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Anikó RAISZ

Some Current Issues of International Law from the Perspective of Central and Eastern European Countries

Concept for the CEPN Junior Programme Textbook on International Law[1]

A defining element of the history of the Central and Eastern European states (which in this case roughly coincide with the countries whose territory is located, in whole or in part, in the territory of the former Austro-Hungarian Empire), which holds implications for international legal relations today, is that many questions remained unanswered. To use a now common expression, countries with a more fortunate history than ours are surprised to find that issues are evident in this region that are no longer evident to them, particularly in relation to the international protection of human rights or sovereignty, and vice versa. We do not understand why communist symbols,[2] which are clearly reminiscent of infringements in this region, cannot be banned, but what is wrong with the use of Christian symbols.[3] It is hardly clear to the

1 I would like to express my special thanks to Katarzyna Zombory, Attila Dudás, János Szinek, János Ede Szilágyi, Gábor Hulkó, Sára Kardos, and Tünde Kovács, as well as all the contributors, authors, reviewers, and peer-reviewers as well as editors for their precious work on this book, some of its chapters, the whole series and programme.

2 See the judgement of the European Court of Human Rights (hereinafter referred to as ECtHR) in the case of ECtHR, Vajnai v. Hungary; No. 33629/06 (ECtHR, 8 July 2008), and the analysis of the case see Koltay, 2010. Further related judgment: ECtHR, Fratanoló v. Hungary; No. 29459/10 (ECtHR, November 3, 2011).

3 ECtHR, Lautsi and others v. Italy; No. 30814/06 (ECtHR, November 3, 2009). In the first Lautsi decision, the Strasbourg Court censured the Italian state for what it considered a violation of the right of children to choose their religious beliefs and the right to education and teaching in accordance with the religious and philosophical beliefs of their parents. Later, the Grand Chamber, acting on an application by Italy, found that the crucifix, as a religious symbol, contributed to Italian identity and that there was no breach of the Convention by the State. Further related judgements: ECtHR, Buscarini and others v. San Marino; No. 24645/94 (ECtHR, February 18, 1998); ECtHR, Folgerø and others v. Norway; No. 15472/02 (ECtHR, June 29, 2007).

Raisz, A. (2022) 'Introduction' in Raisz, A. (ed.) *International Law From a Central European Perspective.* Miskolc-Budapest: Central European Academic Publishing. pp. 11–19. https://doi.org/10.54171/2022.ar.ilfcec_1

outside observer why we cannot rise above ethno-territorial-linguistic issues, why we insist on minority protection,[4] while being more or less generous in dealing with the encroachments on our national-preservation environment or economic spheres of interest.

For the countries of this region constitutional identity[5] (Chapter 1) is of particular importance. It is certainly not unproblematic in the general European perception, but in Central and Eastern Europe the situation is even more complicated. Constitutional identity is a question around which the world is changing,[6] and which itself is changing, despite the fact that the concept implies permanence and inalterability.[7] This paradox is an immanent element of the concept: The interactions between the phenomenon of continuity and change in the constitution[8] shape constitutional identity. Dichotomies of identity—national or constitutional, organically evolving or superimposed, static or dynamic, heterogeneous or homogeneous[9]—only complicate the picture. Constitutional courts[10] also play a key role in shaping its meaning as custodians of a society's legal values. In the context of the assertion of constitutional identity, it can be seen that this concept (well-defined, almost elitist, and therefore limited) cannot (or at least not easily) be misused. With this in mind, it is worth examining its spread and scope.

Constitutional identity appeared in the Hungarian legal literature in the 2010s,[11] and a great number of authors both at home and abroad have in fact considered constitutional identity in its European dimension.[12] The relation to the concept of national identity in Article 4(2) of the Treaty on the European Union was an inescapable theme, but the relation between constitutional identity and international law was equally important. This issue relates first and foremost to the relation between international law and national law.[13] The situation of primarily dualist states is quite different from that of monist states, not to mention hybrid systems. The relationship of the Central and Eastern European states to international law is greatly influenced by which of these systems they choose. The situation is different in Slovenia,[14] Hungary[15] or Austria.[16] To understand the Central and Eastern European approach to

4 See the initiative Minority SafePack—one million signatures for diversity in Europe.
5 Trócsányi, 2014; Trócsányi, 2006; Trócsányi and Lovászy, 2020; Trócsányi, Schanda and Csink, 2019; Trócsányi, 2016.
6 See the longtime international doyen of the issue, Mathieu, 2013.
7 Viala, 2011.
8 In his monograph, Gary Jeffrey Jacobsohn explores the issue of constitutional identity in the context of constitutional continuity and change. See Jacobsohn, 2010, p. 323.
9 Orbán, 2018.
10 Rychetsky, 2017, p. 98.
11 See inter alia Somssich, 2018; Tribl, 2018; Tribl, 2019; Szakály and Tribl, 2018.
12 Trócsányi, 2017; Varga, 2018; Rychetsky, 2017; Orbán, 2018; Faraguna, 2017; Besselink, 2010; Martin, 2012; Burgorgue-Larsen, 2011; Rousseau, 2011.
13 See for example Szmodi, 2009, p. 55.
14 See Article 8 of the Slovenian Constitution (Ustava Republike Slovenije).
15 Fundamental Law of Hungary (25 April 2011), Article Q).
16 See Article 9 of the Austrian Federal Constitution (Bundes-Verfassungsgesetz).

international law, it is first of all necessary to clarify these relations. This is not easy, not least because the picture is sometimes even interspersed with domestic dogmatic disputes,[17] which—as can be seen from a cursory examination of the constitutions concerned—are not in themselves explicit.[18]

The fact that this region has experienced the problem of state succession (Chapter 2) at first hand does not simplify the situation either.[19] It is not only elements of customary law or treaties of succession that need to be discussed, but also practical issues: the history and legal history of former Czechoslovakia or Yugoslavia provide ample examples; suffice it to refer to the development of the latter's membership of the UN[20] or the various citizenship issues in relation to the personal jurisdiction of the state. These events made Central and Eastern Europe realize that it happens to be in a unique position, and that the yardstick for its international advocacy is not necessarily written law or the classical theories once considered eternal. Until today, the ethnic question has been considered a key element in the settlement of succession issues, and the experience of the past century has shown that a peaceful settlement of this issue in accordance with international law can ensure international peace and security (Chapter 3) in the region, as defined almost as a *raison d'être* in the UN Charter. Central and Eastern European states have experienced the opposite at close quarters in the last century. For many years, Europe was less likely to be the scene of situations that threaten international peace and security, but before the events in and preceding 2022, the South Slavic war of the 1990s was also instructive in this respect, not only because of the blood sacrifices, the atrocities committed, or the dramatic consequences of the prolonged artificial state formations, but also because it showed that the world peace that the UN had set as its flag can be fragile in places where international public opinion did not expect. Today, it is more than useful for the states of the region to examine, through their own eyes, what forms of cooperation and dialogue can ensure peace in the region (and how they can help to achieve or maintain it in other regions, not only for humanitarian purposes, but also in their own well-understood interests, by respecting each other's identities). The key to achieving or maintaining peace in any region is to have strong, sovereign states. The issue of sovereignty (Chapter 4) has always been central to international law. This concept has a thousand links to the question of statehood, but also to the abovementioned constitutional identity.[21] When discussing sovereignty, it is necessary to look beyond the classical theoretical problems of international law[22] to contemporary debates of an international legal nature. The possibility of limiting sovereignty, its transferability, and its limits should

17 See also Blutman, 2017; Molnár, 2018, point 49.
18 See for instance Sulyok, 2014; Sulyok, 2013.
19 See inter alia Craven, 1998; Klabbers, 2004.
20 See in details Blum, 1992a; Blum, 1992b.
21 In her study, Réka Somssich asks the question: What is constitutional identity: "the armour protecting national identity or a branch of the European star?" See Somssich, 2018.
22 See for example the works of the classics translated into Hungarian: Hegel, 1983; Kant, 1985; Verdross, 1964.

not be circumvented. One of the largest questions today is precisely this: the room for manoeuvre of states within the framework of international cooperation (Chapter 5). The states in the region are members of roughly the same treaty and alliance system: the United Nations (UN), the North Atlantic Treaty Organization (NATO), the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE), and, more narrowly, the European Union (EU). Cooperation between the Visegrad countries is increasingly being extended, recognizing the value of involving some neighboring countries on certain issues. The different forms of cooperation partly concern different segments of national sovereignty. Within this framework, it is the sovereignty of the European Union's member states that has been subject to the most widespread and drastic interference, and to this day there are heated debates about the direction in which cooperation should continue.[23] This conglomerate, however, has long been treated by international law as a *sui generis* system, showing that the mechanisms of international law are no longer applicable to its internal functioning. However, the European Union is still based on international treaties under international law, so it is still inevitable, and not only for the Central and Eastern European states, that questions of state sovereignty in this area be examined. By comparison, the UN and the Council of Europe are classic international cooperation frameworks, but the effectiveness and political realities of these frameworks are frequently questioned. While in cases where one of the major powers is involved, there are serious doubts about the functioning, including for example the role of the Security Council in assessing situations that threaten or potentially threaten international peace and security, there are segments where, at least at the grassroots level, forward-looking cooperation has been achieved. I refer, for example, to the protection of human rights[24] (Chapter 6).

A more loosely cooperative system of human rights protection has been built up within the UN, but a more concrete accountability system within the Council of Europe. The very fact of the system's existence is a huge step forward, which could have taken place in the psychological moment after the Second World War. Its precedents, including the protection of minorities[25] (Chapter 7) so important for the region, have not been so successful, but they have shown—in retrospect—how important this area is for the whole international community (and its peace). The particular historical situation of Central-Eastern Europe raises the question: Does a mild degree of cultural relativism[26] apply to this region? That is, can and should local specificities be taken into account? Is it right to make a distinction between regions[27] when awarding compensation for the same type of infringement, while at other times ignoring the serious legacy of the region's recent history?[28] Are there limits to

23 Bogdandy, 2016.
24 Mathieu, 2017.
25 Kovács, 1996; Szalayné Sándor, 2003.
26 O'Sullivan, 2004; Otto, 1997–1998; Ramcharan, 2000; Stamoulas, 2004.
27 See also Strasbourg practice on property rights infringements in relation to real estate: Raisz, 2010.
28 See the Vajnai case cited above.

evolutionary interpretation? International lawyers in the region must find the right answers themselves. Although Central and Eastern Europe is not one of the regions most exposed to it, it is worth mentioning the issue of international terrorism, which is also a topical issue from the point of view of international criminal law (Chapter 8) and the human rights restrictions introduced as part of the defence.

Today, we cannot talk about current issues of international law without addressing the issue of migration (Chapter 9). In the ensuing controversy, purely legal arguments have seldom been heard, if only because of the nature of the subject. However, it is advisable to examine international regulation and practice from the perspective of the Central and Eastern European states and their constitutional identity, since this topic is particularly relevant to the role played by the various ways of interpreting international treaties,[29] and to the impact of the various forms of international assistance and their consequences.[30]

Another identity issue essential for Central-Eastern Europe is the protection of cultural heritage (Chapter 10). It is interesting to examine the international law perspective of preserving the intellectual and material values as well as its contribution to a cooperating region guided by mutual respect, with reference to good practices all around the world.

No responsible state can ignore the fact that crises related to international environmental law (Chapter 11) have contributed, at least in part, to other types of crises. However, we do not have to go to the Third World to experience such an environmental crisis whose negative cross-border effects do not spare neighboring countries.[31] In particular, but not exclusively, international water law is an area where in-depth knowledge, wide-ranging, strictly interdisciplinary expertise, and, of course, determined cooperation are needed to find the right solution.

The Central-Eastern European region has already made use of a fairly wide range of international dispute settlement methods (Chapter 12),[32] for example to settle disputes on international water law, as just mentioned. It is in the interest of regions with states of similar size to develop and use international dispute settlement methods, since, as disputes inevitably arise, it is best to find a consensual solution that everyone can mutually accept in their own best interests. After mapping out the positive and negative experiences of the region in this respect, it is useful, as indicated in the introduction, to ask the right questions, so that we do not think of Sienkiewicz's words: Quo vadis, Central and Eastern Europe?

These few reflections have attempted to outline, without claiming to be exhaustive, the justification for a specific approach to international law in the Central and Eastern European region. The issue is closely linked to constitutional identity, and hence sovereignty, which, if properly cooperated with, does not hinder, but rather

29 See the problem of the application of Article 31 of the 1951 Geneva Convention.
30 See for example the Hungary Helps Programme.
31 It suffices to note the cyanide pollution in the Tisza in 2000 or the floods in the Tisza in 2001.
32 Kovács, 2009.

strengthens the coexistence of the states concerned on the international scene. One of the most important principles of contemporary international law,[33] the principle of sovereign equality, does not create situations of tension and explosion, but rather a system based on dialogue and mutual respect. International law, therefore, has no reason to fear the doctrine of constitutional identity, even in specific geographical regions such as Central and Eastern Europe, for this approach does not erode it but reinforces it. Constitutional identity can therefore be a bridge between states, especially in terms of common elements. It can be a catalyst for dialogue, a motor for common thinking, and thus it certainly deserves a place in international law.

This book aims at providing insight into a specific aspect of international law: international law regarded through the lenses of Central and Eastern Europe. The esteemed Authors chose various concrete ways to do so—making this volume a collection of essays that guide the Reader through the fields of international law as if it was a diverse but at the same time straight and logical route.

33 Charter of the United Nations Article 2.1: The Organization is based on the principle of the sovereign equality of all its Members.

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| Chapter 1 |

Constitutional Identity

Bertrand MATHIEU

ABSTRACT

Constitutional identity corresponds to the essential elements of national identity that a people has decided to enshrine in its Constitution, thus giving them legal effect. National identity is what allows a political community to be identified. This State formed by a People and endowed with the attribute of sovereignty is defined by its history, its values... so many elements that characterize both its raison d'être and its specificity. It is at the same time an element of separation from what is not it, an element of dialogue with other communities based on other principles of identity, an element of sharing with other States having in common some of these values.

In a context where globalization is tending to erase these identity values, the resurgence of national identity must lead us to question both its nature and its place in the international and more particularly supranational legal order. It is in fact an instrument of both cooperation and resistance. Indeed, European legal systems, built on the will to promote and defend shared values, are now tending to legally impose a common identity, exclusive of national identities, based on principles that appear to be consensual but whose substantial definition, essentially produced by jurisdictional bodies, tends to achieve a European imperium that is not devoid of ideological connotations.

The resistance of a number of national jurisdictions, in various forms, to this imperium makes it necessary to seek mechanisms that allow both the promotion of common values and the protection of identity-based values. These mechanisms must restore the place of political power which, in a democracy, is the most legitimate to settle possible conflicts. The determination of new mechanisms for regulating the balance between the requirements of national identities and those linked to the values and principles that sovereign States have decided to put in common will probably determine the survival of European legal systems.

KEYWORDS

identity, Council of Europe, nation, European Union, values

The notion of constitutional identity refers to several concepts, first of which is that of a constitution. The Constitution is understood as the text embodying an act of sovereignty in which a People determines the way it intends to govern itself (or be governed) and the principles and values specific to this People. This Constitution thus establishes a political organization but also an ideological system specific to a Nation. We can therefore consider that constitutional identity refers to the elements of its identity that a Nation recognizes as fundamental. It enshrines, within a legal document, elements relating to history, culture, religion, etc., that in a way constitute the

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identity heritage of the Nation. Constitutional identity is thus the legal manifestation of national identity, i.e., a set of norms that allow the national identity to assert itself and to oppose interference by principles or values that would be contrary to it, but also to hold a dialogue with other identities. It implies the distinction between what is our own and what is another's. This national identity conditions the very existence of a State. It is in fact the fundamental reason why a human group settled on a territory has constituted a nation and founded a State, even though these factors may have come into play in a different time frame.

While national identity refers to what is specific, it does not exclude the fact that certain principles or values specific to this identity are shared with other States or other groups of States; they may then constitute elements of the identity common to an international or supranational organization, which implies distinguishing between the specific and the common.

In the subsequent sections, an equivalence will therefore be established between constitutional identity and national identity, the former being considered the legal expression of the latter.

The return of the concept of national identity, both in the field of ideological and geopolitical debate[1] and in the legal sphere, is in some ways a sign of resistance to the globalization movement, which is reflected in the prevalence of the supranational over the national, and which is not only economic and commercial but also cultural. It should be noted, however, that this movement aimed at denying, or considering as secondary, the existence of a national identity is far from universal. Indeed, many States assert themselves as a power by claiming their national identity. This is the case, for example, of China, Turkey, India, and Russia. The crisis of national identity is in fact an essentially European phenomenon. Indeed, two supranational systems, that of the Council of Europe and that of the European Union, have adopted converging approaches aimed at replacing State identities with a common identity, whereas these systems were originally designed solely to identify and defend common elements of identity. For some of these States, such as Germany, the trauma of the Second World War led to a fairly easy acceptance of the assimilation of nationalism and national identity, with the rejection of the former leading to the abdication of the latter. For other States, such as France, which have a long national and State tradition, some have considered that this identity was strong enough to allow a European identity to prevail, but this issue is becoming increasingly important and is leading to a political divide that is tending to supplant the traditional divide of right vs. left. Finally, in States such as Hungary that have experienced successive imperial integrations, Ottoman, Austrian, German, and Soviet, the question of national identity is essential, indeed vital, and Europe, conceived first and foremost as a tool for emancipation, is today perceived by some as running the risk of losing an identity that has barely been recovered.

1 Del Valle and Soppelsa, 2021.

In Western Europe, the concept of Nation is being called into question and the virtues of the State are being challenged, as if there was only room for individuals and supranational structures, the general interest being diluted in the realization of the desires and rights of individuals. The identities recognized and valued are sexual, religious, or even ethnic, while the importance of national identities constantly diminishes. However, the return of the concept of national or constitutional identity should lead us to question their place in the construction of a political community and the conditions for dialogue with common identities that originate from the European melting pot.

1. National identity as a basis for a State political system[2]

If democracy in its various forms constitutes today a political model of reference, it should be remembered that this mode of government, as a mode of legitimizing and exercising power, is not the only one possible.

Democracy has a history. It was preceded by other political regimes, feudal, imperial, and theocratic. All of these were places where it could not develop. If we disregard the ancient cities, or more broadly the small political communities, democracy has found in the nation-State a framework for its development.

1.1. The identification of a political community

By definition, democracy presupposes the existence of a people. This people cannot be universal, which would imply, apart from the purely utopian nature of such a conception, that such a people could govern itself, obey common laws, and share identical values. In any case, this people, equivalent to the universality of human beings, cannot constitute a political society (as in a polity). Yet it is necessarily within a polity that the question of the exercise of power and its legitimization arises.

It is possible to consider that a political community brings together a certain number of individuals grouped on a territory and endowed with a system of government.

There are three basic conditions for the existence of such a political community: a People, a territory, and a political organization.

In the geographical sense, a territory is a *space appropriated and occupied by a human group that identifies with it and bases part of its identity on it, in parallel with the establishment of a legitimate power.*[3] Territory therefore has a political dimension. It also has a social dimension.[4] To use a more contemporary terminology, a so-called "civil" society, detached from a territorial framework, cannot constitute a polity.

2 On this issue, see Mathieu, 2017. Translated into Hungarian, Szazadveg Publishing, 2018, into Spanish, Electoral Court Publishing, Mexico, 2021, into Russian, Hopma Publishing, Moscow, 2021.

3 Théry, 2007, p. 365.

4 Foucher, 2007, pp. 167–168.

Such political organization does not necessarily assume the form of a State.

The State structure, a modern form of political organization, has developed in some countries through the transformation of a feudal system into a monarchical system. In more recent times, this has occurred either through the break-up of empires (Austro-Hungarian, Soviet) or through the establishment of a federal organization bringing together relatively weak State or pre-State structures (United States, Germany), or through more or less artificial divisions carried out in the context of decolonization.

The affirmation of the nation-State in the 19th century strengthened the link between the people and the territory.

Another consubstantial characteristic of the State is sovereignty. Sovereignty is necessarily exercised within the framework of a territory. There was a moment in the Middle Ages when we moved from the idea of a territory as the possession of a man—where the royal domain belonged to the king—to the idea that power no longer implied that the sovereign was in a relationship of possession. We thus leave the realm of private law and enter into a logic of public law.

Sovereignty implies the existence of an initial and unconditional power. This power must be embodied in the right of the mightiest or the most competent, in dynastic right, in religious right, in the people itself. If sovereignty does not imply democracy, democracy can only exist in a system based on sovereignty.

The idea of a border as a line separating two State sovereignties really emerged at the end of the 18th century. In the nineteenth and twentieth centuries, the nation-State builds a political mystique around the border as an instrument of territorial delimitation. The border becomes an instrument of political and symbolic separation. The border is an invention associated with the birth of an international order based on State sovereignty, the border circles a homogeneous territory and raises a line of protection against external interference.[5]

As Chantal Delsol[6] points out, the notion of separation relates to the constitution of beings. *Creation is only established by separations: to constitute beings, we must draw their contours, in other words, their limits. Nothing exists except by its limits. A river without banks ceases to be a river and becomes a swamp. I exist because I can call myself human and not animal, woman and not man, etc. In this respect, borders signify first of all the existence of a society within them… Every human entity has no reality except through its differences. Differences are only concretised by separations: definitions, borders, and an undifferentiated world would be a magma without definition, and therefore without existence. We realise that there is no encounter, solidarity or link between entities that have been previously defined and therefore delimited.* The territory, and therefore the borders, constitute the framework of a representation made of places and histories. Each national community has its own "mental map."[7]

5 Cf. Dullin and Forestier-Peyrat, 2016.
6 *Le Figaro*, October 8, 2015.
7 Foucher, 2012, p. 23.

Today, the migration crisis and the reactions of certain States, which consist in erecting walls, as Hungary has done, for example, reflect the link that naturally exists between the border and identity, the closure of the former reflecting the fear of losing the latter. It is probably the vain temptation to abolish borders that gives rise to new walls. As Pascal Bruckner points out, "*there is no history without geography.*"[8] If we look at recent history, we must observe that since 1980, more than 28,000 km of new international borders have been established and another 24,000 have been the subject of delimitation and demarcation agreements.[9] The crises in Cyprus, the creation of Kosovo, or the annexation of Crimea by Russia, to mention only the European situation, demonstrate if need be the importance of territory and borders.

The nation refers to the idea of a people, not a sum of individuals, but a people driven, to use Renan's expression, by a collective will to live, or a "community of dreams," to use a more poetic expression by Malraux. This nation moulds a people as much as it is its expression. This notion of a people is not defined according to ethnic considerations, but by a voluntary adherence to its history, to values, and to a common project. As Jean-Marc Sauvé points out, "*in France, the State is the foundation on which the nation was built and constitutes its matrix.*"[10]

These States have a constitution. The original definition of the term in the field that interests us can be found in Aristotle, according to whom the Constitution is the government of a political community. It is this aspect that will considered here.

It is within this framework and context that modern forms of democracy have developed.

While globalization seemed to mark the slow death of the State structure, and the individual seemed to have finally attained mastery over his destiny and the freedom of his attachments, the State's defensive function revitalized it. In the context of the multifaceted instability that the world is experiencing today, the need for the State is obvious in the face of rising terrorism, conflicts, and economic and financial crisis. The relegation of the State to the background, or even the plea for its end in favor of the "self-managing" society of individuals, is the result of a certain vision of society's progress. The State as a concept has been denounced because of the faults of which it has been guilty, or of which it has been made guilty. However, with the resurgence of transnational threats and crises of all kinds, especially health crises, the State is once again being called upon to protect freedoms, ensure the development of the economy and defend democracy. Indeed, globalization is not the result of political will, but of the action of financial and economic forces which are not, in principle, democratic. Democracy, as a principle of legitimizing the exercise of power, only operates within a geographical framework that necessarily implies borders. Imagining a global political system would only lead to the establishment of a mechanism for the settlement of conflicts, whether military or economic. From this point of view,

8 Baudet, 2015.
9 Foucher, 2012, p. 7.
10 Sauvé, 2015, p. 12.

economic globalization operates as a "trompe-l'œil" for the construction of a society without borders. This "rootless" society exists only in the hands of private economic and especially financial entities. It can also be the prerogative of an elite that, culturally and financially, evolves within this framework without constituting a political society. These transnational economic and financial structures undermine State structures, thereby weakening democracy and the link between the State, the nation, and democracy.[11] The political space cannot, by its nature, be that of the world.[12] Analyses that aim to support the development of a "right without the State"[13] in fact lead to the question of whether such a right would not be, by its nature, incompatible with democracy. Democracy and national identity depend on each other.

Democracy is the framework and one of the modes of exercising politics. It therefore presupposes *belonging to a polity that is not global but implies a history, a language, and a culture, the delimitation of territories marked by borders, and the existence of a State that embodies the community and ensures security.*[14]

As Alexandre del Valle points out, Aristotle, Plato, and even Rousseau explained that democracy is impossible within a political unit of the imperial type.[15] Montesquieu remarkably demonstrates how Rome perished by granting the right of citizenship to all.

> "The peoples of Italy having become its citizens, each city brought to it its own genius, its own particular interests... The torn city no longer formed a whole, and, as one was a citizen only by a kind of fiction, as one no longer had... the same gods, the same temples, the same tombs, one no longer saw Rome with the same eyes, one no longer had the same love for the Fatherland and Roman feelings were no longer."[16]

A parallel can be drawn, all other things being equal, with the European Union's claim to build a European people. The idea according to which the people would be produced by the law and not the law by the people, supported, in particular, by Jurgen Habermas, constitutes the very negation of the democratic principle, by placing the legists above the people. Democracy implies, as Slobodan Milacic points out, that politics precedes the law, that the Constitution proceeds from the elections, that the people found the law.[17] To say that "the norm overrides the vote" calls into question the democratic principle itself.

11 Zarka, 2016, p. 102.
12 In contrast to the opinion of Rousseau, 2015, p. 105.
13 Cohen-Tanugi, 2016.
14 Le Goff, 2016, p. 242.
15 Del Valle, 2014, p. 109.
16 Montesquieu, 1734, p. 72; cf. the analyses of Manent, 2012, pp. 204 et seq.
17 Colloquium Aix-en-Provence, Nov. 2016, 25 ans d'élections démocratiques à l'Est: quels acquis, quels défis, proceedings forthcoming.

The failure of the European Union to build a real democratic political space as an extension of its economic space, shows that the deconstruction of the people-State-Constitution relationship leads to a democratic dead end.[18] Moreover, European law, like that of the European Convention on Human Rights, can only be applied through the implementation of State legal instruments.

Thus, democracy, as a principle of legitimization of power based on the will of the people, implies the existence of a polity confined within borders and formed by a people composed of citizens (non-citizens being by definition excluded from this polity) linked by a community of destiny and the sharing of common values. As Raymond Aron points out, individuals cannot become citizens of the same State unless they feel they share a common destiny.[19] In any case, democracy presupposes the existence of a demos.[20] From this point of view, democracy is necessarily inclusive, i.e., it brings together individuals who share the same values. In this sense, immigration can only be accepted, and prove to be a source of enrichment, if it is accompanied by the integration of those who join the national community, the framework of democracy.[21] The people is thus defined as a political entity and not an ethnic entity. The deconstruction of the link between the people and the State leads, on the contrary, to communities that are defined rather by ethnicity, religion, or language. From this point of view, unless ethnic communities are transformed into political communities, a communitarian conception of society is radically incompatible with the democratic principle. In fact, it refers to the existence of tribal societies. National identity overrides particular identities—not only can it not be considered discriminatory, but on the contrary, it constitutes a melting pot in which, at the political level, ethnic differences must be ignored. Even if this is far from always the case in practice, national identity excludes an ethnicized conception of society.

From this point of view, a citizen is one who is part of this political community. Aristotle establishes a clear link between the citizen, who is able to participate in the exercise of the deliberative function, and the polis.[22] This citizen cannot be embodied in an atomized individual who would see the political structure only as a provider of rights and material benefits and who would have his other community memberships prevail over membership in the political community, i.e., the national community. The very possibility of dual nationality must therefore be questioned. Acceptance of dual nationality is justified from the point of view of the individual who, having come from elsewhere and become integrated into a new society, wishes to establish a link between his or her community of origin and his or her community of destiny. It is more difficult to accept if one considers this same individual as a citizen and if one looks at the interest of the community to which he or she now belongs, that is, if one takes into consideration not only his or her rights but also his or her duties. If

18 Contrary to the thesis supported by Rousseau, 2016, pp. 93 et seq.
19 Quoted by Baudet, 2015, p. 332.
20 Cf. Baudet, 2015, pp. 13, 16.
21 Cf. Simone cited in Bheres, 2016; Simone, 2016.
22 *Politique*, Livre III-1, La Pléiade, p. 443.

there can be an accumulation of rights, then there can also be a conflict of duties.[23] Moreover, dual nationality, which is debatable in principle, is even more questionable when it concerns a representative of the nation who is responsible for expressing its will and ensuring its protection.

While their scope and universality may be debatable, fundamental rights are born in a national framework. The Declaration of 1789, while proudly addressing not only French citizens but also portraying a universal man, may have given itself the illusion of conquering Europe behind the revolutionary armies and may have allowed France, the "eldest daughter of the Church," to become the "eldest daughter of human rights." The fact remains that these rights were proclaimed within the national melting pot. Human rights were born in the State framework,[24] even if today their development contributes to questioning the State framework. As Hannah Arendt points out, "*it is only within a people that a man can live as a man among men.*"[25]

In this sense, *"the individual can claim his rights only insofar as a State guarantees them and, if necessary, intervenes to defend them. One can feel a profoundly cosmopolitan soul, but one is never a citizen of the world."*[26]

1.2. The sharing of common values by this political community

In further analyses that condition democracy upon the existence of a political community, it is appropriate to consider that this political community can only exist if its members share a certain number of values.

This analysis is developed by Aristotle, who states that "*when the same people inhabit the same territory, the city must be said to remain the same as long as the race of the inhabitants remains the same*" This "ethnic" conception is corrected by the analysis according to which this lack of ethnic homogeneity is overcome when "a community of aspirations" is formed.[27]

Tocqueville develops this link between political community and common values. Indeed, he considers that

> "it is easy to see that there is no society that can prosper without similar beliefs [...] for without common ideas there is no common action and without common action, men can still exist, but no social body. For there to be a society... it is therefore necessary that all the minds of the citizens should always be brought together and held together by a few principal ideas."[28]

23 Cf. Baudet, 2015, p. 342.
24 Lacroix and Pranchère, 2016, p. 37.
25 Quoted by Lescouret and Godin, 2016.
26 Todorov, 2008, p. 126.
27 *Politique*, La Pléiade, pp. 445 and 522.
28 Du principe de la souveraineté du peuple en Amérique, DA II, 15, quoted by Jaume, 2008, p. 105.

He also introduces a link between these values and democracy by stating that "*modern democracy presupposes morals, manners, opinions, and also a certain passion for citizens to perceive each other.*"[29]

The purpose of a constitution is not only to provide for the organization of power within the State—this is the institutional aspect—but also to set out the values of the political community it governs.

Contrary to what a simplistic and commonly shared analysis might suggest, fundamental rights are not the only values set out in the Constitution. For instance, the Statement in Article 1 of the Declaration of 1789 that "*men are born and remain free and equal in law*" is a postulate, which cannot be proven and does not create a specific right, even if it is the basis for the rights that have subsequently been defined. The secular, democratic, and social nature of the Republic affirmed in Article 1 of the French Constitution of 1958 is not a Statement of rights.

The existence of duties toward the community does not exactly refer to values, except to the virtues that characterize a good citizen with regards to protecting the community's interests. This is the case for requirements such as defending one's country, paying taxes, fulfilling one's civic duties, respecting the environment, etc. Other duties are of a rather moral character. They are not limited to regulating social life, but refer to a certain conception of society or man. For example, Article 4 of the 1795 Declaration proclaims that "*no one is a good citizen unless he is a good son, a good father, a good brother, a good friend and a good spouse*." The ideas of fraternity and solidarity (see, for example, Article 2 of the Spanish Constitution), or the idea that the burden of assisting the needy falls primarily on the family (French Constitution of 1848), draw from the same logic. The principle of dignity marks a remarkable innovation from this point of view. Although the principle of dignity can be expressed as a subjective right, the right to protection against attacks on one's dignity, it is essentially a philosophical affirmation referring, in a Christian tradition, to an ontological conception of man. It implies a duty not to violate the dignity of others, even if they consent to it. It justifies limitations on individual freedoms.

More broadly, the European Convention on Human Rights recognizes restrictions provided for by law as necessary in a democratic society and appropriate to safeguard the interests of society and the rights and freedoms of others.

The French Declaration of 1789 refers extensively to these common interests: Thus, the common good may justify social distinctions (Article 1); the law has the task of preventing actions harmful to society (Article 5); manifestations of freedom of opinion, including religious opinion, must not disturb public order (Article 10); and public necessity may justify dispossession (Article 17).

Although these collective interests do not refer to values, they reflect the need to base society on the duty to respect common values.

It is interesting to note that the draft European Constitution, which had the hitherto unfulfilled ambition of creating a political society, frequently recurred to the

29 Jaume, 2008, p. 30.

notion of values. This is particularly true of the Preamble, which refers to "*Europe's cultural, religious and humanist heritage, from which universal values have developed*," as well as Article I-2, entitled "*The values of the Union*." Leaving aside the fact that the text refers alternately to the universal nature of the Union's values and then to their specific character, it should be noted that its purpose is to construct a new legal order, to create ex nihilo a political community. Its authors rely on the existence of common values as the primary condition for the existence of such an order and community. In the same vein, the opening sentence of the Charter of Fundamental Rights of the European Union reads: "*The peoples of Europe, by establishing an ever-closer union among themselves, have resolved to share a peaceful future based on common values*."

One must therefore assume that the existence of common values is a prerequisite for the existence of a political community and hence a democratic regime. Unquestionably, a political community can be based on common values without democratic legitimacy, as is evident from the existence of theocratic regimes. On the other hand, democracy requires a community built around common values.

The values that structure national identity cannot be identified with fundamental rights alone. Their claim to universalism weakens the very concept of national identity. Indeed, these fundamental rights are very largely defined, or interpreted, but this amounts to almost the same thing, by supranational structures of a jurisdictional nature, or even by non-governmental organizations. In this sense, the constitutional courts, guardians of the national values expressed by the Constitutions, implicitly or explicitly submit to the interpretations determined by supranational bodies—we shall come back to this. If one accepts that a people is defined by its identity and that human rights are considered to have a universalist scope, this identity cannot be dissolved in these rights, even though these rights may be part of this identity.

The link between values and identity lies in the fact that the national community is not an accidental or temporary aggregate. It has its roots in the past. "*It is the only organ of preservation for the spiritual treasures amassed by the dead, the only organ of transmission through which the dead can speak to the living.*"[30] In this sense, we can quote Raymond Aron, who said that individuals cannot become citizens of the same State unless they feel they share a common destiny.[31]

The existence of a political community, the first condition of democracy, implies the recognition of its identity and therefore an otherness in relation to what is not it.

First of all, it is necessary to find out what constitutes the identity of a nation. This identity is difficult to define or to enumerate in legal terms. However, it can be found echoed in a constitution: This is the case for language, defined by Jacques Julliard as "*a rallying sign, a culture, a spirit, a form of relationship to the world.*"[32] It is of course, as has been mentioned, a territory, a geography. It is also a culture, a literature, an

30 Weil, 1949, p. 16.
31 Quoted by Baudet, 2015, p. 332.
32 *Le Figaro*, June 5, 2015.

architecture. It is a spirituality, a religion. To deny the Christian tradition of France, or even of Europe, is to commit a denial of reality as well as an act of rupture.

National identity is perhaps essentially the history to which not only books and monuments bear witness, but it is also a narrative. Ernest Renan stated that a nation is both a historical heritage and a contract for the future. History is first and foremost the story of "*shared ideals and beliefs, shared trials and sufferings.*"[33] History is the facts on which an imaginary world is built, and this imaginary world shapes national identity. This conception of history is no more incompatible with a scientific conception of history than the artistic perception of a monument is with a strictly architectural study. However, all too often, the so-called scientific approach to history is the perfect negative of the "roman national" (the national myth). In reality, it aims to destroy the esteem a people has for its past by inculcating a repentance that destroys national cohesion and social ties. How can we integrate the new generations and the foreigners we welcome into a community that denigrates itself and rewrites history to the glory of those who fought it? From the exaltation of (national) heroes, we have moved on to the exaltation of victims (of whom we would be the executioners). Pride in our history has been replaced by a desire for revenge on the part of those who see themselves as victims of our behavior. History has a novel element, it is also a science, and it cannot, under the guise of scientificity, bend to an anachronistic ideological vision.

On a personal level, as on a collective level, only an affirmation of one's identity allows one to know where one comes from in order to know where one is going, to know who one is, in order to know with whom one exchanges. It is the loss of the feeling of identity, the impression of dispossession, that leads to the rejection of the other and not, contrary to what we would like to believe, an identity clearly assumed and open to dialogue with other identities.

2. National identity as a principle of cooperation and resistance in the framework of supranational structures

The phenomenon of globalization, or internationalization, goes far beyond the economic and financial framework and also affects the values of nations by gradually building a system with a universal vocation, that is, one that is not really universal but aspires to become so. This is the case, for example, of an essentially individualistic conception of fundamental rights, of the rewriting of history in the light of contemporary and anachronistic conceptions. Similarly, in a more indirect but deeper way, the technological Big Four (GAFAs) tend to standardize ways of thinking, while creating and developing communities that organize themselves around their own value systems.

33 Le Goff, 2016, p. 17.

If we refocus on the legal field, international or regional law, largely constructed by supranational judges and relayed by national judges, is leading to a forced march toward uniformity.

These phenomena contribute to calling national identities into question and even to devitalizing them, but on the other hand, this attempt at uniformity leads peoples and certain States to withdraw into the defense of their national identity.

The challenge facing lawyers, in particular, is to articulate the requirements resulting from this movement of internationalization to which States have adhered by means of treaty provisions, and the protection of national identity that justifies the very existence of the State.

The guidelines that I will retain are as follows: On the one hand, it is necessary to ensure that States are not subject to the imposition of constraints to which they have not freely adhered and that they retain their free will with regard to their national identity; on the other hand, States must be subject to compliance with the commitments they have made. More concretely, this implies, at the European level, maintaining the mechanisms of respect for the treaties, in particular the jurisdiction of the European Court of Human Rights and the Court of Justice of the European Union, but also delimiting as clearly as possible what comes under national identities, for example questions relating to the conception of the family or religion, and access to one's own territory, and what comes under common values, for example, an independent justice system, respect for the rights of the defense, human dignity, or respect for free elections.

It is up to the constitution's authors to set the identity values and the national judge to enforce them, and it is up to the treaty to set the common values and the European judges to enforce them. The question then is obviously to know how to articulate the protection of these two identities.

The problem lies in the fact that the relationship between international law and national constitutional law does not lend itself to a single hierarchy of norms, which would lead to the creation of a federal constitutional system. It should be noted that the European Court of Human Rights has adopted this logic by defining itself as a constitutional court.

In reality, the current situation results in the existence of several legal orders: international, European, and national, whose relations are essentially regulated by judges, which leads them to intervene widely in the competences of political bodies.

2.1. The temptation to standardize by building a European identity to replace national identities

This phenomenon can be seen both in the law produced within the framework of the Council of Europe and in that produced by the European Union. In both cases, it should be noted that it is essentially the courts that are in charge and that the tools for this standardization/substitution are concepts that are a priori consensual, but whose substance is largely undetermined.

2.1.1. The Council of Europe and the design of a European identity

As far as the Council of Europe is concerned, the central body of this organization is the Committee of Ministers, which is made up of the foreign affairs ministers of the Member States. However, in terms of fundamental rights, the major role is played by the European Court of Human Rights. The Council of Europe has created a multitude of bodies whose role is essentially consultative and that will, in their specialized fields, participate in its mission. This is the case of the European Commission for Democracy and Law, known as the "Venice Commission."

Thus, the European States are effectively supervized by a multitude of bodies competent to ensure that European values are respected. The combined action of these bodies creates an efficient network for the protection and promotion of fundamental rights and European values. In this system, the European Court of Human Rights tends to see itself as a neo-constitutional judge of Europe.

In this sense, the ECtHR recognizes its right to ensure both the identification of European values and the dividing line between these European values and the room for manoeuvre left to the States. It considers that it is up to the Court to adapt the rights recognized by the Convention to what it considers to be the evolution of European society, which may lead it, if necessary, to recognize rights not included in the Convention. Furthermore, the Court considers that it must take into account any relevant rule of international law applicable to the relations between the contracting parties in interpreting the rights and freedoms recognized by the Convention, which is no longer the sole frame of reference. Finally, the Court freely interprets the principle of subsidiarity in the light, in particular, of legislative developments in the Member States—a majority of them, almost all of them?—thus modifying the spirit of the Convention, the substance of which is modified in the light of the evolution of national laws.

The legitimacy of intergovernmental bodies is essentially political. The legal legitimacy of European judges is of a different nature. The legitimacy of expert committees, such as the Venice Commission, that play a key role in affirming and defining common values should also be questioned.

The ECtHR limits the States' room for manoeuvre by referring to very general concepts that are subject to ideological interpretation. For instance, with regard to restrictions on certain rights recognized by the Convention, the Court refers to the respect of a necessary aim in a democratic society, which refers in particular to pluralism, tolerance, and the spirit of openness (7 December 1976, No. 5493/72). From this point of view, the Court confuses democracy and the rule of law in a "sleight of hand."[34]

To take just one example, the Court's case law is undoubtedly sensitive to the demands of the LGBT movements and favorable to theories such as so-called gender theory. The "moralizing" role of the Council of Europe is reflected in "warnings" such as that *"gender stereotyping by the authorities constitutes a serious obstacle to the*

34 On this distinction, cf. Mathieu, 2017 (Hungarian edition, Szazadveg, 2018).

achievement of genuine gender equality, one of the main objectives of the Council of Europe member States."[35] Relying, *inter alia*, on this case law, the Venice Commission considered that *measures aimed at removing the promotion of non-heterosexual gender identities from the public domain affect the fundamental principles of a democratic society, characterized by pluralism, tolerance, and openness, as well as the fair and appropriate treatment of minorities.*[36] But on the other hand, not all minorities are equal. Thus, the European Court of Human Rights has considered that it is in the general interest of society to avoid the emergence of parallel societies based on distinct philosophical convictions and that it is important to integrate minorities into society.[37]

2.1.2. The European Union and the imperium of consensual but largely indeterminate values

The same phenomenon can be observed with regard to the European Union.

Article 2 of the Lisbon Treaty refers to the values of the Union, expressed in a very broad way, which contribute to extending the competences of the Union and its intervention in areas linked to the sovereignty of States. These values include: respect for human dignity, freedom, democracy, equality, the rule of law, respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men.

While nominally there is a broad consensus on these values, it is clear that very different contents can be attributed to them.

If we take the example of the rule of law, this concept is in fact a formidable instrument of assimilation.[38] While respect for the rule of law, which essentially implies respect for the individual and his or her protection against arbitrary action, is truly part of the common European heritage, it can be used to impose ideological conceptions, for example, on the place to be bestowed to sexual identities, or institutional systems, such as the separation of powers, which can be conceived as implying the independence of judges or the autonomy of the judiciary, which are not the same thing.

However, the concept of the rule of law, like that of non-discrimination, whose scope may be limitless, is in fact defined by the European judge. However, it may be considered that in a democratic system, it is not up to the judge to define the substance of these concepts, but at most to ensure respect for the fundamental requirements that fall within them, as defined by the States, if necessary, in the form of a convention.

From this point of view, conflicts between certain States and European structures, namely the courts, do not generally revolve around the recognition of values enshrined in the Treaty, but rather the meaning that should be ascribed to them.

35 Juridicic v. Croatia, February 4, 2021.
36 CLD AD (2013) 022 et avis CDL-AD(2021)050.
37 Konrad v. Germany, September 11, 2006.
38 Cf. Mathieu, 2017.

2.2. The diversity of national resistance to the imperium of European case law

The crises affecting the relationship between national laws and the rules of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, on the one hand, and European Union law, on the other, are of the same nature in that they pit ever greater European integration against the necessary respect for national sovereignty and constitutional identities. The profound differences between these two supranational orders do not allow for an exact transposition of both diagnoses and remedies, but the fact remains that these two systems are shaped by the role played by supranational judges in their development, that the reference norms tend to intermingle and to become homogenized, thus reinforcing the strength of the system as a whole.

With regard to the way in which the "friction" between European and national law is legally identified, the most "heavy-handed" is that which consists of proclaiming, in a general manner, the supremacy of constitutional law over conventional law, including that resulting from supranational jurisdictions. In this way Russia, relying on its constitutional provisions, but also on the absence of relevant provisions in the Convention, refused to apply the decision of the European Court of Human Rights condemning it for the lack of official recognition of same-sex couples (Fedotova v. Russia, 13 July 2021, No. 40792/10).

Resistance to EU law by national courts has taken several legal forms, and only a few recent examples will be given, the diversity and multiplication of which reflect the importance of the problem.

The Polish question is emblematic in this respect. Recently, the European Court of Human Rights (22 July 2021, case 43447/19) ruled that the Polish court responsible for applying European law was not a court established by law within the meaning of the European Convention (Art. 6—right to a fair trial), and CJEU case law has aimed at protecting the independence of national courts (e.g., 7 February 2019, C-49/18). In reaction to this, the Polish Constitutional Court, in its October 7, 2021, decision, ruled that certain provisions of the Union Treaty are incompatible with the Polish Constitution, specifically provisions of Articles 1 (1) and 2 in connection with those of Article 4 insofar as they order a national authority, or allow it, not to apply a provision of the Constitution. The Court of First Instance disputes that integration is achieved, *inter alia*, through the interpretation of EU law by the CJEU.

The German Constitutional Court has declared itself competent to decide that a European institution has acted beyond its competence under Union law (BverfG 29 April 2021, 2 BvR 1651/15, 2BvR 2006/15).

In a decision of December 10, 2021, the Hungarian Constitutional Court ruled that if the exercise of joint competences with the European Union is incomplete, Hungary has the right (and in some cases the obligation), in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive area of competence of the European Union until the institutions of the European Union take the necessary measures to ensure the effectiveness of the joint exercise of competences. Second, it declared that when the incomplete effectiveness of the joint

exercise of competences has resulted in consequences that raise the question of the violation of the right to identity of the persons living on the territory of Hungary, the Hungarian State is obliged to ensure the protection of this right within the framework of its obligation of institutional protection. Finally, the Constitutional Court declared that the protection of Hungary's inalienable right to determine its territorial unity, population, form of government, and State structure is part of its constitutional identity.

The French Constitutional Council, like other constitutional jurisdictions, notably Italy and Spain in somewhat different forms, has reserved the application of European secondary legislation when principles inherent in constitutional identity are at stake. However, in the absence of a constitutional determination of these principles, the French Constitutional Court has applied them quite moderately, as when it judged that the prohibition on delegating the exercise of public force to private individuals was covered by such principles (15 October 2021, no. 2021-940 QPC).

The French Council of State has stated that the French Constitution remains the supreme standard of national law. It has thus ruled, with regard to the application of the so-called "privacy and electronic communication" directive, that it could decline to apply a provision of secondary legislation when it infringes a constitutional requirement that does not enjoy, under EU law, a level of protection equivalent to that guaranteed in the national legal order. This is the case for requirements linked to national security (CE 21 April 2021, no. 393099) and the principle of the free disposal of armed force, which implies that the availability of the armed forces must be guaranteed at all times and in all places to ensure the safeguarding of the fundamental interests of the Nation, foremost among which are national independence and territorial integrity (CE 17 December 2021, no. 437125).

These cases, which occurred within a relatively short period of time, show, beyond the legal logic involved, the difficulties that affect the relationship between the mechanisms of European integration and the affirmation of national constitutional identities.

2.3. Searching for mechanisms to reconcile respect for national constitutional identity with respect for the common European identity

The lines that follow only aim at outlining, in a synthetic and approximate manner, the avenues that could be explored in order to regulate the system relationships and ensure a conciliation between the promotion of the European identity and the protection of national identities.

Otherwise, either we will be heading toward a *de facto* federalism that is not acknowledged and that in the long term will generate revolts on the part of citizens reduced to mere spectators, or we will see a break-up of European structures due to the refusal of certain nations to submit and to abdicate their sovereignty.

2.3.1. Redefining the combination of national and European spheres of competence

This definition must be the work of politicians.

It is a question of clearly determining what competences should be entrusted to European structures and what competences and powers should remain in the hands of the States. In order to do so, a distinction must be made between what comes under the heading of European identity, which justifies the association of a number of States, and what comes under the heading of national identity.

There are two directions in which reflection must be undertaken, as both national and European competences need to be defined more precisely. It is in fact a matter of reflecting on what the States really intend to have in common.

For example, respect for human dignity, the right to a fair trial, and protection against arbitrariness are undeniably common values. The same cannot be said of the conception of the family, the definition of marriage, the place of religion, etc.

It should therefore be accepted that the affirmation of a principle of identity constitutes a reservation to the absolute prevalence of European orders over the national order, a prevalence that is fixed by the treaties and is only valid because it is accepted by the national constitutions.

2.3.2. Compliance with the principle of subsidiarity

Once the broad outlines of this distribution of competences have been established following work of an essentially political nature, it will be easier for the European Court of Human Rights to ensure that the principle of subsidiarity is respected.

This principle implies that only if constitutional protection proves insufficient should the matter be dealt with at the European level. Indeed, as Jean Paul Costa, former President of the Court, points out, this principle implies that the task of ensuring respect for the rights enshrined in the European Convention falls primarily to the authorities of the Contracting States and not to the Court, which only intervenes if the national authorities fail to do so. Thus, in the case of rights or freedoms belonging to both the constitutional corpus and the conventional corpus, one must admit that this protection is first of all ensured, as far as the control of the law is concerned, in the constitutional order.

Today the Court seems to be moving in favor of recognizing a principle of subsidiarity on certain so-called "societal" issues,[39] leaving them to the discretion of national legislation.

Similarly, Protocol No. 15 on the principle of subsidiarity assumes, according to the Brighton Declaration, that "States may choose the manner in which they wish to fulfill their obligations under the Convention." However, assessing this principle's scope remains in the hands of the Strasbourg Court. In the same spirit, following the same protocol, respect for the margin of appreciation of States is enshrined in the Preamble to the Convention. This can be a tool in the hands of the national judge, or government, to argue the Court's ultra vires.

39 For example, in matters of filiation, ECHR 22 March 2012, n° 45071/09 Ahrens v. Germany and n° 23338/09 Kautzor v. Germany.

2.3.3. Moving from an obligation to submit to an obligation of constructive dialogue

A conflict of the type that pitted the German Constitutional Court against the Court of Justice of the European Union, or, to remain within the framework of the Council of Europe, the resistance of the United Kingdom to the case law of the European Court of Human Rights concerning the voting rights of prisoners, testify both to the impasse created by the requirement of a single vertical relationship between European courts and national courts and to the need to find a way of resolving conflicts. It is therefore conceivable that, with regard to relations between courts, the national courts could resubmit a question to the European courts when a conflict arises or is likely to arise. One could also imagine the creation of a flexible conciliation body. For example, in the case of a specific conflict between the Court of Human Rights and a constitutional court or a national supreme court, an ad hoc panel could be convened. A more permanent panel could be convened to deal with recurrent or systemic issues. If conflicts are not resolved, or if, in the view of the State concerned, the solution of the conflict runs counter to a fundamental principle recognized by the constitutional order, the political authorities should be given the final say in the matter.

3. By way of conclusion

It should not be forgotten that although the protection of fundamental rights and freedoms has blossomed in the European melting pot, the States remain the natural framework for the expression of the sovereignty of the Peoples. However, the whole of this organization of State, People, and Sovereignty only makes sense in that it has been built on the basis of national identities enshrined in constitutions. Supranational systems respond to a post-national logic aiming to build a new identity through law, which is universal but disembodied. It largely ignores, when it does not attempt to outright wipe out, the traditions, customs, histories, mentalities, etc., of peoples who have been dispossessed of what led individuals to form an entity united around a common history and projects. If certain forms of supranationality have helped to maintain peace between peoples, the destruction of national identities in favor of a common European identity, which is quite artificial, can only lead to the break-up of a society that is both individualistic and sectarian, a source of conflicts that will no longer be regulated by the sharing of common values.

Europe is rich in the diversity of national identities and the strengthening of a common identity while respecting these national identities.

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| Chapter 2 |

State Succession

Rodoljub ETINSKI

ABSTRACT

State succession has a variety of aspects. Some general rules on State succession exist but these are colored by specific circumstances and there are international customary rules also. All relevant documents define the term "succession" identically as "the replacement of one State by another in the responsibility for the international relations of territory." Replacement regarding responsibility for the international relations of a territory occurs between a predecessor State and a successor State. Succession has different types or categories such as the cession, decolonization, unification, secession, and dissolution of a State. The rules on succession of States to treaties reconcile freedom of contracting with the general interests of continuity and certainty of treaty relations. One basic principle is the freedom of contracting. In this context it means that new successor States choose the treaties of the predecessor State to which they will enter. The 1978 Convention governs succession by two basic rules (the automatic succession and clean slate rules), and it also governs the case of transfer of a part of territory and the case of unification. The State property, debts, archives, and private rights and the effect of State succession to nationality are fundamental issues.

KEYWORDS

succession, conventions, freedom of contracting, property, debts and archives

1. Introduction

Successions of States are not an everyday event. They have occurred occasionally, from time to time. However, about 130 sovereign States emerged after the Second World War, most of which were former colonies. Decolonization was the dominant form of successions, but there were also cases of unification, dissolution, and separation.[1]

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1 An extensive review of the practice of State succession was prepared by the UN Secretariat and published in Materials on Succession of States in Matters other than Treaties, UN Legislative Series 1978 ST/LEG/SER.B/17 https://legal.un.org/legislativeseries/pdfs/volumes/book17.pdf. For a brief history of State successions, see Vagts, 1993, pp. 277–280. For recent cases of the USSR, CSFR, and SFRY, see Oeter, 1995, pp. 76–89; Beemelmans, 1997, pp. 71–124; Williams, 1997, pp. 3–7.

Etinski, R. (2022) 'State Succession' in Raisz, A. (ed.) *International Law From a Central European Perspective.* Miskolc-Budapest: Central European Academic Publishing. pp. 41–69. https://doi.org/10.54171/2022.ar.ilfcec_3

Political elements have played an important and sometimes dominant role in successions. The occasionality of State practice, the specifics of each case, and the prominent role of political factors have slowed the development of the general law of State succession[2] but have not diminished the importance of the general law. Successions affect nations and a large number of individuals, sometimes over long periods, and the development of the general law may mitigate their detrimental effects. Development of the general law may also facilitate normalization of relations among States, which are frequently painfully disturbed in the circumstances of succession. Neither relatively small frequency of successions nor their powerful political connotations exclude the possibility of the development of general rules. Certain commonalities in State practices, the jurisprudence of international courts, and the legal literature do exist and open the door for general legal guidelines. International human rights law and international human rights bodies and courts have breathed new force into the law of State succession. Specifics of human rights are present almost everywhere in the law of State succession and are visible in the succession to treaties, to State debts, and to obligations arising from international delicts and, certainly, in matters regarding effects of succession to nationality. Besides, there are fundamental legal principles that govern State succession, which may substitute missing customary rules and may lead to new customary rules.

Some general rules on State succession exist and they are very important. On the other hand, the implementation of the general rules has usually been colored by the specific circumstances of each case of succession. The specific circumstances of the dissolution of the USSR,[3] the CSFR,[4] and the SFRY[5] entailed differences in the successions. The global position of Russia,[6] as a great power and its economic capacity had a certain influence on succession issues. The dissolution of Czechoslovakia[7] was an agreed dissolution. Contrariwise, the dissolution of Yugoslavia was a contested dissolution, occurring through the unilateral acts of the successor States and connected with tragic armed conflicts. These differences had some bearing on the implementation of the law of succession. It is amazing how much the ECtHR[8] was involved in resolving human rights issues emerging from the succession of Yugoslavia. The Court was addressed not only by individuals, but also by one successor State.

The available space does not allow all the subject matters of State succession to be covered. The succession of States to international organizations or regarding State responsibility will not be considered under separate subheadings. The main principle concerning succession to the membership of international organizations is that a State that continues the personality of the predecessor State also continues

2 Kreća, 2007, p. 271.
3 The Union of Soviet Socialistic Republics.
4 The Czech and Slovak Federal Republic.
5 The Socialistic Federal Republic of Yugoslavia.
6 The Republic of Russian Federation.
7 The Czechoslovak Socialist Republic.
8 The European Court of Human Rights.

its membership in international organizations. New successor States have to apply for membership.[9] That does not mean that there is no succession at all. In the case of dissolution, for example, the successor States succeed to financial debts to an international organization of the predecessor State. General rules on State succession regarding State responsibility are in *statu nascendi*. The old practice and literature denied the succession of a State in the field of State responsibility. The ILC[10] has been working on this matter. Due to the scarcity of State practice, it is not clear whether the ILC has worked on progressive development or codification.[11] New literature[12] and new practices[13] presage a change, and the IIL[14] adopted a Resolution on the matter in 2015.

The allotted space does not allow us either to discuss all questions related to the chosen subject matters, but only the most important ones. The chapter will be therefore limited to the succession to treaties, State property, debts, and archives. The effects of State succession to nationality and private rights will also be considered. Bearing in mind that this book explores international law from the Central European perspective, the focus will be on recent cases of succession in the Central and Eastern Europe. Due to shortage of space, abbreviations will be used extensively.

2. Sources

The customary law and general principles of law were the main sources of the general law of State succession until the adoption of the two universal conventions.[15] The Vienna Convention on Succession of States in respect of Treaties was adopted at the UN Conference in Vienna on August 22, 1978. It was open for signature on August 23, 1978, and entered into force on November 6, 1996. At the time this text was written, October 2021, 23 States have become parties to the Convention.[16] The Vienna Convention on Succession of States in respect of State Property, Archives and Debts was adopted at the UN Conference in Vienna on April 7, 1983. The Convention was opened for signature on April 8, 1983, but it has not yet entered into force. Only seven

9 Jennings and Watts, 1992, p. 223.
10 The International Law Commission.
11 Šturma, 2019, para. 7.
12 Brownlie, 1979, p. 664; Volkovitsch, 1992, pp. 2162–2214; Dumberry, 2005, pp. 419–453; Dumberry, 2006, pp. 413–448; Dumberry, 2007; Kohen, 2015, pp. 511–555; Pajnkihar and Sancin, 2020, pp. 331–356.
13 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment,* International Court of Justice (ICJR), 1997, p. 81, para. 151; *Bijelić v. Montenegro and Serbia* (app. no. 11890/05), April 28, 2009, Judgment; Lakićević *and Others v. Montenegro and Serbia* (app. nos. 27458/06 and 3 others) December 13, 2011; *Milić v. Montenegro and Serbia* (app. no. 28359/05), December 11, 2012; *Mandić v. Montenegro, Serbia and Bosnia and Herzegovina* (app. no. 32557/05), June 12, 2012.
14 The Institute of International Law.
15 Castren, 1954, p. 56.
16 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en.

States have accepted the Convention;[17] eight ratifications or accessions are missing for entering the Convention into force. The two Conventions reflect, but only in part, international customary law. Some provisions are result of progressive development, rather than codification.

The effects of State succession to nationality have been regulated by two European conventions. The European Convention on Nationality, whose Chapter VI is dedicated to the issue of State succession and nationality, was adopted in Strasbourg on November 11, 1996, and entered into force on March 1, 2000.[18] To date, 21 States have ratified the Convention.[19] The Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession was adopted in Strasbourg on May 19, 2006, and entered into force on May 1, 2009.[20] As of October 2021, seven States had ratified the Convention.[21] The number of States that have accepted two universal conventions and two regional conventions is relatively small. That is not a peculiarity of treaties regarding succession only, but it rather reflects a general trend of reluctance of State to bind themselves by treaties in the last decades. There is a number of multilateral or bilateral treaties that govern some specific issues of succession.[22]

The number of international customary rules confirmed by international courts and tribunals is not large.[23] Whether State practice in matters of succession has been sufficiently widespread and uniform is the most problematic issue of identification of international customary rules in this field.[24] The law of State succession has been shaped by general legal principles, in particular by the principle of territoriality, the principle of equity, and the principle of human rights protection. The fact that State succession occurs by the transfer of sovereignty over a territory and that it results in a division of goods and debts implies the importance of the principles of territoriality and equity. Since succession may affect human rights, the principle of protection of human rights is of particular importance. Other principles, such as proportionality or reasonability, are also important.

In spite of the fact that the law of State succession might be seen as of peripheral significance in the system of international law, it has been on the agenda of the ILC almost continuously over a very long period.[25] The ILC selected State succession as one of topics for future codification in 1949. The UN Secretariat prepared memorandums

17 See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-12&chapter=3&clang=_en.
18 The Council of Europe Treaty Series (CETS) No. 166.
19 See https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=166.
20 CETS No. 200.
21 See https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=200.
22 See Information on treaties which may be relevant for the work of the ILC on succession of States in respect of State responsibility, March 29, 2019, A/CN.4/730.
23 Mullerson, 1993, p. 474.
24 Jennings and Watts, 1992, p. 236; Kreća, 2007, p. 270.
25 All materials are available at: https://legal.un.org/ilc/guide/gfra.shtml.

on the succession of States in relation to membership in the UN[26] and to general multilateral treaties deposited with the Secretary General[27] as well as two digests of decisions of international courts[28] and national courts[29] in 1962 and 1963, respectively. The first special rapporteur of the ILC on succession of States and governments was Manfred Lachs, who submitted the first report in 1963.[30] He suggested division of the topic into more branches and, as he was elected as a judge to the ICJ,[31] the ILC appointed Sir Humphrey Waldock as a special rapporteur for succession regarding treaties and Mohammed Bedjaoui as a special rapporteur for succession in respect of State property, debts, and archives. The ILC gave priority to succession to treaties. When Sir Waldock was elected as a judge to the ICJ, Sir Francis Vallat replaced him. The ILC adopted the final draft with comments in 1974,[32] and the UN Conference adopted the final draft, inserting small changes. Bedjaoui submitted 13 reports on succession regarding State property, debts, and archives from 1968 to 1981. The ILC adopted the final draft with comments in 1981.[33] The UN Conference accepted the draft two years later in Vienna. The ILC decided to codify rules regarding effects of State succession to nationality in 1993. The Secretariat prepared a memorandum on practice of States regarding the topic in 1999.[34] The Special Rapporteur Václav Mikulka submitted four reports between 1995 and 1998. The ILC adopted the final draft and comments in 1999. The General Assembly took note on the draft in 2000[35] and since 2004 it has periodically invited governments to accept legal instruments on effects of succession to nationality at regional and subregional levels.[36] The Council of Europe adopted the 2006 Convention on the Avoidance of Statelessness. Having decided to codify rules on succession of States in respect of State responsibility in 2017, the ILC appointed Pavel Šturma as a special rapporteur. The Secretariat prepared a memorandum on corresponding material in 2019.[37] In the period from 2017 to 2021 Šturma submitted four reports on State succession regarding State responsibility. Three of the six special rapporteurs on succession matters in the ILC were distinguished lawyers from countries of the Central Europe.

The work of the ILC on the codification of rules regarding different succession matters and materials prepared by the Secretariat are precious source of information

26 A/CN.4/149 and Add.1.
27 A/CN.4/150. The memorandum was supplemented in 1968 by document A/CN.4/200 & Corr.1 and Add.1 & 2 and in 1969 by document A/CN.4/210, and in 1970 by document A/CN.4/225. The Secretariat prepared also material on succession of States in bilateral treaties in document A/CN.4/229. The supplement was made in 1971 by document A/CN.4/243 and Add.1.
28 A/CN.4/151. The digest was supplemented in 1970 by document A/CN.4/232.
29 A/CN.4/157.
30 A/CN.4/160 and Corr.1.
31 The International Court of Justice.
32 A/CN.4/L.223 and Corr.1 and Add.1.
33 A/CN.4/L.328/Add.2.
34 A/CN.4/497.
35 Res. 55/153 of December 12, 2000.
36 Res. 59/34 of December 2, 2004; 63/118 of December 11, 2008; 66/92 of December 9, 2011.
37 A/CN.4/730.

on State succession. Some drafts have been transformed into universal treaties. The draft, which has not been transposed in a treaty has, also, legal significance. The ECtHR thus referred to the Draft Articles on Nationality of Natural Persons in relation to the Succession of States.[38]

By their doctrinal codifications, the IIL and the ILA[39] contributed greatly to development of the law of State succession. The IIL adopted resolutions on State succession in matters of property and debts[40] and on State succession in matters of State responsibility.[41] The ILA accepted Resolution no. 3/2008 "Aspects of the law of State succession" addressing succession in treatise, property, debts, and archives.

3. The basic notions and categories

All relevant conventions, drafts of the ILC, and doctrinal codifications define the term "succession" identically as "the replacement of one State by another in the responsibility for the international relations of territory." The ILC explains that replacement means complete replacement.[42] The definition does not mean partial transfer or conferral of powers, and the replacement should be permanent. Temporal replacement, such as a belligerent occupation, is excluded.[43] Nor does it denote the succession of governments or other subjects of international law.[44] The term "responsibility" has not been used here in the sense of State responsibility for internationally wrongful act, but in the sense of competence of international representation. The syntagma "responsibility for the international relations of territory" is more appropriate than the expression "replacement in the sovereignty in respect of territory" since it covers all varieties of possible status of territory, such as national territory, trusteeship, mandate, protectorate, and depending territory.[45]

The replacement in the responsibility for the international relations of territory occurs between a predecessor State and a successor State, where the successor State replaces the predecessor State. The 1978 and 1983 Conventions, the 1999 and 2021 ILC Drafts, and the 2015 IIL Resolution[46] also determine identically the meaning of the term "date of succession." The date of the succession denotes the date of the replacement of the predecessor State by the successor State. There may be several successor States and several dates of succession, as happened in the

38 *Kurić and others v. Slovenia* (app. no. 26828/06) Judgment, June 26, 2012, para. 226.
39 The International Law Association.
40 The 2001 IIL Resolution.
41 The 2015 IIL Resolution.
42 Report of the International Law Commission on the work of its twenty-sixth session, p. 171, para. 69.
43 Brownlie, 1979, p. 651.
44 Report of the International Law Commission on the work of its twenty-sixth session, p. 175.
45 Ibid., pp. 175, 176.
46 The 2015 Resolution of the Institute of International law on State succession in matters of State responsibility. See Kohen, 2015.

case of Yugoslavia. The quoted documents do not define a State that continues the international legal personality of the predecessor State, which is commonly named "a continuator."

