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Editorial

The editors are pleased to present issue 2018/I of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

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We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law issues. The next formal deadline for submission of articles is 15 October 2018, though submissions are welcomed at any time.

THE EDITORS

Thoughts on Universalism versus Cultural Relativism, with Special Attention to Women's Rights

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In light of the fact that recently cultural differences, the challenges of peaceful coexistence among people coming from different cultural background or even references to the existence of parallel societies in certain European cities are monopolizing the public discourse in many countries, it is important to analyse one of the oldest legal discussions about universalism versus cultural relativism. The article seeks to introduce the most important elements of this debate, which started with the adoption of the UN Universal Declaration of Human Rights. The paper demonstrates the discrepancy between the tendencies regarding the academic discussion and the approach by states on culturally sensitive issues. While scholars are taking more nuanced positions recently by acknowledging both the merits of universal human rights projects and the significance of culture in the conceptualization and implementation of human rights, the intergovernmental debates at different UN fora are still characterized by radical universalist and cultural relativists statements by member states as it was demonstrated during the first two cycles of the UPR discussion on women's rights. A special focus was devoted to women's rights as they are considered to be one of the culturally most sensitive ones and most affected by local traditions and practices.

Keywords: universalism, cultural relativism, UN, UPR, women's rights, human rights, Universal Declaration of Human Rights, FGM

> *„The ideal subject of totalitarian rule is not the convinced Nazi or the convinced Communist, but people for who the distinction between fact and fiction and the distinction between true and false no longer exist."* (Hannah Arendt: The Origins of Totalitarianism)

1. Introduction

Gender based human rights violations are often defended or legitimized by reference to cultural particularities in a given society. In our globalized world where the different political and economic forces resulted in serious migration flows worldwide, the separation of different cultures is not an option anymore as it was in the Middle Ages and we have to find functioning solutions to address the challenge of the coexistence of representatives of different cultures despite the presence of more and more intolerant societies and intercultural clashes. As the further development of most of the cultures is partly influenced by other cultures the comparison of values prevalent in different cultural contexts it is important to specify the basic inter-cultural human values which belong to the common heritage of humanity. This question brings us to the universalism versus cultural relativism debate ongoing since

the drafting and adoption of the Universal Declaration of Human Rights (UDHR). Questions of relativism have persisted in various forms throughout history, but since the creation of the United Nations these have become a dominant theme for cultural anthropologists and human rights experts, as bearing significantly on the enjoyment of human rights and fundamental freedoms. This paper intends to introduce the different forms of cultural relativism and universalism. It aims to find ways to reconcile the two concepts, which is essential for the further development of the international human rights protection system. It seems obvious from in-depth research on the topic that the radical forms of cultural relativism and universalism are undermining the international human rights system on the one hand and reducing its acceptance globally on the other. The misuse of cultural relativism by authoritarian regimes for justifying human rights violations in the name of cultural particularities should be strictly separated from legitimate claims based on traditional practices, supported by the given cultural community and not in contradiction with basic human rights values. The special focus of this paper is not by coincidence women's rights as they are the ones used to belong – or still belong – to the private sphere and therefore regulated by local traditions and not by legal regulations as other parts of the societal life. The paper is introducing through the UN Universal Periodic Review on women's rights the policy followed by the effected states in order to compare it with the approach of academic researches on the same topic. The UN Universal Periodic Review was used as it is the only truly universal human rights mechanism we are having today in which all the 193 member states of the world organization are taking part and it is covering the whole range of human rights issues, without any limitations. Therefore, culturally sensitive issues are also on the agenda and as the review of states is carried out by other states the process has a strong political component, making the given states' human rights policy more visible. Female Genital Mutilation (FGM) has been chosen to demonstrate the sensitivity and complexity of the problem of cultural relativity because it is the practice affected so far more than 130 million women worldwide and provoked the most flagrant criticism from human rights advocates. However, this is the practice having a 2500 years old history, with very strong cultural relevance and which apparently cannot be addressed only through legal measures without being involved in the cultural context of the problem.

2. The Universalism versus Cultural Relativism Debate

2.1. The Universal Declaration of Human Rights

Many scholars in 1947 were of the view that any generalised human rights regime may encounter cultural differences, and because of that, the American Anthropological Society (AAS) cautioned the UN Commission on Human Rights about this danger during the drafting of the Universal Declaration.[1] In their "Statement on Human Rights" they argued that "values and standards are relative to the culture from which they derive."[2] In their letter they emphasized that the Declaration could not be "a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America."[3] Herkovits, the author of the AAS's Statement of 1947 was of the view that anthropologists should advocate for indigenous peoples to defend them from attempts by international agencies, like the

[1] Roger Lloret Blackburn, Cultural Relativism in the Universal Periodic Review of the Human Rights Council, ICIP Working Papers: 2011/03, Institut Catalá Internacional per La Pau, Barcelona, September 2011, p. 10.

[2] Michael Freeman, Human Rights, Polity Press 2010, p.120.

[3] Nhina Le, Are Human Rights Universal or Culturally Relative? Peace Review: A Journal of Social Justice, Vol 28, p. 203.

United Nations to globalize Western moral values.[4] He considered the UDHR as a charter of an idealist European philosophy, which is not universal in practice.[5]

Cultural relativists usually challenged the Universal Declaration on four grounds[6]:

1. It was drafted by cosmopolitan individuals in a privileged situation within their own society, whose views did not reflect the real concerns of the ordinary people.
2. The Declaration only reflected Western values, putting the emphasis on the individual and forgetting about families and social groups. In 1977 Jamil Murad Baroody, the Saudi delegate to the UN explicitly criticized the UDHR claiming that it was embodying „an exclusively Western approach to the human rights questions".[7] In 1984 the Permanent Representative of Iran to the UN went even further stating that the UDHR "did not accord with the system of values recognized by the Islamic Republic of Iran" and "his country would therefore not hesitate to violate its prescriptions".[8] Mahathir bin Mohamad, the Prime Minister of Malaysia in 1997 urged the UN to mark the 50th anniversary of the UDHR by revisiting its contents as the human rights norms contained therein appear to focus excessively on individual rights while neglecting the rights of society.[9] Mutua, highlighted that many articles of the UDHR echo the US Constitution and the jurisprudence of Western European states. According to him, this is due to a dominance of the West in the early UN, and even most of the Latin American delegates shared a Western point of view in this regard.
3. Governments will not accept those international norms if they consider them to be in conflict with their local cultural values or domestic political interest. Consequently, they will not let the international human rights regime dictate what to do with their practices.
4. Certain rights, like the one of private ownership, or marriage, or religious freedom cannot be reconciled with traditional practices and norms of non-Western societies, so they will be interpreted as a sign of Western cultural imperialism.

In response to these challenges, universalists, though admitting that a large part of the world's population was not represented at the drafting of the Declaration due to continued colonial rule or exclusion from consideration as defeated Axis powers, claimed that several independent experts (Peng-chun Chang – China, Charles Malik – Lebanon, Carlos Rómulo – the Philippines, Hernán Santa-Chile) from the developing world were influential members of the Commission on Human Rights[10] and the first 3 of them were also members of the drafting committee.[11] Although Chang held a doctorate from Columbia University, and Malik had attended Harvard University, they were familiar with both international and local norms and managed to understand and reconcile values of distinct cultures.[12] Their Western education was a great asset during the drafting process as they were culturally more sensitive and it helped to avoid legal solutions which would not be accepted by other non-European cultures.

[4] Richard A. Wilson, Human Rights, Culture & Context, Anthropological Perspectives, Pluto Press 1997, p. 2.

[5] Ibid p. 4.

[6] Nhina Le, pp. 203-204.

[7] Roland Burke, Decolonization and the Evolution of International Human Rights, University of Pennsylvania Press, 2011, p.138.

[8] Ibid p. 142.

[9] Robert Paul Churchill, Human Rights and Global Diversity, Routledge 2016, p. 44.

[10] Nhina Le, p. 205.

[11] Alison Dundes Renteln, International Human Rights. Universalism versus Relativism, Frontiers of Anthropology, Vol 6, Sage Publications 1990, p 28.

[12] Nhina Le, p. 205.

In this context, it is important to note that in 1944 the American Law Institute issued the „Statement of Essential Human Rights", which was strongly influenced by Latin American lawyers and that this document had a serious impact on the text of the UDHR.[13] During debate on the Draft Declaration in the UN General Assembly Third Committee – after it had been completed by the Commission on Human Rights – over one third of the proposed amendments concerning the draft Declaration came from four non-Western states, namely Cuba, Panama, Lebanon and Egypt.[14]

According to the universalists, the UDHR managed to synthesize "the Anglo-American understanding of individual with the modern "dignitarian" rights tradition of continental Europe and Latin America".[15] As a result, it acknowledges that "the individual is constituted and sustained by and through its relationships with others".

The other argument by the Universalists was that the tensions between universal norms and local practices on private ownership, marriage or religious freedom are not zero-sum games and they can contribute to the development of both.[16] They also highlighted how certain traditional practices in non-Western cultures prevent the abuse of power by leaders who refer to cultural differences in order to protect their power. Lastly, in order to prove the universality of the values embodied in the Declaration, several experts referred to the fact that a number of national constitutions drafted after the adoption of the UDHR incorporated some of its provisions.[17] As a result, the prevailing view among states and international lawyers was that "the norms of the UDHR have become binding as part of customary international law, legal principles of the so-called civilized nations" despite the fact that several states abstained during its adoption.[18] As it was put by Charles Norchi: The Universal Declaration "represents a broader consensus on human dignity than any single culture or tradition."[19] Sybesma-Knol underlined that the Declaration was drafted by a Committee composed of experts representing different cultural traditions and then the provisions of the text found their way to legally binding international documents, ratified by the vast majority of UN member states. The universal nature of these standards was confirmed in 1993, by the World Conference on Human Rights in Vienna.[20]

In this context, it should be mentioned that out of the 58 countries which drafted the UN Universal Declaration of Human Rights, 20 were from Latin America, besides four African and 14 Asian states. This means that only 20 states belonged to the European and Western World. Non-Western states had quite a significant input on some rights, mainly on economic, social and cultural rights, but several rights like the protection on minorities or self-determination were also raised by them and although they did not make their way into the Declaration, they were subsequently accepted by international law.[21]

[13] Ayodeji K. Perrin, Human Rights and Cultural Relativism, The „Historical Development" Argument and Building a Universal Consensus, Fall 2005, p 14 http://www.academia.edu/2282438/Human_Rights_and_Cultural_Relativism_The_Historical_Development_Argument_and_Building_a_Universal_Consensus (21 September 2017).

[14] Ibid p. 14.

[15] Nhina Le, p. 205.

[16] Ibid p. 206.

[17] Alison Dundes Renteln, p. 32.

[18] Ibid p. 29.

[19] Diana Ayton-Shenker, The Challenge of Human Rights and Cultural Diversity, United Nations Background Note, DPI/1627/HR-March 1995, p. 2.

[20] Neri Sybesma-Knol, The United Nations System for the protection of human rights. What is happening to the principle of universality? In: André Alen, Veronique joosten, riet Leysen, Willem Verrijdt (eds), Liberae Cogitationes. Liber amicorum Marc Bossuyt. Cambridge Intersentia 2013, p. 696.

[21] Fernand de Varennes, The fallacies in the „Universalism versus Cultural relativism" debate in human rights. Asia-Pacific Journal on Human Rights and the Law 1, 2006, pp.71-72.

It is important to note that the document was adopted with 8 abstentions, with no dissentient votes. Besides the six members of the communist bloc (Poland, Czechoslovakia, Yugoslavia, Byelorussian SSR, Ukrainian SSR and the Soviet Union) South Africa and Saudi Arabia abstained. It was obvious that for South Africa it was challenging to reconcile its Apartheid policy with the principles of the Declaration, while Saudi Arabia claimed that the western, liberal and individualistic approach of the document clashed with the Muslim way of life in the country.[22] The Arab states tried to challenge the right to change one's religion, but their attempt was not supported by the majority of states.[23] The Communist bloc had obvious problems harmonising the text of the Declaration with the Marxist approach to human rights. These abstentions were already an indication that human rights priorities and approaches of UN member states were different, although at that early point, just after the horrible events of WWII, it did not lead to open clashes.

There is now, however, a consensus that the values contained in the Universal Declaration *are* universal and they have been largely integrated into the disparate cultural traditions.[24] The author of this paper shares Donnelly's presumption that the rights enshrined in the UDHR apply universally and they represent a "minimal response to the convergence of basic cross-cultural human values and the special threats to human dignity posed by modern institutions".[25] In his view, this presumption of universality could only be overcome by demonstrating how an anticipated violation is not standard in that society, that the value is not considered basic, or there are alternative protective measures. He argues that such a test can be met rarely and the permissible exceptions are relatively minor and generally consistent with the main thrust of the UDHR.[26]

2.2. The Notion of Universalism

Proponents of universality are of the view that the human rights guaranteed in international treaties and conventions should be applied in all countries, and that they must prevail even when they conflict with established cultural or religious practices.[27] This notion is based upon the equality, indivisibility and universality of all human rights. According to Shestack, "modern universalist theories of human rights can be based on natural law, justice, reaction to injustice, dignity, and equality of respect and concern."[28]As it was correctly pointed out by Michael Freeman, universality cannot be confused with conformity, as universality promotes diversity by protecting cultural freedom.[29]

Universalists firmly believe that human rights and fundamental freedoms are inherent in the nature and dignity of each human being and that there should be a set of basic ethical standards and principles, acceptable to all cultures, religions and political systems.[30] As in their view humanity or some particular

[22] Declan O'Sullivan, The history of human rights across the regions: universalism vs cultural relativism. The International Journal of Human Rights, Vol 2, No.3, 1998, pp. 28-29.

[23] Alison Dundes Renteln, p. 30.

[24] Jack Donnelly, Cultural Relativism and Universal Human Rights, Human Rights Quarterly Vol. 6 No. 4 (1984) pp. 414-415.

[25] Ibid p. 417.

[26] Ibid p. 417.

[27] Karen Musalo, When Rights and Cultures Collide. Markkula Center for Applied Ethics, Santa Clara University Nov 12, 2015, p. 2.
https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/when-rights-and-cultures-collide/ (21 September 2017).

[28] Michael E. Goodhart, Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization, Human Rights Quarterly, Volume 25, No. 4, p. 940.

[29] Michael Freeman, p.132.

[30] Neri Sybesma-Knol, p. 703.

facet of human nature is the only source of rights, cultures are irrelevant concerning the validity of moral rights and rules.[31] This is however, the view of the proponents of radical universalism – as it is called by Donnelly – which implies a certain method of cultural imperialism. Radical universalism completely denies national or subnational ethical autonomy and self-determination, by giving an absolute priority to the demands of the cosmopolitan moral community over all other moral communities.[32] In light of the above-mentioned arguments Donnelly found that radical universalism couldn't be maintained, as certain moral communities should deserve respect from the outside world.

Donnelly in his later work distinguished three ways in which human rights are universal.

1. International legal universality means that the most important internationally recognized human rights are part of international law and politics and the average ratification rate of the six core human rights instruments[33] among UN member states is surprisingly high, around 90 %.[34] What is more striking is, that despite all cultural and political differences, there is almost a universal agreement not just in their existence, but also in their content.[35] Although there is no serious international enforcement mechanism, international legal universality can be seen as one of the most important "practical legacy of international action on behalf of human rights".[36]
2. Overlapping consensus universality means that the adherents of most leading comprehensive doctrines do in fact endorse internationally recognized human rights. This overlapping consensus, although partial and political and not complete and moral, is real and very important given the endorsement by all civilizations of the moral equality of all human beings. In 1995, The Independent published a research paper showing that there is a considerable overlap in attitude between different religions on various issues including blasphemy, non-observance of religious events, murder, adultery, theft, lying, pre-marital sex, homosexuality, divorce, suicide or cruelty to animals.[37]
3. Under Functional Universality Donnelly understands the notion that "internationally recognized human rights respond to certain standard threats to human dignity associated with modern markets and modern states".[38] Irrespective of our cultural, religious, political background we all need protection against certain standard threats and human rights are precisely serving that purpose.

Donnelly emphasized that although human rights first developed in the West, this was not due to any particular features of Western culture, which is today a result and not a cause of human rights ideas and

[31] Sylvain Bayalama, Universal Human Rights and Cultural Relativism, Scandinavian Journal of Development Alternatives, Vol.12. No.2, 3, (1993) p. 132.

[32] Jack Donnelly, Cultural Relativism and Universal Human Rights, p. 402.

[33] The six human rights instruments Jack Donnelly referred to are the following:

- International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- International Covenant on Civil and Political Rights (1966);
- International Covenant on Economic, Social and Cultural Rights (1966);
- Convention on the Elimination of All Forms of Discrimination against Women (1979);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- Convention on the Rights of the Child (1989).

[34] Jack Donnelly, Universal Human Rights in Theory and Practice. 3rd Edition, Cornell University Press 2013, p. 94.

[35] Ibid p. 95.

[36] Ibid p. 95.

[37] Rein Müllerson, Human Rights Diplomacy, Routledge 1997, p. 77.

[38] Jack Donnelly, Universal Human Rights in Theory and Practice p. 97.

practices.[39] In this context, it is sufficient to note that egalitarian readings of Christian ideas were repressed in the name of Christianity throughout almost all of the Christian history. In his view, no culture is by nature either compatible or incompatible with human rights[40] and they can be legitimately applied to non-Western societies too,[41] as they can be as effective as or even more effective than either traditional approaches or modern non-human rights strategies.[42] However, Universalists believe that liberalism is the most suitable political system within which to implement them. Ake even went further by saying that human rights can only exist in atomized, individualistic societies.[43]

Certain universalists even consider that not all societies possess human rights concepts, as traditional societies focus more on duties than on rights per se, and the life is conceptualised communally within a status-based order. They tend to deny collective or third-generation rights as according to them the subject of human rights is the individual and not the group.[44]

Universalists are generally supportive of regional human rights mechanisms, as they can facilitate the implementation of universal standards at regional level.[45] While, the UN struggled for some time between 1948 and 1966 to translate the provisions of the UDHR into legally binding instruments, the Council of Europe managed to do it much earlier, by adopting the European Convention on Human Rights in 1950.[46] The Organization of American States acknowledged the universality of human rights in the American Declaration of 1948 and subsequently in the American Convention of 1969.[47] The third, most recent regional human rights system was the African one, established by the adoption of the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) in 1981. It was the only one focusing not just on the rights but on the duties as well.

In light of the above mentioned thoughts regarding the role of regional organizations, it is interesting to see how the World Conference on Human Rights (1993) reaffirmed the universality of human rights after holding regional preparatory conferences. From our research point of view the regional conferences held in Tunis for Africa, in San José for Latin America and the Caribbean and in Bangkok for Asia are the most important events. Although there was reference in all 3 documents to the distinctive cultural heritage of the given region, the Bangkok Declaration used the strongest language, stating that:" while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds." During this conference several countries like China, Singapore, Malaysia or Indonesia mentioned their distinctive cultural legacy and values and emphasized the importance of communal/state obligations, while highlighting that the monitoring, implementation and interpretation of human rights should be in the purview of the state.[48]In this context, it is not surprising that although the Vienna Declaration underlines that the universal nature of human rights "is beyond question" and that they are "universal, indivisible interdependent and interrelated", there is no reference to the International Covenant on Civil and political Rights, nor to the

[39] Ibid pp. 106-107.

[40] Ibid p. 107.

[41] Sylvain Bayalama, p. 131.

[42] Ibid p. 132.

[43] Ibid p. 132.

[44] Ibid p.135.

[45] Declan O'sullivan, p. 43.

[46] Chaloka Beyani, Reconstituting the universal: human rights as a regional idea, in: Conor Gearty, Costas Douzinas (eds): The Cambridge Companion to Human Rights Law, Cambridge 2012, p.177.

[47] Ibid p. 177.

[48] Adamantia Pollis, Cultural Relativism Revisited: Through a State Prism, Human Rights Quarterly Vol. 18, No. 2, p. 331.

individualist character of human rights and we cannot find the mentioning of freedom of speech, assembly, or religion.[49]However, the Declaration reaffirms the International Covenant on Economic, Social and Cultural Rights and there is a specific reference to the problem of poverty and the need of economic development.

2.2.1. The role of globalization

Many scholars are in agreement that globalization has an important role in generating the multi-culturalization of human rights, making it truly universal.[50] Goodhart drew a parallel between developments related to capitalist revolution in early Europe and the consequences of today's globalization. The economic transformation of the seventeenth and eighteenth century destroyed traditional organizations and triggered serious upheavals in Europe, where communal values were typical at that time. The "enclosure of common lands, the displacement of peasants, huge migration to towns, and the creation of a rudimentary wage labour market were commonplace".[51] As a result, traditional rights became irrelevant, as traditional ties were broken. The same happened with traditional societies, as the global market economy destroyed them and their moralities and "drew every corner of the planet into a single economic machine" as it was put by Anderson.[52] The operation of a capitalist model required a certain system of rights and liberties, resulting in a transformation of social structures. This new development through the appearance of social welfare rights, equal rights for women and minorities, religious tolerance was as alien to the West at that time, as it is nowadays to certain developing counties. The above mentioned parallel shows that certain „cultural" differences between the West and the Rest can be explained by socio-economic factors.

In conclusion, we have to see that ideas about liberty, freedom or human dignity were to be found in different cultures. The difference is that the market economy and the modern state had been created first in the West, establishing the necessary conditions for the development and the realization of these ideas.[53] The current discussion on cultural relativism is consequently between societies which are at different levels of social development.

2.3. The Arguments of Cultural Relativism

The doctrine of relativism is not a new one, as Greeks had already written about it.[54] The core of the theory is not just the recognition of cultural differences in thought or in value, but also implies specific ways in which evaluations or judgements are made. The advocates of cultural relativism argue that permitting international norms to override the dictates of culture and religion is a violation of state sovereignty.[55] However, as it was underlined by Freeman, the reference to state sovereignty is not an

[49] Ibid p. 331.

[50] Matthew Lower, Can and should human rights be universal? E-IR essay, Dec 1 2013 http://www.e-ir.info/2013/12/01/can-and-should-human-rights-be-universal/ (21 September 2017).

[51] Michael E. Goodhart, p. 952.

[52] Ibid pp. 955-956.

[53] Rein Müllerson, pp. 96-97.

[54] Alison Dundes Renteln, p. 62.

[55] Karen Musalo, When Rights and Cultures Collide. Santa Clara University, Markkula Center for Applied Ethics, Nov 12, 2015. https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/when-rights-and-cultures-collide/ (21 September 2017).

appeal to cultural relativism, as the principle of sovereignty is as universal as human rights.[56]State sovereignty is frequently used to discourage unwanted external interference, maintain the peace, but also to protect human rights violations.

According to cultural relativists, rights only exist when a society perceives them as such. Radical cultural relativism considers that culture is the only source of validity of a moral right or rule.[57] Strong cultural relativism is willing to accept the universal application of a few basic rights, but allows variations for most of the other rights. Weak cultural relativists hold that culture can be one of the important sources of the validity of a moral right or rule.[58] In order to differentiate weak cultural relativism from weak universalism one has to examine its views about the human nature, the role of communities and rights. Cultural relativists call for a cross-cultural understanding and respect of other ways of life.[59]

According to contemporary anthropologists, cultural relativism is a response to the doctrine of cultural evolutionism as in the 19th century their predecessors looked at Western values as a model for evolution for the rest of the world. Cultural evolutionism certainly had a racist, Eurocentric character and cultural relativism was originally a response to this.[60]

Leaders misusing the notion of cultural relativism are often referring to communal or collective traditions to justify human rights violations, or to subordinate everyone to the interest of the ruling party.[61] However, collective or communitarian ideologies are not always hostile to human rights, and the respect for the rights of the individual does not mean automatically the neglect of families or the larger community.

Cultural relativism is attractive at least from two aspects at first glance. First, it states that everyone is equally entitled to respect and second that this respect entails respect for that person's culture as culture is part of the person's identity.[62]However, according to Freeman, the principle that we should respect all cultures is a self-contradiction as some cultures do not respect all cultures. He even goes further stating that those cultures that support human rights violations cannot demand our respect, simply because they are cultures.

In the view of cultural relativists, there are no absolute values or principles upon which any culture or society could be judged, apart from those of the given culture, so no moral judgment is universally valid.[63] Consequently, if a human right is not indigenous to a particular culture, its validity and applicability is questionable. Cultural relativism is often criticized as it is rejecting the comparative method of research and therefore rendering the search for cross-cultural universals meaningless.[64]

If cultural relativists would adopt the position that human rights are based in human nature and human nature is universal it would be difficult to explain how human rights could be relative in any way.[65] The solution offered by cultural relativists is that in their view human nature is relative in certain aspects.

[56] Michael Freeman, p. 126.
[57] Jack Donnelly, Cultural Relativism and Universal Human Rights, p. 400.
[58] Ibid p. 401.
[59] Sylvain Bayalama, pp. 137-138.
[60] Alison Dundes Renteln, pp. 62- 63.
[61] Rein Müllerson, pp. 84-85.
[62] Michael Freeman, pp. 125-126.
[63] Michael E. Goodhart, p. 939.
[64] Alison Dundes Renteln, p. 78.
[65] Jack Donnelly, Cultural Relativism and Universal Human Rights, p. 403.

The cultural variability of human nature therefore requires the allowance for cross-cultural variations in human rights.

Robert Paul Churchill called the notion we are discussing now *exceptionalism*, as some groups would like to have exceptions to the application of human rights norms.[66] He listed the following arguments typically used by exceptionalists:

1. Human rights norms cannot be truly universal because of the relativity of all norms (*ethical relativism*). According to Churchill there are no compelling reasons to believe that all values must derive their legitimacy from one particular culture.

2. As human rights are Western products they cannot be transferred from one culture to another (*incommensurability claim*) Churchill holds that the legitimacy of a belief does not depend on its historical genesis. Franck argued that human rights are grounded in modern trans-cultural, social, economic and scientific developments, like industrialization, urbanization, information revolution and not in any particular culture.[67]

3. Powerful states attempt to politically control developing countries (*imperialism charge*). According to Churchill this argument is confusing the concern about the validity on universal human rights norms with the questions about the means and motives used to advance the international human rights regime. It does not explain the human rights criticism about Western countries.[68]

4. Introduction of foreign human rights norms will destroy values native to a culture (*Casual complaint* because of the connection between human rights and the decline of traditional cultures) It is often said that human rights are promoting personal autonomy, self-interested individualism that is destructive of social responsibility, duties and communal loyalties. These are often associated with the spread of market economy and other features of modernity, urbanization, and globalization. We have to separate all these from empirical issues. Human rights movements and the transformation of traditional societies are the consequences of the same forces and not of each other.[69]

5. Human rights norms are irrelevant as traditional values provide better protection (*irrelevancy criticism*). Donnelly questions the assumption of the continuing relevance of traditional practices in modern conditions. In his views as traditional societies are in decline, human rights norms are needed to protect the human dignity that was formally protected by traditional values and norms.[70]

6. The immediate implementation of certain human rights would be politically and socially distractive, by undermining the progress in protecting other rights. Some human rights must be suppressed in order to protect other rights (*Trade-off argument*). Those countries supporting the trade-off argument are of the view that there are conflicts between whole categories of rights. Authoritarian regimes assume that allowing the citizens to exercise their rights will lead to a "slippery slope", destroying social order.[71] They are mistaken in the view of Churchill, by thinking that civil and political rights should be suppressed in order to advance economic

[66] Robert Paul Churchill, p. 45.
[67] Ibid p. 59.
[68] Ibid p. 68.
[69] Ibid pp. 68-71.
[70] Ibid p. 71.
[71] Ibid pp. 83-84.

> development and that the enjoyment of economic and social rights must precede the enjoyment of civil and political rights. It is also a mistake to think that the premature enjoyment of civil and political rights will result in economic stagnation or social instability. They ignore the diversity and interconnectivity of rights.[72]

According to Mutua the entire human rights corpus should be debated and restructured with the participation of all societies and cultures.[73] The multi-culturalization of the human rights corpus could be attempted in a number of areas, such as balancing between individual and group rights, giving more substance to social and economic rights, relating rights to duties or addressing the relationship between the human rights corpus and economic systems.[74] In his view the West has imposed its human rights philosophy on the rest of the world and the rights guaranteed by the human rights corpus require a Western liberal democracy.[75] He goes even further by stating that human rights are used by the West as a foreign policy tool against non-Western states, for example when linked to development assistance with the intention to "civilize" the concerned developing countries.[76]

It is an interesting fact to note that in the 50ies cultural relativist language was mainly used by Western colonial powers, which resisted extending human rights to their colonies, which are – in their view – "at the lower stage of development". During the negotiations of UNGA resolution 843 of 1954 on the Status of Women in Private Law there were non-Western states which were in the frontline to eradicate harmful customs and cultural practices to women.[77]

The rise of cultural relativism in the Third World was clearly associated with the rise of dictatorships in the 60s, 70s.[78] The most important similarity between states referring to cultural relativism was not the culture they represented, but the authoritarian character of their governments. They all shared a common fear of outside investigation and loss of power. In this context, it is worth to mention the distinction between internal and external evaluations and their consequences. Those practices which are not even supported by the internal evaluation of the given culture cannot be defended in cultural terms.[79] The most problematic case is when a practice is acceptable according to internal, but not to external evaluation. The cultural relativism versus universalism focuses on these cases. Of course, the stronger cultural relativism is relying more on the internal evaluation, while the weaker ones are more willing to accept external evaluations too.

As we can see from the above analysis, in most of the cases of cultural relativism the discussion is not about the denial of certain rights; it is more about the different implementation of human rights because of cultural differences. With the exception of the extreme position of strict cultural relativists, fundamental human rights are considered universal and cannot be set aside because of cultural differences. However, due to the different cultural context, the application of the same human rights standard in different situations can have a different result. A classic example of this would be the case, where a politician in the Western World is accused of polygamy and quite likely could obtain a court order to restrict the publication of such information in a newspaper based on the argument that it is permissible to impose restriction on information when such information is damageable to one's

[72] Ibid pp. 84-86.
[73] Makau Mutua, p. xi.
[74] Ibid pp. 6-7.
[75] Ibid p. 59.
[76] Ibid pp. 24-25.
[77] Roland Burke, p. 126.
[78] Ibid pp. 143-144.
[79] Jack Donnelly, Cultural Relativism and Universal Human Rights, p. 406.

reputation. This would not be the case if this politician would live in a country where polygamy is accepted in the social, moral and legal context of the country as the story would not be considered defamatory.[80]

2.4. The Reconciliation of Universalism and Cultural Relativism

First of all we have to separate those deviations in the implementation of international human rights standards which are related to cultural, historical or religious differences from those references to cultural traditions which are intended to justify human rights violations by the political leadership.[81]

It is important to understand that the conflicts between universalism and cultural relativism can have positive effects as well.[82] They are the opposite sides of the same coin and they can mutually reinforce each other. Human rights advocates can benefit from the cultural sensitivity of cultural relativism when they are developing their human rights campaigns in a specific cultural context, avoiding negative reactions from the host society.[83] On the other hand human rights experts can contribute to the development of a culture, making it more adaptive to international human rights standards by helping to reconcile traditional practices with them. As it was so eloquently stated by Kofi Annan: "No single model of human rights, Western or other, represents a blueprint for all states".[84]

As it was put by Rein Müllerson: "The most important human rights, and gross and massive violations of them are not culturally conditioned". Their forms may vary according to different cultural practices, but their content is culturally irrelevant.[85] Moreover, universal human rights standards are not rigid rules, so their interpretation and application can vary depending on the different cultural norms, traditions. The reconciliation of local and international norms is not always possible, but it is possible in many cases, especially in light of the fact that international norms are usually not as detailed as local ones. That is one of the reasons why the practice of the so called "margin of appreciation" [86] doctrine was established by the European Court of Human Rights to solve that kind of problems under its jurisdiction.[87] It is important to see that international human rights norms, by contributing to the gradual eradication of inhuman traditional practices are not undermining the cultural foundations of Asian or African societies, but making them more human.[88]

The cultural relativists' position that human rights are not observed worldwide because they are not integrating the non-Western concepts of dignity is not sustainable as the main elements, values of our present human rights system can be found in almost all the cultures as due to the globalization, people are facing similar threats everywhere and human rights are still the best answers to address them.

[80] Roger Lloret Blackburn, p. 80.

[81] Rein Müllerson, p. 83.

[82] Nhina Le, p. 209.

[83] Ibid p. 209.

[84] Ibid p. 209.

[85] Rein Müllerson, pp. 79-80.

[86] The national authorities of Contracting States to the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as: European Convention on Human Rights – 'ECHR') are permitted a degree of latitude in respect of the manner in which they discharge their obligations under the Convention. This degree of freedom is referred to as the doctrine of the "margin of appreciation".The doctrine plays a pivotal role in ensuring that the ECHR is workable throughout the Contracting States despite the varied differences found in the national systems of Contracting States.

[87] Ibid p. 80.

[88] Ibid p. 84.

Howard suggested an interesting model in order to reconcile cultural relativism and universalism. She would support a national legislation permitting women to „opt out" of traditional practices in favour of universal values. Of course in certain cases – like that only families can use the community owned lands – this reconciliation is not possible, but is some cases it can be a solution.[89]

Dundes Renteln suggested that despite all the difference among individuals there are certain cross-cultural universal values, which are adopted by all societies and which can be used to legitimize universal moral standards.[90] Dembour proposes that we should take an intermediatory position allowing local factors to be taken into account during the implementation of international human rights law.[91] An-Na'im aimed during his works to achieve the cultural legitimacy of international human rights norms. According to him, it can only be achieved if members of a given culture regard the norms to be validated and sanctioned by their own cultural norms, so there is a need for internal legitimation of international human rights law.[92] His two-stage approach included first an internal discussion within cultures, then a cross-regional dialogue.

In conclusion, we can see that the contemporary discussion moved away from the classical dichotomy of radical universalism versus radical cultural relativism, and scholars have been taking more nuanced positions by acknowledging both the merits of universal human rights projects and the significance of culture in the conceptualization and implementation of human rights. [93]

> *„No social group has suffered greater violation of its human rights in the name of culture than women." Arati Rao (The politics of gender and culture in international human rights discourse)*

3. Women's Rights

3.1. The Role of Traditions

The aforementioned example on polygamy brings us to the wider examination of the plight of women, which as we know has been a disadvantaged one throughout history, irrespective of the culture they were living in due to the dominant patriarchal relations.[94] One of the main reasons why concerns and issues related to women were more effected by traditions, cultural differences was that they were traditionally relegated to the private sphere contrary to questions belonging to the public sphere, which was regulated and scrutinised by the states and were not only governed by cultural values and traditions.[95] As a result, certain societies continued to defend their unequal treatment of women in the name of preserving certain cultural particularities.[96] Consequently, as it was so wisely argued by Arati

[89] Jack Donnelly, Cultural Relativism and Universal Human Rights, pp. 418-419.

[90] Gayatri Patel, How 'Universal' Is the United Nations' Universal Periodic Review Process? An Examination of the Discussion Held on Poligamy. Human Rights Review (2017) Vol 18, p. 465.

[91] Ibid p. 465.

[92] Ibid p. 465.

[93] Ibid pp. 465-466.

[94] Bret L. Billet, Cultural Relativism in the Face of the West. The Plight of Women and Femal Children. Palgrave Macmillan. 2007, p. 17.

[95] Gayatri Patel, How 'Universal' is the United Nations' Universal periodic Reviw Process? An Examination from a Cultural Relativist Perspective, PhD Thesis, University of Leicester, 2015, p. 75. https://lra.le.ac.uk/bitstream/2381/37501/1/2016PATELGPhD.pdf (3 November 2017).

[96] Ibid p. 59.

Rao: „no social group has suffered greater violation of its human rights in the name of culture than women." [97]

3.2. Cultural Relativism and the Discussion on Women's Rights during the UN Universal Periodic Review (UPR)

An interesting research was carried out by Patel, regarding the recommendations concerning women's rights during the first two cycles of the UN Universal Periodic Review[98], the only truly global human rights review we have today. The importance of women's rights and the specific vulnerable position of women in society were clearly demonstrated by the fact that 3702 recommendations, by 84 % of acceptance, were formulated in this field, representing 17 % of all the recommendations, which made it the most frequently raised issue.[99] He differentiated several subcategories, like Female Genital Mutilation, abortion, access to health, polygamy, inheritance, forced and early marriage, honour killing, marital rape and domestic violence.

The investigation showed that when observer states took a strict universalist position, asking the concerned government to eliminate a practice and the related cultural norms, the answers were usually defensive and not substantial. However in case of the discussion regarding honour killing or marital rape, observer states refrained referring to international norms in their recommendations.[100] According to the research, challenges to the normative universalism were made on two grounds, on the ground of national sovereignty and on the basis of a strict cultural relativist approach. For example, concerning the recommendations on polygamy Burkina Faso, Chile, Tanzania, Ghana and Libya used religious and cultural norms as a justification of this practice. Regarding FGM, Mali and Liberia mentioned that this practice was deeply embedded in culture, and that therefore the reforms suggested by the observer states could not be accepted.[101]

One of the most important findings of the research was that when states adopted a strict universalist or a strict cultural relativist position, the discussion has been oversimplified, as both approaches interpret culture as a static, homogenous and bounded entity, which cannot be influenced by external norms or beliefs.[102]

However, during the discussion on FGM, forced and early marriage, domestic violence and honour killing both observer states and states under review recognized the relationship between women's rights and culture and they appreciated reforms aimed at discouraging the cultural attitudes towards the

[97] Arati Rao, The politics of gender and culture in international human rights discourse. In: Women's rights, human rights: international feminist perspectives, edited by Julie Peters and Andrea Wolper. New York, New York, Routledge, 1995. p. 167.

[98] The Universal Periodic Review (UPR) is a unique process which involves a periodic review of the human rights records of all 193 UN Member States. The UPR is a significant innovation of the Human Rights Council which is based on equal treatment for all countries. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe. Currently, no other mechanism of this kind exists. The UPR was established when the Human Rights Council was created on 15 March 2006 by the UN General Assembly in resolution 60/251. This mandated the Council to "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States".

[99] Gayatri Patel, p. 73.

[100] Ibid p. 256.

[101] Ibid p. 257.

[102] Ibid p. 259.

practice which are inconsistent with international human rights norms.[103] This moderate cultural relativist position reflects a modern conceptualization of culture, which has porous boundaries and can be influenced by external norms and reformed over a period of time.[104] The discussion on forced and early marriage where many states adopted a moderate cultural relativist position was more fruitful for example than the discussion on polygamy or inheritance, where states followed a strict cultural relativist position.

3.2.1. The Discussion on Polygamy during the UPR

The question of polygamy has been raised in the case of 18 states during the first 2 cycles of the UPR. A total of 22 recommendations were formulated on that topic, 10 were adopted, 12 were noted by the states under review. It is interesting to note that despite the fact that 14 of the 18 states were African, there was not one recommendation from the region.[105] It clearly indicates the importance of regional solidarity on a highly sensitive issue, which is closely related to traditional practices and cultures deeply rooted in many African societies. Patel in her research differentiated 4 types of recommendations on that topic during the first two cycles of the UPR. The first one is declaring polygamy as a harmful traditional practice, the second one is asking reforms to the domestic legislation on polygamy, the third type of recommendation asks the state under review to ensure the compliance of their domestic laws on polygamy with international human rights standards and the fourth one is asking for the elimination of polygamy. In case of the first one the responses by states under review were usually subdued and states did not commit themselves to reform their current practice.[106]

The second type of recommendation was only accepted by Kyrgyzstan during the first cycle among the four states who received it. Burkina Faso's explanation was an interesting one as they said that "polygamous marriage was optional whereas monogamy was the rule" and that polygamy was "one of the secular aspects of the culture of Burkina Faso". Tanzania could not accept the recommendation on the basis of the enjoyment of cultural and religious rights.[107] In the second cycle Equatorial Guinea – the only country receiving that type of recommendation – accepted it and noted that laws prohibiting polygamy were already in place.

Three countries received this type of recommendation during the first and one during the second cycle. During the first cycle it was only Israel which accepted it, saying that it reinstructed the Quaddi's of the sharia courts to refer every suspected case of polygamy to the police. In contrast, Ghana and Libya both noted this type of recommendation. Ghana was explaining that marriages that were customary or faith based "were in conformity with the customs and traditions of Ghana". Libya was explaining that the suggested reforms were "in conflict with the Islamic religion and the customs". Consequently both delegations prioritized their cultural and traditional particularities above the compliance with international human rights norms. In the second cycle Morocco received only that type of recommendation. It was noted without further explanation.[108]

The fourth type of recommendation, suggesting the elimination of polygamy without referring to domestic legislation or international human rights norms was accepted by two states under review and

[103] Ibid p. 261.
[104] Ibid p. 262.
[105] Gayatri Patel, p. 467.
[106] Ibid pp. 468-470.
[107] Ibid pp. 470-471.
[108] Ibid p. 471.

noted by one. Kyrgyzstan and Mauritania accepted the recommendation without further explanation, while Senegal noted it and insisted that the observer state "should take into account the particularities of the Muslim religion which explains the existence of polygamy. In the second cycle The DRC and Russia accepted the recommendation, while Burkina Faso noted it and explained that "those recommendations which were not accepted did not adapt easily to the present cultural and socio-economic realities of Burkina Faso". It is worth mentioning that Burkina Faso used the same argument in the second cycle than during the first one and it was the only state in the second cycle using cultural justification not to accept a recommendation.[109]

Patel found on the basis of her research that regardless of the recommendations, the states under review decided to stick to their selected position on polygamy and therefore the responses were predetermined and prescribed.[110] She underlined that because of the strange character of the UPR system – only focusing on the implementation of accepted recommendations – none of the states which noted the recommendations on polygamy were held accountable during the second cycle. It is clear from her research that most of the observer states using the relationship between polygamy and culture, took a strict radical universalist position, by suggesting the abolition of this traditional practice, whereas states under review who did not accept the recommendations on polygamy, justified their position from a strict cultural relativist perspective. Consequently there was meaningful discussion on the topic as the possible reform of cultural norms supporting polygamy was not even discussed.[111] As it was wisely pointed out by Patel, the UPR discussion by being oversimplified, and lacking a culturally legitimate angle did not generate the political momentum to encourage an internal discussion on the issue aiming at cultural changes.

3.3. Female Circumcision/ Female Genital Mutilation (FGM)[112]

In the context of cultural relativism and women's rights, we have to discuss the term „harmful cultural practices". This, according to Brems, means practices considered harmful and disadvantageous by an outsider, but being meaningful to certain members in a given culture.[113] In these cases, either the cultural insider does not perceive any harm or disadvantage, or it is justified and compensated for in the wider cultural context. These practices include among other female infanticide, child marriage, arranged or forced marriage, polygamy or veiling. However, the lion's share of concerns about human rights groups is about female circumcision, which is described as a barbaric torture and mutilation, intended to perpetuate male ownership over women.[114]

The first confirmation of the existence of this practice was through the discovery of female mummies in Egypt from 484 BC.[115] This might suggest that it originated in Egypt and spread from there. Other researchers, however, suggest that FGM developed as an African tribal puberty rite and extended to

[109] Ibid p. 472.

[110] Ibid p. 472.

[111] Ibid pp. 473-475.

[112] The WHO defines female genital mutilation as comprising „all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural, religious or other non-therapeutic reasons." Both female circumcision and female genital mutulation are used for the practice, however, the first one is considered as a more value-free terminology.

[113] Eva Brems, Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse. Human Rights Quarterly Vol. 19. (1997) p. 148.

[114] Ibid p. 148.

