Tanulmányok 6.

INTERNATIONAL LAW – A QUIET STRENGTH

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LE DROIT INTERNATIONAL, UNE FORCE TRANQUILLE

(Miscellanea in memoriam Géza Herczegh)

edited by
PÉTER KOVÁCS

LÁSZLÓ BLUTMAN – JÁNOS BRUHÁCS – JAMES CRAWFORD
GILBERT GUILLAUME – ROSALYN HIGGINS – GÁBOR KARDOS
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VANDA LAMM – DOBROMIR MIHAJLOV – HISASHI OWADA
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PÁZMÁNY PRESS

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A PÁZMÁNY PÉTER KATOLIKUS EGYETEM
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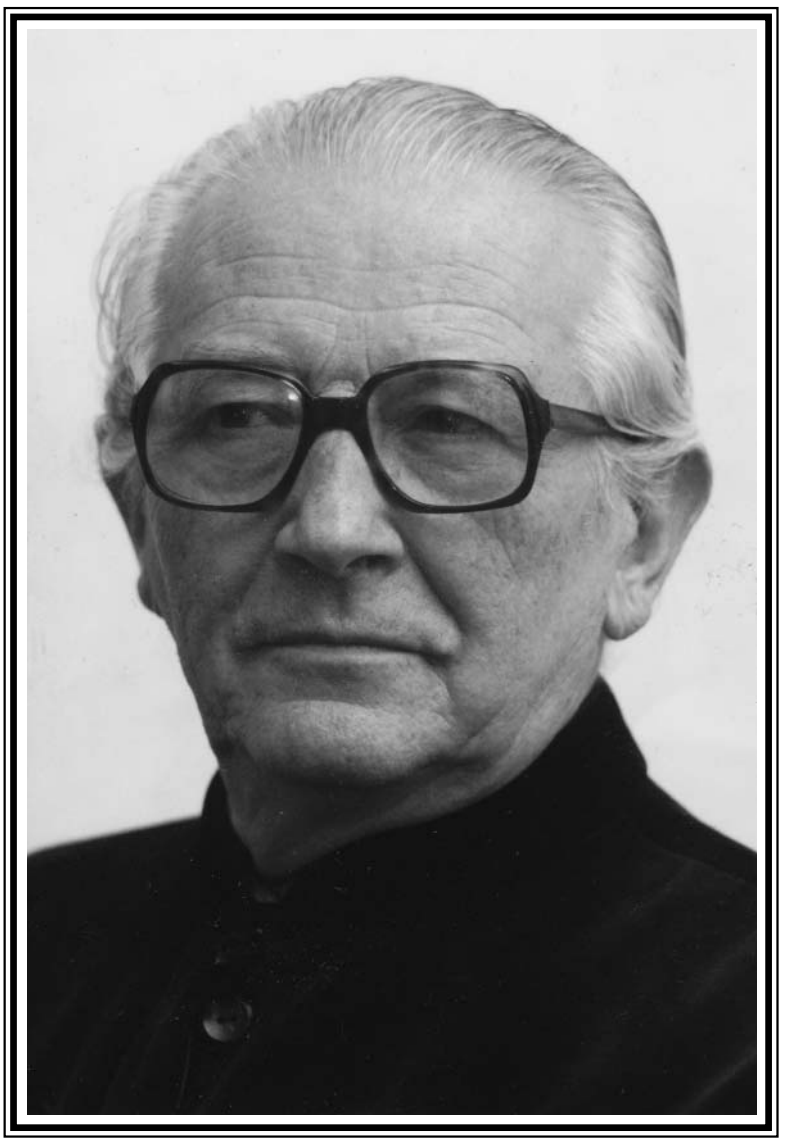

Géza Herczegh
1928–2010

Books written by Géza Herczegh

- *A gyarmati kérdés és a nemzetközi jog.* [Colonial Issue and International Law] Budapest: Közgazdasági és Jogi Könyvkiadó, 1962.

- *General Principles of Law and the International Legal Order.* Budapest: Közgazdasági és Jogi Könyvkiadó, 1969.

- *Nemzetközi jog.* [International law] Budapest, Tankönyvkiadó, 1976.

- *A humanitárius nemzetközi jog fejlődése és mai problémái.* [Development and Current Problems of International Humanitarian Law] Budapest: Közgazdasági és Jogi Könyvkiadó, 1981.

- *Development of International Humanitarian Law.* Budapest: Akadémiai Kiadó, 1983.

- *Magyarország külpolitikája 896–1919.* [Hungary's Foreign Policy 896-1919] Budapest: Kossuth Könyvkiadó, 1987.

- *A nemzetközi jogalkotás lehetőségei és korlátai.* [Possibilities and Limites of International Lawmaking] Budapest: Akadémiai Kiadó, 1987.

- *A szarajevói merénylettől a potsdami konferenciáig.* [From the Sarajevo Attempt to the Potsdam Conference] Budapest: Magyar Szemle Alapítvány, 1999.

- *Peres örökségünk.* [Our Litigated Inheritance] Budapest: Magyar Szemle Alapítvány, 2005.

- *Foggal és körömmel.* [Fight Tooth and Nail – Novel on Hungary at the end of WW 2] Budapest: Helikon Kiadó, 2008.

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FOREWORD

Professor and Judge Géza Herczegh was an outstanding figure of the small community of the Hungarian international lawyers. Since the beginning of his academic carrier, he devoted himself to helping young colleagues and to their promotion at the beginning and throughout of their scientific life. His ambition was to link the way of thinking of Hungarian international lawyers to that of leading western scholars and he was very proud to see references to pieces of Hungarian legal literature in books and articles written in different fields of international law.

Although he had never been in the army, he became a military expert and a specialist of international humanitarian law: in this capacity, he could participate in the Hungarian delegation sent to the 1974–1977 Geneva Diplomatic Conference preparing the additional protocols to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflicts.

Born as a member of the Hungarian minority in the newly created Czechoslovakia and acquiring Hungarian citizenship only after the second marriage of his mother, the question of the due attentation to be paid by the international community to the situation of ethnic and linguistic minorities was always important for him and became even more so, when, after the demolition of the Berlin wall, the newly unified Europe showed readiness to elaborate a new, rather comprehensive international legal framework for the benefit of minorities.

In Hungary, his professional reputation was crowned by his election into the Hungarian Academy of Sciences and then into the Constitutional Court where he assumed the functions of vice-president. He was elected into the International Court of Justice in 1993 and he served there until 2003. There, he became member of the silent majority: he was very proud of his participation in the drafting committee of most of the great cases of the ICJ which explains why he was the author of only a few dissenting opinions.

Those who knew him personally, were impressed by his modesty and deep knowledge of contemporary history and especially the two world wars and the period in between. For him, history and international law were strongly interrelated.

After his death in 2010 and around his birthday in October, the Péter Pázmány Catholic University, also as a depositary of his library of international law and history, organized a memorial conference. The present book is the compilation of the lectures delivered at the conference of October 16, 2010, which had the ambition to embrace the main fields of interest of judge Herczegh, namely 1) diplomatic history of Hungary, 2) human rights, protection of national minorities, international humanitarian law 3) issues and challenges before the International Court of Justice, 4) the protection of national environment in international law, 5) constitutional jurisprudence and European & international law.

In order to make them accessible to foreign readers, most lectures delivered originally in Hungarian were written in English or in French. (The few ones, written in Hungarian, are accompanied with a short English summary.) We are very proud and grateful that president Hisashi Owada and two former presidents of the International Court of Justice, Rosalyn Higgins and Gilbert Guillaume, and two members of the International Law Commission, Alain Pellet and James Crawford joined us in the preparation of the memorial book.

We do hope that this book will give an impetus to the enlargement of the already existing transborder scientific understanding and collaboration and having read the book, the reader will have a better understanding of the importance of the intellectual legacy of professor Géza Herczegh.

Péter Kovács,
professor,
member of the Constitutional Court,
editor of the book

May 2011

I.
Remembrances
Souvenirs personnels

HISASHI OWADA[1] ON GÉZA HERCZEGH'S LIFE[2]

"[…] I would first like to pay solemn tribute, on behalf of the Court, to the memory of one of its former Members, Judge Géza Herczegh, who died on 11 January this year.

Judge Géza Herczegh was born in 1928 in Nagykapos, Slovakia. After studying law at the University of Szeged and gaining a Ph.D. in jurisprudence, he began an academic career devoted to the teaching of international law in several universities in his own country and abroad, before becoming, in 1967, Head of the International Law Department of the Law Faculty of the University of Pécs, then, in 1981, Dean of the same Faculty. He published numerous works and articles, chiefly on international humanitarian law, but also on general international law, on the law of international relations and on the rights of minorities. His expertise in these many fields earned him national recognition: after having been elected a Member of the Hungarian Academy of Sciences, he was appointed Vice-President of the Department of Legal and Economic Sciences of this prestigious institution.

Géza Herczegh also enjoyed a brilliant diplomatic career in his favourite field, humanitarian law. He was chosen to represent the Hungarian Red Cross Society as expert on international humanitarian law at the conferences of The Hague (1971), Vienna (1972), Tehran (1973) and Monaco (1984). He was also selected to act as governmental expert on international humanitarian law at the conferences of Geneva in 1971 and 1972, before serving as a member of the Hungarian delegation at the Diplomatic Conference of Geneva on the protection of victims of international armed conflicts from 1974 to 1977, and later as Vice-President of the Third Commission of the same Conference. He was also Rapporteur at the Third Conference on Parliamentary Democracy organized in 1991 by the Council of Europe on the topic of "Problems of Transition from an Authoritarian or Totalitarian Régime to a Genuinely Democratic System", and a member of the expert working group preparing the draft convention on peaceful

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[1] President of the International Court of Justice.

[2] The text was taken with President Owada's permision form the minutes of the hearing in the case *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo).* Monday, 19 April 2010, Doc. CR 2010/1, 2–4.

settlement of disputes within the framework of the Conference on Security and Co-operation in Europe in 1992.

Finally, Judge Herczegh was a member of the Constitutional Court of the Republic of Hungary from 1990 to 1993, before being elected to the International Court of Justice, where he served for almost ten years from 10 May 1993 to 5 February 2003. Modest, discreet and ever courteous, he was also self-assured. A dedicated worker, he was renowned for his extensive knowledge of case files, as well as his intellectual rigour and integrity. A man of conviction who was also open to discussion, he actively participated in the collective work of the Court. All of his former colleagues can attest to the richness and clarity of his thinking, as well as to his commitment in his work within our institution. We will remember his many astute contributions during the Court's deliberations. Géza Herczegh was a highly respected Member of the Court. He remains, to this day, the only Hungarian judge, elected or *ad hoc*, to have sat at the Court. The Court pays tribute to the memory of a very dear colleague and an eminent judge."

GÉZA HERCZEGH, JUGE À LA COUR INTERNATIONALE DE JUSTICE

GILBERT GUILLAUME[1]

Géza Herczegh fut élu à la Cour internationale de justice en 1993 pour succéder au juge Manfred Lachs décédé au cours de son troisième mandat à la Cour. Réélu sans difficulté quelques mois plus tard pour un mandat plein de neuf années, il devait siéger à la Haye jusqu'en février 2003. Ayant été témoin pendant près de dix ans de son activité au sein de la Cour, c'est pour moi un honneur et un plaisir de témoigner aujourd'hui de son apport à l'œuvre de la Cour internationale de justice.

Géza Herczegh arrivait à La Haye avec un passé qui lui permit immédiatement de contribuer efficacement aux travaux de la Cour. Il avait enseigné le droit international public pendant de longues années dans de nombreuses enceintes, et tout particulièrement à l'Institut des sciences politiques de Budapest et à l'Université de Pecs dont il avait été doyen de 1981 à 1987. Il avait siégé comme juge et vice-président de la Cour constitutionnelle de Hongrie de 1990 à 1993. Cette double expérience juridictionnelle et universitaire le conduisait naturellement à examiner chaque affaire selon ses mérites propres avec l'œil du juge, tout en gardant constamment à l'esprit les principes et les règles de droit international. Sa connaissance parfaite de la langue française faisait en outre de lui un juge écouté avec un vif plaisir et une constante attention.

Au cours de cette décennie, Géza Herczegh fut un juge soucieux de l'autorité de la Cour et conscient du fait que cette autorité repose sur le travail scrupuleux de chacun des juges et sur un délibéré ouvert au cours duquel la recherche du consensus doit demeurer une préoccupation majeure. Dans la quasi-totalité des affaires, après avoir participé activement aux délibérations, il se rangea dans la majorité de la Cour. C'est que pour lui, un jugement n'était pas une simple totalisation des opinions des juges. C'était l'œuvre collective des membres de la Cour.

Il était particulièrement sensible à certaines questions de droit international dont il avait eu à connaître au cours de sa carrière antérieure, et spécialement au

[1] Ancien président de la Cour internationale de justice.

droit des minorités et au droit humanitaire. Il n'eut pas l'occasion de traiter du premier à la Cour, mais y suivit le second avec une vive attention.

A l'occasion d'un colloque organisé à Paris en 1998 par le Ministère français de la défense sur le droit des conflits armés, il s'en expliquait ainsi : « *Nous vivons actuellement*, disait-il *dans une période de paix toutefois assombrie par de graves conflits locaux causant un nombre effrayant de victimes innocentes. Cette paix est en même temps menacée par de nombreux conflits internationaux virtuels sur lesquels les armes de destruction massive peuvent être amenées à peser. En conséquence, les règles du droit international applicables à ces situations de conflits gardent toute leur importance ».* Présidant alors une table ronde sur l'évolution allant du droit de la guerre au droit humanitaire, il ajoutait « *Il s'agit là d'une longue épopée partant des temps très reculés de l'histoire de l'humanité et menant à nos jours. Même si une évolution indiscutable se dégage des efforts louables des siècles précédents, nous ne pouvons pas ignorer les énormes difficultés qui réapparaissent constamment au fil des guerres: ce sont ces difficultés que nous devons surmonter ».*

Lors de la discussion de l'avis consultatif relatif à la licéité de la menace ou de l'emploi des armes nucléaires rendu en 1996 par la Cour sur la demande de l'Assemblée Générale des Nations-Unies, Géza Herczegh eut l'occasion de faire partager à ses collègues ses préoccupations en ce domaine. Dans cet avis, la Cour procéda à une analyse approfondie du droit international humanitaire, ainsi que du droit de la neutralité, analyse qui traduit très largement les préoccupations du juge Herczegh. Elle conclut à l'unanimité que « *la menace ou l'emploi d'armes nucléaires devrait... être compatible avec les exigences du droit international applicable dans les conflits armés, spécialement celles des principes et règles du droit international humanitaire ».*

La Cour constata toutefois que les conséquences qu'il y avait lieu de tirer de ces conclusions demeuraient controversées et décida sept voix contre sept, par la voix prépondérante du président qu'« *au vu de l'état actuel du droit international, ainsi que des éléments de fait dont elle dispose, la Cour ne peut conclure de manière définitive que la menace ou l'emploi d'armes nucléaires serait licite ou illicite dans une circonstance extrême de légitime défense dans laquelle la survie même d'un Etat serait en cause* ».

Géza Herczegh se rallia à cette solution, tout en regrettant dans une déclaration de deux pages jointe à l'avis que de la Cour n'ait pas formulé une réponse plus précise sur ce dernier point, en soulignant que « *la légitime défense ne justifierait que des mesures proportionnelles à l'agression armée subie, et nécessaires pour y riposter ».*

Mais c'est seulement dans deux cas qu'au cours de sa présence à la Cour, Géza Herczegh fut amené à se dissocier de la majorité à certains égards.

Dans l'affaire de l'incident aérien de Lockerbie opposant la Libye aux Etats-Unis et au Royaume-Uni, ces derniers avaient opposé aux demandes libyennes fondées sur la Convention de Montréal diverses exceptions d'incompétences et d'irrecevabilité. La Cour rejeta ces exceptions en 1998. Elle releva notamment que les résolutions adoptées par le Conseil de Sécurité postérieurement à l'introduction des requêtes libyennes étaient sans influence sur la recevabilité de ces requêtes qui devait être appréciée au regard de la situation de droit à la date d'introduction des pourvois. Le juge Herczegh vota avec la majorité de la Cour sur la plupart des exceptions soulevées, mais sur ce point précis, il s'en sépara. Il précisa en effet, dans une brève déclaration jointe à l'arrêt, qu'au vu des décisions du Conseil de Sécurité, le non lieu s'imposait.

En définitive, c'est dans une seule affaire, celle opposant la Hongrie et la Slovaquie au sujet du projet Gabcikovo-Nagymaros que Géza Herczegh fut amené à rédiger une opinion dissidente. Dans cette affaire la Cour avait jugé que le traité de 1977 concernant ce projet était toujours en vigueur et régissait la relation entre les deux Etats. Elle avait déduit que la Hongrie n'était pas en droit en 1989 de suspendre, puis d'abandonner les travaux prévus, notamment à Nagymaros, par le traité liant les deux Etats et que, de son côté, la Tchécoslovaquie n'était pas en droit en 1992 de mettre unilatéralement en service la solution dite « provisoire » détournant les eaux du Danube en territoire tchécoslovaque à Cunovo pour alimenter le bief menant au barrage de Gabcikovo.

La Cour avait cependant précisé qu'aucune des Parties n'avait pleinement exécuté le traité de 1977 depuis des années et qu'elles avaient toutes deux contribué par leurs actes ou omissions à créer une situation nouvelle. Elle avait ajouté qu'elle ne « *saurait ignorer le fait que la centrale de Gabcikovo fonctionne depuis près de cinq ans, que le canal de dérivation qui alimente la centrale reçoit ses eaux d'un réservoir nettement plus petit formé par un barrage qui n'a pas été construit à Dunakiliti, mais Cunovo et que la centrale est exploitée au fil de l'eau et non en régime de pointe comme il était prévu à l'origine. La Cour ne saurait pas davantage ne pas tenir compte de ce que non seulement l'ouvrage de Nagymaros n'a pas été construit, mais qu'il n'y a plus aucune raison de le construire puisque les Parties ont,, dans les faits, écarté l'hypothèse d'une exploitation en régime de pointe ».*

La Cour en a conclu que « *la Hongrie et la Slovaquie doivent négocier de bonne foi, en tenant compte de la situation existante et doivent prendre toutes les mesures nécessaires à l'effet d'assurer la réalisation des objectifs du traité du 16 septembre 1977, selon les modalités dont elles conviendront* ». En outre, la Hongrie et la Slovaquie, sauf si elles en conviennent autrement, doivent, a ajouté la Cour, s'indemniser mutuellement pour les dommages subis du fait des actions illicites de l'autre Partie.

Le juge Herczegh vota en faveur de cette dernière décision. Il nota également que la Cour avait utilement précisé les éléments de fait à prendre en considération par les deux Parties dans leur négociation à venir tendant à la mise sur pied, selon la Cour, d'un « *régime opérationnel conjoint* »

Il se sépara en revanche de la Cour sur plusieurs autres points. Il estima en premier lieu que la Hongrie avait pu légalement suspendre la construction du barrage de Nagymaros, en vue de sauvegarder l'alimentation en eau potable de la ville de Budapest. Face à un péril imminent menaçant un intérêt essentiel du pays, la Hongrie pouvait, selon lui, se prévaloir de l' « état de nécessité » reconnu par le droit coutumier international. Il précisa en outre que la Tchécoslovaquie avait méconnu, quant à elle, ses obligations, non seulement lors de la mise en service de la solution dite provisoire en octobre 1992, mais dès la construction du barrage de Cunovo en novembre 1991. Il en conclut que le traité de 1977 avait pu être dénoncé par la Hongrie en mai 1992 et qu'il n'était de ce fait plus en vigueur. Il ajouta que « *la partie normative de l'arrêt de la Cour aurait été [...] plus conséquente et plus convaincante si elle ne l'avait pas fondé sur le traité de 1977, mais plutôt sur le droit international général et sur les autres traités et conventions qui obligent les Parties* ». En désaccord sur le raisonnement tenu par la Cour, le juge Herczegh n'en notait pas moins que le différend subsistant entre les Parties devait être résolu par la négociation en vue de l'exploitation conjointe par les deux Etats des ressources partagées du Danube.

Dans ces conditions, il apparaît que, si l'appréciation du juge Herczegh sur le comportement passé des Parties, et sur les conséquences de ce comportement sur le traité de 1977 différait de celle de la majorité de la Cour, les préconisations de la Cour et celles de Géza Herczegh étaient moins éloignées qu'on pourrait le croire au premier abord. Etaient ainsi jetées les bases d'une négociation dont on peut espérer qu'elle parviendra un jour aux résultats équilibrés souhaités par les uns et les autres. Ce serait là le meilleur hommage que l'on pourrait rendre à la mémoire de Géza Herczegh.

GÉZA HERCZEGH – OUR COLLEAGUE AND FRIEND AT THE INTERNATIONAL COURT OF JUSTICE

ROSALYN HIGGINS[1]

Much factual information about Géza Herczegh's time as a Member of the International Court of Justice has been deployed in the contribution by Judge Guillaume and I fully subscribe to what he has said.

I would like to add some rather more personal remarks.

Judge Herczegh was already at the Court when I arrived as a new Member in 1995. I found a man who had lived through much, and whose fields of expertise and the views he held were rooted in what he, and his country, had experienced in the previous half-century.

Judge Herczegh was a voice of moderation on the Bench of the International Court of Justice. He belonged to no 'school of law' and approached cases with a totally open mind. One never knew in advance of deliberations what his views would be on the key legal issues in the case. His view was always shaped by his extensive knowledge of the dossier of the case and his careful attention to the pleadings. His opinions were a result of dedicated preparation and deep reflection and, as a result, were always respected by his colleagues.

During the solemn tribute in the Great Hall of Justice on 19 April 2010, President Owada expressed the collective view of Judge Herczegh:

> All of his colleagues can attest to the richness and clarity of his thinking, as well as to his commitment in his work within our institution. We will remember his many astute contributions during the Court's deliberations.

This fully accords with my own memories of working with Judge Herczegh. The preparation of a Judgment at the International Court is a very collegial process. The deliberations may last a few days or continue over several weeks depending on the complexity of the case. Each Member of the Court presents his or her views, in reverse order of seniority, after each of which there is a period for seeking clarification and asking questions. Slowly but surely, a consensus

[1] Former President of the International Court of Justice (2006−2009).

emerges on the various legal questions before the Court. At the same time, areas of disagreement or uncertainty become apparent. Judge Herczegh had the ability to use his presentation to clarify the difficult issues and also to seek consensus where possible. He preferred the identification of common ground to the doctrinal battlefield.

When it comes to drafting the Judgment, a Judge may be elected as a member of the Drafting Committee and be responsible for preparing the initial draft for the scrutiny of his or her colleagues. Judge Herczegh was on various Drafting Committees. His linguistic skills, along with his reputation as a perfectionist as regards the accuracy of facts and the law, made him a natural choice. But if a Judge is not on the Drafting Committee in a particular case, when that draft arrives on the Judge's desk, he or she must prepare to contribute thoughts as to improvements and modifications. Judge Herczegh would quietly and conscientiously working towards a Judgment that would constitute much more than the lowest common denominator of views. He would, where appropriate, draw the Court's attention to Article 31 of the Vienna Convention on the Law of Treaties, and found much value in the maxim *ut res magis valeat*.

As Judge Guillaume has noted, Judge Herczegh differed from the Judgment on very few occasions. His only Dissenting Opinion – understandably enough – was in the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia).* But occasionally there were points he thought it important to clarify or emphasise. I can mention his Declarations in the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the 1998 Judgment on Preliminary Objections in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom), (Libya v. United Kingdom*), the 2001 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, and the 2002 Judgment in *Land and Maritime Boundary between Cameroon and Nigeria.*

In this last he wished to express his concern that the Court had said

> The Court considers that, in particular in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient. (para. 238).

He insisted that Article 59 of the Statute, which provides that "the decision of the Court has no binding force except between the Parties and in respect of the particular case" had not lost its force. In fact, the Court was not, as he supposed, "criticizing" that Article. Rather, it was agreeing with Judge Herczegh's comment that whether in a particular case Article 59 will be sufficient to protect

a state's interests "depends on the Court". Indeed so, and as he said in that Declaration,

> In the present case the Court carefully considered the legal interests of Equatorial Guinea and Sao Tome and Principe and it was in that sense and in that spirit that it rendered its Judgment concerning the determination of the maritime boundary between Cameroon and Nigeria. (p. 473)

I think there was only a perceived disagreement with the Court!

His Declaration in the *Nuclear Weapons Advisory Opinion* expresses the importance that he placed on reaching consensus, but never at the expense of clarity nor certainty. He recognized that on a Bench composed of Judges representing the "main forms of civilization" and "the principal legal systems of the world" it was:

> inevitable […] that differences of theoretical approach would arise between the Members concerning the characteristic features of the system of international law and of its branches, the presence or absence of gaps in this system, and the resolution of possible conflicts between its rules, as well as on relatively fundamental issues.

He noted that the diverse approaches prevented the Court from reaching a more satisfactory result in the *Opinion*, but he still constructively drew attention to the areas of unanimous agreement. He also returned to the topic of his 1965 dissertation "The General Principles of Law and the International Legal Order" (published in English in 1969) to propose an approach to regulating the use of nuclear weapons:

> In the fields where certain acts are not totally and universally prohibited "as such", the application of the general principles of law makes it possible to regulate the behaviour of subjects of the international legal order, obliging or authorizing them, as the case may be, to act or refrain from acting in one way or another. The fundamental principles of international humanitarian law, rightly emphasized in the reasons of the Advisory Opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons.

In addition to his deep knowledge of international law and his strong work ethic, Judge Herczegh's demeanour and personality also made him a valued Member of the ICJ. He was adept in both the working languages of the Court.

He wrote in French, but his English was also very good. He listened attentively and courteously to counsel and to his colleagues. He was self-effacing. On more than one occasion he was approached to see if he might like to offer himself as Vice-President, and each time he declined. He simply wanted to be an ordinary Member of the Court, working quietly for the collective Judgment.

Géza Herczegh is the only Hungarian Judge – elected or *ad hoc* – ever to have sat on the Bench of the International Court. Pursuing his studies and starting his career during a turbulent period in Hungary's history probably led to his abiding interest in international humanitarian law (which was the topic of his second dissertation, published in 1979). The Members of the Court well knew of his great reputation in international humanitarian law – a reputation which was also informed by his diplomatic career during which he actively participated in the conferences that led to the adoption of the two Additional Protocols to the Geneva Conventions.

Judge Herczegh was also an expert in human rights law, in particular minority rights. On the latter field – so topical today – Judge Herczegh did not hesitate to say that "the solution to the present ethnic conflicts is in general democracy […] [and] to recognize in addition to individual rights, the so-called collective or groups' rights, too".[2]

Judge Herczegh's time at the ICJ coincided with a shift in the content of the Court's docket. Whereas the Court traditionally – and still does – receives numerous cases relating to territorial and maritime disputes, in the 1990s, it began to also receive disputes concerning international humanitarian law and human rights law. In addition to the *Nuclear Weapons Advisory Opinion* I mentioned earlier, Judge Herczegh sat on cases concerning allegations of genocide (Preliminary Objections in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*), the use of force (Preliminary Objections in *Oil Platforms (Iran v. United States*), *Cameroon v. Nigeria*), and the relationship between immunities and human rights (*Arrest Warrant (Democratic Republic of the Congo v. Belgium*)).

His decade on the Court also saw a rise in the number of cases being submitted by countries from Central and Eastern Europe. In addition to the *Gabčíkovo–Nagymaros Project*, the Court was also asked to settle a variety of disputes relating to the conflict in the Balkans (*Bosnia v. Serbia, Croatia v. Serbia*, *Legality of the Use of Force* cases). In more recent years, the Court has decided a case between Romania and Ukraine and between Georgia and the

[2] G. HERCZEGH: The evolution of human rights law in Central and Eastern Europe: One Jurist's response to the Distinguished Panelists. *Connecticut Journal of International Law* 8 (1992) 323., 324.

Russian Federation, as well as issued an Advisory Opinion on the unilateral declaration of independence by Kosovo.

In a speech given just after he joined the International Court, Judge Herczegh noted the important role that jurists had played in Hungary. He said that one of the secrets of the peaceful transition from dictatorial regime to a pluralistic democracy was that "we Hungarians are a nation of lawyers".[3] Géza Herczegh was an exemplar of such lawyers. His contributions to scholarship, diplomacy and dispute settlement have had an impact far beyond the borders of Hungary. At the International Court of Justice, he will be remembered as a colleague liked and respected by all. As President Owada so well said in his tribute made on behalf of the Court, Géza Herczegh was "modest, discreet and ever courteous; he was also self-assured […] a man of conviction who was also open to discussion".

He was also a true gentleman and the Court is proud to have had Géza Herczegh sit on its Bench.

[3] Ibid. at 325.

EMLÉKEK HERCZEGH GÉZA GÁBORRÓL

PACZOLAY PÉTER[1]

Nagyon örülök, hogy az általam oly nagyra tisztelt Herczegh Géza – családjának és barátainak Gábor – emlékére a Pázmány Péter Katolikus Egyetem tudományos ülést szervezett, így a legméltóbb módon emlékezik meg e kiváló tudósról. A sors igazán érdekes fordulata, hogy az emlékülésen – legjobb szándékom ellenére – azért nem tudok megjelenni, mert a Velencei Bizottság ülésén veszek részt, és a mai nap délben épp a szlovák nyelvtörvény európai mércéknek való megfeleléséről kezdődik vita.

E sajátos apropóból szeretnék megemlékezni Herczegh Gáborral Velencében eltöltött közös napjainkról. Gazdag életművében ugyanis eléggé epizódszerűnek tűnik, mégis jelentős mozzanat, hogy Ő volt az Európa Tanács „Joggal a demokráciáért Bizottság", másként a Velencei Bizottság első magyar tagja. Ez a testület azért alakult meg épp húsz évvel ezelőtt, hogy előmozdítsa az új demokráciák alkotmányos berendezkedésének a közös európai örökséghez való igazítását. Működése során nemcsak az új demokráciák alkotmányozását és fontos közjogi törvényhozását segítette tanácsaival, hanem a szilárd nyugati demokráciák problémáit is elemezte. Ami Magyarországot illeti, emlékezetes a testület státusztörvényt értékelő véleménye.

De visszatérve a kezdetekhez: Herczegh Gábor tekintélyes nemzetközi jogászként és az újonnan alakult, de nemzetközileg is már jól ismert Alkotmánybíróság helyettes elnökeként Magyarországot képviselte a testületben. Emlékezetes, hogy Magyarországra a kilencvenes évek elején – eltérően a mai történelem-hamisító fanyalgástól – mint a rendszerváltás mintaországára tekintettek, ahol a jogállami intézmények kiépítése a régió számára példaként szolgált. Ezt a megbecsülést azért élvezhettem személyesen is, mert Herczegh professzor gyakran megkért, hogy képviseljem a Bizottság ülésein. Amikor pedig megindult az alkotmánybírósági munkacsoport ülése, sokszor együtt utaztunk – Bécsen keresztül vonattal – Velencébe.

[1] Az Alkotmánybíróság elnöke, a Velencei Bizottság alelnöke, a Szegedi Tudományegyetem egyetemi tanára.

Idősebb, tapasztalt barátként nagy szeretettel oktatott saját életfilozófiája alapjairól. Máig emlékszem, hogy közös velencei sétáink során szeretett a hidakon megállni, és beszélt szegedi egyetemi éveiről, vagy a háború utáni politikai változásokról, melyekből azt a tanulságot vonta le egyebek mellett számomra, hogy a politikai rendszerek változnak, de az emberi jellemek nem. Nem volt akaratom ellenére, amikor a szélsőségek elkerülésére, az olykor egymással ellentétes nézetek iránti empátiára, a kompromisszumok keresésére intett.

Az új jogállami Magyarország képviselete mellett történelmi szerepe volt a Velencei Bizottság kisebbségvédelmi egyezménytervezetének kidolgozásában. Ez rengeteg küzdelmébe került, melyekről részletesen mesélt. A kisebbségi nyelvhasználat kapcsán emlékszem egy pécsi konferencián kifejtett gondolatára: miközben a környezetvédők – amúgy joggal – harcolnak sokszor jelentéktelen külsejű növények vagy épp halfajták fennmaradásáért, nem vesszük észre, hogy napról-napra emberi nyelvek halnak ki! Sokszor eszembe jut ez a gondolata, és örülök, hogy a mai napon is egy kisebbségi nyelv használatáért folyó vitában vehetek részt, a pozícióban, a Velencei Bizottság tagjaként Herczegh Géza örököseként. Ezzel is szeretnék emlékének adózni.

II.
History and diplomacy
Histoire et diplomatie

A PROPOS DU CHEMIN VERS L'ARBITRAGE DE VIENNE DE 1938

(Les préparatifs et l' écho immédiat dans la presse française, anglaise et américaine)

PÉTER KOVÁCS[1]

I. Introduction

Malgré son titre, cet article n'a pas l'ambition de donner un aperçu complet de la couverture médiatique de la sentence arbitrale prononcée par Ciano et Ribbentrop, ministres des affaires étrangères de l'Axe. Il veut encore moins donner une appréciation juridique ou historique de ces événements dont les résultats, à savoir la rétrocession de la partie peuplée en majorité par les locuteurs de langue maternelle hongroise de la Tchécoslovaquie (qui avait possédé ces territoires *de facto* depuis 1919 et *de jure* depuis 1920) à la Hongrie (qui les avaient perdus avec d'autres territoires après la première guerre mondiale[2]) ont été suspendus par le traité d'armistice de 1945[3] pour être déclarés « nul et non avenus » par le traité de paix de 1947. [4]

L'article ne veut non plus critiquer l'appréciation historiographique tchécoslovaque (et slovaque) de ces événements qualifiés « *diktats* » par leurs historiens. Il est évident que l'appréciation de ces questions sera, encore longtemps, intimement influencée par l'identité nationale des auteurs. Pourtant, si l'on arrive au moins à comprendre la logique et la manière de pensée de l'autre, on aura déjà fait un pas en avant.

L'objet de cet article est seulement l'examen succint des notes diplomatiques internes et des articles et dépêches des journaux accessibles. Ces derniers témoignent des arguments que les diplomates hongrois de l'époque pouvaient utiliser pour rapporter que leur État accréditaire n'objectait pas, comprenait voire

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[1] Professeur de droit international à l'Université Catholique Péter Pázmány.

[2] Article 27 du traité de paix conclu le 4 juin 1920 avec les puisances alliées at associées.

[3] Article 2 du traité d'armistice conclu le 20 janvier 1945.

[4] Article 1 (§ 2) du traité de paix conclu le 10 février 1947.

approuvait ou *a fortiori* appuyait les manoeuvres diplomatiques hongroises, éléments d'une politique de haut risque dont les dangers ont été sentis et étudiés par les hauts responsables du ministère hongrois des affaires étrangères qui ne croyaient pas dans la victoire de l'Axe qu'ils estimaient plutôt dangereuse aux intérêts nationaux hongrois.

La présentation claire et — probablement — sincère de ce dilemme est bien perceptible dans les mémoires de ces diplomats[5] qui n'osaient pas cependant rester dehors quand, après deux décennies de propagande revanchiste et irrédentiste, leur public et leur « élite politique » réclamaient d'une voix de plus en plus haute que « le temps est arrivé » et qu' « il faut saisir l'occasion historique ». De nos jours, du haut de nos connaissances historiques[6], il est facile de passer un jugement: mais en 1938, certaines décisions devaient être prises en quelques jours, voire heures et tout cela à une époque où les techniques de communication étaient très-très loin de leur efficacité d'aujourd'hui.

Pourque le lecteur puisse comprendre le contenu et les renvois multiples de la cascade des télégrammes diplomatiques, des dépêches, des articles de journaux politiques et de revues juridiques ci-après, il est important de récapituler en grandes lignes les événements passés entre Münich et Vienne.

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[5] GYÖRGY BARCZA: *Diplomataemlékeim 1911–1945.* [Mes souvenirs diplomatiques 1911–1945] Budapest: Európa História, 1994.; ANDRÁS HORY: *Bukaresttől Varsóig.* [De Bucarest à Varsovie] Budapest: Gondolat, 1987.; ISTVÁN KERTÉSZ*: Magyar békeillúziók 1945–1947.* [Illusions de paix hongroises 1945–1947] Budapest: Európa História, 1995.; [paru en 1984: Between Russia and the West, Hungary and the Illusions of Peacemaking 1945–1947, Notre Dame, Indiana: University of Notre Dame Press, 1984.]; ALADÁR SZEGEDY-MASZÁK*: Az ember ősszel visszanéz.* [L'oeil d'automne d'un homme…] Budapest: Európa História, 1996.; ELEMÉR ÚJPÉTERY: *Végállomás Lisszabon.* [Lisbonne — Terminus!] Budapest: Magvető, 1987.; ANTAL ULLEIN-REVICZKY: *Német háború, orosz béke.* [Guerre allemande, paix russe] Budapest: Európa História, 1993. (paru en 1947: Guerre allemande, paix russe. Le drame hongrois. Neuchâtel: Editions de la Baconnière, 1947.);

[6] EDWARD CHÁSZÁR: *Decision in Vienna, The Czechoslovak-Hungarian border dispute of 1938.* Astor: Danubian Press, 1978.; ANTAL CZETTLER: *Teleki Pál és a magyar külpolitika 1939–1941.* [Paul Teleki et la politique étrangère hongroise 1939–1941] Budapest: Magvető, 1997.; GÉZA HERCZEGH: *A szarajevói merénylettől a potsdami konferenciáig.* [De l'attentat de Sarajevo jusqu'à la conférence de Potsdam] (Magyar Szemle Könyvek) Budapest, 1999.; GERGELY SALLAI: *Az első bécsi döntés.* [la première sentence arbitrale de Vienne] Budapest: Osiris. 2002.; LÁSZLÓ SÜTŐ: *La politique interalliée et la Hongrie pendant la seconde guerre mondiale.* [Thèse soutenue à l'Université de Groningue, en 1983]; MIKLÓS ZEIDLER: *A revíziós gondolat.* [L'idée de la révision] Pozsony/Bratislava: Kalligram, 2009.

II. Récapitulation des grandes lignes des manoeuvres diplomatiques hongrois et tchécoslovaques des semaines concernées

Au cours des jours précédant la rencontre de Münich, la diplomatie hongroise a essayé en vain de mettre la question des revendications territoriales hongroises à l'agenda des quatre puissances. La diplomatie polonaise s'est engagée dans une direction analogue pour pouvoir saisir l'ancienne principauté de Teschen. Sur les quatres personnes (Hitler, Mussolini, Chamberlain et Daladier), statuant sur le sort du territoire des Sudètes, c'était seulement le « *Duce* »qui y était sensible et même s'il a accepté l'ajournement de la question, il a réussi de la faire inclure dans l'annexe portant sur les garanties de frontières de la Tchécoslovaquie.[7]

Suite à cette ouverture incertaine et en croyant en l'arrivée d'un moment diplomatique propice attendu depuis longtemps, la Hongrie est entrée dans des négociations bilatérales[8] avec la Tchécoslovaquie lesquelles ont été rompues une fois, mais reprises après, pour être déclarées closes en raison de l'incapacité des parties à s'entendre sur la ligne précise. La Tchécoslovaquie — dont la délégation a été composée essentiellement des représentants du gouvernement de l'autonomie slovaque — a accepté le retour du territoire de majorité magyare, mais des divergences subsistaient sur la question si les résultats du census de

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[7] Sur les quatre annexes joint à l'accord de Münich, le premier et le deuxième touchaient les revendications hongroises et polonaises.
« Annexe première
Le gouvernement de Sa Majesté dans le Royaume-Uni et le gouvernement français ont conclu l'accord ci-dessus, étant entendu qu'ils maintiennent l'offre contenue dans le paragraphe 6 des propositions franco-britanniques du 19 septembre 1938, concernant une garantie internationale des nouvelles frontières de l'État tchécoslovaque contre toute agression non provoquée.
Quand la question des minorités polonaise et hongroise en Tchécoslovaquie aura été réglée, l'Allemagne et l'Italie, pour leur part, donneront également une garantie à la Tchécoslovaquie.
Annexe II
Les chefs des gouvernements des quatre puissances déclarent que le problème des minorités polonaise et hongroise en Tchécoslovaquie, s'il n'est pas réglé dans les trois mois par un accord entre les gouvernements intéressés, fera l'objet d'une autre réunion des chefs des gouvernements des quatre puissances aujourd'hui assemblés.
Annexe III
Toutes les questions qui pourront naître du transfert du territoire sudète seront considérées comme du ressort de la commission internationale.
Annexe IV
Les quatre chefs des gouvernements ici réunis sont d'accord pour que la commission internationale prévue à l'accord en date de ce jour soit composée du secrétaire d'État à l'Office des affaires étrangères, des trois ambassadeurs accrédités à Berlin, et d'un membre à nommer par le gouvernement tchécoslovaque.»

[8] Les négociations avaient lieu entre le 9-13 octobre dans la partie de Nord de Komarno (Komárom en hongrois), ville divisée en deux par le Danube, devenu frontière en 1920.