There are a few categories or types of succession: a) transfer of a part of territory of a State to another State (cession); b) a dependent territory becomes a newly independent State (a case of decolonization); c) two or more States merge into a new State or a State is incorporated into another State (unification); d) separation of part or parts of the territory of a State (secession); and e) dissolution of a State.[47] The predecessor State remains in all enumerated types of succession, except in cases of dissolution and unification in a union. The CSFR and the SFRY dissolved and ceased to exist. Czechia,[48] Slovakia,[49] BH,[50] Croatia,[51] Slovenia,[52] Macedonia,[53] and the FRY[54] appeared as new successor States. Egypt and Syria merged in the UAR[55] in 1958. Tanganyika and Zanzibar united in the Republic of Tanzania in 1964. North Viet Nam and South Viet Nam merged in the Socialist Republic of Viet Nam in 1975. South Yemen and North Yemen united in the Republic of Yemen in 1990. The unification in the form of incorporation does not affect the personality of an incorporating State, but an incorporated State ceases to exist. The incorporating State thus becomes a State continuator and successor at the same time. The German Democratic Republic was incorporated into the Federal Republic of Germany in 1990. The former ceased to exist as a State and the later has continued its international legal personality and thus become a State continuator, but also a State successor. The successor States are usually new States, but not always. In the cases of cession and incorporation, the successor State is not a new State.

The two Conventions and the two ILC Drafts do not define various categories of succession except "newly independent State." The newly independent State is defined as "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible." This definition denotes a State that has been born in the process of decolonization. The materials of the ILC and State practice indicate the meanings of other terms. Working on the draft on succession regarding treaties, the ILC connected, for example, the term "dissolution" with a union of States, whose component parts "retained a measure of individual identity during the existence of the union."[56] However, the determination of some types of

47 Older literature also enumerates annexation or conquest as types of succession. See Keith, 1907, p. 9.
48 The Czech Republic.
49 The Republic of Slovakia.
50 Bosnia and Herzegovina.
51 The Republic of Croatia.
52 The Republic of Slovenia.
53 The Former Yugoslav Republic of Macedonia, since 2019 the Republic of North Macedonia.
54 The Federal Republic of Yugoslavia.
55 The United Arab Republic.
56 Report of the International Law Commission on the work of its twenty-sixth session, p. 265.

succession is not clear cut in theory and the issue is not without political impact in practice. Qualifying an event as one or another category of succession has been a source of disagreement and confusion in some cases. Austria and the Allied Powers did not agree about character of the break-up of Austro-Hungarian Monarchy after the First World War. Austria qualified the break-up as a dissolution, while the Allied Powers considered it secession and treated Austria and Hungary as continuing the legal personality of the Monarchy. Thus, the Peace Treaty of St. Germain-en-Laye proclaimed Austria, as a State continuator, responsible for the First World War and for war damage.[57] The FRY and the former Yugoslav Republics disputed for over a decade the character of the break-up of the SFRY.[58] Croatia and Slovenia first, and then, successively, Macedonia and BH declared their independence and were successively admitted to the membership of the UN. The FRY saw the succession as a series of secessions, but the former Yugoslav republics viewed it as a dissolution. After certain controversial decisions of the Security Council and the General Assembly regarding the position of the FRY in the UN,[59] the dispute was settled by the application of the FRY for membership in the UN in 2000, which implied a dissolution. Some doctrinal definitions of continuity and discontinuity of States may be found in Arts. 2–5 of 2001 IIL Resolution.[60]

The identification of the changes that affected the USSR is not easy and has provoked discussion.[61] Šturma discussed whether the break-up of the USSR was a case of dissolution or a series of secessions.[62] He noted that the three Baltic States declared independence and left the USSR in 1990 and 1991.[63] The remaining 11 Soviet Republics declared that the USSR had ceased to exist and formed the Commonwealth of Independent States in Alma-Ata in December 1991.[64] Nonetheless, Russia has been treated as a continuator of the USSR in the UN and in international treaties. Russia was not admitted as a new State to the membership of the UN.[65] The Secretary General of the UN, as the depositary of international treaties, treated Russia as continuing the USSR in treaties. The parties to treaties did not object. Most successor States of the USSR and international community recognized Russia also as a continuator of the USSR regarding State debts and State property. It is not easy to see how this practice can

57 Šturma, 2018, para. 82.
58 See polemic between Blum and his opponents Degan, Bring, and Malone. Blum, 1992b, pp. 830–833; Degan, Bring, and Malone, 1993, pp. 240–251.
59 See Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment, ICJ Reports, 2003, paras. 33–48. See, also, Šturma, 2018, para. 176.
60 The 2001 Resolution of the Institute of International Law on State Succession in Matters of Property and Debts. See, Ress, 2000–2001b.
61 Mullerson, 1993, pp. 475–483.
62 Šturma, 2018, para. 84.
63 Ibid., para. 85.
64 Ibid., para. 86.
65 Blum, 1992a, pp. 354–361.

be accommodated to the concept of dissolution as it is defined in the general law of State succession. An attempt of the analogous treatment of the FRY by the Secretary General regarding international treaties faced the objections of some UN Members, leading the Secretary General to change its position.[66] Article 60 of the Constitutional Charter of the SUSM[67] from 2003 provided each member of the Union with the right to decide after three years to leave the Union. Para. 5 of Art. 60 reads: "The Member State which ... [breaks away] ... shall not inherit the right to international legal personality, and any disputable issues shall be regulated separately between the successor State and the newly independent State."[68] The provision is a little clumsy. "The successor State" denotes here a State continuing the Union. "The newly independent State" is not the best translation of the expression "osamostaljena država" used in the original text. In the context of the law on State succession, "the newly independent State" means a State that acquired its independence in the process of decolonization. Montenegro[69] acquired its independence by separation. A better translation of "osamostaljena država" would be "a State that acquired independence." In the case of the separation of Montenegro, what really occurred, as the Constitutional Charter envisaged, is in fact that Serbia[70] has continued the international personality of the SUSM.[71] Serbia, as a continuator of the SUSM, has been confirmed by the Agreement between the Republic of Serbia and the Republic of Montenegro on the Regulation of Membership in International Financial Organizations and Division of Financial Rights and Obligation, signed in Belgrade on July 10, 2006.[72] The quoted Para. 5 of Art. 60 of the Constitutional Charter speaks on the successor State and the State that acquired independence. Serbia was named a successor State and Montenegro a State that acquired independence. The chosen terms do not correspond with their meaning, as determined in the two Conventions and the two ILC Drafts. Montenegro has been, in fact, a successor State and Serbia has become a continuator of the SUSM.

4. Dubious validity of the condition of legality of succession

Common to the two Conventions and the two ILC Drafts is that they limit applicability of their provisions only to "lawful successions." The 1978 Convention,[73] the 1983

66 Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), op. cit., paras. 38, 39.
67 The Constitutional Charter transformed the FRY to the SUSM.
68 *Bijelić v. Montenegro and Serbia*, (app. no. 11890/05), April 28, 2009, para. 37.
69 The Republic of Montenegro.
70 The Republic of Serbia.
71 The State Union of Serbia and Montenegro.
72 Službeni glasnik Republike Srbije (Official Journal of the Republic of Serbia) No. 64/2006.
73 The Vienna Convention on Succession of States in respect of Treaties, Vienna, August 22, 1978.

Convention,[74] the 1999 ILC Draft,[75] and 2021 ILC Draft[76] stipulate that they may be applied "only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations."

The *ratio* of the provision is that an illegal territorial change cannot be legitimized by application of the rules on succession. The provision was initiated in the ILC during preparation of the draft on succession of States in respect to treaties in 1972 and later was generally accepted.[77] That may have sense in the context of the 1978 Convention. A transfer of sovereignty that would be contrary to international law and the UN Charter should not open treaties for illegal territorial changes. The question is whether it may have sense in the context of the other three documents, in particular whether nonapplication of the rules on effects of State succession regarding nationality is a proper choice. The issue was not widely elaborated by the special rapporteur. He referred to the previous work of the ILC concerning Art. 6 of the Draft on succession to treaties and Art. 3 of 1983 Convention. Thus, he concluded that "the current study should not deal with questions of nationality which might arise, for example, in cases of annexation by force of the territory of a State."[78] Does this mean that the fate of individuals who have their habitual residence on the illegally annexed territory is not relevant for international law? Can the annexing State legally impose its nationality on the individuals in the annexed territory contrary to their will? It might be that nonapplication of the rules on nationality has not reached a fair balance, a term borrowed from the ECtHR, between general interest of international community and interest of individuals.[79]

The propriety of the conditions of the legality of a territorial change for application of the 1983 Convention is also questionable, in particular if the situation of illegality lasts a long time. The division of State property or foreign debts or regulation of archives would not necessarily transform an illegal situation into a legal one. Šturma observed that precise rules of international law on the creation and termination of States are missing,[80] which means that the condition of legality might create uncertainty in the application of the rules of succession. The purpose of the provision—not to legitimize an illegal territorial change—may be achieved in another way. Instead of nonapplication, the provision might read as stipulating that the application shall not prejudice legality of the territorial change. A parallel approach has been used

74 The Vienna Convention on Succession of States in respect of State Property, Archives and Debts, Vienna, April 7, 1983.
75 The Draft articles on nationality of natural persons in relation to succession of States adopted by the ILC in 1999.
76 The Draft articles on nationality of natural persons in relation to succession of States adopted by the ILC in 2021.
77 The history of the provision and the reason underlying may be seen at Šturma, 2018, paras. 22–41.
78 Mikulka, 1995, para. 95.
79 See the solutions that have been applied in practice at Grossman, 2001, p. 861.
80 Šturma, 2018, para. 37.

regarding international humanitarian law. The application of humanitarian law does not prejudice the legality of the use of force. The US has never recognized the Confederation as a sovereign State, but the US Supreme Court invoked the doctrine on State succession to attribute the property of the Confederation to the Federation.[81] In the literature there is a strain of thought that does not exclude certain types of succession even in cases of illegally acquired territory.[82]

5. Succession of States to treaties

The rules on the succession of States to treaties reconcile the freedom of contracting and general interests of continuity and certainty of treaty relations. The freedom of contracting is one of the basic principles of the law on treaties. In the context of succession, it means that new successor States choose the treaties of predecessor State into which they will enter. The interest of continuity and certainty of treaty relations requires the automatic succession of new successor States to all the treaties of a predecessor State. The 1978 Convention and international practice do not, however, reconcile these two matters in the same manner. The 1978 Convention governs succession by two basic rules: a) automatic succession for the cases of secession and dissolution, and b) a clean slate rule for newly independent States. Automatic succession means the continuity of the treaties of a predecessor State in respect of a successor State automatically without any notification of succession. The clean slate rules mean that treaties of a predecessor State do not automatically bind a successor State, and instead the successor State is free to choose the treaties of a predecessor State into which it will enter by a notification of succession. Practice has preferred the clean slate rule in the cases of separation and dissolution, where automatic succession has appeared as an exception. In fact, States have traditionally chosen the clean slate approach, but international bodies and courts have recently established an exception regarding human rights treaties. The interaction between the freedom of contracting and continuity of treaties has been informed by the principle of territoriality and the principle of protection of human rights. The two principles restrict the freedom of contracting regarding treaties on frontiers, territorial regimes, and human rights. The freedom of contracting does not exist either in respect of customary international law and general legal principles. The customary international law and general legal principles oblige new successor States regardless their will.

The 1978 Convention distinguishes boundary treaties and treaties of other territorial regimes. Art. 11 states that a succession of States does not affect a boundary established by a treaty or the obligations and rights established by a treaty relating to the regime of a boundary. Art. 12 relates to other territorial regimes and declares that the succession a State does not affect the obligations and rights established by a

81 Hahn, 1994, pp. 266–277.
82 Castren, 1954, p. 56.

treaty and relating to use of any territory or restriction upon its use for the benefit of any territory of a foreign State, or a group of States or all States. The ILC has referred in particular to rights of transit, the use of international rivers, demilitarization of particular localities, etc.[83] The ICJ confirmed that the rule in Art. 12 has acquired the status of an international customary rule.[84] The political geography of the Danube region was changed in the last wave of successions in Europe. Croatia, Moldova, Serbia, and Slovakia have become new parties to the Convention regarding Navigation on the Danube, signed in Belgrade in 1948, but the regime of navigation remains as it was established in 1948 unchanged. The effect of Art. 12 is that succession does not affect the rights and obligations of third parties and that successor State cannot change the established regime by their reservations. Having in view the general practice of States and jurisprudence of the ICJ, it is beyond doubt that the rule in Art. 11 also has the character of an international customary rule.[85] The ICJ was invited to confirm that the key provision of the Convention in Art. 34 on automatic succession has become the rule of international customary rule, but the Court declined to do so.[86]

5.1. Clean slate rule

The substance of the clean slate (*tabula rasa*) rule is that a newly independent State emerging through the process of decolonization is not obliged to remain bound by treaties of a predecessor State, except for treaties referred to in Arts. 11 and 12 of the 1978 Convention, and that it may succeed to multilateral treaties of the predecessor State by the notification of succession. According to Art. 23 Para. 1 of the 1978 Convention, a successor State that has notified succession to a treaty has become the party to the treaty from the date of succession. The provision secures the continuity of the chosen treaties. That entails, however, some uncertainty about the status of a newly independent State in the period between the date of succession and the date of notification. The parties to the treaty remain uncertain regarding the status of successor State in that period. Art. 23 Para. 2 avoids this uncertainty by suspending operation of a treaty until the date of notification. The treaty may be applied provisionally, if a newly independent State notifies such intention. Suspension is probably the only possible solution, but this issue is not quite clear. BH entered the 1948 Convention on the Prohibition and Punishment of the Crime of Genocide by notification succession to the Convention on December 29, 1992, with effect from the date of succession of March 6, 1992. The Secretary-General communicated a depositary notification on succession on March 18, 1993. The moment from which the Genocide Convention was effective regarding BH was uncertain and was discussed in the Genocide case between BH and the FRY. The ICJ was in a position to establish its jurisdiction without

83 Report of the International Law Commission on the work of its twenty-sixth session, p. 197.
84 *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJR, 1997, para. 123.
85 Degan, 2006, p. 196.
86 *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), para. 123.

specifying the moment and it avoided resolving the disputed issue.[87] The ECtHR considered successors States to be bound by the European Convention on Human Rights from the date of succession.[88]

The rule of clean slate was, thus, foreseen for States emerging in the process of decolonization as an equitable solution remedying the subordinate position of the former colonies. Art. 34 of the 1978 Convention foresees automatic succession for the cases of separation or dissolution. Any treaty of a predecessor State in force at the date of succession continues to be in force for all successor States. The rule was supported by the previous practice of the dismemberment of a union of States, but does not reflect a customary rule regarding separation.[89] Members of the unions enjoyed autonomy regarding entering into treaties and they participated in the conclusion of treaties of the union. The rule on automatic succession rests, thus, on the presumption that successor States have already accepted a treaty as the members of a union. Originally, the ILC drafted two articles, one for dissolutions and another for separation. Automatic succession was foreseen for the case of dissolution and the clean slate rule for the cases of separations.[90] Having in view the comments of various governments, the ILC considered whether there was a clear distinction between dissolution and separation and, if there were, whether it should have any bearing on succession regarding treaties. The ILC merged the two articles into one, but preserved the clean slate rule for the cases of separation, which were comparable with newly independent States.[91] This was consonant with the logic that a new State cannot be bound by a treaty if, while being a part of the predecessor State, it did not participate in its treaty-making powers. The last paragraph on the clean slate rule disappeared, however, in the text of Art. 34 of the 1978 Convention.

The website of the Secretary-General of the UN,[92] as a depositary of international treaties, gives information on the practice in succession to multilateral treaties. The practice of State succession to treaties in the last waves of succession was not quite uniform, but the prevailing principle was the principle of clean slate. The commonality of the practice was that the successor States chose the treaties to which they succeeded. BH and Macedonia used notifications of succession to succeed to particular treaties. Croatia, the FRY, and Montenegro informed the Secretary-General of their decisions to succeed to the treaties of the former SFRY, respectively the SUSM, as they were enumerated on the lists annexed to the letters. Similarly, Czechia, Slovakia, and Slovenia informed the Secretary-General that they considered themselves bound by the multilateral treaties of the CSFR and the SFRY, respectively. They informed that they had examined the treaties that they entered in the lists attached to their

87 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Preliminary Objections, Judgment, I. C. J. Reports, 1996, paras. 18–26.
88 See the practice of the ECtHR in f. 6.
89 Cassese, 2005, p. 78.
90 Report of the International Law Commission on the work of its twenty-sixth session, p. 264.
91 Ibid., p. 265.
92 See https://treaties.un.org/Pages/HistoricalInfo.aspx?clang=_en.

letters. The common feature of all enumerated modes of successions is that successor States choose the treaties in which they succeeded and that they accepted the effects of the chosen treaties from the date of succession. These practices were not absolutely consistent. Slovenia acceded, for example, to the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, in spite of the fact that the SFRY was a party. Russia and Serbia informed the Secretary-General that they continued the treaties of the USSR and of the SUSM, respectively, and requested a change in the names of the parties in the register of treaties. The continuity of treaties was secured in all these cases. The exceptions are the successor States of the USSR that acceded to the treaties. They also chose the treaties to which they acceded, but the treaties entered into force after accession.

The continuity of a bilateral treaty is subject to an explicit or implicit agreement of a successor State and another party. Usually, a new successor State negotiate with a State regarding which bilateral treaties between the State and the predecessor State will remain in force and confirm the reached agreement by an exchange of notes.[93]

The 1978 Convention provides for the application of the Convention to the treaties that are constituent instruments of international organizations, but without prejudice to the rules on admission to an organization. If a decision of an organization on admission to its membership is necessary, succession to the constituent instrument is not possible without such a decision. The object and purpose of a treaty may determine a circle of new successor States that can enter the treaty. The object and purpose of the 1948 Convention Regarding Navigation on Danube has determined that only successor States that are riparian States on the Danube might have become parties to the Convention and Members of the Danube Convention. They become the parties by the Protocol, signed in Budapest on March 28, 1998. Something of the principle of *rebus sic stantibus* may be of relevance for succession of States to treaties. The 1978 Convention excludes succession when it is incompatible with the object and purpose of a treaty or when it radically changes the conditions for its operation.[94]

The rule of clean slate leaves the freedom to a successor State to choose the treaties into which it wishes to enter, but are the counterparties of these treaties obliged to enter treaty relations with a successor State? If the parties have recognized the successor State as a new State, and if the treaty is open for unilateral accession, the presumption should be that the parties consented to accept the successor State as a new party. If a party to a treaty to which a successor State entered has not recognized the successor State as a new State, have the treaty relations been established between two States? The ICJ avoided answering this question in the above-mentioned Genocide

93 Beemelmans, 1997, pp. 92–96. The US conditioned recognition of successor States of the USSR, the CSFR, and the SFRY on their acceptance of the treaties of their predecessors. Williams, 1997, pp. 23–31.

94 See about succession to "closed" treaties at Beemelmans, 1997, pp. 85–87.

case. BH entered the Genocide Convention in time when it was note recognized by the FRY. The FRY recognized BH by the Dayton Peace Agreement in 1995, and as the ICJ decided on its jurisdiction in 1996, the previous non-recognition of BH had become irrelevant for the decision on jurisdiction.[95] The practice has been established by declarations deposited with the Secretary General that accession of a State to a treaty does not automatically mean its recognition by a party to the treaty and does not mean automatic establishment of treaty relations among them. A similar logic might be valid regarding succession.

5.2. Automatic succession

Automatic succession would be a natural solution regarding codifying treaties, that is, treaties that codify or reflect international customary rules.[96] Unfortunately, the rule has not been accepted as a general rule.[97] States have preferred the freedom of contracting over legal certainty. This freedom includes the capacity to dispose of the declarations and reservation of a predecessor State, withdrawing or changing them or depositing new declarations and reservations regarding a treaty. Nevertheless, the issue of automatic succession has been considered in international jurisprudence and literature. Having in view the specific nature of the Genocide Convention, the question whether the Convention provides for automatic succession was raised in the Genocide case (BH v. the FRY). In 1996 the ICJ underlined the importance of the particular nature of the Convention but avoided answering.[98] The next year the Human Rights Committee adopted its General Comment No. 26, in which it treated human rights as acquired rights. The Committee recalled its long-standing practice that "once the people are accorded the protection of the rights under the Covenant, such protection devolves with the territory and continues to belong to them, notwithstanding ... State succession..."[99] This has been the long-standing practice of the Committee, but the responses of successor States have not been homogeneous. They reacted differently to invitations of the Committee to submit their periodic reports. BH submitted the report before the notification of succession to the Covenant. The successor States of the USSR and Macedonia did not do that.[100] Invoking the quoted position of the HRC, four judges of the ECtHR advocated automatic succession of treaties of international humanitarian law and war crimes.[101] Evolution of the law in that direction has been

95 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* op. cit., paras. 25 and 26.
96 Jenks, 1952, p. 107.
97 See contrary view at Beemelmans, 1997, pp. 89, 90.
98 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* op. cit, paras. 21, 22.
99 Compilation of general comments and general recommendations adopted by human rights treaty bodies, HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, p. 223.
100 Verbatim record of public sitting of the ICJ of 30 April 1996, p. 49. See further on the practice of the ECtHR and the HRC at Kamminga, 2005.
101 *Janowiec and others v. Russia*, (app. nos. 55508/07 and 2952/09) Judgment, October 21, 2013, Joint partly dissenting opinion of judges Ziemele, De Gaetano, Laffranque, and Keller, para. 27.

noted in the literature.[102] The issue of the automatic succession of States to investment treaties has also been considered in the literature.[103]

5.3. The moving frontier rule

All that discussed above relates to newly independent states born in the process of decolonization and to cases of dissolution or separation. The 1978 Convention governs, also, the case of transfer of a part of territory (cession) and the case of unification. In the case of transfer of a part of territory, it provides for the "moving frontier rule." The treaties of a predecessor State on the transferred territory cease and the treaties of a successor State, which is not a new State in this case, extend to the transferred territory.[104] In the case of unification, the 1978 Convention foresees continuity of treaties of predecessor States in respect of a new successor State. It does not, however, make a distinction between the unification of two or more states in a union of States and the incorporation or adhesion of a State by another State. The continuity of all treaties of predecessor States may have sense in the case of a union, but not in the case of incorporation.[105] In the German case, a case of incorporation, the moving frontier rule was applied.[106] The same rule was applied to the Kingdom of Serbs, Croats, and Slovenes in 1919. The treaties of Serbia, concluded before 1914, were extended to the whole territory of the Kingdom by the St. Germain-en-Laye Treaty.

6. State succession regarding State property, debts, archives, and private rights

The 1983 Convention governs State succession to property, debts, and archives. The ECtHR indicated that the provision of the Convention might reflect international customary law.[107] The IIL adopted the 2001 IIL Resolution to refresh the 1983 Convention by new practice, in particular, by the practice of disintegration of the USSR, the SFRY, and the CSFR.[108] The Resolution does not depart substantially from the Convention, but expands the scope of application to private law aspects and specifies certain rules. It has thus become a proper legal source for the ECtHR.[109] The rules, contained in the 1983 Convention and in the 2001 IIL Resolution, are of a subsidiary nature. The Convention and the Resolution inform that they will be applied in absence of an agreement between concerned States.

102 Cassese, 2005, p. 78.
103 Dumberry, 2015, pp. 74–96; Repousis and Fry, 2016, pp. 421–450.
104 Jennings and Watts, 1992, p. 225.
105 Ibid., pp. 211, 212.
106 Beemelmans, 1997, pp. 98–108.
107 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (App. no. 60642/08) Judgment, Grand Chamber, July 16, 2014, para. 59.
108 Ress, 2000–2001b, p. 712.
109 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (App. no. 60642/08) Judgment, Grand Chamber, July 16, 2014, para. 59.

6.1. State property

The 1983 Convention defined the State property of a predecessor State as the property, rights, and interests that were owned by that State according to the internal law. The 2001 IIL Resolution adds the property of public institutions of a predecessor State.[110] Having in view the specifics of the Yugoslav socialist self-managing political and economic system, determination of the property of the SFRY was one of most disputed issues in the succession negotiation.[111] The problem was resolved by a compromise leaving each successor State to determine, in accordance with international law, whether the property located in its territory was State property of the SFRY.

The principle of territoriality and the principle of equity are the main principles underlying the transfer of property from a predecessor State to a successor State. The immovable State property of a predecessor State follows the fate of the territory where it is located. If it is located on the territory of the predecessor State that has become territory of the successor State, the immovable property passes to the successor State, in principle, without compensation. The movable property of a predecessor State connected with the activity of the predecessor State on territory that has become the territory of a successor State passes to the successor State. According to the 1983 Convention, the rule is applied in all categories of succession. Additional rules are provided for specific categories. In the cases of separation and dissolution, the movable property of the predecessor State that does not relate to its activity on the specific territory shall pass to a successor State in an equitable proportion. In the case of dissolution, the immovable property of a predecessor State that is situated outside its territory passes to successor States in equitable proportions. The 2001 IIL Resolution follows the exposed rules of the 1983 Convention and adds some new ones. The provision in Art. 19 Para. 4, however, is not quite clear. It states that immovable property of the predecessor State situated outside its territory remains "in principle" the property of the predecessor State in the case of cession and separation (secession). Art. 19 Para. 4 adds, however, that nonetheless, successor States have the right to equitable apportion of the property of the predecessor State situated outside its territory. It might look contradictory, but the Rapporteur explained that the provisions were innovative and opened a possibility for apportionment of immovable property abroad in the cases of cession and secession.[112] He referred to the practice of the SFRY and USSR. The referred practice offers, however, little support for the innovation. The SFRY case was a case of dissolution, and the immovable property of the USSR abroad belonged to Russia. The principle of equity requires, however, that the value of immovable property abroad should be account as a part of State property as a whole in searching equitable apportionment in the case of secession. The 2001 IIL

110 Older literature referred to State property in the public and private domains. See Chen, 1923, pp. 180, 181. Alternatively, property of public character and fiscal property. See Castren, 1954, p. 70.
111 Škrk, Polak Petrič, and Rakovec, 2015, p. 224.
112 Ress, 2000–2001a, p. 419.

Resolution distinguishes property of major importance to the cultural heritage of a successor State from whose territory it originates.[113] The provision requires identification of such property within a reasonable time and its passage to be regulated by the concerned States. Annex A to the 2001 Agreement on Succession Issues[114] contains such provision.

6.2. State debts

The rule of equitable proportion was employed by the 1983 Convention to regulate the passing of debts in the cases of transfer of part of territory, separation of a part of territory, and dissolution.[115] The Convention and the 2001 IIL Resolution differ regarding the definition of State debt. The Convention defines State debt as "any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law." The Resolution accepts this definition, but expands it to "any financial obligation of a predecessor State towards any natural or legal person under domestic law." In accordance with this expansion, it obliges successor States to recognize in their domestic legal orders the rights and obligations of creditors established in the legal order of a predecessor State. Private creditors are obliged to participate in negotiations between concerned States on apportionment of private debts. The rules on State succession in respect of debts formulated in the Resolution has become thus relevant, as it will be presented later, for the ECtHR. The 2001 IIL Resolution makes a distinction between "national debts," "localized debts," and "local debts." "National debts" are the debts of a predecessor State or public institution or State-owned enterprises that were operating nationally for the benefit of the State as a whole. "Localized debts" are debts contracted by the mentioned subjects for a particular project or object in a specific region. "Local debts" are debts contracted by local public institutions, such as federal unities, regions, or communes. The principle of territoriality regulates only local debts. The local institutions remain debtors. The principle of equitable proportion governs the passing of national and localized debts to successor States. The successor States of the SFRY, however, entered into interim agreements with the World Bank in 1992, agreeing to repay loans for projects on their territories.[116] These were debts of the SFRY. The practice of the IMF[117] and the World Bank in other cases of secession and dissolution was that successor States assume debts regarding projects on their territories.[118]

113 See on the tension between the principle of territoriality and the concept of cultural heritage of a society at Jakubowski, 2014, pp. 375–396.
114 The Agreement on Succession Issues, adopted at the Conference on Succession Issues of the SFR of Yugoslavia in Vienna on June 29, 2001.
115 See Chen, 1923, pp. 169–174.
116 Paul, 1994, p. 794.
117 The International Monetary Fund.
118 Paul, 1994, p. 792; Williams, 1994, pp. 788–793.

6.3. Criteria of equitable division of State property and debts

The 2001 IIL Resolution enumerates some criteria for the equitable apportionment of property and debts, such as a territorial link or connection between property, rights, and interests on the one hand, and debts on the other hand, based on the participation of the concerned States in the GDP[119] and a formula adopted by the IMF. The formula of the IMF is complex and includes more factors including GDP, foreign currency reserves, and foreign exchange inflows and outflows.[120] The IMF has applied the formula to the succession of States and does not consider itself bound by the agreements of successor States. Czechia and Slovakia agreed in 1992 that the property and liabilities of the predecessor State passed over the successor States in conformity with the population *ratio*, that is in a proportion of two to one.[121] They notified the agreement to the IMF. The IMF applied, however, its formula and allocated to Czechia a bit more than two-thirds of the Czechoslovakia obligation and to Slovakia a bit less than one-third.[122]

The redistribution of property and debts of the USSR has been an evolving process. At the time of dissolution, the eight successor States, all the former Soviet Republics except the three Baltic Republics, agreed on December 4, 1991, on their shares of property and debts on the principle that the percentage shares of property and of debts have to be same. The participation of Russia in property and debts was 61.34%, Ukraine 16.37%, etc.[123] It seems that the implementation of the Agreement was unsuccessful. The idea of joint and several liability emerged as a substitute. On the basis of bilateral agreements with most other successor States concluded during 1992 and 1993, Russia took over all international liabilities of the USSR and its property located abroad, including gold reserves and diplomatic property. Russia accepted shares of debts of smaller successor States and they renounced their shares of the property of the USSR beyond their respective territories.[124] Ukraine concluded with Russia, however, a protocol that preserved participation of Ukraine in debts and assets in accordance with the agreement from December 4, 1991. The implementation of the protocol did not proceed without difficulties, in particular regarding the division of the Black Sea Fleet.[125]

The successor States of the former SFRY agreed in 2001 on the percentages of their participation in property and debts of the predecessor States. The percentage of share for each successor State is almost identical with the percentages as determined by the IMF,[126] although the percentage of participation of a successor State is not identical to its participation in other subject matters. BH participated, for example, in assets in the Bank for International Settlement with 13.20%, in diplomatic property with 15%, and in other foreign financial assets with 15.50%. Similarly, the share of Croatia

119 Gross Domestic Product.
120 See https://www.imf.org/en/About/Factsheets/Sheets/2016/07/14/12/21/IMF-Quotas.
121 Oeter, 1995, p. 76.
122 Ibid.
123 Ibid., p. 80.
124 Ibid., p. 82.
125 Ibid., p. 83.
126 Williams, 1994, p. 802, f. 168.

in assets in the Bank was 28.49%, in diplomatic property 23.5%, and other foreign financial assets 23%. Probably following the principle of equity, the parties tuned their percentages in the division of different goods.

6.4. Archives

The archivistic principle of the preservation of the integral character of archives, the principle of territoriality, and the fact that archives are reproducible underlie the rules on archives as set forth in the 1983 Convention. The archives for normal administration of the territory and archives that relate directly to the territory follow the destiny of the territory in the cases of cession, separation, and dissolution. These archives pass to a successor State to which the territory belongs. All archives, that is, the archives that remain in a predecessor State and archives transferred to a successor State will be at the disposal of each for reproduction at the expense of the State that requires reproduction. In addition, the peoples of these States have the right of access to the archives as necessary for their development and information about their history and their cultural heritage. These provisions establish a fair balance between the principle of the preservation of the integral character of archives and the legitimate needs of successor States and concerned peoples. Art. 31 Para. 2 of the 1983 Convention relates to dissolution and encodes a certain tension between the principle of the integral character of archives and succession. It provides that the archives of a predecessor State will pass in an equitable manner to successor States. Such a total division of archives would be contrary to the principle of their integral character. It was an inappropriate effectuation of legal fact that a predecessor State has ceased to exist.

The issue of the fate of archives was a matter of disagreement between the FRY and other successor States. The compromise in Annex D to the 2001 Agreement on Succession Issues respects the principle of territoriality. Regarding archives that have no territorial link, Art. 6 of the Annex D provides that the successor States will determine their equitable distribution or their retention as a common heritage of States by an agreement that should be reached within six months after entering the Agreement into force. If no agreement is reached, the archives become the common heritage of the successor States. Obviously, this compromise paid tribute to Art. 31 Para. 2. of the 1983 Convention and preserved the integrity of archives. No agreement was reached and the archives have become a common heritage. The Archive of Yugoslavia in Belgrade has survived succession and it is now open to all the successor States. The process of digitalization has begun and the archive will become accessible to everyone.

6.5. Rights and obligations of natural and juridical persons

The general principle is that State Succession does not touch the acquired rights of individuals or private bodies.[127] The general rules of international law that protect acquired rights are valid as well in the circumstances of succession.[128] The principle of

127 Chen, 1923, pp. 177–180; Jennings and Watts, 1992, p. 216.
128 See on concessions at O'Connell, 1950, pp. 93–124.

equity may attribute a certain importance to the historical circumstances of acquired rights, in particular in cases of decolonization.[129] The 1983 Vienna Convention does not prejudice in any respect any question concerning the rights and obligations of natural or juridical persons. The 2001 IIL Resolution declares that successor States will insofar as possible respect the rights of private persons acquired in the legal order of a predecessor State.

The rights of private persons are endangered, in particular, in a contested succession, as the Yugoslav case was. Deeply disturbed inter-ethnic relations and the low level of the rule of law in the successor States aggravated the situation. Two annexes to the 2001 Agreement on Succession Issues are dedicated to acquired rights. Annex E addresses the pensions and Annex G private property and acquired rights. The SFRY was a highly decentralized Federation. Besides the federal pension fund, which paid pensions to employees of the Federation, each Republic as a federal unit had its own pension fund. Annex E obliges the successor States to continue to pay pensions that they have already paid from their funds irrespective to nationality, citizenship, residence, or domicile of pensioners. It provides that each successor State will pay pensions to federal pensioners who have its citizenship. If a pensioner is a citizen of two successor States, the successor State in which the pensioner has domicile will pay the pension. As the successor States entered bilateral treaties on mutually paying pensions to their pensioners, the issue of pensions has been largely settled. Annex G contains a provision on protection of private property and acquired rights of citizens and other legal persons of the SFRY. Art. 2 Para. 1 of Annex G holds key importance. The successor States are obliged to recognize, restore, and protect the rights to movable and immovable property of citizens or other legal persons of the SFRY as they existed on December 31, 1990, in accordance with international law and irrespective of the nationality, citizenship, residence, and domicile of these persons. Any transfer of rights made after December 31, 1990, under duress is null and void. The implementation of Annex G has been only partly successful. Not a few persons have not succeeded in restoring their right.

6.6. Relevant practice of the European Court of Human Rights

When successor States are not capable of resolving certain succession issues that affect human rights, the ECtHR may help. A number of nationals of the former SFRY, who became nationals of successor States, after the dissolution of the SFRY, faced the problem of recovering "old" or "frozen" foreign-currency savings. Due to restrictions imposed by the Yugoslav Government in the late eighties, all depositors of foreign-currency deposits in banks were unable to withdraw the greater parts of their deposits before the dissolution. Since the dissolution the successor States have recognized the debts of the banks established on their territories toward their nationals. The foreigners, now nationals of a successor State, who had deposits in banks established on the territory of another successor State faced the problem of recovery of their deposits.

129 Brownlie, 1979, pp. 654, 655.

Several nationals of BH who had foreign-currency savings in branches of the Serbian bank and the Slovenian bank on the territory on the Republic of BH before the dissolution and who did not succeed in recovering them, instituted proceedings before the ECtHR against all five successor States, alleging breaches of the right to property, the right to effective remedy, and the prohibition of discrimination.[130] During the negotiation on succession issues over 10 years, the five successor States were unable to agree whether the issue of "old" foreign currency savings had to be treated as an issue of liability of the predecessor State or as a private law issue and who would be responsible for recovery—a successor State on whose territory a bank had its seat or a successor State on whose territory the deposit was made.[131] They agreed, however, by the 2001 Agreement on Succession Issues to negotiate later about the guarantees of the SFRY of hard currency savings, which they did but without success. The ECtHR did not base its judgment on succession but on attribution of acts to a State. Having in view the position of socially-owned or state-owned banks in legal systems of successor States and the competences of the successor States regarding the management of these banks, the Court found that the debts of the banks had become the debts of the successor State on whose territory the bank had its seat. The Court attributed the debts of the branch of the Serbian bank in BH to Serbia and debts of the branch of the Slovenian bank to Slovenia.[132] In spite of that, the Court touched *obiter dictum* certain issues of succession. The Grand Chamber disagreed with Serbia and Slovenia that the territorial principle should be applied in this case. It did not qualify the debts in this case as local debts to which the territorial principle is applicable. The Court decided that the equitable proportion principle would be appropriate.[133] It observed, however, that the equitable distribution of the debts in this case would require a global assessment of the property and debts of the predecessor State, which was far beyond its competence.[134] Thus, the Grand Chamber did not apply the equitable proportion principle. It observed, however, that the gains of branches of a bank were transferred to the successor State on whose territory the bank had its seat, which might indicate that the principle of equity played a certain role in the reasoning of the Court. The Grand Chamber relied on its reasoning about succession on the 2001 IIL Resolution.

Another side of the problem emerged in the dispute between Slovenia and Croatia before the ECtHR in 2020.[135] Croatian debtors had not repaid their debts to the Ljubljana

130 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (App. no. 60642/08) Judgment of Grand Chamber, July 16, 2014.
131 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, para. 62.
132 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, 116, 117.
133 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* , para. 121.
134 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* , para. 122.
135 *Slovenia against Croatia*, (app. no. 54155/16), Decision of the Grand Chamber of 16 December 2020.

Bank and civil proceedings of the Bank before Croatian courts remained unsuccessful. Slovenia alleged that Croatia was responsible for breaches of the right to a fair trial, the right to effective remedy, and the prohibition of discrimination. Having in view the status of the Ljubljana Bank as a State-owned bank under control of the Slovenian State, the ECtHR denied the status of nongovernmental organization and rejected the application. Unfortunately, the ECtHR was not also helpful regarding the rights protected by Annex G, taking the position that Annex G was not directly applicable.[136]

7. Effects of State succession to nationality

The guiding principle, emerging from long-standing practice, is that the nationality of the population on a territory follows the destiny of the territory.[137] The principle has been qualified by the right of option, and in addition the matter has to be considered in light of general international principles regarding nationality. The right of option was used extensively in successions.[138] Double nationality and policies of extraterritorial naturalization have also been used in circumstances of succession.[139] The successor States of the SFRY have been tolerant concerning double nationality. Many Serbs refugees from Croatia who acquired Serbian nationality in Serbia also took Croatian nationality to afford themselves freedom of movement in the EU.[140] Also, Croats living in Serbia before and after the dissolution of Yugoslavia, but who were born in Croatia, and their descendants who acquired Serbian nationality may also take Croatian nationality.

The effects of succession to nationality are regulated by Chapter VI of the 1997 European Convention on Nationality. One of the issues—avoidances of statelessness in the circumstances of succession—has been further regulated by the 2006 Convention on the Avoidance of Statelessness.[141] The 1961 UN Convention on the Reduction of Statelessness[142] does not contain specific provisions that address State succession, but as a general convention it may be relevant for interpretation the two European Conventions.

There are several general international principles on nationality that should lead the discussion of the effects of State succession to nationality. The basic principle is that everyone has the right to a nationality. The 1948 Universal Declaration of Human Rights declares this right. The right to nationality of persons who had the nationality of the predecessor State in the circumstances of succession has been confirmed in the

136 *Mladost Turist a.d. v. Croatia* (app. no. 73035/14) Decision. 30 January 2018. *Vegrad DD v. Serbia* (app. no. 6234/08) Decision, June 27, 2019.
137 Brownlie, 1979, pp. 658–664.
138 Chen, 1923, pp. 181–184; Gettys, 1927, pp. 271, 272; Van Ert, 1998, pp. 157–159.
139 Peters, 2010, pp. 628, 632–635.
140 See the principles applied by Croatia at Zgombic, 2011, pp. 846–848.
141 The Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, Strasbourg, May 19, 2006.
142 The United Nations Treaty Series (UNTS), vol. 989, p. 175. Entered into force in 1975. There are 55 parties. https://www.unhcr.org/protection/statelessness/3bbb24d54/states-parties-1961-convention-reduction-statelessness.html.

2006 Convention on the Avoidance of Statelessness and the 1999 ILC Draft.[143] Avoidance of statelessness is one of the principles upon which the 1997 European Convention on Nationality is based. The Explanatory Report to the 1997 European Convention speaks about "a positive formulation of the duty to avoid statelessness."[144] Accordingly, States are obliged to enact legislation on nationality in such a way as to avoid statelessness. The 2006 Convention on Avoidance of Statelessness explicates this duty as a positive obligation—the State shall take all appropriate measures to prevent statelessness.

The right to nationality, avoidance of statelessness, and prohibition of arbitrary deprivation of nationality are three basic guidelines in regulating the effects of State succession to nationality. Moreover, the 1997 European Convention obliges the State to respect the rule of law and human rights in matters of nationality in cases of State succession. That is a general duty of a State in all State affairs. Distinguishing that duty here is, however, fully justified. The rule of law and human rights are usually badly affected in contested successions.

The 1997 European Convention on Nationality enumerates factors that a State Party will consider by deciding on granting or retention of nationality in occasions of State succession:

> "*a) the genuine and effective link of the person concerned with the State; b) the habitual residence of the person concerned at the time of State succession; c) the will of the person concerned; d) the territorial origin of the person concerned*."

The enumeration is exemplary, but the text underlines the importance of the numbered factors, stating that they will be particularly taken into account. The factors are further developed in the 2006 Convention on Avoidance of Statelessness.

The habitual residence of a person at the time of State succession is certainly a general basic factor. It does not mean a "lawful residence" but a "stable factual residence." The ILC noted that habitual residence has most often been used in practice for acquiring nationality of a successor State.[145] The principle of habitual residence is applicable in all categories of State succession, including dissolution and unification. A specific variant of habitual residence—"the rights of citizens in the commune"—was used regarding the succession of the Austro-Hungarian Monarchy.[146] The genuine and effective link is a supplementary criterion of importance, in particular, for individuals who do not have habitual residence in any of successor States. It may denote a link established by birth, by predecessors (the *ius soli* and *ius sanguinis* principles), by marriage, etc. The 1997 European Convention requires that successor States take into

143 Draft Articles on nationality of natural persons in relation to the succession of States, annexed to Resolution 55/153 UNGA of 12 December 2000.
144 Explanatory Report to the European Convention on Nationality, p. 6, para. 23. https://rm.coe.int/16800ccde7.
145 Draft Articles on Nationality of Natural Persons in relation to the succession of States, p. 23.
146 Ganczer, 2017, pp. 100–107.

account the will of concerned individuals. It may be realized by granting the right of option or by avoiding the imposition of nationality against the will of a person.

Art. 20 of the European Convention on Nationality is of particular importance for individuals who have nationality of a predecessor State and habitual residence in successor State, but not nationality of successor State. Para. 1 (a) of Art. 20 proclaims the right of these individual to remain in the successor State. Sub-para. (b) guaranties the equality of treatment of these individuals with nationals regarding social and economic rights. Para. 2 of Art. 20 leaves the State Parties the possibility of excluding these individuals from employment in public services involving the exercise of sovereign powers. The *Kurić and others v. Slovenia* case[147] reflects the importance of Art. 20. More than 18,000 individuals who had Yugoslav nationality and the nationality of any Yugoslav Republic except Slovenia, but who had habitual residence in Slovenia at the time of succession and who did not apply for Slovenian nationality after the succession, became foreigners or stateless persons. They resided in Slovenia illegally and faced difficulties in keeping their jobs, renewing driving licenses, or obtaining retirement pensions.[148] They were unable to leave the country since they could not re-enter without valid documents.[149] In the period between 2005 and 2011, more international bodies addressed the problems of these "erased" people, such as the Advisory Committee on the Framework Convention on the Protection of National Minorities, the Council of Europe Commissioner for Human Rights, and the UN Committee against Racial Discrimination.[150] The Constitutional Court of Slovenia tried to ameliorate the position of the "erased" people. Finally, the Grand Chamber of the ECtHR decided that Slovenia was breaching the right to private and family life and the right to effective remedy and prohibition of discrimination. It noted that the "erased people" were deprived of any legal status and/or "the right to have rights," and observed that that was "a serious encroachment on human dignity."[151] The Grand Chamber concluded that the "erasure" irremediably affected their private and family life.[152] The Court invoked Art. 18 of the European Convention on Nationality and Arts. 5 and 11 of the 2006 Convention on the Avoidance of Statelessness as relevant sources for the interpretation of the European Convention on Human Rights, in spite of the fact that Slovenia was not a Party to these Conventions.[153] That reflects the conviction of the European Court that the two Conventions are relevant for the interpretation of the European Convention of Human Rights even regarding Contracting Parties to the European Convention that are not the Parties to the two Conventions. This is very important since it extends the effects of the two Conventions to all Contracting Parties of the European Convention.

147 *Kurić and others v. Slovenia* (app. no. 26828/06) Judgment of June 26, 2012.
148 *Kurić and others v. Slovenia*, para. 33.
149 *Kurić and others v. Slovenia.*
150 *Kurić and others v. Slovenia*, paras. 220–224.
151 *Kurić and others v. Slovenia*, para. 319.
152 See also *Slivenko v. Latvia* (app. no. 48321/99) Judgment of October 9, 2003.
153 *Kurić and others v. Slovenia*, para. 319.

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| Chapter 3 |

International Peace and Security

Rutvica RUSAN NOVOKMET

ABSTRACT

Maintenance of international peace and security has been the principal goal of the international community for centuries, but after the end of the Second World War States were determined more than ever to achieve that goal by creating firm legal, political, and institutional foundations for long-lasting peace. The international community committed itself to the international cooperation through organs and mechanisms of global and regional organizations. Particular significance was given to the formation of the international and regional legal framework of human rights protection, emphasizing that the respect of human rights is one of the main preconditions for fruitful international cooperation and a long-lasting peace. The United Nations serves as the global co-ordinator of the application of States' obligations under international law through the collective security system and the network of subsidiary bodies. On the other hand, the role of regional international organizations in establishing an adequate legal framework for the preservation of peace and security, as well as for the respect of human rights and the rule of law, is of immeasurable importance. This chapter seeks to explore the efficiency of the international legal framework as well as institutional and diplomatic mechanisms provided by the United Nations and the leading regional organizations (NATO and the Organization for Security and Co-operation in Europe) that are responsible for the promotion, protection, and supervision of the Member States' compliance with their international obligations, particularly from the point of view of Central European States. The author concludes that the most significant role of international organizations is in the continuous advancement of the responsibility of all actors involved to create a solid and long-lasting basis for the maintenance of international peace and security through the respect for human rights, democratic values, and the rule of law.

KEYWORDS

international peace and security, international organizations, international cooperation, human rights protection, rule of law

1. Introduction

After the magnitude of the atrocities and human rights violations committed during the Second World War was revealed, the maintenance of international peace and security became the principal mission of the international community. The entire world became aware of the fact that to achieve that goal, the development of friendly relations and international cooperation between States was needed, and that the

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protection of basic human rights was vital for the well-being of all people and all States. Furthermore, it became clear that full respect for the fundamental principles of international law, and hence for international peace and security,[1] cannot be permanently preserved outside the framework of international organizations and the institutional, political, and legal mechanisms they established precisely for these purposes. Even though most States primarily use domestic political and legal instruments in meeting security challenges on a national level, they largely rely on their membership in global and regional international organizations, as well as on various benefits that they derive therefrom. This kind of international support includes multi-level forms of institutional, political, diplomatic, and financial instruments aimed at the establishment and maintenance of international peace and security.

However, the institutional framework of international organizations does not always provide a guarantee that a consensus on the identification of shared goals and policies or on the activation of appropriate means for their realization is easily reached among Member States.[2] In cases when peace and security are jeopardized, the situation is even more complicated, mainly because an adequate and well-timed response by States to threats to international peace and security depends to a large degree on their understanding of the origin of such threats, the creator(s) and objectives of such threats, and the mechanisms for the suppression thereof. The diplomatic skills of States' leaders and representatives of international organizations to reach such an agreement are crucial in this respect. Still, it is important to emphasize that particularly when international peace and security are at stake, even in situations of emergency, the fundamental principles and rules of international law are the only correct and appropriate framework for a legal and just response of the international community to preserve peace. The principle of sovereignty of States, the duty to settle international disputes by peaceful means, the obligation to refrain from the threat or use of force against the territorial integrity or political independence of any State, the principle of non-intervention, etc., are fundamental rights and duties of States that have been reconfirmed on many occasions and in many internationally binding documents as a prerequisite for the peaceful co-existence of all participants of the international community.

However, States do not always have the capacity to or interest in fully acting in accordance with these values and rules. In this context, membership in international organizations can help Member States meet challenges that jeopardize peace and security on the one hand, and on the other, different diplomatic and legal instruments developed by international organizations can have a positive impact on States

1 The terms "peace" and "security" are not identical concepts, but they are interrelated since they both denote the absence of threats and the protection against threats. They do not, however, relate exclusively to physical violence and the use of armed force. Economic, social, humanitarian, and even environmental problems causing political and social instability can eventually lead to internal or external forms of violence. Kelsen, 1957, p. 1.
2 Gibson, 1991, pp. 92–93.

who tend to deviate from their international obligations. The leading organization equipped with a wide range of mechanisms for the maintenance of international peace and security is the United Nations (the UN). The system of collective security envisaged in the UN Charter and led by the Security Council is a central forum for making decisions crucial for the restoration of peace.[3] However, the opposed views of permanent Member States of the Security Council too often hamper its ability to adopt and implement measures needed for the suppression of acts that endanger international stability and peace. In situations like these, the General Assembly, after deliberating on all the aspects of the situation in question, can make a positive sway toward governments posing a threat to international peace and security by implementing policies in order to establish stability in the international arena.[4] The Secretary-General can also, through his authority, have a significant impact in this context.

Cooperation with regional military organizations for the preservation of peace and security can often be much more effective when all other diplomatic and political efforts fail. For example, many European States, led by the USA and Canada in the North Atlantic Treaty Organization (the NATO),[5] benefit from the institutionalized and strong support of this organization. This support derives from the founding Washington Treaty[6] and its Article 5, which guarantees each Member State the armed protection by all other Member States in case of an armed attack on one of them, as a manifestation of their right to individual and collective self-defence.[7] However, the use of armed response in such cases is conditioned by the Security Council authorization, which in practice was not always given in an indisputable and clear manner. The NATO-led bombardment of Yugoslavia in connection with the resolution of the political and humanitarian crisis in Kosovo in 1999 is an illustrative example of the use of force by several States within this military organization, which was, according to the majority of international lawyers, inconsistent with the legal framework of the

3 Chapter VII of the UN Charter authorizes the Security Council to decide on the use of coercive collective measures for the maintenance of international peace and security in case there is a threat to peace, breach of peace, or an act of aggression.

4 The right of the majority of the UN Member States or of nine Security Council Member States to convene an emergency special session of the General Assembly, provided by the General Assembly Resolution 377 (V) of 1950, serves as an example in this regard.

5 There are currently 30 Member States of the NATO organization. North Macedonia was the last Member State to join NATO, on March 27, 2020.

6 Articles 1 and 2 of the North Atlantic Treaty impose the duty on Member States of solving their international disputes peacefully with the aim that international peace and security not be endangered, to refrain from the threat or use of force inconsistent with the purposes of the United Nations, and to develop peaceful and friendly international relations.

7 In this sense, and according to the text of the Treaty, the activation of Article 5 is inextricably linked to the competences of the Security Council under the collective security system.

UN Charter and conducted without a prior and explicit authorization by the Security Council.[8]

The Organization for Security and Co-operation in Europe (the OSCE) is also significant in this respect. As a regional organization established by the Helsinki Final Act of 1975, it underlines the obligation of Member States to respect the fundamental principles of international law as a prerequisite for the security in Europe: sovereign equality, the prohibition of the threat and use of force, inviolability of frontiers, territorial integrity of States, peaceful settlement of disputes, non-intervention in internal affairs, respect for human rights and fundamental freedoms, and fulfillment in good faith of obligations under international law.[9] The aim of the association of States under the auspices of the OSCE is to strengthen friendly relations and foster peace and security in Europe.[10] The presence of the OSCE institutions and missions on the territory of Member States has made a valuable contribution to the preservation of peace and security, particularly in Southeast Europe after the end of armed conflicts in the 1990s. The focus of the OSCE missions today in Bosnia and Herzegovina, Kosovo, Montenegro, Serbia, Albania, Ukraine, and Moldova has been on developing democratic institutions, promoting the rule of law and human rights, fighting corruption and human trafficking, preventing and solving conflicts, countering terrorism, supporting the development of a multi-national and multi-ethnic society, and securing lasting peace.

If observed merely as the non-existence of armed conflict, international peace and security can be preserved or restored by the efficient use of diplomatic and, sometimes, military mechanisms by States and international organizations, as just discussed. However, the concept of peace and security does not mean merely the lack of an armed conflict. In a broad sense, peace and security imply the stability of a government and its political system that provides social and economic advancement for its citizens, the promotion and respect for basic human rights without discrimination, respect for the rule of law, and the realization of fruitful cooperation in solving international economic, social, cultural, or humanitarian problems. The respect for fundamental human rights is a *conditio sine qua non* for the achievement of peace and

8 For a critical review of the NATO armed intervention in Yugoslavia in 1999 through the analysis of Articles 42 and 51 of Chapter VII and Chapter VIII of the UN Charter, as well as of its implications for further development of the international law on the use of force see O'Connell, 2000, pp. 57 etc. On the other hand, Simma analyzes the NATO intervention in Kosovo from a different angle, explaining that certain exceptional situations, causing imperative political and moral considerations, leave no choice but to breach international law. However, Simma warns that such situations should remain isolated in order not to erode the international legal and collective security system. See more Simma, 1999, pp. 1–22.

9 Declaration on Principles Guiding Relations between Participating States, Helsinki Final Act 1975, preamble.

10 The States participating at the Helsinki Conference recognize in the preamble of the Helsinki Final Act that there is a "close link between peace and security in Europe and in the world as a whole" and that they are "conscious of the need for each of them to make its contribution to the strengthening of world peace and security and to the promotion of fundamental rights, economic and social progress, and well-being for all peoples."

security in the broadest sense. More precisely, it is a prerequisite for peace and stability not only within the boundaries of one State, but also in the context of international cooperation with other international subjects, therefore, for the prevention of armed conflict.

In this context, global and regional Euro-Atlantic organizations contribute immeasurably to the development of democratic institutions and rule of law within the States in Europe as a whole, as well as to the maintenance of hard-gained peace after the Second World War and the dissolution of Central, Eastern, and South-Eastern European States at the end of the 20th century. In light of the new political setting in the first two decades of the 21st century, characterized by economic development and intense international cooperation, particularly under the auspices of international institutions and organizations (the UN, the NATO and the OSCE), this chapter seeks to analyze in what way such cooperation has influenced the improvement of diplomatic relations between these States and enhanced the promotion and protection of human rights and the implementation of the rule of law, and how this coordinated and diverse collaboration contributes to the maintenance of international peace and security. In this context, particular attention is given to the assessment of the efficiency of different mechanisms of cooperation and scrutiny over the implementation of Member States' obligations provided by the international legal framework of these organizations.

2. Maintenance of international peace and security within the United Nations

In order to maintain international peace and security the UN Member States have conferred the primary responsibility for achieving that goal to the executive organ of the UN, the Security Council.[11] The collective security system enshrined in Chapter VII of the UN Charter serves as an institutional, decisional, and operational center for maintaining international peace and security.[12] In order to be effective, the collective security system assembles the military, economic, and political power of States, upon which the implementation of coercive measures actually depends. Inevitably,

11 Article 24, paragraph 1 of the UN Charter prescribes: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

12 Tsagourias and White, 2013, p. 19. Discussing the relationship between the protection of human rights and the collective security system for the maintenance of international peace and security, the European Court of Human Rights pointed out that "(...)While it is clear that ensuring respect for human rights represents an important contribution to achieving international peace, the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfill this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique." *Behrami and Saramati v. France, Germany, and Norway* (2007), paragraph 148.

this causes a factual inequality of otherwise (legally) equal subjects of international law, and consequently, powerful States are likely to be more important actors in the collective security system. Ultimately, successful decision-making within the Security Council largely depends on their cooperation and ability to suppress their own individual interests. However, it is important to bear in mind that in performing its Charter-based duties, although it is authorized to undertake a wide range of mandatory measures, the Security Council is obliged to act in accordance with the purposes and principles of the UN.[13] Therefore, the authority of the Security Council, i.e., *de facto* of the five permanent Members, should not be understood as being unlimited in relation to all other UN Member States. The powers of the Security Council should always be confined to the fundamental principles of international law established in the Charter.

Unfortunately, the use of armed force by the Russian Federation, one of the five permanent Members of the Security Council, against the territorial integrity and political independence of another UN Member State, Ukraine, has impelled the entire international community to question the purpose and efficiency of the institutional solutions provided by the Charter enshrined in Chapter VII, which are supposed to serve the preservation of international peace and security. Namely, the collective security mechanisms available to the Security Council, including those that imply the use of armed force against the aggressor (according to Article 42 of the Charter), are in this situation obviously and completely inapplicable in view of the veto right of Russia. Although there are other non-coercive measures that the UN can use for the purpose of persuading the aggressor State to cease illegal acts against another States and its citizens (such as, for example, the political and moral influence of the Secretary-General, or the pressure of the majority of States in the General Assembly, or even the impact of the Human Rights Council (see *infra*)), the UN as a universal organization primarily established for the maintenance of peace and security has shown significant defects in its own structure, as well as the inability to prevent its own Member States from violating fundamental principles of the Charter.

The political and security situation in States belonging to the Central European region has not been a subject of concern of the Security Council for a couple of decades. Namely, the legal and political systems in States like the Czech Republic, Slovakia, Hungary, Poland, and Romania are all based on multi-party democracy and separation of powers between the legislative, executive, and judicial branches, respecting the principles of the protection of human rights, the rule of law,[14] the right of nations to self-determination and, the rights of national minorities and ethnic groups,[15] respect for the freedom and culture of other nations, non-acceptance of any

13 Article 24 paragraph 2 of the UN Charter. Tsagourias and White also emphasize that although the collective security system represents a global, inclusive, and autonomous order which exhibits a certain degree of institutionalism, its institutional powers are nevertheless restrained by the international legal principles. See more Tsagourias and White, 2013, pp. 33–34.

14 The Preamble of the Constitution of the Czech Republic (Ústava České republiky).

15 The Preamble of the Constitution of the Slovak Republik (Ústava Slovenskej republiky).

statute of limitations of international crimes committed under national socialist and communist dictatorships,[16] the respect for universal human values and citizen rights,[17] and political pluralism.[18] These States are committed to good neighborly relations and fruitful inter-State relations. Such a regional and sub-regional cooperation,[19] whether institutionalized or not, contributes to a large degree to the creation of a solid basis for good bilateral and multilateral relations, the peaceful settlement of disputes, and consequently to international peace and security.

On the other hand, some European States have gone through a much more complicated path in striving for independence and democracy. The dissolution of the former Yugoslavia showed some shortcomings and the complexity of the international systems aiming at international peace and security: a misjudgement of the situation, the late or unbalanced reaction of UN institutions and, as a result, a huge loss of civilian life and material damage marked this period. There are authors who have critically commented on the effectiveness of the UN system, saying that despite constant warning of the atrocities being committed in Bosnia and Herzegovina, the international response was weak, confused, and ineffective. This criticism refers mostly to the Security Council sanctions, which in reality did not have a desired effect.[20] On the other hand, there were also some visible efforts to mitigate the conflict, ranging from the presence of UN forces to instrumental support from the international community for reconstruction and pacification. However, while the deployment of the UNPROFOR was a result of the concern of the international community about the atrocities happening in Srebrenica in Bosnia and Herzegovina, the UNPROFOR forces did not succeed in providing safety for the civilians in Srebrenica, thus indirectly bearing responsibility for not preventing the tragedy of genocide.[21]

16 The Preamble of the Constitution of Hungary (Magyarország Alaptörvénye).

17 The preamble of the Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej).

18 General principles, Article 1 of the Constitution of Romania (Constiutia României).

19 Thus, for example, the foundation in 1991 of the Visegrád Group of four States, the Czech Republic, Slovakia, Hungary, and Poland, was motivated by the desire of three European leaders (Václav Havel, Lech Walesa, and József Antall) to maintain distance from the communist bloc in Central Europe, to overcome past animosities, and to work together as neighboring States in a number of fields of common interest. This organization aims to achieve optimal cooperation and democratic development of the four Member States, in coordination within the existing European and transatlantic institutions. All four Member States of the Visegrád Group were accepted as new Members to the European Union in 2004.

20 See more Watson, 1999, pp. 10–11. See also the relevant Security Council resolutions adopted during 1991 and 1992, as well as the jurisprudence of the International Court of Justice: *Bosnia and Herzegovina v. Serbia and Montenegro* (2007).

21 On the deployment and the activities of the UNPROFOR in Bosnia and Herzegovina and Croatia see Security Council resolutions 743 (1992) and 824 (19923). For the overview of the evolution of UN peacekeeping operations, the normative framework of the UN peacekeeping operations, and the deployment of UN peacekeeping operations see Langholz, 2010, pp. 1–185. A short critical review of the UN operations in Bosnia and Herzegovina, Somalia and Rwanda is given by Willmot and Mamiya, 2015, pp. 382–385.

Thus, although these unfortunate events revealed some deficiencies of the UN mechanisms for safeguarding international peace and security and protecting the most vulnerable groups of people,[22] there are other channels available to UN Member States to draw the world's attention to situations potentially threatening international peace and security. First of all, the General Assembly is an organ where all the relevant issues are discussed and where resolutions concerning peace and security are be adopted, thus exerting a certain degree of pressure on responsible States to harmonize their behavior with their international obligations.[23] Moreover, pursuant to the Resolution "Uniting for Peace" 377 (V) of 1950, the General Assembly can make recommendations to take action where the Security Council fails to fulfill its primary responsibility to maintain international peace and security, if the prerequisites for deciding on coercive measures are met (threat to the peace, breach of the peace, or an act of aggression).[24] The significance of the Resolution lies in transferring to the General Assembly the authority to respond promptly to threats to international peace and security, albeit with rather limited reach, since resolutions thus adopted are not binding on States.[25] In practice, however, the General Assembly is most often reluctant to exercise its competence under Resolution 377 because of the Security Council's dominance in matters of peace and security.

On the other hand, recent reports of grave violations of international humanitarian law and abuses of human rights in Ukraine in the context of armed conflict

22 Legal discussions regarding the international responsibility of the UN peacekeeping forces and of contributing States were conducted on several national and international judicial levels. For example, the courts of the Netherlands analyzed the question of the responsibility of the UN having operational command and control over the Dutch battalion in Srebrenica, and of the Netherlands as a State whose military commander operated and made decisions on the ground. See *N. H. v. The State of the Netherlands* (2008), *Nuhanović v. The State of The Netherlands* (2011), and *The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Hasan Nuhanović* (2013). Central to a well-known decision on the admissibility in the case *Behrami and Saramati v. France, Germany, and Norway* (2007) adopted by the European Court of Human Rights was the issue of attribution of the acts of the UNMIK mission and the NATO KFOR forces to States whose contingents were involved in the missions. Ultimately, the Court concluded that the acts in question should be attributed exclusively to the UN, since the legal basis for the establishment of the UNMIK mission rests with the Security Council and Chapter VII, thus retaining ultimate authority and control over the mission.

23 For example, Croatia has recently presented a draft resolution on behalf of a group of States (among many others, Belgium, Botswana, the Czech Republic, Denmark, Guatemala, Luxembourg, Romania, Rwanda) titled "The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against the humanity," expressing concern with the scale of atrocities in the world, and calling upon the General Assembly to include R2P on its annual agenda. According to the resolution, this would contribute to furthering a serious and structured dialogue among UN Member States on how to prevent genocide, crimes against humanity, war crimes, and ethnic cleansing in a more efficient way. See Statement by H.E. Ambassador Ivan Šimonović, Permanent Representative of the Republic of Croatia at the 75th Session of the General Assembly, UN Doc. A/75/L.82, 2021.

24 General Assembly Resolution, UN Doc. A/RES/377 (V) (1950).

25 White notes that matters of international peace and security fall primarily but not exclusively within the domain of the Security Council. See White, 2015, p. 294.

with Russia prompted the Security Council to activate the Resolution "Uniting for Peace" and, due to the lack of unanimity of five permanent members of the Council, calls for an emergency special session of the General Assembly in March 2022.[26] In the two resolutions thus adopted the General Assembly explicitly called the Russian military intervention on the territory of Ukraine an act of aggression, and emphasized "the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development."[27] Moreover, the General Assembly expressed its outrage over the scale of the military offensive by the Russian Federation, noting that such actions and their humanitarian consequences "are on a scale that the international community has not seen in Europe in decades."[28] Votes of 140 UN Member States for the adoption of the Resolution A/RES/ES-11/2 on March 24, 2022, condemning all violations of international humanitarian law and violations and abuses of human rights, demanding full protection of civilians, humanitarian personnel, journalists, objects indispensable to the survival of the civilian population, and infrastructure, and calling for an end to the sieges of Ukrainian cities, which have further aggravated the humanitarian situation for the civilian population,[29] indicate that the vast majority of UN Members want to participate actively in the decision-making process for the maintenance of international peace and security, particularly when there is such a strong and worrying polarization of the Security Council permanent Member States. Armed conflict in Eastern Europe is certainly a moment in modern history when voices within the General Assembly advocating for peace should be heard as often and as loudly as possible.[30] Cassese, for example, points out that beneficial effects of public condemnation of certain actions by States in the General Assembly cannot be underestimated, since States usually strive to avoid criticism of their policies by the international community.[31]

Protection of human rights, as one of the fundamental preconditions for the maintenance of international peace and security, is also one of the purposes of the UN. Specialized organs, such as the Human Rights Council, established by the General Assembly resolution A/RES/60/251 of 2006, and the High Commissioner for Human Rights, established by the General Assembly resolution A/RES/48/141 in 1993, are responsible for strengthening the promotion and protection of human

26 Security Council Resolution, UN Doc. S/RES/2623 (2022).
27 General Assembly Resolution, UN Doc. A/RES/ES-11/1 (2022). See also UN Doc. A/RES/ES-11/2 (2022).
28 General Assembly Resolution, UN Doc. A/RES/ES-11/2 (2022).
29 General Assembly Resolution, UN Doc. A/RES/ES-11/2 (2022).
30 Tsagourias and White also call for a more frequent activation of the "Uniting for Peace" Resolution and active participation of the General Assembly in decision-making with regard to the maintenance of international peace and security. See Tsagourias and White, 2013, p. 112.
31 Cassese, 2001, pp. 304–305.

rights around the globe, addressing human rights violations, and making recommendations to States on how to improve human rights protection of their citizens.[32] Their task is to "help prevent abuses of human rights and contribute to the defusing of situations that could lead to conflict" and "inject a human rights perspective into all UN programmes."[33] On the other hand, reports on negative responses by certain governments regarding cooperating with Human Rights Council and implementing resolutions for the improvement of the quality of human rights protection suggest that the UN instruments for human rights protection are not always effective in reality. For example, continued concern over the Belarusian government's restrictions on the exercise of the freedoms of peaceful assembly, association, and expression, harassment of civil society organizations, arbitrary detention and arrest of journalists and human rights defenders, and allegations of torture and other inhuman or degrading treatment by law enforcement and prison officers, suggests that the true authority and influence of recommendations given by the Human Rights Council and other bodies on actual improvement of human rights protection largely depends on the political will of a government concerned and its readiness to accept the responsibility to its citizens to carry out its obligations under international law.[34]

Members States of the UN are also subject to universal periodic reviews by the Human Rights Council of the fulfillment of their human rights obligations and commitments, based on an interactive dialogue and the full involvement of the country concerned.[35] Thus, during the past few decades, Central European States have submitted reports to the Human Rights Council regarding the compatibility of their national legislation with their human rights obligations and answered questionnaires prepared by the High Commissioner for Human Rights on various issues. For example, these States had to provide detailed information on the right to privacy in the digital age, protection against gender-based violence committed through the Internet, rights of persons with disabilities (Slovenia); non-discrimination and equality in family and cultural life, right to work and employment of persons with disabilities, non-discrimination and equality with regard to the right to health and safety (the Czech Republic); the impact of the pandemic on the enjoyment of human rights, the right to participate in public affairs, the availability of remedies in the event of illicit export or use of private surveillance technology (Slovakia); measures for the protection of families, the relationship between climate change and the enjoyment of the rights of the child, legislation on the rehabilitation programmes for child victims of trafficking (Hungary); right to freedom of opinion and expression, the right to information during the Covid-19

32 General Assembly Resolutions, UN Doc. A/RES/60/251 (2006) and A/RES/48/141 (1993).
33 Official web site of the United Nations Human Rights Office of the High Commissioner (2022).
34 Report of the Human Rights Council, UN Doc. A/75/53 (2020).
35 General Assembly Resolution, UN Doc. A/RES/60/251 (2006), paragraph 5. On the activities of the Human Rights Council see Spohr, 2010, pp. 169–218.

pandemic, the right of all persons to enjoy the highest standards of physical and mental health (Croatia), and so on.[36]

However, although the purpose of such periodic reviews by States was to subject to the scrutiny of independent UN supervisory organs issues of the compatibility of legislation and practice of UN Member States with their human rights obligations regulated by international law and to ensure universality of coverage and equal treatment with respect to all States, it is arguable whether such monitoring processes can actually compel States to fix the detected shortcomings in their legal and political system and to act toward a better and more coherent human rights protection.[37] We can conclude that, since the opinions and resolutions adopted by the Human Rights Council and the High Commissioner for Human Rights are ultimately non-binding on States, their effects are to a certain extent limited.[38] Nevertheless, these opinions, being public and available to all other States and individuals, can exert a certain degree of political pressure on States to upgrade the level of human rights protection to persons under their jurisdiction and harmonize their behavior with their international obligations.

