

# Clauses Providing Possibility of Choice in International Treaties<sup>1</sup>

**DALMA TAKÓ**

*assistant lecturer, Széchenyi István University, Deák Ferenc Faculty of Law*

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*The use of clauses that provide possibility of choice is explicitly permitted in the law of treaties, whereby international treaties can provide the contracting states various ways to shape the content of the agreement according to their national needs and interests. Although these clauses can be found in many international treaties, they have not been examined in detail so far. In order to remedy this deficiency, the paper gives a definition for the clauses, presents the examples found in international treaties, creates a categorisation of these examples, analyses the rules governing the application of the clauses and examines the limits of their application. With the help of these issues, the study aims to provide an insight into the specific features of these provisions, the mechanisms by which they operate and to reveal the reasons of their use.*

*Keywords: choice of differing provisions, partial consent to be bound, international law, international treaty, possibility of choice*

## 1. Introduction

International law is a system based on coordination, the basis of which is cooperation among the members of the international community. One of the main forms and frameworks of this cooperation is the conclusion of international treaties, through which the actors of international relations interact with each other. This cooperation can be restrictive and broad as well, of which the latter is much more difficult to achieve due to the heterogeneity of the international community, which can be narrowly defined as the community of states. Each of these states has its own interests and views, which they desire to express in every field of international law. This interest-driven nature of states is particularly apparent in the treaty-making process, especially in the case of multilateral international treaties, which involve a large number of parties. In response to the needs arising from this heterogeneity, the law of treaties nowadays contains a number of instruments enabling the contracting states to shape the content of treaties to their own needs, thereby expressing their own national values, interests or opinions. These instruments include clauses providing possibility of choice, application of which is nowadays a permitted and generally accepted way of expressing national interests.<sup>2</sup>

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<sup>2</sup> M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers,

## 2. The Concept of Clauses Providing Possibility of Choice

For further examination it is first of all necessary to clarify what is meant by clauses providing possibility of choice. In this respect, the study will use the following definition: *Clauses providing possibility of choice mean any treaty provisions that enable the contracting states to determine for which part or parts of the treaty they wish to express their consent to be bound.* These clauses thus allow the contracting states to decide for themselves, at their individual discretion, the content of the international treaty. In this way, they are not bound by the treaty as a whole, but only by those specific parts or provisions that they choose.

The emergence and spread of clauses corresponding to the above concept in the law of treaties began around the middle of the 20th century, thanks to a gradual change in the approach to treaty law. Until the middle of the 20th century, the dominant principle in the law of treaties was the principle of absolute integrity,<sup>3</sup> according to which the provisions of a treaty were regarded as indivisible<sup>4</sup> and the agreement as a whole had to be applied to all the contracting states with the same content. This meant, inter alia, that if one state made a reservation to the treaty, for example, it had to be accepted by all the contracting states, otherwise the state making the reservation could not become a party to the treaty. The principle also meant that the consent to be bound could be expressed only for the whole treaty<sup>5</sup> and it was not possible for the contracting states to do that only for certain parts or provisions.<sup>6</sup>

The principle of absolute integrity ensured that the parties of a certain treaty had the same rights and obligations.<sup>7</sup> This led to easily transparent and traceable treaty relations but was not conducive to achieving widespread participation in international treaties. The reason of it is that states that did not agree with one or more provisions of a treaty could not become parties to that treaty.

This issue was raised after the First World War in the context of the United States' membership in the International Labour Organisation (ILO). The International Labour Organisation's Constitution was adopted as part of the peace treaties that ended the First World War,<sup>8</sup> as was the Covenant of the League of Nations. In this way, states which signed and ratified the peace treaties could become members of both the League of Nations and the International Labour Organisation. The United States only wished to become a member of the latter organisation and not of the League of Nations. Finally, the state got the invitation and the permission of the ILO Labour Conference in 1934, with the help of which it had the opportunity to accept only Part XIII of the Versailles Peace Treaty, the part that contained the Constitution of the International Labour Organisation.<sup>9</sup> The United States thus became a member of the ILO by expressing its consent to be bound by only one part of the

Leiden – Boston, 2009, pp. 240-241.