1910 ou de celui de 1930 devraient être utilisés. Le choix entre les deux census aurait déterminé l'appartenance des grandes villes de ces territoires.

Encore avant ces négociations, et en recourant à l'ultimatum, la Pologne a occupé le territoire de Teschen (appelé en polonais Cieszyn) et de Zaolzie.[9] Pour renforcer leur position géopolitique et pour pouvoir se distancier de la puissance de l'Allemagne hitlérienne revanchiste, la Pologne et la Hongrie auraient bien aimé avoir une frontière commune, si possible en rattachant à la Hongrie le territoire de la Ruthénie (l'Ukraine subcarpatique) dont la population parlait une langue slave, proche de l'ukrainien, mais ayant de distances linguistiques très grandes vis-à-vis le tchéque et le slovaque.

Pour accepter qu'elle soit rattachée à la Tchécoslovaquie en 1919-1920, un statut d'autonomie territoriale à placer sous la garantie de la Société des Nations a été promise à la population plutôt hungarophile de la Ruthénie. Pourtant, cette autonomie n'est pas entrée en vigueur jusqu'à 1938. A ce temps-là pour affaiblir la Pologne, un indépendantisme ukrainien pro-allemand a été incité par les services secrètes nazis sur les territoires polonais orientaux[10]. Ce mouvement avait des répercussions aussi bien en Ruthénie et selon les observateurs de l'époque, la vision d'une grande Ukraine pouvait émerger aux yeux de Hitler ambitionnant le recommencement armé de la politique historique du *Drang nach Osten*.

Après la constatation de l'échec et la clôture des négociations hungaro-tchécoslovaques, Prague et Budapest ont commencé à manoeuvrer pour mettre

[9] L'ultimatum a été trasmis le 30 septembre et l'armée polonaise est entrée le 1 octobre 1938. La région de Zaolzie a été occupée aussi à ces jours-là. La majorité de la population de ces territoires parlaient le polonais, comme langue maternelle. (La Zaolzie appartenait avant 1919 à la Hongrie.) En 1920, malgré les prétentions polonaise, l'armée tchécoslovaque a occupé la Cieszyn et la Zaolzie, en profitant de la dislocation lointaine de l'armée polonaise, luttant à ce temps-là avec l'armée rouge de la Russie soviétique.
Cette affaire a été suivie de près par Hory (ministre adjoint des affaires étrangères, mais à ce temps-là, l'envoyé hongois accrédité à Varsovie) qui en a fait un long télégramme et en parle aussi dans ses mémoires.
Selon les mémoires de Hory, après Münich, le gouvernement français a d'abord déconseillé les menaces adressées à la Tchécoslovaquie. Quelques jours après, le ministre polonais Beck a informé les ambassadeurs anglais et français (et tout de suite après eux l'envoyé hongrois) de l'envoi de l'ultimatum. Le jour suivant, les deux ambassadeurs sont revenus avec la réponse de leurs gouvernements qui offraient leurs bons offices, « sans vouloir trainer l'affaire trop long ». Doc. No. 448. In MAGDA, ÁDÁM (sous la dir. de): *Diplomáciai iratok Magyarország külpolitikájához 1936–1945. (II. A müncheni egyezmény létrejötte és Magyarország külpolitikája 1936–1938.)* [Documents diplomatiques sur la politique étangère de la Hongrie 1936–1938 (II. La conclusion de l'accord de Münich et la politique étangère de la Hongrie 1936–1938.)], Budapest: Akadémiai, 1965. 701–705. [cf. *infra* sous *DIMK* II.]; HORY, ANDRÁS: Bukaresttől Varsóig. [De Bucarest à Varsovie] Budapest: Gondolat, 1987. 251.

[10] Territoires au-delà de la ligne Curzon, saisis lors de la guerre polono-soviétique et qui appartenaient entre 1920–1939 à la Pologne. L'URSS les a repris suite au protocole secret du pacte Molotov–Ribbentrop.

un terme au différend.

Lors de la clôture des négociations, la délégation hongroise a transmis une « déclaration » qui après avoir constaté l'absence de chance de pouvoir rapprocher les positions respectives, s'est terminée comme suit: « *Pour ces motifs, le Gouvernement Royal de Hongrie a décidé de considérer ces négociations, en ce qui le concerne, comme terminées et de demander le règlement urgent de ses revendications territoriales vis-à-vis la Tchécoslovaquie, des quatre puissances signataires du Protocole de Münich.* »[11]

Les initiatives hongroises visaient donc la convocation d'une deuxième conférence quadrilatérale agissant quasiment en tant que conférence arbitrale.

Dans un imbroglio diplomatique, la Tchécoslovaquie a essayé de gagner du temps et non seulement elle n'a pas refusé, mais elle a carrément renforcé l'idée de l'arbitrage qu'elle avait imaginée en tant qu'un arbitrage bilatéral de l'Axe, où selon ses calculs, la position pro-tchécoslovaque escomptée de l'Allemagne (position vraisemblablement promise par ce dernier) pourrait avoir de primauté par rapport à l'attitude hungarophile attendue de l'Italie qui aurait dû céder à son partenaire plus fort. (Après Münich et la démission d'Edouard Benes, une orientation pro-allemande s'est développée dans le gouvernement de la Tchécoslovaquie.)

La position tchécoslovaque a été récapitulée dans la note verbale écrite en français le 26 octobre 1938: que le ministre tchécoslovaque a transmise à l'envoyé hongrois et où la cession territoriale et l'arbitrage bilatéral ont été soulignés.[12]

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[11] Doc. No. 493a in *DIMK* II. 712.

[12] « […] Le Gouvernement tchécoslovaque se permet de faire ressortir une fois de plus que les négociations actuelles ne peuvent avoir trait qu'à la question de la minorité hongroise. En effet, les points 1 et 2 du Protocole additionnel de l'Accord de Münich du 29 Septembre 1938 ne parlant que des minorités polonaise et hongroise, d'autres problèmes ethniques doivent rester en dehors du cadre des négociations actuelles.

En ce qui concerne la question de la minorité hongroise, le Gouvernement tchécoslovaque reste animé du désir sincère d'arriver à une solution franche rapide et complète. C'est dans ce but qu'il a présenté le 22 Octobre des propositions qui concernent tout le territoire national uni hongrois (geschlossener Volksboden). Ces propositions ont été transmises comme base générale aux négociations nouvelles auxquelles resteraient réservées des modifications ultérieures.

Le Gouvernement hongrois ne considérant pas ces propositions comme satisfaisantes, le Gouvernement tchécoslovaque est d'accord pour soumettre la question de la minorité hongroise à une décision arbitrale de l'Allemagne et de l'Italie, signataires de l'Accord de Münich.

L'adjonction éventuelle d'autres arbitres devrait être laissée à la décision de ces deux Puissances elles-mêmes. Si ces deux Puissances donnaient suite à la proposition hongroise concernant la Pologne, le Gouvernement tchécoslovaque propose que la Roumanie y soit également associée.

La décision arbitrale devrait fixer les modalités et les délais de l'évacuation par les troupes et les autorités tchécoslovaques du territoire à céder et de son occupation par les troupes

En intervenant dans ces manoevres diplomatiques (et en les manipulant dès le début), Berlin s'est entendu avec Londres et Paris, tous les deux assez réticents d'ailleurs, que contrairement à l'idée hongroise, supportée par l'Italie, ils confient le règlement du différend à l'Axe.

Hitler a aussi objecté que la Pologne et la Roumanie qui s'étaient candidées entretemps, la première comme ami traditionnel de la Hongrie, la deuxième voulant appuyer la position tchécoslovaque, puissent remplacer l'Angleterre et la France. (L'Italie a aussi essayé de maintenir l'idée de l'arbitrage, en le réduisant à l'Axe, vu le rejet allemand d'une nouvelle conférence quadrilatérale.)

Plusieurs missions officielles ainsi que des missions secrètes ont été envoyées par les gouvernements hongrois et tchécoslovaque à Hitler, à Ribbentrop, à Mussolini et à Ciano. Ciano et Ribbentrop s'entretenaient plusieurs fois sur ce sujet par téléphone mais aussi bien lors d'une rencontre personnelle.[13]

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et les autorités hongroises. Le Gouvernement tchécoslovaque propose qu'une commission d'experts militaires hongrois et tchécoslovaques se réunisse de suite pour préparer et accélérer l'exonération des mesures nécessaires.
Veuillez agréer, Monsieur le Ministre, l'expression de ma haute considération, Chalkovsky m.p. » Doc. No. 585. in *DIMK* II. 853–854.

[13] Le 14 octobre Hitler a reçu Darányi, l'ex-premier ministre hongrois mais la rencontre s'est déroulée dans un climat très tendu et elle était caractérisée par le monologue du chancelier sur la versatilité de la Hongrie. (En août 1938, le régent Horthy lui a refusé d'attaquer la Tchécoslovaquie, idée que Hitler lui a proposée pour qu'il puisse engager le Wehrmacht après. Hitler est revenu plusieurs fois à ce refus et souvent, il a répété l'adage allemand: « *celui qui veut manger à table, doit d'abord aider à la cuisine.* ») A cette rencontre, Ribbentrop était hostile aux prétentions hongroises portant sur les villes importantes et il contestait les données ethnographiques hongroises. Hitler a reçu le ministre des affaires étrangères de la Tchécoslovaquie — selon certains document — aussi bien le 14 octobre, mais avant Darányi.
Le 19 octobre à Münich, Ribbentrop a reçu Tiso, le premier ministre du gouvernement autonome slovaque (qui dirigeait la délégation tchécoslovaque aux négociations de Komarno) et l'a informé sur sa position plutôt négative en ce qui concerne les revendications hongroises. En revenant à la « nécessité de faire des concessions », Ribbentrop a proposé à Tiso un plan où les terroires proposés à cession par la délégation slovaque anx négociations de Komarno auraient été complétés seulement par Kassa (Kosice), tandis que les quatres autres villes (Bratislava, Nyitra/Nitra, Ungvár/Ouzghorod et Munkács/Mukacevo) resteraient en Tchécoslovaquie. (Selon Ribbentrop, ceci correspondrait aux demandes que Darányi avait présentées à la rencontre avec Hitler comme le minimum acceptable.) La délégation tchécoslovaque l'a accepté. Ribbentrop laissait entendre cependant qu'il pourrait changer son opinion et préserver Kosice à la Tchécoslovaquie si ceci est sentimentalement très important. (Ribbentrop a envoyé un compte rendu détaillé à Ciano sur le contenu de la rencontre entre Darányi et Hitler d'une part, lui-même et Chvalkowsky, le ministre tchécoslovaque d'autre part.) Doc. 186, du 22 octobre 1938. (RÉTI, GYÖRGY (ed.): *A Palazzo Chigi és Magyarország. Olasz diplomáciai dokumentumok Magyarországról. A Darányi-kormány megalakulásától a Szovjetunió elleni hadüzenetig. (1936–1941)* [Le Palazzo Chigi et la Hongrie. Documents diplomatiques italiens sur la Hongire. La période entre le gouvernement de Darányi et la déclaration de guerre à l'URSS (1936–1941)] Budapest: Italung, 2003. 157.
(En effet, il y a une contradiction en ce qui concerne la participation de Chvalkowsky, le ministre tchécoslovaque. La note approuvée par Ribbentrop et envoyée à Ciano y fait une allusion précise, mais quand Chvalkowsky a récapitulé l'essentiel devant l'envoyé hongrois

A ce temps-là, les envoyés hongrois et tchécoslovaques à Berlin et à Rome, ainsi que des envoyés allemands et italiens à Budapest et à Prague ont informé *quasi* quotidiennement les États accréditants sur la position respective de leurs gouvernements et ont semé des informations et des désinformations.

Selon la logique de la diplomatie, les autres grandes puissances devaient être contactées pour vérifier leur attitudes vis-à-vis le caractère et la nature du règlement du différend territorial ultraimportant pour la Hongrie et la Tchécoslovaquie.

Finalement, suite aux appels successifs et distincts, l'Allemagne a invité la Tchécoslovaquie et la Hongrie à confirmer par des déclarations unilatérales (donc pas dans un compromis *stricto sensu*) qu'elles soumettraient leur différend à l'arbitrage de l'Axe, réuni à Vienne. En l'absence d'un vrai compromis, des divergences de vue subsistaient sur l'étendu du mandat donné aux puissances de l'Axe. Selon la diplomatie hongroise, les arbitres n'ont été sollicités que de prendre la décision sur l'appartenance des villes dont le sort n'avait pas été réglé aux négociations bilatérales. Or, selon la diplomatie tchécoslovaque, vu l'échec des négociations bilatérales, les offres volontaires devenaient caduques et la compétence des arbitres s'étendait à trancher sur tout le territoire réclamé par la Hongrie.

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de Prague, il le faisait toujours comme s'il en avait reçu l'information de la part de Tiso, lui ayant donné un compte rendu par téléphone. Doc. No. 562, 563, 571. in *DIMK* II. 828–829. et 835.)

Le ministre Chvalkovsky a informé l'envoyé hongrois accrédité à Prague que son gouvernement transmettrait sous peu au gouvernement hongrois les propositions arrêtées en commun avec Ribbentrop. Doc. No. 562 et 563. in *DIMK* II. 828–829. En effet, une proposition et une carte géographique ont été transmises. (Vraisemblablement les mêmes propositions et carte qui ont été transmises à Budapest, par l'envoyé allemand, le 22 octobre 1938.) Selon le ministère des affaires étrangères hongrois, ceci ne correspondait pas à la proposition minimaliste de Darányi, car les villes Ungvár/Ouzghorod et Munkács/Mukacevo n'y étaient pas incluses. Dans un climat de plus en plus tendu, Ribbentrop accusaient les Hongrois qu'ils augmentaient le noyeau « minimal » tandis que la diplomatie hongroise laissait entendre que Ribbentrop n'a pas bien compris Darányi.)

Le 14 octobre, une délégation hongroise, menée par le vice-ministre Csáky est arrivée à Rome et a informé Mussolini qui promettait son appui sauf en ce qui concerne la question des plébiscites. Ciano a demandé l'arrivée des experts hongrois pour qu'il connaisse en détail la composition ethnique des territoires contestés. Cette rencontre a eu lieu probablement le 30 octobre à Rome et Ciano a appris toutes les données pour pouvoir surprendre Ribbentrop qui l'avait considéré « un Italien superficiel ». Ciano ambitionnait la cession des villes historiquement importantes aux Hongrois.

Après des conversations téléphoniques de 22 et de 23 octobre, clarifiant les positions, une rencontre personnelle a eu lieu entre Ribbentrop et Ciano le 28 octobre à Rome où le ministre allemand a accepté « définitivement » que Kassa (Kosice), Ungvár (Ouzghorod) et Munkács (Mukacevo) soient restitués à la Hongrie. Le 31 octobre, Ciano en avait informé l'envoyé hongrois de Rome qui l'a télégraphié à Budapest. (Doc. No. 618. in *DIMK* II. 880.)

(La diplomatie hongroise nouait cependant des doutes que entre Rome et Vienne, Ribbentrop ait reçu de la part de Hitler une instruction de devenir moins favorable vis-à-vis les demandes hongroises.)

La rencontre a eu lieu dans le palais de Belvedere, possédé jadis par l'archiduc François-Ferdinand, assassiné à Sarajevo en 1914.

Le déroulement de la conférence de Vienne est très bien reflété dans les notes qu'un diplomate allemand a dû établir en tant qu'un procès verbal des interventions. Ce document a été publié aux États-Unis aux années cinquantes.[14] Les interventions allemandes et tchécoslovaques y sont *verbatim* transcrites et les interventions hongroises et italiennes sont récapitulées. On peut voir par la lecture de ce procès verbal que les formalités procédurales suivaient de près les caractéristiques propres de la partie orale des arbitrages internationaux: on a commencé avec la présentation des positions avec leur argumentation, suivie par réplique et duplique. Ceci a duré pendant deux heures entre midi et 14 heures. Un déjeuner en commun l'a suivi.[15] Le déjeuner terminé, Ribbentrop et Ciano se sont retirés et les délégations gouvernementales tchécoslovaque et hongroise ont dû revenir à 19 heures pour qu'elles entendent la lecture de la sentence et des documents auxiliaires.

(Par contre, les mérites des négociations italo-allemandes avant Vienne et déjà à Vienne sur le tracé exact de la frontière n'ont été reconstitués avec précision suffisante qu'après des décennies. Pendant longtemps, la base primaire était le journal intime de Ciano[16] dont les éléments ont été confirmés, élargis et nuancés par les informations des diplomates de l'époque, publiées après la guerre. Aujourd'hui, dans le mirroir de l'historiographie moderne, on sait que l'essentiel était décidé d'avance par Hitler, sans que la Hongrie ou la Tchécoslovaquie connaissaient la décision définitive avec certitude.[17])

A la conférence de Vienne, on a confirmé la cession territoriale en ajoutant à la partie offerte par la Tchécoslovaquie lors des négociations bilatérales d'octobre 1938 aussi trois grandes villes sur les cinq réclamées par la Hongrie. A ce temps-là, quelques « grandes » villes de la Ruthénie ont été rattachées à

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[14] E. KORDT: Mémorandum of the Conference of the Four Foreign Ministers in the Belvedere palace on November 2, 1938, from 12. noon to 2. PM. Doc. 37. In CHÁSZÁR op. cit. 122–130. (Publié à la première fois, in Documents on German Foreign Policy 1918–1945, From the Archives of the German Foreign Ministry, Series D, 1937–1945, Washington, U.S. Goverment Printing Office, 1949–1956. IV. 118–127.)

[15] Au cours des répliques et dupliques, la délégation tchécoslovaque a voulu ajouter une intervention propre de Tiso, le premier ministre de l'autonomie slovaque, comme représentant de la population locale. Cette initiative a été rejetée en proposant que Tiso prenne la parole au cours du déjeuner. Cependant, cette intervention n'a eu lieu, ni lors des auditions, ni lors du déjeuner.

[16] *The Ciano Diaries, 1939–1943. The Complete, Unabridged Diaries of Count Galeazzo Ciano, Italian Minister for Foreign Affairs, 1936–1943.* Simon Publications, 2001.

[17] La diplomatie hongroise a été assez bien informée de la part de Ciano, sans qu'elle soit convaincue sur les possibilités du ministre italien de faire valoir sa sympathie pour la Hongrie lors de ses contacts avec Ribbentrop, toujours plutôt froid voire hostile vis-à-vis les actions du ministère des affaires étrangères de la Hongrie.

la Hongrie mais la partie vraiment slave est encore restée en Tchécoslovaquie jusqu'à mi-mars 1939 quand l'armée hongroise l'a occupée après que Hitler a imposé au président Hacha la reconnaissance de l'indépendence de la Slovaquie et la signature de l'accord de protectorat en ce qui concerne la Bohême-Moravie.

Cette récapitulation a été nécessaire pour comprendre les informations des média et de la diplomatie qui seront présentées *infra* et qui se réfèreront directement aux événements qui viennent d'être mentionnés très brièvement.

L'objet de notre étude sera donc de voir les informations et les impressions que la diplomatie hongroise a pu collecter selon les règles professionnelles de ce métier sur la perception de ces événements et de ces manoeuvres dans les milieux gouvernementaux et médiatiques anglais, français et américain?

La politique étrangère hitlérienne a été entourée de respect et d'admiration mais aussi bien d'inquiétude et de peur par l'élite politique hongroise divisée où la position des individus a été conditionnée par leur formation, leur mémoire de la grande guerre, la possession ou l'absence d'informations sur la réalité de la puissance économique et militaire de l'Angleterre, des États-Unis et de la France.

L'élite politique hongroise (comme la majeur partie de la population) vivait cependant dans l'espoir de récupérer les territoires perdus après la première guerre mondiale, perte consacrée par le traité de paix de Trianon. Le rève nostalgique et irréaliste pendant une décennie et demie est devenu subitement réalisable — pourvu que les circonstances internationales le permettent et le garantissent, — estimaient les diplomates.

III. Les sources de la reconstitution des informations des diplomates hongrois de l'époque

Est-il possible de reconstituer les informations possédées par les diplomates hongrois de l'époque?

Sans vouloir prétendre que la méthode choisie soit parfaite, on s'est concentré sur l'utilisation de trois types de documents: a) les rapports diplomatiques et les compte-rendus de presse préparés aux légations hongroises, b) les compte-rendus de presse préparés par l'Agence Télégraphique Hongroise (MTI: Magyar Távirati Iroda) et c) la consultation de la version électronique de certains journaux accessible via le portail Gallica en ce qui concerne les journaux français ou bien des bases de données de vocation similaire des universités américaines, australiennes ou néo-zélandaises.

Les références aux écrits de la doctrine juridique[18] de l'époque complètent les recherches et leur citation est d'autant plus intéressante car souvent, il s'agit vraiment de grands noms dont les idées et les remarques ont certainement influencé les diplomates hongrois de l'époque.

L'utilisation de ces sources complémentaires est incontournable à cause du fait que les deux tomes pertinents de la grande documentation diplomatique historique portant sur la politique étrangère de la Hongrie à l'époque de la deuxième guerre mondiale[19] souffrent de lacunes, dues en partie à des destructions de guerre[20] et d'autre part aux difficultés de récupérer des copies gardées aux archives nationaux ou étrangers. Ainsi il y a aussi une disproportionnalité apparente quand on compare le nombre de documents venus de (ou envoyés à) Berlin, Rome, Prague et ceux qui concernent les positions de Londres, de Paris et de Washington. (Le nombre des télégrammes parisiens y publiés est très bas, mais il est inconcevable que les diplomates en poste n'aient envoyé de rapports minutieux ou qu'ils n'aient procédé au sondage du gouvernement d'accueil sur les manoeuvres diplomatiques précédant la conférence de Vienne. Souvent, il y a des références aux compte-rendus et aux réponses déjà envoyés sans que leur contenu soit accessible.)

Dans leurs mémoires précités et rédigés en général après la guerre, souvent dans l'émigration, sans accès aux documents diplomatiques originaux, les diplomates hongrois[21] (en poste à l'époque à Paris, à Londres, à Washington ou bien aux positions décisionnelles du minstère des affaires étrangères de Hongrie) faisaient référence à une compréhension relative de la politique étrangère hongroise dans les milieux gouvernementaux et dans la presse en Grande Bretagne et aux États-Unis et — dans une moindre mesure —, aussi bien en France. La valeur de ces remarques est tantôt approuvée[22], tantôt relativisée[23]

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[18] L'accès aux revues scientfiques juridiques des pays concernés a été effectué par Hein-Online, « Google books » et « Google scholar ».

[19] *DIMK* II.; et MAGDA, ÁDÁM (sous la dir. de): *Diplomáciai iratok Magyarország külpolitikájához 1936–1945. (III. Magyarország külpolitkája 1938–1939.)* [Documents diplomatiques sur la politique étangère de la Hongrie 1936–1945 (III. La politique étangère de la Hongrie 1938–1939], Budapest: Akadémiai, 1970. [cf. *infra* sous *DIMK* III.]

[20] Le bàtiment du ministère hongrois des affaires étrangères a été complètement détruit lors du siège de Budapest (décembre 1944 — février 1945), mais déjà aux jours de l'occupation allemande de la Hongrie, les diplomates hongrois ont brûlé le contenu de l'archive ministériel portant sur les contacts avec la Grande Bretagne et les États-Unis liés aux négociations secrètes sur la sortie hongroise de la guerre.

[21] Sándor Khuen-Héderváry, György Barcza, János Pelényi, Aladár Szegedy-Maszák, Antal Ullein-Reviczky, István Kertész etc.

[22] CARLILE AYLMER MACARTNEY: *October Fifteenth: A history of modern Hungary, 1929–1945.* Occidental Press, 1993.

[23] ANDRÁS D. BÁN: *Hungarian-British diplomacy, 1938–1941: The attempt to maintain relations.* Routledge, 2004. (cf. en particulier les pages 23–55.)

par les ouvrages publiés par ceux qui ont eu accès aux notes internes du Foreign Office et des autres ministères.

IV. Le ton et les remarques principaux des journaux politiques britanniques, français et américains

Si on regarde les écrits pendant les jours entourant les rencontres de Vienne, on peut voir l'apparition des termes *award, arbitral award, arbitration* dans les dépêches des agences et dans les journaux britanniques[24] et américains[25], tandis qu'en général, *arbitrage* ou *sentence arbitrale* ont été utilisés dans la presse française[26].

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[24] En ce qui concerne les grands journaux anglais, comme p.ex.. *The Times,* le *Daily Herald,* le *Daily Mirror*, le *Daily Telegraph*, le *Daily Mail,* le *Guardian, le Manchester Guardian,* l'auteur n'en dispose pas de version électronique. (Aux archives électroniques de l'Agence Télégraphique Hongroise (Magyar Távirati Iroda, abréviée couramment MTI), on peut cependant trouver beaucoup de compte-rendus et quelquefois des traductions partielles des articles de ces journaux. Vu cependant le caractère sensible de la question, l'auteur de ces lignes n'ose pas présumer que partout où dans la transcription hongroise, l'expression « sentence arbitrale de Vienne » peut être lue, forcément « arbitral award » soit retrouvé dans les versions anglaises originales.
Heureusement, on peut cependant profiter de la version numérique accessible de quelques journaux, publiés pour le public australien et néo-zélandais. Manifestement, leurs rédactions se basaient sur les dépêches des grandes agences de presse internationales à Londres et elles citaient souvent les grands journaux britanniques ou les communiqués de presse gouvernementaux ou parlementaires.
C'est pourquoi on cite des exemples dans des journaux publiés en Australie comme le *Sydney Morning Herald* du 4 novembre 1938: « decision », « award »; ou de 5 novembre 1938: « award »; et de 7 novembre 1938: « award », « decided to arbitrate » et à la Nouvelle Zélande, comme l' *Evening Post* (le 4 novembre 1938: « awards », « decision » « agreement »; (D'après la lecture des versions numériques de ces journaux.)

[25] Cf. le New York Times: le 3 novembre 1938: « award »; Pour des raisons similaires que celles développées dans la note de bas de page précédente, on complète ces deux références maigres avec la lecture numérique des « petits » journaux de l'État Utah qui faisaient souvent des compilations des articles de grands journaux américains ou de dépêches de grandes agences. (Utah Digital Newspapers, the University of Utah, J. Willard Marriott Library).
Cf. le *Kane County Standard:* le 18 novembre 1938: « […] foreign ministers Joachim von Ribentrop and Count Galeazzo Ciano have just transferred a large part of Chezchoslovakia to Hungary. »;, le *Salt Lake Telegram:* le 2 novembre 1938: « Nazi, Fascist 'Judges' Grant Hungary's Territorial Claims. », « mediation »; (D'après la lecture des versions numériques de ces journaux.)

[26] Cf. le *Journal des Débats:* le 2 novembre 1938: « arbitrage »; le 3 novembre 1938: « les arbitres prononcent leur sentence »; le 4 novembre 1938: « sentence arbitrale »; *La Croix:* le 3 novembre 1938: « arbitrer le différend », « l'arbitrage de Vienne »: le 4 novembre 1938: l »'arbitrage italo-allemand »; *Le Figaro:* le 3 novembre 1938: « L »Allemagne et l'Italie ont fixé à Vienne que la Tchécoslovaquie devra céder à la Hongrie »; « territoires accordés à la Hongrie »; *Le Temps:* le 2 novembre 1938: « l'arbitrage »,; le 3 novembre 1938: « les arbitres allemand et italien rendront leur sentence »; *L'Ouest Éclair:* le 2 novembre 1938: « arbitrage »; le 3 novembre 1938:

En ce qui concerne la question si les arbitres étaient les deux *gouvernements,* représentés par les deux ministres des affaires étrangères ou bien les deux ministres *in personam*, on peut trouver toutes les deux versions, souvent dans le même journal. La nationalité et l'orientation des journaux ne jouaient pas de rôle décisif dans le choix et la partie introductive[27] de la sentence — substituant un vrai instrument de compromis *en bonne et due forme* et ne référant qu'au consentement des gouvernements en litige — n'a pas toujours influencé les commentateurs. Mais en effet, le public de l'époque (ainsi que le lecteur d'aujourd'hui) a toujours considéré — sans connaître tous les détails désormais accessibles — qu'il s'agissait de l'oeuvre des *deux gouvernements* de l'Axe.

Il est plus qu'intéressant de suivre l'appréciation des deux sentences arbitrales *in merito* dans le média choisi dans notre article et voir les nuances de l'époque.

IV/1. La sentence arbitrale et la presse britannique

Voyons d'abord la sentence arbitrale et la presse britannique à ce sujet, en utilisant aussi les comptes-rendus de presse de l'Agence Télégraphique Hongroise.[28] (Apparamment, entre le 31 octobre et le 7 novembre 1938, 30 articles de presse[29] et 6 dépêches d'agence[30] d'origine anglaise ont été répertoriés et diffusés pour un public gouvernemental restreint.)

En se fondant sur des sources de Pragues, le Sunday Times a considéré la convocation de la conférence de Vienne en tant que victoire de la diplomatie tchèque, car la Hongrie avait dû accepter l'arbitrage des gouvernements de

« sentence » et « sentence arbitrale »; le 4 novembre 1938: « arbitrage » et « sentence arbitrale »; *L'Humanité:* le 2 novembre 1938: « les arbitres […] rendent leur sentence » (D'après la lecture des versions numériques de ces journaux.)

[27] « Considérant la demande adressée par les gouvernements royal hongrois et de la République tchécoslovaque aux gouvernements allemand et royal italien tendant à régler par l'arbitrage la question pendante entre eux des territoires à céder à la Hongrie, considérant les notes du 30 octobre échangées ensuite entre les gouvernements intéressés, le ministre des affaires étrangères de la Reich, M. Joachim von Ribbentrop, et le ministre des affaires étrangères de S.M. le roi d'Italie et l'empereur d'Éthyopie, comte Galeazzo Ciano, se sont rencontré aujourd'hui à Vienne et, au nom de leur gouvernement […] ont rendu la sentence que voici: »

[28] Cf. les comptes-rendus de l'Agence Télégraphique Hongroise dans la série « nouvelles confidentielles » (« bizalmas értesítések ») rédigée à Budapest pour un public restreint des ministères et de l'élite gouvernementale. Ci-après: MTI-Bizalmas avec date et souvent avec un numéro d'identification.
Cf. aussi les comptes-rendus non-confidentiels, transmis aux média, datés et en général avec un numéro d'ordre, mais sans numéro d'identification. Ci-après: MTI.

[29] Daily Express: 5, Daily Herald: 3, Daily Mail: 7, Daily Telegraph: 2, Evening Standard: 1, Manchester Guardian: 2, News Herald: 3, Referee: 1, Sunday Dispatch: 1, Sunday Times: 1, The Times: 4.

[30] Reuters: 5, United Press: 1.

l'Italie et de l'Allemagne, mais — selon ce journal — Berlin n'appuyera pas les revendications hongroises trouvées exagérées. [31] Le Times avait la même opinion.[32] Les journaux britanniques ont cité l'agence Reuters selon laquelle on pouvait s'attendre qu'une frontière ethnographique soit tracée,[33] où les Allemands favoriseraient la position tchèque, tandis que les Italiens prendraient fait et cause pour la Hongrie.[34]

Les nouvelles diffusées après la prise de la sentence présentée comme succès hongrois analysaient la nouvelle frontière et son arrière-plan ethnique, en expliquant que la Hongrie avait reçu tout ce qu'elle voulait, ou même un peu plus qu'elle avait escompté. [35] Elles soulignaient que l'appui italien avait été plus fort qu'attendu et que pour Berlin, l'essentiel consistait à empêcher l'établissement d'une frontière commune entre la Pologne et la Hongrie.[36]

L'Agence Télégraphique Hongroise faisait référence aussi à l'impact considérable perçu dans les milieux de Londres aux mois précédants, d'une étude écrite par Betram de Colonna sur les problèmes irrésolus des minorités ethniques et de la construction politique de la Tchécoslovaquie.[37]

L'Agence Télégraphique Hongroise a cité la réponse donnée par le secrétaire d'état Butler dans la Chambre des Communes où il a exprimé la joie de son gouvernement de pouvoir saluer l'arrangement pacifique du différend des deux gouvernements par le recours volontaire à l'arbitrage.[38] On peut y ajouter la communication du correspondant de Rome qui faisait état à la satisfaction italienne que le roi George V, dans son discours de trone ait apprécié et salué l'activité de Mussolini dans le règlement de la question tchéco-hongroise.[39]

Le Times a consacré un long éditorial à la sentence dont il saluait l'attachement rigide au principe ethnographique[40], même au détriment des impératifs économiques: dans le cas où des difficultés économiques locales surgissaient — surtout en ce qui concerne la région ruthène, c'est à dire l'Ukraine subcarpathique —, il fallait que les gouvernements respectifs fassent leur

[31] MTI-Bizalmas, le 31 octobre 1938, No. 1962.

[32] MTI-Bizalmas, le 31 octobre 1938, No.1959.

[33] MTI-Bizalmas, le 31 octobre 1938, No. 1959 (cf. dans le même sens le Sydney Morning Herald, le 3 novembre 1938)

[34] MTI-Bizalmas, le 31 octobre 1938, No. 1959.

[35] MTI-Bizalmas le 3 novembre 1938, No. 1999.

[36] MTI-Bizalmas, le 3 novembre 1938, No. 1999, 2003 et 2018.

[37] Betram de Colonna: Czecho-Slovakia within, http://www.wintersonnenwende.com/scriptorium/english/archives/czechoslovakiawithin/csw00.html
MTI-Bizalmas, le 3 novembre 1938. (sans numéro).

[38] MTI, le 3 novembre 1938.

[39] MTI, le 5 novembre 1938.

[40] MTI-Bizalmas, le 5 novembre 1938, No. 2044.

mieux pour diminuer l'importance des frontières. [41] Par contre, le Manchester Guardian a été très critiqueur dans son éditorial accusant les arbitres d'avoir été « dirigés par l'ignorance et la gloutonnerie » et il a considéré comme « erreur fatale d'avoir chosir des arbitres de la classe des criminels ».[42] La sentence lui semblait être injuste parce que des communes slovaques et ruthènes étaient aussi bien concernées par la cession territoriale.[43]

Le climat de joie sentie au sein de la population magyare des territoires cédés lors de l'entrée de l'armée hongroise a été reflété dans les reportages sympathisant des journalistes du Daily Telegraph, du Daily Express, du Daily Mail et du News Chronicle qui se sont rendus sur place.[44] (Le Sydney Morning Herald donne son compte-rendu dans le même style, en se basant sur le Daily Telegraph.[45] L'Evening Post faisait la même chose.[46]) Un éditorial du Times critique les décennies précédentes de la politique britannique et refuse catégoriquement de s'opposer au nouveau courant de l'histoire dans un contexte où la logique économique traditionelle de la Mitteleuropa peut être reconnue.[47] Le Times[48], le Daily Herald et la Daily Express rapportaient des incidents antisémites de Slovaquie et l'expulsion forcée des juifs de langue hongroise de Presbourg (Bratislava) vers les territoires perdus.[49]

IV/2. La sentence arbitrale et la presse française

En ce qui concerne la sentence arbitrale et la presse française, selon nos recherches, entre le 31 octobre et le 7 novembre 1938, 16 articles de presse[50] et 1 dépêche d'agence d'origine française[51] ont été répertoriés et diffusés par l'Agence Télégraphique Hongroise à son un public.

A la veille de la conférence, le compte-rendu de presse faisait référence au grand intérêt de l'opinion publique française et citait les articles du Jour, du

[41] Ibid.

[42] MTI-Bizalmas, le 5 novembre 1938, No. 2048.

[43] Ibid.

[44] MTI, le 7 novembre 1938.

[45] Sydney Morning Herald, le 4 novembre 1938.

[46] Evening Post, le 3 novembre 1938.

[47] MTI-Bizalmas, le 7 novembre 1938, No. 2064.

[48] Sydney Morning Herald, le 7 novembre 1938.

[49] MTI-Bizalmas, le 7 novembre 1938, No. 2068.

[50] Action Française 1, Aube 1, Époque 3, Information 1, Intransigeant: 1, Jour: 3, Journal 2, Journal des Débats: 1, Le Figaro: 3, Le Matin 1, Le Temps: 2, Oeuvre 1, Ordre 5, Paris Soir: 1, Petit Journal 2.

[51] HAVAS op. cit. 1.

Petit Journal, de l'Oeuvre et de l'Ordre. A Paris, on comptait sur une bonne entente italo-allemande et au fait que Berlin s'opposerait catégoriquement à une frontière hungaro-polonaise commune, vivement souhaitée d'ailleurs par Varsovie. Les articles référés ne critiquaient pas les changements territoriaux possibles. Le Petit Journal a défendu la politique de Chamberlain et a invité la France à sortir de son statut d'observateur et à devenir plus active. L'Oeuvre ne critiquait pas le redessinage des frontières hungaro-tchécoslovaque mais le fait que ceci soit effectué sans le concours franco-britannique.[52]

L'Ouest-Éclair a fait référence à des sources de Rome selon lesquelles « la seul chose probable c'est que la décision sera prise de manière transactionnelle. »[53]

L'écho de la sentence rendue a été reflété par la référence « aux milieux politiques compétents » ainsi qu'aux articles du Journal, du Figaro, du Jour, du Petit Journal, de l'Époque, de l'Aube et du Matin. Ils faisaient état du soulagement senti avec l'arrivée rapide d'une solution saitisfaisante si importante pour l'équilibre européen et dans le cadre d'un arbitrage, par principe toujours salué du côté français.[54] Les journaux reflétaient cependant l'incompréhension pourquoi l'Angleterre et surtout la France n'avaient pas profité de leur droit de participation dans le règlement déjà prévu à Münich.[55] Les éditions du soir, du Paris-Soir, de l'Intransigeant et du Temps analysaient la nouvelle situation aussi dans le style du « soulagement », tout en faisant allusion à l'abandon de la Tchécoslovaquie et au fait que des minorités slovaque et ruthène vivaient aussi sur les territoires cédés.[56]

Bien que non répertorié dans le compte-rendu de presse de la légation, on peut évoquer aussi La Croix qui soulignait dans le titre de son article que « l'arbitrage italo-allemand donne aux Hongrois les territoires slovaques à majorité magyare. »[57]

Deux jours plus tard, les journaux Ordre et Époque s'inquiétaient déjà de l'avenir de l'influence française en Europe centrale, tandis que l'Action Française estimait que la Hongrie devrait payer le prix de la décison et elle avertissait: « *Timeo Danaos, et dona ferentes.. »*[58] Le Jour, le Figaro, l'Époque, Le Temps et l'Action Française donnaient des nouvelles sur l'entrée de l'armée hongroise sur les territoires cédés.[59]

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[52] MTI-Bizalmas, le 2 novembre 1938, No. 1984.

[53] L'Ouest-Éclair, le 2 novembre 1938.

[54] MTI-Bizalmas, le 3 novembre 1938, No. 1998 et 2000.

[55] Ibid.

[56] MTI-Bizalmas, le 3 novembre 1938, No. 2017.

[57] La Croix, le 4 novembre 1938.

[58] MTI-Bizalmas, le 5 novembre 1938, No. 2052.

[59] MTI-Bizalmas, le 7 novembre 1938, No. 2062.

Le Journal des Débats qui avait cité auparavant des informations collectées à Berlin et à Rome selon lesquelles la sentence serait prononcée strictement d'après le principe ethnique[60], regrettait après la décision que de telles villes de Ruthénie retourneraient à la Hongrie qui témoignaient d'une évolution économique rapide au cours de leur appartenance à la Tchécoslovaquie.[61] Comme d'autres organs, le Journal des Débats et La Croix ont aussi souligné qu'au grand dam de la Pologne, l'Allemagne avait empéché qu'il y ait une frontière hungaro-polonaise commune.[62] Dans son éditorial, La Croix a souligné qu'il devenait clair que sur les quatre puissances de Münich, c'est l'Allemagne qui voulait et qui pouvait imposer sa volonté exclusivement pangermaniste aux autres et le journal a critiqué la politique de Daladier qui avait abandonné l'Europe centrale pour pouvoir préserver l'empire colonial français.[63]

Quant aux éditoriaux du Figaro, ce n'est pas le contenu territorial de la sentence qui est critiqué, mais l'incompréhension pourquoi la France et l'Angleterre se laissaient exclure de la prise de cette décision. Une certaine critique vise cependant aussi les années passées quand les deux pays résistaient aux initiatives de remaniement de territoires.[64]

L'Ouest-Éclair a aussi cité le texte complet de la sentence et le fait que, après avoir reconnu le contenu, les ministres hongrois et tchécoslovaque ont confirmé leur accord. Un des sous-titres concerne aussi « la Pologne mécontente » qui regrette de ne pas pouvoir voir une frontière commune hungaro-polonaise.[65] Les nouvelles sur la joie de la Hongrie et le remerciement du gouvernement hongrois aux dirigeants de l'Axe complètent l'explication de la composition ethnique de la Tchécoslovaquie amoindrie et la carte présentant la nouvelle frontière.[66] Une petite dépêche a indiqué que la Tchécoslovaquie s'orienterait vers l'Axe et qu'elle bannirait donc le communisme.[67]

IV/3. La sentence arbitrale et la presse américaine

Il semble que l'Agence Télégraphique Hongroise n'a pas inclu de nouvelles d'origine américaine dans ses compte-rendus de presse de la semaine entre le

[60] Journal des Débats, le 2 novembre 1938, Le Temps, le 2 novembre 1938.

