) and also assumed responsibilities from international agreements signed before independence. However, many important legal documents were signed after 1991.

In January 1998, the Signing, Ratification and Execution of International Agreements Act was passed (OG 5/98). This law regulates the procedure, ratification, manner of implementation and execution of international agreements (bilateral and multilateral) in accordance with the Constitution of the Republic of Macedonia and international law. This law replaced the Signing and Executing International Agreements Act of the Socialist Federal Republic of Yugoslavia (SFRY) (OG 55/78, 47/89).

2.1.1 The Stabilisation and Association Agreement (SAA)

In 1997, the Co-operation Agreement[1] between the European Community and the Former Yugoslav Republic of Macedonia was signed in Luxembourg, accompanied by a Financial Protocol and Transport Agreement.[2]

In 1999, the EU proposed a new Stabilisation and Association Process (SAP) for five countries in South-Eastern Europe. On 16 June 1999, negotiations with Macedonia were launched and a Stabilisation and Association Agreement was signed with the European Union on 9 April 2001, which entered into force on 1 April 2004. The SAA replaced the Co-operation Agreement of 1997. The SAA in its preamble calls for commitment to political, economic and institutional stabilisation through the development of civic society and democratisation, institution-building and

[1] Entered into force 1 January 1998.

[2] Entered into force 28 November 1997.

public administration reform, enhanced trade and economic co-operation, the strengthening of national and regional security, as well as increased co-operation in justice and home affairs (SAA FYR Macedonia OJ L 49/1). However, the agreement does not provide for any vehicles of democratisation, although it endorses the EU focus on output legitimacy, effectiveness and efficiency in enforcement of EU policies (Risteska 2013). In addition, it provides that:

> parties will attach particular importance to the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the machinery of justice in particular. This includes the consolidation of the rule of law . . . and the independence of the judiciary, the improvement of its effectiveness and training of the legal professions'. (Article 74)

The SAA includes chapters on political dialogue, regional co-operation, free movement of goods and people as well as trade co-operation. It regulates implementation of SAA provisions over a period of 10 years divided into two periods. The SAA was ratified by the Macedonian Parliament with the adoption of the Ratification of the SAA Act 5 days after its signing, and the Macedonian translation of the agreement was published in the Official Gazette. The SAA was applied through this the dualist approach.

For the implementation of the SAA, an institutional framework was established. This encompassed: the SAA Council, SAA Committee and seven SAA sub-committees. In accordance with Article 68 of the SAA, Macedonia started the gradual approximation of its existing and future laws (competition law, intellectual property law, etc.), and the Interim Agreement on Trade and Trade Related Matters was signed and entered into force on 1 June 2001 (OJ L124/3 of 4 May 2001).

The Interim Agreement between the EC and Macedonia regulates all issues related to trade between the EU and Macedonia through an improvement in the balance of trade. The Interim Agreement allows for the full liberalisation of trade between the EU and Macedonia, except for fish, wine and spirit products. The aim of the Interim Agreement was to increase trade, eliminate increases in tariffs and decrease trade barriers. An additional protocol to the Interim Agreement/SAA on wine entered into force in January 2002, covering reciprocal preferential trade concessions for certain wines, and reciprocal recognition, protection and control of wine names/designations for spirits and aromatised drinks.

As trade relations between Macedonia and the EU grew, the SAA went through several amendments. In 2005, Article 27 of the SAA was amended with a protocol on a tariff quota for imports of sugar and sugar products originating from Macedonia and exported into the EU. In 2008, the double-checking system for imports of steel products from Macedonia into the EU was abolished (Council Regulation No. 79/2008 repealing EC Regulation No. 152/2002 for Macedonia; OJ L25/3 of 30.01.2008). Finally, the SAA Council decided that Article 7 of Protocol 2 of the SAA and Annex 1 of the same Protocol would be repealed as of 1 January 2008 (OJ L 25/10 of 30.01.2008).