<sup>3</sup> C. Walter, *Article 19. Formulation of Reservations*, in O. Dörr & K. Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties. A Commentary*, Springer, Heidelberg, 2012, p. 242.

<sup>4</sup> H. Bokorné Szegő, *A nemzetközi szerződésekhez fűzött fenntartások kérdése*, *Jogtudományi Közlöny*, Vol. 15, No. 1-2, January-February 1960, pp. 69-71.

<sup>5</sup> An example of this is the 1928 Havana Convention on Treaties, according to which the consent to be bound can be expressed only for the treaty as a whole. 1928 Convention on Treaties, Havana. Villiger 2009, p. 237.

<sup>6</sup> F. Hoffmeister, *Article 10. Authentication of the Text*, in O. Dörr & K. Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties. A Commentary*, Springer, Heidelberg, 2012, pp. 215-217.

<sup>7</sup> P. Devidal, *Reservations, Human Rights Treaties in the 21st Century: from Universality to Integrity*, LLM Theses and Essays, Athens (Georgia), 2003, pp. 9-19, 104.

<sup>8</sup> 1919 Treaty of Versailles, Part XIII; 1919 Treaty of St. Germain-en-Laye, Part XIII; 1919 Treaty of Neuilly-sur-Seine, Part XIII; 1920 Treaty of Trianon, Part XIII.

<sup>9</sup> Villiger 2009, p. 237.

treaty.<sup>10</sup> After the Second World War, a number of treaties appeared, which provided the contracting states a possibility of choice in various forms, allowing them to individualise international treaties and express their own national interests and positions.<sup>11</sup>

The International Court of Justice also expressed its views on the above-mentioned issue in 1951. In its advisory opinion in connection with the Genocide Convention, the Court stated that the absolute integrity of international treaties is undoubtedly important, yet it does not mean an exclusive and unbreakable rule.<sup>12</sup> According to the Court, the preservation of absolute integrity and the achievement of complete unanimity can only be realised with a small number of parties. These principles are almost impossible to guarantee in connection with a lot of states, since the need to individualise certain parts or provisions necessarily arises in the case of a large number of parties.<sup>13</sup> Therefore, the Court considered that in certain cases – for example to ensure broad participation – it may be justified to break the unity of the treaty and to go beyond the protection of absolute integrity.<sup>14</sup> However, the Court also stated that such a breach could only happen within certain limits, namely the object and purpose of the treaty must be respected in all cases.<sup>15</sup>

These aspects of the above-mentioned advisory opinion have had a significant impact on the codification of the law of treaties, due to which the consent to be bound by part of a treaty and the choice of differing provisions was incorporated into Article 17 of the 1969 and 1986 Vienna Conventions on the Law of Treaties. The texts of the two Conventions differ only as regards the parties to the treaty, therefore Article 17 of the 1969 Vienna Convention (hereinafter: Vienna Convention) will be discussed in detail below. The article provides that: „1. (...) the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree. 2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.”<sup>16</sup>

The first paragraph of the provision thus provides the option of partial expression of the consent to be bound, which is possible only when the treaty itself expressly so permits or when there is an agreement among the contracting states to that effect.<sup>17</sup> The latter possibility, namely achieving an agreement among the states, may take place at any time during the life of the treaty, including the preparation of the treaty, the negotiation of the text and, in case of a treaty allowing accession, even after its entry into force. Since the article does not specify the precise form of this agreement, it may take place at any time and in any form, including both prior authorisation and subsequent approval of the partial expression of the consent to be bound. Moreover, an agreement among the parties may be established in the absence of any objection against the possibility of partial expression of consent to be bound. This was the case with the admission of the United States to the International Labour Organisation, where the Versailles Peace Treaty did not prohibit the consent to be bound

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<sup>10</sup> Hoffmeister 2012, p. 216.