[61] Journal des Débats, le 4 novembre 1938.

[62] Journal des Débats et La Croix, le 3 novembre 1938.

[63] La Croix, le 3 novembre 1938.

[64] « L'Europe centrale bouleversée » et « Les forces en présence » dans Le Figaro, le 4 et le 6 novembre 1938.

[65] L'Ouest-Éclair, le 4 novembre 1938.

[66] L'Ouest-Éclair, le 3 novembre et le 4 novembre 1938.

[67] L'Ouest-Éclair, le 3 novembre 1938.

31 octobre et le 7 novembre 1938, même si le New York Times a cité *in extenso* le texte de la sentence.

D'après la lecture des archives numériques, il est incontestable que même la presse de Utah — donc un état si loin de New York et de Washington DC –, donnait régulièrement des nouvelles sur les antécédents et les événements de Vienne. Fin septembre 1938, ils ont informé leurs lecteurs du fait que les relations de la Tchécoslovaquie devenaient tendus avec la Pologne et la Hongrie à cause des revendications territoriales de ces deux pays.[68] L'agence Associated Press a donné un compte-rendu en cca. 60 lignes sur la question de la minorité hongroise en Tchécoslovaquie et sur la question pourquoi à Münich, on avait ajourné la décision à prendre sur ce sujet.[69] Deux jours plus tard, la question de la cession symbolique de deux villes (avant l'ouverture des négociations directes hungaro-tchécoslovaque) a été incluse dans les « News Flashes »[70] et on a pu prendre connaissance du fait que la Pologne appuyait les revendications hongroises.[71]

Le 2 novembre 1938, l'Associated Press couvrait dans une colonne de 90 lignes les résultats prévisibles de la rencontre commencée en tant que médiation. Informé par l'entourage de Ribbentrop, l'auteur de la dépêche a énuméré avec une précision surprenante les villes à rétrocéder à la Hongrie. [72] (Le titre[73] peut avoir un écho aujourd'hui très négatif, mais le texte ne contenait pas de remarques critiquantes.) Un jour après, une petite dépêche a récapitulé la sentence et elle faisait référence aux garanties des nouvelles frontières de la Tchécoslovaquie et des négociations de Volosin, le dirigeant (pro-allemand) de la Ruthénie autonome.[74] En deux semaines, le même article[75] a apparu dans plusieurs journaux[76] et a souligné que l'Allemagne et l'Italie se sentaient si fortes après Münich, qu'elles n'estimaient plus nécessaire de solliciter le conseil de l'Angleterre et de la France en ce qui concerne le traitement du problème ethnique de la Tchécoslovaquie. L'idée du pacte des quatre n'était donc qu'une pure formalité, a conclu cet article.

[68] Salt Lake Telegram, le 27 septembre 1938.

[69] Salt Lake Telegram, le 30 septembre 1938.

[70] Salt Lake Telegram, le 4 octobre 1938.

[71] Salt Lake Telegram, le 6 octobre 1938.

[72] Salt Lake Telegram, le 2 novembre 1938.

[73] « Nazi, Fascist 'Judges' Grant Hungary's Territorial Claims ».

[74] « Czechs to Receive Italo-German Aid », Salt Lake Telegram, le 3 novembre 1938.

[75] Joseph W, La Bine: Weekly News Review.

[76] Weekly News Review dans le Vernal Express, le 10 novembre 1938, et le Kane County Standard, le 18 novembre 1938. (Dans le Vernal Express, le titre est: « Germany, Italy Dictate Terms of Proposed Four-Power Pact. ».

V. Les grandes revues juridiques sur le révisionnisme et les décisions de Münich et de Vienne

Il est intéressant de voir quelle était la position doctrinale des internationalistes de l'époque, reflétée dans les grandes revues de droit international et des relations internationales car on peut supposer que les grandes revues n'ont pas échappé à l'attention des diplomates en poste à ces années p. ex. à Paris et à Washington.

V/1. La perception de la politique du révisionnisme territorial dans des revues juridiques et des ouvrages politiques français de cette période historique

Dans son long article[77] paru un mois avant Münich, René Cassin a critiqué les arguments juridiques sur la prétendue caducité des traités d'entraide militaire franco-tchécoslovaque de 1924 et de 1925, évoquée par le professeur berlinois Drost et il a mis au point que ni la clause *rebus sic stantibus*, ni les liens entre l'accord militaire, le pacte rhénan et les accords de Locarno ne pouvaient être retenus. Cassin a d'ailleurs laissé entendre ses doutes qu'il s'agissait vraiment d'un différend portant sur l'amélioration du statut des minorités de Tchécoslovaquie car les instruments juridiques internationaux concernant les « litiges », la référence dans des négociations bilatérales ou le recours aux instances de la SdN n'ont pas été appliqués.[78]

En rappelant avec sympathie l'appel à l'attention due à la cause des minorités dans une déclaration de la conférence internationale des mutilés de guerre et des anciens combattants,[79] Cassin a essayé de donner des arguments juridiques aux politiciens qui cherchaient à s'échapper à des obligations, en évoquant des raisons politiques et militaires et il a conclu que « la vraie sauvegarde de la paix réside non seulement dans la force matérielle, mais aussi dans la force morale, c'est à dire dans la conscience des responsabilités et la volonté d'y faire face. »[80]

Plusieurs ouvrages écrits après Münich et Vienne mais avant l'extinction de la Tchécoslovaquie condamnaient la politique de l'apaisement qui menait à l'affaiblissement militaire de l'ancien allié tchèque et qui ne pouvait pas

[77] RENÉ CASSIN: *Les traités d'assistance entre la France et la Tchécoslovaquie.* Politique étrangère. Août, 1938. 334–359.

[78] CASSIN op. cit. 344.

[79] « […] félicité les membres […] appartenant à des pays qui ont des minorités nationales, de lutter contre les ressentiments du passé et les psychoses dangeureuses et de s'employer en faveur du traitement le plus libéral de ces minorités, tout en maintenant les devoirs du loyalisme qui s'impose à ces minorités vis-à-vis de l'Etat auquel elles appartiennent… » CASSIN op. cit. 359.

[80] CASSIN op. cit. 359.

empêcher l'influence grandissante de la politique nazie dans la région de l'Europe centrale. La politique britannique et française se touvait dans le cible des critiques qui touchaient quand même ça et là à la Hongrie et à la sentence arbitrale de 1938.

Bernard Lavergne[81] a fermement condamné la politique des gouvernements de l'Angleterre et de la France, en démontrant par des citations du Mein Kampf qu'il ne vaudraient rien de donner des concessions à l'Allemagne hitlérienne. Il traite la modification de la frontière hongroise seulement très brièvement: « le rattachement à la Hongrie de quelques territoires possédés par la Slovaquie et de nature certes à alarmer la Yougoslavie comme la Roumanie, voisines de l'État hongrois. »[82] (Une année après, Lavergne a écrit un autre article[83] où il voyait ses pronostiques justifiées: en commentant le traité de 2 octobre 1939 sur le rétablissement de la souveraineté tchécoslovaque, conclu entre la France et l'ancien président Benes et son équipe, en émigration à Paris. L'article ne touchait pas la question des frontières précises, il se contentait de la promesse de l'attribution d'une large autonomie locale à la Slovaquie, après le retour des territoires, et il a reconnut que la politique tchèque n'avait pas vraiment compris le problème slovaque.[84])

La *Revue de Droit Public* n'a consacré que deux pages au texte de la décision dans sa section *Mouvement arbitral*, en publiant le texte, sans commentaire et en n'utilisant pas de guillemets pour les titres et les sous titres.[85]

En arrivant à constater la nullité de l'accord de protectorat dans son article[86] publié dans la *Revue Générale de Droit International Public,* Joseph Markus a épargné de ses critiques la sentence de Vienne dont il a présenté le texte

[81] Bernard Lavergne: Les conséquences de Münich pour la France. *L'Année Politique française et étrangère*, Février, 1939. 24–58.

[82] Lavergne (1939) op. cit. 47. (Lavergne rappelle que les pays de l'Europe centrale « deviennent des États esclaves de l'Allemagne […] Pour ce qui est de la Slovaquie, la situation est encore pire. La Slovaquie, presque entièrement séparée de l'État tchécoslovaque, et la Russie subcarpathique, sont devenues, de facto, de simples colonies allemandes où règnent et la Gestapo et les autorités civiles et militaires du Reich. » Lavergne (1939) op. cit. 31.

[83] Bernard Lavergne: Le maintien de la République Tchécoslovaque. *L'Année Politique française et étrangère*, Janvier, 1940. 51–56.

[84] Lavergne (1940) op. cit. 54.

[85] L'arbitrage de Vienne (2 novembre 1938) Texte de la sentence arbitrale. *Revue de Droit Public*, 1939, vol. 23, 301–302. Après le texte de Vienne et par une référence à l'agence de presse tchèque, l'expression neutre est répétée. « L'agence Cétéka précise ainsi l'état des nouvelles frontières hungaro-tchécoslovaques, fixées par l'arbitrage de Vienne. La sentence arbitrale de Vienne fixe la Hongrie et la Tchéco-Slovaquie de la façon suivante: partant de l'ancienne frontière au sud de Bratislava, la nouvelle ligne passe au nord de » […] etc. [vient l'énumération des communes et des points géographiques].

[86] Joseph Markus: Le traité germano-tchécoslovaque du 15 mars 1939 à la lumière du droit international. *Revue Générale de Droit International Public*, 1939. 653–665.

comme preuve de la bonne volonté tchécoslovaque. En même temps, il en a tiré l'argument que l'Allemagne avait donc violé *inter alia* l'accord de Münich en 1939. (En plus, il a présumé — conformément à la vérité historique connue des arrêts du Tribunal Militaire Pénale de Nuremberg — que la signature de l'accord de protectorat avait été effectuée sous menace et contrainte.)

Même si une fois, cet auteur a mis entre guillemets la « sentence arbitrale », il ne le faisait pas aux autres occasions[87] et de plus, il a évoqué le consentement des deux parties: « De leur côté, la Hongrie et la Tchécoslovaquie ont expressément reconnu qu'elles considéraient les résultats de cette sentence arbitrale comme règlement définitif de la question de la minorité hongroise. La preuve en est fournie par le Protocole joint à la sentence arbitrale de Vienne » dont il citait aussi le texte.[88]

On peut trouver aussi de livres parus aux éditeurs de Paris qui ont traité la question de l'arbitrage de Vienne.

Gabriel-Louis Járay condamnait fermement l'arbitrage de Vienne dans un ouvrage paru à Paris en 1939:

« Considérons la carte du nouvel État, né de l'accord de Münich et des décisions prises à Vienne en novembre 1938 par les deux ministres des Affaires étrangères de Berlin et de Rome et qualifiées d'arbitrage, sans doute par ironie. »[89] […] « le prétendu «arbitrage» de Vienne, par lequel elle [l'Allemagne] a imposé son point de vue à l'Italie, à la Hongrie et à la Pologne. »[90]

« que peuvent faire la Grande-Bretagne et la France pour l'aider? elles ont même renoncé de fait à arbitrer les frontières à l'égard de la Pologne et de la Hongrie, à l'encontre de l'accord de Münich; elles ont dressé le bilan de leur impuissance; le nouvel État est incapable de se défendre. »[91]

Paru chez le même éditeur et quasiment en même temps mais quelques mois après que la Tchéquie avait été avalée par l'Allemagne, un autre ouvrage prenait cependant fait et cause pour la Hongrie. Son auteur récitait longuement l'histoire millénaire de la Hongrie et en particulier celle des relations des Magyars et des Slovaques dans la « Grande Hongrie » historique, les revendications nationales des Slovaques, la préparation de la proclamation de l'État tchécoslovaque, le traité de paix de Trianon et les relations des Slovaques et des Tchèques en Tchécoslovaquie, ainsi que les relations entre la Hongrie et la Tchécoslovaquie.

Ce livre s'achève par la présentation des changements territoriaux intervenus en 1938 et 1939: « Depuis [Münich], nous avons connu l'Arbitrage de Vienne,

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[87] Deux fois si on omet la citation des textes officiels.

[88] MARKUS op. cit. 657.

[89] GABRIEL LOUIS-JARAY*: Offensive allemande en Europe.* Paris: Sorlot, 1939. 71.

[90] LOUIS-JARAY op. cit. 137.

[91] LOUIS-JARAY op. cit. 99.

qui restitua à la Hongrie la partie de la Slovaquie, habitée par un million de Magyars »[92] tout en reconnaissant « qu'en résumé, la Hongrie doit à Hitler et à Mussolini — par les effets de l'arbitrage de Vienne — la rétrocession de la Slovaquie magyare. »[93]

V/2. La perception de la politique du révisionnisme territorial dans le Foreign Affairs et l'American Journal of International Law

L'*American Journal of International Law* a publié l'article de Miroslaw Gonsiorowski, professeur invité de l'Université de New York en 1931 sur les caractéristiques des arbitrages politiques.[94] Après avoir rappelé les événements de l'intervention de la Société des Nations dans le règlement de la question de Mossoul[95], Gonsiorowski énumère les caractéristiques des arbitrages conférés aux *gouvernements* dont les méthodes peuvent être différentes de celles des arbitrages indépendants[96] et il met au point que leur décision est souvent de nature d'équité ou *d'ex aequo et bono.*[97]

L'étude de Philip C. Jessup[98] où il analysait les tendences récentes des arbitrages a vu le jour déjà après la première sentence arbitrale de Vienne. Il faisait allusion à l'efficacité très modeste de la Société des Nations, et même s'il constatait que la Tchécoslovaquie n'existait plus[99], il ne faisait pas d'allusion concrète, négative à la première sentence arbitrale de Vienne. Il regrettait cependant que la Société des Nations ait omis d'élaborer les procédures viables de la révision pacifique des traités conclus.[100]

Josef L. Kunz, qui a dû quitter l'Europe, a traité la question de la révision[101] dans l'American Journal of International Law, même s'il a examiné cette question

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[92] André Zwingelstein: *La Hongrie dans les destins de l'Europe.* Paris: Sorlot, 1939. 234.

[93] Ibid.

[94] Miroslas Gonsiorowski: Political Arbitration under the General Act for the Pacific Settlement of International Disputes. *AJIL* 27, 1933. 469–490.

[95] Sur la question de Mossoul, cf. Péter Kovács: Paul Teleki et le règlement de l'affaire de Mossoul dans la Société des Nations. In Péter Kovács (ed): *Historia ante portas.* (L'histoire en droit international / History in International Law) Miskolc: Bíbor, 2004. 188–220.; cf. cer article aussi sur le Web, dans le *Miskolc Journal of International Law* Vol.1(2004) No.2. 156–187. (http://www.mjil.hu ou bien directement http://www.uni-miskolc.hu/~wwwdrint/20042kovacs1.htm)

[96] Gonsiorowski op. cit. 475.

[97] Gonsiorowski op. cit. 482–489.

[98] Philip C. Jessup: The Reality of International Law. *Foreign Affairs* 18, 1939–1940. 244–263.

[99] Jessup op. cit. 252.

[100] Jessup op. cit. 253.

[101] Josef L. Kunz: The Problem of Revision in International Law (« Peaceful Change »), *AJIL* 33, 1939. 33–55.

dans ses aspects généraux portant sur le droit des traités et non pas *expressis verbis* concernant les frontières. Il a précisé cependant que la révision avait sa raison d'être non seulement en ce qui concerne les traités, mais aussi bien par rapport aux situations internationales[102] et se manifestait essentiellement dans le recours à la transformation *ex aequo et bono.*[103]

Il a évoqué l'émergence de ce dilemme par rapport aux traités de paix de Paris et il a souligné que la « justice » ne peut être traduite qu'avec des difficultés considérables aux principes opérationnels. (Dans une note de bas page, il a cité le fameux slogan de l'irrédentisme hongrois, la « Justice for Hungary »[104] qui a été inscrit sur le premier avion hongrois, effectuant le vol New York-Budapest sans escale).

Après avoir comparé de divers écrits de Le Fur, de Scelle et de Kelsen, il a constaté que « la justice en elle-même ne peut pas garantir le succès de la révision ou des plaintes révisionistes des petits pays qui souvent ne sont pas prises en comptes, malgré leur justification. Le problème de la révision aujourd'hui, ce n'est pas vraiment le problème de la justice, mais bien plutôt le problème d'éviter la guerre, ainsi les solutions intervenues sont définies beaucoup mieux par l'esprit de compromis et la vitesse que la justice. »[105]

Cette étude n'a pas rejeté catégoriquement l'idée de la révision, mais elle a souligné que celle-ci devrait être munie de cadres et de formes clairs de droit international, comme la négociation diplomatique, la conférence internationale, la médiation et en fin de compte via la résurrection de la Société des Nations.

L'American Journal of International Law a récapitulé les événements diplomatiques entre Münich et Vienne (y compris l'échec des négociations bilatérales de Komarom en octobre 1938) sur la base des dépêches et des titres parus en octobre et en novembre dans le Times, le Christian Science Monitor et le New York Times, en utilisant les termes *to arbitrate, arbitrators, award.*[106]

Quincy Wright, ès qualité de membre du comité de rédaction de l'American Journal of International Law a aussi publié un article intitulé « le règlement de Münich et le droit international ».[107]

Dans cette étude, il a examiné le chemin parcouru jusqu'à la conférence quadrilatérale de Münich et il a conclu que ni la première convention de la Haye en 1907, ni le Pacte de la Société des Nations, ni le Pacte Briand-Kellogg n'avaient été respectés. L'Angleterre et la France n'ont pas assumé leur responsabilité, mais

[102] KUNZ op. cit. 40., 43.

[103] KUNZ op. cit. 48.

[104] KUNZ op. cit. 45.

[105] KUNZ op. cit. 46.

[106] *AJIL* 33, 1939. 172.

[107] QUINCY WRIGHT: The Munich Settlement and International Law. *AJIL* 33, 1939. 12–32.

les États Unis d'Amérique et l'Union Soviétique étaient également loin de faire tout ce qui était dans leur pouvoir pour exercer de pression. Il faisait cependant référence à l'initiative du président Roosevelt d'ouvrir des négociations à un endroit neutre avec la participation de toutes les nations intéressées où on aurait pu trouver une solution aux problèmes connexes dans l'esprit de la justice et par une procédure équitable.[108]

Les grandes puissances se comportaient comme si dans le cadre du Concert européen du XIXe siècle, elles devraient prendre des décisions sur le sort des États plus petits.[109] L'étude critique cependant aussi la Hongrie et la Pologne d'avoir profité de la position affaiblie de la Tchécoslovaquie.

Les conclusions finales surpennent cependant le lecteur, car elles critiquent beaucoup mieux les formes que les décisons *in merito*.

« Il se peut que le règlement de Münich est essentiellement juste. […] Si le règlement de Münich avait été réalisé par la stricte observation des procédures de la convention de la Haye, du pacte de Paris et du Pacte de la SdN, on n'aurait pu formuler aucune critique juridique, peu importe que les droits de Tchécoslovaquie aient été lésés. Dans la communauté des nations, les droits des États peuvent être sacrifiés, comme on le fait avec les droits des individus, afin de préserver les intérêts suprêmes de la communauté toute entière. » [110]

« La critique juridique fondamentale contre ce règlement peut être formulée comme suit: les hommes d'États responsables considéraient l'essence du règlement plus important que le chemin qui y mène. Par cela, ils avaient répété l'erreur commise il y a vingt ans à Versailles. »[111]

« Jusqu'à ce que la procédure ne soit pas plus importante que l'essence, il faut tenir compte de l'oscillation du monde entre les diktats de Versailles et les diktats de Münich, avec de courts souffles entre les guerres et le colportage des rumeurs de guerres. »[112]

Hamilton Fish Amstrong dans son article « Armistice à Münich » publié dans le *Foreign Affairs*[113] traitait quelquefois aussi la Hongrie en mettant entre guillemets la sentence (« arbitration award »). Selon lui, les considérations stratégiques et économiques avaient joué un rôle majeur dans la prise de décision. L'article faisait allusion aux rumeurs qu'il y avait de chances réelles du partage des territoires slovaques entre la Hongrie et la Pologne. (La Pologne

[108] Wright op. cit. 27.

[109] Wright op. cit. 28.

[110] Wright op. cit. 31.

[111] Wright op. cit. 31.

[112] Wright op. cit. 32.

[113] Hamilton Fish Amstrong: Armistice at Munich. *Foreign Affairs* Vol. 17, January 1939, No. 2. 273–290.

a reçu aussi de critiques pour avoir recouru à l'ultimatum militaire afin de saisir le territoire de Teschen.[114])

La politique franco-britannique n'échappait pas aux critiques non plus: l'article a cité la déclaration de Chamberlain notamment que c'était l'existence de la Tchécoslovaquie et non pas ses frontières précises qui avait été garantie[115]. Il blame les deux gouvernements de ne pas avoir déclaré d'une manière claire s'ils n'avaient pas voulu ou qu'ils n'avaient pas pu participer au règlement de la question frontalière hungaro-tchécoslovaque. Hamilton a laissé entendre qu'il connaît la réponse à cette question quand il constate, surpris, qu'après Vienne, des initiatives diplomatiques français étaient lancées pour conclure un traité d'amitié entre la France et l'Allemagne.

L'article de Hamilton ne traite la sentence de Vienne que dans quelques lignes, et ses critiques sont adressées d'une manière conséquante et d'une manière beaucoup plus aïgue à la politique hitlérienne et à la politique d'apaisement de Chamberlain.

L'article de Josef Hanč[116] a vu le jours encore en 1939 dans le Foreign Affairs, après que l'Allemagne a forcé le président Hacha à demander l'incorporation de la Bohémie-Moravie en tant que « protectorat » du Reich et à reconnaitre l'indépendance de la Slovaquie, état-fantoche, pro-nazi. L'article voulait attirer l'attention du lecteur à la situation du « protectorat ». Tout en condamnant les politiciens slovaques sécessionistes, il donne une explication et excuse à la proclamation de l'indépendance en colportant le rumeur que les politiciens nazis « disaient ouvertement » que l'alternative aurait été la partition du territoire slovaque entre l'Allemagne et la Hongrie.

Seulement quelques phrases concernent la Hongrie et la sentence de Vienne, mise entre guillemets. (Vienna arbitral « award »). La critique concerne cependant non pas l'acquisition territoriale de la Hongrie en tant que telle mais le fait pourquoi autant de Slovaques ont été joints à la Hongrie quand la décision a été prise suivant le principe etnique.[117] Quand il évoque l'annexion de l'Ukraine subcarpathique par l'armée hongroise après la proclamation de l'indépendance slovaque, c'est le sort des ruthènes « sous le pouvoir des magnats hongrois » qui l'agace, craignant[118] que la roue de l'histoire soit retournée de vingt ans et que l'autonomie promise ne soit réalisée car les autres nationalités de Hongrie n'en disposaient non plus. [119]

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[114] AMSTRONG op. cit. 274.

[115] Ibid.

[116] JOSEF HANČ: Czechs and Slovaks since Munich. *Foreign Affairs* Vol. 18, 1939, No. 2. 102–115.

[117] HANČ op. cit. 113.

[118] Ibid.

[119] HANČ op. cit. 105

Dans le même numéro, le titre de l'article de George M. Katona indiquait bien sa perception sur les marges de manoeuvre hongrois, en donnant comme titre: « La Hongrie sur orbite allemande ». [120] L'article a présenté la propagande nazie qui était devenue depuis l'Anschluss de plus en plus forte aussi bien de l'extérieur et que de l'intérieur. L'orientation des derniers gouvernements hongrois a été trouvée de plus en plus évidente, même si l'article n'a pas perdu de vue l'existence des opposants de l'influence allemande. Vu leur faiblesse, l'article a attiré l'attention au danger menaçant la communauté juive déjà objet de lois discriminatoires, antisémites.

Après avoir présenté les grandes questions de la politique étrangère (y compris les gestes de réconciliation avec les États de la « petite entente »), il a donné un compte-rendu objectif et factuel sur la décision de Vienne, en mettant *arbitres* et *arbitrage* sans guillemets.[121] Il est arrivé cependant à la conclusion que les Hongrois et les Polonais avait dû constater avec déception que Rome ne se soit pas prouvé un patron suffisamment fort pour les défendre contre la pression de Berlin.[122]

Arnold J. Toynbee, l'historien britannique déjà de renom, avait l'intention d'inviter les lecteurs américains et canadiens à réfléchir sur l'avenir de l'Europe centrale.[123] Après avoir présenté l'arrière-plan historique de l'idée « Mittel-Europa » qu'il considérait sous certaines conditions logique et géographiquement, économiquement bien fondée[124] , Toynbee a évoqué que « malgré les fondements de l'armistice de novembre 1918 dans les quatorze points [de Wilson], lors du règlement de paix, nous avons appliqué le principe des nationalités au bénéfice de toutes les nations de l'Europe centrale et orientale sauf les trois nations ennemies: les Allemands, les Hongrois et les Bulgares »[125]

« Pour aujourd'hui, l'unité nationale a été acquise en Europe centrale et orientale aussi bien par les nations qui en avaient été déprivées lors des vingt années passées. Cette année, dix millions de sujets allemands de la monarchie défunte des Habsbourg ont été incorporés dans l'État-nation allemand. Plusieurs centaines de milliers de Hongrois qui avaient été déchirés à tort de la Hongrie en 1921 (*sic!)* , pouvaient rejoindre leur mère patrie. […] Voici donc les mesures qu'on aurait pu prendre — *a fortiori* qu'on aurait dû prendre si nos principes proclamés avaient été appliqués avec impartialité par les quatre grands en 1919 à Paris. Ce qu'il faut regretter — et avec la plus grande amertume — c'est de ne

[120] George M. Katona: Hungary in the German Orbit. *Foreign Affairs* Vol. 17, 1938–1939. 599–610.

[121] arbitrators / Vienna award

[122] Katona op. cit. 607–608.

[123] Arnold J Toynbee: A Turning Point in History. *Foreign Affairs* 17, 1938–1939. 305–320.

[124] Toynbee op. cit. 305–311.

[125] Toynbee op. cit. 316

pas avoir pu faire justice à Paris en 1919 et qu'on a manqué de corriger les fautes au cours des vingt ans de la période de grâce. En plus, et ce qui est encore pire, c'est le fait que quand une minute avant minuit, on a procédé au rétablissement de la justice, cela semble être une capitulation devant la dictature nazie à cause du danger imminent de la guerre. » [126] La Société des Nations souffrante et plus tard moribonde a été incapable d'ouvrir un mode procédural « au changement pacifique » des traités de paix de la guerre mondiale. [127] Elle était comme une mère mourante lors de l'accouchement. [128]

Il faut souligner cependant, que la question qui inquiètait Toynbee le plus profondément, c'était de rechercher si la promotion des intérêts britanniques et alliés pourraient être garantis même dans le cadre d'une *Pax hitleriana*, niant ouvertement le monde franco-britannique?[129] Toynbee était plus que sceptique…

(D'ailleurs Toynbee — aussi bien dans ses oeuvres écrites aux années cinquantes — était plutôt compréhensif vis à vis les pas de la politique étrangère hongroise tout en tenant compte du contexte politique d'après 1938. [130])

VI. Similarités et différences entre la perception des média et celle de la doctrine juridique et les perceptions gouvernementale et diplomatique de ces trois pays à la même période, dans la lumière des informations accessibles aux diplomates hongrois de l'époque

VI/1. Les informations de la diplomatie hongroise sur l'attitude gouvernementale britannique

Les rapports de l'envoyé Barcza, télégraphiés avant et après la sentence arbitrale de Vienne, ainsi que les notes internes sur les entretiens avec Geoffrey Knox, l'envoyé britannique de Budapest ou Gascoigne, son suppléant reflètent une métamorphose visible où la politique de la défense du *statu quo* de 1918-1920 s'est alignée (progressivement et pas sans hésitation) à la reconnaissance de l'applicabilité des « principes ethnographiques » approuvés par les quatre puissances à Münich aussi bien au différend entre la Hongrie et la Tchécoslovaquie.

[126] TOYNBEE op. cit. 317.

[127] TOYNBEE op. cit. 318.

[128] TOYNBEE op. cit. 318.

[129] TOYNBEE op. cit. 320.

[130] ARNOLD TOYNBEE — VERONICA TOYNBEE: *Survey of International Affairs 1939–1946.* London–New York–Toronto: Oxford University Press, 1958. 316–319.

Le diplomate hongrois a constaté aussi qu'ils existaient des différences considérables entre l'attitude des diplomates du Foreign Office et la position du premier ministre Chamberlain (et celle de Lord Halifax, ministre des affaires étrangères) et il sentait le risque, i.e. que la chute éventuelle de Chamberlain, la nomination d'un autre premier ministre et le retour d'Anthony Eden au portefeuille des affaires étrangères pourraient facilement détruire les espoirs hongrois.[131]

C'était aussi le motif principal qui poussait Barcza à convaincre les diplomates anglais de tenir compte des problèmes des minorités hongroises dans le contexte d'une nouvelle politique de coopération européenne qui semblait s'émerger vers 1938 et qui était liée à la politique perçue très dynamique de l'Allemagne dirigée par Hitler et de l'Italie, dirigée par Mussolini à une période où les observateurs extérieurs étaient partagés s'il s'agissait de bluffs, de chantage ou de danger réel menaçant la paix européenne (et mondiale). C'est pour les mêmes raisons qu'après que la sentence ait été rendue, Barcza faisait beaucoup pour recevoir la reconnaissance formelle de la part de la Grande Bretagne, dans l'espoir que cette reconnaissance serait irrévocable.

En 1938, les interlocuteurs principaux de Barcza à Londres étaient quelquefois le ministres Eden et son successeur Halifax, mais le plus souvent le secrétaire général Sir Alexander Cadogan, et un des directeurs du Foreign Office, Sir Orme Sargent. Pendant longtemps, Barcza n'a pu rapporter que des conseils rendus à ton amical mais politiquement vides: prière de garder le sang froid, de rester tranquille, de ne pas accentuer l'importance de résoudre le problème minoritaire toute de suite par voie de révision territoriale, prière d'entrer dans des négociations bilatérales, etc. (Lors de l'échec des négociations bilatérales, sur l'insistance de l'envoyé hongrois, Alexander Cadogan a reconnu qu'en elles-mêmes, « les revendications hongroises étaient complètement logiques », mais l'essentiel est que la Hongrie puisse s'entendre avec la Tchécoslovaquie pour qu'on évite la reconvocation du « big four ». Afin de contribuer au succès des négociations, il a promis quand même d'intervenir auprès Prague de pour que la solution soit conciliante et rapide.[132])

L'indice clair du changement qualitatif de la politique britannique est venu de l'Italie où Ciano a informé l'envoyé hongrois accrédité à Rome que l'ambassadeur britannique lui avait confirmé que son gouvernement n'objectait en rien à la convocation de la conférence arbitrale des quatre, mais il avait une préférence pour que l'arbitrage soit effectué par l'Axe.[133] (Cette information était correcte et l'ambassadeur britannique a exécuté une instruction de Halifax dont le texte

[131] Doc. No.° 6. in *DIMK* III. 88–91.

[132] Doc. No.° 548. in *DIMK* II. 814–816.

[133] Doc. No.° 597. in *DIMK* II. 864–865.

est accessible.[134] Evidemment Ciano en a tout de suite informé Ribbentrop.[135])

L'autre signal est venu de la part de Nevil Chamberlain dont la réponse de fin d'octobre à une lettre de Miklós Horthy, le gouverneur-régent de Hongrie avait été considérée comme un encourgement[136] en vaine attendu depuis longtemps.

[134] « I should therefore be glad if you would seek an early interview with the Italian Minister for Foreign Affairs and inform him that while it is difficult for us to adjudicate between the line claimed by the Hungarians and that offered by the Czechs, and to decide whether or not the 1910 census offers a fair basis. His Majesty's Government are, in principle, in favour of the return to Hungary of those districts in which the population is predominantly Hungarian, subject possibly to certain modifications that may be desirable for economic reasons. e.g. Bratislava. The holding of plebiscites in those regions where the races are so ethnographically entangled and when there is a difference of opinion regarding the figures to be taken as a basis for the voting would, however, in the view of His Majesty's Government be extremely difficult, especially at such short notice as the Hungarian Government propose before November 30. His Majesty's Government would, therefore, be happy to see the Czechs and Hungarians agree to settle their differences by reference to arbitration by the Italian and German Governments. If however, it were deamed preferable or necessary that the question in dispute between the Czechoslovak and Hungarian Governments should be referred to the four Munich Powers, His Majesty's Government would be ready to take their part in trying to bring about an agreed settlement. »
No. 476 Telegraphic (C 12934 2319 12) in CHÁSZÁR op. cit. 119.

[135] Doc. 191, du 28 octobre 1938. In RÉTI (sous la dir.) op. cit. 160.

[136] Horthy a évoqué dans sa lettre de 8 octobre 1938 une ancienne promesse d'Austin Chamberlain (qui possédait quelquefois la portefeuille des affaires étrangères) qui était le frère de Neville Chamberlain. Après l'évocation de la visite d'Austin, effectuée en Hongrie.en 1935, Horthy a raconté qu'il avait sollicité son conseil comment procéder pour remédier aux injustices du traité de paix. Il a cité la réponse (« Keep quiet now, I promise you, when the right moment will come, England will help you. ») et l'a continué comme suit: « The past years are prove, that I carried out loyally his advice — I kept quiet and waited for the right moment to come! But I think I am justified in saying: the right moment *has* come. Therefore I am now appealing to you — the man who has shown so much generosity, wisdom and courage, asking you to accept your late brothers' promise to me to help us, as your legacy, and do all in your own and your great country's power to assist and help us in this eventual hour. » (Doc. n° 486. in *DIMK* II. 737–738.). Comme on peut voir de la date, cette lettre a été écrite après Münich où les quatre ont renvoyé le problème hungaro-tchécoslovaque aux négociations bilatérales tout en indiquant qu'en cas d'échec, les quatre seront disposés à trancher le litige.
La réponse de Chamberlain a été écrite le 28 octobre 1938, c'est à dire bien après la rupture des négociations bilatérales et quand l'idée de solliciter un arbitage des quatre (initiative hongroise, appuyée par Mussolini et Ciano) a été froidement et catégoriquement refusée par Hitler dont la diplomatie proposait l'arbitrage de l'Axe. Ciano a dû déclarer non avenues les lettres d'invitation déjà envoyées à Londres et à Paris, le 14 octobre 1938. La partie importante de la réponse de Neville Chamberlain était la suivante: « I should like first of all assure Your Highness that neither His majesty's Government, nor I myself are disinterested in the negotiations which your Government have been carrying on with the Czechoslovak Government for the purpose of adjusting the existing political frontier so, as to bring it into closer harmony with the ethnic situation in that area. If we have abstained from intervention and comment upon the merits of the intricate problems which have been under discussion, it has not been from any indifference to the importance of the issues at stake. On the contrary it is our sincere desire that this opportunity should be taken to reach a settlement, inspired by good will and based on the rights and interests of all concerned, such as will lessen racial

Le premier ministre britannique a déclaré plusieurs fois dans la Chambre des Communes qu'il ne trouvait rien à objecter à la sentence de Vienne.[137]

Idem pour Lord Halifax, aussi bien en ce qui concerne ses interventions publiques avant[138] et après le 2 novembre 1938.[139]

Lors des contacts avec des milieux diplomatiques professionels, les partenaires britanniques de Barcza. faisaient souvent référence à la coïncidence de l'opinion des journaux et de l'opinion du gouvernement: la technique de ce

grievances and lay the foundations for a lasting and fruitful collaboration between Hungary and Czechoslovakia. As Your Highness may have seen Lord Halifax made it clear in a speech at Edinburgh on October 24th that His Majesty's Government recognise that means can be found, in peaceful negotiation, to give effect to them. I enclose the relevant extract. I appreciate that difficulties have arisen and may still arise during these negotiations but it has been and still is our hope that the two Governments most directly concerned may be able, with good will, patience and moderation on both sides, to reach a dircet agreement. Finally, I should like to say that, if at any time you feel that my good offices could be of service, I shall of course be very glad to do what lies in my power to help, in concert with the other parties to the Munich agreement, in reaching a solution of Hungary's claims such as will form the basis of an equitable settlement. » (Doc. n° 603. in *DIMK* II. 869–870.)

[137] Le 14 novembre 1938: « Agreement was, in fact, reached between the Czechoslovak and Hungarian Governments when they agreed to accept as final the arbitral award of the German and Italian Goverments, and in consequence, no question of action by His Majesty's Government arises. »Parliament, Great Britain, Parliamentary Debates, House of Commons, Fifth Series, London, His Majesty's Stationary Office, 1938–1939, Vol. 341, p. 477, col.1, cité in Chászár op. cit. 61.

[138] Le 24 octobre, dans la Chambres des Communes: « I hope indeed that the rectification of frontiers according to the racial distribution of population which is now taking place in Central and South Eastern-Europe may contribute to stability and peace. What we are now witnessing is the revision of the Treaty of Versailles, for which provision was made in the Covenant of the League but which has never till now been made effective. »
In Chester (ed): *Speeches on Foreign Policy by Viscount Halifax.* London: Oxford University Press, 1940. 204., cité par Chászár op. cit. 60.
Le 24 octobre, à Edinburg: « The Hungarian Government are now in negotiation with the Czechoslovak Government, and we hope that they may reach an equitable solution, which will remove or lessen racial grievances. We recognise that Hungary has had legitimate claims, and we trust that means may be found to meet them. There is no ideal solution of such problems, and there must always be minorities left on one side of the line or the other. But if the two parties can negotiate in a spirit of good will, and in the desire to find a remedy for clear grievances, we hope it may be possible for them to agree also on safeguards for minorities that will minimize injustice and make more easy in future friendly cooperation between them. » (C'était l'extrait attaché à la lettre que Chamberlain a écrit à Horthy.) in Chászár op. cit. 121

[139] Le 19 Décembre 1938, par rapport aux nouvelles frontières de la Tchécoslovaquie vis-à-vis l'Allemagne, la Pologne et la Hongrie, Lord Halifax a dit: « The new frontiers of Czechoslovakia have already been laid down by agreement between the Czechoslakian Government and each of the other three interested Governments. […] In these circumstances the question of the conclusion of a further international instrument regarding these frontiers does not appear to arise. » cité in Chászár op. cit. 66. et Barcza op. cit. 406.; Carlyle A. Macartney: *A History of Hungary 1929–1945.* Vol. I. New York: Frederick A. Praeger, 1957. 303.

renvoi a été utilisée aussi bien pour éviter qu'une reconnaissance formelle soit donnée malgré l'insistance des diplomates hongrois.

Les indices d'un retour de l'attitude britannique aux considérations en vigueur avant la politique de l'apaisement ont pu être constatés après l'annexion de la Tchéquie par l'Allemagne nazie, mais pendant des mois, le Royaume Uni a maintenu la différence de perception entre l'importance de la préservation d'une Tchécoslovaquie indépendante et le sort des frontières précises.[140] En fait, ce qui les intéressait le mieux c'était le fait si l'occupation militaire hongroise de la Ruthénie avait été effectuée en concertation avec l'Allemagne ou bien au contraire, d'après des considérations de coopération hongro-polonaise pour pouvoir préserver une distance vis-à-vis de l'Axe.[141]

VI/2. Les informations de la diplomatie hongroise sur l'attitude gouvernementale française

Le changement de la politique française vis-à-vis le *statu quo* des frontières a été symboliquement mais ouvertement exprimé par Daladier à Münich[142] et la diplomatie hongroise a essayé d'en profiter en suggérant l'importance et l'inévitabilité de l'application de ces principes aux minorités hongroises. (Le *Livre Jaune* témoigne d'ailleurs que le compte-rendu rédigé sur les résultats et les avantages diplomatiques[143] de l'accord de Münich que Bonnet a envoyé aux ambassadeurs et aux chefs de mission français les avait informés que la garantie internationale bilatérale franco-britannique des frontières serait élargie avec la participation de l'Allemagne et de l'Italie, mais seulement après le règlement de la question des minorités polonaise et hongroise.[144])

Le recueil hongrois de la correspondance diplomatique ne contient qu'un nombre limité de rapports envoyés par le comte Sándor Khuen-Héderváry,

[140] Doc. 525, du 21 mars 1939, in *DIMK* III. 642–645., en particulier 643.

[141] Doc. 500 du 18 mars 1939, in *DIMK* III. 615–616.

