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The editors are pleased to present issue 2023/I-II. 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.

In the *Articles* section, Dalma Takó provides an analysis of clauses allowing for possibility of choice in international treaties. Bence Kis Kelemen, Ágoston Mohay, Attila Pánovics and Norbert Tóth elaborate on the elusive contours of responsibility of international organizations. Gagik Chilingaryan provides insight into the status of national minorities in the Republic of Armenia in light of the Framework Convention for the Protection of National Minorities. Bence Kis Kelemen elaborates upon the responsibility of international organizations for outer space activities. Marta Romańska, Agata Cebera and Jakub Grzegorz Firlus delve into the peculiar issue of the case of so-called 'LGBT free zones' in Poland.

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As always, a word of sincere gratitude is due to the anonymous peer reviewers of the current issue.

This double issue also marks the end of an era for PJIEL: from 2024, the journal will apply the Open Journal Systems model of functioning, reaffirming our commitment to open access scientific publishing.

As always, we encourage the reader to consider the PJIEL as a venue for your publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and EU law issues.

Corrigendum

In Issue 2022/II, an unfortunate error occurred. The family name of one of the authors of that issue, Sandra Fabijanić Gagro (Human Security and Responsibility to Protect – Challenges and Intersections, pp. 6-19.) has been misspelled, along with her position (which is, in reality, full professor). The editors wish to apologize for the error and any inconvenience caused.

Clauses Providing Possibility of Choice in International Treaties[1]

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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.[2]

[1] Supported by the ÚNKP-22-3-II-SZE-66 New National Excellence Program of the Ministry of Culture and Innovation from the source of the National Research, Development and Innovation Fund.

[2] 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,[3] according to which the provisions of a treaty were regarded as indivisible[4] 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[5] and it was not possible for the contracting states to do that only for certain parts or provisions.[6]

The principle of absolute integrity ensured that the parties of a certain treaty had the same rights and obligations.[7] 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,[8] 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.[9] 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.

[3] 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.

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

[5] 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.

[6] 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.

[7] 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.

[8] 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.

[9] Villiger 2009, p. 237.

treaty.[10] 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.[11]

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.[12] 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.[13] 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.[14] 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.[15]

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."[16]

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.[17] 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

[10] Hoffmeister 2012, p. 216.

[11] 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.

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

[13] 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.

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

[15] M. Prost, *The Concept of Unity in Public International Law*, Hart Publishing, Oxford, 2012, p. 37.

[16] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331. (hereinafter: Vienna Convention), Art. 17.

[17] 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.[18] 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.[19]

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.[20] 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.[21] Until a state does not make its choice clear, it is not bound by the treaty.[22] 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."[23]

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.[24] 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.[25] 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 possiblity 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,

[18] 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.

[19] Villiger 2009, pp. 238-240.

[20] Hoffmeister 2012, p. 217.

[21] S. L. Bunn-Livingstone, *Juricultural Pluralism Vis-á-Vis Treaty Law. State Practice and Attitudes*, Martinus Nijhoff Publishers, The Hague, 2002, pp. 15-16.

[22] 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.

[23] 1961 European Social Charter, 2077 UNTS 272.

[24] Villiger 2009, pp. 238-239; Hoffmeister 2012, p. 215.

[25] 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 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.[26] 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.[27] 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 possiblity 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.[28] 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.[29]

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.[30] 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.[31]

[26] Vienna Convention, Art. 2, para. 1. (d).

[27] 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.

[28] Vienna Convention, Art. 17, para. 1.

[29] 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.

[30] Villiger 2009, p. 241.

[31] 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.[32] 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).[33] Under this provision, the contracting states may choose between the chapters of the treaty,[34] but only in accordance with the variations offered by the treaty.[35]

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

[32] Draft Articles on the Law of Treaties with commentaries, 1966, p. 201.

[33] 1928 General Act on the Pacific Settlement of International Disputes, Art. 38. 93 League of Nations Treaty Series 343.

[34] 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.

[35] 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.[36] 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.[37] 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.[38] 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.[39]

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."[40] 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.[41] 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."[42] It is important to note that some international treaties provide the possibility of opting out in connection with provisional application.[43] 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."[44]

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 á la carte treaty,[45] 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,

[36] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Art. 41, para. 1.

[37] 1969 American Convention on Human Rights, 1144 UNTS 123, Art. 45, paras. 1 and 2.

[38] 1969 American Convention on Human Rights, 1144 UNTS 123, Art. 62, para. 1.

[39] 1998 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, Art. 34, para. 6.

[40] 1957 European Convention for the Peaceful Settlement of Disputes, 23 European Treaty Series, Art. 34.

[41] For example, Sweden and the Netherlands have excluded Chapter III of the Treaty. 320 UNTS 244.

[42] 1947 Convention Concerning Labour Inspection in Industry and Commerce, ILO Convention C081, Art. 25.

[43] 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.

[44] 1994 Energy Charter Treaty, 2080 UNTS 95, Art. 45, para. (2) (a).

[45] 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."[46] 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.[47] However, it is important to note that Part I of the treaty must be accepted by all states.[48]

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."[49] 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."[50] 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.[51]

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

[46] 1961 European Social Charter, 529 UNTS 89, Art. 20, paras. 1. b and c.

[47] 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.

[48] 1961 European Social Charter, 529 UNTS 89, Art. 20, para. 1. a.

[49] 1985 European Charter of Local Self-Government, 1525 UNTS 51, Art. 12, para. 1.

[50] 1992 European Charter for Regional or Minority Languages, 2044 UNTS 575, Art. 2, para. 2.

[51] 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.[52] 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.[53]

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.[54] 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.[55] 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-

[52] Reservations to the Convention on Genocide, Advisory Opinion of 28th May 1951, 1951, ICJ Rep. p. 24.

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

[54] 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.

[55] 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.[56] 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.[57] 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.

[56] 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.

[57] Cali 2010, pp. 108-109.

The Articles on the Responsibility of International Organisations – Still Up in the Air after More Than a Decade?[1]

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The responsibility of international organizations for internationally wrongful acts is a complex issue of international law – a situation that was meant to be changed by the Articles on the Responsibility of International Organisations (ARIO, 2011). Yet the status of the ARIO remains disputed in theory and practice: it is difficult to say whether it qualifies as customary law or rather the progressive development of the law. This paper outlines some of the most important conceptual frameworks regarding this subject, providing insight into the corresponding questions of interpretation.

Key words: international responsibility, ARIO, international organizations, customary international law, shared responsibility

Responsibility for internationally wrongful acts is one of the most complex issues in international law. This is well illustrated by the countless studies and monographs devoted to this field, and by the fact that there is hardly an article on international law that does not deal with some aspect of responsibility, even if in a tangential way.

Understandably, international responsibility was first conceived of in terms of the responsibility of states for breaches of international law, and even this transpired only relatively late, in the 1920s, when the thesis began to appear in international judicial practice that the existence of international

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law necessarily implied the existence of international responsibility, or in other words, 'responsibility is the corollary of law".[2] Subsequently, the regulation of State responsibility has gradually evolved,[3] the discussion of which is beyond the scope of this study; it is sufficient to refer to the endpoint of this evolution, namely the final Draft Articles on the International Responsibility of States (hereinafter: ARSIWA), finalised by the International Law Commission in 2001 and recommended to States by the UN General Assembly in a resolution.[4] Although this codification process did not result in the adoption of an international treaty, the content of ARSIWA, even in the absence of legally binding force, can be seen as having the force of customary international law.[5] The codification efforts of the International Law Commission did not stop there, however, as in 2011 the final Draft Articles on the Responsibility of International Organisations (hereinafter: ARIO) were adopted, which suffered the same fate as the 2001 final draft, i.e. it was merely 'recommended' to States by the UN General Assembly.[6] Although the customary origin of the norms contained in the ARIO may be debated,[7] its fundamental provisions, such as the fact that a breach of international law by an international organization (hereinafter: IO) results in international legal responsibility[8], are undoubtedly binding rules of international law.[9]

In any case, the importance of the responsibility of IOs is easy to understand: the proliferation of international organizations starting with the 20th century has created many new international legal entities whose accountability and responsibility are subject to questions.[10] In this context, it is useful to review and interpret the main conceptual issues of the responsibility of international organisations.

1. Conceptual overview

The basic idea of international responsibility is that states and IOs commit a breach of international law when they act or fail to act in breach of an international legal obligation that is attributable to them. All such conduct gives rise to international responsibility.[11] Starting from this basic idea, it is

[2] J. Bruhács, *Nemzetközi jog I. – Általános rész*, Dialóg-Campus, Budapest–Pécs, 2011, p. 180. (Translation by the Authors.)

[3] On the emergence of this development in Hungarian legal literature, see G. Kecskés, *Az államfelelősség és szankciók nemzetközi jogi kérdéskörének megjelenése a magyar jogirodalomban,* Acta Universitatis Szegediensis: acta juridica et politica, Vol. 77, No. 1, August 2014, pp. 289-301.

[4] GA. Res. 56/83, Responsibility of States for Internationally wrongful acts, 12 December 2001. (hereinafter ARSIWA), point 3.

[5] P. Kovács, *Nemzetközi közjog*, Osiris, Budapest, 2016, p. 542.

[6] GA. Res. 66/100, Responsibility of international organizations, 9 December 2011. (hereinafter ARIO), point 3.

[7] Indeed, even the International Law Commission itself acknowledges that many of the provisions of the draft are progressive developments rather than codification. See United Nations, *Draft articles on the responsibility of international organizations, with commentaries,* (hereinafter ARIO Commentary) in Yearbook of the International Law Commission Vol. 2., Part 2, New York – Geneva, 2011, pp. 46-47, para. 5. However, since the commentary does not distinguish between these provisions, each norm may still have a kind of 'codification authority'. See F.L. Bordin, *Reflections of customary international law: the authority of codification conventions and ILC draft articles in international law,* International Comparative Law Quarterly, Vol. 63, No. 3, July 2014, pp. 556-557.

[8] ARIO, Art. 3.

[9] M. Möldner, *Responsibility of International Organizations - Introducing the ILC's DARIO,* Max Planck Yearbook of United Nations Law, Vol. 16, No. 1, February 2012, p. 286.

[10] A. Delgado Casteleiro, *The International Responsibility of the European Union: from Competence to Normative Control,* Cambridge University Press, Cambridge, 2016, p. 54.

[11] ARSIWA, Arts. 1-2; ARIO, Arts. 3-4.

essential to clarify what is meant by attribution. The literature distinguishes between two concepts of attribution: *attribution of conduct* and *attribution of responsibility.*

As regards attribution of conduct, it is simply the case that states and IOs are not in themselves capable of engaging in any conduct, and therefore in order to speak of conduct by a state or an international organisation, action or omission by another actor must be attributed to states or Ios. If the state commits a *de jure* or *de facto* violation through its organs, this generates international responsibility on the state's side - the same is true of wrongful conduct committed by organs or agents of an IO.[12] This issue will be discussed in more detail in Section 3.

As regards attribution of responsibility, by contrast, states or international organisations cause a collective breach to a third party. Examples include *aid or assistance, direction and control, coercion* and *circumvention* of international obligations.[13] In some cases, these activities are included under the umbrella of *derived responsibility*, effectively treating it synonymous with attribution of responsibility.[14] This is unfortunate, however, if we understand derived liability to mean that one entity assumes liability for the conduct of another entity, while the actor who actually commits the conduct is liable in parallel for his own acts or omissions. A valid criticism of this concept is the fact that a State or an IO will not always be liable for its own conduct if another entity is already liable for the same conduct. A good example is the circumvention of international obligations, where the responsibility of the IO is independent of whether the decision or authorisation was unlawful for its member state(s) or for the international organization itself to implement.[15] It follows that attribution of responsibility does not necessarily imply shared responsibility.[16] Although the concept of derived responsibility is undoubtedly useful and may in some cases be a useful tool for categorising forms of liability, we do not consider it appropriate to use this concept, since, apart from the problems described above, it suggests in name that in such cases responsibility is derived from another responsibility. Categorisation can made this way as well, but in this case it will not be identical with the attribution of responsibility, it will rather mean a much narrower category of responsbility, which will in any case be a subtype of shared responsibility.

Although international responsibility is primarily understood as independent, individual responsibility (and is treated as such by subjects of international law),[17] it is important to mention a concept that can easily occur in practice and has been referred to above: that is the so-called *shared responsibility.* According to leading literature, shared responsibility occurs when several actors contribute to an individual wrongful result, and where responsibility is shared between actors rather than being borne by a collective - or rather a collective entity. It is also important to note that in a case of shared liability, the individual contribution of the actors to the wrongful result cannot be established separately, i.e. the specific conduct of each actor is not directly causally linked to a specific part of the infringement.[18] It is possible to 'share' responsibility in the case of attribution of conduct and

[12] ARSIWA, Art. 4; ARIO, Art. 6.

[13] J. D. Fry, *Attribution of Responsibility,* in A. Nollkaemper & I. Plakokefalos (Eds.), Principles of Shared Responsibility in International Law - An Appraisal of the State of the Art, Cambridge University Press, Cambridge, 2014, pp. 98-100. Although we can see that not all of the examples given can be considered as attribution of responsibility. See ibid 104.

[14] See, for example, S.Ø. Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State,* Oslo Law Review, Vol. 6, No. 3, December 2019, p. 182.

[15] Fry 2014, pp. 103-104; ARIO Art. 17. (3).

[16] Cf. Johansen 2019, p. 182.

[17] A. Nollkaemper, *The duality of shared responsibility,* Contemporary Politics, Vol. 24, No. 5, March 2018, pp. 526-527.

[18] A. Nollkaemper & D. Jacobs, *Shared Responsibility in International Law: A Conceptual Framework,* Michigan

attribution of responsibility as well, even in a way where a State or IO becomes responsible for its own acts or omissions, while another entity becomes responsible via attribution of responsibility.

2. Basic issues of the responsibility of international organisations

If we start from the above-mentioned basic concept that there is no law without responsibility, then the question with regard to the responsibility of IOs will not be primarily whether the responsibility of an IO *can* be invoked, but rather *under what conditions*. This does not mean, of course, that the question of the responsibility of IOs is not a complex one - quite the contrary. By analogy, the gist of the problem is similar to that of the responsibility of legal persons in criminal law.[19] Just as the issue of the criminal responsibility of associations of persons has long been a matter of legal research, the question of how international organisations can be held responsible is proving to be a similarly complex one. Given that the autonomous legal personality of IOs is not questioned in international law, it is not in itself problematic to accept the possibility of the autonomous international responsibility of IOs in principle[20] - irrespective of the derivative and limited nature of their legal personality.[21]

We have already referred to the ARIO's clear starting point that any breach of an existing obligation by an IO entails the responsibility of the organisation. There is no difference compared to ARSIWA as regards the two conjunctive conditions for establishing international responsibility, since ARIO also requires a breach of an existing international obligation of the organisation which is at the same time attributable to the organisation. However, both conditions may raise some questions of interpretation.

2.1. What are the international law obligations of an IO?

In this respect, international treaties concluded by international organisations have a clear position: the Vienna Convention of 1986 between States and International Organizations or between International Organizations refers in Article 26 to the principle of *pacta sunt servanda*. But what about the general rules of international law?

It is hardly realistic to think that *ius cogens* norms, the most fundamental rules of the international legal order, which apply to all international legal entities,[22] should not bind international organisations. In view of the hierarchical position of *ius cogens* in the international legal order, *ius cogens* should take precedence over the international treaties establishing international organisations and

Journal of International Law, Vol. 34, No. 2, 2013, pp. 2-3, pp. 366-368.

[19] For an overview of the criminal liability of legal persons - with a focus on Hungarian and EU law - see Zs. Fantoly, *A jogi személyek büntetőjogi felelőssége,* HVG-Orac, Budapest, 2008, p. 334.

[20] D. J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel,* Virginia Journal of International Law, Vol. 36, No. 2, 1996, p. 277. Of course, Bederman also summarizes in this paper that the legal personality of international organizations was not self-evident from the beginning - indeed, and in this context, the rules of domestic law on legal persons had analogous relevance. Ibid 275-378, on the analogous approach in particular pp. 353-357.

[21] A. Blahó & Á. Prandler (Eds.), *Nemzetközi szervezetek és intézmények,* Akadémiai Kiadó, Budapest, 2014, pp. 58–59.

[22] All obligations arising from *ius cogens* are obligations of an *erga omnes* nature. See Bruhács 2011, p. 143.

should bind organisations in the same way as States.[23] Mention should be made as well of the obligation not to recognise a situation created by a serious breach of *ius cogens*, which should also apply to IOs by virtue of the general binding force of *ius cogens*.[24]

As for customary international law, which is also not relative in scope, but - with the exception of *persistent objector* states - generally binding. At a theoretical level, it can be stated that customary international law is also binding on IOs, in so far as this is compatible with their specific characteristics (other than those of States).[25] According to the dominant view, international organisations are thus bound by customary law *mutatis mutandis, or* at least by a substantial part of customary law - this includes, of course, the law of international treaties, but also the above-mentioned foundational rule of responsibility.[26]

As far as general principles of law are concerned, since international organisations have legal personality under international law and are members of the international community, they should - by the logic of international law - also be bound by these sources of general international law,. *Mutatis mutandis,* therefore, the observations made with regard to customary law can be considered valid here as well.

To sum up, and also with reference to the advisory opinion of the International Court of Justice on the agreement between Egypt and the World Health Organization, it can be said that international organizations, as subjects of international law, are bound by general international law.[27]

2.2. What behaviour can be attributed to the international organisation?

As noted in the introduction, it is important to distinguish between *attribution of conduct* and *attribution of responsibility.* In this section, we briefly discuss the former. Attribution of conduct is dealt with in Articles 6 to 9 of the ARIO as follows.

On the one hand, the ARIO provides for the conduct of the organs or agents of the IO, which will be attributable to the organisation, irrespective of the function/responsibility or position of the organ or agent in the institutional system of the organisation.[28] This can be considered the simplest case. However, the ARIO, like the ARSIWA, broadens the scope of attributable conduct to a certain extent.[29]

Where a State or an IO places an organ or agent at the disposal of another international organiza-

[23] A. A. Cançado Trindade, *Some Reflections on Basic Issues Concerning the Responsibility of International Organizations,* in M. Ragazzi (Ed.), Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie, Martinus Nijhoff, Leiden – Boston, 2013, p. 7.

[24] See ARIO Arts. 41-42 and see for example M. Dawidowicz*, The obligation of non-recognition of an unlawful situation,* in J. Crawford & A. Pellet & S. Olleson (Eds.), The Law of International Responsibility, Oxford University Press, Oxford, 2010, pp. 677-686.

[25] This thesis is mostly accepted, although there are some doubtful commentators. See on this T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre,* Springer, Berlin-Heidelberg, 2011, p. 596.

[26] Ibid p. 598.

[27] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980. p. 73, para. 37.

[28] ARIO, Art. 6 (1).

[29] J. Bruhács, *Az államok nemzetközi felelősségéről szóló végleges tervezet,* in K. Tóth (Ed.), In memoriam Nagy Károly egyetemi tanár (1932–2001), Szegedi Tudományegyetem, Szeged, 2002, p. 122.

tion, the conduct of that organ or agent will be deemed to constitute the conduct of that organ or agent, provided that the latter organization exercises *effective control* over the organ or agent.[30] The introduction of the condition of effective control is necessary, since the organ or agent placed at the disposal of the organisation will not necessarily be controlled exclusively by the international organisation, but will continue to act in some respects as an agent of the 'providing' State - this is typically the case, for example, in UN peacekeeping operations, where the State continues to exercise disciplinary and criminal jurisdiction vis-à-vis members of its contingent offered to the UN.[31] The situation is nuanced by the fact that in the context of peacekeeping missions, the UN emphasises, 'for a number of reasons, notably political', the UN's responsibility towards third parties, which is understandable from a metajuridical perspective, but, as the ARIO commentary emphasises, the attribution of conduct must nevertheless rest on an objective, factual basis.[32] However, the assessment of effective control is neither straightforward nor uncontroversial - especially in the light of the relevant ECtHR case law and its critique.[33]

The international organisation will also be held responsible for the conduct of its organs or agents if the conduct exceeds the organisation's competences or is contrary to its instructions. However, for such conduct to be attributable, the organ or agent must be acting within the scope of its official functions and in accordance with its general function within the organization.[34] Under the ARIO, therefore, *ultra vires* conduct may also be attributable to the organisation and responsibility cannot be avoided on the ground that the organisation or agent exceeded its powers. Attribution to the organisation does not, of course, have any bearing on, or regard to, the 'internal' assessment of the conduct, i.e. its invalidity under the rules of the IO.[35] It should be noted, however, that in practice, because of the derivative and limited, functional legal personality of international organisations, the concept of *ultra vires* acts can only be interpreted in a scope and content significantly different from that of *ultra vires* acts of States.[36]

In addition to the above, ARIO also attributes to the international organisation the conduct it has recognised and accepted as its own. This concerns conduct which would not be attributable to the organisation on the basis of the grounds of responsibility discussed previously.[37] It is important to note that under the ARIO, conduct recognised and accepted by the organisation as its own is attributable to the *extent to which* it has recognised it as its own - recognition may therefore be differentiated and may relate to a specific part of the conduct in question.[38]

The complexity of the attribution issue is increased by the fact that, as Giorgio Gaja, ARIO Special Rapporteur, explains in his seventh report, the attribution of *responsibility* does not always depend on whether the *conduct* is attributable to the international organisation: by way of example, he refers to the possibility that, if an IO coerces a State or another IO into an action which, in the absence

[30] ARIO, Art. 7.

[31] ARIO, Commentary p. 56.

[32] Ibid pp. 57-58.

[33] See also section 4. Regarding the ECtHR case law, Gaja laconically stated in 2009 that the approach chosen by the court, which differs from the ARIO logic, is not convincing *from a policy point of view.* Seventh report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, Document A/CN.4/610, p. 80.

[34] ARIO, Art. 8.

[35] ARIO Commentary, p. 61.

[36] V. J. Proulx, *An Uneasy Transition? Linkages between the Law of StateResponsibility and the Law Governing the Responsibility ofInternational Organizations,* in M. Ragazzi (Ed.), Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie, Martinus Nijhoff, Leiden – Boston, 2013, p. 116.

[37] ARIO, Art. 9.

[38] ARIO Commentary, p. 62.

of coercion, would be an internationally wrongful act for the coerced actor, responsibility will fall on the coercing organisation, even though the conduct is not attributable to it.[39]

3. Relations of responsibility between IOs and their Member States

We have previously clarified that, in the case of attribution of responsibility, several entities necessarily cause collective harm to a third party. As regards the relationship between international organisations and their member states, several variations are conceivable with regard to the attribution of – as well as the sharing of – responsibility. As a starting point, it should be emphasized again that the responsibility of an IO is not necessarily based on the attributability of a given conduct.[40]

The responsibility of a Member State may, of course, arise under an express provision to that effect in the founding treaty of the IO (or an express intention to do so), or where the organisation is under the *direct control* of the State or where the organisation has acted under specific circumstances as an agent of the State, with the unilateral undertaking of obligation or guarantee by the State.[41]

IOs have a *separate will* from their Member States,[42] and therefore, as a rule, Member States cannot be held responsible for the actions of an international organisation.[43] This has been confirmed by the judgments of UK courts in the *International Tin Council* case. The Tin Council was originally set up in 1956 to operate an international agreement (the International Tin Agreement) concluded two years earlier.[44] The main purpose of the organisation, which operated essentially much like a cartel, was to stabilise the world price of tin by influencing the long-term balance between supply and demand.

In 1981, the then 23 members of the organisation (22 countries[45] and the European Economic Community) signed a five-year agreement,[46] but the market price of tin fell dramatically as demand fell.[47] As a result, the International Tin Council soon became insolvent and unexpectedly went bankrupt on 24 October 1985. The bankruptcy of the organisation not only caused huge losses to the creditor banks and others, but also led to a temporary and significant downturn in the international market for some other products as well (e.g. cocoa, coffee, rubber).[48] Negotiations to save the organisation were concluded with unprecedented speed in March 1986, when two of the main tin-producing member states (Malaysia and Thailand) announced that they would not participate in the recovery

[39] Seventh report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur. DOCUMENT A/CN.4/610, p. 77.

[40] Second report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur. DOCUMENT A/CN.4/541, para. 11.

[41] M. N. Shaw, *International Law,* 7th edn., Cambridge University Press, Cambridge, 2014, p. 954.

[42] N. D. White, *The law of international organisations,* Manchester University Press, Manchester, 2005, p. 30.

[43] ARIO Commentary, p. 100.

[44] Since 1960, the Agreement has been regularly renewed by the member states of the Organisation.

[45] Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, the Netherlands, Nigeria, Norway, Spain, Sweden, Switzerland, Thailand, Zaire and the United Kingdom. See I. A. Mallory, *Conduct Unbecoming: The Collapse of the International Tin Agreement,* American University International Law Journal, Vol. 5, No. 3, 1990, p. 835.

[46] UNCTAD, Sixth International Tin Agreement, TD/TIN.6/14

[47] This was due, among other things, to the spread of substitute materials and increased recycling of waste.

[48] Mallory 1990, p. 892.

plan. Despite the fact that, with some exceptions[49], the behaviour of the governments of the member states was at least not 'appropriate', the *Court of Appeal* held[50] that the member states were not liable for the debts of the organisation because it acted as a mediator with independent international entity between the Member States and the creditors (for example, it was a party to commercial transactions) and enjoyed internal legal immunity in the United Kingdom.[51] Although the judgment was in line with the general principle of international law that treaties do not create obligations for third countries without their consent *(pacta tertiis nec nocent nec prosunt),*[52] it also illustrated the legal uncertainty surrounding the responsibility of international organisations and sparked heated debates that continue to this day.

4. Parallel attribution

As indicated above, international law is essentially based on independent individual responsibility, which usually implies exclusive responsibility, i.e. one entity is responsible for one conduct. Consequently, the parallel attribution of conduct to two or more entities *(dual* or *multiple attribution)* is rare in international law.[53] However, the possibility of dual attribution has been accepted by the International Law Commission in both ARSIWA and ARIO, while international judicial fora have so far rather tended to stick to the well-established concept of individual responsibility.[54] It is important to note that we are talking here about attribution of conduct, not attribution of responsibility.[55] The above statement should be complemented by the literature that suggests that parallel attribution is the 'default' concept of attribution in cases where States and IOs act jointly.[56]

Parallel attribution can occur when the acts or omissions of one actor trigger the application of the attribution rules by two or more actors, or when an act is jointly performed by two or more actors whilst their conduct is attributable to two or more actors.[57] In fact, only the former category can be called *dual attribution,* but this will not always entail the international responsibility of both entities involved, since, for example, IOs and States are subject to different international legal obligations, and dual attribution can be envisaged only by establishing the responsibility of one of the parties.[58] An example of this concept is the creation of joint bodies or where a person has an institutionalised attribution relationship with a specific entity. For example, a *de jure* State organ may simultaneously be under the direction and control of another State or even an IO.