[115] Bret L. Billet, p. 20.

places like Egypt. Consequently, its origins predate both Islam and Christianity.[116] There is no reference to FGM in the Koran and it is a mistaken belief this practice is prescribed by Islam. According to the estimation of WHO over 130 million girls and women have undergone some form of female genital mutilation and an additional 2 million girls are at risk annually.[117]

The justification of the practice usually includes several factors, like patriarchy, tradition, religion, myth, social cohesion, sexual considerations and economic concerns.[118] One of the most important issues related to the cultural clash over this practice is about our culturally constructed lens as it was described by Billet.[119] For example, the fact that the collective is having a higher status within the society than the individual is alien for most of us in Western societies.[120] Without knowing much about the cultural relevance of female circumcision, like the importance of a girl entering womanhood, it is difficult to make an objective assessment about the practice. In that cultural context, parents have two options, neither of them is a real choice.[121] They can force their daughter to go through the surgery and by that they violate her right to her bodily integrity or they can let her avoid the surgery in the interest of the protection of her personal autonomy, but as a result she may face embarrassment and humiliation from the community as she did not go through a culturally recognised tradition. According to Mitchum, the lack of choice renders FGM a violation of women and young girls' fundamental right to dignity, bodily integrity and security.[122]

Many human rights experts are of the view that FGM should be considered as a violation of international human rights instruments, regarding their provisions on the right to health.[123] Both the UDHR, the ICESCR and the CEDAW contain articles related to the protection of health. Others believe that it is also a human rights violation because of the fear associated with the concerned girls. Mitchum holds that those cultural practices which are violating international human rights instruments should be discontinued.[124]

The most common measure suggested by those concerned with eliminating this practice is through legislation. Although, this has often been implemented by Governments in an attempt to illustrate their seriousness about the issue towards the West, it is evident that in many occasions the problem was not solved by the law itself.[125] An alternative way of addressing the concern is by introducing educational programs which will encourage a positive trajectory towards eradication of the practice in the long run.[126]

The middle ground solution suggested by Billet is to legalize the mildest form of female circumcision, together with an educational campaign focusing mainly on the health consequences of the more severe forms of the practice, as well as providing information for the local population how to more safely perform this practice.[127] A third suggested step would be to encourage international financial institutions

[116] Ibid p. 21.
[117] Ibid p. 23.
[118] Ibid p. 30.
[119] Ibid p. 39.
[120] Ibid p. 38.
[121] Preston D. Mitchum, Slapping the hand of cultural relativism: female genital mutilation, male dominance, and the health as a human rights framework. William & Mary Journal of Women and the Law (2012) Vol.19, p. 586.
[122] Ibid p. 607.
[123] Ibid p. 599.
[124] Ibid p. 600.
[125] Bret L. Billet, p. 47.
[126] Ibid p. 49.
[127] Ibid p. 50.

to increase assistance to those countries most affected by this practice. These programs could also contribute to increase the status of women within these cultures.[128]

It is important to enumerate those factors, which according to Billet can serve the cultural transformation we are aiming at.[129]

1. Promoting cross-cultural universals, uniting different cultures.
2. The recognition of the fact that cultural development occurs through evolutionary and not revolutionary means.
3. Gradualism opposed to abolition.
4. The importance of the participation of indigenous, internal forces in the gradual process.
5. The functions of a given cultural practice should be taken into account and functional substitutes could be needed for the displacement of an undesirable practice.
6. The power of ethno-centric forces in a society should be acknowledged.
7. The presence of patriarchy should be incorporated into the realization.
8. Evaluation of how women have historically been oppressed.
9. The importance of economic impoverishment, as a common denominator of all these cultural practices.
10. Positive impact of educational programs.

3.3.1. The Evaluation of Female Genital Mutilation (FGM) by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities

In an interesting study Katherine Brennan analysed how the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities evaluated the practice of FGM and despite the fact that the members of the Committee were influenced by theory of cultural relativism they concluded that Female Genital Mutilation is a violation of women's human rights.[130] Her conclusion is identical that of this paper in that the international human rights system has a legitimate role to play in evaluating cultural practices and to "propose a set of values to guide behaviour in all societies".

The first attempt by the UN was in 1959, when the ECOSOC requested the WHO to prepare a study on possible ways to eradicate FGM. The World Health Organization refused to undertake the study stating that these operations were "based on social and cultural backgrounds, the study of which is outside the competence of the World Health Organization". Also UNICEF refused to take action until 1980.[131] As a result of a strong campaign by Western and African women in the late 70ies the WHO sponsored conferences about the harmful consequences of FGM.

By the early 80ies due to the changing attitude towards women a sizable opposition to FGM had been created. In 1981 the Minority Rights Group (MRG) presented a comprehensive report during the session

[128] Ibid p. 51.

[129] Ibid p. 186.

[130] Katherine Brennan, The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study, Law & Inequality Vol. 7 (1989) p. 369.

[131] Ibid p. 378.

of the Sub-Commission about female circumcision.[132] The representative of the MRG requested the Sub-Commission to establish a working group in order to evaluate the practice of FGM. In 1982 the Sub-Commission decided to take up the issue and the report of the working group was published in 1986. In 1988, the Commission on Human Rights asked the Sub-Commission in a resolution to investigate national and international measures for the eradication of traditional practices which are harmful to women and children.[133] From the behaviour of the Sub-Commission, it was clear that its members realized the cultural significance of the practice and the report they prepared analysed the question not just from a human rights point of view but taking into account the historical and cultural factors too. The position taken by the Sub-Commission shows that the members were aware of the cultural sensitivity of the question but did not adhere to a cultural relativist approach meaning that cultural practices cannot be evaluated by human rights norms.[134]

The cultural sensitivity of the Sub-Commission was reflected in two ways. First, the African members and members from countries where FGM is practiced cautioned the other participants to respect the culture from which the practice came. Second, the Western members did not participate in the discussions. The only Western member who was vocal about the issue was Ben Whitaker from the UK, who was the chair of the Working Group on Slavery, which was the first one to discuss the report of the MRG, taking into account a broad definition of slavery established by the Working Group, including abuses of power exercised over children.[135]

The Sub-Commission's decision was influenced by the practical and political realities in Africa. It acknowledged the magnitude of the health problem resulting from FGM and they also took into consideration the growing opposition developed in and outside of Africa. There was no real opposition to study FGM so the Sub-Commission could adopt its resolution without real problems. The way the Sub-Commission managed to avoid the cultural relativism versus human rights theory trap, was to indicate that their goal was to address a health issue and not questioning the underlying cultural values of female circumcision.[136] The Sub-Commission's work demonstrated that cultural relativism can even have a positive effect on the human rights system. The Working Group of the Sub-Commission did not follow the usual protocol regarding UN reports and did not apply the relevant human rights norms, but instead carefully balanced the cultural function of FGM against its harmful consequences. The report stated that due to changes in the African societies – related to education and urbanization – the practice of FGM did not enjoy as much support as it did previously. The report finally seemed to conclude that FGM constitutes a human rights violation but used evasive language in its conclusion.[137] The Working Group's intention was to say that FGM "became outmoded because it no longer served a function and because changes in cultural values meant that it became less tolerable".[138]

4. Conclusion

It is my sincere hope that this paper, which could only highlight some parts of the interesting and vitally important intellectual discussion on cultural relativism and universalism managed to indicate the

[132] Ibid p. 379.
[133] Ibid p. 381.
[134] Ibid p. 382.
[135] Ibid p. 383.
[136] Ibid pp. 386-387.
[137] Ibid p. 390.
[138] Ibid p. 391.

complexity of this problem and aimed at contributing to the recalibration of our culturally constructed lens through which we look at all developments in the world.

Radical universalism by neglecting cultural particularities in the implementation of international human rights standards is seen as a form of cultural imperialism by developing states and therefore it is not serving the universal acceptance of human rights. On the contrary, this approach provokes strong resistance from most of the cultures outside of Europe thereby undermining the whole international human rights system. Radical cultural relativism on the other hand, by stating that culture is the only source of validity of a moral right or rule, fundamentally undermines the universality of human rights and provides a ground for misusing the concept in the interest of veiling human rights violations.

The discrepancy between the positions taken in academic circles and state practice on this issue is visible in light of the consideration of women's rights during the first two cycles of the UN Universal Periodic Review. While scholars have been taking more nuanced positions recently by acknowledging both the merits of universal human rights projects and the significance of culture in the conceptualization and implementation of human rights, the intergovernmental debates at different UN fora are still characterized mostly by radical universalist and radical cultural relativist statements by member states. The international community has a serious responsibility for not addressing substantially the question of universality and the role of culture in the international human rights enterprise. There is an urgent need for further dialogue on these issues which may trigger internal debates within cultures or societies where traditional practices prevail which are in conflict with the international human rights obligations of the given state. The United Nations could play an important role – like the Council of Europe did in 2008 by preparing a White Paper on Intercultural Dialogue[139] – in organizing this discussion aiming at a cultural transformation which can contribute to the enhanced cultural acceptance of internationally recognized human rights norms and by this means to the strengthening of the universality of global human rights standards. The United Nations Alliance of Civilizations (UNAOC) could be also used as one of the forums for discussion.[140] It was also clear from the research about the consideration of women's rights during the first two cycles of the UN Universal Periodic Review that real dialogue on culturally sensitive issues only started when states challenging a certain traditional practice in a given county were willing to accept its cultural relevance and they did not refer only to the legal solution. It is the firm conviction of the author that cultures are not closed entities, with rigid borders, but they can be developed or changed as a result of interaction with external effects or influence. This is however, a much longer process than amending a law, but by involving internal forces an organic interculturalization process can happen in a given society making these cultural changes sustainable as it would be the result of internal discussions and not enforced by external forces.

[139] White Paper on Intercultural Dialogue "Living Together As Equals in Dignity" Launched by the Council of Europe Ministers of Foreign Affairs at their 118th Ministerial Session (Strasbourg, 7 May 2008) https://www.coe.int/t/dg4/intercultural/source/white%20paper_final_revised_en.pdf (24 January 2018).

[140] https://www.unaoc.org/ (24 January 2018).

Principles of Good Administration under the European Code of Good Administrative Behavior

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The purpose of good administration and the conduct of administrative functions by the administration bodies are to provide citizens with the most efficient services by supporting and respecting the general interest of the society and the realization of human rights. Good administration has to be based on principles that serve as a basis for exercising the activities of the administration bodies. The EU member states and those states aspiring to be part of the European family are in constant effort to harmonize principles of good governance, an effort that derives from ideas for a common "European administrative space".
Having this in mind, this paper aims to review: a) the basis of establishing principles of good administration in the European context, b) a description and review of a number of basic principles set out in the European Code of Good Administrative Behavior, and c) an explanation of the importance of implementing these principles from states that aim to have a good and efficient administration.

Keywords: Good Administration, Principles of Good Administration, Implementation of Principles, European Code of Good Administrative Behavior

1. Introduction

The purpose of this paper is to a) provide the basics of establishing principles of good administration in the European context, b) describe and review of some of the basic principles outlined in the European Code of Good Administrative Behavior, b) address the importance of applying these principles by states that aim to have a good and efficient administration, and c) offer recommendations regarding the implementation of the principles dealt with in the paper. Administrative law is defined as the set of rules and principles governing the procedures for the exercise of administrative functions, the organization of the institutions exercising these functions and, in general, the social relations created in the administrative field[1]. As such, administrative law enables and at the same time limits the administrative behavior as foreseen in the implementation of EU laws.

As a result, good public administration is linked to the degree of the state democratization and the leadership model since the administration is considered as a multilateral state activity and part of state authority.[2] It is difficult to imagine the existence of a rule of law without general principles because through them in practice it is possible to resolve disputes and realize the rights of the citizens according to procedural ways rather than to resort to other means that can even lead to violence. In this regard, the principles of good administration can be understood as a basis for good administration in practice. Undoubtedly, a good administration should be based on principles that guarantee the rights and the

[1] *SIGMA*, Principles of Good Administration 2014, p. 5.
[2] *SIGMA*, Principles of Good Administration, 2014, p. 6.

realization of citizens' interest in the provision of administrative services by the public administration bodies.

Good administration is especially important in creating and maintaining the trust of citizens as it has a direct impact on improving the living standards of citizens. As a principle, good administration has been initially envisaged in the Charter of Fundamental Rights of the European Union, which has a legal character in high regard that should be respected by all EU institutions and other structures of Member States tasked with the implementation of EU law. Although the principles of good administration are foreseen in the legislation of different countries, depending on the internal regulation of states, the European Code of Good Administrative Behavior and the European Court of Justice have foreseen some key principles that should be respected by member states that are part of the European Union, as well as by states that aim to integrate in the EU. The Code of Good Administrative Behavior is a very important source to understand the principles of good administration and their importance, as well as to understand the functioning of the right to good administration in practice. Therefore, this paper also focuses on examining some of the key principles set out in the European Code of Good Administrative Behavior. Despite the fact that the code contains a large number of summarized principles, only the following principles are presented in this paper: The Principle of Lawfulness, the Principle of Non Discrimination, the Principle of Proportionality, the Principle of Impartiality and Independence, and the Right to be hard and to make statements. After reviewing these principles, the paper seeks to highlight the importance of applying these principles to countries that claim to have good administration. Finally, this paper will put forward a number of recommendations on how to proceed further in improving the implementation of these principles for countries that are part of the EU, as well as states aiming to be part of the EU.

2. Basis of Establishing Principles for Good Administration in the European Context

Given the chronological aspect of efforts to establish the principles of good administration and their harmonization among EU countries, good governance and its principles are foreseen in several legal acts, resolutions and European treaties which explain good administration as "a framework concept drawing together a set of rights, rules and principles guiding administrative procedures with the aim of:

- Ensuring procedural justice,
- Public administration adherence to the rule of law, and
- Sound outcomes from administrative procedures.

They justly stress that the principles of good administration have developed in close connection with the precept of procedural justice and the principle of the rule of law. [3] Each body of public administration should consider these principles as a basis for setting the direction to intensify government efficiency and liability.

Today, the main objective of public institutions is to promote good governance as key tool for the state development toward democratic, transparent, efficient, effective and simplified administrative procedures. These principles during the conduct of administrative procedures affects the reduction of corruption, respect for human rights, improvement of public services, government accountability, sector reforms and state stability in general. According to Fukuyama (2013), there are two dimensions to qualify governance as good or bad: the capacity of the state and the bureaucracy's autonomy. They both complement, in the sense that when the state is more capable, for instance through the collection of taxes, there should be more autonomy because the bureaucrats are able to conduct things well without

[3] Jerzy Suprernat: *Good Administration in European Administrative Law*, Institute of Administrative Studies, University of Wroclaw, 2011, p. 2.

being instructed with a lot of details. In less capable states, however, less discretion and more rules setting are desirable.[4]

Good governance might be approximated with provision of public services in an efficient manner, higher participation given to certain groups in the population like the poor and the minorities, the guarantee that citizens have the opportunity of checks and balances on the government, the establishment and enforcement of norms for the protection of the citizens and their property and the existence of independent judiciary system.[5]

On the other hand in 1989 the World Bank identified "bad governance" as the main obstacle to development, describing "bad governance" as the absence of accountability, transparency and efficient administration combined with corruption in respect of financial spending.[6]

The fundamental idea is that the public administration exists to serve citizens. That idea does not deny, but at the same time cannot be reduced to, the classical conception of administrative science that the public administration should identify and pursue the public interest.[7] Further, the United Nations has taken a leading role in reconceptualizing governance. In the UN's paradigm, governance is defined as "the exercise of political, economic, 7th Global Forum on Reinventing Government 7 and administrative authority to manage a nation's affairs. It is the complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations and mediate their differences.[8]

The modern and democratic governments should promote and guarantee the sustainable public bodies in order to establish intellect of accountability towards the citizens. Similarly, the leaders of these free market democracies are developing their own beneficiary goals without considering the basic requirements of the citizens. The citizens have to be conscious about their position in the government in order to increase the level of demands concerning their rights that are guaranteed. Governments and citizens have to guarantee that they work together in good cooperation to achieve the promotion and implementation of principles of good governance.

The challenge for political and administrative leaders in all countries is to redefine the roles of government and to build the capacity of public and private institutions to play beneficial roles in helping citizens to cope with the uncertainties, and benefit from the opportunities, of globalization. [9]

The right to good administration was initially envisaged in two documents that did not have binding effect: a) the Charter of Fundamental Rights of the European Union and b) the European Code of Good Administrative behavior. The European Charter of Fundamental Rights, Article 41, provides for the right to good administration, while Article 42 provides for the right of access to documents. The Code of Good Administrative Behavior aims to detail and clarify the right of good administration provided for in the Charter of Fundamental Rights and at the same time to provide guidance on the implementation of this right in practice, in order to avoid the maladministration by administrative bodies.[10]

Unlike the aforementioned documents, the principles envisaged by the European Court of Justice in regards to European Community law are binding for the member state, which implies that member states are obliged to apply them when applying the European Court's right. The legal status of the right to good

[4] Fukuyama, Francis (January 2013): *What Is Governance?*, Center for Global Development, Working *paper 314.*

[5] Merilee Grindle: *Good Enough Governance: Poverty Reduction and Reform in Developing Countries*; *Governance: An International Journal of Policy, Administration, and Institutions*, October 2004, 17 (4): 525–48.

[6] Beate Rudolf: *Is 'Good Governance' a Norm of International Law?* in: Common Values in International Law: Essays in honour of Christian Tomuschat, Pierre-Marie Dupuy *et al.* (editors), 2006, p. 1009.

[7] Jocelyne Bourgon: *Responsive, responsible and respected government: towards a New Public Administration theory*, International Review of Administrative Sciences, Vol. 73 No 1 (2007) 7-26.

[8] United Nations Development Progarmme, *Reconceptualizing Governance*, Discussion Paper No. 2. New York: UNDP (1997): 9.

[9] Dennis A. Rondinelli and G. Shabbir Cheema (eds.): *Reinventing Government for the Twenty-first Century: An Introduction*, Chapter 1. Stanford, CT: Kumarian Press (2003).

[10] *Principles of Good Administration in members of the European Union*, Statkontoret, 2005, p.7.

administration would be strengthened by the agreement on the European constitution, the purpose of which is to establish the constitution of the European Union. The adoption of this constitution was supposed to be unified and all agreements to be replaced by a single document. However, the agreement was signed by 18 states but after France and the Netherlands did not vote in May 2005, this constitution remains unapproved.

If viewed chronologically, good governance as a concept has been used even earlier than the 1977 Council of Europe Resolution, which foresees some principles that are still considered today as basic principles of good administration. According to this resolution, the basic principles for good administration are: the *Right to be heard, Access to Information, Assistance and Representation, and the Guidance on the Use of Legal Remedies.*[11] Good governance is also envisaged in Article 298 of the Treaty on the Functioning of the European Union (TFEU), which states" *that the institutions, bodies, offices and agencies of the Union during the performance of their mission should have the support of an independent open and efficient European Administration*".[12] Therefore, citizens have right to require the development of administrative procedures in harmony with principles of good administration in order to promote transparent and efficient procedures.

The European Code of Good Administrative Behavior was originally proposed as an idea by Roy Perry Mep in 1998. The European Ombudsman has drafted the text on its own initiative and presented it to the European Parliament as a special report. Thus, the parliament's resolution regarding the code is based on the ombudsman's proposal approving the Code of Good Administrative Behavior, which the institutions and bodies of the European Union, their administrations and their officials should respect in their relations with the public. This code was adopted on 6 September 2001 by the European Parliament and foresees the principles of European administrative law according to the practice of the European Court of Justice, also based on the legislation of member states.[13] Given that the European ombudsman drafted and proposed the code on good governance, it shows the importance of different individuals to have the opportunity to present their offers on how to improve certain policies or government actions that are not deemed beneficial to the citizens. More specifically, for the European citizens the ombudsman is a tool to address the gaps in administration.

Since the Code does not have a binding legal force for EU institutions, agency bodies and agencies, the European Ombudsman Institute has limited authority – mostly applied by offering recommendations, warnings and advice to the relevant institution. Nevertheless the ombudsman is authorized and required to warn the parliament and the public about the practices or decisions that are characterized as cases of bad administration.[14]

A clear trend towards strengthening the procedural rights of individuals affected by administrative decisions has also been noted in most Member States of the European Union.[15] In each state, the power of government depends on its democratic and accountable institutions that act according to the rule of law and respect of human rights. The promotion of good administration demands the engagement of governments to promote and protect citizens' rights, to reduce the duration and increase the level of internal control in order to act in harmony with principles of good government. Such demands shall lead to rule of law, reliable and more efficient administration, reduction of corruption and citizen's satisfaction. As stated above, the European Charter foresees the right to good administration as a fundamental right. The purpose of the Code of Good Administrative Behavior is to explain the practical

[11] Resolution (77) 31 on the Protection of the Individuals in Relation to the Acts of Administrative authorities, Adopted by the Committee of Ministers on 28 September 1977 at the 275th [11] *Meeting of the Ministers' Deputies*.

[12] Treaty on the Functioning of the European Union, Official Journal of the European Union, 2012.

[13] Luxemburg: Office for Official Publications of the European Communities, The European Code of Good Administrative Behavior, 2005.

[14] Ivan Kopric *et al*: *Good administration as a Ticket to the European Administrative space*, Udk35.07 EU,061.1.1(4) EU, Izvorni Rad Primljeno:Rujan 2011, p. 1525.

[15] Jürgen Schwarz : *European Administrative Law*. London: Sweet and Maxwell, 1992, *p.1175-186*.; Carol Harlow: *Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot*, European Law Journal, Vol 2. No 1. March 1996, p. 6.

implementation of Article 41 and 43 of the Charter of Fundamental Rights of the EU.[16] The Code encompasses 27 articles, including 24 articles dealing with different principles of good administrative behavior and its use is foreseen for all officials and other servants employed by EU institutions, bodies, offices and agencies. The Code is intended to serve as a guide for interaction between the public, citizens, businesses, or civil sector organizations regardless of their nationality or their country of origin.[17]

However at the end we can conclude that Grindle argues that the good governance agenda is unrealistically long and growing longer over time. Among the multitude of governance reforms that "must be done", there is little guidance about what's essential and what's not, what should come first and what should follow, what can be achieved in the short term and what can only be achieved over the longer term, what is feasible and what is not. If more attention is given to sorting out these questions, "good enough governance" may become a realistic goal for many countries.[18]

3. Principles of Good Administration and their Importance according to the European Code of Good Administrative Behavior

Good administration is the process for issuing and executing administrative acts that need to be delivered through procedures based on the rule of law. In this regard, the main characteristics of good administration include the focus on accountable and transparent governance, meaning that decisions are issued in harmony with positive legislation. Further, good administration includes the obligation of the government to provide to all its citizens administrative services in effective, efficient and in responsible manner. New developments in governments have increased the role of good administration in achieving the expected results of administrative reform, bearing in mind that government performance affects a series of state functions across the various sectors.

Good administration is considered as a basic element that indicates the potency of democracies and the rule of law. The basic principles of good administrative behavior are prescribed in the European Code of Good Administrative Behavior and they regulate all relations between institutions and their administrations with the public, unless they are regulated by specific provisions. Further, these basic principles of good governance describe the relations between institutions and its officials, but these relationships are also regulated by internal acts.[19]

The basic principles of good administration encourage a general perception about the importance of good administration and help public institutions to provide direct efforts towards offering more efficient and transparent services to the citizens. In order to achieve and maintain trust among the citizens, the public administration needs to be liable, responsive and considerable towards the citizens. This includes the willingness of the administration to establish a close cooperation with its citizens regarding different matters that are of their general interest. Moreover, the fundamental idea is that the public administration exists to serve its citizens. That idea does not deny, but at the same time cannot be reduced to, the classical conception of administrative science that the public administration should identify and pursue the public interest.[20]

[16] The European Code of good administrative behavior, Luxemburg: Office for Official Publications of the European Communities, 2005.

[17] Ivan Kopriq *et al*: *Good administration as a Ticket to the European Administrative space*, Udk35.07 EU, 061.1.1(4) EU, Izvorni Rad Primljeno:Rujan 2011, p.1524.

[18] M. Grindle: *Good Enough Governance: Poverty Reduction and Reform in Developing Countries*, Governance, 2004, 17(4): 525 - 548.

[19] The European Code of Good Administrative Behaviour, European Ombudsman, 2001.

[20] See generally, Jocelyne Bourgon: *Responsive, responsible and respected government: towards a New Public Administration theory*, International Review of Administrative Sciences, Vol. 73 No 1 (2007) pp. 7-26.

Some of the general principles of administrative law set out in the European Code of Good Administrative Behavior which are foreseen to be applied by all Member States when implementing the European Community law are among others:

a) The Principle of legality,

b) The principle of non-discrimination,

c) The principle of proportionality,

d) Absence of abuse of power,

e) Principle of impartiality and independence,

f) Legitimate expectations and consistency,

g) Data Protection,

h) Access to information and documents.

Moreover, in the European Code of Good Administrative Behavior, the principles governing the area of administrative procedure are set out as: objectivity, public consultation, fair, impartial and reasonable treatment, the right to use the language of a citizen, the right to be heard and make statements, the reasonable time limit for making the decision, the duty to state the grounds of decisions, indication of the possibilities of appeal the instruction of the party to appeal and the notification of the decision.[21] In addition to these principles, the code also contains provisions on administrative ethics, obligation to transfer documents to competent services or institutions, keeping records of activities and correspondence and the need for the publicity of the code.[22] Although the Code of Good Administrative Behavior has foreseen a greater number of principles for good administration, due to efforts to systematize key principles, the most important ones will be presented in the following as well.

3.1 The Principle of Legality

The principle of legality is considered as the basis of any legal order which in essence defines the rule of law and in this sense all administrative activities must be based on legal norms. As stipulated in the European Code of Good Administrative Behavior, the principle of legality is defined as the basic principle under which "the *official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law.''*[23]

Ewik and Silbey define *Legality* more broadly as "those meanings, sources of authority, and cultural practices that are in some sense legal although not necessarily approved or acknowledged by official law". The concept of legality the opportunity to consider "how where and with what effect law is produced in and through commonplace social interactions.... How do our roles and statuses our relationships, our obligations, prerogatives and responsibilities, our identities and our behaviors bear the imprint of law.[24]

The principle of legality, which is considered as the basis of the functioning of any justice system, is given special importance in the Code of Good Administrative Behavior being that all the administrative actions should be based on the law, while respecting the rights of citizens. The importance of the principle of legality consists of respecting the law, which implies that the activity of administrative bodies should be based on concrete legal provisions whereby the powers and limitations of the scope of

[21] The European Code of Good Administrative Behaviour, European Ombudsman, 2001.

[22] The European Code of Good Administrative Behaviour, European Ombudsman, 2001.

[23] The European Code of Good Administrative Behaviour, European Ombudsman, 2001, *Art 4.*

[24] Berman, Paul Schiff*: Global Legal Pluralism: A Jurisprudence of Law beyond Borders*, Cambridge University Press. Via Google Books (27 February 2012).

administrative bodies are foreseen. In this way decisions should be reconsidered by the hierarchy and judges.

In a paper on Normative Phenomena of Morality, Ethics and Legality', Legality is defined taking states role in to account as "*The system of laws and regulations of right and wrong behavior that are enforceable by the state (federal, state, or local governmental body in the U.S.) through the exercise of its policing powers and judicial process, with the threat and use of penalties, including its monopoly on the right to use physical violence"*.[25]

3.2. The Principle of Proportionality

The principle of proportionality is considered to be one of the most important instruments for controlling administrative decisions, especially administrative discretion. Proportionality acts as an assumption that an administrative action should not go beyond what is necessary to achieve the desired result, i.e. if some measures are considered they are worse off than good at achieving a set target then those measures are better not to apply at all. According to this principle, the law should not be applied harshly if its implementation would achieve an unwanted outcome, which would be considered as misuse of the administrative authority.

As stipulated in the Code of good administrative behavior: "*when taking decisions, the official shall ensure that the measures taken are proportional to the aim pursued. The official shall in particular avoid restricting the rights of the citizens or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued"*.[26]

In the constitutional law, the principle of proportionality finds its use mainly in the field of protection of human fundamental rights and liberties. It is considered as an efficient criterion of appreciation of legitimacy of the interventions of the state authorities in a situation limiting the exercise of some rights.[27] Proportionality enjoys the distinction of being one of the most important principles in today's Constitutional and Administrative Law. First in Europe, and later in different ways at a worldwide level, the notion of proportionality in the fields of Administrative and Constitutional Law has been elevated to a basic principle or doctrine acquiring a more specific structure and form.[28]

3.3. The Principle of Non-Discrimination

According to the European Code of Good Administrative Behavior "*in dealing with requests from the public and in taking decisions, the official shall ensure that the principle of equality of treatment is respected. Members of the public who are in the same situation shall be treated in a similar manner*."[29]

In almost all member states of the European Union, the principle of non-discrimination is guaranteed by constitutional rules. In the constitutions of some states, the causes of discrimination are presented decisively, for example. In Austria's constitution, Article 7 foresees that all citizens are equal before the law and no one can be privileged based on their background, gender, status, religion, or physical disability.[30] Non-discrimination is also guaranteed by other legal and sub-legal acts of EU member states.

[25] Werner Erhard & Michael C Jensen, Steve Zaffron: *Integrity: A Positive Model that Incorporates the Normative Phenomena of Morality, Ethics and Legality*, 2009, SSRN Electronic Journal. Doi:10.2139/ssrn.920625.

[26] The European Code of Good Administrative Behaviour, European Ombudsman, 2001, *Art.6.*

[27] Marius Andreescu: *Principle of Proportionality, Criterion of Legitimacy in The Public Law*, Challenges of the Knowledge Society. Law, p. 528.

[28] Javier Barnes: *The Meaning of the Principle of Proportionality for the Administration, A comparative view*, research gate, 2007, pp.1-2.

[29] The European Code of Good Administrative Behaviors, European Ombudsman, 2001, *Art.5.*

[30] Austria's Constitution of 1920 Reinstated in1945, with Amendments through 2009 Art.7.

According to the article 14 of the EU convention on human rights the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[31]

The principle of non-discrimination as a fundamental human right is also foreseen charter of fundamental rights of the European union exactly in Article 21 is foreseen any discrimination based on any ground such as sex, race, color, 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.[32]

Both between the two world wars and in today's Europe issues of equality and nondiscrimination have arisen most often in the public consciousness in relation to the treatment of groups, most often ethnic or national minorities.[33]

3.4. Principle of Impartiality and Independence

According to the European Code of Good Administrative Behavior, officials should be impartial and independent. Attention should be focused on the extent to which administrative authorities should be impartial and independent while deciding an administrative issue. The official should avoid any arbitrary action or preferential treatment that could affect the citizen.

The conduct of the official shall never be guided by personal, family or national interest or by political pressure.[34] The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest.

The right to good administration requires decisions to be made in a duly and based on procedures that guarantee impartiality. Impartiality requires the prohibition of arbitrary actions and unjustified preferential treatment, including personal interest.[35] Everyone has the right to examine his or her case impartially, fairly and within a reasonable time from the institutions, bodies, offices and agencies of the union.[36]

The public official has a duty always to conduct himself or herself in a way that the public's confidence and trust in the integrity, impartiality and effectiveness of the public service are preserved and enhanced.[37]

The public official should never accept either gifts that constitute a real or apparent reward for actions or omissions in the exercise of his or her functions. It is essential to preserve the citizens' trust in the impartiality of public administration.[38]

According to the case law under Article 6 of the European Convention on Human Rights, the right to an independent and impartial tribunal established by law contains both objective and subjective elements, where the objective requirements are mainly institutional, demanding separation of powers.[39]

[31] European convention for the protection of human rights and fundamental freedoms, Art.14.

[32] Charter of fundamental rights of the European Union, (2000/C 364/01), Art. 21.

[33] Harris Gomien & Zwaak: *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, 1996, p. 346.

[34] The European Code of Good Administrative Behaviour, European Ombudsman, 2001 *Art.8.*

[35] Diana-Urania Galeta, Professor of Administrative Law, University of Milan, *et al, The General Principles of EU Administrative Procedural Law*, In-depth Analysis, 2015.

[36] Charter of Fundamental Rights of the European Union (2000/C 364/01), Art. 41 (1).

[37] Codes of conduct for public officials, Recommendation rec(2000)10 and Explanatory Memorandum, Council of Europe, January 2001, Art.9.

[38] Ibid Art.18.

[39] Harris Gomien & Zwaak: *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, 1996, p. 169.

3.5. Right to be Heard and to Make Statements

According to the code of good administrative behavior, *"In cases where the rights or interests of individuals are involved, the official shall ensure that, at every stage in the decision making procedure, the rights of defense are respected"*.

Every member of the public shall have the right, in cases where a decision affecting his rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken.[40]

European Convention on Human Rights guarantees the right to a fair and public hearing as follows: Article 6 (1) of the European Convention on Human Rights guarantees the right to a fair and public hearing as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[41]

To illustrate this right, we may take an example regarding a notice of termination of the employment contract within the EU military mission. In this regard, the Ombudsman has considered the termination of the contract as unacceptable as the worker was sick, and was on medical leave due to psychological disorders. Being so, he was unable to enjoy the right to be heard and defend himself.[42]

The right to be heard is also foreseen in the Charter of Fundamental Rights where it is stipulated that" *every person has the right to be heard before any individual measure that would affect him or her adversely is taken".*[43] Regarding the content of the right to be heard, the European Court of Justice has stated that this right is realized when the parties have been given the opportunity to make known their views on the veracity and relevance of the alleged facts and circumstances and documents used to support their claim.[44]

4. Conclusions

The principles that are summarized in the European Code of Good Administrative Behavior generally include all kinds of administrative actions and administration activities. In general, states have included principles of administration in their legal acts, but the difference between them and the principles summarized in codes is precisely that they do not include all administrative activities undertaken by the administration bodies. Although the principles dealt with during the proceedings are guaranteed in state legislations, the summary of principles in a single code would include all stages of the administrative process and would guarantee a safer basis for ensuring the realization of citizens' rights in provision of administrative services and the protection of their rights in administrative proceedings.

The European Code of Good Administrative Behavior, drafted and proposed by the Ombudsman, has no binding legal force for the institutions; in this case the Ombudsman has no full authority, except for the possibility of making recommendations and suggestions to the respective institutions in cases when

[40] The European Code of Good Administrative behavior, European Ombusman, 2001, Art.16.

[41] European Convention on Human Rights, Art.6 (1).

[42] Good Administration in Practice: The European Ombudsman's Decisions in 2013.

[43] Charter of Fundamental Rights of the European Union (2000/C 364/01) Art. 41.2(a).

[44] Case 85/76 Hoffmann-La Roche v Commission ECR 1979, p.461.Para.11.

they violate these principles. Moreover, the Ombudsman is entitled to inform the Parliament and the public opinion for potential cases of violations during the administrative procedure.

From this conclusion we can recommend that, despite the concrete institutional arrangements of the administration in different countries, the state and public administrations should have adopted code-based principles and adhere to standards that are common to EU member states despite the non-binding power of the code and guaranteeing its implementation only in the Ombudsman's supervisory power. The importance of the implementation of the principles set out in the European Code of Good Administrative Behavior is because their implementation guarantees good administration and realization of the rights of citizens and therefore the binding force of the code would be very significant in the administrative justice system in general.

The human factor is crucial to ensuring the implementation or the obstruction of the application of the principles regardless of their regulation by legal acts, hence the professionalism and ethics of the public officials is considered as one of the key factors in the implementation of the principles. In this regard, we recommend the states to pay special attention to the importance of the professionalism, recruitment and ethics of the administration officials and to enable them to have professional and personal development opportunities being that they are required to comply with the legal rules and ethical standards for proper functioning of the administration. Without professionalism in public administration, the overall perception of its work would undoubtedly falter.

The challenge remains to create a common, European Act (Constitution) that would consolidate and unify all agreements by giving them a higher enforceable power in, this case including the European Code of Good Administrative Behavior an act that promotes good administration and realization of rights. The uniform application of the European Code in the EU states would have an impact on the embedding of a common European administrative space.

Failure to apply principles of good administration can result in poor administration and maladministration, weak state institutions, and low capacities to promote its welfare. Maladministration that comes as a result of non-respect of the principles can lead to dissatisfaction among the citizens.

Unilateral Withdrawal of a Member State? Some Thoughts on the Legal Dimensions of Brexit[1]

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Brexit opened the door of legal interpretation in relation to the right of a member state to unilaterally withdraw from the European Union. Article 50 TEU regulates the process providing a framework, however it lets open many practically important questions which has to be answered. This paper attempts to analyse Article 50, highlight its arguable points, and summarize the withdrawal process and the main legal aspects of Brexit. There are some procedural question marks as well in the application of Article 50 that should be elaborated via negotiations and on the base of the interpretation of the Court of Justice – which is still waited.

Keywords: Brexit, Article 50 TEU, interpretation of withdrawal clause, procedural and practical implications of Brexit

1. Introduction

The Treaty of Rome (hereinafter referred to as: EEC Treaty) establishing the European Economic Community in 1957 determined the main objective of the European integration project as intending to establish "*an ever closer union among the peoples of Europe.*"[2] The EEC Treaty was an attempt to foster European economic integration in that fragmented period after the World Wars. Article 240 of the EEC Treaty declares that the Treaty is "*concluded for an unlimited period*"[3] which means that the Treaty creates a permanent organization which aims to achieve stability. In parallel to that, the EEC Treaty places permanent limitations on the sovereign rights of the Member States whose limitations were interpreted in the C-6/64., *Costa v. ENEL* case.[4] In the *Costa v. ENEL* case the Court states, that *"the EEC Treaty has created its own legal system which became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.*"[5] Therefore, the founding Treaties did not include any provisions on the withdrawal

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[2] Treaty establishing the European Economic Community (EEC Treaty) (1957), available: http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11957E/TXT&from=HU (5. September 2017).

[3] EEC Treaty, Article 240.

[4] C-6/64., *Costa v. ENEL* case [1964], Court Report 1141, ECLI:EU:C:1964:66.

[5] C-6/64., *Costa v. ENEL* case [1964], Court Report 1141, point 3

from this supranational organization. The European Constitutional Treaty included the unilateral right to withdraw from the European Union (hereinafter referred to as EU), however, due to the *referenda* in France and the Netherlands, it never came into force. Thus, European Community (and later EU) Law did not regulate the issue of a member states' withdrawal until the Lisbon Treaty came into force in 2009. Although the question of a Member State's unilateral withdrawal was raised up several times[6] during the history of the European Union, no member state has withdrawn from the EU yet.[7]

The referendum of 23 June 2016 on EU membership in the United Kingdom (hereinafter referred to as: UK) resulted in an unprecedented and surprising situation resulting in the first application of Article 50 of the Treaty of the European Union. In point 2, I analyse the Article itself, and in point 3, I summarize the legal aspects of the withdrawal and draw some conclusions.

2. Unilateral Withdrawal of a Member State under the TEU

Article 50 TEU introduces the unilateral right for a member state to withdraw from the EU. Accordingly, EU law regulates the issue of the exit from the Union, therefore the process cannot rely only on international law anymore. EU Law is more or less a *self-contained regime*[8], which is interweaved with international law in many aspects, but where the relationship of the European Union and its member states are in question, EU Law functions as *lex specialis*, which necessarily *derogat legi generali*.[9]

In practice, the negotiated withdrawal seems more likely to happen than the unilateral one. Unilateralism in this sense means the voluntary decision on exiting made solely by the exiting state, and not the unilateralism of the whole process. As accession needs active behaviour from both the EU and the acceding member state, withdrawal also requires action from the EU as well – at least the silent acknowledgment of the decision of the member state made on the ground of its constitutional requirements. After the member state has made its decision and notified the EU about this, the process becomes bilateral (*i.e.* bilateral between the member state and the EU). Thus, only the decision of leaving the integration is made unilaterally, the following process is necessarily two-sided in practice.

Article 50 TEU regulates as follow:

[6] For example: in February and October 1974, the United Kingdom Labour Party issued Election Manifestos that mandated renegotiation of the terms of Britain's accession treaty with the EEC (1973) and a national referendum to determine Britain's continued membership. The EEC heads of state met in Dublin in March 1975, to conclude the negotiations, after which the British cabinet voted by a majority that the United Kingdom should remain in the EEC. By national referendum of June 5, 1975, a 67.2% British majority voted for the United Kingdom to remain in the EEC.

[7] More precisely, Greenland consensually withdrew from the European Communities in 1985, but it was part of Denmark and not a member state by its own right, so it was just a reduction of the territorial scope of the founding Treaties as it meant a partial withdrawal and not a full one. This process was made on the base of an international law instrument, namely the *Vienna Convention on the law of treaties* (1969, 1155 UNTS). The Convention provided a general position under public international law when it came to the termination or withdrawal from international Treaties.

[8] See further information about self-containedness: Liana Andreea Ionita(2015): *Is European Union Law a Fully Self-Contained Regime? A Theoretical Inquiry of the Functional Legal Regimes in the Context of Fragmentation of International Law*, Studia Politica; Romanian Political Science Review, available at: https://www.questia.com/library/journal/1P3-3695684861/is-european-union-law-a-fully-self-contained-regime (7. March 2018).

[9] Although, there are many dilemmas in the legal literature in this regard. For example, the UN Charter always prevails over the founding treaties of the EU. But in this case, there is no need to analyse the relationship of international treaties and EU law instruments, as the withdrawal of the UK is an inner issue of European Union law, and the TEU is not contradictory to international law.

"1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

2.1. Constitutional Requirements

Article 50 paragraph 1 declares that "*Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."* This means 28 different ways of withdrawal in theory, as every member state has its own constitutional requirements. This undermines the process in a sense. From the perspective of European Union law, it does not matter what the constitutional requirements of the exiting member state are. This presumes that the EU is going to accept the decision, without examining the base and conditions under which the national decision was taken. Hypothetically, this means that the European Union trusts that the decision about EU membership is made on the basis of democratically accepted constitutional requirements, and therefore there is no reason to question them.

In the case of the United Kingdom, paragraph 1 raised the first legally problematic question. How should constitutional requirements be interpreted in a country which does not have a written constitution? Could the referendum be accepted as one component of constitutional requirements? Could the result of the Brexit-referendum could be recognized as a constitutional requirement?

The result of a referendum – in contrary to the case in Hungary – is not legally binding for the British Parliament. Therefore, Westminster had the opportunity to ignore it in a legal sense, however – from a political point of view – that was not plausible. If we count the result of the *vox populi* as a constitutional requirement, the question arises who was entitled to vote? Was constitutionally correct the eligibility to vote under European Law requirements? Obviously, the result of an election is depends on the

`*composition of voters*`. The *European Union Referendum Act of 2015*[10] Section 2 determines the entitlement to vote in the referendum. According to that:

> *"(1) Those entitled to vote in the referendum are—*
>
> *(a) the persons who, on the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency,*
>
> *(b) the persons who, on that date, are disqualified by reason of being peers from voting as electors at parliamentary elections but—*
>
> *(i) would be entitled to vote as electors at a local government election in any electoral area in Great Britain,*
>
> *(ii) would be entitled to vote as electors at a local election in any district electoral area in Northern Ireland, or*
>
> *(iii) would be entitled to vote as electors at a European Parliamentary election in any electoral region by virtue of section 3 of the Representation of the People Act 1985 (peers resident outside the United Kingdom), and*
>
> *(c) the persons who, on the date of the referendum—*
>
> *(i) would be entitled to vote in Gibraltar as electors at a European Parliamentary election in the combined electoral region in which Gibraltar is comprised, and*
>
> *(ii) fall within subsection (2).*
>
> *(2) A person falls within this subsection if the person is either—*
>
> *(a) a Commonwealth citizen, or*
>
> *(b) a citizen of the Republic of Ireland.*
>
> *(3) In subsection (1)(b)(i) "local government election" includes a municipal election in the City of London (that is, an election to the office of mayor, alderman, common councilman or sheriff and also the election of any officer elected by the mayor, aldermen and liverymen in common hall)."*

This means that the approximately 3,4 million[11] EU citizens living[12] in the UK at the time of the election were not eligible to vote, which is, in my view, controversial to some rights in relation to EU citizenship. According to the Article 20 paragraph 2 point b) of TFEU, European citizens "*have the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State*". Although this does not entitle EU citizens to vote in general national elections in their member state of residence, it highlights the intention of the concerning EU law. The intention is to entitle EU nationals to get involved

[10] European Union Referendum Act of 2015, available at: http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted (7. March 2018).