[142] La fameuse phrase a été prononcée le 29 septembre 1938: « S'il s'agit de démembrer la Tchécoslovaquie, la France dit non. S'il s'agit de permettre à trois millions d'habitants des Sudètes qui veulent être allemands de le devenir, nous sommes d'accord. » C'est par ces mots que le président du Conseil, Edouard Daladier entérine à Munich, en compagnie du Premier ministre britannique Neville Chamberlain, les accords qui, en face du chancelier allemand Adolf Hitler et du duce Mussolini, sont censés sauver la paix en Europe. » http://www.lodace.net/ca1jour/sep/29091938.htm

[143] Bonnet a essayé de présenter des acquis par rapports aux exigences de Hitler, exprimées dans les points de Godesberg du 23 septembre 1938.

[144] Doc. 15, le 3 octobre 1938, Livre jaune, 16.

l'envoyé hongrois accrédité en France et la majorité d'entre-eux traitent l'écho de presse.[145]

Des quelques rapports sur les contacts directs, on peut relever cependant le télégramme résumant la conversation de Khuen-Héderváry avec Georges Bonnet, ministre des affaires étrangères, peu après Münich. Bonnet a dit qu'il faudrait régler la question hungaro-tchécoslovaque le plus vite possible et qu'il avait envoyé un message dans ce sens à Prague. Il a également dit qu'il serait prêt à coopérer ou à intervenir, mais il exige que le climat des négociations soit conciliant, diplomatique et sans menaces.[146]

Il y a aussi quelques compte-rendus sur les entretiens de Maugras, envoyé français à Budapest avec le ministre hongrois ou ses adjoints. Peu après l'ouverture des négociations bilatérales hungaro-tchécoslovaque, Maugras a transmis le conseil de son gouvernement qu'il faudrait diminuer l'étendue géograpraphique des revendications hongroises pour qu'elles restent dans les cadres des principes établis à Münich.[147]

(On ne peut pas savoir si la diplomatie hongroise en avaient connaissance, mais l'ambassadeur Charles Corbin, accrédité à Londres, a été instruit à ces jours par Georges Bonnet, critiquant la proposition hongroise sur l'organisation des plébiscites sur les territoires contestés et en particulier en Ruthénie. Bonnet a exprimé ses craintes sur les arrières pensées politiques éventuelles de cette intitiative et il avait confirmé à son ambassadeur qu'un plébiscite ne pourrait pas être concilié avec les cadres du règlement envisagé, basé sur les considérations ethniques qui ne pourraient concerner que les régions peuplées par une population en majorité hongroise.[148]

Quelques jours avant la conférence de Vienne, Corbin a récapitulé à son ministre la position de Lord Halifax qui indiquait lors d'un tête à tête qu'il faudrait se méler dans le moindre possible dans cette affaire délicate et qu'il ne s'attacherait pas trop aux compétences prévues dans l'accord de Münich, d'autant moins qu'on pourrait compter sur un compromis équitable à cause de certaines différences entre les points de vue de l'Italie et de l'Allemagne. Ils se sont entendus qu'il faudrait envoyer un message au gouvernement de Prague

[145] Le contenu de ces télégrammes coïncide avec la partie correspondante de notre article donc il serait inutile de présenter ces rapports de Khuen-Héderváry.

[146] Doc. 454 du 3 octobre 1938, in *DIMK* II. 712.

[147] Doc. 509 du 12 octobre 1938, in *DIMK* II. 780–781.

[148] Sallai, Gergely: *« A határ megindul... » A csehszlovákiai magyar kisebbség és Magyarország kapcsolatai az 1938–1939. évi államhatár-változások tükrében.* [« La frontière s'en va… » — Les relations entre la Hongrie et la minorité hongroise de Tchécoslovaquie dans le mirroir des changements frontaliers de 1938–1939] Bratislava: Kalligram, 2009. 130. Dans ce livre, le texte du message de Bonet à Corbin est cité en hongrois sur la base du document suivant: AD Europe 1918–40. T. vol. 136, f. 65–66, T. Nos 3276–3378.

que la France et l'Angleterre seraient néanmoins disposées à participer à la conférence sous condition d'une demande tchécoslovaque explicite.[149])

Khuen-Héderváry a aussi rapporté sur sa conversation avec le chargé d'affaire italien qui l'avait informé sur ses entretiens avec Georges Bonnet. Dans sa réponse à l'invitation italienne à participer à une conférence arbitrale quadrilatérale à Venise pour examiner les demandes du gouvernement hongrois, le ministre n'a pas refusé l'idée mais il a expliqué que sa réponse définitive ne pourrait être donnée qu'après l'approbation du premier ministre Daladier et après avoir concerté avec son homologue britannique.[150] Suivant ses entretiens avec l'ambassadeur français à Berlin, l'envoyé hongrois Sztójay a rapporté que François-Poncet « était d'avis qu'il ne fallait pas porter l'affaire devant une conférence à quatre. La France, estimait-il, devait défendre la cause tchèque (qu'elle avait abandonnée une fois) et l'Angleterre devait appuyer la position française. »[151]

Dans un de ses rapports, Khuen-Héderváry a récapitulé les informations saisies auprès de Bonnet et de Bressy, nouveau responsable de la presse au Quai d'Orsay, ainsi que de l'ambassadeur polonais et du chargé d'affaires italien pour conclure que le gouvernement français avait conseillé à la presse française de s'occuper le moindre possible des négociations hungaro-tchécoslovaques, de la question d'une frontière hungaro-polonaise commune. Le résultat *in merito* n'intéressait pas le gouvernement français pourvu qu'il soit un bon compromis accepté aussi bien par Prague et par Budapest.[152]

Dans le recueil hongrois de la correspondance diplomatique, on trouve un compte rendu sur l'écho de presse de Vienne, et l'envoyé Khuen-Héderváry constatait que du côté français, il n'y avait aucune animosité, même si probablement une grande partie du public estimait que la Hongrie avait reçu plus que ce qui lui aurait été dû d'après l'application stricte du principe ethnographique.[153]

Le premier document témoignant de l'opinion gouvernementale française formulée après le 2 novembre 1938 qu'on trouve dans le recueil hongrois de la correspondance diplomatique est une brève note sur la conversation de Maugras et de Kánya, ministre hongrois des affaires étrangères où l'envoyé français a transmis le message de son gouvernement « peut être déjà dépourvu

[149] SALLAI op. cit. 157. Dans ce livre, le texte du message de Corbin à Bonet est cité en hongrois sur la base du document suivant: AD Europe 1918–40. T. vol. 136, f. 120–123.

[150] Doc. No. 531. in *DIMK* II. 798. (La rencontre du chargé d'affaire italien avec Bonnet a eu lieu le 14 octobre 1938, et l'envoyé hongrois en était informé le même jour.)

[151] Cité par SÜTŐ (op. cit. 27) avec la date de 15 octobre 1938 et le numéro d'identification: Küm. Res.pol. 1938/a–210. (Ce document n'est pas publié dans le *DIMK* II.)

[152] Doc. 592, du 27 octobre 1938, in *DIMK* II. 858–859.

[153] Doc. 24, du 12 novembre 1938, in *DIMK* III. 111.

d'actualité » conseillant au gouvernement hongrois de former sa politique vis-à-vis la Ruthénie de telle manière qu'elle ne mène pas aux *complications*.[154]

Un jour après, Villani, le chef de la mission hongroise à Rome a envoyé un télégramme sur ses entretiens avec André François-Poncet, le nouvel ambassadeur français (qui vient de quitter sa mission précédente qui était d'ailleurs l'ambassade de la France à Berlin). François-Poncet a évoqué la question de la Ruthénie et s'interrogeait si le fait que la frontière hungaro-polonaise n'avait pas été acquise — seulement les deux grandes villes proches, Ungvár (Uzghorod) et Munkács (Mukacevo) étaient attribuées à la Hongrie - jouait un rôle dans la chute du gouvernement Imrédy.[155] Il est intéressant de lire que « Poncet approuvait la position du gouvernement [hongrois] qui a été taillée dans l'esprit de la conférence quadrilatérale de Münich. Selon lui, l'entrée des troupes hongroises en Ruthénie aurait provoqué la protestation commune de toutes les quatres puissances et en plus, surtout à Berlin, un mauvais oeil et une réaction forte. Or, la Hongrie devrait préserver les bonnes relations avec le Reich car il est indéniable que les États de l'Europe centrale appartiennent à la « zone d'influence » allemande, même si la Hongrie devrait veiller à éviter qu'elle se trouve dans une dépendance plus accentuée. »[156]

Aux jours de l'annexion de la Bohême-Moravie et de la déclaration de l'indépendance slovaque, la mission hongroise de Paris a rendu compte du choc du public français, de la condamnation de la trahison et de la rupture des engagements ainsi que du renforcement évident de l'opinion anti-allemande.[157] Un des rapports constatait avec soulagement que l'occupation hongroise de la Ruthénie n'avait pas eu d'écho négatif.[158]

Les mémoires des diplomates hongrois mentionnent que Bonnet a félicité (!) à l'envoyé hongrois de Paris du succès de la Hongrie,[159] mais parmi les télégrammes publiés, on n'en trouve pas de preuve.

Le *Livre jaune* français[160], paru en automne 1939, donc après le déclenchement

[154] Doc. 75, du 24 novembre 1938, in *DIMK* III. 157.

[155] En réalité, Imrédy, devenu trop germanophile a été invité à démissionner par le gouverneur-régent qui voulait nommer un gouvernement qui pourrait renforcer les anciens liens avec Londres, sans s'éloigner vite de la politique de l'Allemagne.

[156] Doc. 85, du 25 novembre 1938, in *DIMK* III. 165. (L'envoyé Villani a refusé que la Hongrie soit classée dans quelconque zone d'influence. Dans la partie finale de la conversation, le diplomate français a averti qu'il serait erronné de compter sur Rome pour contrebalancer Berlin.)

[157] Doc. 534, du 22 mars 1939, in *DIMK* III. 654–655.

[158] Doc. 535, du 22 mars 1939, in *DIMK* III. 655–656.

[159] P.ex. Barcza op. cit. 407.

[160] Le livre jaune français, Documents diplomatiques 1938–1939, Pièces relatives aux événements et aux négociations qui ont précédé l'ouverture des hostilités entre l'Allemagne d'une part, la Pologne, la Grande-Bretagne et la France d'autre part. Ministère des affaires étrangères, Paris: Imprimerie nationale, 1939.

de la deuxième guerre mondiale, a rendu public un grand nombre de télégrammes de la diplomatie française et a eu la vocation d'attester la bonne foi du gouvernement français ayant fait une série de gestes de conciliation en faveur d'obtenir des garanties des frontières françaises et de l'indépendance de la Tchécoslovaquie et de l'intégrité de la Pologne.

En ce qui concerne la correspondance interne de la diplomatie française, les documents répertoriés dans le *Livre jaune* utilisaient d'une manière conséquante les formules *arbitrage*[161] *sentence arbitrale*[162], sans y ajouter de remarques péjoratives, guillemets, etc.

Cependant le document le plus intéressant du point de vue de l'histoire de la sentence de Vienne est le compte-rendu de François-Poncet, où l'ambassadeur passant les derniers jours de son accréditation à Berlin, récapitule l'analyse de Hitler que le führer lui a présentée dans le nid d'aigle d'Obersalzberg près de Berchtesgaden où il est arrivé au bord de l'avion personnel du chancelier le 18 octobre.[163]

En recevant une réponse à sa question posée sur le différend territorial de la Hongrie et de la Tchécoslovaquie, François-Poncet ne faisait état d'aucune protestation, de remarque ou d'avertissement de sa part ou de la part de son gouvernement. Une demi page sur six-et-demie concerne les rapports hongro-tchécoslovaques et les questions du changement des frontières et de l'arbitrage quadrilatérale.[164]

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[161] Cf. le document n° 51 et 65 (M. Coulondre, ambassadeur de France à Berlin, à M. Georges Bonnet, Ministre des Affaires Étrangères), envoyés le 2 et le 14 mars 1939 (Livre jaune, 51, 80, 82.)

[162] Cf. le document n°73 (M. Coulondre, ambassadeur de France à Berlin, à M. Georges Bonnet, Ministre des Affaires Étrangères), envoyé le 16 mars 1939 (Livre jaune, 92, 97.)

[163] Il faut souligner que Georges Bonnet a retourné à l'importance de cette conversation aussi bien devant l'assemblée nationale française. Annexe II, extrait du discours prononcé à la Chambre des députés par Georges Bonnet, ministre des affaires étrangères, le 26 janvier 1939. (Livre jaune, 423)

[164] « Sur deux autres sujets, j'essaie encore d'inciter le Führer à me faire connaitre sa pensée; les revendications de la Hongrie et la guerre d'Espagne.
Il convient sans détour que les Hongrois ont des prétentions qu'il juge excessives. Il ajoute, il est vrai, que les cessions et les concessions des Slovaques sont trop maigres. Pour lui, le seul critérium est l'ethnographie, la race; c'est le seul dont il se soit réclamé vis-à-vis des Tchèques pour le tracé des nouvelles frontières; les Hongrois, les Polonais n'ont qu'à s'y tenir, eux-aussi; visiblement, l'effort de ceux-ci pour se doter d'une frontière commune ne lui est pas sympathique. Le Chancelier se vante d'avoir faire échouer le recours, proposé par la Hongrie, aux quatre Puissances de Münich. Il croit avoir, de la sorte, écarté un péril certain. « Une telle conférence, dit-il, nous aurait placés devant deux thèses éloignées l'une de l'autre. J'aurais été obligé, quelle que fût mon opinion intime, de me prononcer pour les Hongrois et les Polonais, à cause des liens politiques qui nous unissent à eux; Mussolini aurait agi de la même façon. Vous, cependant, et les Anglais, pour des raisons analogues, vous auriez défendu les Tchèques. Ainsi trois semaines après l'accord de Münich, nous aurions de nouveau un conflit, qui cette fois ne se fût pas arrangé. J'ai rendu service à l'Europe, en l'évitant. J'ai préféré exercer

(Quatre jours après, Villani, l'envoyé hongrois à Rome a transmis à Ciano l'analyse du gouvernement hongrois, très proche aux phrases hitlériennes prononcée à Obersalzberg et le document hongrois a souligné que la France et l'Angleterre aurait de préférence pour l'arbitrage bilatéral de l'Axe car elles ne voudraient pas s'occuper du différend hongro-tchécoslovaque dans l'avenir.[165])

VI/3. Les informations de la diplomatie hongroise sur l'attitude gouvernementale américaine

Dans le recueil hongrois de la correspondance diplomatique[166], on a inclu le rapport établi sur les entretiens du chargé d'affaires de la mission américaine avec Apor, l'adjoint permanent du ministre hongrois où Traverser « a parlé — comme toujours — avec une grande compréhension, même avec approbation sur la justesse de nos revendications. »[167]

Dans ses mémoires très pro-hongrois, parus à la première fois en 1947, JF Montgomery, l'envoyé diplomatique américain en poste à Budapest entre 1933-1941 ne fait pas allusion à quelconque avertissement *a fortiori* de condamnation qu'il a dû transmettre durant les semaines d'octobre ou de novembre 1938. Derrière l'échec des négociations bilatérales, il a cru découvrir les manoeuvres par lesquels Hitler avait manipulé le gouvernement tchécoslovaque afin de pouvoir se présenter enfin comme arbitre.[168] Dans ses notes personnelles, dont les pièces les plus caractéristiques ont été récemment publiées en Hongrie[169], on peut voir qu'il avait collecté des informations sur l'état des négociations, mais ce sont surtout la question de la Ruthénie (et les chances d'une frontière commune

une pression sur les Hongrois et les Tchèques et les persuader de renouer les pourparlers interrompus., en se montrant, les uns et les autres, moins intransigeants. Mussolini m'a aidé. J'espère qu'une transaction interviendra. Mais toute l'affaire est dangereuse. On voit à cette occasion combien la France et l'Angleterre on eu tort d'accorder à la Tchécoslovaquie la garantie de ses frontières, avant même que celles-ci ne fussent clairement définies. Il en peut sortir les plus fâcheuses complications. » cf. le document n°18 (M. François-Poncet, ambassadeur de France à Berlin, à M. Georges Bonnet, Ministre des Affaires Étrangères), envoyé le 20 octobre 1938, (Livre jaune, 28.)

165 Doc. 188, du 22 octobre 1938. In Réti (sous la dir.) op. cit 158.

166 Le *DIMK* II. précité.

167 Doc. 433, in *DIMK* II. 689. La rencontre a eu lieu le 1er octobre 1938.

168 Montgomery op. cit. 103–104.

169 Frank, Tibor (szerk): *Roosevelt követe Budapesten: John F. Montgomery bizalmas politikai beszélgetései 1934–1941.* [L'envoyé de Roosevelt à Budapest: Les entretiens politiques confidentiels de John F. Montgomery, 1934–1941] Budapest: Corvina, 2002.

de la Hongrie avec la Pologne) et la préparation d'un projet de loi antisémite qui étaient dans le centre de son attention.[170]

Dans le recueil des documents diplomatiques du Secrétariat d'État américain, les rédacteurs ont inclu le rapport de l'attaché militaire de Berlin,[171] un compte-rendu de l'ambassadeur américain de Varsovie,[172] et le rapport de l'envoyé américain à Prague[173], mais on n'y a pas trouvé de rapport venu de Budapest en la matière.

En ce qui concerne les contacts de Pelényi, l'envoyé hongrois à Washington, le recueil hongrois de la correspondance diplomatique publie un télégramme dans lequel le diplomate raconte qu'au Secrétariat d'État américain, il a eu la possibilité de lire quelques télégrammes envoyés aux jours de Münich par le chargé d'affaires Traverser et l'envoyé Montgomery qui avaient suggéré l'appui résolu des demandes territoriales hongroises. Le sous-secrétaire d'État, Sumner Welles lui a posé la même question que Dunn, directeur du département de l'Europe avait aussi touchée peu de temps avant, à savoir à dire à son coeur si la rétrocession de la Ruthénie satisferait vraiment la Hongrie?

Bien sûr, Sumner Welles n'attendait pas vraiment de réponse claire et surement pas d'engagement; Pelényi a averti donc ses supérieurs qu'il faudrait éviter de surestimer l'influence de Montgomery dont les propos sympathisant ne reflètent pas forcément la position officielle de Washington, ayant opté pour le moment pour l'isolationnisme.[174]

Quand l'occupation militaire de la Ruthénie a eu lieu, Montgomery a posé au ministre adjoint (qui était déjà Vörnle) les mêmes questions que Barcza a reçues à Londres: l'action a-t-elle été concertée ou approuvée par l'Allemagne ou non?

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[170] Il a rencontré Apor, le suppléant permanent du ministre des affaires étrangères (qui l'avait informé sur l'état des négociations bilatérales), Kobr, l'envoyé tchécoslovaque à Budapest (qui lui a indiqué que Prague accepterait l'Allemagne et l'Italie, comme arbitre, mais pas du tout la Pologne), Rasic, l'envoyé yugoslave, Ermansdorf, l'envoyé allemand, Eckhardt, député au parlement, Imrédy, premier ministre, Bethlen, ancien premier ministre, Teleki, ministre de l'éducation à l'époque, ancien et futur premier ministre, FRANK op. cit. 191–206.

[171] Le 3 octobre 1938: L'attaché Smith analyse longuement comment les revendications territoriales hongroises et polonaises ont été reçues à Münich et il constate que Mussolini a appuyé beaucoup mieux ces demandes que Hitler.) United States Department of State / *Foreign relations of the United States diplomatic papers, 1938. General* (1938), The German-Czechoslovak crisis, (483–739.), http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=article&did=FRUS.FRUS1938v01.i0009&id=FRUS.FRUS1938v01&isize=M 716–718.

[172] Ambassadeur Biddle, écrivant sur le « recent Italo-German arbitration conference in Vienna » fait état de la déception des pays de l'Europe centrale, et en particulier de la Hongrie et de la Pologne envers l'Italie qui pouvait équilibrer suffisamment la pression allemande. Foreign relations of the United States, diplomatic papers, tome précité, 5 novembre 1938, 731–733.

[173] Le 7 novembre 1938, l'envoyé Carr donne un compte rendu sur l'évacuation des territoires sudètes, la délimitation de la ligne précise, et certaines difficultés mineures émergées. Foreign relations of the United States, diplomatic papers, tome précité, 733–735.

[174] Doc. 465 du 5 octobre 1938 (76/pol. – 1938), in *DIMK* II. 722–723.

Selon le compte-rendu hongrois, Montgomery était d'avis que si la Hongrie n'avait pas occupée la Ruthénie, ce territoire aurait été prise doute sans par l'Allemagne.[175]

VII. Conclusions

Aujourd'hui, on a beaucoup plus de connaissance qu'en 1938 et il est évident que les gouvernements de la politique de l'apaisement (ainsi que ceux qui les ont suivis et qui ont réussi à vaincre le nazisme et à libérer l'Europe du joug hitlérien de la guerre) n'avaient pas informé leur public sur tous les accords et tous les consentements conclus ou envoyés par les canaux diplomatiques.

Comme on l'a indiqué au début, l'objet de cet article n'est pas la réappréciation historique ou juridique des événements liés à une période tragique dans la mémoire tchèque et slovaque, période qui précédait la deuxième guerre mondiale. On espère cependant qu'on pouvait démontrer la cohérence entre les perceptions de la presse politique, de la presse scientifique juridique et de la position des gouvernements en exercice à cette époque en Angleterre, en France et aux États-Unis au moins dans le sens des messages comme les diplomates anglais, français et américains ont envoyé au gouvernement hongrois.

Les diplomates hongrois ont senti qu'il s'agissait d'une opération à haut risque, mais ils ont pu constater que la Hongrie ne rencontrait pas d'objection de la part de ces trois gouvernements si elle profitait de la nouvelle situation. Ils ont pu croir qu'un nouveau paradigme (le paradigme de Munich) succéderait au paradigme de la conférence de paix de Versailles.

Ce n'est que six mois plus tard qu'il est devenu clair que le paradigme de Münich peut être renversé par un autre. L'Angleterre et la France se sont rendu compte que Hitler ne pourrait pas être satisfait par des gestes et des concessions. L'annexion de la Tchéquie, les menaces adressées à la Pologne, la provocation de Gleiwitz et le déclenchement de la deuxième guerre mondiale, le drôle de guerre et l'invasion allemande du front de l'Ouest témoignaient que c'est seulement par la force armée que l'Allemagne hitlérienne et le camp de l'Axe pourraient être arrêtés et vaincus.

La Hongrie dont la politique est devenue de plus en plus liée à celle de l'Allemagne, a pu constater que le maintien de l'acquis viennois serait tributaire du résultat de la guerre. La partie anglophile de l'élite politique et gouvernementale et les diplomates du ministère des affaires étrangères n'ont pas pu empêcher que la Hongrie abandonne sa neutralité et le statut de non-belligérent, et qu'elle participe à l'agression contre la Yougoslavie et l'URSS.

[175] Doc. 499 du 18 mars 1939, in *DIMK* III. 614–615.

Bien plus tard, les tentatives de quitter l'Axe et la guerre ont été empêchées par l'occupation allemande en mars 1944 et le coup d'État des croix fléchés, parti nazi hongrois, en octobre 1944.

La Hongrie a terminé cette partie de son histoire dans le banc des vaincus par la coalition antifachiste, fondatrice du paradigme onusien.

Dans le traité d'armistice de janvier 1945, la Hongrie a dû rentrer à l'intérieur des frontières du début 1938 et en 1947, le traité de paix a formellement reconfirmé les frontières de 1938 avec l'adjonction de trois villages situés dans la proximité de Bratislava à la Tchécoslovaquie. (La Tchécoslovaquie a renoncé de sa part de la Ruthénie, qui devenait attachée à l'URSS et au sein de la fédération à la République Soviétique Socialiste Ukrainienne.[176])

En Hongrie, les criminels de guerre et quelques hauts responsables politiques ont été exécutés ou sévèrement châtiés et des centaines de milliers d'innocents avaient péri à la guerre et après la guerre. Cet article n'a voulu traiter ni la responsabilité politique pour la guerre, ni la responsabilité politique pour les actes, les erreurs et les crimes commis entre 1938-1939-1945. Ceci est dûment examiné par l'historiographie moderne.

Les questions auxquelles l'article voulait chercher la réponse, — c'est à dire si les diplomates hongrois de l'époque avaient raison de constater (et de confirmer dans leurs mémoires) que 1) les gouvernements — en exercice — anglais, français et américain ne protesteraient pas si la Hongrie saisissait l'occassion et que 2) le média et l'opinion publique ainsi que les écrits de la doctrine de droit international ne témoignaient pas de tel refus massif qui laisseraient entendre que le gouvernement sur place pourrait être renversé sous peu et que l'arrivée d'un nouveau gouvernement au pouvoir avec une politique opposée est manifestement prévisible, peuvent être répondues affirmativement.

Les diplomates — malgré toutes les insuffisances de la documentation accessible de nos jours — ont bien perçu l'opinion de ces trois gouvernements et ils savaient bien que ces gouvernements suivaient la logique d'une politique qui était contestée ou, au moins, vue avec angoisse de la part d'une partie considérable de leur élite ministérielle et politique. La position arrêtée à Münich semblait être un nouveau paradigme et ils ne pouvaient pas prévoir (ou très peu d'entre eux l'ont prévu) que ce paradigme allait être mis en cause justement par le régime hitlérien, en forçeant deux sur les quatre des auteurs de l'accord de Münich, de revenir a *statu quo ante*.

Même à l'époque, on était obligé de constater que la politique de l'apaisement et les résultats intervenus engendaient cependant des critiques dans une partie considérable de la société et dans des milieux des internationalistes: mais le ton de la critique s'est aggravé au fur et à mesure que le monde assistait à bras

[176] Traité du 29n juin 1945 conclu entre l'URSS et la Tchécoslovaquie.

baissés à l'annexion de la Tchéquie (la Bohême-Moravie) et a vu que l'appétit de l'Allemagne hitlérienne visait désormais la Pologne. En effet, le retour à la politique précédente s'est justifié surtout dans la mesure où il fallait assumer la responsabilité pour prendre les armes pour la cause de l'humanité et la préservation de la culture et de la valeur de l'être humain.

On peut constater aussi que les « grands professeurs » et les « promesses » de la doctrine américaine du droit international de l'époque ont développé de tels arguments — tout en laissant entendre leurs critiques — qui regardaient la sentence arbitrale de Vienne de 1938 avec une compréhension relative.

Or, aussi bien les politiciens pratiquant la politique de l'apaisement que les gouvernements qui les succédaient savaient bien qu'il était dans leur intérêt de cacher devant leurs citoyens les messages discrets envoyés vers la Hongrie et la Tchécoslovaquie d'une part, et les puissances de l'Axe, d'autre part. C'est ainsi que le média et une grande partie de la doctrine ont évalué *a posteriori* les événements de Vienne de 1938 comme s'ils avaient eu lieu sans le consentement de la diplomatie de leurs gouvernements respectifs.

Pourtant, ces gouvernements savaient tout ou presque tout. Ils croyaient qu'il s'agissait des corollaires d'un nouvel paradigme où les sacrifices cruels mais inévitables étaient historiquement et politiquement justifiables. Il est devenu clair au cours des mois de 1939 qu'ils avaient tort.

Chamberlain, Halifax, Daladier et Bonnet ainsi que leurs collaborateurs les plus proches savaient donc tout ce qu'il adviendrait. La logique de la guerre et du règlement de l'après guerre militait aussi bien aux yeux de leurs successeurs en faveur de l'occultation de ces concessions comme si de la part de leur élite, il n'y avait qu'une seule faiblesse: la conclusion de l'accord de Münich.

Finalement, le sentiment de culpabilité pour la trahison de Münich a déterminé l'interprétation et l'appréciation de la décision de Vienne.

Après que la décision politique sur le caractère *nul et non avenu*[177] avait été prise, la doctrine y a apporté des justifications juridiquement *prima facie*

[177] On dit que c'était l'accord conclu le 29 septembre 1942 entre les deux gouvernements en exil, représentés par le général De Gaulle et Benes où la formule nul et non avenu a été utilisé à la première fois, en ce qui concerne les changements territoriaux de la Tchécoslovaquie. Or, même la position de la France Libre a été ambigüe en ce qui concerne les liens entre les conséquences juridiques *in abstracto* et les frontières *in concreto* car l'alternation des années 1938 et 1939 sous-entendait une marge de manoeuvre considérable:
« Dans cet esprit, le Comité National Français, rejetant les accords signés à Munich le 29 septembre 1938, proclame solennellement qu'il considère ces accords comme nuls et non avenus, ainsi que tous les actes accomplis en application ou en conséquence desdits accords. Ne reconnaissant aucun changement territorial affectant la Tchécoslovaquie, survenus en 1939 ou depuis lors, il s'engage à faire tout ce qui sera en son pouvoir pour que la République tchécoslovaque, dans ses frontières d'avant septembre 1938, obtienne toute garantie effective concernant sa sécurité militaire et économique, son intégrité territoriale et son unité politique. »

correctes et logiques, mais formulées de la manière qui avait la vocation complémentaire d'exculper les gouvernements de la politique de l'apaisement, d'amoindrir leur responsabilité, d'occulter leur complicité ou leur concours à la création de la situation. Une autre partie de la doctrine, agissant de toute bonne foi ou seulement en croyant à certains ouvrages écrits aux années après guerre, a donné son appréciation juridique aux nouvelles générations des juristes sans connaître tous les éléments historiques.

Je crois qu'on peut se permettre de reconstituer les circonstances conformément à l'histoire. Il est évident qu'en 2011, aucun titre juridique ne peut être déduit de la présentation correcte des faits de 1938.

J'ai choisi donc de traiter ce sujet en détail puisque je sais qu'il était proche de Géza Herczegh ayant des connaissances historiques si profondes, mais aussi personnelles via son frère, lui-même diplomate de la période historique relatée qui travaillait auprès de personnes mentionnées dans le présent ouvrage ou bien qui lisait leurs rapports. Malheureusement, Géza Herczegh n'a publié ses livres sur l'histoire diplomatique qu'en hongrois: j'espère bien que j'ai pu collecter de documents en nombre suffisant qui prouvent ses constats et ses suppositions.

III.
Human rights, minorities and international law

Droits de l'homme, minorités et droit international

TWO EXAMPLES OF THE LEGAL LABYRINTH OF MINORITY IDENTITIES

GÁBOR KARDOS[1]

GÉZA HERCZEGH the eminent scholar of international law, a charming person has always been a great friend of his younger colleagues giving a helping hand to them both in their professional work and in their personal careers. My personal memory of his personality centers around a Prague conference where I had the opportunity to have long discussions with him not only on international law but also on history and literature. One of his main fields of interests has been the international protection of minority rights.

Introduction: The Principles of Minority Protection

If the question is whether a field of law has developed its own principles, the first thing to clarify is how clearly the field is defined, how well its regulation has been established to have its own principles. I consider that in the case of international protection of minority rights one can hardly have doubts that minority protection both on multilateral and bilateral level is a mature branch of international law.

Those authors are right who identify two basic substantial principles of international protection of minorities: *equality* and *identity*.[2] These principles presuppose each other; there is no true equality without protection and promotion of identity; how may a minority person be equal without having the same cultural institutions as the majority has? Similarly, there is no identity without equality because how could you preserve your identity if your equality is violated?

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[2] For example, KRISTIN HENRARD: The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities. *The Global Review of Etnopolitics* Vol. 1, No. 1, (2001), 43–45.

It is also true that equality and identity are more than principles; they are the basic norms of minority protection as well. As rule principles help the interpretation and application of legal norms but equality and identity, beside their role in interpretation and application of international minority law, have their own normative content.

I think there is a third principle of international protection of minority rights having both substantial and procedural significance: the protection of minority rights forms integral part of the international protection of human rights, and as such falls within international co-operation (See, in this regard: Article 1 of Framework Convention for the Protection of National Minorities). Its substantial significance is that if minority rights are human rights their enjoyment can not be conditional, depending, for example, on the so called fidelity to the territorial state. Article 20 of the Framework Convention, which emphasises that in the exercise of the rights enshrined in the Framework convention the national legislation should be respected, does not contradict this interpretation since there is no possibility to deny those rights. The procedural significance of the principle is not simply that the protection of minority rights are not exclusively the concern of domestic jurisdiction[3] but that one day the jurisdiction of a human rights mechanism, for example the European Court of Human Rights, can include the protection of minority rights in a direct way.

Equality seems to enjoy an almost universal support at least on theoretical and normative levels but identity and its consequences are not necessarily well received. In post-modern Western European societies *identity* is a delicate question: there are large immigrant communities, more and more other social groups identify themselves along the lines of a particular identity and in a way or another majority seems to be disappearing. At the same time the visible signs of obvious "otherness" on parade reconstitute the feeling of belonging to the majority and the amorphous majority regains its shape by redefining itself against the various minority and particular social groups, mainly against immigrants. In Central and Eastern Europe after the fall of Communism the rebirth of different ethnic identities have taken place and the threat perception of the majority still comes from the lack of understanding of political consequences of ethnic pluralism and of open identity manifestations in combination with old intolerances and competition for state resources. In my contribution I will examine two identity-related issues, the identification of a minority group and a consequence of pluralism inside a religious identity: the public use of religious symbols in public places. The first issue seems to be eternal because of the dynamic nature of identity; the second provides a reason to rethink what the core elements of minority freedom of religion are.

[3] GEOFF GILBERT: The Council of Europe and Minority Rights. *Human Rights Quarterly* Vol. 18 (1996) No. 1, 175.

The Identification

The states have a legitimate interest to know who the subjects of minority rights are, since the protection of additional rights involves significant expenses. Thus, it is justified to clarify whether the right holders are really entitled to the guaranteed services or not. Beside the just mentioned utilitarian approach, if the legislation secures a special political representation to the minorities, which simply comes from the basic understanding of democracy, others should know on behalf of whom the representatives speak. So it can not be a question that mere declaration of the alleged subjects can not be the only ground for departure and objective factors are to be calculated. This might easily lead to the sensitive question of the collection of ethnic data which is not allowed in many European countries because of the long shadow of the past when the open manifestation of identity was a reason for persecution.

In any case, it is beyond any reasonable doubts that a delicate balance should be set between the subjective and the objective approaches. The elaboration of that delicate balance can not be done differently than with the help of sometimes awkward, sometimes painstaking processes of a dialogue involving those who demand rights for themselves, the authorities and the international supervisory bodies. It is also important to observe that the delicate balance to be achieved is far from being a static phenomenon, and in the case of certain minorities it is closer to objective aspects while in other cases it is closer to the subjective approach.[4]

In international law the classic wisdom in this question came from the Permanent Court of International Justice, which stated in the Case of Greco-Bulgarian "Communities" that "The existence of communities is a question of fact; it is not a question of law."[5] Later on the Court added that a minority community is "a group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another."[6]

As far as the first, laconic statement is concerned the generally shared, correct interpretation comes from the Venice Commission and implies that the state recognition of the existence of a minority community became irrelevant

[4] José Bengoa: *Existence and Recognition of Minorities.* E/CN.4/Sub.2/AC.5/2000/WP.2 3 April 2000. 15–16.

[5] Permanent Court of International Justice, Advisory Opinion, Greco-Bulgarian "Communities" Ser. B. No.17, 16.

[6] Ibid. 26.

under international law.[7] Here it is important to add that the emphasis is on the words "under international law". Because it is quite obvious that to enjoy minority rights under national law there is a need for recognition on behalf of state legislation.

In the case of the concept of minority community one can find, on the one hand, references to objective criteria related to the existence of the specific characteristic features of the group such as religion, language, etc. On the other hand, it is also underlined that the members of the group should exhibit a sentiment of solidarity reflecting their desire to preserve their specificities, which renders? their subjective understanding ? decisive.

In the Rights of Minorities in Upper Silesia (Minority Schools) case the Permanent Court of Justice accepted that a declaration on behalf of a minority pupil on his origin or mother tongue required by law as a precondition to be admitted to a minority language school is not violating equal treatment.[8] Consequently, members of the group should give evidences of their subjective view on their identity, if they would like to enjoy minority protection. Through this it is also secured that their subjective identification is not arbitrarily made, the subjective choice is intertwined with its objective ground. The question is whether they would like to and they are able to convincingly admit their identity or not.

According to the UN Human Rights Committee, beside the objective ground, the subjective element, the wish to maintain ties with the community is decisive:

"Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant"[9].

In the *Lovelace v. Canada* case the Committee clarified that if the domestic legislation restricts a minority right attached to membership in a minority community, any restrictions should be objectively and reasonably justified.[10] At the same time, a person belonging to the minority concerned may not be arbitrarily excluded from the minority community (which would result in the loss of entitlements attached to minority status). This approach, which involves that the burden of proof goes to the legislation, is also applied if the recognition of membership is concerned in a different context. The watchdog of the International Covenant on the Elimination of the All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination

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[7] European Commission for Democracy through Law (Venice Commission): *Report on Non-citizens and Minority Rights.* CDL-AD (2007) 001, 4.

[8] Permanent Court of International Justice, Judgment, Rights of Minorities in Upper Silesia (Minority Schools), Ser. A. No. 15, 30–33.

[9] *Lovelace v. Canada,* Communication No. R/6/24/ para. 14.

[10] Ibid. para. 16.

in its General Recommendation VIII underlines that "such identification shall, if no justification exists to the contrary, be based on the self-identification by the individual concerned."[11] It means that the individual or the group of the individuals might be subjective; the burden of the proof – the reasonable and objective justification of the negative decision on membership or on the very existence of the distinct community – is on the shoulder of the *authorities* denying the recognition. As it has been demonstrated, the Concluding Observations in relation to state periodic reports clearly confirms this approach.[12]

Although Article 5 (1) of the Framework Convention for the Protection of National Minorities sheds some light on it, – by linking the concept of identity to religion, language, traditions and cultural heritage – there is no definition of a national minority in the Convention. Meanwhile, the Framework Convention also contains the right to identity in its Article 3 (1). If we take together the lack of definition but the reference to objectively distinctive features of a national minority and the clear recognition of the right to identity, altogether they provide a solid ground for departure. The Explanatory Report states that Article 3 (1)

"(D)oes not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity."[13]

So, the group and those individuals who consider themselves as members should give evidences of their subjective view on their identity – it is the classic wisdom. In reality much depends on the application of the? approach of the Advisory Committee: how the subjective and the objective aspects are balanced. Is the balance closer to objective aspects, or to the subjective approach? The Advisory Committee leaves a margin of appreciation to the State Parties, because it only provides advice to the State Parties on how to improve their compliance and has no definition on its hand. But having a continuous dialogue with the authorities and urging a constructive dialogue between the authorities and the minority groups, necessarily in soft form, gives an advantage to the subjective self–identification. Many examples prove that.[14] Here I would like to quote only one but very convincing recent example in the Third Opinion on Hungary adopted on 18 March 2010. As usual the Advisory Committee encourages the authorities to continue efforts to include the possibility for persons belonging to other groups to enjoy the protection of the Framework Convention and to be covered by the national legislation on minorities. The concrete cases concerned

[11] Committee on the Elimination of Racial Discrimination, General Recommendation No. 08: Identification with a particular racial or ethnic group (Art.1, par.1 & 4) 1990. 08. 22.

[12] Kristin Henrard: *Equal Rights versus Special Rights?* Minority Protection and the Prohibition of Discrimination. European Commission, 2007, 64.

[13] Explanatory Report H(1997)010 para. 35.

[14] See, Henrard (2007) op.cit. 634–6.

included the Jewish, Russian, Hun and Bunjevci communities.[15] Without going into details, whether the Jewish, Russian or Bunjevci communities are national minorities under Hungarian law might be a debatable question, but Huns – the people of Attila – are an imagined community, based on an arbitrary self-identification of a group of persons with an ancient people.

The Use of Islam Symbols in Public Places

Freedom of religion and belief has a double nature: it is a general human right, a "cornerstone of the democratic society," its role is comparable to freedom of expression, and at the same time, a highly important minority right. (Actually, its career started as a minority right.) Minority rights, in general, might be seen as signs of equal recognition by the majority. In those states where the only recognized minority right beside equality and non-discrimination is freedom of religion, and also everywhere in the case of new – immigrant – minorities, whose minority rights confined to non-discrimination and freedom of religion, the latter has a special position. It provides a general protection of identity because there is a significant overlap between religious and other forms of identity, namely ethnic and cultural identities. Consequently, the use of religious symbols in public places indicates not only religious but ethnic and cultural identities at least for a part of the community. Islam identity is more than simply religious, it is the most important expression of the sense of collective, overlapping identity, which has been imbued with an existential significance in the case of certain communities. They might see the toleration of the use of their religious symbols as signs of their *equal recognition* and the acceptance of their *authentic existence.*

Essentially the problem is the visibility of Islam in Europe which is getting more and more obvious. It is not necessarily related to recent immigration because the use of Islam symbols might be a product of religious revival of earlier generations. In a continent which have cherished the freedom of religion for centuries the phenomenon poses a hardly resolvable question. How to react to a complex phenomenon in which certain part of the users of Islam symbols behaves in a certain way because of their true religious conviction, their cultural identity, and another part behaves that way because they want to protest against Western culture, to disturb proper operation of public organs or they have been forced to do that. Law is in an exceptionally hard position, if it tries to regulate this phenomenon, – and regulation is not an unavoidable option, – since the rule should *presuppose* one of them. If the law presupposes the first variation,

[15] ACFC/OP/III(2010)001 paras. 33–36.

the disturbing cases as exceptions might be forbidden. If the law presupposes the second, the outcome might be a general ban in public spaces. In the second case the collateral damages at the expense of a basic human right of certain true believers are too high even if the law is not enforced in public places of worship.