The other case of parallel attribution, on the other hand, presupposes a rather rare situation where the joint action of two persons belonging to two separate actors, for example the joint wrongful

[49] For example, the UK, Canada, Japan and the EEC. See ibid

[50] Maclaine Watson & Co. Ltd v International Tin Council, 26 October 1989, 81 ILR 670.

[51] See The International Tin Council (Privileges and Immunities) Order, S.I. 1972, No. 120.

[52] See 1969 Vienna Convention on the Law of Treaties, Art. 34.

[53] Nollkaemper & Jacobs 2013, p. 383; J. d'Aspremont & A. Nollkaemper & I. Plakokefalos & C. Ryngaert: *Sharing Responsibility Between Non-State Actors and States in International Law: Introduction,* Netherlands International Law Review, Vol. 62, No. 1, June 2015, pp. 58-59.

[54] Nollkaemper & Jacobs 2013, p. 385.

[55] Cf. Fry 2014, pp. 98-99.

[56] F. Messineo, *Attribution of Conduct,* in A. Nollkaemper & I. Plakokefalos (Eds.), Principles of Shared Responsibility in International Law - An Appraisal of the State of the Art, Cambridge University Press, Cambridge, 2014, p. 97.

[57] Ibid p. 67.

[58] Johansen 2019, pp. 182-183.

conduct of soldiers of two separate states, results in parallel attribution to both entities.[59] In both of the above categories, we can speak of shared responsibility, but this should not be confused with the concepts of derived responsibility or the attribution of responsibility.[60] It should be stressed, however, that the concept of parallel attribution cannot be used in all cases where an act or omission is potentially attributable to more than one entity: the principle does not apply to seconded organs.[61]

This paper is not intended to go in-depth into the case law on parallel responsibility, but it needs to be pointed out that this notion has mainly been raised in the context of peacekeeping missions, and that the cases have resulted in a variety of decisions on the question of international responsibility. However, noting its importance, the case law of the European Court of Human Rights (ECtHR) deserves specific mention: the ECtHR first had to deal with the possibility of parallel attribution in relation to IOs in the joined *Behrami* and *Saramati* cases. Here, the ECtHR rejected the concept of shared responsibility and thus of parallel attribution, and attributed the wrongful conduct underlying the facts of the case to the UN alone.[62] The decision has been the subject of much criticism in the literature, as the ECtHR applied the so-called *ultimate authority and control* test in assessing attribution, rather than that of *effective control.*[63] The ECtHR's jurisprudence later became more nuanced and, like some national courts, accepted the possibility of shared responsibility and even the concept of parallel attribution.[64]

Part 5 of the ARIO contains provisions on the liability of Member States for the unlawful activities of an international organisation.[65] According to Article 58(2), an international organisation will be liable if its Member State provides *aid or assistance 'in accordance with the rules of the organisation'* to the commission of the wrongful act. However, a non-Member State may also be held liable if it knowingly assists a wrongful act committed by an IO, provided that (1) it is aware of the circumstances of the conduct and (2) the conduct would be wrongful if the State itself were committing it.[66] Under Article 60 ARIO, the State, and not the international organisation, will be responsible if its Member State knowingly compels the organisation to commit the breach,[67] or if it attempts to 'hide' behind the organisation in order to circumvent its own international legal obligations. [68]

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[59] For further examples, see Messineo 2014, pp. 67-79; for a simplified typology of liability in such cases, see Johansen 2019, p. 190.

[60] Johansen 2019, pp. 98-99.

[61] Messineo 2014, p. 83; ARSIWA Art. 6 and ARIO Art. 7.

[62] Behrami v. France, 71412/01; Saramati v. France, Germany and Norway, 78166/01, Decision of 2 May 2007. para. 144.

[63] See, for example, A. Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases,* Human Rights Law Review, Vol. 8, No. 1, February 2008, pp. 151-170, 164. Nevertheless, there is also a view in the literature that the ECtHR did apply the effective control test, but in a special presumption-opposition format. See Y. Okada*, What's Wrong with Behrami and Saramati? Revisiting the Dichotomy between UN Peacekeeping and UN-authorized Operations in Terms of Attribution,* Journal of Conflict & Security Law, Vol. 24, No. 2, March 2019, pp. 362-365.

[64] See, for example, Hárs 2015, pp. 72-73; Johansen 2019, p. 189; P. Perisic, *Attribution of Conduct in UN Peacekeeping Operations,* Pécs Journal of International and European Law, Vol. 2020/I, May 2020, pp. 17-23.

[65] ARIO, Arts. 58-61.

[66] ARSIWA, Art. 16*(a)-(b)* "*(a)* the State does so with the knowledge of the circumstances of the internationally wrongful act; and *(b)* the act would be internationally wrongful if committed by that State."

[67] In this context, it cannot be ruled out that this coercion is in accordance with the rules of the organisation, although it is difficult to imagine coercion in accordance with the rules of the organisation. Cf. ARIO Commentary p. 98.

[68] According to Art. 61(2) of the ARIO, this rule applies even if the act in question does not constitute a breach on the part of the international organisation.

However, in the case of a non-member State that directs and controls an international organisation or knowingly instructs it to commit a breach, international responsibility lies with the latter.[69] Finally, as an additional element, a Member State is also responsible for an international organization's wrongful conduct if it has admitted its responsibility, expressly or implicitly, to the injured party[70] or it has led the injured party to rely on its responsibility.[71]

5. Concluding thoughts

The ARIO took much less time to create than ARSIWA, partly because the ARIO essentially follows the structure, principles, and provisions of the ARSIWA: this feature has been criticised as much as praised. The International Labour Organisation, for example, in its comments during the codification process, criticised the fact that the overly 'parallel' provisions of the ARIO did not take sufficient account of the significant differences between legal entities; Alain Pellet (who was a member of the International Law Commission at the time of the codification), on the other hand, pointed out - in agreement with Special Rapporteur Gaja - that international responsibility as such cannot reasonably have several different basic concepts.[72]

That being said, the ARIO raises even more questions of interpretation than its predecessor. In fact, if we go into the details, we can see that the two documents differ considerably in terms of content,[73] and therefore we cannot speak of the existence of fully coherent rules in the international liability regime. Indeed, the International Law Commission has in many cases refrained from using analogies, which has made the interpretation and application of ARIO more uncertain and unpredictable from this point of view - there is no question, of course, that there are much greater differences between international organisations than between States in terms of their various specificities, but it seems more important to emphasise similarities and similarities in order to ensure the coherence of the liability regime.[74]

As shown above, the ARIO's rules have left a number of questions open as to the different possible variations in the division of responsibilities between IOs and their member states. In order to fill these gaps, there is a need for clear practice by international organisations and their member states, from which conclusions can be drawn as to the relevant international legal norms. At the same time, amendments to the founding treaties of IOs clarifying this issue could also help to resolve the debated elements of the ARIO.

As for parallel attribution, although its possibility seems now to be accepted in principle by international and national judicial fora, it is still not a secure basis for holding international organisations responsible in the absence of jurisdictional fora that have jurisdiction covering IOs.[75]

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[69] ARIO, Arts. 59 (1) and 60.

[70] The aggrieved party in this context cannot only be a state or an international organisation. See ARIO Commentary p. 101.

[71] ARIO, Art. 62.

[72] Cf. A. Pellet, *International organizations are definitely not states. Cursory remarks on the ILC articles on the responsibility of international organizations*, Martinus Nijhoff, Leiden – Boston, 2013, p. 44.

[73] See for example ARIO Arts. 6, 17 and 61. See on this C. Ahlborn, *The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations - An Appraisal of the 'Copy-Paste Approach'*, International Organisations Law Review, Vol. 9, No. 1, January 2012, pp. 53-66.

[74] Ahlborn 2012, p. 61. This is also emphasized by Pellet in the above-mentioned work (ibid).

[75] Nollkaemper & Jacobs 2013, p. 436.

The above issues also need to be discussed as regards the European Union as a *sui generis* international organisation. The specific supranational nature of the Union and its autonomous legal order with its own judicial mechanism may well have implications for the way in which responsibilities are shared and attributed between the Union and its Member States. Despite its specific characteristics, which are different from those of international law, the European Union is not a state, but is, at least from the point of view of international law, a unique international organisation. In the various codification processes of the International Law Commission, the EU initially referred to itself as a rather specific international organisation which goes well beyond the usual attributes of classical international organisations, and then, being less successful in this, began to position itself as a regional (economic) international organisation.[76]

One possible distinction, which emphasises the EU's exceptionalism, is that in the course of integration the European Union became a 'constitutional international organisation', while the others remained 'functional international organisations'.[77] In any case, it is clear that EU law cannot exist without interactions with international law, if only because the Union itself is subject to international law[78] and as such can become a party to international treaties and even conclude them on behalf of itself and its Member States.[79] The Union must also be bound by customary international law, *mutatis mutandis*, in view of the jurisprudence of the CJEU.[80]

The ARIO and ARSIWA are the results of a codification process of international law and are therefore presumed to incorporate the relevant rules of customary international law. According to the case law of the CJEU, the rules of customary international law are part of the EU legal order and must be taken into account when EU secondary legislation is drafted. This position is also in line with the rules of international law in force, since, as the International Court of Justice has stated in relation to international organisations with international legal personality, these organisations are bound by obligations arising from the general rules of international law.[81] In the case of the Union, therefore, the system(s) of rules of liability based on customary law cannot be ignored, although neither can the *sui generis*, autonomous character of the Union (which it itself emphasises rather powerfully) - the specific rules of the organisation, its internal responsibility system, its own system of legal remedies, etc. at the very least raise the possibility of *lex specialis* rules in many instances. The EU's insistence on the uniqueness of its legal order – as something other than international law – is strongly reflected for instance in Opinion 2/13 of the CJEU as well.[82] This, among other things, has a strong bearing on the EU's (still only planned) accession to the European Convention on Human Rights; the CJEU's abovementioned opinion has had a direct impact on the revised accession negotiations. In March 2023, the CDDH Ad Hoc Negotiation Group reached unanimous provisional agreement on solutions to the issues raised by Opinion 2/13 – save for the jurisdiction

[76] T. Molnár, *Leválás, majd saját képre formálás: az Európai Unió és a nemzetközi jog fejlesztése, különös tekintettel az ENSZ Nemzetközi Jogi Bizottság munkájára*, in G. Kajtár & P. Sonnevend (Eds.), A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században. Tanulmányok Valki László tiszteletére, Eötvös Kiadó, Budapest, 2021, pp. 383-384.

[77] L. Gasbarri, *The Concept of an International Organization in International Law*, Oxford University Press, Oxford, 2021, p. 64.

[78] The European Union is a legal person as per Art. 47 TEU.

[79] See Arts. 3(2) and 216-217 of the Treaty on the Functioning of the European Union (TFEU).

[80] Of course, this issue is not without its uncertainties and divergences in the jurisprudence. See, for example, Á. Mohay, *A nemzetközi jog érvényesülése az uniós jogban,* PTE ÁJK Európa Központ – Publikon Kiadó, Pécs, 2019, pp. 83-95.

[81] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I. C.J. Reports 1980, pp. 89-90.

[82] EU:C:2014:2454

issue tied to the Common Foreign and Security Policy (hereinafter: CFSP), which the EU intends to resolve internally, by introducing a 'reattribution' concept.[83] The CFSP-conundrum is indeed one of jurisdiction, but is at the root of it an responsibility question, revolving around attribution. This further underscores the need for a clear interpretation and consistent implementation of responsibility rules applicable to international organizations – be they 'traditional' or supranational.

[83] 46+1(2023)35FINAL, 30 March 2023. For an overview of the outcome of the renegotiations see J. Krommendijk, *EU Accession to the ECHR: Completing the Complete System of EU Remedies?* SSRN, pp. 3-4 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418811 (2 May 2023).

Norms of the Council of Europe in the Postsoviet Space: National Minorities in the Republic of Armenia and the Framework Convention for the Protection of National Minorities

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The present paper includes activities of Framework Convention for the Protection of National Minorities (FCNM), which is Europe's most comprehensive treaty protecting the rights of persons belonging to national minorities in the territory of South Caucasus focusing on The Republic of Armenia. The paper the instruments and mechanisms of protection of national minorities in the republic. It aims to analyze FCNM monitoring cycles, focusing on recommendations by Council of Europe and Reports by the government of the Republic of Armenia as well as Opinions by Advisory Committee of FCNM, considering the influence of Constitutional amendments of 2015 and the "Velvet Revolution" of 2018 in the Republic of Armenia if they are. The paper helps to understand the causes of problems in fulfillment of obligations undertook by the Republic of Armenia in the sphere of national minority protection.

Keywords: Republic of Armenia, National Minority, FCNM, Monitoring Cycle, State report, Advisory Committee, Opinion, Resolution

1. Introduction

The historical, geographical, national, and religious characteristics of Armenia have played a significant role in shaping the region's demographic composition. The ever-changing status and borders of Armenia over the centuries, influenced by numerous wars and conflicts, have led to shifts in the ethnic makeup of the area. While modern national and ethnic minorities have coexisted with Armenians for centuries, the transformation of this ethnic mosaic has been driven by changes in the balance of power in Transcaucasia and the broader Caucasus region over the past two hundred years. The Russian Empire's increasing presence in the nineteenth century, Armenia's incorporation into the USSR in 1920, its subsequent withdrawal from the USSR in 1991, and the Karabakh conflict have all left a lasting impact on the region's demographic composition. These events set the stage for the emergence of relatively new ethnic minorities alongside traditional domestic ones, while some, like the Azerbaijanis, disappeared. Since the early years of Armenia's independence, the country has taken steps to improve the conditions for national minorities and eliminate discrimination. Armenia has ratified a series of international conventions and treaties related to the protection of minority rights, including the International Covenant on Civil and Political Rights (ratified

in 1993), the International Convention on the Elimination of All Forms of Racial Discrimination (ratified in 1993), the European Charter for Regional or Minority Languages (ratified in 2001), and the Framework Convention for the Protection of National Minorities (ratified on 17 February 1998). Despite these efforts, the number of national minority representatives in Armenia has steadily decreased since the early years of independence.

National minorities in Armenia can be broadly categorized into two groups. The first group comprises Yezidi and Kurdish minorities, representing non-Christian minority populations. Strict laws and customs within these groups discourage conversion and intermarriage, contributing to their separation from the broader society. The second group, consisting mainly of Christian minorities, has a higher rate of integration due to common religious affiliations and intermarriage with the majority population.

This research aims to understand the situation of national minorities in Armenia and analyze how Armenia's policies affect their well-being. The implementation of the Framework Convention for the Protection of National Minorities (FCNM) plays a pivotal role in Armenia's approach to national minorities. Economic challenges sometimes hinder Armenia's ability to fulfill its FCNM obligations, leading to a decrease in the number of minorities in the country. The small number of national minorities, combined with economic constraints, results in their diminishing significance in Armenian domestic policy. This study relies on primary and secondary sources. Primary sources include legal documents, international treaties, state reports to the Advisory Committee of the FCNM, and interviews with representatives of national minorities. Secondary sources encompass books, scientific articles, reports, and data-based studies. Major primary sources regarding the history of national minorities in Armenia are housed in state archives, which were not accessible due to geographical limitations.

2. Current minority institutions and their legal regulation in Armenia

The legal status and characteristics of national minorities in the Republic of Armenia are determined by a range of domestic and international laws. These legal norms emphasize the principle of non-discrimination on racial and national grounds. International instruments play a significant role in safeguarding the rights of national minorities in Armenia.[1]

The FCNM holds a special place in international mechanisms for protecting these rights. Armenia ratified this convention on February 17, 1998. Armenia submits regular reports on the protection of national minorities to the Council of Europe as required by the convention. An Advisory Committee delegation visits Armenia to gather information, which informs the committee's opinion on Armenia's adherence to the FCNM.[2] The European Charter for Regional or Minority Languages, effective from May 1, 2002, recognizes Assyrian, Yezidi, Greek, Russian, and Kurdish as minority languages within Armenia.[3]

[1] Extraordinary public report of the RA Human Rights Defender on the protection of the rights of national minorities. https://www.ombuds.am/images/files/9711eea3661a09face5102809637e692.pdf (15 November 2022).

[2] The fifth and last visit of the committee took place from February 22 to February 25, 2022. https://www.coe.int/en/web/minorities/-/armenia-visit-of-the-advisory-committee-on-the-framework-convention-for-the-protection-of-national-minoriti-1 (15 November 2022).

[3] Decision of the National Assembly of the Republic of Armenia on the participation of the European Charter for regional or Minority Languages (Adclosed Declaration). http://www.irtek.am/views/act.aspx?aid=15653 (15 November 2022).

Armenia ratified the UN Convention on the Elimination of All Forms of Racial Discrimination on June 23, 1993, which established a Committee on the Elimination of Racial Discrimination. [4] In accordance with Article 9, States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative or other measures they have adopted to implement the provisions of this Convention.[5]

Additionally, Armenia ratified the International Covenant on Civil and Political Rights on June 23, 1993. This covenant, while not exclusively focused on national minorities, contains aspects related to their rights.[6] By virtue of the aforementioned international agreements, RA started to initiate a number of legislative changes.[7] According to Article 21 of the Law of the RA „On Legal Acts", laws and other legal acts of the Republic of Armenia must comply with the universal norms and principles of international law.[8]

In other words, according to the constitutional provision, the international treaties ratified by the Republic of Armenia are an integral part of the legal system of the RA and are superior to domestic laws. Thus, the principle of non-discrimination is also expressed in Articles 28 and 29 of the Constitution.[9] Article 56 of the Constitution of the RA declares that everyone has the right to preserve their national and ethnic identity. Persons belonging to national minorities have the right to preserve and develop their traditions, religion, language and culture. Articles 26-29 of the Constitution of the RA, as well as the relevant laws, guarantee human and citizen's rights to freedom of thought, conscience, religion, beliefs, peaceful assembly and association, and free expression. Article 77 declares that the use of basic rights and freedom for the purpose of violent overthrow of the constitutional order, incitement of national, racial or religious hatred or propaganda of violence or war shall be prohibited.

Several institutions in Armenia are dedicated to national minorities. The Ethnic Minorities and Religious Affairs Division within the RA Government Staff coordinates policies related to ethnic minorities and religious affairs. It provides expertise on draft legal acts and issues associated with its areas of activity. Armenia allocates funding to national minorities from the state budget. This amount has increased from 10 million drams to 20 million drams annually since 2012. These funds are distributed among non-governmental organizations representing national minorities.[10]

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[4] Seventh-Eleventh (joint) Periodic National Report of the Republic of Armenia on Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965). https://www.gov.am/u_files/file/kron/CERD/7-11TH.pdf (18 November 2022).

[5] International Convention on the Elimination of All Forms of Racial Discrimination, 1965, UNTS 660:195

[6] Extraordinary public report of the RA Human Rights Defender on the protection of the rights of national minorities. https://www.ombuds.am/images/files/9711eea3661a09face5102809637e692.pdf (15 November 2022).

[7] In case of conflict between the norms of international treaties ratified by the Republic of Armenia and those of laws, the norms of international treaties shall apply. Constitution of the Republic of Armenia, Art. 5, part 3.

[8] Law of the Republic of Armenia "On Legal Acts". https://www.arlis.am/documentview.aspx?docid=117040 (6 November 2022)

[9] Everyone shall be equal before the law and Discrimination based on sex, race, skin colour, ethnic or social origin, genetic features, language, religion, world view, political or other views, belonging to a national minority, property status, birth, disability, age, or other personal or social circumstances shall be prohibited.» It has to be mentioned, that the second part of this Constitutional norm implies the right to replace the military service of a citizen with another service if it contradicts his religious tradition, practice and beliefs.

[10] The Republic of Armenia Government Staff Ethnic Minorities and Religious Affairs Division. https://www.gov.am/en/religion/ (30 November 2022).

3. Framework Convention for the Protection of National Minorities and the Republic of Armenia

The FCNM is a groundbreaking legal instrument dedicated to safeguarding the rights of individuals belonging to national minorities. It distinguishes itself by allowing for interpretation based on the unique characteristics of participating countries, giving it a „framework" nature. The convention comprises optional norms and principles that countries must implement through their internal legislation and policies. Notable exceptions to this framework approach can be found in Article 3, which ensures the right of individuals belonging to national minorities to choose their classification, and Article 13, which guarantees the right of national minorities to establish and manage their own schools.[11][12]

The effectiveness and efficiency of the FCNM is underscored by the significant number of participating countries. As of March 2022, the FCNM had 39 participating countries. However, it's important to note that Russia's membership in the Council of Europe was suspended, and consequently, it is no longer considered a participating country in the FCNM.[13] Today it is valid for 38 CE member states and since 2004 it has been applied in accordance with the UN MIK-Council of Europe Monitoring Agreement in Kosovo.[14] According to the requirement of the convention, since 2001, Armenia regularly submits the report of the RA on protection of national minorities to the Council of Europe. To date, there are 5 cycles of cooperation between the Advisory Committee and the Government of the RA.[15] According to the requirement of the convention, since 2001, Armenia regularly submits the report of the RA on protection of national minorities to the Council of Europe. To date, there are 5 cycles of cooperation between the Advisory Committee and the Government of the RA.[16]

3.1. First State Report submitted by the Republic of Armenia on 1 of November 1999

Armenia's obligations under FCNM stipulated that the country should submit its first state report by November 1, 1999, within one year of the Convention's entry into force. However, due to certain reasons, the report was submitted with a delay. In this report, Armenia initiates by provid-

[11] S. Marshal & F. Palermo, *Commentary of Article 3*, *The Framework Convention for the Protection of National Minorities*, *a commentary,* in R. Hofmann, T. H. Malloy & D. L. Rein (Eds.), The Framework Convention for the Protection of National Minorities: a commentary, Brill Nijhoff, Boston, 2018, pp. 92-111.

[12] D. Rein, *Commentary of Article 13, The Framework Convention for the Protection of National Minorities: a commentary,* in R. Hofmann, T. Malloy & D. L. Rein (Eds.), The Framework Convention for the Protection of National Minorities: a commentary, Brill Nijhoff, Boston, 2018, pp. 246–253.

[13] On 16 March 2022, the Committee of Ministers adopted a decision by which the Russian Federation ceased to be a member of the Council of Europe, after 26 years of membership. The decision was made in the context of the procedure launched under Article 8 of the Statute of the Council of Europe. As a result, the Russian Federation will no longer participate in the work of the CCPE or any of its subordinate bodies and working groups. https://www.coe.int/en/web/ccpe/-/the-russian-federation-is-excluded-from-the-council-of-europe (15 December 2022).

[14] R. Hofmann, T. H. Malloy & D. L. Rein (Eds.), *The Framework Convention for the Protection of National Minorities: a commentary,* Brill Nijhoff, Boston, 2018, p.12.

[15] Specific monitoring in Armenia of the implementation of the Framework Convention for the Protection of National Minorities. https://www.coe.int/en/web/minorities/armenia (15 December 2022).

[16] Specific monitoring in Armenia of the implementation of the Framework Convention for the Protection of National Minorities. https://www.coe.int/en/web/minorities/armenia (15 December 2022).

ing a historical context and detailing the reasons for signing the FCNM. According to the report, Armenia had already embarked on extensive legal reforms following the declaration of the Third Republic. However, upon joining the Council of Europe, it was recognized that further significant reforms were needed. The report likely highlights the country's commitment to aligning its policies and practices with international standards for the protection of national minorities.[17]

The report provides an extensive list of local and international legal instruments that protect the rights of national minorities in Armenia, which include the Constitution of the Republic of Armenia, various international covenants and conventions, all contributing to the safeguarding of minority rights.[18]

The report highlights an important gap in Armenia's legislation, which is the absence of a dedicated „Law on National Minorities." While efforts have been initiated to draft such a law involving experts in ethnographic studies, the law is still pending. Additionally, the report recognizes the significant role of the Human Rights Commission under the President of the Republic of Armenia, which plays a key role in addressing and rectifying violations of human rights, including those of national minorities.[19]

The absence of a specific „Law on National Minorities" is recognized as a legislative gap in Armenia. However, work has commenced on drafting this law within the National Assembly and the President's Office of the Republic of Armenia, involving leading experts in the field of Armenian ethnography. Additionally, the Human Rights Commission under the President of the Republic of Armenia serves as an essential institution for safeguarding the rights of national minorities. This commission takes action to rectify rights violations, prevent human rights abuses, and plays a crucial role in enhancing the overall human rights situation in the country.[20]

The report presents a noteworthy observation, highlighting the shortcomings within Armenian legislation regarding national minorities. Specifically, the report emphasizes the challenges and ambiguities surrounding the definition of the term „National minority," even though this term is used in the Constitution and various other legal frameworks. Article 3 of the Framework Convention, a pivotal component of the report, plays a significant role in defining the primary recipients of the law and the methods employed to protect the rights of individuals belonging to national minorities.[21]

In January 2000, the Republic of Armenia had 14 registered religious organizations. Out of these, 9 were Christian, which is a notable figure considering the strong historical presence of the Armenian

[17] As at the time of submitting the report, the last census in the Republic of Armenia was conducted in 1989, according to practice, the next census should be conducted in 1999. But according to the Law on Population Census, adopted by the RA National Assembly in 1999, a new population census was planned for 2001. The report was prepared by the Ministry of Foreign Affairs of the Republic of Armenia on the basis of information provided by the relevant ministries and departments, taking into account the comments and suggestions made not only by the relevant departments, but also by non-governmental organizations of the national minorities of the Republic of Armenia.

[18] The Agreement on the Establishment of the Commonwealth of Independent States, signed between Russia, Ukraine and Belarus on December 8, 1991 in Minsk, formally confirming the collapse of the USSR, stipulated that the parties must protect the national minorities living on their territory in order to promote the expression, preservation and development their ethnic, cultural, linguistic, religious identity. The heads of state of the CIS signed the Convention "On the Protection of the Rights of Persons Belonging to National Minorities", in 1994 in Moscow.

[19] Commission of human rights was established under the President of the Republic of Armenia in 1998.

[20] According to the Article 2 of the "Law on Language" of the Republic of Armenia "In the communities of national minorities of the Republic of Armenia, general education and study may be organized in their native language according to state school programs with the obligatory study of the Armenian language."