[11] According to the Office for national Statistics (https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality,7. March 2018) approximately 3,4 million EU citizens were living in the UK at the time of the Brexit-referendum. Now this data is around 3,7 million.

[12] According to the Eurostat, the 4,9% of the UK`s population were born in other member state. See: http://ec.europa.eu/eurostat/statistics-explained/index.php/People_in_the_EU_%E2%80%93_statistics_on_origin_of_residents#Foreign-born_residents_from_another_EU_Member_State (7. March 2018).

in a decision-making processes where their future might depend on. There is a huge difference between a national election, a municipal election, a European Parliamentary election and a referendum. A national referendum on EU membership – taking into account its nature and possible consequence – is quite different. The discrepancy is in the consequence of the decision. It is understandable that EU citizens[13] cannot vote in national elections, as the result of it generally does not change their status in that member state. Normally – in democratic countries – the result of a national election does not change radically the quality of living, the statehood, thus when an EU citizen decides to move to another member state, this decision generally will not depend on a national election within that state. However, a decision which is taken on the membership of that state is much different, as it might change not just the status of the state in the EU, but the status of its citizens as well. Still we must acknowledge that no legal obligation flows from EU law which would legally require member states to enable EU citizens to vote in national referenda.

A second interesting provision of the EU Referendum Act is that it excludes UK citizens from voting on the EU membership referendum, who were last registered to vote over 15 years ago. This – not to mention how this might affect the right to the free movement of people within the EU[14] – takes the general elections and the referendum in this case as if they were essentially similar, as this provision is also applied in general elections, but they are really not. Moreover, *argumentum a contrario* this 15-year rule should be applied also in the case of those EU citizens who reside in the UK for more than 15 years. It is understandable in my view that the UK nationals living somewhere else for 15 years are excluded, as they live their everyday live somewhere else, their contribution to British life is not 'relevant' (supposedly they pay their taxes where they live and work, etc.), their life cannot change radically due to the referendum, therefore their opinion is 'less important' in this sense. But – in contrast – those nationals of EU member states who are continuously living and working in the UK, contributing in the system (working and paying taxes, but not citizens of the UK yet) were also excluded, which is hardly understandable. In addition to this, another contrast: the *Commonwealth* citizens[15] not living in the UK were eligible. There is an inequity in this mechanism which should have been supervised – in my opinion.

Accepting that the *common law* traditions are widely divergent from civilian ones and therefore assuming that the so-called constitutional requirements in the case of the United Kingdom might fully only be understood by the British, a critical statement is addressed to the EU legislator at this stage concerning the first imperfection of Article 50. The critique concerns the fact that the European Union provides the right to a member state to unilateral decision-making on the one hand, but does not supervise or control neither the "know-how" of that decision-making, nor the availability of the constitutional requirements. As the member state is sovereign, it has the right to decide on the basis of its constitutional requirements about its membership. However, respecting the fact that the member state is sovereign and the EU is not a federal state, a common frame of constitutional requirements should be in place in order to avoid 28 different ways of decision-making. This would not affect the sovereign right of a member state, but would mean a guarantee for the citizens and for other member states. In my view, the missing element is not supervision or control, but should be a common framework to be applied as laid down by the European Union. Are there common constitutional

[13] It is important to add that EU citizenship is not an alternative of regular citizenship, it is an additional supplementary bouquet of rights which are arising from the membership status of a state in the EU. The main legal question is, whether and how the legal nature and position of these acquired rights could change due to the Brexit.

[14] See the argument made in *R (Preston) v Wandsworth London Borough Council* [2013] QB 687.

[15] *E.g.* British Overseas Territories citizen, British Overseas citizen, Britishsubject, British National (Overseas) or a national of a country listed in Schedule 3 of the British Nationality Act 1981.

requirements in our EU − which gained values via respecting the so-called common constitutional traditions of the member states?

Of course – as it was declared in the *Schindler* case[16] by the High Court – the "*UK undoubtedly has a sovereign right to determine the constitutional procedures which shall be followed in determining the question*". However, the problematic issue here is not the determination of the constitutional requirement which is obviously the competence of a sovereign state, but the inequity in the eligibility of voters. Taking into account that the difference[17] between the numbers of the votes of the '*Remainers*' and the '*Brexiters'* was not significant, ensuring the right to vote of EU citizens living in the UK – eg. for more than 15 years − might even have led to a different result of the referendum.

2.2. Procedural Issues Defined by Article 50

Article 50 paragraph 2 clearly contains procedural provisions. This Section starts with the following: *"A Member State which decides to withdraw shall notify the European Council of its intention."*

The member state – in this case the United Kingdom – shall notify the EU institutions, namely, the European Council of its intention. More precisely, it is not the intention anymore that is notified, but the decision on the withdrawal. The notification – after internal debates in the UK about who is entitled to submit, the Prime Minister or the Parliament, alone or after the approval of the Westminster[18] – was submitted on 29 March 2017.

Firstly, there is no explicit time limit for taking the action of notification. The referendum resulting in Brexit was held on 23 June 2016, and the notification was submitted 9 months later. The British could wait even longer, as EU law does not regulate this issue in detail. Leaving the door open between when the withdrawal decision is made in a member state on the basis of constitutional requirements and the notification of the decision is submitted to the EU raises practical problems, such as uncertainty. What if the member state decides to withdraw, but does not take the notification at all?

According to *Steve Peers* and *Darren Harvey*, "*the member states are under the duty to respect the values of the Union as enshrined in Article 2 TEU as well as to abide by the principle of sincere cooperation in Article 4 (3)TEU."*[19] This necessarily implies that the "*discretion of the UK vis-á-vis the timing for providing Article 50 TEU notification should not be limitless.*"[20] Thus – according to the spirit of EU law – wasting time and holding the other member states in uncertainty is not compatible with the Union law. That is why the deadline should be counted from the date when the decision is made under the national law. The content that is missing from Article 50 is on the one hand understandable as it only provides a framework, which was probably not intended to be applied. Thus,

[16] *H. Schindler MBE & J. MacLennan v Chancellor of the Duthcy of Lancaster, Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 957 (Admin.) per Lloyd Jones Lj, available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/04/shindler-final.pdf (7. March 2018).

[17] The proportion of the votes of the Brexiters and the Remainers were: 51.9% and 48,1%, respectively.

[18] This debate was finally decide upon the *Miller* case (*R Miller v Secretary of State for Exiting the EU* [2017]), where the Supreme Court stated that under the British law, the approval of the Parliament is needed before the Prime Minister submits the notification. For further information about this topic, see: Paul Craig (2016): Brexit: *A Drama in Six Acts*, European Law Review, Vol. 41., issue 4, pp. 447-468; and Sir David Edward & Sir Francis Jacobs & Sir Jeremy Lever & Helen Mountfield & Gerry Facenna (2017): *In matter of Article 50 of the Treaty of European Union* – Opinion, available at: https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf (7. March 2018) pp. 44-55. etc.

[19] Steve Peers & Darren Harvey (2017): *Brexit: The Legal Dimensions*, in: Catherine Barnard and Steve Peers (ed.): European Union Law, p. 824.

[20] Christoph Hillion (2015): *Accession and Withdrawal in the Law of the European Union*, in: D. Chalmers – Anthony Arnull (eds.): The Oxford Handbook of European Union Law (Oxford, Oxford University Press), pp. 126-151.

Article 50 is much more like a European constitutional guarantee for member states to keep their sovereignty tangible than a real, nuanced procedure under EU Law.

Secondly, using the word '*intention*' suggests, that even if the decision is made on the basis of internal law, it is still just an *intention* (and not a fully declared decision) until it is going to be successfully delivered to the European Council. Using the word "*intention*" is controversial to paragraph 1, as that gives the right to the member state to decide on the withdrawal based on its constitutional requirements, thus paragraph 2 should use the word "*decision*" instead. This decision should just be sent simply to the EU, if that would be considered as a decision of a sovereign state without any reaction needed by the other party. This may increase uncertainty regarding the sovereign member state, suggesting that even if it is entitled to unilaterally decide about its future membership in the EU under TEU, that decision is just a declaration of intention until the European Council declares that the notification was delivered, or *silently approves* it by issuing the guidelines as an answer.

Article 50, paragraph 2 continues: *"In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union."*

This defines the first obligation of the European Union, as the European Council has to provide guidelines for the withdrawal negotiations. This sentence also lacks a deadline because there is no obligation to issue the guidelines in time. The timing of the issue of the guidelines should be counted from the submission date of the notification by the member state. The timeline is also an uncertain factor in the process. The guidelines – in the current case – were issued in April 2017, a month after the UK sent the notification to the Council.

The second part of the sentence obliges the Union to negotiate the withdrawal of the member state. It is not clear whether the provision obliges the EU only to negotiate or that the duty extends to concluding an agreement as well. Subsequent parts of Article 50 however establish the opportunity of a withdrawal without having an agreement, consequently only the negotiation is compulsory which is – taking into account the principle of the loyal cooperation – obvious.

The negotiations and the possible agreement should involve the arrangements for the withdrawal taking into account the future relationship of the member state and the EU. The guidelines of the Council declared that a parallel negotiation process of the withdrawal and future relationship is not possible, only after the first chapter of withdrawal had been finished could the new stage of the future cooperation start. Therefore, it is hardly understandable what the *"taking account of the framework for its future relationship with the Union"* means. On the one hand, it is logical to close a process and then start a new one. However, when Brexit happens, the UK becomes a third country from EU law perspective and this time it can start to negotiate its new relationship with the EU as a whole or with different states via bilateral agreements, the result cannot be seen at this moment. The negotiations necessarily take years, which – without having a transitional period maintaining the current system – is simply uncertain. Moreover, it is unclear what it means to conclude an agreement setting out the arrangements for the withdrawal. Who is entitled to draw the conditions of the withdrawal agreement? Is it an obligation? What if the UK and the EU cannot agree or only in minimum questions due to the time pressure and economic interests?

As the minimum content of the withdrawal agreement – the so-called arrangements – are not listed in Article 50, nor in other parts of EU law, and as paragraph 3 lets the withdrawal happen without having an agreement, this section is also very controversial.

The end of paragraph 2 provides clear procedural regulations declaring that *"agreement shall be negotiated in accordance with Article 218(3) TFEU"* and that the agreement *"shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament."* Thus, this admits the liable body to proceed the withdrawal on the side of the EU, entitling the Council, but requiring a qualified majority on the one hand, and the consent of the Parliament on the other. A complex question arises also from paragraph 2 of Article 50, namely the revocability of the notification. More precisely: can a member state change its mind? Whether the notification under the EU Law is revocable or not? Who is entitled to decide on this? I address the question from another perspective: assuming that the notification is not an intention, but a decision which was declared by the decision maker in the direction of the addressee, the question is not the revocability of that procedural action of sending this message to the addressee, but the decision itself. And the question is more likely whether the decision could be revoked unilaterally and unconditionally, or not? If the decision is changeable, then it is just a technical issue whether the notification is replaceable and under what circumstances. The Brexit-literature is quite divided on this topic. Before I summarize the concurring opinions, the first point is that this question – as it is related to EU law – should be interpreted by the European Court of Justice via preliminary ruling procedure, as that is the only body who is entitled to give the missing authentic interpretation.

Firstly, there is a political and a legal side to this question. Politically, obviously, deciding to leave integration and then withdraw the withdrawal process seems irrational and not permissible. This would easily lead to political games of double mill. This was agreed by the applicants and the British government in the abovementioned *Miller* case. Nevertheless, other member states may follow the British example, which is – from the integrationist perspective –not reasonable. Logically, the previous argument is false from a practical point of view. Every member state has advantages of the membership, hypothetically saying, it is not plausible that a member state is going to follow the British example just because they seemingly gained a 'plus' via Brexit. Practically, nobody will divorce from his wife just because the neighbour did and they feel good now. It is not viable.

Legally, there is no prohibition in Article 50 related to the reversibility of the process. Thus, as it is not forbidden, it is legally – theoretically – possible, until the European Court of Justice interprets differently. The question – as I mentioned above – is whether it is revocable unilaterally, unconditionally and at any time? As *Hillion* argued related to the timing of the notification itself, it cannot be limitless in time. The same has to be true in this case as well. Therefore, firstly, EU law does not prohibit it, so it is theoretically possible. Secondly, revocability arises from the ancient legal values formed in principles of law – such as the '*clausula rebus sic stantibus*'. If we consider the two-year time that Article 50 provides for the process and if there is no mutually agreed extension, within this time-frame, the notification should be revocable. Thirdly, the last paragraph of Article 50 declares that a member state who has withdrawn, may apply to be a member of the EU later − treating it as a third country – using Article 49 as a basis. Therefore, if the TEU keeps the door open for the future, strengthening the integrationist perspective of "*establishing an ever-closer Union*", why would the EU close the road '*halfway*', if a member state could change its mind before leaving integration? The rest of the commentators[21] agree on that the notification is revocable, but nor unconditionally and neither

[21] See to this topic *e.g.*: P. Craig (2016): *Brexit: A Drama in Six Acts*, ibid.; Takis Tridimas (2016): *Article 50: An Endgame without an End?*, *King's Law Journal*, Vol. 27., issue 297, pp. 303–305; A. Thiele (2016): *Der Austritt aus der EU:*

limitless. In addition to that, *Craig* highlights "*the nature of electoral politics in democratic societies dictates that there may well be a change of government from time to time. It would therefore seem absurd to hold as a matter of law that the notification to leave the EU rendered by a previous government was binding upon the incumbent government despite them assuming office on an electoral pledge to reverse the withdrawal process.*"[22]

All in all, from a legal point of view, there is no reasonable obstacle in the way of revoking the notification made on the base of Article 50. However, politics could undermine the legal interpretation and until the only authentic interpreter of the EU law – namely the European Court of Justice – is not addressed with this question via preliminary ruling procedure, the commentators can only argue.

Article 50 defines the parties of the negotiations which on the EU side is the European Council. Paragraph 2 refers to the Article 218 (3) of the Treaty on the Functioning of the European Union (TFEU). Article 218 (3) declares that

> "*The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.*"

This focuses on the roles of different EU institutions in the withdrawal progress. These are purely procedural issues. The first duty of the Council under Article 50 is to provide guidelines to provide a framework for the negotiations. Then, it has to cooperate with the European Commission according to TFEU Article 218 (3). Article 50 does not expect consent from the member states related to the withdrawal agreement. An agreement may be concluded after a qualified majority vote in the Council, then after getting the consent of the European Parliament. Thus, the member states hold no formal veto over the process of negotiation and conclusion of a withdrawal agreement.[23]

Paragraph (4) declares that the representatives of the exiting member state cannot participate and vote in the EU decisions concerning the withdrawal of that state.

On the other hand, the Article does not define the obligations of the exiting member state. It neither obliges it to time limits concerning the submission of the notification, not defines the constitutional standards the decision has to meet, etc. Why the TEU lacks these obligations, while it declares the duties of EU institutions related to the withdrawal process? What are the obligations of the exiting member state, besides those defined in the principles – such as loyal cooperation?

Hintergründe und rechtliche Rahmenbedingungen eines 'Brexit', Europarecht, Vol. 51., issue 281, p.295*;* P. Eeckhout and E. Frantziou (2016): *Brexit and Article 50 TEU: A Constitutionalist Reading*, UCL European Institute Working Paper, pp. 37–40.
http://www.ucl.ac.uk/european-institute/eipublications/brexit-article-50.pdf (10. March 2018).

[22] Steve Peers & Darren Harvey (2017): *Brexit: The Legal Dimensions*, in: Catherine Barnard and Steve Peers (ed.): European Union Law, p. 825.

[23] Ibid p. 827.

2.3. The Cease of EU Membership

Article 50 (3) provides that:

> "*The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*"

Thus, the membership of the exiting member state ceases after the two-year period counted from the submission of the notification – in case this period is not extended by the EU and the UK, or unless the withdrawal treaty defines otherwise. This means – in my view – that if there is no extension or other action, on 29 March 2019 at midnight, the Treaties shall cease to apply to the UK, thus the UK *de iure* loses its membership.

This point clarifies that the withdrawal agreement is just one option, without an agreement the UK's membership can be lost just because of the time. The same happens if only one party intends to extend the period.

Firstly, regarding the 'time', it is more or less obvious that two years are not enough for this process. In the case of Greenland in 1985, the quasi-exit took more than three years – where the cooperation was not even at the same level as it is now.

Secondly, the exit cannot happen without a transitional period. When a member state accedes to the EU, there is a time frame for '*Europeanisation*', this means among others: harmonization, closing up economically, implementing certain institutions, etc. Therefore, when a state withdraws, the transition is necessary for the '*de-Europeanisation*' as well. This period is very important, not just from the perspective of the withdrawing state – as it has to deal with financial, economic, administrative, labour and clearly legal issues – but from the aspect of the citizens as well, especially those EU citizens who are currently living in the UK. Their situation and future is also a very important question that could be the subject of another research paper.

2.4. Leaving the Door Open

Article 50 (5) declares that "*if a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49".* This means that after the UK withdraws, there is no condition which could impede their future application to the EU. The door is open, which could mean that the most important guiding principle is the ethos of '*the ever-closer Union*'. Nobody can foresee the future, especially until we do not see the end of negotiations and the withdrawal agreement itself vis-á-vis the UK. The negotiations about the future relationship of the EU and the UK may start only after the withdrawal is done, which assumes a transitional period for negotiations and leading out the United Kingdom from the EU legal system. In any case, this paragraph handles the withdrawing state as a third country with no benefit or advantage in case for a re-accession. It is important that the Article does not link any extra obligation or "punishment" as a consequence if a state which had previously left the EU changes its mind in the future.

3. Summary

Brexit might be useful from the point of view of legal clarification, because it highlights the problems with Article 50 TEU and the uncertainties which arise from the whole procedure, as it is barely regulated and unprecedented. Therefore, the withdrawal of the United Kingdom – besides being regrettable as European integration may lose such a great generator of innovation as the United Kingdom – could fill legal gaps on the one hand.

There are purely legal questions that are not regulated in detail and this causes practical problems when it comes to the application of the Article.

Firstly, the '*constitutional requirements*' need a common frame or standards, which has to be fulfilled while the decision about the withdrawal is made at the national level. There must be a level of control, at least before the decision is made, related to how that decision is taken. This is what is important in my opinion in order to prevent other member states from considering a decision on withdrawal. In addition, I would add into the accession treaties in the future a clause which defines (pre-accession) their conditions to withdraw. In this case, a member state would make its decision on the accession taking into account its possible withdrawal and its consequences.

Secondly, the obligations of the withdrawing state are not clear, apart from the submission of the notification. There are missing frameworks both in time and in duties. Moreover, the relevant Article is silent about the revocability and the possible conditions of the notification.

Thirdly, Article 50 misses the opportunity to lay down a framework for the transitional period starting from the end of the two-year period and lasting until the member states loses its membership. Currently, there is an option for losing the membership with no agreement about the withdrawal and no agreement about the future, which results in a very uncertain situation.

Brexit might in a sense be useful also for the European Union, as it may indicate the limits of the integration process. Since 1957, European integration has been growing, spreading, developing and becoming more and more harmonized. Sometimes the member states used their "brakes" and reflected that an issue on agenda could be solved in a better way nationally and used their '*subsidiarity*' warning when it came to the decision. This happened with many private law instruments which aimed harmonization or unification such as the Common European Sales Law. Integration can be ever closer, always developing, improving and even more borderless, but we can see that even this cooperation has its limits. Brexit shows us that the limits have been reached by now, many challenges are on the agenda (*e.g.* related to migration into Europe), and there are important foreign policy issues that have to be solved before the integration moves toward the next level.

In my view, the European Court of Justice should be asked about the interpretative questions of Article 50, as many uncertainties could be turned into certainty. Brexit will have a significant effect on the internal legal situation in the United Kingdom, as a common law country may return to its own traditions – by leaving continental influences outside. However, those influences which are already implemented into national law will still continue to have effects, as decades of cooperation necessarily leave a lasting impression not just on the legal system of the UK, but on the European Union as well.

Legislative history analysis of the operation of foreign higher education institutions in Hungary

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The legislative changes to the higher education institutions operating in Hungary that entered into force in April 2017 generated a serious policy/political debate both in the public and among politicians and professionals involved in the topic. The goal of my paper is to examine and analyze – both the previous and the current – respective regulation, furthermore to present and evaluate the impact of the changes and modifications from socio-economic and scientific aspects. I present the forms of operation of foreign higher education institutions operating in Hungary under the current regulations and draw my conclusions.

Keywords: foreign higher education institutions in Hungary; Hungarian operating permit; cross-border services; Act CCIV of 2011 on national higher education

1. Introduction

The legislative changes to the higher education institutions operating in Hungary that entered into force in April 2017 generated a serious policy/political debate both in the public and among politicians and professionals involved in the topic, thereby triggering a significant national and international public response as well.

The goal of my paper is to examine and analyze – both the previous and the current – respective regulation, furthermore to present and evaluate the impact of the changes and modifications from socio-economic and scientific aspects. Considering that the Act on higher education of 1993 (hereinafter: Higher Education Act ‘93) was the first independent and comprehensive legal regulation of Hungarian higher education, I will start my analysis by looking at this piece of legislation first.

2. Regulation Governing the Foreign Higher Education Institutions Operating in Hungary between 1993 and 2011

2.1. Foreign Higher Education Institutions in Hungary based on the Higher Education Act ‘93

Already the original text of the Higher Education Act ’93 as published in the Hungarian Official Gazette (3.VIII.1993) referred to the operation of foreign higher education institutions in Hungary. Pursuant to point j) of Article 74 (1) of the Act, the Minister of Culture and Public Education authorizes the operation

of foreign higher education institutions in Hungary within his public tasks related to higher education. Article 110 specified further rules:

"Article 110 (1) Foreign higher education institutions may offer regular undergraduate, specialization or doctorate programs (on its own or within the framework of or in cooperation with other organization) and may issue foreign diplomas in Hungary, if

a) the institution and the diploma it issues (the academic degree it results in) are officially recognised in the country, where its registered seat is, as higher education institution and as higher education diploma (academic degree) and this has been proven credibly;

b) the Minister of Culture and Public Education authorized such operation of the foreign higher education institution.

(2) Hungarian higher education institutions and foreign higher education institutions may offer joint undergraduate, specialization and doctorate programs, if the cooperating foreign higher education institution meets the criteria specified in point a) of paragraph (1). Such cooperations shall be reported to the Minister of Culture and Public Education."

Point b) of Article 110 (1) of the Higher Education Act '93 was supplemented by "after obtaining the opinion of HAC" and by the following paragraph (3) as of November 1, 1996[1]:

"Article 110 (3) The Minister issues a decree on recognition and equivalence of foreign diplomas issued with respect to the programs provided based on paragraph (1) that was authorized by the Minister of Culture and Public Education. The annex of this decree lists the institutions and their courses, to which the decree applies."[2]

According to the reasoning attached to Act LXI of 1996 on the modification of Act LXXX of 1993 on higher education, modification of Article 80 specifying the tasks of the Hungarian Accreditation Committee (hereinafter: HAC) made the modification of point b) of Article 110 (1) of Higher Education Act '93 necessary. (The reason for the modification being that this task expanded the function of the HAC.)

The modifications affecting the function of the HAC derived partially from proposals for amendment relating to other provisions of law (establishment of association, granting permits to start courses, starting accredited higher-level vocational training, etc.) and partially they aimed at increasing the role of the HAC in the continuous control of quality of the higher education program and in the quality assurance (e.g. establishment of faculties, recognition of diplomas, etc.).

The reason for adding the new paragraph (3) to Article 110 of the Higher Education Act '93 was that the higher-level vocational training activity of foreign higher education institutions in Hungary had significantly increased. [3] However, the ministerial decree mentioned in Article 110 (3) was never adopted. Pursuant to Article 1 (2) of Government Decree 47/1995 (IV.27.) on recognition and homologation of academic degrees, certificates and diplomas obtained in a foreign higher education institution, it was still possible in the permission regulated in point b) of Article 110 (1) of the Higher

[1] Established by Articles 80 (1)-(2) of Act LXI of 1996. Effective from November 1, 1996.

[2] Author's translation. All Hungarian legislation quoted in the paper was translated by the author, except for quotes from Act CCIV of 2011 which is available in English at the website of the Hungarian Accreditation Committee: http://www.mab.hu/web/doc/hac/regulations/Ftv2012_Eng.pdf

[3] Reasoning of Act LXI of 1996 on amendment of Act LXXX of 1993 on higher education* „Acts do not have official justification adopted by the Parliament. We clarified and completed the justification of bills drafted by the person who submitted them in accordance with the adopted amendments." Source: Legal directory. Wolters Kluwer Kft.

Education Act ’93 to recognize – upon request – the certificates and diplomas issued by a foreign higher education institution specified in Article 110 of the Higher Education Act ’93. In lack of such provision in the permission, the provisions of Government Decree 47/1995 (IV.27.) also applied to the certificates and diplomas issued by a foreign higher education institution in Hungary. Act C of 2001 on recognition of foreign certificates and degrees (hereinafter: Recognition Act) repealed Article 110 (3) of the Higher Education Act ’93 and Government Decree 47/1995 (IV.27.) as of January 1, 2002. The primary reason was the accession of Hungaty to the European Union and the harmonization obligations arising therefrom. Hungary undertook during the accession negotiations that it will harmonize its laws with the respective Community legislation until the date of accession to the European Union and that included the recognition of foreign certificates and degrees as well. [4]

Thereafter the regulations of the Higher Education Act ’93 relating to foreign higher education institutions did not change substantially until Act CXXXIX of 2005 on the higher education (hereinafter: Higher Education Act ’05) entered into force.

2.2. Foreign Higher Education Institutions in Hungary based on the Higher Education Act ‘05

Pursuant to Article 116 (1) of the Higher Education Act ’05, “foreign higher education institutions may operate or issue foreign diploma in the territory of the Republic of Hungary, if the institution and the diploma it issues are legally recognized in the country of origin as a higher education institution and as a duly corresponding diploma, and such recognition has been credibly proven, and furthermore, the licence required for commencement of operation has been issued by the registration centre. Unless otherwise provided by law, the establishment of the foreign higher education institution, its education and research activities, the pertaining monitoring procedures, the operation of the institution and the specification of entry requirements shall be subject to the relevant provisions of the state which recognizes the higher education institution as its own.”

Article 116 (2) also provides that if the registration centre ascertained the fulfilment of conditions defined in paragraph (1), the maintainer was granted an authorization necessary to start operation. The HAC and, based on the Recognition Act, the Hungarian Equivalence and Information Centre (hereinafter: HEIC) cooperated as expert bodies in the authorization procedure. The authorization for starting operation could be denied, if the degree of the foreign certificate or the qualification certified by the diploma could not be recognised in Hungary. The Minister of Education was empowered to verify the legality of the functioning of foreign higher education institutions and within such powers he could request – at least once every eight years – the verification of fulfilment of the conditions stipulated in Article 116 (1).

[4] See further: a) Council Directive 89/48/EEC on the general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration; b) Council Directive 99/42/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC; c) Directive 1999/42/EC establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications; d) Directive 2005/36/EC on the recognition of professional qualifications.

The Higher Education Act ’05 provided a possibility to establish and operate a higher education institution issuing foreign diploma in Hungary on the basis of an international agreement. Higher education institutions established and operating on the basis of an international agreement were ex officio registered by the registration centre as well. [5] The provisions pertaining to the control of lawfulness had to be applied to these institutions unless otherwise prescribed by the international agreement.

Like the Higher Education Act ’93, the Higher Education Act ’05 also allowed joint programs of Hungarian and foreign higher education institutions resulting in issuance of Hungarian or foreign or joint diploma, provided that all of the following criteria are met:

a) the higher education institutions are entitled to provide such programs,

b) the higher education institutions concerned have agreed to organise the program,

c) the higher education institutions concerned are recognized by the state as higher education institutions in their country of residence,

d) the diploma issued qualifies as a diploma awarded in higher education according to the national law of the countries concerned,

e) the agreement expressly specifies, the requirements of which Hungarian undergraduate, graduate or doctorate course or postgraduate specialist training course the joint program meets. [6,7]

An additional paragraph was added to the article cited above on September 1, 2007. Pursuant to this new paragraph, authorization for operation of the foreign higher education institution in Hungary was not necessary in case of joint programs; only the permission of the registration centre needed to be obtained for the joint program, with the HAC acting as expert body.

The Higher Education Act ’05 already required the expert opinions of the HAC and the HEIC for the authorization of the operation of foreign higher education institutions in Hungary.[8] The text of the law as published in the Official Gazette included that in case of foreign higher education institutions, the registered seat of which are in a country party to the European Economic Area (EEA), the above bodies shall examine during their procedure “only” whether the higher education institution obtained state recognition in its country of residence.[9] However, this had been deleted from the text that entered into force on March 1, 2006.

[5] Article 116 (3) of the Higher Education Act ’05.

[6] Article 117 (4) of the Higher Education Act ’05.

[7] Due to the modification that entered into force on October 1, 2009, point e) was modified as follows*: „it is clear from the agreement, the requirements of which Hungarian field of education, higher education level (degree) and vocational training or specialization the joint program meets.”*

[8] Those foreign higher education institutions that started their operation based on an authorization obtained from the Minister of Education before the Higher Education Act ’05 entered into force, were obliged to go through the licensing procedure required to perform the activity again until December 31, 2010. If they did not meet this condition, they were not allowed to matriculate students to the first grade from the school year that began on September 1, 2011. However, the students matriculated in the previous years could complete their studies under the same conditions and the law did not set a deadline for that. (See: Article 151 (7) of the Higher Education Act ’05).

[9] Text in the Gazette of Article 106 (7) of the Higher Education Act ’05.

Pursuant to the modification that entered into force on January 1, 2009, the registration centre may decide without the expert opinion of HAC in case of commencement of undergraduate, graduate or equivalent divided program (that does not qualify as joint program) accredited in an EEA state or recognised by the given state as belonging to its higher education system, if the – foreign and Hungarian – higher education institutions concerned have agreed to organize the program and the foreign higher education institution has undertaken in this agreement to issue a foreign diploma with regard to the program provided by the Hungarian higher education institution. This program, the rights and obligations of those participating in the program, the education activity, the monitoring thereof and specification of the entry requirements are governed by provisions of the state which recognized the higher education institution as its own. [10] The above provision has actually introduced a new form of cooperation: the Hungarian higher education institution performs the "foreign" program at the expense of its own infrastructure (meaning: lecturers, lecture halls, etc.) but according to the rules relating to the foreign program, and it is the foreign institution issues that the diploma (thus this is not a joint program). The Hungarian higher education institution performs – by using a common wording – a "licence program".

During the amendment of the law due to the implementation of Directive 2006/123/EC on services in the internal market[11], it was declared with regard to higher education institutions established in an EEA state that the issuance of permission necessary to commence operation cannot be denied with reference to it not being possible to recognize the level of education of the foreign diploma issued by the institution in Hungary. [12] The only thing expected from foreign higher education institutions was that if it is not possible to recognize the level of education of the foreign diploma issued in Hungary then the institution shall clearly and verifiably call the applicants' attention to this fact; and the registration centre monitored the fulfilment of this obligation.[13] According to the reasoning of the amendment, "with adequate information for the applicants, it shall be decided by the students whether to apply for such program or not but the possibility thereof cannot be prohibited." [14]

Regulation of the activities of a service provider having the right to the freedom to provide services had been added to the Higher Education Act '05 as of September 1, 2009. From this time on, Article 116 (7) provided that "[the] service provider having the right to free provision of services under the Act on the general rules of commencing and pursuing service activities, shall report its intent to perform higher education activities in the territory of the Hungarian Republic within the framework of cross-border provision of services to the registration centre. The registration centre registers the service provider having the right to free provision of

[10] Article 106 (7) of the Higher Education Act '05 from September 1, 2009.

[11] Article 338 of Act LVI of 2009 on modifications related to the entry into force of Act CXI of 2008 on modification of Act CXL of 2004 on the general rules of administrative proceedings and services and to the implementation of Directive 2006/123/EC on services in the internal market.

[12] Cf. footnote No. 8.

[13] Article 116 (6) of the Higher Education Act '05 from September 1, 2009.

[14] Justification of Act LVI of 2009 on modifications related to the entry into force of Act CXI of 2008 on modification of Act CXL of 2004 on the general rules of administrative proceedings and services and to the implementation of Directive 2006/123/EC on services in the internal market.

services, if the institution and the diploma it issues are legally recognized in its country of origin as higher education institution and as a duly corresponding diploma. The Minister exercises its powers specified in Article 105 over the service provider having the right to free provision of services and within the scope of that power the Minister and the registration centre cooperating in the monitoring may request verification of fulfilment of legitimate conditions of operation based on documents submitted in authenticated copies or in authentic Hungarian translation. The registration centre publishes on its website the list of languages where non-certified Hungarian translation of documents is also accepted." [15]

3. Regulation Governing the Foreign Higher Education Institutions Operating in Hungary based on the National Higher Education Act

3.1. From Entry into Force until the Modification in April 2017 of the NHE Act

The regulation of the operation of foreign higher education institutions in Hungary did not change conceptually with the entry into force of Act CCIV of 2011 on National Higher Education (hereinafter: NHE Act). Providing university training still requires the recognition of the foreign decision authorizing the operation of the institution as a state-recognised higher education institution in its country of origin as well as the authorization of operation by the Hungarian Educational Authority. The Educational Authority recognizes the foreign decision, if the principles of higher education of the given state comply with the higher education principles of the European Higher Education Area. Further condition of the operating authorization is an expert opinion, which declares the human resources and material conditions of the program, the quality of the program as well as the conformity between the operational and program conditions in Hungary and the operating authorization issued in the country of residence. The operating authorization may be refused based on the expert opinion obtained by the Educational Authority. [16]

As a general rule, the authorization of operation may still be refused, if the educational level attested by the foreign diploma cannot be recognized in Hungary,[17] however, issue of the authorization necessary for the commencement of operation of a higher education institution established in another EEA state shall not be refused based on the condition of equivalence. If the educational level attested by the foreign diploma issued by a higher education institution established in another EEA state cannot be recognized in Hungary, the institution shall call the applicants' attention to that clearly and justifiably, and the educational authority shall monitor fulfilment thereof. [18]

Like under the previous regulation, it is possible to establish and operate a higher education institution issuing foreign diploma in Hungary on the basis of an international agreement as well. The educational authority shall register such higher education institutions ex officio and, in lack of provisions to the

[15] Implemented by Article 338 (2) of Act LVI of 2009; effective from October 1, 2009.

[16] Articles 76 (1)-(2) of the NHE Act.

[17] Article 76 (3) of the NHE Act.

[18] Articles 77 (1)-(2) of the NHE Act.

contrary in the international agreement promulgated in an act, the provisions concerning the supervision of the legality of higher education institutions shall apply.[19]

The conditions of a joint program offered by a Hungarian higher education institution and a foreign higher education institution leading to the issuance of a Hungarian and a foreign diploma or a joint diploma have however been changed by entry into force of the NHE Act as follows:

> a) the higher education institutions involved qualify as state-recognised higher education institutions in their country of residence,
>
> b) the diploma issued qualifies as a diploma issued in higher education under the national laws of the countries concerned,
>
> c) both the Hungarian and the foreign higher education institutions are authorised to launch programs, the educational and completion requirements of which are the same as the educational and completion requirements of the program subject to the agreement, [20]
>
> d) the credit transfer committee of the Hungarian higher education institution states that the credit equivalence between the program authorized to be launched and the program subject to the agreement reaches 75%,[21]
>
> e) students collect at least thirty credits at the Hungarian higher education institution authorized to launch the program. [22]

In case of the above program, authorization of operation of the foreign higher education institution in Hungary is still not necessary. [23]

Regulation of the activities of a service provider having the right to free provision of services has not changed significantly compared to the Higher Education Act ’05. The educational authority registers the service provider having the right to free provision of services, if the service provider meets the condition specified in Article 76 (1). [24]

The text of the NHE Act related to the operation of foreign higher education institutions in Hungary has been modified as of September 1, 2015. The modification resulted in significant changes to the content of the regulation of diplomas issued by higher education institutions and in a clarification of the provisions related to issuing operating authorizations. Pursuant to the new text, “a foreign higher education institution may perform programs leading to a diploma in the territory of Hungary, if it qualifies as a state-recognised higher education institution in its country of origin, the program to be performed in the territory of Hungary (and the diploma issued for its completion) qualifies as a program (diploma) providing higher education degree recognized by the state, and its operation has been authorised by the educational authority. The educational authority shall revoke its decision on the

[19] Article 76 (6) of the NHE Act.

[20] Point c) was amended by the modification that entered into force on July 1, 2016 as follows: „the Hungarian and the foreign higher education institutions are authorized to launch programs in a field of study or discipline that can be considered as equivalent to the field of study or discipline of the joint program subject to the agreement”. Declared by Article 57 of Act LXXX of 2016.

[21] Repealed by point 17 of Article 82 of Act CXXXI of 2015. Ineffective from September 1, 2015.

[22] Article 78 (3) of NHE Act.

[23] Article 78 (4) of NHE Act.

[24] Article 77 (3) of NHE Act.

operating authorization, if the higher education institution or the program subsequently fails to comply with these conditions."

Furthermore, the modification – like Article 106 (7) of the Higher Education Act '05 – made it possible again for Hungarian higher education institutions to launch a state-recognised bachelor or master program, or an equivalent two-cycle program not qualifying as a joint program of a higher education institution recognized by a state which is a party to the Agreement on the European Economic Area or to the Convention on the Organisation for Economic Cooperation and Development (OECD) and to register it with the Educational Authority, provided that there is an agreement between the foreign and the Hungarian higher education institutions involved in the organisation of the program and the foreign higher education institution has undertaken in this agreement to issue a foreign diploma with respect to the program performed by the Hungarian higher education institution. [25] In this case the Educational Authority does not "authorize the operation", it has merely performs the registration.

3.2. Amendment of the NHE Act entering into force in April 2017

According to the general reasoning of the draft bill No. T/14686 submitted to amend the NHE Act (hereinafter: bill), "based on the experience of the past period, rules of the NHE Act related to the international relations of the Hungarian higher education need clarification with respect to the higher education institutions of third countries operating in Hungary, as well as to the programs and lecturers thereof." [26] The controversial amendment, also known as "lex CEU"[27], which was adopted by the Parliament on April 4, 2017[28] and has received continuous media attention ever since, is supposed to implement the above clarification.

The key points of the amendment are on the one hand the requirement that was added as point a) of Article 76 (1) of the NHE Act, on the basis of which a foreign higher education institution may perform a program leading to a diploma in the territory of Hungary, if – among others – "the contracting parties have acknowledged the binding effect of the international agreement on principle support of its operation in Hungary, concluded by and between the Government of Hungary and the Government of the state where the foreign higher education institution is established (in case of a federal state, if the central government is not entitled to acknowledge the binding effect of the international agreement, a preliminary agreement concluded with the central government is also necessary)", and on the other hand the provisions of point b) of the same article which proclaims: "it qualifies as a higher education institution recognized by the state that operates and actually performs higher education activities in its country of origin". It is worth noting that originally the amendment did not contain the provision

[25] Article 77 (4) of NHE Act from September 1, 2015

[26] The reasoning continues as follows: „It is a key cultural policy objective of Hungary to cooperate with third countries outside the European Union on the field of education and the regulated activities (in Hungary) of lecturers as citizens of third countries and of foreign higher education institutions outside the European Union can be a tool thereof. However, the respective provisions of the NHE Act shall ensure enforcement of the intentions of the Hungarian Government defining and supporting the direction and area of international cooperation in higher education, enforcement of foreign policy goals and timely national security considerations during the students and lecturers' movement and entry to the country associated with the operation of international relations."

[27] Act XXV of 2017 on modification of Act CCIV of 2011 on the national higher education (hereinafter: Amending Act).

[28] http://www.parlament.hu/iromanyok-lekerdezese?p_auth=ETjI5Ovb&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_irom.irom_adat%3Fp_ckl%3D40%26p_izon%3D14686 (17 October 2017).

applicable to federal states, it only required the contracting parties to acknowledge the binding effect of the international agreement. According to some views, the abovementioned condition – which only affects some American universities among the higher education institutions operating in Hungary – made the authorization of operation of foreign higher education institutions in Hungary subject to an unachievable condition, namely "the United States belongs to those federal states, in which the federal government has the powers reserved by the Constitution only, while any other powers shall be exercised by the states. The 10th Amendment to the United States Constitution (1971) expressly declares that: » The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. « As the American Constitution does not delegate the powers related to education – including higher education – to the federal government, the bodies thereof cannot conclude international agreements on this subject."[29]

The phrase "actually performing higher education programs" brings a significant change compared to the previous regulation. As a result, a higher education institution established outside the EEA may perform programs leading to issuance of a diploma in the future only if it performs actual programs (operates campus) in its country of origin as well. This affects (affected) only one institution among the foreign higher education institutions currently operating in Hungary, namely the Central European University (CEU).

The change intorduced by the Amending Act affected the right declared in Article 77 (4) of the NHE Act (previously mentioned as "licence program"), namely the states that are party to the Convention on the Organisation for Economic Cooperation and Development (OECD) were removed from the regulation, thereby narrowing the scope of subjects. [30]

Having reviewed the – not just foreign – higher education institutions currently operating in Hungary, it appears that the amendment related to the rules governing the use of name of higher education institutions incorporated as paragraphs (2a) and (2b) of Article 9 of the NHE Act also affects CEU and its Hungarian partner, the Közép-európai Egyetem [KEE] (which means "Central European University" in Hungarian) only. Pursuant to this amendment "[the] name of a higher education institution must clearly differ from the name of other higher education institution. The name of a higher education institution cannot be misleading, cannot give rise to a false appearance of the institution or of its activity. The name of the higher education institution qualifies as misleading or confusing if its name in Hungarian or in foreign languages is the same as the name of an other higher education institution registered at the educational authority." Article 76 (1a) of the NHE Act added to this provision, according to which, with respect to foreign higher education institutions operating in Hungary, "rules under paragraphs (2a) - (2b) of Article 9 shall also be applied as meaning that the name of the higher education institution cannot be confused with the higher educations under Annex 1 or with a foreign higher education institution performing education activities in Hungary."

The legislator set January 1, 2018 as the date of implementation of these additional conditions – except for the preliminary agreement to be concluded with the central government of federal states – as defined in the Amending Act. In case of federal states, the parties had six months after the Amending Act entered into force (April 11, 2017) to conclude the required agreement. The foreign higher education institution that does not meet the conditions cannot matriculate students at the first grade of the program of the foreign higher education institution in Hungary after January 1, 2018 but the programs already

[29] Jakab-Lévay-Sólyom-Szente: *Amicus curiae.*… pages 6-7.

[30] Article 77 (4) of the NHE Act based on the modifications that entered into force on September 1, 2017.

commenced in Hungary on January 1, 2018 can be finished under unchanged conditions in 'end-of-series' system but not later than in the school year 2020/2021. [31]

Many complaints were raised regarding the amendment because of – in addition to several other criticisms – the very short preparation time period determined for the implementation of the act. The critical voices were not unfounded, which is supported by the opinion of the Venice Commission adopted at its session on October 6, 2017.[32] With regard to this (as well), the Prime Minister of Hungary submitted a proposal for amendment to modify the deadlines set forth by the NHE Act and the Amending Act. The Parliament approved the proposal.[33] Accordingly, the original deadlines were changed to January 1, 2019 and the school year 2020/2021 was changed to school year 2021/2022. The text "within six months after the entry into force" set forth for the preliminary agreement with respect to federal states is replaced by August 31, 2018. Based on the general reasoning, this was necessary because "the international agreement under the Amending Act was concluded in case of the McDaniel College Budapest only, the other international agreements are at most at negotiation stage; the Government […] finds it justified to extend the deadline for the obligations imposed, thereby facilitating compliance with the law." This seems to contradict that according to the text of the American-Hungarian draft agreement on supporting the operation of CEU available since September, the agreement shall be ratified until November 15,[34] thus the extension of the deadline seems rather unnecessary. In addition to that, the detailed justification of the proposal explains that „the changes introduced by the Amending Act create equal conditions for operation of foreign higher education institutions in Hungary", however the facts described above show that we cannot talk about equality with respect to higher education institutions established within the EEA and outside the EEA.