Perhaps because they address a truly global perspective, universal human rights texts and bodies are clearly inclusive in that question, two illustrations:

Article 6 of the UN *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* says:

"the right to freedom of thought, conscience, religion or belief shall include, inter alia", (c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief."[16]

The UN Human Rights Committee states:

"The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group."[17]

The decisions in the *Dahlab*, *Sahin*, *Dogru* cases demonstrate how the European Court of Human Rights has conceived the problem, although they have emerged only in school context.

In *Dahlab* the Court dismissed the application of an elementary school teacher who had converted to Islam and who complained because she was not allowed to wear her Islamic headscarf during the instruction. The Court found that the Islamic headscarf was a powerful external symbol having proselytizing effect under the above mentioned conditions and also accepted that wearing of it was not reconcilable with gender equality. The Court emphasised that in the case of a teacher of a state school operating under denominational neutrality, that proportionate restriction is justified.[18]

As far as the elements of the reasoning of the Court are concerned I can accept the reference to the proselytizing effect (but only under the special circumstances of the case) and that it may justify the restriction. In my opinion, a school teacher is not a representative of a school and in the case of obviously free option self-determination comes first over gender equality. Moreover, the reliance on the big and powerful nature of the symbol might be indirect discrimination because the powerful symbols belong to Islam and the tiny symbols of other religions seem to be classified separately.

[16] UNGA Res. 36/55 of 25. November, 1981.

[17] UNHR General Comment 22 para. 4.

[18] *Dahlab v. Switzerland*, 15 February 2001.

In *Sahin* the Court was ready to accept the prohibition in the case of a university student, underlying the margin of appreciation approach:

„Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance."[19]

The Court again accepted that the prohibition was based on equality of sexes,[20] and gave special importance to pressurization:

"The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."[21]

In a disturbing way, the Court added that the secular way of life in Turkey leads to pressing social needs to prohibit the use of Islam symbols, "especially since this religious symbol taken on political significance in Turkey in recent years."[22]

There are at least *three* problems with the ruling. Even if a teacher might be seen as a representative of the school (university), a student obviously might not be. The pressurisation argument gives priority to an alleged social fact over the right of an individual in a case where the applicant was obviously a true believer having rational autonomy, although it can be convincing if the special circumstances of the case lead into that direction. Finally, the secular way of life and the political significance as justifications can lead too far, can justify almost everything, for example the complete ban on public use of certain religious symbols. That is the reason why I think the 2010 French law can go through the scrutiny of the Court.

The dissenting opinion presented by judge Tulkens criticizes the large margin of appreciation left to the Turkish authorities. She correctly observes that the European supervision quite simply seems to be absent from the judgment, and there is a need for harmonization of standards in that question. She emphasizes that Turkey's specific historical background does not justify properly the state interference, wearing merely the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and "extremists" who seek to impose the headscarf as they do other religious symbols.[23]

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[19] *Leyla Sahin v. Turkey*, 29 June 2004, para. 109.

[20] Ibid. para. 104.

[21] Ibid. para 115.

[22] Ibid.

[23] Ibid. Dissenting Opinion of Judge Tulkens, paras. 1–13.

In *Dogru* in which a grammar school girl was the applicant, the Court upheld its approach emphasising the diverse European practice as justification to leave the question to the margin of appreciation of State Parties,[24] and the importance of the protection of the rights of others.[25]

The first argument is not convincing, if a free practice aspect is at stake a European standard might be justified. The second may refer to a possible social conflict and to the importance to avoid such phenomenon, and as such it seems to be reasonable, but I think concrete signs of a possible wider social conflict would have been necessary.

Consequently, principal features of the Court's approach are the following: too much attention is given to whether a state-party adopted the principle of secularism; and the illegitimate interference to the free practice is too narrowly interpreted although in *Dahlab* certain arguments might be appreciated. I think only extreme cases like *obvious* proselytism, and provocation, imminent terrorist threat or cases in which there is no reasonable doubt that pressurization occurred may justify the interference.

Instead of Conclusions

Minority identities pose a challenge to law, including international law. In search of an answer to the dilemmas not arbitrarily made identification and the protection of pluralism, even inside a community should be the basic principles.

[24] *Dogru v. France*, 4 December, 2008, para. 63.

[25] Ibid. para 64.

GLOBAL HUMAN RIGHTS PROFILE AT THE THRESHOLD OF THE XXI CENTURY

FERENC KONDOROSI[1]

Introduction

The economic, social, political perspectives of the XXI. century are viewed in the light of globalization by many disciplines. However, the term globalization cannot easily be interpreted in the field of law, it is often referred to as a **"**chameleon**"** expression. It first of all means economic-social trends becoming global, thus economic-social problems also internationalize, the same way as the solutions require unity and co-operation on an international scale. Dependence of states, peoples and individuals increases in the globalizing world, country borders do not stop the effect of national trends, they clearly influence other countries as well.

Globalization is making relations among states more intense, inducing major developments in international law at the same time. Although sovereign states remain primary subjects of international law, organizing and synchronizing the more and more diversified interstate relations served as a base for the foundation of international establishments in the late 1900s, with an ever growing importance in international affairs. The so-called "modified sovereignty" is a result of globalization in international law: against total power in domestic issues, which is increasingly being squeezed by international obligations and the number of seats in commissions and assemblies is a way of measuring sovereignty. Now, this number can only be improved by self-restraint regarding traditional sovereignty, thus joining international organizations.

In meeting the challenges of globalization the depth of authority of international law is expanding. Consequently states now are united while approaching more and more issues of world affairs, formerly restricted to of national interest only (respecting basic human rights is one). At the same time countries also share efforts to find solutions to problems that are out of their individual capabilities, such as the protection of the environment, cross-border

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crime (drug trafficking) or even social barriers and the struggle against poverty.

Globalization's most influential and controversial aspect is the realization of economic, social and cultural rights. Danger is that traditional mechanisms involving states as subjects cannot be applied to multinational companies and worldwide financial corporations. Obviously, the growth of global poverty coincides with other global trends. Poverty, which can easily rid an individual of his basic rights and dignity, is an issue of major concern addressed by the United Nations and its institutions.

Despite the relative wealth enjoyed in developed countries, world-scale poverty is expanding vigorously. One of every five of us humans on the planet, 1.2 billion people altogether live under extremely hard up circumstances. This figure will probably rise in the upcoming two decades as world population is expected to grow by 2 billion, most of which coming from poor countries. The social gap between the wealthy and the poor is an even greater concern for example in Brazil with the poorest 20% of the population rationing only about 2.5% of the national income and the richest 20% enjoying 2/3 of it. Countries ranging from Russia to South Africa, from Colombia to Nigeria show alarming income distribution statistics and many agree that economic globalization is to blame. True, the fruits of globalization can be found rather unevenly. In China, Malaysia or even Thailand, differences in wealth have been growing on in the last decade, despite protracted and dynamic economic progress and world trade integration.

There is increasing awareness that more solid, better coordinated actions, development of rights, extended defense mechanisms and improving control efficiency in the international community can further promote protection of human rights.

1. Globalization and the internalization of human rights

The field of ideas of human rights dates back to the formation of bourgeoisie and the civil revolutions, when citizens' demands were translated into freedom rights in constitutions and other documents of constitutional importance against the state and ruling power. Economic development including improvements in infrastructure and travel and also expansion of trade intensified not only state-to-state, but also relations among citizens of different states. Intensified relations have brought along phenomena and problems worth to be solved by states together, thus requiring international cooperation and international law.

In the early 20th century, the impacts of economic development reached a certain extent that demanded international regulations of labor conditions (first that of child and woman labor), leading to the foundation of the International

Labor Organization in 1919. Premature attempts of international human rights regulations included first the protection of rights of foreign citizens, later regulation (prohibition) of international-scale issues, such as slave trade and the trafficking of women, but the real driving force towards international regulation was brought about by the horror of the WWII. It became obvious that no state is entitled to do whatever it wants with its own citizens, and that no state can repeatedly ignore human rights without one way or another affecting other countries, mostly by posing a threat to international peace. Therefore internationalization of human rights – namely creation and further rapid development of the international human rights regulations – can be attributed to globalization. Fundamental rights previously set in national constitutions were lifted to the level of international obligations by international human rights regulations and later the range of these rights has steadily been extended.

Law experts view "the idea human rights (in its moral, political and social sense) is a collective definition of the basic values of legal and political culture or the set of legal values of a culture; such values that are a must for a legal system"[2]. All in all human rights are not isolated legal entities but moral and social values represented in law.

As a result, human rights are "rather diversified, so legal classification offers an easier understanding"[3]. A well-known method of classifying human rights is as follows:

- protective rights: the right to life and security;
- freedom rights: the freedom of religion, opinion and assembly;
- social rights: the right to work, food and shelter;
- participation rights: the right to take part in both political and economic terms.[4]

Human rights can be divided on the basis of their subjects: individual and collective rights. Collective rights can by their nature be enjoyed in association with others, such as the freedom of assembly and association. Nowadays rights, mainly rights of certain minorities to geographical, self-governing and cultural autonomy, which are collectively entitled to groups of individuals as legal subjects are becoming more and more important.

The fact that states may exercise limitations on human rights and the conditions under which these limitations are set forth by the international law can form another basis for classification[5]. There are absolute rights to be

[2] Bragyova, András: Can human rights be based on international law? (Or can international law take the place of natural law?) *Állam- és jogtudomány*, 1990. No. 1–4. 94.

[3] Weller, Mónika: *Human rights and European integration.* EJMKK, Budapest, 2000. 19.

[4] Jürgen Moltman: Man, mankind and the right of land. *Világosság*, 1990. No. 8–9. 635–643.

[5] Bokorné Szegő, Hanna: The international community and human rights. In *Changes in the*

respected even in a state of emergency such as the right to life, prohibition of torture and inhuman treatment, prohibition of slavery and legal penalty with retrospective effect.

According to this way of classification a great deal of the above rights can "normally" be revoked by the state under well-defined conditions: limitations must be based on law, and limitations must aim at the common interest of the society (public order, public moral, public security and public health).

A classification of this kind identifies a group of rights, where an even wider range of limitations on economic, social and cultural rights can be accepted under certain economic circumstances, in the light of the state's financial capabilities.

Recently there is a tendency to sort human rights into a system of hierarchy. "Thus international law agrees on fundamental human rights that are ius cogens, for example the right to life, prohibition of torture, slavery and legal penalty with retrospective effect. These fundamental norms are obligatory without exception, contradicting international legal norms are invalid (ineffective) placing human rights on top of this hierarchy. More numerous are the so-called erga omnes rights, that are obligatory to all parties. Respecting these rights so essential for the international community serves the interest of all states"[6].

Most frequently human rights are divided into groups by "generations" reflecting differences in time and content in parallel with the three key ideas of the French Revolution: the first generation lists civil and political rights (to ensure freedom), the second economic, social and cultural rights (seeking equality), and the third generation includes collective rights (referring to brotherhood)[7]. The numbering of the generations reflects a chronological order of the formation of rights, although quite misleadingly. Today it is generally accepted, that the first two generations of rights are of equal importance, inseparable and can only be viewed through mutual interconnections. Still these two generations form unique entities as it shows in the UN's two separate documents: the Proclamation of Civil and Political Rights and the Proclamation of Economic, Social and Cultural Rights (1966). Traditional interpretation in textbooks sees the difference between the first two generations based on the need of a state's self-restraint towards civil and political rights and its crucial contribution to provide economic, social and cultural rights. By now, it is widely recognized that maintaining political rights does require interference from the state as well as economic, social and cultural rights (the ones that need no direct

world community and international law. (Jogtudományi Értekezések) Budapest: Akadémiai Kiadó, 1993.

[6] WELLER op. cit.

[7] KARELL VASAK: La déclaration universelle des droits de l homme, 30 ans apres. *Courrier de l' UNESCO*, 1977.

action from the state) are becoming less and less expensive. International law expects states to comply in providing civil and political rights without delay, but economic, social and cultural rights to be achieved gradually. Nevertheless, gradual progress must not be delayed without sound reasons. These two groups of legal rights show distinction in international legal defense policies as well. In the case of economic, social and cultural rights only report mechanisms have been set up traditionally, whereas an individual's civil and political rights are protected by the legal system, and also victims are entitled to turn to appeal courts. Second generation rights have recently been known to offer forums for complaint as the Europe's Social Chart lists systematic procedures for collective complaints. Anyway, international law and its protective procedures with numerous guarantees are indispensable in securing efficient protection for basic human rights.

There is indeed a group of human rights that not only spread worldwide in the wake of globalization, they were rather created and shaped by globalization itself. International law often views the latest-evolved third generation rights (also known as solidarity rights[8]) as "human rights answers to the challenges of globalization"[9]. Although it is not clear yet which rights belong to the above group and what exactly these rights stand for. Without doubt on the list: the right to peace (the arms race counterpart); the right to a healthy environment (for environmental pollution awareness). With the sprout in the problems of globalization, third generation human rights handbooks are becoming heavier and heavier. Basic rights belonging to the third generation are yet at an embryonic stage in the struggle against global threats. These rights cannot at this point be completely realized within the boundaries of a state, and also these rights (or elements of these rights) cannot (or only to a certain extent) be interpreted as the individual's subjective right against the state. However, when identifying individual rights various components are to be taken into consideration: interpretations of the right to life and health must comply with the right to a healthy environment. There is a growing consensus that the right to a healthy environment may just as well mean an individual's right to a healthy environment worthy to go to court for. In the case of the right to a healthy environment interpreted as the right to environmental conservation (protection and development), it includes the right to be informed on decision making and

[8] Mavi, Viktor: Rights of solidarity or the third generation of human rights? *Állam- és Jogtudomány*, 1987–1988. No. 1–2. 151–173. Mr. Mavi often refers to the latest human rights as solidarity rights, placing solidarity among individuals and peoples as a common background.

[9] Kardos, Gábor: *Human rights at the threshold of a new era*. Budapest: T-Twins publishing, 1995.; chapter 2. Mr. Kardos refuses to refer to„third generation rights" as „rights" (for not having a clear subject and context), or as generations (for not showing proper coherence), and defines them as mere human rights responses to global issues on the basis of common „efforts to transform, synthesize and adapt global challenges into the system of human rights".

plans affecting with environment, the right to take part in decision making procedures and chances for efficient appeal correspondingly. Therefore the right to a healthy environment translates into a right with the individual as its subject, but the whole (international) community as its beneficiary[10].

It is not by any means a one-way relationship between globalization and human rights, as globalization's influence on human rights (internationalization of certain rights while formation of others) comes right back with human rights becoming universal and promoting globalization of civil societies.

2. Universality of human rights

The idea of human rights being universal roots in ideological grounds of the age of enlightenment and became incorporated into the policies of the revitalized United Nations Organization after the 2nd World War. In 1948 the General Assembly adopted the Universal Declaration of Human Rights making it the reference point and a cornerstone for further international human rights regulations[11].

The phrase "universal" in the title of the Declaration refers to rights independent from any state, rights inalienable from the individual by nature[12]. Publications have questioned the adjective "universal", as the Declaration defined western civilization achievements as universal[13]. Yet others agree that the Declaration is actually universal in the sense that it compiles all common values of mankind (rights inalienable from any human being by nature) and at the same time they admit that there is a lack of universality regarding the Declaration's contents and its cultural conclusions[14]. The Declaration's major novelty is that its adoption can be closely linked to the protection of human rights becoming a worldwide concern. It is however criticized by politicians pressing cultural relativism and distinctly interpreting the relationship between

[10] A. A. CANCADO TRINDADE: Environmental Protection and the Absence of Restrictions on Human Rights. In KATHLEEN E. MAHONEY – PAUL MAHONEY (ed.): *Human rights in the 21st century: A global challenge*. Martinus Nijhoff Publishers, 1993. 584.

[11] On the Universal Declaration of Human Rights and its obligatory force see detail: KARDOS, GÁBOR: The discreet charm of international human rights. For the fiftieth anniversary of the Universal Declaration of Human Rights. *Fundamentum*, 1998. No. 4. 5–9.

[12] Ibid.

[13] NORBERT ROULAND: Les utilisations de la notion de droits de l'Homme dans le nouvel ordre international. *Revue de la Recherche Juridique. Droit Prospectif*, 1992. No. 1. 131–138., 136.

[14] ÉTIENNE LE ROY: Les fondements anthropologiques des droits de l'homme. Crise de l'universalisme et post-modernité. *Revue de la Recherche Juridique. Droit Prospectif*, 1992. No. 1. 131–138.

a society's cultural values and human rights; such decision makers demand the traditional policy of non-intervention in international affairs.

Universality of human rights offers several aspects. There is a difference between the universality of creating norms and executing them[15]. Under UN flags enactment of human rights norms is indeed universal as all UN member states are invited to take part in the composition of would-be treaties and declarations. A lot fewer states, on the other hand, are ready to incorporate these norms, many do not accept them to be obligatory in domestic affairs and in everyday practice execution shows only traces of such universality. Which is then present in the formulation phase of human rights norms, but absent in their implementation and recognition.

On a theoretical basis universality of human rights primarily means that every human being is entitled to all the rights and freedoms without distinction of any kind, such as race, sex, color, religious or other opinions of conscience, social origin, property or else, regardless of regions, frontiers or regimes. Since the idea of basic human rights emerged from Western ideological workshops of the 1700's (mainly that of enlightenment and natural law) and since regulations of Western and European legal systems are believed to be the most sophisticated representatives of other civilizations (mainly developing countries) frequently argue that human rights are products of the West and its cultural imperialism, thus aimed at nothing, but to impose Western cultural achievements and political and social philosophies on Third World countries. Such countries commonly prefer cultural relativism to universality of human rights.

Tensions remain between universality and cultural relativism while globalization brings fragmentation alongside in international affairs. This is apparent in the relationship between universality and regionalism concerning human rights.

Although major supporters of cultural relativism are found among Islamic and Asian countries, there is an interesting familiarity with the United States' attitude to international human rights agreements[16]. According to cultural relativism fundamental human rights and freedoms are universal, execution of these rights are solely the responsibility of the governments with regard to the country's traditional sets of values[17]. One cannot ignore the fact that complaints about the universality of human rights most usually originate not

[15] See Piet Van Reenen: A Culture's Receptiveness for Human Rights; A Preliminary Sketch of a Conceptual Framework. *SIM Special,* No. 21. 591–608.

[16] See details at Johan D. Van Der Vyver: Universality and Relativity of Human Rights: American Relativism. *Buffalo Human Rights Law Review*, 1998. Vol. 4. 43–78., with particular note on 65–76.

[17] See Kurt Mills: Reconstructing Sovereignty: A Human Rights Perspective. *Netherlands Quarterly of Human Rights*, 1997. No. 3. 267–290., 285.

from the people affected, but instead from their leaders with contempt towards those rights[18]. After Asian leaders at a regional conference preceding the 1993 Human Rights World Congress in Vienna, Austria had argued universality to be obsolete, NGOs were ready to express their commitment to universal rights in a proclamation[19].

Examples from East and South-East Asia show signs of reciprocity in the way objections from totalitarian leaders riding economic booms proliferate against individual human rights and at the same time growing economies produce people demanding democracy and human rights in unique profusion[20].

In recent years governments of Asia (especially Singapore, Malaysia, China and Indonesia) have introduced their views at UN General Assemblies and had their voices heard against Western human rights concepts on numerous occasions. Their arguments include "the need to respect internal issues free from outside interference on one hand, a sound priority of economic and social rights over civil and political ones secondly and thirdly, a greater emphasis on social and collective rights instead of individual freedoms. […] Asian government officials […] have long insisted that people in Asia prefer order to freedom and that order helps best in keeping up economic growth. Malaysian Prime Minister, Dr. Mahathir Mahamad not once have claimed that developing countries cannot afford the luxury of human rights"[21].

Besides political clashes a significant conceptual debate has popped up about the possibilities of adopting human rights in Asia. Deeply influenced by their unique traditions Asian societies share a common approach that one is entitled to human rights not because he is a human being, but because these rights are given by god. Also, it has become urgent to define brand new rights as a result of globalization in the region, thus making things even more complex. With migration and corruption on the rise countries without solid legal traditions rely on powerful governmental control and administrative regulations.

Globalization is driven by mutual connections, while in the meantime enhancing them. The principle of human rights being mutually dependent is only one aspect and it highlights the fact that human rights and various generations of human rights are linked so closely to one another that disregard

[18] As UN Secretary-general Kofi Annan puts it: "It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so." (www.unhchr.ch)

[19] See DATO' PARAM CUMARASWAMY: The Universal Declaration of Human Rights: Is it Universal? *Human Rights Law Journal*, 1997. No. 9–12., 476–478.

[20] See MAARTEN KUITENBROUWER: Human Rights and the Clash of Civilisations. An Interdisciplinary Perspective on the Huntington Debate. *SIM Special* No. 21. 557–575.

[21] KÖRNYEI, ÁGNES: *Regionalism in universalizing human rights with special respect to the Organization of American States.* Budapest: EJMKK, 1999. 278.

for one of the rights deprives the benefits of another. It is equally important to point out that human rights cannot be thoroughly enjoyed in any corner of the world with mass human rights violations elsewhere. As the threat it poses to world peace may seem obvious, human floods of refugees often induce large-scale tensions "exporting" legal offences from the countries of origin. Recipient or target countries then come under enormous public pressure as social welfare systems become compromised, inhuman conditions in refugee camps make it to the headlines and acts of racism and intolerance overwhelm.

Such close links often manifest in the interaction of cultures. Western legal traditions and human rights philosophies focus on individualism and are historically in favor of rights rather than duties, whereas non-Western societies emphasize obligations to the community over individual freedoms. As a consequence of a better understanding between cultures, non-Western approaches may eventually acknowledge a new, complex set of individual choices and obligations and also Western philosophy may incorporate collective duties[22]. The impacts of Buddhism have already appeared in Western thinking as reflected in environmentalists' attitudes to the rights of future generations. The idea of collective duties towards the greater community is getting more attention as recognition of economic and social rights is established, although providing these rights remain the responsibilities of society's solidarity (by means of social distribution and NGO efforts). Western countries could serve as examples for successful adoption and vindication of economic and social rights alongside with civil and political principles. These examples prove that individual rights and freedoms often labeled as creations of the West can peacefully coexist with collective norms and accepting the value of individualism allows for reconciliation with the solidarity found among citizens. Of course, liberal views have long nodded at society's common boundaries of individual freedoms and acts; even the concept of social contract outlines rights to be valid within the community. Freedoms are not at all limitless in modern international law as it is clearly highlighted in human rights declarations: in the case of civil and political rights the interests of society and the need to protect the rights of fellow citizens justify certain forms of restrictions of various extent. Upon imposition of such limitations the countries' unique social and cultural features may also be taken into consideration.

An important aspect of universality of human rights in an institutional-authority oriented approach lies in the international legal regulation of universality and regionalism. With worldwide human rights agreements and control mechanisms in place, the need for regional establishments does not aim at undermining universality of human rights, but is principally a product of

[22] Adamantia Pollis: Towards a New Universalism; Reconstruction and Dialogue. *Netherlands Quarterly of Human Rights*, 1998. No. 1. 5–23.

the struggle for efficiency and somewhat that of a larger-scale social-cultural homogeneity particularly at regional levels. When compared, universal and regional documents about international human rights show little variation in contents and the rights to be provided, there are no fundamental philosophical or value gaps, only regional variances[23]. Take the American Declaration of Human Rights for instance, which goes further than most UN and regional agreements in reaffirming the right to life with the prerequisite "in general from the very moment of fertilization" life is entitled to protection. Or there is the Chart of African Nations expounding the importance of ethnic rights and individual obligations.

Real contrast can only be encountered during control and law enforcement mechanisms, which are often the roots of disagreement present in the texts[24]. European legal systems show strong judicial dominance offering ideal grounds for isolated individual claims, but inefficient against structural, serious and mass human rights violations[25]. The American procedure places the Human Rights Commission (with its at-the-scene fact-finding probes) ahead of the actual court system, which has only contributed a rather consultative role so far[26]. The judicial side has not been a strong one in African legal systems either. According to a popular explanation, African, as well as some Asian traditions and justice philosophies have always downplayed court case orders, instead turning to civil mediators to help in negotiating a settlement[27].

Along with regional policies, the UN's universal legal mechanisms are vital not only in cases where there are no regional charts or human rights institutions to watch and protect, but also where present regional procedures need support and update. UN's most frequently notable control mechanism is the report procedure. As an advantage, the commission in charge, using

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[23] See CHRISTOPHER SCHREUER: Regionalism vs. Universalism. *European Journal of International Law*, 1995. 477–499., particularly 485.

[24] A document introducing individual rights protection with special emphasis on state responsibility could hardly have room for an article about normative individual obligations; what is more, the power of control mechanisms over obligatory duties has a great impact on the depth of obligations voluntarily undertaken by states.

[25] See in details: MENNO T. KAMMINGA: Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations? *Netherlands Quarterly of Human Rights*, 1994. No. 2.; and AISLING REIDY – FRANCOISE HAMPSON – KEVIN BOYLE: Gross violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey. *Netherlands Quarterly of Human Rights*, 1997. No. 2. 161–173. Diplomatic means could prove more efficient than individual claims, even though states are reluctant to turn to diplomatic channels for political reasons.

[26] SCHREUER op. cit. 486.

[27] For comparison between regional human rights systems see: KÖRNYEI, ÁGNES: Regionalism in universalizing human rights with special respect to the Organization of American States. *Acta humana studiosorum,* 1999. 362.

official government reports and other information sources as well, can call attention to a country's basic structural problems long before related individual complaints appear or even prior to the actual human rights violations. Such report mechanisms may therefore prove useful for anticipation and prevention. Another advantage of universality in the world of human rights is that it enables people representing different cultures to share similar objectivity and criticism when referring to previously untouchable regional traditions – the same way as regional institutions may point out at a country's controversial issues and legal practices, often taken for granted and not even seen as issues by the culture's natives –, thus allowing cultural diversity to contribute to improvements in human rights protection.

Human rights universality does not contradict the idea of diversity among societies and cultures, as universality is never intended to mean uniformity[28]. Nor can it mean cultural uniformity, as human rights only draw a bottom line in the conditions for individual and collective well-being[29]. Universality sets certain fundamental values inalienably entitled to all members of the human family based on their biological and social needs and musts. Such values include life (free of fear and suffering), human dignity and basic health. Human rights represent exactly these values, although their actual manifestation and effect may vary culture by culture. Human rights philosophies have two principal cornerstones: prohibition of discrimination and tolerance, that is respect for the rights of others. All in all universality should be viewed in the light of these two principles, as it tolerates every culture unless it denies basic human rights values treasured by an overwhelming majority of civilizations.

3. The effects of economic globalization on human rights performance

In general, globalization is attributed to economic factors, namely the liberalization of market interests and world trade. Economic factors on the other hand have a great influence on attitudes to human rights. In the case of economic, social and cultural rights there is a more or less direct correlation as such necessary government actions are limited by economic conditions. The concept is present in numerous international agreements, primarily in the Universal Declaration of Economic, Social and Cultural Rights, allowing states

[28] Kuitenbrouwer op. cit. 574. As evident as it is from the nature of international legal regulations, it by no means aims at uniformity, on the contrary it is of rather subsidiary purpose, only setting minimum standards for basic human rights.

[29] Michael Freeman: Human Rights and Real Cultures: Towards a Dialogue on 'Asian Values'. *Netherlands Quarterly of Human Rights*, 1998. No. 1. 25–39., 37.

to allocate resources within their financial limits. This close relationship works only in one direction though; protecting human rights requires a certain level of economic development, whereas high industrial output lacking further political will and action does not necessarily mean effective human rights responses. It is generally true that providing all the economic, social and cultural rights puts an enormous budgetary pressure on its administration, although some the rights of this sort, for example the right to form labor unions costs significantly less than others, of course practically even these expenses are pushed over to the private sector, mainly to business units as employers. Also true, that certain civil and political rights claim a bigger portion of the budget cake as does the court system housing fair legal protection or the voting process in democratic elections – the costs of democratic institutions as a whole. In connection to human rights, one might be able to say that since the two major groups of freedoms can only be provided together with one another, there is a minimum level of economic development and resources essential for providing full-scale human rights coverage. Consequently, trade liberalization and integration, if healthy for economic growth, can have a positive impact on the realization of human rights.

Another aspect of the relationship between human rights and the economy is the way everyday human rights practices influence economy. Deprivation of classic rights can in the long run lead to economic recession, as seen among the countries of the former communist bloc, although market stability – on both national and international level – presumes political stability, which in the end relies on a basic standard of civil and political rights conditions. Realization and practice of these rights have proved inseparable from those of economic, social and cultural rights; realization of one branch of rights requires respect for the other on the basis that neither of the branches is superior or more important (theory of mutual dependence among human rights). A successfully carried out economic liberalization gives way to new administrative and decision making centers with clearly defined functions, eventually leading to political liberalization[30], a the new middle class can push for improvements in democratic standards[31]. Economic growth therefore triggers social demands for democratic rights, flawless human rights conditions contribute to political stability, which then encourage investment hopes, thus fueling business growth after all.

Political studies found that long-term economic uphill favors degradation of traditional or material values (such as work, family, prestige) and a renaissance

[30] See MAHMOOD MONSHIPOURI: The Muslim World Half a Century after the Universal Declaration of Human Rights: Progress and Obstacles. *Netherlands Quarterly of Human Rights*, 1998. No. 3. 287–314.

[31] See SAMUEL P. HUNTINGTON: *The clash of civilizations and the remaking of world order.* Budapest: Európa Könyvkiadó, 1998. 320.

of postmodern, post-material values (such as democracy, human rights and protection of the environment). A value shift of this kind has frequently been a key factor in democratic consolidation processes in Latin America and Asia. The shift is by no means irreversible, following a sudden economic downfall even Western societies show signs of revaluation among historic and mundane achievements at the expense of democratic values[32]. The phenomenon serves as a bright example for inseparable and mutually interdependent human rights, equally important civil and political and also economic, social and cultural freedoms. Attention turns usually to rights abuse cases only and human life cannot be complete without the full set of values represented in these human rights. Despite such an obvious relationship economic and social rights boost tax rates and the price of labor at the same time holding back effectiveness and competitiveness, no wonder they are not so much welcome among corporate leaders. These issues can be alleviated by world community's harmonized efforts to provide economic and social rights.

Competitive advantages resulting from an artificially low level of economic and social rights, often referred to as social dumping have previously stirred up resistance from international organizations. The struggle has always been a major driving force behind the development of, among other economic institutions of integration, the European Community and the World Trade Organization, promoter of worldwide quota liberalization[33].

Besides labor conditions, globalization has a rather negative effect on various aspects of human rights. Globalization has increased disparities regardless of anti-discrimination principles. Economic and social differences have always been there, globalization only made things worse. Social gaps and poverty are on the rise and globalization exclusively fruits for very limited fractions of the population, distinctions made on the basis of geographical location, income and language used in telecommunication. Urban and rural ways of life have come oceans apart and disparities in future prospects divide continents not only by the historic trenches between North and South, but within the developed world bringing more and more racial discrimination along. Besides generally accepted achievements mass proportions of women's employment have resulted in underpaid thousands of women flooding suburban areas all over the developing world. Rootless, hungry and desperate, many end up as victims of prostitution or trafficking. Nevertheless, globalization is not always a direct cause of brand new human rights abuses, it has simply drawn excess attention to previously identified, but long ignored issues[34].

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[32] See Kuitenbrouwer op. cit. 572.

[33] There have been previous efforts from WTO; see details at Farkas, Orsolya*: Social rights and policies of EU.* Szeged: Grimm – JATEPress, 1998. 174.

[34] Robert Howse – Makau Mutua: *Protecting Human Rights in a Global Economy. Challenges*

Globalization is not only a playground for business trends, but it is indeed influenced greatly by political currents. Market conditions are in the hands of politics and the rules of the game are constantly being shaped through power talks at both bi and multilateral round tables, as at the World Trade Organization[35]. To identify political dimensions in globalization one has to simply remind of the growing number of ideas about global government, supporters proposing for extended UN institutional authority to cope with global issues.

Present institutions of global governing system have in the past been selectively sensitive to global issues, most of them only with a slight familiarity to the aspects of sustainable growth and globalization. Among others, the UN Development Program (UNDP) presses that strategic reforms in any economy must coincide with appropriate social welfare policy able to withstand the negative effects of market forces. Its 1999 annual, the Human Development Report stressed out that the institutions of global governing system need to be reoriented in order to successfully maintain fairness during international negotiations.

Human rights institutions founded by the United Nations Charter (the Economic and Social Council, the Human Rights Commission and its sub-commissions) often address different issues of globalization, however linked human rights groups show less ambition in doing so. The majority of attention came from the Economic, Social and Cultural Rights Commission. In May, 1998 the Commission turned to the World Bank, the International Monetary Fund (IMF) and the WTO to implement social monitoring methods to probe real public impact on human rights along with their measures. The Commission declared: country reports will have to be evaluated with respect to international economic policies, which greatly influence a state's chances to do her duties set forth by the Universal Declaration. In the general comment section of the right to food, the Commission addressed the issue of food safety affected by globalization, the responsibility of private organizations and the obligations of states to properly regulate private and corporate activities, and highlighted the stakes involved as international organizations must keep the right to food in mind while setting up policies and trying to enforce them[36].

for the World Trade Organization. International Centre for Human Rights and Democratic Development. http://www.ichrdd.ca/111/english/commdoc/publications/globalization/wtoRightsGlob.html

[35] J. OLOKA-ONYANGO – DEEPIKA UDAGAMA: The realization of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights. Preliminary report to the Sub-Commission on the Promotion and Protection of Human Rights. *UN Doc.* E/CN.4/Sub.2/2000/13. http://www.unhchr.ch

[36] Uo. OLOKA-ONYANGO–UDAGAMA op. cit.

An exceptionally high amount of criticism hits international economic and financial institutions from human rights perspectives. Both World Bank and the IMF has on several occasions been charged with prescribing structural reform projects and shock therapy measures on state budgets, that significantly deteriorated the population's economic and social rights conditions. The WTO has been blamed before for its trade liberalization and competitive advantages resulting from cheap labor. As an outcome, critics say, Labor Code minimums and social welfare standards decline, causing after all, or at least threatening with, downward-harmonization of a sort. In order to restore balance, industrial countries and labor unions have urged a so-called social clause to be enclosed in trade agreements. These steps are not at all welcome among developing countries, who see it as protectionism of the developed. Studies conducted by international economic workshops on the other hand show that although some corporate decisions are actually based on exploitation-generated low cost advantages, poor or lacking Labor Code standards do not attract investments exponentially as many business entities anticipate social discontent and unrest along, not mentioning the emerging danger of customer boycott. Countless multinational corporations have set their own business policies containing additional human rights remarks, much encouraged by the governments of industrial nations in case of public procurement procedures for instance. Such initiations can easily confront WTO guidelines concerning procurement conditions and eliminating technical trade obstacles, thus bringing WTO sanctions. To avoid WTO getting in the way of human rights vindication in the process of globalization, experts suggest promoting the principle of human rights primacy over any other contractual commitments in international law. And if free trade agreements are to be reconciled with human rights obligations, steps in human rights development will hardly clash with WTO regulations again[37].

Besides regulatory issues, international economic and financial institutions receive complaints for their formal-organizational structure, which ignores human rights principles. Insufficiencies in the structure such as dominance of the developed countries and a marginal position of the developing part of the world in decision making procedures. Operational defects are believed to include lack of publicity and transparency and also unwillingness to consult with civil groups. The establishment that has gone the furthest on this way is World Bank by listening to what civil societies have had to say and by pioneering human rights conditionality (linking loan commitments to certain human rights conditions). The IMF is slightly behind as the Fund only made some progress

[37] Warren Allmand: *Trading in human rights: The need for human rights sensitivity at the World Trade Organization. International Centre for Human Rights and Democratic Development.* http://www.ichrdd.ca/111/english/commdoc/publications/globalAllmand.html

in information availability and is yet to implement all other components of transparency and responsibility[38].

During the struggle against the negative effects of globalization there is a growing consensus that besides states, international organizations and multinational companies should also be held accountable by the world community in order for more efficient human rights protection. It is now widely believed that states' mandates stretch further than their own international human rights obligations in respecting those rights, but they also need to compel all citizens and organizations within their jurisdiction to do the same. At the present time the world community faces the unique challenge of multinational business activity, which thrives on all the economic benefits of globalization, while neglects any pressure to compensate for the disadvantages. All this is a result of their overwhelming economic power, which smaller states cannot even dream to be a match for, and bigger countries find it just as hard to exercise jurisdiction over business units of such mobility.

In order to keep transnational business activities within the boundaries of human rights, in 1999 the UN Secretary-General launched the Global Compact program intended to provide an enlarged budget to promote cooperation between the international business community and the UN and to directly integrate the efforts of the corporate sector to comply with universal human rights norms. According to Global Compact, companies are to lay down business policies and internal ethics coherent with international human rights and labor law guidelines. The aim is to encourage corporations not only to implement respective working and employment conditions for their very own colleagues, but also to demand that subcontractors do likewise. They can incorporate policy restrictions on investments targeting economic areas with disregard to human rights. Corporate giants have by now realized the need to take the lead as respect for human rights values has become crucial in improving production figures, too. Firstly, increasing consumer awareness puts the pressure on market competitors to guarantee their workers' basic human rights, as well as environmental and animal treatment minimums. Secondly, respect for underlying principles set forth in the Universal Declaration of Human Rights greatly contributes to the stabilization of a constitutional state, creating a more effective, more placid business climate. It is also widely believed that staff members work better if contented, thus treated with respect and dignity. In investment target and trade partner countries promotion of human rights norms serves the best interests of the business sector, and even so since developed countries have lately been imposing trade sanctions on states with contempt for basic rights – sanctions obstructing free trade. Multinational companies hope for borderless business

[38] OLOKA-ONYANGO–UDAGAMA op. cit.

opportunities and open markets, however these features along with human rights conditions can be improved by sponsoring local welfare, healthcare and educational infrastructure or by disseminating the concept of human rights and supporting civil groups' efforts[39].

4. Globalizing civil societies

Civil society members, NGOs play an essential role in promoting respect for human rights both nationally and internationally and an equally significant role in turning around negative human rights trends resulting from globalization. The world of NGOs has proved to motivate most UN institutions to discuss various aspects of development and globalization and states nowadays to focus on the influence of world trade on human rights.

During the late 1980's the revolution in information technology sped up the process of globalization and global government institutions were unable to follow. As an outcome, social tensions became apparent triggering demonstrations by anti-global groups, who have been seen marching with the moral basis of human rights and relying on IT products as information sources and as certain means of disapproval, all of which have proved extremely useful in stirring up events into angry protests. Globalization is therefore the hand feeding the mouth that bites the hand. A unique combination of human rights and technical innovation aid along globalizing civil societies.

Nevertheless, in the complex process civil society itself has become a major driving force behind globalization. Besides a top-bottom cascade of procedures found in the world of politics and economics, environmental, antinuclear, feminist and other human rights groups exert a key upward pressure on the globalization process[40]. This from-bottom-to-top kind of globalization could potentially encourage a fully democratic evolution for globalization, through consultative statuses at international organizations for instance.

One function of NGOs is facilitate a dialogue between cultures in order to agree on universal values – a dialogue nowhere near so fluent at government level. Civil groups stand a much better chance of revealing the real essence of cultures, of listening to the voices of those bearing the consequences of ideological debates, whose opinions could not count any less for the official, governmental reports of totalitarian regimes. The paradox of human rights dialogues is that any real dialogue requires a minimum set of human rights[41].

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[39] *Business and Human Rights: A Progress Report.* http://www.unhchr.ch/business.htm

[40] Oloka-Onyango–Udagama op. cit.

[41] Freeman op. cit. 30. This is the democratic approach to cultural interpretation.

Hungry, illiterate and discriminated people excluded from public life are unable to attend the discussions over their rights. Deprivation of economic rights often constitutes to a sometimes complete absence of true choice, a lack of freedom. The freedom of speech so indispensable for liberal politics is significantly limited, if citizens depend financially on the state and if they are reluctant to jeopardize their economic and social status, instead they give up the right to publicly criticize the state and accept the official interpretation of culture. International cooperation of civil groups and international NGO activity have broadened operational possibilities and independence for each one of them and also brought about an increased efficiency in fighting human rights abuses and in achieving goals, at the same time reducing chances of states to get away with human rights violations.