<sup>11</sup> Examples of this are the 1949 Revised General Act on the Pacific Settlement of International Disputes and the 1957 European Convention for the Peaceful Settlement of Disputes. Both treaties will be discussed in more detail in the next chapter. Hoffmeister 2012, pp. 215-217.

<sup>12</sup> Reservations to the Convention on Genocide, Advisory Opinion of 28th May 1951, 1951, ICJ Rep. pp. 10-11, 13-15.

<sup>13</sup> C. Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, British Yearbook of International Law, Vol. 64, No. 1, November 1994, p. 247.

<sup>14</sup> J. F. Hogg, *The International Court: Rules of Treaty Interpretation*, Minnesota Law Review, Vol. 43, 1959, pp. 420-421.

<sup>15</sup> M. Prost, *The Concept of Unity in Public International Law*, Hart Publishing, Oxford, 2012, p. 37.

<sup>16</sup> 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331. (hereinafter: Vienna Convention), Art. 17.

<sup>17</sup> Hoffmeister 2012, pp. 215-217; Villiger 2009, p. 239.

by a part of the treaty and no state objected to its exercise by the United States.<sup>18</sup> However, it is important to highlight that if none of the above situations permitting partial consent is present, the consent to be bound can only be expressed for the treaty as a whole. If a state expresses partial consent without an express treaty provision or the agreement of the contracting states, the declaration will not have any legal effects. In such a case, the state is bound by the treaty only if it expresses its consent to be bound by the whole treaty. Therefore, partial consent expressed without the necessary conditions can be extended only if the state so agrees.<sup>19</sup>

In comparison, the second paragraph of Article 17 governs the case when a treaty allows the contracting states to choose among differing provisions. This can be provided by allowing the states to decide on the content of the whole treaty or by requiring them to accept one or more certain part or parts of the treaty and giving them the opportunity to exercise the right of choice only in respect of certain parts or provisions.<sup>20</sup> In this respect, the Vienna Convention stipulates that the exercise of the right of choice must in all cases be clear. It means that the declaration of a state must make it clear which provision or provisions it intends to choose.<sup>21</sup> Until a state does not make its choice clear, it is not bound by the treaty.<sup>22</sup> In practice, states express their choice by making a declaration at the same time as they express the consent to be bound. In this declaration, states indicate which parts or provisions of the treaty they wish to accept as binding on them. States usually formulate their declarations according to the possibilities offered by the treaty, for example by listing the articles they wish to select or by indicating the chapters or parts they wish to choose. For example, in the context of the European Social Charter, Hungary made the following declaration when it expressed consent to be bound: „The Republic of Hungary undertakes to consider itself bound, in accordance with Article 20, paragraph 1, sub-paragraphs b and c, by Articles 1, 2, 3, 5, 6, 8, 9, 11, 13, 14, 16 and 17 of the European Social Charter.”<sup>23</sup>

In addition to analysing the content of Article 17, the relationship between the two paragraphs of the article is worth considering, as there are various views on this in the literature. Some authors argue that the whole article is intended to give possibility for partial expression of consent to be bound and that the second paragraph is singled out simply because of the special nature of the subject.<sup>24</sup> However, the documents of the International Law Commission all suggest that the two paragraphs should be regarded as two separate issues, or even two separate types of treaty.<sup>25</sup> This is also indicated by the title of the article and the differences between the paragraphs. The first paragraph governs the situation when a provision of a certain treaty or the agreement of the contracting states gives the states the possibility to express the consent to be bound by only a part of the treaty. In this case, neither the treaty, nor the agreement of the states offers various options. Thus, the mere possibility of partial consent is given to the contracting states. The second paragraph, by contrast,

<sup>18</sup> M. O. Hudson, *The Membership of the United States in the International Labor Organization*, American Journal of International Law, Vol. 28, No. 4, October 1934, pp. 671, 675.