3. NATO as the guarantor of international peace and security in Europe

Diplomatic efforts made within the political and constitutional framework of international organizations, although in most cases successful and efficient in solving inter-State disputes and preventing aggravated relations from escalating, are not always enough for the protection of peace. Sometimes States are not eager to retreat from their goals and aspirations, even at the cost of armed conflict. In such situations, military mechanisms provided by regional international organizations might be more effective when all other diplomatic and political efforts fail. However, the primary duty of Member States to resolve international disputes peacefully is always underlined in their constitutions. The thirty Member States of NATO are obliged under the Washington Treaty to settle any international dispute in which they may be involved by peaceful means, as set forth in the UN Charter. They are further obliged to contribute to the development of peaceful and friendly relations by strengthening their free institutions, and by promoting conditions of stability and well-being. However, the NATO organization was primarily established with

36 The connection and cooperation of various international bodies and institutions competent to observe the respect by States of their international obligations is seen particularly in the field of human rights protection. Thus, for example, the jurisprudence of the European Court of Human Rights under the auspices of the Council of Europe has brought forward the most elaborate concept of treaty interpretation that applicants before some other international bodies (such as, for example, the Human Rights Council) have frequently referred to and invoked in the case law of the European Court of Human Rights. Schlütter, 2012, p. 267.
37 Oberleitner, 2012, p. 258.
38 Fleiner and Basta Fleiner, 2009, p. 196.

the purpose of protecting the security of its Member States, and to develop and use military resources to that end.[39] The Washington Treaty centers its legal basis for collective self-defence of all Member States in Article 5, which prescribes that an armed attack against one or more of them shall be considered an attack against them all and consequently that "each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forth, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."[40] However, Article 7 confirms the primary responsibility of the Security Council for international peace and security, whose enforcement measures, if undertaken in accordance with Article 5, shall cause the termination of measures taken by the NATO.

NATO military operations were not on every occasion in conformity with the provision of the UN Charter, particularly with regard to the obligation to obtain prior authorization of the use of armed force by the Security Council, in accordance with Chapter VII. Kosovo once again serves as a good example. Namely, although the Security Council adopted Resolution 1199 in 1998 under Chapter VII, stating that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region, it did not authorize UN Member States to use armed force nor any other necessary means that would imply the authorization of the use of force.[41] NATO nevertheless began its bombing campaign over Yugoslavia in March 1999 in response to violence led by Serbian authorities against Kosovo Albanians without an explicit authorization from the Security Council.[42] Some of the NATO Members States justified the military action by referring to a so-called humanitarian intervention, by saying that prior authorization for the use of military force by the Security Council was not needed, or by seeking the legitimacy of the action in the rules of acting in necessity or distress.[43] Whatever the justification, NATO's intervention in the former Yugoslavia has encountered heavy criticism among international lawyers who argue that the rules of international law are not easily changed, and that a different and arbitrary interpretation of fundamental principles on which the

39 De Wet explains that NATO was not established as a regional organization under Chapter VII of the UN Chapter, but as a collective defence organization in the sense of Article 51 of the Charter, since its original purpose was to offer protection against external aggressor. See more De Wet, 2015, p. 316.

40 So far, Article 5 has been invoked once, in response to the 9/11 terrorist attacks in the USA in 2011.

41 In paragraph 16 of the Resolution it is stated: The Security Council "decides, should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region (...)" See Security Council Resolution, UN Doc. S/RES/1199 (1998).

42 The NATO intervention in Kosovo was followed by the UN administration UNMIK authorized by the Security Council Resolution 1244 (1999).

43 O'Connell, 2000, pp. 80–82.

international community is based could lead to legal uncertainty and impair their legitimacy.[44]

Central European States, such as the Czech Republic, Hungary, and Poland (who all joined the NATO in 1999), Slovakia and Slovenia (who joined in 2004), and Croatia (who joined in 2009), have all adhered to the aims of the NATO organization to promote stability and cooperation in building a Europe united in peace, democracy, and common values. Membership in this regional organization was particularly important, even necessary, for States that had relatively recently experienced war with their neighbors and whose defence depends on NATO for political and military support. Thus, after completing a decade-long NATO Partnership for Peace programme, Croatia accessed the alliance in 2009. Since then, Croatia not only has received support by being a Member but also contributed to NATO-led missions all around the world. For example, Croatia has made its military contingents available to the NATO operation in Kosovo (KFOR—Kosovo Forces), authorized by Security Council resolution 1244 (1999) under Chapter VII of the UN Charter, in which it was decided on the deployment of an international civil and security presence in Kosovo, with the appropriate equipment and personnel.[45] It also participated in Afghanistan in the International Security Assistance Force (ISAF) established by Security Council resolution 1386 of 2001, by which the ISAF was authorized to assist the Afghan Interim Authority to maintain security in Kabul and surrounding areas.[46] Military troops of the Czech Republic, Hungary, Poland, and Slovenia are still active in the KFOR, while Slovakia withdrew its contingents. On the other hand, the responsibilities of the ISAF were focused on conducting stability and security operations, disarming illegally armed groups, and providing post-operation assistance, including the supporting of the growth of governance structures. All of the mentioned States contributed to the realization of the ISAF mission with their military contingents.[47]

Similar to the evaluation of the UN peacekeeping operations in Bosnia and Herzegovina, it should be noted here as well that the ISAF mission, commanded by NATO since 2003, could not escape criticism regarding incidents of civilian casualties connected to counter-insurgency and air-strike operations, when miscalculation

44 See, for example, O'Connell, 2000, pp. 82 et seq.; Weller, 2015, pp. 30–31; Nanda, 2000, pp. 327–331.

45 Security Council Resolution, UN Doc. S/RES/1244 (1999), paragraphs 5, 7 etc. NATO helped to establish a professional and multi-ethnic Kosovo Security Force, it still participates in the European-sponsored dialogue between the authorities in Priština and Belgrade, and it is active in the normalization of political relations between Kosovo and Serbia. On the issues of the legality of the use of force by NATO in Kosovo prior to the adoption of Resolution 1244 (1999) see Breau, 2005, pp. 117–147; Simma, 1999, pp. 1–22.

46 Security Council Resolution, UN Doc. S/RES/1386 (2001), para. 1, etc. NATO assumed command over ISAF in 2003.

47 There were up to 51 countries contributing to the ISAF. By the end of 2014 the ISAF mission came to an end and was succeeded by a new NATO-led non-military mission, the Resolute Support Mission (RSM). This mission was withdrawn in September in 2021.

of a particular military operation or inadequacy of prior preparation of soldiers had fatal consequences for the civilian population.[48] Since the number of victims increased as the conflict in Afghanistan intensified, the NATO-led operation was qualified as lacking "the necessary procedures or a coherent system to address civilian casualties."[49] The Organization then admitted that new strategies and policies were needed in order to reduce civilian casualties while managing to achieve the initial goals of the mission. This resulted in the adoption of the NATO Policy for the Protection of Civilians, which was endorsed by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw in 2016. Stating that experiences with mitigating civilian casualties during the ISAF mission in Afghanistan are valuable in the context of creating overarching policies and guidelines for future NATO-led operations and other activities, the Policy for the Protection of Civilians emphasized that all the NATO-led operations should be conducted in accordance with applicable international law, particularly international human rights law, as well as international humanitarian law. Furthermore, it is pointed out in the document that "all feasible measures must be taken to avoid, minimize and mitigate harm to civilians," giving particular consideration to "those groups most vulnerable to violence within the local context."[50] Current challenges arising from armed conflict in Eastern Europe will be a true test for the NATO Member States in view of a genuine adherence to the principles contained in the Policy for the Protection of Civilians, especially through the processes of planning, education, and conduct of operations on the ground.[51]

Certain revisions of the NATO concept originally centered around the collective self-defence system and military operations were made in 2010 with the adoption of the Strategic Concept for the Defence and Security of the Members of NATO. In this document NATO acknowledged that new threats to the safety of its citizens are emerging and confirmed the commitment of the NATO Member States to preventing crises, managing conflicts, stabilizing post-conflict situations, working closely with other international organizations, particularly the UN and the EU,[52] creating the conditions for a world without nuclear weapons, being open to the membership of all European democratic States that meet the required membership standards, and

48 Piekarski, for example, analyzes accusations of Polish soldiers participating in ISAF mission for war crimes committed against civilians in 2009. See Piekarski, 2014, pp. 91–92.

49 Keene, 2014, p. 3.

50 NATO Policy for the Protection of Civilians, 2016, Articles 5, 6, etc.

51 For an evaluation of the basic components of the NATO Policy for the Protection of Civilians see Hill and Manea, 2018, pp. 146–160.

52 In the NATO Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization, it is emphasized that the NATO and the EU can and should play complementary and mutually reinforcing roles in supporting international peace and security. See NATO, *Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, 2010, pp. 28–29.

safeguarding the freedom and security of all its Members by political and military means.[53] In this context, NATO serves primarily as a forum for political consultations on matters concerning security in the Euro-Atlantic area. It also serves as a central place for States to share information, exchange views, and discuss common goals. This is particularly important in the 21st century, when the world is faced with new forms of threats to international peace and security: cyber-attacks, extremism in various forms, terrorism, trans-national illegal activities, trafficking in arms, narcotics, and people, and new technologies for electronic warfare. Therefore, political and diplomatic channels within the NATO are intensely devoted to inter-State dialogue and negotiations with the aim of preventing armed conflicts. NATO continually monitors the international environment and analyzes the political and security situations of its Member States and beyond, in order to anticipate potential crises and undertake adequate measures to prevent them from escalating into larger conflicts.[54] It can thus be concluded that the NATO organization has somewhat revised its primary mission of the collective self-defence of its Members and spread its mandate to include a wide range of crisis management activities.[55]

In comparison to the political situation after the Second World War and the relationship between Western States belonging to the NATO and States belonging to the opposite block of Eastern and some Central European States, the Warsaw Pact, when Member States of each military block were primarily oriented in the arms race, today the security situation is quite different. The Warsaw Pact ceased to exist in 1991 and most of its Member States joined NATO.[56] The world is also facing new challenges to international peace and security, ones not limited to armed threats, breaches of peace, and acts of aggression. Today, issues like the risks of climate change, environmental challenges, natural disasters, migration crises, and terrorist attacks dominate the conversations of world leaders and international organizations with which NATO closely cooperates. Solutions to these problems therefore require new strategies, the readiness to identify new but common goals, and the wisdom to reach consensus on the implementation of adequate and timely measures in order to maintain peace and security for the well-being of humanity. However, NATO Member States, even in new and challenging situations, should endeavor to hew to the international legal regime and its constraints, especially in cases that represent a threat to peace. Otherwise, the core of the collective security system would be jeopardized, and the fundamental principles of international law on the use of force undermined.[57]

53 NATO, *Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, 2010, pp. 4–5.
54 NATO, *Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, 2010, pp. 19–20.
55 Similarly De Wet, 2015, pp. 316–317.
56 On the establishment of NATO and the Warsaw Pact and the political circumstances surrounding the two alliances see Kramer, 2005, pp. 164–171.
57 Similarly Simma, 1999, p. 22.

4. Protection of human rights within the Organization for Security and Co-operation in Europe as a pledge for peace and security

The OSCE, as the biggest regional international organization with the membership of 57 European, Central Asian, and North-American States, has developed diverse, multi-level instruments in order to achieve the goals set in the Helsinki Final Act in 1975. The promotion of better relations among States with the aim of creating the conditions for true and lasting peace, overcoming confrontations stemming from the character of their past relations, enhancing mutual understanding, cooperating in the interests of mankind, contributing to world peace and security, and promoting fundamental human rights and economic and social progress, are just some of the principles to which State participants of this organization have committed.[58]

The significance of the OSCE as a regional peace and security keeper, as well as of the Helsinki Final Act and other binding and non-binding documents adopted within the framework of the OSCE, was particularly evident during the emergence of new States in Eastern and South-Eastern Europe at the end of the 20th century. Namely, one of the guidelines set in the Declaration on the Recognition of New States in Eastern Europe and the Soviet Union of 1991 issued by the Economic Community was to condition the recognition of new States on their adherence to, among others, the commitments subscribed to in the Helsinki Final Act and in the Charter of Paris, particularly with regard to the rule of law, democracy, and human rights.[59] The implementation of the guidelines and the confirmation thereof by the OSCE was vitally important for States where the protection of human and minority rights was a prerequisite for reconciliation, the proper functioning and development of democratic institutions and mechanisms, and adherence to the highest standards of international law.[60] In this period the OSCE took on a specific role in shaping a European security system in collaboration with the EU and the NATO (see *infra*).[61] Namely, this organization strengthened its activities in the area of early warning, conflict prevention, conflict management, and post-conflict rehabilitation through its field missions, as well as through institutions of a human dimension, the High Commissioner on National Minorities and the Office for Democratic Institutions and Human Rights (the ODIHR).[62]

58 The Preamble of the Helsinki Final Act, 1975. The OSCE organization developed from the Conference for Security and Co-operation in Europe (CSCE) held from 1973 to 1975, when the Final Act of the summit was signed by 33 European participating States, the US, and Canada. In 1994 the CSCE was succeeded by the OSCE. Although the Helsinki Final Act is not formally binding on participating States, it reflects legal awareness of European States of the need to respect human rights and fundamental freedoms grounded in international law, as well as in United Nations documents. Andrassy et al., 2010, p. 395.

59 Caplan, 2005, pp. 187–188.

60 Andrassy et al., 2010, pp. 94–96.

61 Rotfeld, 2000, p. 100.

62 The OSCE human dimension of security is a concept created for the purpose of promoting and protecting human rights and democratic values, thus expanding the mission and activities

Furthermore, in close collaboration with NATO, the OSCE became a significant contributor to the restoration of peace on the territory of the former Yugoslavia.[63]

The OSCE mission to Croatia, which began in 1996 and operated until the end of 2007, is an example of a comprehensive and ultimately successful cooperation of the OSCE institutions of the human dimension mentioned above. The task of the mission was to provide assistance and expertise to all levels of the Croatian authorities, as well as to interested individuals, groups, and organizations in the field of the protection of human rights and the rights of persons belonging to national minorities. However, the OSCE human rights mechanisms were also referred to collaboration with other organizations and institutions, such as the Council of Europe, the Special Envoy for Regional Issues, the UN High Commissioner for Refugees, the International Committee of the Red Cross, and UNTAES (the United Nations Transitional Authority in Eastern Slavonia, Baranja, and Western Sirmium), particularly in regard to confidence-building and reconciliation, as well as to the development of independent democratic institutions at all State levels.

On the other hand, the OSCE mission in Bosnia and Herzegovina, whose mandate stems from the General Framework Agreement for Peace in Bosnia and Herzegovina concluded in Paris in 1995 (the Dayton Agreement), serves as an example of long-lasting efforts of the international community to build sustainable democratic institutions in a State whose citizens and political institutions suffered great damage during armed conflict and are still, more than twenty-five years after the end of hostilities, dependent on the support of international institutions in developing a stable multinational and multi-ethnic democratic society. The cooperation with the OSCE on matters pertaining to the human dimension, as well as with other international governmental and non-governmental organizations, should ultimately lead to the political stabilization, more developed human rights protection, and true equality of all three constitutive ethnic groups (the Bosniaks, Croats, and Serbs).[64]

of the OSCE beyond traditional military, security, disarmament, and border issues. Foundations of the human dimension were established in the Helsinki Final Act in 1975, and were later upgraded in the 1990 Copenhagen Document, the 1990 Charter of Paris for a New Europe, and the 1991 Moscow Document. See OSCE Human Dimension Commitments, 2011, pp. 18 etc.

63 Its mission in Kosovo, for example, during the humanitarian crisis in 1999 was interrelated not only with the NATO-led peace force deployed in Kosovo (KFOR), but also with the UN Interim Administration (UNMIK) established by Security Council Resolution 1244 in 1999, the EU, and the Council of Europe. For a comprehensive overview of the factual and legal background of the crisis in Kosovo, the international administration in Kosovo, and its status in international law see Novokmet, 2013, pp. 184–196.

64 OSCE, Survey of OSCE Field Operations, 2021, p. 11. However, the most recent political setbacks between political leaders in Bosnia and Herzegovina and the representatives of the international community do not give much hope that the stabilization of the relations between the three ethnic groups is in sight. It is nevertheless important, even crucial in this context, that the institutions of the UN as well as principal European organizations consider the security situation in Bosnia and Herzegovina a priority and use all their diplomatic and political skills to keep the hard-won peace and prevent the escalation of inter-ethnic tensions.

Closer cooperation of the OSCE with other international organizations and institutions for a more effective security policy is decided on and formulated in the Charter for European Security,[65] a document adopted in Istanbul during the Istanbul Summit of the OSCE in 1999. Expressing their commitment to a free, democratic, and more integrated OSCE area, State participants of the Istanbul Summit agreed to adopt the Platform for Co-operative Security in order to more efficiently use the resources of the international community through international organizations; to develop the role of the OSCE in peace keeping; to create Rapid Expert Assistance and Co-operation Teams (REACT) and Operation Centers in order to react promptly to demands for assistance in field operations; and to strengthen the consultation process within the OSCE.[66] The goal of this document was to recognize new challenges to security within the Euro-Atlantic region, such as international terrorism, violent extremism, organized crime, and drug trafficking, and to foster mechanisms to respond to such challenges by collaborating more closely with other organizations in a spirit of solidarity and partnership.[67] The respect of human rights and fundamental freedoms, particularly the rights of national minorities, is acknowledged as a core of the OSCE's comprehensive concept of security.[68]

The OSCE has also established a judicial organ competent to adopt binding decisions. The Court of Conciliation and Arbitration was thus established under the Convention on Conciliation and Arbitration within the OSCE, adopted in Stockholm in 1992, with the purpose of serving States Parties to the Convention as easily accessible mechanism for the peaceful settlement of disputes. A State Party to the Convention can activate this mechanism unilaterally against any other State Party. States are primarily encouraged to use conciliation as a means of peaceful settlement because it offers a wide range of possibilities and legal as well as non-legal sources for settlement. Arbitration as a judicial means, on the other hand, can provide assurance that States will actually respect the arbitral award, which is binding. Unfortunately, the Court is yet to hear a case, but it cooperates with OSCE institutions in the promotion of conciliation and arbitration as effective methods of conflict resolution.[69]

In conclusion, institutional instruments of the human dimension within the OSCE have proved to be indispensable mechanisms for States to observe commitments to the fundamental principles and values proclaimed by the OSCE framework, the rule of law, the principle of free and democratic elections, the respect for human rights, and the promotion of tolerance throughout society.[70] The particular signifi-

65 OSCE, Charter for European Security, 1999.
66 OSCE, Charter for European Security, 1999, Para. 1.
67 OSCE, Charter for European Security, 1999, Paras. 12–16.
68 OSCE, Charter for European Security, 1999, Paras. 19 et seq.
69 See further, Mazzeschi and Carli, 2020, pp. 205–219; Andrassy et al., 2006, pp. 37–38.
70 For example, particular importance of the OSCE observer missions is evident in the election processes in its Member States, as they help build public confidence in electoral process, enhance political stability, provide support for domestic observers, and improve election practices in host countries. Eicher, 2009, pp. 265–267.

cance of all aspects of the human dimension is that it should enable the identification of crucial legal, political, or social obstacles that State participants face in the effort to fulfill their obligations. Moreover, making available to the public problematic, illegal, and corruptive actions of political actors on all levels is crucial for raising awareness throughout society that more effort is needed to bring national legislation and practice closer to the highest standards of human rights protection. Still, one may have certain reservations with regard to the non-obligatory character of the recommendations and reports of the OSCE institutions. Still, such a non-binding institutional framework can in reality have much more effect in terms of creating pressure on governmental and local authorities to adopt laws and practice policies that reflect a true adherence to the respect of human rights and freedoms, minority rights, basic democratic values and orientation of the whole society to the rule of law, and ultimately, to the preservation of international law and security.

Collaboration and coordination of the OSCE activities together with other regional organizations, particularly with the EU and the NATO, is in our opinion the right direction of current and future operations of the OSCE in Europe, given that the experience has shown that one organization can hardly be up to the task of successfully handling all security, military, humanitarian, and financial aspects of crisis management and other challenges of international security.[71] In this sense, the current political and humanitarian crisis in Ukraine due to Russia's aggression proves that the OSCE, as well as other international organizations, have certain limitations with regard to its legal, political, and military capacities and should therefore work together to coordinate their goals and activities and contribute to the restoration of peace and security in a comprehensive and harmonized manner.

5. Concluding remarks

The maintenance of international peace and security has been one of the principal concerns of the international community for centuries. Still, international peace has never been achieved easily and without certain compromises and adjustments by States that needed the support of other States and international organizations. In return, the relative stability of the international legal order could be achieved and maintained within the framework of international global and regional institutions. On a global level, the institutional, diplomatic, and coercive mechanisms provided by the UN are designed for the purpose of adequately and in a timely manner respond to different situations that might cause instability in a region or international community as a whole. Furthermore, coercive measures (even ones involving the use of armed force) within the collective security system led by the Security Council, and in cooperation with the NATO as a regional military organization, however imperfect and inapplicable in its original form, if applied in accordance with the international

71 Similarly Rotfeld, 2000, pp. 104–105.

legal order and with the purpose of restoring infringed peace, can help suppress actors whose actions represent a threat to the peace or breach of the peace.

On the other hand, the UN organs that are not given competence to make binding decisions can nevertheless have a significant impact on States in terms of compelling them to harmonize their behavior with the fundamental principles of international law and thus contribute to the maintenance of international peace and security. This is particularly evident in the area of international cooperation regarding human rights protection, which is essential for preserving peace within the boundaries of one State, as well as for achieving good and prosperous relations with other States. International peace and security are unattainable unless basic human rights standards, democratic values, and the rule of law are respected on a national, regional and universal level.

Unfortunately, global and regional mechanisms are not always implemented in the most efficient and successful way due to the lack of proper understanding of a particular situation or the unwillingness of Member States to adopt and implement bold and urgent measures, regardless of their own political interests. We agree with the opinion that threats to the peace and gross violations of human rights do not happen as a result of the acts of only one party. On the one hand, there are individual perpetrators and governments allowing the atrocities to happen, and on the other, there are other States, international organizations, and other international subjects who bear their part of the responsibility for their inactions and misjudgements of the intensity of certain crises.[72]

In this context, in our opinion, the role of regional international organizations in creating more efficient mechanisms for inter-State cooperation is crucial. The establishment of an adequate constitutional framework of these organizations serves as a foundation in this sense, but a revision of this framework on a regular basis, along with the creation of a network of monitoring bodies and instruments, periodic reviews, reports, questionnaires, and field missions sent with the purpose of participating actively in democratic processes in Member States, would raise this cooperation to a new level. These instruments provide direct insight in the political systems and practice of States regarding their ability to implement democratic values and the rule of law. Accordingly, regional organizations in Europe, particularly the OSCE in coordination with and military support of the NATO, continuously observe the compliance of States' policies and practices with their international obligations, and, more importantly, adopt recommendations with the aim of continually advancing the responsibility of all actors involved to create solid and long-lasting ground for the maintenance of international peace and security.

72 Nollkaemper, 2015, pp. 438–439.

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| Chapter 4 |

Sovereignty in International Law

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ABSTRACT

Sovereignty is a concept enshrined in the theory of international law. As an attribute of independent states, it constitutes the basis for their autonomous activities in the international legal space. Virtually the entire contemporary primary conceptual apparatus of *jus gentium* has been developed around this notion. The principle of the sovereignty of all states results in their mutual sovereign equality. Sovereignty of states is protected by the prohibition against intervening in their internal affairs and the prohibition on the use of force in international law. The state exercises its sovereign rights over the population in a given territory. Sovereignty is associated with the right to freely shape relations within the state, and it means legal independence from external factors. Freedom of action by sovereign states means, first of all, the freedom to conclude international agreements between states and to assume obligations. Such actions do not infringe on states' sovereignty; rather, they are an expression of it whereby the state exercises its legal capacity. This is because only coerced actions undertaken against the will of a given entity could be perceived as an attack on a state's sovereignty. Of course, the sovereignty of a state can be eliminated by its own free will—this entity may join (unite with) another state entity, thus losing its sovereignty. However, it is not possible to confer sovereignty on another entity as a result of activities consisting in the transfer of only a limited scope of state powers. Even the transfer of a part of territory under the administration of another state does not deprive the transferor of sovereignty over the territory, to which it is entitled under international law. States may also delegate their competences to other subjects of international law—other states (most often this is the case of microstates, which are unable to perform all standard functions of the state, especially in the field of external relations, economic management, or the administration of justice) or international organizations. Such a delegation of competences does not imply a revocation of sovereignty. It occurs by way of an international agreement between entities transferring competences, or an agreement between the founding states of an international organization. At any time, the member states can withdraw the delegated competences or dissolve the organization. Even if the scope of the delegated competences is considerable and the organization begins to play an important role by assuming a supranational position in the area of the adopted internal law, it does not become a sovereign entity. Theories that suggest otherwise are essentially based on confusing the concept of sovereignty with the concept of competence.

KEYWORDS

state in international law, sovereign equality, territory, competences, transfer of state powers, international organization

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1. Introduction

Sovereignty is a concept of fundamental importance to the theory of international law. The essence of this legal order as a normative whole is based on it,[1] for there is no doubt that only by accepting the principle of state sovereignty can the fiction of the equality of states in the light of international law (*par in parem non habet imperium*) be maintained. Equality of states, on the other hand, constitutes the basis both for a universally recognizable plane of horizontally binding sources of law and for the space of international peace and security, which affects states' actions in other areas of social life. Of course, the situation of the sovereign equality of states is a legal construct that is based on a stable theoretical assumption. In reality, contemporary international law is based on the presumption that all states that declare such a state of affairs are sovereignly equal, irrespective of actual political inequalities between them.

Although in contemporary political science the concept of sovereignty is sometimes used to include other actors in international relations (not only those whose subjectivity is established in the light of international law), and as a philosophical concept it may even be extended to individuals,[2] in classical international law it is exclusively an attribute (feature) of states. The state is the basic and central concept in, and subject of, international law.[3] On the other hand, this change in the perception of sovereignty as an attribute of exclusively the state has led to attempts to limit this very sovereignty. Hence the theoretical concepts (e.g., of divided or shared sovereignty) that actually contradict the essence of the nation-state; instead, they provide a natural basis for the theory of global government. It seems that in view of linguistic, cultural, and political diversity, the replacement of sovereign political communities such as states with a global hierarchy is an utter fiction at present. Developing such a world order could only happen with the abandonment of not only state sovereignty, but also of democracy as the basis of their functioning.[4]

State sovereignty is a particularly crucial issue for the countries of Central and Eastern Europe. In this region, the perception of sovereignty, as well as the early recognition of threats to independence, is much more pertinent than in other regions of the Old Continent. This is due to the fact that these countries, due to their exceptionally unfavorable geographic location, have historically been particularly exposed to the actual violation of their independent existence. Although historical experience

1 The very notion of sovereignty is only a legal concept that defines a certain state of affairs. From the cognitive perspective, it refers to the factual sphere, not a legal one. It is not a norm within the meaning of legal science. Cf. Kranz, 2015, p. 50.

2 Tarasiewicz, 2015, pp. 11–13; also Tarasiewicz, 2012, p. 35. Cf. Perez, 1996, pp. 463–490.

3 Cf. Kaplan and Katzenbach, 1964, p. 81.

4 Cf. Schwab and Malleret, 2020, p. 45. The abandonment of democracy would have to occur at least in the initial phase of shaping a New World Order before democracy could possibly be applied at a centralised global level. Otherwise, the implementation of the new order may be impossible, because it should be assumed that in some local democratic entities their national interest will gain an advantage over the global interest.

in this regard can be traced back to the Middle Ages, it was manifested most clearly in the 20th century, when significant threats were posed by totalitarianisms rooted in left-wing ideologies (national socialism and communism), adopted by countries with a tradition of political domination in the region. Central and Eastern European states, victims of these totalitarianisms, are well aware of the fact that basing power—whether exercised by a state or indirectly derived from the will of sovereign states—on an ideology that is devoid of values, or founded on artificial values, must inevitably end up in failure. Hence, bearing in mind the socialist experiments of the past and the present collapse of values (the emptiness of the new values) on which the new European order is to be based, they approach the idea of federalization of the European Union with extreme caution.

It is worth devoting some attention to these issues by pointing to the fundamental role of state sovereignty in international law. Undoubtedly, of key importance for the determination of the scope of state sovereignty will be the resolution of "borderline" problems—e.g., to what extent the transfer of competences (understood as the ability to exercise power in a given area) by a state to another entity can be perceived as a loss of sovereignty by the former, or to what extent it is tantamount to relinquishing sovereignty.

2. The concept of sovereignty throughout history

In the case of ancient Greek cities, there were some grounds for basing relations on the equality of entities, but in the period of the Roman Empire, and then in medieval Europe, the parties to the then relations were not perceived as sovereign. The hierarchy of relations was not intended to lead to equality, and the so-called sovereign rights were applied to dynasties and monarchs.[5] The then perception of property rights over land (*dominium*) and state power (*imperium*) were identical. Landlords at different levels of the feudal ladder were active in the field of *jus gentium* relations.[6] The rights of the Christian community (*Universitas Christiana*), i.e., a global community of faith and an emanation of the Kingdom of God on Earth, were perceived as universally sovereign.[7] Importantly, however, this concept was approached slightly differently in medieval Central Europe—a significant role in the formation of Polish or Czech statehood was played by the interests of the national community and external territorial threats from the German State (Holy Roman Empire).[8] The Reformation and the

5 The very word "sovereignty" is derived from the Vulgar Latin word "*supremitas*," which means hierarchical superiority (*suprema potestas*). Cf. Maftei, 2015, p. 56.

6 Von Liszt, 1907, p. 39.

7 This thinking was manifested in the titles of rulers—once an emanation of sovereignty understood in a religious way: *Defensor Fidei* (King of England), *Rex Apostolicus* (King of Hungary), *Rex Fidelissimus* (King of Portugal), *Rex Catholicus* (King of Spain), *Rex Christianissimus* (King of France).

8 Szczaniecki, 1872, p. 34.

ensuing religious split forced a change in the perception of European reality, which became dominated by political realism detached from the existing Catholic dogmas.

The concept of sovereignty in the science of law was defined and disseminated by Jean Bodin,[9] a theoretician of absolute monarchy.[10] According to Bodin, sovereignty was *la puissance absolue et perpetuelle*, referring to the ruler's actions in both the internal and external fora. These aspects of sovereignty were later described by Vattel as self-governance and independence, respectively.[11]

A theoretical basis for the modern perception of sovereignty dates back to the Peace of Westphalia (although the significance of Münster and Osnabrück Agreements is considerably overestimated in this context). The essence of sovereignty in the era after the Peace of Westphalia (1648) was based on territoriality and the exclusion of external actors from domestic power structures.[12] Sovereignty was secured by the principle of non-intervention in the internal affairs of the state. Although perceived as an absolute idea, sovereignty did not admit the possibility of interfering with the rights of other independent entities. However, absolute independence from the influence of external state entities was not tantamount to absolute independence from the principles of morality and the rules of international law.[13]

In this way, a general change in the understanding of the concept occurred in the period from the Peace of Westphalia to the turn of the 20th century—a transition from the sovereignty of the monarch to the sovereignty of nations (and states as a way of organizing nations) coupled with a fundamental relativization of the concept of absolute sovereignty. The state started to be commonly perceived as an entity that had the legal and factual ability to prevent any other state from restricting its power over its territory and population. At the same time, by acting with other entities of the same type, the state may contractually change the scope of its rights and obligations.

Even at the end of the 19th century, the concept of absolute sovereignty still seemed to fundamentally interfere with the principle of equality of sovereign states. States striving for primacy over others could resort to any actions necessary to strengthen their position, including war as a last resort. The theory of absolute sovereignty attracted considerable interest in the philosophy of classical German idealism.[14] In the interwar period, however, it was significantly relativized, largely because of the views of Hans Kelsen.[15]

Georg Jellinek, a German theorist of state law, defined sovereignty as an attribute of state power, connected with the right to self-determination and to incur (external)

9 Bodin, 1577. Thomas Hobbes' views also assumed the transfer of full power to the sovereign as a result of a social contract (cf. Hobbes, 1668).
10 Cf. Potočný and Ondřej, 2006, p. 14.
11 De Vattel, 1758.
12 Dinicu, 2018, p. 182.
13 Verdross, 1964, p. 7.
14 See Hegel's concept of war as a form of striving for the highest state of sovereignty. Cf. Hegel, 1979, pp. 497–503.
15 Cf. Kelsen, 1920. See also footnote 59. Hans Kelsen also developed the theory of transferring sovereignty to international organisations in order to create global law—see Section 7.

self-obligations.[16] Sovereignty provides the state with the possibility of determining its own powers—the competence to create its own competences (cf. the German term *Kompetenz-Kompetenz,*[17] which in the English doctrine is also referred to as auto-determination). At the same time, the indivisibility of sovereignty as such was emphasized.[18]

Relative understanding of state sovereignty would sometimes carry the risk of grading the level of sovereignty depending on the scope of international obligations binding the state. This line of reasoning implies an inversely proportional relationship between binding international law and sovereignty. In its most radical version, relative sovereignty assumes the primacy of international law over sovereignty—according to this view, the former determines the level of sovereignty enjoyed by a state. However, such reasoning is burdened with the flaw of understanding sovereignty as a simple sum of state competences. Meanwhile, sovereignty also entails the right to freely delegate one's own competences. The delegation of competences by a state for the purpose of their implementation at the international level (i.e., by creating norms of international law) does not decrease sovereignty, which is indivisible.

In international jurisprudence, the modern classical perception of sovereignty was influenced by the 1927 judgment of the Permanent Court of International Justice in the Case of the S.S. Lotus.[19] It determined the fundamental limits of state sovereignty as restrained by the sovereign rights of other states.

The classic concept of sovereignty, as legitimized by international law, is currently predominant in the doctrine of *jus gentium*. It constitutes the basis for the activity of states in the area of creating binding international law. This concept can also be used to explain the mechanisms of transferring competences between sovereign states (which will be described later in this text), including those relating to territorial authority, as well as the establishment of international organizations with extensive powers. It is worth noting that already in the Wimbledon case,[20] the Permanent Court of International Justice stated that any restriction affecting the activity of the state as a result of voluntarily concluded international agreement cannot be perceived as a restriction of sovereignty. The right to freely conclude international agreements (*jus tractatuum*) is the essence of the sovereign rights of the state. Thus, international law regulations that reduce the competences of the state cannot be perceived as a restriction of sovereignty.

16 Jellinek, 1905, pp. 461 etc.

17 It ought to be emphasized that the *Kompetenz-Kompetenz* principle should not be equated with sovereignty—it basically refers to the possibility of a court (e.g., an arbitral tribunal) to determine its own jurisdiction in a case (competence to determine its own competence) and, as such, it is essentially developed in the jurisprudence of the Federal Constitutional Court. It was in this context that it was used by that court in relation to the mechanisms of European integration. That court stated that no competence-competence was established for the benefit of the EU—cf. 2 BvR 2134, 2159/92, BVerfGE 89, p. 155.

18 Cf. Makowski, 1918, p. 136.

19 S.S. "Lotus" (France v Turkey), Judgment No. 9, September 7, 1927, PCIJ Series A No 10.

20 S.S. "Wimbledon" (Britain et al. v. Germany), Judgment No. 9, August 17, 1923, PCIJ Series A No 01.

Of course, the scope of matters governed by international law is undoubtedly large at present; it is necessary to accept *erga omnes* obligations, universal norms of an absolutely binding nature (*jus cogens*) are in force, the interests of the international community as a whole need protection, and the rights of the individual have significantly expanded. All this results in a significantly greater number of matters that are transferred from the exclusive competence of the state to an area covered by its international legal obligations.[21] In particular, they are moved to a sphere governed by secondary entities of international law, such as international organizations. Although this does not directly affect the scope of state sovereignty, the scale of this regulation certainly contributes to the creation of theories aimed at the remodelling of contemporary international law, including with regard to the creation of new holders of the concept of sovereignty[22] (such concepts will be discussed in Section 7).

3. Contemporary definition of state sovereignty in international law

State sovereignty denotes a lack of dependence on the power of other entities. This position is recognizable from the external as well as internal perspective of the state. From the constitutional and legal viewpoint, the concept of sovereignty is often replaced by the essentially identical concept of independence, although the latter is associated with politics rather than with law (assuming that it is possible to attribute a given concept to a specific field of science).[23] Sovereignty is generally described in terms of behavior characterized by independence.[24] According to the classical formula, sovereignty is associated with the state's exclusive power over its own territory and its own citizens, including the internal freedom of shaping economic relations. It also refers to the external activity of the state—entering into alliances, establishing diplomatic relations, creating external economic ties, etc. Hence, the internal and

21 Cf. Roth, 2004, p. 1028.

22 Cf. Ferreira-Snyman, 2007, p. 395.

23 It could be exemplified by the Constitution of the Republic of Poland of 1997 (Journal of Laws 1997, no. 78, item 483), although with the reservation that it is a very unsuccessful creation in terms of its construction (which in practice makes it possible to draw mutually conflicting interpretations), hastily adopted as a result of a compromise between competing political parties. Undoubtedly, the Republic of Poland needs a new constitution, following the example of Hungary, and not one based on transitional post-communist solutions. In the Polish Constitution, the notions of sovereignty and independence are used interchangeably. Thus, the Preamble to the Constitution mentions the "possibility of a sovereign and democratic determination of [Poland's] fate." Article 5 of the Constitution of the Republic of Poland states, "The Republic of Poland shall safeguard the independence and integrity of its territory (...)." Referring to the competences of the President, Article 126(2) of the Constitution states that: "The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory." The very oath of the President, quoted in Article 130, again uses the term "independence."

24 See the concept of internal (people's) sovereignty—Rousseau, 1762.

external sovereignty of the state is clearly distinguished in the doctrine.[25] The former is defined in the old Polish legal doctrine as *całowładność* (the competence to regulate all domestic affairs), the latter as *samowładność* (legal independence from external factors).[26] In the external scope, the limits of state sovereignty are determined by other states' lawful interests and the scope of international legal obligations.[27]

The assumption of sovereignty entails derivative normative constructs, which are provided for in international law. Their character may be positive—they are legal institutions that directly support state sovereignty (e.g., the principle of sovereign equality, mentioned at the beginning, or the right to self-determination)—or they may create prohibitions against behaviors of entities of international law that violate sovereignty (e.g., prohibitions on intervening in the internal affairs of states, prohibitions on the use of force in international law).

The sovereign equality of states is presented in the United Nations Charter as a fundamental principle of the legal order (Article 2(1) of the Charter[28]). It also means that sovereignty implies the equality of sovereign subjects of international law.[29] The principle of sovereign equality is precisely defined in the UN General Assembly Resolution 2625 (25) of 24 October 1970 (The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States).[30] It ought to be mentioned that the concept of sovereign equality has also influenced treaty law and customary legal rules connected with diplomatic and consular relations (as well as protocol rules, which are not legal ones). Sovereign equality means legal equality. It is not synonymous with the political equality of entities, which may sometimes result in special rights connected with their international status (this is the status of the Great Powers, currently recognized by the law of the United Nations, and previously known at least since the European Concert of Nations).[31] Thus, equality before the law can be understood as equal subjectivity and legal capacity.[32] In particular (but not exclusively), this equality

25 In older publications of the Polish doctrine, external sovereignty is directly identified with the subjectivity of the state. Cf. Ehrlich, 1948, p. 104.

26 Cf. Bierzanek and Symonides, 1992, p. 115.

27 Gelberg, 1977, p. 102.

28 Quote: "The Organization is based on the principle of the sovereign equality of all its Members."

29 Cf. Góralczyk, 1989, p. 129.

30 Resolution (General Assembly) No. 2626 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations: "(...) The principle of sovereign equality of States. All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: (a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States (...)."

31 Oppenheim, 1912, p. 170.

32 Shaw, 2000, p. 136.

concerns law-making. Generally, the equality of subjects has a formal character, which does not affect the exercise of the law, as it depends on factual factors (e.g., access to the sea).[33] Equality is usually associated with the "one state, one vote" principle of voting (in international organizations, at international conferences); however, states are free to change this mechanism. In practice, it happens in negotiations when the disproportion of votes is objectively justified (e.g., due to economic power or demographic potential).

The competence to regulate one's own internal relations is also enshrined in the United Nations Charter—Article 2(7) indicates that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state (...)."

An issue worth mentioning here is state recognition. Under international law, sovereignty can only be assigned to a state. Therefore, it needs to be established whether a given territorial entity is a state. Unrecognized states or states with limited recognition (i.e., those that are recognized by individual states or a group of states) pose a significant problem in this respect. Regardless of whether we adopt a constitutive or a declarative theory of state recognition (which is more in line with practice), the decision whether an entity meets the criteria for recognition as a state (has a separate territory, permanent population, and effective government) is the prerogative of the recognizing state.[34] As a result, there are situations when a given state is not equally recognized by countries of even one region. This is currently the case of Kosovo, whose declaration of independence on February 17, 2008, meant a violation of Serbia's territorial integrity. Kosovo is not recognized by some EU countries, including some Central European countries (Romania, Slovakia). In this way, state recognition makes the problem of sovereignty a multifaceted question, as the same entity may be perceived as sovereign by one state and as an illegal territorial entity by another.

4. Partial sovereignty? Loss of sovereignty by the state

It ought to be be noted that the concept of part-sovereign states used in the history of international law contained a commonly recognized inaccuracy. These entities were characterized by a lack of independence in external relations. Partial sovereignty of a protectorate, for example, actually denoted a lack of sovereignty,[35] and the establish-

33 Cf. Combacau and Sur, 1997, p. 229. The fact that states do not have the same factual or legal capacity does not testify to the limited sovereignty of those that are less powerful. Sovereignty is not quantitative; it is not the sum of powers.

34 Richter, 2019, p. 20.

35 Such entities were created in the previous centuries by the British Crown by granting extensive autonomy to some overseas areas (e.g., South Africa). Cf. Lawrence, 1911, p. 120. The protectorate was used by Great Britain for the Ionian Islands (1815–1864; previously in 1800–1807 it was a joint British-Russian protectorate); protectorates were also used by France (e.g., in Tunisia, Morocco). Cf. Brierly, 1955, p. 128. There were also dependent areas in other regions of the world at the turn of the 20th century. Essentially similar constructions are used for some overseas territories today (e.g., Puerto Rico).

ment of a protectorate over a hitherto independent state would result in its loss of sovereignty.[36] Any autonomy of a dependent area (even if it reflects its former sovereignty) results from the consent of the sovereign state.[37] The relationship between the protector and the protected state is termed suzerainty.

In Poland's history, the Free City of Cracow was a protectorate in 1815–1846 (the protectors were the partitioning powers (Russia, Austria, and Prussia), then the city was annexed by Austria). In the interwar period, the Free City of Gdansk (Danzig) posed a special formal problem—it was under the "protection" of the League of Nations, which, however, could not be called the protector of Gdansk. The League of Nations, as an international organization,[38] was not sovereign, so it could not function as a suzerain for Gdansk—only a state could play such a role. Since the essence of a protectorate relationship is to take over the foreign affairs of the protected entity (regardless of its will), it was Poland, responsible for the foreign affairs of the Free City of Gdansk, that was considered its protector.[39] Importantly, the position of a dependent "state" or protectorate results from a special legal status imposed on a given entity, not its free will. The matters of this territorial entity are subject to the authority of the protector—a sovereign state, because the protected entity lacks sovereignty. Such a situation should be clearly distinguished from the conferral of an analogous scope of competences (including, for example, in the field of foreign, economic, or judiciary affairs) by one sovereign state on another. This situation has no impact on the sovereignty of the parties to such a relationship, but results from an international agreement. Therefore, situations that are seemingly identical in terms of effects may actually be completely different in legal terms.

The false concept of limited (partial) sovereignty of a dependent entity is in direct conflict with the principle of the indivisibility of sovereignty, on which international law rests. Hence the so-called dependent state is not a state as defined by international law, but part of another sovereign state's territory, irrespective of how much autonomy the former enjoys, even including the power to shape its external policy to some extent.

The threat of losing sovereignty does not seem to be particularly real nowadays. This is due to the existing *de jure* legal mechanisms supporting the maintenance of sovereignty by states. In view of the unlawfulness of war of aggression,[40] even

36 Glahn, 1965, p. 75.

37 It is incorrect to regard such phenomena as a sharing of sovereignty. Cf. Krasner, 2004, p. 1095. The author cites the alleged sovereign rights of Hong Kong after 1997 to support this thesis (including the right to participate in certain international organisations and to retain the final jurisdiction of British courts in certain cases) without noticing that this is due to China's consent to maintain such autonomy in the Special Administrative Region.

38 An organisation is a secondary entity (because it was created by the will of primary entities), with limited competences (compared to primary entities), and most importantly a dependent entity (because it can be liquidated at the will of member states—which happened in the case of the aforementioned League of Nations).

39 Cf. Cybichowski, 1928, p. 109.

40 *De jure* since the adoption of the Paris Pact of 1928 (General Treaty for Renunciation of War as an Instrument of National Policy signed in Paris on August 27, 1928 [the so-called Kellogg-Briand Pact], League of Nations Treaty Series 1929, vol. 94, no. 2137).

a complete annexation of a territory is not *de jure* regarded as a loss of statehood. Therefore, the loss of territory and real power over a population does not simply lead to a loss of sovereignty. The history of Central Europe knows examples of governments functioning in exile (e.g., the Polish or the Czechoslovak government during World War II), which emanated the sovereignty of states under illegal occupation. Regardless of this, any threat of territorial annexation (whether explicit, as was the case in Crimea in 2014, or *de facto*, through unrecognized external subjects, as in the Donbas region) raises fundamental questions about the loss of sovereignty over the territory. The loss of the actual possibility of exercising sovereign rights over a territory undoubtedly undermines the sovereign functioning of the state. The passage of time is also an important factor, as it may lead to the recognition of an illegal situation as legal by an increasing number of countries. Therefore, although an annexation resulting in the loss of control over a territory and population does not entail the loss of sovereignty by the state whose territory has been annexed, it certainly threatens its further sovereign existence.

States are free to relinquish their sovereignty. This happens by transferring the sovereignty of one state to another (newly created or already existing) as a result of unification. History knows many examples of federal states whose constituent parts used to be sovereign entities; as a result of unification, their sovereignty expired—it was conferred on the united state.[41]

5. Threats to economic sovereignty

Liberalized or free trade is not perceived nowadays as a threat to sovereignty. Different opinions in this regard were formulated as recently as in the interwar period. In 1931, the Permanent Court of International Justice recognized the customs union between Germany and Austria as undermining the latter's independence.[42] Following the Second World War, however, the increasing number of free trade agreements and

41 A separate issue, exceeding the scope of these considerations, is the right to secede from a federal state. In such a case, however, sovereignty should be seen as newly created at the moment of secession. Discussing the right to secession as a sovereign right of a constituent part seems to be incorrect from an international legal perspective, given that the constituent part is not sovereign until secession. However, it may be perceived differently from the perspective of the federation's internal constitutional law.

42 Customs Regime between Germany and Austria Question, Advisory Opinion—5th Sept 1931 PCIJ Series A / B. no 41. Despite the fact that Austria retained full freedom to withdraw from the treaty on the customs union, the court considered Austria's independence to be threatened by the economic influence of another state. Even then, however, this ruling faced formal criticism (although the content of the PCIJ opinion resulted from the specific legal rules concerning Austria contained in the Treaty of Saint-Germain-en-Laye; drawing conclusions of a general nature affecting the sovereignty of any entity, was too far-reaching). This criticism also reached Poland, a country that at the time was rather opposed to the customs integration of Austria and Germany (in any case the idea was abandoned by these countries before the court's ruling was issued). Cf. Dembiński, 1933, pp. 148–149.

the conclusion of the General Agreement on Tariffs and Trade (GATT)[43] changed the perception of economic threats to state sovereignty. Nowadays, the benefits of international trade to countries are generally not connected with the collection of customs duties. In view of the widespread interdependence of states in terms of resources and energy, economic ties are rarely perceived as a threat to sovereignty. However, much still depends on the nature of these relationships. On the one hand, the notion of sovereignty in the economy is often overlooked or presented as a problem of the past. This is especially important in view of the fact that corporations often have budgets that are many times greater than that of a not very rich country, which allows them to influence the political decisions of states. On the other hand, capital does have a nationality, which is well understood especially by the most powerful and largest countries in the world. The history of trade in raw materials shows that resources such as crude oil and natural gas can be an effective economic weapon when used, for example, by Russia against Central and Eastern Europe or as a source of financing for the expansion of Saudi Arabia's Wahhabi ideology, which destabilizes the social and politic situation in the Islamic world. Therefore, is it actually true to say that there has been a paradigm shift in this regard?

Undoubtedly, this is a thorny issue for the countries of Central and Eastern Europe. It seems that handing over commercial and economic matters to international organizations and foreign corporations may be perceived, perhaps not unreasonably, as a threat to sovereignty—not in legal terms, but as understood through the prism of politics. This is particularly evident with regard to raw materials. Countries such as Poland have experienced being blackmailed by Russia in connection with the supply of oil or gas. Maintaining independence in this respect requires costly projects connected with the diversification of suppliers of these raw materials (which has actually happened in the case of Poland, following the launch of a gas terminal and the construction of a gas pipeline from Norway). Dependence on one unpredictable supplier certainly poses a threat to the stability of economic development. In such circumstances, implementing economic policies is undoubtedly a challenge for the state authorities.

A fundamental question arises at this point: Does the economy as such have a direct impact on sovereignty? The state is free to make any economic decisions. A decision with unfavorable consequences may be forced by a monopolist supplier of raw materials. For example, blackmail connected with the supply of a raw material that is essential for the economy and that cannot be replaced or obtained from another source deprives the purchasing state of real freedom of action. Even if the blackmail constitutes a breach of an international treaty, the blackmailed state cannot usually take any retaliatory measures, which require proportionality. Since the direction of trade with the supplier of the raw material is typically one-way, there is no real possibility of applying retaliatory sanctions.

43 General Agreement on Tariffs and Trade, signed at Geneva on October 30, 1947 (United Nations Treaty Series 1950, vol. 55-I, no. 814).

Activities characterized by economic blackmail ("soft" coercion) cannot be considered coercive (i.e., carrying the consequences of Article 52 of the Vienna Convention on the Law of Treaties[44] in the event of having concluded an agreement). Nevertheless, this is undoubtedly a form of exerting influence on a state, which may deprive it of real, if not theoretical, freedom of action. While in theory it may be difficult to demonstrate the violation of sovereignty (as defined by law) as a result of a *de facto* forced dependence (often on very unfavorable financial terms) on a supplier of a raw material needed by the economy, in practice states recognize such situations and, if possible, try to prevent them. The fact that economic problems are identified with sovereignty also proves that this notion may be understood in political terms, which is subject to mythologization due to its unspecified character and inconsistency with the legal definition. The science of law must distinguish between non-legal pressures resulting from the clash of states' interests from violations of sovereignty due to the breaching of fundamental norms of international law (prohibition of the use of force, threat of use of force, intervention in internal affairs).[45]

6. Limitation of sovereignty, transfer of competences, or transfer of sovereignty?

The alleged limitation of sovereignty is often identified with phenomena that do not entail any real restrictions in this regard, and result from the use of solutions derived from private law, with origins in Roman law, in relations between states. Based on relevant agreements, states may apply solutions that delegate the temporary exercise of rights identified with sovereignty over a territory to another entity. However, this does not imply a loss of sovereignty over the territory or a restriction of the transferor's sovereignty. In this case, the distinction between sovereignty over a territory and territorial rights exercised as a result of a contractual title between states resembles the relationships of ownership and possession in civil (private) law. Sovereignty is the full title to rule a territory as understood by public international law, but a sovereign entity may relinquish some of its symptoms in favor of another entity. However, this is a transfer of competences, not sovereignty. The notion of the transfer of sovereignty itself is alien to classic international law (at most, one can consider here the unification of sovereign entities, as mentioned toward the end of Section 4). International law is unambiguous in this respect, even with regard to supranational organizations (as discussed later in this section).

In this way, various types of territorial lease mechanisms can be developed (concerning military bases, for example) that resemble the transfer of possession of things in civil law or servitude (in the case of the right to a passage through a territory,

44 Vienna Convention on the Law of Treaties done at Vienna, adopted on May 23, 1969 (United Nations Treaty Series 1980, vol. 1155, no. 18232).
45 Cf. Kranz, 2015, p. 111.

for example). The latter is perceived particularly negatively in Central Europe—the demand for a right to a corridor from Germany to East Prussia through Polish Gdansk Pomerania was aggressively asserted by the Third Reich in 1939.[46] Currently, one of the most protected and vulnerable territories within NATO countries is the Polish Suwalki Gap between the Kaliningrad Region and Belarus, which at the same time connects Poland and Lithuania.

In the history of Central Europe, a particularly telling case connected with authority exercised over a territory by an entity other than the sovereign concerned Bosnia and Herzegovina. Under the provisions of the Treaty of Berlin, in 1878–1908 it was formally a part of Turkey, but its governance rested with Austria-Hungary (which formally incorporated the province in 1908). Many such cases from other geographic areas are known to international law.[47] Acceptance of such solutions might have resulted from the fact that in spite of being based on titles other than the basic one (in domestic law, such a title is ownership of property, in international law sovereignty), they resembled the fiefdoms known to the law of medieval Europe. In practice, titles that introduce a limited administrative power of one state over a part of another state's territory also apply to much smaller functional territories, such as ports, port quays, or military bases. Depending on the content of the agreement between states, the exercise of limited territorial authority may entail the establishment of exclusive or partial jurisdiction of the state exercising administrative control over the territory.

It is also significant that in the event of an interstate dispute over their sovereignty over a given territory, the argument may be temporarily suspended by establishing a joint territorial sovereignty (condominium) without prejudging the affiliation of the disputed area.[48]

Delegation of competences by some states, including in particular so-called microstates or ministates, is a natural tendency. Due to objective factors (their demographic or economic situation), they are unable to undertake costly diplomatic activities or use permanent diplomatic and consular services to an extent that would allow them to maintain real relations with most countries of the world. Hence, cases of conferring competences on other entities are not uncommon. Similarly to the abovementioned assumption of administrative power over a territory, this happens

46 Łukomski, 2000.

47 Examples of the administration of the Panama Canal by the USA until 1999, or the lease of Hong Kong by Great Britain from China until 1997, are commonly cited in the doctrine. The Guantanamo base, for example, has a similar status—under the 1903 treaty, the USA exercises jurisdiction over territory whose formal sovereign is Cuba.

48 Historical examples of such condominiums include the New Hebrides (joint British and French management—since 1980, it has been the independent state of Vanuatu); until 1955, Sudan was also governed by the British-Egyptian condominium. Cf. Czapliński and Wyrozumska, 2006, p. 138. The notion of condominium can also be applied to sea areas. Thus, three coastal states have been recognized as exercising joint sovereign powers over Fonseca Bay. Cf. Judgment of the Central American Court of Justice of 9 March 1917 (*American Journal of International Law*, 1917, p. 702). Also see: ICJ Judgment of 11 September 1992 Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening (General List no. 75).

by way of an international agreement between the conferrer of competences and the state that is going to exercise them. Of course, this is only a conferral of competences, not of sovereignty. The conferrer has the right to revoke the transfer of powers, in whole or in part, at any time in order to exercise them by itself or transfer them to another entity, which may be another sovereign primary entity (state) or a non-sovereign secondary entity (international organization). Cases of such revocation of competences are not uncommon in international law. A good example is the situation of Liechtenstein, an independent state since 1866. Until 1918, its international affairs were managed by the Habsburg monarchy; after the collapse of Austria-Hungary, on January 1, 1924, a significant part of these powers was conferred on Switzerland.[49] In the 1990s, Liechtenstein introduced changes to the agreement with Switzerland, which modified the scope of the conferred economic and customs competences. In 1991 Liechtenstein decided to participate in the European Free Trade Association. In 1994 it decided to be the member state of the European Economic Area, to which Switzerland never acceded. The amended agreement returned some of the competences to the sovereign (Liechtenstein), which in turn delegated them for implementation under EFTA, and then EEA. These competences therefore became the competences of international organizations of which Liechtenstein is a member.[50]

The transfer of competences to an international organization is the most common situation today. States conclude an international agreement with each other, in which they simultaneously create a new entity—an international organization (secondary, with limited competences, dependent—because it can be liquidated at the will of the signatories). The founding states provide the organization with the necessary competences, derived from the states' own competences (as well as from competences conferred by other member states in the future). Although a conferral of a range of competences occurs in the case of accession to any international organization (e.g., with regard to its independent decisions concerning personnel or budget), it is particularly noticeable in the case of the so-called supranational organizations. They are usually tasked with achieving economic or even political integration of the member states within the scope of the powers conferred upon them. Such secondary entities have self-reliance that is essential for their purposes (they act on their own behalf and in the interest of the organization as a whole above all). They issue binding legal acts of secondary law, on the basis of which a separate legal order is built (which may even be an order that is dissociated from its international legal sources as a *sui generis* order). In addition, the assessment of compliance with this secondary law by member states is subject to a judicial authority established within the organization. Due to these factors, their exceptional character is noted. The impression that organizations manage the affairs of their member states contributes to the propagation of theories about their alleged sovereignty.

49 Vertrag zwischen der Schweiz und Liechtenstein über den Anschluss des Fürstentums Liechtenstein an das schweizerische Zollgebiet, Abgeschlossen am 29. März 1923, BBl 1923 II 374.
50 Hummer and Prager, 1997, pp. 377–410.

Regardless of the nature of an international organization, it is a secondary subject of international law. It can be dissolved by the member states, which can eliminate the legal order created by this organization. States can also withdraw from this organization individually. Since its legal existence fully depends on the will of other legal entities, it is a fundamental mistake to speak of its sovereignty in any respect. In the light of contemporary international law, a sovereign entity cannot be liquidated at the will of other entities. The ultimate impossibility of management of its own existence certainly makes such an entity as a supranational organization non-sovereign.

While transferring competences, only the sovereign entity (state) is active. An international organization merely "absorbs" its competences. Its legal status resembles the status of the recipient in the case of a donation agreement. The scope of the donation is determined by the donor. Analogously, an international organization may not actively request a conferral of competences or lawfully extend the scope of competences to an area not covered by the original conferral.[51] The fact of conferring competences clearly confirms the sovereignty of the conferrer. The entity receiving the competences does not have to be sovereign, and in the case of an international organization is not sovereign. The interpretation of the scope of the conferral of competences is subject only to the assessment of the conferring state. In particular, it is unacceptable to make self-findings and unilateral arrangements concerning the scope of the conferral by entities upon which the competences were conferred. It is worth quoting at this point the ruling of the German Constitutional Court in 2009, referring to the transfer of powers by a state to the European Union.[52] The concept of states as "masters of the treaty" (*Herren der Verträge*) cited by the Court accurately reflects the essence of the matter.[53] Sovereignty is understood as freedom within the law.[54] It is worth noting that the conferral of competences on an international

51 It ought to be be noted that the above is fully confirmed in the Treaty on the European Union (Consolidated version of the Treaty on European Union OJ, 26.10.2012, C 326, pp. 1–390). Article 4(1) of the Treaty states: "(...) competences not conferred upon the Union in the Treaties remain with the Member States." In accordance with Article 5(1) of the Treaty, "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality." Later in Section 2 it is stated: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." Section 3 sentence 1 defines a limited scope of application of the subsidiarity principle: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." It seems that the European Union's problem is the violation of the competences of the Treaties by its bodies.

52 Cf. Judgment of the Federal Constitutional Court of Germany of 30 June 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (judgment of the FCC in the case of the Treaty of Lisbon, BVerfGE 123, p. 267).

53 Cf. Bainczyk, 2017, pp. 151, 208.

54 Cf. Kwiecień, 2015, p. 53.

organization is also stipulated to a limited extent by constitutions of some member states of the European Union—and undoubtedly it is up to them to make the final assessment of actions undertaken under the treaty.[55]

As mentioned before, the transfer of competences may take place in favor of a sovereign entity (another state) or a non-sovereign entity (an international organization). Competences may also be further transferred from one organization to another, when the former becomes a member of another international organization within the scope of the transferred competences.[56]

It is also possible to confer certain limited powers on entities that are not subjects of international law at all, such as protectorates or autonomous provinces of the state. Sovereignty means that states have the primary competence to self-organize, including in the field of foreign trade or even foreign affairs, so the possible powers of individual administrative parts of the state in no way violate the sovereignty of a complex state (e.g., a federal state). The distribution of competences occurs in accordance with internal law.

It is also worth noting that a separate problem concerning the limitation of sovereignty is currently connected with the subject of environmental protection and the protection and exploitation of natural resources. Paradoxically, these two issues are intrinsically irreconcilable, which means that the current model of state jurisdiction is not undergoing a sudden revolution in this respect. While the protection of the borderless natural environment may inspire international actions aimed at the reduction of exploitation by individual entities exercising their sovereign economic rights, granting states the rights to the natural resources in their territory clearly enhances the perception of their sovereignty.[57] The rights of the state to natural resources in its territory are defined in international law as permanent sovereignty.[58]

55 It is worth noting that in Article 90(1), the Constitution of the Republic of Poland, cited before in footnote 23, provides that "The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters." This provision mentions the delegation of competences (and not of sovereignty) and only in certain matters—and therefore to a limited extent.

56 For example, the European Union, as a separate customs territory, is a member of the World Trade Organization (WTO). Within the scope of its competences connected with civil procedural law and conflict of law rules, it is also a member of the Hague Conference on Private International Law, alongside its member states.

57 Cf. Conforti, 1995, p. 196.

58 The United Nations has repeatedly adopted resolutions confirming the sovereignty of a state over natural resources, trying to create instruments to counteract the depravation of the territory of developing countries by the developed ones. The Resolution of the General Assembly no. 3281 (29) of 12 December 1974 (Charter of Economic Powers and Duties of States) played a special role in this case. Cf. Chapter II(2)(1) of the Charter, which indicates full permanent sovereignty over natural resources. Cf. Skubiszewski, 1981, pp. 85–99.

7. Threats resulting from a change in the perception of sovereignty

Although international law seems to consistently enshrine sovereignty as a permanent attribute of the state, political concepts have emerged that proclaim a paradigm shift in this respect. They indicate the distribution of sovereignty to other entities.[59] Regardless of the fact that their influence on the doctrine of international law does not yet seem significant, they are still worth noting. It is equally noteworthy that they are based on a categorial shift—a fundamental logical fallacy that assumes the identity of the concept of sovereignty and state competence. Sovereignty is not just unlimited power, the full sum of powers in the hands of the sovereign. If this erroneous understanding were adopted, there could be no sovereign entities today, even including the great powers.[60] However, sovereignty may be associated with the right of the state to distribute its powers. States are free to choose how to perform their functions.[61]

The most dangerous theory that threatens the sovereignty of states is the theory of global law. Sovereignty as understood by Hans Kelsen (1881–1973) was to be significantly limited as a result of the institutionalization of international cooperation by means of newly established entities—international organizations. The law of individual countries would therefore need to be gradually subordinated to global law, which would be systematically developed on the basis of the activities of these organizations. Regardless of the formula in which it would occur—through a transfer of competences ultimately resulting in the assumption of sovereignty, or the creation of some unrealistic form of global government—it is striking to see that sovereignty would thus be limited by an arbitrary power, established independently of states' will and using law for purely instrumental purposes, not derived from natural law. Natural law has been a mainstay of sovereignty, regardless of the fact that since the times of Grotius and Hobbes the present understanding of this concept has been shaped by the so-called juridical rupture (*ruptura iuridica*), which secularized it. An arbitrary determination of sovereignty by a collective *super omnes* entity essentially presupposes a predatory seizure of sovereignty. It is essentially a violation of sovereign rights, without any title and legal legitimacy.

The creation of such a superstate power could take place only with the express consent of entities indicating the need for such *de jure* unification. On the other hand, it is worth bearing in mind that the development of world orders in modern history did on several occasions involve the abandonment of the existing principles and the

59 It is worth noting that examples of entities that are allegedly characterised by shared sovereignty include semi-internationalized or mixed tribunals, international companies managing investments, e.g., pipelines or raw material extraction, and dependent territories with autonomy. Cf. Krasner, op. cit., pp. 1095–1097.

60 Hence Kelsen's view (cf. Kelsen, 1942, p. 78) of an unreal bearer of sovereignty. Cf. Merezhko, 2019, pp. 46–48.

61 Cf. Kwiecień, 2004, p. 196.

adoption of new, completely different ones that, in the light of the existing order, would be considered illegitimate.