2.1.2 WTO

The SAA does not exclude WTO provisions and specifically refers to Article 24 of the GATT on customs unions, and Article 5 of the GATS on economic integration and market liberalisation between the signatory countries. This makes the two processes of accession to the European Union and WTO reform complementary. The high level of political commitment to the first process was reflected in WTO membership success. Macedonia was able to complete the overall accession process within a record period of 3 years (1999–2002) and become the 146th member of the WTO in April 2003. Consequently, Macedonia has signed bilateral free trade agreements with all neighbouring countries and territories. To facilitate the application of the WTO agreement, the Macedonian Parliament adopted the ratification of the accession package, which was also published in Macedonian in the Official Gazette of Macedonia, while the Government provided additional information about the WTO through the official websites of the Government and the Ministry of the Economy, national strategies, and several translated books and printed brochures. The WTO agreement, accepted and ratified by the Parliament of the Republic of Macedonia, has the status of national law, which is derived from the Constitution of the Republic of Macedonia. Since members of the WTO accept WTO agreements as a 'single undertaking', a different period of time is needed to apply its provisions. The TRIPS agreement is part of this package, so most of its provisions are implemented and harmonised as part of the domestic law of Macedonia that refers to intellectual property law, i.e. the Industrial Property Act (OG No. 21/09, No. 24/11), the Copyright and Related Rights Act (OG No. 115/10, No. 51/11), and the Protection of Competition Act (OG No. 145/10).

In 1991, Macedonia joined WIPO, with the result that most of the rules that refer to intellectual and industrial property rights were approximated with national law.

2.1.3 The ICTY

The International Criminal Tribunal for the Former Yugoslavia (ICTY) constitutes a judicial signed intervention, i.e. intervention by legal means, without the use of force (Birdsall 2007). The ICTY as a case of judicial intervention is a concrete expression of the conflict between order and justice. It constitutes external intervention by a number of states in the internal affairs of another sovereign state in order to enforce human rights laws and to protect principles of justice. This means that one state's sovereignty (as a fundamental principle of international order) is compromised to protect human rights (as a principle of individual justice). The ICTY is a means rather than an end in itself, making the enforcement of universal justice norms possible on an international basis (ibid).

Macedonia signed a co-operation agreement with the ICTY, which was transformed into the domestic legal system with the Co-operation with the ICTY Act, in which 'all state bodies committed themselves to joint co-operation, and

exchange of information and documents that are within the competence and interest of the International Criminal Court' (OG 73/2007, Article 1). This law implements UNSC Resolution 827. The law allows for proceedings in front of the ICTY (for crimes regulated by the ICTY Statute) to have primacy over proceedings against the same person on the same criminal charge in front of the public prosecutor or a domestic court (Article 8, paragraph 1). In 2010, the International Co-operation in Criminal Matters Act was passed (OG 124/2010). By means of this law, Macedonia agreed to co-operate in all matters with the European Court of Justice (ECJ), European Court for Human Rights (ECtHR), International Criminal Court (ICC) and other international organisations that Macedonia is a member of or has signed international agreements with (Article 3).

2.1.4 The Aarhus Convention

The first steps towards providing a legal framework for access to environmental information were undertaken by the Republic of Macedonia in 1999 when the Parliament of the Republic of Macedonia ratified the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the Ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) Act (Official Gazette of the Republic of Macedonia No. 40/99).

Since Article 118 of the Constitution of the Republic of Macedonia states that 'international agreements ratified in accordance with the Constitution are part of the internal legal system and cannot be changed by law', and since Article 68 (Constitution of the Republic of Macedonia) declares that 'the Parliament of the Republic of Macedonia ... ratifies international agreements', the Aarhus Convention is considered to be of the same rank as national law. As such, and in accordance with Article 98 (Constitution of the Republic of Macedonia), 'the courts shall judge on the basis of the Constitution and the laws and international laws ratified in accordance with the Constitution'.

3 The Macedonian Judicial System

The judicial system in Macedonia is regulated by the Constitution of the Republic of Macedonia (Part III point 4, Articles 98–105 and Amendments XXV, XXVI, XXVII, XXVIII) and the Courts Act (OG Nos. 58/06, 35/08 and 150/10). According to the Macedonian Constitution (Article 98), judicial power is exercised by the courts, which are autonomous and independent. The court system has a single organisation. With the latest changes to the Courts Act (OG No. 150/10), proponents of the European continental model (Davitkovski and Pavlovska-Daneva 2006, p. 114; Hristov 1981, p. 449) in the field of administrative justice came out on

top in the debate with the proponents of the Anglo-Saxon model (Gelevski 1997a, b, pp. 73–74; pp. 242, 252, 254), which resulted in the decision to introduce a specialised administrative court in the judicial system which seeks to address ongoing and unacceptable delays at the Supreme Court level in resolving administrative appeals and the consequent expense and inefficiencies (Davitkovski 2005, pp. 1–3). The new court system structure, however, still does not allow for the establishment of ad-hoc courts. To summarise, the Macedonian court system encompasses basic courts (27 in total), courts of appeal (4 in total), the Administrative Court, the Higher Administrative Court and the Supreme Court of the Republic of Macedonia (Courts Act, Article 22).