By publicizing universal human rights, these civil initiations have contributed to the process of globalization. In the eyes of supporters of cultural relativism – those opposing universality – human rights movements are nothing but crusaders of Western cultures. Such Western attitude provokes disagreement first and resistance later as political leaders of mainly non-Western societies eagerly cite the prohibition of interference with internal affairs. The population then often rejects human rights interventions commonly viewed as declaration of superiority of Western social values and – based on their historical experience or just the interpretations of those in power – regards human rights themselves to be not more than manifestations of Western individualism and self-interest. The concept is somewhat misleading in the sense that solidarity from human rights movements with the victims of rights abuse and oppression could also be considered as a moral obligation[42]. Human rights groups have frequently reprimanded not only non-Western cultures, but also Western social practice, enabling these NGOs to more authentically call attention to human rights issues than Western states that have on several occasions been blamed for double measuring. All of these are in proper accordance with the Universal Declaration of Human Rights making every person, not only states, obliged to respect basic human rights.

5. Summary

During the highly complex process of globalization, human rights development has been heavily influenced and human rights themselves have had their own wide range of effects on globalization. Along with intensifying international cooperation, basic human rights have become primary subjects of international

[42] FREEMAN op. cit. 38.

law, several brand new rights emerged in response to global challenges and also universal human rights initiations have stimulated globalization.

Globalization has always had negative effects on the realization of human rights in many aspects of everyday life, but particularly so with increasing disparities. Globalizing economies have produced a number of rights abuses, arousing only slow-motion reactions – which are also controversial ever since – from the economic and financial bodies of global government. Instead of helping to solve problems, economic sanctions imposed on human rights violators have only worsened the situation caused by the violations. It is now widely believed, that although human rights abuses cannot be overlooked, instead of or along with economic sanctions alleviated with a combination of programs promoting human rights are to be implemented[43].

In the battle against globalization's negative side-effects there is a growing need for civil society organizations, for their international cooperation. Quite remarkably it is one of globalization's main catalysts, information technology and its innovations that supply "battle combatants" with the necessary tools.

Therefore globalization alone must not be doomed nor praised, its defects and benefits come hand in hand. International cooperation among states and also among civil groups is crucial in order to maintain balance between positive effects and negative ones, such as pollution or mass human rights violations inspiring anti-global protests against international economic organizations and multinational corporate policies[44].

[43] *Human Development and Human Rights. Report on the Oslo Symposium, 2–3 October 1998.* http://undp.org/hdro/Oslorep2.html

[44] See also: Anthony Woodiwiss: *Globalisation, Human Rights and Labour Law in Pacific Asia: the Beginning of a Voyage in?* http://www.bsos.umd.edu/CSS97/papers/woodipap.html; Bernhard Serexhe: *Deregulation/Globalisation: The Loss of Cultural Diversity?* http:/www.ctheory.com/ga1.10-deregulation.html; Haider A. Khan: *Beyond Distributive Justice in the McWorld.* http://www.du.edu/gsis/gj/sp99/beyondd.htm; David P. Levine: *Global Justice and Inequality.* http://www.du.edu/gsis/gj/sp99/global.htm.

INTERPRETATION OF INTERNATIONAL COURTS WITH REGARD TO CERTAIN ASPECTS OF THE CRIME OF GENOCIDE

Eszter Kirs[1]

It is a great honor and pleasure to contribute to the present volume devoted to the memory of Professor Géza Herczegh. As a member of the young generation of Hungarian international lawyers, I keep Professor Géza Herczegh in my memories as an icon of international law, and someone who never failed to encourage young academic actors to join the community of international lawyers. I keep the autographed copy of his essay "Fields adjacent to International Law" (A nemzetközi jog "holdudvarában") on the shelf of treasured books, and I take a look from time to time on his kind words encouraging for enthusiasm and hard work.

One of the great achievements of Professor Géza Herczegh was the participation in the Geneva diplomatic conference of 1974-77 and his contribution to the negotiations of the 3rd Commission charged with the deliberation about the issue of the protection of civilian population in an armed conflict. The foregoing decades have brought unfortunate and extreme cases where certain groups of civilians became victims of genocide. The present paper briefly discusses two selected and highly controversial aspects of the definition of the crime of genocide that have been analyzed both by international judicial institutions and academic stakeholders.

Definition of a protected group with regard to the crime of genocide

According to the definition, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.[2]

Quoting the words of Professor Antonio Cassese, "normally the various classes of groups are defined objectively, on account of some alleged objective features each group exhibits".[3] *National group* is a multitude of individuals distinguished by their nationality or national origin. *Racial group* is composed of persons who share some hereditary physical features such as the color of skin. The members of an ethnic group share a language and cultural traditions, and individuals who share the same religion or set of spiritual beliefs and faith are meant to be a religious group.[4]

One of the controversial issues that came forth in this regard was whether the membership in a protected group shall be evaluated on an objective or a subjective basis.

This became a crucial issue before the International Criminal Tribunal for Rwanda (hereinafter, ICTR). The two major local groups, tutsis and hutus share a common language, the Kinyarwanda, a common culture, traditions and religion and they belong to the same major ethnic group, the Banyarwanda.[5] The Belgian colonizing authorities handled them as two distinctive groups and issued distinctive new identity cards to the members of the local population. In this context, the Trial Chamber of the ICTR concluded in the *Rutaganda* case that the membership is rather a subjective than an objective category.[6] Another Trial Chamber of the Tribunal shared this view by opining that in the case where the specific identity of the victim and his or her belonging to the protected group is questionable, the question shall be answered on a subjective basis. Consequently, if the perpetrator perceived the victim as belonging to the protected group, the victim shall be identified by any court as a member of the protected group with regard to the crime of genocide.[7]

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[2] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Art 2.

[3] ANTONIO CASSESE: *International Criminal Law.* Oxford University Press, 2008. 138.

[4] Ibid. See also ANTONIO CASSESE (ed.): *The Oxford Companion to International Criminal Justice.* Oxford University Press, 2009. 334.

[5] LARS WALDORF: Rwanda's failing experiment in restorative justice. In *Handbook of Restorative Justice*. Routledge, 2006. 423.

[6] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence (6 Dec. 1999), para 56.

[7] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment (7 June 2001), para 65.

The subjective approach was not qualified as an exclusive method for defining the protected nature of a certain group by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter, ICTY) in the *Brđanin* case, which outlined that both objective and subjective elements shall be taken as relevant while examining the issue.[8]

In the case of Jelisić who was convicted by the ICTY, the specific *mens rea* of the perpetrator became highly significant due to the fact that the perpetrator acted individually without any broader policy of genocide. Therefore, the Trial Chamber of the ICTY confirmed the above discussed subjective approach of the ICTR. The Chamber concluded that the stigmatization of a group as a distinct national, ethnical or racial unit by the community is the most significant fact while deciding about the qualification of a group of victims as protected group with regard to the crime of genocide.[9]

At the same time, the Appeals Chamber of the ICTY held that both subjective and objective circumstances shall be taken into consideration while defining a group as protected. The perception of perpetrators is only one fact of the circumstances that are relevant concerning the identity of the protected group. [10]

According to Professor William Schabas, the subjective approach seems to be more effective in practice. Furthermore, he states that the efforts to find objective basis for the qualification of the group as a distinct ethnic, national, racial or religious group protected by the Genocide Convention would suggest that the perpetrators act rationally, and „this is more credit than they deserve".[11] He argues, that "responsibility for genocide lies with racists, and they attack groups not because they are 'stable and permanent' but because they perceive them to be national, racial, ethnic or religious".[12] In the case of criminal responsibility of individuals, this view can be shared based on the high significance of the specific intent of the perpetrator.[13]

In the *Bosnia genocide* case, the International Court of Justice added to the above mentioned conclusions of the *ad hoc* tribunals that the group which is the

[8] Prosecutor v. Brdanin, Case No. IT-99-36-T, (1 Sept. 2004), para 684.

[9] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment (14 Dec. 1999), para 70.

[10] Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, (22. March 2006), para 25.

[11] William A. Schabas: Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide. *Rutgers Law Review*, Vol. 61 (2008–2009) 167.

[12] William A. Schabas: *An Introduction to the International Criminal Court.* Cambridge University Press, 2010. 97.

[13] For the introduction of the issue of genocidal intent see: Florian Jessberger: The Definition and the Elements of the Crime of Genocide. In Paola Gaeta (ed.): *The UN Genocide Convention: A Commentary.* Oxford University Press, 2009. 105–110.

target of genocidal intent shall be specifically identifiable and cannot be defined by a negative approach.[14]

The International Criminal Court has not changed the general conclusion that the issue of the identification of a protected group shall be analyzed on a case-by-case basis by reference to the objective particulars of a given social or historical context and by the subjective perceptions of the perpetrators. The majority of its Pre-Trial Chamber held in the *Al Bashir arrest warrant* case, that the exploration of the problem of the objective or subjective approach to the definition of a protected group was unnecessary.[15]

The subjective approach might be more effective in practice especially from the point of view of prosecutorial discretion. On the other hand, the objective approach guarantees that judicial chambers stay within the frames of the definition of genocide while adjudicating the facts of a case.

Lack of a broader genocidal policy does not exclude criminal responsibility for genocide

The significance of the perception of the perpetrator is discussed in the foregoing section through the lenses of the Trial Chamber in the Jelisić case. In that case, the Chamber of the ICTY had to deal also with the question whether an individual can be held accountable for the crime of genocide if a broader genocidal policy does not exist in the context of the case.

Goran Jelisić acted under the authority of the police in Brčko district of Bosnia and Herzegovina in the summer of 1992. The police at that time was under the control of the Serbian forces. The detention center in Luka was under the authority of the police. The 24 year old Jelisić, who called himself the "Serb Adolf" killed five people at the Brčko police station and eight at the Luka camp. The accused plead guilty of all counts of crimes against humanity and violations of the laws or customs of war included in the indictment. Thereafter, the proceeding was limited to the count of genocide.

Professor Cassese mentions with critical tone that there are academic stakeholders who noted that acts of genocide always presuppose a general policy

[14] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, International Court of Justice, (26 Feb. 2007), para 193.

[15] See ROBERT CRYER – HAKAN FRIMAN – DARRYL ROBINSON – ELIZABETH WILMSHURST: *An Introduction to International Criminal Law and Procedure*. Cambridge University Press, 2010. 212.

or at least a collective activity of a state, an entity or a group, which policy the perpetrator contribute to.[16]

The Trial Chamber in the Jelisić case held that although the prosecution failed to prove that the crimes committed by Jelisić were part of a general plan to destroy the Muslim population in Brčko district, it did not exclude the theoretical possibility of convicting the perpetrator individually for the crime of genocide. Therefore, the genocidal intent can be proven on an individual basis and the perpetrator of the crimes can be held accountable for the crime of genocide even without a broader genocidal policy.

In practice, however, if a perpetrator has genocidal intent without a broader system of genocide, it is likely that the perpetrator turns out to have psychological disorder that indeed, was diagnosed in the case of Jelisić as well. Consequently, although the Trial Chamber came to the theoretical conclusion that he could be convicted for the crime of genocide,[17] under the specific circumstances Jelisić did not become the first person to be convicted as a lone genocidaire. He was acquitted on the count of genocide already at the phase of Rule 98 *bis* proceeding. On the other hand, he was sentenced to imprisonment of 40 years for crimes against humanity and violations of the laws or customs of war. Nevertheless, also the Appeals Chamber confirmed that a broader genocidal plan or policy is not required for the conviction for the crime of genocide.[18]

Contrary to the theoretical conclusions, Prosecutor Brammertz added to the dialogue on the theoretical possibility of a lone genocidaire that "resources in the international justice system are most appropriately directed towards genocide cases involving a more systematic pattern of conduct".[19]

This opinion has been confirmed by other practitioners and academic actors. Professor Cassese emphasized that the contextual element is not required with regard to two categories of the acts of genocide, namely, the one of killing members of the protected group and the acts of causing serious bodily and mental harm to the members of the protected group. The other three categories of acts of genocide inevitably take the shape of some sort of organized action. However, he shares the view of Prosecutor Brammertz that in reality, even these acts are hardly conceivable as isolated or sporadic events.[20]

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[16] Cassese (2008) op. cit. 334–335.

[17] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment (14 Dec. 1999), para 100–101.

[18] Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Judgment (5 July 2001), para 48.

[19] Serge Brammertz: Reflections on Genocide. In *Proceedings of the Second International Humanitarian Law Dialogs: August 25–26, 2008, at the Chautauqua Institution*. American Society of International Law, 2009. 61.

[20] Cassese (2008) op. cit. 335.

In addition to the fact that the possibility of a lone genocidaire can be described only as "little more than a sophomoric *hypothèse d'école*",[21] the inclusion of the possibility in the interpretation of the notion of genocide might lead to the expansion of the concept of genocide[22] over the frames of the Genocide Convention.

The foregoing judicial and academic opinions are confirmed also by the fact that the negotiations about the Elements of Crimes (which assists the International Criminal Court in the interpretation of the Rome Statute), were following the same line of reasoning. Consequently, the conclusion was the same, namely, that the acts of genocide shall take place "in the context of a manifest pattern of similar conduct directed against that group" or they shall themselves "effect such destruction".[23]

The process of the judicial evaluation of the above discussed two problematic aspects of the crime of genocide demonstrates the obvious fact that judging such controversial international legal issues requires both an academic and a practitioner's mind. It is a great honor for us, young international lawyers that we can follow in Professor Géza Herczegh's footsteps in this regard. I always remain grateful for him for the outstanding example and encouragement.

[21] WILLIAM A. SCHABAS: Darfur and the „Odious Scourge": The Commission of Inquiry's Findings on Genocide. *Leiden Journal of International Law*, Vol. 18 (2005), 877.

[22] See CRYER–FRIMAN–ROBINSON–WILMSHURST op. cit. 207.

[23] Elements of Crimes (ICC), 9 September 2002, Art 6 (a) and 6 (b) 4, Art 6 (c) and 6 (d) 5 and Art 6 (e) 7.

IV.
International Court of Justice

Cour internationale de Justice

SOME REMARKS ON THE RECENT CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE ON RESPONSIBILITY ISSUES

ALAIN PELLET[1]

I had intellectual contacts with Géza Herczegh long before he became a Judge in the ICJ. Both of us wrote our doctoral thesis on the same topic: general principles of law. His book[2], published in 1969, immediately stroke me as a rigorous piece of research, written in a purely scientific mind, quite impervious to the political and ideological pressure – quite an exception among Eastern countries scholars at the time. We met once or twice before he was elected at the World Court in 1993, a position where he confirmed his independence and intellectual rigour and honesty, as others testify in the present book.

Experienced both as a professor and a judge, he did not let his roles as University professor and judge get in the way of each other and, as a judge, he usually abstained to develop general theories and his rare declarations[3] were concise. His only long dissent was appended – quite understandably[4] – to the

[1] Professor at the University Paris Ouest, Nanterre-La Défense; Member and former Chairman of the International Law Commission, Associé de l'Institut de Droit international. (The author is most indebted to Alina Miron, researcher at the Centre de Droit international de Nanterre, for her assistance in searching the ICJ's case-law and establishing the English text of this study.)

[2] GÉZA HERCZEGH: *General Principles of Law and the International Legal Order*. Collection Series in Foreign Languages by the Institute for Legal and Administrative Science of the Hungarian Academy of Sciences, Budapest: MTA, 1969. 129.

[3] ICJ, Judgment, 27 February 1998, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections*, *Declaration of Judge Herczegh. Reports 1998*, 51–53; ICJ, Judgment, 16 March 2001, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits*, *Declaration of Judge Herczegh. Reports 2001,* 216.; ICJ, Judgment, 10 October 2002*, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Merits, Declaration of Judge Herczegh, Reports 2002*, 472–473.

[4] Maybe because the undersigned was Counsel for Slovakia in that case, he still finds the construction *and* the implementation of Variant C legally justified, in spite of Judge Herczegh's vigorously argued reasoning: by its behaviour, Hungary had made the implementation of the (still in force) 1977 Treaty impossible.

1997 Judgment in the case concerning the *Gabčíkovo–Nagymaros Project*.

Although he observed "that in reality one does not often see 'pure' or unequivocal cases, in the sense that they require only one single abstract type of legal settlement or solution" and warned that "[m]ore often than not, the legal situation in which the parties find themselves falls within the ambit of several rules of international law at the same time"[5], the distinguished Judge globally adopted the Hungarian case. But he did so with moderation and restraint, calling for "a balance, admittedly hard to achieve, between the interests of the upstream and the down-stream countries, and […] harmonious progress in enhancement of the natural resources would be carefully organized to prevent the long-term disadvantages from outweighing the immediate advantages."[6]

In that moderate but firm dissent, Judge Herczegh mainly tackled issues related to the law of the international responsibility of States. And, since a striking feature of the case-law of the Court in the two last decades is the growing place taken by responsibility cases[7], this tribute paid to the distinguished Judge is an occasion to briefly evaluate the position taken by the World Court in this respect.

Although Judge Herczegh had never been a member of the ILC, like the Court itself[8], he largely based his dissenting reasoning on the ILC Articles, which it used not less than five times. It is therefore appropriate to stress more particularly the use (and non-use) made by the Court of the Articles of the ILC on the Responsibility of States for Internationally Wrongful Acts.

* * *

The law of international responsibility of the State has always been essentially judge-made. First, the arbitral tribunals established at the end of the 19th and the beginning of the 20th centuries that settled its bases, in particular on the occasion of disputes opposing European States or the United States of America to Latin American States, summoned to fulfil their international obligations in defending the foreign interests endangered by the recurrent revolutions and the instability reigning at the time in the sub-continent. Then, the Permanent Court

[5] ICJ, judgment, 25 September 1997, *Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Dissenting Opinion of Judge Herczegh. Reports 1997*, 197.

[6] *Ibid.* 189.

[7] Out of the twenty-five judgments given by the Court in the period 2001–2010, eleven touch upon, mainly or accessorily, responsibility issues. Out of the thirteen cases now on the Court's General List, ten contain conclusions relating to responsibility.

[8] In its 1997 Judgment, the Court mentioned eight times the ILC Articles or their commentaries (*Reports 1997*, pp. 38–39, para. 47, p. 39, para. 50, p. 40, para. 51, p. 41, para. 53, p. 42, para. 55, p. 46, para. 58, p. 54, para. 79, p. 55, para. 83).

laid them down in condensate turn of phrases that are nowadays the vulgate of the law of responsibility. Finally, the ILC, in its 2001 Articles, took largely note of this judge-made law without calling into question its fundamentals, nevertheless filling in some of its gaps and dissipating some of its uncertainties, while adding a prudent and still welcome flavour of progressive development.

Whereas it accepts to assess the customary character of such and such provision of the Articles – to which it makes sparing references, depending on the cases, the Court rightly considers unnecessary to make an appreciation of their customary character as a whole.[9] Up to now[10], the Court has had only one occasion to take position on the steps forward that constitute the Articles 33, 40 and 41[11], 42, 48 and 54 which root the concept of international community into the law of responsibility and trigger some consequences therefrom[12]. On the other side, it considered that the following Articles are *lex lata*:

- Article 4 ("Conduct of organs of a State")[13],
- Article 5 ("Conduct of persons or entities exercising elements of governmental authority")[14] ;
- Article 8 ("Conduct directed or controlled by a State")[15] ;
- Article 14, paragraph 3 (obligation of prevention)[16] ;
- Article 16 ("Aid or assistance in the commission of an internationally wrongful act")[17] ;
- Article 25 ("Necessity")[18] ;

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[9] ICJ, judgment, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits*, para. 414.

[10] The present study takes into account the decisions posterior to the adoption of the ILC Articles (2001) till the date of its drafting (December 2010).

[11] Without mentioning them, the Court echoed them nonetheless in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; see *infra*, fn. 108.

[12] Ibid.

[13] ICJ, judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reports* 2005, p. 226, para. 160 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* fn. 8, paras. 385 et 388.

[14] *Armed Activities on the Territory of the Congo, ibid.,* p. 226, para. 160 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ibid.*, para. 414 .

[15] *Armed Activities on the Territory of the Congo, ibid.* p. 226, para. 160 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ibid.,* paras. 398–407.

[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ibid.* para. 431.

[17] Ibid. para. 420.

[18] ICJ, advisory opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Reports* 2004, p. 195, para. 140.

– Article 31 (“Reparation”)[19] ;
– Article 36 (“Compensation”)[20] ;
– Article 45 (“Loss of the right to invoke responsibility”)[21] ;
– Article 58 (“Individual responsibility”)[22].

While applying these provisions, the Court gave interesting details on their interpretation and scope, in particular on the system of international responsibility and on the concept of international wrongful act (A), on the attribution of such an act to the State (B) and on the content and implementation of the responsibility (C).

A. The system of the international responsibility and the notion of internationally wrongful act

Though the Court never took up the question from a doctrinal point of view, it indirectly confirmed that a State entails its international responsibility when a conduct attributable to it under international law constitutes the violation of one of its international obligations[23] – without paying attention at this stage to whether or not such an internationally wrongful conduct had caused damage to the Applicant State.[24]

Thus, in the *Genocide* case, the Court had first established that the massacres committed in the Srebrenica region were constitutive of the crime of genocide in the meaning of the 1948 Convention (the objective element), then, in order to “ascertain whether the international responsibility of the Respondent can have been incurred” in relation to those facts, it wondered whether “the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility” specifying that “this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable […] to

[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* fn. 8, para. 460.

[20] *Ibid.*

[21] *Armed Activities on the Territory of the Congo, supra* fn. 12, p. 266, para. 293.

[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide , supra* fn. 8, para. 173.

[23] Cf. Art. 2 of the ILC Articles.

[24] The exclusion of damage as one of the constituent elements of State responsibility is one of Ago’s essential contribution. (see Ch. Dominicé, “The International Responsibility of States for Breach of Multilateral Obligations”, *E.J.I.L.*, 1999, vol. 10, n° 2, pp. 359–360; or A. PELLET : Les articles de la C.D.I. sur la responsabilité de l’État pour fait internationalement suite – et fin? *A.F.D.I.* 2002. pp. 1–23.

the Respondent"[25]. In the same vein, in the *Armed Activities* case, the Court had started by verifying the reality of the facts Uganda was accused of, qualifying them afterwards as "massive human rights violations and grave breaches of international humanitarian law"[26], and only afterwards did the Court turn to the question « as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda »[27].

Unsurprisingly, the Court put on the same level the breaches of conventional[28] and customary[29] obligations, thus confirming the irrelevance of the origin or the nature of the obligations violated.[30] It equally confirmed that a State could not take shelter under domestic rules in order to exonerate itself of its international responsibility. In the *Pulp Mills* case, the Court considered that Uruguay was responsible for the violations of its obligations of notification under the 1975 Statute of the Uruguay River and noted that "by doing so, Uruguay gave priority to its own legislation over its procedural obligations under the 1975 Statute". Surprisingly in this context, instead of referring to the principle enshrined in Article 3 of the ILC Articles,[31] the Court insisted that Uruguay had in this way "disregarded the well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'"[32]; by doing so, the Court creates a confusion between the respective spheres of the law of treaties and of the law of State responsibility, confusion

[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* , *supra* fn. 8, para. 379.

[26] *Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 239, para. 207.

[27] *Ibid.* p. 242, para. 213. See also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* fn. 17*,* p. 197, para. 147.

[28] For instance Articles II and III of the 1948 Genocide Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* fn. 8, paras. 231–376 and paras. 377–424) or Article 13 of the Covenant on Civil and Political rights and Article 12, paragraph 4, of the African Charter (ICJ, judgment, 30 November 2010, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits,* paras. 64–74).

[29] ICJ, judgment, 6 November 2003, *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Reports* 2003, pp. 182-183, para. 42; *Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 243, para. 217; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* fn. 17, p. 171, para. 86.

[30] Cf. Art. 12 of the ILC Articles. See also, *Gabčíkovo–Nagymaros Project*, *supra* fn.4, p. 38, para. 47.

[31] This provision states: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

[32] ICJ, judgment, 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* para. 121.

of little practical implications, but nonetheless intellectually disturbing, all the more since the Court had warned against it in the *Gabčíkovo-Nagymaros* case[33].

In its two judgments of 2001 and 2004 relating to the application of Article 36 of the Convention on consular relations, the Court seems to put an end to the recurrent uncertainty of whether the mere incompatibility of a domestic law with an international obligation was sufficient to establish State responsibility or if its effective application was necessary for that purpose.[34] In the *LaGrand* and *Avena* decisions, the ICJ clearly opted for the second possibility:

> « In itself, the rule [of procedural default] does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State. »[35].

The Court thus confirmed the disputable position it had assumed in the *Gabčíkovo–Nagymaros* case where it had dissociated between Slovakia's responsibility for recourse to the « variant C » and the practical application of this one[36].

Another uncertainty to which the recent case-law has put an end concerned the distinction between obligations of conduct and of result. In the 2007 decision, the Court described it in crystal-clear terms:

> "[…] it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far

[33] *Gabčíkovo–Nagymaros Project*, *supra* fn. 4, p. 38, para. 47 ; for a similar confusion, ICJ., judgment, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Reports 2008*, pp. 222–223, paras. 122 et 124.

[34] Ch. DOMINICÉ : Observations sur les droits de l'État victime d'un fait internationalement illicite. In *L'ordre juridique international entre tradition et innovation. Recueil d'études*, P.U.F., 1997, pp. 265–266, in particular fn. 11.

[35] ICJ, judgment, 27 June 2001, *LaGrand (Germany v. United States of America)*, *Reports 2001*, p. 497, para. 90 and ICJ, judgment, 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America), Reports* 2004, p. 56, para. 112.

[36] *Gabčíkovo–Nagymaros Project*, *supra* fn. 4, pp. 53–55, paras. 74–81 et p. 82, para. 155.1.B et C.

> as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide."[37]

Equally, in the *Pulp Mills* case, the Court considered that:

> "the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river ».[38]

These clarifications are of some importance, since, in the project adopted on first reading, the ILC had retained, on Ago's proposition, heterodox definitions of these two categories of obligations,[39] that called for harsh criticism from the doctrine.[40] Consequently, in the final draft, following a suggestion by the Special Rapporteur James Crawford, who doubted the usefulness of the distinction,[41] the Commission gave up mentioning it. In the above passage, the Court returned to a more classical and workable definition of these notions, as they are reflected in civil law systems on which the distinction was based: "in the civil law understanding, obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one's power to achieve a result, but without ultimate commitment."[42]

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[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 430.

[38] *Pulp Mills sur le fleuve Uruguay, supra* fn. 31, para. 187.

[39] V. Articles 20 and 21 of the draft in first reading, *YILC* 1977, vol. II, part II, pp. 9–30.

[40] On this debate, see J. Combacau: Obligations de résultat et obligations de comportement – Quelques questions et pas de réponse. In *Le droit international : unité et diversité. Mélanges offerts à Paul Reuter*. Paris: Pedone, 1981. pp. 181–204. ; P. M. Dupuy: Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. *E.J.I.L.* 1999. pp. 371–385.; or A. Marchesi: *Obblighi di condotta e obblighi di risultato: contributo allo studio degli obblighi internazionali*. Milano: Giuffrè, 2003. pp. X–174.

[41] See his second report, A/CN.4/498, pp. 24–42, paras. 55–92.

[42] J. Crawford *ibid.* p. 27., para. 57; also, Combacau (1981) op. cit. p. 196.

In the same vein, the 2007 Judgment brings out important specifications concerning the obligation of prevention – which, on first reading, had been enshrined in a specific provision (Article 23 of the ILC 1996 Draft)[43] but was simply mentioned in paragraph 3 of Article 14 of the 2001 Draft. The latter reformulates, in a more nuanced way, the text of former Article 26 relating to the moment and the duration of the obligation to prevent a specific event. In the *Genocide (Bosnia and Herzegovina v. Serbia)*, the Court:

- noted the subsidiary character of the duty to prevent: "t is only if the Court answers the first two questions [namely whether Serbia had committed a genocide or was accomplice to it] in the negative that it will have to consider whether the Respondent fulfilled its obligation of prevention" in application of en Article III of the 1948[44] ;
- appreciated that the obligation of prevention "is not merged in the duty to punish nor can it be regarded as simply a component of that duty"[45];
- underlined that "[t]he content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented"[46] – which means that, as some States stressed in respect of Article 23 of the ILC Draft in their commentaries on the first reading, this provision pertained to primary (or substantive) rules and therefore could not find a proper place in the draft[47];
- specified that, since it is an obligation of conduct, , "it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question"[48]; and,
- endorsed the principle expressed by Article 14, paragraph 3, of the 2001 Articles:

> "Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of

[43] *YILC* 1978, vol. II, part II, 81–85.

[44] C.I.J, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 382.

[45] *Ibid.* para. 427.

[46] *Ibid.* para. 429.

[47] See J. Crawford, second report, A/CN.4/498, 39, para. 84; this seems to have also been the position of the Special Rapporteur (see *ibid.* 39, para. 90).

[48] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 430.

> the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, […].
>
> This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.
>
> However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent."[49]

Finally, in the 2007 Judgment on the merits, the Court confirmed the position it had taken in 1996 in the judgment on the *Preliminary Objections* [50], where it established that individual criminal responsibility is not exclusive of international responsibility of State and that « State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one. »[51]

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[49] *Ibid.* para. 431. By twelve votes to three, the Court found that "Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July" (*ibid.* para. 571.5)). Without going back to the *Corfu Channel* or the *Hostages* cases, the Court has considered the obligation to prevent in more recent cases (*Armed Activities on the Territory of the Congo, supra* fn. 12, p. 231, para. 179; p. 252, para. 246; p. 253, para. 248) or *Pulp Mills*, *supra* fn. 31, paras. 101 or 185.

[50] ICJ, judgment, 11 July 1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Reports* 1996, p. 616, para. 32.

[51] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 182.

Naturally, the recent case-law of the Court confirms that international responsibility can only occur where the circumstances precluding wrongfulness are absent, as chapter V of the ILC Articles established.

In this respect, the 2005 Judgment in the *Armed Activities* case brings forth useful clarifications in respect of consent of the victim in distinguishing between the internationally wrongful act on the one hand and recognition of the necessity to organise an orderly process allowing for this act to cease.[52] Such a distinction – difficult as it may be in practice – might have an impact upon the analysis of the agreements ending an armed conflict or of the Security Council resolutions drawing consequences from an international wrongful act (including the breach of an obligation under peremptory norms of general international law).

Concerning self-defence, two of the recent judgments considered it thoroughly[53]; however both of them dealt with it not under the law of State responsibility but on the basis of the UN Charter[54] – to which self-defence actually belongs, as the author of these lines has constantly underlined, since indeed it constitutes *lex specialis* that has no place in the codification of general international law of responsibility.[55] In respect to the state of necessity, the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[56] the Court, while mentioning Article 25 of the ILC Articles, recalls that the state of necessity can only be invoked if the measures adopted were the only way for the State to safeguard its interests.[57]

Significant as might seem the ICJ's recent contribution to the definition of conducts possibly amounting to internationally wrongful acts, it is in respect to attribution that the Court's input has been the most substantial.

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[52] *Armed Activities on the Territory of the Congo, supra* fn. 12, p. 211, para. 99; in the same decision, the Court recalled that consent has to be deprived of any ambiguity (*ibid.*, p. 199, paras. 50–52; or p. 210, paras. 95–97).

[53] *Oil Platforms*, *supra* fn. 28, pp. 180–199, paras. 37–78; and *Armed Activities on the Territory of the Congo, supra* fn. 12, pp. 215–223, paras. 112–147.

[54] *Reports* 2003, p. 183, para. 42; pp. 186–187, para. 51; p. 189, para. 57; pp. 191–192, para. 64; or *Reports* 2005, pp. 221–223, paras. 142–147; and p. 269, para. 304. In all these passages, the Court assessed whether the conditions established in Article 51 of the Charter were fulfilled; in none of them did the Court refer directly or indirectly to Article21 of the ILC Articles.

[55] PELLET op.cit. fn. 23, p. 6 ; see also *YILC* 2001, vol. I, p. 99, para. 88.

[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* fn. 17, p. 194, para. 139.

[57] Ibid. pp. 194–195, para. 140.

B. Attribution to a State of an internationally wrongful act

In its 2005 Judgment in the *Armed Activities* case, the Court recalled that, "[a]ccording to a well-established rule of international law, which is of customary character, 'the conduct of any organ of a State must be regarded as an act of that State'"[58]; however, though Article 4, paragraph 1, of the ILC Articles very clearly expresses this rule[59], the Court ignored this provision[60] and chose to make a reference to its own case-law in citing the 1999 Advisory Opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*;[61] it is true however that the Court had mentioned in that text that "[t]his rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading"[62]. Moreover, in a previous passage of the same Judgment, the Court has made express references to Articles 4, 5 and 8 of the ILC Articles:

> "In the view of the Court, the conduct of the MLC was not that of 'an organ' of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC's conduct was "on the instructions of, or under the direction or control of" Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see *Military and Paramilitary Activities in and against Nicaragua*

[58] *Armed Activities on the Territory of the Congo, supra* fn. 12, p. 242, para. 213.

[59] "The conduct of any State organ shall be considered an act of that State under international law…".

[60] In the same 2005 Judgment, the Court based itself on the law of armed conflict rather than on Article 7 of the ILC Articles for establishing that the conduct of the organ of a State (its armed forces in that circumstance) was attributable to the State, even if they "acted contrary to the instructions given or exceeded their authority". It did so despite the fact that the ILC Articles specify this principle, while it can only be implicitly deduced from the texts invoked by the Court: "According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces" (*Armed Activities on the Territory of the Congo , supra* fn. 12, p. 242, para. 214).

[61] ICJ, Advisory Opinion, 29 April 1999, *Reports* 1999 (I), p. 87, para. 62.

[62] Ibid.

> *(Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports* 1986, pp. 62–65, paras. 109–115). »[63]

Thus the 2005 Judgment not only confirms the scope and positivity of Articles 4 (Conduct of organs of a State), 5 (Conduct of persons or entities exercising elements of governmental authority), 7 (Excess of authority or contravention of instructions) and 8 (Conduct directed or controlled by a State) of the ILC Articles, but also, and in a more general perspective, this decision acknowledges that Chapter II of the 2001 Articles constitutes the normative scale according to which one must assess whether a conduct can be attributable to a State at the international level or not. This is even more apparent in the approach taken by the Court in the 2007 Judgment in the *Genocide* case.

The Court first wondered 'whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph *(a)*, of the Convention, are attributable, in whole or in part, to the Respondent'; it specified that :

> "This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent."[64]

The first step consists of wondering whether the genocide in Srebrenica was committed by an organ of Serbia, in the sense of Article 4 of the ILC Articles – and this is what the Court did in paragraphs 385 to 395 of its Judgment[65], in harmony with "the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State."[66]

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[63] *Armed Activities on the Territory of the Congo , supra* fn. 12, p. 226, para. 160.

[64] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 384.

[65] This part of the Judgment is entitled: "The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organs".

[66] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 385.

Having answered that question in the negative, the Court afterwards addressed, in paragraphs 396 to 412, the separate issue if "in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control."[67] "On this subject," the Court added, "the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility."[68]

The Court took up this opportunity to strongly reassess the relevance of the 'Nicaragua test', that the ICTY had had the guts to dispute.[69] In the 1986 Judgment, the Court had established a particularly stringent criterion that eventually led it to discard any United States responsibility for the acts of the Contras (the counter-revolutionary armed groups in Nicaragua):

> "United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras***,** the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself (...) for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[70]

Sticking to this position, the Court made a particular rigid application of it in order to reject Serbia's responsibility, on that account, in the Srebrenica genocide:

– *quite sharply putting the ICTY in its place, the Court observed that this one "was not called upon in the Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and

[67] Ibid. para. 397.

[68] Article 8: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

[69] In the Tribunal's words "[t]he requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control." (Appeals Chamber, Judgment, 15 July 1999, IT-94-1, *Tadić*, para. 117 (italics in the text)).

[70] ICJ, Judgment, 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Reports* 1986, pp. 64–65, para. 115.

extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction;"[71]

– any idea of *comitas gentium* thus set aside, the Court further noted that "the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. […] [T]he 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility"[72] ;
– in the same vein, the Court also bluntly rejected Bosnia's argument suggesting "not to repudiate but to forget Nicaragua"[73] since

> *"the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the 'effective control' of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* […]. The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility."[74]

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[71] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* fn. 8, para. 403.

[72] Ibid. para. 406.

[73] CR 2006/8, 3 March 2006, p. 34, para. 63 (A. Pellet).

[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* fn. 8, para. 401.

One could hardly be more explicit: as the "inventor" of the concept of "effective control", the Court sticks to it and means that the other international jurisdictions that might be in a position to a apply it should fully accept it. By the same token, the Court seals the positivity of Article 8 of the ILC Articles, which reflects the Nicaragua test despite the reluctance expressed by some of the ILC members.[75]

The 2007 Judgment goes further than simply confirming the norms contained in the ILC Articles in respect of attribution of internationally wrongful acts, it completes and prolongs them. In particular, following a suggestion made by Bosnia's Counsel during the pleadings,[76] the Court introduced the notion of *de facto* organ somewhere in between the institutional criterion of Article 4 of the ILC Articles and the Nicaragua test reflected in Article 8 – and insisted that this criterion was distinct from both.[77] Resting again on the 1986 *Nicaragua* decision[78], the Court answered in the positive to the question "whether it is possible in principle to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act."[79] But it added that it was necessary, for that purpose, that those "persons, groups or entities act in 'complete dependence'[[80]] on the State, of which they are ultimately merely the instrument."[81]

In the same 2007 Judgment, the Court addressed the issue of complicity.[82] It mainly based itself upon Article III.e of the 1948 Convention, which constitutes a *lex specialis* in parallel with the general international law of State responsibility. The Court nonetheless appreciated that

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[75] V. *Ann. C.D.I.* 1999, vol. I, p. 286, paras. 92–93.

[76] CR 2006/9, 6 March 2006, pp. 55–56, paras. 12–14; CR 2006/10, 6 March 2006, p. 21, para. 27; pp. 27–29, paras. 36–42 (L. Condorelli).

[77] "The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* , *supra* fn. 8, para. 397; also para. 400).

[78] *Military and Paramilitary Activities, supra* fn. 69, pp. 62–64, paras. 109–115.

[79] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* , *supra* fn. 8, para. 391.

[80] Wording taken from the 1986 *Nicaragua* judgment (*Reports* 1986, p. 63, para. 110).

[81] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* , *supra* fn. 8, para. 392.

[82] Ibid. paras. 419–424.

> "although 'complicity', as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the 'aid or assistance' furnished by one State for the commission of a wrongful act by another State. In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule […]. Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph (e), of the Convention, and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 – setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity."[83]

The typology of the hypotheses of attribution of an internationally wrongful act to a State is, in this way, considerably expanded; it results from the Court's case-law in general, and remarkably from the 2007 Judgment, that a conduct may be attributable to a State for the purposes of responsibility not only if it is that of a State organ, in the meaning of Article 4 of the 2001 ILC Articles, but also if it emanates from an entity found under the 'complete dependence' of that State or from a person or group of persons under the control (strictly understood) of that State or again if one of these entities was accomplice of an internationally wrongful act, since the Court assimilated complicity with "aid or assistance" furnished for the commission of a wrongful act.[84]

C. Content and implementation of responsibility

Concerning the content of responsibility, the recent case-law of the ICJ mainly confirms the principles established in Part Two of the ILC Articles, which all the same codify customary principles already well-reflected in previous judgments,

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[83] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, paras. 419–420.

[84] See CH. DOMINICÉ: Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State. In J. CRAWFORD – A. PELLET – S. OLLESON – K. PARLETT (eds.): *The Law of International Responsibility*. OUP, 2010. pp. 281–289.

with the possible exception of Chapter III dedicated to the serious breaches of obligations under peremptory norms of general international law. The Court recalled in several of its decisions the following principles:

- the principle according to which "'the breach of an engagement involves an obligation to make reparation in an adequate form' (*Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21)"[85] ;
- the principle of the variety of the possible forms of reparation "depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury"[86], which is actually reflected in Article 34 of the 2001 Articles,
- keeping in mind that "[t]he principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' (*P.C.I.J. Series A, No. 17*, p. 47: see also Article 31 of the ILC's Articles on State Responsibility)."[87] ; and
- accordingly, there is priority of the *restitutio in integrum* over all the other possible forms of reparation, as article 36, paragraph 1, of the ILC Articles recalls: "where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both; […] see also Articles 34 to 37 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts)"[88];
- the principle that, absent any material damage, the simple finding by the Court of a wrongful act constitutes appropriate satisfaction[89]; or

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[85] *Avena*, *supra* fn. 34, p. 59, para. 119.

[86] *Ibid.;* also *Pulp Mills*, *supra* fn. 31, para. 274.

[87] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* , supra fn. 8, para. 460 ; also ICJ; Judgment, 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Reports* 2002, pp. 31–32, para. 76–77; *Avena*, *supra* fn. 34, p. 59, para. 119; *Armed Activities on the Territory of the Congo, supra* fn. 12, p. 257, para. 259.