The activities of bodies of the European Union, as a supranational integration organization undertaking regional activities in Europe, evidently refer to the notion of centralized international authority. The sovereignty of a state is not reduced by powers conferred on other entities of international law, as long as this conferral is reversible. On the other hand, the acquisition of these competences by another entity, either by coercion or judicial lawlessness (appropriation of competences), can be perceived as a threat to sovereignty. A particularly drastic mechanism of violating state competences by entities of secondary law are attempts to extend competences to cover areas that were explicitly reserved as the exclusive domain of member states in the treaties establishing the international organization. Activities of organs of international organizations that consist in issuing acts of secondary law concerning matters beyond their competence, and of judicial authorities issuing decisions outside their jurisdiction, should be noticed and stigmatized by states.[62] A state whose sovereignty has been violated as a result of such practices has the right to not recognize the effects of the organization's legislative activities and not execute the judgments of its judicial bodies. Unfortunately, this issue is not purely theoretical. The organs of European integration seem to be departing from the regulations contained in their own treaties, which lie at their source.[63]

In Europe, this dispute over competences (in the future, perhaps, over sovereignty) has led to the emergence of phenomena that are far removed from the principles of democracy. Bodies of an international organization (without any democratic legitimacy, with the exception of its parliamentary bodies), operating within the scope of powers conferred upon them by states (under the alleged shared sovereignty), are appropriating the competences of primary entities on the basis of decisions of international judiciary bodies. Tribunals operating at international organizations have become tools for the gradual limitation of rights reserved exclusively for sovereign states. The practically unlimited jurisprudence of international judicial bodies (elected by secret ballot from among people who are dependent on

62 The fact that this occurs to a very limited extent in the case of the European Union demonstrates the weakness of some states compared to other, larger states in the EU that strive for such domination of the EU (because it is *de facto* their domination, and the possible future creation of a federal state on the basis of the EU will ensure their central status and a major advantage in this new country).

63 See footnote 51. Polish Member of the European Parliament Prof. Ryszard Legutko wrote about the activities of the European Union in this area: "I lost any faith in the European Union and the possibility of self-correction a long time ago. Anyway, all this language is mendacious. It mentions subsidiarity, that subsidiarity needs strengthening. Subsidiarity has long since been violated and killed in the European Union. It is no longer there. It is no longer in the powers of the European Commission, the CJEU, not to mention the Parliament. The principle of admission does not exist anymore—it has been violated. They use a language that is distorting or blurring the reality, they are not able to reform, they are just heading in that direction. It is like a huge machine that is slowly sliding down because it does not know how to brake, and even if it did, it would not want to brake" (Cf. Legutko, 2021).

political parties and "groups of influence") leads to a new system—"judicracy." The courts of an international organization usurp the right to contradict the decisions of the governments of sovereign states—governments that undoubtedly have the democratic legitimacy of citizens. Such practices of the Court of Justice of the EU[64] or the European Court of Human Rights[65] in relation to Hungary, Poland or Romania[66] are a clear example of this phenomenon. Opposition to such clearly unlawful practices is proof that the countries of the region continue to be sovereign. Indeed, through such *ultra vires* actions, international judicial authorities risk issuing *sententiae non existens* judgments, entering into a significant dispute with constitutional courts and authorities of the member states.

64 Judgment of the Court of Justice of 15 July 2021, C-791/19 European Commission v the Republic of Poland.

65 For example, the recognition by the ECtHR of the Constitutional Tribunal of the Republic of Poland as a court, which is not a court within the meaning of Polish law. Cf. Judgment of 22 July 2021 in the case of Reczkowicz v. Poland (application no. 43447/19), Judgment of the ECtHR of 7 May 2021 in the case of Xero Flor v. Poland (application no. 4907/18). Compare the Judgments of the Constitutional Tribunal of 14 July 2021 (reference number P 7/20), of 7 October 2021 (reference number K 3/21), and of 24 November 2021 (reference number K 6/21). A specific war between the national tribunals and the European Union (with clear support from the ECtHR) is obviously visible concerning the domestic judiciary. This matter, reserved for the competences of the member states, is subject to appropriation by the Court of Justice of the European Union. In the case of Poland, this appropriation has a special dimension, as it takes place as an attempt to block an important national reform of the judiciary. This is paradoxical as the CJEU thus situates itself as a defender of the communist judiciary (often still exercised by judges nominated by the communist dictatorship, who sentenced oppositionists to prison during the martial law period of 1981–1983). Courts in Poland did not undergo any serious reform after the change of the political system in 1989 (the structure of the National Council of the Judiciary was maintained against the Polish constitution until 2018), the judge-criminals of the communist era were never taken to account, and the body that could serve this purpose—the Disciplinary Chamber of the Supreme Court—has now been challenged by the European Union.

66 See CJEU judgment relating to the Constitutional Court of Romania—Arrêt (le 21 décembre 2021) dans les affaires jointes C-357/19 Euro Box Promotion ea, C-379/19 DNA- Serviciul Teritorial Oradea, C-547/19 Asociația «Forumul Judecătorilor din România," C-811/19 FQ ea et C-840/19 NC). *Nota bene,* this ruling was accurately countered by the Romanian Tribunal on December 23, 2021.

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| Chapter 5 |

International Cooperation—International Organizations

Elżbieta KARSKA

ABSTRACT

This chapter is devoted to the international organization as the legal form of international cooperation. It begins with an historical analysis, in which the author refers to the examples of ancient Greece and the local forms of cooperation between city-states, which are considered the precursors of today's international organizations. The author subsequently discusses the historical changes over the last two centuries that gave rise to contemporary international organizations. Examples cited include universal and regional organizations such as the United Nations, the Council of Europe, the European Union, and the North Atlantic Treaty Organization. The author uses these examples as the basis for examining the goals of international cooperation as well as the principles and axiology of international organizations. Particular attention is paid to the goals of the international community, such as ensuring international peace and security, building common collective security, developing the principles of a democratic state of law, and developing the protection of human rights.

In the following part, the author considers the attributes of an international organization that determine effective international cooperation. These include the right to conclude international agreements, the right to send and receive diplomatic representatives, the right to bring international claims, and the obligation to bear international responsibility. Conclusions regarding the role of states in creating international organizations and equipping them with specific competences in the sphere of international relations are important in this respect.

This is fundamentally a question about the scope of subjectivity and legal capacity to act in the sphere of international law. In the penultimate part, the author considers the role of the organs of an international organization in making cooperation more effective and introduces categories of organs by dividing them according to various criteria. The paper ends with reflections on the changing needs of states and the international community that affect the goal of international cooperation and the legal form of its implementation, i.e., an international organization.

KEYWORDS

international organization, international cooperation, United Nations, North Atlantic Treaty Organization, Council of Europe

1. Introduction

States participating in contemporary international relations have at their disposal three basic instruments of cooperation. These include: an international agreement, diplomacy, and an international organization. This chapter is dedicated to

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international organizations as an instrument of cooperation between states and other subjects of international law.

The analysis will cover historical issues, selected international organizations in terms of the purpose of their activities, cooperation as an instrument serving this purpose, and the legal basis for their operation and their structures. The most important organizations in the region of Central and Eastern Europe will be presented in detail. This analysis will therefore cover issues related to the institutional aspects of cooperation, the purpose of establishing an international organization understood as an instrument of cooperation, the specificity of the region, including the cross-border effect, as well as cooperation at many levels, including both governmental and regional, and last but not least the role of local governments and the activity of and the role of non-governmental organizations. The summary will present the conclusions about the dynamics of the phenomenon of international cooperation, the subjects of this cooperation, and their role and trends in terms of the goal and motives of the changing globalized international and supranational reality from the perspective of regional reality.

2. International cooperation—historical aspects

Historians of the law of nations[1] look for the first international organizations in antiquity. As an example, they point to ancient Greece, where *amphictyonies* and *symmachias* functioned.[2] The first was a union focused on religious and political cooperation, the second on political and military cooperation. According to Zbigniew Doliwa-Klepacki, "in terms of structure and organization, these organizations were similar to contemporary international organizations. Their members comprised the Greek states. They had permanent organs. The supreme body was composed of delegates from all member states. It met several times a year. This body, in turn, chose the executive body. The amphictyonies had permanent locations, which were one or more temples. The priests of these temples performed the functions of the administrative organ. The member states sent gifts to the temples on a relatively regular basis, which were kept in the temple treasury. These gifts constituted a form of contributions paid by the member states in modern international organizations. One of the most famous amphictyonies was the Delphi-Thermopylae amphictyonia, which consisted of 12 countries."[3] Political and military cooperation within the framework of the symmachia looked slightly different. The same author explains that "they had organs similar to the amphictyonia, and their seats were located in one of the Greek temples as well. In some of them, such as the Athenian-Delian League, instead of gifts sent to temples, an obligation to pay regular fees to the common fund was introduced. The

1 For more on this topic, see Grewe, 2000, p. 7.
2 Bierzanek and Symonides, 1998, pp. 33–35.
3 Doliwa-Klepacki, 1997, pp. 31–32.

most important symmachias were: the Peloponnesian League, known as the Spartan League, and the Athenian-Delian League, known as the Athenian Maritime Union. The first was founded in the second half of the 6th century BC and disbanded in 371 BC, while the second was created after the Persian wars in 477 BC and fell apart in 355 BC. In the period of its greatest prosperity, the Athenian-Delian League consisted of over 300 states."[4]

Unfortunately, it is difficult to find an analogy in the case of ancient Rome, which became the hegemon in contemporary reality. There were arbitration commissions whose task was to settle disputes between Rome and other countries, but it is difficult to find in them a cooperation in the nature of a partnership. The assumptions of *civitas maxima* were actually aimed at creating a universal state rather than cooperation. Similar assumptions regarding potential cooperation within international organizations can be observed in the Middle Ages, when the idea of a universal Christian state was implemented, in which the pope played the dominant role, or a universalist secular state, with the dominant role of the emperor. Unfortunately, these factors did not contribute to the development of the international organization as an instrument of cooperation during this period.

The first international organizations, similar in nature to those that function today, were established about 200 years ago. They took the form of international technical cooperation. Their emergence in the area of international relations was a consequence of cross-border contacts between states that established at the same time the objective of mutual cooperation between these states but which was rather limited compared to the present era.

The perspective and needs of international cooperation have changed historically when its goal became that of ensuring international security. Building a collective security system[5] forced states to institutionalize cooperation. It began to take the shape of permanent organs that could continuously monitor the situation and came to be seen as the best instrument to achieve the new goal of international cooperation. As a result, new entities of international cooperation emerged—international organizations—and their functions, tasks, and competences were significantly modified from those of the original entities. This new catalogue of subjects of international law was also associated with concerns, as expressed in literature, regarding the maintenance of sovereignty and the role of central bodies in making key decisions in the sphere of international relations. It was, however, also associated with the hopes of the international community, obviously related to assuring international peace and security in the first place, but also, as Jerzy Menkes and Andrzej Wasilkowski write,

> "these hopes resulted from the expectations that international organizations, without destroying nation states, would be able to moderate the behavior of states, ensuring the implementation of the collective interest, protection of

4 Ibid., p. 32.
5 For more on this topic, see Zięba, 2006, p. 77.

> the common good, and the generally recognized values common to the family of nations. Moreover, by supplementing the functions of the nation-state on the one hand and limiting its role on the other hand, these organizations will become an important factor in building an institutionalized international community, implementing an internalized normative system—the desired axiological order."[6]

Of course, in this case, international peace and security became the basis of the axiology of cooperation, which over time was supplemented by such overriding values as the protection of human rights.

Attempts were made to describe the twentieth century as the "century of international organizations." Their significant development, the increased number of regional organizations, the expansion of the scope of cooperation, the creation of non-governmental organizations, and the enormous increase of their importance within international relations contributed to this line of argument. At the same time, the basic goal of international cooperation is defined as "the protection of peace and the strengthening of law by institutions."[7] As J. Menkes and A. Wasilkowski write, "in this emerging and created international order, a significant place belongs to international organizations, active entities in international relations, thanks to which the new universalist international order will be an order that respects rights and freedoms, including the diversity of individuals, groups, states, nations and peoples. Successive international organizations are focused on ensuring security through law (treated as a value) closely related to the system of institutions ensuring its implementation."[8]

3. Goals of international cooperation

International organizations are essentially created so that the entities that create them might achieve specific, common goals of international policy. For this reason, international cooperation appears as an instrument for the implementation of common international policy goals that can be pursued by both states and other entities participating in international relations.[9] These goals are included in the act constituting a given organization. The Charter of the United Nations (1 UNTS XVI) can be cited as a classic example. It gives "maintaining international peace and security" as its basic goal, which consequently makes it the main goal of cooperation implemented within the framework of the United Nations. At the same time, it should be stressed that a number of further provisions of the Charter refer in detail to the manner of achieving this goal. States cooperate to maintain the peace by applying the

6 Menkes and Wasilkowski, 2004, p. 10.
7 Franceschet, 2001, p. 212.
8 Menkes and Wasilkowski, 2004, p. 17.
9 For more details on this topic, see Simmons and Steinberg, 2006, pp. 18–28.

Charter and following the procedures set out therein. J. Menkes and A. Wasilkowski write that,

> "The Charter provides for the application of collective measures to prevent threats to peace and eliminate these threats, to deal with or settle international disputes or situations that may lead to a disturbance of peace, by peaceful means, in accordance with the principles of justice and international law. Therefore, in further provisions (Chapters VI and VII), the Charter defines various procedures for the peaceful settlement of disputes (Chapter VI) and actions that may be taken in the event of threats to the peace, breach of peace and acts of aggression (Chapter VII), including the adoption of sanctions by the Security Council without the use of armed forces, and when this proves insufficient—with the use of armed forces."[10]

It is a new dimension of international cooperation based on the experience of the League of Nations. However, there are still serious shortcomings, in particular the voting method in the Security Council and the possibility of exercising the right of veto by a permanent member or members of this body, especially when the matter concerns this entity or several entities. The situation of aggression by the Russian Federation on the territory of Ukraine is the most recent example of the far-reaching shortcomings of this cooperation mechanism in the light of the United Nations Charter. It should be noted, however, that

> "in the pursuit of maintaining peace, the Charter is not limited to diplomatic procedures and sanctions. (...) It considers the issue of ensuring peace in a much broader context. Under this new philosophy, preserving peace cannot be just a matter of diplomats, procedures and sanctions, but requires greater justice in respect to both relations between nations and within states. This is reflected in many provisions of the Charter and practical initiatives undertaken within the United Nations."[11]

Another goal of international cooperation implemented within the United Nations concerns the development of friendly relations between nations. The content of the Charter states that

> "such relations are to be based on respect for the principle of equality and self-determination of peoples, treating it as an important factor in strengthening universal peace. The practice of the United Nations has developed these rather succinct provisions of the Charter. Two resolutions of the General Assembly were of particular importance here: Declaration on Principles of

10 Menkes and Wasilkowski, 2004, p. 38; de Wet, 2004, pp. 133–145.
11 Menkes and Wasilkowski, 2004, pp. 38–39.

> International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nation (2625 / XXV of October 24, 1970) and Declaration on the Granting of Independence to Colonial Countries and Peoples (1514 / XV of December 14, 1960)."[12]

Moreover, J. Menkes and A. Wasilkowski indicate another important goal and, at the same time, the method of "developing international issues through cooperation." According to the authors,

> "The Charter lists economic, social, cultural and humanitarian issues. It also announces the promotion and encouragement of respect for human rights and fundamental freedoms for all, irrespective of race, sex, language or religion. These provisions of the Charter in particular refer to the deeper sources of conflicts arising from various types of injustice and discrimination, and which may pose a threat to international stabilization and peace."[13]

When analyzing the United Nations as a whole—its legal character and the universal nature of its actions and general competences—a basic and, at the same time, general goal should be noted: the "establishment of a center for harmonizing the actions of nations aimed at achieving the goals set out above"[14] (...), while "in time, the entire system of influencing the processes taking place in the world through international cooperation has developed."[15]

When analyzing the goals of international cooperation pursued within international organizations, the regional aspect and the specificity of the matter in Central and Eastern Europe should be taken into account. The global organizations that undertake cooperation with universal goals in mind are not the only ones actively operating in this area. Other organizations that are active include the Council of Europe or the European Union, whose activity is even more visible and seems to better reflect the need for cooperation between the countries of the region, taking into account its regional identity and dynamics. The Council of Europe is probably the most important and largest in this regard. This body is a regional extension of activities aimed at consolidating peace and cooperation between states in general. The preamble to the Statute states that "that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human society and civilisation."[16] Moreover, the Statute refers to the spiritual and moral values "which are the common heritage of their peoples and the true source of individual freedom, political liberty and the

12 Ibid., p. 39.
13 Ibid.
14 Ibid. See also Evans, 2003, pp. 269–271.
15 Menkes and Wasilkowski, 2004, p. 40. Cf. Cassese, 2005, pp. 320–322.
16 Preamble of the Statute of the Council of Europe of 1949 (ETS No. 001). See Moecklin, Shah and Sivakumaran, 2014, pp. 442–446.

rule of law, principles which form the basis of all genuine democracy."[17] Therefore, the goal of international cooperation within this organization is a common axiology understood as the realization of values, and governments wanting to "create an organisation which will bring European States into closer association"[18] decided to establish the Council of Europe "for the maintenance and further realisation of these ideals and in the interests of economic and social progress" and because "there is a need of a closer unity between all like-minded countries of Europe."[19] The statute of the Council of Europe lists the aims in detail and concisely in Art. 1, which are the achievement of greater unity among its members, in order to protect and implement the ideals and principles which constitute their common heritage, and to facilitate their economic and social progress. Moreover, as stipulated in Art. 1(c) of the Statute, "Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties."[20] and "Matters relating to national defence do not fall within the scope of the Council of Europe."[21]

The North Atlantic Treaty of 1949 (34 UNTS 243), whose basic goal is to assure the security of this geographical area, is a very interesting study subject.[22] The preamble of this document reads that "The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments. They are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic area. They are resolved to unite their efforts for collective defence and for the preservation of peace and security."[23] Moreover, the parties indicate in Art. 2 some other goals of international cooperation in addition to peace and security of North Atlantic region. These include "strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded" and "promoting conditions of stability and well-being," and to "seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them."

It should also be noted that the goals of international cooperation, both at the global and regional levels, may undergo modifications. The shape of the international community is changing, and the problems that require a response are changing too, and the original purpose of cooperation may in the end change as well. The first European Communities, created as forms of economic cooperation within selected narrow sectors of the economy such as coal, steel, or nuclear energy, can serve as an

17 Moecklin, Shah and Sivakumaran, 2014, pp. 442–446.
18 Ibid.
19 Ibid.
20 Art. 1(c) of the Statute of the Council of Europe.
21 Art. 1(d) of the Statute of the Council of Europe.
22 Horoşanu, 2014, p. 17.
23 Preamble of the North Atlantic Treaty.

example. Over time, economic cooperation in such selected sectors was extended to become the European Economic Community and to create a European Union with a common internal market. The domain of cooperation in the field of human rights, which is evolving not only institutionally but also materially within the Council of Europe, is another example. The Member States modify initially established institutions for cooperation in the field of human rights protection and adopt additional protocols, through which the catalogue of human rights and fundamental freedoms is expanded. The UN agenda and priorities have also changed many times, although without fundamental changes to the UN Charter.[24]

4. The rules of international cooperation within the scope of international organizations

Analysis of the principles of international cooperation prompts us to reconsider the general global thread, especially in the case of organizations such as the United Nations, and then, against this background, the specificity of regional organizations. The principles of cooperation are a natural consequence of the organization's goals. At the same time, they seem to result from a number of other factors, such as the legal cultures of the modern world[25] or the legal standard applied amongst a given group of states, most often of a particular region, which is the case for both the European Union and the Council of Europe.[26]

The issue of the principles of cooperation once again refers us to the UN Charter, because "the principles formulated in the UN Charter (Art. 2) define the nature of contemporary international law and the position of states in the international community."[27] It is worth focusing on the five basic principles of this cooperation. First is the principle of the sovereign equality of states. According to the Charter, it comes first because international law has developed the assumption that states, as the primary subjects of this right, are sovereign. It is emphasized in the literature that although:

> "The Charter does not define sovereignty, and does not even use this concept directly (...), it is important because it facilitates the evolution of the understanding of sovereignty, so needed in the world of growing international ties and the increasing role of international organizations (in relation to the Member States as well). The term 'sovereign equality' used in the Charter relates primarily to equality before the law."[28]

24 For more on challenges for the UN on the threshold of the new millennium, see Moore Jr. and Pubantz, 2006, pp. 62, 118.
25 Broude and Shany, 2008, p. 295.
26 For more details on this topic, see Mik, 2019, pp. 5–32.
27 Menkes and Wasilkowski, 2004, p. 40.
28 Ibid.

Another very important principle of international cooperation from the point of view of the certainty of international relations is the principle of fulfilling obligations in good faith, which is anchored not only in the UN Charter, but also in the law of treaties, the centuries-old tradition of international law, and a number of acts of derivative law.[29] It is also impossible not to mention the principle of peaceful settlement of disputes and the principle of refraining from the use of force and the threat of its use, its natural consequence. From the perspective of the aggression of the Russian Federation and the war waged on the territory of Ukraine, the above-mentioned principles of international cooperation implemented within the United Nations are of particular importance.

The above-mentioned principles of international cooperation, expressed in the UN Charter, are contained in the provisions of the North Atlantic Treaty, which in Art. 1 states that

> "The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."[30]

In order to achieve its goals, the states-parties have established the principle of self-help and mutual aid as principles of international cooperation. Pursuant to Art. 3: "In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack."[31] Detailed principles of cooperation are also included in the principle of consultation, expressed in Art. 4 of the North Atlantic Treaty, which states that "the Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."[32]

The issue of the principles of cooperation is presented extensively in the Statute of the Council of Europe which stipulate the fulfillment of its aims "by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal, and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms."[33]

29 The principle of *pacta sunt servanda* is based in the Vienna Convention on the Law of Treaties of 1969 (1155 UNTS 331) or the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nation of 1970.
30 Art. 1 of the North Atlantic Treaty.
31 Art. 3 of the North Atlantic Treaty.
32 Art. 4 of the North Atlantic Treaty.
33 Art. 1(b) of the Statute of the Council of Europe. For more on the support given to states by the Council of Europe to help them achieve common standards in specific fields, see Karski and Oręziak, 2022.

5. Attributes of an international organization determining effective international cooperation

International organizations, as instruments of international cooperation, are as a rule established by states in order to achieve specific goals in foreign policy. This is not an easy undertaking. The goals set are sometimes ambitious and their implementation difficult, sometimes even impossible. However, an international organization must be equipped with certain minimum attributes that will enable it to function in the international community and at the same time to take actions that have legal effects.[34]

The most important aspect is that international organizations operating in the contemporary international community are subjects of international law insofar as the states that create them under an international agreement provide them with attributes to undertake specific actions in the area of this law and international relations. The literature lists three such basic attributes: 1) *ius tractatum* (the right to conclude international agreements); 2) *ius legationis* (the right of passive and active legation), i.e., the right to receive and send diplomatic representatives; 3) *ius standi* (the right to bring international claims and the obligation to incur international liability).[35]

The same attributes are of course enjoyed by states in the sphere of international law. However, the scope of granting them to an international organization determines the powers of the bodies and, consequently, the effectiveness of actions. All these attributes comprise the issue of subjectivity in the light of international law. Of course, international organizations do not enjoy the same scope of subjectivity as states, which are the only original subjects of this right. As is emphasized in the literature,

> "the subjectivity of intergovernmental international organizations has been assigned by the member states and has a scope defined by them. The existence of an international organization depends on the will of the founding states. An international organization will be created if states decide that the organization is capable of being subject to certain rights and obligations, and that it has the ability to produce legal effects by its own action. The subjectivity of the organization is therefore derivative, not primary."[36]

In addition, a very important element in considering the effectiveness of international cooperation within international organizations concerns its legal capacity.[37] In this area, there are fundamental differences between primary and derivative subjects of international law, for

34 For more on this topic, see Sarooshi, 2007, pp. 54–64 and the literature quoted therein.
35 Kuźniak, Marcinko and Ingelevič-Citak, 2017, p. 12.
36 Ibid.
37 For a detailed discussion, see Portmann, 2013, p. 7.

> "the scope of an organization's legal capacity results from the provisions of its statute, from the goals set for the organization, and from its powers. The extent of an organization's ability to produce legal effects is not identical to that of a state. Individual organizations also have different scope of legal capacity. The legal capacity of international organizations is limited in relation to that of the state, and this limitation varies in scope for individual organizations. In conclusion, it should be stated that the subjectivity of international organizations derives from the will of the states that created them, and therefore has a derivative character, and that it is limited by the function that, according to the statute, a given organization is to perform."[38]

Sometimes the provisions of the agreement establishing a given organization contain provisions on legal personality and legal capacity in the area of internal law of the states. Art. 104 of the UN Charter can be quoted as an example, under which "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."[39]

However, the most important attribute of an international organization, which determines effective international cooperation, is the right to adopt legislation by the bodies of such organization. If the organization has such powers, achieving the goals for which it was established becomes realistic. Although the resolutions of the bodies of international organizations are not listed in the Statute of the International Court of Justice as the basis for adjudication from which the doctrine derives the catalogue of sources of international law, they are considered as such if they meet certain conditions. The literature lists three of them: 1) it is a resolution of an intergovernmental (not non-governmental) organization; 2) it is a binding resolution (and therefore not an appeal or a resolution whose value is embedded mainly in the moral and political sphere, and legally it constitutes at most a de lege ferenda postulate); 3) it is a resolution of a normative / law-making nature (i.e., one that creates and not only applies legal norms; by way of illustration, a resolution of an intergovernmental organization on admitting a new member to the organization, despite the fact that it is a resolution adopted by a government organization and is binding, is not a source of law as it does not create new legal norms, but is only an application of the statute).[40]

This system has developed most extensively relatively in the European Union, where regulations, directives, and decisions have the status of supranational law. In classical international organizations, the resolutions of the organs are not always directly enforceable.[41] Sometimes states retain the right to withdraw from applying these resolutions. However, most of the adopted resolutions concern the standardization of technical issues and their content is negotiated so that, as a rule, it does not raise any

38 Kuźniak, Marcinko and Ingelevič-Citak, 2017, p. 12.
39 Art. 104 of the Charter of the UN.
40 Kuźniak, Marcinko and Ingelevič-Citak, 2017, p. 24.
41 Danilenko, 1993, pp. 190–192.

objections in the implementation process. Effective international cooperation actually depends on the adoption and implementation of such resolutions in such areas as, for example, technical cooperation in the field of international transport or civil flights.

6. The bodies of international cooperation within the scope of international organizations

International cooperation could not be implemented without the bodies of international organizations. By concluding an international agreement establishing an international organization, the states-parties create bodies that are empowered to undertake specific tasks. By exercising these powers, the founding members aim to achieve the goal of an international organization through these bodies. The issue of international cooperation pertains both to relations between states and to the relationships between the bodies created. Permanent bodies of international cooperation within the framework of an international organization must cooperate both with the founding states and internally within the framework of their powers, while implementing the purpose for which the organization was created.

The bodies of international organizations have diverse structures. Usually there is a group of "principal" organs, as defined in the founding treaty, and subsidiary organs that may be constituted by the principal organs as required, through derivative legal sources. By way of example, we can mention the principal organs of the United Nations, including the Security Council, responsible for the maintenance of international peace and security, which, in accordance with the UN Charter, may establish subsidiary organs. Sometimes their existence is explicitly provided for in the Charter, such as the Military Staff Committee, whose role is "to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament."[42] The Security Council has also created other subsidiary bodies, including *ad hoc* judicial bodies, i.e., the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.[43] A number of examples can be found in other international organizations. In the European Union, the General Court (today the Court) was created as an auxiliary body of the Court of Justice (today the CJEU). In other international organizations, auxiliary bodies are also established, often of an advisory, expert, and monitoring nature.

42 Art. 47(1) of the Charter of the UN.

43 Although the establishment of these judicial bodies was related to a number of controversies as to whether the Charter gives the Security Council the right to establish judicial bodies at all, nevertheless these courts were created by resolutions and effectively functioned as auxiliary bodies of the UN Security Council, and the international community recognized them as bodies responsible for supporting the process of maintaining peace and international security. See Karski, 1993, pp. 74–75.

As a rule, such bodies are equipped with powers to work toward the achievement of the goal of such international cooperation. The exercise of these powers and their performance in good faith is usually based on internal regulations, and the agreement establishing an international organization usually contains fairly general provisions regarding the powers of specific bodies. There are many classifications of the bodies of international organizations in the literature. One of them is

> "the division made according to the function criterion:
> — supreme bodies (making the most important decisions);
> — management bodies (with executive powers);
> — administrative bodies (various secretariats[44]);
> — audit bodies (courts of auditors, audit committees);
> — bodies for the peaceful settlement of disputes (permanent courts, arbitration tribunals, conciliation commissions, mediation bodies);
> — consultative bodies (facilitating the cooperation of the above-mentioned bodies);
> — expert advisory bodies."[45]

Another division could be made based on the

> "legal nature of the members:
> — bodies associating representatives of states represented by their heads, heads of government or representatives of individual ministries;
> — bodies associating international officials;
> — bodies associating representatives of the economic and social communities of the Member States;
> — parliamentary bodies, associating members of parliament elected directly by the people of the Member States or representatives of parliamentarians of the Member States, delegated by national parliaments;
> — mixed bodies, associating different categories of the above-mentioned individuals."[46].

The authors distinguish the following bodies according to the criterion of the number of their members[47]: plenary bodies, i.e., associating the representatives of all member states; bodies with limited composition such as e.g., UN Security Council.

The following bodies are defined based on the criterion of their significance: principal bodies; subsidiary bodies.[48]

44 See Zacklin, 2012, pp. 2–6.
45 Kuźniak, Marcinko and Ingelevič-Citak, 2017, p. 16.
46 Ibid.
47 Ibid.
48 Ibid.

The task of permanent bodies of international organizations and employees employed by way of competitions is to maintain continuous cooperation between countries and ensure its proper level, nature, and achievement of the purpose for which it was established. Thus, such bodies are an inherent element of the stability of international cooperation carried out within an international organization. They belong to an institutional system and an international structure that, as a team of administrative officers from the Member States, ensures the continuity of operations and continuing dialogue between the Member States at the various levels of their bodies.

7. Conclusion

As international cooperation within an international organization needs to be formalized, the states conclude international agreements to define the legal foundations of this cooperation and the rules governing it. Permanent bodies distinguish an international organization from other cooperation instruments, such as diplomacy. The latter has the character of bilateral cooperation, while within an international organization cooperation is multilateral. Therefore, it allows for dialogue between a greater number of entities participating in international relations. In the practice of international organizations, cooperation is a permanent dialogue between the states participating in a given organization. Another feature of cooperation is a certain permanent agenda of sessions held by collective bodies, marking the next stages of international dialogue. Cooperation procedures can, of course, cause some difficulty. However, these are mostly carried out on the basis of acts of internal organs, which can be modified much more easily than international agreements and according to the needs of effectively implemented cooperation.

States cooperate in the area of international relations, implementing strictly defined goals of cooperation. The historical development of such institutions can indicate the integration of states due to common goals that can be more easily achieved when states cooperate with each other. Obviously, an international organization is a certain legal and structural form of international cooperation. This form facilitates the stabilization of that cooperation, which in turn facilitates the achievement of its goals through joint actions.

There are many international organizations globally, which constitute the legal forms of international cooperation, ranging from universal organizations, such as the United Nations and its specialized organizations, to a number of regional organizations centered around a group of countries, geographically and culturally operating in a given region. Naturally, the goals of cooperation in these two cases will be different, just as the principles or axiology on which the countries of the region are based will also be different. At the same time, it should be stressed that the goals of international cooperation are evolving. Changes take place depending on the needs of the changing reality.[49] Nevertheless, the need for international cooperation has remained unchanged for centuries.

49 See Boasson and Nurock, 1973, pp. 20–31.

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| Chapter 6 |

Protection of Human Rights—The Role of the ECHR

Péter PACZOLAY

ABSTRACT

In present-day Europe a multilevel protection of human rights has developed. Freedoms in Europe are protected at the national level, the Council of Europe level, and the European Union level. National courts, especially constitutional courts, defend rights based primarily on the ground of the national constitutions, but also by the international legal instruments. The Court of Justice of the European Union protects the rights embodied in the Charter. The European Court of Human Rights protects the freedoms and rights enshrined in the European Convention of Human Rights.

The chapter analyses only the developments of jurisprudence of the Strasbourg Court, and focuses on three distinct subjects: the protection of ethnic minorities, the right to education, and the human rights challenges of the digital era.

The Court considers the Convention a "living instrument," and by the way of its "innovative interpretation" can protect human rights even outside the area that the Convention's text strictly covers. Through this flexible approach, the Court is able accommodate human rights protection to changing political and social environments. Nevertheless, as the first subject indicates, the efforts are not always successful. In the area of the protection of ethnic and national minorities the result cannot be called a success story, and the case-law is unfortunately contingent. Contrariwise, the subject of education rights provides an example of how the Court could enlarge the applicability of a right previously interpreted very narrowly and elevate the standard of assessment higher than its previous case-law.

The Court could also give adequate answers to the challenges of the digital era, extending human rights jurisprudence to the online world. The approach of the Court is illustrated in connection with two fundamental rights protected by the Convention: first, the Internet and freedom of expression; second, data-protection and retention issues relevant for the Internet in the context of the right to privacy.

KEYWORDS

European Court of Human Rights, minority rights, right to education, internet

1. Introduction: The protection of human rights in the era of transitional justice

This article first reviews for the reader the difficulties of the transition from the Communist regime to a democratic political system based on rule of law. The aim of the transition was not only to introduce human rights into the constitutions but also to provide effective enforcement mechanisms for the protection of those rights.

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After shortly addressing these enforcement and guarantee mechanisms, I present the developments in the jurisprudence of the European Court of Human Rights in three specific fields, namely the protection of ethnic minorities, the right to education, and the challenges of the digital era.

After World War Two, in 1948 the United Nation Universal Declaration of Human Rights opened a new era in the history of protection of human rights. The Declaration codified the universal character of human rights and called for their protection. These objectives were realized by the UN Covenants on civil and political rights, and on economic, social, and cultural rights, respectively.

International treaties protecting freedoms and human rights were adopted also at regional levels, in Europe by means of the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 (hereinafter "the Convention").

The protection of human rights has a special historical importance in Central and Eastern Europe. Without digging deeper into the history of this area, it is enough to recall to the dramatic decades in the second half of the 20th century spent under Communist rule. Therefore, the present state of the art of human rights in these countries (I am referring, as in this volume in general, to Croatia, the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia) has to be evaluated and understood in light of the difficulties of transitional justice.

First of all, former Communist countries had to provide constitutional guarantees for human rights and introduce the judicial enforcement of those rights after decades when no protection of basic rights existed. Rights in the communist-era constitutions tended to be unenforceable pledges.[1] Although at the beginning the expectations were that these countries would simply adopt international human rights standards and apply them quite automatically to their legal system, the reality has become much more complex. Even with the accession of these States to the Council of Europe and to the European Union, the concept of sovereignty has remained strong, and in some countries the idea of "constitutional identity" has gained popularity. This controversial process cannot be depicted simply as "democratic backsliding" or an "illiberal turn"; one should see the difficult search for balance between sovereign and European values.

In present-day Europe a multilevel protection of human rights has developed. Freedoms in Europe are protected at the national level, the Council of Europe level, and the European Union level. National courts, especially constitutional courts, defend rights based primarily on the ground of the national constitutions, but also by international legal instruments. The Court of Justice of the European Union protects the rights embodied in the Charter. The European Court of Human Rights (hereinafter the Court) protects the freedoms and rights enshrined in the Convention. Although formally the multilevel protection multiplies the guarantees for remedy violations of human rights, this complexity might also create difficulties.

The European Court of Human Rights is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political

1 See Osiatynski, 1994, p. 112.

rights set out in the Convention. Since 1998 it is a full-time court and individuals can apply to it directly. The Court's judgments are binding on the member States. The Court is based in Strasbourg.

2. The concept of identity in the case law of the European Court of Human Rights

Identity as a self-identity is a common concept in the social sciences. Although much less common in law and jurisprudence, a specific use has recently emerged, and in the meantime the concept of constitutional identity has become popular, with the most significant area of application and interpretation being European Union law.

Unlike EU law and the Treaty, the European Convention on Human Rights does not contain the concept of identity, nor can the concept of constitutional identity arise in the context of the legal interpretation of the Convention. However, the limited application of the concept of identity can be found in the case law of the European Court of Human Rights, but this differs significantly from the dialogue on constitutional identity within EU law. The essence of the fundamental difference is that the debate over constitutional identity appears in the context of individual states and supranational integration, while in matters related to the interpretation of the Convention, it arises from the question of the identity of collectives within States.

The first-level concept of identity that emerges in the interpretation of the Convention refers to individual self-identity and the physical and psychological integrity related to privacy, and is outside our scope today.

The second level of interpretation and application is collective identity, which can refer to national, ethnic, linguistic, religious, or cultural group identity, or a combination of these.

2.1. National and ethnic identity

In the case law of the Court, collective identity is linked to minority rights. Unlike the International Covenant on Civil and Political Rights, the European Convention provides for the protection of the rights of minorities. The notion of "belonging to a national minority" appears in Article 14, which prohibits discrimination (and in Article 1 of Additional Protocol No. 12, which states the general prohibition of discrimination), as part of the usual indicative list, but the Court linked minority rights to Article 8 (private and family life), Article 10 (freedom of expression), and Article 11 (freedom of association) as well. Even if the Court's jurisprudence is not extensive regarding the issue of identity, in several cases the Court addressed the problem of different aspects of identity.

It is important to mention that among the legal documents adopted by the Council of Europe, the Framework Convention for the Protection of National Minorities (Framework Convention) is Europe's most comprehensive treaty protecting the rights of persons belonging to national minorities. It is the first legally binding multilateral

instrument devoted to the protection of national minorities worldwide, and its implementation is monitored by the only international committee dedicated exclusively to minority rights: the Advisory Committee. It was adopted on November 10, 1994, by the Committee of Ministers, and it entered into force on February 1, 1998. It is now in force in 39 states.

The European Charter for Regional or Minority Languages is the European convention for the protection and promotion of languages used by traditional minorities. Regional or minority languages are part of Europe's cultural heritage and their protection and promotion contribute to the building of a Europe based on democracy and cultural diversity. The Charter, drawn upon the basis of a text put forward by the Standing Conference of Local and Regional Authorities of Europe, was adopted as a convention on June 25, 1992, by the Committee of Ministers of the Council of Europe, and was opened for signature in Strasbourg on November 5, 1992. It entered into force on March 1, 1998.

As regards national-political identity, in the case of the *United Communist Party v. Turkey* the Court faced the problem of how to recognize and protect the identity of minorities in the context of the national identity of the respondent State. The United Communist Party of Turkey ("the *TBKP*"), the first applicant, was a political party that was dissolved by the Constitutional Court. According to the Constitutional Court the *TBKP* sought to promote separatism and the division of the Turkish nation by drawing a distinction in its constitution and programme between the Kurdish and Turkish nations. The identity of the Kurdish minority has been at odds with the Turkish national identity at the state level, and such a political challenge to national identity is defended by the Court. However, the Court avoided addressing the identity problem, stating that "The Court notes that although the *TBKP* refers in its programme to the Kurdish 'people' and 'nation' and Kurdish 'citizens,' it neither describes them as a 'minority' nor makes any claim—other than for recognition of their existence—for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population."[2] With regard to the right to self-determination, the *TBKP* does no more in its program than deplore the fact that because of the use of violence, it was not "exercised jointly, but separately and unilaterally," adding that "the remedy for this problem is political" and that if the oppression of the Kurdish people and discrimination against them are to end, Turks and Kurds must unite. The Court found a violation of Article 11 of the Convention.

In *Sidiropoulos and Others v. Greece*, the recognition of Macedonian minority culture was at stake,[3] in *Gorzelik v. Poland* the recognition of the Silesian national minority.[4] In other cases, the use of the adjectives "Turkish," "Kurdish," and "Macedonian" has become a source of controversy.

2 *United Communist Party of Turkey and Others v. Turkey*, January 30, 1998, § 56, Reports of Judgments and Decisions 1998-I.
3 *Sidiropoulos and Others v. Greece*, July 10, 1998, Reports of Judgments and Decisions 1998-IV.
4 *Gorzelik and Others v. Poland* [GC], no. 44158/98, ECHR 2004-I.

The protection of the ethnic identity of the Roma minority was adjudicated by the Court in the case of *Chapman v. The United Kingdom*.[5] In this and other four similar cases applications were brought by applicants from five British gypsy families, as the judgment identifies them. Sally Chapman bought land in 1985 on which to station her caravan without obtaining prior planning permission. She was refused planning permission for her caravan, as well as permission to build a bungalow. It was acknowledged in the planning proceedings that there was no official site for gypsies in the area and the time for compliance with the enforcement order was for that reason extended. She was fined for failure to comply and left her land for eight months, returning due to an alleged lack of other alternatives and having spent the time being moved on from one illegal encampment to another. In all five cases, the Court considered that the applicants' occupation of their caravans was an integral part of their ethnic identity as gypsies and that the enforcement measures and planning decisions in each case interfered with the applicants' rights to respect for their private and family life. However, the Court found that the measures were "in accordance with the law" and pursued the legitimate aim of protecting the "rights of others" through preservation of the environment. As regards the necessity of the measures taken in pursuit of that legitimate aim, the Court considered that a wide margin of appreciation had to be accorded to the domestic authorities, who were far better placed to reach decisions concerning the planning considerations attaching to a particular site. In these cases, the Court found that the planning inspectors had identified strong environmental objections to the applicants' use of their land that outweighed the applicants' individual interests.

The Grand Chamber generally noted that there was a growing consensus among Member States to recognize the special needs of minorities and to take responsibility for the protection of their security, identity, and way of life (in particular the Framework Convention for the Protection of National Minorities), and not only to protect the interests of minorities but also to value cultural diversity for the community as a whole.[6] Thus, the Court imposed a positive obligation on the States to facilitate the preservation of the traditional Roma way of life. However, in the concrete case the Court did not find a violation.

The ethnic identity of the individual and its self-determination is an essential feature of his private life. In the case *Ciubotaru v. Moldova* the applicant claimed that there had been a violation of Article 8 of the Convention on account of the fact that when collecting and recording information concerning his identity the authorities had refused to register his Romanian ethnic identity and forced on him an ethnic identity (Moldavian) with which he did not identify. The applicant considered that the Moldovan ethnic identity had been created artificially by the Soviets and perpetuated by the new Moldovan authorities for political reasons. He felt humiliated as a result of being forced to assume an ethnic identity that was contrary to his philosophy and

5 *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I.
6 Ibid., § 93.

his inner belief about his true identity. The Court observed that Mr Ciubotaru's claim was based on more than his subjective perception of his own ethnicity. It is clear that he was able to provide objectively verifiable links with the Romanian ethnic group such as language, name, and empathy.[7] For the Court, the State's failure consisted in the inability for the applicant to have his claim to belong to a certain ethnic group examined in the light of the objectively verifiable evidence adduced in support of that claim. The Court therefore concluded that the authorities failed to comply with their positive obligation to secure to the applicant effective respect for his private life. There was accordingly a breach of Article 8 of the Convention.

Among the language rights in the broadest sense, minority language use may also be linked to the use of language in court proceedings (Article 6.3), and the arrested person must be informed in a language he or she understands (Article 5.2) and afforded the services of a free interpreter in criminal proceedings (Article 6.3.e). These rights are also connected to the protection of freedom of expression or to the educational rights (to be discussed below).

2.2. Religious identity under Article 9

Another important aspect of the subject matter is religious identity as formulated in Article 9 of the Convention.

In *Kokkinakis v. Greece* the Court pointed out the role of the Orthodox Church in the preservation of Greek culture and language (*mutatis mutandis* identity) and Hellenism:

> "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[8]

In the case of *Leyla Sahin v. Turkey*, the Court proceeded from the premise that freedom of religion is one of the most important elements in the identity and conception of life of believers.

> "This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion,"

7 *Ciubotaru v. Moldova*, no. 27138/04, § 58, April 27, 2010.
8 *Kokkinakis v. Greece*, 25 May 1993, §§ 14, 31, Series A no. 260-A1.

but no reference was made to identity in deciding and arguing the case.[9] The headscarf is part of their identity for believers and a political symbol for outsiders.[10]

The verdict in the famous and controversial *Lautsi v. Italy* case was widely criticized, saying the Court did not stand up for minorities or for the weak. The Government explained the presence of crucifixes in State-school classrooms as the result of Italy's historical development, a fact that gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition that they considered it important to perpetuate. The Court took the view

> "that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development."[11]

The cross was considered essentially a passive symbol that does not violate the neutrality of the state, while the headscarf is a powerful external symbol whose prohibition protects the neutrality of the state.

According to the evaluation of the literature, the Court has avoided defining the concept of identity, but has emphasized in its judgments that opinions, views, and statements on collective identity cannot be excluded from the democratic debate, nor can the formation of associations be prevented. Attempts by States to do so have been declared unconstitutional by the Court in its judgments, but it has followed this philosophy where, for some reason (for example, due to a failure to exhaust domestic remedies), it has not found a violation of the Convention, unlike the *Gorzelik* case, where the Polish authorities and courts rejected the claim for the registration of an association of Silesians. Accepting the argument of the Supreme Court, the Strasbourg Court stated that Silesians are an ethnic group not entitled to have the rights of a national minority. The Court acknowledged with nice words that associations formed for different purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity, or asserting a minority consciousness, are also important to the proper functioning of democracy. "For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts."[12] Nevertheless, even in this case the Court concluded that there was no violation, as the Grand Chamber found it hard to perceive any practical purpose for this paragraph in relation to the association's proposed activities other than to

9 *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 104, 114, ECHR 2005-XI.
10 Ibid., § 35.
11 *Lautsi and Others v. Italy* [GC], no. 30814/06, § 68, ECHR 2011 (extracts).
12 *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 92, ECHR 2004-I.

prepare the ground for enabling the association and its members to benefit from the electoral privileges accorded to "registered organisations of national minorities."

It can be noted that the Court could further refine and clarify its conception of identity, but given that it develops its case law on a case-by-case basis (vulgarly: it works from imported material), this development of law is contingent.

3. Education rights

3.1. The right to education in the ECHR—structure, meaning, scope, and interpretation

Article 2 of Protocol No. 1 of the European Convention on Human Rights (more precisely, the Convention for the Protection of Human Rights and Fundamental Freedoms—hereinafter ECHR) defines the right to education as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The inclusion of a right to education among the Convention rights in 1952 was accepted among controversies although the originally proposed formula ("Every person has a right to education") was rejected to avoid imposing positive obligations on the State. Even today, there is an unusually high number of reservations and declarations regarding this Article.[13]

The first sentence of the Article guarantees the right of individuals to education. The second sentence refers to the right of parents to have their children educated in conformity with their religious convictions. The second sentence is considered by the Court as an adjunct of the fundamental right to education.

> "The education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers is particular to the transmission of knowledge and to intellectual development."[14]

The Convention does not require the establishment of any special educational system, but merely guarantees in principle access to the means of education existing at a given time. In spite of its importance, the right to education is not an absolute right, but may

13 Jacobs, White and Ovey, 2014, p. 520.
14 *Campbell and Cosans v. UK*, 1982, February 25, 1982, § 33, Series A no. 48.

be subject to limitations. These are permitted by implication since the right of access "by its very nature calls for regulation by the State."[15]

The objective of the second sentence is the safeguarding of pluralism in education, an essential element in the preservation of the democratic society. It does not guarantee an absolute right to have children educated in accordance with their parents' religious or philosophical convictions.[16]

3.2. Principles

First, the Court underlines the necessity of an effective right of access to educational institutions. Although that Article cannot be interpreted as imposing a duty on the Contracting States to set up or subsidize particular educational establishments or institutions of higher education, any State doing so will be under an obligation to afford an effective right of access to them.[17] Put differently, access to educational institutions is an inherent part of the right to education.[18] The right of access obviously pertains only to existing educational institutions. It includes also the right to obtain official recognition of the studies completed. The beneficiary of education should be able to draw profit from the education received. Education in the majority of cases is not an end in itself.[19]

Second, the Convention does not impose a positive obligation on the States but demands the duty of regulation. The first sentence has a negative formulation not obliging the States to establish or subsidize education of any particular type.[20] However, the second sentence implies some positive obligations on the part of the State.

Third, the right to education is enjoyed at all school levels. The case law mainly refers to primary or elementary schooling, but the Court has extended the rights to secondary[21] and higher education as well,[22] stating that it would be hard to imagine that institutions of higher education do not come within the scope of the first sentence of Article 2 of Protocol No 1.

In the Court's view, the State's margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned. Thus, at the university level, which remains optional for many people, higher fees for aliens seem to be commonplace and can be considered fully justified, as clarified by the Court. The opposite holds for primary schooling, which provides basic literacy and numeracy—as well as integration into society—and is compulsory in most countries.[23]

15 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* [=*Belgian linguistic case* (No. 2)] (merits), 23 July 1968, § 2, Series A no. 6, 154; *Leyla Şahin v. Turkey,* no. 44774/98, § 5, 29 June 2004.
16 *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* December 7, 1976, § 50, Series A no. 23.
17 *Belgian linguistic case,* § 3-4; *Leyla Şahin v. Turkey,* no. 44774/98, § 137, June 29, 2004.
18 *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* December 7, 1976, § 50, Series A no. 23.; *Ponomaryovi v. Bulgaria,* no. 5335/05, § 49, ECHR 2011.
19 *Belgian linguistic case,* § 4.
20 *Valsamis v. Greece,* no. 21787/93, December 18, 1996.
21 *Cyprus v. Turkey* [GC], no. 25781/94, § 278, ECHR 2001-IV.
22 *Leyla Şahin v. Turkey,* no. 44774/98, § 137, June 29, 2004.
23 *Ponomaryovi v. Bulgaria,* no. 5335/05, § 49, ECHR 2011.

The fourth principle guarantees education in the national language. Since the Belgian linguistic case the right to be educated in the national language forms part of the general right to education. "The right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be."[24]

3.3. Restrictions

The text of the Convention does not contain expressed list of restrictions or exhaustive list of legitimate aims.

States enjoy a certain margin of appreciation in this sphere, but the Court must satisfy itself that the restrictions are foreseeable for those concerned and pursue a legitimate aim. Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[25]

Admission and selection criteria are compatible with the Convention and may be imposed, but the criteria must be foreseeable for those concerned.

School fees may have legitimate reasons, but not unreservedly so, and must not create a discriminatory system. In the *Ponomaryovi* case the applicants of Russian origin had enrolled in and attended secondary schools run by the Bulgarian State. They were later required, by reason of their nationality and of their immigration status, to pay school fees in order to pursue their secondary education. The applicants were thus clearly treated less favorably than others in a relevantly similar situation on account of their personal characteristics.[26]

3.4. Discrimination

The eventual different treatment in the implementation of Article 2 of Protocol 1 should not lead to the violation of the prohibition of discrimination enshrined in Article 14. The applied test is again legitimate aim plus proportionality. The case law of the Court has mainly focused in this respect on three main areas: first, on the discrimination based on nationality, as in the above-mentioned *Ponomaryovi v. Bulgaria* case requiring free access to education as "effective access."

Second, the Court faced the problem of the educational discrimination based on ethnic origin. In particular, there have been numerous cases related to discrimination against the Roma community.[27]

In the case *Horváth and Kiss v Hungary* the applicants, Roma children with mild mental disabilities, were placed in schools for children with mental disabilities where

24 *Belgian linguistic case,* § 3. In the cases *Cyprus v. Turkey* [GC] and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts) the Court reiterated the right to receive education in the national language.

25 *Leyla Şahin v. Turkey,* no. 44774/98, § 154, June 29, 2004.

26 *Ponomaryovi v. Bulgaria*, no. 5335/05, § 49–50, ECHR 2011.

27 *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV; *Oršuš and Others v. Croatia* [GC], no. 15766/03, ECHR 2010.

a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a consequence, they received an education that did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools. The education in the view of the Court should help them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Thus, the State is obliged to implement positive measures against segregation.[28]

Third, recently the specific concern of the Court has regarded discrimination against persons with disabilities. The development of the Court's case-law in this regard is worth for a closer look.

3.5. Substantive equality of pupils with disabilities

The former European Commission of Human Rights (the Commission, which functioned until 1998) interpreted the scope of the States' obligation to provide specific arrangements and solutions for disabled persons quite narrowly. A wide measure of discretion had to be left to the appropriate authorities regarding how to make the best possible use of the resources available to them in the interests of disabled children.

In the restrictive practice of the Commission, the second sentence of Article 2 of Protocol No. 1 did not require that a child suffering from a severe mental handicap should be admitted to an ordinary private school rather than placed in a special school for disabled children.[29] Similarly, it did not require the placing of a child with serious hearing impairment in a regular school.[30] The Court followed a similar interpretation. The use of public funds and resources also led to the conclusion that the failure to install an elevator at a primary school for the benefit of a pupil suffering from muscular dystrophy did not entail a violation.[31] In the same vein, the refusal of a single school to admit a disabled child could not be regarded as a breach of the Convention.[32] In the case of *Şanlısoy v. Turkey*,[33] the applicant had complained of a discriminatory breach of his right to education on account of his autism. After examining the facts of the case and the minor's situation, the Court found that there had not been a systemic denial of the applicant's right to education on account of his autism or a failure by the State to fulfill its obligations under Article 2 of Protocol No. 1 taken together with Article 14 of the Convention. It thus dismissed the application. Applications have been aimed at the accommodation in special schools as well. In *Simpson v. UK* the local education authority considered adequate the education of a child in a local large comprehensive school, while the parent wished the dyslexic child to attend a special

28 *Horváth and Kiss v. Hungary*, no. 11146/11, § 127, January 29, 2013.
29 *Graeme v. the United Kingdom* (Commission decision), no. 13887/88, February 5, 1990.
30 *Klerks v. the Netherlands* (Commission decision), no. 25212/94, July 14, 1995.
31 *McIntyre v. the United Kingdom* (Commission decision), no. 29046/95, October 21, 1998.
32 *Kalkanli v. Turkey* (dec.), no. 2600/04, January 13, 2009.
33 *Şanlısoy v. Turkey* (dec.), no. 77023/12, § 60, November 8, 2016.

school. The Commission concluded that it was not its task to assess the standard of the special facilities provided.[34]

However, the Court has gradually developed an approach more in favor of the vulnerable groups through the adoption of two related concepts: inclusive education and reasonable accommodation. Inclusive education brings all children together in the same classrooms, in the same schools. It opens real learning opportunities for groups who have traditionally been excluded, like children with disabilities or speakers of minority languages. A reasonable accommodation is an adjustment made to accommodate or make the system for individuals of a proven need fair. The term was introduced by the Convention on the Rights of Persons with Disabilities (CRPD—adopted by the United Nations on December 13, 2006, and entered into force on May 3, 2008) The refusal to make accommodation results in discrimination. The CRPD defines a "reasonable accommodation" as

> "... necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

In the case of *Çam v. Turkey*, the National Music Academy refused to enroll a blind person even though she had passed the examination. The Academy had not even considered special accommodations to meet her special needs. The Court considered that discrimination on grounds of disability also covers refusal to make *reasonable accommodation*. The Court underlined that it must have regard to the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved. The Court noted the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education, which are enshrined in many international texts. It further emphasized that those international instruments have recognized *inclusive education* as the most appropriate means of guaranteeing the fundamental principles.[35]

The Court observed that the refusal to enroll the applicant in the National Music Academy was based solely on the fact that she was blind and that the domestic authorities had at no stage considered the possibility that reasonable accommodation might have enabled her to be educated in that establishment. The Court considered that the applicant was denied, without any objective and reasonable justification, an opportunity to study in the National Music Academy solely on account of her visual disability. It therefore concluded that there had been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1. The Court was aware that every child has his or her specific educational needs, and this applies particularly

34 *Simpson v. the United Kingdom* (Commission decision), no. 14688/89, December 4, 1989.
35 *Çam v. Turkey*, no. 51500/08, February 23, 2016 (§ 64).

to children with disabilities. In the educational sphere, the Court acknowledges that reasonable accommodation may take a variety of forms, whether physical or non-physical, educational or organizational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation, or appropriate facilities. Finally, the Court emphasized that it is not its task to define the resources to be implemented in order to meet the educational needs of children with disabilities. The national authorities, by reason of their direct and continuous contact with the vital forces of their countries, are in principle better placed than an international court to evaluate local needs and conditions in this respect.

In the case of *Enver Şahin v. Turkey* while the applicant was a first-year mechanics student in a technical faculty of a University, he was seriously injured in an accident that left the lower limbs of his legs paralyzed. He asked the faculty to adapt the university premises in order to enable him to resume his studies. The judgment reiterated that education is geared to promoting equal opportunities for all, including persons with disabilities. Inclusive education indubitably forms part of the States' international responsibility in this sphere.[36]

The judgment also addressed the other concept, that of the respect for the "reasonable accommodation—necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case"—which persons with disabilities are entitled to expect in order to secure their "enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 CRPD). The Court concluded that the national authorities, including in particular the academic and judicial authorities, had not reacted with the requisite diligence to ensure that the applicant could continue to exercise his right to education on an equal footing with other students and, consequently, to strike a fair balance between the competing interests at stake, and that this resulted in the violation of the Convention.[37]

After these developments in the related jurisprudence of the Court, its practice still leaves open certain questions for the standards of reasonable accommodations. Two cases on inclusive education decided by decisions at the Committee level after cautious balancing rejected the applicants' claims for violation.

Thus, there had not been a systemic denial of the applicant's right to education in *Bettina Dupin v. France*[38] when an autistic child who had been denied admission to a mainstream school was directed to a specialized institution. In my view the Court did not turn away from its previous case-law, having taken into due consideration the situation of the child (the applicant's son) and the assessment of the domestic authorities, courts, and experts, who found it more appropriate in this autistic child's case to enroll him in a special medico-educational institute.

36 *Enver Şahin v. Turkey,* no. 23065/12, § 55, January 30, 2018.
37 *Enver Şahin v. Turkey,* no. 23065/12, § 68, January 30, 2018.
38 *Dupin v. France,* decision, no. 2282/17, December 18, 2018.

In the case of *Stoian v. Romania*[39] the Court took into consideration that the applicant was never completely deprived of education, and she continued her studies despite the lack of personal assistance, and that she advanced through the school curriculum. When evaluating whether the state authorities complied with their duty to provide reasonable accommodation, the Court took into consideration that the authorities made efforts to find and retain a suitable personal assistant for him. The authorities—in compliance with the international standards in the field, which recommend inclusive education for children with disabilities—recommended that the child attend mainstream schools throughout his education. When the parents alerted them to the lack of accessibility and of reasonable accommodation in school, the domestic courts ordered the local authorities to take concrete measures in the first applicant's favor. The courts also gave interim orders compelling the authorities to make immediate accommodation for the first applicant in school. Thus, the Court rightly observed that the domestic courts reacted quickly and adequately to changes in the first applicant's situation and renewed their instructions to the administrative authorities whenever they found that the measures taken by those authorities were insufficient. The Court took note of the difficulties encountered by the State in finding a suitable personal assistant for the first applicant and could not ignore the fact that some of these difficulties were created by the parents themselves. In the understanding of the Court, the authorities did not turn a blind eye to the first applicant's needs, but allocated resources to the schools attended by him in order to help accommodate his special requirements. Therefore, the Court, in accordance with its case law, concluded that the domestic authorities complied with their obligation to provide reasonable accommodation "not imposing a disproportionate or undue burden" and, within their margin of appreciation, to allocate resources in order to meet the educational needs of children with disabilities, and there was no violation of Article 8 of the Convention or of Article 2 of Protocol No. 1 to the Convention taken alone or together with 14 of the Convention.

Recently, in the *G.L. v. Italy* Chamber judgment, the Court concluded that the inability of an autistic child to receive the specialized learning support to which she was entitled by law during her first two years of primary school, had entailed a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1.[40] The national authorities had not determined the child's real needs or the possible solutions to allow her to attend primary school in conditions that were equivalent as far as possible to those enjoyed by other pupils, without imposing a disproportionate or undue burden on the administration. However, in this case based on very similar facts that in *Stoian*, the Court raised the threshold. The case concerned a girl with non-verbal autism who had a special assistant during kindergarten, but this was discontinued when she started elementary school. As the girl according to Italian law had a right to special assistance, the parents initiated court proceedings. Their claim was

39 *Stoian v. Romania,* no. 289/14, June 25, 2019.
40 *G.L. v. Italy,* no. 59751/15, September 10, 2020.

rejected by the domestic administrative courts, mainly based on the argument that the local authorities had taken the necessary steps but that there had been a reduction of resources allocated to the region. The justification of the lack of resources caused by budgetary restrictions was not accepted by the Strasbourg Court. The Court went even further: it underlined that limitations caused by budgetary restrictions should impact the educational offer for both non-disabled and disabled pupils in an equivalent way. The concurring opinion of Judge Wojtyczek rightly pointed out that the Court is not consistent in its interpretation of the duty of reasonable accommodation. In any case, *G.L. v. Italy* elevated the standard of assessment higher than in its previous case law.

4. Fundamental Rights in the Age of Digitalization

4.1 Digitalization and human rights: Advantages and risks

Without doubt, the most important challenge of the 21st century is cyberspace and the growing role of digital technologies. Politicians, experts, lawyers, human rights advocates, and civil society organizations soon grasped the impact of the digital era on human rights. Without entering into the details of the respective debate, let me give only some examples of the possible advantages and negative consequences.

On the positive side, one can mention the facilitation of transparency mechanisms (among others against corruption), the digitalization of communication tools that opens up new perspectives for freedom of speech and opportunities for active and interactive communication and to share information with incomparably wider audiences than ever before, extended political participation, wider access to knowledge in education—these all are benefits attributable above all to the Internet.

On the other hand, digital technology exposes human rights to unprecedented risks such as filtering content or blocking access to new technologies and their use for censorship and surveillance. The existence of new technologies in itself creates new inequalities like the "digital divide" (the gap between people with effective access to digital technologies, and those with limited or no access—"IT analphabetism") and might lead to extreme concentrations of power.

The main problem, in my view, that the digital era creates for human rights stems from the following factors. It is without question that the speed of technological progress is by far faster than the legislative response to it. Historically, the first international document reflecting the potential impact of new technologies on fundamental rights was the UN General Assembly Resolution 2450 (XXIII) "Human rights and scientific and technological developments," adopted on December 19, 1968, which initiated interdisciplinary studies to define respective new standards of protection of human rights. The resolution laid down the fundamental features of the approach to the ambivalent relation of technological progress and human rights.

The second problem is that technology, digitalization, and cyberspace go hand in hand with globalization. Technologies cannot be limited to space, to the territory of a State, or to the control of a government, as they go beyond the jurisdictions of

these spaces. Regulatory regimes have shifted from States and treaties between States to new global and transnational institutions and unclear forms and types of soft governance.

The third factor is the continuously growing variety of the fields, disciplines, and topics affected by the dynamic rise of new technologies. If we look just at the case law of the European Court of Human Rights related to new technologies, we see decisions on the following: electronic data, e-mail, Global Positioning System, Internet, mobile telephone applications, musical copyright, radio communications, satellite dish, telecommunications, the use of hidden cameras, video surveillance, the "right to be forgotten," etc. In any case, all legal fields are concerned with solving the legal problems raised by new technologies in criminal law, private law, intellectual property law, and administrative law.

Within this general, wide-ranging context I limit myself to the presentation of the case-law of the ECHR in two fields:

1. The Internet and freedom of expression (Article 10),
2. Data protection and the Internet (Article 8).

4.2 Internet and freedom of expression

Freedom of expression is guaranteed by Article 10 of the Convention.[41] Internet publications fall within the scope of Article 10 and its general principles, but the particular form of that medium has led the Strasbourg Court to rule on certain particular restrictions that have been imposed on freedom of expression on the Internet. Freedom of expression, as protected by Article 10 § 1, constitutes for the Court an essential basis of a democratic society. Limitations on that freedom foreseen in Article 10 § 2 are interpreted strictly. Interference by States in the exercise of that freedom is possible, provided it is "*prescribed by law*" and "*necessary in a democratic society*,"; that is to say, according to the Court's case law, it must correspond to a "*pressing social need*," be *proportionate to the legitimate aim* pursued within the meaning of the second paragraph of Article 10, and justified by judicial decisions that give relevant and sufficient reasoning.

In the judgment *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*,[42] the Court for the first time acknowledged that Article 10 of the Convention had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet. In that case the applicants had been ordered to pay damages for republishing an anonymous text, which was objectively defamatory, that they had downloaded from the Internet (accompanying it with an editorial indicating the source and distancing themselves from the text). They had also been ordered to publish a retraction and an apology—even though the latter was not provided for by law. The national authorities

41 For a comprehensive analysis of the Court's related jurisprudence, see European Court of Human Rights, 2015. See also European Court of Human Rights, 2021, pp. 99–106.
42 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, May 5, 2011.

must thus be careful to respect the duty of journalists to disseminate information on questions of general interest, even if they have recourse to a degree of exaggeration or provocation. However, the protection of journalists is subject to the proviso that they act in good faith and provide reliable and precise information in accordance with *responsible journalism*.[43]

The Court has applied these general principles to cases concerning *online publication*: "the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally."[44] It is for the domestic courts—which are better placed than the Court to appreciate all the facts and evaluate the impact of the statements made—to weigh all the interests in issue. A proper balance must be struck between the competing interests and there must be no arbitrariness in the decisions of the domestic courts. That was the Court's view in a case brought by an association whose aim was to fight corruption in public administration. The Court set out the following principle, applicable in all circumstances: "The distortion of the truth, in bad faith, may sometimes overstep the limits of acceptable criticism: a true statement may be accompanied by additional remarks, value judgments, suppositions, even insinuations that could give the public the wrong picture."[45] In this case the militant association had published a press release on its website relating to light heating oils and a case of massive tax evasion that had received widespread media attention. The press release took the form of a summons addressed to an MP and Vice-President of the Chamber of Deputies, who subsequently became Interior Minister and who was invited to clarify his relationship with certain people. The association complained about the damages it had been ordered to pay. The courts had punished it for having published information about the MP that was inaccurate and distorted, and therefore misleading. The Court found no violation of Article 10.

Delfi AS v. Estonia was the first case in which the Court had been called upon to examine a complaint concerning the liability of a company running an Internet news portal because of comments posted on the portal by its users. The portal provided a platform, run on commercial lines, for user-generated comments on previously published content. In such cases some users—whether identified or anonymous—can post clearly unlawful comments that infringe the personality rights of others. The Court held that the commercial operator of an Internet news portal may be held accountable for offensive comments posted on the portal by users. It is important to underline that the posted comments violated the personality rights of others and constituted hate speech.

The Grand Chamber then laid down four criteria for determining whether or not the finding that Delfi AS was liable for comments posted by third parties had violated its freedom of expression. It took into account:

1. the context and contents of the comments,

43 *Stoll v. Switzerland* [GC], no. 69698/01, § 104, ECHR 2007-V.
44 *Delfi AS v. Estonia* [GC] § 133.
45 *Růžový panter, o.s. v. the Czech Republic*, no. 20240/08, § 32, February 2, 2012.

2. the liability of the authors of the comments,
3. the measures taken by the applicants and the conduct of the aggrieved party,
4. the consequences for the aggrieved party and for the applicants.

After the examination of these criteria, in the end the Court found no violation of Article 10.