[21] R. Hofmann, T. H. Malloy & D. L. Rein (Eds.), *The Framework Convention for the Protection of National Minorities: a commentary,* Brill Nijhoff, Boston, 2018, p. 93.

Apostolic Church. In the early years of Armenia's independence, besides religious organizations, various cultural organizations established by national minorities also emerged. Several national minorities had ethnographic ensembles, with the Ukrainian, Russian, and Greek ensembles being among the most renowned and active.[22]

3.2. First Advisory Committee visit to the Republic of Armenia and Opinion

Following the receipt of Armenia's State Report on June 11, 2001, the Advisory Committee embarked on the process of evaluating the report. In this context, the Advisory Committee delegation visited Armenia from December 10 to 14, 2001. Afterward, at its 14th meeting on May 16, 2002, the Advisory Committee issued its decision regarding Armenia.

In its assessment, the Advisory Committee expressed appreciation for Armenia's efforts and commitment to fulfill the obligations outlined in the Framework Convention. It also highlighted the importance of maintaining intercultural harmony. However, the Advisory Committee identified various shortcomings and omissions in areas such as education, the use of national minority languages in public contexts, and access to the media within Armenia.[23]

The Advisory Committee recognized Armenia's efforts in protecting the rights of national minorities but identified shortcomings, including insufficient airtime for national minority languages in media, educational issues, and limited support for cultural organizations. The absence of a dedicated law on National Minorities was a concern. The Committee stressed the importance of continuing efforts despite economic challenges, as issues could grow more complex over time. Additionally, uncertainties surrounding the national identity of Kurds and Yezidis were noted. The 2001 Census allowed self-identification as Yezidis or Kurds, a positive development.

In the state report, Armenia recognized 11 officially registered national minorities and acknowledged the existence of other ethnic groups. However, these additional groups were not classified as national minorities due to their preference not to be labeled as such and their reluctance to establish public organizations. The Committee recommended the continuous consideration of including these groups under the FCNM. The opinion stressed the importance of conducting an effective population census in the future.

3.3. Government comments and Resolution by Committee of Ministers

On October 14, 2002, the Republic of Armenia responded to the Fourth Opinion by the Council of Europe's Advisory Committee regarding FCNM. The Armenian authorities expressed their appreciation for the Advisory Committee's opinion and conveyed their commitment to implementing improvements to fulfill the obligations outlined in the FCNM. They acknowledged the valuable and practical proposals put forth by the Committee. Simultaneously, the Armenian authorities emphasized that some of the identified shortcomings were a direct result of the challenges associated with the country's serious socioeconomic and demographic situation, as well as the structural

[22] Armenian Apostolic Church, Armenian Catholic Church, Russian Orthodox Church, Yezides religious community, Jewish community, Pagan Community, "Bahai" community, Mormons, Baptists, Evangelists, Christians of evangelical faith, Kharizmats. 7th day Adventists, New Apostolic Church.

[23] First Opinion on Implementation of the FCNM by Armenia, 16 May 2002, p. 3.

changes inherent in a newly independent, developing state in transition.[24]

The Armenian government has committed to adopting a special law on national minorities, with a draft law already submitted for consideration. This law will distinguish between general rights, ensuring equal treatment with all citizens, and ethnic rights, providing comprehensive guarantees for customs, traditions, religious beliefs, and language use. However, the publication of census results may be delayed.[25]

The Committee of Ministers, in a resolution adopted on 15 January 2003, highlighted several shortcomings in Armenia's implementation of the Framework Convention. These issues included problems in media access, education, the use of minority languages in the public sphere, and participation in public affairs. The resolution stressed the importance of establishing proper legislation and a legal framework for protecting the rights of national minorities. It also emphasized the need to preserve and develop the identity and culture of minority representatives and to provide media access and educational opportunities in their languages.[26]

3.4. Second State Report submitted by the Republic of Armenia on 1 of November 2004

The second State Report, submitted by the Republic of Armenia on November 1, 2004, was prepared by the Department of National Minorities and Religious Issues of the Government of Armenia. Unlike the first report, this report did not contain an analysis of Armenia's socio-economic situation. It indicated that addressing key socio-economic issues in Armenia would provide national minorities in the country with more opportunities to maintain their identity and receive greater material support from the state. The report was based on discussions with ministries, government departments, heads of national minority organizations in Armenia, NGOs, expert surveys, and meetings with community members of national minorities. The report also analyzed the requests and proposals made by national minority representatives in Armenia. In addition to meetings with numerous national minority NGOs, the Department for National Minorities and Religious Issues visited many minority communities in 2004.[27]

The Second State Report highlighted several developments and gaps. Armenia has made progress in democratization and establishing key state institutions. In 2003, the Ombudsman Law was enacted, with the first Ombudsman taking office in 2004. Constitutional amendments in 2005 solidified the Human Rights Defender's role. In 2004, the Department on National Minorities and Religion Issues was founded. They published „*Freedom of Conscience, Religion and Faith*," covering Armenian laws on religion, international documents, registered religious organizations, and an overview of religion in Armenia. Another milestone was the „Alternative Service" law, permitting certain minorities with religious objections to military service to opt for „labor service."[28] The

[24] Comments of the Government of Armenia on the First Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Armenia 14 October 2002.

[25] During September-October 2002, only the parameters of the resident population at the state level were published.

[26] Resolution ResCMN(2003)2 on the implementation of the Framework Convention for the Protection of National Minorities by Armenia (Adopted by the Committee of Ministers on 15 January 2003 at the 824th meeting of the Ministers' Deputies).

[27] NGOs and organizations of national minorities, including more than 30 religious organizations, 4 Assyrian communities, 2 Russian sectarian communities. and about twenty Yezidi-Kurdish settlements throughout Armenia.

[28] Second State report submitted by Armenia pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities, 1 November 2004.

Second State Report highlighted active efforts by Armenian authorities to support cultural events and ethnic traditions of national minority representatives. Regarding language use, the authorities emphasized cooperation, especially with Yezidi and Kurdish minorities, attributing this to other minorities' preference for teaching and using the Russian language. Furthermore, some national minorities have opportunities to learn and use their languages at Armenian universities.[29]

3.5. Second Advisory Committee visit to Republic of Armenia and Opinion

The second visit of the Advisory Committee to Armenia occurred from March 28 to 30, 2006, and their opinion was adopted on May 12, 2006. The Advisory Committee acknowledged Armenia's progress and the positive stance of Armenian authorities regarding minority rights. They noted legislative and institutional developments since the First Opinion, including the adoption of a law on Culture, which supports the preservation of national minority cultural identity. Although a separate Law on National Minorities hadn't been enacted during this monitoring cycle, a draft law had been reviewed and discussed, although some representatives of national minorities expressed dissatisfaction with it. The Advisory Committee highlighted general tolerance towards national minorities, emphasizing the crucial role of the Ombudsman institution in Armenia. Education was a significant concern raised by national minorities, but authorities had taken new steps to address their educational needs since the first Opinion.[30]

Despite notable progress in incorporating national minority languages into the media, their presence remains limited and unsatisfactory. Communication between authorities and national minority representatives can be challenging, even with advisory bodies such as the Coordinating Council for National Minorities in place. In its first opinion, the Advisory Committee recommended that Armenian authorities consider including individuals from other groups, including non-citizens, under the scope of the Framework Convention on an article-by-article basis. The Advisory Committee appreciated Armenia's inclusive approach to incorporating individuals belonging to national minorities without Armenian citizenship into the Convention's scope.[31]

3.6. Government comments and Resolution by Committee of Ministers

Armenia welcomed the Second Opinion of the Advisory Committee on Armenia dated May 12, 2006, and expressed readiness for continued dialogue to address national minority issues within the Framework Convention. They responded to most of the comments and recommendations in the Opinion. Regarding concerns about media representation, Armenia stated that its legislation doesn't restrict national minorities' involvement in the media, but limitations can be due to the choices of

[29] There is a department of Kurdish studies at the Institute of Eastern studies of National Academy of Science of the RoA. The department of Oriental studies of Yerevan State University has a special course in the Kurdish language. Hayknet" educational institution offers a course of the Greek language to all who wish, without age limit. By suggestion of the Greek embassy, there are Greek Sunday schools operating in 10 towns, inhabited by Greeks, in the RA. The Greek teachers leave for Greece for training.

[30] The teaching of the Yezidi, Kurdish and Assyrian languages at school has been developed in the settlements where a significant number of persons belonging to these national minorities live.

[31] The amendment of former Article 37 of the Constitution of Armenia (now Article 41 following the reform of the Constitution in 2005), according to which the enjoyment of the constitutional right to preserve and develop their traditions, religion, language and culture is granted to "persons belonging to national minorities", and no longer to citizens only.

national minorities themselves.[32] In response to paragraph 24 of the Opinion, the authorities noted that some smaller ethnic communities in Armenia are not covered by the Framework Convention.[33]

The Armenian authorities clarified that there isn't a traditional Roma community in Armenia. The Armenian-Boshas, often mistaken for Roma, consider themselves integrated and not Roma. They emphasized Armenia's open minority policy and readiness to cooperate with all ethnic communities, whether they participate in the Coordinating Council for National Minorities or not. Regarding the draft law on National Minorities, those who opposed the 2005 version now support the 2006 revision. Concerning paragraph 30, individuals who don't meet the criteria and aren't part of the majority population will be considered „non-Armenian citizens" and will have different rights compared to those representing „ethnic minorities."[34]

The Committee of Ministers of the Council of Europe adopted a Resolution on February 7, 2007. In this Resolution, it was acknowledged that Armenia has developed its legal and institutional framework for protecting national minorities. However, financial difficulties in various areas related to national minority protection hinder the effective implementation of these measures.

The Resolution called for further efforts to promote equal opportunities for individuals belonging to national minorities, with the following specific recommendations: Continue supporting consultation mechanisms with national minorities, taking into account their diversity. Find ways to increase the participation of minorities in the media and remove legal barriers to broadcasting in minority languages on public radio and television. Conduct more systematic monitoring of cases of discrimination based on ethnic origin, involving the Office of the Commissioner for Human Rights. Ensure that any future law on national minorities is fully consistent with the provisions of the Framework Convention.

3.7. Third State Report submitted by the Republic of Armenia on 1 of November 2009

The preparation of the Third Report involved a special working group created by the Government of Armenia, comprising representatives from various state bodies, including the Ministry of Foreign Affairs, Ministry of Justice, Ministry of Education and Science, Ministry of Culture, Police, President's Office, National Assembly, Human Rights Defender's Office, and the Coordinating Council for National and Cultural Organizations of National Minorities, among others. During the Third Report's preparation, numerous meetings and conferences dedicated to national minority rights were organized. Discussions were held with regional governors (Marzpetarans) in Armenia and the Yerevan City Hall on policies related to national minorities and religious organizations, in accordance with the law, as well as the Framework Convention and the European Charter for Regional and Minority Languages. Regarding financial assistance from the state budget for national minorities, the Armenian government indicated that the amount of financial aid is adjusted in line with Armenia's socio-economic development. While the economic crisis has prevented an increase in financial assistance since the previous monitoring cycle, the government highlighted its commitment to continuing educational and cultural programs for national minorities despite the

[32] About the small number of persons of Roma and Azeri origin who are not currently covered by the protection of the Framework Convention should be allowed to benefit from it if they claim it in the future.

[33] Udies, Abkhazians, Iranians, Abazins, Moldavians, Romanians, Mordvans, Bulgarians, Ingushians, Tatars, Osetians, Lithuanians, Latvians.

[34] The existing draft law included definitions of "non-Armenian citizens" and "ethnic minorities".

challenging economic conditions.[35]

Migration processes driven by political, economic, and social events have led to significant changes in Armenia's ethnic composition. The Draft Law of the Republic of Armenia „On Citizens of Non-Armenian Nationality and National Minorities" represented the third attempt to create a law on national minorities. According to the Report, the project's discussion remained incomplete due to strong criticism from some national minority representatives.

On June 13, 2008, the President of the Republic of Armenia issued a decree to establish a new advisory body known as the Public Council. This depoliticized entity operates on the principle of voluntary participation, including citizens of Armenia, representatives of non-governmental associations, and diaspora. The Public Council's purpose is to contribute to the development of a democratic system, safeguard fundamental human rights and freedoms, prevent the spread of intolerance in society, promote sustainable development, strengthen civil society, foster trust between state institutions and citizens, and establish a constructive partnership between the public and authorities. It aims to enhance public engagement in governance and facilitate public monitoring efforts.[36]

3.8. Third Advisory Committee visit to the Republic of Armenia and Opinion

The third delegation visit of the Advisory Committee to the Republic of Armenia occurred from June 21 to 24, 2010, with the resulting Opinion adopted on October 14, 2010. The Opinion commended the constructive approach of the Armenian authorities toward the monitoring process under the Framework Convention, including the timely submission of their State Report. It acknowledged that Armenia, like many other countries, was grappling with the impact of the ongoing economic crisis, which was affecting resource allocation for implementing the Framework Convention.

The economic hardship had repercussions on both Armenian society and national minorities, with many members of the latter emigrating from Armenia in recent years. The Opinion highlighted that there were no significant legislative changes since the last Resolution. Notably, persons belonging to national minorities in Armenia generally did not see a need for a specific law on national minorities, as they found the current sectoral legislative and administrative arrangements satisfactory. Anti-discrimination legislation had not seen significant changes; it was fragmented and did not provide adequate protection against discrimination. However, the Office of the Human Rights Defender continued to enjoy strong public support and received numerous individual complaints.[37]

In 2011, Armenia was planning a new population census, but questions about nationality, language, and religion were set to be mandatory, limiting choice, which was seen as a violation of the Framework Convention. Additionally, the practice of translating names into Armenian for certain national minorities didn't follow their languages' grammar, which was also inconsistent with the Convention.[38]

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[35] Third State Report submitted by the Republic of Armenia. https://www.gov.am/u_files/file/kron/PDF_3rd_SR_Armenia_en.pdf (2 March 2023).

[36] The Public Council of the Republic of Armenia. https://www.helix.am/portfolio/council/Website/75 (2 March 2023).

[37] Third Opinion of Committee on the Republic of Armenia. https://www.gov.am/u_files/file/kron/PDF_3rd_OP_Armenia_en.pdf (2 March 2023).

[38] According to Article 11 of FCNM: The Parties undertake to recognize that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to modalities provided for in their legal system.

3.9. Government comments and Resolution by Committee of Ministers

The Armenian government responded to concerns about the population census by stating that they included a „refuses to answer" option, and they had to reduce the number of questions due to financial constraints. The third Resolution on the Framework Convention for National Minorities highlighted positive aspects like constructive monitoring and tolerance but also noted issues with the population census and a lack of proper legislation for national minorities.[39]

In order to protect the rights and interests of national minorities in Armenia, it is crucial to immediately establish proper data collection procedures for future censuses and other data collection activities that ensure reliable information about national minorities, including age, gender, and geographic distribution, while respecting self-identification and international data collection standards, further consultations with national minorities should be conducted during local government reform planning to guarantee their effective participation in local public affairs, in addition, there is a need to strengthen anti-discrimination legislation, consult with national minorities about the transcription of their names in official documents, and actively support and promote cultural events that aim to preserve and celebrate the rich diversity of minority cultures within the country.

3.10. Fourth State Report submitted by the Republic of Armenia on 2 of December 2014

In its Fourth State Report to the Council of Europe in 2014, the Government of Armenia outlined various measures taken at the national level to address the outcomes of the Third monitoring cycle of the Framework Convention. Notably, these efforts included the publication of the Framework Convention in Armenian, the translation of relevant documents into Armenian, the establishment of a centralized electronic database incorporating local and international laws concerning the rights of national minorities, and the organization of conferences with non-governmental organizations representing national minorities. Additionally, the report mentioned the distribution of booklets titled „Some Provisions of Interstate European Documents Regarding the Rights of National Minorities of the Republic of Armenia," as well as improvements in the educational system, particularly at Yerevan State University, where the Second and Third national reports on the Framework Convention were translated into Armenian and Russian and made available on the Government of Armenia's website.[40]

In the Fourth State Report, details about the Recommendations made by the Committee of Ministers in their 2012 Resolution were provided. The report highlighted that the National Statistical Service of the Republic of Armenia had presented the population composition of the country based on the 2011 census, including data on urban and rural distribution, migration dynamics from 2002 to 2011, and the distribution of live births and deaths by nationality from 2002 to 2012. The census program in Armenia for 2011 was developed in line with the recommendations for the 2010 housing census. It was noted that respondents were required to answer all questions in the questionnaire except those related to nationality, language, and religion, with special considerations for maintaining the confidentiality of data for small nationality groups.[41]

[39] Third Resolution on the implementation of the Framework Convention for the Protection of National Minorities by Armenia.

[40] Fourth report submitted by Armenia pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities, 2 December 2014, pp. 1-5.

[41] As According to the FCNM, one should not be obliged to reveal his/her nationality.

Armenia's response to the concern regarding anti-Semitic statements in certain media outlets and the lack of adequate response from authorities and the public was included in the report. It stated that the ALM TV channel, where such statements were allegedly made, denied broadcasting anti-Semitic content and claimed they never intended to incite national hostility or division. The TV channel also issued an apology for any offensive statements as perceived by the Jewish Community, noting that the Jewish Community had not filed any written complaints with the National Commission on TV and Radio.[42] The report also highlighted Article 26 of the Law of the Republic of Armenia on Television and Radio, which stipulates that television and radio companies in Armenia are required to allocate broadcast time for national minorities. The law specifies that this allocated time should not exceed 2 hours per week on television and 1 hour on radio. Armenia has been consistently airing television and radio programs dedicated to the culture, language, and history of national minorities. Additionally, the Public Radio Company broadcasts programs in five different minority languages throughout the day, totaling more than one hour daily. The same article also outlines other obligations for Public Television and Radio, particularly related to ensuring program diversity.[43]

The issue regarding the non-compliance with Paragraph 11, Article 1 of the general principles of the Framework Convention, specifically concerning the incorrect grammar of the Belarusian, Russian, and Ukrainian languages when translating surnames and patronymics in birth and marriage certificates of individuals from national minorities, was addressed in the Government of Armenia's response. The government explained that in accordance with the Decision of the Government of the Republic of Armenia, points 11 and 12 of the Procedure for completing forms of civil status records, information about an individual's nationality is recorded in the civil status records when it is indicated as such in their identification documents. In the case of birth records, a child's nationality is recorded with the written consent of the parents. It's noteworthy, as Hoffman pointed out, that certain languages include the suffix „-ova" for females in their surnames. The Armenian language, being the state language of the Republic of Armenia, doesn't have this suffix. The inclusion or exclusion of such suffixes is directly related to the identity and dignity of individuals belonging to national minorities, and its implementation should align with the norms of the Framework Convention.[44]

In response to the comment highlighting the necessity of ongoing discussions with representatives of national minorities in the planning and execution of local self-government reform programs, as well as their involvement in public affairs, the Government of the Republic of Armenia emphasized the existence and operation of the Coordinating Council for National and Cultural Organizations of National Minorities of the Staff of the President of the Republic of Armenia since 2000. The government detailed the responsibilities of this Coordinating Council, which primarily revolve around matters concerning national minorities, such as supporting and safeguarding their rights, and providing recommendations regarding major programs related to national minorities. However, it should be noted that the Coordinating Council functions as an advisory body and doesn't possess executive authority.[45]

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[42] The presidential candidate of Armenia (Presidential elections 2008) Tigran Karapetyan accused the Jews of direct participation in the Armenian Genocide, the accusation was followed by a harsh reaction from the head of the Jewish community of Armenia, Rima Varuzhanyan. p.15 of this research.

[43] Fourth report submitted by Armenia pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities, 2 December 2014, pp. 7-8.

[44] H. Rainer, *Commentary of Article 11*, in R. Hofmann, T. H. Malloy & D. L. Rein (Eds.), The Framework Convention for the Protection of National Minorities: a commentary, Brill Nijhoff, Boston, 2018, pp. 220–225.

[45] Fourth report submitted by Armenia pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities, 2 December 2014, pp. 10-13.

3.11. Constitutional Amendments

In 2013, Armenia initiated constitutional reforms, transitioning from a semi-presidential to a parliamentary system to enhance democracy and the rule of law. The Venice Commission highlighted the need for broad societal consensus, but this was lacking. In December 2015, a constitutional referendum saw 825,521 citizens vote „for" the amendments and 421,568 „against," indicating a significant change in Armenia's governance structure.[46]

3.12. Fourth Advisory Committee visit to the Republic of Armenia and Opinion

The Advisory Committee visited Armenia in April 2016 and appreciated Armenia's cooperation in the monitoring process, highlighting the regular state reports and their translations. They emphasized the importance of discussing constitutional reforms, ensuring that the new Constitution continues to protect the rights of national minorities. The AC also called for a review of relevant laws, such as the Electoral Code.[47]

The Advisory Committee expressed concern that Armenia, despite promoting ideas of tolerance and understanding, remains predominantly mono-ethnic. Some national minorities are often viewed as mere additions to Armenia's ethnic makeup. The AC highlighted the lack of media attention to national minorities and the presence of a „one nation, one religion, one culture" concept in relation to religious minorities, equating them to sects and posing a threat to Armenia's statehood. They also noted the socio-economic challenges in regions with Yezidi populations, exacerbated by the unresolved Nagorno Karabakh conflict. However, the AC appreciated Armenia's acceptance of 20,000 people from Syria, particularly those of Armenian and Assyrian origin.[48]

In conclusion, the Advisory Committee (AC) adopted four recommendations for immediate action, emphasizing the need for civil society and national minority organizations' involvement in discussions related to the draft Law on National Minorities and other relevant legislation to ensure their compliance with international standards. They also called for a more proactive approach to protect the rights of national minorities in line with the Framework Convention, consultation with minority representatives to address their actual needs, and addressing urgent issues regarding Yezidi children's education, especially girls, and the revision of legislation to align with international human rights standards, particularly criminalizing forced marriage and providing preschool education to all children. Additionally, there were recommendations for slower, ongoing actions, such as consulting with local representatives of national minorities to clarify the implementation of language rights.[49]

In addition, the list of Further Recommendations encompassed several important points. These included the necessity to ensure the proper conduct of future censuses and other data collection programs related to national minorities, fostering positive relations among various national minority groups, creating conducive conditions for dialogue between Yezidi and Kurdish minorities, providing adequate resources for the human rights defender to protect the rights of national minorities, revising criminal legislation to criminalize discrimination of any kind, including cyber-hatred,

[46] Referendum results given by the Central Commission on December 13, 2015. https://res.elections.am/images/dec/15.99_A.pdf (01 May 2023).

[47] Fourth Opinion on Implementation of FCNM by RA, 13 February 2017, p. 5.

[48] Fourth Opinion on Implementation of FCNM by RA, 13 February 2017, 5-6.

[49] List of Recommendations of Immediate action in Fourth Opinion.

ensuring the accurate presentation of national minority histories in schools, aligning public radio activities with the principles of the Framework Convention regarding national minorities, and involving national minority representatives in consultations on the adoption of a new electoral code to ensure their fair representation in the Parliament.[50]

3.13. Government comments and Resolution by Committee of Ministers

The Republic of Armenia provided observations in response to the Fourth Opinion by the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities. In one instance, Armenia mentioned that the new Electoral Code had entered into force on June 1, 2016, emphasizing that representatives of national minorities participated in the discussion of the draft code. Armenia suggested amending a section in the opinion to ensure the accuracy of the information, recommending that it should state: „The Advisory Committee calls on the authorities to ensure effective implementation of the provisions of the Electoral Code on national minorities." This was in response to a comment made during the Committee's visit in April 2016, and Armenia believed this correction was necessary.[51]

Concerning the use of topographical names in languages of national minorities, Armenia pointed out that the law in Armenia allows recommendations on geographical names to be made by various entities, including state bodies and individuals. The Department for National Minorities conducts consultations in rural areas to inform local representatives of national minorities about their right to make proposals for topographical names and indications in their languages.[52]

The 7th paragraph discussed the Nagorno-Karabakh conflict's impact on Armenia's national minorities. The Armenian government detailed a four-day conflict escalation with Azerbaijan, highlighting reported brutalities and atrocities. They also emphasized that the conflict, closed borders, and blockade have affected the country's demographics and spurred migration, including among national minorities.[53]

The Armenian government disagreed with concerns about the reliability of the 2011 census, claiming it was conducted following European standards and that a campaign was launched to encourage participation, but acknowledged local skepticism about the census results.[54]

The Armenian government disagreed with the assertion that the 2011 census results were inaccurate according to national minority representatives, explaining that these numbers didn't meet the expectations of those minorities. They also mentioned that some minority organizations may manipulate data to boost their authority. In response to a comment about the impact of the Nagorno-Karabakh conflict on patriotism and isolation exploited by media, the government claimed that these events have made Armenians more open and responsive to all nationalities, but acknowledged isolated cases of xenophobia.[55]

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[50] List of Further Recommendations in Fourth Opinion.

[51] It should be mentioned that the Fourth Visit of the Advisory Committee is not even covered by the Armenian media.

[52] The Law of the Republic of Armenia on Geographical Indications.

[53] Comments of the Government of Armenia on the Fourth Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Armenia 13 February 2017.

[54] While working on this thesis, I came across a Facebook post from one of the well-known sociologists of Armenia, in which she speaks unflatteringly about the censuses in Armenia, which is now unfortunately deleted.

[55] Interview.