[88] *Pulp Mills*, *supra* fn. 31, para. 273 ; also *Gabčikovo-Nagymaros Projet*, *supra* fn. 4 p. 81, para. 152 ; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* fn. 17*,* p. 198, paras. 152–153 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* , *supra* fn. 8, para. 460; also *Diallo*, *supra* fn. 27*,* para. 161.

[89] *Arrest Warrant*, *supra* fn. 86, p. 31, para. 75; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* , *supra* fn. 8, paras. 463 et 469; *Certain Questions of Mutual Assistance in Criminal Matters, Reports 2008*, p. 245, para. 204 ; *Pulp Mills*, *supra* fn. 31, para. 269. Article 37 of the ILC Articles does not expressly mention such a possibility (that implies determination by a third of responsibility) but the commentary makes clear that:

– the good sense principle that a State can only be required to cease a wrongful act if the act in question is of a continuous character,[90] without for the Court to have to expressly state so in the operative part of its judgment.[91]

Some judgments give however interesting details concerning the modalities of *restitutio* and of compensation and call for a number of remarks in respect of assurances and guarantees of non-repetition.

The 2010 Judgment in the *Pulp Mills* case shows the limits of the priority of *restitutio* over all the other forms of reparation. Considering that "Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations."[92] Even though the Court does not expressly state it[93], it is highly probable that the Judges considered that such a dismantling would constitute a disproportionate burden in comparison with the violation found. "Like other forms of reparation, restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it."[94]

Applying this very same principle in the *Avena* case, the Court rejected Mexico's claims aiming at a judicial annulment or depriving of the effects of the verdicts and sentences pronounced by the US tribunals against the nationals whose consular rights had not been respected, on the account that

> "the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph l, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal

"One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal." (*Report of the International Law Commission on the work of its fifty-third session*, GAOR, 56th session, Supplement n°10 (A/56/10), p. 106, para. 6) of the commentary.)

[90] Article 30.a) of the ILC Articles.

[91] *Avena*, *supra* fn. 34, p. 68, para. 148 or *Armed Activities on the Territory of the Congo, supra* fn. 12, p. 255, para. 254 ; or 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, para. 148 ; *Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal* in the *Arrest Warrant* case. *supra* fn. 86, p. 88, para. 89.

[92] *Pulp Mills*, *supra* fn. 31, para. 275.

[93] But it does mention Article 35 of the 2001 Articles that excludes restitution when it involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation" (ibid. para. 273).

[94] Ibid. para. 274.

> proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention."[95]

The Court pointed to the differences separating that case from the Arrest Warrant case where "the Court found that act [the arrest warrant against the Congolese Ministry of Foreign Affairs] to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (*ICJ Reports 2002*, p. 33)".[96] Even though in that case the Court cautiously left to Belgium the choice of the means to annul the warrant,[97] it nonetheless went very far in the direction of an injunction to the State, and some of the Judges expressed legitimate concerns in that respect.[98]

Still in the *Avena* decision, the Court stated that it simply reaffirmed the *LaGrand* solution[99]; such a statement however lacks consistency: the solution it gave in the Judgment of 27 of June 2001 and the Court pretended to be implemented concerned Germany's assurances of non-repetition[100] whereas, in the Judgment of 31st March 2004, it related to reparation. This confusion highlights the quite artificial character of the distinction operated by the ILC Articles between, on the one side, guarantees and assurances of non-repetition – which appear, together with cessation, in Article 30, and on the other side, restitution, present in Article 35, as one of the possible forms of reparation. Despite the Commission's explanations[101], one may reasonably consider that guarantees of non-repetition, as well as cessation, are indeed forms of reparation and are part respectively of the broader concepts of restitution[102] and of satisfaction.

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[95] *Avena*, *supra* fn. 34, p. 60, para. 122.

[96] Ibid. para. 123.

[97] *Arrest Warrant, supra* fn. 86, p. 32, para. 76.

[98] *Arrest Warrant, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal,ibid.*, p. 88, para. 88.

[99] *Avena*, *supra* fn. 34, p. 59, paras. 120-121, et p. 62, para. 128.

[100] *LaGrand*, *supra* fn. 34, pp. 513–514, para. 125.

[101] *Report of the International Law Commission on the work of its fifty-third session*, supra fn. 88, p. 89, para. 7 of the commentary to Article 30.

[102] In the *San Juan River* case, the Court underlined that "the cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation for the injured State." (*Dispute regarding Navigational and Related Rights*, *supra* fn. 90, para. 149).

Since the Court had, in the *LaGrand* case, the imprudence to show itself receptive to a request for guarantees of non-repetition (as distinct from satisfaction), States have felt encouraged to systematically make such requests, although those ordered or taken note of by the Court actually lacked practical implications. From this point of view, in *LaGrand* and *Avena*, the Court simply took note of "the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b)"[103] ; and, in the *Armed Activities* case, the Court did not consider necessary to include this conclusion in the *dispositif* and appreciated that "if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to cooperate with them in order to fulfil such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law."[104]

In two recent decisions, the Court seemed to express some impatience towards these systematic requests for guarantees of non-repetition. In the *San Juan River (I)* and the *Pulp Mills* cases, the Court firmly clarified that:

> "while the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which it is for the Court to assess.
> As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed (see *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). There is thus no reason, except

[103] *LaGrand*, *supra* fn. 34, p. 516, para. 128.6); also pp. 512–513, para. 124 ; and *Avena*, *supra* fn. 34, p. 73, para. 153.10 ; also p. 69, para. 150).

[104] *Armed Activities on the Territory of the Congo supra* fn. 12, p. 256, para. 257.

in special circumstances […] to order [assurances and guarantees of non-repetition]."[105]

As far as compensation is concerned, it is remarkable that, since the Corfu Channel case, the Court no longer had the occasion to fix the appropriate amount, though in several cases, it made a finding on the principle. Until its most recent Judgment given on the 30th of November 2010 in the *Diallo* case, the Court expressed little willingness to incite the Parties to effectively proceed with it. The *Gabčíkovo–Nagymaros* case is symptomatic in this respect: whereas in its 1997 Judgment, the Court found that the Parties were under the mutual obligation to compensate for the damages born out of their respective wrongful acts[106], thirteen years later, the case is still on the General List, absent an agreement between the Parties on the final evaluation of the compensation due or a seisin of the Court, by any of them, in order for it to fix the amounts. Such a situation is insane and it belongs to the Court to make use of its inherent powers and to remove the case from the List if any the Parties has not seised it.

The *Armed Activities* case opposing DRC to Uganda might lead to a similar outcome. Here the Court found that every Party had committed internationally wrongful acts towards the other that engaged its responsibility and called for reparation. In this respect, the Court decided that "failing agreement between the Parties", the issue was to be settled by the Court[107] in a subsequent phase of the proceedings, without any date being fixed for that purpose.The situation went differently in *Diallo* where the Court established that:

"In light of the fact that the Application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings soon be brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should

[105] *Dispute regarding Navigational and Related Rights*, *supra* fn. 101, para. 150; and *Pulp*, *supra* fn. 31, para. 278. Also C.I.J., Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Reports* 2002, p. 453, para. 321; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide: "*There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court […] considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above […]. In the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent's continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.» (*supra* fn. 8, para. 466).

[106] *Gabčíkovo–Nagymaros Project*, *supra* fn. 4, p. 83, para. 155.2)D.

[107] *Armed Activities on the Territory of the Congo, supra* fn. 12, p. 281, para. 345.5) and 6), and p. 282, para. 345.13) et 14).

be limited. Therefore, failing agreement between the Parties within six months following the delivery of the present Judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court in a subsequent phase of the proceedings."[108].

Last but not least, one must stress the probably most notable progress (at least symbolically) in the Court's jurisprudence on responsibility: in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ,* without expressly referring to Article 41 of the ILC Articles on the particular consequences of a serious breach of an obligation under peremptory norms of general international law, the Court nevertheless confirmed the scope of this debated and fortunately (though prudently) "progressive" provision. Having established serious breaches by Israel of *erga omnes* obligations (obligation to respect the Palestinian people's right to self-determination and certain humanitarian obligations),

> "[g]iven the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.
>
> Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion."[109]

* * *

[108] *Diallo*, *supra* fn. 27, para. 164. The Applicant State has itself suggested the six month delay.

[109] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* fn. 17, p. 200, paras. 159–160; also p. 202, para. 163.3)D.

By way of conclusion, the present study of the Court's recent case-law on responsibility calls for the following remarks:

1° After a long period where the Court was seised of few responsibility cases – it is also true that at the time the Court was only seised of a few cases at all – at present they are on an equal footing with the cases of land or maritime delimitation;[110]

2° generally speaking, and although it does not always expressly state so, the Court applies the rules contained in the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Act, – rules that are in their turn quite largely based upon the Court's own case-law; in consequence, the normative value of these rules is comforted and this confirms, if necessary, that there is no need to 'conventionalize' the ILC's Draft, which fulfils very well its role of guide to State practice and to the case-law of international courts and tribunals;

3° Moreover, the general character of the Articles and their non-binding nature allow for them to be completed and adapted to needs and circumstances. As the recent case-law has shown it, the Court fulfils this mission with authority and in a satisfactorily manner.

Mutatis mutandis, what Judge Herczegh wrote about the principle *reservation judicata* embodied in Article 59 of the Statute, can be transposed to the law of international responsibility: these are rules whose potentiality can only be discovered through practice and through the wise exercise by the Court of its judicial function: "[They are not rules] of law which, in [themselves], might be said sufficiently to protect or not to protect a legal interest of a particular country. It is, rather. a [body of rules] which it is for the Court to interpret and apply in such a way that such protection is made as effective as possible."[111]

[110] Out of the twenty-five judgments given by the Court in the period 2001-2010, eleven touch upon, mainly or accessorily, responsibility issues. Out of the thirteen cases now on the Court's General List, ten contain conclusions relating to responsibility.

[111] *Land and Maritime Boundary between Cameroon and Nigeria, Declaration of Judge Herczegh, supra* fn 2, p. 473.

AN INFREQUENTLY INVOKED JURISDICTIONAL CLAUSE CONFERRING JURISDICTION ON THE INTERNATIONAL COURT OF JUSTICE PROVIDED FOR IN A EUROPEAN CONVENTION

Dobromir Mihajlov[1]

I. Introduction and Outline

On 23 December 2008 the Federal Republic of Germany instituted proceedings before the International Court of Justice against the Italian Republic, alleging that "[t]hrough its judicial practice Italy has infringed and continues to infringe its obligations towards Germany under international law"[2] to respect its jurisdictional immunity as a sovereign state. As the basis for the jurisdiction of the Court, Germany invoked a jurisdictional clause stipulated for in Article 1 of the European Convention for the Peaceful Settlement of Disputes (CETS No.: 023, hereinafter "the Convention"), adopted by the Council of Europe on 29 April 1957 and which entered into force on 30 April 1958. This Article states:

"The High Contracting Parties shall submit to the judgment of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;"
d. the nature or extent of the reparation to be made for the breach of an international obligation."

The Convention and the jurisdictional clause prescribed by it have been usually ignored by international lawyers, in their writings both are mentioned mostly

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[2] Source: ICJ Press Release No. 2008/44.

in footnotes[3]. At first sight this attitude is justified since the number of cases brought to international arbitration under this clause is not considerable. However, a scrutinizing analysis of the implementation of the clause shows some important characteristics indicating that *pro futuro* the Convention may still provide for the only possibility for recourse to the International Court of Justice (hereinafter ICJ) mainly in disputes between European states parties to the Convention on the one side and Germany or Italy on the other, respectively between Germany and Italy themselves.

This paper aims to explore this issue. For the purpose it starts with a summary of the provisions of the Convention (Section 2), followed by a brief overview of its antecedents, conclusion and status (Section 3). The cases invoking the clause will be examined in Section 4, and the conclusion will be drawn in Section 5.

2. Summary of the Provisions of the Convention

The Convention provides three ways of settling disputes by peaceful means.

First, the Parties agree to submit to the judgment of the ICJ all international legal disputes which may arise between them and concern the interpretation of a treaty, any question of international law, the existence of any fact constituting a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation (Article 1).

Second, for the settlement of other disputes or when Parties have agreed to submit them to conciliation prior to recourse to judicial resolution, Parties agree to submit a dispute to a Permanent Conciliation Commission or to a special Conciliation Commission (Chapter II).

Third, for all disputes which may arise between the Parties other than those mentioned in Article 1 and which have not been settled by conciliation, either because the Parties have agreed not to have prior recourse to it or because conciliation has failed, Parties agree to apply the procedure of arbitration (Chapter III).

The provisions of this Convention are not applied to disputes that the Parties have agreed to submit to another procedure of peaceful settlement. As regards disputes falling within the scope of Article 1 of the Convention, Parties shall refrain from invoking as between themselves agreements that do not provide for a procedure entailing binding decisions. The Convention in no way affects the

[3] In Hungarian sources it was last mentioned by Lamm, Vanda, a distinguished expert of the case law of the International Court of Justice, in: *A Nemzetközi Bíróság kötelező joghatósági rendszere*. Budapest: MTA Jogtudományi Intézet – KJK-KERSZÖV, 2005. 56., note 47. (*infra* LAMM)

application of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4th November 1950 (Article 28).

Finally, if one of the parties to a dispute fails to carry out its obligations under a decision of the International Court of Justice or an award of the Arbitral Tribunal, the other Party to the dispute may seise the Committee of Ministers of the Council of Europe which may make recommendations with a view to ensuring compliance with the decision or award.[4]

At least in two issues the Convention provided for most contemporary solutions:

1) The ruling that provisions of the Convention should not apply to disputes concerning questions which by international law were solely within the domestic jurisdiction of States (Article 27 para. b) even in 1957 considered to be a definite refusal of the Connally Reservation[5]. The Convention provides even for the case of a dispute the subject of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities. In this instance the party in question may object to the dispute being submitted for settlement by any of the procedures laid down in this Convention until a decision with final effect has been pronounced, within a reasonable time, by the competent authority. After such a decision with final effect has been pronounced in the State concerned, in a period of five years from its date it is possible to resort to any of the procedures laid down in this Convention. (Article 29)
2) According Article 31, para. 1 in all cases where a dispute forms the subject of arbitration or judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the ICJ, acting in accordance with Article 41 of its Statute shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures. The binding effect of the provisional measures of the ICJ stated by the Convention in 1957 was laid down as a general provision by the ICJ itself only in 2001, in its Judgment of 27 June 2001 in *LaGrand Case*[6].

[4] Source: http://conventions.coe.int/Treaty/en/Summaries/Html/023.htm

[5] On the proposal of Senator Tom Connally in 1946 the Senate accepted and the United States deposited a reservation limiting compulsory jurisdiction of ICJ to matters „as determined by the United States". In the period 1947–58 five other states also used this reservation known also an „automatic" or „peremptory" reservation. This form of reservation is incompatible with the Statute of ICJ since it contradicts the power of the Court to determine its jurisdiction. Ian Brownlie: *Principles of Public International Law.* Oxford University Press, 1998. (*infra* Brownlie) 717. and 720–721.

[6] Judgment of 27 June 2001, *LaGrand Case (Germany v. United States of America)*, para. 109.

The provisions of the Convention for possibilities to make declarations and reservations are formulated very precisely and *expressis verbis* leave unmentioned the jurisdictional clause in Article 1. (Article 34 and 35)

The Convention provided for its own jurisdictional clause, too, since disputes relating to its interpretation or application, including those concerning the classification of disputes and the scope of reservations, are also subject to submitting to the ICJ. In such cases recourse to the ICJ provisions has the effect of suspending the conciliation or arbitration proceedings concerned until the decision of the ICJ is known (Article 38).

The Convention enters into force on the date of the deposit of the second instrument of ratification. The Convention contains no provision regarding termination and may be denounced by a party subject to six months' notice. Denunciation does not release the party concerned from its obligations under the Convention in respect of disputes relating to facts or situations prior to the date of the six months' notice. Such dispute should, however, be submitted to the appropriate procedure under the terms of the Convention within a period of one year from the said date. Subject to the same conditions, any party, which ceases to be a member of the Council of Europe, shall cease to be a party to this Convention within a period of one year from the said date. (Article 40 para 3.)

The topic of this paper limits the train of thoughts in it mainly to the essence and effect of Article 1 of the Convention.

3. The Antecedents, Conclusion and Current Status of the Convention

The post-war period was marked mainly by the efforts to start and stimulate the process of early European integration including establishment of European legal institutions[7] and of transnational European legal order, which was intended to result in creating a European constitution for the future United States of Europe. This vision of Winston Churchill[8] could not be realised but still very significant international legal instruments were enforced in the early 50's: the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 005, 1953), Treaty of Paris (1951), the Treaty providing for a European Defence Community (1952) and others. From the very beginning

[7] The Council of Europe (1949), the Western European Union (1954), the European Coal and Steel Community (1951) as the first supranational organisation with its Court of Justice, also created in 1951, as the predecessor of the Court of Justice of the European Communities.

[8] Winston Churchill, speech delivered at the University of Zurich, 19 September 1946. Available on http://www.ena.lu/address_given_winston_churchill_zurich_19_september_1946-022600045.html

of its activities the Council of Europe played a very decisive part in laying the foundations of European integration and unity. Among others the Council of Europe was keen to provide for a regulation of peaceful solution of the regional disputes in (Western) Europe as stated in article 52 of the UN Charter. Following the Recommendation 56 relative to the creation of a permanent organisation for the peaceful settlement of disputes between Members of the Council of Europe, adopted on 24th November 1950, at the conclusion of the Debate on the Report of the Committee on Legal and Administrative Questions[9] and Recommendation 22 on the establishment of a single European jurisdiction (adopted on 11th December, 1951)[10], on the 27th September, 1952, the (then) Consultative (since February 1994: Parliamentary) Assembly of the Council of Europe adopted Recommendation 36 on the establishment of a European Court of Justice and of a European Act for the Peaceful Settlement of Disputes[11] and lastly the drafting process was finished by Recommendation 79 (1955) on the draft European Convention for the Peaceful Settlement of Disputes adopted by the Assembly on 9th July 1955[12]. It should be mentioned that the drafting of this instrument was very much influenced by the dispute about the necessity of establishment of a unified European Court of Justice. The stages of the debate are well illustrated by the recommendations mentioned above. The first one [Recommendation 56 (1950)] did not support the creation of such a court since it "would overlap with the International Court of Justice, whose jurisdiction has been accepted as binding by several Members of the Council of Europe, and further […] a new Court, unless it were subordinated to the International Court of Justice, would put an end to the unity of jurisprudence assured by the Hague organ and indispensable to the development of International Law".[13] The next Recommendation [22 (1951)] assumed an opposite point of view, it stood firm for the creation of a single European Court of Justice, which "would be […] qualified to settle disputes between Members of the Council of Europe, regarding the interpretation and application of the Statute, as of all European Conventions, and could at the same time fulfil the same advisory functions in relation to the Committee of Ministers and to the Assembly, as the International Court of Justice does in relation to the United Nations Organisation, […]."[14] It was the Committee of Ministers, which pointed out the interrelation between the problems, raised by the two recommendations and decided joint measures and

[9] http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta50/EREC56.htm

[10] http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta51/EREC22.htm

[11] http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta52/EREC36.htm

[12] http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta55/erec79.htm

[13] *Supra* note 9.

[14] *Supra* note 10.

actions in favour of their implementation.[15] Consequently the Recommendation 36 (1952) in its appendix contained the proposals of the Committee on Legal and Administrative Questions on:

1) a Statute for the European Court of Justice and

2) a European Act for the peaceful settlement of disputes[16].

This draft regulation declared that the European Court of Justice should become the judicial organ of the Council of Europe and in the case of legal disputes arising between members (of the Council of Europe) of which one at least was not a signatory of the Statute of the International Court of Justice, that Court should be replaced by the European Court of Justice, as the mandatory organ of judicial settlement. The same procedure was to be followed in the settlement of any dispute concerning the interpretation or the application of conventions concluded by all members of the Council of Europe or open to acceptance by its members and only by them.

And yet the controversy on the single European Court was closed by the rejection of its creation. Contrasting political interests influenced the work of the deliberating and decision-making bodies of the Council of Europe but they took into consideration also the formation of the Court of Justice of the European Coal and Steel Community (1951) and of the European Court of Human Rights prospected by the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and also a number of legal arguments[17] and the final result was Recommendation 79 (1955)[18] which on the one hand left unmentioned the European Court, on the other declared for the first time the jurisdiction of the International Court of Justice on judicial settlement of the disputes between the signatories of the future convention. This recommendation alluded to the comprehensive examination of the text of the draft convention referring particularly to the role of the Swedish Government.

The European Convention of Peaceful Settlement of Disputes was opened for signature on 29th April 1957 and since the condition for its entry into force was

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[15] Resolution (52) 53 (12 September 1952) – (Adopted by the Ministers' Deputies) Peaceful Settlement of Disputes – Creation of a Single European Court of Justice, available: https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=562798&SecMode=1&DocId=710478&Usage=2

[16] *Supra* note 11.

[17] For details see: IGNAZ SEIDL-HOHENVELDERN: Le réglement des différends en Europe au-delá du Marché Commun. 173–179. (*infra* SEIDL-HOHENVELDERN) In DANIEL BARDONNET (ed.): *The Peaceful Settlement of International Disputes in Europe: Future Prospects /Le règlement pacifique des différends internationaux en Europe: perspectives d'avenir.* Workshop 1990 / Colloque 1990. Recueil des cours – Colloques/Livres de droit de l'Académie de Droit International de la Haye (Workshops) Law Books of the Hague Academy of International Law, 15, Publication year 1991. (*infra* BARDONNET)

[18] *Supra* note 12.

two ratifications (they were made by Norway and Sweden) it could be enforced on 30th April 1958. According to its status as of 28th January 2011, it has been ratified by 14 states and further 5 states notified signature yet not followed by ratification[19]. Hungary is not a party to the Convention[20].

An indispensable element of the examination of the legal nature of the Convention and the jurisdictional clause provided for should be its comparing with the American treaty on pacific settlement "Pact of Bogotá" signed at Bogota on 30 April 1948, in force from 6 May 1949. The Pact of Bogotá (hereinafter Pact) may be considered as the most important post-war antecedent of the Convention. In so far as it provides for all diplomatic methods of dispute settlement (Chapter Two and Three), and arranges for the possibility for the parties concerned in the solution of a controversy to petition the General Assembly or the Security Council of the UN to request an advisory opinion of the ICJ on any juridical question, the scope of application of the Pact is significantly more extensive. The provision for the jurisdictional clause, however, declares the jurisdiction of the ICJ compulsory only for the disputes in the limits of Article 36, paragraph 2 of the Statute of the ICJ (Chapter Four Article XXXI). In comparison to it, by the expression "in particular" in its Article 1 the Convention just lays stress on these types of disputes but does not restrict the jurisdictional clause to their scope. In the case of the Pact this clause is weakened also by the provision that its parties may agree upon submitting their disputes to arbitral procedure thus bypassing the ICJ. These provisions of the Pact gave the ICJ grounds for interpretation of its jurisdiction in its judgment of 20 December 1988 rendered in the *Case concerning Border and Transborder Armed Actions.* In so far the topic of this study is concerned, in its judgment the ICJ observed that two possible readings of the relationship between Article XXXI and the Statute have been proposed by the Parties. That Article has been seen either as a treaty provision conferring jurisdiction upon the ICJ in accordance with Article 36, paragraph 1, of the Statute, or as a collective declaration of compulsory jurisdiction under paragraph 2 of the same Article[21]. The latter reading was rejected *in concreto* by the ICJ but it held back from taking a principled position on the possibility to accept a collective declaration of compulsory jurisdiction[22]. A more flexible stand was taken by Judge Oda in his separate opinion: after comparing the jurisdictional clause provisions of the Pact with those of the Convention (and of the Revised General Act for the Pacific Settlement of International Disputes,

[19] Status as of 28th January 2011, available at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=023&CM=8&DF=28/01/2011&CL=ENG

[20] Hungary however made a declaration under the optional clause on 22 October 1992.

[21] *Case concerning Border and Transborder Armed Actions*, Judgment of 20 December 1988, para. 33 and subsequently.

[22] Lamm op. cit. 56. For more details see Lamm op. cit. 52–57.

adopted by the United Nations General Assembly in 1949) he concluded that in cases of general dispute-settlement treaties, the acceptance of jurisdiction over legal disputes in the framework of Article 36, paragraph 1, of the Statute, can be equated, in effect, with the acceptance of jurisdiction under Article 36, paragraph 2. Such an obligation must, however, be assumed in an unequivocal manner, as the Convention states in its Article 1 and the lack of it in the Pact was one of the causes which made Judge Oda hesitating in assimilation the Pact to the other two general dispute-settlement treaties[23].

Hungarian international lawyers define the Convention-type clause either as a jurisdictional one[24] (indicating the conference of jurisdiction), either as a compromissory clause[25] [like the compromis/special agreement it is also a (part of) international instrument but unlike to it the latter is concluded before the arise of the dispute]. The difference in terminology does not point to any difference in approaches.

According to Ian Brownlie the clause included in treaties and conventions and granting the ICJ jurisdiction over disputes in advance is by definition consent *ante hoc*. He defines the same way the declaration under the optional clause. In his view both fall under the category of "compulsory" jurisdiction but this label is used rather to describe jurisdiction arising under Article 36 paragraph 2 of the Statute[26].

Legally the status of the Convention is defined by Art. 36 paragraph 1 of the Statute of the ICJ: the jurisdiction of the Court comprises all matters specially provided for in treaties and conventions in force. According to the information available at the website[27] of the ICJ at present the number of instruments conferring jurisdiction to the ICJ exceeds three hundreds including both bi- and multilateral treaties with total number of signatories between 60 and 100 states. These instruments (treaties or conventions) are classified in two groups:

1) those having as their object the pacific settlement of disputes between two or more States and providing in particular for the submission to judicial decision of specified classes of conflicts between States subject sometimes to certain exceptions, and

[23] Separate opinion of Judge Oda, para. 15.

[24] KARDOS, GÁBOR – LATTMANN, TAMÁS: *Nemzetközi jog.* Budapest: ELTE Eötvös Kiadó, 2010. 423–425; BRUHÁCS, JÁNOS: *Nemzetközi jog II – Különös Rész.* Budapest–Pécs: Dialog-Campus Kiadó, 2010. 311–314.; NAGY, KÁROLY: *Nemzetközi jog.* Budapest: Püski Kiadó, 1999. 602.

[25] KOVÁCS, PÉTER: *Nemzetközi jog.* Budapest: Osiris Kiadó, 2006. 487.; LAMM,VANDA: A Nemzetközi Bíróság. In LOMNICI, ZOLTÁN (ed.): *Intézmények Európában.* Budapest: HVG-ORAC, 2002. 29–30.

[26] BROWNLIE op. cit. 717. and 720–721.

[27] http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1

2) those having an object other than the pacific settlement of disputes, in which case the jurisdictional clause of the treaty or convention in question will refer solely to disputes concerning the interpretation or application of the treaty or convention or only some of its provisions (e.g. disputes where the issue relates to a peremptory rule of international law — jus cogens). Such clauses may be included in the body of the text or in a protocol annexed to the treaty. They may likewise be compulsory or optional and may be open to reservations or not[28].

In view of the object of the Convention its Article 1 places it with the first group (and that serves the basis of this paper) but *stricto sensu* (regarding settlement of disputes concerning the interpretation and application of the Convention itself) its Article 38 places it with the second group.

At present the importance of the Convention is defined not only by its legal provisions but also by the scope of its application, which is determined by the (number of) parties to the Convention and the volume of declarations/ reservations made by them. With regard to the number of international and national instruments available for recognizing the compulsory jurisdiction of the ICJ, in my view the Convention clause would be really valuable in so far as it supplies a deficiency. According to the data concerning the ICJ status as of 28 January 2011[29] 66 states made declarations under the optional clause recognizing as compulsory the jurisdiction of the ICJ. Comparison with parties to the Convention makes it clear that one state – Italy – has not made a declaration but is a party to the Convention, and two other states which are parties to the Convention since 1960-61, made such a declaration only in the recent past: Germany (20 April 2008), and the United Kingdom (5 July 2004). In other words, a European state party to the Convention may/might apply for instituting proceedings against these two countries concerning disputes arisen before their declaration only with reference to the jurisdictional clause of the Convention, and in the past and at present this was/is true concerning settlement of any dispute with Italy, too. For the sake of completeness it should be mentioned that from among the five states, which signed but did not ratify the Convention, France and Turkey together with Spain (not even signing the Convention) have not made a declaration under the optional clause either.

Another feature of the Convention is that since its creation it was open for signature only by the members of the Council of Europe. It did not comprise a provision for non-member states of the Council of Europe (including the communist states in the region of Central and Eastern Europe) to become

[28] *International Court of Justice.* The Hague: ICJ, 2004, Fifth Edition, 40.

[29] http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=a&PHPSESSID=08e216010eaa9baf657b8e537cfd1a70

parties and thus their accession to the Convention was unregulated. It should be noted that even in the early 50's some of the conventions adopted by the Council of Europe provided *expressis verbis* for the accession of non-member States[30]. In 1990 Yankov observed that the post-war ideological and political division of Europe was an obstacle to the setting up of common European arrangements for the peaceful settlement of inter-state disputes and one of its implications was that the parties to the Convention were limited to the member states. Consequently the countries of Central and Eastern Europe could not join the Convention until after they would be invited to become members of the Council of Europe by the Committee of Ministers as provided for in Article 4 of the Statute of the Council[31]. The interrelation between membership and accession to the Convention is confirmed by its above-mentioned provision (still in force) according to which any party, which ceases to be a member of the Council of Europe, shall cease to be a party to the Convention within a period of one year. According to the website of the lists of treaties of the Council of Europe at present the Convention is open for both *member states* and *European and Non-European non-member states* of the Council of Europe[32]. The non-member states may become parties thereto, upon invitation by the Committee of the Ministers of the Council of Europe and by means of the procedure of accession[33]. In the early 90's and later the countries in Central and Eastern Europe became members of the Council of Europe but only Slovakia ratified in 2001 the Convention and it made the declaration under the optional clause only later in 2004.[34]

Finally the application of the Convention is determined also by the fact that most of the reservations exclude the legal effect of the provisions of its Chapter III relating to arbitration. Perhaps this may be explained by the uncommon provision of Article 26, which states that if nothing is laid down in the special agreement or no special agreement has been made, the Arbitral Tribunal shall decide *ex aequo et bono*. Since the resort to conciliation, which is the third way of dispute-settlement provided for by the Convention may rest also on alone

[30] See European Interim Agreement on Social Security Schemes Relating to Old Age, Invalidity and Survivors, adopted 19 December 1953, Article 14; European Convention on Social and Medical Assistance, adopted 11 December 1953, Article 22; European Cultural Convention, adopted 19 December 1954, Article 9 para. 4, etc.

[31] YANKOV, ALEXANDER: The integration of Central and Eastern European States into a common European system for peaceful settlement of disputes. In BARDONNET op. cit. 447–448.

[32] http://conventions.coe.int/Treaty/EN/v3MenuEtats.asp

[33] http://conventions.coe.int/general/v3IntroAccessNMSENG.asp

[34] In fact after a long interval since 1980 (following Liechtenstein's ratification) Slovakia has been the first and until now the last state ratifying the Convention. Also it is interesting to note that the Czech Republic, Slovakia's co-state in the former Czechoslovakian Federation, has still taken no steps to recognize the compulsory jurisdiction of the ICJ.

consent *ad hoc*, the real scope of application of the Convention is determined by its jurisdictional clause.

4. The Cases of Invocation of the Jurisdictional Clause of the Convention

1) In the *Case of the North Sea Continental Shelf* (Germany/Denmark and Germany/Netherlands) the ICJ joined the two cases upon the request of the three parties. Since Germany was not a party to the Statute of the ICJ, by declaration of 29 April 1961 and in conformity with the Resolution 9 (1946)[35] of the Security Counci1 of the United Nations of 15 October 1946 on conditions under which the ICJ should be open to States not parties to the Statute of the Court, it accepted the jurisdiction of the Court in respect to all disputes which might arise between Germany and any of the parties to the European Convention of 29 April 1957 for the Peaceful Settlement of Disputes. Beside Germany, Denmark and Netherlands were parties to the Convention, too. A special agreement concluded between Germany and Denmark provided for the submission to the ICJ of the difference between the two states concerning the delimitation of the continental shelf in the North Sea. The special agreement among others rested upon the obligation assumed by the two states under Articles 1 and 28 of the European Convention for the Peaceful Settlement of Disputes to submit to the judgment of the ICJ all international legal controversies[36]. Similar special agreement was concluded between Germany and Netherlands.

2) In the *Case of Certain Property* (Liechtenstein *v.* Germany) Liechtenstein instituted proceedings against Germany concerning "decisions of Germany […] to treat certain property of Liechtenstein nationals as German assets […] seized for the purposes of reparation or restitution as a consequence of World War II […] without ensuring any compensation."

[35] http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/036/72/IMG/NR003672.pdf?OpenElement

[36] Special Agreement for the submission to the International Court of Justice of a difference between the Kingdom of Denmark and the Federal Republic of Germany concerning the delimitation, as between the Kingdom of Denmark and the Federal Republic of Gemany, of the continental shelf in the North Sea; Special Agreement for the submission to the International Court of Justice of a difference between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the delimitation, as between the Federal Republic of Germany and the Kingdom of the Netherlands, of the continental shelf in the North Sea. In *International Court of Justice. Pleadings, oral arguments, documents. North Sea Contental Shelf Cases.* Volume I. 1968, 6, respectively 8.

In 1945, Czechoslovakia – during World War II an allied country and a belligerent against Germany – through a series of decrees (the Beneš decrees) seized German and Hungarian property located on its territory. Czechoslovakia applied those decrees not only to German and Hungarian nationals, but also to other persons allegedly of German or Hungarian origin or ethnicity. For this purpose it treated the nationals of Liechtenstein as German nationals. A decision of the Federal Constitutional Court of 28 January 1998 concerned a Pieter van Laer painting which was among the Liechtenstein property seized in 1945, and which was in possession of the Historic Monument Offices in Brno, Czech Republic, a State entity of the Czech Republic. It was brought to Germany for the purposes of an exhibition, and thus came into possession of the Municipality of Cologne. At the request of the Reigning Prince, Prince Hans Adam II, acting in his private capacity, the painting was attached pending determination of the claim by the German courts. Eventually, however, the claim failed. The Federal Constitutional Court held that the German courts were required by Article 3 of the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed by the United States of America, the United Kingdom, France and the Federal Republic of Germany, at Bonn on 26 May 1952 (in force from 5 May 1955, hereinafter Settlement Convention) to treat the painting as German property in the sense of the Convention. Accordingly the painting was released and returned to the Czech Republic. The application of Liechtenstein claimed that the decision of the Federal Constitutional Court was unappealable, and was attributable to Germany as a matter of international law and was binding upon Germany[37].

As a basis for the Court's jurisdiction, Liechtenstein invoked Article 1 of the European Convention for the Peaceful Settlement of Disputes. For this case it administered to Lichtenstein the only legal title for proceedings against Germany at the ICJ.

Germany raised six preliminary objections to the jurisdiction of the Court and the admissibility of Liechtenstein's application. One of them maintained that the application had to be rejected on the grounds that the Court lacked jurisdiction *ratione temporis* to decide the dispute. Germany asserted the dispute fell outside the jurisdiction of the Court by virtue of Article 27 para. a) of the European Convention for the Peaceful Settlement of Disputes. In its view, such a dispute related to facts or situations prior to 18 February 1980, the date when the Convention entered into force as between Germany and Liechtenstein. The ICJ found that the decisions of the German courts in the Pieter van Laer Painting case could not be separated from the Settlement Convention and the Beneš Decrees (*in concreto* Decree No. 12 of 21 June 1945), and therefore the

[37] ICJ Press Release 2001/14, 1 June 2001.

latters were the source or real cause of the dispute. In light of the provisions of Article 27 para. a) of the Convention, Germany's preliminary objection was therefore upheld, and consequently the Court found that due to lack of jurisdiction it could not rule on Liechtenstein's claims on the merits[38].

A judgment on merits undoubtedly would be of great interest to Hungary since the Court probably would not be in the position to avoid legal evaluation of the Beneš Decrees.

3) In the next case *(Case of Jurisdictional Immunities of the State)* it was Germany, which invoked Article 1 of the Convention as the basis for instituting proceedings before the Court against the Italian Republic. Germany made the declaration under the optional clause on 30 April 2008 but between Germany and Italy the jurisdictional clause of the Convention entered into force on 18 April 1961, when it was ratified by Germany. In its application Germany alleged that "[t]hrough its judicial practice […] Italy has infringed and continues to infringe its obligations towards Germany under international law". In its application, Germany contended: "In recent years, Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State. The critical stage of that development was reached by the judgment of the Corte di Cassazione of 11 March 2004 in the Ferrini case, where [that court] declared that Italy held jurisdiction with regard to a claim […] brought by a person who during World War II had been deported to Germany to perform forced labour in the armaments industry. After this judgment had been rendered, numerous other proceedings were instituted against Germany before Italian courts by persons who had also suffered injury as a consequence of the armed conflict." The Ferrini judgment having been recently confirmed "in a series of decisions delivered on 29 May 2008 and in a further judgment of 21 October 2008", Germany "is concerned that hundreds of additional cases may be brought against it"[39].

Italy submitted a counter-claim by which it asked the Court to declare that 1) Germany had violated this obligation with regard to Italian victims by denying them effective reparation; 2) Germany's international responsibility was engaged for this conduct; 3) […]. Germany denied that the counter-claim had met the requirements of jurisdiction. It noted that Italy based the Court's jurisdiction over its counter-claim on Article 1 of the Convention and that

[38] *Case of Certain Property (Liechtenstein v. Germany)* Judgment of 10 February 2005. http://www.icj-cij.org/docket/index.php?p1=3&code=la&case=123&k=d9&PHPSESSID=08e216010eaa9baf657b8e537cfd1a70

[39] *Case of Jurisdictional Immunities of the State (Germany v. Italy)*, Application of 23 December 2008, http://www.icj-cij.org/docket/files/143/14925.pdf?PHPSESSID=08e216010eaa9baf657b8e537cfd1a70

Germany contended that, under Article 27 para. a) of that same Convention, the Court did not have jurisdiction *ratione temporis* over the counter-claim, because the provisions of the Convention "shall not apply to […] disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute", which, according to Germany, was the case in this instance. The Court proceeded to find that the dispute that Italy intended to bring before the Court by way of its counter-claim related to facts and situations existing prior to the entry into force of the European Convention as between the parties, namely, the legal régime established in the aftermath of the Second World War. That dispute accordingly fell outside the temporal scope of the Convention; the counter-claim therefore did not come within the Court's jurisdiction as required by Article 80, paragraph 1, of the Rules of Court. At the same time the Court observed that it did not need address the question whether the counter-claim was directly connected with the subject matter of the claims presented by Germany.[40] The latest development in the case was that on 13 January 2011 Greece requested permission to intervene in the proceedings referring to legal interest[41].

The case is pending. Should the ICJ not find a lack of jurisdiction it may face the challenge to rule on merits the issue whether could the sovereign immunity of state be dispensed with or even withdrawn for violations of *jus cogens* including human rights in the scope of *acta jure imperii*[42].

4) The jurisdictional clause of the Convention was applied in settlement of a minority's protection dispute, too. In 1971 with reference to the Convention Austria and Italy concluded an agreement which was enforced in 1992 and which was in favour of the German-speaking population of the Italian Trentino Alto Adige. This agreement provided for the possibility that a bilateral dispute of minority issue might be submitted to the ICJ with a very important stipulation which suspended the *ratione temporis* effect of the Convention, i. e. the compulsory jurisdiction of the ICJ got retroactive effect as from 5 September

[40] Order of 6 July 2010 of the ICJ, available at: http://www.icj- cij.org/docket/files/143/16027.pdf?PHPSESSID=08e216010eaa9baf657b8e537cfd1a70

[41] See details of Greek application: http://www.icj-cij.org/docket/files/143/16294.pdf . Seealso *infra* note 42, for the European Court of Human Rights (hereinafter ECHR) has already examined some of the Greek judgments that form the base of the legal interest of Greece to intervene.

[42] In *Case of Kalogeropoulou and Others v. Greece and Germany* (appl. No. 59021/00) in a Decision brought 12 December 2002 the ECHR examining judgments rendered by Greek courts in actions for damages against Germany brought by relatives of victims of massacre perpetrated by Nazi occupation forces in Distomo (Greece), did not find it established, that there was yet acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity [point D/1/a.]. The Court observed, however, that these findings do not preclude a development in customary international law in the future.

1946 (the date of the conclusion of the so-called De Gasperi-Gruber South Tyrol agreement).

5. Conclusion

Two states form the connecting link in the four cases above reviewed: Germany and Italy. As Italy has not made yet a declaration recognizing the compulsory jurisdiction of the ICJ and Germany made such one only 21 months ago, the jurisdictional clause of the Convention may be still very useful in supplying the deficiency in relation to these two states. The value of the Convention should be not measured by the rare cases of its application, its existence as a dispute-settlement instrument is valuable in itself. In the opinion of Seidl-Hohenveldern the Convention often plays a *fleet in being* role[43].