Clearly the publication of false information on the Internet is not protected by the Convention. However, the "duties and responsibilities" of journalists do not go so far as to require the removal from the public electronic archives of the press of all traces of past publications deemed defamatory in final court decisions. In the *Węgrzynowski and Smolczewski v. Poland* case, the Court found no violation of Article 8 in respect of a press article considered defamatory that had been kept in a newspaper's Internet archives. Indeed, the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention. Furthermore, it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications that have in the past been found defamatory by final judicial decisions.[46]

In the case of *Magyar Tartalomszolgáltatók Egyesülete and* Index.hu *Zrt v. Hungary*, the Court reiterated that although not publishers of comments in the traditional sense, Internet news portals had to assume duties and responsibilities. However, the Court considered that the Hungarian courts, when deciding on the notion of liability in the applicants' case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants' right to freedom of expression and the real estate websites' right to respect for its commercial reputation.[47]

The case of *Magyar Jeti Zrt v. Hungary* concerned a finding of the applicant company as liable for posting a hyperlink to an interview on YouTube that was later found to contain defamatory content. The applicant company complained that by finding it liable for posting the hyperlink on its website the domestic courts had unduly restricted its rights. The Court held that there had been a violation of Article 10 of the Convention. It underscored in particular the importance of hyperlinking for the smooth operation of the Internet and distinguished the use of hyperlinks from traditional publishing—hyperlinks directed people to available material rather than provided content. Updating its case law on these issues, the Court set down elements that need to be considered under Article 10 when looking at whether posting a hyperlink could lead to liability and said that an individual assessment was necessary in each case. Objective liability for using a hyperlink could undermine the flow of information on the Internet, dissuading article authors and publishers from using

46 *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, July 16, 2013.
47 *Magyar Tartalomszolgáltatók Egyesülete and* Index.hu *Zrt v. Hungary*, no. 22947/13, February 2, 2016.

such links if they could not control the information that they led to. That could have a chilling effect on freedom of expression on the Internet.[48]

It is clear from the wording of Article 10 of the Convention that its scope includes the right to receive and impart information. In addition to the substance of information, Article 10 also applies to the various forms and means by which it is transmitted and received, since any restriction imposed on the means necessarily interferes with the right to receive and impart. The Court broadened the scope of its interpretation and acknowledged that the "*freedom to receive information*" includes the right of access to information. Although the public has a right to receive information of general interest, Article 10 does not guarantee an absolute right of access to all official documents. However, once a national court has granted access to documents, the authorities cannot obstruct the execution of the court order. In the context of historical research, the Court has found that access to original documentary sources in State archives is an essential element of the exercise of Article 10 rights.[49]

Associations of civil society whose function is similar to the role of the press benefit equally from the strong protection of Article 10. The authorities cannot create obstacles and barriers to the gathering of information in matters of public importance, especially if they hold a monopoly of the information.[50]

4.3. Data protection and retention issues relevant for the Internet

The protection and retention of personal data clearly falls within the scope of private life as protected by Article 8 of the Convention. Article 8 encompasses a wide range of interests—namely private and family life, home and correspondence. Article 8 protects personal information that individuals can legitimately expect should not be published without their consent, such as their home address. Private life includes the privacy of communications, which covers the security and privacy of mail, telephone, e-mail, and other forms of communication; and informational privacy, including online information.

The Internet differs as an information tool from the printed press, and the risk it poses to the rights protected by Article 8 of the Convention is certainly higher.[51]

Among other challenges (data portability, the right to be forgotten), questions of surveillance are all the more relevant in the context of the Internet, as the evolution of Internet technology has included the rapid development of equipment and techniques to monitor online communications. In the case of *Big Brother Watch and Others v. the United Kingdom*,[52] the applicants complained about the interception of communications by intelligence services. The Grand Chamber found that when viewed as a whole, the regime, despite its safeguards, had not contained sufficient "end-to-end"

48 *Magyar Jeti Zrt v. Hungary,* no. 11257/16, December 4, 2018.
49 *Kenedi v. Hungary,* no. 31475/05, May 26, 2009.
50 *Társaság a Szabadságjogokért v. Hungary,* no. 37374/05, April 14, 2009.
51 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine,* no. 33014/05, § 63, May 5, 2011.
52 *Big Brother Watch and Others v. the United Kingdom,* nos. 58170/13 and 2 others, September 13, 2018.

safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse. In particular, the following fundamental deficiencies in the regime had been identified: the absence of independent authorization, the failure to include the categories of selectors in the application for a warrant, and the failure to subject selectors linked to an individual to prior internal authorization. Those weaknesses concerned not only the interception of the contents of communications but also the interception of related communications data. Therefore the Court concluded in violation of Article 8 (right to privacy).

As regards the complaint under freedom of expression, the Court observed that under the bulk interception regime, confidential journalist material could have been accessed by the intelligence services intentionally through the deliberate use of selectors or search terms connected to a journalist or news organization. As that situation would very likely result in the acquisition of significant amounts of confidential journalistic material, it could undermine the protection of sources to an even greater extent than an order to disclose a source; the interference would be commensurate with that occasioned by the search of a journalist's home or workplace. Therefore, before the intelligence services used selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, the selectors or search terms had to be authorized by a judge or other independent and impartial decision-making body vested with the power to determine whether they had been "justified by an overriding requirement in the public interest." The regime, which had interfered with their right to freedom of expression, did not comply with the above requirements, and there was a violation of Article 10.

The Court would not exclude that the monitoring of an employee's telephone, e-mail or Internet usage at the place of work may be considered "necessary in a democratic society" in certain situations in pursuit of a legitimate aim. However, the member States have an obligation to provide sufficiently clear and accessible rules governing the use of the Internet in the workplace. Monitoring of employees' computer use was the subject of the case *Bărbulescu v. Romania*.[53] This case concerned the decision of a private company to dismiss an employee—the applicant—after monitoring his electronic communications and accessing their contents. The applicant complained that his employer's decision was based on a breach of his privacy and that the domestic courts had failed to protect his right to respect for his private life and correspondence. The Grand Chamber held that there had been a violation of Article 8 of the Convention, finding that the Romanian authorities had not adequately protected the applicant's right to respect for his private life and correspondence. They had consequently failed to strike a fair balance between the interests at stake. In particular, the national courts had failed to determine whether the applicant had received prior notice from his employer of the possibility that his communications might be monitored; nor had they had regard either to the fact that he had not been

53 *Bărbulescu v. Romania* [GC], no. 61496/08, September 5, 2017.

informed of the nature or the extent of the monitoring, or the degree of intrusion into his private life and correspondence. In addition, the national courts had failed to determine, first, the specific reasons justifying the introduction of the monitoring measures; second, whether the employer could have used measures entailing less intrusion into the applicant's private life and correspondence; and third, whether the communications might have been accessed without his knowledge.

The Internet can also relay personal information that is not meant initially to be posted online. A simple press release, for example, issued in an individual case with no intention of its being posted on the Internet may well be picked up by third parties and discussed on the Web to the detriment of the individual's right to protection of private life.[54]

The case *Szabó and Vissy v. Hungary*[55] concerned Hungarian legislation on secret anti-terrorist surveillance introduced in 2011. The applicants complained in particular that they could potentially be subjected to unjustified and disproportionately intrusive measures within the Hungarian legal framework on secret surveillance for national security purposes. They notably alleged that this legal framework was prone to abuse, notably for want of judicial control.

In this case the Court held that there had been a violation of Article 8 of the Convention. It accepted that it was a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies, including massive monitoring of communications, in pre-empting impending incidents. However, the Court was not convinced that the legislation in question provided sufficient safeguards to avoid abuse. Notably, the scope of the measures could include virtually anyone in Hungary, with new technologies enabling the Government to intercept masses of data easily concerning even persons outside the original range of operation. Furthermore, the ordering of such measures was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary and without any effective remedial measures, let alone judicial ones, being in place.

As a conclusion we can say that the Court's jurisprudence is based on the principle expressed very clearly by the following motto: *"The same rights that people have offline must also be protected online."*[56]

5. Conclusion

The examination of three specific fields and how the protection of human rights is exercised by a special international human rights court affords us interesting lessons.

54 *P. and S. v. Poland*, (no. 57375/08, 30 October 2012). §§ 130–134.
55 *Szabó and Vissy v. Hungary*, no. 37138/14, January 12, 2016.
56 UN Human Rights Council, *Promotion and protection of all human rights…*, A/HRC/21/L.6 (September 21, 2012).

The first observation regards the method with which the Strasbourg Court tries to address problems and phenomena that are not regulated by the text of the Convention. The Court considers the Convention a "living instrument," and by the way of its "innovative interpretation" can protect human rights even outside the area that the Convention text's strictly covers. This seems successful in the case of the challenges developed by the digital era. The same cannot be said if we look at the highly important and sensitive issue of the protection of ethnic minorities, an area that seems to be a failure of the Convention system. This affects Central Europe, not exclusively but seriously, as an area where minority rights are a burning issue, while the subject of education rights provides an example of how the Court could enlarge the applicability of a right previously interpreted very narrowly.

Further, as I have already underlined, these are only three specific segments of the jurisprudence of a Court that does not stand alone in protecting human rights. The Court always emphasizes its "subsidiary" role. The subsidiarity principle requires the member States to be primarily responsible for providing effective remedies for human rights violations (Articles 1 and 13). The Strasbourg Court is secondary to the national courts in adjudicating violations of Convention rights. All possible domestic remedies have to be previously exhausted, and the Strasbourg Court is not a court of appeal from national courts. Moreover, the Court strongly emphasizes the "margin of appreciation" of the States when applying the Convention. Human rights have a universal character, but they are applied in the context of national legal systems.[57]

57 The principle of the "margin of appreciation" elaborated by the Court was inserted into the preamble of the Convention by Protocol 15, adopted in 2013 and entered into force in 2021: "... the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

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Chapter 7

International Law in the Service of Minority Protection—Hard Law, Soft Law, and a Little Practice

Elisabeth SÁNDOR-SZALAY

ABSTRACT

With the increase in the number of international organizations directly or indirectly involved in the protection of human rights on the European continent, a kind of competition has developed in recent decades in the field of fundamental rights: By widening the scope of the rights to be protected on the one hand, and by expanding the forms of legal remedies for their protection on the other, the organizations concerned are becoming increasingly integrated into the internal legal systems of the European states. This is why the shortcomings in the effective, systematic protection of minority rights in Europe are quite obvious. It is therefore a contradictory area of law, which must be examined in the light of the potential and the obvious weaknesses of the existing norms and monitoring systems of minority rights. There are tensions and contradictions at many points between the typically individualistic constitutional systems of our time and the concept of minority rights today. It is also clear, however, that it is precisely the highly developed fundamental rights systems that are expected to protect the rights of minorities. The history of the development of minority rights protection, which has its roots in the distant past, provides ample examples of mistakes to be avoided and of the details to which particular attention should be paid in the course of regulation.

KEYWORDS

minority rights, international law, European law

1. Introductory thoughts

In Europe, the history of minority protection[1] goes back centuries—much further than the concrete historical events that gave rise to international human rights law. The protection of minorities today, which is closely linked to the protection of human rights, is—despite obvious past failures—an upward process, the subject of increasingly effective legislation for the benefit of the groups of people to be protected.

1 The present study deals only with the protection of national and ethnic minorities, and does not address the protection of persons and communities who are in a different situation from the majority on the basis of other characteristics.

Sándor-Szalay, E. (2022) 'International Law in the Service of Minority Protection—Hard Law, Soft Law, and a Little Practice' in Raisz, A. (ed.) *International Law From a Central European Perspective.* Miskolc-Budapest: Central European Academic Publishing. pp. 157–179. https://doi.org/10.54171/2022.ar.ilfcec_8

Thus, for example, the establishment and failure of the inter-war minority protection system under the auspices of the League of Nations in the 20th century was both a success and a failure. However, effective minority protection has been limited and raises many unresolved issues, for example in the case of Roma communities.

The protection of minorities is generally qualified as more or less effective by the extent to which civil and political rights are guaranteed—a rating that is much more nuanced for some minority communities, such as the Roma, and certainly requires a multi-directional approach. The development of effective legal protection for such minorities is not made easier by the fact that in their case the usual forms of discrimination are compounded by poverty, social exclusion, and a lack of education and training. Easier international movement of persons and migration for various purposes and in various forms also raises new aspects of and difficulties in the legal framework for the protection of minorities. Effective minority rights protection, which is also in the interests of society as a whole, often becomes a serious economic issue in such a situation.

The community of European states defines itself as a community of law—a high level of fundamental rights protection has been established on the European continent over the last half century. Nevertheless, situations may arise that point to serious shortcomings in the legal protection of certain groups of people. In 2010, for example, there was widespread international outcry over the expulsion of Roma people and even entire Roma communities living in France—highlighting a number of issues of international, EU, and national legislation for the protection of minorities, or even the lack of regulation and uncertainty.

With the increase in the number of international organizations directly or indirectly involved in the protection of human rights on the European continent, a kind of competition for fundamental rights has developed in recent decades: By widening the scope of the rights to be protected on the one hand, and by expanding the forms of legal remedies for their protection on the other, the organizations concerned are becoming increasingly integrated into the internal legal systems of the European states. This is why the shortcomings in the effective, systematic protection of minority rights in Europe are quite obvious.

In order to gain a realistic picture of the current situation, it is worth reviewing the main stages in the development and evolution of minority rights.

Minority rights are considered by international law scholars an international norm with vague contours that are difficult to identify. Today, its content has become very broad and includes a large number of detailed legal provisions, yet its application reveals many shortcomings and raises many doubts. It is therefore a contradictory area of law, which needs to be examined in the light of the potential and the obvious weaknesses of the existing minority rights norms and systems. There are tensions and contradictions at many points between the typically individualistic constitutional systems of our time and the concept of minority rights today. It is also clear, however, that it is precisely the highly developed fundamental rights systems that are expected to protect the rights of minorities. The history of the development of minority rights

protection, which has its roots in the distant past, provides ample examples of mistakes to be avoided and of the details to which particular attention should be paid in the course of regulation.

2. The instrument of political-national assimilation: "Negative" minority protection in Europe before 1945

The international protection of minority rights is much older than the international protection of human rights, the systematic protection of which was first developed within the framework of the United Nations. However, in the early period of the development of minority rights, the first forms of human rights protection were already in place, mainly in the form of the fight against discrimination and the protection of religious minorities. Systematic protection of minorities first emerged at the beginning of the 20th century as a result of the peace negotiations following the Second World War.[2]

By the end of 1919, the Western powers had managed to persuade the last reluctant Central and Eastern European state to sign a treaty for the protection of minorities. This was the end of the negotiating process on the subject of minority protection, which had been on the agenda during the second phase of the Paris conference. The politicians attending the conference—bowing to external pressure—decided to oblige the Central and Eastern European states to sign treaties on the protection of minorities, which, once they entered into force, would be subject to permanent international guarantees and international monitoring. These politicians saw the treaties as a means of securing the territorial changes of 1918–1919 and of avoiding the threat to peace in Europe—and the danger that could upset European peace at any moment was obvious to all reasonable politicians: the partial application of the principle of national self-determination in Central and Eastern Europe. For those national minorities that were not allowed to exercise their right to self-determination after the First World War, minority rights guaranteed in treaty form could, as a kind of satisfaction, have been a way of reconciliation—in the view of the conference participants. The ideal end goal, according to the framers of the treaty system, would have been general political-national assimilation, and treaty guarantees would have made the road to that goal possible and bearable.

Already during the war, the need to compensate for the very partial exercise of the right of self-determination was raised. During the peace negotiations, the American delegation showed itself open to this question, and in May 1919, with its preparations and drafts, it formally launched the process that resulted in the establishment of a treaty system of minority protection. The fate of the Romanian Jews before the First World War was of decisive importance for the diplomatic actions and perseverance of

2 For a monographic examination of this process, see Szalayné Sándor, 2003, p. 247.

the American peace delegation. Moreover, the members of this delegation were those who took up the initiative of the Eastern European and American Jews. At the heart of these proposals was the guarantee of individual and collective minority rights and national autonomy. In the background was the acceptance of the fact that the states of Central and Eastern Europe are multi-national. However, the idea and model of the unitary nation-state still dominated the atmosphere at the Peace Conference, preventing the above concepts from gaining ground, which were eventually taken off the negotiating table. In the face of the concepts of autonomy, one of the most frequently mentioned arguments, which is peculiarly of a nation-state character in nature, was the danger of a "state within the state" situation. It was also the maintenance of the fiction of the nation-state that led the great powers that were participants at the Peace Conference—less so the American and more so the British and especially the French delegates—to decide to create an internationally guaranteed system of minority protection on the basis of proposals drawn up by Jewish organizations. At that time, the dominant politicians did not really have in mind a positive protection of minorities, but saw the potential of the treaties to pave the way for comprehensive national assimilation. This kind of logic could even be seen as a kind of "negative" minority protection. The prominent politicians of the Allies, through overt and covert references, gave voice to these expectations in 1919, and later as well, in the interpretation of certain terms and concepts.

As the texts of the minority treaty provisions were ready in May 1919, a new problem arose: The politicians of the great powers were confronted with the partly instinctive and partly conscious resistance of the states concerned, which sought to avert the assumption of treaty obligations to protect minorities as a restriction of their sovereignty and an interference in their internal affairs. All the Central and Eastern European states concerned expressed reservations and concerns about the draft treaties. Their opposition and rejection foreshadowed the reasons for the subsequent failure of the minority protection system: The peace conference-conference had created a unilateral system of a political nature without real sanctions.

The sources of the specific international minority law guaranteed by the League of Nations largely took the form of bilateral or multilateral international treaties and certain treaty provisions or declarations—these were elements of substantive minority law. Resolutions adopted by the League of Nations for the protection of minorities, for the purpose of monitoring and accounting for the international treaty obligations entered into, were the sources of formal minority law. The latter contained rules of procedure and provisions for the enforcement of treaties, and were concerned with, and presumed to concern, the functioning of the League of Nations and its Council.

The sources of law for the minority rights created between the two world wars with the help of the League of Nations could be grouped as follows:

a) general treaties for the protection of minorities—the territorial scope of these treaties covered the entire territory of the state concerned and sought to regulate the relationship between the state and its minority in a comprehensive manner:

- — the so-called minority treaties—concluded between the Allied and Associated Powers and the new, i.e., territorially enlarged, states (Poland, Czechoslovakia, Serb-Croat-Slovenian State, Romania, Greece, Armenia)
- — relevant chapters of peace treaties—concluded between the Allied and Associated Powers and the former Central Powers (Austria, Bulgaria, Hungary, Turkey);

b) special treaties for the protection of minorities—the territorial scope of these treaties covered only certain areas of the states concerned, or only certain minority rights (e.g., Åland Islands, Upper Silesia, the Memel Region, the Free City of Gdansk)

c) minority declarations—certain states were expected by the League of Nations to make unilateral minority declarations (Albania, Estonia, Latvia, Lithuania, Iraq).

The League of Nations' system of minority protection between the two world wars, briefly described above, failed. The failure was ultimately caused by the resistance of states to the protection of minorities guaranteed by the international law of the time. The labyrinthine political situation over minority and territorial issues after 1919 ultimately confirmed those who had reservations about the Treaty of Versailles. This also led the term "minority rights" to be discredited after the Second World War. The space limitations of this manuscript do not allow for a listing and analysis of the phenomena and events that justify the refusals of the obligated states.[3] A United Nations (hereinafter UN) Secretary-General's report[4] on the impact of the treaty system as a whole, its aftermath, and the scope of the individual minority treaty obligations was produced in 1950, which, on the basis of various legal arguments, came to the general conclusion—which is otherwise disputable on a number of points—that the inter-war minority treaty system had ceased to exist. This summary statement, made in 1950, has taken on particular meaning in Europe during the ethnic upheavals in the Balkans in the 1990s.

3. Striving for freedom of identity choice: "Positive" minority protection regimes in a human rights/fundamental rights context after 1945

After the Second World War, the issue of minority rights in Europe was taken off the agenda: The mass extermination of some ethnic groups and the mass expulsion of others from their birthplace gave the false impression that special rules for the protection of minorities were no longer needed—or so the victorious powers thought. The protection of communities was relegated to the background, and the protection

3 See in detail Szalayné Sándor, 2003, Chapter II.

4 United Nations Secretary-General, 1950. For an evaluation of the study in Hungarian, see Szalayné Sándor, 2003, Chapter IV.

of individual rights, together with the individualistic concept of the protection of human rights under international law, came to the fore. However, the realization that fundamental human rights—and with them the rights of persons belonging to minorities—can only be understood in relation to the social embeddedness of the individual (social and cultural rights) and that many human rights can only be exercised through membership in a community (right of association, right of assembly) was relatively quickly established. There is a long way from recognition to implementation and the setting of a right balance: It is not easy to guarantee minority rights without the states concerned feeling that their national sovereignty is under threat. The situation was further complicated after 1945 by the relatively rapid onset of the Cold War. During this period, traditional legal categories were superseded by ideological differences, previously apparently clear points of alignment became ensnared, and disorders of orientation were created and re-emerged from time to time.

For the majority of liberal Western states, minority protection was not an alien phenomenon after the Second World War—but these states were determined to build a broad, individualist conception of fundamental rights protection. At the same time, they were suspicious of any right or claim that emphasized the collective nature of the human rights to be protected.

In the same period, the socialist-communist states ultimately reached the same position from the opposite direction: They supported (in principle) the strengthening of the collective nature of human rights in international relations, but when the international community wanted to emphasize this collective component in the introduction of international human rights instruments and procedures, the socialist-communist states reacted with the same suspicion and rejection as the liberal Western states.

3.1. The level of universal international law: The role of the UN

The final result of years of preparatory work and negotiations was a compromise: Article 27 of the International Covenant on Civil and Political Rights, drafted under the auspices of the United Nations. Its text is as follows:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Immediately after the adoption of the Universal Declaration of Human Rights—of the nature of a recommendation—in 1948, preparatory negotiations began on the drafting of international covenants to protect human rights with treaty force. The above-mentioned Article 27 on the protection of minorities was already ready in 1954, but it was finally adopted in 1966, together with the full text of the International Covenant on Civil and Political Rights, and entered into force in 1976, after the necessary

number of ratifications had been received—just a quarter of a century after the start of the preparatory negotiations.

In order to protect the Covenant, and with it the rights enshrined in Article 27, procedural rules had to be established. This was the purpose of the possibility of an individual complaint, which is still covered by the First Additional Protocol to the Covenant. The Protocol is also optional: It allows individual complaints only against States that have ratified it. Thus, any person who suffers a violation of a right under the Covenant, such as Article 27 on minority rights, may submit a complaint to the Human Rights Committee[5] set up by the Covenant and operating since 1977. The Committee comments on the petition after hearing the other party, i.e., the State complained against. This procedure, which can be regarded as a rather "sovereignty-saving" one, has in recent decades helped to interpret and clarify some fundamental issues relating to the concept of minorities, their rights, and the obligations of states. For example, in the Lovelace case,[6] it has established the freedom of choosing one's identity, and traditional crafts were established as part of the cultural heritage of minorities in the Kitok case.[7] In 1994, a general commentary[8] on Article 27 was published by the Human Rights Committee with the intention of serving as a compendium of conclusions and explanations drawn from the cases examined so far, and as a reference point in the application of minority rights.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted by the UN General Assembly on December 18, 1992,[9] contributed to further clarifying the content of concepts and rights and the level of requirements imposed on the state. The text of the Declaration was preceded by a lengthy debate, in particular on the definition of minorities. Its main virtue is that it exists, even if its content and wording have become very limited: Several minority rights that are considered fundamental are missing from it. The Declaration considers the legislative activity of the territorial state to be absolutely necessary for the protection of minorities (Article 1), and it requires the active behavior of the territorial state instead of a defensive (*non-facere*) attitude. It also requires the state to protect the existence and identity of minorities. The specific rights of members of minorities: the right to practise their religion, to use their language, or to participate in decisions affecting them, are regulated in Article 2. The subjects of the minority rights listed is defined in Article 3, in accordance with Article 27 of the International Covenant on Civil and Political Rights, insofar as members of minorities may exercise their rights individually and in community with other members of the minority concerned, without discrimination. Due to its declaratory nature, it has no binding force in international law and, despite the existence of the UN Working Group on

5 In detail see http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx.
6 *Lovelace v. Canada*, Comm. No. 24/1977, UN Doc. CCPR/C/13/D/24/1977.
7 *Kitok v. Sweden*, Comm. No. 197/1985, UN Doc. CCPR/C/33/D/197/1985.
8 United Nations Human Rights Committee, 1994.
9 United Nations General Assembly, 1992.

Minorities[10]—replaced by the Minority Forum in 2007—these bodies are not empowered to formally review complaints. The Declaration reflects the state of minority protection reached at the universal level by the early 1990s. It clearly reflects the recognition that there is a collective component to minority protection, but does not go so far as to recognize the collective nature of minority rights in the narrow sense. Despite its lack of binding force in international law, the Declaration reflects the position of the majority of the international community on the rights to be granted to minorities and can therefore be regarded to some extent as a general minimum standard.

To sum up the role of the UN: Despite the serious political doubts about the legal protection of minorities immediately after the Second World War—and not least due to the adoption of international treaties on general and specific human rights—a modest but nevertheless existing system of the general content of minority rights (substantive law) and the mechanisms for their protection (formal law) seems to have taken shape. At the beginning of the 21st century, the main aspects of international legal protection of minorities developed at the universal level are the following:

a) The protection of minorities is present in international law as part of the universal protection of human rights. Minority rights are individual rights, i.e., rights that can be exercised individually, even if it is recognized and accepted that the identity and exercise of rights of a person belonging to a minority can only be understood within that community and with its members. The protection of minority rights as collective rights is therefore enforced only indirectly.

b) It has long been debated whether Article 27 of the 1966 Covenant is only capable of protecting persons belonging to minorities against discrimination, or whether it also includes a positive duty of protection incumbent on states. The latter interpretation is now the more common. In certain circumstances, states are also obliged to provide financial support for the exercise of minority rights.

c) The freedom to choose one's identity is a subjective criterion and a fundamental principle of belonging to a minority. [11] Objective criteria can only be taken into account if belonging to a minority would be abused. As a general rule, a person cannot be denied the right to identify himself or herself as belonging to a minority (Lovelace case).[12]

d) The protection of natural habitats and ways of life, and the need to preserve traditional crafts as a minority right, especially for indigenous peoples, has been on

10 See Working Group on Minorities from 1995 to 2006, then replaced in 2007 by the Forum on Minority Issues and the Special Rapporteur on minority issues. Download here: http://www.ohchr.org/EN/Issues/Minorities/Pages/TheformerWGonMinorities.aspx and http://www.ohchr.org/EN/HRBodies/HRC/Minority/Pages/ForumIndex.aspx.

11 See for this the most renowned and quoted work of Bíró, 1995, p. 290.

12 *Lovelace v. Canada*, Comm. No. 24/1977, UN Doc. CCPR/C/13/D/24/1977.

the agenda of the Human Rights Committee in several cases (the Kitok case,[13] Lubicon Lake Band case,[14] and Länsman case[15]).

e) The question of whether Article 27 of the Covenant is intended to protect only traditional, indigenous, and historical minorities, or whether it also covers new minorities such as immigrants is a matter of ongoing debate. In this context, it is now accepted that a distinction can and should be made between the two groups, with classical minority rights being reserved for historical minorities. However, new minorities should also benefit from at least the prohibition of discrimination.

f) The monitoring of minority rights is carried out not only through individual complaints against the state under the Optional Protocol to the Covenant, but also through a kind of monitoring procedure. [16] Every five years, the States Parties to the Covenant are obliged to submit reports to the Human Rights Committee, which analyses and investigates in depth cases relating to the rights of minorities—in the course of these procedures, minorities have the opportunity to provide the Human Rights Committee with information, express their views, and make use of the possibilities for enforcing their interests through publicity and providing the general public with information.

g) There are many other sources of international law and other documents and international monitoring procedures, most of which were established after the Second World War, mainly under the auspices of the United Nations. These procedures, if not directly aimed at guaranteeing the protection of minorities, are indirectly for their benefit: Such treaties contain a number of provisions prohibiting discrimination on various grounds—national, ethnic, linguistic, religious, and others—and, by protecting the rights of persons belonging to special groups (children, women), they also provide for the protection of the rights of those members of minority communities who belong to such special groups as well.

3.2. Activity at the European level

The idea of minority protection is rooted in the history of Europe. The cultural framework and the ideological-historical background for the protection of human rights is more homogeneous here than at the universal level. [17] It is therefore possible to start from the assumption that there is a consensus at European level for a broader, stronger, and more effective protection of human and minority rights than at universal level. The facts and the results support this assumption, even if the process by which Europe has reached the current level of protection of human and minority rights has

13 *Kitok v. Sweden*, Comm. No. 197/1985, UN Doc. CCPR/C/33/D/197/1985.
14 *Lubicon Lake Band v. Canada*, Comm. No. 167/1984 (1990) A/45/40.
15 *Länsman et al. v. Finland*, Comm. No. 511/1992, UN Doc. CCPR/C/58/D/671/1995.
16 Universal Periodic Review (UPR).
17 The analysis of cultural diversity and cultural heritage in conjunction with human rights and their interaction is a rare phenomenon. In this context, the following work is noteworthy: Langfield, Logan and Craith, 2010, p. 255.

not been smooth. Backsliding and restarting have been as much a part of this development as progress or stagnation, depending on historical events, domestic and foreign policy priorities, and even security policy circumstances.

3.2.1. The role of OSCE

After the Conference on Security and Cooperation in Europe and its subsequent transformation into an organization, the Organisation for Security and Cooperation in Europe (hereinafter OSCE) not only brought Europe out of the Cold War, but has also been a great service to the development of modern European minority protection. The Copenhagen Conference on Human Dimension in 1990[18] was of decisive importance in this process, dealing in detail with the issue of minority protection and succeeding in bringing the issue of the effective protection of minorities back to the negotiating table. The OSCE, due to its role and tasks, approaches the minority issue from at least two different perspectives. On the one hand, it places direct emphasis on improving the plight of minority communities and their members, but on the other hand, the protection of minorities is merely a means of implementing security policy. The tasks, powers, and activities of the OSCE High Commissioner on Minorities are evidence of this dichotomy: He does not perform an ombudsman function and does not investigate individual minority violations. In recent years—since 2003—the OSCE has placed great emphasis on the education, health, and housing issues of Roma communities and their members, and has monitored the manifestations of law enforcement agencies and the media, also in relation to Roma communities.[19]

3.2.2. The role of the Council of Europe

In the past decades, two mammoth organizations on the European continent have been developing complementary processes: The development and stabilization of the Council of Europe's human and minority rights protection mechanism has been accompanied by the European Union's steps to protect fundamental rights and minorities. The European Convention on Human Rights, which entered into force 70 years ago, does not contain an explicit provision on the protection of minorities. Article 14 of the Convention can, as a rule, provide ancillary protection: It can only be invoked in proceedings before the European Court of Human Rights in the event of a violation of another right.

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

18 See: https://www.oscepa.org/publications/reports/special-reports/election-observation-reports/documents/1344-osce-copenhagen-document-1990-eng/file.
19 See Organization for Security and Co-operation in Europe (OSCE) and OSCE Office for Democratic Institutions and Human Rights, 2013.

However, the 12th Additional Protocol to the Convention, which entered into force in 2005 after ratification by ten contracting parties, already contains an explicit non-discrimination provision for national minorities, which allows the right to the protection of minorities to be enforced independently. However, ratification of this protocol is proceeding very slowly. Until now, 37 of the 47 member states of the Council of Europe have signed it and only 18 have ratified it. [20] Article 1 of the Protocol, on the general prohibition of discrimination, obliges Member States to ensure that:

> "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

For a long time, the legal remedy bodies established by the Convention, including the European Court of Human Rights itself, have shown little inclination to use the remedies provided for in the Convention in the interests of minorities. Recently, however, the concept has changed: The large number of complaints from Kurdish and Roma minorities and the seriousness of the violations have led the Court to modify its previously restrictive interpretation of the Convention in favor of minorities. In the case of the Kurdish minority, Turkey has been condemned by the Strasbourg Court on several occasions, in particular for violations committed in prisons. In the case of the Roma minority, the types of rights violated and discrimination are much broader than in the case of the Kurdish minority. The European Court of Human Rights has already been confronted also with extreme situations and violations of the Roma minority motivated by the very intention to discriminate and, at the same time, by a conscious violation of rights by the state. The forced sterilization of Roma women in Slovakia and the destruction of Roma settlements on the island of Crete, in France, and in Romania are just some of the cases mentioned, which have been dealt with by the Strasbourg Court in various versions in recent years. The seriousness of the cases is shown by the fact that on more than one occasion, the Court has found not only a violation of the prohibition of discrimination, but also a violation of Article 3 of the Convention: Therefore it has repeatedly condemned certain States for inhuman or degrading treatment.[21]

20 At the time of finalization of this manuscript the countries of our region are at the following stage of recognizing the binding force of Protocol 12: Hungary, Austria, Czech Republic, and Slovakia have signed but not ratified; Romania, Slovenia, Ukraine, Croatia, and Serbia have signed and ratified, Bulgaria has not signed. See Chart of signatures and ratifications of Treaty 177.

21 See among others Prohibition of discrimination: landmark judgments.

Particular attention was paid to the judgements against the Czech Republic and Greece, where the Strasbourg Court found discrimination against Roma children in school. In these countries, Roma children were systematically—as measured by statistical data—sent to special educational institutions for children with learning difficulties. The statistically measurable number of children concerned was sufficient evidence for the court to find that discrimination had occurred. The fact that the Roma parents themselves had allegedly requested the admission of their children to special schools was not considered relevant by the court in finding an infringement. The pressure exerted in Greek society, including at the street level, to segregate Roma children in schools was another factor for the court that called into question the sincerity of the parents' consent or request for admission, whereby the Court excluded the admissibility of this aspect and only confirmed the existence of discrimination and the violation of the Convention.[22] The high level of activism by human rights activists and human rights institutions has been one of the decisive factors in the change of approach of the Strasbourg Court. The Strasbourg Court now treats events involving the Roma community and its members as a systematic, recurrent violation, with a variety of litigation management and procedural tools facilitating and expediting the adjudication process.[23]

In addition to the European Convention on Human Rights and its associated judicial remedies, the Council of Europe member states developed in the 1990s a set of hard-soft law instruments, mainly in the form of country reports, shadow reports, and monitoring procedures, in the form of the European Charter for Regional or Minority Languages and the Framework Convention on Minority Rights. It is hard law, because by signing international treaties the signatory states have assumed real obligations, but due to the lack of an international judicial alternative of enforcement, these treaties have a purely soft law effect. However, they have led to a strengthening of international public opinion and the role of domestic and international NGOs.[24] The Parliamentary Assembly of the Council of Europe has also paid attention to the current situation of many minority groups; for example, in 2014 it adopted the Kalmár-Report, which sought to explore the legal situation of indigenous/historical minorities.[25]

3.3. The seeds of indirect protection of minorities in the European Union—EU protection of fundamental rights as a Trojan horse?

Great expectations have been placed on the role of the institutions of European integration in this area. In the early decades of the European Community, it sought to avoid not only the question of minority protection, but even the question of fundamental rights. The reason for this was—to put it somewhat simplistically—the fact that the Member States kept decision-making on human rights and, by extension, minority

22 See as above.
23 See http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c.
24 European Charter for Regional and Minority Languages, 1998 and Framework Convention for the Protection of National Minorities, 1998.
25 See http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=20561.

rights to themselves: They did not give the Community legislative powers. However, from the 1990s onwards, European integration began to deepen: The creation of the European Union was accompanied by a wide-ranging extension of competences, including in fundamental rights matters.

The break-up of Yugoslavia and the Soviet Union finally forced the European Union—then still a Community—to take an open stance on minority issues. The then four-decade-old integration organization and its member states were forced to create a recognition strategy and a matching set of conditions. The Community and, from November 1993, the Union quickly recognized that the extremely complex national and ethnic characteristics of the Balkans and Eastern Europe made the protection of minorities in that part of Europe a key issue for stability. In its guidelines on the recognition of new states,[26] published on December 16, 1991, the Community identified adequate minority protection as a precondition for recognition. An eerily similar situation and condition was found in the resolutions adopted at the Berlin Congress of 1878. Returning to the early 1990s, although the successor states of Yugoslavia showed a willingness to accept the European Community/Union's requirements for the protection of minorities, as is well known, the process of disintegration of the Yugoslav state was tragically accompanied by the most serious ethnic conflicts and crimes. In other geographical regions, however, the European Union's recognition policy has proved capable of contributing to the peaceful transformation of communist regimes that had swept ethnic differences under the surface into democratic regimes that have sought to acknowledge and address ethnic conflicts and minorities in general, rather than to silence them.

In the first half of the 1990s, in parallel with the events taking place in the Balkans, the European Union developed its accession criteria. As an integral part of the gradual approach to EU membership, a set of requirements was formulated for the Central and Eastern European countries wishing to join. These were economic, political, and legal obligations (Copenhagen criteria—1993),[27] among which human rights and the protection of minorities were given a high priority—and the situation of the Roma communities was also given special emphasis in this process.

In the following years, the EU began to apply its human rights and minority rights standards in its external policy to its own internal functioning, and minority issues were increasingly raised not only with the applicant countries but also with the EU Member States. The application of double standards was a recurrent reproach from the Central and Eastern European states, and the steps taken to resolve the situation within the EU have brought to the surface a number of sometimes sharply divergent views. The European Parliament has been—and remains—the main arena for debate and forward-looking action: since the 1980s, some reports by Model European Parliaments (hereinafter MEP; Arfé, Kujpers, Stauffenberg, Alber) [28] have kept on the

26 Türk, 1993.
27 See Copenhagen European Council, 1993.
28 See the evaluation in detail at the round-table event celebrating the 15th anniversary of the Framework Convention for the Protection of National Minorities, 2013.

agenda the search for a solution, mainly based on the concept of ethnic groups. These proposals, which were essentially based on German ideas, met with strong resistance, particularly from France, but also from the United Kingdom. For the French, the British, and several other European states, the reports and proposals submitted to the Parliament placed too much emphasis on the collective nature of minority rights. For these states, the way to the legal protection of minorities can only lead through a system of fundamental rights of a purely individual nature—at least within the institutional system of the Union and through its mediation, if there could be at all any legal protection of minorities within the legal system of the Union. In its judgment of 1998,[29] the European Court of Justice in Luxembourg paved the way for this interpretation: It declared that the protection of minorities is a legitimate objective of the Union, and that the Union's legal order must therefore also take account of it.

In the 1990s, a number of factors emerged that led the European Union to take an increasingly visible stance in favor of the protection of minorities. The main factors were the growth in awareness of fundamental rights, the intensification of academic debate, and the emergence of international NGOs. In the EU Member States and in the EU institutions themselves, there has been a growing awareness of fundamental rights at the level of citizens and EU institutions alike, not to mention the proactive case law of the Luxembourg Court. At the same time, academic debates on fundamental rights have multiplied and the protection of minorities, which is seen as an integral part of fundamental rights protection, has come into the spotlight, although there remains disagreement about the individual or collective nature of minority rights. The lobbying activities of NGOs focusing on the protection of human rights and minority rights, as well as actions by the members of international academic networks and monitoring committees, have become increasingly intensive.[30] Phenomena related to federalism has become more widespread and more common in the state structures of many EU Member States, and there is a growing willingness to expand minority rights in these states.

In summary, as a result of the development process briefly described above, the Member States of the European Union have recognized the need to enshrine the need for legal protection of minorities in the primary law of the Union and to establish certain indirect forms of protection at the level of the principles—twenty years ago one could not even dream of the current EU legal instruments of protection. The most relevant legal sources are listed below.

a) Article 21 of the Charter of Fundamental Rights of the European Union, adopted in its first version in December 2000 and legally binding since December 1, 2009, when the Lisbon Treaty entered into force, prohibits discrimination on the ground of belonging to a national minority, and Article 22 protects culture, religion, and languages.

29 See Case C-274/96 Bickel and Franz (ECR 1998, I-7637, 44), ECLI:EU:C:1998:563.
30 See, e.g., http://www.coe.int/t/dghl/monitoring/minorities/6_resources/PDF_FCNM_15th_Anniv_AEide_en.pdf.

> "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." (Charter of Fundamental Rights of the EU, Article 21 paragraph (1))
> "The Union shall respect cultural, religious and linguistic diversity." (Charter of Fundamental Rights of the EU, Article 22)

b) Under Article 19 of the Treaty on the Functioning of the European Union (hereinafter TFEU),[31] the EU can take action, including EU law, against racial or ethnic discrimination. This power provided the legal basis for the adoption of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (July 19, 2000).

c) The Lisbon Treaty, in force since December 1, 2009, has finally taken an even stronger step toward the protection of minorities. The Treaty on European Union (hereinafter TEU) and the Treaty on the Functioning of the European Union (hereinafter TFEU) make the following provisions a primary legal obligation. Compliance with these provisions—given their primary nature—is expected of all the institutions and bodies of the Union in the course of their work, but Member States are also obliged to comply with the provisions and requirements, at least in the context of the application of EU law.

Primary law and the application of its rules are under the control of the Union's institutions—finally, and if there is a dispute, it is subject to the jurisdiction of the Court of Justice of the European Union. The—although apparently soft—wording of these provisions and their place in the Treaty (common provisions, provisions of general application) suggest that they represent a horizontal obligation: They are binding on all actors in the Union and in the Member States, whatever their specific policy area or form of action. Their only drawback is that they are not enforceable on their own—they can only be enforced before the Court of Justice in conjunction with a specific breach of EU law.

The wording of the Union's core values is as follows:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." (Article 2 TEU)

31 Article 19 of the Treaty on the Functioning of the European Union was incorporated into the EU Treaty by the Treaty of Amsterdam, which entered into force on May 1, 1999.

Combating discrimination is also a generally applicable obligation:

> "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." (Article 10 TFEU)

The following EU objective indirectly affects the situation of certain minorities, such as the Roma, and therefore, in my opinion, also indirectly serves the interests of minorities:

> "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health." (Article 9 TFEU)

Among the efforts made by the European Union as a specialized international integration organization in recent years, a number of further steps should be mentioned. Among other things, the EPP Group in the European Parliament paid particular attention to the legal situation of indigenous minorities at a public hearing in April 2015. [32]

4. Applicability of existing standards in EU minority protection?

Approximately 9% of the total population of the European Union comprises people belonging to national minorities—currently around 45 million people. In this light, it is perhaps surprising that the European Union's primary law, the founding treaties, which are the Union's basic constitutional documents, made no mention of national minorities before the entry into force of the Lisbon Treaty in 2009. Of course, mere mention does not in itself bring about substantive changes, and it is usually very difficult for Member States to agree on amendments to the founding treaties, especially on more sensitive issues. In the absence of an explicit EU legislative mandate for minority protection, the question then arises as to whether there are other ways, such as the introduction of standards of international law, to supplement minority protection at the EU level. In this context, it is worth examining whether, for example, any form of sanction could be imposed for violations of the rights of national minorities. It is also worth examining whether the standards developed within the Council of Europe can be applied in this context.

As already mentioned above, since the Lisbon Treaty, the Treaty on European Union states that the rights of "persons belonging to minorities" are among the fundamental values of the European Union (Article 2). According to Article 21 (1) of

32 See Hearing on the protection of traditional minorities, 2015.

the Charter of Fundamental Rights, which is now legally binding, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, affiliation with a national minority, property, birth, disability, age or sexual orientation is prohibited. However, primary law does not explicitly mention minority rights elsewhere than in Article 2 of the TEU, and thus there is no legal basis for the adoption of EU measures specifically affecting minorities. The EU Citizens' Initiative, also established by the Lisbon Treaty, which allows at least one million EU citizens to call on the European Commission to put forward a proposal on matters where citizens consider that an EU legal act should be adopted, was seen by many as a way of bringing minority issues into the framework of EU law. However, the EU citizens' initiative is not an unlimited option:[33] The Commission cannot, of course, go beyond its own powers, and the initiative must serve the purpose of implementing the founding treaties, so this option is also surrounded by uncertainty.

4.1. Article 7 applicable where the fundamental values of the Union are violated

The European Union is often criticized for taking the guarantee of certain values, including citizenship rights, more seriously in relation to the applicant countries than it does in relation to its own Member States. To some extent, Article 7 TEU was (also) intended to address this problem. Without going into details, Article 7 allows for the sanctioning—in the form of the withdrawal of voting rights in the Council—of a Member State that violates the fundamental values of the Union listed in Article 2 TEU. This procedure is not limited to areas where the Union has legislative powers, and can therefore be used in the event of conduct by a Member State that is contrary to the fundamental values of the Union in relation to any matter. The concepts used in Article 7, such as "clear risk of a breach of fundamental values" or "serious and persistent breach of fundamental values," are difficult to define.[34] We can therefore say that there is a possibility of sanctions of a Member State that violates minority rights, but the procedure has its own difficulties and problems.

4.2. Council of Europe standards in the EU legal order?

A number of international law standards apply to the protection of national and ethnic minorities, in particular the Council of Europe acquis. The question is whether these standards of international law—developed primarily by the Council of Europe—can be applied in the EU legal order.

33 The detailed rules can be found in Regulation 211/2011/EU; see the European Citizens' Initiative.

34 For example, it is safe to say that judgements of the European Court of Human Rights condemning Member States—which are also known to find violations of the rights protected by the European Convention on Human Rights against EU Member States—do not constitute a sufficiently serious violation of rights: There are many such judgements, but Article 7, as is known, has never been applied only and exclusively on the basis of a Strasbourg judgement condemning a Member State. Obviously, it cannot be excluded that this might happen in the future.

The relationship between international law and EU law is a complex issue that is only partially covered by primary law in the context of the international treaties concluded by the EU.[35] The founding treaties mention international law in other respects as well. In its relations with the rest of the world, the Union contributes, among other things, to "strict observance and the development of international law, including respect for the principles of the United Nations Charter." [36] The principles enshrined in the UN Charter and the obligation to respect international law must guide the Union's action at international level, both in general and in its common foreign and security policy actions. [37]

More generally, decades before the primary law even mentioned fundamental rights, the Court of Justice of the European Union (CJEU) regularly referred to international human rights instruments (in particular the European Convention on Human Rights) as sources of information in identifying general principles of EU law, including the protection of fundamental rights.[38] Moreover, the Court has ruled that the (relevant) rules of customary international law are also binding on the European Union.[39] In view of this, the possibility cannot in principle be ruled out that the Court of Justice, in its practice of developing the law, may—if this appears necessary and appropriate for adjudicating in a specific case—incorporate even the international standards of minority rights into Union law on a case-law basis by extending the system of the general principles of law. However, it is evident that the Court's case law in this direction is of a case-by-case nature, and thus uncertain and obviously not in line with the scale and value of the minority rights to be protected. So far, only one element of the Court's case law can be identified as one linked to minorities and minority rights: the judgements relating to the use of minority languages—but it must be stressed that these judgements were also delivered in the context of the free movement of persons and the freedom to provide services.[40] It is also worth mentioning that not all EU Member States have ratified the Council of Europe's Framework Convention for the Protection of National Minorities. It also seems likely that if the ECJ were to demonstrate a willingness to incorporate international standards of minority rights into the EU's system of fundamental rights protection through its practice—as I

35 International treaties concluded by the Union are binding on the Union's institutions and its Member States, and these agreements form an "integral part" of Union law from the moment they enter into force and may have direct effect (WTO law being an exception in this last respect). As far as the hierarchical position of these treaties in the EU legal order is concerned, the EU's international treaties are below primary law but above secondary norms—see e.g., C-61/94 Commission v Germany [ECR 1996., p I-3989. o.], ECLI:EU:C:1996:313, Para. 52.

36 Article 3 (5) TEU.

37 Article 21 (1) and Article 23 TEU.

38 Case 29/69 Stauder v Ulm [ECR 1969, p 419], ECLI:EU:C:1969:57; Case 4/73 Nold v Commission [ECR 1974., p 491], ECLI:EU:C:1996:444, Case 44/79 Hauer v Rheinland-Pfalz [ECR 1979., p 3727], ECLI:EU:C:1979:290.

39 Case C-286/90 Anklagemyndigheden v Poulsen and Diva Navigation Corp, para. 9 [ECR 1992, I-6019], ECLI:EU:C:1992:453.

40 See primarily the judgements delivered in the Mutsch, Bickel and Franz, Groener, and Angonese and Haim Cases. Evaluated in Van Bossuyt, 2007.

have indicated above, no such explicit intention can currently be seen—this would be likely to be strongly resisted by a number of Member States, who would consider such a ruling outside the scope of the EU's founding treaties.

Even if it was possible to apply international minority law standards in the EU, there would still be other problems that this segment of international law already struggles with: For example, there is a notorious lack of a generally used and accepted binding definition in international law of traditional national minorities. Furthermore, the monitoring and enforcement of international minority law standards is far from effective, not least because there is no international judicial forum to monitor compliance with the two relevant Council of Europe conventions, the Language Charter and the Framework Convention.

4.3. Some open questions and ways forward

Possibilities and proposals for improvement can still be formulated, through which respect for the minority rights standards of the Council of Europe could be enhanced in the EU.

The first such proposal suggests a soft law solution. It would be feasible and useful to feed the results of the monitoring reports of the two relevant Council of Europe Conventions on minorities into the EU system. The development of an early warning system for violations of minority rights—or of the fundamental values of the Union in general—could be a useful complement to the existing European mechanisms for the protection of rights, which are also partly of a soft law nature. The possibilities of the OSCE High Commissioner on Minorities in this area are rather limited and not specifically focused on EU Member States. The European Commission presented a framework for safeguarding the rule of law in the European Union in 2014. As a *soft law* instrument, the document refers to Articles 2, 7, and 49 of the Treaty on European Union as its basis. With this in mind, a similar early warning system could be envisaged for minority rights. The EU Agency for Fundamental Rights already reports on minority rights issues, among others, and could be an active participant in the new mechanism—which would of course require an amendment to Regulation (EC) No 168/2007,[41] which applies to the Agency. In relation to soft law instruments, it is worth noting that the EU Framework for National Roma Integration Strategies already addresses the Roma minority—as a Commission Communication[42]—but these documents have also been subject to much criticism, mainly because they do not focus on combating prejudice and discrimination. A stronger integration of anti-discrimination standards based on the European Convention on Human Rights and developed in the case law of the European Court of Human Rights into the EU Roma Framework Strategy could increase its effectiveness.

41 Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

42 See Communication (COM(2011) 173 final) on an EU framework for National Roma Integration Strategies up to 2020.

The application through judicial practice in the EU framework of minority rights standards under international law and linked to the Council of Europe is theoretically possible, but in reality it would raise a number of questions and problems, and such a development does not seem likely at present. Notwithstanding the above, however, the following questions remain to be addressed. Can the European Union ignore the fact that there are some 45 million persons belonging to minorities living on its territory? Can the question of the individual and collective rights of members of such a large (albeit extremely heterogeneous) group be left unanswered by one of the most important and influential regional European organizations, which is based on common interests and integration through law?

There are many autonomy-related and even separatist movements in the EU Member States, some of which have recently intensified their activities. In my view, more (minority) rights and greater autonomy could help to avoid separatist tendencies—and there are many good examples in Europe on which to build.

5. On the relationship between the state and its minorities: Concluding thoughts

A wide range of solutions can be found when looking at the ethnically heterogeneous states of the world, from explicit constitutional recognition to complete lack of recognition, or even denial of recognition. There are diverse intermediate stages: recognition by law or administrative act, recognition of private organizations representing minorities, and many others. The meaning of the term "recognition" varies from one state to another, and may even vary from one period to another within a state. In some places, recognition means the legal personality granted to minorities—rarely, as the evidence shows—whereas in others, members of minorities are granted rights that, taken as a whole, protect the existence and interests of the group, while in others, they are granted scattered rights that do not form a logical system.

In what direction and with what content is state behavior sufficient for a minority, its culture, and its use of language to survive and develop? This question has been asked for a long time by many people, with many different answers. International law has never been the law of nations—as a superficial analysis of the words might lead one to believe—but has always been the law of states, even though the right of peoples and nations to self-determination is an integral part of international law today, and despite the fact that, compared to the first half of the 20th century, the declaration and defence of human rights is a widely accepted phenomenon in the first years of the 21st century. European minorities—which, with a few exceptions, can also be called fragments of nations—are, as a rule, not subjects of the current norms of international law, but at best only their beneficiaries. This was also the case at the time of the minority protection regime under the aegis of the League of Nations.

A minority, even if it had international legal personality, would be incapacitated to act in the absence of statehood. It is therefore logical to conclude that effective

minority protection requires a combination of international and national law. The relationship between these two legal systems cannot be indifferent in any era: Ideally, states should participate in international and regional international conventions on minority protection and their implementation with the naturalness justified by consolidated international public life, and the content of these conventions should merely be a minimum objective for national law. In an ideal situation, the international political climate would render references to national law and arbitrarily interpreted sovereignty superfluous and unacceptable. On the question of the protection of minorities—similarly to the protection of human rights—it is therefore reasonable to accept the controlling role of international law.

However, the protection of minorities requires more than the mere application of the text of positive law. The "psychological climate," the will that can be extracted from the general culture of the citizens, is of vital importance beyond the rules of positive law. With regard to minorities, the prohibition of discrimination and *de facto* equality—i.e., treatment effectively comparable to that of other citizens of the state—go hand in hand with the prohibition of discrimination. If a minority as a group is only guaranteed equal treatment, the very existence of such a community is called into question. Beyond the prohibition of discrimination, there remains a grey area of positive action measures that, by taking into account the specific characteristics of minorities, guarantee real equality. These compensatory measures are the very essence of the prohibition of discrimination in the constructive sense. In other words, the protection of minorities cannot be achieved by applying the principle of equal treatment alone—but it is certainly not possible to interpret it without that.

The (nation-)state can only be understood in conjunction with its minorities,[43] regardless of space and time. The acceptable form of coexistence at any time is a dynamic series of mutual compromises. Neither side should sit back and relax, for the task for both state and minority is the same: The perpetual search for and maintenance of compromises is both an end and a never-ending process. It is the past and present legal environment of international law and, in particular, EU law where we need to operate; it provides the universal and the regional framework for the everyday reality of each country's domestic law and, not least, their minority policy.

43 Bíró, 2014. For other relevant literature see: Galbreath and McEvoy, 2012, p. 213; Vizi, Dobos and Shikova, 2021, p. 327; Bienenstock and Bühler, 2011, p. 230.

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| Chapter 8 |

The International Criminal Court in the Context of International Criminal Law[1]

Péter KOVÁCS

ABSTRACT

There was a long path to the establishment of a permanent international criminal tribunal, from 1474 through the so-called Versailles Peace Treaties, the International Military Tribunal of Nuremberg and the International Military Tribunal of Tokyo, and the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide to the text of the Rome Statute, which was adopted in 1998. Although the circle of international crimes is much larger than that of the crimes covered by the Rome Statute, it cannot be denied that it covers most international crimes. The jurisdiction of the International Criminal Court is based on the satisfaction of the preconditions settled in the Rome Statute. The jurisdictional competence of the International Criminal Court is based on two hypotheses: It is competent when the crime is committed on the territory of a States Party to the Rome Statute or by a national of a States Party. The main organs of the International Criminal Court are the Judiciary, the Office of the Prosecutor, the Registry, and the Assembly of States Parties. The International Criminal Court must use different evidentiary standards when rendering its decisions.

KEYWORDS

Rome Statue, international crimes, jurisdictional competence, evidentiary standards

1. From early thoughts and promises to their realization: The long road to establish a permanent international criminal tribunal

1.1. Historical antecedents

While war, cruelties, and atrocities are interrelated in the history of mankind, only a few historical examples can be found of genuine, concerted international action to set up at least *ad hoc* mechanisms to investigate war crimes and if possible, to punish their perpetrators. The best-known historical example is Peter von Hagenbach's condemnation and execution in 1474 for crimes committed during his rule in Breisach as bailiff instated by Charles the Bold, Duke of Burgundy.

1 This contribution was written in his personal capacity. The thoughts expressed herein cannot be attributed to the International Criminal Court.

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The Imperial War Council of Emperor Leopold von Habsburg had to open an investigation in order to clarify why some commandants and officers of the troops of the Holy League had engaged in a massacre of the Jewish population as well as Turkish children, women, and surrendered soldiers when liberating Buda from the Ottoman yoke in 1686. Moreover, a good number of Jewish survivors were kept as slaves of the Christian officers, who engaged in the slave trade or ransom business until the well-off Oppenheim, supplier of the army and the emperor's creditor, arranged their freedom and, as a counterpart, reduced the huge imperial debt.

Nor were the following two centuries void of actions that today can be considered war crimes. See, e.g.: *i*. Napoléon's order to massacre his Arab and Albanian prisoners of war at Jaffa[2] during the Egyptian campagne; *ii*. the execution of surrendered Hungarian generals by Julius von Haynau[3] after the defeat of the Hungarian War of Independence of 1848/1849; *iii*. the Battack massacre by the Ottomans in the uprising in Bulgarian territories[4]; *iv*. the attacks against native American women and children in the Wild West[5]; and *v*. the establishment of British concentration camps during the Boer wars.[6]

Even if the second half of the 19th century saw the birth of what we can rightfully call international humanitarian law in the form of several multilateral conventions (see e.g., the Saint-Petersburg declaration[7], the Geneva Convention,[8] and The Hague Conventions[9]), which was followed by similar or complementary treaty-making at the beginning of the 20th century,[10] World War One broke out and ended four years later in a context where rules of warfare could be considered well known but no previously

2 Siege of Jaffa.
3 The 13 Martyrs of Arad.
4 Batak Massacre.
5 Wounded Knee Massacre.
6 Second Boer War concentration camps.
7 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868.
8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1866; Additional Articles relating to the Condition of the Wounded in War, 1868.
9 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1899; Declaration (IV,2) concerning Asphyxiating Gases, 1899; Declaration (IV,3) concerning Expanding Bullets, 1899.
10 Convention on Hospital Ships, 1904; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1906; Convention (III) relative to the Opening of Hostilities, 1907; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907; Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 1907; Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, 1907; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, 1907; Convention (IX) concerning Bombardment by Naval Forces in Time of War, 1907; Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, 1907; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 1907; Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 1907.

established international sanctioning mechanism existed to give them effect. Although the observation of elementary rules of humanitarian law can be considered as rather satisfactory in 1914–1918 (which is certainly true if we take into account their observation during World War Two), this does not mean that outrageous crimes did not occur, committed equally by soldiers of the Central Powers and soldiers of the Entente Cordiale. (It is to be noted that there was an important legal weakness hidden in a good number of the above conventions, i.e., the so called "*clausula si omnes,"* liberating the contracting parties from their obligations if at least one of the enemy belligerents was not bound by the given convention.)

However, the peacemakers of the so-called Versailles Peace Treaties intended to establish only one international tribunal having jurisdictional competence over a single, emblematic person, the German Emperor William II. As we know, this international tribunal never came into being because the Netherlands granted asylum to the abdicated emperor and refused to surrender him.

A German tribunal established and working in Leipzig was mandated by the Allied and Associated Powers to probe German officers charged with war crimes, and this institution delivered a handful of judgments, some of which pronounced imprisonments.[11] Concerning other alleged war criminals of the former Central Powers, no penal procedure was engaged and e.g., the genocide committed against Armenians living in the Ottoman Empire[12] was left without genuine persecution even if 3 such persons were among the 18 sentenced to death during the period between the Sèvres and the Lausanne Peace Treaties.

It is also to be emphasized that war crimes committed by the armies of the victorious Entente Cordiale were at once forgotten and left without consequences. This was parallel to the lack of trial concerning the military use of poisonous and asphyxiating gases, a form of warfare used on the frontline by both sides.

Law-making after WW I tried to address the shortcomings of the previous Hague and Geneva Conventions as observed in the war. The adopted humanitarian law conventions dealt *inter alia* with the protection of the wounded and the sick[13] and that of prisoners of war,[14] the prohibition of gas weapons,[15] without touching upon, however, the *si omnes* rule or the status of resistants not belonging to the regular armies.

Interlinked with the political climate created by Yugoslav King Alexander's murder in 1934 in Marseille by extremists of the VMRO and Oustashi movements,[16] where politicians and media suspected the involvement of governments of several countries, the League of Nations' treaty making activity took a turn that Romanian international

11 Leipzig Trials.
12 Armenian genocide.
13 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1929.
14 Convention relative to the Treatment of Prisoners of War, 1929.
15 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.
16 Kovács, 2022; Monier, 2012; Müller, 2015.

lawyer Vespasian Pella[17] had already suggested in 1925. However, neither of the two conventions[18] drafted by experts commissioned in 1934 by the League of Nations and finalized by a diplomatic conference in 1937—whose text, contrary to Pella's original idea, focused only on terrorism—received enough ratifications to enter into force.

The 1930s had already witnessed mass cruelties during Japan's aggression against China (e.g., the Nanking massacre,[19] 1937) and Italy's aggression against Abyssinia (e.g., use of mustard gas at least at three battles and against 13 cities or villages[20] in 1936), but World War Two revealed once again the problems of a deliberate will to violate the well established rules and the discrepancy between the technical capacities of modern armies and the lack of adequate protection of the civilian population. The Hitlerian racial policy aiming at the extermination of Jews in Europe by units of the SS and the Wehrmacht as well as with the complicity and even active collaboration of governments and administration in the occupied territories and the selective, racially, or politically based denial of the rights of prisoners of war[21] after the launch of the Barbarossa Plan are all terrible examples of the violation of basic rights of victimes of armed conflicts. The Japanese warfare in South-East Asia and the Pacific was also marked by extreme cruelty arising from another version of a feeling of racial superiority as manifested vis-à-vis the local civilian population and prisoners of war.

The trilateral declaration on atrocities,[22] focusing only on crimes committed by Germans in Europe, warned already in 1943 of the *in personam* serious legal and judicial consequences of these acts without being able to stop their commission.

17 "(...) la peine doit s'étendre à toutes les personnes physiques qui ont participé à la préparation des actes criminels ou qui ont eu l'initiative de leur accomplissement. Par conséquent, il faut punir les dirigeants politiques qui, par leur action, ont sciemment précipité les événements et ont occasionné ainsi un conflit armé entre leur Etat et un autre Etat." Pella, 1925, pp. 183–184.

18 Convention for the Prevention and Punishment of Terrorism, 1937; Convention for the Creation of an International Criminal Court, 1937.

19 Nanjing Massacre.

20 Grip and Hart, 2009, pp. 3–4.

21 The order called "Kommissarbefehl" denied POW status to the Communist political officers of the Soviet Army (see the English translation e.g., at https://en.wikipedia.org/wiki/Commissar_Order). POWs of Jewish origin were also often killed after capture or in camps.

22 "(...) three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows:
At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. (...) Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors in order that justice may be done. The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies." (Moscow Conference, October 1943).

The declaration also emphasized deterrence and, although in an obscure manner, it evoked a joint prosecution of the most responsible parties and those whose acts cannot be linked to a single state.

After the surrender of Italy (1943), followed progressively by the surrender of satellite states of the Axis (1944/1945), ending in Germany's and then Japan's capitulation, the victorious powers realized their solemn promise and established the International Military Tribunal of Nuremberg (IMTN) and the International Military Tribunal of Tokyo (IMTT). These instances enjoyed competence over top German and Japanese war criminals. Occupying tribunals enjoyed penal jurisdictional competence on the basis of a separate regulation[23] over Germans suspected and charged with war crimes or crimes against humanity not falling under the jurisdiction of the IMTN. As to Italy and the satellites (Bulgaria, Finland, Hungary, Romania), they had already engaged in surrender agreements, and in their peace treaties undertook to put their own war criminals to trial at home or to extradite them to their victims' countries.

A procedure for eventual violations of the law of warfare by the Allies[24] was out of question at that time, even if some issues incidentally emerged[25] during the Nuremberg trial.

On the basis of the London Agreement,[26] Article 6 of the Statute of the IMTN enumerated the following crimes[27] as falling under the jurisdiction of the International

23 Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, December 10, 1945.

24 The bombing policy ("carpet bombing") practiced by the British-American air forces, the destruction of Hiroshima and Nagasaki by atomic bombs or the mass expulsions, spoliation, and rapes committed by troops of the Soviet Army, conditions and abuses in Soviet POW camps as well as ethnic vengeance targeting minorities, etc., were evidently hardly compatible with internationally accepted humanitarian legal rules.

25 The International Military Tribunal of Nuremberg had to strike out the *Katyn massacre* from the list of German's war crimes, and Admiral Dönitz's defence successfully evoked the "*tu quoque*" principle in order to have his client acquitted of one of the charges. See Karl Doenitz.

26 Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republic for the Prosecution and Punishment of the Major War Criminal of the European Axis, London Agreement of August 8th 1945.

27 Article 6.

"The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or

Military Tribunal of Nuremberg: crimes against peace, war crimes and crimes against humanity. The same structure with *grosso modo* the same content appeared in the Control Council Law No. 10 and in the peace treaties. (The Control Council Law added a fourth pillar[28] covering membership in the Gestapo, SS, SA, SD, the Oberkommando of the Wehrmacht, the Nazi government, and the leadership of the NSDAP, all determined to be criminal organizations in the judgments of the IMTN.) The peace treaties referred to the same three pillars, without containing any enumeration, focusing mostly on the arrest and the extradition of those who were under investigation for crimes committed elsewhere.

As to the IMTT, established by an order of January 19, 1946. issued by Douglas McArthur, Supreme Commander for the Allied Powers,[29] the enumeration of the crimes was nearly identical, but war crimes were covered by a general definition without any example[30] and the religious motif was absent from the crimes against humanity.

1.2. From Nuremberg to Rome

After the sentences[31] pronounced by the IMTN and the IMTT, the world had to think on how to continue. The famous philosophy of "*Never again!"* was legally reinforced by the incorporation of the Nuremberg principles into a resolution of the United Nations' General Assembly, which solemnly recognized their customary law character and called for the International Law Commission

persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. Nuremberg Trial Proceedings Vol. 1. Charter of the International Military Tribunal."

28 Article II/1 (d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

29 International Military Tribunal for the Far East, 1946.

30 Article 5 (b): Conventional War Crimes: Namely, violations of the laws or customs of war.

31 The IMTN condemned to death by hanging Hermann Göring (who succeeded in committing suicide before his execution), Joachim von Ribbentrop, Wilhelm Keitel, Alfred Jodl, Hans Frank, Arthur Seyss-Inquart, Alfred Rosenberg, Wilhelm Frick, Fritz Sauckel, Julius Streicher, and *in effigie* Martin Borman. Rudolf Hess, Walther Funk, and Erich Raeder were condemned to life imprisonment, and imprisonment sentences were pronounced on Albert Speer, Baldur von Schirach, and Konstantin von Neurath, while Hjalmar Schacht, Franz von Papen, and Hans Fritzsche were acquitted. The IMTT pronounced capital punishment on Doihara Kenji, Hirota Koki, Itagaki Seisiro, Kimura Heitaro, Macui Ivane, Muto Akiri, and Todjo Hideki, and 18 indictees were condemned to imprisonment of different terms.

> "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal."[32]

In a subsequent resolution, it gave a precise mandate to the International Law Commission to prepare a code for crimes against peace and humanity.[33]

However, the decades following these solemn engagements showed a rather slow development characterized by recurring obstacles and renewed activity.

It is true, however, that the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), prepared by the way by an *ad hoc* expert committee and not by the ILC, could be considered a genuine success and the realization of the solemn promises.