The Committee of Ministers issued several recommendations for Armenia, which included immediate actions such as consulting with society and national minority representatives in drafting a law on national minorities, actively protecting national minority rights in line with the Framework Convention, ensuring policies align with the Convention, and consulting with minorities to identify their needs. Special attention was placed on addressing issues faced by Yazidi children, ensuring pre-primary education for all children, reviewing legislation to criminalize coercive marriage, and consulting with local national minority representatives regarding language and topographic indications.[56]

The Further Recommendations encompass the importance of establishing proper procedures for future censuses and data collection, fostering positive relations among various national minority groups, promoting dialogue between minorities, providing necessary resources for the Ombudsman to protect minority rights, revising criminal legislation to address hate acts against minorities (including online), guaranteeing the coverage of cultural aspects of national minorities, and ensuring the effective application of the electoral code concerning minority interests.[57]

3.14. 2018 "Velvet Revolution" in The Republic of Armenia

In 2015, the Constitution of the Republic of Armenia was amended, shifting the country into a parliamentary system. However, despite earlier promises that he wouldn't seek the position, President Serzh Sargsyan was elected Prime Minister on April 17, 2018, leading to widespread public discontent. Opposition Member of Parliament Nikol Pashinyan initiated a non-violent protest, marching from Gyumri to Yerevan, which marked the start of a peaceful revolution. As a result, Serzh Sargsyan resigned as prime minister on April 23, 2018, just five days after taking office. Subsequently, in parliamentary elections held on December 9, 2018, Nikol Pashinyan came to power, with a commitment to democratize the country.[58]

3.15. Fifth State Report submitted by the Republic of Armenia on 15 June 2020

In the Fifth State Report submitted by the Republic of Armenia in 2020, much like in the Fourth State Report from 2014 to the Council of Europe, the Government of Armenia detailed various initiatives at the national level aimed at implementing the Framework Convention. Notably, the Ministry of Justice began drafting a law to safeguard the rights of national minorities to preserve their cultural and ethnic identities, including religion, language, and culture. This draft law, along with related legislation concerning legal equality, was developed in consultation with NGOs and state bodies and posted for public discussion on an electronic database website. The report states that this draft is currently being refined through public discussions and active cooperation with relevant stakeholders, in alignment with the recommendations from Council of Europe experts.[59]

The report highlighted that non-governmental organizations regularly host seminars and discussions in various regions regarding the challenges faced by Yezidi students, with a particular emphasis on Yezidi girls. In 2018-2019, a public organization called the „Armavir Development Center,"

[56] List of Recommendations of Immediate action in Resolution (CM/ResCMN(2018)5) by CoE of 2018.

[57] List of Further Recommendations in Resolution (CM/ResCMN(2018)5) by CoE of 2018.

[58] M. Lanskoy & E. Suthers, *Armenia's Velvet Revolution,* Journal of Democracy, Vol. 30, No. 2, April 2019, 85-99.

[59] Drafts of laws. https://www.e-draft.am/en/projects/1801 (28 December 2022).

which received funding from the US and Canadian Embassies in Armenia, executed programs to advance the right to education for Yezidi girls. The objective was to ensure the full realization of the right to education for girls and women. Additionally, between 2015 and 2018, the provincial administrations of the Republic of Armenia provided financial support to national minorities without a kin state. The Division conducted meetings with representatives of national minorities, communities, and non-governmental organizations to address issues concerning their situation, express their concerns, and facilitate the exercise of their rights.[60]

Following constitutional amendments, Armenia transitioned from a semi-presidential system to a parliamentary one. The Council of National Minorities, under the Chief Advisor to the Prime Minister, began functioning on May 3, 2019, according to the Prime Minister's decision. The Draft Law "On National Minorities" introduced some regulations, including the use of minority languages in public and administrative domains in communities where the national minority population comprises at least thirty percent. The report incorporated data from the Statistical Committee, derived from the 2011 census, based on the distribution of national minorities in urban and rural areas. In accordance with a Government decision made on October 10, 2018, a regular census was scheduled to be conducted in Armenia from October 18 to October 27, 2020. Notably, this census would mark the first time in Armenia's history that data was collected using the state register of the population, supplemented by additional characteristics gathered through 25 percent sample surveys.[61]

Starting from September 3, 2018, a 35 - 40 minute program titled „Side by Side," focusing on the cultural life of national minorities, was broadcasted by the Public Television Company every Thursday at 19:35, with a repeat every Friday at 15:25. During the same period, the news service produced over 40 materials and reports covering events related to national minorities. On October 31, 2019, the Ministry of Foreign Affairs of Armenia hosted a panel discussion titled „Draft Law on National Minorities: Issues, Concerns, and Opportunities." Additionally, on July 4, 2019, the Ministry of Foreign Affairs of Armenia organized a discussion of the Fifth Report of Armenia with the participation of representatives from 11 national minorities represented in the Council of National Minorities of Armenia. In 2018, Armenia signed the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. In 2019, the construction of the world's largest Yezidi temple in Armenia, named the Malek Taus and Seven Angels, was completed. Furthermore, a database of students representing national minorities was established within the Department of General Education of the Yerevan Municipality's Staff. This initiative aimed to involve these students in national holidays and other events, encouraging their active participation.

3.16. Fifth Advisory Committee visit to the Republic of Armenia and Opinion

The Fifth Advisory Committee (AC) visit to Armenia took place from February 21 to 25, 2022, and the Opinion was adopted on October 5, 2022. The AC commended Armenia's constructive approach to fulfilling its commitments. It expressed satisfaction with the positive feedback from national minorities regarding the country's general atmosphere of tolerance. However, the AC highlighted persistent issues with laws guaranteeing the rights of national minorities, as well as challenges arising from the Karabakh Conflict escalation in 2020 and the COVID-19 situation, impacting human rights and minority rights. Concerns were raised about the situation of Yezidi girls, including early and forced marriages, and difficulties in accessing education. The absence of comprehensive legislation on national minorities and unreliable statistics were noted. The AC's

[60] Fifth Report submitted by Armenia Pursuant to Article 25, paragraph 2 of the FCNM received on 15 June 2020, p. 4.

[61] Decision of the Government No 1115-N of 10 October 2018.

Opinion included Recommendations for Immediate and Further Actions. These recommendations called on the authorities to protect the freedom of expression for national minority individuals and representatives according to international human rights standards. They also urged the collection of data on gender-based violence against minority women and children, early and forced marriages, and the development of policies to prevent and combat these issues. Immediate action recommendations also emphasized revising the Draft Law on National Minorities in full compliance with international standards, consulting effectively with all stakeholders. Further recommendations focused on addressing issues like self-identification flexibility among national minorities, collecting socio-economic data, and facilitating the practice of cultural and national traditions.

3.17. Comments by the Government of the Republic of Armenia

In response to the Fifth Opinion by the CoE Advisory Committee on the Framework Convention for the Protection of National Minorities, submitted on February 8, 2023, the Republic of Armenia provided several observations. They clarified that most planned improvements had been implemented despite the challenges posed by the Karabakh Conflict and COVID-19, which impacted the efficiency of their work. Armenia also explained that while bills and relevant acts addressing the rights of national minorities were under consideration in Parliament, their adoption had been delayed due to the mentioned crises. Regarding concerns about kidnappings and early marriages of Yezidi girls, the authorities noted that such cases sometimes invoked Yezidi ethnic traditions but asserted that Armenian law and international conventions upheld gender equality and marriage by mutual consent. Finally, they attributed the decrease in the number of representatives of small communities to security and economic issues arising from the blockade by Azerbaijan and Turkey. These observations aimed to provide context and clarification regarding the matters raised in the Fifth Opinion.[62]

4. Conclusion

My research had a primary objective of assessing Armenia's adherence to the obligations prescribed by the Framework Convention. This study delved into the history, emergence, and subsequent evolution of national minorities in Armenia. It also examined the mechanisms in place to safeguard their rights. The findings support the hypothesis that Armenia, due to financial and economic constraints, struggles to fully meet these obligations, resulting in the challenges associated with their implementation. Despite the significant strides Armenia has made to enhance institutional and legislative frameworks for safeguarding the rights of national minorities, several pressing issues persist. These include the absence of a dedicated law on national minorities, difficulties in the education of children from specific minority groups, preserving cultural attributes, and promoting the use of minority languages. The contextual backdrop of constitutional amendments in 2015 and the "Velvet Revolution" in 2018 is critical in understanding these issues. While Armenia has indeed taken notable steps to protect the rights of national minorities, both institutionally and legislatively, certain problems remain unsolved. Most notably, the absence of a dedicated Law on National Minorities and the challenge of enabling language use by minority groups continue to hinder progress. Issues related to education, particularly early marriages among Yezidi girls, persist as well. The tumultuous events in the region, including the Karabakh conflict in 2020 and the flow of

[62] Constitution of the Republic of Armenia, Arts. 30 and 35.

Russian and Ukrainian nationals into Armenia due to the situation in Ukraine, have heightened the importance of safeguarding the rights of national minorities. As a result, Armenia must intensify its efforts to pass the Law on National Minorities to ensure the proper regulation of this crucial matter.

The Final Frontier: responsibility of international organizations for outer space activities*

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The responsibility of international organizations for internationally wrongful acts is by no means a field of international law that is ruled by consensus even on the level of the most basic norms of responsibility. This confusion is even more prevalent when an international organization acts in outer space. International law applicable for outer space activity is sometimes regarded as lex specialis to general norms of responsibility without much further considerations. The aim of this contribution is to examine whether this statement has merit, in light of the Outer Space Treaty and the Liability Convention and the Articles of the Responsibility of International Organizations drafted by the International Law Commission. Based on a theoretical analysis—due to the lack of practice—, it can be concluded, that the joint and several responsibility regime created by the Outer Space Treaty, and the liability and—at the same time—international responsibility system of the Liability Convention are indeed lex specialis and this responsibility is by default shared in nature. This conclusion is valid only for damage caused by illegal space activity by space objects on the surface of the Earth and to aircraft in flight.

Keywords: ARIO, international organization, responsibility, outer space activity, lex specialis

1. Introductory Remarks

The primary agents of human activities in outer space, from the accessibility of the technology until recently, have been exclusively states.[1] However, nowadays we cannot speak of such exclusivity, as on the one hand, the private sector has achieved remarkable success in the commercial utilization of space,[2] and on the other hand—and this holds greater significance for this article—international (intergovernmental) organizations also possess significant presence in space. In support of this latter statement, we can refer to classic international organizations such as the International Telecommunication Satellite Organization, established in 1962 and since then privatized, or the European

[1] * This research was supported by the Hungarian Scientific Research Fund (OTKA) of the National Research, Development and Innovation Office (Research Project No. FK-134930) within the framework of the young researcher project.

Gy. Gál, *Világűrjog*, Közgazdasági és Jogi Könyvkiadó, Budapest, 1964, p. 250.

[2] To illustrate this question, it is sufficient to refer to the American company SpaceX, which in 2012 became the first private company to deliver supplies to the International Space Station. Furthermore, in 2020, it became the first to send humans into space using its own designed and built spacecraft. See A. Edl, *A világűr-politika fejlődése és irányai*, in B. Bartóki-Gönczy & G. Sulyok (Eds.), Világűrjog, Ludovika Egyetemi Kiadó, Budapest, 2022, pp. 73-74.

Space Agency, established in 1975 and still functioning as a classic international organization.[3] Additionally, there are international organizations that have recently begun notable space activities, such as the European Union, which has been formulating its own space policy since the Lisbon Treaty and through the treaty, gained the capacity to realize a European space program, although excluding the harmonization of Member State laws.[4] Within this framework, the Galileo satellite navigation and positioning system was implemented, which commenced its high-precision services in January 2023.[5]

The existence and increasing importance of international organizations engaged in outer space activities naturally raise the question of how international law pertaining to the responsibility of international organizations are applicable in this specific area. Should these norms be assessed through the 2011 Draft articles on the responsibility of international organizations (hereinafter referred to as ARIO),[6] developed through the codification and progressive development work of the International Law Commission, which is considered to be a collection of general international legal norms, or should the issue be assessed based on the treaty or since then (possibly) customary international law norms? In this article, I primarily seek to answer this question by comparing the rules of outer space law applicable to international organizations—primarily in light of international treaties concluded by states—with the general provisions of ARIO in order to determine whether the liability model for outer space law can be considered as *lex specialis*. My standpoint is that an affirmative answer must be given to this question (Section 2). Subsequently, I address a specific question: can shared responsibility exist between international organizations engaged in outer space activities and states, with particular attention given to whether shared responsibility can exist with states other than member states. Again, I take an affirming position (Section 3). At the end of the paper, I briefly summarize my findings and draw conclusions regarding the issue of responsibility arising from the activities of international organizations in outer space (Section 4).

2. Outer space responsibility/liability—a *lex specialis?*

The ARIO, similar to its big brother, the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission (hereinafter referred to as ARSIWA),[7] provides that the rules contained in the document do not need to be applied when the issue of responsibility is regulated by a special rule of international law.[8] This principle is

[3] M. Ganczer, *Nemzetközi intézményrendszer,* in B. Bartóki-Gönczy & G. Sulyok (Eds.), Világűrjog, Ludovika Egyetemi Kiadó, Budapest, 2022, pp. 121-124.

[4] Treaty on the Functioning of the European Union (hereinafter: TFEU) Arts. 189(1)-(2). Since then, the EU has established the European Space Program Agency as the successor of the European GNSS Agency, and significant cooperation has been formed between the European Union and the European Space Agency within the framework of the Union's space program. The European Space Agency has various responsibilities in the implementation of the space program. See, Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU, OJ L 170, Arts. 1 and 30.

[5] Galileo High Accuracy Service goes live! https://www.euspa.europa.eu/newsroom/news/galileo-high-accuracy-service-now-operational (30 January 2023).

[6] GA. Res. 66/100, Responsibility of international organizations, 9 December 2011. (hereinafter: ARIO). The resolution was brought to the attention of the states by the United Nations General Assembly, but it did not result in an international treaty, similar to the final draft on state responsibility that was adopted 10 years earlier.

[7] GA. Res. 56/83, Responsibility of States for internationally wrongful acts, 12 December 2001. (hereinafter: ARSIWA). Art. 55.

[8] ARIO, Art. 64. According to the ARIO, such special rules can be included in the internal regulations of the international organization itself.

coined as lex specialis. The commentary to ARSIWA expressly highlights that the rule of joint and several responsibility for damage caused by space objects, as provided in the 1972 Convention on International Liability for Damage Caused by Space Objects (hereinafter referred to as the Liability Convention),[9] clearly constitutes lex specialis and deals with the concept of liability for lawful activities carried out in outer space rather than state responsibility.[10] I will return to this question of delimitation later. In contrast, the commentary to ARIO does not address outer space law issues.

Naturally, all of this provided sufficient ground for a scholarly debate, in which some accept outer space law as lex spec*ialis*[11] for the responsibility of international organizations without further examination, while others take a contrary position.[12] To resolve this question, it is necessary to compare the rules of outer space law and ARIO's rules on responsibility in order to determine whether a special responsibility framework indeed applies in the relevant area of international law.

Considering that the International Law Commission intended ARIO to be a document regulating the responsibility of international organizations in general, it is advisable to outline the international responsibility system of these organizations based on that first. Similar to ARSIWA, ARIO also establishes responsibility based on the simultaneous existence of two conjunctive conditions: the conduct of the international organization—which can be an act or an omission[13]—must, on the one hand, constitute a breach of an existing international legal obligation of the organization, and, on the other hand, be attributable to the organization.[14] Therefore, the responsibility of international organizations presupposes both a breach and the attribution of such conduct.[15] The breach by an international organization can arise from any obligation imposed on it, whether derived from an international treaty or a general rule of international law.[16] It is worth emphasizing that, just like in the case of state responsibility, damage[17] and fault[18] do not form the basis for establishing responsibility.

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[9] 1972 Convention on International Liability for Damage Caused by Space Objects (hereinafter: Liability Convention).

[10] ARSIWA Commentary, p. 125. para. 5.

[11] Pablo Mendes de Leon and Hanneke van Traa, for example, firstly emphasize that outer space law is *lex specialis* compared to ARSIWA. They then establish that the system of ARIO visibly differs from the rules of outer space law. From this, in my opinion, one can draw the conclusion that the authors consider it as *lex specialis* not only in the context of outer space law and state responsibility but also in relation to the responsibility of international organizations. See, P.M. de Leon & H. van Traa, *Space Law,* in A. Nollkaemper & I. Plakokefalos (Eds.), The Practice of Shared Responsibility in International Law, CUP, Cambridge, 2017, p. 455. and pp. 465-466.

[12] Sienho Yee argues, for instance, that the rules of outer space law cannot be considered as special rules because, they should be regarded as general rules that regulate the responsibility of international organizations instead of the ARIO. See, S. Yee, *'Member Responsibility' and the ILC Articles on the Responsibility of International Organizations: Some Observations,* in M. Ragazzi (Ed.), Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie, Martinus Nijhoff Publishers, The Hague, 2013, p. 335.

[13] ARIO Commentary, p. 53. para. 2.

[14] ARIO, Art. 4.

[15] Attribution of conduct and attribution of responsibility are two separate and distinct notions. See J.D. Fry, *Attribution of Responsibilty*, in A. Nollkaemper & I. Plakokefalos (Eds.), Principles of Shared Responsibility in International Law, CUP, Cambridge, 2014, pp. 102-107.

[16] B. Kis Kelemen & Á. Mohay & A. Pánovics, *A nemzetközi szervezetek felelőssége: koncepcionális és értelmezési kérdések*, in G. Kajtár & P. Sonnevend (Eds.), A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században. Tanulmányok Valki László tiszteletére, ELTE Eötvös Kiadó, Budapest, 2021, pp. 289-290.

[17] ARIO Commentary, p. 53. para. 3.

[18] Although this question is not addressed in the ARIO commentary, I believe that *mutatis mutandis* it should also be applied to the responsibility of international organizations, see, ARSIWA Commentary, p. 36, para. 10. The commentary assumes that *mens rea*, the mental or psychological element behind the violation, is present in the concept of fault, such as the intention to cause harm. Additionally, in my opinion, nothing excludes the adoption of borrowed terminology from Hungarian civil law and simply stating that it is not a requirement for the international organization (or the state) to act as would generally be expected in the given situation.

Regarding the issue of attribution, ARIO contains seemingly different rules from ARSIWA: on the one hand, the conduct of the organs or agents of the organization is attributable to the international organization if they perform their functions and duties within the organization (Article 6), and, on the other hand, the conduct of governmental organs as well as organs or agents of other international organizations placed at the disposal of the international organization will also be attributable to the international organization (Article 7), and finally, conduct recognized by the international organization as its own is also attributable to the organization (Article 9).[19]

The comparison is also significantly influenced by the so-called circumstances precluding wrongfulness. ARIO, just like ARSIWA, lists six circumstances precluding wrongfulness. These are consent, self-defense, countermeasures, force majeure, distress, and necessity.[20] These circumstances precluding wrongfulness essentially serve the same function as the grounds for exemption in civil law claims for damages.[21]

After this brief overview, let us examine how the issue of responsibility unfolds in terms of international legal rules concerning space activities. International outer space law primarily consists of treaty law sources, five of which deserve special mention: the Outer Space Treaty, the Rescue Agreement, the Liability Convention, the Registration Convention, and the Moon Agreement.[22] Among these, the provisions of the Outer Space Treaty and the Liability Convention will be relevant to our topic, from which two, at least the fundamental provisions of the Outer Space Treaty have reached the level of customary international law[23] and I see no reason why the same should not be true for the Liability Convention as well. It is also necessary to note that, naturally, international organizations are also bound by general international law and thus by the rules of customary international law.[24]

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[19] ARIO, Arts. 7-9. Cf. ARSIWA, Arts. 4-11. For a comparison of the attribution norms of ARSIWA and ARIO, see. B. Kis Kelemen, *Responsibility for Human Rights Violations of Private Military and Security Companies on EU Borders: A Case Study of the Contracts of the European Asylum Support Office*, in D. Duić & T. Petrašević (Eds.), EU and Comparatavie Law Issues and Challenges Series (ECLIC 4). EU 2020 – lessons from the past and solutions for the future, Josup Juraj Strossmayer University of Osijek, Osijek, 2020, pp. 155-180.

[20] ARIO, Arts. 20-25. ARSIWA, Arts. 20-25.

[21] N. Tóth, *Ismeretlen vizeken. Nemzetközi jogi felelősségi szabályok az uniós jogban?* Jogtudományi Közlöny, Vol. 77, No. 10, October 2022, pp. 385-394.

[22] G. Sulyok, *Nemzetközi jogi szabályozás,* in B. Bartóki-Gönczy & G. Sulyok (Eds.), Világűrjog, Ludovika Egyetemi Kiadó, Budapest, 2022, pp. 84-104.

[23] U. M. Bohlmann, *Article XIII,* in S. Hobe & B. Schmidt-Tedd & K. U. Schrogl (Eds.), Cologne Commentary on Space Law, BWV, Berlin, 2017, p. 687. para. 12; C. F. Amerasinghe, *An Assessment of the ILC's Articles on the Responsibility of International Organizations,* in M. Ragazzi (Ed.), Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie, Martinus Nijhoff Publishers, The Hague, 2013, p. 75. When it comes to the question of establishing customary international law, it is advisable to proceed with caution, considering, on the one hand, the relatively young nature of these treaties and, on the other hand, the fact that the United States, for example, has taken a persistent position of opposition regarding the transformation of the provisions of the Moon Agreement into customary law, see, Sulyok 2022*,* p. 106.

[24] N. Blokker, *International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?* International Organizations Law Review, Vol. 14, No. 1, June 2017, pp. 1-12; K. Daugirdas, *How and Why International Law Binds International Organizations*, Harvard International Law Journal, Vol. 57, No. 2, Spring 2016, pp. 325-381. See also in the case-law of the International Court of Justice " „[…] general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour." *North Sea Contiental Shelf,* Judgment, I.C.J. Reports 1969, p. 3. para. 63. See also „[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties*." Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* Advisory Opinion, I. C.J. Reports 1980, p. 73. para. 37.

The 1967 Outer Space Treaty comprehensively regulates the exploration and use of outer space, including the Moon and other celestial bodies. One of the most significant provisions of the treaty is that it designates outer space as a territory of a status of *res communis omnium usus*.[25] By January 2022, a total of 112 states gave consent to be bound by the international treaty, while 23 states have only signed the document.[26] Although before the conclusion of the treaty, the Soviets wanted only states to be entitled to engage in outer space activities,[27] international organizations appeared already in the first U.S. draft on the principles,[28] and they ultimately appear in two places in the Outer Space Treaty, namely in the form of international organizations and intergovernmental organizations.[29] To avoid conceptual confusion, it must be noted that the distinction between international organizations and intergovernmental organizations is not justified in this context, as all provisions of the Outer Space Treaty are applicable only to intergovernmental organizations,[30] which is consistent with the personal scope of ARIO as well.[31]

Article VI of the Outer Space Treaty states, that

"[…] When activities are carried on in outer space, 6 including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization."

This means that both the international organization and states parties will be responsible for violations of the provisions of the Outer Space Treaty.[32] In terms of the nature of this responsibility, it is joint and several,[33] meaning that states and international organization jointly bear responsibility towards the injured state, but there is no rule on the distribution of responsibility among the responsible states and international organizations. In the absence of a specific norm, it can be presumed that it follows the system of the Liability Convention, where the parties can agree on the allocation of financial obligations among themselves.[34] In the absence of such an agreement, in my opinion, it is justified to apply a liability model based on fault between the parties, or if this cannot be determined, then an equal distribution of damages based on the model of Article IV(2) of the Liability Convention.

It is easy to see that this provision is not compatible with ARIO, which, apart from the narrow exceptions it defines, excludes the responsibility of member states for the unlawful conduct of international organizations.[35] While the Outer Space Treaty creates joint and several responsibility between member states and the international organization in an absolute manner, ARIO establishes

[25] 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter: Outer Space Treaty) Arts. I-II.

[26] Status of International Agreements relating to activities in outer space as at 1 January 2022. 28 March 2028. A/AC.105/C.2/2022/CRP.10* p. 10.

[27] B. A. Hurwitz, *State Liability for Outer Space Activities in Accordance with the 1972 Convention on International Liability for Damage caused by Space Objects*, Martinus Nijhoff Publishers, Dodrecht, Boston, London, 1992, p. 70.

[28] Gál 1964, p. 251.

[29] Outer Space Treaty, Arts. VI and XIII.

[30] M. Gerhard, *Article VI,* in S. Hobe & B. Schmidt-Tedd & KU. Schrogl (Eds.), Cologne Commentary on Space Law, BWV, Berlin, 2017, p. 429. para. 81.

[31] ARIO, Art. 1. According to the ARIO, an international organization is "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities." See, ARIO, Art. 2(a)

[32] Gerhard 2017, pp. 429-430. para. 82.

[33] Bohlmann 2017, pp. 685-686. para. 10.

[34] Liability Convention, Art. VI.

[35] ARIO Commentary, p. 81. para. 1.

the exclusive responsibility of the international organization as the main rule.
The Outer Space Treaty also states that

"The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the Moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international intergovernmental organizations. Any practical questions arising in connection with activities carried on by international intergovernmental organizations in the exploration and use of outer space, including the Moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty."[36]

The commentary attached to the treaty emphasizes that this provision was created to prevent states from evading their responsibility for outer space activities through the use of international organizations.[37] Ultimately, this provision makes the application of the most fundamental, treaty rules of outer space law obligatory for international organizations that are not parties to the treaty itself. However, it should be noted that the Outer Space Treaty does not allow for international organizations to accede to the agreement, nor does it allow them to unilaterally declare acceptance of the treaty, dissimilar to later universal international agreements related to outer space.

After reviewing the provisions of the Outer Space Treaty, it seems appropriate to conduct a more thorough examination of the Liability Convention, but for this, it is necessary to clarify some preliminary questions regarding the distinction between liability and international responsibility.

It is important to draw attention to the fact that the treaty uses the term 'liability'[38] instead of 'international responsibility', as used in the ARIO.[39] However, these two concepts are not synonymous, as pointed out by the International Law Commission in the commentary on ARSIWA,[40] which was consistently reaffirmed in the commentary of the ARIO as well.[41] Accordingly, under the concept of liability, it is necessary to understand responsibility for damages caused by conduct that is not prohibited by international law.[42] On the other hand, as stated above, international responsibility refers to the conduct of a state or an international organization that violates their international legal obligations.[43] This distinction is emphasized in international legal literature. For example, Nikolaos Voulgaris highlights that the rules of liability belong to the primary rules of international law, while liability rules are considered secondary norms.[44] However, it should also be noted, as emphasized by Sienho Yee, that the distinction between international responsibility and liability is relatively recent, dating back to the 1972 Liability Convention. Therefore, it can also be argued that the liability mentioned in the treaty encompasses both liability for damages resulting from lawful conduct according to contemporary interpretation and international responsibility as enshrined in the ARSIWA and the ARIO.[45] In my opinion, the correct interpretation lies in the latter, which is supported by an overview of the provisions of the treaty. Therefore, it is justified to conduct a slightly more detailed examination of the treaty to determine the overlap between liability under the Liability Convention and international responsibility according to ARIO.

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[36] Outer Space Treaty, Art. XIII.

[37] Bohlmann 2017, p. 679. para. 1.

[38] See for instance Liability Convention, Arts. II and III.

[39] See, *e.g.:* ARIO, Art. 1(1).

[40] ARSIWA Commentary, p. 125. para. 5.

[41] ARIO Commentary, p. 48. para. 5.

[42] ibid

[43] ARSIWA, Art. 2 and ARIO, Art. 4.

[44] N. Voulgaris, *Allocating International Responsibility Between Member States and International Organisations,* Hart, Oxford, London, New York, New Delhi, Sydney, 2019, pp. 66-67.