4. Summary: Forms of Operation of Foreign Higher Education Institutions Operating in Hungary under the Current Regulation

4.1. Operation of Foreign Higher Education Institutions possessing a Hungarian Operating Permit

Based on Article 76 and Article 77 (1)–(2) of the NHE Acta foreign higher education institution may provide a higher education program by permanently settling in Hungary. In this case, the foreign higher education institution may conclude a cooperation agreement with a Hungarian partner (which may be any Hungarian higher education institution, company or other organization) thus the program (education) takes place at the campus ensured by the partner but the higher education institution may also establish its campus for education independently.

[31] Article 115 (7) of the NHE Act.

[32] European Commission for Democracy through Law (Venice Commission) Hungary Opinion on Act XXV Of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education. Endorsed by the Venice Commission at its 111th Plenary Session (Venice, 6-7 October 2017).
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)022-e (17 October 2017).

[33] Act CXXVII of 2017 on modification of Act CCIV of 2011 on the national higher education and of Act XXV of 2017 on amendment of Act CCIV of 2011 on the national higher education

[34] CEU considers the Government's act suspicious. October 16, 2017
http://hvg.hu/itthon/20171016_Nagyon_gyanus_a_CEUnak_a_kormany_lepese (17 October 2017).

Over the course of such an educational program, the foreign law shall apply to the entrance exam, the performance of the educational program, the examination and to the requirements for issuing a diploma. The students enter into a legal relationship with the foreign higher education institution and get a „foreign" diploma after the successful completion of the program.

In this case an official authorization of operation issued by the Educational Authority is necessary in Hungary. The condition for the operating authorization to be issued is that the foreign institution qualifies as a state-recognized higher education institution in its country of origin and that the program and diploma to be performed by the foreign institution in Hungary qualify as a state-recognised higher education program and diploma.

The abovementioned requirements apply to all of the foreign higher education institutions holding an operating permit in Hungary on September 1, 2017. The legal requirements have become more stringent after April 2017 therefore a foreign higher education institution that intends to newly perform a program in the territory of Hungary, may start educational activities leading to a diploma, if it qualifies as a state-recognized higher education institution operating and actually performing higher education program in its country of origin and the program it intends to perform in the territory of Hungary and the diploma issued for the completion thereof qualify as a state-recognized higher education program. If the foreign higher education institution is a higher education institution having its registered seat outside the EEA, then other condition of operation in Hungary is that the contracting parties acknowledge the binding force of the international agreement on principal support for the operation in Hungary concluded by and between the Government of Hungary and the Government of the state where the registered seat of the foreign higher education institution is – in case of federal states, if the central government is not entitled to acknowledge the binding force of the international agreement, then a preliminary agreement concluded with the central government thereof is also necessary.

The foreign higher education institutions that held a valid operating authorization in Hungary on September 1, 2017 shall fulfil the above conditions until January 1, 2019. In case of federal states, the underlying preliminary agreement shall be concluded until August 31, 2018. The educational authority revokes the operating permit of those foreign higher education institutions that do not fulfil the conditions and after January 1, 2019, students cannot be matriculated to the first grade of the program of the foreign higher education institution in Hungary, however the programs already commenced on January 1, 2019 in Hungary may be completed under unchanged conditions in an 'end-of-series' system but not later than in the school year 2021/2022.

Issuance of the operating permit may be refused on the grounds of the expert opinion from a higher education accreditation organization in the country of origin or from other higher education accreditation organization complying with ESG,[35] if it can be concluded that the operating and program conditions applicable in the country of origin significantly differ from those applied in Hungary. The Hungarian operating permit for a foreign higher education institution having its registered seat outside the EEA can also be refused, if the level of education of the foreign diploma cannot be recognized in Hungary.

It is important to note that majority of the foreign higher education institutions currently holding an operating permit in Hungary obtained their operating permits under the Higher Education Act '05, which did not require that the diploma issued must lead to higher education level; it only required the possibility to recognize the level of education of the foreign diploma in Hungary. (The requirement of the program (diploma) awarding higher education level was added to the NHE Act only on September 1, 2015 as

[35] Standards and Guidelines in the European Higher Education Area, the European standard of higher education quality assurance.

well.) Furthermore, it shall be stated that the registration centre/educational authority did not have the possibility between January 1, 2009 and August 31, 2012 to obtain accreditation expert opinion with respect to the foreign program. Thus in case of those higher education institutions that obtained an operating permit during this time, not only the diploma leading to higher education level but the existence of accreditation may also be missing.

The educational authority shall review the operating permits at least every five years in order to confirm compliance with the conditions specified above.[36] If the foreign higher education institution or the program thereof does not comply with the current legal requirements, then the previous operating permit may be revoked.

4.2. Operation of a Foreign Higher Education Institution within the Framework of Cross-Border Services

This covers a form of higher education program performed on the basis of Article 77(3) of the NHE Act, the essence of which is that the foreign higher education institution performs activities for a short period and on ad hoc basis. This form of program also involves presence in Hungary but the freedom of provision of services within the EEA provides an opportunity for the foreign higher education institution to perform higher education activity without an authorization procedure, following a notification sent to the educational authority, if it performs it as cross-border service. [37] In addition to the notification obligation, the condition of the program is that the foreign higher education institution qualifies as a state-recognized higher education institution actually operating and performing higher education program in its country of origin and the program it intends to perform in the territory of Hungary and the diploma issued with respect to that qualify as state-recognized program awarding higher education level.

The problem with this type of program is that due to the school-based training nature of higher education it is difficult to accomplish actual higher education activity – especially in case of full-time programs – without settling down and without permanent infrastructure. [38]

4.3. The „Licence Program”

This is a form of higher education program based on Article 77 of the NHE Act, under which a Hungarian higher education institution performs the state-recognized program of a higher education institution recognized by a state which is a party to the Agreement on the European Economic Area[39] based on an agreement concluded with a Hungarian higher education institution in such a way that the foreign higher education institution issues a foreign diploma for completion of the program. Thus the

[36] Specified by: Article 67 of Act CXXXI of 2015. Effective from: 1 November 2015.

[37] Pursuant to point e) of Article 2 of Act LXXVI of 2009 on the general rules of commencement and performance of services, cross-border services mean: performance of service activities without settling, on a temporary or *ad hoc* basis.

[38] Notification of only one foreign higher education institution was acknowledged since the regulation entered into force, namely the notification of Fernuniversität in Hagen foreign higher education institution, which performs distance education only in its country of origin as well. (Source: Educational Authority).

[39] Prior to September 1, 2017, the programs of a higher education institution recognised by a state that is party to the Convention on the Organisation for Economic Cooperation and Development (OECD) could also be performed within the framework of licence program. See: point a) of Article 7 and Article 8 (2) of Act XXV of 2017 on modification of Act CCIV of 2011 on the national higher education.

foreign higher education institution is not settled in Hungary but it entrusts the Hungarian institution to organize the program, however the student has a student relationship with the foreign higher education institution. The disadvantage of the program is that it applies only to organization of a state-recognized bachelor or master program, or an equivalent two-cycle program, not qualifying as a joint program of a foreign higher education institution.

The rules of the country of origin shall apply to the establishment of foreign higher educations, the educational and research activities performed by them, the supervision of such activities, the operation of the institution, and the conditions for admission. Thanks to the licence program, the foreign higher eduction programs may be available in Hungary without an operating permit obtained by the foreign institution.

4.4. Joint Program in Cooperation with a Hungarian Higher Education Institution

This is a type of higher education program based on Article 78 (3) of the NHE Act, where the foreign higher education institution and the Hungarian higher education institution launch a joint program, and students study in more than one institution. (The rules of establishing a legal relationship are aligned with the laws of the country of origin and the student must have an active student status in Hungary by the last semester at the latest.) The diploma awarded is a joint diploma (joint degree) or multiple diploma (multiple degree).

The following cumulative conditions must be met to launch such a joint program:

1) the higher education institutions involved qualify as state-recognized higher education institutions in their country of origin,

2) the diploma issued qualifies as a higher education diploma pursuant to the national laws of the countries concerned,

3) both the Hungarian and the foreign higher education institutions are authorized to launch programs in a field of study or discipline that can be considered as equivalent to the field of study or discipline in which the joint program subject to the agreement is launched,

4) students collect at least thirty credits at the Hungarian higher education institution authorized to launch the program.

4.5. Dual Program in Cooperation with a Hungarian Higher Education Institution

Finally, this is a form of higher education program based on student mobility and activity, which, based onmutual credit recognition – with respect to at least partially matching professional content – provides the opportunity for students to obtain the diploma of a Hungarian and a foreign higher education institution usually in shorter time than completing the two programs successively. In this case, the student must be admitted to both the Hungarian and the foreign programs. Accordingly, the student is a student (with respect to the institution's own program) and guest student (with respect to the program of the partner higher education institution) at the same time at the Hungarian and foreign higher education institutions. In case of the Hungarian program, the condition for obtaining the diploma is that

the student obtained at least one third of the credits to be acquired at the Hungarian higher education institution. The student receives two diplomas after completing the programs: a Hungarian diploma with respect to the Hungarian program and the diploma of the foreign higher education institution with respect to the foreign program.

5. Conclusions

It is clear from my paper that the rules on foreign higher education institutions did not undergo major conceptual changes from 1993 until the modifications made this year. However, it can be clearly stated that the legal environment has become more stringent in recent years. The reason thereof may be – among others – that the mobility of students and lecturers and the continuous development of the European higher education area encourage the higher education institutions to keep up with this process, which can for example be realized through cross-border programs,. With respect to that, some countries needed to regulate the operation of higher education institutions „coming from abroad" in their national legal systems in more detail compared then previously.

In summary, I draw the following conclusions:

1. It is a significant problem relating to the operation of foreign higher education institutions in Hungary that the foreign higher education institution does not perform its higher education program within the appropriate legal framework. Namely, in fact it does not operate in Hungary, the foreign program or a major part thereof is executed by the Hungarian partner and in most cases the majority of the lecturers are lecturers of the Hungarian institution. In case of those programs, where the foreign higher education institution is not actually present in Hungary, their programs should be registered as licence program or dual program, provided the legal requirements thereof are met. In this case, the foreign higher education institution does not (or should not) have to obtain an operating permit in Hungary.

2. It is also a common deficiency with respect to the operation of foreign higher education institutions that the document issued by the foreign higher education institution is not a state-recognized diploma (degree). In case of the higher education system of some European countries (e.g. France, Austria), a higher education degree (qualification) is not only a matter of content but a formal issue as well. In these countries, only the programs of public (i.e. state-run) higher education institutions may provide a state-recognized higher education degree (qualification), the programs of private higher education institutions may not. Therefore, it may happen that the private higher education institution intending to settle in Hungary may not obtain operating permit or its existing previously obtained operating permit must be revoked due to the lack of state-recognized higher education degree (level). It is a similar phenomenon, when the foreign higher education institution does not qualify as state-recognized higher education institution in its country of origin. In this case, it is not possible to authorize its operation or to authorize it to issue diplomas in Hungary within the current legal framework.

The Security Council's Non-Determination of a Threat to the Peace as a Breach of International Law

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This paper is focused on characterizing the inaction of the Security Council as a failure in the enforcement of international law in the field of collective security. Moreover, such lack is also believed to be a breach of the rule of international law which is to lead to responsibility of the United Nations as an international organisation. Security Council's omission in determining the situation in Iraq in 2014 a threat to international peace and security is seen as contrary to the primary rule of Article 39 of the Charter of the United Nations, which sets an obligation, not merely a possibility or a privilege realisable within a wide margin of discretion. Examples of its past actions in comparable situations are given in order to demonstrate the developed practice that has become established practice of determining threats to the peace in cases of humanitarian crises. A short overview of the General Assembly's and the Secretary-General's (in)activities is given as well.

Key words: Security Council, Iraq, international law, breach, obligation, responsibility

1. Introduction

Chapter VII of the Charter of the United Nations (Charter) bestows upon the United Nations Security Council (UNSC) the power to enforce international law, in the form it finds appropriate, for the purpose of keeping international peace and security, the first purpose of creation of the United Nations (UN), as in Article 1(1) of the Charter. Not only empowered, the UNSC bears the primary responsibility for the maintenance of international peace and security. In the words of the Charter, it *shall* [emphasis added] determine the existence of any threat to the peace and shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security (Article 39).[1] Actions performed on this basis usually come under question mark when, to the rest of the world, it seems as if the UNSC had overstepped its authority, had executed it inappropriately or when it had failed to perform at all. The latter is the cause for examining UNSC's behaviour in this paper.

No wars have had more lasting impact on the UNSC's standing than those involving Iraq since 1980.[2] From the Operation Desert Storm, "the zenith of multilateral cooperation and the realization of many of the principles embodied in the UN Charter system", through its nadir, Operation Iraqi Freedom,[3] to

[1] "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Art. 41 and 42, to maintain or restore international peace and security."

[2] J. Cockayne & D. M. Malone, *The Security Council and the 1991 and 2003 Wars in Iraq*, in V. Lowe, A. Roberts, J. Welsh & D. Zaum (Eds.), The United Nations Security Council and War: The Evolution of Thought and Practice since 1945, Oxford University Press, 2008, p. 384.

[3] C. M. Glen, *The United Nations Charter System and the Iraq Wars*, Public Integrity, Vol. 11, No. 4, 2009, pp. 309-326, p. 310.

complete neglect of the post-American Iraq and failure in realisation of its main purpose – the maintenance of peace and security. In the end of 2000s and beginning of 2010s, with a peak in 2014, a situation developed in Iraq which was in many an element very similar to situations when UNSC had determined a threat to international peace and security in other countries, as well as in Iraq itself 24 years beforehand. And when it had acted upon such determinations. In 2014 UNSC, however, remained deaf and blind to severe humanitarian crisis, heavy intra-state conflict and pleas from both the international public and Iraq itself for help. Such inconsistency inevitably raises issues regarding the correct functioning of the UNSC, in particular with respect to this UN organ's *obligation* [emphasis added] to enforce international law within the sphere of keeping peace and security.

This paper will address the issue of determination of a threat to the peace and security as an obligation arising as such clearly and directly from the Charter, and as established practice in situations where humanitarian crisis element is a predominant factor of the threat. UNSC's inaction in the case of modern-day Iraq[4] will be portrayed as an example of enforcement failure and thus of a breach of the primary rule of international law, of the abovementioned Article 39, constituting internationally wrongful act according to Draft Articles on the Responsibility of International Organisations (DARIO).

2. The Situation in Iraq

After the tumultuous 1990s, which began with Iraq committing breach of peace[5] and the international community responding to it with the use of force, came the 2000s when that state went from the limelight of international law and community in 2003, suffering as a victim of an aggressive attack[6] which happened despite all the legal and political battles before the UNSC, to complete oblivion by the end of the decade culminating with the end of 18-year-long designation as a threat to international peace and security (end of 2008). Both during the occupation and afterwards,[7] however, the growing internal instability of Iraq mirrored in the long list of acts of violence, acts of terrorism, human casualties,[8] including UN staff, all occurring in the context of rising levels of general insecurity and inter-religious intolerance. In his 2013 July report to the UNSC, the UN Secretary-General could not but characterize the situation as "posing a major threat to stability and security in Iraq".

Unlike the 1990s, in 2012 and 2013 UNSC did not convene often with Iraq on its agenda: once a year to adopt a resolution extending mandate of UNAMI,[9] the other few (usually three) to host presentation of reports of the UN Secretary General's special representative in Iraq,[10] who did report on the grave

[4] The scope of the paper will not go beyond 2014, since the crisis became regional and the focus of attention of the international community was transferred mostly to Syria.

[5] SC Res. 660 (1990).

[6] In an interview to BBC, Kofi Annan, UN Secretary-General, when asked on the legality of invasion of Iraq, replied: "I have indicated it was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal." *Iraq war illegal, says Annan*, BBC News (16 September 2004), http://news.bbc.co.uk/2/hi/3661134.stm (10 April 2017).

[7] United States completed their withdrawal from Iraq on 18 December 2011.

[8] According to the Government of Iraq, total number of killed civilians in 2012 was 3102, and of injured 12146. According to UNAMI's data total number of killed civilians in 2012 was at least 3238, and of injured 10379. *Report on Human Rights in Iraq: July – December 2012*, 3, http://www.uniraq.org (10 April 2017).

[9] Assistance mission in Iraq established by the 2003 UN SC resolution 1500. SC Res. 1500 (2003).

[10] Mr Martin Kobler of Germany was replaced by Mr Nickolay Mladenov of Bulgaria in August 2013 as Special Representative for Iraq and Head of the United Nations Assistance Mission for Iraq (UNAMI).

situation and demanded the international community to take a stand against all forms of widespread and deliberate targeting of civilians.

In 2014 Iraq found itself in a state of non-international armed conflict,[11] with the Islamic State of Iraq and the Levant (ISIL) spreading terror at every turn.[12] By December 2014, ISIL was in control of large parts of the west and north of Iraq.[13] Acts have been committed that were yet to be officially confirmed as war crimes and crimes against humanity.[14] It seemed beyond doubt that ISIL's goals, as identified by Nickolay Mladenov, have truly been the destruction of Iraqi state and its replacement with a state of terror that is built on genocide, war crimes and crimes against humanity.[15] In his address to the UNSC, he characterised their activities as a threat to global peace and security, and consistently emphasized Iraq's inability to deal with this threat alone and the need for regional, interregional and international support.

The wider public, not to use the term 'international community',[16] has been aware of the grave situation of Iraq. The media have been present and deeply involved in the matter, and religious leaders around the world have condemned the violence ISIL had been committing and have invoked a help reaction.[17] But the UNSC simply would not react. On 10 January 2014, it held a meeting on the subject of Iraq resulting in a statement deploring the recent events in Iraq, condemning Al-Qaeda's and ISIL's attacks and expressing concern for the civilians, but going no further from this standard wording, except to condemn acts of terrorism as being criminal and unjustifiable.[18] After more than half a year,[19] on 30 July the UNSC met to adopt a resolution with regard to the situation in Iraq – only to prolong the UNAMI mandate.[20]

What followed only few days afterwards was the tragic Mount Sinjar 'episode', when the region fell under ISIL's control and tens of thousands of Yezidis found themselves in imminent danger for their lives.[21] It was then that the US President Barack Obama, at the request of the Iraqi government,

[11] Mr Mladenov presenting the report of the Secretary General on the activities of UNAMI before the SC at its 7314th meeting on 18 November 2014, S/PV.7314 7314th meeting, 18 November 2014, meeting record, p. 2.

[12] According to approximate, rounded numbers given by Mr Mladenov to the UNSC on 18 November 2014, from January until the end of October, at least 10,000 people were killed and almost 20,000 injured. According to casualty figures data at UNAMI website, the exact number (estimate) of civilian casualties from January till end of October 2014, not including Anbar governorate, was 8591 persons. The number of those injured, in the same time-period, again not including Anbar, was 13787. *ibid*.

[13] According to the report of Valerie Amos, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, on the situation in Iraq before the SC on 18 November 2014, the number of internally displaced persons exceeded two million and continued to rise. *ibid* p. 7.

[14] In the words of the UN High Commissioner for Human Rights: "it is possible that 3 out of the 5 offenses falling under the crime of genocide, as listed in the Genocide Convention and the Rome Statute, have been perpetrated by the (…) ISIL". *ibid* p. 5.

[15] As put by Mr. Mladenov, ibid p. 2.

[16] The term dealt with in C. Tomuschat, *Die Internationale Gemeinschaft*, Archiv des Völkerrechts 33, 1995, pp. 1-20, pp. 1-6.

[17] Letter of the Holy Father to the Secretary General of the United Nations Organization concerning the situation in Northern Iraq, The Vatican, 9 August 2014, http://w2.vatican.va/content/francesco/en/letters/2014/documents/papa-francesco_20140809_lettera-ban-ki-moon-iraq.html (10 April 2017).

[18] S/PRST/2014/1, Statement by the President of the SC, 10 January 2014.

[19] A period in which more than 5596 civilian lives had been lost and more than 9495 civilians had been injured. All data exclude Anbar governorate. http://www.uniraq.org/ (27 April 2016).

[20] SC Res. 2169 (2014).

[21] In justified fear for their lives, tens of thousands of Yezidis fled their homes and climbed the barren Mount Sinjar trying to escape the ISIL. They remained there exposed to the heat and the sun without food or water, trapped, as the ISIL covered the

authorised military operations to help them, as was subsequently confirmed in a letter by Iraqi Minister for Foreign Affairs addressed to the President of the UNSC.[22] In the absence of UN-organised and authorised action, USA's military activity again took place on the territory of Iraq. This was another intervention, which, in light of all interventions outside UN activity under Chapter VII, could be considered questionable and against international law and the basic rule on refraining from the threat or use of force against the territorial integrity or political independence of any state (Article 2(4) of the Charter). This intervention, however, was the result of the agreement[23] of the intervening state and the state in which intervention took place, thereby underscoring the political independence of the latter. As for territorial integrity, force was used 'for' it not 'against' it. This was an example of one of rare types of interventions that could not be categorised as 'illegal', as it was an intervention upon request, legitimised through the consent of the Iraqi government.[24] The International Court of Justice termed such type of intervention 'allowable' in the *Nicaragua Case*.[25]

The UNSC met again on 19 September, when Mr Mladenov emphasised Iraq's need for the support ('collective measures') of the international community, calling the situation a "threat to the region and to international security".[26] All participants showed unanimity in their expressions of outrage at ISIL's activities, with only some emphasising the need for further collective action by the UNSC.[27] The meeting resulted in a statement by the President welcoming the newly formed Iraqi government and invoking national reconciliation within Iraq, as well as international support for that aim.[28] As for the gravest matter of all — the UNSC strongly condemned terrorist attacks and expressed its deep outrage for all the innocent lives lost, calling upon the Government of Iraq and the international community to work towards ensuring that all perpetrators be brought to justice.

The UNSC shifted the burden of dealing with massacres, genocidal acts, and loss of more than a third of its national territory to the government of a state so differentiated in ethnic, religious and political composition that the term 'unstable' was an understatement for its description. In 2014, as the terrorists were beheading people in public, raping and enslaving, the UNSC decided that it was time for Iraq to practice its sovereignty. Experience is indeed the best teacher. Thus the comments of the representative of Rwanda echo a simple but undoubtable truth: 'It is unfortunate that every time the UNSC defaults on

territory of the foot of the mountain, threatening them with death. Their tragic outcome was imminent – whether by forces of nature or man.

[22] S/2014/691, Letter dated 20 September 2014 from Permanent Representative of Iraq to the United Nations addressed to the President of the SC.

[23] "Iraq is grateful for the military assistance it is receiving, including the assistance provided by the United States of America in response to Iraq's specific requests. Iraq and the United States have entered into a Strategic Framework Agreement, and that Agreement will help to make such assistance more effective

and enable us to make great advances in our war against ISIL." Ibid.

[24] „…there seemed to be a tacit acceptance among the UN membership that interventions based simply on consent and without a Council authorising resolution were admissible under the Charter." Security Council Report Special Research Report Security Council Action Under Chapter VII: Myths and Realities, 2008 No. 1, 23 June 2008. www.securitycouncilreport.org (21 October 2017).

[25] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 126, para. 246.

[26] S/PV.7271 7271st meeting, 19 September 2014, meeting record, p. 2.

[27] The Representative of Chile invoked "a forceful but legitimate response from the international community" – a response that "should come from this body [the UNSC], whose task it is to maintain international peace and security, in accordance with the Charter of our Organization and international law.", Ibid, p. 17.

[28] S/PRST/2014/20, Statement by the President of the SC, 19 September 2014.

its inherent responsibility, that of the maintenance of international peace and security, the human cost is just unbearable.'[29]

Did the UNSC default in Iraq in 2014?[30]

3. UNSC's Action under Article 39 of the Charter

Institutionalised and centralised enforcement[31] of international law, within the meaning of Abi-Saab's 'exogenous enforcement',[32] can first and foremost be attributable to the UN, and more specifically, to the UNSC within the domain of protection of international peace and security. Here, a true collective enforcement mechanism is in function,[33] one regulated in Chapter VII of the Charter and triggered by following the rule laid down in Article 39 – the "single most important provision of the Charter".[34] Which should, however, not be viewed too isolated from the rest of the Charter, in particular not without having in mind the "purpose of all purposes",[35] the maintenance of international peace and security, and then Article 24 – the first explicit duty setter upon UNSC (in Russian version of the text it is UNSC's *obligations* that are in question [emphasis added])[36]. Observing the wording of Article 39, both its subject and its object is the UNSC itself. UNSC is the doer, the executor, the active element of this norm, but also the addressee of it. It is to enforce the Article upon others by making a legal determination[37]

[29] S/PV.7271, p. 8.

[30] In line with the temporal scope of this paper (see note 4), UNSC's activity beyond 2014 is not analysed. However, for the sake of rounded information on the case, let it be mentioned that in 2015 UNSC adopted one resolution on Iraq (S/RES/2233(2015) extending again UNAMI's mandate, and noting, interestingly, "that the presence of ISIL on Iraq's sovereign territory is a major threat to Iraq's future, underscoring that the only way to address this threat is for all Iraqis to work together…". No longer, it seems, was that threat seen to anything else, but the poor State's future. In 2016, the same UNAMI-mandate-extension resolution was adopted (S/RES/2299(2016) with an interesting detail – "Welcoming the political, military and financial assistance to the Government of Iraq from Member States, and encouraging such assistance to continue and expand." – a detail, which, had it been combined with recognition of the situation as a threat to international peace and security and authorisation of the Member States to use force, could have easily been ex-post approval of military activities undertaken by the USA and other States.

[31] Enforcement of law can be described as securing the normative integrity of a system by executing its normative prescriptions or rather by their internalisation or integration into the behaviour of the subjects of the law in question and system's reaction to behaviour contrary to that prescribed or to violations of its rules with repressive means in order to compel the offender to comply with the rules again. This 'definition' is made from the combination of elements used by Abi-Saab to describe '*mise en oeuvre*' of international law and his description of '*l'execution forcée*'. G. M. Abi-Saab, *De la sanction en droit international: Essai de clarification*, in J. Makarczyk (Ed.), Theory of International Law at the Treshhold of the 21st Century: Essays in Honour of Krzysztof Skubiszzewski, Kluwer Law International, The Hague, 1996, pp. 63-66.

[32] According to Abi-Saab, international law can be enforced endogenously (internally), by the addressee of the rule himself, and exogenously (externally), by the community. Ibid pp. 63-64.

[33] "In order to reach the primordial goal of peace maintenance, States were ready to submit to the central organ in a manner unprecedented in the international order." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.), *The Charter of the United Nations: A Commentary*, 3rd edition, 2012, p. 1240.

[34] *ibid* p.1273.

"[I]f any single provision of the Charter has more substance than the others, it is surely this one sentence, in which are concentrated the most important powers of the Security Council." J. Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Northwestern Journal of International Human Rights 24, 2008, p. 36, http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1065&context=njihr (10 April 2017).

[35] B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 109.

[36] See note 65.

[37] "The determination that there exists a threat to the peace is a legal determination, because it constitutes a qualification (or characterization) of a factual situation, which then draws (albeit in the discretion of the Council) certain legal consequences, namely sanctions or other enforcement action under Art. 41 or 42."

that someone threatens the peace[38] or has breached the peace or committed an act of aggression, thus opening its way towards enforcement of peace, and automatically, by directing the UNSC's activity towards another subject, the norm *i.e.* the law[39] is enforced as well.[40]

The norm of Article 39 contains only disposition, lacking both hypothesis and sanction, an imperfection most unfortunate, since it is exactly this norm that provides the UNSC with the basis for adopting decisions binding on all other Member States.[41] The absence of clearly prescribed conditions for determining those three situations has led to a belief that the UNSC is under no obligation to make them. If the UNSC decided to do so, it would be purely the result of its discretionary will to act,[42] it is claimed, and only then would the UNSC be under obligation[43] to take any necessary provisional measures and focus on a long-term solution to the situation by making recommendations or deciding which more serious measures to take.[44] The view expressed in this paper is the opposite – determining, or rather engaging in a discussion in order to determine,[45] the existence of a threat to the peace, breach of the peace, or act of aggression is indeed seen as an obligation, one set clearly by the Charter, itself a source of international law.[46] If the Charter's main purpose is maintaining peace and security, not only a purpose but an obligation under it,[47] and the UNSC was entrusted with principal responsibility and corresponding duties to achieve the realisation of that purpose, how was it ever devised as a serious instrument for insuring peace and security in a post-world-war world if the UNSC was conceived as never really having to determine a threat to the peace?

Aside from 'general obligation' to act, there is also an obligation, stemming from the established practice of the UNSC, to act in situations involving severe humanitarian crises.

A. Tzanakopoulos, *Disobeying the Security Council. Countermeasures against Wrongful Sanctions*, Oxford University Press, 2011, p. 62.

[38] "The determination by the SC of a threat to the peace might become relevant as a preliminary finding that certain norms of international law, in particular those creating *erga omnes* obligations have been breached." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 1267.

[39] On the law enforcement and peace enforcement within Chapter VII see H. Nasu, *Chapter VII Powers and the Rule of Law: The Jurisdictional Limits*, Australian Year Book of International Law, Vol 26, pp. 87-117, p. 92.

[40] Not quite identical to this view, but Orakhelashvili also recognizes the different roles of enforcing both international peace and international law by the UNSC, since, in the end "…the concept of peace is firmly premised on the observance of fundamental principles of international law, and that compliance with international law is a condition for peace.", A. Orakhelashvili, *Collective Security*, Oxford University Press, 2011, pp. 18-19.

[41] Art. 24(1) of the Charter: "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."; Art. 25 of the Charter: "The Members of the United Nations agree to accept and carry out the decisions of the SC in accordance with the present Charter."

[42] But, as A. Peters explains, discretion is *per definitionem* subject to some outer limits. And, in a way, it is the opposite of arbitrariness. A. Peters, *The Security Council's Responsibility to Protect*, International Organizations Law Review 8, 2011, pp. 15-54, p. 31.

[43] According to Kelsen, the UNSC is not even then under obligation, but only has authority to take enforcement action. H. Kelsen, *The Law of the United Nations, A Critical Analysis of Its Fundamental Problems*, Stevens & Sons Limited, London, 1950, pp. 264-265.

[44] Measures not involving the use of armed force (Art. 41 of the Charter) or should they be inadequate, "it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Art. 42 of the Charter).

[45] Determination itself is a result of the vote, and as such could not be imposed as an obligation.

[46] M. N. Shaw, *International law*, Cambridge University Press, 2014, p. 66.

[47] See note 58.

3.1. Article 39 of the Charter – The UNSC's Obligation or Prerogative?

The central question of this paper is whether the UNSC was obliged to act and if, by its inaction, it committed a breach of international law, as set out in Article 39 of the Charter, read in conjunction with Articles 1(1) and 24(1), making the UN thus responsible for international wrongful act under the DARIO. UNSC, political and wilful as it might be, is not unbound by law.[48] Such was also the reasoning of the ICTY in Prosecutor v Dusko Tadic, which found that neither the text nor the spirit of the Charter conceives of the UNSC as *legibus solutus*.[49] But, how is it bound?

Nature of Article 39 is seen by many as not creating an obligation, even though the future permanent members of UNSC called it themselves exactly that in their statement on the "Yalta formula" on voting: „In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the *obligation* to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred."[emphasis added].[50] In the Commentary of the Charter, Simma and others argue that it stems clearly from the wording of Article 39 that the UNSC was meant to enjoy broad discretion also in deciding whether to act at all in a given situation.[51] They believe that both the history of the Charter and subsequent State practice show that the UNSC is under no obligation to make a determination under Article 39, even if it considers that a threat to or breach of the peace exists. Its "relatively assertive wording (shall determine)", they find, empowers but does not oblige the UNSC to act. They admit, however, as does the ICTY,[52] that the UNSC is not unlimited in its discretion. Another *ad hoc* tribunal, the International Criminal Tribunal for Rwanda, allows the UNSC greater freedom as it considers their assessments of a threat to international peace and security non-justiciable.[53] In her article on the UNSC's duty to decide, Spain establishes that the UNSC "has neither a duty to decide nor any other commitment mechanism that clarify its decision-making responsibilities. Currently, neither the Charter nor the UNSC's own procedural rules address the question of whether or when it must pass decisions. It enjoys wide discretion to do as it pleases. It has no obligation to take up matters in a consistent way or based

[48] „The Council is not, however, a free agent acting according to a private agenda outside the scope of international law able to pick and choose issues and decide on measures without due respect to the rule of law." N. Elaraby, *Some Reflections on The Role of the Security Council and the Prohibition of the Use of Force in International Relations: Article 2(4) Revisited in Light of Recent Developments*, in Verhandeln für den Frieden Negotiating for Peace Liber Amicorum Tono Eitel, Springer, 2003, pp. 41-67, p. 56.

[49] ICTY, Appeals Chamber, *Prosecutor v Dusko Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, 1995, para. 24. and 28.

[50] Statement at San Francisco by the delegations of the four Sponsoring Governments (China, the UK, the USA and the USSR) on "The Yalta Formula" on Voting in the Security Council, UNCIO, 1945, Vol. XI, pp. 710-14, 713.

[51] B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, pp. 1275-1276.

[52] "The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)." *Prosecutor v Dusko Tadic* para. 28.

[53] "Although bound by the provisions of the Chapter VII of the UN Charter and in particular Art. 39 of the Charter, the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber." ICTR, Trial Chamber II, *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defense Motion on jurisdiction of 18 June 1997, (1997), para. 20.

on defined criteria".[54] Ronzitti believes that as a political organ, it would be difficult to conceive of the UNSC's inaction as constituting a violation of international law, or of the Charter, since it has discretionary powers in connection with the determination of an act of aggression, a threat to peace or a breach of peace.[55] In their claims of not finding UNSC under obligation, the abovementioned and others rely heavily on Hans Kelsen, according to whose firm belief UNSC could be considered to be only under moral obligation, but not legal, due to the absence of the sanction in the norm.[56]

It should never be forgotten that the Charter is a treaty, and treaties oblige. They are concluded with certain goals to be achieved, and achievement of those goals is an obligation of the parties, whether to realise them themselves or via another agent designated or created for that purpose. Charter was signed to achieve peace and security in the world. Its parties, the states, were obliged to refrain from the threat or use of force, and the newly created organ, the UNSC, was assigned with the duty of dealing with the situations of endangered peace and security. The rights and duties of the UN must depend upon its purposes and functions as specified or implied in the Charter and developed in practice.[57] To claim that realisation of the main purpose of treaty is not an obligation for the parties to that treaty and agents established by it for realisation of that purpose would go against the reason of a treaty's origin and existence.[58] Orakhelashvili so defends the position of Article 39 clearly posing an obligation, claiming that "the structural inter-connection between the pertinent provisions of the Charter compels us to view the Article 39 determination power as part of the imperative mandate of the Council, which does not admit selectivity in confronting threats."[59] He goes on invoking Resolution 294(1971) where the UNSC itself admits: "*Conscious* of its duty to take effective collective measures for the prevention and removal of threats to international peace and security and for the suppression of acts of aggression,".[60] Tomuschat shares the same line of thought when, speaking of UNSC's Somalia 1992 (see *infra* 2.) reasoning, he says that the UNSC *must* deal with the situation even if there were no cross-border effect.[61] [emphasis

[54] Spain finds this deficit a threat to the SC's legitimacy, and argues that the SC should have a clear duty to decide, which would require it to take up decisions about whether or not it will take action in crises under its jurisdiction. A. Spain, *The U.N. Security Council's Duty to Decide*, Harvard National Security Journal, Vol. 4, 2013, pp. 320-384, pp. 320-325, http://harvardnsj.org/wp-content/uploads/2013/05/Vol.4-Spain_Final-Revised3.pdf (10 April 2017).

The same danger to SC's legitimacy is perceived by Roscini who believes that the "selective and opportunistic approach of the Security Council with regard to, inter alia, the enforcement of international humanitarian law could in the end affect its legitimacy: even though '[n]o system of collective security can be realistically expected to respond to every transgression of the prevailing order or effectively respond to every breach of the public peace[,] … [it must nonetheless] show a reasonable degree of coherence, consistency and effectiveness." M. Roscini, *The United Nations Security Council and the Enforcement of International Humanitarian Law*, Israel Law Review, 43(2) 2010, pp. 330-359, p. 353.

[55] N. Ronzitti, *The Current Status of the Principle Prohibiting the use of force and legal justifications of the use of force*, paper presented at the international conference on 'Redefining Sovereignty, The Use of Force after the End of the Cold War: New Options, Lawful and Legitimate?' Frankfurt, 2002, https://www.ciaonet.org/catalog/12362 (10 April 2017).

[56] Kelsen 1950, p. 264.

[57] ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C. J. Reports 1949, p. 174, p. 180.

[58] Though, according to Simma and others, it is a matter of controversy whether the purposes of the UN as contained in Art. (1) of the Charter are meant to be legally binding. It is the place of the purposes in the Charter, as they say, that would qualify them as legally binding, whereas their wording is more appropriate for political objectives. B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 108.

[59] Orakhelashvili 2011, p. 151.

[60] SC Res. 294 (1971).

[61] „Damit steht nunmehr fest, daß auch ein allgemeiner Zustand der Anarchie und Gesetzlosigkeit in einem Lande, selbst wenn davon keine grenzüberschreitenden Auswirkungen ausgehen, vom Sicherheitsrat aufgegriffen werden kann, ja im Grunde muß, denn eine gegebene Zuständigkeit kann niemals nach Lust und Laune oder Willkür ausgeübt werden, sondern steht vor allem unter dem Gebot der Gleichheit." Tomuschat 1995, pp. 12-13.

added] And Judge Elaraby finds the UNSC *duty-bound* to adopt measures to maintain international peace and security without freedom of picking and choosing issues to deal with.[62] [emphasis added] Since the same claim in this paper is based on the word of the Charter, analysis of its relevant parts is the most logical way forward.

3.1.1. Wording of the Charter[63]

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[64] And words used in Article 24(1) of the Charter[65] to describe the UNSC's role within the collective security system are: '*primary responsibility*' in correlation with '*duty*'[66] [emphasis added]. When read in conjunction with Article 39 of the Charter, which uses an ultimate modal verb expressing a command – 'shall' ("The Security Council shall determine the existence of any threat to the peace") – it becomes very difficult not to notice the element of obligation.[67] As Kelsen himself puts it, the *demanding* element of the rule of law is expressed by the statement that one 'shall' observe the conduct prescribed by the law.[68]

'Shall' is indeed an ambiguous word in English legal drafting. Even though under strict standards of drafting only its mandatory sense of 'has a duty to' is acceptable,[69] in reality 'shall' can bear five to eight senses even in a single document, expressing permission, conditional duty, entitlement, false or real future tense.[70] However, in a construction 'subject + shall + action by the subject (in a clear active mode)' the meaning is taken to convey an obligation, a duty on the subject of the sentence, being thus the most traditional and correct use of the term 'shall'.[71] When 'shall' is used in that construction

[62] Elaraby 2003, pp. 56, 63.

[63] The emphasis of this analysis is placed on the English version, since the drafting did occur in that (and French) language. According to the Charter itself, though, 5 language versions (Chinese, French, Russian, English and Spanish) are equally authentic.

[64] Identical Art. 31(1) in both Vienna Convention on the Law of the Treaties and Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations

[65] In French version („Afin d'assurer l'action rapide et efficace de l'Organisation, ses Membres confèrent au Conseil de sécurité la responsabilité principale du maintien de la paix et de la sécurité internationales et reconnaissent qu'en s'acquittant des devoirs que lui impose cette responsabilité le Conseil de sécurité agit en leur nom.") those words are „la responsabilité principale" and „devoirs". In Russian version („Для обеспечения быстрых и эффективных действий Организации Объединенных Наций ее Члены возлагают на Совет Безопасности главную ответственность за поддержание международного мира и безопасности и соглашаются в том, что при исполнении его обязанностей, вытекающих из этой ответственности, Совет Безопасности действует от их имени.") the corresponding words are „главная ответственность" (closer to French „la responsabilité principale" than to English „primary responsibility") and, quite a strong one, „обязанность" which translates as „duty" but also „obligation".

[66] Kelsen finds the word 'duty' in Art. 24 not correct due to the absence of the sanction in the norm. It is interesting, though, how in speaking of GA's responsibilities for the maintenance of international peace and security, Kelsen himself uses the word 'duty' to emphasise the difference between that and other organ's competences: „…, the responsibility of other organs certainly does not imply the duty or competence of 'prompt and effective action by the United Nations'." H. Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, The American Journal of International Law, Vol. 42, No 4, October, 1948, pp. 783-796, p. 786.

[67] Both French and Russian versions use only a present tense of the main verb („Le Conseil de sécurité constate l'existence d'une menace contre la paix,…", „Совет Безопасности определяет существование любой угрозы миру,…").

[68] H. Kelsen, *General Theory of Law and State*, Harvard University Press, 1949, p. 35.

[69] B. A Garner (Ed.), *Black's Law Dictionary*, Tenth Edition, p. 1585.

[70] Bryan A Garner, *Garner's Dictionary of Legal Usage*, Oxford University Press, Third Edition, p. 952.

[71] *ibid.*

throughout the Charter,[72] in most cases there is no dispute whatsoever on the obligatory nature of the rule in question (ex: "All Members shall refrain in their international relations from the threat or use of force",[73] "The General Assembly shall consider and approve the budget of the Organization."[74] *etc.*). And identical words in the Charter should be presumed to carry the same meaning.[75] If all those '*shalls*' were to be put under question mark, like the 'shall' of Article 39,[76] there would happen a relativisation so vast that the meaning of the entire Charter, and beyond, the nature of international law itself would again need to be defended. Judge Weeramantry in his dissenting opinion to Provisional Measures in Lockerbie case sees clearly an obligatory nature of Article 24(2)'s 'shall' calling the duty there expressed "imperative".[77] The linguistic constructions of Articles 24(2) and 39 are the same. It also needs to be emphasised that the Charter does not use another word for expressing obligations, whereas it does use 'may' where it wants to read 'is permitted to' or 'has discretion to'. It is in that sense interesting to notice the wording of Article 99, dealing with the matter of same scope but referring to different organ: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." Here, an evident discretion is in question, not an obligation. According to the ordinary meaning of the words used, there is no doubt that the drafters wanted to oblige the UNSC to action, and, as seen in the Yalta statement, the future UNSC was aware of it and accepted it. The lack of sanction in that norm does not make that duty[78] any less mandatory, than, for example, the duty for all states to refrain from the use of force. As for the object and the purpose, which are also to be taken into account when interpreting a treaty, in the words of Judge Sir Percy Spender "The purpose pervading the whole of the Charter and dominating it is that of maintaining international peace and security and to that end the taking of effective collective measures for the prevention and removal of threats to peace. Interpretation of the Charter should be directed to giving effect to that purpose, not to frustrate it."[79]

3.1.2. UNSC Practice in Determining Threats to International Peace and Security

As mentioned above, the rule of Article 39 of the Charter lacks a hypothesis where all the conditions for the conduct demanded in disposition would be clearly enumerated. After 70 years of practice, though, it would be unrealistic to pretend that all the cases in which this was invoked or acted upon do not, when

[72] It should be noted that according to the 'American rule' in legal drafting, 'shall' means only 'has a duty to' and the Charter was drafted on the territory of the United States of America.

[73] Art. 2(4) of the Charter.

[74] Art. 17(1) of the Charter.

[75] Absent specific indications to the contrary. B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 771.

[76] One cannot disagree with Kelsen interrelating impossibility of obligation with voting duty. It is indeed difficult to see how determining the threat to peace and security can come to be realized if the vote results on the matter turn negative. Kelsen 1950, 265. It does not, however, minimize the obligation of the UNSC, asserted in this paper, to only tackle the matter and take on the voting, the results be what they may.

[77] ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3., p. 62.