The post-Yugoslav phase in the development of the country's judiciary commenced in 1995 when the new Courts Act was adopted, introducing the election of judges by Parliament and life-long service. Under democracy, litigation increased, judicial proceedings took longer and efficiency and effectiveness decreased. With the process of accession of the country to the EU, external pressure for reform of the judiciary increased, mainly focusing on increasing efficiency in court proceedings. In 2005, a new Judicial Council was established (Amendment XXIX of the Constitution of the Republic of Macedonia) so that the election of judges, lay judges and court presidents is carried out by this Council, while members of the Judicial Council are elected by the Parliament of the Republic of Macedonia.

The Constitutional Court of Macedonia is not part of the regular court system of the country, but a special organ of the Republic established for the protection of the legal principles of constitutionality and legality. Constitutional Court competencies include: decisions on the conformity of laws with the Constitution and on the conformity of other regulations and collective agreements with the Constitution and laws; protection of the freedoms and rights of the individual and citizen relating to the freedom of personal conviction, conscience, thought, and public expression of thought, political association and activity, and prohibition of discrimination against citizens on the basis of sex, race, religion, or national, social or political affiliation; decisions on conflicts of competencies between holders of offices in the legislative, executive and judicial branches of state power; decisions on conflicts of competency between the organs of the central government and organs of the units of self-government; decisions on the accountability of the President; decisions on the constitutionality of the programmes and statutes of political parties and associations of citizens; and decisions on other issues as determined by the Constitution. The decisions of the Constitutional Court are final and binding.

3.1 The Authority to Apply International and EU Law

Amendment 15 of the Constitution of the Republic of Macedonia declares that judicial power is exercised by independent courts that function according to the Constitution and laws and also international agreements ratified pursuant to Constitutional authority. It defines the authority of all courts to perform their

adjudication function on the basis of the Constitution, the laws and international agreements ratified in accordance with the Constitution (the Constitution of the Republic of Macedonia 1991, Amendment 15). The Supreme Court, on the other hand, ensures the uniform implementation of laws by all courts (Klimovski 2005, p. 505). In accordance with Amendment 10 of the Constitution, the Supreme Court of the Republic of Macedonia is the highest court in the country's judicial system.

In the Macedonian system, the decisions of the court are treated as sources of law only for the parties involved in the case (*res iudicata facit jus inter partes*). The decisions of upper courts are not formally binding on lower courts but it is necessary for them to respect them, especially in the area of intellectual property law (Dabovik-Anastasovska et al. 2011).

The Constitutional Court, in addition to deciding on the lawfulness and constitutionality of laws and other regulations, collective agreements, statutes, or the programme of a political party or association, also provides protection for 3 of the 24 basic human rights and freedoms (Article 110, Constitution of the Republic of Macedonia, 1991), and in this respect applies the international law that regulates these rights.

3.2 The Capacity to Apply International and EU Law

When it comes to the application of international and EU law, the capacity of the judicial institutions to employ provisions from international legal documents and agreements is pertinent. Capacity is built up through the education system and the training of legal professionals.

3.3 International Law Education

Legal training in Macedonian is provided by: (1) higher education institutions (faculties of law); (2) an academy for training judges and public prosecutors; (3) civil society and professional organisations.

In Macedonia, there are 24 accredited higher education institutions, of which 17 are private and 7 are publicly managed. In total, approximately 10,000 students graduate each year. The National Bureau of Statistics said that in 2011 9,802 students graduated from higher schools and faculties in Macedonia, which is 1.4 % fewer than in 2010. Analysis of the statistics also shows a decrease in enrolment on undergraduate courses and an increase in enrolment on post-graduate ones.

Of these, four public and five private universities offer undergraduate studies in law. The recent changes in the Higher Education Act (OG Nos. 35/08, 103/08, 26/09, 83/09, 99/09, 115/10, 17/11, 51/11, 123/12, 15/13 and 24/13) introduced doctoral studies. Of the higher education institutions currently operating in the

Table 1 International and EU law studies at Macedonian universities

University	International law	EU law
Saints Cyril and Methodius—Skopje	Yes	Yes
Kliment Ohridski—Bitola	Yes	No
Goce Delchev—Shtip	Yes	Yes
State University Tetovo	Yes	No
South East European University	Yes	No
First Private European University	Yes	No
FON University	Yes	Yes
American College	Yes	No

Source: Websites of the universities and the Ministry of Education and Science of the Republic of Macedonia

country, only three are accredited to organise doctoral studies in law, of which two are public institutions and one is private. Only eight of these universities offer specialised international law studies and three offer EU law as a special module, although some offer a master's programme in European studies. Some of the private higher education institutions in the Republic of Macedonia offer law studies (Table 1).