[45] Yee 2013, p. 334.

The Liability Convention establishes three main regimes of liability. On the one hand, there is absolute or strict liability, which allows for exemption, introduced by the formula 'absolutely liable' in the treaty.[46] This liability form is applicable when damage occurs in outer space, on the surface of the Earth, or to an aircraft in flight.[47] In this case, exemption may be possible if the launching state or international organization proves, that

"[…] the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents."[48]

On the other hand, there is another form of liability based on fault,[49] which according to the treaty is applicable when damage occurs in the space object of a launching state, or in persons or property present therein, elsewhere than on the surface of the Earth. This liability is fault-based because in this case, the injured party must prove that the damaging state caused the damage through its own fault or through the fault of a person for whom it is otherwise responsible.[50]

Finally, mention should be made of the third and final form of liability, which can be characterized as absolute liability, without allowing for exemptions.[51] The Liability Convention regulates this form of liability seen as below:

"No exoneration whatever shall be granted in cases where the damage has resulted from activities conducted by a launching State which are not in conformity with international law including, in particular, the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies."[52]

This provision is derived from the revised Hungarian draft,[53] and its significance lies in the fact that it does not provide for any exemptions regardless of the source of the obligation if the damage results from the breach of international legal obligations by the liable state or international organization.[54] However, the provision raises some interpretational questions as it is not clear whether liability for damage caused by unlawful space activities can only be established under the regime of absolute liability, *i.e.,* in cases of damage caused on the surface of the Earth or in aircraft in flight, or if fault-based liability, *i.e.*, liability for damage between space objects outside the surface of the Earth, also applies. The grammatical and logical interpretation of the Liability Convention,

[46] Liability Convention, Art. II. G. Kecskés, *Az űrtevékenység felelősségi jogi kérdései,* in G. Sulyok & B. Bartóki-Gönczy (Eds.), Világűrjog, Ludovika Egyetemi Kiadó, Budapest, 2022, p. 140. K. Schmalenbach, *Convention on International Liability for Damage Caused by Space Objects,* in P. Gailhofer & D. Krebs & A. Proelss & K. Schmalenbach & R. Verheyen (Eds.), Corporate Liability for Transboundary Environmental Harm. An International and Transnational Perspective, Springer, Cham, 2023. p. 528. It should be noted that the author only distinguishes between two liability regimes and uses the term 'strict liability' alongside absolute liability. However, Bruce A. Hurwitz applies strict liability only in cases where there is no defense available for the liability forms. See, Hurwitz 1992, p. 42.

[47] Liability Convention, Art. II.

[48] Liability Convention, Art. VI (1).

[49] Kecskés 2022, p. 140. Schmalenbach 2023, p. 528.

[50] Liability Convention, Art. III. Schmalenbach 2023, p. 530. It should also be highlighted that the interpretation of the phrase "the fault of persons for whom it is responsible" in the treaty is questionable. It is possible that the reference to responsibility is made in terms of general international responsibility rules, *i.e.,* those established by ARSIWA and ARIO. However, it is also possible that the specialized rules of outer space law should be applied in this context. According to the author, the latter is the correct interpretation. ibid p. 529.

[51] Kecskés 2022, p. 140.

[52] Liability Convention, Art. VI (2).

[53] Hungary: revised draft Convention concerning Liability for Damage caused by the Launching of Objects into Outer Space. (A/AC.105/C.2./L.10/Rev.1) Art. V.

[54] Hurwitz 1992, p. 42.

through the use of formulas such as "[n]o exoneration whatever shall be granted […]"[55] from liability and "[...] exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents,"[56] indicates that the rule excluding exemption from liability applies only in cases of absolute liability. This argument is likely accepted by Gábor Kecskés and Kristen Schmalenbach.[57] In contrast, János Bruhács considers the form of liability which allows no exoneration (according to his terminology, absolute liability) to be applicable to all unlawful space activities.[58] Bruce A. Hurwitz, on the other hand, seems to operate based on complete inconsistency in his 1992 monograph. While he argues that "[…] the Liability Convention denies exoneration"[59] in cases of unlawful space activities, the example he provides leads to a different conclusion. Hurwitz illustrates the rule by stating that if the Soviet Union (now the Russian Federation) were to launch a nuclear-armed space object, it would clearly violate Article IV of the Outer Space Treaty. If as a result, the United States were to render the object uncontrollable, resulting in damage to the United States, its citizens, or permanent residents, the Soviet Union would be liable, regardless of whether the damage was caused by the intervening conduct of the United States.[60] Therefore, Hurwitz seemingly makes no distinction as to where the damage occurs, thus considering this absolute liability construct without exemptions applicable in both situations. Considering that the application of the Liability Convention has not yet been supported by state practice, it is certain that the question cannot be definitively answered. However, in such situations, I personally find a restrictive interpretation[61] more appropriate.

These questions have significant importance when establishing the liability of international organizations, particularly in determining a *lex specialis* liability regime for outer space activities. First, it should be noted that under the ARIO, the liability of an international organization can be established if the act is both unlawful and attributable to the international organization. In contrast, the Liability Convention establishes liability for lawful conduct under both the regime of absolute liability with exemptions and the fault-based approach. There is only one exception to this, which pertains to damage caused by unlawful space activities in an aircraft in flight or on the surface of the Earth, for which the launching state and international organization are fully liable. This means that international liability, which applies not only to international organizations but also to states, and the liability for damage caused by outer space activities, constitute separate but intersecting categories in terms of their material scope, as illustrated in the following diagram:

[55] Liability Convention, Art. VI (2).

[56] Liability Convention, Art. VI (1).

[57] Kecskés 2022, p. 141. Schmalenbach 2023, p. 530. o.

[58] J. Bruhács, *Nemzetközi jog II. Különös rész,* Dialóg Campus, Budapest, Pécs, 2011, p. 130.

[59] Hurwitz 1992, p. 42.

[60] Ibid p. 42-43.

[61] "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." See 1969 Vienna Convention on the Law of Treaties Art. 31 para 1. J. Bruhács, *Nemzetközi jog I. Általános rész,* Dialóg Campus, Budapest, Pécs, 2011, p. 113.

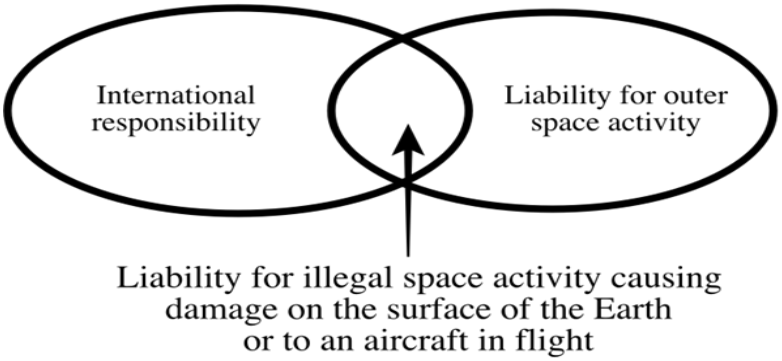

Diagram No. 1.
Relationship between international responsibility and liability for outer space activity[62]

Based on this, I will compare the rules of international responsibility and at the same time liability for damage caused in an aircraft in flight or on the surface of the Earth by unlawful acts, which can be found at the intersection of the ARIO and liability regime of outer space law. The goal of the comparison is to determine whether liability differs from ARIO and thus qualifies as *lex specialis*.

After discussing the preliminary questions, I will now turn to the status and main provisions of the Liability Convention. Similar to the Outer Space Treaty, the convention has a large number of parties, with 98 state parties as of January 1, 2022, supplemented by 19 signatory states and four international organizations that have accepted the rights and obligations arising from the convention.[63] The latter is made possible by Article XXII of the Liability Convention, which states, that its norms excluding those, which are pertaining to the technical details of concluding the treaty (Articles XXIV-XXVII) are also applicable to international organizations, when

"[…] if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies."[64]

The four international organizations that have accepted the Liability Convention are the European Space Agency (ESA), the European Telecommunications Satellite Organization (EUTELSAT), the European Organization for the Exploitation of Meteorological Satellites, and the International Telecommunication Satellite Organization (INTERSPUTNIK).[65] Although the numerical change is not significant, it is worth highlighting that in 1989, only two international organizations made similar statements.[66] Among these, EUTELSAT has been privatized to such an extent that the international organization now only oversees the operations of Eutelsat S.A., a private company that took over the formers assets.[67] INTERSPUTNIK has also been partially privatized, but in my opinion, this should not affect its rights and obligations under the treaty.[68] The privatization is a significant issue in this regard because if an international organization, like EUTELSAT, loses its status as an

[62] The diagram was prepared by the author.

[63] A/AC.105/C.2/2022/CRP.10* p. 10.

[64] Liability Convention, Art. XXII (1).

[65] A/AC.105/C.2/2022/CRP.10* p. 10.

[66] Hurwitz 1992, p. 71.

[67] Ganczer 2022, p. 128.

[68] Following the privatization of INTERSPUTNIK, the organization's space segment continues to belong to the international organization, based on ownership or leasing arrangements. See, ibid p. 125.

international organization conducting space activities, the provisions of the Liability Convention would not apply to it. This assertion is supported by the commentary to Article XIII of the Outer Space Treaty, which states that the relevant provision does not apply to organizations that have lost their international organization status.[69] Therefore, among the four mentioned organizations, in my opinion, this can only be established in the case of EUTELSAT, and the remaining three organizations are subject to the provisions of the international treaty. Furthermore, if we attribute customary force to the provisions of the Liability Convention, they could be applicable to other international organizations engaged in space activities, such as the European Union, which, based on the consistent case law of the Court of Justice of the European Union, is also bound by customary international law.[70]

In line with the above reasoning, in order to determine the nature of *lex specialis*, it is necessary to examine the rules of liability for damages caused by unlawful outer space activities, which also give rise to international responsibility when such damages occur on the surface of the Earth or an aircraft in flight.

First, it is worth making some explanatory remarks regarding relevant concepts such as damage and launching state or international organization. The Liability Convention defines damage as the loss of life, personal injury, impairment of health, as well as the loss and damage to property of states—and international organizations—and individuals.[71] This concept of damage includes mental health impairment, and some scholars also include indirect damages within its scope.[72] As for the launching entity, the Liability Convention refers to the launching state, which naturally includes the launching international organization as well. Therefore, any international organization that launches or procures the launching of space objects or uses its facilities for the launching of space objects qualifies as a launching international organization.[73] As a supporting argument for the lex *specialis* character of this field, it is also possible to refer to the fact that by applying the category of 'launching state' with the aforementioned content, the Liability Convention departs from the attribution rules that would otherwise be applicable according to the ARIO. In its resolution on the launching state adopted in 2005, the United Nations General Assembly drew the attention of states to conclude agreements in accordance with the Liability Convention through cooperation.[74] ESA fulfilled this requirement as early as 1977 when it adopted a resolution on the organization's liability, which regulated the sharing of responsibility between member states, other states, and the international organization.[75]

It is clear from this that an international organization can be a launching entity that incurs both international responsibility and liability for damages caused unlawfully on the surface of the Earth or in an aircraft in flight.[76] According to the Liability Convention, in such cases, the international

[69] Bohlmann 2017, pp. 682-683. para. 6.

[70] Á. Mohay, *A nemzetközi jog érvényesülése az uniós jogban,* PTE ÁJK Európa Központ – Publikon Kiadó, Pécs, 2019, pp. 83-100.

[71] Liability Convention, Art. I(a).

[72] Schmalenbach 2023, p. 531.

[73] Liability Convention, Art. I(c). According to the provision in question, as stated in para. 2, the state whose territory is used for the launch is also considered a launching state. Considering that international organizations do not possess territory, this norm, in my opinion, does not apply to them.

[74] GA. 59/115, Application of the concept of the „launching State", 25 January 2005. para. 2.

[75] Resolution of the Council of the European Space Agency on the Agency's Legal Liability. Adopted on 13 December 1977. ESA/C/XXII/RES.3.

[76] Liability Convention, Art. II, VI (2) and XXII (1).

organization and its contracting member states are jointly and severally liable.[77] This seemingly contradicts the rules of the ARIO, which only allow member state responsibility for the actions of the international organization in a limited scope.[78] The specialty of the regulation of outer space responsibility/liability is further reinforced by the fact that according to the Liability Convention, the request for compensation must be initially submitted to the international organization, and member state responsibility is only 'activated' if the organization fails to pay the amount of damage within six months.[79] In essence, we can say that the responsibility of international organizations takes precedence over that of states.[80] This is in direct contradiction with Article 48(1) of ARIO, which states

„Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act."[81]

It should be noted, however, that the ARIO also states that the invocation of subsidiary or secondary liability is only possible if the invocation of primary liability did not lead to a result.[82] This provision would be in line with the Liability Convention if the ARIO did not narrowly interpret secondary liability and only deemed it acceptable if a member state of an international organization accepted its responsibility towards the injured party or induced the injured party to invoke the responsibility of the member state.[83] In the framework of the Liability Convention, it can ultimately be concluded that the injured state will always be able to claim compensation from another state,[84] as opposed to the rules of the ARIO.

After reviewing the above, it must be determined whether the presented special rules are sufficient to characterize the liability of international organizations in outer space as *lex specialis*. Kristen E. Boon defines a four-element test to determine the existence of *lex specialis* norms: a) an actual collision between rules, b) one legal regime being more specific, c) the sources leading to the collision support the applicability of *lex specialis*, and d) it does not affect the rights of the parties to the agreement.[85]

In my opinion, the above-mentioned framework for the liability of international organizations in outer space easily meets the requirement of an actual collision between rules. This is undoubtedly proven by the detailed argumentation above. Although the question of the specialty of the rules is the most difficult to prove,[86] still, I believe that the rules established in the framework of outer space law qualify as special rules, at least from the perspective that it regulates international responsibility according to the ARIO and ARSIWA only *per tangentem* and, it creates a more specific liability system, that partially overlaps with the general international responsibility rules. It is also questionable what has primacy of application, whether the ARIO as a codification effort and at the

[77] Ibid Art. XXII (3).

[78] ARIO, Part Five.

[79] Liability Convention, Art. XXII (3).

[80] M. Lachs, *The Law of Outer Space. An Experience in Contemporary Law-Making,* Sijthoff, Leiden, 1972, p. 123.

[81] ARIO, Art. 48 (1).

[82] ARIO, Art. 48 (2).

[83] ARIO, Art. 62 (1.)

[84] F. Tronchetti & L. J. Smith & A. Kerrest: *Article XII (International Intergovernmental Organizations) LIAB*, in S. Hobe & B. Schmidt-Tedd & K. U. Schrogl (Eds.), Cologne Commentary on Space Law Vol. II, Carl Heymanns Verlag, Köln, 2013, p. 206. para. 385.

[85] K. E. Boon, *The role of lex specialis in the articles on the repsonsibility of international organizations,* in M. Ragazzi (Ed.), Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie, Martinus Nijhoff Publishers, The Hague, 2013, p. 141.

[86] Ibid p. 142.

same time a development of international law, or a treaty or customary law provision. According to Boon—who considers the ARIO solely as new development of international law, not a codification of existing rules—international treaties always enjoy primacy over the ARIO.[87] In my view, the question cannot be settled so easily. On the one hand, the ARIO can be considered to have a customary nature in certain aspects—for example, regarding the determination of international responsibility. On the other hand, we can only partly identify a 'hierarchy' between international treaties and customary international law.[88] When states concluded their relevant international treaties concerning outer space, they 'contracted out' of the application of general rules among themselves, so in their relations, treaty norms take precedence over customary norms. However, considering that the majority of the Outer Space Treaty is of customary nature, and there is no reason to doubt that this is the case for the Liability Convention as well, this does not pose a problem in establishing the existence of *lex specialis*. As a third condition, it should be mentioned that Article 64 of the ARIO supports the existence of *lex specialis* norms when it provides that the ARIO does not need to be applied if a special rule of international law is applicable to the determination or implementation of international responsibility. Article XXIII(1) of the Liability Convention also states that the convention does not affect other international agreements of the parties. Although this provision would presumably be applicable to other international treaties, it may indicate to us that the convention does not exclude the applicability of other norms. Therefore, this means that the ARIO allows for the application of special norms, such as the Liability Convention, and the latter also allows for the application of other more general rules. Finally, it should be mentioned that outer space responsibility/liability does not affect the applicability of the general rules of international responsibility; it only complements them, similar to the interaction between international humanitarian law and the international human rights system.[89] In this form, we cannot argue that any claimant has fewer rights due to the continued applicability of the special rules.

Based on these considerations, I believe it can be reasonably argued that the responsbility of international organizations in outer space, based on the general and liability rules of outer space law is established as *lex specialis* compared to the general rules of international responsibility.

3. Shared outer space responsibility/liability

Shared responsibility, according to André Nollkaemper, encompasses situations where multiple actors contribute to one harmful outcome, and the responsibility for that outcome is divided among the contributing actors.[90] Shared responsibility can arise through the attribution of responsibility, such as when a state assists another in committing a violation, as well as through the attribution of conduct, where an activity or omission is attributed to two international legal entities.[91]

The liability of international organizations for space activities raises the possibility of shared re-

[87] Ibid

[88] A treaty prevails over customary international law only to the extent that the states parties 'contract out' of it, but it does not affect the rights and obligations of other states. See C. Greenwood, *Sources of International Law: An Introduction*, https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf (2023.02.08.) p. 5.

[89] Boon 2013, p. 144. Of course, the relationship between international humanitarian law and international human rights law is a much more complex issue. See, S. P. Marks, *Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflict*, in K. Vasak (Ed.), The International Dimensions of Human Rights, UNESCO – Greenwood Press, Westport, Paris, 1982, p. 193 and pp. 200-201.

[90] A. Nollkaemper, *Introduction*. in A. Nollkaemper & I. Plakokefalos (Eds.), Principles of Shared Responsibility in International Law. An appraisal of the State of the Art, CUP, Cambridge, 2014.

[91] S. Ø. Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State,* Oslo Law Review, Vol. 6, No. 3, December 2019, pp. 179-197.

sponsibility from two perspectives. Firstly, as mentioned above, both the Outer Space Treaty and the Liability Convention speak of joint and several responsibility,[92] meaning that the responsibility is shared between the international organization conducting the space activity and its member states.

However, shared responsibility can also arise in the case of space activities carried out by international organizations involving third states other than their member states. It can be easily conceivable that international organizations, without their own territory, always rely on at least one launching state for the launching or procurement of the launching of their space objects.[93] According to Article I(c) of the Liability Convention, not only the state that launches the space object is considered a launching state but also the one that practically performs this launch and the state whose territory or facility is used for this purpose. Consequently, it can be concluded that the international organization, as a launching state, is jointly and severally responsible (*i.e.* shared responsibility is established) with those states whose territory or infrastructure is used for the launch.[94] Since these states may not necessarily coincide with the member states of the international organization, this can be considered as a separate form of shared responsibility.

4. Conclusions

Based on the above, it can be concluded that specific *lex specialis* rules apply to the liability of international organizations regarding activities conducted in outer space. The joint and several responsibility rule of the Outer Space Treaty contradicts the ARIO, which emphasizes the primacy of the international organizations' responsibility. On the other hand, the Liability Convention primarily regulates a liability, in contrast with the general international responsibility regime of ARIO. However, it should also be noted that liability under the Liability Convention and the international responsibility of international organizations according to ARIO intersect, particularly concerning unlawful damages caused on the surface of the Earth or in aircraft in flight. The argument for *lex specialis* is further reinforced by the fact that the concept of the 'launching state', which deviates significantly from ARIO's attribution rules. This concept needs to be applied to international organizations as well.

Finally, and following from the concept of the launching state mentioned above, it should be noted that the international responsibility and liability of international organizations is inherently a shared responsibility for their activities in outer space. This shared responsibility is based on the principles of joint and several liability, both concerning their member states and third states other than their member states. In the latter case, provided that both third states different from the member states and the international organization qualify as launching states according to the provisions of the Liability Convention.

[92] Outer Space Treaty, Art. VI. Liability Convention Art. XXII (3). It needs to be noted however, that liability of international organizations has primacy according to the Liability Convention.

[93] An exception from this would be if the international organization launches its space objects with its own infrastructure from the High Seas. See, Schmalenbach 2023, p. 528.

[94] Liability Convention, Arts. V (1) and (3).

Between morality and discrimination by public administration: the case of so-called 'LGBT free zones' in Poland

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In recent years in Poland, local authorities were eager to express their views on ideological and moral issues. These statements were not mere declarations of a group of councilors (politicians) but administrative rule-making. The so-called LGBT-free zones have gained particular attention within the EU borders and abroad. These resolutions are of mixed i.e. normative and political characteristics. Moreover, the contribution seeks an answer to whether there is a legal basis for issuing such a resolution and whether it complies with EU law and the case law of the CJUE and ECHR. The analysis also covers a judicial review of resolutions issued by municipalities. Finally, it was described how the activities of the Polish accountability network contributed to a shift in EU policy regarding the protection of underrepresented groups.

Keywords: judicial review of administrative action, human rights, EU non-discrimination law, network of accountability, municipalities.

1. Introduction

In the modern world, it is increasingly difficult to find universally accepted moral patterns. People move, change environments, get to know new cultures, open to the models of life. They expect from the environment—including state and EU bodies—that their privacy is respected, and their freedom is not interfered with. The EU as a community of values harmonises not only legal systems, but also social attitudes in the spirit of non-discrimination on the way to building an inclusive

society and ensuring moral tolerance.[1] Conflicting with these expectations, the authorities of many municipalities in Poland have adopted resolutions which were declarations defining decencies they consider acceptable and worth supporting, and those which they perceive as reprehensible and requiring combating (resolutions establishing so-called LGBT free zones).

The activity of local self-government in this field triggered ambivalent opinions. Some see it as a form of discrimination and spreading hate speech,[2] others – as an opposition to 'contemporary threats'. There are also those who do not attach much importance to it, not seeing the danger in resolutions characterised as non-binding ideological manifestations, difficult to apply and enforce. Against this background the working hypothesis is as follows: each action undertaken by a Member State aimed at determining which forms of behavior are unacceptable on the national forum (immoral behavior), when the same behavior is accepted, or considered natural (not leading to scandal) in another Member State, is not only a threat to the rights and freedoms of specific (singular) EU citizens, but above all—by creating barriers —it is not in compliance with the freedom of movement of people, services and capital secured under the Treaty on the Functioning of the European Union. Thus, it constitutes a real threat to integration processes. Especially this is the case in context of the freedom of movement and right to seek and take up employment, run a business or invest.[3]

In this paper, we are trying to determine whether the legal system provides grounds for actions on a local level which refers to prima facie non-legal criteria such as morality. The analysis of provisions, motives, and declared goals delivered by local self-government authorities will provide the legal characterization of those resolutions. To do so one should also analyze whether the private, state actors and/or EU institutions are vested with proper competencies to fight back administrative actions that are discriminatory. In this regard, the authors present the catalogue of legal institutions that were used to verify the legality of actions declaring that some behaviors are not accepted by the community based on morality and decencies.

The empirical material for the research includes EU regulations, Polish law, judgments of national administrative courts and European courts, and case statistics. We very much appreciate the feedback from 'Atlas of Hate' who provided us with detailed statistics and information. 'Atlas' is a non-profit group advocating for LGBT rights in Poland. In 2020 'Atlas' was nominated for Sakharov Prize.

2. Resolutions regarding the locally oriented decencies

In the group of resolutions concerning the locally oriented decencies, the first to address are so-called policy resolutions, commonly known as acts establishing 'LGBT-free zones' in those units

[1] J. Zajadło, *Prawo kontra obyczajowość*, in J. Zajadło & K. Zeidler (Eds.), Fascynujące ścieżki filozofii prawa 2, Wolters Kluwer Polska, Warszawa, 2021, p. 76.

[2] In the light of the jurisprudence of the ECtHR, state authorities not only cannot incite to spread hate speech, but also violate Art. 3, 8 and 14 of the Convention of November 4, 1950 for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) in the absence of an adequate response to hate crimes, see: *Sabalič v. Croatia* (App. no. 50231/13) ECtHR (2021) and *Association AC-CEPT and others v. Romania* (App. No. 19237/16) ECtHR (2021), including in particular when anti-minority statements come from active politicians see: *Chaprazow v. Bulgaria* (App. No. 12567/13) ECtHR (2021) and *Behar and Gutman v. Bulgaria* (App. No. 29335/13) ECtHR (2021). In these judgments, the ECtHR defined the criteria for assessing whether a single statement concerning minorities is so harmful that it affects the sense of identity of members of a certain minority community and their own assessment.

[3] Case 507/18, NH v Associazione Avvocatura per i diritti LGBTI [EU:C:2020:289].

of the administrative division of the country whose authorities issued them. The activity of local government in this area will serve as core of the analysis, due to the universality of the problem and the interest of the international community.[4] The activity of the bodies of Polish local government units which adopted the discussed resolutions resulted in a reaction at the European Union level, not only in the legal and economic, but also in the axiological and programmatic dimension.[5]

The discussed resolutions of local government units are not uniform. Already their titles let us distinguish, on the one hand, declarations on suppression of the 'LGBT' ideology by the local government community ("Local government free from LGBT ideology"), and on the other hand, Local Government Charter of the Rights of the Family.[6] The two types of acts also differ in terms of their content[7]. Only some declarations on the suppression of the 'LGBT' ideology by the local government community ("Local government free from LGBT ideology") were reviewed by the administrative courts. Nevertheless, irrespective of the differences in nomenclature, content and quantity, the analysis of the jurisprudence of administrative courts allows for the reconstruction of a pattern of an illegal act related to locally oriented decencies. For this reason, conclusions will be formulated jointly.

In this paper, the anti-LGBT resolutions are understood as normative (obliging certain entities to specific actions) and non-normative (expressing the opinion of a group of councillors) statements of municipality authorities, referring at least indirectly to the sphere of privacy and sexual orientation of a person. These resolutions do not directly affect the political rights of the municipality inhabitants. As a result of their enactment, there is no, for example, exclusion or restriction of the active and passive voting rights of EU citizens in local elections. On the other hand, in praxis, they may constitute a form of discouragement. In view of the clear declaration of the representative body, the participation in local elections of a person whose sexual orientation does not fit into the preferred (or even only acceptable) pattern, often in a single-mandate system, may turn out to be pointless.