In Article I of the Genocide Convention, "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." The forms of perpetration, as enumerated in Article II, are practically *verbatim* identical with those listed in the London and Nuremberg documents focusing on the Holocaust as *crimes against humanity*. This article stipulates that

> "[i]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

However, although it closely followed the London and Nuremberg definitions, the draft code of crimes against peace and security of mankind, submitted in 1954 of the table of the General Assembly by the ILC,[34] was not discussed *in merito*. Even if it was put, e.g., on the G.A. agenda in 1954, 1968, and 1974, governments were satisfied with short, formal discussions and promised future study of the question.

Governments generally referred to the lack of a legal definition of aggression in order to avoid detailed discussion of the draft. They were also divided whether it is useful to amend the classic Nuremberg principles with dispositions penalizing other—contemporary well spread and largely used—actions and behaviors. Moreover,

32 Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal.
33 Formulation of the principles recognized in the London Charter of the Nuremberg Tribunal and in the judgement of the tribunal.
34 Draft Code of Offences against the Peace and Security of Mankind, 1954.

several governments questioned the feasibility of the project without an expressed will to establish a specialized international tribunal. (It is to be noted that the Genocide Convention alluded to the establishment of a tribunal having jurisdiction to adjudge individual cases,[35] but States did not do too much to realize this commitment.)

An initiative submitted by Trinidad and Tobago put an end to this "Cinderella dream" in the 1980s, and the ILC finally put two drafts on the table of the governments: a Draft Statute for an International Criminal Court[36] (1994) and a Draft Code of Crimes against the Peace and Security of Mankind[37] (1996). The International Law Commission made the right step in the right direction.

The international jurisdiction—as suggested by the ILC in the draft-statute—would have embraced four (traditional) crimes i.e., a) genocide, b) aggression, c) violation of the laws and customs of warfare, and d) crimes against humanity, complete with a fifth one i.e., e) crimes constituting the violation of different international conventions, enumerated in an annex.[38]

Surprisingly, these ILC drafts received a much warmer welcome than before. The openness of the States was probably due to the political and psychological impact of the recent armed conflicts in ex-Yugoslavia and Rwanda and to the experiences of the functioning of the two international tribunals, established respectively in 1993 and 1994 by the Security Council *acting under Chapter VII* through Resolutions 827 (1993) and 955 (1994).

According to its statute, which was annexed to the report of the Secretary General of the United Nations and approved by Resolution 827(1993), which later underwent several modifications and was reissued in other resolutions,[39] the International Criminal Tribunal for the former Yugoslavia (ICTY) was competent over *i.* war crimes, differentiated as grave breaches of the 1949 Geneva Conventions[40] or as breach of laws

35 Genocide Convention, Article VI.
Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

36 Draft Statute for an International Criminal Court, 1994.

37 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996.

38 The annex referred to the following conventions: the four 1949 Geneva Conventions on the protection of victims of armed conflicts and their 1977 Additional Protocols; International Convention on the Suppression and Punishment of the Crime of Apartheid, 1974; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; Convention for the suppression of unlawful seizure of aircraft, 1970; Convention for the suppression of unlawful acts against the safety of civil aviation (with Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Montreal in September 1971; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988.

39 E.g., SC resolutions 1166 (1998), 1329 (2000).

40 Here, there was an exemplicative enumeration going from *a* to *h*.

and customs of war,[41] *ii.* genocide (with the 1948 components), and *iii.* crimes against humanity (enumerating in a representative manner murder, extermination, slavery, deportation, imprisonment, torture, rape, persecution on political, racial, or religious grounds, and other inhuman treatment).

In the statute of the ICTR, the same crimes were mentioned (though in a slightly different order), but war crimes were defined as breaches of Common Article 3 of the 1949 Geneva Conventions and its Additional Protocol II. Terrorist acts were added thereto.

The minor conceptual differences in the statutes of the ICTY and ICTR are due to the fact that while states were very divided whether the ex-Yugoslav conflict should be classified as an international or a non-international armed conflict, the nature of the Rwandan tragedy as a civil war was never contested. As to the ICTY, the war crimes that were enumerated can legally be understood in the context of international as well as non-international armed conflicts.

1.3. Rome and the adoption of the Statute of the International Criminal Court

The text of the Rome Statute,[42] where one may discover at the same time the original proposals of the ILC and the experiences of the ICTY and ICTR, had to be adopted by governments with different views and interests as manifested at the preparatory negotiations and at the Rome Diplomatic Conference.

The states remained divided concerning the jurisdictional competence over the crime of aggression (whether with or without a definition) as well as concerning the proposal to attach new crimes to the classical Nuremberg ones. Moreover, the question of the practicality of the precision adopted in defining the different crimes and the identical or different nature of certain crimes committed in an international or non-international armed conflict emerged repeatedly.

The preparatory works (*travaux préparatoires*) reflect rather well the conflicting and concurring proposals put forward until the very end of the discussions—see especially the Triffterer Commentary[43]—but the outcome of the final days was due to the heroic activity of the committee of the whole chaired by the Canadian Philippe Kirsch of devising a suitable text from the very conflicting proposals. The result was submitted with the philosophy of "*take it or leave it*." The text they drew up contains many formulas, either consensual or backed by a great majority, and is definitely a genuine and fantastic backbone, but, on the other hand, it is not easy to understand in all particulars and is not void of lacunae or illogical textual positions of dispositions on closely related institutions and their respective procedural roles and competences.

The text of the Rome Statute was finally adopted on July 17, 1998, with 120 votes in favor, 7 against, and 21 abstentions, while 12 States did not participate in the voting. The adoption opened the way to signatures and ratifications. (As of 2021, 123 States

41 Here an exemplificative enumeration going from *a* to *e*.
42 International Criminal Court, 2011 (hereinafter: Rome Statute).
43 Triffterer and Ambos, 2016.

are bound by the Statute, but unfortunately some very important States are still missing.[44])

Concerning aggression, the Rome Diplomatic Conference opted for a pragmatic-diplomatic solution by postponing the real decision, saying that the jurisdiction of the International Criminal Court over aggression could only be materialized when States Parties agree upon a precise and legally binding definition of the crime of aggression.

Contrary to skeptics' prognosis, this approach seemed useful, and in Kampala in 2010, the States Parties were surprisingly able to agree on the definition by adopting *quasi verbatim* the formulas contained in the famous Resolution 3314 (XXIX) of the General Assembly. (It is, however, true that the French text shows a number of differences between the 2010 and the 1974 versions, but none of them is materially important.)

Consequently, some new articles[45] had to be inserted into the Rome Statute and their entry into force had to be decided by the Assembly of States Parties after the submission of the 30th instrument of ratification. Finally, in 2017, the Assembly decided to activate the competence over aggression if committed after July 17, 2018. [46]

As to the other crimes penalized by the Rome Statute, their formulation and position may be summarized as follows:

The crime of genocide with all its five traditional forms is the subject of Article 6. Crimes against humanity are enshrined in Article 7 with a similar content as that of the ICTY and ICTR, but without the crime of terrorism, although apartheid was added thereto.[47]

War crimes are inserted in Article 8 in a very precise manner and treated separately considering whether they were committed in an international or a non-international armed conflict. (This method, however, resulted in a considerable textual repetition.)

44 The most important ones are the following: China, Russia, USA, Israel, India, Pakistan, Indonesia, and Malaysia. Excepting Jordan and Tunisia, Arab States did not join either.

45 Rome Statute, Articles 8bis, 15bis, and 15ter.

46 International Criminal Court, 2015.

47 Rome Statute (hereinafter Rome Statute), Article 7, Crimes against humanity.

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

War crimes committed in the context of an international armed conflict are treated in two parts: Article 8, § 2, *a* and *b*.

While Article 8, § 2, *a* concerns so-called grave breaches of the 1949 Geneva Conventions, Article 8, § 2 *b* in its 26 subpoints enumerates the violations of the law and customs of war. Several of these points reflect the impact of different conventions forbidding the use of certain types of weapons or a certain manner of warfare.

Article 8, § 2 *c* and *e* are devoted to non-international armed conflicts, casually called civil wars. Article 8, § 2 *c* repeats the four grave breaches of commun Article 3 of the Geneva Conventions, while Article 8, § 2 *e* incorporates 15 forms of violations of laws and customs to be applied during a civil war.

Nearly all the crimes hereby enumerated are defined with such a precision that might remind the reader of national military criminal codes. They are thus very different from the proposals submitted by the preparatory committee of the diplomatic conference (the "*PrepCom*") between 1995–1998 which emphasized precise descriptions of the three or four most important crimes. The finally adopted version—as already mentioned—is due to the *ad hoc* committee chaired by Philippe Kirsch, who explained that in the approach they had chosen, the committee tried to synthetize the proposals of the national delegations and cite the core formulas of the convention provisions accepted unanimously or by a huge majority banning some types of weapons of some types of warfare.

As a result, beside the breach of the most important conventions contracted on the protection of victims of armed conflicts (i.e., the so-called *Geneva Law*), the ICC's jurisdiction was also established over violations of the commitments of the conventions on the manner of warfare[48] (i.e., the so-called *The Hague Law*). However, as a consequence of this approach, the list of crimes falling under the ICC's jurisdiction became much longer than those considered by the Geneva Convention or their Additional Protocols as "grave breaches" of their dispositions. The adopted formulas became more precise than those proposed originally by the International Law Commission; moreover, the Assembly of States Parties adopted a special, *de jure* non-binding but very important interpretative document entitled "*Elements of crimes*," which explains the constitutive elements of the different crimes one by one.

1.4. The possibility of enlarging the ICC's scope of jurisdiction?

It had already become clear during the preparatory works and later in Rome that states are so divided concerning the acceptance of the ICC's jurisdiction over illegal trade of drugs[49] or terrorism that it was decided provisionally to set them aside with

48 E.g., *i.* Declaration (IV,3) concerning Expanding Bullets, 1899; *ii.* Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954; *iii.* Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.

49 Recall that Trinadad and Tobago put the idea to create an international criminal tribunal on the table of the General Assembly precisely to strengthen the fight against forbidden trade of drugs through the enhancement of international cooperation and the deterrence of the offenders (1989); History of the ICC.

a statement, however, in the Final Act of the Rome Diplomatic Conference that the Assembly of States Parties may consider in the future whether the ICC's competence can be extended to these crimes as well.

Currently, international crimes can be symbolized by two concentric circles that can be enlarged. Most international crimes belong under the jurisdictional realm of the International Criminal Court. Prosecuting and jurisdictional power are exercised by the states as well as by the ICC. The principle of complementarity is the tool that helps to decide whether the ICC or the State(s) are entitled to act and to punish.

We have just mentioned that some crimes (e.g., drug smuggling, terrorism) are not covered by the Rome Statute, but of course this does not hamper the States' right to retaliate on the basis of the principle of the universal jurisdiction, confirmed by many international conventions to which they are contracting parties.

There are also examples of other international tribunals or the so-called hybrid (mixed) international judicial bodies acting against perpetrators of crimes not included in the Rome Statute. This happened *inter alia* in Lebanon in the procedure initiated against alleged perpetrators of the terrorist bombing killing PM Rafik Hariri and some of his colleagues. (Special Tribunal for Lebanon (STL), *see below*).

It goes without saying that the circle of international crimes is much larger than that of the crimes covered by the Rome Statute. It cannot be denied, however, that most international crimes—and especially the most important ones—are there. Their list can certainly be enlarged and the Rome Statute, putting emphasis on the procedural rules of how to amend, does not contain any material precondition for new crimes as the object of a future amendment. Taking into account the realities and customs of international diplomacy, one might assume that chances depend first and foremost on the importance of the crime and the quasi-unanimuous will to punish it.

Three amendment packages have been adopted so far by the Assembly of States Parties.

The first package was adopted in Kampala (2010) where, beside the definition of aggression, States agreed to also criminalize the use of poisonous or asphyxious gases and bullets that flatten easily in human body in the case of internal armed conflicts.

The second package was adopted in 2017 and it penalizes the use of *i*. microbiologic and toxic weapons and poisons, *ii*. weapons the primary effect of which is to injure by fragments that in the human body escape detection by X-rays, and *iii*. lasers and other similar weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. These are crimes irrespective of whether they were committed in an international or non-international armed conflict.

The third package dates back to 2019 and concerns the prohibition of starvation as a method of warfare in a non-international armed conflict as well.

Even if adopted by the Assembly of States Parties, states still must ratify these amendments in order to be binding on them. In 2021, the ratio of ratifications is unfortunately not very promising.[50]

2. The procedure of the International Criminal Court

2.1. Which are the most serious crimes and what is complementarity?

The jurisdiction of the International Criminal Court is based on the satisfaction of the preconditions settled in the Rome Statute. The ICC does not *per se* enjoy competence over the above outlined four main crimes: The Rome Statute placed great emphasis on the "most serious crimes" and the observation of the rule of "complementarity" in its Preamble and Article 1,[51] but these expressions and their technical details reappear several times in the subsequent articles.

The qualification as "most serious" shall not be understood as only referring to the extreme cruelty of a criminal act but *inter alia* the large scale of crimes, their organized patterns, and their planning can substantiate its evocation, as the reader may find in the introductory part ("chapeau") of the articles on crimes against humanity[52] and war crimes.[53] The realization of the criteria of the *chapeau* constitutes the contextual elements of the crime.

Complementarity means that the International Criminal Court steps in if the state is apparently *unable or unwilling* to exercise the criminal prosecution. If the prosecution was engaged in on a national level and is managed diligently, or if it is fully accomplished and, in case of condemnation, the sanction pronounced is adequate for

50 As of May 26, 2021, the amendment on aggression had been ratified by 41 States, but the other elements of the first package only by 15, the second by 9, and the third by 6. See https://asp.icc-cpi.int/en_menus/asp/RomeStatute/Pages/default.aspx.

51 International Criminal Court, 2011, Preamble
The States Parties to this Statute, (...) Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,
Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, (....) have agreed as follows:
Article 1 The Court An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute and shall be complementary to national criminal jurisdictions (...).

52 Rome Statute, Article 7, Crimes against humanity
1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (....).

53 Rome Statute, Article 8, War crimes
1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or
policy or as part of a large-scale commission of such crimes (...).

the crimes committed, under both hypotheses the principles of the rule of law and fair trial were duly observed and the ICC does not need to proceed because the double jeopardy principle (*ne bis in idem re*) forbids a second condemnation for the same act. The same rule applies also in case of an acquittal, pending its pronouncement solely on the scrupulous observation of the fair trial requirements.

However, if the state knowingly does not proceed or if the procedure amounted to a condemnation but the sanction seems to be manifestly mild, the ICC enjoys jurisdictional competence, providing the *ratione loci* or *ratione personae* preconditions (see below) are met. The ICC is also empowered to adjudge when the state is unable to prosecute and punish, which could be the effect of a prolonged civil war, the total or partial collapse of the public administration, or the lack of staff and/or truly independent judiciary.

2.2. Competence based on territory or nationality and the importance of the peculiar timeframe (Jurisdictio ratione loci, ratione personae, and ratione temporis)

The jurisdictional competence of the International Criminal Court is based first and foremost on two hypotheses: The ICC is competent when the crime is committed *i.* on the territory of a States Party to the Rome Statute or *ii.* by a national of a States Party.[54]

Huge continuous debates surrounded the formulation of these two pillars, and one of the main issues was whether the State's consent is needed or not, or under what conditions. The other difficulty was whether the ICC may enjoy competence over nationals of States that did not ratify the Statute, and if it does, under what conditions.

The finally chosen solution was at the same time legal and political/diplomatic.

As the idea of the need for the States Party's consent as precondition of proceedings was continuously rejected by most of the participants of the diplomatic conference, it was not included in the adopted text.

Concerning the question of the impact of the Rome Statute on non-States Parties, there are two alternative solutions.

On the one hand, if a non-States Party accepts *in concreto* the ICC's competence,[55] we meet a well-known exception to the rule of the *pacta tertiis nec nocent, nec pro sunt*.

54 Rome Statute, Article 12, Preconditions to the exercise of jurisdiction
1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national. (...).

55 Rome Statute, Article 12, Preconditions to the exercise of jurisdiction (...) 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

The second exception, however, is related to competences attributed to the Security Council by Chapter VII of the United Nations' Charter: The Rome Diplomatic Conference agreed to recognize certain competences to the Security Council in the context of the jurisdiction under the Rome Statute.[56] Even if this is absolutely correct legally, it is obvious—and the ca. 75-year long history of the UNSC has proved it abundantly—that most of the permanent five members of the top organ of the United Nations too often act (or more precisely, miss taking an obviously needed step) following their own geopolitical interests instead of observing their responsibility under the Charter and general international law.

The Security Council was also granted other prerogatives[57] in the Rome Statute, and the jurisdiction over aggression was also adjusted with special rules[58] aiming to ensure harmony with Chapter VII of the UN Charter.

It should be emphasized, however, that from a truly theoretical point of view, the legal situation is not at all easy to understand and to match with classic rules of international law. On the one hand, as a result of the interplay of the above-mentioned *ratione loci* and *ratione personae* rules, if the crimes are committed on the territory of a States Party, the ICC's competence is established over perpetrators, irrespective of whether their citizenship is of a States Party or a no-States Party. On the other hand, it is to be asked why such a solution, while definitely settled in the Rome Statute *inter partes*, should have a binding impact on non-States Parties whose nationals are allegedly involved and whose cooperation is crucial for an expeditious procedure. (It should be pointed out nevertheless that the "hot potato" issue of the eventual jurisdiction over nationals of non-States Parties did not prevent the continuous participation of States advocating for a *sine qua non* consent to this form of jurisdiction, even though this position was defeated in indicative and real voting during the negotiations.)

56 Rome Statute, Article 13, Exercise of jurisdiction
The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

57 See e.g., Rome Statute, Article 16, Deferral of investigation or prosecution
No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions. See also Article 53(2), (3), Article (5)(b), (7), Article 115.

58 See Rome Statute, Articles 15*bis* (Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)) ad 15*ter*. (Exercise of jurisdiction over the crime of aggression (Security Council referral)).

The *ratione temporis* principle should be understood *i*. first, as a general rule,[59] excluding the retroactive effect of the Rome Statute on facts prior to its entry into force, i.e., July 1, 2002. *ii*. It is equipped with a secondary rule, that if a State becomes bound only later by the Rome Statute, the entry into force of its instrument of ratification prevails.[60] *iii*. Third, a State may mandate the ICC to exercise its jurisdiction on events having occurred prior to this date.[61] *iv*. Fourth, the *ratione temporis* rule applied with the date July 17, 2018, on States Parties having by that date ratified the Kampala Amendment on Aggression; *v*. Fifth, if a State becomes bound only later by this Amendment, the precise date of the entry into force of the instrument of ratification prevails. *vi*. In case of minor amendments concerning additional crimes to the Rome Statute, the date of the entry into force of the amendment should be taken into consideration or the date of the entry into force of the instrument of ratification if it is posterior in the case of the given State Party.

2.3. The main organs of the International Criminal Court

The main organs of the International Criminal Court are the following: *i*. the Judiciary, *ii*. the Office of the Prosecutor (OTP), *iii*. the Registry, and *iv*. the Assembly of States Parties (ASP).

Due to its importance and special autonomous status, I think that the Trust Fund for Victims should *de facto* be considered one of the main organs as well.

Eighteen judges, elected for a single nine-year term by the Assembly of States Parties, work in Pre-Trial Chambers (PTC), in Trial Chambers (TC), or in the Appeals Chamber (AC). They elect their president from themselves for a three-year term. The election of judges is organized in such a manner that—except for a judge's death during his or her term or eventual demission, etc.—every three years, the Assembly of States Parties elects six judges who have extensive practice in criminal law or are recognized international law experts of the academic world.[62] The judges are elected

59 Rome Statute, Article 11, Jurisdiction *ratione temporis*
1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. (...).

60 Rome Statute, Article 11, Jurisdiction *ratione temporis* (...)
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only
with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.

61 See Rome Statute, Article 11 (2), last part of the paragraph. (The reference to the previously cited Article 12(3) means the *mutatis mutandis* applicability of the rule of consent as it works in case of a non-State Party).

62 Rome Statute, Article 36, Qualifications, nomination and election of judges
1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court. (...)
3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
(b) Every candidate for election to the Court shall:
(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

with a two-third majority and an equitable geographical representation and fair representation of female and male judges should also be taken into consideration during the election process. The candidates presented by States Parties are auditioned and evaluated by an Advisory Committee on nominations, established by the ASP and composed mostly of former ICC judges. The candidates are also auditioned by representatives of NGOs in a public hearing.

The control that the three-member *Pre-Trial Chambers* perform over the activity of the prosecutor is similar to the task of the *juge d'instruction* in national systems. However, the PTC does not investigate; its most important duty is to assess the OTP's materials and decide whether they can be considered sufficient for sending a person under investigation to trial: This decision is the confirmation of charges. The Rome Statute defines with precision all the fields where the Pre-Trial Chambers check and counterbalance the prosecutor's activity. The three-member Trial Chambers deal with the first instance trials and the five-member Appeals Chamber has to adjudicate interlocutory and *in merito* appeals.

The *Office of the Prosecutor* carries out the investigations, submits the charges, and represents them before a Trial Chamber if confirmed by a Pre-Trial Chamber.

The *Registry,* beside the general housekeeping management of the daily work of the ICC, deals—through its different specialized units—*inter alia* with *i*. the representation of witnesses and assistance to them, *ii.* the custody of detainees arrested and transferred to The Hague, *iii*. the assistance given to the defence, and *iv*. some aspects of foreign relations and judicial cooperation with national authorities.

The *Assembly of States Parties* elects the judges—as already mentioned above—and the Prosecutor, whose term of office is nine years. The ASP approves the budget and adopts and modifies the Rules of Procedure and Evidence and the related statutory documents. It can amend the Rome Statute (sometimes in the framework of a review conference). The Rome Statute enumerates the issues that must be adopted with a 2/3 majority or a 7/8 majority and those that require ratification by States.[63]

The *Trust Fund for Victims* enjoys a special autonomous status in the system. It handles the reparation and assistance due to victims from the assets resulting from the confiscated property of convicted persons and voluntary contributions on behalf of states, legal persons, and individuals.

2.4. Referrals, Situtations and Selection of Cases

In terms of the Rome Statute, the International Criminal Court can adjudge crimes that were committed on the territory of a States Party or by a national of a States Party. Any States Party may call the Prosecutor's attention to such crimes, irrespective of

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

63 Rome Statute, Articles 121–123.

whether it was "territorially" or "nationally" involved in their commission. It might even take this step without being directly linked to the crimes.

When a State submits a *situation* to the ICC, it falls upon the Prosecutor to decide which is or are the precise *case*(*s*) that will be investigated. When making his choice, the Prosecutor takes into consideration the character and gravity of the crimes, the number of victims, the impact of the crimes on the given state or on its neighborhood, etc.

However, the Prosecutor is also entitled to step in *ex officio* (or according to the language of the Rome Statute: *proprio motu*) on the basis of acquired or commonly known information or individual communications, etc., but only vis-à-vis States Parties. The above enumerated elements of case selection and prioritization must be observed in this case as well. Preliminary examination is automatically granted, but if the Prosecutor would like to enter in the actual investigations, he should ask the Pre-Trial Chamber for approval. The PTC grants the request only when the submitted materials prove, support, or justify that there "is a reasonable basis to proceed."[64]

A third possibility is when the referral comes from the Security Council acting under Chapter VII. Such a referral may concern States Parties but also non-States Parties.

The Prosecutor enjoys a great margin of freedom of appreciation during these procedures: He is not bound by any legal or factual position expressed either in the State or in the UNSC referral.

The Prosecutor should check whether both the jurisdiction criteria (subject matter jurisdiction analysed *ratione loci, ratione personae, ratione temporis*) and the admissibility criteria are met. A case is inadmissible if it runs against the *ne bis in idem re* principle[65] or if it is not of "sufficient gravity to justify further actions by the Court."[66]

64 Rome Statute, Article 15, Prosecutor
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

65 Rome Statute, Article 20, *Ne bis in idem*
1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which
formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise, were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

66 Rome Statute, Article 17, Issues of admissibility, 1(d).

The Prosecutor does not initiate an investigation if the admissibility criteria are not met or if "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[67]

Contrary to the procedure of the *proprio motu* referral, if the referral comes from states or from the Security Council, the Prosecutor exercises his investigative competences without the permission of a Pre-Trial Chamber. The proceedings in this case follow a reversed logic, i.e., if the OTP stops its inquiries within the preliminary examination phase and does not continue the investigations, the referring party may ask the PTC to exercise a kind of revision of the well-foundedness of the OTP's decision not to investigate. If the OTP's decision is based solely on the reference to the interests of justice, the PTC may review it *ex officio*.

If the PTC concludes that the OTP's position—in the above matters—is not substantiated, it may order the OTP to reconsider its position. Nevertheless, after reconsideration, the Prosecutor may arrive at the same conclusion as before, i.e., there is no need to investigate. The Prosecutor enjoys thus a huge margin of independence. (Nonetheless, such a reconsideration may take a long time and could be subject to litigation concerning the elements that can be examined when assessing gravity, the appreciation of a genuine reconsideration, and the precise competences of a PTC when reviewing the assessments, etc., as seen in the so-called situation of Registered Vessels of Comoros, Greece, and Cambodia.[68])

As to the touchy issue of the "*interests of justice*," it is enough to point out that here—as the Appeals Chamber clarified in a judgment rendered regarding the situation in Afghanistan—a PTC may not stop the procedure by referring *proprio motu* to the interests of justice if this was not put on the table *expressis verbis* by the OTP.[69]

As the choice of a *case* (or some *cases*) from the submitted situations has received great criticism on the part of governments as well as non-governmental organizations, the OTP has delivered several public documents explaining different aspects of its case selection policy.[70]

67 Rome Statute, Article 53, Initiation of an investigation
1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
68 International Criminal Court, 2017.
69 International Criminal Court, 2020a; International Criminal Court, 2020b; International Criminal Court, 2020c.
70 International Criminal Court, Office Of The Prosecutor, 2016a; International Criminal Court, Office Of The Prosecutor, 2014; International Criminal Court, Office Of The Prosecutor, 2016b; International Criminal Court, Office Of The Prosecutor, 2021; etc.

The Prosecutor must check whether genuine national prosecutions have not been lauched or accomplished in the case under selection, and must pay attention to the eventual home procedures when dealing with the given case(s). The OTP's assessment is verified by the Pre-Trial Chamber or, if the charge has already been confirmed by a PTC, this question may emerge before a Trial Chamber as challenge of jurisdiction. The challenge of complementarity can be submitted by the person against whom a decision of arrest warrant has been submitted or charges have been formulated, waiting for their confirmation by a PTC. Governments are also entitled to submit a challenge of jurisdiction based on the principle of complementarity. Even if complementarity is to be examined *ex officio,* if a challenge is submitted, the onus of the proof of the satisfaction of the criteria of *ne bis in idem re* is on the shoulders of the challenging government or person.

All this means that if national governments open investigations and put perpetrators on trial at the latest during the preliminary examination period or in the investigation phase of the proceedings of the International Criminal Court and the home procedures satisfy the criteria of fair trial and rule of law, and in case of condemnation the sentenced punishment is adequate for the crime committed, the conditions of the ICC's jurisdictional competence are not met in the given case.

2.5. Imprescriptibility, irrelevance of immunity and fair trial rights

The crimes listed in detail in the Rome Statute cannot be subject to prescription,[71] and the immunities attributed constitutionally to some high state officials cannot prevent the International Criminal Court from exercising its jurisdiction.[72]

The International Criminal Court shall not only prosecute and punish at all costs, but it is imperative that it carry out this task through the scrupulous observation of human rights, especially concerning those who are already in the confirmation or in trial phase. These rights are the classic human rights enumerated in similar terms in the different human rights instruments of the world. They were also inserted in the Rome Statute, although, surprisingly, they do not appear in one block but emerge at different parts of the document.

71 Rome Statute, Article 29, Non-applicability of statute of limitations
The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

72 Rome Statute, Article 27, Irrelevance of official capacity
1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

One may find the *nullum crimen sine lege*,[73] the *nulla poena sine lege*,[74] and the non-retroactivity[75] principle as well as the principle of individual responsibility[76] under Part 3, among the "General principles of criminal law."

The other traditional procedural rights are mentioned in the context of the different procedures, like the rights of persons during an investigation[77] and the rights of the accused.[78] The presumption of innocence makes part of the rights related to the

73 Rome Statute, Article 22.
74 Rome Statute, Article 23.
75 Rome Statute, Article 24.
76 Rome Statute, Article 25.
77 Rome Statute, Article 55, Rights of persons during an investigation
1. In respect of an investigation under this Statute, a person:
(a) Shall not be compelled to incriminate himself or herself or to confess guilt;
(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.
78 Rome Statute, Article 67, Rights of the accused
1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
(c) To be tried without undue delay;
(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses

investigation phase,[79] but was granted a distinct article in the articles devoted to the trial phase.[80]

2.6. The three evidentiary standards

During its proceedings, the International Criminal Court must use different evidentiary standards when rendering its decisions.

In order to grant the Prosecutor's request to open *proprio motu* an investigation, the Pre-Trial Chamber should be satisfied that there is a *reasonable basis* to proceed.[81] This standard is generally considered as being the same as that of the *reasonable ground* that is required to issue an arrest warrant.[82]

against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
(h) To make an unsworn oral or written statement in his or her defence; and
(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

79 Rome Statute, Article 55 2 (b) (cited *supra*).

80 Rome Statute, Article 66, Presumption of innocence
1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

81 Rome Statute, Article 15, The Prosecutor (...)
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. (...).

82 Rome Statute, Article 58 Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear
1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; (...).

However, a considerably higher legal conviction, i.e., the *substantial reason to believe*, is required for the confirmation of charges by the PTC.[83]

Furthermore, when it comes to condemning the accused for the commission of the charged crimes, the classic rule of necessity to have a conviction *beyond any reasonable doubt* applies.[84]

2.7. Sentencing

If the culpability is established, the International Criminal Court may pronounce a penalty of imprisonment for up to 30 years, depending on the gravity of the crime. Exceptionally, even a sentence of life imprisonment can be delivered. Moreover, confiscation of property and obligation to participate in the covering of the costs of reparation can also be constitutive elements of the judgement.

The ICC has no prison of its own. Instead of building or buying one, it was decided to keep people under provisional arrest in an annex rented within the Scheveningen Detention Center of The Hague, together with other international criminal tribunals (ICTY, ICTR, etc.) established in the city. A sentenced perpetrator stays in this compound until the presidency of the ICC comes to an agreement with a state that is ready to offer its institutions for the rest of the imprisonment, from which the time elapsed in provisional arrest is to be deducted.

Before the end of 2021, condemnation judgments were pronounced in the following cases: *i.* recrutement and use of child-soldiers during the civil wars in Congo (Thomas Lubanga case[85]); *ii*. the murder and pillage of the civil population and recruitment and use of child-soldiers during the civil wars in Congo (Bosco Ntaganda case[86]); *iii*. the massacre of Bogoro during the civil wars in Congo (Germain Katanga case[87]); *iv.* the destruction of religious and historical monuments in Timbuktu (Mali) that were on the UNESCO World Heritage List (Al Mahdi case[88]); *v.* pillage, destruction, and rape during the civil war in the Central African Republic (Jean-Bemba Gombo case[89]), and *vi*. the related Bemba et al. case,[90] which concerned offenses against at the adminis-

83 Rome Statute, Article 61, Confirmation of the charges before trial, (...)
5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. (...)
7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. (...).

84 Rome Statute, Article 66, Presumption of innocence (...).
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

85 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.

86 The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06.

87 The Prosecutor v. Germain Katanga, ICC-01/04-01/07.

88 The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15.

89 The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08.

90 The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13.

tration of justice, during the main procedure of the ICC; and *vii*. murder, pillage, rape, and sexual slavery during the armed conflict in Uganda (Dominic Ongwen case[91])

As to the precise length of the sentence of imprisonment, the different trial chambers took into consideration the specifics of the crimes, the character of the contribution of the condemned perpetrator to the crime, the condemned person's eventual repentance, and the impact of the crimes on victims, communities, the country, and eventually also in the neighboring countries.[92]

Currently, the following procedures are under trial: *i*. the responsibility of the deputy commandant of the Islamic Police of Timbuktu for torture, rape, sexual slavery, condemnation without fair trial, destruction of historical and religious monuments, etc., during the rule of the Islamists (Al Hassan case[93]); *ii*. murder, torture, and the destruction of civilian property during the civil war in the Central African Republic by units of the (Christian) Anti-Balaka militias (Yekatom and Ngaïssona case[94]). (Because charges were recently confirmed against Mahamat Said Abdel Kani.[95] alleged leader of Seleka militias, composed mostly of Muslims, the crimes of the other side of the civil war of the Central African Republic will also be examined in trial. The background of the Yekatom and Ngaissona case and Abdel Kani case is related to the fact that it was predominantly the believers of the other religion who were targeted by militias, each of them advocating for self-defence and retaliation); and *iii*. another offence against the administration of justice (Paul Gicheru case).[96] This case had to be stopped because the accused had died in Kenya.

The trial against a leader of the Janjawed militia, with confirmed charges of crime of murder, rape, destruction of property, and forcible transfer of the population committed in the Darfur region of Sudan (Abd-Al-Rahman case[97]) will open in 2022.

It is to be noted that the International Criminal Court has acquitted several indictees or pronounced a decision of a "stay of the proceedings." These are the following: *i*. the Bemba case, where the Appeals Chamber acquitted the indictee as to the crimes committed in the CAR while approving the condemnation and sentence for offence against the administration of justice; *ii*. the massacre in Bogoro, where one of the

91 The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15.

92 Thomas Lubanga: 14 years; Germain Katanga: 12 years; Jean-Pierre Bemba Gombo (in first instance, overruled by the acquittal in appeal): 18 years; Ahmad al-Faqi al Mahdi (guilty plea): 9 years; Dominic Ongwen (in first instance, under appeal still pending): 25 years; Bosco Ntaganda: 30 years. In the case of Bemba et al., Jean-Pierre Bemba Gombo was sentenced to 1 year; Aimé Kilolo Musamba: 3 years; Jean-Jacques Mangenda Kabongo: 2 years; Narcisse Arido: 11 months; Fidèle Babala Wandu: 6 months. However, taking into account that these sentences had to be deducted from the time effectively spent in the ICC's detention center, these penalties did not need to be served after their pronouncement.

93 The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18.

94 The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18.

95 The Prosecutor against Mahamat Said Abdel Kani, ICC-01/14-01/21, International Criminal Court, 2021c.

96 The Prosecutor v. Paul Gicheru, ICC-01/09-01/20.

97 The Prosecutor v. Ali Muhammad Ali Abd–Al-Rahman, ICC-02/05-01/20.

accused was condemned but the other was acquitted because the OTP's evidence was not considered as proven beyond a doubt (Ngudjulo case[98]); *iii.* the head of state and his deputy in a case related to crimes against humanity perpetrated during post-electoral violences in Kenya, (Kenyatta case[99] and Ruto case[100]); and *iv.* the head of state and one of his ministers in a case also related to crimes against humanity perpetrated during post-electoral violence in Côte d'Ivoire (Laurent Gbagbo and Charles Blé-Goudé case[101]).

Moreover, several investigations did not lead to a trial case, e.g., because the person under investigation died in the meantime or the charges were not confirmed by the given Pre-Trial Chamber and the OTP did not produce more solid evidence.

Besides the already mentioned trial and pre-trial cases, it is worth mentioning that in a good number of situation countries, whether in Africa,[102] the Middle East,[103] Asia,[104] South America,[105] or Eastern Europe,[106] preliminary examinations or investigations have been launched if needed, with the approval of a Pre-Trial Chamber.

2.8. Cooperation with the ICC challenged by local realities of situations and turbulences of great politics

"International law is based on the cooperation of states": Every law student will learn this basic statement in the first lecture on international law. The sentence will be repeated later at nearly all conferences, thus contributing *nolens volens* to the well-known skepticism of non-international lawyers vis-à-vis the *jus gentium*.

Cooperation is especially important for the work of the International Criminal Court, which has no special enforcement mechanism to impose its will on governments.

The Rome Statute devotes a special chapter (Part 9) to cooperation with States Parties and with non-States Parties. The rules on the cooperation with States Parties are based on the Rome Statute itself, while special agreements need to be contracted with non-States Parties. However, if the given "situation" was put on the ICC's agenda *via* referral by the Security Council, when the state in question is member of the UN, special agreement is not required.

In the framework of the Rome Statute, the organ designated to act in case of failure to cooperate is the Assembly of States Parties, which however is not empowered with

98 The Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12.
99 The Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11.
100 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
101 The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, ICC-02/11-01/15.
102 International Criminal Court, 2014.
103 International Criminal Court, 2021d.
104 International Criminal Court, 2019; International Criminal Court, 2021b; International Criminal Court, 2020a.
105 International Criminal Court, 2021a; International Criminal Court, 2021e.
106 International Criminal Court, 2016; International Criminal Court, 2022; International Criminal Court, 2019; International Criminal Court, 2021b; International Criminal Court, 2020a; International Criminal Court, 2021d.

hard competences in the matter. (In case of a UNSC referral, on the ICC's demand, the Security Council is entitled to assess the failure and eventually sanction with all its powers under the Charter of the United Nations.)

Even if States Parties are generally keen to cooperate, one may identify some typical problems and difficulties. *i*. The first is the internal situation of the state where the crimes were committed, which might be afflicted with an ongoing armed conflict, epidemics, or the dilatoriness of the public administration. *ii*. The second problem is of a political nature. In spite of the fact that most of the cases thus far adjudged were put on the ICC's table through self-referral (i.e., the territorial state referred the situation to the ICC), the false perception was created and artificially reinforced that the ICC is "biased" and targets only Africa. This perception also resulted in a certain regional solidarity within the African Union in favor of Omar Hassan Ahmad Al-Bashir, the—since then already destituted and arrested—Sudanese head of State, against whom a warrant of arrest was delivered in the context of the investigation of the genocide allegedly committed in Darfur, a situation referred by the UNSC to the ICC. On the other hand, States denouncing, not ratifying, or not signing the Rome Statute regularly invoke the issue of *pacta tertiis nec nocent, nec pro sunt,* especially when the investigation could concern their nationals.[107] There was also a time when the then ICC Prosecutor Fatou Bensouda and one of her collaborators were targeted with *in personam* sanctions for investigating the Afghanistan situation against American personnel.[108]

But as always, there are also examples of good cooperation: From time to time, depending on the recognition of common interests in a given "situation," a certain cooperation was realized between the ICC and the USA[109] that resulted *inter alia* in Dominic Ongwen and Bosco Ntaganda's arrest and transfer to the Hague.

There are also agreements about the technical details of the cooperation with States Parties, *inter alia* about field-offices in some of the situation countries and modalities of interactions. We must also mention cooperation agreements contracted with the United Nations and the European Union and memoranda of understanding with Interpol, Europol, etc.

There is generally good cooperation between the ICC and most of the situation countries, as well as with countries hosting victims or witnesses, such that the transfer of documents of national investigations, the search for and eventual freezing of indictees' foreign assets, and cooperation in securing witnesses' travel to The Hague or in long-distance video-hearings proceed smoothly and with great facility. The same can be said about the offer of imprisonment facilities for the condemned to serve the sentence pronounced by the ICC, etc.

107 International Criminal Court, 2021d; International Criminal Court, 2016; International Criminal Court, 2022.
108 These sanctions imposed by US president Donald Trump were revoked by President Joe Biden.
109 This happened under Barack Obama' presidency.

2.9. The victims' participation during the proceedings and the importance of assistance and reparation to victims

One of the main novelties of the Rome Statute is the victims' institutionalized position during the whole proceedings: They are no longer just people that the parties are speaking about or who are eventually listened to as witnesses of their own case, but enjoy a *sui generis* status during the investigation, pre-trial, and trial. While the status of "party" is reserved at these stages to the OTP and the defence, victims, through their chosen common representatives (private lawyers or lawyers of the Office of Public Counsel for Victims (OPCV) belonginging to the Registry), have access to the submitted documents, may react to them, may submit their own views, and may ask the witnesses questions or even call witnesses of their own. In the meantime, it should be borne in mind during trial that they cannot act as a prosecutor-*bis*; their interventions should not be related to the actual facts (i.e., what happened, why did it happen?) but to their perception of these facts and the impact they had on them as victims, on their families or their communities.

If the accused's culpability is established at the end of the procedure, victims are entitled to reparation. During the reparation phase, the parties are the "defence" and the "victims." At this stage, the OTP does not need to play any role.

Even if the condemned perpetrator is obliged to assume the full reparation of the harms caused, in most cases—according to the experiences—this would not help *in concreto* because most perpetrators are indigent. Moreover, the case policy of the OTP and the importance of the contextual elements of the crimes against humanity and war crimes target mostly—and understandably—crimes with a huge number of victims. As a consequence, full reparation is reasonably impossible even if the condemned person is supposedly wealthy.[110]

All this means that the simple promise of reparation is not enough and intervention is needed on behalf of the international community. As already touched upon in Subsection 2.3, this activity is realized through the Trust Fund for Victims (TFV) under the judicial control of a trial chamber. The budget of the TFV is supplied by imposed fines ("*own resources*") and voluntary contribution from States and individuals ("*other resources*"). Theoretically, the TFV only advances the costs of the reparation, and ICC's Presidency could initiate a procedure for reimbursement if the condemned perpetrator's financial situation has changed and he is no longer indigent.[111] The amount of the due reparation is established by a Trial Chamber, and on the basis of the reparation judgement, the TVF should prepare a precise plan for implementation on collecingt the necessary amount of money for the programs. The planning, collection, and implementation are organized under the "*reparation mandate*" and are supervised by the judges.

110 To date, the only really wealthy indictee was Jean-Pierre Bemba Gombo, condemned at first, but acquitted at second instance.

111 No such change has occurred so far that would render a reimbursement appropriate.

The Trust Fund for Victims can take care of the victims of the situation prior to the perpetrator's condemnation when medical or other humanitarian actions are urgently needed. It can also happen that not all the victims concerned in a situation will be eligible for reparation, e.g., because the crimes committed against them do not make up part of the case (see for example an enduring civil war where only some special years or some precise attacks were chosen or when the person under investigation and allegedly responsible for given atrocities died in the meantime during battle). In case of acquittal, there is no condemnation, and consequently there is no obligation of reparation even if there is a huge number of victims in need.

The "*assistance mandate*" was established to provide for such cases. It is also performed by the TFV within a considerable margin of freedom and financed from the "*other resources*."

However, despite the theoretical importance of the distinction between "*assistance mandate"* and "*reparation mandate*," considering the limited available resources, in practice the actual services are very similar under both mandates, with priority given to necessary medical and psychological intervention and schooling, eventually complemented with help to rebuild a destroyed dwelling or to relaunch a micro-agricultural or artisanal activity.

3. The ICC and the other international criminal tribunals and hybrid tribunals

3.1. Other international criminal tribunals

Even if the presentation of the long way to the establishment of the ICC as a permanent international criminal tribunal might give the impression that one single court should be enough to put an end to impunity, this is not the case.

The ICTY[112] and the ICTR[113] could accomplish most parts of their original mandate by condemning the most important perpetrators of crimes during the ex-Yugoslav and Rwandan armed conflicts, but even the execution of judgments necessitates judicial supervision and decision making. However, the ICC could not step in because of the strict time limit enshrined in the Rome Statute (i.e., the *ratione temporis* competence). As a consequence, the Security Council decided to set up the Mechanism for International Criminal Tribunals[114] in order to deal with judgments under appeals and issues of execution of the imprisonment penalties.

112 Of the 161 indictees, 83 were condemned e.g., Radovan Karadjic, Ratko Mladic. Slobodan Milocevic, the mastermind of the ethnically colored armed conflict died in the detention center, in the middle of his procedure. The indictees and the condemned persons include not only Serbian but also Croat and Bosniak politicians, officers, and soldiers.

113 Of the 93 indictees, 62 were sentenced to imprisonment, e.g., Jean Kambanda, Jean Paul Kayesu, Jean Bosco Barayagwiza.

114 Statute of the Mechanism for International Criminal Tribunals, 2010, Annex 1.

3.2. The hybrid tribunals

Similarly, the prosecution by the ICC for the atrocious crimes committed under the Khmer Rouge in Cambodia in 1975–1979, by Charles Taylor in Sierra Leone in 1996–2003, or by Hissène Habré in Chad in 1982–1990 would have run against the *ratione temporis* principle. For this reason, special so-called hybrid tribunals like *i.* the Special Tribunal for Sierra Leone (STSL), *ii.* the *Extraordinary Chambers in the Courts of Cambodia* (ECCC), and *iii. Extraordinary African Chambers* (EAC) were set up concerning the crimes committed in these countries through agreements contracted by Sierra Leone[115] and Cambodia[116] with the United Nations or Senegal[117] (hosting the destitute president Habré) with the African Union. Their common element was the simultaneous presence of national judges and international judges, and their budget was mostly covered by the United Nations.

The *Special Tribunal for Lebanon* (STL) was created in order to put to trial the perpetrators of the murder by bombing of PM Rafik Hariri and some of his colleagues. The legal difficulties of putting the case before the ICC were numerous: Neither Lebanon nor Syria (the country where the perpetrators arrived from and returned to) is a States Party, and terrorism or terrorist acts are enumerated neither in Article 7 (crimes against humanity) nor in Article 8 (war crimes) of the Rome Statute and the "*chapeau*" of these two articles (see Subsection 2.1 above) could also be considered as not totally fitting in this case. In answer to these difficulties, the UNSC decided to establish a special court[118] for the purpose and an agreement was subsequently contracted between Lebanon and the United Nations. [119]

The ICTY was competent – as we have seen above – on war crimes and crimes against humanity committed during the ex-Yugoslav conflict and the indictees were mostly Serbian, Bosniak, and Croat soldiers, officers and politicians. Later, it became clear that the organization called UÇK, which was first a paramilitary formation set up in order to protect Kosovars from their massive deportation or forced expulsion and became later a political party, also seemed to be involved in the commission of crimes, partly war crimes but, according to alarming reports, illegal trading of human organs as well.[120]

The jurisdictional competence of the ICTY was, however, prevented by the decision already taken by the UNSC to close it by transforming it into the residual mechanism. However, there was an even more important obstacle, i.e., the lack in its statute of a crime of illegal trade in human organs. The same lacuna can be observed in connection with the Rome Statute. Moreover, the *ratione temporis* rule would also have excluded the ICC's competence.

115 United Nations, 2002.
116 United Nations, 2003.
117 Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.
118 S.C. Res. 1757, 5685th mtg, May 30, 2007, S/RES/1757 (2007), Annex.
119 Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Beirut, 29 January 2007 & New York, 6 February 2007.
120 Marty, 2011.

Under these circumstances, the European Union agreed with Kosovo about the establishment of a special tribunal called *Kosovo Special Chambers* (KSC),[121] whose content was promulgated also by the Parliament of Kosovo.[122]

In addition to the trade in human organs, the formulation of the different other crimes follows rather closely the text of the Rome Statute, and the time frame is three years from 1998 to 2000. The construction of the judiciary is also based on a "hybrid" composition (national and international judges) and on the observation of Kosovar (and prior Yugoslav) legislation and judicial practice. The budget is mostly covered by the European Union.

4. Conclusions and remarks

It would be naive to expect that humanity will never again commit crimes or that the pure establishment and the functioning of the International Criminal Court are in themselves sufficient for punishing all the perpetrators of war crimes or crimes against humanity.

The trials before the ICC contribute, however, to discouraging potential perpetrators of these horrible crimes and make them realize that they can easily be brought to justice. Even their own state could conclude that solemn speeches about the determination of the national judiciary to punish militaries having committed war crimes are not enough if the results of the proceedings are not openly accessible to the public. The main philosophy behind complementarity is that beside the importance of the principle *ne bis in idem re*, the real solution is punishment at the national level, an international legal commitment enshrined in several international conventions.

Today's young lawyers or young military officers may easily become directly involved in regional armed conflicts when participating in different peacekeeping or peace-creating missions close to or far from their own country. They can encounter difficult situations where different elements of multinational forces are fighting together when their home countries are not forcibly bound by the Rome Statute: The conflict between the obligation to obey their superior's orders and the individual criminal responsibility for having committed a war crime is an issue that no soldier, whether sub-officer, officer, or general, would ever like to experience.

The lawyer, as a police or border guard officer or as a state attorney, can easily meet in the near future a transmitted ICC warrant and the notification that according to some confidential information or common knowledge, an alleged perpetrator is probably on the territory of the given state. Judges working on the national level can meet such a litigation when the alleged perpetrator contests the legality of his arrest.

In order to be able to pass the right decision against or in favor, lawyers should be familiar with the basic rules of the Rome Statute and should also take into

121 Kosovo Specialist Chambers, Specialist Prosecutor's Office, 2014.
122 Kosovo Specialist Chambers, Specialist Prosecutor's Office, 2015.

consideration that all these rules are continously interpreted in line with a rather coherent judicial practice, which is, however, an evolving jurisprudence like that of the other international tribunals.

This is by far not an easy job, but it is feasible if truly challenging for an ambitious lawyer, state administrator, or attorney at law.

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| Chapter 9 |

Migration

Karol KARSKI

ABSTRACT

Migration is inherent in human history. It is what we name a change of habitual residence or temporary residence by natural persons. It can be permanent or temporary. Its purpose may be, *inter alia*, tourism, education, treatment, pilgrimage, or earning money. Of course, also in this case we encounter a number of definitions that define a narrower or broader concept of migration. These forms include emigration, immigration, re-emigration, refugeehood, evacuation, and repatriation. The issue of admitting foreigners to a territory is, as a rule, regulated by national law. The freedom of action of states is, however, to some extent limited by international agreements.

International law pays particular attention to refugees. This matter is regulated, in particular, by the Geneva Convention relating to the Status of Refugees of 1951, amended by the New York Protocol of 1967. These issues are also tackled in the acts of international humanitarian law, including the Fourth Geneva Convention relative to the protection of civilian persons in time of war of 1949 and the First Additional Protocol of 1977 to the Geneva Conventions of 1949. Respective legal acts have been also adopted by the European Union and include Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted and Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Migrant workers are another form of migrants, whose status is regulated by the conventions of the International Labour Organization and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990. In Europe—within the scope of the Council of Europe—this issue is regulated by the European Convention on the Legal Status of Migrant Workers of 1977.

Other acts of international law, including universal treaties such as International Covenant on Civil and Political Rights of 1966, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and UN Convention on the Rights of the Child of 1989 refer partly to some aspects of the status of foreigners. Regional acts such as the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights also refer to these issues.

The international community has established a number of institutions handling the status and rights of migrants as a whole and their individual types. These institutions include the UN High Commissioner for Refugees and the UN Special Rapporteur on the Human Rights of Migrants and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, which is a treaty body of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

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KEYWORDS

migrants, refugees, states, treaties

Migration is defined as a change of place of residence or temporary stay by natural persons. It may be external, when it involves crossing state borders, or internal, when it takes place within one country. In this Chapter, we will discuss the first of these, i.e., external migration. It may be permanent or temporary, and its purpose may be, *inter alia*, tourism, education, treatment, pilgrimage, or earning money. Other forms of migration include, in particular, emigration (departure), immigration (arrival), re-emigration (return from migration), refugeehood, evacuation (removal of given persons by the state to avoid a threat), and repatriation (permanent return of former citizens of a given country from a foreign territory). As Robert Tabaszewski emphasizes: "The decision to emigrate is made voluntarily by emigrants and can be withdrawn at any time, which means that migrants can, in principle, freely return to their home country. The lack of an unambiguous definition of a migrant in the binding acts of international law makes the protection granted to this category of people ambivalent and is largely determined by national legislation, including adopted immigration procedures. Hence, we can distinguish de jure migrants and de facto migrants."[1]

Refugeehood is a special form of migration. As Barbara Mikołajczyk points out, "refugees are foreigners coming from another country and applying for protection because of persecution, wars and various types of catastrophes, although according to international law the concept of a refugee is narrower and is related to the institution of asylum."[2] On the other hand, Dominika Cieślikowska emphasizes that refugeehood should be defined as: "The process of changing the place of permanent residence (usual residence) in the event of a threat of persecution. Contrary to migration, it does not take place entirely voluntarily, and is the result of the political and social situation in a given place (most often but not limited to armed conflicts)."[3] The author quotes the division of refugeehood into: "external—occurs when a person forced by the situation leaves the state of which he or she is a citizen and resigns from its protection, recognizing that the state authorities have not duly fulfilled their obligation to provide protection" and "internal—when a person forced by the situation leaves the place of permanent residence / stay, but does not cross the border recognized as international."[4] She adds that:

> "In order to avoid legal controversy, it is postulated to use the terms 'internal displacement' or 'internal resettlement' instead of internal refugeehood, because according to the letter of the law (e.g., the Geneva Convention)[5] international protection applies only to external refugeehood. However,

1 Tabaszewski, 2020, p. 251.
2 Mikołajczyk, 2014, p. 517. See also Owen, 2020, pp. 36–44.
3 Cieślikowska, 2022.
4 Ibid.
5 Convention relating to the Status of Refugees, 1951 (189 U.N.T.S. 137).

> the practical activities of organizations dealing with the issues (e.g., the United Nations High Commissioner for Refugees) usually cover both types of refugeehood."[6]

The definition of a refugee is provided in the Geneva Convention relating to the Status of Refugees of 1951. Pursuant to Art. 1(A)(2) of the Convention, the term "refugee" applies to any person who:

> "as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Moreover, this provision states that the status under the Convention is also granted to any other person who has been or could be recognized as a refugee on the basis of other international agreements enumerated in the document. The definition referred to in this Convention is slightly modified—by removing time and territorial limitations with regard to circumstances that may form the basis for recognition as a refugee—in Art. 1 of the Protocol relating to the Status of Refugees of 1967 (New York Protocol).[7]

Not all people commonly referred to as refugees have this status under the Geneva Convention. As R. Tabaszewski points out:

> "Therefore, taking into account the legal basis, the following types of refugees can be distinguished: (1) conventional refugees (based on the 1951 Convention); (2) mandated refugees (under the care of UNHCR[8]); (3) de facto refugees (due to the existing threat, they do not want to apply for the refugee status); (4) internal refugees (within the limits of national jurisdiction); (5) environmental refugees who, due to natural disasters, were objectively forced to leave their homes."[9]

The European Union's belief regarding its external obligations in this area and its own needs is expressed in the definition of the refugee provided currently in Art. 2(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for

6 Cieślikowska, 2022.
7 Protocol Relating to the Status of Refugees, 1967 (606 U.N.T.S. 267). United Nations High Commissioner for Refugees. 1967.
8 United Nations High Commissioner for Refugees.
9 Tabaszewski, 2020, p. 254.

persons eligible for subsidiary protection, and for the content of the protection granted.[10] Pursuant to this provision, 'refugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it (...). "Some exclusions from the refugee status despite meeting the premises defined in Art. 2(d) of the directive are provided for in its Art. 12."[11]

Persons staying on the territory of a given country can be divided into citizens of that country, foreigners who are citizens of other countries, and persons who do not have citizenship of any country, i.e., apatrides (stateless persons). As a rule, the citizens of the given state stay on its territory except for special cases, while foreigners stay within that state temporarily. However, there may be cases where a foreigner has the right of permanent residence in a given state.

Citizenship is a special, permanent legal bond that connects the state with a natural person. As Remigiusz Bierzanek and Janusz Symonides point out:

> "Citizenship is the basis on which all the rights and obligations of an individual towards the state are based. It causes a number of significant consequences at the international level. A state with which an individual has a permanent legal relationship exercises diplomatic and consular protection over such individual, and in some cases, when it was obliged to prevent violations of the law, it is also responsible for the actions of such individual. It is a universal obligation for the state to admit its own citizens to its territory."[12]

Although all persons staying in the territory of a given state, both citizens and foreigners, are subject to the authority and law of that state, there are certain exclusions in this respect, concerning, *inter alia*, diplomats. As a rule, the treatment of foreigners remains a national competence of the states, governed by national law. However, states conclude international agreements regarding the treatment of their citizens in other countries and, consequently, the treatment of foreigners. A certain international law practice has developed in this respect. As Wojciech Góralczyk and Stefan Sawicki indicate, the main systems include:

1. national treatment (general equality), which provides for granting foreigners, in principle, the scope of civil rights enjoyed by citizens of that state;

10 OJ L 337, 20.12.2011, p. 9.
11 Karska, 2020, p. 11–12. For historical solutions see Fitzmaurice, 2013; Holborn, 1956; Holborn, 1938; Karska, 2017; Simpson, 1938, pp. 607–628.
12 Bierzanek and Symonides, 1998, pp. 260–261.

2. special treatment (specific equality), under which foreigners are granted only certain rights in specific areas, which are inherent in that country to its citizens;

3. highest preferential treatment, i.e., granting citizens of another country the scope of rights enjoyed by nationals of any other third country.[13]

When defining the status of foreigners on their territory, states often refer to the principle of reciprocity, according to which a given country grants certain rights to citizens of another specific country only if the latter provides the same rights to the citizens of the former. These rights may include issues of trade, settlement, or legal issues. These issues may be regulated by acts of national law or international agreements. It should also be noted that the Geneva Convention relating to the Status of Refugees of 1951 formulates certain limitations with regard to the applicability of the principle of reciprocity in relation to refugees. Pursuant to Art. 7 (1) of the Convention, except where this Convention contains more favorable provisions, a State shall accord to refugees the same treatment as is accorded to aliens generally; (2) after a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the State; (3) each State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State; (4) the State shall consider favorably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to Paras. 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfill the conditions provided for in Paras. 2 and 3; (5) the provisions of Paras. 2 and 3 apply both to the rights and benefits referred to in Articles 13 (Movable and immovable property), 18 (Self-employment), 19 (Liberal professions), 21 (Housing), and 22 (Public education) of the Convention and to rights and benefits for which this Convention does not provide.

The state may expel or deport, i.e., forcibly return to the border, a foreigner who has violated the law or whose further stay threatens the interests or security of that state. This right should be limited by the provisions of international law that a given state is bound by. It should also be applied in a non-discriminatory manner.[14]

The state has full competence to regulate international passenger traffic, which, however, is limited at their will by the concluded international agreements. According to the definition by W. Góralczyk and S. Sawicki:

> "International passenger traffic should be defined as the movement of persons combined with the crossing of the border or state borders. The international movement of persons includes temporary or permanent transfers of individuals, and includes leaving the territory of a state by its own nationals as well as

13 Góralczyk and Sawicki, 2020, p. 287.
14 Ibid., p. 288.

> the admission of foreigners to the territory of the state. This movement takes place by voluntarily moving across state borders under normal, peaceful conditions. Therefore, its scope does not include such phenomena as movement of troops during the war or forced displacement of people."[15]

These authors also add that:

> "The state, by virtue of its sovereign power, may itself establish the rules for crossing its borders. Therefore, it may pursue a policy of freedom or restriction of personal traffic, set conditions for its own citizens to leave its territory and for foreigners to be admitted to its territory. A state's discretion in this area may be limited by the provisions of international agreements binding that state. There is now a large number of multilateral and bilateral agreements aimed at increasing the freedom of the international movement of people (...)."[16]

An expression of this tendency is, *inter alia,* free movement of persons, as one of the freedoms operating within the European Union, and the abolition of border controls between most European Union Member States.[17]

As R. Bierzanek and J. Symonides point out:

> "No state is obliged to admit foreigners—people who do not have its citizenship—to its territory. It may prohibit access, and may set conditions whose fulfillment determines the consent. In the modern world there is, in principle, no state that would admit all foreigners into its territory without any restrictions and conditions or would not let anyone in. Certain restrictions on the freedom of action in this respect may result from bilateral and multilateral international agreements that states conclude on matters related to the movement of persons. An examination of the practice and internal legislation leads to the conclusion that while tourists obtain permission to enter relatively easily, in the case of economic immigration this consent is granted selectively."[18]

The issues associated with migration are regulated by many international law agreements. Their creation was significantly accelerated as a result of migration processes that were the result of the World War I and its consequences, including specifically the Russian Revolution. The related mass movements of people made it necessary to protect them, and at the same time, a need arose to control and record the movements of individual natural persons. In 1921, as part of the League of Nations, the office of

15 Ibid.
16 Ibid. See also Perruchoud, 2012.
17 See Socha, 2005, pp. 66–70.
18 Bierzanek and Symonides, 1998, p. 265.

the High Commissioner for Refugees was established, headed by the Norwegian polar explorer Fridtjof Nansen. He was the creator of the so-called Nansen passports, i.e., special documents issued to stateless persons. The Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees (89 LNTS 47) was signed in 1926, followed in 1928 by the Arrangement Relating to the Legal Status of Russian and Armenian Refugees (89 LNTS 53). Following F. Nansen's death, the Nansen International Office for Refugees operated from 1930, to be replaced in 1938 by the Intergovernmental Committee on Refugees. Subsequent events that preceded World War II, and in particular the mass persecution of the Jewish population, led to the conclusion of the 1933 Convention Relating to the International Status of Refugees, the 1936 Provisional Protocol Relating to Refugees Arriving from Germany, and the 1938 Convention Relating to the Status of Refugees Arriving from Germany (192 LNTS 59) and the Additional Protocol of 1939 to the Interim Agreement and the Conventions of 1936 and 1938 on Refugees Arriving from Germany (198 LNTS 141). The United Nations Relief and Rehabilitation Administration was established during World War II, which operated in the years 1943–1947. In 1946, the Constitution of the International Refugee Organization (18 UNTS 3) was adopted, which in 1948 became one of the specialized organizations of the United Nations system. In 1950 it was replaced by a UN agency, the UN High Commissioner for Refugees (UNHCR), which is elected by the UN General Assembly for a five-year term at the request of the UN Secretary-General. UNHCR is mandated to aid and protect refugees, forcibly displaced communities, and stateless people, and to assist in their voluntary repatriation, local integration, or resettlement to a third country.[19]

Wider protection—as opposed to migrants at large—is granted to their special category, i.e., refugees. This is related to some extent to the forced circumstances of their relocation to other countries, i.e., the direct threat of persecution or death, as well as the objective source of the threat (war, riots, actions of undemocratic regimes, etc.). As already indicated, the concept of a refugee is often invoked together with the concept of asylum, one of the oldest institutions of international law, the rationale of which is to provide shelter to a person fleeing persecution.[20] B. Mikołajczyk emphasizes that it is defined in three ways. First: "Asylum is regarded as one of the forms (next to refugee status) of protection granted to foreigners to which the UN General Assembly declaration on territorial asylum of 1967 refers."[21] Second:

> "Asylum is the equivalent of broadly understood international protection granted to people seeking refuge from persecution outside their country of origin, in accordance with Art. 14 (1) of the Universal Declaration of Human

19 See Omelaniuk, 2012.
20 Karska, 2020, p. 12; Mikołajczyk, 2014, p. 517; Tabaszewski, 2020, p. 252. For the issue of asylum see Wieruszewski, 2014, pp 35–37; Kotzeva, Murray and Tam, 2008, pp. 5–39.
21 Mikołajczyk, 2014, p. 517.

> Rights of 1948 formulating the right to seek asylum: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'"[22]

B. Mikołajczyk rightly notes that: "In practice, however, most often asylum means the status of a refugee within the meaning of the Geneva Convention relating to the Status of Refugees of 1951 and the New York Protocol of 1967. The terms asylum seeker and refugee are often used interchangeably, however, according to the Geneva Convention, a refugee is only a person who meets the criteria set out therein."[23]

The issue of the legal nature of the stay of foreigners on the territory of a country other than their own country is also regulated by the International Covenant on Civil and Political Rights of 1966 (999 UNTS 171). Such a state has a right to expel a foreigner however only subject to certain conditions. Pursuant to Art. 13 of that treaty:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

This matter is also regulated in the acts concerning detailed regulations referring to specific actions or groups of people. For example, under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (1465 UNTS 65), Art. 3(1) specifies that: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Art. 3(2) additionally specifies that:

> "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

22 Ibid. It should be also stressed that—pursuant to Art. 14(2) of this document—"This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." The 1948 Universal Declaration of Human Rights [A / RES / 217 (III)], being a resolution of the United Nations General Assembly, is not formally a legally binding document. However, the doctrine emphasizes that it reflects the norms of common law and / or general principles of law. Czapliński and Wyrozumska, 2004, pp. 431–432.

23 Mikołajczyk, 2014, p. 517.

The UN Convention on the Rights of the Child of 1989 (1577 UNTS 3) also refers to this matter, and in accordance with Art. 22(1) of that treaty:

> "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties."

It was added in Art. 22(2) that:

> "For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention."

These matters are also in the center of interest of regional systems, including the European Union's legislation. The Charter of Fundamental Rights of the European Union[24] guarantees the right to asylum. Art. 18 thereof stipulates that:

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of (...) 1951 and the Protocol of (...) 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union."

This means that a reference was made to other legal acts that shall apply in that case. Moreover, Art. 19 of the Charter stipulates that: "(1) Collective expulsions are prohibited. (2) No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[25]

24 OJ C 326, 26.10.2012, p. 391.
25 Hurvitz, 2009, pp. 205, 210, 247–249.

These issues are also regulated in EU secondary legislation. These legal acts include, *inter alia*, Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person[26] and—already mentioned—Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.[27] The EU institutions also issued a general legal act in the case of occurrence of specific individual situations related to mass influx of displaced persons. This is Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, i.e., the Temporary Protection Directive (TPD).[28] This Directive served as a basis to issue, *inter alia*—adopted unanimously—Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.[29] Pursuant to these regulations:

> "Individuals who receive TPD status will be granted the following protections and rights: (1) Residence Authorization—issued for an initial one year; Renewal eligibility and details have yet to be announced; (2) Work Authorization / Access to Labour Market—in line with the duration of the individual's residence authorization; (3) Social Welfare Assistance; (4) Access to Medical System; (5) Access to Other Government Assistance Programs: (6) Study Permission for Student-Aged Individuals—note that TPD will also confer the right to legal guardianship and access to the local education system for unaccompanied children and teenagers."[30]

Migrations are also a consequence of armed conflicts. For this reason, the international agreements in the area of international humanitarian law of armed conflicts refer to them as well.[31] The Fourth Geneva Convention relative to the protection of civilian persons in time of war of 1949 (75 UNTS 287) uses the term "refugee," although it does not define it. Moreover, Art. 73 of the additional First Protocol of 1977 to the

26 OJ L 180, 29.6.2013, p. 31.
27 OJ L 337, 20.12.2011, p. 9.
28 OJ L 212, 7.8.2001, p. 12.
29 OJ L 71, 4.3.2022, p. 1.
30 Newland Chase, 2022.
31 The issue of states and natural persons for the breach of the provisions of international humanitarian law is discussed inter alia in Karska, 2009; Socha, 2002–2003.

Geneva Conventions of 1949, and relating to the protection of victims of international armed conflicts (1125 UNTS 3) stipulates that:

> "Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of (...) the Fourth [Geneva] Convention, in all circumstances and without any adverse distinction."