However, none of the universities deal with the application of international and EU law. This suggests that law students gain knowledge on international law, but lack the skills for its application.

3.4 Training in International and EU Law for Legal Professionals

An academy was established by the Academy for the Training of Judges and Public Prosecutors Act (OG No. 13/2006). The Academy is the main body in the judicial system that provides continuous education and training for judges, public prosecutors, and judicial and prosecution clerks, as well as the professional development of candidates for judges and public prosecutors. The Academy also contributes to the organisation and implementation of training for educators, as well as for lawyers, public notaries and other legal professionals that apply national law.

The Academy programme for initial training encompassed a total of 660 lessons in 2006–2007, and 659 lessons in 2007–2008. This figure gradually fell to 232 sessions in 2012 (Annual Reports 2006–2007; 2011–2012). The training is delivered by both domestic and foreign trainers in various legal areas. In 2007–2008, of the 659 lessons provided, 6 % were on subjects related to international law, and 5 % focused on EU law. In 2012, of 232 training sessions, almost 2 % were on international law, while interest in EU law increased up to 7 % of all training sessions provided.

However, a more detailed examination of the programme reveals that legal requirements stemming from international law and EU law in particular have been integrated into the training programme. This is especially applicable to new features introduced into the Macedonian legal system as a result of approximation with EU law in areas of material and procedural legislation in basic legal areas (criminal, civil, commercial); the fight against organised crime, corruption and human trafficking; and competition, intellectual property, consumer protection, international bankruptcy, international humanitarian law, etc. In 2012, the Academy also held workshops focusing on: 'Court Decisions within a Reasonable Period of Time'; 'Competition Law in the European Union'; 'Protection of the Environment in the EU'.

The Academy has specifically focused on the European Convention on Human Rights (ECHR) since its establishment and continuously provides training on application of the ECHR by domestic courts as well as applying the case law of the European Court of Human Rights (ECtHR) and other international courts with the aim of correctly applying international standards for a fair trial within a reasonable time (Annual Report 2007). In 2012, the strategy of the Academy turned to also providing workshops and discussions (round table discussions, conferences and seminars), including topics related to the ECHR. A good example is the round table on the topic 'Court Practice Related to Crimes against Honour and Reputation and a Review of the Practice of the ECtHR in Terms of Applying Article 10 of ECHR' (Annual Report 2012).

The Academy has contributed to a very important aspect of capacity building in the application of international and EU law since its establishment, which is by providing beginner and advanced level foreign language courses (English being the primary choice, followed by German and French). Proficiency in a foreign language is a precondition for reading decisions of the ECtHR and other international courts and applying them in domestic proceedings.

Lastly, the Academy has dedicated part of its activities to raising awareness of the work of the European Court of Human Rights in areas of Macedonian society such as the media. In 2012, it organised a study trip to the European Court of Human Rights for the highest representatives of judicial institutions in the Republic of Macedonia and also representatives of the print and electronic media in the country to familiarise them with the practice of the court in relation to Articles 8 and 10 of the ECHR. The goal was to inform the media and judiciary of the latest documents of the Council of Europe and to present an overview of the jurisprudence related to the crimes of slander and offense committed through the media. There was also a brief overview of the jurisprudence of the ECtHR through the development of standards concerning the implementation of Article 10 of the ECHR, and the degree of their implementation in national practice in terms of the conduct of judges and journalists with regard to freedom of expression and information (Annual Report 2012).

Awareness-raising activities have been further accelerated in recent years (2010–2013), with the Academy organising a number of public events such as a conference marking International Tolerance Day, as well as series of events

promoting ECHR values to contribute to a renewal of the country's commitment to protection of the fundamental rights and freedoms of citizens. The target audience of these events was judges and public prosecutors, but also representatives of almost all areas of society, including journalists, politicians, academics, civil society and representatives of religious communities.

Capacity building for the application of international law does not encompass only training and awareness-raising, but also providing resources for legal professionals to use when applying international law in legal proceedings. Over the past several years, the Academy has created such resources by publishing the following publications: 'International Documents on an Independent and Efficient Judiciary: Opinions (1–6) of the Consultative Council of European Judges with the Landmark Documents and ECHR Jurisprudence' and 'International Documents on an Independent and Efficient Judiciary: Opinions (7–12) of the Consultative Council of European Judges with the Landmark Documents and ECHR Jurisprudence' (Annual Report 2012). In the course of 2013, the Academy has identified 20 out of a total of 28 relevant European Court of Human Rights decisions to be made available on the portal for international jurisprudence, which will be an integral part of the website of the Supreme Court of the Republic of Macedonia. In addition, judicial authorities in the Western Balkans recently agreed to create the WB HUDOC database, which will encompass all ECtHR decisions against Western Balkan countries translated into local languages to serve as an important resource for domestic courts when applying the ECHR (interview with Bogdanov 2013). In addition, the Supreme Court of Macedonia took a step forward by adopting a decision on setting up an editorial committee to be the main filter in the selection of national jurisprudence to which the ECHR is applied (interview with Panchevski 2013). This committee includes representatives of all four appellate regions, the Supreme Court and the Academy of Judges and Public Prosecutors.