As mentioned above, the common denominator is that the statements of the municipality authorities, regardless of their 'fulfilment' with normative elements, belong to the sphere of morality (decency). They declare[8], inter alia, that:

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[4] L. Ash, *Inside Poland's "LGBT-free zones*, BBC News, https://www.bbc.com/news/stories-54191344 (26 June 2022); R. Picheta & I. Kottasová, *You don't belong here. In Poland's LGBT-free zones, existing is an act of defiance*, CNN, https://edition.cnn.com/interactive/2020/10/world/lgbt-free-poland-intl-scli-cnnphotos/ (19 May 2023).

[5] EU was declared by European Parliament as "LGBTIQ Freedom Zone" https://www.europarl.europa.eu/news/en/press-room/20210304IPR99219/parliament-declares-the-european-union-an-lgbtiq-freedom-zone (19 May 2023).

[6] https://kartarodzin.pl/wp-content/uploads/2022/02/SKPR_commune_ENG.pdf (19 May 2023) (hereinafter: the Charter).

[7] Importantly, the Charter violates the horizontal principles of obtaining European funds – information provided by 'Atlas'. It is rightly pointed out that the EU per se does not prohibit this type of resolution, but local governments that undertake such actions will not receive funding – M. Makuchowska, deputy director of the Campaign Against Homophobia, said in an interview. D. Beker*, Samorządowa karta praw rodzin też dyskryminuje [WYWIAD],* Dziennik Gazeta Prawna, https://serwisy.gazetaprawna.pl/samorzad/artykuly/8495419,uchwala-anty-lgbt-samorzadowa-karta-praw-rodzin.html. (7 November 2023); I. Jędrzejowska-Schiffaue & M. Łączak, *The Enforcement of Non-Discrimination Law and Sexual Minorities' Rights in the EU: The Cases of Hungary and Poland*, Adam Mickiewicz University Law Review, Vol. 14, No. 1, December 2022, p. 202. "[…] some local governments have adopted so-called Charters of family rights, which in essence are anti-LGBT resolutions, albeit under the veil of protecting the constitutionally entrenched traditional family model."

[8] The list below is based on the Istebna Commune Council of September 2, 2019. Elements of the act have been translated and paraphrased. It should be mentioned that the texts of the resolutions were uniform in the communes that adopted the declaration. The original (Polish) text was included in the footnotes—where necessary.

a) in Poland, an undefined group of radicals (sic!) strives for a cultural revolution by attacking "freedom of speech, children's innocence, family and school authority, and the freedom of entrepreneurs"[9] (declaration of councillors as natural persons; no normative meaning);

b) self-government represented by the council is based on a centuries-old Christian tradition[10] (no normative content). This element of the resolution is important for its interpretation by referring to a specific system of values that consolidates one way of bringing up children and the family model tolerated in the community. The resolutions thought in this respect is illegal since it violates the obligation of public authorities to remain neutral in field of *e.g.*, religious matters. This obligation is prescribed under Polish constitution;[11]

c) councillors declare not to interfere in the "private sphere of Polish families"[12] (moral and political declaration). The wording of the resolution is discriminatory since it does not refer to the term "a person living in a municipality," but divides the members of the community into those who are protected and the rest. A contrario*,* therefore, this "private sphere of life," regardless of its semantic core, will not be protected if it concerns EU citizens other than Poles;

d) it is not acceptable to "employ guardians of political correctness in schools,"[13] which has to do with the issue of teaching about human sexuality. This content is normative because it creates the pattern of mandatory behaviour for authorities responsible for schooling and education;[14]

e) councillors do not allow "administrative pressure to apply political correctness (sometimes rightly called homopropagadna").[15] The normative nature of this provision resulted from the wording "administrative pressure," as far as its relating to self-government bodies as a public entity, and thus acting in the name and for the benefit of the state. The pattern of behaviour derived from this element of the resolution means that the administration is to exert pressure, and thus use measures to support politically incorrect activities, which is illegal both from the point of view of national and the EU law;

f) introduced to protect, inter alia, teachers and entrepreneurs "against imposing unprofessional criteria on them."[16] It should be mentioned that in the case of vertical relationships, in case K 16/17 of 26 June 2019, the so-called[17] Polish Constitutional Tribunal ruled that the provision penalising the refusal to provide a service without just cause is inconsistent with the Polish Constitution. This ruling regard the refusal to provide the service of printing posters for the LGBT foundation. However, analogous solutions are not applicable horizontally. A municipality may neither oblige non-public entities to discriminate nor provide them – due to generally applicable provisions of law – legal protection. Therefore the resolution introduces a standard of conduct, which is perma-

[9] Pol. "Radykałowie dążący do rewolucji kulturowej w Polsce atakują wolność słowa, niewinność dzieci, autorytet rodziny i szkoły oraz swobodę przedsiębiorców."

[10] Pol. "[…] deklarujemy, że samorząd który reprezentujemy – zgodnie z naszą wielowiekową kulturą opartą na wartościach chrześcijańskich […]."

[11] Supreme Administrative Court, 2022, III OSK 4240/21.

[12] Pol. "[…] nie będzie ingerować w prywatną sferę życia polskich rodzin."

[13] Pol. "Nie zgadzamy się na sprzeczne z prawem instalowanie funkcjonariuszy politycznej poprawności w szkołach (tzw. „latarników")."

[14] Provincial Administrative Court in Kielce, 2020, II SA/Ke 382/20.

[15] Pol. "Nie pozwolimy wywierać administracyjnej presji na rzecz stosowania poprawności politycznej (niekiedy słusznie zwanej po prostu homopropagadną) […]."

[16] Pol. "Będziemy chronili m.in. nauczycieli i przedsiębiorców przed narzucaniem im nieprofesjonalnych kryteriów działania […]."

[17] Since 2015, there has been doubts in Poland as to whether the Constitutional Tribunal is a court, and therefore what the legal force of its judgments is. The above was confirmed in: *Xero Flor w Polsce sp. z o.o. v. Poland* (App. no. 4907/18) ECtHR (2021). For this reason, the study refers to the so-called Tribunal.

nently unenforceable due to an obvious contradiction to the law. Similarly, the Charter provides for a certification program for "businesses that have adopted family-friendly solutions". The problem is that responsibility for this task is supposed to be laid with the local government. Not only could the certification process have a discriminatory effect, but there is also no legal basis for such actions by the authorities.

g) an obligation has been imposed on executive bodies of the local government to take actions oriented on "specific measures aimed at protecting the rights of parents and the welfare of children in school and kindergarten."[18] By this provision local self-government is declaring only certain 'types' of family life will be promoted and protected. The protection of one group is therefore to be carried out at the expense of the minority. Interestingly under this provision atypical affirmative action took place. This is to say the authorities will be positively discriminating with benefit for the group which is not underrepresented whereas, in a normal course of action, additional protection is linked with the others.

h) it would not be allowed to grant public funds on projects (proposals, social initiatives) that undermine the constitutional identity of marriage as a union of a man and woman[19]. The normative (legally binding) nature of this declaration stems from the fact that in the reviewing process, competent authority will be obliged to determine whether the proposal compliances with all criteria including the 'originalistic' view on marriage and parenthood. By the way of example under Polish law NGOs may apply for various grants and subsidies. In the context of a declaration, the question arises whether they will be eligible for funding or not if their sole purpose is to promote equality but understood by some politicians as being against 'constitutional identity of marriage.'

3. Role of administrative courts in Poland and the process of complaining against resolutions on locally oriented decencies

3.1. Administrative courts in Poland—characteristics

In Poland the control over the resolution-making activity of local units of local self-government has been subject to the jurisdiction of administrative courts. For this reason, 'anti-LGBT' resolutions were complained against to administrative courts. Administrative courts in Poland were established, in particular, to provide legal protection to individuals, i.e. entities located outside the state administrative apparatus.

Polish administrative courts are European courts within the meaning of the Treaties, and the judges vested with power to verify public administration actions are EU judges. Therefore, a complaint to the court serves the implementation of the right to an effective remedy provided for in EU law and under the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). Due to the context of the application of EU law, the administrative court, also in the cases which are the subject of the analysis, thus fulfils its dual function as the Polish judicial authority and the court within the meaning of European regulations. For these reasons, in complaints against the so-called anti-LGBT resolutions, the ombudsman made a request to the court to consider whether the matter at stake should be submitted for a preliminary ruling to the CJEU[20].

[18] The Charter, p. 5.

[19] The Charter reads: "It is especially crucial to exclude any chance of allocating public funds and public property for projects that undermine the constitutional identity of marriage as a relationship between a man and a woman […]."

[20] Jędrzejowska-Schiffaue & Łączak 2022, p. 202.

The Polish courts did not take this route[21] because as it turns out the national law creates sufficient grounds for annulment of the challenged acts of the municipality authorities.

The example of the 'anti-LGBT' resolutions showed, however, that the role of a complaint to the administrative court as an implementation tool for the right to an effective remedy provided for in EU law (Article 47 of the Charter) and based on the Convention (Article 6) may be questioned. The discussed issue is related with the scope of administrative courts' jurisdiction. Namely, who can trigger the review and what administrative actions may be challenged before the court. No less important is the issue of the scope and effects of the judicial review on rule-making activities at the local level.

3.2. Subjective aspect of access to the administrative court (*locus standi,* standing)

The Polish system of judicial review of the activities of public administration is not based on the *actio popularis* formula. In cases in which the activity of municipal (city) councils consisting in issuing resolutions is to be reviewed, the following actors are entitled to file a complaint:

a) private entities, *e.g.* resident of the municipality or local businesses; and

b) institutional entities (advocates for supra-individual interest *e.g.*, a prosecutor, ombudsman, etc.) – whose standing is not based on their own legal interest but merely on formal criteria which in turn are related to the statutory scope of tasks assigned to them.

Under applicable laws[22] the right to file a complaint in cases where the subject of the complaint is a general act, *e.g.* a resolution of the municipality council declaring a 'LGBT free zone' – having standing to challenge such an act before administrative court means proving a violation of the legal interest or right of the complainant, and thus manifesting that the resolution is affecting to the legal situation of the complainant[23]. In the context of discussed resolutions, it will mean that the complainant were obliged to demonstrate belonging to a social group to which the provisions of the resolution refer, and therefore disclosure of sensitive data within the meaning of the GDPR[24], relating to *e.g.* sexual orientation. We argue that the mere formulation of questions before a court of law relating to a private sphere of life must raise objections. What is then the optimal model of standing? One should bear in mind that the core component of the democratic states of law is the principle of equality of all citizens before the law.[25] If so the right to bring an action before the administrative court should have each person who invokes fundamental rights *e.g.,* the right to privacy or inherent dignity. Such an interpretation will however be problematic in light of Article 101 (1) of the Municipal Self-Government Act, under which the conditions for access to administrative court were laid down. Thus, it is only a proposal for future changes and therefore the question then remains the same whether social 'sensitivity' of the administrative action justifies per se the modification of the given institution.

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[21] *e.g*. Voivodeship Administrative Court in Gliwice, 2020, III SA/Gl 15/20.

[22] Act of March 8, 1990 on municipal self-government. Hereinafter: "Municipal Self-Government Act" and Act of August 30, 2002, Law on proceedings before administrative courts. hereinafter: LAC.

[23] Municipal Self-Government Act, Art. 101 (1) states: "Anyone whose legal interest or entitlement has been violated by a resolution or order adopted by a municipal body in a matter related to public administration may appeal against the resolution or order to an administrative court."

[24] Regulation of the European Parliament and of the Council (EU) 2016/679 of 27/04/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 94/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

[25] M. Doherty, *Public Law,* 2nd edn., Routledge, Milton Park, 2018, p. 304.

The legal limitations of access to court by private entities results in an increase in the importance of the collective interest advocates such as the Ombudsman, who have been granted the right to initiate administrative court proceedings[26]. In Poland, this special status is related to the prosecutor, the Ombudsman, the Ombudsman for Children, the Ombudsman for Small and Medium-sized Entrepreneurs, and when the subject of the complaint is a resolution of local government bodies – also the voivode (Pol. *wojewoda*)[27], as a supervisory authority. The complaint of such advocates cannot be rejected due to the lack of a standing.

To sum up the individual (*e.g.,* inhabitant of city, village etc.) could have difficulties in demonstrating the standing in proceedings regarding legality of anti-LGBT resolutions[28], which does not seem to be in compliance with Article 47 Charters and Art. 6 of the Convention[29]. Only the complaints filed by the advocates of the collective interest were admissible in this respect.

One type of actor involved in the protection of LGBTQ rights was omitted meaning non-governmental organizations which are called under Polish law 'societal organizations'. Further on we will discuss their input to the accountability network in Poland. For now, it is worth mentioning that their standing is also limited. Although they cannot challenge resolution before an administrative court, they can, under court decision, participate in the proceedings as an entity with the rights of a party. In the analysed cases, several NGOs reported such participation *e.g.,* Sings of Equality, pol. Federacja "Znaki Równości".

3.3. Subject of the complaint to the administrative court

The standing of collective interest advocates, in particular the Ombudsman, to challenge anti-LGBT resolutions were not questioned. However, these entities are not entitled to challenge all resolutions of local government units, but only those adopted in public administration matters[30] which led to another legal question. Namely, the administrative court was to determine whether the resolution issued by municipality X adopting the declaration on "deterring LGBT ideology by the local government community" ("Local government free from LGBT ideology") falls under the statutory requirement of being passed in "a public administration matter". For example, in its judgment of 23 June 2020, III SA/Kr 105/20, the Voivodship Administrative Court in Kraków ruled that the challenged resolution of the municipality council "does not apply to a case in the field of public administration, as it does not constitute the implementation of a public task assigned to this local government body by law, it does not impose an obligation, does not state a right or obligation, and

[26] LAC, Art. 8 reads: The Prosecutor, the Ombudsman, the Ombudsman for Children, the Ombudsman for Small and Medium-sized Entrepreneurs may take part in any ongoing proceedings, as well as submit a complaint, a cassation appeal, a complaint and a complaint to reopen the proceedings. In such a case, they have the rights of a party.

[27] Municipal Self-Government Act, Art. 93 (1) reads: After the deadline specified in Art. 91 (1), the supervisory authority cannot, on its own, declare the resolution or order of the municipality body invalid. In this case, the supervisory authority may challenge the resolution or order before the administrative court.

[28] Administrative courts found inadmissible complaints filed by private actors due to lack of standing, *e.g.*, the decision of the Provincial Administrative Court in Białystok of October 10, 2019, II SA/Bk 651/19; the decision of the Provincial Administrative Court in Poznań of April 16, 2020, II SA/Po 188/20; the decision of the Provincial Administrative Court in Poznań of December 2, 2020, II SA/Po 767/20.

[29] It should be emphasized that the administrative courts also declare inadmissibility of complaints due to lack of standing in the case of anti-discrimination resolutions *e.g.* decision of the Provincial Administrative Court in Gdańsk of September 10, 2018, III SA/Gd 636/18.

[30] LAC, art 3. (2) point 6 reads: Control of public administration activities by administrative courts includes adjudicating on complaints against [...] acts of local government bodies and their associations, other than acts of local law adopted in public administration matters.

does not create or cancel an existing legal relationship. In the opinion of the court, the submitted declaration "does not belong to the category of cases referred to in Article 18 of the Municipal Self-Government Act."

The above line of jurisprudence has met with criticism in the literature.[31] As a result of the ombudsman's cassation appeal, the Supreme Administrative Court, by its decision of 2 July 2021, III OSK 3353/21, repealed the decision of the Voivodship Administrative Court in Kraków and referred the case to the court of first instance for reconsideration. The Supreme Administrative Court pointed out that each resolution adopted by a municipality body is subject to complaint to an administrative court even if it is not an act of local law unless it has direct effects under civil law. Such 'civil' resolutions may be challenged before common courts.

The Supreme Administrative Court adopted the broadest possible interpretation of statutory admissibility requirements. The extensive view of what falls under the "public administration matter" constitutes the optimal access to judicial verification of general acts of the municipality.[32] This stand can be described as 'pro-constitutional'. On the one hand, it emphasizes the function of a complaint to an administrative court as a judicial mean of protecting human rights. On the other hand, the Supreme Administrative Court secured the systemic primacy of the administrative courts over review of administrative actions (presumption of legal route).[33]

4. Assessment of the legality of the challenged resolution resolutions on matters of preferred morality

4.1. Assessment of the legality resolutions on matters of preferred morality?

As a rule, in Poland the criterion for judicial review of administrative actions is legality. Therefore purposefulness, rationality, or morality are excluded from the court's jurisdiction but also and as such constitute prohibited indicators and reasons for review of administrative action. The challenged resolution may be annulled only when the administrative court finds a significant (substantial, serious) violation of the law[34]. This, in turn, may occurs on one of the two levels. Firstly, at substantive level, relating to the matter regulated by the act, and in other words – the subject of its regulation. Secondly, at formal level concerning the method of reaching the adoption of a resolution and/or the procedure.

The verification of the administrative court consists in comparing 'as is' with 'as it should be,' and therefore the resolution is compared with the review pattern. The review pattern, in turn, consists of positive conditions that must be met in order for the resolution to be adopted by the municipal-

[31] M. Hadel, *Problematyka aksjologicznego nadużycia kompetencji w kontekście tzw. uchwał „antyLGBT". Rozważania na kanwie aktualnego orzecznictwa sądów administracyjnych*, Samorząd Terytorialny, No. 12, 2020, pp. 7-8.

[32] A. Kwaśniak, *Stwierdzenie nieważności uchwały rady gminy w przedmiocie „strefy wolnej od LGBT". Glosa do wyroku WSA z dnia 14 lipca 2020 r., III SA/Gl 15/20*, Orzecznictwo w Sprawach Samorządowych, No. 4, 2020, pp. 105, 108.

[33] B. Dolnicki, *Pojęcie sprawy z zakresu administracji publicznej. Glosa do postanowienia Naczelnego Sądu Administracyjnego z dnia 2 lipca 2021 r., III OSK 3353/21*", Orzecznictwo Sądów Polskich, No. 7-8, 2022, p. 220.

[34] Municipal Self-Government Act, Art. 91 (4) reads: In the event of an insignificant violation of the law, the supervisory authority does not declare the resolution or order invalid, limiting itself to indicating that the resolution or order was issued in violation of the law.

ity's body, and negative conditions, i.e. the occurrence of which makes it impossible to adopt a resolution, even if the positive conditions are met beforehand. In this area, the analysis will therefore cover:

a) interplay between decencies (morality) and rights and freedoms of individuals in the local community, i.e., the question of the legal basis for adopting a resolution (positive condition)

b) assessment of the negative conditions for adopting a resolution, and therefore determining whether the content of so-called 'anti-LGBT' resolutions violate Polish and/or EU law?

4.2. Decencies and personal rights and freedoms in the local community (positive conditions for adopting a resolution)

4.2.1. Polish and EU perspective

The formal legality of an act is conditioned by the existence of a legal basis for its adoption. One should determine whether the municipality's action concerning the locally oriented decencies falls within the scope of statutory prescribed competences. To do so it's necessary to compare the legislative activity at hand with the Article 18 (1) of the Municipal Self-Government Act which constitute the catalogue of the municipality's task and activities. Nevertheless, this assessment must be preceded by general comments on the admissibility of introducing such authorization into the legal system. In other words, is it possible to authorize the commune to act in the sphere of morality and who is competent in this field.

The rights to privacy and family life, freedom of thought, conscience and religion, and freedom of expression, covered by the Convention, are not absolute. The necessary limit to the exercise of these rights must be determined considering the exercise of the same rights and freedoms by other members of the community. Interference by public authority in the exercise of the right to privacy may be justified in cases provided for by law and necessary in a democratic society due to state security, public safety or economic well-being of the country, protection of order and crime prevention, protection of health and morals or protection of the rights and freedoms of others (Article 8(2) of the Convention). The same circumstances are listed in Article 31 (3) of the Constitution of the Republic of Poland, as they may justify restrictions on the exercise of constitutional freedoms, with the reservation, however, that the established restrictions may not violate the essence of freedoms and rights.

Both in the light of the Convention, and the Polish constitution, restrictions on the exercise of personal rights and freedoms may be treated as justified after their establishment by a decision of the competent authority ("in cases provided for by law")[35], and besides, they must be justified with regard to the purpose of the introduction, and therefore the value they are intended to protect ("due to..."). In Polish conditions, the powers to legislate universally binding law were established at the national level for the benefit of the parliament; however, the law applicable locally may also be created by local government units. The Convention (*e.g.,* Article 8(2)) and the Polish constitution

[35] As explained by the ECtHR in its judgment *Weiser i Bicos Beteiligungen Gmbh v. Austria* (App. no. 74336/01) ECtHR (2007), an interference with privacy cannot be considered "prescribed by law" if it does not have, above all, some basis in national law. In meaning of Article 8 (2) of the Convention, the term 'law' should be understood in a 'substantive' and not 'formal' sense. In the field covered by written law, the 'act' is a binding legal act as interpreted by the competent courts.

(Article 31(3)) mention the protection of morality as a justification for the establishment of restrictions on the exercise of personal rights and freedoms. Morality, identifying and bringing together the values recognized by members of society, the realization of which—as good—they should strive for in their attitudes and the evil that they should avoid, is one of the social normative systems. Moral norms have a religious and philosophical origin, and the rules of conduct derived from them are subject to certain changes over time and in cultural conditions. Yet many of them have a permanent and universal dimension. However, not only such norms are addressed to us. In the process of socialization, our attitudes are also shaped by moral norms adopted in the community in which we function. The content of these norms should not be controversial. Therefore, morality seems to be something else than preferences in terms of decencies.

The discussed matter is sensitive, and the approach to it may differ among the Members States of the EU to such an extent that moral issues may be addressed with restraint by European law and authorities including judiciary branch of governance.[36] Interestingly the right to respect for private and family life, home and communications prescribed under the Article 8 of the Charter was implemented into national legal systems without any reservations whereas the right to marry and to found a family will be guaranteed in accordance with the national laws governing the exercise of these rights (Article 9 of the Charter), and the right to refuse to act against one's conscience, is to be exercised in accordance with the national laws governing the exercise of this right (Article 10 of the Charter).

In the judgment of July 16, 2019[37], the ECHR, referring to its earlier jurisprudence, reminded that public authorities are obliged to guarantee appropriate space for action and gathering, without being exposed to violence from opponents to members of associations representing minority views on decencies. In the case of discrimination based on sexual orientation, the State's margin of discretion to introduce a difference in treatment is narrow, and its application requires convincing and compelling reasons.[38]

In this context, it is also worth noting the EU's stand to the discussed matters. Undoubtedly on the political and symbolic level, actions are being taken to intensify the protection of LGBTQ rights. As an exemplary would serve the legislative proposals related to so-called 'rainbow families.'[39] In turn, the analysis of the CJUE jurisprudence shows that the court is quite moderate to comment on issues that are objectively human rights but may, from a national perspective, raise questions about the conflict of law, morality, and worldview. The court shows a high degree of deference towards the Member States and the national laws. Let us take as an example the judgment of the Court (Grand Chamber) of 14 December 2021 in case 490/20, V.M.A. v Stolichna obshtina, rayon "Pancharevo", [EU:C:2021:1008]. In Recital 52, the CJUE states that: "The Member States are thus free to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law. Nevertheless, in exercising that competence, each Member State must comply with EU law, in particular, the provisions of the FEU Treaty [...]". Importantly, however, the ideological factor does not constitute a proper justification for establishing a legal basis at the national level for discriminatory actions that may result in hate speech, and which will lead to the

[36] *e.g. Orlandi v. Italy* (App. no. 26431/12) ECtHR (2017); Case 673/13, Commission v. Stichting Greenpeace Nederland and PAN Europe*;* Case 528/ 13, Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du san, [EU:C:2015:288].

[37] *Zhdanov and others v. Russia* (App. no. 12200/08) ECtHR (2019).

[38] *X and others v. Austria* (App. no. 19010/07) ECtHR (2013).

[39] Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final.

violation of human rights.

Also in Poland, there are instances of rather ambivalent interpretation of LGBTQ rights. By the way of example, the judgment of the Supreme Administrative Court of July 6, 2022, II OSK 2376/19, gained media publicity. On the one hand, the court declared the legality of the authority's refusal to transcribe a same-sex marriage certificate. On the other hand, court, in the context of the constitutional provision on marriage, pointed out the following: "[t]his provision does not mean that it is impossible to legally regulate same-sex relationship […].The court of first instance shared the applicants' position that the above constitutional principle results not so much in the constitutional understanding of the institution of marriage, but in the guarantee of special protection and care of the state for the institution of marriage, but only on the assumption that it is a relationship a woman and a man. For this reason, as rightly noted by the court of first instance, the content of Article 18 of the Constitution could not constitute an independent obstacle to transcribing a foreign marriage certificate if the institution of marriage as a union of persons of the same sex was provided for in the national order. As indicated above, the discussed provision of the Constitution does not prohibit the statutory regulation of same-sex relationships. Currently, the Polish legislator has not decided to establish this type of solution.". In the literature, the judgment was criticized[40]. Indeed, the justification is not coherent.

4.2.2. The role of local government communities in Poland in the 21st century

Since restrictions on the exercise of personal rights and freedoms may be treated as justified after they have been established by a decision of an authorized authority, it is also necessary to consider whether such authorities are the bodies of Polish self-government communities, and if so, what is the scope of their independence and empowerment in a unitary state, such as Poland, to encroach on personal rights and freedoms, whether such interference is admissible at all or under what conditions. The characteristics of the role of self-government communities in Poland are of key importance for the answer to this question.

The role of a national legislator in designation of the place for local territorial government in the organisational structure of a state is described in the European Charter of Local Self-Government 1985, which in Article 4 (2) and Article 4 (1) first sentence states that: "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority," and "The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute."

According to Article 165 (2) of the Polish Constitution, local self-government is independent in its operation, which is expressed, inter alia, in the fact that it performs the public tasks assigned to it on its own behalf and under its own responsibility.

In the Polish three-tier model of local government, the basic structures are municipalities operating pursuant to the Municipal Self-Government Act of 8 March 1990. It follows from the systemic regulations determining the place of a municipality in the organisational structure of the state, its tasks and competences of the organs implementing them, that the municipality as a subject of public law is not autonomous, but only relatively independent (self-governing).[41] It has the right to perform

[40] B. Wojeciechowski, *Refleksje na temat dynamiczności i deliberatywności wykładni trudnych przypadków na przykładzie spraw dotyczących osób LGBTQ+,* Archiwum Filozofii Prawa i Filozofii Społecznej, Vol 33, No. 4, 2022, p. 30.