<sup>19</sup> Villiger 2009, pp. 238-240.

<sup>20</sup> Hoffmeister 2012, p. 217.

<sup>21</sup> S. L. Bunn-Livingstone, *Juricultural Pluralism Vis-à-Vis Treaty Law. State Practice and Attitudes*, Martinus Nijhoff Publishers, The Hague, 2002, pp. 15-16.

<sup>22</sup> For example, in the context of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, the UN Secretary-General postponed the deposit of the instrument of accession until he had received an indication of the states about the protocols they had chosen. Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, 1999, UN Doc ST/LEG/7/Rev.1, para. 146; Hoffmeister 2012, p. 217.

<sup>23</sup> 1961 European Social Charter, 2077 UNTS 272.

<sup>24</sup> Villiger 2009, pp. 238-239; Hoffmeister 2012, p. 215.

<sup>25</sup> Report of the International Law Commission, 36 UN GAOR, Supp. No. 10. (A/36/10), pp. 134-135.

provides only for cases when the treaty expressly offers different options for the states, which may choose between these options. A further difference is that under the first paragraph, the contracting states express the consent to be bound only by partial ratification, approval, acceptance or accession, whereas under the second paragraph, these are done for the entire treaty, and the contracting states exercise their right of choice in a declaration.

In addition to the distinction between the above cases, it is also important to distinguish the clauses providing possibility of choice from other treaty clauses, including the question of reservations. According to the Vienna Convention, a reservation is a unilateral statement, however phrased or named, made by a state, (...), whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.<sup>26</sup> An important distinction between reservations and clauses providing possibility of choice is that, whereas a reservation is permitted in the absence of an express prohibition of the treaty, the possibility of choice cannot be exercised in the absence of an express treaty provision or of the agreement of the contracting states.<sup>27</sup> A further difference is that a reservation may also be made to modify a specific provision, which is not possible in the case of a clause providing possibility of choice. Moreover, in the case of a reservation, the only other option available in addition to modification is the exclusion of the provision or provisions in question, whereas the possibility of choice can take many more forms, for example the acceptance of a certain provision. In addition, the Vienna Convention itself also expressly distinguishes the possibility of reservations from the possibility of choice provided in Article 17, stating that Article 17 may be applied without prejudice to articles 19 to 23 (provisions on reservations) of the Convention.<sup>28</sup> In other words, reservations and the clauses providing possibility of choice may be made to a treaty at the same time under the Convention. This is also evidenced by the fact that a number of international treaties expressly allow reservations to be made while also providing possibility of choice.<sup>29</sup>

In addition to reservations, clauses providing possibility of choice must also be distinguished from treaty provisions, which a state is free to invoke or waive. These provisions include above all the provisions in connection with dispute settlement, in particular the so-called optional clauses for the recognition of the jurisdiction of the International Court of Justice.<sup>30</sup> It is also important to note that, although Article 17 of the Vienna Convention does not refer to the separability of treaty provisions (Vienna Convention, Article 44), it is clear from the article that, when a treaty provision or the agreement of the states allows partial expression of consent to be bound or a choice of differing provisions, it considers the provision or provisions concerned to be separable from the rest of the treaty.<sup>31</sup>

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<sup>26</sup> Vienna Convention, Art. 2, para. 1. (d).

<sup>27</sup> This is reinforced by the fact that, according to the International Law Commission, when a treaty allows reservations, partial consent is not possible unless there is an express provision to that effect in the treaty or the intention of the contracting states to that effect cannot be established. Draft Articles on the Law of Treaties with commentaries, 1966, p. 202.

<sup>28</sup> Vienna Convention, Art. 17, para. 1.