4 Judicial Application of International and EU Law

Considering that most Macedonian judges have not been educated or trained in international law and that they have a limited knowledge of foreign languages, the level of application of international law by Macedonian courts is very limited. If we were to ask who initiates the issue of application of international law in Macedonia, we would find that it is usually the attorneys of the applicant that initiate the application. There are also a handful of judges that specialise in certain areas of international law, such as the ILO conventions or ECHR, and who use references to international law in their work (interview with Bogdanov 2013). It is rather infrequent for attorneys to initiate the application of the case law of the ECtHR and even less likely for judges to use it as a source of international law and apply it in their judgments.

For the purpose of this paper, we conducted a review of the case law of the basic and appellate courts, as well as the practice of the Constitutional Court. We used the

electronic system for publishing court decisions, which is available on the websites of the courts. To detect decisions where the ECHR was applied, we used the keyword *discrimination* in the search engines of the basic, appellate and constitutional courts. As far as other international legal documents are concerned, identification was carried out using a snowball methodology and face-to-face interviewing in which legal professionals directed us to court decisions that referred to or applied international law. The cases we identified in the course of the research phase have been categorised and analysed to reveal trends in the judicial application of international law. The analysis is presented below and focuses on: (1) the application of international treaties and other legal documents; (2) the application of the case law of the ECtHR.

4.1 Application of International Treaties and Legal Documents

4.1.1 Application of the ECHR

The international legal document most widely applied and referred to by Macedonian courts has been the European Convention for the Protection of Human Rights and Fundamental Freedoms. This has been a result of the capacity-building and awareness-raising activities on the ECHR in combination with the work of the European Court of Justice, whose decisions against Macedonia have been widely reported in the media. From an analysis of the case law, three distinct strategies used by the Macedonian judiciary can be perceived: (1) reference to the ECHR indirectly through mirror provisions in Macedonian laws; (2) reference directly to ECHR provisions and use of the ECHR in the justification part of decisions; (3) application of ECHR provisions directly. Both basic and appellate courts often refer to the Convention, but rarely apply it directly. In most cases, the courts apply mirroring provisions in the Constitution of Macedonia (interview with Medarski 2013). Only one particular case was detected in the research phase. This was *Sexual Workers v. the Ministry of Interior* (no. 9-P-2605/09), where the Skopje second basic court directly applied Articles 3, 5 and 8(2) of the ECHR in its decision.

The Constitutional Court, on the other hand, leads in the number of cases in which there is a reference to this source of international law. However, in one case it did not consider the ECHR as a sufficient legal basis for its decisions. In the *Georgi Pavlov v. the Appellate Court of Shtip* case, the protection of rights enshrined in the ECHR was sought. However, the Constitutional Court of Macedonia in its decision ruled that:

> although the ECHR is encompassed in the domestic legal order it cannot be considered as a direct and independent legal basis for a court's decision. The Convention's provisions can be considered as an additional argument when deciding on the rights and freedoms the Court is entitled to protect under Article 110(3) of the Constitution of Macedonia.

4.1.2 Application of the Aarhus Convention

Implementation of the Aarhus Convention was to a large extent a result of the country's striving towards European integration. Real implementation started when the provisions from the Convention were translated into the Environment Act (Official Gazette of the Republic of Macedonia No. 53/05), adopted in 2005 as a result of the approximation of Macedonian legislation to the EU *acquis*. The following year, the country adopted another law which complemented implementation of the Aarhus Convention: the Free Access to Public Information Act (Official Gazette of the Republic of Macedonia No. 13/06). This law sets out the rules and procedures for access to information in general, including access to environmental information.

There has been only one lawsuit in the area regulated by the Aarhus Convention: *Citizens of Veles v. Republic of Macedonia* concerning long-term pollution of the city. The lawsuit was filed by seven NGOs and the municipality of Veles. However the Veles district court rejected it as unfounded.