[41] D. Dąbek & J. Zimmermann, *Decentralizacja poprzez samorząd terytorialny w ustawodawstwie i orzecznictwie pokonstytucyjnym*, in P. Sarnecki (Ed.), Samorząd terytorialny. Zasady ustrojowe i praktyka, SGH, Warszawa, 2005,

administrative functions derived from the state. When exercising its competences in the field of public administration, it acts in compliance with the common state legal order, and the effectiveness of its actions is also secured by state coercion. These statements are confirmed in Article 7 in connection with Article 2 of the Polish Constitution, in the light of which public authorities operate on the basis and within the limits of the law. [42]

Article 6 of the Municipal Self-Government Act implies that the scope of the municipality's activity includes all public matters of local importance, not reserved by statutes for other entities, including adjudication in individual cases on such an issue. The tasks of a municipality defined in this way include, as its own task, satisfying the collective needs of the community, and activity in this field includes, among others, meeting the basic living needs of residents (energy supply, water, sewage collection), care for spatial order, communication and public transport, environmental protection, but also supporting families and satisfying the health, cultural and educational needs of the residents.

In the light of Article 1 (1) and Article 11 (1) of the Municipal Self-Government Act the basic substrate of the municipality, its 'building blocks,' are the inhabitants, because they form the self-governing community.[43] They are responsible for making decisions in universal voting (by elections and referenda) or acting through municipality bodies. This means that municipality brings together the inhabitants of the area assigned to it, but on the other hand, the activities of its organs should be undertaken after learning the opinions and postulates of community members, considering their interests and goals. Therefore, municipality authorities should seek information on the needs of community members, and they should choose solutions of which they can reasonably claim that they serve them optimally.

A self-government community is perceived as an organiser of social life located closest to its members. Living in the same area usually results in certain circumstances uniting its inhabitants. The properties of the land (shaped, for example, by geographic location, climate, soil, management) have an impact on the occupation of its inhabitants; historical tradition and shared experiences bring a certain community of values important to people who make up a local government unit, but also an awareness of the needs and aspirations of these people. Therefore, the local authorities should seek information about the needs of community members, and in their choices, they should prefer those solutions that they can reasonably say that they optimally serve them.[44]

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pp. 9-10.

[42] As rightly noted by W. Skrzydło, in a democratic state governed by law, organs of public authority may be established only on the basis of the law, and legal norms must define their competences, tasks and procedures, thus setting the limits of their activity. These organs can only function within these limits. While the individual is free to act in accordance with the principle that what is not expressly prohibited by law is permitted, public authorities may only act where and insofar as the law authorizes them to do so, and the citizen may always demand that there be grounds for legal area in which the authority undertook specific activities .W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Wolters Kluwer Polska, Warszawa, 2013, p. 21). In a democratic state, the principle that everything that is not prohibited is allowed does not apply to entities of public authority; instead the opposite principle applies: everything that is not allowed is prohibited. M. Kamiński, *Mechanizm i granice weryfikacji sądowoadministracyjnej a normy prawa administracyjnego i ich konkretyzacja*, C.H. Beck, Warszawa, 2016, p. 61; J. Alder, *Constitutional and Administrative Law*, Palgrave Macmillan Law Masters, London, 2005, p. 127; and: Polish Constitutional Tribunal, 1994, W 7/94. Those arguments serve as part of justification for declaring by administrative courts that resolutions proclaiming 'LGBT-free zones' were null and void.

[43] With the inhabitants having such a creative meaning for the municipality, it can be perceived as a legal entity of a corporate nature. Z. Niewiadomski, *Samorząd terytorialny*, in R. Hauser & Z. Niewiadomski & A. Wróbel (Eds.), System prawa administracyjnego, t. VI, Podmioty administrujące, C.H. Becki, Warszawa, 2011, p. 116.

[44] The instruments allowing to obtain this knowledge are forms of direct democracy, namely elections (of councilors, mayor, and village leader), commune referendum and other forms of obtaining information by the municipality author-

The static perception of a local government unit as an area for years inhabited by the same community of people requires correction in the modern world, where the ideas of free movement of people and capital are realised, and in a society whose members are increasingly mobile, they are associated with a specific place not for a lifetime, but for the time of study, work or performance of certain social tasks, and according to their needs they move to other places.[45]

In their daily activities, municipalities do not use forms of direct democracy, and exercise powers by acting through bodies. All matters within the scope of the municipality's activities belong to the jurisdiction of the municipality council[46] (Article 18 (1) of the Municipal Self-Government Act), which is a collegiate body, derived from elections. In Article 18 (2) of the Municipal Self-Government Act the legislator listed matters relating to the municipality, which fall within the exclusive competence of the council. They can be generally considered organisational and financial.

On the basis of statutory authorisations, in the form of resolutions, the municipality council may pass acts of local law (Article 41 (1) and Article 40 (1) of the Act), with the binding force limited to the boundaries of the municipality. The subject of this law can only be a matter that the legislator has explicitly transferred to the municipality, leaving it with a limited freedom as to the manner of its regulation.[47]

4.2.3. Communes in Poland do not have a legal basis to adopt 'anti-LBGT' resolutions

As far as 'anti-LGBT' resolutions are concerned, the Polish legal system does not create the explicit and concrete legal grounds authorizing the municipality council to adopt such resolutions. For this reason, municipalities, or more precisely their legislative bodies (councils), adopting anti-LGBT resolutions, referred to Article 18 (1) of the Municipal Self-Government Act. This provision does not mention delegating the authority to formulate statements on ideological and moral issues to the municipality council. Also, in the statutory catalogue of the matters that may be regulated by local law, there is no question of establishing any rules of morality and decency, which – due to the spatial boundaries of binding acts originating from local government – should be local in nature. For these reasons, administrative courts declared that 'anti-LGBT' resolutions are invalid since they are lacking the legal ground to adopt them.[48]

The municipality, as well as the state and all its organs, must respect the constitutional and statutory order, including the principle of legality which should be understood that public entities are not

ities about the needs and preferences of various groups of commune residents.

[45] The above factors mean that more and more people do not live in one place, but divide their time between different places with which they feel equally connected not only because of their physical stay for some time a year and a certain emotional relationship to them, but also because in all these places they pay taxes, participate in social life and have their own expectations as to how the functioning of these communities will be organized. De lege lata, the problem is that the form of direct democracy, which boils down to participation in elections to the commune's representative bodies, can only be used by its registered inhabitants, and each natural person can have only one place of residence. This means that each adult citizen has an influence on appointing a representative body in only one municipality in the country, regardless of how closely he is associated with it.

[46] In municipalities with the status of cities—city council.

[47] These are: the internal structure of the municipality and auxiliary units, the organization of municipality offices and institutions, the rules of managing municipality property, the rules and procedure of using municipal public utility facilities and devices Municipal Self-Government Act, Art. 40 (2).

[48] *e.g.*Voivodeship Administrative Court in Lublin 2020, III SA/Lu 7/20, ruled that resolution is invalid since it is missing legal basis and in turn municipality violated the principle of legality prescribed under Article 7 of Polish constitution.

allowed to do everything, but only such activities as authorized by the law. This means that even under the law on petitions[49], the municipal authorities cannot express their opinions on any freely chosen topic on their own behalf. If, however, they breached this rule, as was the case with the adoption of anti-LGBT resolutions, the resolution adopted by them will be the view of a particular political majority, which was so numerous that it was able to fill a council of a specific municipality, but not sufficiently numerous to push their agenda and amendment the Constitution. Of course, people who are members of the municipality council and who would like to inform the community about their preferences in moral matters may do so by signing a joint statement. However, this will be an expression of their individual views, under which they should put their own name, without using the municipality council sign, which they may use only when they act based on statutory competences and within its limits. Regardless, it is doubtful that the statement written by a few or a dozen people, usually unknown outside the municipality community in which they operate, and being a manifestation of their moral preferences, would interest the public. The situation is different when these people make such a manifestation using the sign of the municipality council.

Not only state authorities are not entitled to push ideological agenda but are under obligation to counteract homophobic actions of public officials, and in the event of taking such actions—to efficiently remove their effects and eliminate the causes of.[50] They are responsible for omissions in this respect.

At this point, it is necessary to highlight the difference between declarations on "deterring LGBT ideology" ("Local government free from LGBT ideology"), combating homophobia, and promoting non-discrimination attitudes by the local government community. The first action lacks legal basis and as such is illegal. The second action is mandated by law. In turn, the municipality's actions in the affirmative sphere are legally indifferent. On the one hand, those activities as a rule are not mandated by law. On the other hand, they seem to be legal since the aim is to promote human rights. Namely, the activity aims at informing and promoting, not creating laws. The Polish example of such initiative is provided by the city of Gdańsk, where the "Model for Equal Treatment" was adopted and challenged by voivode before administrative court. The Provincial Administrative Court in Gdańsk, in the judgment of December 20, 2018, III SA/Gd 718/18, declared that the resolution was partially invalid for formal reasons. Nevertheless, some arguments are worth emphasizing as follows:

a) validity of legal basis for adopting the resolution. The court argued that "a sufficient legal basis for the contested resolution, which is not an act of local law, is Article 18 (1) Municipal Self-Government Act and Article 18 (2) point 15 of the Municipal Self-Government Act, according to which the competence of the municipal council includes deciding on other matters reserved by statute to the competence of the municipal council.

b) the city council's directives (guidelines) which are making the mayor (city president) responsible for taking non-discrimination measures are legal. However, according to the court, the way the resolution was to be implemented was specified in too much detail, which led to a violation of Art. 18 (2) point 2 Municipal Self-Government Act.

c) introducing into the resolutions "conceptual categories related to the phenomenon of discrimina-

[49] In the Polish legal system, everyone is entitled to submit complaints and requests regarding the activities of public administration. Therefore, a citizen's complaint about the mayor's negligence in field of local morality cannot be ruled out. The situation caused by such a complaint is sensitive. On the one hand, the authority is under legal obligation to 'respond' to the complaint. On the other hand, is forbidden to make moral judgments. Therefore, competed authority should refer to the scope of the municipality's activities. Formalism in this case protects against moralizing and, at the same time, illegal activities.

[50] *Aghdgomelashvili and Japaridze v. Georgia* (App. no. 7224/11) ECtHR (2020).

tion" and taking "from the achievements of social sciences and the jurisprudence of the Court of Justice of the European Union" is legal.

d) the phenomenon of discrimination is nationwide, however, several problems diagnosed on a macro scale are also important for the local community (the city of Gdańsk). Under Polish law the legality of the resolution is conditioned by the 'local' character of the rulemaking activity.

Incidentally, it should be noted that the complainant in this case was the voivode. Therefore, we are dealing with a different situation than in the case of complaints against the so-called 'anti-LGBT' resolutions. Voivode is a supervisory body for local self-government, so ideally, the complaint should be based on the fact that the resolution is violating the legal order. However, from a practical perspective, due to the political status of the voivode,[51] by lodging the complaint with administrative court instrumentalization of supervision may have taken place. This would be evidenced by the initiation of administrative court proceedings not so much to remove an illegal act from legal order, but to annul the resolution that is not in line with the state policy implemented in a given period. The de facto 'inaction' of voivodes when it comes to challenging the declarations "deterring LGBT ideology" ("Local government free from LGBT ideology") by the local government seems to make this hypothesis more probable.

The case from Gdańsk is no exception here. Also, in court proceedings regarding declarations "deterring LGBT ideology" ("Local government free from LGBT ideology") an atypical arrangement arises in court.[52] Interestingly, the convergence of views on the legality of the complained resolutions occurred in the group composed of inter alia the prosecutor and the municipality, while the opposition included the complaining ombudsman and anti-discrimination organizations (*e.g.* Sings of Equality, Polish "Znaki Equality" Federation). In this context, it cannot be ignored that some judgments of provincial administrative courts declaring the invalidity of the so-called 'anti-LGBT' resolutions were appealed to the Supreme Administrative Court by a prosecutor of the National Prosecutor's Office[53].

4.3. Whether the content of 'anti-LGBT' resolutions violate Polish and/or European law?

The analysis shows that, as a rule, Polish law does not provide for general competence of public authorities to express opinions in matters of local decencies, unless there is an explicit basis for the right to refer to the issue of morality in connection with the protection of other socially relevant values. However, what makes cases concerning complaints about the so-called anti-LGBT resolutions interesting is that despite the lack of a legal basis for adopting them, the courts undertook a review of actions in terms of their content and discriminatory nature, although due to the lack of a legal basis for the challenged action, it was mandated for courts to declare such a resolution null and void.

What Polish administrative courts have done was of the educational importance and as a such serves as a tool for building the legal awareness of the society and may be seen as precaution for

[51] Pursuant to Article 22 of the Act of January 23, 2009, on the voivode and government administration in the voivodeship, the voivode is responsible for implementing the policy of the Council of Ministers in the voivodeship. The literature indicates that from a practical point of view, policy acts are de facto binding. M. Pacak & K. Zmorek, *Ustawa o wojewodzie i administracji rządowej w województwie. Komentarz,* LexisNexis 2013, Art. 22, para. 3. It is the voivode who adapts the government's policy to local (provincial) conditions. P. Sadowski, *Relacje administracji samorządowej i rządowej w świetle kompetencji marszałka województwa i wojewody*, Przegląd Prawa Publicznego, No. 5, 2019, p. 80.

[52] The above findings were based on the analysis of case law and data provided to the 'Atlas of Hate'.

[53] Jędrzejowska-Schiffaue & Łączak 2022, p. 202.

other municipalities. So, the effects of possible implementation[54] of the legal basis for so-called anti-LGBT resolution (*e.g.,* by amending to Municipal Self-Government Act) were assessed by the judiciary in an anticipatory manner. That being said the answer seems to be unequivocal. Such a resolution would still be illegal. Negative premises for the adoption of the resolution stems from both national and European law.

On the national plate[55] the so-called anti-LGBT resolutions violated:

a) the principle of ideological neutrality (impartiality) of public authorities (Article 25 (2) of the Constitution of the Republic of Poland);

b) freedom of conscience and religion of individuals (Article 53 of the Polish Constitution);

c) the principles of respecting the dignity of the human person (Article 30 of the Polish Constitution);

d) the principle of equality before the law (Article 32 of the Polish Constitution);

e) the principles of a democratic state ruled by law (Article 2 of the Constitution of the Re-public of Poland).

However, we must also observe the supranational aspect of the case. The states parties of the Convention undertook obligation to ensure to every person subject to their jurisdiction the rights and freedoms specified therein, including respect for private and family life (Article 8(1)), freedom of thought, conscience, and religion (Article 9(1)), to freedom of expression (Article 10(1)). The exercise of these rights and freedoms is to be ensured without discrimination on grounds such as *e.g.*, sex, race, political or other opinion, (Article 14).

The European Union, of which Poland has been a member since 1 May 2004, has also acceded to the Convention, within the limits of its competences defined in the Treaties. Fundamental rights, guaranteed in the Convention and resulting from the constitutional traditions common to the Member States, were recognized by the European Union as part of EU law as general principles of law (Article 6(2) and (3) of the 1992 EU Treaty).

In the light of the EU Charter of Fundamental Rights of 7 December 2000, which has the legal force of the Treaties, human dignity is an inviolable value that requires respect and protection (Article 1). The Charter guarantees everyone the right to respect for private and family life, home and communications (Article 7).

The European Union, based on the values of respect for human dignity, freedom, democracy, equality, the rule of law, as well as respect for human rights, including the rights of persons belonging to minorities, as values common to the Member States in a society based on pluralism, non-discrimination tolerance, justice, solidarity and equality between women and men, declares to provide its citizens with an area of freedom, security and justice without internal borders, in which the free movement of people is guaranteed. Implementation of the free movement of people as one of the four fundamental freedoms in the EU[56], as well as declared in Art. 15 of the Charter, the right to

[54] The symptomatic phenomenon of 'correcting' judicial decisions by the legislator has been identified based on the rights of non-heteronormative persons in the context of the law of entering into marriage in the USA which was analysed by S. Zschirnt, *Gay Rights, the New Judicial Federalism, and State Supreme Courts: Disentangling the Effects of Ideology and Judicial Independence*, Justice System Journal, Vol. 37, Nov. 4, October – December 2016, p. 348. See also Voivodeship Administrative Court in Kielce, 2020, II SA/Ke 382/20.

[55] Jędrzejowska-Schiffaue & Łączak 2022, pp. 200-201.

[56] Also Directive 2004/38/EC on the legal right of the Union and their family to move and reside freely within the

take up work and pursue a freely chosen or accepted occupation (paragraph 1), the freedom to seek employment, to pursue work, to exercise the right of establishment and to provide services in any Member State (Article 15(2)) is possible on a non-discriminatory basis environment. In Art. 21 sec. 1 of the Charter prohibits any discrimination against subjects subject to EU law, in particular on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

The resolutions in question not only limited the right to free movement of EU citizens or were a tool of discrimination in employment but also operated on a quasi-censorship mechanics. Against this background case-based argumentation may serve as a subsidiary tool for demonstrating the lack of legality of the actions of some Polish local governments. On the one hand, the mere announcement of the exclusion of a person or a specific group of people from the community is not as clear a manifestation of discrimination as the refusal to issue an ID card or passport due to the sexual orientation of the parents.[57] Nevertheless, the effect is the same. The message from public authorities is: 'You are not welcome.' This, however, undoubtedly constitutes a publicly made announcement of discrimination at the recruitment stage of employment.[58] It should be emphasized that municipalities are employers.[59] In turn, the fact that a given commune was not conducting any recruitment at a given time has no legal significance.[60] On the other hand, deterring only selected worldviews while preferring others leads to violation of freedom of expression.[61]

5. Public administration in relation to LGBT community in Poland

As it was mentioned above Polish administrative courts did not limit their arguments to domestic law—although there were grounds for doing so. Administrative courts boldly referred to the

territory of a Member State. See: Case C-413/99, Baumbast and R v. Secretary of State for the Home Department, [EU:C:2002:493].

[57] Case C 490/20, V.M.A. v Stolichna obshtina, rayon „Pancharevo", [EU:C:2021:1008]. In recital 64, the CJUE indicated that: "[…] for the child, the principle of non-discrimination, which requires that that child is to be guaranteed the rights set forth in that convention, which include in Article 7 the right to be registered immediately after birth, the right to a name and the right to acquire a nationality, without discrimination against the child in that regard, including discrimination on the basis of the sexual orientation of the child's parents.". Court also argue as following: "It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected." Case 673/16, Coman and Others, [EU:C:2018:385], para. 47.

[58] Case C507/18, NH v. Associazione Avvocatura per i diritti LGBTI, [EU:C:2020:289]. In recital 58, the CJUE indicated that: "[…] the concept of "conditions for access to employment … or to occupation" in Article 3(1)(a) of Directive 2000/78 must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical."

[59] Supreme Administrative Court, 2022, III OSK 4028/21.

[60] A. Tryfonidou, *Case C-507/18 NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford: Homophobic speech and EU anti-discrimination law*, Maastricht Journal of European and Comparative Law, Vol. 27, No. 4, September 2020, p. 517.

[61] *Macaté v. Lithuania* (App. no. 61435/19) ECtHR (2023). To the extent that the so-called anti-LGBT resolutions limited access to information in schools seeking to influence the curriculum.

provisions of the Constitution of the Republic of Poland[62], EU law[63], the jurisprudence of the CJEU[64] and the ECtHR.[65] This proves that the problem of 'anti-LGBT' resolutions was not only Polish (national).[66] The municipalities actions were in fact a declaration of freedom not so much 'from' ideology, but paradoxically from the basic principles anchored in the legal order.

Subsequent studies confirm that the issue of discrimination against the LGBTQ community is not a Polish specialty. However, the Polish experience can serve as a negative example. All actions of state authorities, whether individual or general, which would result in the exclusion of a person from the community are illegal. On the bright side, one can get the impression that, paradoxically, the actions of the Polish local government accelerated the process of formalizing the protection of the rights of LGBT people at the EU level.

Polish experience also proves that the EU is moving away from the market model in the area of human rights. Just a few years ago such a shift was not obvious at all.[67] Nevertheless, the main argument for the protection of the rights of LGBTQ people remains the free movement of people[68], which is also confirmed by the Romanian[69] and Bulgarian[70] cases. Free movement is guaranteed to everyone, regardless of their identity. Public authority in the EU cannot create barriers, even if only of a political nature. This is also the case under Article 8 of the Convention.[71]

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[62] In the opinion of the courts, the introduction of resolutions constituted a violation of the right to education. Article 70(1) and Article 73 of the Constitution; and a restriction of freedom of expression Article 54(1) of the Constitution. Judgment of the Voivodeship Administrative Court in Gliwice, 2020, III SA/Gl 15/20; and the right to bring up children in accordance with one's own beliefs. Article 48 of the Constitution. Judgment of the Provincial Administrative Court in Kraków, 2022, III SA/Kr 975/21.

[63] Voivodeship Administrative Court in Warsaw, 2020, VIII SA/Wa 42/20: the appealed resolution establishing an LGBT-free zone violates Art. 21 sec. of the Treaty on the Functioning of the EU by limiting the freedom of movement, by discouraging EU citizens who identify as LGBT from staying in the commune. Also: Supreme Administrative Court, 2022, III OSK 4240/21.

[64] *e. g.*, Supreme Administrative Court, 2022, III OSK 4028/21—in its argumentation, refers to: Case 507/18, NH v. Associazione Avvocatura per i diritti LGBTI, [EU:C:2020:289].

[65] For example: Supreme Administrative Court, 2022, III OSK 4240/21, indicated: *Handside v. Great Britain* ECtHR (1976)—in the case of does not cover the situation of expressing a worldview by a commune. Similarly Supreme Administrative Court, 2022, III OSK 4041/21.

[66] Supreme Administrative Court, 2022, III OSK 4041/21: which indicated that Poland is a party to a number of international agreements on human rights, including the ECHR and the EU Charter of Fundamental Rights, it has also transposed EU directives against discrimination in employment, including on grounds of sexual orientation. Therefore, public authorities are legally obliged to protect the rights of Polish citizens, in particular those belonging to various types of minorities.

[67] S. Douglas-Scott, *The European Union and Fundamental Rights,* in R. Schütze & T.Tridimas (Eds.), Oxford Principles of European Union Law: The European Union Legal Order: Volume I, Oxford University Press, Oxford, 2018, p. 419.

[68] Jędrzejowska-Schiffaue & Łączak 2022, p. 189: "The absence of protection of sexual minorities in salient socio-economic areas is also partly compensated by the safeguards provided under the freedom of movement within the EU territory."

[69] Case 674/16, regarding marriages.

[70] Case 490/20, regarding parenthood and child right who is minor and EU citizen.

[71] *Novruk and Others v. Russia* ECtHR (App. no. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14) (2016), § 83; *Taddeucci and McCall v. Italy* (App. no. 51362/09) ECtHR (2016), § 83.

6. Restitution of legality in field of LGBTQ right – mechanics and model

The legal system is composed of various tools aimed at coping with the discriminatory actions of public authorities. Violation of the principle of non-discrimination is sanctioned in legal or financial forms. The sanctions also take on an informal character—criticism of public, international organizations, media, and experts.

Adoption so-called LGBT-free zones, triggers the reaction of civil society institutions, ombudsman, national courts, EU institutions (European Parliament,[72] European Commission[73]), Council of Europe,[74] or even foreign partners, including twinning programs.[75] The sum of these activities over the years has brought an improvement in the situation. What is more, in the agreement with the European Commission under the Recovery and Resilience Plan, the Polish government undertook the obligation to respect the principle of non-discrimination.[76] In legal paper it is impossible to assess which of the measures were more effective. It seems that in this case a network approach should be used.

The activity of non-governmental organizations, hosts of cities opposing declarations of freedom from LGBT and the media resulted in assigning a high rank to the problem. Without the ombudsman, court proceeding would be inadmissible. As for the courts, let us remember that some of them rejected the complaints, but the Supreme Administrative Court acted as an advocate of the rule of law. The result of these actions was the annulment of the challenged resolutions. Yet legal actions are of an individual nature. They concern a specific local government unit and a specific resolution (micro scale). It must be however stressed that courts must have specific tools to act as promoters of non-discrimination. Therefore, the regulation at the EU level is absolutely necessary.[77]

On a macro scale, the dynamics of the analyzed process followed slightly different paths. A court ruling may establish an order of conduct, but only with respect to a specific municipality, i.e., the one whose resolution was challenged before administrative court. The courts however have created a pattern of illegal behaviour. Namely the presumption of lawfulness of resolutions has been weakened by the power of the court's authority. Having an argument based on court judgments, the Ombudsman could act against the municipalities. In this case, he petitioned the authorities to reverse the resolutions on their own.[78] A similar modus operandi was adopted by NGOs.

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[72] European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones (2019/2933(RSP))**.** T.3.: "Strongly condemns […] as well as the recent declarations of zones in Poland free from so-called 'LGBT ideology', and calls on the Commission to strongly condemn these public discriminations".

[73] On 15.07.2022 European Commission launched infringement procedure against Poland https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668 (7 November 2023).

[74] Ibid

[75] E. Kalitta, *Strefy wolne od LGBT a aksjologiczny aspekt partnerstwa miast*, Samorząd Terytorialny, No. 11, 2021, pp. 26-33; Z. Wanat, *Polish towns pay a steep price for anti-LGBTQ views,* Politico*,* https://www.politico.eu/article/poland-lgbtq-steep-price/ (7 November 2023).

[76] Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, Brussels, COM(2022) 268 final.

[77] *e.g.* Regulation on the recognition of parenthood between Member States. Document Ares(2021)2519673; Jędrzejowska-Schiffaue & Łączak 2022, p. 198. "[…] standards in Central and Eastern Europe has shown that the Union is to a large extent powerless in the face of a defiant Member State refusing to take the values of Article 2 TEU seriously."

[78] Detailed information is available on the website of the Polish Ombudsman. https://bip.brpo.gov.pl/pl/content/rpo-uchwaly-anty-lgbt-samorzady-odpowiedzi-kolejne (7 November 2023).

The third effect was caused by the actions of EU[79] institutions and supranational initiatives (*e.g.*, European Economic Area Financial Mechanism[80]), which are not in power to declare that such resolutions are null and void. Interestingly, the EU institutions acted prior to the judgments issued by Polish courts.

The sum up these activities resulted in withdrawal by some local governments from previous declarations. Local authorities have realized that it is not profitable[81] to maintain the discriminatory status quo.[82]

7. Summary. Forecast for the future

The practice has shown that despite extensive guarantees of civil rights and freedoms in a country declaring ideological neutrality, no one else but the public authorities recognized that they are competent to declare the lack of acceptance for certain people due to their sexual preferences and way of life. It also showed that the protection of violated and endangered values can be ensured using instruments available in the national legal order in the form of court-administrative verification. It seems that system at least worked. Administrative courts granted legal protection, some local governments withdrew from previous declarations and the European Commission on 26.01.2023 closed the infringement procedure against Poland regarding violation of the principle of sincere cooperation by Poland for failing to fully answer questions on the so-called 'LGBT ideology free zones' resolutions (INFR(2021)2115).[83] Does it means that the issue discussed in this article is no longer relevant? Well, from a legal perspective, new challenges are on the horizon. Firstly, we must remember that not all local governments withdrew the declarations (resolutions). There is still much work to be done in this area. Especially the public law academia must consider how to restore legality as quickly as possible. Secondly, the new challenges for LGBT rights arrived. These solutions were modelled on a disturbing legislative and administrative trend recognized, among others, in some US states or in Russian Federation.