<sup>29</sup> These include the 1928 General Act on the Peaceful Settlement of Disputes, the 1949 Revised General Act and the 1957 European Convention for the Peaceful Settlement of Disputes. Hoffmeister 2012, p. 217.

<sup>30</sup> Villiger 2009, p. 241.

<sup>31</sup> Villiger 2009, pp. 238-239.



### 3. The Use of Clauses Providing Possibility of Choice

#### 3.1. Classification of the Forms in which the Clauses Appear

Treaty clauses corresponding to the concept defined in the previous chapter can take several forms in international treaties. On the basis of the examples available, four categories of clauses providing possibility of choice can be distinguished.

The first category includes clauses, which allow the contracting states to express the consent to be bound by a part of a treaty. In this case, the treaty authorises states to accept only a part of the treaty and to express their consent by partial ratification, acceptance, approval or accession.<sup>32</sup> As discussed earlier in relation to Article 17 paragraph (1) of the Vienna Convention, in the case of these clauses the treaty does not list options for the states, but merely provides the possibility of partial consent. As has been explained in the previous chapter, under the Vienna Convention, this possibility may be provided by an exact treaty provision or by an agreement of the contracting states to that effect. An example of this is the membership of the United States in the International Labour Organisation, which happened by accepting only Part XIII of the Versailles Peace Treaty.

The second option, which at first sight seems similar to the above case, is the use of clauses, under which the states can choose between certain mutually exclusive options. In the case of these clauses, the choice of the states may only relate to one of the options listed in the clause, which also means the exclusion of any other option. This solution is governed under Article 17 paragraph (2) of the Vienna Convention as it means a choice between differing provisions. This kind of clause can be found for example in the General Act on the Pacific Settlement of International Disputes (1928), Article 38 of which agreement says that accessions to the present General Act may extend either to all the provisions of the Act (Chapters I, II, III and IV); or to those provisions only which relate to conciliation and judicial settlement (Chapters I and II), together with the general provisions dealing with these procedures (Chapter IV); or to those provisions only which relate to conciliation (Chapter I), together with the general provisions concerning that procedure (Chapter IV).<sup>33</sup> Under this provision, the contracting states may choose between the chapters of the treaty,<sup>34</sup> but only in accordance with the variations offered by the treaty.<sup>35</sup>

The third category is the so-called opt-in and opt-out clauses, which allow the states to accept or to exclude a particular provision or subject matter. In the case of these clauses, the treaty also gives the contracting states a number of options, due to which this question is also covered by Article 17 paragraph (2) of the Vienna Convention.

In the case of an opt-in clause, a contracting state is bound by a particular provision of the treaty only if it expressly declares that it considers itself bound by that provision. Such a possibility is provided for example, in the International Covenant on Civil and Political Rights, Article 41 of which says that states may recognize the competence of the Human Rights Committee to receive

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<sup>32</sup> Draft Articles on the Law of Treaties with commentaries, 1966, p. 201.

<sup>33</sup> 1928 General Act on the Pacific Settlement of International Disputes, Art. 38. 93 League of Nations Treaty Series 343.

<sup>34</sup> Sweden and Norway, for example, have chosen Chapters I, II and IV of the Act, while Belgium and Denmark accepted all the chapters of the treaty. 93 League of Nations Treaty Series 345.

<sup>35</sup> Article 38 of the 1949 Revised General Act on the Pacific Settlement of International Disputes contains text identical to that of 1928. 71 UNTS 101.

and consider communications. If a state does not make an acceptance declaration to this effect, no communication involving that state shall be received by the Committee.<sup>36</sup> A similar provision can be found in the American Convention on Human Rights, Article 45 of which requires states to expressly accept the competence of the Inter-American Commission on Human Rights to receive and examine communications. The Commission shall not admit any communication against a State Party that has not made such a declaration.<sup>37</sup> Furthermore, under Article 62 of the American Convention, states must expressly declare their acceptance of the jurisdiction of the Inter-American Court of Human Rights.<sup>38</sup> In addition, the Protocol to the African Charter on Human and Peoples' Rights also operates on an opt-in basis, as Article 34 of the Protocol says that all states ratifying the Protocol must accept the jurisdiction of the African Court on Human and Peoples' Rights to rule on individual applications. In the absence of such an express declaration of acceptance, the Court may not rule on individual applications against the state.<sup>39</sup>