In its decision, the court unfortunately did not apply the Aarhus Convention directly but referred to the European Charter on Environment and Health (EC 1979) and EC Directive 2004/35/E. This can also be seen in the decision of the Skopje Appellate Court concerning an appeal against the decision of the basic court in Veles. In this example, the appellate court used European Union regulations to explain how the basic court decision was based on national and international law, and rejected the appeal against this decision as unfounded.

We can conclude that Macedonian courts do not apply the Aarhus Convention but instead refer to sources of European law which mirror the Aarhus Convention and then use them as grounds for their judgments while simultaneously using Macedonian domestic laws that regulate the area.

4.1.3 Application of International Labour Law (ILO Conventions)

An analysis of case law shows that Macedonian basic and appellate courts apply international labour law parallel to domestic law regulating labour relations. This includes the conventions and recommendations of the International Labour Office. To illustrate this, we will examine Skopje Appellate Court decision no. 5943/06 of 21.09.2006 upholding the decision of the Skopje Second Basic Court no. 2357/05 of 03.04.2006. In this case, the appellate court based its decision on its interpretation of reasons for employers terminating a contract in Recommendation 166 on termination of employment, issued by the ILO in 1982. In its judgment, it noted that ILO Recommendation 166 stipulates that the termination of contracts must be regulated by law or by-laws (such as collective agreements). The judgment also stated that Article 12(1) of the Labour Relations Act stipulates that contracts and their termination should be in accordance with the Labour Act, international agreements to which Macedonia is a signatory, and other regulations such as collective

agreements. 'In this respect the ILO Recommendation is compulsory and obligatory to the employer when deciding about the termination of a contract for business reasons' (no. 5943/06 of 21.09.2006). Since the decision on terminating the contract made by the employer was not in accordance with ILO Recommendation 166, the appellate court found the termination of the labour contract unlawful.

In a different case, *Avromovski v. Partner Agency for Temporary Employment*, the applicant referred to ILO Convention 111 on discrimination in employment when challenging the hiring criteria used by a temporary employment agency. The Constitutional Court also applied the Convention in its decision in this case, and ruled that the employment criteria used by the agency were in line with ILO Convention 111 and therefore non-discriminatory.

4.1.4 Application of the SAA

Application of the Stabilisation and Association Agreement has been rather limited. The review and analysis of cases only allowed us to identify a single case where the courts have applied the SAA: *Makpetrol v. Ministry of Finance Customs Office*. In this case, the First Skopje Basic Court directly applied Article 5 of the Interim Agreement and Article 18 of the SAA. In the reasoning of its judgment, which was upheld by the appellate court in Skopje, the First Basic Court referred to the SAA and Interim Agreement for Trade and Trade Issues. In this case, the applicant complained that customs duties were charged on imported goods, although the Interim Agreement and SAA annulled such charges. The defendant based the customs charges on two government decisions that have the power of by-laws in the Macedonian legal system: the Decision on closer definition of the means and conditions for importing oil and oil derivatives; and the Decision on the allocation of goods for export–import. In their judgments, the courts (both basic and appellate), besides applying the SAA and Interim Agreement directly, also gave precedence to international law rather than to domestic law (i.e. the two by-laws applied by the Customs Office and the Ministry of Finance of the Republic of Macedonia). In their decisions, the courts also concluded that the two domestic by-laws were in conflict with ratified international agreements and therefore they were no longer in force.

4.1.5 Application of the ICTY Agreement

According to the international agreement on co-operation with the ICTY, the Republic of Macedonia had to co-operate in exchanging information and documents regarding the inter-ethnic conflict of 2001. In 2005, the ICTY issued an indictment in which it stipulated that an armed conflict had occurred in Macedonia in the period from January to September 2001. On the basis of this indictment, the ICTY called upon the Macedonian government to provide all relevant information concerning the two people who had been indicted: Ljube Boshkovski (Minister of

the Interior at the time of the conflict) for command responsibility and Johan Tarchulovski (inspector of the unit providing security for the President) also for command responsibility for an attack against civilians in the village of Ljuboten. In the two court cases, the accused were individually charged with war crimes in accordance with Article 7 of the ICTY Statute. The state institutions communicated well with the ICTY and provided all the relevant information and evidence, and were commended by the EC in its progress reports.

Besides this case, in accordance with the agreement on co-operation, the Government handed over jurisdiction in four more cases involving the 2001 conflict: Lipkovo Dam; the Mavrovo Workers; disappeared persons from Neproshteno; the NLA leadership. The ICTY took over the cases from the Macedonian authorities in different phases of the investigations, but due to a lack of evidence, the cases were returned to the Macedonian judicial institutions for further investigations. However, the ICTY proceeded with the cases against Boshkovski and Tarchulovski. In 2008, the ICTY judicial council decided to lift all charges against Boshkovski, whereas Tarchulovski was sentenced to 12 years in prison.