Additionally, for some time, efforts had been made to ensure that some provisions of the so-called 'anti-LGBT resolutions' become part of the legal order.

Firstly, in October 2021, the Sejm of the Republic of Poland received a bill "Stop LGBT"[84] promoted by Kaja Godek, providing for far-reaching restrictions on the rights of LGBT persons. It assumes, among others: the prohibition of organising 'equality parades,' questioning marriage as a relationship between a man and a woman, promoting same-sex relationships, extending the defini-

[79] Jędrzejowska-Schiffaue & Łączak 2022, p. 198: "On 27 May 2020 the Commission addressed a letter to five local government authorities […] The EC called on the local authorities to ensure compliance with EU law and to ensure non-discriminatory access to activities financed by cohesion policy".

[80] R. Savage, *Norway, Iceland, Lichtenstein cancel grant to Polish 'LGBT-free zone'*, Reuters, https://www.reuters.com/article/us-poland-lgbt-norway-trfn-idUSKBN2A22MD (7 November 2023).

[81] Jędrzejowska-Schiffaue & Łączak 2022, p. 199. "The financial sanction proved to be effective and some local governments have already repealed the resolutions in question."

[82] Which is documented by press reports: A. Karwowska, *„Strefy wolne od LGBT" bez pieniędzy z Unii*, Wyborcza, https://wyborcza.pl/7,75398,29769197,zadnych-pieniedzy-bez-poszanowania-wartosci-tzw-strefy-wolne.html (7 November 2023).

[83] Information available via this search form: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en (7 November 2023).

[84] *Bill "Stop LGBT" in the Sejm. MEPs debate during first reading,* PolishNews, https://polishnews.co.uk/bill-stop-lgbt-in-the-sejm-meps-debate-during-first-reading/ (7 November 2023).

tion of marriage to persons of the same sex, promoting the definition of gender as an independent phenomenon from biological conditions. Unlike the commented resolutions, this act would have binding force throughout the country and must be implemented by the authorities.

Secondly, in May 2023, the Madam Speaker (Marshall) of the Sejm and the leader of the then ruling party announced a law aimed at modifying the rules under which NGOs may operates in schools. The proposal was about preventing the 'exualization of children'. This initiative de facto means the introduction of one of the elements of anti-LGBT resolutions to the statutory level. Interestingly values such as inclusion and diversity are also 'taken out of schools' in the USA, *e.g.* in the state of Florida.[85]

On October 15, 2023, general elections were held in Poland. As of the date of submitting the article, everything indicates that the government will be taken over by the democratic opposition (this is how a group of parties other than Law and Justice and the United Right describe themselves). The parties forming the government declare that they will introduce mechanisms for restoring the rule of law in Poland including the equality and non-discrimination laws. The basic area of regulation will concern the judiciary. Nevertheless, we cannot forget about the rights of LGBT people and the analyzed resolutions. One of the lessons of the 2015-2023 period would be the empowerment of the nodes within the network aimed at advocating for human rights. The atomized actors (private, official, and courts) had the same goal which was the restoration of human dignity. These mechanisms should be strengthened so that in the future no authority publicly declares the exclusion of anyone from the community.

[85] N. Nehamas, *DeSantis Signs Bill Defunding Diversity Spending in State Schools*, The New York Times, https://www.nytimes.com/2023/05/15/us/politics/ron-desantis-dei-bill.html?smid=nytcore-ios-share&referringSource=articleShare (7 November 2023).

The right to translation in the criminal procedure and the meaning of essential documents – three recent cases of the European Court of Justice in the field of criminal cooperation between Member States[1]

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The case note concerns three preliminary rulings of the European Court of Justice (hereinafter referred to as ECJ). Case C-242/22 PPU TL, C-338/20 Prokuratura Rejonowa Łódź-Bałuty and case C-278/16 Sleutjes each concerned the right to translation in the criminal procedure and legal remedies in the event of not providing that right. Thus, the basis of adjudication of the cases was Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation translation and in the criminal proceedings. The case note sheds light on the deficiencies of the Directive which are the consequences of the legislative technique applied in this legislative instrument, namely that Member States retain great discretion in implementing its often-vague regulations on the right to translation. However, through the preliminary ruling procedure, the ECJ clarified the meaning of the essential document which is subject to translation according to the Directive, found that a final decision shall be considered a judgement even if formally it is not, and finally, it set out the essential parts of a judgement or other decision that are subject to translation for the purpose of safeguarding the right to a fair trial.

Keywords: criminal cooperation, procedural directives, translation, procedural autonomy, essential documents, right to legal remedy

1. Introduction

Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings was the first directive which realized the 2009 Roadmap created by the Council, setting out the objectives for strengthening the protection of suspected and accused persons in criminal proceedings.[2]

The 2009 roadmap of the Council argued for the need for common rules strengthening the position of the suspect and the accused in the criminal procedure due to the system of criminal cooperation

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[2] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, 2010 OJ L 280/1 (hereinafter referred to as Directive 2010/64/EU); Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009 OJ C 295/1 (hereinafter referred to as Roadmap).

between Member States of the European Union based on the principle of mutual recognition.[3] Strengthening the protection of the suspect and the accused is perceived by the academics as a counterbalancing measure to the application of the principle of mutual recognition in the field of criminal cooperation between Member States,[4] since judicial decisions subject to the principle gain extraterritorial nature and take effect in Member States other than that which issued them.[5] However, due to the automatic process established in secondary sources of EU law regarding these judicial decisions, Member States may not refuse their recognition and execution even if doing so would violate certain fundamental rights of the person subject to those decision. Therefore, judicial cooperation under this system may potentially compromise the protection of rights of individuals in the criminal procedure.[6]

Directive 2010/64/EU aims to increase mutual trust between Member States by laying down common rules in the fields of interpretation and translation applicable in every Member State.[7] In doing so, it heavily relies on the European Convention of Human Rights (hereinafter referred to as ECHR) and the case law of the European Court of Human Rights (hereinafter referred to as ECtHR).[8]

With an overarching motive of strengthening the status of the individual in the criminal procedure, and increasing mutual trust between Member States in the field of criminal cooperation, taking significant inspiration from the ECHR and the case law of the ECtHR,[9] Directive 2010/64/EU sets out the obligation and formulates the minimum extent of translation and interpretation in the criminal procedure including, but not limited to the timely manner in which they must be provided, requirements regarding their quality, the documents which are subject to them and the legal remedy if the former requirements are not fulfilled in a criminal procedure.[10]

However, due to its nature and effect of minimum harmonization, Member States implement Directive 2010/64/EU in various forms which gives rise only to moderate approximation of their criminal justice systems regarding translation and interpretation. This inevitably results in differences between the implementations in each Member State.[11] In addition to that, the often-vague regulations put forward in the Directive resulted in certain deficiencies in its implementation in Member States which turned up in multiple cases of the European Court of Justice (hereinafter referred to as ECJ). Such cases concerned the right to translation of essential documents, the right to legal

[3] Roadmap, points 8-9.

[4] J. Ouwerkerk, *EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-standing Approximation of Procedural Rights and Their Progressive Effect on the Charter's Scope of Application*, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 27, No. 2, p. 90.

[5] V. Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart, Oxford, 2018, p. 125.; In the EU area of free movement, criminals have greater freedom and they make use of that. The EU legislators – in turn – decided to enhance Member States' enforcement capabilities with the principle of mutual recognition implemented in the process of criminal cooperation. To this end, a standard regulatory technique is used which was first utilised in the EAW framework decision, and it is referred to as a cooperative system by Mitsilegas. See: V. Mitsilegas, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual,* Yearbook of European Law, Vol. 31, No. 1, 2012, p. 319.

[6] Mitsilegas 2018, p. 154.

[7] Directive 2010/64/EU, Preamble 9.

[8] On many occasions, the Directive refers to the right to a fair trial as set out in the ECHR. See: Directive 2010/64/EU Preamble 5, 14, 17, 20, 26 and Arts. 2-3.

[9] Roadmap, point 13.

[10] Directive 2010/64/EU, Arts. 2-3.

[11] L. Siry, *The ABC's of the Interpretation and Translation Directive,* in S. Allegrezza & V. Covolo (Eds.), Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies, Wolters Kluwer Italia, Milano, 2018, p. 48.

remedy and the retrospective scrutiny of the quality of interpretation in the criminal proceedings.[12]

In the following points, I will discuss the right to translation in criminal proceedings as regulated by the Directive and the unresolved issues of this legal regime which were addressed by the ECJ. In order to do so, I will analyse three cases that were adjudicated by the ECJ in its preliminary ruling procedure. With their analyses, I will shed light on the deficiencies inherent in the legal framework set forward by Directive 2010/64/EU and draw conclusions from the judgements of the ECJ regarding these issues.

2. The right to translation in Directive 2010/64/EU

Directive 2010/64/EU lays down common minimum rules for the right to translation and interpretation in the criminal procedure. As the analysed cases concern the right to translation, I will only focus on the legal regime put forward in the Directive to guarantee a common approach in every Member State towards translation in the criminal procedure.

Article 3 sets out that the right to translation of essential documents shall be provided for the suspect or the accused who does not understand the official language of the criminal proceedings so that they are able to effectively exercise their right of defence which safeguards the fairness of the procedure.[13] Due to the fact that the Directive achieves minimum harmonization, its rules are far from complete. Instead, they are more like general guidelines given to Member States to approximate their criminal justice systems. This shows in that the Directive only provides an exemplificative list of the so-called essential documents which must be translated. Essential documents include any decision depriving a person of his liberty, any charge or indictment, and any judgement.[14]

It is easy to understand that solely prescribing the translation of the above documents is not sufficient to provide the fairness of the procedure. However, the Directive does not set out more examples of those, as the criminal justice systems of the Member States vary. Instead, it prescribes that the competent authorities must decide whether any other document is essential.[15] In an attempt to better safeguard this right, the Directive also lays down the fundamental rule for the right to legal remedies. According to its Article 3(5), Member States must ensure that the suspect or the accused has the right to challenge the decision of the competent authority not to translate a document.[16]

The above minimum rules regarding the translation of essential documents leave plenty of room for interpretation which is shown in three cases analysed below. All cases fundamentally concerned and clarified the meaning of essential documents which is especially important due to the discretion of the competent authorities to decide on whether a document is considered essential. In addition to that, in two cases, the ECJ gave guidelines for the principle of procedural autonomy of the Member States and borrowed standards from the case law of the ECtHR.

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[12] For details, see cases C-242/22 PPU TL [EU:C:2022:611], C-338/20 Prokuratura Rejonowa Łódź-Bałuty [EU:C:2021:805], C-564/19 IS [EU:C:2021:949], C-278/16 Sleutjes [EU:C:2017:757], C-216/14 Covaci [EU:C:2015:686].

[13] Directive 2010/64/EU, Art. 3(1).

[14] Directive 2010/64/EU, Art. 3(2).

[15] Directive 2010/64/EU, Art. 3(3).

[16] Directive 2010/64/EU Art. 3(5); V. Covolo, *Ensuring the Effectiveness of Defence Rights: Remedial Obligations under the ABC Directive,* in S. Allegrezza & V. Covolo (Eds.), Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies, Wolters Kluwer Italia, Milano, 2018, p. 87.

3. Facts of the cases

In case C-242/22 *PPU TL* a criminal procedure pending in Portugal was brought before the ECJ in the preliminary ruling procedure due to the lack of translation of an important procedural document. This was the so-called DIR which serves to establish and maintain contact with the suspect throughout the criminal procedure and even after that. As such, the suspect must provide their current address in the DIR which is used for communication between the person subject to the DIR and the competent authorities. In addition to that, the DIR obliges the suspect, later the accused and finally even the convicted person to inform the competent authorities if their address changes so that the they may remain available.[17]

In the underlying Portuguese case, a Moldovan individual, TL committed a traffic violation, and they were convicted for twelve months of prison sentence on probation.[18] After the final judgement, TL changed their address which meant that they became unavailable to the competent authority which intended to implement the probation scheme prescribed by the original judgement.[19] As a result, the convicted person was summoned to appear before the court in order to be heard due to their failure to comply with the conditions of the probation scheme. Two notifications were sent to the address of TL indicated in the DIR, which was found to be invalid, but none of them had been translated to a language the convict could understand.[20] Since TL did not appear before the court, the suspension of their prison sentence were revoked in another procedure.[21] This was followed by the arrest of the convict for the purpose of enforcing their sentence.[22] However, TL challenged the decision as the DIR was not translated into a language understood by them, nor were they assisted by an interpreter during the drafting of the DIR. They claimed that they had no knowledge of their obligation to notify the authorities about their change of addresses. They also put forward a claim regarding the lack of translation of the summons for the hearing due to the non-compliance with the probation scheme.[23]

Even though the Portuguese criminal procedure provided for remedy in situations where translation or interpretation was not provided for the concerned person, such legal remedy may be applied until the respective procedural action is finalized – in this case, the drafting of the DIR. As a result, by law, the first instance court turned down the claim.[24] However, the second instance court considered the DIR as an essential document which shall be translated, since it sets out important procedural obligations for the suspect or the accused.[25] In light of the procedural importance of the DIR and the time-bar imposed on the legal remedy by the Portuguese criminal procedure code, the second instance court decided to put forward a question for the ECJ whether the Portuguese legislation – especially its rules on legal remedy – is in line with the Directive.[26]

Case C-338/20 *Prokuratura Rejonowa Łódź-Bałuty* concerned the translation of a decision ordering the payment of financial penalty for a traffic violation. In 2019, a Polish national, D.P. commit-

[17] C-242/22 PPU TL, para. 14.

[18] C-242/22 PPU TL, paras. 15-17.

[19] C-242/22 PPU TL, para. 18.

[20] C-242/22 PPU TL, para. 19.

[21] C-242/22 PPU TL, para. 20.

[22] C-242/22 PPU TL, para. 21.

[23] C-242/22 PPU TL, para. 23.

[24] C-242/22 PPU TL, paras. 12, 24.

[25] C-242/22 PPU TL, para. 27.

[26] C-242/22 PPU TL, para. 29.

ted a traffic violation in the Netherlands.[27] The Netherlands central administrative authority responsible for the collection and recovery of fines issued in connection with offences committed in the territory of the Netherlands (hereinafter referred to as CJIB[28]) requested the referring Polish court to execute a decision imposing financial penalty on D.P. as they failed to pay the fine.[29] At the hearing before the referring court, the addressee claimed that they did not understand the letter which was sent previously from the Netherlands about the traffic violation and the imposed financial penalty as it did not include a Polish translation, which was confirmed by the CJIB as well.[30]

In connection with the claim of D.P., the referring Polish court noted that even though Framework Decision 2005/214 regulating the recognition and execution of financial penalties in the European Union does not contain any provision explicitly stating an obligation to provide the addressee with a translation for the decision imposing a financial penalty, according to Directive (EU) 2015/413 in facilitating the cross-border exchange of information on road-safety-related traffic offenses and Directive 2010/64/EU, any decision imposing a financial penalty in the context of the Framework Decision shall be served in a language the addressee understands. This is particularly important for them to be able to exercise their rights of defence.[31] The referring court also claimed that this view is reiterated by the ECtHR as well which found in more cases that the translation requirement is applicable even in cases concerning minor offences.[32]

Against the previous background, the polish court referred a question before the ECJ inquiring whether the execution of a decision imposing a financial penalty may be refused on the basis that a translation is not provided to the addressee.[33]

Last, but not least, in case C-278/16 *Sleutjes* the ECJ was called to decide whether a penalty order in German criminal procedure law shall be translated when the concerned person does not understand the official language of the criminal procedure.

In this case, a Dutch national, F.S. committed a traffic violation. In the German criminal procedure, the prosecutor issued a penalty order imposing a financial penalty.[34] The penalty order was drafted in German language with Dutch translation available only for the legal remedies.[35] The accused requested the trial to be held in accordance with their right to do so. However, they made the request in their native language instead of German. After being informed that German language shall be used when communicating with the German court, the accused lodged an objection to the penalty order in that language, however it was dismissed as inadmissible on account of its late submission.[36] F.S. then challenged the dismissal.[37]

In the following procedure, the referring court noted that the obligation to translate the penalty order seems uncertain to it. It emphasized that the German criminal procedure code does prescribe the translation of the judgement, however, it was unsure whether the concept of judgement covers penalty orders. As a result, the proceeding court referred a question before the ECJ whether a judgement also includes penalty orders.[38]

[27] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 15.

[28] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 13.

[29] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 16.

[30] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, paras. 16-17.

[31] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 18.

[32] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 19.

[33] C-278/16 Sleutjes, para. 20.

[34] C-278/16 Sleutjes, para. 10.

[35] C-278/16 Sleutjes, para. 12.

[36] C-278/16 Sleutjes, paras. 13-14.

[37] C-278/16 Sleutjes, para. 15.

[38] C-278/16 Sleutjes, paras. 18-19.

4. Judgement of the ECJ

In case C-242/22 *PPU TL*, the ECJ argued that all three procedural documents – the DIR, the summons, and the revoking of the suspension of prison sentence – that TL claimed to not have been translated into a language they understood shall be considered essential documents.[39]

The ECJ argued that the DIR entails obligations that must be adhered to throughout the criminal procedure and significant consequences when failing to do so. In addition, the person subject to the criminal procedure is notified of these obligations via the declaration in the DIR.[40] Thus, the DIR is of utmost importance for informing the subject of the criminal procedure of their obligations which is why it shall be translated under Art. 3(3) of Directive 2010/64/EU. The ECJ applied a similar argument to the other two procedural documents as well, since the summons was important for the case in that the purpose of the court hearing was to decide on whether the suspension of the prison sentence should be revoked, and the decision revoking the suspension of the prison sentence entailed the execution of the prison sentence. Without the translation of those documents, the convicted person could not exercise their right of defence.[41]

Last, but not least, the ECJ argued that even though TL should have been informed of their right to interpretation and translation based on Arts. 2(1) and 3(1) of Directive 2010/64/EU according to Art. 3(1) of Directive 2012/13,[42] in the present case, such information was not provided to them.[43] As such, the ECJ held that TL's rights to translation, interpretation and information have been infringed.[44]

It is important to note though that the Portuguese legal system holds the lack of interpretation and translation where necessary a procedural defect which entails the relative nullity of the corresponding procedural actions. Yet, for this legal remedy to be effective, the person concerned must plead the infringement of the right in question before the finalization of the act. Failing to do so in time sets in a time-bar for the legal remedy.[45] Regarding the Portuguese legal regime of legal remedies in connection with the relative nullity of procedural acts, the ECJ noted that Directives 2010/64/EU and 2012/13/EU do not set out the consequences of failure to provide the rights therein. Instead, the directives only stipulate that a legal remedy shall be provided to the person concerned, thus Member States may formulate their legal system as they see fit in this regard. However, the rules implementing the rights which individuals derive from EU law must not be less favourable than those governing similar domestic actions, nor they may be framed in such a way as to make it impossible or excessively difficult to exercise the rights conferred by EU law. In essence, the ECJ referred to the principle of procedural autonomy of Member States which provides for the possibility for Member States to formulate their legal systems autonomously if harmonization does not lay down procedural rules, however it also noted that this principle is limited by the principles of equivalence and effectiveness.[46]

The Court found that as far as the principle of equivalence is concerned, the Portuguese legal regime for legal remedies is in line with the directives, however in terms of the principle of effectiveness, it found the rules regulating legal remedies lacking as TL was not informed of their rights to interpretation and translation. Without the knowledge of those rights, the concerned person was unable to plead their infringement in the time provided for them which effectively rendered the right to legal remedy non-existent.[47]

As such, the ECJ decided that national legislation is precluded under EU law if the infringement of the

[39] C-242/22 PPU TL, para. 53.

[40] C-242/22 PPU TL, para. 60.

[41] C-242/22 PPU TL, paras. 65-66.

[42] C-242/22 PPU TL, para. 61.

[43] C-242/22 PPU TL, para. 69.

[44] C-242/22 PPU TL, para. 70.

[45] C-242/22 PPU TL, para. 71.

[46] C-242/22 PPU TL, paras. 74-75.

[47] C-242/22 PPU TL, paras. 76-80.

rights provided for by those provisions of those directives must be invoked by the beneficiary of those rights within a prescribed period, failing which that challenge will be time-barred, where that period begins to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof.[48]

In the second case – C-338/20 *Prokuratura Rejonowa Łódź-Bałuty* – concerning a Dutch decision imposing financial penalty, the ECJ approached the question from the refusal grounds laid down in Framework Decision 2005/214 instead of the other two directives brought up by the referring court. According to Art. 7(2)(g) of that Framework Decision, the competent authority of the executing Member State may refuse to recognize a decision imposing a financial penalty if the addressee of that decision has not been informed of their right to appeal and the time limit for doing so.[49] The Court also held that even though the manner of providing information is left to Member States to decide on, the notification of the addressee should be sufficiently detailed so that they can get to know the reasons upon which the decision was taken. In other words, it is not enough to translate the passages concerning the right to legal remedy. Instead the addressee shall have full knowledge of the relevant facts so that they can effectively challenge the decision.[50] In connection with the information provided to the addressee, the ECJ referred to the case law of the ECtHR which sets out that the person charged with a criminal offence shall be informed not only of the accusation, but also the material facts and the legal details and classification of the accusation.[51]

As such, according to the ECJ, the addressee must be served a notification along with the decision translated to a language they understand. In addition, the translation shall include the facts on which the notified decision is based, the offence committed, the penalty imposed, the legal remedies available against that decision, the time limit laid down for that purpose and the identification of the body before which the appeal must be lodged.[52] Based on this argument, the ECJ held that the decision imposing a financial penalty may be rejected if the notification of the addressee lacked the translation of the essential elements of the decision which are required for exercising the right of the defence.[53]

In the third case – C-278/16 *Sleutjes* –, the ECJ held that the penalty order shall also be translated, since it is considered both an indictment, since it represents the first opportunity for the accused person to be informed of the accusation against them and a final judgement.[54] The Court also argued that the lack of translation results in the violation of the right of defence, since the accused is not sufficiently informed of the criminal offense they are charged with.[55] Hence the ECJ held that the penalty order, which is essentially an order provided for in national law for imposing sanctions in relation to minor offences and delivered by a judge following a simplified unilateral procedure shall be considered an essential document that is subject to translation for the purpose of enabling the addressee to exercise their rights of defence.[56]

[48] C-242/22 PPU TL, para. 89.

[49] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 32.

[50] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, paras. 33-34.

[51] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 36.

[52] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 39.

[53] C-338/20 Prokuratura Rejonowa Łódź-Bałuty, para. 44.

[54] C-278/16 Sleutjes, paras. 30-31.

[55] C-278/16 Sleutjes, para. 33.

[56] C-278/16 Sleutjes, para. 34.

5. Comments

In conclusion, the EJC's rulings may provide several points of clarifications for national criminal procedures. As far as essential documents are concerned, translation shall be provided not only for those documents which are a decision depriving a person of their liberty, any charge or indictment and any judgement in the meaning of the final adjudication of a case, but also those decisions that establish obligations and informs the suspect, the accused or the convicted person in the criminal procedure including but not limited to the DIR. In addition, the ECJ emphasized in its case C-242/22 *PPU TL* that any decision which may lead to the deprivation of liberty shall also be considered an essential document which is subject to translation.[57]

Moreover, in connection with the penalty order, the ECJ clarified that a final decision is subject to translation even though it is formally not a judgement. Despite the difference on the formal level, in terms of substance, they shall be considered a final judgement, as they adjudicate the guilt of the concerned person. Last, but not least the ECJ set out an important safeguard relating to the extent of translation in the second case, C-338/20 *Prokuratura Rejonowa Łódź-Bałuty*, Building on ECtHR case law, the Luxembourg Court held that the translation of a final judgement shall include at least the facts on which the notified decision is based, the offence committed, the penalty imposed, the legal remedies available against that decision, the time limit laid down for that purpose and the identification of the body before which the appeal must be lodged so that the fairness of the procedure is guaranteed. This is particularly important due to Article 3(4) of Directive 2010/64/EU as it allows for not translating parts of the essential documents which are not necessary for the purposes of enabling suspected or accused persons to have knowledge of the case against them.[58] This type of negative approach towards defining parts that are not essential may have led to misinterpretations which can be avoided now, as there is a list which identifies parts of documents which must be translated.

Apart from identifying the most important characteristics of an essential document, the ECJ also gave an interpretation of the principle of procedural autonomy and its limitations in case C-242/22 *PPU TL* where even though the Portuguese legal regime for legal remedies was sufficiently equivalent to the legal remedies provided for suspects or accused persons of similar domestic cases, it did not meet the requirements of the principle of effectiveness, as in the underlying case, the concerned person was not notified of their right to interpretation and translation which made it impossible to plead for their provision. This shows that even though directives may not regulate the procedural aspects of certain provisions they lay down, Member States still have to implement them in a manner that guarantees that individuals can effectively exercise the rights derived from them.

Finally, the ECJ referred to the ECHR and the case law of the ECtHR multiple times in its judgements which reiterates the overarching motive of the Directive and the will of the legislator to directly apply standards of the Convention and the Strasbourg Court. It is a clear indication for criminal judicial authorities of the Member States that they need to consider these standards when proceeding in different cases as there is a direct connection between those and the EU directives harmonizing criminal procedure law of the Member States.

To sum up, all the above cases demonstrated that the minimum harmonization technique of the Directive and the relatively big extent of procedural autonomy provided for Member States in implementing it makes it difficult to create a unified approach towards translation and interpretation in the criminal procedure. Even though these cases concerned the legal systems of individual Member States, the reasoning behind the decisions of the ECJ can easily be applied in other Member States as well. This shows the importance of the ECJ's preliminary ruling procedure which slowly but surely extends the standards that must be applied in the criminal procedure in order to make it more protective of fundamental rights.

[57] C-242/22 PPU TL, para. 67.

[58] M. Fingas, *The Right to Interpretation and Translation in Criminal Proceedings – Challenges and Difficulties Stemming from the Implementation of Directive 2010/64/EU*, European Criminal Law Review, Vol. 9, No. 2, p. 180.

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