In comparison, the opt-out clause provides the possibility for the contracting states to exclude certain provision, provisions, part or parts of an agreement. This means that the provision concerned is binding unless a state makes an exact declaration in which it expresses that it does not wish to be bound by that provision. The 1957 European Convention for the Peaceful Settlement of Disputes contains such an opt-out clause, as Article 34 of the treaty states that „(...) any one of the High Contracting Parties may declare that it will not be bound by: Chapter III relating to arbitration; or Chapters II and III relating to conciliation and arbitration.”<sup>40</sup> In the light of this provision, if a state excludes Chapter III or Chapters II and III, it shall not be bound by these provisions.<sup>41</sup> However, in the absence of such a declaration, the state is bound by the entire treaty. A similar provision can be found in the International Labour Organisation Convention No. 81, Convention concerning Labour Inspection in Industry and Commerce (1947). Article 25 of the Convention states that „Any Member of the International Labour Organisation which ratifies this Convention may, by a declaration appended to its ratification, exclude Part II from its acceptance of the Convention.”<sup>42</sup> It is important to note that some international treaties provide the possibility of opting out in connection with provisional application.<sup>43</sup> Article 45 of the Energy Charter Treaty, for example, declares that the treaty should be provisionally applied, but it also provides the possibility for the contracting states to exclude this provision by means of an opt-out clause. Accordingly, any state may deliver „(...) a declaration that it is not able to accept provisional application.”<sup>44</sup>

The fourth category is made up of provisions, which allow the contracting states to select the content of the treaty to which they are bound provision by provision (*à la carte* treaties). In this case, the treaty does not offer any variations to the contracting states, but merely specifies the number and the category of the articles, which the states must choose. The 1961 European Social Charter is an *à la carte* treaty,<sup>45</sup> Article 20 of which provides that each of the contracting states undertakes „(...) to consider itself bound by at least five of the following articles of Part II of this Charter: Articles 1,

<sup>36</sup> 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Art. 41, para. 1.

<sup>37</sup> 1969 American Convention on Human Rights, 1144 UNTS 123, Art. 45, paras. 1 and 2.

<sup>38</sup> 1969 American Convention on Human Rights, 1144 UNTS 123, Art. 62, para. 1.

<sup>39</sup> 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art. 34, para. 6.

<sup>40</sup> 1957 European Convention for the Peaceful Settlement of Disputes, 23 European Treaty Series, Art. 34.

<sup>41</sup> For example, Sweden and the Netherlands have excluded Chapter III of the Treaty. 320 UNTS 244.

<sup>42</sup> 1947 Convention Concerning Labour Inspection in Industry and Commerce, ILO Convention C081, Art. 25.

<sup>43</sup> H. Krieger, *Article 25. Provisional Application*, in O. Dörr & K. Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties. A Commentary*, Springer, Heidelberg, 2012, pp. 415-416.

<sup>44</sup> 1994 Energy Charter Treaty, 2080 UNTS 95, Art. 45, para. (2) (a).

<sup>45</sup> Report of the International Law Commission, 37 UN GAOR, Supp. No. 10. (A/37/10), p. 142.