[78] For the purpose of demystifying the word 'duty', used by some for 'softening' the meaning of the UNSC's tasks under the Charter, it should be mentioned that in English language, „duty" is defined as „a moral or legal obligation". Oxford Dictionaries, https://en.oxforddictionaries.com/definition/duty (24 March 2018), Collins English Dictionary, https://www.collinsdictionary.com/dictionary/english/duty (24 March 2018), Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/duty (24 March 2018).

[79] ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, Separate Opinion of Judge Sir Percy Spender, 186.

taken together, present a developed hypothesis within the meaning of customary law. Though this hypothesis may not rise to the level of general international law, it surely exists as a special UN customary law norm,[80] as, for example, in the case of non-realised idea on UN corps from Article 43[81] of the Charter and its replacement in practice with Member States' contingents.[82] Such practice of the UNSC's authorising the use of force by coalitions led by an individual States clearly differs from the main Charter vision of military action being under UN direction and control[83] but it is now widely accepted and beyond questioning, at least as a concept, individual cases aside. Also the matter of interpretation of the term 'concurring votes' in Article 27(3) of the Charter as including abstentions was based on the practice of the UNSC and general acceptance of member States, and concluded to form 'general practice of that Organization'.[84] If the Charter is considered 'living',[85] it would be unrealistic to expect one of its parts to remain immune to such changes.

From the following examples a regularity of reacting in cases similar to Iraq will try to be determined, in order to identify the existence of not only consistent subsequent practice, a means recognised for the interpretation of constituent instrument of international organisations,[86] but of established practice too, a quasi-customary rule in itself and part of the rules of the organisation.[87] The *travaux preparatoires* for Article 39 of the Charter reflect the drafters' intention to allow the UNSC to take enforcement action in a broad range of cases and not to subject it to severe restrictions in its decision when to act.[88] In particular, the category of threat to international peace and security, as the most important concept in Article 39,[89] has evolved rapidly as the perception of what meets this threshold has broadened.[90]

[80] "UN resolutions can directly create special, usually UN, law, but can only have indirect effects on general international law by acting on one of the constitutive elements of customary law." M. D. Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, European Journal of International Law , Vol. 16, No. 5, 2005, pp. 879 - 906, p. 905.

[81] "… this practice should be justified by affirming that it has given origin to a custom, within the Charter, or by reference to Article 48 of the Charter, which states that action required to carry out SC decisions shall be taken by all UN members or some of them, as the SC may determine." Ronzitti 2002.

[82] As Shaw notices in the case of Korea in 1950: "This improvised operation clearly revealed the deficiencies in the United Nations system of maintaining the peace since the Charter collective security system as originally envisaged could not operate, but it also demonstrated that the system could be reinterpreted so as to function.", Shaw 2014, p. 910.

[83] V. Lowe, A. Roberts, J. Welsh & D. Zaum (Eds.), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, 2008, p. 20.

[84] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, 22.

[85] D. Lapaš, *Pravo međunarodnih organizacija*, Narodne novine, Zagreb, 2008, p. 139.

[86] Conclusion 12: „1. Articles 31 and 32 apply to a treaty which is the constituent instrument o fan international organisation. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties." 'Third report on subsequent agreements and subsequent practice in relation in the interpretation of treaties' by Georg Nolte, Special Rapporteur, International Law Commission, A/CN.4/683, 213-214.

[87] C. Peters, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?*, Goettingen Journal of International Law 3 (2011) 2, pp. 617-642, doi: 10.3249/1868-1581-3-2-peters, pp. 618-620.

[88] B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 1274.

[89] *ibid* p. 1278.

[90] Shaw 2014, pp. 898-899. "…it established a common practice to take action with respect not only to interstate but also to internal conflicts, which had previously seemed problematic in light of the wording of Art. 39." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, pp. 1241-1242. In the wording of The International Criminal Tribunal for the former Yugoslavia: "(…) there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts". *Prosecutor v Dusko Tadic*, para. 30.

Number of determinations of threat to peace and security under Article 39 in the period from 1946 to 1988 was almost negligible,[91] but even those few cases, actions on Rhodesia and South Africa, can be seen as first small steps towards the use of that power for achieving human rights objectives.[92] There were some interesting discussions, however, conducted in those early days on the nature of Article 39 and action under it: on the relation with Article 2(7) and the action of UNSC being exempted from the principle of non-intervention in matters of domestic jurisdiction, on the difference between 'potential threat' and 'real threat' and therewith related fear of too narrow an interpretation of Article 39,[93] on the lack of adjective 'international' before the noun 'peace' in the first part of Article 39 and the meaning of it.[94] There were even proposals to have criteria established for determining threats to peace, but were rejected as unacceptable attempts to give definition of 'threat to peace'.[95]

1989 marks a beginning of a new and fertile period of UNSC's activity in this domain, both qualitatively and quantitatively. One of the first examples of this fruitful and, as afterwards generally seen, successful activity was Iraq itself. In 1991, after already determined breach of peace, through Resolution 688 (1991), the UNSC condemned the repression of the Iraqi civilian population in many parts of Iraq, "the consequences of which threaten international peace and security in the region".[96] This Resolution is often cited as a milestone in the UNSC's practice with respect to humanitarian crises, given its interpretation of what constituted a threat to international stability.[97] It is seen as a significant step in the development of the proposition that the Council could and should use its Chapter VII authority to deal with internal policies that threatened a humanitarian disaster where that disaster presented some plausible threat to the peace of the region.[98]

Staying on the same path, in 1991 UNSC was deeply concerned by the fighting in Yugoslavia, which had been causing heavy loss of human life and material damage and thought that the continuation of that situation constituted a threat to international peace and security,[99] only to confirm in the following year and determine explicitly that the situation in Bosnia and Herzegovina and other parts of the former Socialist Federative Republic of Yugoslavia indeed constituted a threat to international peace and

And not only those. Throughout the years, there have been very different situations proclaimed a threat to peace and security: non-extraditing own citizens (Libya and the Lockerbie case) and non-prosecuting them (Sudan and assassination attempt on Egyptian President), presence of a former president in a region (former president Taylor in relation to Liberia and Sierra Leone) etc.

[91] In relation to the Palestine question, Southern Rhodesia, South Africa. Repertoire of the Practice of the Security Council, http://www.un.org/en/sc/repertoire/actions.shtml (8 October 2017).

[92] M. J. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War*, United States Institute of Peace, 2006, p. 46.

[93] Related to discussion on the Spanish question and the non-determining the Franco regime a threat to peace. Repertoire of the Practice of the Security Council.

[94] Unlike the representative of the United Kingdom who thought of it as a consequence of an oversight, the representative of the United States claimed the word 'international' was in fact replaced by the word 'any' to emphasise additionally the scope of situations to come under UNSC's review. *ibid*.

[95] This was proposed by the United Kingdom while discussing the Greek frontier incidents question. France replied the following: „SC would thus be committing itself in advance, if such situation would occur, it would have to consider it threat to peace.".*ibid*.

[96] SC Res. 688 (1991).

[97] J. M. Welsh, *The Security Council and Humanitarian Intervention*, in V. Lowe, A. Roberts, J. Welsh & D. Zaum (Eds.), The United Nations Security Council and War: The Evolution of Thought and Practice since 1945, Oxford University Press, 2008, p. 538.

[98] Matheson 2006, p. 51.

[99] SC Res. 713 (1991).

security.[100] Next came the large-scale humanitarian crisis situation in Somalia in 1992 that was determined to be a threat to peace with the explanation that "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security".[101] The UNSC unanimously adopted resolution 794(1992) where, acting under Chapter VII, it authorised the use of all necessary means to establish a secure environment for humanitarian relief operations. This was one of the first cases where the use of force was authorised for a solely humanitarian purpose[102] and the UNSC was, alongside with voices expressing concern about it,[103] very aware of its precedent-setting nature,[104] and of beginning of new ways of adapting to new challenges.[105] International community simply could not tolerate a humanitarian disaster of the scale that was looming, and the UNSC acted.[106] Noteworthy example is also the case of Haiti in 1993, where the UNSC expressed concerns about the incidence of humanitarian crisis, including mass displacement of population, becoming or aggravating threats to international peace and security and determined that, in those 'unique and exceptional circumstances' the continuation of that situation threatened international peace and security in the region.[107] A year later, in 1994, the UNSC, deeply disturbed by the "magnitude of the human suffering", first expressed concern that the continuation of the situation in Rwanda constituted a threat to peace and security in the region[108] and later determined the existence of that threat due to "the magnitude of the humanitarian crisis"[109] authorising the use of force ('all necessary means') in order to achieve humanitarian objectives of contributing to the security and protection of displaced persons, refugees and civilians at risk, and providing security and support for the distribution of relief supplies. UNSC's reasoning followed the same line of thought in the case of Great Lakes Region, and in particular, eastern Zaire, where again, concerned by the humanitarian situation and the large scale movement of refugees and internally displaced persons, it determined the existence of a threat to peace and security in the region.[110]

[100] SC Res. 757 (1992). It is interesting to see that the UNSC had continued to determine situation in Bosnia and Herzegovina a threat to international peace and security until the present day, two decades after the end of war hostilities, and while recognizing the security environment to be calm and stable.

[101] SC Res. 794 (1992).

[102] Welsh 2008, p. 539.

[103] S/PV.3145, Provisional verbatim record of the three thousand one hundred and forty-fifth meeting, 3 December 1992, representative of China, p. 17, the President, p. 51.

[104] „…any unique situation and the unique solution adopted create of necessity a precedent against which the future, similar situations will be measured. Since the situation in Somalia is the first of its kind to be addressed by the Council, it is essential that it be handled correctly." *ibid*, representative of Zimbabwe, p. 7.

[105] *ibid*, representative of France, p. 30, representative of the United States of America, p. 36-38, representative of Hungary, p. 47-48.

[106] „Unlike the previous situation in northern Iraq, the Somali situation did not present any immediate credible threat of interstate armed conflict. The judgement that the situation was a threat to the peace was based, rather, on the feared destabilizing effect on internal peace and order in neighbouring countries of massive refugee flows and uncontained civil conflict. But without doubt, the primary objective and motivating factor behind the use of Chapter VII was not the threat to peace as such, but the threatened loss of hundreds of thousands of Somali lives." Matheson 2006, pp. 53-54.

[107] SC Res. 841 (1993).

[108] SC Res. 918 (1994).

[109] SC Res. 929 (1994).

[110] SC Res. 1078 (1996).

Humanitarian reasons where underlying the determinations of a threat to peace and security in the cases of Sierra Leone,[111] Afghanistan,[112] East Timor,[113] Kosovo.[114]

Even though, initially, the UNSC framed such interventions as exceptional measures, and non-precedent setting, by the end of the 1990s it had become more confident in its expanded definition of threats to international peace and security, in particular in treating human rights as an integral part of the definition itself of international peace and security.[115] Thus, the change of language from stressing the unique and non-precedent setting nature of the SC's actions, to relying on the Charter, presents a clear move towards establishing consistent and reliable practice of intervening for humanitarian reasons that would serve the purpose of completing the scant written rule. This was also in line with the growing awareness of the concept of 'human security',[116] which other actors also dealt with. In his report to the UNSC,[117] Secretary-General Kofi Annan insisted that "massive and systematic breaches of human rights law and international humanitarian law constitute threats to international peace and security", thereby demanding the attention and action of the UNSC (including, if necessary, enforcement under Chapter VII). He also recalled instances from 1990s (such as Iraq and Somalia) where, he argued, such a precedent had been established. This call for greater attention and action was reinforced by Member States, who emphasised that because 'human security had become synonymous with international security', the principles of state sovereignty and non-interference, while still applicable, had certain qualifications."[118] UNSC itself responded by underlining its commitment to human security in Resolutions 1265,[119] 1296,[120] 1674,[121] 1738,[122] and 1894,[123] by affirming the view that "the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict,

[111] „violence and loss of life…, the deteriorating humanitarian conditions", SC Res 1132 (1997).

[112] SC Res. 1267 (1999).

[113] In the case of East Timor there was an extenuating circumstance of Indonesian consent for the intervention. Welsh 2008, pp. 550-551.

[114] Judge Cançado Trinidade devoted almost in entirety his separate opinion in the Kosovo Advisory Opinion to underlining the element of humanitarian crisis that propelled the activity of the UNSC in the case, reflecting thus new directions of development of international law, its humanization. ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, Separate Opinion of Judge Cançado Trinidade.

[115] Welsh 2008, p. 538. On the extended interpretation of 'threat to the peace': J. E. Alvarez, *International Organizations as Law-makers*, Oxford University Press, 2005, pp. 171-172. J. Delbrück, *Right v. Might – Great Power Leadership in the Organized International Community of States and the Rule of Law*, in Verhandeln für den Frieden Negotiating for Peace Liber Amicorum Tono Eitel, Springer, 2003, pp. 23-40, p. 29. C. Amorim, *Effectivness and Legitimacy of the United Nations Security Council: A Tribute to Tono Eitel*, in Verhandeln für den Frieden Negotiating for Peace Liber Amicorum Tono Eitel, Springer, 2003, pp. 5-18, p. 14. G. Wilson, *The United Nations and Collective Security*, Routledge, pp. 34-35. Matheson 2006, pp. 62-63.

[116] B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, pp. 1284-1285.

[117] S/PV.4130 4130th meeting, 19 April 2000, meeting record.

[118] Welsh 2008, p. 548.

[119] SC Res. 1265 (1999).

[120] SC Res. 1296 (2000).

[121] SC Res. 1674 (2006).

[122] SC Res. 1738 (2006).

[123] SC Res. 1894 (2009).

may constitute a threat to international peace and security".[124] Such practice is even seen, by High-level Panel on Threats, Challenges and Change as an emerging norm that there is a collective international responsibility to protect,[125] exercisable by the UNSC authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[126] This was in fact the finding of, for that matter specifically established, International Commission on Intervention and State Sovereignty,[127] which set up a list of principles for military intervention[128] needed in such cases, resembling to those of classic *bellum iustum*, bestowing upon the UNSC the role of only right authority for authorising such intervention. 2005 World Summit reached similar conclusion declaring preparedness of the international community to take collective action through the UNSC and under the Chapter VII of the Charter for the purpose of protecting populations from genocide, war crimes, ethnic cleansing and crimes against humanity when national authorities are failing in that themselves.[129] Its specification 'on a case-by-case basis' may be seen by advocates of UNSC's freedom of action as confirmation of non-existence of obligation to act, but it actually only relies on the fact that non-existence of criteria for determining threats to the peace and security demands special approach in every case as opposed to standardised one, that was never accepted, not at the stage of drafting the Charter nor as later attempts.

The understanding of what can constitute a threat to international peace and security continued to develop thereafter. Terrorism itself, or more precisely international terrorism, was declared a threat to international peace and security by Security Council Resolution 1368 (2001) and was the subject of many other resolutions adopted under Chapter VII in the years to come. It thus became one of generic threats to international peace and security,[130] next to Africa's food crisis, proliferation of weapons of mass destruction, AIDS/HIV.

Why, then, having in mind this two and a half decade long practice, was the same not done in 2014 in Iraq, when the situation on the ground included an enormous number of displaced persons (over two million), tens of thousands of killed and injured civilians, genocide, war crimes, and terrorism, and the government, as in the case of East Timor, was in want of help? Indeed, the UNSC has acknowledged all

[124] The subsequent three resolutions on the protection of civilians in armed conflict, Resolution 2175(2014), Resolution 2222(2015) and 2286(2016) dealt only with certain groups of civilians (medical and humanitarian personnel and media workers).

[125] According to A. Peters, UNSC has already endorsed the responsibility to protect, in its Resolutions 1970, 1973 and 1975. This principle has, however, not yet become fully-fledged legal principle and not being such, it cannot yet lead to UN's responsibility of committing an illegal act in the case of inaction. A. Peters, 2011, pp. 15, 52.

[126] Report of the Secretary-general's High-level Panel on Threats, Challenges and Change, 'A more secure world: Our Shared Responsibility', 2004, United Nations, www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (10 September 2017).

[127] The Report contained conclusion about the existence of international responsibility to protect in cases where a population is suffering serious harm, as a result of war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert that harm. 'The Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty, 2001, XI, http://responsibilitytoprotect.org/ICISS%20Report.pdf (10 September 2017)

[128] Just cause, right intention, last resort, proportional means, reasonable prospects, right authority. *ibid*, XII.

[129] GA Res. 60/1, 16 September 2005, p. 30.

[130] Such development may not be widely acceptable though: "Despite obvious functional benefits, the move towards legislation goes well beyond the role contemplated for Chapter VII action in the initial conception of the Charter. The Charter does not assign legislative powers to any organ and only grants SC mandatory powers for action in specific crises, not for addressing generic threats through general norms." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 1253.

this.[131] But the most important decision – the one of declaring this situation a threat to the peace, and acting upon it by using force (i.e. authorising Member States to use all necessary means to restore international peace and security in the area[132]) as the only measure adequate to face the terrorists and the threat they represented – was never adopted. In the absence of such a decision, not even an *ex post* authorisation endorsing action already in existence (of the USA and its allies) via a subsequent resolution was possible. Such inaction deviated from the UNSC's previous practice, wherein very similar situations were pronounced a threat to international peace and security. The consistency of proclaiming internal conflicts with large humanitarian crisis element a threat to peace and security was present and undisputable within UNSC's practice ever since its post-Cold War zestful awakening, followed by awareness of its existence.[133] As Alvarez puts it, even though some would not agree with seeing UNSC's enforcement measures as 'precedents', it is a known fact that prior practices within organizations are often a reliable guide to future actions, imposing on those resisting such action the burden of showing why something was permissible previously and is later unwise.[134] UNSC's action under Article 39 in the sense of determining threats to peace and security in cases of humanitarian crises was abundant, consistent and undisputed (yes, there were reservations in the form of stressing the uniqueness of situations, but there were no objections in the form of finding human sufferings unworthy of proclamation a threat to the peace) leading thus to the conclusion that established practice has emerged out of it. *Opinio iuris* of such quazi-customary law is not difficult to determine, as the established practice is based on the secondary law of the organization,[135] in this case on the binding resolutions of the UNSC, where, based on Article 25 of the Charter, there can be no protests. International Law Commission, though recognizing it as at least a supplementary element of the law of an international organization,[136] quite limits the scope of influence of the established practice, finding it related only to the internal operation of the organization and thus being capable of giving rise only to a 'kind of customary law of the organization, formed by the organization and applying only to the organization', without really being relevant to the formation and identification of customary international law.[137] It is difficult to keep the internal-external division when it comes to activities of the UNSC, since the internal rules made and applied by that organ indeed have a normative spill-over effect which reaches beyond the internal sphere of the UN.[138] The line between internal and external law-making is indeed fading,

[131] In the preamble to the SC Res. 2169 (2014), in the Statement by the President S/PRST/2014/20, in meetings, in listening to regular reports of the Special representative for Iraq.

[132] Under Chapter VIII of the Charter the UNSC is authorised to use regional arrangements or agencies for enforcement action under its authority. Here, however, a will and determination of such subjects to act would be a precondition for the UNSC's use of them. Since the (in)action of the UNSC is the focal point of this expose, no further attention is given to regional arrangements or agencies, as there have been none that the SC would in this case prevent in action by its passivity.

[133] During the discussion on the situation in Myanmar and as a response to China's claim that the situation should not even be discussed as it was an 'internal affairs of the country', the USA replied: „…since the adoption of resolution 688(1991) dealing with the refugee flows from Iraq after the first Gulf war, the Council had considered similar matters as threats to international peace and security,", Repertoire of the Practice of the Security Council.

[134] Alvarez 2005, p. 194.

[135] C. Peters 2011, p. 631.

[136] 'Third report on subsequent agreements and subsequent practice in relation in the interpretation of treaties' by Georg Nolte, Special Rapporteur, International Law Commission, A/CN.4/683, p. 31.

[137] Third report on identification of customary international law by Michael Wood, Special Rapporteur, A/CN.4/682, pp. 49-50.

[138] J. Wouters, P. De Man, *International Organizations as Law-Makers*, Working Paper No. 21 – March 2009, Leuven Centre for Global Governance Studies, p. 8.

since, at present day, most decisions of international organizations have both internal and external normative impact.[139]

3.2. The UNSC's Inaction as an Internationally Wrongful Act

The question that rises next is could the UNSC, *i.e.* the UN as a subject of international law, be held in breach of Articles 24(1) and 39 by not acting upon them.[140] As mentioned before, Article 39 lacks any sanction that would make the imposition of direct consequences for action contrary to its disposition almost impossible. However, with the opinion that the UNSC is not *legibus solutus*, it is appropriate to turn to the DARIO and to assess whether under these secondary rules, created less as a codification (due to limited practice) and more as a progressive development,[141] the UN could be considered responsible for an internationally wrongful act due to the UNSC's (in)activity in view of Article 39 of the Charter, primary rule of international law binding it.[142] Draft Article 4 enumerates two elements of an internationally wrongful act of an international organisation: that the conduct consisting of an action or omission is attributable to that international organisation, and that the conduct constitutes a breach of an international obligation of that organisation. International obligation, as in the case of State responsibility means an obligation under international law regardless of the origin of the obligation concerned.[143] In this case, the obligation is imposed by a multilateral international treaty, which also happens to be the organisation's constituent instrument, the Charter.

The conduct at issue is determining whether the situation in Iraq is a threat to international peace and security and undertaking activities necessary to restore the peace and security. As this action never took place, the conduct here takes the form of an omission. Omission, as such, is not easy to identify, since it is not susceptible to any material concretization. It corresponds to an abstention, an instance of inaction by an international actor; however, in contrast to those two terms, the word 'omission' presupposes to a certain extent an obligation to act which has not been fulfilled.[144] As for the conduct of UNSC being attributable to the UN, "normative conduct of the SC will always be directly attributable to the Organization as conduct undertaken by one of its organs".[145] With respect to the second element, Draft Article 10(1) offers the grounds for determining the existence of a breach of an international obligation: "There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned." One of the UN's main obligations is precisely to

[139] Ibid.

[140] „On the premise that the Security Council acts within the realm of law and that its decisions are subject to legal limits, there is no reason to desist from attaching legal consequences to the Council's omission to take a decision regarding international peace and security." B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 773.

[141] General commentary, Report of the International Law Commission, General Assembly Official Records Sixty-sixth session, Supplement No 10 (A/66/10).

[142] Simma and others do not share this view. Exactly the opposite, they claim that „it is clear that the notion of responsibility in Art. 24 does not relate to secondary obligations in the sense of the ILC Draft Articles on the International Responsibility of Organizations, which arise in the event of a breach of primary norms of international law". They do allow that the mentioned 'responsibility' implies a legal requirement to act. B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, p. 766.

[143] General commentary, Report of the International Law Commission, General Assembly Official Records Sixty-sixth session, Supplement No 10 (A/66/10) , p. 99.

[144] F. Latty, *Actions and Ommissions* in J. Crawford, A. Pellet and S. Olleson (Eds.), The Law of International Responsibility, Oxford University Press, 2010, p. 357. Elaraby finds a 'benign neglect' a deviation from the rule of law. Elaraby 2003, p. 56.

[145] Tzanakopoulos 2011, p. 30.

maintain international peace and security, and to that end, to take measures for the prevention and removal of threats to the peace (Article 1 of the Charter). In not realizing this obligation, the UN's conduct was evidently not in conformity with the requirements of its foundational treaty, and was therefore, following Draft Article 10, in breach of the UN's international obligation. Both elements conditional for the existence of an internationally wrongful act appear to be present in this case.

As admitted in the General commentary itself, the provisions of the DARIO do not necessarily yet have the same authority as the corresponding provisions on State responsibility, and their authority will depend upon their reception by those to whom they are addressed. But even if there were no DARIO, if there were no notion of responsibility of international organisations, and no firmly established practice there would still be primary rule of international law, embodied in Articles 24(1) and 39 of the Charter, quite expanded by unquestionable subsequent practice and thus allowed to be interpreted wider than initially meant, that has remained unenforced. And if that rule is seen as an obligation, which is an assertion of this paper, then there was indeed a case of breach of a norm of international law. Simma and others, while not accepting the subsuming of UNSC's (in)actions under Articles 24(1) under the scope of the DARIO, admit that, with UNSC's responsibility being instrumental in realizing the overall objectives of the UN, that organ could be held accountable (not only politically but also legally) for not discharging its responsibility.[146] In not obeying the command directed to it in Article 39 of the Charter by not determining the existence of a threat to peace, the UNSC also failed in taking measures to restore peace and security. (Though its duty was not to succeed but to try, as its obligation is not an obligation of result but of conduct.)[147] In Iraq there has been no peace or security for the last few decades. Nor has there been in its neighbouring countries (most notably Syria). The consequences of this were death and misery on a level of the human individual, and the existence of an unenforced legal norm on the level of international law. Bearing in mind the definition of enforcement, one can conclude that the normative integrity of international law system was not secured as its normative prescriptions (provisions of the Charter) were not executed and the system has failed in reacting to the behaviour contrary to that prescribed.

All are aware that the UNSC is a political body. But it was conceptualized as such from the beginning, at the same time as its obligations were formulated. If its nature was to be completely incompatible with its duties, it is safe to presume that the drafters of the Charter, the majority of Permanent Members of the UNSC, would have conceived it differently. Since all agree that the task is not to find alternatives to the UNSC as a source of authority but to make it work better that it has,[148] focus should be on making its actions and its policy on the circumstances in which it will and will not act consistent, or at least rational and defensible, since its inconsistency hurts the view of justice (not treating like cases alike) and the rule of law (impartial administration of justice), and ultimately deprives it of credibility as the guarantor of the rule of law in international society.[149] And as the protector of peace and security.

[146] Since they do not see the UNSC's responsibility to maintain peace and security as hard-and-fast-obligation under international law, at least not for the moment, they also do not see the UNSC's failure in taking up its responsibility as constituting international wrongful conduct under the law as it stands now. They do, however, envisage, the UNSC's responsibility hardening into a real legal obligation of conduct which could, then, be violated by UNSC's passivity or inadequate reaction, constituting thus an internationally wrongful act of the UN. B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (Eds.) 2012, pp. 772-775.

[147] Ibid p. 774.

[148] 'A more secure world: Our Shared Responsibility', 2004, p. 61.

[149] V. Lowe, A. Roberts, J. Welsh & D. Zaum (Eds.) 2008, p. 36.

4. The Role of the Rest of the United Nations System

The primary responsibility for the maintenance of international peace and security does rest upon UNSC, but it is not exclusive. As ICJ puts it, the Charter makes it abundantly clear that the GA is also to be concerned with international peace and security.[150] After all, this universal body representing (almost) every State in the world today has a unique legitimacy that should be used for reflecting all the contemporary challenges of the international community and for approaching in an active manner the most compelling issues of the day.[151] There was nothing preventing GA from discussing the matter (Article 10) and calling the attention of the UNSC to it (Article 11), thereby exercising more pressure and, in a sense, 'extorting' the UNSC's reaction. According to Provisional rules of procedure of the Security Council,[152] the President shall call a meeting of UNSC if the GA makes recommendations or refers any question to the UNSC under Article 11(2) of the Charter.[153] Throughout its 68th and 69th session, covering the calendar year 2014, the GA nevertheless failed to do so. It failed to put the suffering of Iraq on its agenda and thus to help, or at least try to help, diminish it.[154] There were times when the GA, more interested in keeping international peace and security, devised means to act beyond its Charter authorities[155] while in this case it never consumed the basic at its disposal.

The Secretary-General is also an influence, if not a 'check',[156] on the UNSC's authority for keeping peace and security. Under Article 99 of the Charter, the Secretary-General has "formidable, but hitherto

[150] ICJ, *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151., p. 163.

[151] 'A more secure world: Our Shared Responsibility', 2004, pp. 77-78.

[152] Rule 3, Provisional rules of procedure of the Security Council.

[153] „The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

[154] There were, fortunately, those who did not fail in performing their functions. Even though they did not concern the highest matter of peace and security, their endeavours need to be at least mentioned, if not for the recognition of work on those issues, then at least out of sheer respect for the devotion of individuals working under life-threatening conditions. Such work includes: UNICEF and the World Health Organisation (WHO) supporting the Iraqi Ministry of Health on a mass polio immunization campaign, UNICEF delivering assistance to internally-displaced people primarily through water distribution and sanitation programs, the WHO providing medicines and medical supplies, supporting health mobile clinics, and helping to strengthen disease surveillance systems, the UN refugee agency providing essential aid such as tents, mattresses, water jugs, hygiene kits and other emergency items, the International Organisation for Migration providing Iraqis with basic help such as blankets, mattresses, storage bins, kitchen cookware and toiletry items, the UN Development Program providing legal aid to refugees and internally displaced persons, helping local authorities maintain environmental sanitation in schools and communities which host large numbers of internally displaced persons, the World Food Program and the Food and Agriculture Organisation addressing food insecurity. These activities deserve praise and respect.

[155] The 1950 GA resolution 'Uniting for Peace' gives its author power when "the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression" to "consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security". "…the International Court of Justice in Certain Expenses clarified that the power of the General Assembly to act in the maintenance of international peace and security was a residual one, and did not include 'coercive', preventive or enforcement measures under Chapter VII." Schott 2008, p. 65.

[156] Ibid pp. 37-38. „…we are grateful for the promptness, indeed urgency, with which he has brought to the attention of the Security Council the grave and tragic dimension the problem of Somalia has recently assumed.", S/PV.3145, Provisional verbatim record of the three thousand one hundred and forty-fifth meeting, 3 December 1992, representative of Zimbabwe, p. 6.

much underutilized authority"[157] to "bring to the attention" of the Council "any matter which in his opinion may threaten the maintenance of international peace and security". Such action would, according to Rule 3 of Provisional rules of procedure of the Security Council, entail calling an UNSC meeting. In his capacity as the 'chief administrative officer' of the UN, performing functions entrusted to him by, the Security Council and other organs, the Secretary-General has occasionally played a significant role in influencing UNSC's Article 39 determinations. For instance, in Somalia, Boutros Boutros-Ghali's reports persuaded the Council that an Article 39 determination was warranted given the inadequacy of non-military measures and the "repercussions of the Somali conflict on the entire region".[158] The Secretary-General has also acted in matters of international peace and security without the invitation of the UNSC. In his first report to the Council on troop deployment in the Congo in 1960, Dag Hamarskjöld went even further, contending that the deteriorating situation in the country was "a threat to peace and security justifying United Nations intervention".[159] In 2014 not only did the Secretary-General not find the situation in Iraq sufficiently serious to bring it to the attention of the UNSC as a potential threat to international peace and security, but also failed to make even one special report devoted specifically to the situation in Iraq.[160]

The UN's other organs have little in the way of legally-ordained recourse in checking Council action under Article 39.[161]

5. Conclusion

From the beginning of 1990s onwards, the UNSC has been expanding the scope of application of Article 39 of the Charter by including more and more situations into those to be considered a threat to international peace and security, most notably internal armed conflicts, humanitarian crises and terrorism. When such a situation occurred in Iraq, UNSC failed to react even at the peak of crisis, in 2014. Despite the calls of the world public to do so, UNSC never determined that situation as posing a threat to peace and security and, consequently, it never provided much needed military assistance to the Government of Iraq in freeing its territory of terrorist occupation and saving lives of its civilian population. It also never gave subsequent authorisation of military assistance granted to Iraq by individual Member States. Though clearly acknowledging the gravity of the situation, and even being aware of the existence of war crimes, the UNSC was never even close to acting under Article 39 of the Charter. It never convened even only to discuss whether to determine that the situation constituted a threat to international peace and security, or the measures needed to restore a peace that had not only been threatened, but lost. With Article 24(1) of the Charter clearly indicating existence of duties for the UNSC ('obligations' in Russian version) for the purpose of achieving the realisation of its primary responsibility, maintenance of international peace and security, and with subsequent practice, in the application of Article 39, built up to established practice showing clear extension of the range of situations to be classified as a threat to peace and security, UNSC has, by its inaction, found itself not only in a state of utter political and moral insensitivity, but more importantly, in breach of this primary

[157] 'The Responsibility to Protect' 2001, p. 35.

[158] Schott 2008, pp. 37-38.

[159] Ibid pp. 37-38.

[160] The list of Reports submitted by / transmitted by the Secretary-General to the Security Council in 2014, http://www.un.org/en/sc/documents/sgreports/2014.shtml (10 April 2017).

[161] Schott 2008, p. 38.

rule of international law. Article 39 of the Charter, whose clear obligation-imposing wording, though without hypothesis and sanction, read together with Article 24(1), as well as with Article 1 on the purposes and principles of the UN, leaves no place to believe that action based upon it is purely discretionary and non-obligatory. However imperfect a legal rule may be, conduct contrary to its disposition is still a violation of that rule. According to the DARIO, whose nature is of a progressive development mostly, by such omission of its organ, the UN would in fact be responsible for internationally wrongful act. Subsuming UNSC's (in)action under the DARIO is not, for the moment, widely accepted, nor even seeing the responsibility for maintaining international peace and security as the UNSC's legal obligation, though positions indicate change *de lege ferenda*.[162] In order to have goals of a 73-year-old treaty more readily achievable, and for the wellbeing of the 'succeeding generations', that change better happen soon.

Though the 2003 aggression against Iraq is seen as a damage to the UN normative and institutional framework,[163] it would have been better for its role and reputation had something similar taken place in 2014. Had it even been blocked by a Permanent Member's veto, no one could accuse it of not acting in accordance with international law.

Despite having had the chance to act, the GA and the Secretary-General unfortunately only magnified the UNSC's aloof position, thereby attributing it to the UN more generally. Had there been no involvement by various international organisations focused primarily on humanitarian assistance, it would have appeared as if the international community (international organisations) was completely indifferent as to what would become of one State and of all its people.

[162] See notes 125 and 146.

[163] I. Johnstone, *US-UN Relations after Iraq: The End of the World (Order) As We Know It?*, European Journal of International Law, Vol. 15 No. 4, 2004, pp. 813-838, p. 833.

The Right of Residence of Third Country Spouses who Became Victims of Domestic Violence in the Scope of Application of the Free Movement Directive – *Legal Analysis of the NA Case*

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The NA case focuses on the right to remain in a host Member State for the TCN spouse of a migrant Union citizen who fell victim of domestic violence during their marriage with the Union citizen, but where the abuser had left the member state in question before the dissolution of the marriage. The case reveals gap in the relevant EU framework, while it provides an opportunity to examine the broader question of the relation between supranational citizenship and the rights of TCNs under EU law.

Keywords: free movement of Union citizens, domestic violence, retention of the right of residence by third country family members

1. Introduction

There are an increasing number of cases brought before the European Court of Justice whose facts are regulated by provisions that a priori belong to the competence of the member states, including those which govern the entry and residence rights of third country citizens, however, they are closely related to the right of EU nationals to free movement and residence. To approach the issue from another aspect, the enforcement of *the supranational rights of EU citizens* requires, in certain cases, that the EU law be applied in some highly sensitive areas which are traditionally within the regulatory competence of the member states. Such issues include, for example, the loss of member state citizenship,[1] the area of family law[2] or immigration policy[3]as we will also see in this paper.

The case that is discussed in the paper, i.e. the *NA* case[4] also belongs to the above group as it deals with the right of residence of third country spouses. The reason why it deserves attention is the very subject of it, i.e. the issue of domestic violence which has just recently come to the attention of the Court,[5] but raises serious legal and moral dilemmas.

[1] Case 135/08, *Janko Rottman kontra Freistaat Bayern*, [2010] I-01449.

[2] See the pending *Coman case*, Case 673/16.

[3] Case 34/19, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm).* [2010] I-01177.

[4] Case 115/15, *Secretary of State for the Home Department v NA, not yet reported.*

[5] Kuldip Singh was the first case which focused on the issue of domestic violence. Kuldip Singh judgment, Case 218/14, *Kuldip Singh and Others v Minister for Justice and Equality*, not yet published.

In the focus of the case, there is the issue of the right of residence of third country nationals in the host countries who fell victim to domestic violence during their marriage with EU citizens, but where the abuser had left the member state in question before the dissolution of the marriage. According to the 2004/38/EC Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the EU member states[6] (hereinafter referred to as: the Free Movement Directive) as a general rule, the victim may retain his/her right of residence after the dissolution of the marriage, however, it is not clarified by the directive whether this is so when the abuser, who is an EU citizen, leaves the territory of the host country prior to divorce, thus interrupting the process of the legality of residence. So, in fact, it is the loophole left by the Free Movement Directive that requires legal interpretation from the European Court of Justice.

2. The Issue of Domestic Violence in View of the Free Movement of EU Nationals: the NA Case

2.1. The Facts of the Case and the Application for Preliminary Ruling

A Pakistani national NA married a German national KA in September 2003, then the married couple moved to the United Kingdom in May 2004, where the husband obtained an employee legal status. The relationship of the spouses later deteriorated. NA fell victim to domestic violence several times. In October 2006, KA left the common residence of the married couple, then in December 2006, he also left the host country, i.e. the United Kingdom. The married couple have two daughters, who were born in the territory of the United Kingdom and are German nationals. KA wished to get a divorce from NA through a Talaq pronounced in Karachi, Pakistan in March 2007. It was eventually NA who launched the procedure for the dissolution of the marriage in September 2008, in the United Kingdom. The dissolution of the marriage took binding effect on August 4, 2009. It was NA who was granted custody over the two children. The two daughters had attended school in the United Kingdom since January 2009 and September 2010, respectively. Then NA applied for permanent residence in the United Kingdom, which was rejected with the justification that NA was not authorized to retain her right of residence pursuant to the provisions set out in Section (2), Article 13 of the Free Movement Directive.

The Court of Appeal decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

a) In its first question, the Court expected an answer to whether the provisions set out in Point c) of the first subsection of Section (2), Article 13 of the Free Movement Directive should be interpreted as follows: in case a third country national who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, is entitled to retain her right of residence in the host Member State, on the basis of that provision, where the divorce post-dates the departure of the Union citizen spouse from that Member State.

b) In its second and third questions, the point was whether he/she can retain his/her right of residence based on the primary right, as long as he/she is not allowed to retain this right of residence pursuant to

[6] Directive 2004/38/EC (30 April 2004) of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77; Hungarian special edition, chapter 5, volume 5, p. 46).

the Free Movement Directive. Thus, the question sought ascertain whether Article(s) 20 and /or 21 of the Treaty on the Functioning of the European Union, (hereinafter referred to as TFEU) which ensures the EU citizen's legal status and the related right to free movement, should be interpreted in such a way that they confer a right of residence in the host member state on a minor Union citizen who has resided since birth in that Member State but is not a national of that Member State, and on the parent, a third-country national, who has sole custody of that minor.7

c) The fourth question asked by the Court was targeted at the case law on the residence of the family members of ex-EU workers, more precisely, whether the provisions set out in Article 12 of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community 8 should be interpreted in such a way that a child and a third-country national parent who has sole custody of the child are entitled to a right of residence in the host Member State, under that provision, in a situation, such as that in the main proceedings, where the other parent is a Union citizen and has worked in that Member State, but has ceased to reside there before the date when the child begins to attend school in that Member State.

2.2. The Legal Context of the Preliminary Ruling

The legal documents on the free movement of EU citizens do not provide any original rights to the non-EU nationals. This means that they can only obtain the right of residence in the territory of a member state in a *derivative* way, through a tie to an EU citizen family member. As is put by Section (2), Article 7 of the Free Movement Directive,"[…] the right of residence shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State […]".[9]

The residence of non-EU citizen family members based on a derivative right, however, may cause several problems. The question arises what happens, for example, if the family ties that serve as the legal grounds for the residence are terminated or perhaps weakened during the residence in the host country, so the married couple gets divorced, or they separate from each other with the intention of a divorce. Of course, it is also possible that the EU citizen spouse simply leaves the territory of the host country prior to the divorce[10], as is well shown by the above-discussed *NA* case as well.

The secondary EU law, including the Free Movement Directive aims to settle the above groups of cases under the titles "Retaining the rights of residence of family members [...]". Thus, it gives a detailed list of the cases in which the family members who earlier used to stay in the country on the basis of a derivative right can retain their rights of residence. Article 13 of the Directive, which is relevant for this case, deals with the issues related to the dissolution of marriage, more precisely, it is Point (c), Section (2) of this Article that touches upon the question of domestic violence. Pursuant to the provision in

[7] As long as the above-mentioned persons are entitled to a right of residence in this member state pursuant to national or international law.

[8] Regulation (EEC) No 1612/68 of the Council of 15 October, 1968 on freedom of movement for workers within the Community OJ L 257, 19.10.1968, pp. 2–12 (DE, FR, IT, NL). This regulation has since been replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April, 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, pp. 1–12).

[9] Article 7(2) of the Free Movement Directive.

[10]This may happen due to the deterioration of the marriage or for a completely different reason as well, for example, the EU citizen spouse takes up employment in another member state.

question, the divorce does not affect the right of residence of the non-member state citizen if "this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting". [11] In these cases, the non-member state citizen may retain his right of residence and may later obtain a permanent right of residence, as long as he fulfills the other criteria set by the directive.

This in itself would not bring up a serious question of interpretation. However, what still makes the interpretation of Article 13 difficult for the Court is Article 12 of the Directive, more precisely, the joint interpretation of these two articles (Articles 12-13). The latter defines rules for the cases of the death of the EU citizen or their departure from the territory of the host country. While, however, Article 12 expressly specifies the retention of the right of residence with regard to the member state citizen family member in the case of the departure of the EU citizen from the member state, it says nothing about the legal consequences of the same with regard to a third country national family member. Also, it basically leaves the question open what will happen if the two factual situations, i.e. the dissolution of the marriage and the circumstance of the prior departure, occur jointly. The directive gives no guidance whatsoever as to this and it does not specify whether either of the two provisions has priority over the other.

However, it is this very issue that is in the focus of the *NA* case, i.e. the retention of the right of residence of an EU national's third country spouse, in case that the EU citizen has left the member state in question with no intention of returning and after his departure, a procedure for the dissolution of marriage has been launched. This question had partially been answered by the Court in its *Kuldip Singh* judgment[12], which preceded the *NA* case.

In this decision, the Court declared that as long as an EU citizen departs from the host member state before the judicial proceedings aimed at the dissolution of marriage commence, this will automatically involve the lapsing of the derivative right of residence of the third country spouse, which thus cannot be retained any more based on the provisions set out in Article 13 of the Directive. However, in the case that we have referred, unlike in the current case, the claimants were always such third country men whose EU citizen spouses had departed from the host country before the divorce case was launched, and no violence whatsoever occurred during the marriage.

In the *NA* case, the Court is seeking an answer to the question what will happen if a third country wife becomes the victim of abuse during the marriage and the EU citizen husband leaves the host member state after committing such violent act but before the dissolution of the marriage. The question arises whether the departure of the EU citizen spouse, at least by taking the content of the above *Singh* judgment into account, will immediately terminate the status of the non-EU citizen as per the Free Movement Directive, even if the circumstance of domestic violence exists, dealing a death blow to the cases of retention of the right of residence as listed in Article 13. All this is asked in light of the fact that in accordance with the Court's earlier case law, the third country citizen will continue to be entitled to the right of residence in case the married couple separates in the host member state. [13]

[11] Point (c), Section (2), Article 13 of the Directive.

[12] Case C-218/14.

[13] It was declared by the Court very early, i.e. in relation to the Diatta case that a third country citizen's permanent separation from their spouse does not affect the right of residence of this person either. Thus, this person may reside in the host member state even after the separation, up to the point when the divorce is declared in a binding decision. C- 267/83, *Aissatou Diatta v Land Berlin*, [1985] 567.