The primary act of international law regulating the issue of refugees is the Geneva Convention relating to the Status of Refugees of 1951 including the New York Protocol of 1967. These acts regulate the rights and obligations of refugees, the procedure of obtaining refugee status, and the positive and negative obligations of the state in respect to refugees.[32]

Refugee status is not granted in an irrevocable manner. Pursuant to Art. 1(C) of the Convention, it ceases to apply in respect to a person when: (1) he has voluntarily re-availed himself of the protection of the country of his nationality; or (2) having lost his nationality, he has voluntarily reacquired it; or (3) he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) he can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

In accordance with Art. 1(F) of the Convention, refugee status may be denied to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Art. 2 quotes the obvious statement that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Refugees should be treated in non-discriminatory manner. Art. 3 stipulates that the states shall apply the provisions of the Convention to refugees without discrimination as to race, religion, or country of origin. Moreover, in accordance with Art. 4, States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

The Convention also refers to the juridical status of a refugee, which is regulated in Chapter II (Arts. 12–16). In respect to the personal status of a refugee, (1) it shall

32 See Chetail, 2012, pp. 56–92.

be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence; (2) rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee. Subsequently, in regard to movable and immovable property, the Convention stipulates that States shall accord to a refugee treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property. Therefore, in this case we are dealing with a specific clause of most preferential treatment. It also regulates the issue of artistic rights and industrial property. In respect of the protection of industrial property, such as inventions, designs or models, trademarks, and trade names, and of rights in literary, artistic, and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence. The Convention also contains a reference to the right of association of a refugee. As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country, in the same circumstances. In respect to access to courts, (1) a refugee shall have free access to the courts of law on the territory of all States; (2) a refugee shall enjoy in the State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*; and (3) a refugee shall be accorded in the matters referred to in Para. 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III (Arts. 17–19) stipulates further the right of refugees to gainful employment. States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the State concerned, or who fulfils one of the following conditions: (a) He has completed three years' residence in the country; (b) he has a spouse possessing the nationality of the country of residence (a refugee may not invoke the benefit of this provision if he has abandoned his spouse); and (c) he has one or more children possessing the nationality of the country of residence. States shall consider assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees

who have entered their territory pursuant to programs of labor recruitment or under immigration schemes. Moreover, the States shall accord to a refugee lawfully in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts, and commerce and to establish commercial and industrial companies. The Convention also refers to the issue of practising liberal professions by the refugees. States shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances. The Convention further stipulates that the States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV (Arts. 20–24) of the Convention also regulates the welfare of a refugee. It contains some elements of special treatment formula (detailed equality) and highest preferential treatment formula. For example, where a rationing system exists that applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals. Subsequently, as regards housing, the States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances. States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education. States shall accord to refugees treatment as favorable as possible, and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas, and degrees, the remission of fees and charges, and the award of scholarships. States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals. States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters; (a) in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on homework, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining; (b) social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities, and any other contingency that, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations: (i) There may be appropriate arrangements for the

maintenance of acquired rights and rights in course of acquisition; and (ii) national laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits that are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the State. Moreover, the States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

Chapter V (Arts. 25–34) refers to administrative measures. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority. The authority or authorities mentioned above shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities and shall be given credence in the absence of proof to the contrary. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services. Each State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances. States shall issue identity papers to any refugee in their territory who does not possess a valid travel document. States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. States may issue such a travel document to any other refugee in their territory. Moreover, the States shall not impose upon refugees duties, charges, or taxes, of any description whatsoever, other or higher than those that are or may be levied on their nationals in similar situations. A State shall, in conformity with its laws and regulations, permit refugees to transfer assets that they have brought into its territory to another country where they have been admitted for the purposes of resettlement. A State also shall consider the application of refugees for permission to transfer assets wherever they may be and that are necessary for their resettlement in another country to which they have been admitted. States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Art. 1 of the Convention, enter or are present in their territory without authorization, provided

they present themselves without delay to the authorities and show good cause for their illegal entry or presence. This means that the refugee has the right to cross the border between the state in which he is threatened and the first safe state. The refugee must cross borders between successive safe states in accordance with national and international law regulating the rules of international passenger traffic, and it may be legally liable for their violation. An individual's fulfillment or potential fulfillment of the criteria set out in Art. 1 of the Convention does not constitute grounds for illegal border crossing between safe countries, or more precisely, does not make such an act legal or non-punishable. States may, of course, in such cases elect not to punish such a person on general terms. States shall not apply to the movements of such refugees who managed to enter their territory, restrictions other than those which are necessary, and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. States shall allow such a refugee a reasonable period within which to seek legal admission into another country. States reserve the right to apply during that period such internal measures, as they may deem necessary. No State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[33] The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. Moreover, the States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

As R. Tabaszewski points out:

> "In practice, states granted (...) broader protection than it resulted from the provisions of the Convention. This is called subsidiary protection, i.e., protection granted to a foreigner who does not meet the conventional conditions for

33 The principle of non-refoulement is also based on the provisions of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) of 1950 (ETS No. 5, as amended), specifically its Art. 3. The scope of that protection is broader than envisaged in the Geneva Convention of 1951. See Kapelańska-Pręgowska, 2017.

> granting refugee status, but nonetheless granted in the event that his return to the country of origin may expose him to a real risk of suffering serious harm (...), has not been regulated in a single convention-type document."[34]

International law also regulates the issues related to migrant workers, who should be distinguished from refugees. The first regulations in this area were drafted by the International Labour Organization (ILO). These legal acts include the Migration for Employment Convention of 1939 (ILO No. 66),[35] the Migration for Employment Convention (Revised) of 1949 (ILO No. 97), and the Migrant Workers (Supplementary Provisions) Convention of 1975 (ILO No. 143). These regulations deal with the recruitment, job agency, and working conditions of migrant workers. In turn, the European Convention on the Legal Status of Migrant Workers (ETS No. 093) was adopted within the framework of the Council of Europe in 1977. Pursuant to Article 1(1), for the purpose of this Convention, the term "migrant worker" shall mean a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment. The Conventions of ILO and the Council of Europe adopt as a rule that a foreigner (migrant worker) needs to obtain a permit for the entry and employment on the territory of the given state unless individual consent is not required from the citizens of certain countries or other groups of people. A Consultative Committee was created to examine Parties' reports on the application of the European Convention. Except for some Western Europe countries, the European Convention was signed only by Albania, Moldavia, and Ukraine. Another act of international law regulating this matter is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (2220 UNTS 3).[36] For the purposes of the Convention, the term "migrant worker" refers to a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national. Pursuant to Art. 5 thereof, migrant workers and members of their families: (a) are considered as documented or in a regular situation if they are authorized to enter, to stay, and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party; and (b) are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in Para. (a). States undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, color, language, religion or conviction, political or other opinion, national, ethnic, or social origin, nationality, age, economic position, property,

34 Tabaszewski, 2020, p. 254.
35 This is an already withdrawn instrument made under the decision of the International Labour Conference at its 88th Session in 2000.
36 International Labour Office, 2003; World Council of Churches, 1991.

marital status, birth, or other status. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law and are necessary to protect national security, public order ("*ordre public*"), public health or morals, or the rights and freedoms of others and, are consistent with the other rights recognized in the present part of the Convention. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin. The right to life of migrant workers and members of their families shall be protected by law. The Convention established another treaty body to monitor the execution of human rights insofar as defined therein. This body is the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Its powers include the review of periodical reports of the states. The Committee also may accept inter-state and individual complaints. The Convention has been signed so far by less than half of the states.[37]

The UN Special Rapporteur on the Human Rights of Migrants operates within the scope of the Special Procedures of the UN Human Rights Council. This mandate was created in 1999 by the Commission on Human Rights, pursuant to Resolution 1999/44. The task of the Special Rapporteur is to examine ways and means to overcome the obstacles to the full and effective protection of the human rights of all migrants at all stages of migration and elaborate recommendations on strengthening the promotion, protection, and implementation of the human rights of all migrants. The mandate of the Special Rapporteur on the Human Rights of Migrants covers all countries, irrespective of whether a State has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990.[38]

37 See Cholewiński, 2012.

38 For more on the mandates operating within the scope of UN Special Procedures, see, e.g., Rattan and Rattan, 2018, pp. 217–220, 226–227; Ramcharan, 2015, pp. 136–137, 161–162, 207–210; Tabaszewski, 2020, pp. 257–258.

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Chapter 10

The Protection of Cultural Heritage in International Law

Katarzyna ZOMBORY

ABSTRACT

International cooperation in cultural heritage protection has developed primarily within the framework of UNESCO, whose pioneering efforts have led to the adoption of five international cultural conventions. The main areas of protection of cultural heritage in contemporary international law include safeguarding of cultural property during war, preventing the illicit trade of cultural property, and protecting the world cultural heritage, understood as tangible (material) and intangible (non-material) manifestations of culture, as well as natural sites. One of the most significant recent developments of international cultural heritage law is the recognition of the human rights dimension of heritage protection, which is closely related to the notion of cultural rights. In Europe, international efforts in the preservation of cultural heritage were initiated under the auspices of the Council of Europe. There is no binding international instrument dedicated exclusively to the protection of cultural property in Central and Eastern Europe. International protection of cultural heritage in this region faces several challenges owing to the region's turbulent history. The frequent non-coincidence of political boundaries and ethnic boundaries makes the protection of cultural heritage a highly sensitive issue, given the role of cultural heritage in shaping and maintaining national identities.

KEYWORDS

cultural heritage, cultural rights, UNESCO, national minorities, indigenous peoples, international law, Central and Eastern Europe

1. Introduction

Cultural heritage plays a powerful role in shaping the identity of every person, community, and nation, and for this reason it has received substantial international protection. International cultural heritage law is one of the oldest and at the same time one of the most complex fields of public international law. International cooperation in this area takes various forms, and during the last hundred years has been constantly evolving, defining and re-defining its scope, trying to provide a protective framework for different manifestations of culture in the face of different challenges. This chapter provides a general overview of the international cultural heritage law and presents the main pillars of international cooperation aimed at the protection of

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cultural legacy in its various aspects. It discusses different approaches to safeguarding of cultural heritage in international law, including the human rights perspective, and challenges in protecting cultural heritage in the Central and Eastern European countries.

2. Definition of cultural heritage in international law

There is no uniform, unanimously agreed definition of cultural heritage, because its ever-expanding scope resists easy description or unambiguous definition. According to Francioni, the term cultural heritage represents today

> "the totality of cultural objects, traditions, knowledge and skills that a given nation or community has inherited by way of learning processes from previous generations and which provides its sense of identity to be transmitted to subsequent generations."[1]

A meaningful definition of cultural heritage, which gives an accommodating expression of the constantly evolving concept of cultural heritage, can be found in the Council of Europe's 2005 Convention on the Value of Cultural Heritage for Society.[2] It defines "cultural heritage" as

> "a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time."

A great number of legal definitions of cultural heritage in different legal instruments reflect the variety of approaches to the protection of culture in international law. Over the years, United Nations Educational, Scientific and Cultural Organization (UNESCO) documents relevant to the protection of culture have referred first to the notion of "cultural property," and later also to the term "cultural heritage" and "intangible cultural heritage." Less predominantly, also other expressions have been used, such as "cultural expressions" or "cultural goods and services." Although the terms "cultural heritage" and "cultural property" are sometimes used interchangeably, their meaning and content are not identical. The earlier term "cultural property" is associated with the protection of material objects, while the more recent term "cultural heritage" is generally considered to be a broader, more holistic notion, embracing all forms of

1 Francioni, 2008, p. 6.
2 *Convention on the Value of Cultural Heritage for Society*, adopted in Faro on October 27, 2005, under the auspices of the Council of Europe, CETS No. 199.

manifestations of culture, including physical, as well as non-physical forms.[3] Such a vast, all-encompassing understanding of cultural heritage, as opposed to the protection simply of material cultural objects, might prompt terminological difficulties, but it corresponds better to the generally accepted understanding of *culture.* Earlier regarded as an *elite* concept, culture is currently considered a broad anthropological concept embracing every aspect of contemporary society—in other words, a way of life.[4]

Definitions of cultural heritage formulated by legal scholars refer to the concept of inheritance.[5] Cultural heritage is described as resources received from the past that should be held in trust by the current generation, and possibly passed on to the next generations unaltered. According to the UN independent expert in the field of cultural rights,

> "the cultural heritage links the past, the present and the future, as it encompasses things inherited from the past, which are of such value today that individuals and communities want to transmit them to future generations."[6]

The temporal character of cultural heritage was already emphasized in the Constitution of UNESCO (1945), in which the Organization was endowed with the duty of "assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science."[7] The duty of the current generation to safeguard resources inherited from the past underpins the international cooperation in the field of cultural heritage protection, but is also crucial to the international protection of the natural environment. The principle of sustainable development, together with the concept of inter-generational equity, is a source of the obligation to preserve the cultural and natural wealth of our planet for the future. Since cultural heritage, similarly to natural resources, is a non-renewable resource, its enjoyment shall be conducted in such a way as not to exhaust it.[8]

3 Blake, 2015, pp. 6–7. See also the explanation contained in the Report of the United Nations (UN) Special Rapporteur in the field of cultural rights, Karima Bennoune, on the intentional destruction of cultural heritage, submitted in accordance with Human Rights Council resolution 28/9, 9 August 2016, A/71/317, para. 10.

4 Donders, 2008, p. 318; Blake, 2015, p. 288. See also the definition of culture laid down in the Preamble of the UNESCO Universal Declaration on Cultural Diversity, adopted in Paris on 2 November 2001, UNESDOC CLT.2002/WS/9: '(...) culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."

5 See e.g., Francioni, 2008, p. 6; Blake, 2015, pp. 7, 272; Forrest, 2010, pp. 2–3.

6 Shadeed, 2011, para. 5.

7 *The Constitution of UNESCO,* signed in London on November 16, 1945, UN Treaty Series vol. 4, No. 52, Article 1.

8 Blake, 2015, pp. 8–9.

3. Categories of cultural heritage in international law

Manifestations of cultural heritage involve almost anything, whether man-made or given value by man, embodied in material and non-material forms.[9] Expressions of culture might include movable objects, immovable places, and sites, and natural sites and cultural landscapes, as well as intangible manifestations of cultural value. Over the years, a distinction has developed in international cultural heritage law-making, according to which cultural heritage can be divided into the following three categories:

(i) *tangible cultural heritage*—material manifestations of culture, for example artistic masterpieces, buildings, monuments, historic places, archaeological sites, books, clothes, or other artifacts[10];

(ii) *intangible cultural heritage*—non-material manifestations of culture, such as language, spiritual beliefs, social traditions, customs and practices, folklore, traditional knowledge, traditional medicine, culinary traditions, music, and dance[11];

(iii) *natural heritage*—natural sites, such as cultural landscapes, protected natural reserves, and historic parks and gardens.[12]

Nonetheless, it is not always possible to draw a clear line between different forms of cultural manifestations. The distinction between the tangible and intangible cultural heritage does not correspond entirely to the reality, and as such is rather of a scholarly nature. In most cases, the two forms of cultural manifestations are intertwined and inseparable, as cultural heritage may be embodied at the same time in tangible and in intangible forms. Material objects or places (e.g., archaeological sites, artifacts) are often related to their intangible aspects (human context), which give them their cultural significance and value. In turn, the intangible cultural heritage (e.g., music, dance) is often perceived through its tangible elements (musical instruments, costumes).[13] However, as Forrest points, cultural

9 Forrest, 2010, pp. 2–3. See also Shaheed, 2011, para. 4.

10 For example: the Pyramid Fields in Egypt, Taj Mahal in India, Vlkolínec in Slovakia, Wieliczka and Bochnia Royal Salt Mines in Poland, the Historic Center of Český Krumlov in Czehia, the Historic City of Trogir in Croatia, Studenica Monastery in Serbia (examples include sites listed on the UNESCO World Heritage List).

11 For example: the Saman dance in Indonesia, the Flamenco in Spain, the traditional Joumou soup in Haiti, traditional Turkish archery, the Busójárás end-of-winter carnival in Hungary, the Lacemaking in Croatia, the Klapa multipart singing of Dalmatia in Croatia, the Puppetry in Slovakia and Czechia, the Kolo traditional folk dance in Serbia, the Flower carpets tradition for Corpus Christi processions in Poland (examples include practices listed on the UNESCO Representative List of the Intangible Cultural Heritage of Humanity).

12 For example: Białowieża Forest in Poland and Belarus, Danube Delta in Romania, Galápagos Islands in Ecuador, Royal Botanic Gardens of Kew in UK, Tokaj Wine Region Historic Cultural Landscape in Hungary, Plitvice Lakes National Park in Croatia (examples include sites listed on the UNESCO World Heritage List).

13 Blake, 2015, pp. 10–11.

heritage is value, in the way that it is neither the material object nor the practice itself that is of some importance to a people, but the importance itself.[14] It can be embodied in an object, a place, a dance, or all three in combination. It is the given value and cultural significance that is protected by the international legal regimes.[15]

4. Areas of protection

Although several examples of initiatives to preserve cultural artefacts and historical remains can already be found in ancient times,[16] it was not earlier than the beginning of the 20th century when the modern international law relating to cultural heritage started to develop. The need to provide protection of cultural objects and sites grew out of the context of war and was first recognized in international humanitarian law (the Hague Conventions and Regulations of 1899 and 1907). Since then, international law has gone significantly further, and a great number of international instruments on the protection of cultural heritage in times of peace have also been adopted on both the universal and regional levels. Currently the complex international framework for protecting cultural heritage can be divided into the following three areas: (1) *protection of cultural heritage in times of armed conflict and war,* (2) *protection of cultural heritage against illicit movement,* and (3) *protection of the world cultural heritage*. A brief description of the protective framework will be presented below, focusing on the landmark international agreements adopted under the auspices of UNESCO.

4.1. Protection of cultural heritage in times of armed conflict and war

4.1.1. International humanitarian law

The first modern attempts to regulate the protection of cultural heritage were made within the international humanitarian law, with the view to alleviate the effects of war on cultural property. Since time immemorial, the unwritten rules of war have allowed belligerents to confiscate or destroy the enemy property ("right to pillage"), while the destruction of cultural heritage has been used a deliberate strategy to

14 Forrest, 2010, pp. 3–4.

15 In any tangible or non-tangible form of cultural heritage, three kinds of (usually competing) values can be attributed: expressive value (e.g., aesthetic value that expresses beauty, or divine sanctity, expressed by religious or moral attitudes), archaeological and historic value, and the economic value. Forrest, 2010, pp. 4–7.

16 For example, an early private museum of antiquities was established in Babylon by Ennigaldi-Nanna, the daughter of King Nabonidus, in the 6th century BC. According to Blake, cultural legislation *per se* appeared for the first time in Europe in the 15th century AD, with the Bull of Pope Pius II entitled *Cum almam nostram urbem* aimed at the preservation of the ancient ruins in Rome and Campagna (1462). For more examples and a wider historical context of the cultural heritage legislation, see Blake, 2015, pp. 1–4.

destroy the morale of both the combatants and civilians. That is why the very first international documents that addressed the conduct of warfare—the Hague Conventions and Regulations of 1899 and 1907, and later on the Geneva Convention IV of 1949 and its First and Second Additional Protocols of 1977—formally prohibited pillage and deliberate destruction of property.[17] The protection of the *treasures of culture* during armed conflicts was also recognized in the so called Roerich Pact, adopted in 1935 under the regional framework of the Pan-American Union.[18] The milestone international agreement relating to the protection of material cultural heritage in wartime was the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict.[19] The 1954 Convention became the first international treaty dedicated solely to the protection of cultural heritage. The adoption of the 1954 Convention was a direct reaction to the massive destruction of numerous historic monuments and cultural objects during the Second World War.

The 1954 Convention introduced in Article 1 a definition of cultural property, which included movable and immovable property of great importance to the cultural heritage of every people, buildings where movable cultural property is preserved or exhibited, as well as centers containing monuments. All cultural property within the meaning of the Article 1 of the Convention enjoys general protection, which comprise "the safeguarding of and respect for" such property (Article 2). Such regime requires from the state-parties both positive and negative duties, which include the duty to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict (Article 3), as well as the obligation to refrain from any use of the cultural property for purposes that are likely to expose it to destruction or damage in the event of armed conflict; and to refrain from any act of hostility directed against such property (Article 4 Paragraph 1). The obligation to respect cultural property includes cultural heritage situated within state-parties' own territory, as well as within the territory of other state-parties of the Convention. The obligation to refrain is limited, however, and can be waived in cases where military necessity imperatively requires it (Article 4 Paragraph 2).

17 *The Hague Convention of 1899 (II) with respect to the Laws and Customs of War on Land*, adopted at the Hague on July 29, 1899, 32 Stat. 1803 (1899), Treaty Series, no. 403; The *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, adopted at the Hague on October 18, 1907, 36 Stat. 2277 (1907), Treaty Series, no. 539; *The Geneva (IV) Convention Relative to the Protection of Civilian Persons in Time of War*, adopted in Geneva on August 12, 1949, UN Treaty Series vol. 75; *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, adopted on June 8, 1977, United Treaty Series vol. 1125; *Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, adopted on 8 June 1977, UN Treaty Series vol. 1125. For further reading, see Bos, 2005; Kalshoven, 2005; Forrest, 2010, pp. 67–69.

18 *The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments* (Roerich Pact), adopted in Washington on April 15, 1935, under the auspices of Pan-American Union.

19 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, adopted at The Hague on May 14, 1954, under the auspices of UNESCO, UN Treaty Series vol. 249, No. 3511.

Apart from the general protection enjoyed by all cultural heritage, the 1954 Convention introduces a special protection regime for a restricted category of cultural heritage *of very great importance*.[20] Special protection is granted to cultural property by its entry in the "International Register of Cultural Property under Special Protection." With regard to such cultural property, states are obliged to ensure its immunity by refraining from any act of hostility directed against it, and from any use of such property or its surroundings for military purposes (Article 9). Furthermore, under certain conditions, the 1954 Convention ensures immunity for the transport of cultural property, as well as the personnel engaged in the protection of cultural property (Articles 12–15). The 1954 Convention created a distinctive emblem, called the Blue Shield, to facilitate the recognition of cultural heritage falling under the conventional protection regime (Article 6). It can be used alone to mark a property under general protection, while repeated three times in a triangular formation, such emblem identifies cultural property under special protection regime (Articles 10, 16–17).

The provisions of 1954 Convention have been supplemented with two additional protocols. The first additional protocol[21] was adopted in 1954, with the aim of preventing the exportation of cultural property and to provide for the restitution of illegally exported objects. The second additional protocol was adopted in the aftermath of the Second Gulf War and war in the former Yugoslavia in the early 1990s, which witnessed immense destruction to cultural heritage. The protocol was meant to remedy some of the weaknesses of the 1954 Convention that had appeared during its application (e.g., limited recourse to special protection regime, or the lack of adequate sanctions for individual perpetrators).[22] The 1999 Protocol established a new mechanism, called enhanced protection regime, to ensure more effective protection of cultural property of *the greatest importance for humanity* (Article 10). It has also established individual criminal responsibility and provided for criminal sanctions for violations against cultural heritage (Article 15).

The 1954 Hague Convention, together with the Regulations for its execution,[23] which form its integral part, and the 1954 and 1999 Protocols are seen by some authors as the most valuable instruments of the protection of cultural property in contemporary international law.[24] Unfortunately, the adoption of the 1954 Convention has

20 According to Article 8 para. 1, a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, or centers containing monuments and other immovable cultural property can be placed under special protection if they fulfill conditions specified in the Convention.

21 *Protocol for the Protection of Cultural Property in the Event of Armed Conflict*, adopted at The Hague on May 14, 1954; *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* adopted at The Hague on March 26, 1999.

22 Toman, 2005, p. 25. For further reading, see on the Second Additional Protocol Henckaerts, 1999; Forrest, 2010, pp. 110–121.

23 *Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*.

24 Toman, 2005, p. 15.

neither eliminated nor prevented the destruction of cultural property in all armed conflicts, and the cultural heritage continues to be another victim of war.[25]

4.1.2. International criminal law

The protection of cultural heritage in wartime is envisaged also under international criminal law. According to the Rome Statute of the International Criminal Court, individual criminal responsibility can include serious offences against cultural heritage, which are considered *war crimes*.[26] The first individual who was prosecuted and faced charges at the International Criminal Court (ICC) solely for cultural destruction as a war crime was Ahmad Al Faqi Al Mahdi, a member of an Islamic extremist group in Mali. In 2016, he was found guilty under Article 8(2)(e)(iv) of the Rome Statute for the war crime of intentionally directing attacks against 10 buildings of a religious and historical character in Timbuktu, for which he was sentenced to nine years' imprisonment (the sentence was later reduced by two years).[27] The mausoleums and mosques destroyed by Al Mahdi and the militia group were part of the UNESCO's World Heritage sites. According to the ICC Chief Prosecutor, the charges brought against Ahmad Al Faqi Al Mahdi involved most serious crimes; they were about the destruction of irreplaceable historic monuments and about a callous assault on the dignity and identity of entire populations and their religion and historical roots.[28]

Pursuant to the case law of international criminal tribunals, the destruction of cultural property with discriminatory intent against a cultural community can also be charged as a crime against humanity, and the intentional destruction of cultural and religious property and symbols can be considered evidence of an intent to destroy a group, which falls under the definition of *genocide*.[29] According to the ICTY,

> "an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group

25 One of the most recent examples is the destruction of cultural heritage after the Russian invasion on Ukraine in February 2022. In the period from February 24 to July 11, 2022, UNESCO verified damage to 161 pieces of cultural property in Ukraine within the meaning of the 1954 Convention (although no UNESCO World Heritage site appears to have been damaged). See UNESCO, 2022. For further reading on the international conflicts and the protection of cultural heritage, see, e.g., Forrest, 2010, pp. 56–67; Lostal, 2017; Chainoglou, 2017.

26 *Rome Statute of the International Criminal Court*, adopted in Rome on July 17, 1998, UN Treaty Series vol. 2187, No. 38544, Article 8^2 para. 2 (b) (ix) and Article 8^2 para. 2 (e) (iv). Similar criminal responsibility was envisaged in the *Statute of the International Criminal Tribunal for the former Yugoslavia* (ICTY), adopted by UN Security Council Resolution 827 (1993) of 25 May 1993, Article 3 (d).

27 ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, judgement of September 27, 2016, Case no. ICC-01/12-01/15, Para. 109.

28 International Criminal Court, 2015.

29 See e.g., ICTY, *Prosecutor v. Radislav Krstic*, Case no. IT-98-33-T, Trial Chamber, August 2, 2001, para. 580, and affirmed by Appellate Chamber, April 19, 2004; ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, Trial Judgment, Case No. IT-95-14/2-T, February 26, 2001, paras. 206–207. For further reading, see Meron, 2005; Bennoune, 2016; Vrdoljak, 2009.

its own identity distinct from the rest of the community would not fall under the definition of genocide, nonetheless, where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group."[30]

4.2. Protection of cultural heritage against illicit movement

Much of illicitly obtained cultural heritage, either looted as a "spoil of war" or otherwise illegally removed, find its way to the lucrative international art and antiquities market.[31] Trafficking and illegal trade in cultural objects is a serious threat to cultural heritage all over the world. It affects to a greater extent developing countries, which are poorer in economic terms, but richest in cultural sites and artefacts. [32] International concern about the growing commercial demand for cultural heritage and the resulting illicit trade led to the adoption in 1970 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[33]

The 1970 Convention is the most important international instrument dealing with the illicit movement of cultural heritage. According to its Preamble, cultural heritage constitutes one of the basic elements of civilization and national cultures, which is a recognition that cultural heritage is at the same time at the heart of international concern and of national interest. Under the 1970 Convention, cultural property of each state shall be protected; however, it is up to each state to determine what cultural property shall fall within the protectional regime.[34]

The 1970 Convention imposes on states-parties the obligation to oppose with the means at their disposal all the practices falling under the category of illicit import, export, or transfer of ownership of cultural property (Article 2). All movement or transfer of ownership of cultural property effected contrary to the conventional regulations shall be regarded as illicit (Article 3). At the same time, the 1970 Convention

30 ICTY, *Prosecutor v. Radislav Krstic*, para. 580.

31 Forrest distinguishes three different types of illicit cultural heritage: (i) cultural heritage that has been removed from monuments or archaeological sites illegally, without the permission of the source states, (ii) cultural heritage stolen from private individuals and entities or from public institutions, such as museums, and (iii) cultural heritage exported without an export permit, including illicit export of cultural objects by its lawful owners. Forrest, 2010, pp. 137–138.

32 Forrest, 2010, p. 137; Blake, 2015, p. 23. Developing states rich in cultural objects and sites include e.g., India, Somalia, Tanzania, Niger, Peru, Cambodia, Thailand, China, Kenya, and Afghanistan.

33 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, adopted in Paris on November 14, 1970 under the auspices of UNESCO, UN Treaty Series vol. 823, No. 11806.

34 According to Article 1, the term "cultural property" means property that is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art, or science, and that belongs to one or more of categories of cultural heritage specified in the 1970 Convention.

establishes a regime of lawful export and import, whose central element is the authorization of export granted by the state where the cultural property is located. States shall introduce an appropriate certificate that specifies that the export of the cultural items in question is authorized, which constitutes evidence of the legality of the export. The certificate should accompany any export, and the exportation of cultural property from their territory without an export certificate is prohibited (Article 6). Another core obligation of states-parties is the prohibition of the import of cultural property stolen from a public institution in another state-party after the entry into force of the Convention (Article 7 Paragraph a). States shall also prevent museums and similar institutions within their territories from acquiring cultural property that has been illegally exported from another state-party (Article 7 Paragraph b). The 1970 Convention provides also for the obligation of states to impose penal or administrative sanctions on persons responsible for infringing the prohibitions of illicit export and import (Article 8).

Despite the adoption of the 1970 Convention, the global illicit trade of cultural heritage increased, which revealed several weaknesses of this international instrument. One of the most significant shortcomings of the Convention has been identified as the imbalance between the onerous duties imposed on exporting states and the obligations imposed on importing countries, considered that exporting states are almost always developing countries without sufficient financial resources.[35] These states have not been able to fulfill the conventional duties, hindering the objectives and the application of the treaty.

To render the protection of cultural heritage more effective, UNESCO initiated the adoption of an instrument capable of addressing private law aspects of illicit traffic in cultural property. Upon this initiative, the International Institute for the Unification of Private Law (UNIDROIT) adopted in 1995 the Convention on Stolen or Illegally Exported Cultural Objects.[36] It was designed to complement the framework of the 1970 UNESCO Convention by dealing with the cultural heritage as private property.[37] The 1995 Convention allows claims for the restitution of stolen cultural objects, and the return of illegally exported cultural objects (Article 1). It establishes a system for the return of cultural heritage to the lawful owner in the case of stolen property (Articles 3 and 4), or to the state of export when the cultural property has been illegally exported (Articles 5–7). The 1995 Convention allows for direct access to court by private individuals, and lays down an individual right to compensation (Articles 4 Paragraph 1 and 6 Paragraph 1). While the 1970 UNESCO Convention forms part of public international law, the 1995 UNIDROIT Convention is essentially a private international law instrument.[38]

35 Forrest, 2010, p. 195.

36 *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, adopted in Rome on 24 June 1995, UN Treaty Series vol. 2421, No. 43718.

37 Forrest, 2010, p. 398.

38 For further reading, see on the protection of cultural heritage against illicit trade: Kowalski, 2005; Vadász, 2016; Prott, 2009; Blake, 2015, pp. 23–69.

4.3. Protection of the world cultural heritage

In the 1960s, UNESCO started to develop a protective framework for different forms of cultural heritage, understood as the *world heritage of mankind* and considered to be of universal value for the whole of humanity. UNESCO's pioneering role in this field has led to the adoption of numerous documents, including international treaties as well as non-binding (soft-law) documents. The international treaties relating to the protection of world cultural heritage adopted under the auspices of UNESCO are: the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage,[39] the 2001 Convention on the Protection of the Underwater Cultural Heritage,[40] the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage,[41] and the 2005 Convention on the Diversity of Cultural Expressions.[42] The most relevant soft-law documents include: Recommendation on Safeguarding the Beauty of Landscapes (1962), Recommendation on the Preservation of Cultural Property Endangered by Public Works (1968), Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it (1976), Recommendation for the Protection of Movable Cultural Property (1978), Mexico City Declaration on Cultural Policies (1982), Recommendation on the Safeguarding of Traditional Culture and Folklore (1989), and Universal Declaration on Cultural Diversity (2001).[43]

Along with the UNESCO framework presented in this chapter, the protection of cultural heritage has also been developed on regional levels under the framework of regional international organizations.[44]

39 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted in Paris on November 16, 1972, under the auspices of UNESCO, UN Treaty Series vol 1037, No. 15511.

40 *Convention on the Protection of the Underwater Cultural Heritage*, adopted in Paris on November 2, 2001, under the auspices of UNESCO, UN Treaty Series vol. 2562, No. 45694.

41 *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted in Paris on October 17, 2003, under the auspices of UNESCO.

42 *Convention on the Diversity of Cultural Expressions*, adopted in Paris in October 2005 under the auspices of UNESCO, UN Treaty Series, vol. 2440, No. 43977.

43 *Recommendation on Safeguarding the Beauty of Landscapes* adopted in Paris on December 11, 1962; *Recommendation on the Preservation of Cultural Property Endangered by Public Works* adopted in Paris on November 19, 1968; *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it,* adopted in Nairobi on November 26, 1976, UNESDOC CC.88/WS/34; *Recommendation for the Protection of Movable Cultural Property* (1978), *Mexico City Declaration on Cultural Policies* adopted in Mexico City on August 6, 1982, UNESDOC CLT/MD/1; *Recommendation on the Safeguarding of Traditional Culture and Folklore,* adopted in Paris on November 15, 1989; *Universal Declaration on Cultural Diversity*, adopted in Paris on November 2, 2001, UNESDOC CLT.2002/WS/9.

44 See e.g.: *Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations*, adopted in Santiago on June 16, 1976 under the auspices of Organization of American States (Convention of San Salvador), OAS Treaty Series No. 47; international agreements adopted in Europe under the auspices of the Council of Europe: *Convention for the Protection of the Archaeological Heritage of Europe* adopted in Valletta on January 16, 1992 (Valletta Convention), CETS 143; *European Landscape Convention* adopted in Florence on October 20, 2000 (Florence Convention), CETS 176; *Convention on the Value of Cultural Heritage for Society* adopted in Faro on October 27, 2005 (Faro Convention), CETS 199.

4.3.1. The 1972 World Heritage Convention

The Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) is the paramount international instrument for the protection of cultural heritage, which embodies the idea that certain exceptional examples of cultural and natural sites should be protected in the interest of the entirety of humankind.[45] It combines in a single document the concepts of nature conservation and the preservation of cultural properties. The need to protect cultural and natural sites of outstanding universal value grew out of the recognition that the cultural heritage was increasingly threatened in several ways by changing social and economic conditions (increasing urbanization, industrialization, pollution and climate change, rise in international tourism, etc.).[46]

The 1972 Convention specifies the forms of cultural manifestations that are considered cultural heritage, and lays down the definition of natural heritage (Articles 1 and 2). Only physical manifestations of cultural heritage, such as monuments, buildings, or sites, fall under the scope of application of the Convention. The 1972 Convention sets out the duties of states-parties in identifying potential sites and their role in protecting and preserving them. The primary duty of each contracting state is to ensure the identification, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage situated on its territory (Article 4). Furthermore, the 1972 Convention sets out the obligation of state-parties to cooperate with each other, and to refrain from any deliberate measures that might damage the cultural and natural heritage situated on the territory of other states-parties (Article 6).

The 1972 Convention establishes a forum of international cooperation and a monitoring body called the World Heritage Committee (Article 8). On the basis of the inventories and nominations submitted by states, the Committee publishes and regularly updates the World Heritage List. The cultural and natural sites inscribed on the World Heritage List enjoy protection under the World Heritage Convention and are marked with the circular World Heritage Emblem. The Convention stipulates the obligation of States Parties to report regularly to the World Heritage Committee on the state of conservation of their World Heritage properties (Article 29). Sites inscribed on the World Heritage List might be delisted if they lose the attributes conveying their outstanding universal value for the humanity.[47] The World Heritage sites in need for the conservation, and for which assistance has been requested, might be put on the List of World Heritage in Danger (Article 11 Paragraph 4).

45 According to the Preamble to the 1972 Convention, "(...) parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole."

46 The Preamble to the 1972 Convention. See also Forrest, 2010, p. 224.

47 So far three sites have lost their World Heritage status, most recently in 2021 the site "Liverpool—Maritime Mercantile City" in UK, which was inscribed on the World Heritage List in 2004. The constructions and development were so detrimental to the site's authenticity and integrity that they led to irreversible loss of its outstanding universal value, see: UNESCO, 2007.

The establishment of the World Heritage Committee and the World Heritage Fund embodies the cooperative protective regime that stems from the universal interest in the protection of the world cultural heritage represented by the 1972 Convention. The most successful aspects of the Convention include the number of ratifications, the significant number of cultural and natural sites inscribed on the World Heritage List, which contains 1154 elements as of July 2022, and, importantly, its contribution to raising global awareness of the concept of the world cultural and natural heritage and the need for their protection.[48]

4.3.2. The 2001 Convention on the Protection of the Underwater Cultural Heritage

The 2001 Convention on the Protection of the Underwater Cultural Heritage (UCH Convention) focuses on the protection of the underwater archaeological sites and other remains that are situated wholly or partly beneath the sea. It provides a normative framework for states parties on how to identify, research, and protect their underwater heritage while ensuring its preservation and sustainability.

The 2001 Convention lays down the obligation of states-parties to take all appropriate measures and cooperate in protecting underwater cultural heritage (Article 2 Paragraphs 1 and 2). In the view of the Preamble, the underwater cultural heritage is considered an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage. It is defined as all traces of human existence having a cultural, historical, or archaeological character that have been partially or totally under water, periodically or continuously, for at least 100 years, such as: (i) sites, structures, buildings, artifacts, and human remains, (ii) vessels, aircraft, other vehicles, and their cargo or other contents, and (iii) objects of prehistoric character (Article 1 Para. 1). Pipelines and installations placed on the seabed are not considered underwater cultural heritage.

The objectives of the 2001 Convention specified in Article 2 stipulate the general duties and obligations of state-parties. They include, *inter alia*: ensuring and strengthening the protection of underwater cultural heritage, cooperating with other states-parties in the protection of underwater cultural heritage, preserving underwater cultural heritage for the benefit of humanity, refraining from any commercial exploitation of the underwater cultural heritage, depositing the recovered underwater cultural heritage in a manner that ensures its long-term preservation, and ensuring that proper respect is given to all human remains located in maritime waters. It is clear that the main purpose of the 2001 Convention is the protection of the cultural heritage situated under water in order to keep it safe from damage and destruction. According to Article 2 Paragraph 5, the preservation *in situ* of the underwater cultural heritage shall be considered the first option before allowing or engaging in any activities directed at this heritage. For this reason, an obligation is placed on states-parties

48 Forrest, 2010, p. 286. For further reading on the 1972 World Heritage Convention, see, e.g., Forrest, 2010, pp. 224–286.

to prevent or mitigate any adverse effects that may arise from activities under jurisdiction incidentally affecting underwater cultural heritage (Article 5).

The 2001 Convention addresses in separate provisions the issue of the protection of underwater cultural heritage in different maritime zones, regulating the rights and responsibilities of the states concerned (Articles 7–12). Furthermore, it places upon states the obligation to cooperate and assist each other in the protection and management of underwater cultural heritage, and to share information concerning underwater cultural heritage, including discovery of heritage, its location, and information about the heritage excavated or recovered contrary to the Convention (Article 19 Paragraphs 1 and 2). Other obligations include raising public awareness regarding the value and significance of underwater cultural heritage (Article 20) and establishing competent authorities (Article 21). The need for public education, including of government officials, judges, and other officials, is stressed as a means of protection as well as a means of ensuring public access to this heritage.[49]

The 2001 Convention was the first international regime to establish a protective framework for the underwater cultural heritage, which had not been sufficiently addressed under the existing law of the sea and the 1972 UNESCO World Heritage Convention.[50]

4.3.3. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage

Since the 1980s, there was a growing awareness of the need to introduce into the international framework a more extended notion of cultural heritage that would provide protection to intangible manifestations of culture. For years, however, the safeguarding of material manifestations of cultural heritage dominated the international cultural law-making, and the first binding international document aimed at the protection of non-material forms of culture—namely, the Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention)—was not adopted until 2003.

The 2003 ICH Convention, modelled on the 1972 World Heritage Convention, expanded the meaning and scope of the cultural heritage subjected to international protection to include non-physical forms of cultural manifestations. According to its Preamble, there is a deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage. According to Article 2 Paragraph 1, "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artifacts and cultural spaces associated therewith—that communities, groups, and, in some cases, individuals recognize as part of their cultural heritage. It can be manifested *inter alia* in oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship (Article 2 Paragraph 2).

49 Blake, 2015, p. 98.
50 Forrest, 2010, p. 361; Blake, 2015, p. 113.

The ICH Convention sets out obligations of states parties both at the domestic and at the international levels. At the national level, states are supposed to take necessary measures to ensure the identification and safeguarding of the intangible cultural heritage present on their territory (Articles 11–14). Communities, groups, and individuals that create, maintain, and transmit international cultural heritage should be involved in the process of identification of the elements of intangible cultural heritage, as well as in the safeguarding activities (Articles 11 (b) and 15). The ICH Convention provides for mechanisms of international cooperation and assistance. States-parties shall recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and they shall cooperate at the bilateral, subregional, regional, and international levels (Article 19 Paragraph 2).

The ICH Convention establishes two treaty bodies: the General Assembly of the States Parties (Article 4) and the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (Article 5). To ensure better visibility of the intangible cultural heritage and awareness of its significance, the Committee publishes and updates the Representative List of the Intangible Cultural Heritage of Humanity upon proposals from states-parties (Article 16). As Blake notes, the drafters of the 2003 ICH Convention intentionally used the term "representative" in the name of the international list to distinguish it conceptually from the World Heritage List under the 1972 UNESCO Convention. While the World Heritage List contains iconic and outstanding examples of world heritage, the elements inscribed on the ICH list are merely representative of the mass of intangible heritage in the world.[51] The ICH Committee acts as a monitoring body of the ICH Convention, accepting from the states-parties periodic reports on the legislative, regulatory, and other measures taken for the implementation of the Convention (Article 29). Another form of international cooperation within the meaning of the ICH Convention is the Fund for the Safeguarding of the Intangible Cultural Heritage, the use of which is decided by the ICH Committee based on guidelines laid down by the General Assembly (Article 25).

The adoption of the ICH Convention was a milestone in the international cultural heritage law, which added a new dimension to the existing conventional framework. The new conventional regime was based on the assumption that raising the awareness of the existence of intangible heritage and its importance is the best way to ensure its viability and to inspire respect for such forms of cultural heritage.[52] For this reason, the ICH Convention does not impose on states-parties far-reaching obligations and is rather modest in requiring state action. The 2003 ICH Convention and its "role model," the 1972 World Heritage Convention, complement each other, allowing for the different manners in which culture is manifested to gain international recognition and normative protection.[53]

51 Blake, 2015, p. 14.
52 Forrest, 2010, p. 386.
53 For further reading on the international protection of intangible cultural heritage, see, e.g., Blake, 2007; Petrillo, 2019.

4.3.4. The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions

During the first two decades of 21st century, the increasing diversity of cultures and the growing importance of local communities, indigenous peoples, and national minorities posed a new challenge for the international cultural heritage law. Ensuring adequate space and freedom of expression for all of the world's cultures became one of the new purposes of safeguarding cultural heritage.[54] A new framework was needed to create conditions for interactions between different peoples and societies on the basis of mutual understanding, respect, and the equality of all cultures. This issue was addressed in the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression.

The Preamble of the 2005 Convention recognizes that cultural diversity forms a common heritage of humanity and is indispensable for peace and stability on the international and national levels. The principle underlying the 2005 Convention is the recognition that cultural activities, goods, and services have both an economic and cultural nature. The instrument deals with culture in its broad concept, as affirmed in the Universal Declaration on Cultural Diversity adopted by UNESCO in 2001.[55]

The 2005 Convention specifies several measures that shall be adopted by states-parties to protect and promote the diversity of cultural expressions. It recognizes the sovereign right of states to maintain, adopt, and implement cultural policies on their territory (Article 2.2).[56] Apart from adopting these measures, states should fulfill other conventional obligations in order to achieve its objectives (Articles 7–17). States are encouraged to support the active participation of civil society in the field of culture (Article 11), as well as the cooperation between the public sector, private sector, and non-profit organizations (Article 15). Additional efforts need to be taken to ensure the participation and contribution to cultural expression by specific social groups, including women, persons belonging to minorities, and indigenous peoples (Article 7.1.a).

A follow-up mechanism has been established, which consists of two organs monitoring the implementation of the Convention: the Conference of Parties and the Intergovernmental Committee (Articles 22–23). The financial means shall be conferred to the International Fund for Cultural Diversity (Article 18). To ensure transparency and information sharing, states are obliged to provide UNESCO with periodic reports on measures and policies taken to promote and protect the cultural diversity (Article 9.a).

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is not a classical "cultural heritage protection" instrumen, in the sense of the 1972, 2001 and 2003 UNESCO Conventions. It reflects the many competing aspects of the complex notion of cultural diversity and, as a result, it can be seen as an

54 Blake, 2015, p. 194.

55 See the Preamble of the 2001 Universal Declaration.

56 The cultural policies may consist of, *inter alia*, providing opportunities for domestic cultural activities, goods and services, providing domestic independent cultural industries with effective access to the means of production, dissemination and distribution of such activities, promoting the diversity of the media, or public financial assistance (Article 6 of the 2005 Convention).

instrument with a somewhat confused character, but it definitely plays an important role in safeguarding the diversity of cultures and heritages.[57]

5. Human rights dimension of cultural heritage protection

International cooperation in heritage protection was long based primarily on the principle that the cultural heritage is a common legacy of mankind, as expressed for the first time in the 1972 UNESCO World Heritage Convention. In the 2003 Intangible Cultural Heritage Convention, cultural heritage was also recognized as a source of value to local communities and individuals, as a fundamental aspect of their own unique cultural identity. Soon thereafter, the protection of cultural heritage was explicitly considered a human rights issue, because cultural heritage is closely linked to human dignity and identity.[58]

Safeguarding cultural identity through the access to and enjoyment of cultural heritage is the central conception to the human rights dimension of cultural heritage protection. The individual right to access one's own cultural heritage enjoys protection primarily within the framework of the *cultural human rights*.[59] The most relevant for cultural heritage protection is the right of everyone to take part in cultural life, proclaimed in Article 27 of the Universal Declaration of Human Rights,[60] and Article 15 Paragraph 1 (a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[61] which refer to culture and cultural life understood very broadly, as ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter, and the arts, customs, and traditions through which individuals, groups of individuals, and communities express themselves.[62] The right of everyone to take part in cultural life also includes the right to have access to their own cultural and linguistic heritage and to that of others.[63] Although Article 15 Paragraph 1(a) of ICCESCR is the most evident and universal cultural right, other human rights might also have cultural components, and as such have direct or indirect relevance to the

57 Blake, 2015, pp. 194–195.
58 Shaheed, 2011, para. 2.
59 As Francioni explaines, cultural rights rest on the uniqueness of legacy that binds a group or a community to a shared memory upon which the powerful sentiment of belonging and identity is built. Francioni, 2008, p. 3.
60 *Universal Declaration of Human Right*s, adopted in Paris on December 10, 1948, by the UN General Assembly, Resolution 217 A (III), A/RES/3/217 A.
61 *International Covenant on Economic, Social and Cultural Rights*, adopted in New York on December 16, 1966, UN Treaty Series vol. 993, No. 14531.
62 UN Committee on Economic, Social and Cultural Rights, *General comment No. 21 on the Right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights*, December 21, 2009, E/C.12/GC/21, para. 13.
63 Ibid., para. 49.

preservation of cultural heritage (for example: the right to education, the right to freedom of expression, or the right to freedom of thought and religion).[64]

The human rights approach to the cultural heritage protection is particularly important for *national minorities*[65] and *indigenous peoples*,[66] who struggle to preserve their own unique cultural heritage, different from the "majority" cultural heritage. Although persons belonging to national minorities or indigenous peoples fully benefit from the protection under the right of everyone to take part in cultural life, this does not ensure sufficient protection of the cultural heritage of such communities. Accordingly, international law provides for specific protection to be enjoyed only by members of cultural minorities and persons belonging to indigenous peoples, in addition to "general" cultural rights held by all people.

Since traditions and the sense of connectedness with the past are crucial for the protection of cultural heritage of minority communities, Article 27 of the International Covenant on Civil and Political Rights (ICCPR)[67] provides for the right of persons belonging to ethnic, religious, and linguistic minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language in community with the other members of their group. Over the years, the Human Rights Committee has dealt with several cases in which it has clarified the scope of protection under Article 27 ICCPR, and extended it also to members of indigenous peoples.[68] Article 27 of ICCPR has provided an inspiration for the adoption in 1992 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[69] The protection of cultural heritage of national minorities has reached a high level in Europe with the adoption of an international treaty entirely dedicated to the protection of national minorities' rights, the 1995 Framework Convention for the

64 Shaheed, 2011, paras. 44–48. For further reading, see Francioni and Scheinin, 2008; Symonides, 1998; Blake, 2015, pp. 271–312.

65 According to Capotorti, a "minority" is a group numerically inferior to the rest of the population of a state, in a non-dominant position, and whose members being nationals of the state, possess ethnic, religious, or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity directed toward preserving their culture, traditions, religion or language; see Capotorti, 1979, para. 568.

66 According to UN Special Rapporteur Martínez Cobo, "indigenous populations" are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, and, by conquest, settlement, or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic, and cultural customs and traditions than with the institutions of the country of which they now form part (...), see: Martínez Cobo, 1972, para. 34.

67 *International Covenant on Civil and Political Rights* adopted in New York on December 16, 1966, UN Treaty Series vol. 999, No. 14668.

68 UN Human Rights Committee, *General Comment No. 23: Art. 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, para. 3.2. See e.g., HRC, *Sandra Lovelace v. Canada*, 30 July 1981, Communication No. 24/1977; HRC, *Lubicon Lake Band v. Canada*, 16 March 1990, Communication No. 167/1984, HRC, *Jouni E. Länsman et al. v. Finland*, 17 March 2005, Communication No. 1023/2001.

69 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted in New York on December 18, 1992, by General Assembly Resolution 47/135.

Protection of National Minorities,[70] and a binding instrument for the protection of linguistic heritage in Europe, the European Charter for Regional or Minority Languages, adopted in 1992.[71]

International protection of indigenous cultural heritage is based on the recognition that cultural identity has a collective dimension for indigenous peoples, and that their heritage needs to be protected as a collective good.[72] Safeguarding indigenous cultural heritage is inherently connected to land rights, right to self-determination, and environmental protection, because of a special spiritual link with land, animals, and natural resources that lies in the heart of every indigenous culture. The main universal documents dedicated to the protection of indigenous peoples' rights include the UN Declaration on the Rights of Indigenous Peoples of 2007[73] and the Indigenous and Tribal Peoples Convention, adopted by the International Labour Organization in 1989.[74] The international protection of indigenous cultural heritage on the universal level is still underdeveloped, and requires involving indigenous peoples in the law-making process as the trustees of their own cultural heritage.[75] Some of the regional human rights systems, however, provide for further-reaching protection of indigenous peoples' cultural rights than the universal instruments, in particular the Inter-American framework of human rights. The Inter-American Court of Human Rights has long been dedicated to the protection of cultural identity and heritage of indigenous communities through the evolutionary interpretation of the American Convention on Human Rights.[76]

6. The Central and Eastern European perspective in cultural heritage protection

On the European level, concerted efforts in cultural heritage protection have taken place primarily within the framework of the Council of Europe, being a forum of cooperation for more than 40 different states. Central and Eastern European (CEE) countries do not take a separate legal approach to the protection of cultural heritage, even though, as Blake notes, within regions and sub-regions countries are likely

70 *Framework Convention for the Protection of National Minorities*, adopted in Strasbourg on February 1, 1995, under the auspices of the Council of Europe, CETS No. 157.
71 *European Charter for Regional or Minority Languages*, adopted in Strasbourg on November 5, 1992, under the auspices of the Council of Europe, CETS No. 148. Further reading: Pentassuglia, 2013; Weller, 2005.
72 Blake, 2015, p. 293.
73 *The United Nations Declaration on the Rights of Indigenous Peoples* adopted in New York on September 13, 2007, by the General Assembly Resolution 61/295.
74 *Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries*, adopted in Geneva on June 27, 1989, under the auspices of the International Labour Organization, UN Treaty Series vol. 1650, No. 28383.
75 For further reading, see Thornberry, 2002; Marinkás, 2016; Wiessner, 2013.
76 *American Convention on Human Rights*, adopted in San José on November 22, 1969, under the auspices of the Organization of American States, OAS Treaty Series, No. 36.

to have shared values and similar challenges, which can result in more innovative approaches to heritage protection and policy setting.[77] In the CEE region, due to its turbulent history, the international dialogue on the heritage protection is an ever-challenging issue.

Rampley identifies several issues that distinguish the Central and Eastern Europe from the Western European countries in terms of cultural heritage protection. A basic distinction is related to the process of state formation and the construction of national identities.[78] In Western Europe, the sense and awareness of distinct national identities grew out of already existing states, or the process was simultaneous. In Central and Eastern Europe, the process was reversed, as in many cases distinct ethnic and national identities had already existed before the rise of nation-states, many of which had emerged only after the collapse of the multi-ethnic empires.[79] Different narratives of the common history and different perspectives on "shared memories" (sense of loss, sense of victory) make the protection of cultural heritage, together with the protection of national minorities, a highly sensitive issue in the CEE region.[80]

Another distinguishing feature of the cultural heritage in Central and Eastern Europe is related to the location of the "cultural homeland," understood as symbolic places which played important role in the formation of national identity.[81] In Western European countries, symbolic places are usually situated within the boundaries of the modern nation-state, and historically have always been there (e.g., monuments of the French national identity, such as Notre-Dame de Paris cathedral or the Eiffel Tower). In Central and Eastern Europe, the cultural homeland is often located outside of the current borders of the respective nation-state. Wars, frequent and turbulent changes of frontiers, and displacements of population have led in many cases to a non-coincidence of the cultural homeland and political territory of the state.[82] The sense of entitlement to the cultural homeland is capable of providing the incentive for nation-states to reclaim what they consider to be theirs, sparking armed aggression.[83] Generally, the issue of protection of cultural heritage situated outside the kin state can foster ethnic tensions and hinder foreign relations. Suffice it to say, the very identity of cultural heritage sites is often not unambiguous. For this reason, the protection of

77 Blake, 2015, p. 313.

78 Rampley, 2012, pp. 10–11.

79 Ibid. Much has been written about the development of CEE countries, whose specific features up to this day affect the political situation and foreign relations in this region. Further reading: Szűcs, 1985; Smith, 1986; Čepulo, 2022.

80 See, e.g., the case of the protection of cultural rights of Serbian national minority in Vukovar, Croatia, as mentioned by Čepulo (Čepulo, 2022), or the problematic issue of the protection of public monuments and the symbolic "ownership" of the public space in Cluj/Kolozsvár in Romania, as described by Stirton (Stirton, 2012, pp. 41–66).

81 Rampley, 2012, p. 11.

82 Ibid.

83 US President Woodrow Wilson in his famous address to Congress in January 1918 ("The Fourteen Points") considered the (re)adjustment of national and ethnic borders in Central Europe as a prerequisite to establish world peace. The proposals were later taken as the basis for peace negotiations at the end of World War I. See points IX–XIII of Wilson, 1918.

national minorities and adequate policy setting is of great importance for the dialog on cultural heritage in Central and Eastern Europe, especially in regions with large minority communities like Transylvania, Transcarpathia, Vojvodina, or Kosovo, or in cities with a rich historical background, like Lviv, Vilnus, Bratislava, or Cluj.

7. Conclusions

Although the international community had already demonstrated concern for the protection of cultural heritage from the end of the 19th century, the development of modern cultural heritage law essentially began after the Second World War. The main forum of international cooperation in this field is the United Nations Educational, Scientific and Cultural Organization (UNESCO), endowed with a special mandate and the duty of assuring the protection of the world's cultural legacy. The pioneering and coordinating efforts of UNESCO have led to the adoption of five international cultural conventions, which nowadays constitute main pillars of the international cultural heritage law. The main areas of protection include: safeguarding cultural property during war, preventing the illicit trade of cultural property, and protecting the world cultural heritage. Initially only material objects and sites enjoyed international protection, but the beginning of the 21st century has seen a more holistic approach to cultural heritage, expanding the protective framework to include intangible forms of culture. Another important recent development is connected to the recognition of the human rights dimension of heritage protection, manifested in everyone's right to access to and enjoyment of cultural heritage. This development is particularly relevant to the protection of the cultural heritage of national minorities and indigenous peoples.

International protection of cultural heritage in Central and Eastern Europe faces several challenges due to the region's turbulent history and strong national sentiments. The fact that political boundaries often do not follow ethnic boundaries makes the protection of national minorities a central issue in the discourse on cultural heritage in this region of Europe. The international cooperation mechanisms, which consider cultural legacy a common concern of all humanity, lay the groundwork for the protection of the cultural heritage with a contested past and even more contested present.[84]

84 See e.g., the following World Heritage sites: Historic Center of Sighişoara in Romania, Levoča and Spišský Hrad in Slovakia, Historical Town Center of Kutná Hora in Czechia, Old City of Dubrovnik in Croatia.

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| Chapter 11 |

International Environmental Law from a Central European Perspective

Anikó RAISZ

"Let us be proud of who we have been and
let us try to be more than a match for who we are."

"Legyünk büszkék arra, amik voltunk,
és igyekezzünk különbek lenni annál, ami vagyunk!"
Ottó Herman[1]

ABSTRACT

International Environmental Law is relevant one way or another for every state as a field where innovative solutions may sculpt the future of international law. Globally connected through climate, the never-changing quantity of waters on Earth, or the potential devastating effects of certain transboundary pollutions, states regularly face international environmental challenges. It is even more true for Central European states whose geographical, historical, and cultural proximity explains why this region faces challenges that only partly correspond to the general European trends. The chapter reflects briefly on the economic and social heritage of the region as a possible reason for the particularities of the countries within the region before turning to certain general questions of international environmental law. While presenting some key features of the evolution of international environmental law, we draw attention to issues and achievements relevant for Central European states, in particular in relation to sovereignty and demographic questions. Apart from the main features of international treaties in the field of international environmental law, the chapter refers to the Central European attitude toward IEL treaties. Finally, international environmental adjudication is treated in general, highlighting the main opportunities and possible shortcomings of this field.

KEYWORDS

international environmental law, Central Europe, international environmental treaties, international environmental adjudication, evolution of international environmental law

1 Quoted by Vértes, 2011, p. 41.

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1. Introduction

International Environmental Law (IEL) is the field of international law with the most potential. Being relevant one way or another for every state, it is the realm where innovative solutions may sculpt the future of international law. Globally connected through climate, the never-changing quantity of waters on Earth, or the potential devastating effects of certain transboundary pollutions, states regularly face international environmental challenges. The majority of these challenges stems from human activities, namely from the unsustainable use of resources or from environmental pollution whose scale exceeds the capacity of the environment to render it harmless.[2] However, it is not only our responsibility as human beings recognizing the need to be capable and liable to act upon the consequences of our own activities that urges us to turn to the tools of international environmental law; it is also the certainty that there is a power far beyond us and that the rules of nature are unavoidable. This chapter focuses on the main features of international environmental law and the issues most relevant in the Central European context. After highlighting some of the challenges of the Central Eastern European region, the chapter elaborates the evolution of international environmental law before turning to international environmental treaties and international environmental adjudication in order to give both a brief overview of IEL and a Central European perspective.

2. Challenges in the Central Eastern European region

The Central Eastern European (CEE) region faces challenges that only partly correspond to the general European challenges and trends. Given that every region has its own particularities, it is no surprise that it is the case here as well. The post-socialist heritage (in both society and economy) to a great extent explains certain difficulties.

Heritage No. 1: Economic structure. The economies of the socialist era were far from a concern for sustainability or even rentability/profitability (it is sometimes forgotten that being profitable actually *is* an important form or element of sustainability[3]). The economic structure of the Central Eastern European states—maintaining certain elements logical for their survival—was far from viable, but, illogically, it was not necessarily an expectation at the time. Political ideologies, often coming from abroad, influenced the direction of economic policy more than the actual interests of the peoples living there. In the 1990s, the change of political regime resulted in a change in both the economic structure and society, with a strong shift in the direction of the so-called "Western model." Nevertheless, the wind of change—however strong it was—could not erase certain columns of the former regime. We find here and there

2 Shelton and Kiss, 2005, p. 3.
3 In this regard see World Economic Forum, 2015; Csath, 2020.

in this region concrete columns towering as mementos of an era gone with this wind, but leaving memories behind, for instance, in former barracks of the foreign troops stationed in these countries or in factories whose profitability (from the point of view of the economy of the given country/region[4]) has always been at least questionable. These columns quite often serve as signs of places of extreme environmental pollution and constitute—among others—a very expensive heritage for the countries of the region (see e.g., rustbelts[5]). Cases before the European Court of Human Rights have shown what devastating results such policies had.[6] However, admittedly, this problem is not a particularity of former socialist countries.[7] A short-sighted profit orientation can also lead to similar results.[8] From a purely economic point of view, such extreme environmental pollutions always, without exception and inevitably, become enormous debts for coming generations. Not only have such costs (the costs of recultivation) not originally been calculated (and, hence, have to be produced typically from a different source), but such costs also become higher as time goes by. However, the Central Eastern European states had such a high number of projects needing recultivation at the crash of the socialist regime that even with regard to the above facts, a complete and immediate remedy of the situation was not possible; the only hope was that technology and innovation may help in the near future to solve the remaining problems.[9]

Heritage No. 2: Environment and the society. One of the greatest disasters the socialist era caused in the Central Eastern European region was social change: ever more and increasingly violent measures de-rooting the population from the land, making society forget the formerly evident symbiosis. Generations passed and a fast-growing percentage of the population has forgotten how lands should be used so that the very same lands shall serve not only the given generation, but also those coming afterwards. Now a fair balance shall be found in the society between economic and social

4 See e.g., the practice that what should be produced and where was often decided based on political considerations and completely regardless of e.g., the availability of the raw materials in the neighborhood, resulting in extreme unsustainable, i.e., utmost expensive and polluting production techniques ranging from extremely long supply chains to harsh groundwater pollutions on the spot. See cf. Lakatos, 2017, p. 28.

5 See the different efforts as attempts to normalize the situations, e.g., the attempts to clean the soil of former Soviet military barracks in Hungary from the beginning of the 1990s where yearly several hundreds of thousands of cubic meters of contaminated soil and water were cleaned of polluting materials like liquid paraffin, BTEX compounds, heavy metals, or chlorocarbons. See the document provided by the Hungarian Academy of Sciences in a case in front of the Constitutional Court: Németh et al., 2018, p. 5; or see e.g., Government decrees Nos. 444 and 619 of 2021 in Hungary (rustbelts) with which the Hungarian regulation seeks to favor and promote investments that undertake to tackle the environmental problem in the frame of their investment, e.g., with taxation rules.

6 See European Court of Human Rights (ECtHR), Fadeyeva v. Russia, Judgment of 9 June 2005.

7 See e.g., ECtHR, Howald Moor and Others v. Switzerland, Judgment of 11 March 2014.

8 See Inter-American Commission on Human Rights (IACHR), Mossville Environmental Action Now v. United States of America, Judgment of 17 March 2010.

9 As for Hungary, see Baross et al., 2016.

interests of current and future generations, i.e., the notion of sustainability shall be revisited in a somewhat broader sense than usual. It is of particular importance that common sense prevail over trendy but unsustainable ideas. In this region, despite this heritage, the sense of balanced environmental protection being a Christian obligation still seems to prevail,[10] and happens to occur also in legal texts such as the Hungarian Fundamental Law,[11] the Slovakian,[12] the Serbian,[13] the Croatian,[14] the Slovenian[15] or the Polish Constitutions,[16] as societies that wish to stay on their lands and preserve their culture necessarily need children and a healthy mental and material (natural and built) environment in order to achieve this goal.

3. The Evolution of International Environmental Law and the CEE countries

In order to put our current situation in context, we should turn our attention to the evolution of international environmental law, best described with reference to the United Nations (UN) conferences held in Stockholm (1972), Johannesburg (2002), and Rio de Janeiro (1992, 2012). This is more than reasonable, as their very titles show the change of attitude and focus of the global community. While the very first, 1972 Stockholm conference was entitled "on the Human Environment," the 1992 Rio de Janeiro conference was called "United Nations Conference on Environment and Development"; moreover, in 2002, in Johannesburg, the World Summit already had the title "on Sustainable Development," just like the Rio+20 Conference, held in 2012.

The Stockholm Conference adopted the Stockholm Declaration and an Action Plan for the Human Environment as well as a few resolutions.[17] The starting point is clearly stated in Article 1 of the Declaration, namely that "*[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.*" Everyone with a basic understanding of natural sciences would regard this statement as self-evident. Nevertheless, in 1972 it was of a great importance that it could appear as such in a UN document. Looking back at the events thereafter, drawing the parallel between the well-being of the environment and economic growth in Point 2 was perhaps one of the wisest statements of the declaration, pointing to another evident issue that nevertheless paved the way to ensure the willingness of states to participate even at a later stage in a project with few apparent direct advantages.

10 See among others the Encyclical Letter Laudatio Si' of the Holy Father Francis on Care for Our Common Home.
11 See Articles XX and XXI.
12 See Articles 20, 23, 44, and 45.
13 See Articles 74, 83, 88, 97, 183, and 190.
14 See Articles 3, 50, 52, 70, and 135.
15 See Article 72.
16 See Articles 5, 31, 68, 74, and 86.
17 See United Nations, 1973.

Based on the equality of states, Stockholm Principle 24 paved the way for regional (and of course sub-regional) cooperation and was particularly helpful when trying to handle cases of trans-boundary pollution. By quoting the ever-lasting principle and real basis of international law, "*the sovereignty and interests of all States*," the Stockholm Declaration has already drawn attention to an often forgotten aspect of international environmental disputes: the source of the conflicts is rarely easily avoidable, for differing interests—and, in their own aspect, well-based interests—stand behind it. Hence, the solution of international disputes—as we will see—has a greater chance of success when this is taken into account.

The United Nations Conference on Environment and Development, held in Rio de Janeiro between June 3 and 14, 1992, shows in its title that the issue of environment had received an important co-traveller that would stay by its side (forever): the economic aspect. It clearly shows that at the international level the road to success usually leads through compromises (a.k.a. political reality). The Rio documents do not hesitate to emphasize the needs of developing states, who (for obvious reasons) refused to participate in the common project unless their needs were taken into account (at least to a certain extent). The Rio Declaration on Environment and Development is understood in its Principles 3, 4, 6, and 12 as guarantees.[18]

The Declaration includes many of the principles directly or indirectly connected to international environmental law relevant at the time of the adoption, such as sustainable development, a principle best explained[19] in the closing report (Our Common Future, 1987) of the so-called Brundtland Commission, formerly known as the World Commission on Environment and Development, founded in 1983 by the then Secretary-General of the United Nations, Javier Pérez de Cuéllar; the integrity of the Earth's ecosystem; common but differentiated responsibilities; the different position of the developed and the developing countries and their societies; (a reserved version of) the polluter-pays principle; the significance of environmental impact assessment; the necessity of information about possible harmful effects on the environment of other states;[20] and the peaceful settlement of international environmental disputes.