5, 6, 12, 13, 16 and 19; in addition to the articles selected by it in accordance with the preceding sub paragraph, to consider itself bound by such a number of articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs.”<sup>46</sup> It can be seen that the treaty allows each contracting state to choose which provisions it considers itself bound by, but the treaty also specifies the number of provisions to be chosen.<sup>47</sup> However, it is important to note that Part I of the treaty must be accepted by all states.<sup>48</sup>

The 1985 European Charter of Local Self-Government also operates on an à la carte basis, as Article 12 of the treaty states that: „Each Party undertakes to consider itself bound by at least twenty paragraphs of Part I of the Charter, at least ten of which shall be selected from among the following paragraphs: Article 2, Article 3, paragraphs 1 and 2, Article 4, paragraphs 1, 2 and 4, Article 5, Article 7, paragraph 1, Article 8, paragraph 2, Article 9, paragraphs 1, 2 and 3, Article 10, paragraph 1, Article 11.”<sup>49</sup> Furthermore, in the category of à la carte treaties, the European Charter for Regional or Minority Languages can also be mentioned, according to which: „(...) each Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.”<sup>50</sup> It is also important to note that the European Charter for Regional or Minority Languages also stipulates that all states are obliged to accept Part II of the treaty.<sup>51</sup>

### 3.2. Necessity and Limits of the Application of the Clauses Providing Possibility of Choice

As can be seen from the previous chapter, clauses providing possibility of choice can take many different forms in different international treaties. This raises the question of the extent to which the use of such clauses can be considered necessary. In this respect, it can be established that the heterogeneity of the contracting states of a given agreement and the purpose of achieving broad participation may make it necessary to provide the possibility of choice in the treaty. If the treaty is intended to regulate the relations of a large number of states, the interests of the entities representing different positions must be reconciled in some way in the agreement. Providing the possibility of choice, through various clauses, could be an appropriate instrument for this purpose, as it would allow each state to affect the content of the treaty based on its own needs, thus expressing national interests and positions. This, of course, does not mean that the use of the clauses is necessary in all cases, but providing the possibility of choice undoubtedly contributes to increasing the willingness of interest-driven states to participate in a certain treaty.

Treaties providing the possibility of choice undoubtedly give greater freedom for the contracting states, however, it is important to note that this freedom is not unlimited in any of the options, every option creates some kind of limits for the states. The states have the least freedom in case of opt-in

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<sup>46</sup> 1961 European Social Charter, 529 UNTS 89, Art. 20, paras. 1. b and c.

<sup>47</sup> It is worth noting that in 1996 the Revised European Social Charter was adopted, which is also an à la carte treaty. As regards the relationship between the two agreements, the Revised European Social Charter contains an explicit provision stating that „Acceptance by the Party concerned of any obligation contained in any provision of this Charter (...) shall imply that the corresponding provision (...) of the European Social Charter (...) shall no longer apply to that Party (...).” 1996 Revised European Social Charter, 163 European Treaty Series, Part III, Art. A and B.

<sup>48</sup> 1961 European Social Charter, 529 UNTS 89, Art. 20, para. 1. a.

<sup>49</sup> 1985 European Charter of Local Self-Government, 1525 UNTS 51, Art. 12, para. 1.

<sup>50</sup> 1992 European Charter for Regional or Minority Languages, 2044 UNTS 575, Art. 2, para. 2.

<sup>51</sup> 1992 European Charter for Regional or Minority Languages, 2044 UNTS 575, Art. 2, para. 1.



and opt-out clauses, where they can exercise their right of choice only by expressly accepting or excluding a provision or a part of the treaty. A category that provides greater freedom is the possibility of choosing between mutually exclusive options, whereby the contracting states may exercise their right of choice in respect of the options offered in the agreement. The third category contains à la carte treaties, which specify the number and range of provisions to be chosen but leave the states free to choose the provisions they wish to accept within these limits. Lastly, the category of treaties which offer the greatest freedom contains those treaties, which allow the contracting states to express the consent to be bound by a part of a treaty, without listing any variations or other options.