The overall picture is further nuanced by the jurisprudence of the Court regarding third country citizens who raise children who are EU citizens, which expands the right of residence of family members in the territory of the host country to cases that go beyond those listed in the Free Movement Directive. Thus, taking the provisions set out in Regulation No. 1612/68 on the freedom of movement for workers within the Community referred to above into account, it was declared by the Court that the child of a migrant worker has a right of residence if he or she wishes to attend educational courses in the host member State, even if the migrant worker no longer resides or works in that member State. That right of residence extends also to the parent who is the child's primary carer.[14] Furthermore, it was stipulated by the Court that a third country citizen parent who is a primary carer of an EU citizen child is also entitled to the right of residence in the member state where the child resides[15], even if the case does not involve a cross border element[16] (*Zambrano* case).[17] This last conclusion comes from the Court's famous *Zambrano* doctrine, according to which Article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.[18]

In light of the above, the *NA* case in question allows the Court to examine the theoretical considerations underlying the rights of residence granted to third country citizens and also, to make an attempt at eliminating the tension that arises from the simultaneous exercise of supranational EU citizen's rights and traditional member state competences in the field of immigration policy.

2.2.1. The Opinion of the Advocate General

In his opinion, Advocate General Wathelet primarily responded to the concept brought up by the Government of the United Kingdom, according to which the second and third questions asked by the referring forum are hypothetical in character, since the right of residence of NA and her children had already been recognized in the United Kingdom based on Article 8 of the European Convention of Human Rights (hereinafter referred to as ECHR).[19] In his response, the Advocate General very rightly pointed out that the referred questions are obviously not hypothetical, as the question whether NA is entitled to receive protection of a higher degree than the one offered by international law, one which is directly based on EU law,[20] will presumably be determined on the basis of the responses given to them.

Then the Advocate General went on to answer the first question, *i.e.* whether NA should be able to prove, in order to be able to retain her right of residence, that her EU citizen spouse was still residing in the host country at the time of the dissolution of their marriage [see Point (a)]. Wathelet began his

[14] C-413/09, *Baumbast and R v Secretary of State for the Home Department***,** [2002] I-07091; C-480/08, *Maria Teixeira kontra London Borough of Lambeth és Secretary of State for the Home Department*, [2010] I-01107.

[15] C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen. v. Secretary of State for the Home Department*, [2004] I-09925

[16] The parents will be entitled to this right even if the child in question never before used the right to free movement.

[17] Case C-34/19.

[18] According to the Court, a refusal to grant a right of residence and also a work permit to a third-country national who has dependent minor children in the Member State where those children are nationals and reside, has such an effect. It must be assumed that a refusal (of a right of residence to such a person) would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents. Similarly, without a work permit such a person would risk not having sufficient resources to provide for himself and his family. That would also result in the children having to leave the territory of the Union.

[19] According to the standpoint taken by the Dutch government, this conclusion makes all the questions hypothetical.

[20] Case C- 115/15. Opinion of Advocate General Wathelet, paras 26-31.

investigation into the issue by analyzing the content of the Court's above-cited *Kuldip Singh* decision.[21] The situation is that in this decision, the fundamental principle was established, i.e. that the right of residence of the family members of an EU citizen who are not the citizens of any member state will cease immediately when the EU citizen to whom the right of residence is related leaves the territory of the host member state. [22]

The Advocate General, not paying any special attention to the problems of the revival of the right, or to the relationship between Articles 12 and 13, in answering the question, focused on Article 13 and the underlying considerations. He declared very simply that any potentially occurring events within the framework of the proceedings aimed at the dissolution of marriage allow the retention of the right of residence of the family members, even despite the above.[23] At this point, he found it important to emphasize that it is not the divorce in itself but the special circumstances described in detail in Section (2), Article 13 of Directive No. 2004/38, thus in the current case, the occurrence of the element of domestic violence as the "root cause" that maintains the right of residence of the family members.[24] Relying on the teleological interpretation, he found that the point of the provision is the very circumstance that the derivative right of residence of an EU citizen is converted into a personal right of residence if certain circumstances that warrant protection, such as domestic violence, exist.[25] This is what is referred to by Preamble (15) of the Directive too, which declares that "[the] family members should be legally safeguarded in the event of […] divorce […]."[26]

The Advocate General also stresses the protective nature of the provision in question when he says that "the loss of the derived right of residence […] could be used as a means of exerting pressure to stop the divorce at a time when the circumstances are in themselves enough to wear the victim down psychologically and, in any event, to engender fear of the perpetrator of the violence." [27]

Finally, stressing his standpoint, he also defines the negative consequences of an interpretation that is contrary to the above, from the aspect of the implementation of a criminal procedure, such as the potential failure to call the abuser to account.[28] Thus, to sum up the above, according to the position taken by the Advocate General, as long as the marriage is dissolved after the occurrence of domestic violence, it is absolutely irrelevant with regard to the retention of the right of residence where the EU citizen spouse resided when the divorce case was launched.

The second and third questions were dealt with jointly by the Advocate General's opinion as well. In the course of this, it had to be answered whether the refusal to grant a right of residence to a minor EU citizen or a third country citizen parent having sole custody over this child runs contrary to Article 20 or Article 21 of the Treaty [see Point (b)]. In answering this question, the Advocate General first of all relied on the Court's earlier *Alokpa* judgment,[29] in which it was established that the non-EU citizen who has sole responsibility for her minor children who are EU citizens may reside in the host member state

[21] Case C-218/14.

[22] Ibid. para 62.

[23] Case C- 115/15. Opinion of Advocate General Wathelet, para 58.

[24] Ibid. paras 54-61.

[25] Ibid. para 75.

[26] Directive, Preamble Point 15.

[27] Case C- 115/15. Opinion of Advocate General Wathelet, para 70.

[28] Ibid. para 72.

[29] C- 86/12, *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* , not yet reported.

with his or her children by virtue of Article 21 of the TFEU, as long as the EU citizen meets the criteria specified in the Free Movement Directive. However, according to the Advocate General's Opinion, it is for the national court to determine whether NA's children meet the criteria laid down in Section (1), Article 7 of the Directive, particularly the requirement to have sufficient financial means.[30] If this criterion is not met, the refusal to grant the right of residence will not breach Article 21 of the TFEU. Then the Advocate General endeavored to examine the referred question from the aspect of the conclusions of the *Alokpa* judgment regarding Article 20 of the TFEU. In the course of this, the Court, taking the *Zambrano* doctrine into account, examined whether it was still possible to grant the right of residence on an exceptional basis if the refusal of such grant would result in the children's having to leave the territory of the European Union, depriving them of the genuine enjoyment of the substance of the rights conferred by virtue of that status.[31]

Although the 'interpretation criterion on the deprivation of the very point of the rights' has been specified since the *Dereci* case,[32] the Advocate General still thinks that the question arises whether the obligation to depart from the territory of the European Union is to be understood *in legal terms* or *in concreto*, *i.e.* with regard to the facts.[33] In his view, the possibility for a third country citizen and his or her EU citizen children to move to the member state according to the citizenship of the children should not exclusively exist "in the abstract".[34] As is very aptly put by Wathelet, NA's children have constructed their citizenship in the United Kingdom,[35] so they cannot reasonably be expected to reside in a member state of which they do not even speak the language, which is otherwise the one according to their citizenship. However, the examination of these factual circumstances is the responsibility of the national court, which may thus mean a threat to the theoretical test of the *Zambrano doctrine*.[36]

In his opinion, Wathelet touched upon the question of taking the provisions on fundamental rights (Article 7 of the EU Charter of Fundamental Rights, Article 8 of the ECHR) into account as well in applying the above provisions. The starting point in the argumentation of the Advocate General was again the Court's statement made on the *Dereci case*, *i.e.* "if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter." [37] Wathelet thinks, however, that we also act under the effect of European Union law when the Court establishes that the refusal to grant the right of residence due to certain criteria is not contrary to

[30] In the course of this, para 27 of the Alokpa judgment, as well as paras 28-30 of the Zu and Chen judgment were cited, according to which the source of the financial means is absolutely irrelevant, so these can also be secured by the third country parents of the affected minor citizens. Case C - 115/15. Opinion of Advocate General Wathelet, para 92.

[31]Ibid. paras 95-96.

[32] C- 256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, [2011] I-11315.

[33] Case C - 115/15. Opinion of Advocate General Wathelet, para 98.

[34] Ibid, para 114.

[35] Ibid, para 115.

[36] It should be noted here that after the Rendon Marín judgment following the NA case, in its Zambrano test, the Luxembourg Court did not exclude the possibility for a family to move to the country of origin of the EU national child. Although it was indicated by the claimant that he had nothing to do with Poland and that they did not speak Polish, the Court did not conduct an in-depth analysis of the question but what it actually did was that it left it to the court of the member state to decide whether a parent who is in fact a primary carer of his children can be entitled to the derivative right of accompanying his children to Poland, and reside with them in Poland, as the case may be. C-165/14, *Alfredo Rendón Marín v Administración del Estado*, para 79.

[37] Case C-256/11 Dereci EU:C:2011:734, para 72.

the provisions set out by the Treaty. Consequently, if it was already established by court, as happened in the case in question too, that the deportation of an EU citizen would violate Article 8 of the ECHR, the national court does have to take this into account when the test of the 'deprivation of the very point of rights' is considered. [38]

Finally, the Advocate General answered the fourth question [see Point (c)] in the affirmative. He established that Article 12 of Regulation No. 1612/68, must be interpreted as meaning that a child and his or her primary carer enjoy a right of residence in the host Member State where the parent who is a Union citizen and has worked in that Member State has ceased to reside in that Member State before the child enters education there. In his argumentation, he referred to the Court's earlier case law, more precisely, to its *Teixeira*[39] and *Ibrahim*[40] decisions.

2.3. The Court's Considerations on the Questions Submitted for Preliminary Ruling

As regards the first question [see Point (a)], the Court significantly deviated from the content of the opinion of the Advocate General. As a starting point, they used the points declared in the Court's earlier *Singh* judgment,[41] which considerations can also be applied to the current case in the Court's opinion. Thus, in accordance with this, the right of residence of a third country spouse remaining in the host member state will cease to exist when the EU citizen spouse departs from this country. This right cannot be revived by applying for the dissolution of the marriage either, as Article 13 of directive No. 2004/38 only mentions the *retention* of the existing right of residence. Thus, the EU citizen spouse of a non-EU citizen shall stay in the host member state until the court proceedings aimed at the dissolution of the marriage are launched, in order to ensure that this third country citizen retains their right of residence in this member state under Section (2), Article 13 of this directive.[42]

The Court may just as well have stopped at this point in answering the first question, but it still found it necessary to support its position by some further arguments. Thus, in the justification of its judgment, it went on to interpret Section (2) of Article 13 and especially, its Point (c), during which it practically demonstrated the entire repertoire of the interpretation methods. As regards the grammatical interpretation, it pointed out that Section (2) of Article 13 exclusively discusses the retention of the right of residence.[43] Then it stressed the exceptional nature of the provision in question, as the dissolution of the marriage does not involve the loss of the right of residence of third country citizens in the regulated groups of cases, which practice deviates from the general rule. This is so despite the fact that after the dissolution of the marriage, the former citizens do not fulfill the criteria listed in Section (2) of Article

[38] Case C-115/15, Opinion of Advocate General Wathelet, para 124.

[39] According to the reasoning of the judgment, the goal of Article 12 of regulation No. 1612/68 is, particularly, to ensure that the children of a Community worker may commence and, as the case may be, complete their studies in the host member state even if the worker is not employed in the member state in question any more. C- 480/08, para 51.

[40] In the judgment in question, the Court reaffirmed, that as is apparent from the very wording of Article 12 of Regulation No1612/68, the right to equal treatment in respect of access to education is not limited to children of migrant workers. It applies also to children of former migrant workers. C-310/08, *London Borough of Harrow kontra Nimco Hassan Ibrahim and Secretary of State for the Home Department*, [2010] I-01065, para 39.

[41] Case C-218/14.

[42] Case C-115/15 paras 34-35.

[43] Ibid. para 40.

7 of the directive any more, as they are no more the family members of the EU citizens who exercise the right of free movement.[44] The judgment briefly touches upon the contents of Article 12 as well, namely that the legislator did not wish to provide protection to third country family members for the case of the departure of the EU citizen relative from the host member state. As regards the legislator's intention, the judgment, similarly to the Advocate General's opinion, emphasizes the objective of Article 13, which is also stipulated in the preamble, i.e. that it aims to provide special protection for the case of divorce, thus granting a right of residence on a personal basis.[45] This objective is supported by historical data as well when it is pointed out that in the course of the elaboration of the proposed Free Movement Directive,[46] it was an express criterion to provide this special legal protection to those whose right of residence is attached to the family ties established through marriage, with a view to avoiding blackmailing. According to the proposed directive, however, "such protection will only be necessary if the marriage is dissolved with binding effect, considering that the separation does not affect the right of residence of the spouse who is a third country citizen".[47] Placing a rather strong emphasis on this statement, the Court has concluded that protection is only and exclusively subordinated to the dissolution of the marriage. It is after summarizing all this that the Court comes to the ultimate conclusion that a third country family member may only invoke the retention of the right of residence if the EU citizen was residing in the territory of the host country not only at the time of committing the act but also at the time of launching the divorce proceedings.

After answering the first question, the Court went on to examine the fourth question [see Point (c)]. In answering this question, the Court cites the *Teixeira and Ibrahim* cases[48], which also served as a ground for the opinion of the Advocate General, and as a result of which it reaches a conclusion that is in line with the Advocate General's opinion. Thus, the Court stipulates that the children of the ex migrant worker, namely those of KA, who have been residing in the host member state since they were born, are entitled to the right of pursuing studies and also, to the related right of residence. So, the fact whether the previously migrant worker parent resides in the member state in question when his or her child starts pursuing his or her studies, has no relevance whatsoever in this respect. [49]

Then the judgment started to examine the issue of NA's right of residence. The outcome of this examination also agrees with the opinion of the Advocate General, in that the right of residence of the children involves the right of residence of the parent who is a primary carer of the child, in this case, NA's right of residence. In order to support this, the Court cites the *Baumbast and R* case, which is of fundamental significance.[50]

Finally, the Court goes on to jointly examine the second and third questions [see Point (b)]. Contrary to the opinion filed by the Advocate General, it first of all studies the applicability of the *Zambrano doctrine* to the case in question. In the course of this, it repeats what it declared earlier, i.e. that those national measures which involve depriving the EU citizens of the genuine enjoyment of the substance

[44] The Free Movement Directive does not provide the right of entry to and residence in the member states to all third country nationals, only to those who are the family members of an EU citizen who exercises his/her right to free movement through settlement in a member state that is different from the one of which he/she is a national, paras 41-42 of the judgment.

[45] Ibid. para 45.

[46] COM (2001) 257 final.

[47] Case 115/15 paras 46-47.

[48] Case 480/08 and C-310/08.

[49] Case 115/15 para 63.

[50] Ibid. para 65, C-413/99 para 71.

of the rights ensured through this EU citizen's legal status run counter to Article 20 of the TFEU. Also, it stresses the exceptional nature of this criterion, i.e. that it exclusively refers to such situations where the secondary law that refers to the right of residence of third country citizens is not applicable.[51] However, since NA and her children are entitled to residence in the United Kingdom on the basis of the secondary law, including Regulation No. 1612/68, the exceptionality criterion laid down in the *Zambrano* judgment is not met according to the Court.

Then the European Court of Justice goes on to examine the applicability of the freedom of movement and right of residence as specified in Article 21 of the TFEU to the case in question, in the course of which the Court basically follows the line of thought of the Advocate General's opinion. Thus, it stipulates the necessity of meeting the criterion of sufficient financial means required by the Free Movement Directive.[52] However, the Court leaves the examination of this circumstance to the national court.

Finally, the Court cites the principle that is well-known from the case law of the Court and which was also voiced in the Advocate General's opinion, i.e. that the parent who is the primary carer of a minor EU citizen is also entitled to the right of residence with a view to ensuring the efficient exercise of the rights arising from EU citizenship.[53] So, if the criteria required by the directive, primarily those which refer to the need for sufficient financial resources, are met, NA as the parent who is a primary carer of the children may be granted residence in the territory of the host member state pursuant to Article 21 of the TFEU.

2.4. Criticism of the Argumentation

As was also pointed out by Advocate General Wathelet when he examined the acceptability of the question, it is by far not irrelevant with regard to this case whether NA and her children are only provided protection granted by international law,[54] or whether their right of residence is directly based on *EU law*, and if so, on what *legal source* of the latter, since the individual legal sources provide them different ancillary rights,[55] or they do not provide any rights at all.

So, the subject of the case is primarily not the question whether NA continues to be entitled to stay in the territory of the member state but it is rather to find out what the actual legal grounds of her stay are. The situation is that after the divorce, NA applied for the legal status of *permanent residence*, without any success, in light of the current judgment.

The legal status of permanent residence can be obtained by five years of continuous and lawful residence under the Free Movement Directive. The question arises whether this right also extends to those whose residence is ensured only derivatively under this directive. The answer given by Advocate General Wathelet in this respect is clearly affirmative, what is more, according to his position, the fulfillment of the criteria of permanent residence is also possible for NA through exercising several derivative rights

[51] Ibid paras 70-72.

[52] In relation to this, it is declared that this can also come from a third country citizen, i.e. the source of these means is absolutely irrelevant. Case 115/15 paras 76-78.

[53] At this point, the Court quotes the above-cited Chen and Alokpa judgments, case C-86/12 paras 79-80.

[54] Case C–115/15. Opinion of Advocate General Wathelet, para 30.

[55] For example, the use of some social security and non-contributory benefits in addition to residence.

of residence related to different EU citizens. However, it should also be pointed out that this criterion cannot be met in the case of those who are entitled to stay in the territory of the member state on the basis of Regulation (EEC) No. 1612/68 of the Council on freedom of movement for workers within the Community rather than on the basis of the Directive itself, at least pursuant to the Court's *Alarape* decision.[56] This is why it has critical importance whether it is the directive itself or the legislation in question that will serve as the basis for NA's right of residence.

In light of the above, it is unfortunate that according to the Court's decision, NA could exclusively obtain a right of residence in the territory of the host country on the basis of the above referred legislation, in her capacity as a primary carer of her children.[57] Consequently, the third country citizen who does not have a child from his or her marriage,[58] or who does not obtain parental supervisory rights over his or her children, ad absurdum, whose EU citizen spouse forcibly takes their common child from the country in question when the latter departs from the host member state, will basically remain without protection in such a case. Similarly, if the EU citizen spouse happens to have worked in the territory of the host member state as a self employed rather than as an employee earlier, the third country spouse is not eligible to protection under the EU law again, at least pursuant to the content of the Court's *Czop* decision.[59]

In light of the above, the statement of the Court, according to which in order to be able to retain the right of residence of a third country citizen as stipulated in the directive, the EU citizen spouse should be staying in the territory of the host member state when the divorce case is launched, should be examined more thoroughly.

2.4.1. Criticism of the Argumentation of the European Court of Justice regarding the Lapsing of the Right of Residence according to the Directive

The line of thoughts of the European Court of Justice with regard to the lapsing of the right of residence according to the directive is broken at several points, it is erroneous and imperfect. Thus, first of all, and contrary to the statement made by the Court, it is not so obvious that the move of an EU citizen to another member state will simply make the regulation relating to the dissolution of a marriage in the Free Movement Directive, i.e. the contents of Article 13 invalid. The above position taken by the Court

[56] In its judgment, the Court declared that the periods of residence spent by the third country family members of an EU citizen in one of the host member states exclusively pursuant to Article 12 of Regulation No. 1612/68, and without fulfilling the criteria required by directive 2004/38 with regard to obtaining the right of residence, shall not be taken into account in obtaining a permanent right of residence as per the aforementioned directive by these family members. C-529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department*, not yet reported.

[57] Not as a victim of domestic violence, who may retain their right of residence after the divorce pursuant to the directive.

[58] The Court, for example, did not attach any particular significance to the fact that at the time of the divorce, NA was only expecting their second child.

[59] In the Czop judgment, the Court declared that Article 12 of Regulation (EEC) No. 1612/68 of the Council on the freedom of movement for workers within the Community provides the right of residence only to the migrant worker who is a primary carer of his or her child who pursues studies in the host member state, without providing such a right to a self employed who in fact exercises parental supervisory rights over his or her child. C-147/11, *Secretary of State for Work and Pensions v Lucja Czop and Margita Punakova*, not yet reported.

is based on their earlier *Singh* judgment, which decision[60] has received quite a number of critical remarks by the representatives of legal literature. [61]

These critical remarks as we will see it below are primarily targeted at an interpretation of Section (2) of Article 7 offered by the European Court of Justice, which makes the right of residence of the family member dependent on the continuous stay of the EU citizen in the host member state.[62] Similar doubts have emerged with regard to the Court's legal interpretation of Section (2), Article 13 of the Directive. The situation is that the Court artificially connects the terms "commencement of divorce" and "residence in the host member state" mentioned in Point (a), Section (2) of Article 13 in the justification of the Singh judgment, which serves as the basis for the NA decision, from which the mistaken conclusion is easily drawn that the EU national spouse must reside in the host member state until the court proceedings aimed at dissolving the marriage are launched.[63] However, according to the right interpretation of Article 13, the EU national spouse *may reside anywhere* when the divorce case is launched, this in itself exerts no impact at all on the right of residence of the third country spouse.[64] It is this very right that is the subject of the provision in question in the case of the dissolution of a marriage. The situation is that Article 13 is meant to realize one of the major objectives of the law, *i.e.* that the protection of the third country spouse (and at the same time, their right of residence) should be ensured on a personal basis, irrespective of the place of residence of the ex-spouse.[65]

The above is somewhat contradicted by the argument also voiced by the Court, i.e. that Article 12 of the directive keeps quiet about retaining the right of residence of a third country family member in the case of the departure of the EU national and it only provides for the retention of the right of residence in the case of EU nationals. The Court opines that by doing so, the EU legislator essentially meant to refrain

[60] Pursuant to this decision, as long as the EU citizen spouse departs the territory of the host member state before the divorce proceedings are launched, this will involve the lapsing of the right of residence of the third country national spouse in the host member state and this right cannot be revived by an application for the dissolution of marriage either.

[61] Francesca Strumia, *Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens' free movement: Kuldip Singh and Others'*, Common Market Law Review (2016), vol. 53, pp. 1373-1394; Steve Peers, *Domestic violence and free movement of EU citizens*. http://*eulawanalysis.blogspot.hu/2016/07/domestic-violence-and-free-movement-of.html* (28 March 2018).

[62] The situation is that Section (2), Article 7 says that "[…] the right of residence shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State […]". Strumia thinks that by this, the legislator essentially only wishes to specify those family members who are in principle entitled to reside with the EU citizen, at least as long as the other criteria set out in the directive are met. Thus, the terms "accompanying or joining" specified in the provision in question only refer to the commencement of the right of residence, and not to its process. Also, Section (2) of Article 7 does not refer to, at any point, the concept of a third country national who "continuously resides" with an EU citizen.

[63] The point is that Point (a), Section (2) of Article 13 says that "[…] the divorce shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State if prior to initiation of the divorce […], the marriage […] has lasted at least three years, including one year in the host Member State".

According to the right interpretation of the words of the directive, the one-year residence in the host member state may take place at any time during the three years of the relationship, not only in the year preceding the divorce. Thus, just contrary to the Court's decision adopted in the Singh case, this makes one conclude that the EU citizen spouse may reside anywhere at the time of launching the divorce proceedings, this in itself has no impact at all on the right of residence of the third country national spouse.

[64] See Strumia p. 1379.

[65] "Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis." Preambles of the Directive, Point 15. This was confirmed by the Court's practice as well, see Ogieriakhi judgment, para 40, C-244/13, Ewaen Fred Ogieriakhi v Minister for Justice and Equality and Others, not yet reported.

from providing special protection to non-EU national family members in the case that the EU national leaves the territory of the host member state.[66] However, the Court acknowledges this purpose of protection for the cases set out in Section (2) of Article 13. In this context, it does refer back to the content of the draft Free Movement Directive, according to which it intends to provide protection to those third country nationals whose right of residence is related to the family tie established by marriage and who can thus be blackmailed with the dissolution of the marriage.[67] According to the draft directive, however, such protection only becomes necessary when a marriage is dissolved with binding effect, since separation does not affect the right of residence of the third country national spouse. Unfortunately, from this, the Court draws the conclusion that ensuring protection is completely subordinated to the dissolution of marriage between the affected spouses. This argumentation, however, is logically wrong, what is more, it is almost absurd.[68] It is a fact that the separation of the parties does not affect the right of residence in each case,[69] as long as the EU national stays in the host member state. However, taking it into account that as a result of the departure of the EU citizen spouse, at least according to the Court's interpretation, the right of residence will cease to exist completely, safeguards will in fact become necessary in such a case. Otherwise the EU citizen may hold their spouse in check by threatening them with departure rather than divorce. The Advocate General also shares this view, as he thinks that the loss of the right of residence may be used as a means to impose pressure, to inflict an emotional trauma on the victim and to cause long-term fear in relation to the abuser. [70] The question arises whether the legislator in fact meant to create this distinction, i.e. that in one case the threat is acceptable, while it is excluded in the other.

2.4.2. The Theoretical Considerations Underlying the Rights Provided to Third Country Nationals

At this point of the analysis, it makes sense to examine the effect, nature and motives of the rights provided to third country citizens on a derivative basis, which may provide some guidance to those who apply the law. There are fundamentally two considerations underlying the rights provided to third country family members. These are primarily aimed at the most efficient possible exercise of rights by EU nationals, i.e. at facilitating the exercise of their free movement and residential rights. This is certified by the Court's jurisprudence of expanded effect, which broad interpretation ensures the right of residence to third country family members beyond the scope of eligible parties specified in the directive,[71] in other cases too. Thus, for example, to a third country national who in fact raises an EU

[66] Case C-115/15 paras 43-44.

[67] COM (2001) 257 final.

[68]Steve Peers, Domestic violence and free movement of EU citizens. http://eulawanalysis.blogspot.hu/2016/07/domestic-violence-and-free-movement-of.html (28 March 2018).

[69] The effect of the decision adopted by the Court on the Diatta case, i.e. that the spouse does not necessarily have to continuously live together with the EU national in order to become eligible to a residential right on a derivate basis, was further broadened by its judgment adopted in the Ogieriakhi case. In this, the Court declared that with regard to obtaining the permanent right of residence, it is irrelevant whether the married couple did not live together in a certain period of their marriage, or even if they lived with other partners. Thus, this essentially does not require any kind of co-habitation from the parties. This decision of the ECJ was justified by that an interpretation contrary to this would involve the application of a more favorable system in the case of the dissolution of the marriage than in the case of separation, with regard to the affected third country nationals. Case C-115/15 paras 38-42.

[70] See Articles 6,7 and 16 of the Directive.

[71] See Articles 6, 7, 16 of the Directive.

national child while the EU national parent is exercising the right of free movement,[72] or a third country family member who is a primary carer of his or her child with union citizenship,[73] and TCN parent caretakers where no free movement has occurred but the substance of a Union citizen's rights would otherwise be impaired (Zambrano doctrine).[74] As is also explained in the justification of the Iida judgment,[75] it is a common element of the above facts that, although they are regulated by such provisions which are the *a priori competence* of the member states,[76] they are still closely related to the EU nationals' right of free movement.[77] The situation is that the non-recognition of the above rights may interfere with the union citizens' right to free movement by having an adverse effect on the family life of these nationals, which deters or holds them back from exercising their right of entry into the host member state and residence in that member state.[78]

The above consideration may be logically questioned by the departure of the EU national, considering that third country family members do not need residence in the host member state any more in relation to exercising their free movement and family rights. In principle, this may explain the "keeping quiet" of Article 12, including that in the case of the departure of the EU national, the protection of the third country national in the host member state will cease.

However, the other fundamental consideration underlying the provision of rights to third country citizens, which is the requirement of the *protection of personal rights*, should also be mentioned.

The rights of citizens of third countries, which were originally provided on an exclusively derivative basis, should start living an independent life in certain situations. The dissolution of a marriage with an EU national (Article 13) and the rights of residence provided in the case of the death of an EU national (Article 12) are the specific expressions of this very consideration. This means that at this point, the legal institution of EU citizenship penetrates into the areas that traditionally belong to the competence of the member states, which "now requires the member states to regard the third country citizens as one of the members of their community, irrespective of the nature of the family tie, or the exercise of the EU national's free movement rights."[79]

The *NA* case unfortunately falls into the legal loophole between the provisions set out in Article 12 and Article 13, which as we have seen, poses a major challenge to those who apply the law. Furthermore, it seems like the considerations underlying the rights that the third country citizens are entitled to do not provide a clear guidance either, as they point to different directions.

[72] C- 60/00, *Mary Carpenter v Secretary of State for the Home Department*,[2002] I-06279; C- 457/12, Minister *voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, not yet reported.

[73] Case C-200/02.

[74] Case C-34/19.

[75] C-40/11, *Yoshikazu Iida kontra Stadt Ulm*, not yet reported.

[76] Thus, the provisions on the rights of entry and residence of third country citizens.

[77] Ibid para 72.

[78] As early as at the outset of integration, the view was acknowledged that in order to be able to efficiently exercise the rights of the migrant member state citizens, it is critical to provide similar rights of residence and employment to their family members too. See G. Barrett, *Family Matters: European Community Law and Third-Country Family Members*, C.M.L.Rev., 2003 (40), pp. 375–376; Alina Tryfonidou, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach*, European Law Journal, issue 2009/5, p. 636; Alina Tryfonidou, *Jia or 'Carpenter II': The edge of reason*, European Law Review, 2007 (32), p. 913

[79] See Strumia p. 1384.

The situation is that in the light of ensuring the effective exercise of the rights of the EU nationals as a fundamental consideration, the above standpoint, according to which the third country national spouse does not need protection from the host member state any more in the case of the departure of the EU national, seems entirely justifiable. This assumption, however, can still be challenged in certain cases, as long as the examination of the protection of family life in the context of the rights of free movement can contribute to this.

2.4.3. The Protection of Family Life in the Context of Free Movement

In the EU law, the institution of the *family* receives protection through the idea of *cross-border EU citizenship*, which conception is specifically represented in the rights to free movement. This unique context in which the right to free movement is stressed is one which at the same time allows the narrow or broad interpretation of the concept of family life. The former concept is built on the definition of the *market citizen*, in which a family is acknowledged strictly as the means to ensure free movement, subordinated to the interest of the economically active member state citizen. The above approach of the Court was enforced in a high number of cases when the Court, instead of invoking the fundamental rights, many times disregarding even the opinion of the Advocate General, ensured the protection of family life on *sui generis* EU basis.[80] As compared to this, the *Singh* and *NA* decisions mean a further twist in the above approach to the family concept related to family rights and EU citizenship. [81] Before the above decisions were adopted, it was the *protection of the unity of the family* that served as a *safeguard for free movement*. After the judgments in question, however, it is concerning that in certain cases, only the final dissolution of the family, including the dissolution of the marriage may provide protection to those third country rights which cannot be integrated into the classical framework of free movement. In other words, in the future, the interpretation of Article 13 of the directive by the Court may serve as a kind of *incentive* for the dissolution of the family tie as soon as possible, *i.e.* for the launch of the divorce case before the departure of the EU citizen, thus filling the protection gap with regard to the third country citizens' rights disintegrating from the rights to free movement.

Looking at the issue from another angle, however, it is the very cross-border nature of free movement and EU citizenship that may pave the way for the acceptance of a progressive family model. The Singh and NA cases are excellent examples for showing that the legislations in question do not always provide appropriate protection for the migrant EU citizen and mainly, for the latter's family members left behind in his/her host member state. It is the very cross-border nature of free movement and EU citizenship that may justify a more flexible approach, in which the spouses, in a certain period of their family life, live in geographical separation from each other, in two different member states of the European Union but they keep the unity of their family all through. This is, at least partly,[82] supported by the *Diatta* decision of the European Court of Justice, which does not necessarily require permanent co-habitation with the migrant worker in order to guarantee the exercise of derivative rights any more. This decision of the Court was later confirmed by the *Iida* case, in which it was added that this is so even if the spouse thinks that they would later like to get divorced from each other.[83] In a Europe without borders, more and more

[80] See the above-quoted Baumbast, Zambrano, Alokpa, Zu and Chen judgments.

[81] See Strumia p. 1387.

[82] Considering that the facts of the matter are restricted to one member state in the case in question.

[83] Case C-40/11 para 58. Even if, as the case may be, Mr. Iida did not have the chance to enjoy the advantages offered by the directive, considering that he wished to obtain a right of residence in the member state according to the nationality of his EU national spouse.

people "may be compelled" to take up employment in another member state, far from their spouse, by using their right to free movement. Thus, in light of the above line of thought, the standpoint taken by the Court in the *Singh* and *NA* cases, i.e. that the departure of an EU national spouse will automatically terminate the rights of residence of a third country family member, can be questioned. The departure of an EU national from the host member state may become part of a cross-border family life in pretty much the same way as the EU national's exercise of the right to free movement for the first time, including his/her move to the host member state.

Thus, based on the above approach, the legal consequences of the EU national's departure from the host member state should be reconsidered, even in the case of the occurrence of a "family crisis". Taking into account the aim of effective exercising of the EU national's right to free movement as a fundamental consideration, it is actually possible to have such an interpretation of Articles 12 and 13 of the Directive by the European Court of Justice in which the temporary separation of the family is acknowledged as the means to facilitate free movement, as the case may be, and it is on the basis of this consideration that the family members may be entitled to protection. [84]

In this case, however, a very legitimate question arises: where are the limits of the Court's broad interpretation? Where is the point at which the expanded interpretation of the European Court of Justice may easily transform into the member states' resistance against the institution of free movement? There is nothing that would express this better than those sometimes almost threatening political statements which are targeted at strongly curbing the rights to free movement, or the very fact of Brexit.[85] The potential tensions arising from issues of competence may even act as a logical explanation for the cautious approach taken by the Court in the Singh and NA cases.

The Court's "cautiously progressing" approach, however, forces the affected third country citizens to make a rather bitter choice. 'Get divorced as soon as possible, or leave the host country', as the judgment goes.

This situation is further aggravated by that in the NA case, we are talking not only of an average third country family member whose relationship with her EU national spouse has in the meantime deteriorated. We should always keep in mind that NA became a victim of domestic violence. The situation is that according to the NA decision, as long as a third country spouse would like to get away from domestic violence by breaking the family tie, or the very abuser would like to avoid the potential legal consequences, the non-EU national family member should, as a general rule, face expulsion from the territory of the host member state.

Thus, except for the above-described isolated groups of cases, often there is nothing else that the third country citizen can do but to continue with the relationship, not risking their residence in the host member state and the potential loss of their children.

Discussing the above in light of a specific case, we can see that the claimant of the case in question could retain her right of residence according to the decision if she commenced the divorce proceedings

[84] This may be realized in practice through the joint interpretation of Article 21 of the Treaty ensuring the right of free movement, and the provisions in question, which however, raises quite a number of problems. Thus, the question arises what will happen if the EU national spouse happens to leave for a third country rather than another member state. On the basis of this scenario, the third country family members would obviously not be entitled to any protection.

[85] Thym thinks that by now, free movement has obtained a "symbolic function", it acts as a kind of projection of the currently emerging economic, social and political fears. Daniel Thym, *The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens*, C.M.L.Rev., 2015, Vol. 52, p.18

before her EU national spouse leaves the host member state. However, one wonders what chance there is that a third country mother who is five months pregnant and has an eleven-month-old baby, fleeing domestic violence, will file for divorce in the host member state when she also faces problems of housing and livelihood.

3. Conclusion

In the NA case, we are facing an *exceptional situation*, as the number of such cases when the EU national who commits domestic violence departs from the host member state before the divorce is very low.[86] Even if the number of those affected by the decision is very low, the issue of domestic violence should be taken seriously, especially in the case of the European Union, which is an organization committed to the idea of the rule of law and fundamental rights. What is more, the Commission proposed the European Union to sign the 2011 *Istanbul Convention*,[87] the goal of which document of the Council of Europe is to prevent and eliminate violence against women and domestic violence.[88] Article 59 of the Istanbul Convention requires the provision of the right of residence independently from the spouse, in cases of domestic violence.[89] The situation is that neither the document nor the interpretative explanation thereof contain any reference whatsoever to the above distinction, depending on whether the abuser has or has not departed from the territory of the country in the meantime. But why would it contain such anyway? For the Convention, the place of residence of the abuser is totally irrelevant.[90] The exclusive goal of this, as well as that of the respective Article 13 of the directive, is to provide protection to the victim. The Court will definitely have to take this into account in its future judgments. This is partly why it is very difficult to understand the consideration underlying the *NA* decision, according to which the third country spouse will not need the protection of the host member state after the departure of the EU national spouse, so the right of residence of the former can automatically be terminated. As, however, it has been very rightly pointed out by Advocate General Wathelet, in such cases, the loss of the right of residence of the spouse who is a third country citizen "may be used as a means to impose pressure […], to inflict an emotional trauma on the victim and to cause long-term fear in relation to the abuser." [91] What is more, the Court's interpretation of Article 13 of the Directive essentially deprives the legislation in question of its effectiveness, as it makes the protection dependent exclusively on the intention of the offender to stay in the territory of the host member state.

The reconsideration of the decision is also encouraged by the examination of the protection of family life in the context of the right to free movement. The interpretation of the *NA* case submitted by the Court may act as an incentive for the dissolution of family ties as soon as possible in the future, and therefore for the launching of the divorce case before the departure of the EU national from the territory

[86] Consequently, the number of those third country nationals whose right of residence would thus be retained is presumably insignificant.

[87] www.coe.int/en/web/istanbul-convention/home (28 March 2018).

[88] www.europa.eu/rapid/press-release_IP-16-549_hu.htm (28 March 2018).

[89] "The Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognized by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship." See Article 59 of the Istanbul Convention.

[90] See Steve Peers, *Domestic violence and free movement of EU citizens*. http://*eulawanalysis.blogspot.hu/2016/07/domestic-violence-and-free-movement-of.html (28 March 2018).*

[91] Case C - 115/15, Opinion of Advocate General Wathelet, para 70.

of the country in question, thus filling the gap of protection with regard to third country national rights emanating from the rights of free movement. However, it is exactly the cross-border nature of free movement and EU citizenship that may justify a more flexible approach. According to this, the departure of the EU citizen from the host member state, including the temporary separation of the family members does not necessarily have to result in the lapsing of the right of residence of the third country spouse. This secondary movement may become a part of cross-border family life just like the exercise of the rights of free movement for the first time.[92] Of course, the question arises where the boundaries of expanded interpretation are. We should realize that the judges are not in an easy situation when they have to provide guidance to those who apply the laws in the buffer zone of immigration policy, which is traditionally a member state competence, on the one hand, and supranational EU rights, on the other hand. What is more, they have to do all this in the midst of a crisis period that gravely affects Europe, in which the very institution of free movement was also jeopardized. [93] The *NA* case was not the first time when the complex issues of the relationship between the EU nationals residing on the basis of their original right and the third country nationals residing on the basis of a derivative right are in the focus of attention, allowing the Court to settle those competence issues which have caused tension for a long time. [94] The situation is that there is an increasing number of cases before the Luxembourg forum whose facts are regulated by provisions that *a priori* belong to *the competence of the member states,* thus those that regulate *the right of entry and residence of third country nationals*, however, they are still closely related to the right of EU citizens to free movement and residence. One of the critical steps in this respect was the Court's judgment adopted in the *Zambrano* case. During this case, the Court reached such a high level of the protection of the EU citizens' rights derived from Article 20 of the TFEU in which it ensures family reunification rights to the third country parents of EU citizens in a purely member state situation, giving an undoubtedly spectacular example for how judges can develop the law. In its less generous case law following the *Zambrano* decision, the Court, however, also made it clear that the protection provided on the basis of Article 20 of the TFEU may only be applied in highly exceptional cases. Thus, basically only in the case of such *EU* minors who reside in their country of origin with their third country parents, without ever having exercised their right to free movement.[95] In the NA case, this was obviously not the case, as opposed to the subsequent *Rendon Marin* and *CS cases*[96], in which the Court examined the derivative right of residence of third country parents with a criminal record based on Article 20 of the TFEU. In the above cases, the EU national children have been residing in the member state of which they were nationals since they were born. In these decisions, the Court now clearly confirmed that in the case of EU nationals residing in the host member state, it is first of all always Article 21 of the Treaty that ensures the right of free movement that can be invoked and it is only then that Article 20 underlying the *Zambrano* test can be applied. The Court's decision adopted in the NA case is an excellent example for this. The situation is that it is declared by the Court crystal clearly that in relation to the case in question, what should primarily be investigated into is whether the EU citizen and their third country relative may obtain a right of residence under secondary law. From all

[92] This is, at least partially, supported by the Diatta decision of the European Court of Justice, which does not necessarily require permanent co-habitation with the migrant worker in order to guarantee the exercise of derivative rights.

[93] Laura Gyeney, *The limits of Member State solidarity*, in Marcel Szabó (ed.): *Hungarian Yearbook of International and European Law*, The Hague: Eleven International Publishing, 2016. p. 434.

[94] The Court is more and more often accused of too intensively interfering with the area of immigration policy, namely into the regulation of the third country nationals' right of entry and residence, which is a national competence, in its jurisprudence under the pretext of the effective exercise of the rights arising from EU citizenship, C- 127/08, Blaise Baheten Metock és társai kontra Minister for Justice, Equality and Law Reform, [2008] I-06241, para 67.

[95] Case C-165/14 para 74.

[96] C-304/14, Secretary of State for the Home Department v CS, not yet reported.

this, it becomes absolutely clear that the protection provided on the basis of Article 20 of the TFEU may only act as a last resort, even if we are talking about a mother who fell victim to domestic violence. In light of the above, the NA decision adopted by the Court is to be carefully considered, especially in contrast with the Court's decisions adopted in the *Rendon Marin* and *CS* cases. Based on all this, it seems like a criminal enjoys a higher level of protection[97], according to the current status of EU law than a mother who fell victim to domestic violence.

[97] In the Cs case, the Court decided that the member state may take an expulsion measure in exceptional circumstances based on public policy and public security considerations, however, this has very strict criteria and this can only happen after a very thorough consideration of the existing interests, among others, considerations of fundamental rights.

The high-level protection provided by the Zambrano doctrine is referred to by Article 7 of the Charter of Fundamental Rights of the European Union ensuring the protection of family life, as well as Section 24(2), which safeguards the best interests of the child, what is more, the relevant Strasbourg practice, including the reference of the Court to the Jeunesse v. the Netherlands judgment, both in the Rendon Marin (para 66) and the Cs (para 36) judgments.

"New Minorities" in the States Parties to the Framework Convention: The Importance of Self-Identification and Recognition

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This paper aims to present some of the issues faced by minorities, especially "new minorities", namely lack of recognition as such and societal acceptance, mainly in the countries part to the Framework Convention for the Protection of National Minorities, as well as the exclusion from citizenship status and, in general, from how the majority society (or even other, "established" minorities) define their nation. I contend that this exclusion stems from a state of denial that most European societies are in, which determines a lack of recognition of factual diversity. And although some improvements can be applauded, especially in the case of easing the criteria for citizenship, the general societal, legal and political situation in Europe points to a less than satisfying image. As such, another aim of this paper is to reveal the importance of individual self-identification of persons belonging to minorities and of recognition of the identities that result from this (mostly) internal process by their peers and by their "host" states.

Key words: new minorities, self-identification, recognition, Framework Convention, citizenship, national narrative.

1. Introduction

The purpose of this paper is to ascertain some of the issues faced by present-day so-called "new minorities". The term has recently began to be used more and more to describe a variety of different groups. As such, I will first try to give a theoretical outline to the term itself and other terminology used in minority rights studies in order to correctly pinpoint its meaning and ambit. In doing so, I will use Will Kymlicka's terminology, since it is probably the most influential, and make some distinctions to his definitions. In defining and ascertaining who these groups are, I will not only refer to their origins or length of residence, but also to the type of rights they seek and their relation to the majority.

After the theoretical introduction, I will present on some of the issues which individuals pertaining to new minorities are facing, some of them being very distinct from the problems facing traditional or "old" minorities. I will particularly focus on two aspects which have an especially disproportionate effect on individuals belonging to new minorities: the lack of social and legal recognition as minorities and the lack of citizenship or the existence of restrictive interpretations of what "citizenship" and "nation" mean.