Of the four cases returned to the Macedonian authorities, only one went to trial: the Mavrovo Workers case in which 22 people were charged with war crimes, three of whom died during proceedings. However, the case was dropped by the Macedonian criminal court, as in 2012 Parliament issued its interpretation of the Amnesty Act (adopted in 2002), stipulating that

> pursuant to Article 113 of the Criminal Code (OG No. 37/96) and Article 1 of the Amnesty Act (OG No. 18/02), all those engaged in the preparation of criminal activities relating to the conflict of 2001 prior to 1 January 2001 are also subject to the amnesty provided by the Amnesty Act.

This initiated fierce discussion in the legal profession, with comments that crimes against humanity cannot be treated *ad acta*, and that the *ius cogens* norms of international law had been violated with this interpretation of the Amnesty Act. The Helsinki Committee for Human Rights criticised the interpretation as unlawful. The Council of Europe Commissioner for Human Rights in November 2012 termed the interpretation of the Amnesty Act as a political act that entrenched the 'continuity of non-punishment of the severe human rights and international humanitarian law violations during the 2001 conflict', while Amnesty International demanded justice in the cases returned by the ICTY to the Macedonian judicial authorities, stating that 'crimes against humanity cannot be subject to political bargaining and agreement'. However, the Constitutional Court of the Republic of Macedonia decided that the interpretation of the Amnesty Act did not violate basic principles of constitutionality and therefore in two instances decided on the constitutionality of the interpretation provided by Parliament.

The fact that the ICTY returned the cases to the Macedonian judicial authorities did not mean that crimes against humanity had not been committed or that there were no elements in the four cases for the criminal investigation of war crimes. The return of the cases was in accordance with Articles 25–28 of the Co-operation with the ICTY Act, which precisely regulates the instances in which the tribunal will

return cases to the national judicial authorities; to which organ the case will be returned; and how the domestic judicial authorities should proceed in such cases. However, in these cases, the judicial authorities of Macedonia did not apply international law, as in three of the cases they had not acted in line with the international agreement for co-operation with the ICTY and the national legal act transforming the international law into the Macedonian legal system (the Co-operation with the ICTY Act) and had halted proceedings in the fourth as a result of the interpretation of the Amnesty Act issued by Parliament in 2012.

The application of international law (UNSCR 827) shows that the Macedonian judiciary has the capacity, willingness and track record (with the Boshkovski and Tarchulovski cases) when it comes to applying ICTY law. It can also play a political role when needed. This means that Macedonia's sovereignty has been compromised to protect human rights (as a principle of individual justice). However, as this case shows, ICTY law has not proven to be effective in the 'enforcement of universal justice norms possible on an international basis' (ibid).

4.2 Referring to the Case Law of the ECtHR

Transnational relationships between courts in this instance can be approached analytically through the framework of judicial implementation and impact (Volcansek 1989, p. 569). Impact analysis focuses on the consequences or results of judicial actions. An analysis of the case law shows that there is no commonality in the practice of the Constitutional Court when it comes to the application of the jurisprudence of the European Court of Human Rights (ECtHR). A review of all the decisions issued from 1991 to May 2013 shows that the Court chooses to: (1) ignore application of the decisions of the ECtHR; (2) apply the decisions made by the ECtHR in certain cases and uses them to justify its own decisions; or (3) explicitly refuses direct application, as the jurisprudence of the ECtHR cannot be interpreted as a source of international law. The following three cases are illustrations of these practices of the Constitutional Court of Macedonia when applying international law, particularly the jurisprudence of the ECtHR.

In the case *Nikola Gelevski v. Dragan Pavlovic Latas* (U. No. 3/2012-0-0 of 02.05.2012), which came before the Constitutional Court in an attempt to overturn a decision awarding damages on the basis of protecting freedom of expression as guaranteed under Article 16 of the Constitution, the attorney of the applicant referred to the extensive practice of the ECtHR in applying Article 10 of the ECHR. The applicant used the judgment in the *Lingens v. Austria* case of 1986 to defend themselves against the accusation of telling lies and untrue facts on the grounds that they were expressing a value judgment, which according to the ECtHR in the *Schwabe v. Austria* case of 1992 did not need to 'be proved to be true or untrue'. In the same case, the jurisprudence of the ECtHR was also used to argue that the language used by the applicant was acceptable (*Dalban v. Romania*, 1999;

Oberschlick v. Austria, 1991; *Lopes Gomes de Silva v. Portugal*, 2000) and to appeal against the basic and appeal courts in Macedonia ruling that the same was damaging and libellous.