It can be seen that international treaties may provide the possibility of choice within a broader or narrower scope. The determination of this question is entirely up to the will of the contracting states, which is usually negotiated during the conclusion of the treaty. On the basis of the examples analysed above, it can be said that international treaties usually seek to keep a part of the treaty unified by making it binding on all states and to provide the possibility of choice merely in addition to this unified part. In addition, the treaties usually specify the variations on the basis of which, or the provisions between which the right of choice may be exercised. This is in line with the advisory opinion of the International Court of Justice presented earlier, according to which the absolute integrity of international treaties can be breached and the unity of the treaty provisions can be disrupted, but only within limits. As has been explained, the Court has defined the limit of the breach as respect for the object and purpose of the treaty, which, according to the Court, cannot be sacrificed for the sake of any objective.<sup>52</sup> Although the treaties providing possibility of choice do not expressly refer to the object and purpose of the treaty, the limits they impose do have the effect of preserving it. In the light of the above, it can be said that the clauses providing possibility of choice do not contribute to the absolute integrity of the treaty, however, they do not sacrifice it completely, since they seek to preserve a minimum mandatory content and, at the same time, provide the possibility of choice within limits.<sup>53</sup>

#### 4. Concluding Thoughts

The study has shown that the use of clauses providing possibility of choice can be found in any kind of international treaties, since it is only the will and need of the contracting states that is necessary for the application of these clauses.<sup>54</sup> This is usually the case when the aim is to achieve broad participation in the agreement and the interests of a large number of contracting states would be difficult or impossible to reconcile without the right of choice.<sup>55</sup> In the context of the application of the clauses, it is of particular importance that they can only be applied on the basis of a decision of the contracting states, and the application must happen exceptionally and within limits. As the provisions of the Vienna Convention show, the use of such clauses may be provided either by an express provision in the treaty or by an agreement of the contracting states. As the International Court of Justice has explained, it is also important not to infringe the requirement of respect for the object and purpose of the treaty.

The examples presented in this study illustrate that international treaties do not give complete free-

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<sup>52</sup> Reservations to the Convention on Genocide, Advisory Opinion of 28th May 1951, 1951, ICJ Rep. p. 24.

<sup>53</sup> R. Nixon & W. P. Rogers, *Vienna Convention on the Law of Treaties*, The International Lawyer, Vol. 6, No. 2, August 2018, pp. 431-432.

<sup>54</sup> The examples also show that the application of the clauses has so far mainly taken place in the fields of international dispute settlement, international labour law and social rights. Hoffmeister 2012, pp. 215-217.

<sup>55</sup> B. Cali, *International Law for International Relations*, Oxford University Press, Oxford, 2010, pp. 108-109.

dom for the contracting states, most of the time they merely allow to exercise the right of choice within certain limits. The background to this is the effect of the clauses on the uniform text and application of the treaty and the need to keep this effect within limits. The provisions in question necessarily undermine the absolute integrity of the treaty, since the agreement applies to each of the contracting states with different content on the basis of the provisions chosen by the state.<sup>56</sup> However, the breach of the uniform text also has an impact on the application of the treaty, since each contracting state will put into practice the agreement which contains its own choice. As a consequence of the differences in content, the treaty cannot be applied in a uniform manner. This effect of the possibility of choice is the reason for the restrictions existing in the law of treaties and in the individual agreements.

However, it is also important to note that the use of clauses providing possibility of choice is by no means unfavourable, as they make it possible to include a large number of states with different values and points of view in a treaty. In this respect, the international community and much of the literature is clearly of the opinion that, on issues affecting the international community as a whole, it is much better to have a broad cooperation with fewer common elements than a detailed agreement that applies with the same content to all but only with few parties.<sup>57</sup> On this basis, the application of clauses providing possibility of choice is an integral part of the functioning of multilateral international treaties, therefore, the knowledge of the conditions and limits of their application is particularly important.

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<sup>56</sup> It is not possible to speak about undermining however, if all contracting states make the same commitments, for example if they accept the same provisions. However, this is very unlikely to happen, especially where there are a large number of contracting states.

<sup>57</sup> Cali 2010, pp. 108-109.