In what follows, I will mainly direct my attention on European states, particularly those that have signed and ratified the Council of Europe's Framework Convention for the Protection of National Minorities (henceforth "the Framework Convention"), as it is one of the most comprehensive and modern legal instruments that deals expressly with national minorities, and its main monitoring body, the Advisory

Committee's work, especially its Thematic Commentary No. 4 on the scope of application of the Framework Convention.[1] However, I will also refer to the Canadian example as a particularly well-functioning multicultural system that can be used as a reference point when comparing European states' approaches. For clarity purposes, I will also compare the doctrinal definitions of "minority" and "new minority" with the elements the Advisory Committee uses for "national minority", the only term of the three that is also used by the Framework Convention. Although there is no *per se* definition of "national minority", it can be ascertained through the Committee's work. Moreover, since most of the Committee's work focuses on traditional minorities, I will refer to those parts that would also apply to new minorities.

2. Who and What are the "New Minorities"?

Will Kymlicka makes a basic distinction in his book, *Multicultural Citizenship: A liberal theory of minorities rights*,[2] between national and ethnic minorities. To him, national minorities are those groups that usually wish to maintain their cultural distinctiveness, form their own societies and maintain them through self-governance,[3] while ethnic groups or ethnic minorities are constituted mainly from immigrant groups that leave their countries on a family basis and, consequently, usually do not request autonomy or self-governance rights, but still desire integration.[4]

"New minorities", on the other hand, as one author puts it, are "groups formed by individuals and families who have left their original homeland to emigrate to another country generally for economic and, sometimes, political reasons" and that they "consist of migrants and refugees and their descendants who are living, on a more than merely transitional basis, in another country than that of their origin".[5]

I prefer to use the term "new minorities" in this context, instead of "ethnic minorities" because I wish to emphasize the non-recognition of many of these groups as minorities. The term "ethnic minorities", while not entirely objectionable, does not focus on this problematic, but more on the lack of a link with a kin-state and the type of rights Kymlicka associates with ethnic minorities (such as polyethnic rights). I will not engage in a detailed discussion on what type of rights these new minorities should be granted, but will focus instead on the issue of lack of coherent state policies to integrate them. However, when I refer to "new minorities" in the context of Kymlicka's writings, I am referring in part to his concept of "ethnic minorities", with which the concept of "new minorities" partially overlaps. To exemplify this, it is my view that ethnic minorities can be categorized as old or new (the Roma are, for example, an old ethnic minority in Romania, while Syrians or Turks in Germany would be a new ethnic minority). National minorities are, on the other hand, more or less always overlapping with the concept of "old minorities", as they usually have traditional and long-term links with the state in which they reside, as well as with the territory they occupy. In short, the distinction between new and old minorities is made on the basis of length of existence as a group in a particular state, while the distinction between ethnic and national minorities mainly refers to the existence or lack of existence of a kin-state, as well as other

[1] Advisory Committee on the Framework Convention for the Protection of National Minorities, Thematic Commentary No. 4 on the scope of application of the Framework Convention, Commentary ACFC/56DOC(2016)001, Strasbourg, 27 May 2016.

[2] Will Kymlicka, *Multicultural Citizenship: A liberal theory of minorities rights,* Oxford University Press, New York, 2003.

[3] Ibid, pp. 10-11.

[4] Ibid.

[5] For more details, see Roberta Medda-Windischer, *New minorities, old instruments? Diversity governance from the perspective of minority rights*, in Migration Letters, Volume 13, No. 2, May 2016, pp. 178-192, p. 179.

factors. But, in any case, I will also speak of "immigrant communities" or "immigrant minorities" so as to refer to both what Kymlicka refers to as "ethnic minorities" and the concept of "new minorities".

Of course, there are other theoretical delimitations that use the term "immigrant minorities" in a much broader sense. In a working paper[6] for the ECMI (European Centre for Minority Issues), Alan B. Anderson describes immigrant minorities as "ethnic minorities which have originally come from other countries, thus lack a territorial base within an adopted country where they have resettled".[7] While this definition might suit the concept of "new minorities" used in this paper as well, Anderson's concept also includes so-called "imperial relics", *i.e.* "remnants of imperial settlement policies, representing ethnic kinship with the colonizing power, yet remaining behind after de-colonization or independence",[8] such as ethnic Germans and Hungarians in the territories that once belonged to the Austro-Hungarian Empire, ethnic Turks or other Muslims in parts of the former Ottoman Empire and ethnic Russians settled in the former republics of the USSR.[9] It also includes "metropolitan migrants", groups formed from migrants that travel from former colonies to the "metropolis", such as Francophone Africans, Haitians, Moroccans or Algerians in the case of France, West Indians and Indo-Pakistanis in the case of Britain, Surinamese in the case of the Netherlands or Congolese in the case of Belgium.[10] "Middleman minorities" are another category used by Anderson to describe temporary migrants, such as the Turkish *Gastarbeiter* in Germany, or the Chinese and Vietnamese in France.[11]

Finally, "permanent migrants" are used to refer to various groups, including economic migrants that do not move on a temporary basis and refugees. However, he includes in this category not only Syrian refugees in various European states, but also Russians, Jews and other Eastern Europeans in Paris.[12] In any case, with the exception of the "imperial relics", most of the groups included in the latter three categories are included in my use of the terms "new minorities" or "immigrant communities/minorities". Other examples that have not been mentioned are the more recently-arrived Romanians in Spain,[13]

[6] Alan, B. Anderson, *Ethnic minorities and minority rights in Europe: Theoretical Typologies*, ECMI Working Paper No. 99, September 2017.

[7] Ibid, p. 8.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid, p. 9.

[12] Ibid.

[13] According to the Instituto Nacional de Estadística (National Institute of Statistics), in 2014 there were 730,340 people with Romanian as their main nationality and 678.098 in 2017. Their numbers have dropped considerably since the economic crisis and are mainly economic migrants, but their presence in Spain as a group seems to point to a permanent presence there. Also, according to a 2011 study on Romanian immigrants in Spain, 29% of Romanians living in Spain plan to remain there, while 15% think on returning only in the long-term (over more than 5 years), 33% think of leaving within 2-5 years, while the rest were planning on returning the following year. In any case, while their numbers are decreasing, there is data to suggest that a large portion will remain in Spain and seek integration and, possibly, also minority status. And even if they choose not to request official recognition, some of the rights enshrined in the Framework Convention could definitely be applied to them as well, especially those rights that have a broad scope of application. For the statistic by the Instituto Nacional de Estadística, see *Population Figures at 1 January 2014. Migration Statistics 2013*, 30 June 2014, p. 4, available online at: http://www.ine.es/en/prensa/np854_en.pdf (23. September 2017) and *Cifras de Población a 1 de enero de 2017 Estadística de Migraciones 2016*, 29 June 2017, p. 4, available online at: http://www.ine.es/en/prensa/cp_2017_p_en.pdf (last accessed on 23.09.2017); For the mentioned study, see *National Report. Romanian immigrants in Spain*, Barcelona, December 2011, p. 69, available online at: http://www.participation-citoyenne.eu/sites/default/files/report-spain.pdf (23. September 2017).

Italy,[14] Germany[15] etc, Serbians in Austria[16] or Germany[17]. The latter have been forming as communities even before the 1990, while the former have been increasing in numbers only after 1990, although the biggest increase followed Romania's accession to the European Union in 2007.

While it is true that immigrant communities that constitute new minorities mainly and, more important, initially seek accommodation by making the welcoming society more tolerant and, above all, more engaged with them, it is, nonetheless, important to note that the presence of a large enough immigrant community could also lead to the natural creation of separate, parallel societies and, of course, to the requesting of rights usually associated with national minorities. There are, of course, individuals and families that have neatly integrated into the larger "receiving" society and also maintain some degree of cultural distinctiveness so it may be true that these groups only seek accommodative measures. Small groups would tend to assimilate easier, if not right from the first generation, then certainly after the second or third, because of intermarrying and adoption of the mainstream majority culture. Integrating large groups of immigrants, on the other hand, can pose serious difficulties, not only from a logistical and resource point of view, but also because of the lack of social acceptance by the majority culture.

Even though minorities in general could be viewed by the majority as "the Other", an acute feeling of "otherness" is evoked by new minorities as they are not as predisposed as old minorities to social recognition. They are not viewed as part of the cultural fabric of a nation. Thus, while, for example, Hungarians and Germans in Romania may be viewed as being more or less always present in the nation's recent cognitive history, new minorities, such as Syrians, are not. Could the fear of separatism be at the center of states' refusal to officially recognize new minorities?

What Kymlicka notes is that immigrant minorities usually don't pose such a threat to a nation as they usually do not organize as well as old minorities and, consequently, are not as susceptible to cause civil war or insurgencies.[18] This is because, Kymlicka argues, they do not request self-governing rights, but so-called polyethnic rights,[19] which aim at integration in the larger society. Self-governance is, therefore, not an issue usually associated with the claims of immigrant minorities, which have "weaker" claims. It

[14] At the end of 2015, there were 1,151,395 Romanian citizens living in Italy, although the total number of individuals of Romanian ethnicity might be higher, due to some of them being naturalized Italian citizens. Although, as with the case of Spain, a considerable portion would choose to leave Italy, there still remains a sizeable group that would choose to remain. According to a 2012 study, amongst the Romanians recently arrived in Italy, only 8% would choose to remain, while almost 25% of those that have been residing there between 3 and 6 years would choose to reside permanently in Italy. For the statistical numbers, see: http://demo.istat.it/str2015/index.html (23. September 2017); For the study, see Isilda Mara, *Surveying Romanian Migrants in Italy Before and After the EU Accession: Migration Plans, Labour Market Features and Social Inclusion*, Vienna Institute for International Economic Studies, Research Reports, 378, July 2012, pp. 23-24.

[15] According to a 2015 census done by the German Federal Statistical Office (*Statistisches Bundesamt*), there are 657.000 persons with Romanian migration background (*Personen mit Migrationshintergrund*). See Statistisches Bundesamt (Destatis), *Bevölkerung und Erwerbstätigkeit, Bevölkerung mit Migrationshintergrund, Ergebnisse des Mikrozensus 2015, Fachserie 1 Reihe 2.2*, p. 62, available online at: https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220157004.pdf;jsessionid=85A7339F5B34916BE4AB300E6487C349.cae1?__blob=publicationFile (25. September 2017).

[16] According to Statistik Austria, there were 209.000 people with Serbian, Montenegrin and Kosovar backgrounds. See Statistik Austria, *Migration & Integration. Zahlen. daten. indikatoren 2012*, Vienna, 2012 (http://medienservicestelle.at/migration_bewegt/wp-content/uploads/2012/07/IBIB_2012_Integrationsbericht.pdf, p. 26.).

[17] According to the German Federal Statistical Office, there were 281.000 persons with Serbian migration background in 2015. See *supra*, note 15.

[18] Will Kymlicka, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, New York: Oxford University Press, 2007, p. 175, *apud.* Darian Heim, *"Old" natives and "new" immigrants: beyond territory and history in Kymlicka's account of group-rights*, in Migration Letters, Volume 13, No. 2, May 2016, pp. 214-227, p. 216.

[19] Will Kymlicka, *Multicultural Citizenship*, pp. 30-31.

would be particularly difficult for immigrants to engage in separatist movements, since this would presuppose not just the manifestation of their cultural distinctiveness, but also the creation and sustaining of institutions similar to those used by the majority,[20] which would need a considerable legal framework and substantial resources. Moreover, there is no evidence, at least in Western societies, of immigrant groups seeking such goals.[21] Thus, the fear of separatism appears to be unfounded.

But even this chain of thought is marked by the assumption that immigrants have a different mindset from that of old minorities and that they always seek less than old minorities, which is not always the case. While old minorities try to gain some sort of autonomy inside the host state, since they are not considering returning to the kin-state as an immediate and pending option, some immigrant communities, Kymlicka argues, are always on the verge of returning to their state of origin and, as a direct consequence of this, they tend not to form parallel societies.[22] However, this is not entirely true for all minority groups that would qualify as "new minorities".[23] Many do decide to remain in their new state and choose to either assimilate in the majoritarian society, many doing so with probably greater success than old minorities, or retain their distinctiveness by integration or, in less fortunate cases, by isolating themselves from the majority. Even the case about old minorities not desiring to return or move to their kin-states is not entirely accurate, as the example of Hungarians and especially Germans and Jews in Romania shows. Groups of people leave a particular country for various reasons and intentions. Indeed, Kymlicka does not assert that his theory should be taken for granted as making clear cut distinctions between new (ethnic) and old (national) minorities.[24] The assumption that new minorities would soon leave is, however, used as a basis for state policies, as in the case of Germany, which will be discussed below.

One of the reasons some minorities remain attached to their states of origin or kin-states[25] is the fact that they suffer from systematic disadvantages and discrimination in the host state. Actually, I believe that much of the lack of loyalty minorities have towards their host state stems not from their own individual attachment to their state of origin, which can nevertheless be reconciled with their relationship with the host state, but from the policies of the host state, which sometimes chooses to marginalize them instead of offering integration. The example of the Turkish *Gastarbaiter* in Germany is particularly revealing in this sense, as many of them, although now in the third or fourth generations, are more loyal to their parents' and grandparents' country of origin than to their host country because of the initial exclusion

[20] Will Kymlicka, *States, Nations and Cultures, Spinoza Lectures, University of Amsterdam*, Assen: Van Gorcum 1997, p. 52–56, *apud*. Roberta Medda-Windischer, *Changing Paradigms in the Traditional Dichotomy of Old and New Minorities*, in Kristin Henrard (ed.), *Double Standards Pertaining to Minority Protection*, Netherlands, 2010, pp. 195-218, p. 217.

[21] Ibid.

[22] Will Kymlicka, *Multicultural Citizenship*, p. 15.

[23] As a matter of fact, the "on the verge of leaving" state of mind can also be present in old minorities. Romanian Jews, for example, numbered over 138.000 in 1948 (if we take into consideration only those speaking Yiddish) or 428.000 (their probable real number), while Germans numbered approximately 344.000, according to the 1948 census. While Jews could definitely be recognized as an old minority in Romania (as they are still a recognized minority), their numbers dropped to approximately 9000 in 1992 and 3271 in 2011, primarily due to mass emigration to Israel. Germans in Romania also emigrated mainly to Germany, as part of an economic deal by which Germany would pay for each ethnic German left to leave, and their numbers dropped to 36.042 in 2011. The numbers of Hungarians also dropped from 1,6 million in 1948 to 1,2 million in 2011. What is interesting to note, however, is that during the Communist period and even up until the late 1990's, many old minorities were fleeing Romania in massive numbers and their reasons to emigrate, especially in the case of Germans and Jews, were strikingly similar to that of many new minorities (oppression, state attempts to forcefully assimilate minorities, lack of protection for human rights and minorities rights, but also for economic and family reunification reasons). Talk of emigration was omnipresent among Germans and Jews. For more on the exodus of minorities from Romania, see Lucian Boia, *Cum s-a românizat România* (Transl.: How Romania Romanianized), Humanitas, Bucharest, 2015, pp. 107-117.

[24] Will Kymlicka, *Multicultural Citizenship*, p. 25.

[25] Roberta Medda-Windischer, *Changing Paradigms in the Traditional Dichotomy of Old and New Minorities*, p. 197.

from minority status and citizenship, as well as lack of social acceptance. The recent failed coup in Turkey, for example, revealed a high level of political consciousness and implication[26] in the political landscape of Turkey by the Turkish diaspora in Germany, as great numbers of Turks demonstrated in support of Erdogan. But while this can be viewed in a positive light, it also entails a certain degree of disinterest in German domestic affairs.

Moreover, new minorities are thought to request in general less protection than old minorities since their decision to leave their countries of origin is voluntary and, consequently, do not have the same expectation as old minorities that they would reproduce their society in the new host state.[27] However criticized Kymlicka is because of the association of voluntariness with new minorities,[28] he does mention that there are groups that don't fit neatly into his proposed dichotomy and that some groups, such as those that are constituted from refugees, do not leave their country of origin on a voluntary basis.[29]

Notwithstanding the above delimitations, definitions and categories of minorities made by Kymlicka, the Advisory Committee of the Framework Convention has flexible and, at some times, possibly different interpretations of what a minority constitutes or which are the groups to be considered as minorities. Of course, the Framework Convention does not have a definition, yet it does make consistent use of the term "national minority". It is useful to note that this term does not necessarily overlap with Kymlicka's use of the same term. It is not to be understood in the *stricto sensu* meaning he ascribes to it. On the contrary, the Framework Convention can also be applied to so-called ethnic minorities (as understood by Kymlicka) or to indigenous communities, notwithstanding formal recognition as national minorities or not. As proven by the Advisory Committee,[30] some indigenous people do not wish to be formally recognized as national minorities, yet the rights and guarantees found in the Framework Convention are open to them as well and they could avail themselves of their protection without having to identify as a national minority. Even so-called minorities-within-minorities, *i.e.* members of the majority population living in areas where they are numerically inferior to that of the minority or minorities that have a majority position, can benefit from the rights and guarantees enshrined in the Framework Convention, since their position is similar to that of other minorities.

The lack of a definition in the Framework Convention is not only a result of consensus by the states parties, but also a doctrinal choice that highlights the nature of the Convention. More specifically, as former president of the Advisory Committee, Francesco Palermo, pointed out[31], the issues relating to minority rights protection have shifted from "who" to protect to "how" to protect. This underlying

[26] There is also concern for the way Turkish President Erdogan is trying to profit from the rift in German society for electoral purposes. But the rift itself is internal, caused by decades in which German multicultural policies failed. Consequently, the present Turkish generations in Germany are easily attracted to Erdogan's speeches on them being part, not only of Germany, but also of Turkey. Of course, Erdogan's speeches emphasize not the diaspora's belonging to German society, but their being supported by Turkey, thus cashing in on the Turkish diaspora's disenchantment. For more on the German Turks' turn to Turkish politics, see:
https://www.washingtonpost.com/news/worldviews/wp/2016/07/18/home-to-3-million-turkish-immigrants-germany-fears-rising-tensions/?utm_term=.2d0ad0ddd200.

[27] Will Kymlicka, *Multicultural Citizenship*, p. 15.

[28] Heim, 2007, p. 219.

[29] Will Kymlicka, *Multicultural Citizenship*, p. 25.

[30] Thematic Commentary No. 4, paras. 46-49.

[31] The quote has been taken from the conference that launched the Advisory Committee's Fourth Thematic Commentary on the Scope of Application of the Framework Convention, held in Strasbourg on the 11th of October, 2016. The webcast of the conference is available for viewing at:
http://www.coe.int/en/web/minorities/tc4_conference (18. July 2017).

interpretative principle is also mentioned in the Advisory Committee's Thematic Commentary No. 4,[32] which dealt with the issue of scope of application of the Framework Convention: "Rather than asking '*who'* should be protected, it asks '*what'* is required to manage diversity most effectively through the protection of minority rights. It is for this reason that the Convention does not contain a definition of the term 'person belonging to a national minority'". This does not mean that the scope of application *ratione personae* of the Convention is a closed issue that no longer needs clarification or that the issue of "*who*" to protect is of no interest any more. I contend that an interpretation more consistent with the work of the Advisory Committee and the object and purpose of the Framework Convention would dictate a different meaning to this change of paradigm. Thus, my interpretation is that in the present day, the focus is not on strictly delimitating groups of national minorities with the intention to protect them by enclosing them from the majority, but on how to effectively distribute and guarantee minority rights as measures protecting diversity. Minority rights measures in the 80's and 90's focused mainly on preserving the culture of minorities separately from the majority. Approaches nowadays, on the other hand, lean more towards integration, which presupposes constant interaction with the majority.

3. Why is Recognition Important?

According to article 3 (1) of the Framework Convention, "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice". Under this widely used formula,[33] the Framework Convention lays down one of its core provisions: the right to self-identity or the right to self-identification. If one reads further into the Explanatory Report's clarification of the first paragraph, three main components of this right become apparent.

The first and, probably, the most self-evident aspect, is the guarantee that every person belonging to a national minority is free to choose to be treated or not as such[34] and whether that person wishes to fall under the scope of application of the Framework Convention.[35] However, since this provision is, as such, open to abuse, the Explanatory Report further extracts another element: the exclusion of arbitrary declarations from persons wishing to be treated as pertaining to certain national minorities and the link between the individual's subjective choice and objective criteria relevant to the person's identity.[36] The

[32] Thematic Commentary No. 4, Executive summary, p. 3.

[33] The 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE also lists the principle in a similarly worded fashion: "To belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice" (para. 32). The previously mentioned Recommendation 1201 of the Council of Europe's Parliamentary Assembly also indicates, in article 2, that "Membership of a national minority shall be a matter of free personal choice" and that "no disadvantage shall result from the choice or the renunciation of such membership". The same can be said of the OSCE Ljubljana Guidelines on Integration of Diverse Societies, which offers a very similar, though more broadly worded, definition in principle 6 (Primacy of voluntary self‑identification): "Identities are subject to the primacy of individual choice through the principle of voluntary self-identification. Minority rights include the right of individual members of minority communities to choose to be treated or not to be treated as such. No disadvantage shall result from such a choice or the refusal to choose. No restrictions should be placed on this freedom of choice. Assimilation against one's will by the State or third parties is prohibited."

[34] Framework Convention, Explanatory Report, para. 34.

[35] Ibid.

[36] Ibid, para. 35.

third and last element is the guarantee that no disadvantage shall arise from this free choice and that no indirect obstacle exists in the way of exercising the rights connected to this choice.[37]

By deconstructing the right to self-identity, we can detect a subjective part, stemming directly from an individual's belief that he or she is part of a national minority, but also an objective counter-weight, of which the primary function is to test the authenticity of the individual's statement.[38] Moreover, it is also essential, especially for the purpose of this paper, to retain that individuals can self-identify for some purposes, but not for others.[39] In my opinion, this should be the logical outcome when corroborating the article-by-article approach promoted by the Advisory Committee and the fact that the right to self-identify should be exercised freely. Thus, individuals wishing to be recognized as being part of a minority could rightly solicit recognition for the purpose of gaining the possibility to exercise some rights granted by the Framework Convention, but not others.[40] In any case, as the Advisory Committee declared in its 4th Thematic Commentary, "the right to free self-identification (…) is a cornerstone of minorities rights".[41]

The reason why the right to self-identification is so important for the recognition of ethnic and national minorities is that it represents the normative expression of ethnic or national consciousness. And even though these latter forms of consciousness have obvious communitarian undertones, they are, after all, the product of individual self-identification. The individual is the fabric of the "cultural structure" that constitutes the basis of ethnic or national identity and it is the individual that can modify it from within,[42] since it is his or her free choice to act as such. In the end, the right to self-identify, like the majority of the rights guaranteed by the Framework Convention, is an individual right, although it also has a collective dimension to it, which should, nevertheless, not be neglected.

Opposite the right to self-identification lies the obligation of states to recognize ethnic and national minorities that request this. Recognition, in this sense, would function as a form of justice, not in a distributive sense, but as a guarantee against oppression, marginalization or forced assimilation.[43] Of course, legal recognition, alone, is not sufficient to combat injustice, reduce discrimination or integrate ethnic and national minorities into the wider society. It is, however, one of the basic requirements of any policy on minorities, especially new minorities, which have a particular difficulty in getting recognized as such. The alternative, nonrecognition or misrecognition, can, in the words of philosopher Charles Taylor, "inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being".[44] Recognition by the state has a legitimizing effect on the presence of ethnic

[37] Ibid, para. 36.

[38] However, according to the Advisory Committee, "these (objective) criteria must not be defined or construed in such a way as to limit arbitrarily the possibility of such recognition, and that the views of persons belonging to the group concerned should be taken into account by the authorities when conducting their own analysis as to the fulfilment of objective criteria" – Advisory Committee of the Framework Convention, Third Opinion on Bulgaria, ACFC/OP/III(2014)001, para. 28.

[39] Elizabeth Craig, *Who are the minorities? The role of the right to self-identify within the European minority rights framework*, Journal on Ethnopolitics and Minority Issues in Europe Vol 15, No 2, 2016, 6-30, p. 10.

[40] The Advisory Committee highlights this in its Thematic Commentary No. 4: "Moreover, it [the Advisory Committee] has considered that free self-identification implies the right to choose on a situational basis when to self-identify as a person belonging to a national minority and when not to do so." (para. 11); "In practice, this means that each person belonging to a national minority may freely decide to claim specific rights contained in the Framework Convention, while under certain circumstances or with respect to certain spheres of rights, he or she may choose not to exercise these rights" (para. 12).

[41] Thematic Commentary No. 4, para. 9.

[42] Will Kymlicka, *Liberalism, Community and Culture*. Oxford: Clarendon Press, 1989, pp. 166-167 *apud*. Craig 2016, p. 11.

[43] Craig, 2016, p. 9.

[44] Charles Taylor, *The Politics of Recognition*, in *Multiculturalism: Examining the Politics of Recognition*, ed. A. Gutmann, 25-73, Princeton University Press, 1994, p. 25.

or national minorities and, in my opinion, is rather a precondition to, or at least presents itself as a catalyst of, social acceptance than its effect. Even the Advisory Committee, which sees the recognition of minorities in a pragmatic light, taking account of the rights individuals belonging to minorities factually enjoy, once said of the Estonian authorities' policy of excluding non-citizens from the personal scope of the Framework Convention that: "this formal exclusion of non-citizens from the personal scope of application of the Framework Convention, retains a strong symbolic importance among persons belonging to national minorities."[45] This was its position notwithstanding the fact, acknowledged by the Advisory Committee itself, that in Estonia, citizens and non-citizens belonging to ethnic or national minorities have equal rights, except for political rights.[46] Thus, even if individuals have access to rights, their identities should nevertheless be recognized. Recognition is not only a means to obtain rights, but also an end in itself.

However, notwithstanding its clear focus on the individual, the right to self-identification does have a collective or communitarian part to it. Humans develop their identities, whether individual or shared, in the context of a larger society.[47] This can best be seen when recognition by peers is taken into account. For example, the Advisory Committee has criticized the fact that in Bosnia and Herzegovina some political parties included on their electoral lists candidates that changed their declared ethnic affiliation from one election to another in order to gain seats reserved for those national minorities, although these candidates are not recognized by the national minorities they claim to be members of.[48] The fact that candidates for national minorities require fewer signatures in order to be validated as such for elections, combined with the legal possibility to change one's declared ethnic identity[49] meant that it was relatively easy to abuse[50] the right of self-identification granted by article 3 (1) of the Framework Convention and implemented, in this case, by legislation in Bosnia and Herzegovina. Not only does this particular abuse exemplify the necessity of objective criteria in the self-identification process, but also the collective dimension of the right, the Advisory Committee rightly pointing out the lack of recognition of these candidates by the national minorities they claimed to represent.[51] Thus, it can be rightly said that recognition by co-ethnic or co-national peers or our "significant others",[52] as Charles Taylor puts it, is to be taken into account as another criterion to be met in order for a person to be correctly recognized as a member of a particular ethnic or national minority.

Of course, this reliance on other members of a particular ethnic or national minority should not itself be disproportionate, or else the door opens for abuse coming from the community and directed against the individual. Although a case from the United States Supreme Court, *Hurley v. Irish-American GLIB*

[45] Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Fourth Opinion on Estonia, adopted on 19 March 2015, p. 13.

[46] Ibid.

[47] Taylor, 1994, p. 33.

[48] Advisory Committee of the Framework Convention, Third Opinion on Bosnia and Herzegovina, ACFC/OP/III(2013)003, para. 151.

[49] Ibid.

[50] *Ibid:* "While acknowledging the principle of free self-identification laid down in Article 3 of the Framework Convention, the Advisory Committee is concerned at the abuse of this system, which was intended to promote the effective participation of national minorities at local level."

[51] Ibid.

[52] Taylor, 1994, p. 32. According to him, humans learn to better articulate their identities not alone, through a monological process, but through dialogue, debate and interaction with our peers, our "significant others".

Association[53] illustrates, in my view, how recognition should be based on the principle of effective equality[54] between individuals pertaining to ethnic or national minorities.[55] The case concerned an LGBT organization which requested to join the St. Patrick's Day Parade in Boston and was refused by the organizers. Notwithstanding the fact that the Supreme Court framed the issue as a problem of free speech, rather than equality, what is relevant for the present discussion is that effective equality, as required by the Framework Convention and the Advisory Committee's interpretations thereof, would necessitate, in similar situations, that the individual be protected from exclusion, marginalization or oppression from the minority group itself, not only from the majority group (in this particular case, Irish LGBT individuals from the Irish minority). Of course, in the US legal context, the interpretation of the case in the light of the right to free speech, as guaranteed by the First Amendment, would make sense. However, seen through the lenses of the right to self-identification, it seems apparent that in the process of recognizing ethnic or national minorities, states should pay equal attention to other "in-group" minorities, such as sexual, religious or even language groups.

The ECtHR case of *Ciubotaru v. Moldova*[56] is also relevant to this discussion. There, the applicant, a Moldovan citizen, was refused his application for an identity card by the Moldovan authorities because he indicated that his ethnicity was Romanian, instead of Moldovan. Since in Moldova, ethnic identities were recorded on the basis of the ethnic identities of one's parents, the applicant's request was rejected because he had not provided sufficient proof that his parents were of Romanian ethnicity. Personal affiliation of the individual in this case was obviously not taken into consideration. Instead, he was recognized on the basis of third-parties' identities. Consequently, the European Court of Human Rights found a violation of article 8 of the ECHR,[57] since there were "objectively verifiable links with the Romanian ethnic group,[58] such as language, name, empathy and others".[59] Although the Court makes it clear that one needs to provide more than one's subjective perception of one's own ethnicity, the inclusion of "empathy" in the "objectively verifiable" links with a particular ethnicity shows that the Court's assessment leans more towards the individual's personal appraisal of his or her own identity than on purely objective elements. Ultimately, one's "empathy" for a specific ethnic or national identity can be objectively proved through one's actions and declarations. What is clear is that the applicant's identity in this case was not tied to his peers', but to his own subjective appraisal, combined with some objective elements, although even these are intrinsically linked with the person of the individual concerned and not with recognition by third parties.

In addition to the above aspects, the right to self-identify is also viewed by the Advisory Committee as being optional, as any right should be. This logically stems from the free exercise of rights in general, where the intrinsic nature of rights consists of the fact that they are at the disposition of the individuals that have them. Therefore, no one should be forced to identify as a specific ethnic or national minority if he or she would not do so out of his or her free will. In its opinions, the Advisory Committee found several cases in which states failed to guarantee a free and optional right to self-identification.

[53] *John J. Hurley and South Boston Allied War Veterans Council v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Etc* (1995), 515 U.S. 557.

[54] As required by article 4(2) of the Framework Convention.

[55] Craig, 2016, p. 10.

[56] *Ciubotaru v. Moldova* (application no. 27138/04), ECtHR (2010).

[57] Ibid, para. 59.

[58] Here, the European Court seems to use the term "ethnic group" to refer to what Kymlicka would consider a national minority.

[59] Ibid, para. 58.

In the case of Cyprus, for example, the Advisory Committee found that the three "religious groups" there (Armenians, Maronites and Latins) were obliged by article 2 of the Cypriot Constitution to affiliate themselves to one of the two majority communities, the Greek Cypriots or Turkish Cypriots.[60] Moreover, it also criticized their designation as "religious groups", especially in the case of Armenians and Maronites, related to whom the Committee noted "a general consensus that (…) above and beyond their distinctive religious characteristics, (they) possess a linguistic, cultural and historical identity by which they may be regarded more broadly as ethnic minorities".[61] The questionnaire used for the 2011 housing and population census also failed to meet the standards required by the Framework Convention, as it gave no possibility for Roma people to identify as such and neither did it allow for responses such as "other" or "none".[62] Also, the Roma were not presented with the possibility to choose between the main two communities (Greek and Turkish).[63] Most of the Roma people were affiliated with the Turkish community, since they were Muslims and spoke Turkish, while a small part was included in the Greek community, as they were Christians and spoke Greek.[64]

The subjective core of the right to self-identification is, thus, undermined if states, such as Cyprus, construct rigid national identities to which members of ethnic or national minorities are obliged to adhere. Moreover, in the case of individuals of Roma origin, we can see that even though objective aspects related to the individuals' identities were taken into consideration, the mechanism through which they were associated with one community or another did not take into consideration the subjective appraisal and the desire of the individual.

A similar problem was discovered by the Advisory Committee in Italy during its first monitoring cycle.[65] As part of a package of measures taken by the Italian state in favor of the German-speaking population of Trento-Alto Adige/Südtirol, a declaration of affiliation to a minority language was instituted as part of a census in the province of Bolzano/Bozen.[66] However, the Advisory Committee noted that the declaration remains valid for 10 years, cannot be changed during this period and is retained by district courts, so there is no guarantee of confidentiality.[67] Moreover, even though there is a neutral category ("other"), unlike the situation in Cyprus, where it lacked, individuals must still be affiliated to one of the three linguistic minorities in Bolzano (German-speakers, Ladin-speakers and Italian-speakers) in order to stand as candidate in elections or to apply for public service posts.[68] Consequently, anyone who is not affiliated to one of the above-mentioned linguistic minorities will be economically and politically disadvantaged.[69] The situation changed since then and, during its third monitoring cycle,[70] the Advisory Committee was pleased to note that the declaration was now confidential, with the cases in which it can

[60] Advisory Committee of the Framework Convention, Second Opinion on Cyprus, ACFC/OP/II(2007)004, para. 25; Third Opinion on Cyprus, ACFC/OP/III(2010)002, para. 28; Fourth Opinion on Cyprus, ACFC/OP/IV(2015)001, para. 12.

[61] Ibid¸ Second Opinion on Cyprus, para. 28.

[62] Ibid, Fourth Opinion on Cyprus, para. 12.

[63] Ibid, para. 11.

[64] Ibid.

[65] Advisory Committee of the Framework Convention on National Minorities, First Opinion on Italy, ACFC/INF/OP/I(2002)007.

[66] Ibid, para. 18.

[67] Ibid, paras. 19-20.

[68] Ibid.

[69] Ibid, para. 21.

[70] Advisory Committee of the Framework Convention on National Minorities, Third Opinion on Italy, ACFC/OP/III(2010)008.

be disclosed now being limited, but that the change takes effect only after a period of 18 months.[71] Also, the Committee noted that, notwithstanding the improvements, the declaration mechanism still obliges individuals to choose one of the three linguistic minorities.[72]

What the above criticisms show is that the right to self-identify should take account of the dynamic and complex identities individuals have. Ethnic and national identities change over time, they are neither static, nor homogenous. Moreover, individuals are characterized by a pluralism of identities, whether they be multiple ethnic, national or other (religious, linguistic, sexual etc). As Brigitta Busch, the Austrian member of the Advisory Committee, once said,[73] in the past, "identity was seen as stable and defined as a bundle of characteristics ascribed to a particular group (traditional minorities rights). Now, given that today individual biographies are complex and multilayered, due to mobility, such ideas of fixes identity can no longer be upheld".

This broad and flexible approach can be seen also in the Fourth Thematic Commentary, where the Advisory Committee said that: "Multiple identities and increasing mobility, for instance, have become regular features of European societies. However, such features must not limit access to minority rights".[74]

Indeed, while in premodern times, issues of identity existed, they were not debated with such detail as in the present.[75] But this is not due to people not having identities or not needing recognition, but more to the lack of instruments of expression, whether linguistic, philosophical, political, ideological or others. We have now learned to better articulate our identities as a complex of multiple, often overlapping and interchangeable set of characteristics. The present focus on the complex nature of human identity is also expressed in legal instruments such as the Framework Convention, which, according to the drafters of the thematic commentary, is constructed on a broad and flexible understanding of identity which allows for pluralism and dynamism.[76] What the Framework Convention does presently, in this interpretation, is to offer the possibility for a richer articulation of identity in the legal dimension of minorities issues.

4. Citizenship and National Narrative

Having established how the Framework Convention, as viewed presently by the Advisory Committee, is the product of a relatively new and modern approach to minorities rights which takes account of the diversity of human identity, I believe it would be appropriate to further ascertain how states have changed their own collective identities in view of the rising demand for recognition by minorities and, of course, the advent of globalization, the increase of migration and the creation of groups of new minorities. I will not engage in a discussion over national identity *lato sensu*, but instead focus on how

[71] Ibid, para. 53.

[72] Ibid.

[73] Her remarks here were taken from the conference that launched the Advisory Committee's Fourth Thematic Commentary on the Scope of Application of the Framework Convention, see *supra* note 19.

[74] Thematic Commentary No. 4, para. 5.

[75] Taylor, 1994, p. 35.

[76] The Ljubljana Guidelines also highlights this aspect its 5th principle (Recognition of diversity and multiple identities): "Diversity is a feature of all contemporary societies and of the groups that comprise them. The legislative and policy framework should allow for the recognition that individual identities may be multiple, multilayered, contextual and dynamic".

states have defined citizenship in the recent past and if there have been any changes that can be linked to the growing factual multiculturalism that has become the case for many societies. While the notion of citizenship has been traditionally linked with the nation-state and that state's national identity or, better put, the majority's national identity, it can be said of today's societies, with its individuals more conscious of their own identities than ever before, that the strict, exclusive and homogenous interpretation of "nation" and, consequently, of its legal emanation – citizenship – no longer expresses a realistic paradigm. Moreover, the relatively recent debate over "new minorities" also exposes the shortcomings of present state definitions of citizenship, which are still strongly intertwined with the idea of nation-state. I will focus mostly on European states, especially Germany, although I will also mention Canada as well, since its concept of citizenship was deeply changed by multiculturalism's challenge. I believe Germany and Canada function as appropriate elements for comparison mainly because they are both presently very diverse societies with high numbers of individuals with migration backgrounds, but, on the other hand, they dealt with this growing diversity in different ways.

4.1. Germany: the Case of the Ethnic Turks

I will start with Germany, since it has become an interesting example of a country whose policy makers refused to view it as a country of immigration and, consequently, initially upheld a conception of citizenship strongly infused with the *jus sanguinis* principle.[77] German law on nationality was, of course, based on a German understanding of nation or *Volk*, which harked back to the end of the Wars of Liberation (*Befreiungskriege*) against Napoleon and German national identity consequently formed itself on primarily ethnic and cultural commonalities, as did the German conception of citizenship.

However, post-war migration, especially of Turkish guest workers (*Gastarbeiter*), changed all this. The initial guest workers were met with a policy of "returnist multiculturalism", as Kymlicka describes it,[78] which meant that German authorities did not aim for the integration of guest workers in German society, but merely accommodated them and sought to reintegrate them in their countries of origin.[79] Language or education measures were only meant to offer temporary assistance to foreign workers, their families and, especially, their children, who needed to continue their education in their native tongue. For example, during this initial migration period of guest workers, some German states even established separate schools for migrant children so that they could be educated in their own language.[80] At first glance, one might confuse this measure to be one implementing a right of minorities to be educated in their own language. However, the policy actually aimed at reintegrating migrant children in their home countries once they returned together with their parents, not at accommodating their particular cultural needs in Germany.

The Turkish community in Germany is a particularly relevant example here. Initially, since the signing of the Bilateral Recruitment Agreement with Turkey in 1961 and up until 1973, when the German

[77] The 1913 German Law on Nationality (*Reichs- und Staatsangehörigkeitsgesetz*, abbreviated as *RuStAG*) created the first all-encompassing German citizenship, which included the citizenships of the federal states and did not replace them. The law would remain in force, albeit heavily modified, until 2000.

[78] Will Kymlicka, *Multiculturalism without citizenship?*, 2017, available online at: https://www.academia.edu/33677436/Multiculturalism_without_Citizenship_2017_ (24. July 2017).

[79] Yaşar Aydin, The Germany-Turkey migration corridor: Refitting policies for a transnational age¸ February 2016, Migration Policy Institute, Washington, DC, p. 13.

[80] See Simon Green, *The politics of Exclusion: Institutions and Immigration Policy in Contemporary Germany*, Manchester University Press, Manchester, UK, 2004, *apud.* Aydin, 2016, p. 13, footnote 47.

Economic Miracle (or *Wirtschaftwunder*) ended, the vast majority of Turks came for labor purposes on a temporary basis, on the principle of rotation.[81] The idea was that the overwhelming part of contracts would be short-term, but this was soon abandoned due to pressures coming from employers, who preferred to keep their old employees.[82] Most guest workers did return to their home country, while the remaining started to bring their families to Germany.[83] Consequently, the next phase of migration to Germany was characterized by the predominance of family reunification.[84] In this context, it became apparent that the initial "returnist" policies could not cope with the vast numbers of guest workers and their family members.[85]

To contend with such a challenge, German migration policy changed accordingly. The above-mentioned German law on Nationality, for example, changed substantially in 2000, when elements of *jus soli* were also introduced, so children born out of non-German parents residing in Germany for at least 8 years (formerly it was 15 years) and holding a permanent right of residence would automatically receive German citizenship at birth.[86] The downside of this was that, unlike EU citizens, which could keep double citizenship starting with 2007, non-EU citizens born in Germany would have had to choose upon reaching the age of 21 whether they would like to keep their German citizenship or adopt the citizenship of their parents.[87] Hence, the small number of Turks today that have both citizenships, many preferring to keep the German citizenship when confronted with the choice between Turkish and German citizenship.[88] Many individuals pertaining to the Turkish diaspora in Germany were, of course, split between opting for German or for Turkish citizenship. Luckily, the situation improved again in 2014, when a new law exempted people growing up in Germany from opting between two. These include persons habitually residing in Germany for at least 8 years, those who attended school in Germany for at least 6 years or those who completed their schooling or vocational training in Germany.[89]

The potentiality of scaring away a substantial part of their workforce determined German authorities to relax their citizenship criteria. But the change can also be attributed to the fear of impeding integration, the threat of alienating a part of its populace which, by then, already constituted its largest minority and a new minority at that as well. Most importantly for the purpose of this paper, however, the change in Germany's definition of citizenship from a mostly ethnic notion to a more open and diversity-friendly conception not only resonates more with the factuality of Germany's multicultural society, but also

[81] Aydin, 2016, p. 4.

[82] Ibid.

[83] Ibid.

[84] Ibid.

[85] According to a 2015 census done by the German Federal Statistical Office (*Statistisches Bundesamt*), there are 2.851 million people with a Turkish migration background (*Migrationshintergrund*). The term "migration background" is used to refer to any person not born in Germany, foreign nationals (even if born in Germany) and those which have at least one parent not born in Germany. See Aydin, 2016, p. 6, footnote 20. Also see the German Federal Statistical Office's 2015 census (*Bevölkerung und Erwerbstätigkeit, Bevölkerung mit Migrationshintergrund, Ergebnisse des Mikrozensus 2015*, Fachserie 1 Reihe 2.2), p. 177, available online at: https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220157004.pdf;jsessionid=85A7339F5B34916BE4AB300E6487C349.cae1?__blob=publicationFile (24. July 2017).

[86] See the German Federal Foreign Office's site for the information on the Law on Nationality: http://www.auswaertiges-amt.de/EN/EinreiseUndAufenthalt/04_Recht/Staatsangehoerigkeitsrecht_node.html (last accessed on 24. July 2017).

[87] Ibid.

[88] Only a small number of Turks are dual citizens: 246,000, or 8.6% of the total number of people with Turkish migration background. See the 2015 census by the German Federal Statistical Office, p. 167.

[89] Ibid.

brings the German legal framework closer to the desiderata of the Framework Convention and the Advisory Committee. A notion of citizenship that allows for multiple identities (including multiple citizenships) respects the multilayered and complex identities that individuals have, especially individuals who are members of ethnic or national minorities. This change, of course, does not mean that the scope of application of the Framework Convention has been extended to people of Turkish origin in Germany, or to any other minority as a matter of fact. It does, however, mark a significant improvement that could, in the end, lead to recognition and, possibly, as a next logical step, to extending the personal scope of the Framework Convention to cover minorities not previously included.

Even though the Advisory Committee has been consistent in its view that citizenship should not be regarded as a condition for recognition, but of granting specific rights from the Framework Convention, one should not be oblivious to the fact that most countries do require citizenship as a pre-condition to granting official minority status. From one point of view, this is understandable, because most countries probably have a more or less homogenous view of their societies and, for various reasons, including costs in administration, are reluctant to recognize other ethnic or national minorities.