The Constitutional Court in its decision referred to Articles 12, 19 and 29(2) of the Universal Declaration of Human Rights, to Articles 17 and 19 of the International Pact for Civic and Political Rights, and Articles 8 and 10 of the European Convention of Human Rights. It ruled that the State has the right to limit freedom of expression under Article 172(1) of the Criminal Code, which criminalises defamation. Therefore, the Constitutional Court found that the decisions of the other domestic courts were in line with the Constitution and international law, and so did not choose to apply the jurisprudence of the ECtHR.

In *Bektesh in Macedonia v. Republic of Macedonia*, which involved a religious community, the Constitutional Court chose another strategy. It again referred to international law, such as Articles 18 and 29(2) of the Universal Declaration of Human Rights; Articles 18(1), 18(3) and 26 of the International Pact for Civic and Political Rights; and Articles 9 and 12 of the European Convention of Human Rights, including Article 1 of Protocol 12 of the same. In addition, although not initiated by the applicant, the court decided to directly apply the jurisprudence of the ECtHR (the court's decision) in the (*Belgian Linguistic Case, Judgment of 23 July 1968*) and the standpoint of the UN Human Rights Committee in *General Comment No. 18*.

On the other hand, in *Ljupcho Ristovski v. Skopje Second Basic Court* (U. No. 39/2012-0-0 of 12.09.2012), the Constitutional Court decided not to accept the applicants' request to directly apply the ruling of the ECtHR in *Kraus v. Poland*. The justification the Court gave was that the ruling could not be interpreted as a source of international law and that 'domestic courts in Macedonia work in accordance with the Constitution, the law and ratified international agreements that are in conformity with the Constitution'.

Considering that change is the expected result of court decisions (Miller 1969), we may conclude that there is inconsistency in the way the international court's decisions are applied by Macedonian courts and that a consistent gap between policies to apply decisions of international courts or refer to their jurisprudence (such as the case concerning the Civil Liability for Defamation and Libel Act, which requires Macedonian courts to apply the decisions of the ECtHR) and their actual implementation.

5 Conclusion

In the hierarchy of the Macedonian legal system, international treaties and recognised principles of international law stand below the Constitution but above all other sources of law. Article 118 of the Constitution stipulates that international agreements that are ratified and which are in accordance with the Constitution are

an integral part of the domestic legal order and cannot be changed or derogated with laws. Considering that ratification is needed for an international legal act to be transformed into the national legal system, it might be concluded that in Macedonia a dualistic approach to the incorporation of international law into national law is taken.

Macedonian courts have the authority to perform their adjudication function on the basis of the Constitution, the laws and international agreements ratified in accordance with the Constitution of the Republic of Macedonia. However, the application of international and EU law is related to the capacity of judicial institutions to employ provisions from international legal documents and agreements. One in six accredited Macedonian universities specialise in international law, and one in eight in EU law. Since they do not have practical education in the application of international and EU law, we can conclude that while students have knowledge they lack the skills to apply international law. The Academy for the Training of Judges and Prosecutors plays an important role in building such capacity and raising awareness, but analysis shows their strategy to be highly dependent on donor-funded projects.

To depict the level of judicial application of international law, we have reviewed the case law of both the Constitutional Court and the basic and appellate courts. Macedonia has signed the Stabilisation and Association Agreement with the European Union and is well on its way in the process of approximating domestic legislation with the EU *acquis*. The review of case law also shows that although they do so infrequently, Macedonian courts apply the SAA and use it as primary source of law. This is also the case with the International Labour Office conventions, though not so much with the ECHR and the Aarhus Convention. While for the Aarhus Convention the courts opt to apply mirroring of the Convention in the Macedonian legal system, the analysis of the case law in the application of the ECHR has shown variations in how it is done: from indirectly referring to ECHR provisions to direct application of the Convention. The practice of the Constitutional Court in this respect is not very standardised, as it often uses the ECHR to justify its reasoning in its rulings. However, the analysis has also detected cases where the Court does not recognise the Convention as a sufficient source of law for it to base its decisions upon.

Finally, the most intriguing area is the application of international court decisions. The research has shown that although the decisions of international courts are compulsory and have to be applied, an analysis of the case law related to the decisions of the ICTY and the ECtHR shows that Macedonian courts are not very aware of this requirement. The Constitutional Court in particular lacks consistency in interpreting and applying ECtHR decisions. It diverges from them, uses them as a legal basis for judgments, refers to them to justify a decision or to reject an application, or states that international court decisions are not a sufficient basis for it to make a judgment.

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