Rio Principle 8 addresses the promotion of "*appropriate demographic policies*." Being a highly sensitive question, the document elegantly stops there. This is a question relevant not only for Europe, but particularly for the Central European region, as here demographic decrease is more than visible: according to the World Bank data, the population of Central Europe has decreased by 7 percent over the last three

18 See United Nations General Assembly, 1992.

19 See Report of the World Commission on Environment and Development: Our Common Future, p. 41.

20 It had particular significance in 1992, just a few years after the Chernobyl disaster. See international activity after the catastrophe, especially in the framework of the International Atomic Energy Agency (IAEA), e.g., Lamm, 1998, pp. 170 et seq. For On the Convention on Early Notification of a Nuclear Accident, see Moser, 1989, pp. 119–128.

decades.[21] With this process having clear societal consequences (see, e.g., the questions of economy or migration), certain European countries have effectively decided to face the challenge and try to elevate the highly problematic fertility rates (or at least try to slower the reduction of the population). According to the UN-based data of the World Bank,[22] the general total fertility rate has decreased significantly since 1960, when the fertility rate (births per woman) was globally and generally 5, while in 2019 this number was 2.4 (demographers more or less agree that approximately 2.1 is needed[23] in order to maintain a society).

In Europe (we work with the data of the World Bank regarding the territory of the European Union), the numbers are equally telling: Europe never had a peak close to the global one, and since its rate of 2.6 in 1960, it has practically steadily decreased to 1.5.[24]

The fertility rates of Central European states were clearly below even the EU average at the time of their accession to the European Union and far under the desired 2.1. These states seem to have decided to try to solve this problem, with certain results giving room for optimism, see e.g., the Czech Republic, where over the past two decades the fertility rate has increased from 1.1 to 1.7; Hungary, where from a very low 1.2, the past decade—due to an intense support from the government for families—has seen an increase of 0.3 percentage points; Poland, where there has been a rather steady increase to 1.4 since the nadir of a rate of 1.2; or Slovakia, where in the past two decades, there has been an increase of over 0.37 since the nadir (1.19).[25] These numbers have to be considered with regard to the following: The 10 countries with the highest fertility rates in the World Bank's 2021 report are all from the African continent, with Niger leading at 6.8,[26] while 10 of the 15 countries with the lowest fertility rates are European (South Korea's figure of 0.9 is followed in fourth place by the first European nation on the list, Malta, with 1.1).[27]

Naturally, from an international environmental point of view, population and fertility are not the only factors that have to be taken into consideration. Another widely acknowledged factor—which is in fact, just like the fertility rate, not real data but a calculated average number based on real data—is the so-called ecological footprint, where we can see that countries with the largest impact are mostly (but not

21 Population, total—Central Europe and the Baltics. In 1989, at the peak, it was 110 million, in 2020 only over 102 million.

22 Fertility rate, total (births per woman).

23 See among others Fertility rate; Total Fertility Rate 2022; Organisation for Economic Cooperation and Development, 2016.

24 Fertility rate, total (births per woman)—European Union.

25 Fertility rate, total (births per woman)—Czech Republic, Slovak Republic, Poland, Hungary.

26 As we can see from the data, the fertility rate of heavily indebted countries (Fertility rate, total (births per woman)—Heavily indebted poor countries (HIPC) as well as low-income states (Fertility rate, total (births per woman)—Low income) have also decreased significantly by approximately 2 units, from 6.6/6.7 to 4.6 (1.8 since the adoption of the Rio Declaration); of course, the two lists overlap remarkably.

27 Fertility rate, total (births per woman).

entirely) developed countries.[28] In the Central European region the country having the largest ecological footprint (according to 2018 data[29]) is the Czech Republic (with 5.72 gha)[30] at 24, with Slovenia at 29 (5.37), Poland at 37 (4.75), Slovakia at 38 (4.73), Croatia at 59 (3.88), Hungary at 60 (3.87), and Serbia at 77 (3.07), while the global average is 2.77.[31] These data may also be modulated by other factors (e.g., absolute size of the population), but they give an insight into the global situation and the place of Central Eastern Europe within it, and also show that an approach that tries to separate the economy and environment would always have a limited scope of validity.

This is also reflected in Rio Principle 25, according to which "*[p]eace, development and environmental protection are interdependent and indivisible*." It is important to note that not only development and environmental protection, but also peace and environmental protection are indivisible. This is another obvious statement of the Rio Declaration which has long been disregarded, but it has significance in various respects. First, however complicated the issue of aggression is, the question arises whether such an attack (i.e., an attack causing "only" environmental harm amounting to an "armed attack" in the sense of Article 51 of the UN Charter) could be regarded as an act targeting the sovereignty, territorial integrity, or political independence of another state (but obviously by other means, without the classical use of armed forces).[32] Second, when already at the stage of war, is the destruction of the environment a tool of warfare worth paying extra attention to? Although the Rio Declaration does not go further, we know that it is, and not only in the case of direct destruction of the natural environment of the state under attack (see operation Agent Orange, for instance), but also with the deliberate destruction of the cultural (built) heritage of a country, also belonging to the notion of "environment."[33] The world is slowly taking a different view in this regard: while there were already a few scholars talking about the possibility of ecocide in in the 1990s,[34] especially since the International Criminal Court (ICC) Policy Paper of 2016, there has been an even greater shift of interest in this direction.[35] The Rio Declaration included in Principle 24 a clear statement that

28 The countries with the highest fertility rates all rank between 136 and 182 in the ecological footprint list.

29 See https://data.footprintnetwork.org/#/compareCountries?type=EFCpc&cn=167,198,199,97,173,98,272&yr=2018.

30 "Global hectare": the measurement unit for ecological footprint.

31 See https://data.footprintnetwork.org/#/compareCountries?cn=all&type=EFCpc&yr=2018.

32 See Raisz, 2015.

33 See e.g., Hungarian Act 1995/LIII on the General Rules of the Protection of the Environment quoting in its Article 4 that an element of the environment also includes "man-built environment"; as well as International Criminal Court, Office of the Prosecutor, 2016, p. 14, quoting the "destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land." See furthermore the so-called Al Mahdi case of the ICC, The Prosecutor v. Ahmad Al Faqi Al Mahdi, 27 September 2016, No. ICC-01/12-01/15. See furthermore Trindade, 2010, pp. 340 et seq.; Kovács, 2020, pp. 100 et seq.

34 See among others Higgins, 2012; Gray, 1996; Teclaff, 1994.

35 See among others Ahmed, 2017; Lambert, 2017; Prosperi and Terrosi, 2017.

"[w]arfare is inherently destructive of sustainable development" and invited the states to protect the environment even during an armed conflict.

One of the most important principles of the Rio Declaration, a key to the willingness of states to further cooperation, is No. 2 stating another principle evident at the time of the creation of the United Nations but partly questioned from time to time ever since: the sovereign right of states to exploit their own resources and follow their own policies.[36] That this is problematic is most visible in the case of groundwater in aquifers or fossil waters.[37] Fossil waters were regarded in certain cases as a secret and "cheap" source of water even for territories that are not so rich in surface/rainwaters.[38] However, reality soon knocked on the door: with the majority of the resource exploited came the realization that the fossil waters need significantly more time (essentially a hundred thousand years) to recover. This bitter experience in California or Spain's Valladolid (both being the "vegetable gardens" for their continents) as well as in Libya (where water was mostly used for oil production) suddenly brought to prominence the idea that states having fossil waters should henceforth no longer regard it as something under their sovereignty and promote their recognition as the common heritage of mankind, i.e., a good everybody should be given access to.[39] Given the above background (former almost complete exploitation of its own resources), such ideas originating from the concerned regions cannot really be expected to be taken seriously, it is thus in the essential interest of all states (as clarified already in the Rio Principles) that countries that had the means to exploit (alone) their own resources earlier than the others do not tend to vindicate a right to have a share from the resources of other states (who have not yet exploited their own resources for one reason or the other). However humane and sustainable this idea may sound at first sight, it would be unwise to take this path and—under a seemingly august pretext—infringe the sovereignty of other states, among others Central European states. Such ideas may give anyone pause, especially developing countries dubious about the real intentions of environmental legislation (not to even mention that it would not promote the responsible management of resources) and are hence contrary to the global interest. This example shows the extent to which we should be cautious with majestic ideas and double-check the real consequences.

Rio Principle 2, however, has not simply declared the sovereignty of states; it has equally stated the other side, the responsibility of states vis-à-vis activities under their control that cause harm to the environment of other states, a principle already present in every international-environment-related judgment since the Trail Smelter case. Furthermore, Principle 13 envisages international cooperation in order to find ways to settle liability questions through international law-making. Clearly it is only a declaration that has had limited results ever since.

36 Schrijver, 1988, pp. 95 et seq.
37 Raisz, 2013.
38 See e.g., the case of Libya and its use of fossil waters for oil production. See Voss and Soliman, 2014.
39 See Martin-Nagle and Aquifers, 2011.

However, the fact that even such binding documents as conventions could be adopted in 1992 indicates the success of the Rio Conference, as it was a clear point of reference twenty years on as well.

The Rio+20 Conference, entitled "United Nations Conference on Sustainable Development," released a final document, the General Assembly Resolution called *The future we want*.[40] Essentially, it reaffirmed the Rio Principles and hinted that there have been progress and setbacks at the same time. It referred among others to poverty, developing countries, and sustainable development.[41] It reaffirmed the devotion toward the territorial integrity and the political independence of states, and also to the national sovereignty of states over their national resources.[42]

It made concrete reference to multinational environmental agreements, among others—logically—on climate change and biodiversity, but also on desertification, chemicals, and waste, as well as the law of the sea,[43] giving insight into the areas the UN regards itself to have made significant progress in.

4. IEL Treaties and CEE countries

In the following, we will focus on international environmental regimes highly relevant for the general development of international environmental law, and therefore on the law affecting Central European countries as well.

Concerning the *ratio materiae*, international environmental law has three major fields: i. the protection against/consequences of certain types of pollution, ii. the protection of certain species or the natural environment, and iii. the regulation of certain elements of the environment. These are of course complemented with specific issues, such as regulation of the right to information.

Concerning the form, insight is needed into the sources of international law relevant in international environmental law. Being a complicated issue (see Article 38 of the Statute of the International Court of Justice), although many other sources[44] have relevance (see, e.g., resolutions, the highly interesting question of customary law, and

40 United Nations General Assembly, 2012.

41 Cf. Hallgren, 1990.

42 See among others points 20, 22, 23, 25, 28, 31, 36, etc.

43 See among others United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and Stockholm Convention on Persistent Organic Pollutants, United Nations Convention on the Law of the Sea, and Convention on International Trade in Endangered Species of Wild Fauna and Flora.

44 Or subsidiary means for the determination of rules of law, as stated in Article 38 of the Statute of the International Court of Justice

certain principles[45]), this chapter only reflects on two specific issues—treaties and the judicial decisions of international courts and tribunals.

According to a study by the University of Oregon,[46] there are over a thousand multilateral and over two thousand bilateral international environmental agreements worldwide, and the intensity of concluding multilateral environmental agreements reached a peak in the 1990s. International environmental agreements have the following main characteristics:[47] i. frequent cross-references to other international environmental agreements, eventually causing the states to accept obligations stemming from treaties they are not direct parties to; ii. frequent so-called framework conventions where only the principles are elaborated in common and the detailed rules are either stated in so-called protocols or left entirely to the states; iii. the possibility for the states-parties to adopt a provisional (interim) application of the treaty even before its entry into force; and iv. simplified forms of modification of the treaty (in order to allow a quick reaction to the change of situation[48]).

Among the numerous international agreements (concentrating on multilateral agreements), the question arises how should we choose the most relevant ones? Two methods seem to be the most obvious: the treaties with the most states-parties or the treaties that are the most frequently cited (by other agreements, court cases, jurisprudence, media, etc.).[49]

The treaties with the most state parties are quite logically those adopted within the framework of the United Nations. Hence, the "leading" documents are the Montreal

45 As it can be deducted from the presentation of the world conferences that the principles of international environmental law include state sovereignty, sustainable development, the duty not to cause environmental harm, common but differentiated responsibilities, the precautionary principle, the prevention principle, the polluter pays principle, and the environmental impact assessment. The principles of international environmental law are in constant change and development. New principles emerge, while others strengthen their status (for instance through receiving a normative form) or remain/become mere political declarations. Although the majority are known and used in national laws, their role in international environmental law is far more profound and practical than in national law. They are used to fill gaps, but one has to take into consideration the particularities of international law: A fair balance should be found between the extended use of these principles and the sovereignty of the states. As the advisory opinion in the genocide case has already shown: Pragmatic solutions, however un-progressive they may seem at first sight, help to maintain international cooperation (International Court of Justice, 1951, p. 15; in this case, the ICJ changed the thus far prevailing principle of the "absolute integrity" of a treaty, facilitating the wilfullness of states even belonging to opposite political families to enter into international treaties.)

46 See International Environmental Agreements Database Home. The research was conducted between 2002 and 2020, with a major update in 2017. According to their statistics (see International Environmental Agreements Project Contents), there are 2296 bilateral environmental agreements, 1450 multilateral environmental agreements, and 250 other international agreements that do not belong to either category.

47 Shelton and Kiss, 2005, pp. 15–16.

48 For instance, including the actual list of protected species "only" in the appendix.

49 The first method's results can be found in Hunter, 2021, while the second is in Treaties.

Protocol on Substances that Deplete the Ozone Layer of 1987 (198 signatories[50]), the UN Framework Convention on Climate Change of 1992 (UNFCCC), and the Convention to Combat Desertification of 1994 (with 197 signatories each),[51] the Convention on Biological Diversity of 1992 (196 signatories), the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Convention of 1972 (194 signatories), the UNFCCC's Kyoto Protocol of 1997 (192 signatories), and the Paris Agreement of 2015 (193 signatories). Other relevant treaties include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989 (189 signatories),[52] the Stockholm Convention on Persistent Organic Pollutants of 2001 (185 signatories), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973 (184 signatories), the Ramsar Wetlands Convention of 1971 (171 signatories), the Cartagena Protocol on Biosafety of 2000 (173 signatories), and the Law of the Sea Convention of 1982 (UNCLOS, 168 signatories). Of course, treaties with a later adoption date (notwithstanding their actual date of entry into force) reflect the intense willingness of the states to participate in such projects (as these treaties surely had less time to gain a place in this illustrious list)—the Paris Agreement clearly leads the way in this regard.

The list of most frequently cited treaties includes many of the documents mentioned above: the Basel Convention, the Cartagena Protocol, the UNFCCC, the UNCLOS, the Kyoto Protocol, the Paris Agreement, the Stockholm Convention, and the CITES are excellent examples. However, there are other treaties that gained relevance despite not having reached such a broad recognition on the part of the states as the other documents just mentioned. Hence, we have to pay attention to the Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997, the International Convention for the Prevention of Pollution from Ships (MARPOL) of 1973, and the International Convention for the Regulation of Whaling of 1946. (These conventions appear in international court cases, thus further facilitating their frequent citation.)

Apart from these conventions, a few others also deserve to be noted, especially for their Central Eastern European relevance. First is the Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo in 1991 in the

50 A UN convention having more signatories than the UN has member states (as of today, 193) comes from the fact that these treaties often have non-state members or states that, for one reason or another, e.g., because of small size, cannot strive for a UN membership (however, in this regard a kind of uncertainty remains, cf. Nauru vs. the Cook Islands). For instance, the Montreal Protocol (the first "universally" ratified treaty of the United Nations) also has the Holy See and the European Union as signatories, as well as Niue or the Cook Islands.

51 The number of signatories is based on information from the UNTC, as of April 7, 2022.

52 In its framework works the Basel Convention Regional Centre for Training and Technology Transfer for Central Europe in Slovakia. This regional center is responsible for Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Montenegro, Poland, the Republic of Moldova, Romania, Serbia, Slovakia, Slovenia, the Republic of North Macedonia, and Ukraine. For the national legislation adopted by the countries in the region see National Legislation.

framework of the UNECE, the United Nations Economic Commission for Europe, one of the five regional commissions of the United Nations. It was the first multilateral treaty to address the rights and duties of states with regard to planned activities with transboundary effects. Although a highly sensitive issue (especially as it touches upon sovereignty and the principle of not causing harm in the territory of another state), the success of this document will be examined with regard to the fact that its adoption preceded the adoption of the Rio Principles. It has 45 signatories (44 states plus the European Union), excluding the United States of America.[53] The parties to the convention undertake to apply environmental impact assessments before authorizing an activity that may cause significant transboundary harm. Such a convention is of utmost importance in a region where borders of different countries are much closer to each other than, for instance, on the Northern American continent.[54]

The Aarhus Convention, i.e., the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, was also adopted in the framework of the UNECE. The Aarhus Convention, which was signed in 1998 and entered into force in 2001, has 47 signatories (46 states and the European Union), which clearly represents the majority of the United Nations Economic Commission for Europe (UNECE) member states, however, excluding the United States of America. It takes a rights-based approach,[55] i.e., it aims to take into consideration the interest of present and future generations via access to information, access to justice, and broadening the possibility of public participation in decision making in environmental matters. The Aarhus Convention clearly includes in certain cases well-detailed rules on the obligations of the public authorities or the types of information that should be made available to the public. As part of a visible trend in international law, it includes provisions on a possible settlement of disputes, referring—on the basis of mutuality—the disputes to either the International Court of Justice or arbitration (Article 16). As both the Espoo and the Aarhus Conventions are treaties that the European Union (or rather its predecessor) adheres to, they often appear in cases in front of the Court of Justice of the European Union.[56]

In 1992, two other important UNECE conventions were adopted. The Convention on the Transboundary Effects of Industrial Accidents, adopted at Helsinki, aims at protecting human health and the environment against industrial accidents whose effects exceed the borders of states, as well as promoting cooperation between those states concerned before, during, and after such events. It has 41 signatories, including

53 Despite its name, the UNECE represents not only European countries (including Russia), but also the United States of America and Canada. The Espoo Convention was in fact signed but never ratified by the USA, which is in a way particularly interesting with regard to the fact that the complete international environmental adjudication started in a case where the USA cited Canada (just) before a tribunal for a similar omission (Trail Smelter arbitration).

54 See among others Emmerechts, 2008, pp. 96 et seq.; Schrage, 1999; Leb, 2015, pp. 100 et seq.

55 See the Preamble and Article 1.

56 See e.g., Case C-411/17, Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen vzw v. Conseil des ministers.

the European Union but excluding both the USA and Canada, who signed the document but have not ratified it. (Notwithstanding, it took eight years for the convention to enter into force.) The Convention on the Protection and Use of Transboundary Watercourses and International Lakes, also adopted at Helsinki, needed only half the time of the previous one to enter into force and has even more signatories (46).[57] Although it has even more major absentees (besides the USA and Canada, also the United Kingdom), given the specificity of the topic, it is far more relevant that states on the old continent chose to accept it (for whom it has actual—geographical—relevance). The vast majority of Central European states are parties to these conventions.

It is of significance for the region that there is a sub-regional understanding concerning one of its most important watercourses: the Danube River Protection Convention, adopted in Sofia in 1994 (as well as the international organization created as a result, the International Commission for the Protection of the Danube River), includes all the states of the Danube River Basin, being one of the first examples of an integrated and holistic approach to the protection and sustainable and equitable use of waters, including groundwater. Apart from the Danube, which is the river with the most states in its basin, other similar commitments have been made in the region, e.g., concerning the Sava River.[58]

Within the framework of the Council of Europe, an organization relevant for the countries of this region, as a symbol of their active participation in common European projects for more than three decades now, there are also several conventions related to environmental questions. Some of them have been more successful than others; e.g., the Convention on the Conservation of European Wildlife and Natural Habitats (of 1979) has been a single success (and not only for Central Europe). The original European Convention for the Protection of Animals during International Transport of 1968 also had the Russian Federation as a party before its accession to the Council of Europe and needed an additional protocol to enable the European Union to enter the convention; however, it has remained relatively unpopular among Central European countries. On the other hand, the Council of Europe Landscape Convention (2004) has basically all the Central Eastern European states among its parties. At the same time, attempts like the Convention on the Protection of the Environment through Criminal Law (of 1998) or the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (of 1993) have not even entered into force despite needing only three ratifications (the latter has not even produced one). Without going into the details, these examples show that political reality is just as interesting for the success and possible effects of an international agreement as accurate and professional wording.[59]

57 Boisson de Chazournes, 2015, pp. 33 et seq.
58 See https://www.savacommission.org/.
59 Furthermore, for many Central European states the European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes of 1986 is of interest.

5. International Environmental Adjudication: First Steps on a Long Way

The following section focuses on international environmental adjudication, and an overview is given of the most relevant cases that bear direct or indirect relevance for the Central European countries.

It is generally accepted that international environmental adjudication has three major judgments as its basis: the Trail Smelter, Lake Lanoux, and Corfu Channel cases.[60] The Trail Smelter award[61] was an arbitral award based on a 1935 special agreement between Canada and the USA to handle the conflict that arose over transboundary pollution coming from a smelter operating on the Canadian side but also causing damage to US farmers. It was the first judgment where an international tribunal declared that due to the sulphur emitted into the air, Canada illegally caused harm in the territory of the USA, thus infringing international law (as no state may use its territory in such a way that its activities cause harm in another state; *sic utere tuo, ut alienum non laedas*). In the Corfu Channel case, the very first decision of the International Court of Justice (ICJ),[62] where—among others—the ICJ established the liability of Albania for not having removed the naval mines in the channel after World War II (which led to loss of life and significant damage to British vessels crossing the channel), questions of responsibility, i.e., responsibility for acts within a state's frontiers (exclusive control) were clarified, paving the way for establishing state responsibility more easily in the future. The Lake Lanoux judgment[63] concerned plans of the French government to use the waters of Lake Lanoux (a lake in French territory that feeds a river that crosses the French-Spanish border) in such a way that after utilization, only a certain amount of the water in the river would be returned, an amount that would correspond to the actual needs of the Spanish users. The Spanish government opposed the plan and considered it to be contrary to the Treaty of Bayonne of 1866 (and its Additional Act), one of several treaties settling the borders between the two countries; however, the arbitration tribunal found no breach on the part of the French government, taking into consideration the negotiations between the parties as well as the interests taken into account. As the Additional Act provides for a regime for the use of common waters and expressly refers to the requirement for consultations before exactly such interference,[64] the decision of the tribunal seems disappointing for those arguing for the interests of so-called downstream countries. It should however be noted that the decision was made in 1957, in an era when the theory of the so-called Harmon doctrine was relatively strong (or was at least not questioned as strongly as afterwards), as it was only in the second half of the twentieth century

60 Shelton and Kiss, 2005, p. 41.
61 Award, 1938, 1941.
62 International Court of Justice, Corfu Channel, United Kingdom of Great Britain and Northern Ireland v. Albania, Judgments of March 25, 1948, April 9, 1949, and December 15, 1949.
63 United Nations, 1957.
64 See MacChesney, 1959.

when we see a true proliferation of the related doctrines[65]—without there being a standstill among them even to date.

These judgments, however, mark only the beginning of international environmental adjudication, the complexity of which derives from the fact that the notion includes a variety of tribunals dealing with or potentially dealing with international environmental issues. For instance, special tribunals like human rights courts on the European or American continent have a significant jurisprudence in this regard. Similarly, in the framework of the present chapter neither the International Criminal Court, the Court of Justice of the European Union, the WTO dispute settlement bodies, nor the International Tribunal of the Law of the Sea will be treated. These courts all have a specific mission and hence, completely understandably, treat potential international environmental issues through such spectacles. This chapter can only discuss a limited number of cases and thus focuses on the decisions of certain arbitral tribunals and the already mentioned International Court of Justice.

The International Court of Justice has often had the opportunity to treat cases with a focus on an element of the environment (land, sea, lake, etc.). However, this mere fact does not make such cases automatically part of international environmental adjudication, and hence this chapter focuses on cases with more direct environmental relevance.

Central Eastern Europe has provided the most famous case[66] of international environmental law so far in the history of the International Court of Justice. The Gabčikovo-Nagymaros case[67] is in the center of attention even if—given the circumstances—it could not serve as "the" precedent for all future international environmental law cases. One of the most cited cases of the ICJ,[68] it could only partly touch upon environmental issues, as the parties could only agree on questions in a special agreement turning to the ICJ that does not even mention the word "environment"... The case has to be decided "on the basis of the Treaty [on the Construction and Operation of the Gabčikovo-Nagymaros Barrage System of 1977] and rules and principles of general international law, as well as such other treaties as the Court may find applicable"—not too much space was left for revolutionary environmental adjudication. Besides Judge Herczegh's pragmatic-environmentalist view in his dissenting opinion, Judge Weeramantry's separate opinion concentrating on various issues of international environmental law (e.g., sustainable development, continuing environmental impact assessment), and especially the parts declaring the customary law feature of the principle of sustainable development, is often cited, but another part of his separate opinion deserves even more attention: "Environmental rights are human

65 See among others the doctrines of absolute territorial sovereignty, absolute territorial integrity, prior use, no substantial harm, equitable utilization, or optimal use. Cf. Moermond III and Shirley, 1987, pp. 140 et seq.

66 See Nagy, 2020.

67 International Court of Justice, Case Concerning the Gabčikovo-Nagymaros Project, Judgment of September 25, 1997.

68 See Nagy, 2020.

rights. [...] A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights"—referring to the difference of the framework of international environmental law in 1977 and 20 years later.[69]

Although a small step in the right direction, the ICJ seems to have missed the opportunity to adequately elaborate on international environmental issues in a case where both parties referred to the principles of international environmental law in the Pulp Mills case between Argentina and Uruguay in 2010.[70] Despite recognizing the violation of certain rules on consultation by Uruguay (based on a 1975 treaty between the two states regarding the rational utilization of the river), as the Court did not find it proven that the contested industrial activities would or could have an adverse impact on the quality of waters and thus cause transboundary harm, it finally concluded that there has been no substantial violation of international law.[71]

However, in 2010, two other environmental cases started in front of the ICJ. The first—however heart-warming for environmentalists—reminds us again in its aftermath of the necessity to take political reality and pragmatism into account. In the Whaling in the Antarctic case[72] Australia claimed that Japan's whaling activity in the Antarctic within the so-called JARPA II Programme was in breach of its obligations under the International Convention for the Regulation of Whaling. Japan unsuccessfully tried to maintain that its techniques constitute activities that—being "scientific" activities—are exempted from the obligations deriving from the convention, and the ICJ in its 2014 judgment found Japan in breach of some of its obligations, ordering it to stop such activities. First, Japan declared that it would accept the judgment, but a year later decided to resume whaling activities in the Antarctic[73] and even resumed commercial whaling in 2019, withdrawing from the International Whaling Commission.[74]

The second case started as a crystal-clear environmental case—dredging activities in the San Juan river bank (mostly) in the territory of Nicaragua but obviously threatening the flora and fauna of the river's riparian, Costa Rica. Soon, Nicaragua also started a case against Costa Rica, claiming the harmful environmental effects of the construction of a road next to the San Juan River. The ICJ decided to join these cases and found violations on both sides in its solomonic judgment of 2015.[75] This judg-

69 Judge Weeramantry's opinion is only visible in Part C of the Decision when voting against the legality of putting the so-called "provisional solution" in operation.

70 International Court of Justice, Pulp Mills on the River Uruguay, Argentina v. Uruguay, Judgment of April 20, 2010. See Separate Opinion of Judge Cançado Trindade, p. 53.

71 See furthermore Foster, 2013, pp. 49 et seq.

72 International Court of Justice, Whaling in the Antarctic, Australia v. Japan, Judgment of March 31, 2014.

73 Japan to resume whaling in Antarctic despite court ruling.

74 Kolmaš, 2020.

75 [75] International Court of Justice, Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica), Judgment of December 16, 2015.

ment seems to be one where the ICJ took political considerations into account, trying to maintain the willingness of the states to turn to them with their disputes (and not to choose other, perhaps illegal forms of dispute settlement). While acknowledging this objective of the ICJ (present since the very beginning), as well as noting that this judgment elaborates at least on one aspect of international environmental law in detail, namely environmental impact assessment, the emphasis seems to have been shifted in the wrong direction: The breach of substantive obligations seems to be harder to establish than procedural ones.

Within the framework of the Permanent Court of Arbitration, this chapter only mentions two awards. First is the 2014 Arctic Sunrise award,[76] the relevance of which for international environmental law is of a completely different nature than those we have already discussed. It concerned the seizure of an environmental activist (Greenpeace) vessel under Dutch flag protesting oil drilling in the exclusive economic zone of Russia. Russia was found in violation of the International Tribunal for the Law of the Sea (ITLOS) Convention, as the Court did not find it proven that the actions taken by the activists (e.g., climbing on the platform) or their consequences would have been dangerous to the marine environment. It is interesting that it was not Russia that referred to this kind of defense, as they refused to take part in the procedure, but it was the Court which systematically went through all the possibilities that could, upon the ITLOS Convention, justify the actions of the Russian authorities—and the protection of the marine environment was one of these possibilities.

Another judgment with far more direct relevance for Central Europe is the Kishenganga award of 2013.[77] The proceedings were initiated based on the 1960 Indus Waters Treaty. It basically concerned water supply questions (as well as sewerage, waste management, and remediation). Even interim measures were issued in 2011, prohibiting India from proceeding "with the construction of any permanent works" that "may inhibit the restoration of the full flow of that river to its natural channel."[78] The final award upheld India's right to divert water from the Kishenganga River in order to realize its hydro-electric project, but issued a judgment that India should release a certain minimum amount of water at all times in order to maintain the environment downstream. The award—however solomonic—is of high relevance for international environmental law, and especially international water law, as it clearly addresses the issue of the environment downstream of such a project (Point 92ff), drawing scientific evidence into the examination and trying to take into consideration Pakistan's holistic approach to the situation; however, in the end, the amount of water India was obliged to provide is far less than what Pakistan asked for.

Although the majority of these cases do not concern Central Europe directly, we may easily recognize issues essential for Central European countries, particularly

76 Permanent Court of Arbitration, The Netherlands v. The Russian Federation, Awards of November 26, 2014, August 1, 2015, July 10, 2017.
77 Permanent Court of Arbitration, Indus Waters Kishenganga Arbitration, Pakistan v. India, Award of December 20, 2013.
78 Ibid, p. 2.

transboundary pollution, as well as questions of water quality and quantity. History has taught us in this region of the world to value the peaceful settlement of eventual disputes, hence it is in our interest to make such efforts successful.

6. Conclusions

International environmental law is one of the youngest fields of international law. This fact provides both opportunities and difficulties, making it one of the most interesting fields of international law in the next few decades. In this chapter we mentioned some of the challenges that the Central European region faces and offered insight into the existing international legal framework.

Besides giving an overview of the standing of international environmental law, this chapter focused on the question of political reality within the framework of international environmental lawby assessing its development, the most influential international treaties and judgments, concluding hereby that in this field—as in many others—cooperation is essential for the Central European region.

It is important to note that international environmental law reflects many of the issues relevant for Central Eastern Europe: questions of sovereignty, demography, economy and development, war and peace, and cooperation, including possible dispute settlement. Obviously, the more the answers given by this field are adapted to the circumstances in which the states find themselves, the more successful this field of international law may be. Therefore, international cooperation on the most pressing international environmental issues of the region is essential for the states concerned, and thus Central Eastern Europe has a potential to play a significant role in the future development of international environmental law.

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| Chapter 12 |

International Dispute Settlement

Michał BALCERZAK

ABSTRACT

The present chapter aims to discuss the methods and institutions designed to solve international disputes between states (and/or states and international organizations) from the perspective of the Central-Eastern European region. The chapter starts by explaining the notion of an "international dispute," followed by a discussion of the techniques used for dispute settlement. The author invokes Article 2(3) of the UN Charter, which establishes the obligation of states to settle disputes without prejudice to international peace and security. Another important point of reference is Article 33(1) of the UN Chapter, which obliges states to seek a solution to a dispute endangering the maintenance of international peace and security, while listing a non-exhaustive list of methods used for that purpose (negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement, or "other peaceful measures of their own choice"). In the subsequent subsections the author comments on the development of the international judiciary and the "renaissance" of arbitrage as a means of international dispute settlement, as well as the specificity of dispute resolution within European regional organizations. The last subchapter includes examples of disputes between Central and Eastern European States that have been submitted to various mechanisms of settlement since the collapse of communism in the late 1980s.

KEYWORDS

international dispute settlement, peaceful resolution of disputes, international judiciary, regional European organizations

1. Introduction

Settlement of international disputes by peaceful means has been expressly recognized as one of the primary purposes and principles of the United Nations (cf. Articles 1(1) and 2(3) of the United Nations (UN) Charter, respectively), though it dates back to an earlier milestone of international law: the 1899 Hague Peace Conference.[1] Having established its firm roots in the UN Charter, the principle of peaceful settlement of disputes found further confirmation *inter alia* in the UN General Assembly Resolution

1 See the Convention for the Pacific Settlement of International Disputes (the I Hague Convention), which established the Permanent Court of Arbitration. The provisions of this treaty were expanded in the convention of the same title adopted during the Second Hague Conference in 1907.

Balcerzak, M. (2022) 'International Dispute Settlement' in Raisz, A. (ed.) *International Law From a Central European Perspective.* Miskolc-Budapest: Central European Academic Publishing. pp. 285–303. https://doi.org/10.54171/2022.ar.ilfcec_13

2635(XXV) on Principles of International Law concerning Friendly Relations and Co-operation among States[2] and the Manila Declaration on the Peaceful settlement of disputes between States.[3]

It is perhaps superfluous to recall that in the UN era international disputes have been supposed to be settled "in such a manner that international peace and security, and justice, are not endangered" (Article 2(3) of the UN Charter). There is no doubt that the prevention of aggression and other threats to peace and security constitutes a primary aim of international law and is of vital concern of the international community as such. Thus, the institutional and procedural developments after both World War I and World War II with respect to settling international disputes can only be described as thriving. Whether or not the plethora of means and techniques available to states interested in settling a dispute is always eagerly or adequately used is another matter. As an introductory remark, however, it needs to be stressed that "international dispute settlement" remains a fairly well-established area of diplomatic, quasi-judicial, and judicial instruments at the disposal of states.

As Chapter VI of the UN Charter deals with the "pacific settlement of disputes," its Article 33 Para. 1 should be quoted here *in extenso*:

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace or security, shall, first of all, seek a solution by negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

Article 33 Para. 2 of the Charter vests the Security Council with the competence to "call upon the parties to settle their dispute by such means" if the Council deems it necessary.

The open catalogue of means referred to above is broad and allows interested states much room for maneuver, depending on a variety of factors such as the character of the dispute, the political will of the concerned parties, the willingness to engage a third party to facilitate the resolution, and the existence of a jurisdictional basis allowing for recourse to an international court.

2. The notion of an "international dispute"

The concept of "international dispute" has been traditionally explained by reference to the *Mavrommatis Palestine Concessions* case adjudicated by the Permanent Court of International Justice (PCIJ) in 1924.[4] The PCIJ ruled that "a dispute is a disagreement

2 Resolution adopted on October 24, 1970.
3 United Nations General Assembly, 1982.
4 Judgment of the PCIJ of August 30, 1924, PCIJ Series A, no. 2.

on a point of law or fact, a conflict of views or of interests between the parties."[5] The International Court of Justice (ICJ) reiterated this concept *inter alia* in an advisory opinion of 1950[6] and its subsequent case law.

One can divide international disputes using several criteria. The first criterion relates to the above-mentioned Article 33 of the Charter, which distinguishes disputes likely to endanger the maintenance of international peace or security. As not all disputes reach that level, some do not fall within the ambit of that provision. Nevertheless, even disputes that do not seem to endanger the maintenance of international peace or security are supposed to be resolved by peaceful means. The distinction between "endangering" and "non-endangering" disputes is important, as it determines the competence of the Security Council to deal with the case and call upon the parties to settle it. The Security Council (SC) may also take other actions as provided in Chapter VI of the UN Charter (Article 33(2)), including an investigation into any dispute or any situation that has not yet developed into a dispute in order to determine whether it falls under the category of endangering the maintenance of international peace or security (Article 34 of the UN Charter [UNC]). If it does, the SC may "recommend appropriate procedures or methods of adjustment" (Article 36 Para. 1 of the UNC). Should the parties to the dispute fail to solve it by the means referred to in Article 33 of the UNC, they are expected to refer it to the SC, which shall decide whether to take action under Article 36 or "to recommend such terms of settlement as it may consider appropriate."

Another distinction can be drawn between political and legal disputes. This differentiation is far from clear, and historically it has been a matter of many controversies. It is of little assistance in explaining this division that under Article 36 Para. 3 of the UN Charter: "legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." This could imply—at least in theory—that non-legal (political) disputes are those that should be resolved in a diplomatic rather than judicial way. The political and legal reality of the international community seems to be more complicated. It would be unsustainable to argue that we can distinguish between purely political or legal international disputes. One could claim that given the contemporary stage of development of international law, there are hardly any areas for virtually political disputes without any legal norms or principles in the background. On the other hand, it would be unrealistic to infer that each and every international dispute can be resolved solely by reference to international law.

Historically speaking, the division between legal and political disputes was juxtaposed with the differentiation between justiciable and non-justiciable ones. The first category denotes disputes that can be effectively examined and resolved by recourse to legal norms, while the other—such as disputes concerning the "vital interests of states" or those "incapable of objective judicial determination"—refers

5 Para. 11 of the judgment.
6 International Court of Justice, 1950, p. 74.

to disputes that cannot be solved "just" by the application of relevant law. It is a matter of individual (and subjective) assessment to determine what kinds of disputes are indeed non-justiciable, and the assessment itself might be a matter of dispute between states. Yet another kind of dispute may arise in justiciable cases: that where the parties disagree as to the appropriate forum of submitting the dispute, for instance if only one party is interested in the adjudication of the International Court of Justice. In general, however, the non-justiciability of an international dispute would result from the fact that it involves a highly political component, at least in the eyes of one of the parties.

In contrast to the above distinction (justiciable v. non-justiciable), it is perhaps less problematic to indicate the meaning of "legal disputes," as the latter are explicitly referred to in Article 36 Para. 2 of the Statute of the International Court of Justice. According to this provision:

> "The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a) the interpretation of a treaty;
> b) any question of international law;
> c) the existence of any fact which, if established, would constitute a breach of an international obligation;
> d) the nature or extent of the reparation to be made for the breach of an international obligation. [emphasis added]"

In essence, the distinction between political and legal international disputes seems to still play a role on the conceptual level; however, the division between justiciable and non-justiciable can be regarded as obsolete.

One should also note that international disputes arise between states as primary subjects of international law, but it is conceivable that a dispute may also arise between a state and an international organization or an organ thereof (e.g., a member state of the European Union and the European Commission). In the latter case, the regime of dispute resolution might be subject to very specific methods of resolution (including judicial ones), although one could argue that negotiations would always remain a method of "first choice." It could also be asked whether an "international dispute" may involve other subjects than states or international organizations, i.e., individuals or international corporations. It is sometimes the case that international law provides these classes of subjects with specific procedural rights allowing them to enter into a dispute with a state, for instance on the basis of a human rights treaty or under an investment treaty (in case of corporations). However, these kinds of disputes usually have a very specific procedural background and the parties do not have the same plethora of "options" as states in the event of an inter-state dispute.

3. The classic methods of peaceful resolution of disputes

By "classic" peaceful methods of international dispute settlement one can list the modes referred to in Article 33 of the UN Charter, comprising: *negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.* One can differentiate between diplomatic and judicial means of dispute settlement, while the principal criterion that distinguishes diplomatic methods from judicial ones is the degree of involvement of a "third party." In case of diplomatic methods, the parties to a dispute are not legally obliged to follow the result of the settlement, whereas submitting a dispute for a judicial determination creates an expectation (and usually a legal obligation) that the parties will accept the decision adopted this way.

Negotiations are traditionally regarded as the most common and "natural" way of settling international disputes. This method implies the direct participation of parties interested in settling without a third party or a facilitator. Negotiations assist in solving a dispute, but they may also help to prevent one, and such an effect can be achieved through consultations. It is sometimes expected that the parties to the dispute would attempt negotiations before reaching for other means of settlement. For instance, Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination provides:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."[7]

Direct consultations or negotiations may or may not be institutionalized in the form of *ad hoc* bilateral (or multilateral) mixed commissions. Notwithstanding the widespread use of negotiations in international relations, it may happen that parties to a dispute arrive at the limits of the possible compromise, and/or the process gets stuck. The question then arises whether the parties are at least capable of agreeing on the next possible step, i.e., choosing an appropriate procedure involving a third party or a judicial method of resolving the dispute. Sometimes the "next step" in case of failed negotiations might be foreseen by a particular treaty and the path to a judicial solution opened. Irrespective of the follow-up to failed negotiations, however, any subsequent method of dispute resolution takes the dispute to the next level by allowing a third party either to facilitate or settle the conflict. This does not mean that unsuccessful negotiations automatically remove the disputes from the hands of the

7 See on the application of this clause in Balcerzak, 2018.

involved parties. Even in the lack of a negotiated settlement and/or during a procedure involving a third party, the parties usually retain the possibility of returning to the negotiating table.

Negotiations as means of settling an international dispute might not only be a matter of parties' choice but may result from a treaty or general international law. By way of example, such a legal obligation to negotiate in good faith was established by the ICJ in the *Gabčíkovo-Nagymaros Project* case *(Hungary/Slovakia)* case and expressed as follows:

> "[The ICJ] finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon."[8]

Apart from the above, however, assuming the negotiations were not capable of leading to an amicable solution to a dispute, the other non-judicial methods of settling include *enquiry, mediation,* and *conciliation.* The essence of mediation (sometimes called "good offices") is to allow a third party (a state, an international organization, or sometimes even an individual) to facilitate the negotiations as an intermediary and offer its assistance as may be required. Should the parties to the dispute differ as to the factual background of the case, they may also decide to set up an inquiry commission. Conciliation on the other hand goes a step further than mediation or inquiry (while involving these elements), where it is implicit that a conciliation commission not only facilitates an amicable solution but also impartially examines the case and offers its recommendations as to the settlement of the dispute. The standard rules of conciliation were included in the 1961 resolution of the International Law Institute.[9]

The above-mentioned non-judicial methods of dispute settlement have been used with varying frequency after World War II. States have not been particularly enthusiastic regarding the use of mediation or conciliation, despite many facilitating arrangements, both in bilateral and multilateral treaties. Therefore, examples of successful conciliations in the last decades are not very numerous: One should mention, however, the *Timor Sea Conciliation (Timor Leste v. Australia),* undertaken under Article 298 and Annex V of the United Nations Convention on the Law of the Sea.[10] There have also been interesting developments in the application of the conciliation mechanism provided by one of the UN human rights treaties (International Convention on the Elimination of All Forms of Racial Discrimination [ICERD]).[11]

8 Para. 2. B (operative part), *Gabčíkovo-Nagymaros Project* case *(Hungary/Slovakia),* judgment of September 25, 1997, ICJ Reports, p. 7.A.
9 Available at Institute of International Law, 1961.
10 Proceedings initiated on April 11, 2016, and concluded by a final Award on May 9, 2019. See Permanent Court of Arbitration, 2018, and Tamada, 2020.
11 See Eiken and Keane, 2021.

4. Arbitration and international judicial settlement of disputes

The main reason to distinguish arbitration and the judicial settlement of international disputes from the methods referred to above (negotiation, mediation, inquiry, and conciliation) is the binding character of judicial and arbitral decisions.[12] The essence of arbitration is to submit a dispute to a tribunal or joined commission composed of arbitrators designated by the parties to the dispute and chaired by an arbiter agreed upon by the parties. Arbitration tribunals or commissions may be set up *ad hoc* for a particular dispute or be composed in the framework of a pre-existing arbitral mechanism.

Historically speaking, arbitration has a long tradition in international law. Examples of arbitration can be traced back to Antiquity and Middle Ages, though it was not until the end of the 18th century that this method of settling international disputes started to regain its significance. Several historical treaties and disputes contributed to the development of arbitration, principally those between the United States and the United Kingdom: the Jay Treaty of 1794, the Treaty of Ghent of 1814, and the famous *Alabama* case of 1871. The arbitral practice of the 19th century led to the establishment of the Permanent Court of Arbitration based on the 1899 Hague Convention. While actually not "permanent" and not exactly "a court," the PCA remains the oldest international organization that provides a variety of dispute resolution services (not only in the framework of arbitration) to interested parties (not only states, but also international organizations and other entities). It is seated at the Peace Palace in the Hague, just like the International Court of Justice.

Although the practice of international arbitration in the XXth century has been quite significant, the development of the international judiciary might have been one of the factors why the recourse to arbitration was not particularly frequent, at least not until the beginning of the 21st century. That is not to say that arbitration was fully forgotten following World War II; there have been notable examples of international arbitration, such as the *Lake Lanoux* case (France v. Spain),[13] *Rann of Kutch* case (India v Pakistan),[14] or the *Channel* arbitration (UK v. France).[15] An important development in the history of international arbitration was the set-up of the Iran-US Claims Tribunal in 1981.

The first two decades of the XXIs century could be considered as a period of renaissance of international arbitrage, both in inter-state disputes, as well as those involving other states and private investors.[16] As regards inter-state arbitration cases between Central and Eastern Europe (CEE) states, one should mention the *Arbitration between the Republic of Croatia and the Republic of Slovenia*, which concerned a territorial

12 Merrills, 2011, pp. 83 et seq.
13 Lake Lanoux Arbitration (France v. Spain), 1957.
14 United Nations, 1968.
15 United Nations, 1977–1978, p. 6.
16 On the latter kind of disputes in Central Eastern Europe, see Nagy, 2019.

and maritime dispute.[17] Based on an Arbitration Agreement, both parties entrusted the Arbitration Tribunal, composed of five arbiters, to apply "the rules and principles of international law" as well as "international law, equity and the principle of good neighborly relations in order to achieve a fair and just result by taking into account all relevant circumstances." The proceedings started in 2012 and a Final Award in the case was rendered in 2017.[18]

Notwithstanding the importance of arbitration as a means of international dispute settlement, the last hundred years could be regarded as an era of international judiciary. It started with the establishment of the Permanent Court of International Justice by the Covenant of the League of Nations in 1919. The PCIJ was the first permanent international court, and from its inaugural sitting in 1922 until its dissolution in 1946 it was seised with 29 contentious cases and delivered 27 advisory opinions. The PCIJ's successor, the International Court of Justice, was established in 1945 as a principal judicial organ of the United Nations. The ICJ is without doubt the most important international court, and its jurisprudence is an object of constant scholarly attention. In its more than 75 years of operation, the ICJ has only very rarely had an opportunity to adjudicate cases involving CEE countries. One of these (*Gabčíkovo-Nagymaros Project* case, Hungary/Slovakia) will be briefly commented upon in the last section of this chapter.

In discussing the development of the judicial settlement of international disputes, one should at least mention the phenomenon of the second half of the XXth century known as the "proliferation of international courts and tribunals." While the very term "proliferation" might not be the most fortunate in this context, it is supposed to denote a tendency to set up specialized and/or regional international courts, exercising their jurisdiction in matters relating *inter alia* to human rights law,[19] international law of the sea[20] or international criminal law.[21] It can be argued that some reservations initially expressed as to the "multiplication" of international courts and fears of weakening the ICJ's role as the principal judicial organ of the UN have not proved justified. Regional and/or specialized international courts play a vital role in the international administration of justice and reflect the will of states to submit specific kinds of disputes to the jurisdiction of these courts. Another problem is whether states are always eager to abide by judgments of international courts in cases in which they are parties. In any event, however, there is no doubt that the expansion of the international judiciary over the last century has greatly contributed to the development of international law.

17 See Permanent Court of Arbitration, 2017a.
18 See Permanent Court of Arbitration, 2017b.
19 Cf. the European Court of Human Rights (established on the basis of the Convention on the Protection of Human Rights and Fundamental Freedoms of November 4, 1950), the Inter-American Court of Human Rights (established under the American Convention on Human Rights of November 22, 1969), and the African Court of Human and Peoples' Rights (acting under the Protocol to the African Charter on Human and Peoples' Rights adopted on June 9, 1998).
20 Cf. the International Tribunal for the Law of the Sea (ITLOS), established under the UN Convention on the Law of the Sea of December 10, 1982.
21 Cf. the International Criminal Court, established under the Rome Statute of July 17, 1998.

5. Specificity of dispute settlement within European regional organizations

5.1. European Union

EU law is a specific legal order, governed *inter alia* by the principles of autonomy and direct effect. "Classic" inter-state disputes over the application of EU law occur very rarely. More often than not, a dispute over the incorporation of EU directives or adopting provisions that are not in conformity with EU law may arise when the European Commission launches an infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU),[22] which provides:

> "If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

However, it may happen—albeit exceptionally—that a Member State of the EU directly confronts another Member over the non-application of EU law. This is considered exceptional because the general idea of the resolution of legal disputes in the EU is based rather on persuasion or negotiations between the European Commission and the interested Member State or the interested Member States themselves before addressing the Court of Justice of the EU. The judicial way of settling inter-state disputes among the EU Member States is thus far from preferred, but possible under Article 259 of the TFEU, which provides:

> "A Member State which considers that another Member State has failed to fulfill an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.
> Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.
> The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.
> If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court."

22 Consolidated version of the Treaty on the Functioning of the European Union, 2012.

Fewer than 10 disputes under Article 259 TFEU have found their way to the Court of Justice of the European Union (CJEU), with some of them considered by the Court to be outside the scope of the EU law and thus inadmissible,[23] and some were resolved before a judgment of the CJEU as to the merits (see the Czech-Polish dispute over the Turów mine commented upon at the end of this chapter).

Another existing but extremely rarely used possibility of bringing an inter-state dispute to the jurisdiction of the CJEU can be traced in Article 273 of the TFEU, which stipulates:

> "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties."

This provision of the TFEU lay dormant until Germany and Austria brought a case to the Court over an interpretation of a bilateral convention for the avoidance of double taxation with respect to taxes on income and capital.[24] The CJEU judgment in this case clarified some aspects of the application of Article 273 TFEU,[25] though it should rather not be expected to have opened the gates to a flow of new inter-state disputes brought under this head.

5.2. Council of Europe

The Council of Europe does not have a statutory[26] organ entrusted with the competence to adjudicate international disputes between its member states. However, two issues need to be mentioned in the context of the role of this organization in the judicial settlement of inter-state disputes. The first relates to a special instrument adopted for that purpose: the European Convention for the Peaceful Settlement of Disputes.[27] The other is the competence of the European Court of Human Rights to adjudicate inter-state cases based on Article 33 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

As regards the European Convention for the Peaceful Settlement of Disputes, it could be regarded as an expression of the good intentions of the Council of Europe member states in the first years of its functioning, even though the Convention itself has not necessarily brought tangible results. The adoption of this Convention might in a way be perceived as an attempt to mitigate doubts around the establishment of the European Court of Human Rights, which at that time was considered by some

23 See judgment of the CJEU of January 31, 2020, Case C-457, *Republic of Slovenia v. Republic of Croatia*, ECLI:EU:C:2020:65.
24 See judgment of the CJEU of September 12, 2017, Case C-648/15, *Republic of Austria v. Republic of Germany*, ECLI: EU:C:2017:664.
25 See Nowak, 2020.
26 The Statute of the Council of Europe was adopted in London on May 5, 1949. European Treaty Series no. 1.
27 Adopted on April 29, 1957, European Treaty Series no. 023.

commentators as creating a "competition" with the International Court of Justice. The parties to the 1957 Convention agreed to submit to the jurisdiction of the ICJ "all international disputes that may arise between them," without prejudice to other undertakings that the states might have undertaken to accept its jurisdiction (for instance, by way of a declaration recognizing the jurisdiction of the ICJ as compulsory under Article 36 Para. 2 of the Statute of the ICJ). The 1957 Convention includes also provisions on conciliation and arbitration procedures (Chapters II and III). Importantly, the Convention does not apply to disputes "which the parties have agreed or may agree to submit to another procedure of peaceful settlement" (Article 28).

The moderate success of the 1957 Convention is illustrated by the fact that it was ratified by only 14 (of the current 46) Council of Europe member states, mostly West European (with the notable exception of the Slovak Republic, which ratified it in 2001). This does not mean that the convention is obsolete: It was directly invoked by Germany in instituting proceedings against Italy at the International Court of Justice in 2008[28] and 2022.[29]

The second important aspect of settling inter-state dispute in the framework of the Council of Europe is the competence of the European Court of Human Rights under Article 33 of the European Convention on Human Rights (ECHR). While the control system of the ECHR is primarily focused on individual complaints (brought under Article 34 of the Convention), the adjudication of inter-state cases is part and parcel of the Court's judicial agenda. The ECHR allows any state party to bring a complaint about "any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party" (Article 33). Thus a complaint under this head need not concern an allegation of a violation of the Convention against the applicant state's national(s). In the history of the ECHR system, it has happened that some states decided to launch inter-state proceedings in the general interest of the European public order.[30]

In general, the inter-state disputes at the ECHR in the past two decades were either a reflection of the serious deterioration of international relation, with an armed conflict in the background or examples of less grave disputes over rights and freedoms protected in the Convention that could not be solved in an out-of-court way.[31] The two major groups of cases from the first category concern the conflicts between Ukraine and Russia, Georgia and Russia, and Armenia and Azerbaijan. The exclusion of the Russian Federation from the Council of Europe on March 16, 2022, did not result in the discontinuation of cases launched against it by Ukraine.

28 International Court of Justice, 2008.

29 International Court of Justice, 2022.

30 See the so-called "Greek cases" (no I and II) submitted between 1968 and 1970 by Denmark, Norway, Sweden, and the Netherlands. The cases did not reach the European Court of Human Rights, as in the control system prior to the entry into force of Protocol no. 11 (in 1998) both individual and inter-state complaints were first lodged with the European Commission on Human Rights. The first inter-state complaint adjudicated upon by the Court was *Ireland v. United Kingdom* (judgment of June 27, 1978).

31 See e.g., the *Liechtenstein v. the Czech Republic* case (no. 35738/20).

Concerning the inter-state disputes involving CEE states, one should mention the *Slovenia v. Croatia* case concluded by the decision of the Grand Chamber of the ECHR, which found that it had no jurisdiction to hear the case. The complaint will be commented upon at the end of the chapter.

5.3. Organization for Security and Co-operation in Europe

The Helsinki Final Act of 1975, which has been the cornerstone of the then Conference and since 1995 the Organization for Security and Co-operation in Europe, refers to the peaceful settlement of disputes in Para. V and stipulates:

> "The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.
> They will endeavour in good faith and a spirit of cooperation to reach a rapid and equitable solution on the basis of international law.
> For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.
> In the event of failure to reach a solution by any of the above peaceful means, the parties to a dispute will continue to seek a mutually agreed way to settle the dispute peacefully.
> Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult."

While the Helsinki Final Act was not an international treaty, it can be considered an important step toward alleviating the tensions between the West and the East in the Cold War era. The transformation of the Conference into an international organization (OSCE) has retained the idea of peaceful resolution of disputes as one of the basic assumptions of international order. To this end, the OSCE has specifically developed two areas of activities: mediation support and conciliation and arbitration services.

As regards mediation, it is noteworthy that a Mediation Support Team was established within the Conflict Prevention Center[32] with a view to provide states with a variety of services to facilitate dialogue and mediation arrangements. As regards other methods of pacific dispute settlement mentioned in the Helsinki Final Act, a special court was established by the Stockholm Convention of 1992: the Court of Conciliation and Arbitration, with the mandate to settle disputes between states.[33]

32 See Organization for Security and Co-operation in Europe Secretariat, 2014.
33 See Commission on Security and Cooperation in Europe, 1992. The Convention entered into force on December 5, 1994. There are 34 state parties to the Convention as of 2022.

The Court is a non-permanent body, and conciliation or arbitral commissions are supposed to be established on an *ad hoc* basis. There have not so far been any cases submitted by the parties to the Stockholm Convention. On the one hand, this fact could call the Court's utility into question, but on the other one should recall that also another Court offering conciliation and arbitration services, i.e., the Permanent Court of Arbitration, experienced long periods of underuse in the 20th century. Only time will tell if there will be any demand for the services of the OSCE Court of Conciliation and Arbitration in the new security architecture that sooner or later will emerge in Europe after the armed conflict in Ukraine.

6. Selected disputes between Central and Eastern European States

This section comments on three selected international disputes that involved Central and Eastern European States: (1) *Gabčíkovo-Nagymaros Project* case *(Hungary v. Slovakia)* at the ICJ, (2) *Slovenia v. Croatia* at the European Court of Human Rights (appl. no. 54155/16), and (3) Case C-121/21 *Czechia v. Poland* at the Court of Justice of the European Union (Turów mine case). Essentially, only the first dispute resulted in a judgment as to the merits; in the second dispute, the Grand Chamber of the ECHR found that it had no jurisdiction to take cognizance of the application, whereas the third dispute led to some procedural orders by the CJEU, followed by an agreement between the interested states and the withdrawal of the complaint by Czechia.

Since each of these cases concerns a different factual and legal context and was adjudicated by a different international court, it would be hard to argue that these examples allow us to reach any definite conclusions as to the character of "Central European disputes." However, one might observe that, in essence, the first two disputes concerned in one way or another the aftermath of the political and economic transformation of the region in the late 1980s and early 1990s. Further, the first and third of the disputes discussed below concerned environmental law.

6.1. Gabčíkovo-Nagymaros Project case (Hungary/Slovakia) at the ICJ

The *Gabčíkovo-Nagymaros Project* case can be considered unique for a few reasons: It is the only contentious case brought so far to the ICJ by two Central European States; it was the first environmental dispute submitted to this Court; and further, for the first time in the history of the ICJ that the judges paid a visit to the site during the proceedings. It is also quite unusual for a case at the ICJ to be still on the list of cases almost 30 years after it was brought and 25 years after the delivery of the judgment.

The case originated from a dispute between Hungary and Slovakia over a large barrage project in the Danube. The project was undertaken on the basis of the Budapest Treaty signed between the Czechoslovak Socialist Republic and the Hungarian People's Republic on September 16, 1977. While the work on the Slovakian part proceeded, the project came to a halt in 1989 when Hungary first suspended and then abandoned the works that were supposed to be undertaken on its part. In 1993

Hungary and Slovakia agreed to submit the dispute to the ICJ by a Special Agreement, asking the Court: (1) whether Hungary was legally entitled to suspend and abandon the works on the Nagymaros Project, (2) whether in 1991 the Czech and Slovak Federal Republic was entitled to enforce a "provisional solution," and (3) what were the legal effects of the termination of the Budapest Treaty by Hungary in 1992.

The ICJ delivered a judgment on September 25, 1997, holding that Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and that the "provisional solution" enforced by Czechoslovakia in 1991 was in conformity with international law. However, the Court found that Czechoslovakia was not entitled to put into operation the barrage system back in 1992, and further that Slovakia was a legitimate successor as a party to the Budapest Treaty from January 1, 1993. The Court stressed the obligation of both parties to negotiate in good faith and take all necessary measures to ensure the achievement of the objectives of the Treaty. The ICJ has also ruled on the mutual financial claims of both parties.

The implementation of the 1997 judgment met with some unwillingness on the part of Hungary, which prompted Slovakia to request the ICJ for an additional judgment. According to Slovakia, a draft Framework Agreement between the parties was reached but was later disapproved and disavowed by Hungary. Both parties submitted their observations to the Court but in the end no subsequent judgment was delivered, given that both states resumed negotiations and informed the Court about the progress. In 2017 Slovakia requested the ICJ to "place on record the discontinuance of the proceedings," which Hungary did not oppose.

The *Gabčíkovo-Nagymaros* judgment is considered one of the most influential pronouncements of the ICJ.[34] The ruling contributed to the development of certain areas of international law, such as the law of treaties and the law of international state responsibility. The case is illustrative of legal struggles originating in a huge construction project that was not completed in the shape originally planned by signatories to an international treaty. While the *Nagymaros* part of the waterworks has never been built, the *Gabčíkovo* power plant operates, though not at full efficiency. The uncompleted project also resulted in obstacles to inland navigation. In any event, the *Gabčíkovo-Nagymaros* case remains a landmark example of an environmental dispute in Central Europe submitted to the attention of the ICJ.

6.2. Slovenia against Croatia (appl. no. 54155/16) at the ECtHR

This inter-state dispute originated in civil claims of Ljubljana Bank, established in 1955 in the former Yugoslavia, and later reorganized, nationalized, and restructured by the Slovenian state. The claims were raised against various Croatian companies in relation to unpaid and overdue loans granted before the 1990s. Following unsuccessful civil proceedings lodged by Ljubljana Bank with Croatian courts, there were attempts by the Ljubljana Bank to seek protection under Article 1 of Protocol No. 1 to the European Convention on Human Rights (protection of property). In the decision

34 See Forlati, Mbengue and McGarry, 2020.

Ljubljanska Banka D.D. v. Croatia[35] the ECHR declared the application inadmissible, since according to the Court the applicant bank did not have sufficient institutional and operational independence from the state. Therefore the applicant bank could not be considered a "non-governmental organization" and the application was incompatible *ratione personae* with the provisions of the Convention. It should be noted that under Article 34 of the ECHR only "individuals, non-governmental organizations or groups of individuals" may be applicants before the Court.

Slovenia lodged an inter-state complaint with the ECHR under Article 33 of the Convention, which provides that *any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.* According to the applicant State, the Croatian authorities had prevented and continued to prevent Ljubljana Bank from enforcing and collecting the debts of its Croatian debtors in Croatia. Slovenia argued that the case revealed multiple violations of Articles 6 Para. 1 (right to a fair hearing), 13 (right to an effective remedy), and 14 (prohibition of discrimination) of the Convention, as well as Article 1 of Protocol No. 1 (protection of property).

The case required the Strasbourg Court to address the question of whether it is permissible to examine an inter-state application that had been lodged by a State-Party to protect the rights and interests of an entity that was not a "non-governmental organization" and thus could not successfully lodge an individual complaint under Article 34 of the Convention. The respondent state opposed an interpretation of the Convention that would allow state parties to invoke a violation thereof by entities other than those indicated in the aforementioned Article 34.

The Grand Chamber of the Court decided to follow its findings in the *Lubjlanska Banka D.D. v. Croatia* case insofar as the applicant bank was found to enjoy insufficient institutional and operational independence from the State and therefore could not be regarded as a "non-governmental organization." The Court recalled that the Convention must be read as a whole and interpreted in a way that promotes internal consistency and harmony. The fact that Article 33 of the Convention does not refer to "classes" of victims or applicants—in contrast to Article 34—does not change the specific nature of the Convention as an instrument for the protection of human rights. According to the Court, even in inter-state cases it was always an individual who was directly or indirectly harmed and primarily "injured" by the violation of the Convention. Neither states themselves nor legal entities that have the status of "governmental organizations" can be bearers of the Convention rights.

The Slovenian-Croatian dispute over the unpaid loans granted to Croatian debtors by the Ljubljana Bank before the dissolution of Yugoslavia is an illustration of how the unsettled claims from the pre-1990s can lead to international litigation three decades later. The case referred to above was unique among the inter-state applications submitted to the ECtHR under Article 33 of the Convention. More often than not, the inter-state disputes brought to the Court are a consequence of an armed conflict or another

35 *Ljubljanska Banka D.D. v. Croatia*, appl. no. 29003/07, decision of May 12, 2015.

situation involving grave violations of human rights endangering European public order. Nevertheless, some inter-state cases raise also the allegations of "individual violations" with no armed conflict in the background. Regardless of the origin and nature of the dispute, the inter-state mechanism under Article 33 of the Convention can only be useful when the applicant state seeks to protect the rights and freedoms of individuals, groups of individuals, or non-governmental organizations, rather than entities that do not have sufficient institutional and operational independence from the state.

6.3. Czechia v. Poland (Case C-121/21) at the CJEU

The dispute concerned a Polish coal mine located in Turów, in the vicinity of the Polish-Czech border, which has delivered coal for a large Turów Power Station. The license for the extraction of coal at the mine was supposed to expire in April 2020, but the Polish authorities decided to extend it by another six years and expressed the intention to continue extraction for another two decades. The prolongation was in accordance with Polish law, but doubts arose whether it might have infringed the applicable EU law and in particular Directive 2011/92 of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment.[36] These doubts were voiced by Czechia, who claimed that the operation of the mine had a considerably negative impact on the environment and endangered the quality of life of several nearby Czech communities. It was feared that the continuing operation of the mine would lead to the drying up of wells and might also cause soil subsidence.

Both governments engaged in negotiations in 2020; however, given the delays in negotiations, the Czech government submitted the dispute to the European Commission, alleging the violation of EU law by the Polish side. The Commission concurred and subsequently, on February 26, 2021, the Czech authorities brought an action against Poland to the Court of Justice of the European Union, alleging violations of several EU Directives.[37] The applicant state also invoked Article 4(3) of the Treaty of the European Union (the principle of sincere cooperation). The principal allegation concerned the prolonging of the consent for extraction of coal at the Turów Mine without an environmental impact assessment. Czechia claimed that the prolongation was performed in a way that effectively prevented it—or the public concerned—from any possibility of intervening in the procedure for the grant of the final development consent for extraction activity in the Turów Mine until 2026.

36 Official Journal of the European Union (hereinafter OJ), 2012 L 26, p. 1.

37 Apart from the Directive 2011/92/EU referred to above, the Czech government also pleaded the violation of Directive 2000/60/EC of the European Parliament and of the Council of October 23, 2000, establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), and Directive 2003/4/EC of the European Parliament and of the Council of January 28, 2003, on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

It is extremely rare for an EU member state to bring legal action against other EU member states for infringement of obligations stemming from EU law. It was also the first case in which one EU member challenged another at the CJEU over an environmental issue. Apart from the main complaint, the Czech government filed with the CJEU an application for interim measures under Article 279, requesting the Court to order that Poland shall immediately cease lignite mining activities at the Turów Mine. The request was granted by an Order of the Vice-President of the Court, delivered on May 21, 2021 (Case C-121/21). Moreover, by another Order of 20 September 2021,[38] and given Poland's failure to comply with the order to stop mining at Turów, the same Vice-President (R. Silva de Lapuerta) obliged Poland to pay the European Commission a penalty payment of EUR 500,000 per day from the date of notification of that order until Poland enforced the Order of 21 May 2021 and ceased mining activities. The order imposing a financial penalty per day for non-compliance with the CJEU order on interim measures was unprecedented and resulted in fierce criticism on the part of the Polish government. The latter argued that a sudden halt of operations at the Turów Mine would endanger national energy security and induce serious social consequences.

However, the Czech and Polish governments returned to the negotiation table and managed to achieve an agreement on February 3, 2022. Poland agreed to pay damages (EUR 45 M) and complete the construction of a barrier to stop the lowering of underground waters on the Czech side. As a result of the agreement, the applicant government withdrew the complaint to the CJEU and the case was discontinued on February 4, 2022.[39] The total amount of penalties due for non-compliance with the CJEU Order of 21 May 2021 was EUR 68 M. The attempts of the Polish government to have the penalty annulled in view of the agreement reached with the Czech Republic failed, and the penalties were deducted from the funds due to Poland from the EU budget.

The Polish-Czech dispute over the Turów Mine at the CJEU proves that even between EU member states there might be cases that are not easily resolved by negotiations. While the parties to the dispute have finally reached an agreement and the court proceedings have been discontinued, the "intervention" of the CJEU was far more expensive for Poland (due to the penalties for non-compliance with interim measures) than the sum finally agreed on as satisfying the Czech claims. It is another matter whether or not the CJEU "overreacted" as regards the scope of interim measures and the amount of penalties imposed for non-compliance. Be that as it may, the Czech-Polish dispute can serve as a background for discussion of the EU climate and energy policies as well as of the effectiveness of settling disputes between EU member states.

38 EU:C:2021:752.

39 Order of the President of the CJEU of February 4, 2022, removing Case C-121/21 from the list of cases.

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