Another reason is that they do not view some minority groups as being part of the "national narrative", they do not see them as state-constituting actors. In this sense, I am using "national narrative" to refer to the historical and social self-perception and self-identification of one nation, which is usually confused with the majority (or dominant) national group, the one we find regularly as defining the identity of the whole country.[90] While some ethnic or national minorities might be considered a part of the history and cultural fabric of one nation, some might not, as they are not viewed as being autochthonous. This "judgment" of whether a minority group is part of the nation or not is usually "decided" by the majority national group, but this does not exclude social non-recognition by other, recognized minorities as well. This type of recognition can be seen, for example, in history books officially endorsed by a government, where the participation of ethnic or national minority groups in the country's history and foundation might be omitted or not seen as amounting to being part of the "national narrative". And sometimes, this attitude is shared by the dominant national group, although it might not always be the case that omitting the contribution of ethnic or national minorities to the country's history from officially endorsed history books mirrors an equivalent social non-recognition.

On the other hand, "nation" can also overlap with the concept of citizenship in a more *lato sensu* meaning, encompassing not only the majority, but also traditional minorities. For example, in the case of Romania, even the Constitution lays down, in article 4 (1) the foundation of the state of Romania as being "laid on the unity of the Romanian people and the solidarity of its citizens." Even if the second paragraph of this articles establishes that Romania is the homeland of all its citizens, without discrimination on account of, among others, race, ethnic origin, language and nationality, it is clear that the State, which views itself as a unitary state, identifies more with the majoritarian culture, which is mentioned expressly.[91] Other groups, including old minorities such as Hungarians and Germans, while not part of the majoritarian culture, nevertheless are part of the "national narrative", *i.e.* their history and culture are intertwined with that of the majoritarian culture. One example of this link is the simple fact that pupils and students are also taught in history classes about these "traditional" minorities, but there

[90] Such as Romanians, Germans, Hungarians defining their countries as Romania, Germany, Hungary and the nation as Romanian, German, Hungarian.

[91] This constitutional combination between the choice for a unitary state and non-recognition of other languages as official languages could draw parallels with the French Constitution, which also lays the foundation of a unitary state and recognizes French as the sole official language of the Republic. However, while Romania signed and ratified both the Framework Convention and the European Charter of Regional or Minority Languages, France did not, mainly because of France's highly centralized form of governance which it inherited from the time of the French Revolution.

is also a national consciousness that their history and culture are closely linked with those of the Romanian nation and that they are "at home" in Romania. The Hungarian Constitution also mentions in its Preamble or National Avowal that "We (the Hungarian people) proclaim that the nationalities living with us form part of the Hungarian political community and are constituent parts of the State". In both cases, however, new minorities are not part of this "national narrative" and are instead viewed as outsiders.

Defining national identity might be selective and it can also have legal manifestations under the form of constitutions outlining a state as unitary or national, as in the above case of Romania. Thus, it might seem as if the constitution creates second class citizens out of individuals belonging to national minorities. But while this is the case with traditional minorities, new minorities are not even considered state-constituting actors or part of the "national narrative". In this sense, Bhikhu Parekh stresses out the need for political communities to self-identify and self-define themselves not in ethnic or cultural terms, but in politico-institutional terms,[92] whereby ethnic and national minorities would not feel left out or be seen, as he puts it, as "less authentic 'sons of the soil', less reliable and patriotic than the rest, less entitled to demand respect for their culture and religion, and passed over in politically sensitive appointments."[93] By defining the state as "the national home of the majority community",[94] minorities' presence in the said state is seen as less legitimate, hence the need to re-define the "nation" in broader terms.

In my view, one must not "wait" for a particular ethnic, religious or cultural group to become part of the "national narrative" or the national consciousness of one state's nation. Thus, minority groups may be part of the population,[95] but not of the nation. Legal recognition should not be bestowed upon a minority after there has been a social recognition or acceptance into the "national narrative". On the contrary, I believe that legal recognition should come first, as an official form of recognition by the state. This official recognition, which would grant minorities the rights offered by national, regional and international legal instruments, would have a legitimizing effect on their existence and would also accelerate the integration process, which, as a matter of fact, functions in a two-way manner[96]: the minorities' desire to integrate into the mainstream society, while also retaining its distinctiveness, is to be mirrored by the host state's openness. And since social acceptance is a matter of time and various other factors that cannot be exactly ascertained, legal acceptance should precede it, as it involves actions by the state, which should be, by their very nature, predictable, certain and not subject to societal factors, which are more dynamic.

As in the case of the above-mentioned Turks in Germany, new minorities that are excluded from citizenship because of a *ius sanguinis*-infused concept of citizenship are also barred from social

[92] Bhikhu Parekh, *Rethinking Multiculturalism*, Macmillan Press, 2000, p. 231.

[93] Ibid, p. 234.

[94] Ibid.

[95] The term "population" would probably be better placed in this context than "nation" (understood *stricto sensu* in ethnic terms), since I refer not only to the majoritarian nation, which usually also defines a state's name, history and culture, but also to the other national or ethnic minorities that have been, in the meantime, interwoven in a state's history and, hence, have become part of the so-called "national narrative". "Population", in my view, is more statistical and factual than "nation" and would probably be better suited to today's ever more multicultural societies than a rigid and overly historical interpretation of "nation". Of course, some states might have a more open understanding of "nation", than others. Canada, for example, sees itself as a country of immigration and, consequently, requires fewer years of physical presence there (4 years) for granting citizenship than most European countries.

[96] The Advisory Committee too highlighted this aspect in its Thematic Commentary No. 4, at para. 44: "The Advisory Committee's established position is that integration is a process of give and-take and affects society as a whole. Efforts cannot therefore be expected only from persons belonging to minority communities, but they must also be made by members of the majority population".

acceptance.[97] The end result is the creation of parallel societies, as a symptom of the state's inability to properly integrate minorities, but also of the resistance of the minority itself from being assimilated or assimilating itself. The Turkish *Gastarbeiter* in Germany are such a good example because, initially, members belonging to this minority traveled to Germany as economic migrants, albeit on the invitation of a host country that expected them to return to their country of origin afterwards.[98] Consequently, initial German policies did not focus on integration, but temporary accommodation.[99] Given the lack of state support for integration, social acceptance was also hampered, since many of the first generations of *Gastarbeiter* did not know German and could not integrate properly. Moreover, because of an incoherent integration policy of migrants,[100] the threshold for becoming a part of the German "national narrative" is higher for new minorities than for old ones and new minorities are obliged to go to greater lengths to integrate than "established" minorities.

4.2. Hungary, Poland, Norway, Romania, the Czech Republic: Diverging Approaches

Some other states, such as Hungary[101] and Poland[102], require minorities to have lived on their territory for a certain period of time – in this case, one hundred years. I believe that this requirement, which obviously seriously impedes recognition of new minorities, would probably be justified by the fact that these states only wish to recognize as minorities those groups which have been traditionally residing the territories now belonging to them and, consequently, have become part of the "national narrative". Societal acceptance is, again, preceding legal recognition. Consequently, those that do not qualify as such are also viewed as alien to the cultural landscape of the host country.

On the other hand, in its recent Thematic Commentary No. 4 on the scope of application of the Framework Convention for the Protection of National Minorities, the Advisory Committee stressed out the fact that length of residency of minority groups in a particular country should not be a determining factor for the application of the Framework Convention as a whole. The same view is held by the UN Human Rights Committee, which interpreted article 27 of the ICCPR (on the right of minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language) in the sense that even migrant workers or visitors should benefit from it, not just permanent residents.[103]

[97] As Kymlicka rightly points out, the German conception of nationhood would more quickly accept Germans in Russia as citizens than Turks, even if the former have lived all their lives in Russia, while the latter have been living in Germany for three or four generations. See Will Kymlicka, *Multicultural Citizenship*, p. 23.

[98] See James Angelos, *What Integration Means For Germany's Guest Workers. The Debate Over Multiculturalism Alienates the Immigrants Germany Needs Most*, from Foreign Affairs, 28th October, 2011, available online at: https://www.foreignaffairs.com/articles/europe/2011-10-28/what-integration-means-germanys-guest-workers.

[99] Ibid.

[100] Ibid.

[101] The Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities defined minorities in Article 1 (2) as those ethnic groups "with a history of at least one century of living in the Republic of Hungary", the new Act CLXXIX of 2011 uses the same definition.

[102] The Polish Regional Language, National and Ethnic Minorities Act defines minorities in article 2 as a group of Polish citizens who, among other criteria, has had ancestors residing within the present territory of the Republic of Poland for at least a hundred years.

[103] See the Thematic Commentary No. 4 on the scope of application of the Framework Convention for the Protection of National Minorities, ACFC/56DOC(2016)001, 27 May 2016, p. 13, para. 31 and the General Comment of the UN Human Rights Committee No. 23(50), CCPR/C/21/Rev.1/Add5/26 April 1994, para. 5.2.

Norway has a similar legislation which recognizes only those minorities that have been traditionally residing in Norway. According to its first state report, "in Norway, the term 'national minorities' is understood to mean minorities with a long-term connection with the country."[104] Therefore, the only minorities recognized are the Jews, Kven, Roma/Gypsies, the Romani people/Travellers, Skogfinn and Sami people.[105] While the term "long-standing" is not given any formal definition, Norwegian authorities have interpreted it to refer to a minimum claim of 100 years of connection with the state,[106] which makes it similar to legislations in Hungary and Poland. Notwithstanding this, the Advisory Committee noted in its third opinion on Norway that "migrants who have recently arrived in Norway, and who wish to identify with ethnic groups with national minority status in Norway, can benefit from the same measures as those intended for the national minorities".[107] Therefore, normally, even migrant Roma would be covered by the rights enshrined in the Framework Convention, not only the Norwegian Roma. However, as the government of Norway noted in its fourth report, EEA citizens temporarily residing in Norway are not taken into consideration, since they "do not have such a long-established connection to Norway that recognition as a national minority is considered relevant."[108] Regarding this, the Advisory Committee recalls in its fourth opinion on Norway that it has consistently encouraged an inclusive approach, especially in the case of vulnerable groups.[109]

Other countries, such as Romania[110] do not have such temporal conditions and, while Romanian legislation does not have any definition of the term "national minority" and, theoretically, according to Romanian legislation, any ethnic group that forms an organization representing them and gathers a specific number of votes will be represented in the Council of National Minorities and, consequently, recognized as a minority.[111] While social acceptance would remain a problem even in these countries, as it already is the case with the United Kingdom and its new minorities and Romania with some of its old minorities, at least the legal recognition would open a wide range of possibilities for new minorities to integrate.

[104] Report submitted by Norway pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR (2001) 1, p. 17.

[105] Ibid., p. 3.

[106] Patrick Thornberry, Maria Amor Martin Estebanez, Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe, Council of Europe publishing, Germany, 2004, p. 122, n. 71.

[107] Advisory Committee of the Framework Convention, Third Opinion on Norway, ACFC/OP/III(2011)007, para. 29.

[108] Fourth report submitted by Norway pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR/IV(2015)006, p. 14.

[109] Advisory Committee of the Framework Convention, Fourth Opinion on Norway, ACFC/OP/IV(2016)008, para. 11.

[110] Romania has a draft Law on the Status of Minorities which has been proposed in 2005, but has not been, as of yet, adopted. The first draft defined national minorities as "any community of Romanian citizens, which lives on the territory of Romania from the moment *when the modern Romanian state was founded* (emphasis added), which is numerically inferior to the majority population, having its own national identity expressed through culture, language or religion, which it desires to keep, express and develop". The Venice Commission has criticized this definition in its Opinion no. 345/2005, CDL-AD 2005 026, stating that: "the requirement that the community must have lived on the territory of Romania from the moment the modern Romanian state was established in order to qualify as a national minority. (...) This seems to indicate that the relevant time is 1919, although the creation of a modern state may be seen as a process rather than a definite event". Consequently, the draft proposal has been changed accordingly and now the definition is rather similar to those of Hungary and Poland, by requiring minority groups to have lived in Romania for at least 100 years.

[111] See Law 208/2015 on elections. Under the conditions laid down by the said law, if an organization representing a minority gains somewhere between 200 and 3000 votes, it will be represented in the Parliament by one seat in the Council of National Minorities and, as a consequence, will be granted official recognition as a protected minority. The requirement for citizenship is, however, still present.

The Czech example is also interesting, given the 2013 recognition of Belarusians and Vietnamese as (new) minorities.[112] The Czech system resembles more or less the Romanian one, in both cases there is lack of legal certainty regarding the recognition process of minorities, but, on the other hand, they are both theoretically flexible in the case of recognizing new minorities, because in both cases acceptance in their respective state council for minorities would mean that the state has recognized a new minority.[113] In the Czech example, the Vietnamese and Belarusians have been requesting recognition for a long time and in 2013, the Czech Government passed a resolution that amended the charter of their Council for National Minorities to include representative from the two aforementioned groups.[114]

While this is quite unique in Europe and especially in Central and Eastern Europe, where definitions of minorities, where they exist, usually include both citizenship and historicity of their presence on the territories of those countries and, as such, would probably exclude new minorities from the start, it is important to note that the Czech Republic had previously included representatives of a Serbian minority NGO, in 2004, although the Serbian minority there consists mostly of immigrants from the 1990's.[115] A precedent existed, therefore. And while inclusion of representatives in the Czech Council of National Minorities via a resolution of the executive has been described as "legally unsound"[116] and lacking in legal certainty,[117] the conclusion was that it amounted to an official recognition of those minorities by the state[118] and, logically, of the scope of application of the Framework Convention.

The case of the Vietnamese migrant-communities-turned-minorities presents several similarities with the situation of the aforementioned Turkish diaspora in Germany. While initially migrating as temporary workers starting with the 1950s as part of a program co-sponsored by the Vietnamese government, which hoped to gain skilled workers which would return to their country, they eventually settled down and, especially after the fall of Communism in Europe, started bringing their families to the Czech Republic as well.[119] And, as with Germany, initial "returnist" policies gave way to more integrative ones which, unlike in Germany, culminated with recognition as a minority.

The Romanian legislation in this field is also pretty vague, as mentioned above. Thus, for electoral purposes, Law 208/2015 on elections understands the term "national minority" as referring to those ethnicities[120] represented in the Romanian Council of National Minorities.[121] Other national minorities' organizations can also participate if they are of "public utility" and if they can produce a list of persons representing 15% of the total number of citizens that have declared themselves as belonging to that national minority.[122] According to the current above-mentioned elections' law, the threshold applied to these organizations is 5% of the average number of votes given to a Deputy.[123] The same 5% threshold

[112] See Marián Sloboda, *Historicity and citizenship as conditions for national minority rights in Central Europe: old principles in a new migration context*, Journal of Ethnic and Migration Studies, 2016, 42:11, 1808-1824.

[113] Ibid, p. 1819.

[114] Ibid, p. 1814.

[115] Ibid, p. 1815.

[116] Ibid, p. 1819.

[117] Ibid, p. 1815.

[118] Ibid, p. 1816.

[119] Ibid, p. 1814.

[120] Here, I am merely reproducing the term used by Law 208/2015, which does not make the distinction between national and ethnic minorities, but instead refers to "ethnicities" as synonymous with "national minority".

[121] Law 208/2015, art. 56 (3).

[122] Ibid, art. 56 (4).

[123] Ibid, art. 56 (1).

is required of regular parties,[124] although it relates to the total number of votes. This last threshold is also to be applied to national minorities' organizations which participate in electoral alliances.[125]

In these circumstances, the only national minority organization that has consistently managed to reach the threshold for regular parties is the Democratic Alliance of Hungarians in Romania, mainly due to its largely loyal electorate and high number of individuals belonging to this minority.[126]

Thus, in theory, the legislation is very permissive with its understanding of the term "national minority", with no single, general definition existing at any legislative level, except for the one mentioned above, which links the recognition of a national minority with its representation within the Council of National Minorities.[127] As a direct consequence of this policy, since any organization representing national minorities can achieve official recognition, provided they attain the required number of votes, the number of organizations grew from the initial 12 in 1990,[128] when the first free elections were held, to the present 18 (including both those represented by one depute in the Council and the Hungarians represented in the Parliament). Given that the number of votes required of national minorities to be represented in the Council and, thus, also recognized is small,[129] the chances that a new minority would be recognized in Romania are indeed high. At least in theory.

In the Czech example, while there was a definition of what national minorities are, it included, besides the citizenship criterion, a historicity criterion as well, it was formulated in vague terms.[130] It allowed, therefore, for negotiation[131] on the historicity of a minority's presence in the Czech Republic. In the case of Romania, however, there is no official definition of what constitutes a national minority yet. While the Advisory Committee urged[132] the Romanian government to ensure that an open and flexible approach to the scope of application of the Framework Convention was reflected in the above-mentioned draft Law on the Status of National Minorities, the existing draft law contains a definition that requires

[124] Ibid, art. 94 (2).

[125] Ibid, art. 56 (8).

[126] According to the latest census which took minorities into consideration, from 2011 (there is a 2016 census, but it does not include data on national minorities), there were 1.227.623 Hungarians living in Romania, representing 6.5% of the total population. The census data is available in English at: http://www.insse.ro/cms/files/statistici/comunicate/alte/2012/Comunicat%20DATE%20PROVIZORII%20RPL%202011e.pdf (14. February 2017).

[127] Monica Căluşer, *Reprezentarea minorităţilor naţionale pe locurile rezervate în parlament* (The reprezentation of national minorities on the rezerved seats in parliament), in Levente Salat (ed.), *Politici de integrare a minorităţilor naţionale în România* (National minorities integration policies in Romania), Centrul de Resurse pentru Diversitate Etnoculturală, Cluj-Napoca, 2008, p. 170.

[128] By the rules established by article 4 of Decree-law no. 92/1990 for the organization of elections, 13 minorities (besides the Hungarians, which entered directly into Parliament, with 41 Senators and Deputies) were initially represented in the Romanian Parliament's Council for National Minorities by 11 organizations: Germans, Roma, Lipovan Russians, Armenians, Bulgarians, Czechs, Slovaks, Serbians, Greeks, Polish, Tatars, Turks and Ukrainians. The Czechs and Slovaks formed just one organization – The Democratic Union of Slovaks and Czechs in Romania. Shortly after, the Turks and Tatars factions split and former distinct organizations, bringing the total number of seats in the Council to 12 and the number of organizations in Parliament, as a whole, to 13 (including the Hungarians). For more details, see Căluşer, 2008, pp. 169-170.

[129] The required number of votes was 1336 in 1992, 1494 in 1996, 1273 in 2000, 2841 in 2004 (when the threshold was lifted to 10% instead of 5%, but this was reverted to 5%), etc.

[130] "A national minority is a community of citizens of the Czech Republic living in the present-day Czech Republic who differ from other citizens, as a rule, in their common ethnic origin, language, culture and traditions, constitute a numerical minority of the population, and demonstrate their will to be considered a national minority for the purpose of their joint efforts to preserve and develop their own identity, language, and culture, as well as for the purpose of expressing and protecting the interests of their historically constituted community". See the Czech Minorities Act No. 273/2001, Sec. 2.1. (Translated by Sloboda, 2016, note 4, p. 1820).

[131] Sloboda, 2016, p. 1811.

[132] Advisory Committee of the Framework Convention, Third Opinion on Romania, para. 32, ACFC/OP/III(2012)001.

both citizenship and that the minority must have been living in Romania for 100 years.[133] However, in light of the Czech case with the Belarusians and Vietnamese, I believe that the adoption of the law in this form would severely limit the possibility to negotiate a group's minority status in the future. While the present state of Romanian legislation on minorities leaves a lot to be desired, it does offer more room for flexibility when speaking strictly about official recognition.

4.3. The United Kingdom and Canada: Liberal Policies

Other countries, such as the United Kingdom and Canada, have a much more liberal approach. The United Kingdom, for example, has been praised by the Advisory Committee of the Framework Convention for its broad interpretation of the term "ethnic minorities".[134] The Fourth Opinion of the Advisory Committee on the United Kingdom even starts by acknowledging that it is "traditionally a multi-ethnic society where efforts to guarantee and extend the protection of the rights of persons belonging to national and ethnic minorities have been carried out for decades."[135] Besides this, the United Kingdom has undergone a series of devolutions (the granting of powers to regional legislative and executive bodies from the Parliament of the United Kingdom), namely the ones granting powers to the Scottish, Welsh and Northern Irish legislatives and executive bodies, have increased the political participation of these minorities. Moreover, since the 2014 recognition of the Cornish people as a minority,[136] there have been talks and also an agreement reached in 2015 for a devolution in the case of Cornwall as well.[137]

Canada, as well, has been defining themselves as multicultural for some time now. Its multicultural policy shifted from the 1960's view that multiculturalism is an extension of citizenship[138] and, thus, applying to persons that are already citizens (such as long-standing communities of Ukrainians, Poles or Italians), to the present extension of multicultural integrative measures to immigrants as well.[139] The 1988 Canadian Multiculturalism Act, for example, officially defines Canada's multiculturalism as being fundamental to the Canadian identity:

"It is hereby declared to be the policy of the Government of Canada to:

(a) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage

[133] See *supra* note 105.

[134] Advisory Committee, First Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para. 14: "The Advisory Committee strongly welcomes the inclusive approach of the United Kingdom in its interpretation of the term "national minority". The Advisory Committee notes that the term "national minority" is not a legally defined term within the United Kingdom, but that the State Report is based on the broad "conventional" definition of "racial group" as set out in the Race Relations Act (1976). Under this Act "racial group" is defined as "a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origin". This includes the ethnic minority communities. The Courts have furthermore interpreted the term and found it to include the Scots, Irish and Welsh by virtue of their national origin. On a case-by-case basis the Courts have also included Roma/Gypsies as well as Irish Travelers (also defined as a racial group for the purposes of the Race Relations (Northern Ireland) Order (1997), Sikhs and Jews."

[135] Advisory Committee, Fourth Opinion on the United Kingdom, 25 May 2016, ACFC/OP/IV(2016)005, para. 1.

[136] Ibid, para. 6.

[137] Ibid, para. 14.

[138] Will Kymlicka, *Multiculturalism without citizenship?*, p. 1.

[139] Ibid, p. 2.

(b) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future"[140]

The fact that Canadian society view itself as intrinsically multicultural means that their definition of the Canadian nation leaves the possibility open for new minorities to become part of it without having to renounce their distinctiveness. They are, in other words, "state actors", constituent parts of the national narrative and of the nation itself.[141] The contrast with the German example is obvious: whereas Germany has been reluctant to see itself as a country of immigration and has only recently started to tone down on its citizenship requirements in the face of growing disenchantment within communities of persons with immigrant background, Canada has taken its multicultural role seriously and, although initially reliant on *Anglo-conformity* or *Anglocentrism,*[142] the practice of requiring immigrants to conform to the English-speaking majority's culture, it has shifted towards recognizing multiculturalism as the basis of Canadian identity itself and not only as an institutional mitigation aimed solely at foreigners. Of course, it has to be borne in mind that Canada started to be confronted with the paradigm of it being a country of immigration at a time when Germany was still a country of emigration. Nevertheless, German authorities' slow response in facilitating access to citizenship to its increasing population of individuals with migrant background should always be put into the context of Germany's particular socio-historical and cultural situation, which is markedly different from Canada's.

Then again, Germany's *Leitkulturdebatte* or "leading culture" debate, which started in the early 2000's, presents similarities with the notion of Anglo-conformity. Catalyzed by the intention of the social democrats and greens, which came to power in Germany in 1998, to reform the country's immigration and citizenship policies, the debate was sparked between the progressive left and conservatives (represented by the CDU and its Bavarian sister-party, the CSU) as to whether Germany should tilt towards more multicultural policies and, consequently, also towards a more diversity-friendly self-perception of the German nation, or, as the conservative camp argued, in a more or less Huntington-esque tone, immigrant cultures should be kept separated and those that wished to "join" the nation and also become citizens should conform to a German *Leitkultur*. In this case, what was meant by *Leitkultur* was the more general Western liberal-democratic culture with roots in the Enlightenment and, following internal debates in the CDU, "German" *Leitkultur* was transformed into the broader European *Leitkultur*. European Western ideals were viewed as the yardstick against which immigrants' integration was to be measured.[143] As one might assume, the concept of *Leitkultur* is deeply suspicious of immigrant communities and presupposes the superiority of the European culture to which German culture is ascribed in order to demand assimilation.

The leading culture paradigm is a reaction to transnationalism, free movement and, to a certain extent, globalism in general, and, as such, is not necessarily a specifically internal German issue, but merely the internalization of a wider debate, which is present all across Europe and beyond. Although Germany, for example, succeeded in reforming its citizenship law in order to ease its granting to persons with

[140] Canadian Multiculturalism Act, 1988, section 3 (1).

[141] Will Kymlicka, *Multiculturalism without citizenship?,* p. 2.

[142] "Anglocentrism required migrants to abandon the traditions and cultures of their homelands and instead adopt the values and behaviors of English-speaking Canadians". For further details on Canada's initial assimilationist policies, see Jatinder Mann, *"Anglo-Conformity": Assimilation Policy in Canada, 1890s–1950s*, International Journal of Canadian Studies, Volume 50, 2014, pp. 253-276.

[143] Hartwig Pautz, *The politics of identity in Germany: the Leitkultur debate*, Race & Class, Institute of Race Relations 0306-3968 Vol. 46(4), 2005, pp. 39–52, p. 44.

migration background, it has done so after lengthy political debates. The sensitivity of the issue can be seen also in Italy, where, recently, a bill which proposed a more *ius soli*-oriented approach to citizenship and facilitated naturalization for immigrants was delayed owing to intense political opposition.[144] Switzerland, on the other hand, overwhelmingly voted in favor of a law that eases the naturalization process for third-generation foreigners no older than 25 years,[145] while in 2014, the Czech Republic reformed its citizenship legislation,[146] one of the major changes being the introduction of dual or multiple citizenship, in contrast with the old legislation, according to which Czech citizenship would be withdrawn from persons acquiring foreign citizenship.[147] Estonia also eased its citizenship requirements in 2015 and allowed double citizenship, granted citizenship retroactively to stateless children under 15 years old born in Estonia and, most importantly, abolished the principle of *jus sanguinis.*[148]

Of course, easier access to citizenship status, while definitely enticing integration and signifying a form of acceptance and recognition, does not constitute *per se* a recognition of minority status. It does, however, permit unrecognized minorities to organize politically and demand further recognition and protection, while also overcoming the citizenship criterion used by many states as a pre-condition to minority status.

5. Conclusion

There are, of course, many other issues that I did not address. However, what is clear is that the dichotomy between old and new minorities is not always a clear-cut distinction. Moreover, some perceptions of new minorities are inherently simplistic and do not take count of the variety of circumstances which characterize their existence and lead to the triumph of formalism over factual realities. And sometimes the factual realities reveal a closer resemblance between new and old minorities, whether we are considering their claims, their relationship with the majority or their belonging to the so-called "national narrative" of a specific country.

New minorities' and other minorities' struggle for recognition and acceptance is a particularly modern phenomenon in my view, as a part of the growing interest in identity politics and the general struggle for recognition of all facets of human identity. In this context, the process of recognizing minorities, especially new minorities, as part of today's societies ultimately challenges homogenous views of

[144] See James Politi, *Italy delays vote on citizenship for immigrants' children*, Financial Times, July 17, 2017, available online at: https://www.ft.com/content/bb0203a4-6ace-11e7-bfeb-33fe0c5b7eaa (08. August 2017) and Manuela Perrone, *Italian parties clash over citizenship rights for immigrant children*, Italy24, 26 June 2017, available online at: http://www.italy24.ilsole24ore.com/art/politics/2017-06-22/italian-parties-clash-over-citizenship-rights-for-immigrant-children-171609.php?uuid=AEgjWckB (08. August 2017).

[145] Philip Oltermann, *Switzerland votes to ease citizenship process*, The Guardian, 12 February 2017, available online at: https://www.theguardian.com/world/2017/feb/12/switzerland-votes-immigrants-citizenship-rights-islamophobia (08. August 2017).

[146] Act No. 186/2013 concerning the nationality of the Czech Republic and amending certain acts or "Czech Nationality Act".

[147] The Advisory Committee of the Framework Convention took notice of this change in its Fourth Opinion on the Czech Republic: "The Advisory Committee welcomes this change as it is likely to encourage foreign citizens to apply for Czech citizenship, thus formally including them in the scope of application of domestic legislation on national minorities and the Framework Convention." See Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Fourth Opinion on the Czech Republic, adopted on 16 November 2015, p. 10.

[148] The Advisory Committee also praised these reforms in its Fourth Opinion on Estonia. See *ibid*, Fourth Opinion on Estonia, adopted on 19 March 2015, pp. 13-14.

nations and determines valuable debates on how to redefine nationality and, of course, citizenship as well. As pointed out above, in the case of citizenship, many European countries have recently eased their requirements and criteria for granting it.

However, while these changes are indeed welcomed, they do not necessarily signify a shift or a redefinition of those countries' societies' understanding of "nation", nor does it highlight any particular or sudden shift of support for recognizing migrant communities as minorities. On the contrary, as the post-2015 political scene in Europe has shown us already, a new strand of populist parties and movements have begun to rely heavily on anti-migration discourse and have gained considerable support from their constituencies. If this rise in popularity of populist figures has have shown anything, it is that following the European migrant crisis, a great part of the European electorate, especially in Central and Eastern Europe, but also in Western Europe, is against the presence of migrants, in particular those from the Middle East, in their countries. Thus, they are also probably at least indifferent to improving their integration process, not to mention their recognition as minorities.

The fact that we are witnessing a process of "securitization" of discourses on minority rights and of migration or asylum issues, by which the public's attention is diverted to seeing minorities and migrants as security issues, only underlines the increased difficulties new minorities have in integrating into their receiving societies. Societal recognition and acceptance represent a time-consuming process, as part of the process of integration, one of carefully studied accommodation and compromise. Legal recognition as citizens and as minorities should function as a doorway to societal recognition.

Nevertheless, even in this most hostile environment, governments are bound to realize that pluralism is unavoidable and identity is dynamic and that official recognition of new minorities would not only increase loyalty towards the state from a group that factually reside there in one form or another, but also bridge the typical gap that always exists between law and the reality for which it seeks to offer a normative framework.

Review

Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds): The Oxford Handbook of Refugee and Forced Migration Studies

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The Oxford Handbook of Refugee and Forced Migration Studies[1] aims at providing a comprehensive overview of the major scholarly works in the ever-expanding field of refugee and forced migration studies. This 53-chapter volume (including the introduction) sheds light on the most recent debates and challenges that have involved both academics and practitioners (lawyers, activists, etc.) in this field and promotes an interdisciplinary approach to the study of displacement, migration, and migrants' rights. It engages with a diverse range of topics from legal studies, political science, international relations and even presents some regional case studies. The book is a useful and inspirational source for both students and scholars who wish to explore new research directions in this field.

This edited volume has an excellent and coherent structure. It is structured into seven parts: Approaches: Old and New (Part I), Shifting Spaces and Scenarios of Displacement (Part II), Legal and Institutional Responses to Forced Migration (Part III), Root Causes of Displacement (Part IV), Lived Experiences and Representations of Forced Migration (Part V), Rethinking Durable Solutions (Part VI), and finally Regional Studies (Part VII). It begins by addressing the history of the field of migration studies. Chapter 2 outlines the development of refugee and forced migrants studies from a Europe-centric approach in the 1920s and 1930s to a more global approach in the 1980s. It then provides an up-to-date interdisciplinary approach to the field of forced migration as it covers topics from the perspectives of political science (chapter 4), sociology (chapter 7), international relations (chapter 5), anthropology (chapter 6), geography (chapter 9), and security studies (chapter 21).

For legal studies researchers, this handbook has a lot to offer concerning the legal approach to refugees and forced migrants. Chapter 3 is a very good introduction to the most important legal tools in the international law of refugee protection. It outlines a short history of the first initiatives to give refugees legal protection (International Refugee Organization, replaced later by the United Nations High Commissioner for Refugees - UNHCR). Major international conventions on refugee protection (the 1951 Convention to the Status of Refugees, the 1967 Protocol) and regional treaties (the Cartagena Treaty, the Convention on Specific Aspects of Refugee Problems in Africa) are also included in this section (chapter 3). Regional and international legal instruments are examined through several chapters: human rights and migrants (chapter 16), borders and citizenship (chapter 19), statelessness and refugees (chapter 21), resettlement and displacement (chapter 23 - 24), trafficking (chapter 25), non-refoulement principle (chapter 16), and encampment and self-resettlement (chapter 10). Finally, while parts of the book cover the legal and institutional responses to forced migration at a general, encompassing level,

[1] Edited by Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona, Oxford, 2014.

other parts focus on specific issues that are of high importance in today's migration studies. Gil Loescher, for instance, explores the effectiveness of the UNHCR and the challenges it is likely to face in the future in general without dwelling much on concrete, local issues (chapter 17). By contrast, Susan Akram writes about the role of specific UN agencies such as the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) and the United Nations Conciliation Commission for Palestine (UNCCP) in distinguishing the legal status of Palestinian refugees from other refugees (chapter 18).

One of the key features of the book is that different chapters are dedicated to different categories of refugees. This can be seen mainly in part II and part V of the book: urban refugees (chapter 11), refugees and diasporas (chapter 14), IDPs (chapter 11 and 13), protracted refugees (chapter 12), children refugees (chapter 31), women refugees (chapter 32), older refugees (chapter 33), and refugees with disability issues (chapter 34). This categorization strategy is a very effective way to draw the reader's attention to the importance of distinguishing different labels and concepts in migration studies.

The Handbook goes beyond the legal, social, and political science approaches to provide a specific section for regional case studies. These selections range from the African continent (chapters 42-45), Asia (chapter 46–48), Australia, New Zealand, and the Pacific (chapter 49), the Americas (Chapter 50–52), and finally Europe (chapter 53).

Despite the diversity of topics, this volume does not address sufficiently a few issues. First, it lacks a systematic, up-to date review of the relationship between media and refugees. Only one chapter (chapter 36) discusses this question, and this chapter covers only the media's representation of refugees and the negative campaigning towards immigrants going on in some countries such as the UK. Given our current age of information, one chapter is not enough to cover the omnipresent and highly debated issue of technological development and its impact on immigrants. A whole section should be included in future editions addressing social media's influence. The work of Stefen Castles[2] for instance is an attempt to understand the impact of globalization on the flow of people and the new mobility trends with the emergence of a transnational community and multi-layered citizenship.

The Handbook's edition also fails to engage with the omnipresent use of the Information and Communication Technology (ICT) by transnational migrants. Works done by Anastasia N. Panagakos and Heather A. Horst,[3] for example, demonstrate how different ICT tools have been incorporated into migrants' lifestyle. Furthermore, this volume neglects the role of social media tools in fostering and/or hindering the social integration process of migrants into their new host societies. A recent study by Khorshed Alam and Sophia Imran[4] in Australia, for instance, focused on the linkages between migrants and technology. Other scholars have examined the role of the new communication channels in facilitating migration[5]. While individual chapters tackle the problem of anti-immigrant representation (chapter 36) and governments' policies in criminalizing forced migration (chapter 15), very little is said about anti-immigrants campaigning by politicians and governments. This phenomenon is a very

[2] C. Stephen, Migration and Community Formation under Conditions of Globalization, International migration review, Vol. 36, No. 4, 2002, p. 1143-1168.

[3] P. N. Anastasia & H. A. Horst. Return to Cyberia: Technology and the Social Worlds of Transnational Migrants, Global Networks, Vol. 6, No. 2, 2006, p. 109-124.

[4] K. Alam & S. Imran, The Digital Divide and Social Inclusion Among Refugee Migrants: A case in regional Australia. Information Technology & People, Vol. 28, No. 2, 2015, p. 344-365.

[5] R. Dekker & G. Engbersen, How Social Media Transform Migrant Networks and Facilitate Migration, Global Networks, Vol. 14, No. 4, 2014, p. 401-418.

common practice today in some countries (such as the UK, USA, Hungary, and Poland) and deserves a deeper attention from researchers.

Despite the lack of more up-to date work on mass media, technological development, and migration studies, the Oxford Handbook is overall an excellent, interdisciplinary, and extremely diverse source for anyone interested in the field. It provides not only theoretical background about the various presented topics, but it also examines challenges and problems with the current legal tools used in addressing forced migration. It not only presents some of the most debated theoretical issues in migration studies but also offers practical solutions to the increasingly complex threats facing refugees and forced migrants. As Katy Long, one of the book's authors puts it: "[…] we need to not only rethink solutions, but also rethink protection. Such strategies can make displacement itself better, by allowing the displaced – when they are able – to move beyond humanitarian space and engage in development, exercising choice, and autonomy, even if this does not amount to an ideal durable solution" (2014, p. 376).

Review

Martin Binder: The United Nations and the Politics of Selective Humanitarian Intervention

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In the 1980s, the International community seriously began to discuss how to respond effectively to gross and systematic violations of the human rights of citizens. The debate intensified after the tragedies in Rwanda and the Balkans. Actions by outside military forces in several territories have provoked questions about whether there is a right to humanitarian intervention. And certainly, the debate on the subject has been spurred by the strong sense that there were crises (*e.g.* the genocide in Rwanda in 1994) in which the international community should have intervened promptly but failed to do so. The question at the heart of the matter is whether States have unconditional sovereignty over their affairs or whether the International community has the right to intervene in a country for humanitarian purposes. Some International agreements adopted after 1945 (such as the Genocide Convention) have limited the sovereignty of individual states (albeit only with their agreement) and raised the questions of the conditions under which the International community should intervene in internal affairs in order to ensure the implementation of these agreements. There is a contradiction between, on the one hand the right of the state to govern inside the country – and the implementation of human rights on the other. As is known, humanitarian intervention, a long-standing issue in international legal writing and in state practice, has become a major focus of international legal thinking and military action. Since the early 1990s, there have been new and unexpected elements in the practice of intervention, in its authorization, and in debates about it.[1].

In his book entitled, *The United Nations and the Politics of Selective Humanitarian Intervention*,[2] Martin Binder suggests an explanation for the Security Council's selective politics of humanitarian intervention. He takes an approach that variation in the Council's response to humanitarian crises cannot be explained by a single factor but is driven by the interplay of humanitarian considerations, material interests, and institutional effects.

Martin Binder is a researcher fellow in the research unit Transnational Conflicts and International Institutions at the Social Science Research Center Berlin and his research interests include international institutions, military intervention, and human rights.[3] Since 2015 he is also Associate Professor at University of Reading and guest researcher at the WZB unit Global Governance. Martin Binder was a WZB Researcher at the Mindos de Gunzburg Center for European Studies at Harvard University. He

[1] A. Roberts, *The So-Called 'Right' of Humanitarian Intervention*, pp. 3, available at: https://weblearn.ox.ac.uk/access/content/user/1044/YBIHL_vol_3_2000__publ_2002__-_So-called__right__of_humanitarian_intervention.pdf (26 March 2018).

[2] Palgrave Macmillan, 2017.

[3] M. Binder, Center for European Studies Harvard, 2012-2013, available at: https://ces.fas.harvard.edu/people/001382-martin-binder (13 March 2018).

has also worked extensively with human rights and also analyzed Humanitarian Crises and the International Politics of Selectivity, also legal, political and philosophical perspectives on international institutions. Thanks to his background in research, history and the practical side, Martin Binder is an expert on the issue and his work is very promising.

First, Martin points out that a combination of four factors determines whether and how strongly the Council acts when faced with a humanitarian crisis: ,,the extent of human suffering in a crisis; the extent to which a crisis spills over to neighbouring countries and regions; the ability of a target state to resist outside intervention (countervailing power); the extent of material and reputational resources the UN's has committed to the resolution of a crisis in the past (sunk costs)."[4] In his book is he explains that none of these factors is sufficient in itself to account for the observed variation in UN humanitarian intervention. Jointly, however, they offer a powerful explanation that covers more than 80 percent of the Council's response to humanitarian emergencies after the Cold War. The book focuses on UN Security Council intervention decisions for several reasons, but especially because the Council is the key international security institution and the only one with a truly global reach.

In the second chapter, Martin Binder draws the reader's attention to the explain why the Security Council responds selectively to humanitarian crises and gross violations of human rights. This chapter consider how decisions are taken in the Security Council in order to argue that, given the institutional bargaining dynamics and voting rules in the Council, collective intervention decisions by the Council are different from unilateral ones, and thus require different, separate analyses and explanations.

The third section explains that a large extent of human suffering and substantial previous involvement in a crisis by inter-national institutions are the key determinants for strong Security Council action, but only when combined with either limited countervailing power of the target state or with negative spillover effects to neighbouring states or regions.

The fourth chapter offers an in-depth analysis of the motivations that drove the Security Council to authorize the use of military force in Bosnia. Martin Binder argues that a combination of four motives were decisive for the Security Council's response: ,,(1) humanitarian concerns for the plight of the Bosnian civilian population, and the moral pressure generated by transnational operating human rights protagonists and the media; (2) Council members were concerned about the conflict spilling over to Western European countries, most notably in form of refugee flows, and about the destabilization of the Balkan region and beyond; (3) over the course of the conflict, the Council committed tremendous material and reputational resources to its resolution. When the Bosnian Serbs took hundreds of UNPROFOR blue helmets hostage, bringing the UN to the brink of failure, concerns that prior investments could be lost contributed to the Council's decision to authorize the use of military force to put an end to the war; (4) this decision was facilitated by the inability of the Bosnian Serbs and the Serbian government to generate sufficient countervailing power against outside intervention by the UN and NATO."[5]

In the last chapters Martin Binder examines the crisis in Darfur and the Council's response to this crisis. Responses to three of the most recent humanitarian crises in Côte d'Ivoire, Libya, and Syria are also analysed in detail. Binder highlights that the Council's reaction to these crises can only be explained by several motivational factors taken together. The concluding chapter of this book summarizes the central findings of Martin research and discusses their various theoretical and normative implications. Binder

[4] M. Binder, *The United Nations and the Politics of Selective Humanitarian Intervention*, University of Reading, UK, 2017, pp. 3.
[5] *Ibid*., pp. 19-20.

concludes firstly that the conflicts had important negative effects for neighbouring countries and for members of the Security Council — destabilizing effects linked to refugee flows and to thousands of returnees that lost their jobs due to the conflicts, as well as to economic downturn and the reduced flow of capital. Analyzing the case of Côte d'Ivoire Martin Binder notes how this case clearly shows that the Council's decision to authorize military intervention was also driven by the wish to protect material and immaterial investments that the UN and regional organizations had made in the past to resolve the crisis. The author notes that The Security Council can not act without the agreement of a majority of its members, including the permanent members and It has shown under what conditions we can expect that such an agreement to address situations of massive human suffering will form and when it will not. This has important consequences for decision makers in national and international institutions, for humanitarian organizations that operate in crisis areas, and, of course, for the populations affected by humanitarian emergencies around the world.

Finally, the book offers an explanation for the Security Council's politics of selective intervention. Martin Binder develops his argument in two steps. He first sets out by suggesting that a broad concept of humanitarian intervention – one that takes into account the entire range of possible Security Council action – is required to adequately grasp the patterns of the Security Council's selective response to humanitarian crises over the past two decades. Martin Binder presents a configurational – or multicausal – explanation of Security Council intervention that centers on the interplay of humanitarian concerns, material interests, and institutional effects. The findings of this book have important theoretical and practical implications. They contribute to a better understanding of the way that international organizations work and how they take decisions. However, Martin's work requires a certain level of knowledge in order for the reader to be able to understand the contrast and his references throughout the book, but it is nonetheless a very interesting read. This book helps to better understand certain situations in Darfur, Côte d'Ivoire or military interventions in Somalia, Bosnia, or Libya. Martin Binder analyzed in detail what factors account for the UN's selective response to humanitarian crises and what are the mechanism that drive – or block – UN intervention decisions and thereby contributed an important piece of work to research related to the field of international peace and security and the legal conundrum of humanitarian intervention.