Considering the ICJ a central institution for the peaceful settlement of legal disputes which in accordance with the UN Charter is the principal judicial organ of the UN, the bodies of the Council of Europe regularly stress the importance of the acceptance of the compulsory jurisdiction of the ICJ, always referring to the Convention. Last time it was promoted by Recommendation CM/Rec(2008)8 of the Committee of Ministers to member states on the acceptance of the jurisdiction of the International Court of Justice[44].

[43] Seidl-Hohenveldern op. cit. 184.

[44] http://www.coe.int/t/e/legal_affairs/legal_co- operation/public_international_law/texts_%26_documents/Rec%282008%298%20E.pdf

GENERAL PRINCIPLES OF LAW AS A SOURCE OF INTERNATIONAL LAW

GÁBOR SULYOK[1]

General principles of law are frequently ranked among the most controversial categories of the doctrine of sources of international law. Nearly each and every important parameter of these principles has induced prolonged and intense academic debates ever since the advisory committee of distinguished jurists entrusted with the preparation of a report on the Statute of the Permanent Court of International Justice decided nine decades ago to include "the general principles of law recognized by civilized nations" in the enumeration of sources that would be applied by the future judicial body.[2] In the spirit of expediency and positive experiences, a quarter-century later the drafters of the Statute of the International Court of Justice took over from the preceding document the provision on applicable sources in an identical shape, save for a minor specifying addendum.[3] Given that the academic discussion persevered into the period of contemporary international law, it remains a matter of debate whether general principles of law form part of positive law or natural law, originate from domestic law or international law, carry a distinctively private law or public law content, possess a subsidiary or supreme character, qualify as an independent source of international law, and occupy a separate, if any, position in the international legal order. Finally, the methods and conditions of their international applicability likewise yield much disagreement in the scholarly community.[4] The present study seeks to examine whether general principles of law constitute a source of international law based on the assumption that these

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[2] Statute of the Permanent Court of International Justice, Article 38, paragraph 3. Promulgated in Hungary by Act No. I of 1926.

[3] Statute of the International Court of Justice, Article 38, paragraph 1, sub-paragraph c). Promulgated in Hungary by Law-Decree No. 18 of 1974.

[4] BIN CHENG: *General Principles of Law, as Applied by International Courts and Tribunals.* Reprint. Cambridge: Cambridge University Press, 1994. 2–5.

rules belong to the domain of positive law and have their origins in national legal systems.

I.

Even though the extensive debate on the legal nature of general principles of law recognized by civilized nations evolved only after the adoption of the Statute of the Permanent Court of International Justice, representatives of legal doctrine had shown great interest in the interaction of international law and national legal systems as early as in the first half of the 19th century. Writings of contemporaneous publicists examined, for example, the relationship of international law and domestic law, the effects of domestic law on the development of international law as well as the value of certain municipal laws and regulations concerning the international conduct of states as potential sources of international law – a topic that requires closer scrutiny for our investigation. Notwithstanding that these scientific treatises, as "subsidiary means for the determination of rules of law",[5] offer an obvious point of departure in a quest to understand the role played by provisions originating from domestic law in traditional international law, it needs to be noted at the outset that the exploration of former state of affairs is an extremely complicated task in this case.First and foremost, considerable difficulties are caused by the numerous layers of meaning and inconsistent application of the expression "source of law", as a result of which the borders between sources, causes and evidences of international law become all too often indistinct. The following critical remarks, made by a prestigious scholar of that period, clearly indicate the gravity of the problem:

"[T]he term »source of law« is made use of in different meanings by the different writers on International Law. It seems to me that most writers confound the conception of »source« with that of »cause«, and through this mistake come to a standpoint from which certain factors which influence the

[5] Both Article 38, paragraph 4, of the Statute of the Permanent Court of International Justice and Article 38, paragraph 1, sub-paragraph d) of the Statute of the International Court of Justice label the teachings of the most highly qualified publicists "as subsidiary means for the determination of rules of law". The Supreme Court of the United States had earlier pronounced in a similar manner. The Paquete Habana, 175 U.S. 700 (1900). Selected scholarly writings were used as *quasi* sources of law in the period of traditional international law. In the 1860s, for example, the Chinese Government officially adopted the translation of a famous treatise by Henry Wheaton and instructed authorities dealing with foreigners to apply it. CSARADA, JÁNOS: *A nemzetközi jog története a legrégibb időktől a vesztfáli békéig, tekintettel Magyarország nemzetközi viszonyaira a középkorban.* [The History of International Law from Ancient Times to the Peace of Westphalia, With Regard to the International Relations of Hungary in the Middle Ages] Budapest: Eggenberger-féle Könyvkereskedés, 1894. 22–23.

growth of International Law appear as sources of rules of the Law of Nations."[6]

The situation is further aggravated by the fact that the literature of traditional international law attributed different significance to the gradually diminishing rules of natural law: some publicists defined international law as the law of nature realized in the relations of sovereign states, others professed the parallel existence of natural law and positive international law, and still others expressly denied the *raison d'être* of natural law and heralded the exclusive domination of positive international law. Representatives of these schools of thought evidently approached both the system of sources of international law and the question of international application of domestic legal rules in a divergent manner.

Finally, the most formidable obstacle in the way of synthesization of erstwhile views is the vagueness, overlapping and disturbingly chaotic literary portrayal of boundaries and contents of sources of law and other relevant legal categories. Hence an analysis focusing on the position assumed in international law by provisions originating from domestic law unavoidably brings in scope various principles of natural law, morality and religion, rules of customary law, judicial decisions, cases of analogy, surviving elements of Roman Law, municipal laws and regulations concerning the international conduct of states as well as fields and products of parallel domestic law-making (*Parallelgesetzgebung*). Notwithstanding these difficulties, the formulation of a few general conclusions seems to be possible.

It may be observed that until the end of the 19th century, a significant proportion of scholars of traditional international law, apart from a few exceptions,[7] considered municipal laws and regulations exerting, on account of their subject, substantial influence on international relations as a source of international law.[8]

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[6] Lassa Oppenheim: *International Law: A Treatise.* Vol. I. London–New York–Bombay: Longmans, Green, and Co., 1905. 20. In a similar manner, see, Charles G. Fenwick: *International Law.* London: George Allen & Unwin Ltd., 1924. 61.

[7] Henry Bonfils: *Manuel de droit international public (Droit des gens).* Paris: Arthur Rousseau, 1894. 28–29; Frantz Despagnet: *Cours de droit international public.* Paris: L. Larose, 1894. 70–71; Richard Wildman: *Institutes of International Law.* Vol. I. London: William Benning & Co., 1849. 1–2, 20.

[8] Johann C. Bluntschli: *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt.* Nördlingen: Druck und Verlag der C. H. Beck'schen Buchhandlung, 1868. 58–59; Carlos Calvo [Charles]: *Le droit international théorique et pratique, précédé d'un exposé historique des progrès de la science du droit des gens.* Quatrième édition, revue et complétée. Tome I. Paris – Berlin: Guillaumin et Cie. – Puttkammer et Mühlbrecht, 1887. 161–162; Pasquale Fiore: *Nouveau droit international public, suivant les besoins de la civilisation moderne.* Deuxième édition. (Charles Antoine trad.) Tome I. Paris: G. Pedone–Lauriel, 1885. 158–159.; Henry W. Halleck: *International Law, or Rules Regulating the Intercourse of States in Peace and War.* San Francisco: H. H. Bancroft & Co., 1861. 57–58; Franz von Holzendorff – Alphonse Rivier: *Introduction au droit des gens: recherches philosophiques, historiques et bibliographiques.* Edition française. Hamburg: Verlagsanstalt und Druckerei A. G., 1889. 83.; Thomas J. Lawrence: *The Principles of International Law.* Boston: D. C.

Thus various rules established by civilized states, primarily by former great powers, pertaining to the treatment of aliens, international trade, diplomatic and consular intercourse, use of international rivers, navigation on the seas, jurisdiction of prize courts, or neutrality in war often appeared as sources of the law of nations. These provisions were in part elevated to the international level as a result of parallel domestic law-making governing the same subject-matter. Several enactments, however, gained international recognition in absence of analogous national legislative acts, owing solely to their specific content, as illustrated by the Law of Guarantees adopted by the Kingdom of Italy to settle the status of and relations with the Holy See.[9]

Even though these municipal laws and regulations are only associated indirectly with the topic of general principles of law, their categorization as a source of law is of utmost importance, since it indicates the conviction of traditional legal doctrine that international law, regardless of its special scope and characteristics, may and does draw on the technically more advanced national legal systems. The category of parallel domestic law-making is especially noteworthy in this regard due to its rationale, which clearly corresponds to the logic behind the international application of general principles of law recognized by civilized nations.

It needs to be added that the notion of principle of law also emerged in treatises published during the 19th century, albeit in a fairly indistinct manner: in line with the context, it belonged either to the domain of natural law or positive law, and referred either to a particular rule of conduct or an abstract principle underlying concrete legal norms or the causes and foundations of international law itself. Nonetheless, it should be noted that selected authors recognized the international relevance and nature of principles derived from Roman Law or domestic law as a source of international law either explicitly or implicitly, by including analogy in the enumeration of sources of law.[10] That recognition was reflected by the practice of international courts of arbitration and other judicial bodies, which habitually applied rules originating from domestic law in order to resolve disputes submitted to them.[11] Given that the judgments of

Heath and Co., 1895. 105–106; FEDOR F. MARTENS: *Traité de droit international*. (Alfred Léo trad.) Paris: A. Chevalier-Marescq, 1883. 252–253.; PAUL L. E. PRADIER-FODÉRÉ: *Traité de droit international public européen & américain, suivant les progrès de la science et de la pratique contemporaines.* Tome I. Paris: G. Pedone-Lauriel, 1885. 88–89.; HENRY WHEATON: *Elements of International Law, with a Sketch of the History of the Science.* Philadelphia: Carey, Lea & Blanchard, 1836. 49.

[9] Legge delle Guarentigie, n. 214, 13 maggio 1871.

[10] CALVO op. cit. 165.; HALLECK op. cit. 55–57.; PRADIER-FODÉRÉ op. cit. 89. See also, ROBERT PHILLIMORE: *Commentaries upon International Law.* Vol. I. Philadelphia: T. & J. W. Johnson, 1854. 66–69.

[11] For a few examples, see, FABIÁN O. RAIMONDO: *General Principles of Law in the Decisions of*

these bodies were classified as a source of law by a number of contemporaneous textbooks, certain provisions of domestic law could have penetrated the system of international law through judicial decisions, as well.

The general opinion perceptibly changed at the turn of the 19th and 20th centuries. Writings of international lawyers published between the beginning of the 20th century and the end of the Second World War reveal a completely different picture as regards the international treatment of provisions originating from domestic law. The overwhelming majority of literary works in those decades did no longer categorize the aforementioned rules of national legal systems as a source of international law, and devoted at best a few remarks to them on the subject of evidences of customary law.[12] Therefore, the community of scholars, who considered the products of parallel domestic law-making and other municipal laws and regulations concerning the international conduct of states as a source of international law, basically vanished – their place was taken over by an initially diminutive group of authors, who advocated that general principles of law, as contained in the Statute of the Permanent Court of International Justice, constitute an independent source of law.[13]

This phenomenon can be explained by both practical and theoretical reasons. It is conceivable that the change occurred in the wake of a redistribution of power generated by the combined effects of the antecedents and consequences

International Criminal Courts and Tribunals. Leiden – Boston: Martinus Nijhoff Publishers, 2008. 8. *et seq.* On the history of international judicial bodies, see, Lamm, Vanda: *Az államok közötti viták bírói rendezésének története.* [The History of Judicial Settlement of Disputes between States] Budapest: Akadémiai Kiadó, 1990.

[12] Paul Fauchille: *Traité de droit international public.* Huitième édition, entièrement refondue, complétée et mise au courant, du Manuel de droit international public de M. Henry Bonfils. Tome I. Paris: Rousseau et Cie., 1922. 41., 48–49.; Fenwick op. cit. 62.; William E. Hall: *A Treatise on International Law.* Eighth edition. (A. Pearce Higgins ed.) Oxford: Clarendon Press, 1924. 5.; Franz von Liszt: *Das Völkerrecht systematisch dargestellt.* Siebente Auflage. Berlin: Verlag von O. Häring, 1911. 11–12.; Karl Melczer: *Grundzüge des Völkerrechts, unter Berücksichtigung der Friedensverträge für Studienzwecke zusammengestellt.* Wien–Leipzig: Verlag Carl Wilhelm Stern, 1922. 21–22.; Oppenheim op. cit. 24.; Karl Strupp: *Grundzüge des positiven Völkerrechts.* Dritte, völlig neubearbeitete Auflage. Bonn: Ludwig Röhrscheid Verlag, 1926. 8., 10.; John Westlake: *International Law.* Part I. Cambridge: University Press, 1904. 14., 16.

[13] Edwin M. Borchard: The Theory and Sources of International Law. In *Recueil d'études sur les sources du droit en l'honneur de François Gény.* Tome III. Paris: Librairie du Recueil Sirey, 1934. 354–356.; Louis Le Fur: La coutume et les principes généraux du droit comme sources du droit international public. *ibid.* 366–372.; Alfred Verdross: Les principes généraux du droit comme source du droit des gens. *ibid.* 383–386.; Charles de Visscher: Contribution à l'étude des sources des droit international, *ibid.* 395–398. See also, Hersch Lauterpacht: *Private Law Sources and Analogies of International Law, with Special Reference to International Arbitration.* London: Longmans, Green, and Co., 1927. 69–71. For the attitude of states, see, James B. Scott (ed.): *The Proceedings of the Hague Peace Conferences: The Conference of 1907.* Vol. I. New York: Oxford University Press, 1920. 351.

of the First World War. Great powers of the 19th century may have possessed sufficient authority to induce the international community to recognize products of their domestic law-making pertaining to international relations as a regulatory model or even as a source of law. That authority, however, came to an end with the confrontation of great powers and the ensuing rearrangement of international influence, hence municipal laws were degraded to mere facts from the standpoint of international law.[14] Provisions of domestic law remained relevant for international law in a single case only: if they were generally established in and recognized by the legal systems of members of the international community. Still it is most likely that this development was accompanied by a fundamental alteration of academic attitude, as well.

The "abandonment" of domestic law may have been prompted by the monism-dualism debate, which surfaced around the end of the 19th century concerning the relationship of international law and domestic law. It is common knowledge that Heinrich Triepel, the principal proponent of the dualistic school of thought, published his famous work entitled "*Völkerrecht und Landesrecht*" in the last year of that century, and described international law and domestic law as distinct legal systems – two circles that at most touch one another, but never overlap.[15] Thus international legal norms may produce an effect in domestic law only if states receive and incorporate them into their respective legal systems by means of a special process called transformation. Nevertheless, it is much less known that the renowned scholar also examined the possibility of admission of domestic rules in international law in a separate chapter, as a result of which he completely ruled out the reception of public law, and expressed serious doubts regarding the reception of private law. He acknowledged, on the other hand, the existence and necessity of "empty" international provisions that, without carrying out an actual reception, simply refer to the content of certain domestic rules with a view to specify and supplement the vague and sporadic system of international law.[16]

Bearing all this in mind, it may appear that the spreading of the negative position regarding the international relevance of provisions originating from domestic law can be attributed to the emergence and gradual dissemination of the dualistic theory. However, the plausibility of this assertion is greatly undermined by the fact that the alteration of academic attitude involved not only continental, primarily French, German and Italian authors, who actively participated in the developing monism-dualism debate, but also "Anglo-Saxon" publicists, who originally followed the discussion with rather moderate

[14] German Interests in Polish Upper Silezia (Germany v. Poland), Judgment No. 7., 25 May 1926. P.C.I.J. Series A, No. 7., 19.

[15] HEINRICH TRIEPEL: *Völkerrecht und Landesrecht.* Leipzig: Verlag von C. L. Hirschfeld, 1899. 111.

[16] TRIEPEL op. cit. 211–225., 230.

attention.[17] Consequently, the phenomenon under consideration must have been caused by another, more profound change: the complete marginalization of natural law thinking and the consolidation of a purely positivist international legal theory.

It is mainly due to this cause that strong national tendencies cannot be discovered in traditional international law regarding the question whether parallel domestic law-making and other municipal laws and regulations concerning the international conduct of states, and later the general principles of law, constitute a source of international law – a positive or negative answer was primarily determined by the overall perception of the nature of international law and the naturalist or positivist approach of each author. (Traditional Hungarian legal doctrine, which conventionally followed the German example, was likewise divided.[18]) Just as everywhere else, exceptions can certainly be come across. Nevertheless, the previous statement is excellently illustrated by the attitude of extreme positivists, who were disinclined to take general principles of law into consideration even after the Statute of the Permanent Court of International Justice expressly sanctioned their application.[19]

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[17] An authoritative English opinion later stated that "the entire monist-dualist controversy is unreal, artificial and strictly beside the point". Sir Gerald Fitzmaurice: The General Principles of International Law Considered from the Standpoint of the Rule of Law. *Recueil des Cours*, Tome 92. (1957–II), 71.

[18] Several authors considered municipal laws and regulations concerning the international conduct of states as an independent source of law. Apáthy, István: *Tételes európai nemzetközi jog.* [Positive European International Law] Second, fully modified and expanded edition. Budapest: Franklin-Társulat, 1888. 31.; Csaradą op. cit. 34–35.; Kiss, István: *Európai nemzetközi jog.* [European International Law] Eger: Érsek-Lyceumi Kő- és Könyvnyomda, 1876. 49.; Tassy, Pál: *Az európai nemzetközi jog vezérfonala.* [The Fundamental Line of European International Law] Kecskemét: Scheiber József könyvkereskedő, 1887. 9.; Teghze, Gyula: *Nemzetközi jog.* [International Law] Debrecen: Városi Nyomda, 1930. 27., 32. Others held that the products of parallel domestic law-making, municipal laws and regulations concerning the international conduct of states and general principles of law merely reflected customary law, but did not constitute an independent source of law. Faluhelyi, Ferenc: *Államközi jog.* [Interstate Law] Vol. I. Pécs: Dr. Karl Könyvesbolt Kiadása, 1936. 14.; Irk, Albert: *Bevezetés az új nemzetközi jogba.* [Introduction to the New International Law] Second edition. [Unknown]: Danubia Kiadás, 1929. 11.; Weninger, Vincze L.: *Az uj nemzetközi jog.* [The New International Law] Budapest: Turcsány Antal Kiadása, 1927. 25–26. Still others held that general principles of law constituted an independent source of law. Buza, László: *A nemzetközi jog tankönyve.* [A Textbook of International Law] Budapest: Politzer Zsigmond és Fia Kiadása, 1935. 10.; Csiky, János: *Az általános jogelvek, mint a nemzetközi jog forrása* [General Principles of Law as a Source of International Law] Szeged: Szeged Városi Nyomda és Könyvkiadó, 1934. 10–12., 31.; Kertész, István: *Az állam nemzetközi felelőssége.* [The International Responsibility of the State] Budapest: Grill Károly Könyvkiadóvállalata, 1938. 72–73.

[19] Comparative lawyers also observe that it is extremely difficult to explain the application of such principles to representatives of positivist legal theory. David, René: *A jelenkor nagy jogrendszerei. Összehasonlító jog.* [Les grands systèmes de droit contemporains. Droit comparé] (Margit Dusa trans.) Budapest: Közgazdasági és Jogi Könyvkiadó, 1977. 124.

The academic debate on general principles of law continued in the period of contemporary international law, though its scope and structure have significantly altered. While representatives of traditional legal doctrine mostly discussed whether these principles constitute a source of international law and form part of natural law or positive law, publicists writing after the Second World War needed to face several new problems. Because of fundamental changes in the international political relations and the composition of the international community and the system of international law, "the general principles of law recognized by civilized nations", hitherto contained in Article 38, paragraph 1, sub-paragraph c) of the Statute of the International Court of Justice, have raised previously ignored and entirely novel questions.

Firstly, it should be mentioned that the formerly exclusive jurisprudential reasoning was accompanied by a political and ideological approach during the Cold War that was mostly manifest, quite understandably, in socialist legal theory. Striking as it may sound, the rivalry of western and socialist states also had an impact on general principles of law. Numerous socialist scholars with a worldwide reputation considered the idea of international application of principles originating from domestic law unacceptable, claiming that normative principles common to the opposing systems of socialist and bourgeois law could not exist. Even if certain principles of these legal systems appeared to be identical, they were, in fact, considered to be completely different on account of their class character, social functions and objectives.[20]

This speculation found more than a few proponents, but it could by no means reach absolute exclusivity in socialist legal theory[21] as several attempts were made to refute or refine its categorical statements. Nonetheless, it may be declared that this conception brought, at least for a while, a peculiar new element into the discussion on the nature of general principles of law, thereby arousing the interest of international lawyers and legal comparatists alike.

Despite that many international lawyers have held firm to the established position, according to which general principles originate from national legal systems and constitute an independent source of international law,[22] the

[20] GRIGORIJ I. TUNKIN: *A nemzetközi jog elméletének kérdései.* [Questions of the Theory of International Law] (Hanna Bokor-Szegő, Géza Herczegh, Anna Horváth trans.) Budapest: Közgazdasági és Jogi Könyvkiadó, 1963. 155. In western literature, see, HANS KELSEN: *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems.* London: The London Institute of World Affairs, 1950. 533.

[21] GODEFRIDUS J. H. VAN HOOF,: *Rethinking the Sources of International Law.* Deventer: Kluwer Law and Taxation Publishers, 1983. 140.

[22] MAARTEN BOS: *A Methodology of International Law.* Amsterdam – New York – Oxford: North-Holland Publishing Co., 1984. 68., 72., 75.; ANTONIO CASSESE: *International Law.* Oxford: Oxford University Press, 2001. 155–159.; PIERRE-MARIE DUPUY: *Droit international public.* Septième édition. Paris: Dalloz, 2004. 331–334.; ELIHU LAUTERPACHT (ed.): *International Law: Being the*

consolidation, clarification and development of principles of international law resulted in an important shift in emphasis in contrast to the past debates. A few principles of international law, such as the prohibition of intervention, had already come into existence in the period of traditional international law, but their scientific depiction and practical implementation were rather diverse. In contemporary international law, the Charter of the United Nations and subsequent international instruments finally ascertained the catalogue of principles underpinning the new international order. These principles include, for example, the sovereign equality of states, the prohibition of threat or use of force, the prohibition of intervention, the peaceful settlement of international disputes, and the right to self-determination of peoples.[23] The development of international law, therefore, inevitably brought about the emergence of a position that general principles of law originate from international law rather than domestic law, and are essentially equivalent of the principles of international law. This belief was mainly characteristic of the socialist conception of international law.[24] (The question whether general principles form part of natural law or positive law simultaneously marginalized, although naturalist thoughts turn up in the relevant literature time and again.[25])

Given that the principles of international law assume a conventional or customary form, and as such, do not qualify as an independent source of international law, the combination or synonymous treatment of general principles of law and principles of international law can easily lead to the denial of existence and autonomous legal value of the former category. It is hardly surprising that this scheme was most sympathetic to socialist scholars.

Collected Papers of Hersch Lauterpacht. Vol. I. Cambridge: Cambridge University Press, 1970. 68–70.; Lord Arnold McNair: The General Principles of Law Recognized by Civilized Nations. *British Yearbook of International Law*, Vol. 33. (1957) 6., 15.; Hermann Mosler: General Principles of Law, in Bernhardt, Rudolf (ed.): *Encyclopedia of International Law.* Vol. 7. Amsterdam–New York–Oxford: North-Holland Publishing Co., 1984. 95.; Raimondo op. cit. 1., 39.; Georg Schwarzenberger: *International Law as Applied by International Courts and Tribunals.* Third edition. Vol. I. London: Stevens & Sons Ltd., 1957. 26., 43–44.; Alfred Verdross: *Völkerrecht.* Zweite, völlig umgearbeitete und erweiterte Auflage. Wien: Springer-Verlag, 1950. 114., 116.; Michel Virally: The Sources of International Law. In Max Sørensen (ed.): *Manual of Public International Law.* London–New York: MacMillan & Co. Ltd. – St. Martin's Press, 1968. 121., 146–148.

[23] Charter of the United Nations, Article 2. Promulgated in Hungary by Act No. I of 1956. See also, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. G.A. Res. 2625, 25 GAOR, Supp. 28. (A/8028), 121; Conference for Security and Co-operation in Europe, Final Act. Questions Relating to Security in Europe, 1 (a): Declaration on Principles Guiding Relations between Participating States, Helsinki, 1 August 1975.

[24] Tunkin op. cit. 155.

[25] Lauterpacht (ed., 1970) op. cit. 76–77.; Shabtai Rosenne: *The Perplexities of Modern International Law.* Leiden–Boston: Martinus Nijhoff Publishers, 2004. 40–41.

By and large, it may be concluded that not only scientific, but also political and ideological considerations could induce the rejection of general principles as a source of international law in the decades after the Second World War. Naturally, the traditional negative approach too survived, and persisted to refute the existence of general principles derived from domestic law and their characterization as a source of international law by a purely jurisprudential, namely positivist or voluntarist, reasoning.[26]

In addition to opinions advocating the domestic or international origins of general principles of law or denying their *raison d'être*, several intermediate theories emerged that, although never coalesced into a coherent school of thought, created a new situation. One such theory questions the feasibility of investigating the roots of general principles, claiming that they do not belong to a particular system of law, but are common to them all – they spring from the essence of law, and equally permeate domestic law and international law.[27] Further intermediate theories maintain that the notion of general principles encompasses principles originating from both domestic law and international law. The composition of the latter group of principles varies in literature: the category may include the principles of international law, general principles of international law, principles of international organizations, principles of transnational law, and principles of supranational law.[28] Finally, a peculiar suggestion should also be recalled here, according to which general principles of law originate from national legal systems, but rest on a conventional or customary basis in international law.[29]

It should be noted that socialist theories equating general principles of law with principles of international law disappeared with the demise of the bipolar world order, which caused a shift in the weight of different schools of thought.

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[26] KELSEN op. cit. 533.

[27] CHENG op. cit. 390.; DANILO TÜRK: *A nemzetközi jog alapjai.* [Foundations of International Law] (Orsolya Gállos trans.) Szeged: Szegedi Egyetemi Kiadó, 2009. 27., 31.

[28] IAN BROWNLIE: *Principles of Public International Law.* Sixth edition. Oxford: Oxford University Press, 2003. 18.; VLADIMIR Đ. DEGAN: *Sources of International Law.* The Hague–Boston: Martinus Nijhoff Publishers, 1997. 137.; PETER MALANCZUK: *Akehurst's Modern Introduction to International Law.* Seventh revised edition. London: Routledge, 1997. 48.; CHARLES ROUSSEAU: *Droit international public.* Onzième édition, avec chapitres supplémentaires par Pierre-Marie Dupuy. Paris: Dalloz, 1987. 88–89.; OSCAR SCHACHTER: *International Law in Theory and Practice.* Dordrecht–Boston–London: Martinus Nijhoff Publishers, 1991. 50.; CHRISTOPH SCHREUER: The Waning of the Sovereign State: Towards a New Paradigm of International Law? *European Journal of International Law*, Vol. 4. No. 1. (1993), 457.; JOHN L. SIMPSON – HAZEL FOX: *International Arbitration: Law and Practice.* London: Stevens & Sons Ltd., 1959. 132.

[29] PAUL GUGGENHEIM: *Traité de droit international public, avec mention de la pratique internationale et suisse.* Tome I. Genève: Librairie de l'Université, Georg & Cie., 1953. 152. A different author believes that general principles of law constitute a separate, *sui generis* category of customary law. BENEDETTO CONFORTI: *International Law and the Role of Domestic Legal Systems.* (René Provost, Shauna van Praagh trans.) Dordrecht: Martinus Nijhoff Publishers, 1993. 63–64.

Notwithstanding that shift, the contemporary literature remains divided over the origins and content of general principles.[30] (Hungarian legal doctrine has likewise been fragmented, especially before the political transition.[31])

From among the principles of international law, the sovereign equality of states should be given special emphasis as it enriched the dialogue concerning general principles of law with yet another important component. In spite of sovereignty being coeval with states and an essential attribute of statehood,[32] the universal recognition of legal equality of states and the amalgamation of the principles of sovereignty and equality only took place after the Second World War.

The attitude of traditional legal doctrine was determined by an axiomatic distinction of civilized, semi-civilized and uncivilized states.[33] International

[30] The significance of political and ideological considerations simultaneously decreased, although a global consensus has not been reached. Christian Tomuschat: International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law. *Recueil des Cours*, Tome 281. (1999) 399.

[31] Several authors held that general principles of law originated from domestic law, but did not constitute an independent source of international law. Hanna Bokor-Szegő: Les principes généraux du droit. In Mohammed Bedjaoui (ed.): *Droit international: bilan et perspectives.* Tome 1. Paris: Editions A. Pedone – UNESCO, 1991. 228–229.; Buza, László: *A nemzetközi jog fő kérdései az új szellemű nemzetközi jogban.* [Main Issues of International Law in the New Spirit of International Law] Budapest: Akadémiai Kiadó, 1967. 32–33. (note the interesting change in attitude compared to his previous position, *supra* note 17.); Herczegh, Géza: Az általános jogelvek kérdése a Nemzetközi Bíróság Statutuma szerint. (A Statutum 38. cikkének értelmezéséhez.) [The Question of General Principles of Law under the Statute of the International Court of Justice. (On the Interpretation of Article 38 of the Statute)] In *Az Állam- és Jogtudományi Intézet Értesítője*, Vol. IV. No. 1–2. (1961), 214.; Géza Herczegh: *General Principles of Law and the International Legal Order.* Budapest: Akadémiai Kiadó, 1969. 97–98. See also, Samu, Mihály: A nemzetközi jog fogalma és tagozódása. [The Concept and Structure of International Law] *Jogtudományi Közlöny*, Vol. XXI. No. 10. (October 1966), 523. Others held that general principles of law were equivalent of the principles of international law. Hajdu, Gyula (ed.): *Nemzetközi jog.* [International Law] Budapest: Tankönyvkiadó, 1954. 18.; Haraszti, György: *A Nemzetközi Bíróság joggyakorlata 1946–1956.* [The Practice of the International Court of Justice 1946–1956] Budapest: Közgazdasági és Jogi Könyvkiadó, 1958. 17–18. Still others held that the category of general principles of law encompassed principles originating from both domestic law and international law. Vitányi, Béla: Haraszti György: A Nemzetközi Bíróság joggyakorlata 1946–1956. [György Haraszti: The Practice of the International Court of Justice 1946–1956] *Jogtudományi Közlöny*, Vol. XIV. No. 1. (January 1959), 38. Finally, a fourth position held that domestic provisions applied by analogy became an independent source of international law. Nagy, Károly: Az analógia és a joghézag kérdései a nemzetközi jogban. [Questions of Analogy and Gaps in International Law] In *Jogi tanulmányok Dr. Buza László egyetemi tanár, akadémikus oktatói működésének 50. évfordulójára.* [Legal Studies in Honour of Professor László Buza, Member of the Academy, on the 50th Anniversary of His Educational Activities] *Acta Juridica et Politica*, Vol. V. No. 1–15. (1958), 224–225.

[32] Convention on the Rights and Duties of States, Montevideo, 26 December 1933, Article 1. Sovereignty can be identified as "government" in the enumeration of conceptual elements of statehood set forth by the convention.

[33] For a theoretical background, see, Holzendorff–Rivier op. cit. 10–13. On the inequality and relative value of states, see, James Lorimer: *The Institutes of the Law of Nations: A Treatise of*

law merely governed the relations of civilized states – these states composed the "international legal community" that, in addition to the legal bonds, was also a political, cultural, religious, moral and interest community. This conglomerate had initially comprised the Christian states of Europe, but its membership expanded over time: it gradually embraced the newly independent states of the American continent, the protectorates and colonies of European great powers as well as Turkey and Japan, from the mid-19th century onward. A treatise published in the early 20th century asserted that the number of civilized states exceeded forty.[34]

The principle of equality prevailed between civilized states only. Semi-civilized and uncivilized states were afforded by international law limited protection or none at all. The former belonged to the international legal community insofar as they gave up their isolative foreign policies and concluded international treaties with civilized states to regulate particular relations therewith. This group included, for example, China, Persia and Siam – entities that received an invitation to the Hague Peace Conferences, as well. Miscellaneous other international relations of semi-civilized states and the entire spectrum of international relations of uncivilized states were governed at most by the "fundamental principles of Christianity and humanity".[35]

This blatantly unequal, colonialist approach was challenged even after the First World War,[36] but its total eradication was realized only by the adoption of the Charter of the United Nations and the declaration of the sovereign equality of states.[37] Bearing that in mind, it is understandable how and why several provisions of the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice refer to civilization.[38] (It should be stressed that the activities of the League of Nations greatly contributed to

the Jural Relations of Separate Political Communities. Vol. I. Edinburgh – London: William Blackwood and Sons, 1883. 168. *et seq.*

[34] LISZT op. cit. 2–4., 6.

[35] LISZT op. cit. 5–6. A more realistic contemporaneous description suggested that the relationship of "barbarian peoples" and civilized states "today is still based on total arbitrariness, and lacks regulation by any legal principle". CSARADA op. cit. 23.

[36] For example, a later edition of the already cited treatise by Franz von Liszt omitted the epithets "semi-civilized" and "uncivilized", and referred to "other non-European states" and "states that have not yet fully integrated into the international legal community" instead. FRANZ VON LISZT: *Das Völkerrecht systematisch dargestellt.* Zwölfte Auflage. (Max Fleischmann bearb.) Berlin: Verlag von Julius Springer, 1925. 5–6. Other works categorically denied the *raison d'être* of every distinction. STRUPP op. cit. 7.

[37] Charter of the United Nations, Article 2, paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

[38] Covenant of the League of Nations, Article 22, paragraphs 1 and 6. Promulgated in Hungary by Act No. XXXIII of 1921. Statute of the Permanent Court of International Justice, Articles 9 and 38, paragraph 3.

the future abolition of distinction between states regardless of references to civilization in its founding document.)

With the consolidation of the sovereign equality of states, the academic debate on general principles extended over the requirement of recognition by civilized nations. No less than three major conceptions have crystallized as regards the interpretation of the traditional phrase "civilized nations" in contemporary international law: the first sustains, the second declines, while the third endows it with new content.

Interestingly enough, there have been writings published after the Second World War that used the concept of civilized nations upon the introduction of general principles with absolute unaffectedness and devoid of critical remarks.[39] The explanation is quite simple: certain representatives of international legal doctrine reacted slowly to the fundamental alteration of the normative background. (This delay was not specific to general principles of law, and can be demonstrated in other fields of international law.) However, we may also come across scientific opinions that overtly praised the phrase at issue nearly a decade after the explicit recognition of the principle of sovereign equality of states, pointing out that its draftsmen "reintroduced the standard of civilisation into international law and drew a sharp, and necessary, dividing line between civilised and barbarian nations".[40] Even so the approach, which uncritically construed the reference to civilized nations in line with its erstwhile meaning, has gradually disappeared owing to a lack of widespread theoretical and practical support, and nowadays can be recalled only as a curiosity.

The predominant view in contemporary international legal doctrine professes that the requirement of recognition by civilized nations, in its original form, has become anachronistic, superfluous and intolerable. In order to comprehend this process, we need to reach back into the period of traditional international law again. An early perception held that the term "nation" was used as a synonym of "peoples" in Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice. The epithet, therefore, had an important function: it was meant to indicate that exclusively the domestic laws of human communities with developed legal systems could be taken into account for the derivation of general principles, while the primitive systems of law were excluded from consideration.[41] This perception, however, remained in isolation. The adequate interpretation is that the term "nation" has always denoted, and still denotes, "state" – thus the epithet "civilized" originally designated the group of states comprising the international legal community. It was these states that could

[39] Guggenheim op. cit. 149–156.; Kelsen op. cit. 533–534.; Verdross (1950) op. cit. 113–116.

[40] Georg Schwarzenberger: Foreword. In Cheng op. cit. xi. The same author later published a more progressive interpretation of the phrase "civilized nations", as well. *Infra* note 48.

[41] Cheng op. cit. 25.

submit their disputes to international arbitration or judicial settlement, and it was their legal systems that could serve as a pool of resources in an eventual application of general principles of law.

The appearance of the sovereign equality of states significantly expanded this community, which currently embraces not only the countries of the European and American continent, but every state of the world regardless of its political, economic, social or cultural system. Since sovereign states are legally equal and independent statehood is the highest form of civilization that can be achieved by any human community, every state must necessarily be regarded as civilized – thus the epithet became redundant.[42] (It was argued that the emergence law by itself implied civilization as early as at the time of the drafting of the Statute of the Permanent Court of International Justice.[43])

It is open to debate when this change actually happened. If we consider the alteration of the normative background as the point of departure, Article 38, paragraph 1, sub-paragraph c) of the Statute of the International Court of Justice was superfluous and obsolete at the time of its adoption as the document is annexed to and "forms an integral part" of the Charter of the United Nations,[44] which sets forth the principle of sovereign equality of states. However, if we take the effective transformation of the composition of the international community and the completion of the process of decolonization as a basis, the reference to civilized nations became utterly inappropriate with the granting of independence to colonies one or two decades later.

In addition to aesthetic problems resulting from its superfluousness and anachronism, the phrase "civilized nations" is often deemed to be controversial from the perspective of international law. As a distinguished expert pointed out, it is "incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law".[45] Several other commentators of contemporary international law have pronounced in a similar manner, including the representatives of socialist legal theory, who were especially inclined to discover in the phrase a

[42] For that reason, a member of the International Court of Justice rather used the phrase "any general principle of law (recognized by the nations)". Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, *I.C.J. Reports* 1949, Dissenting Opinion by Judge Krylov, 219. See also, CHENG op. cit. 25.; HERCZEGH (1969) op. cit. 39–42.; RAIMONDO op. cit. 51–52.

[43] RAIMONDO op. cit. 51.

[44] Charter of the United Nations, Article 92.

[45] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. The Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, Separate Opinion of Judge Found Ammoun, 132.

sinister attempt to render principles of western legal systems universally binding and to compel countries of the Third World to unwillingly recognize them.[46]

International treaties must be interpreted in good faith in accordance with the ordinary meaning to be given to terms in their context, and with due regard to any subsequent practice of states parties.[47] Hence claims have been made that the requirement of recognition by civilized nations should be interpreted and applied in conformity with the principles, spirit and realities of contemporary international law. Scholars propagating that claim likewise deem the phrase "civilized nations" obsolete, but they strive to endow it with new content rather than allow it to fall into oblivion by way of *desuetudo*. One particular theory suggests that the phrase, as contained in Article 38, paragraph 1, sub-paragraph c) of the Statute of the International Court of Justice, points to Article 9 of the same document, which provides that "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured".[48] If we place an equals sign between the main forms of civilization and the principal legal systems of the world, then the requirement of recognition of general principles by civilized nations might as well be construed as the acceptance of such principles by major families of law – a feature that can be persuasively verified by a consensus among judges pertaining to the existence and content of the rules concerned.[49]

This contextual interpretation does not depart considerably from the previously discussed predominant view as both identify "civilized nations" as the community of states. However, there is a fundamental difference in the breadth of required recognition: owing to a higher degree of abstraction, it leaves more room for divergences and exceptions merely to expose the presence of selected principles in the principal legal systems of the world than to demonstrate that these principles are indeed generally accepted by states.

A more innovative and audacious theory considers the presumption that states are inherently civilized rebuttable. Even though, as a general rule, all members of the international community should be regarded as civilized, historical experiences reveal that states may deviate from the path of civilization and fall back into anarchy, barbarism and crime. Therefore, a novel interpretation of the reference to civilized nations can offer a useful means to protect the values and

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[46] Buza (1967) op. cit. 32.; Nagy op. cit. 224–225.; Tunkin op. cit. 154.

[47] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 31, paragraphs 1 and 3, sub-paragraph b). Promulgated in Hungary by Law-Decree No. 12 of 1987.

[48] Statute of the International Court of Justice, Article 9.

[49] Schwarzenberger (1957) op. cit. 44. See also, Mosler op. cit. 95.; Van Hoof op. cit. 142.; Virally op. cit. 146.; Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objection, Judgment of 22 July 1952, *I.C.J. Reports* 1952, Dissenting Opinion of Judge Levi Carneiro, 161.

achievements of civilization, and to prevent the quality deterioration of general principles of law.[50]

The various theories described above convincingly support the introductory observation that nearly each and every important parameter of general principles of law has induced prolonged and intense academic debates. Bearing in mind the structure and scope of the relevant scientific discourse, we may now proceed to the actual examination of the nature of general principles as a source of international law.

II.

The substantive analysis of the problem whether the general principles of law recognized by civilized nations constitute a source of international law demands an answer to the preliminary question whether they originate from domestic law or international law. It has already been stated at the outset that the present study is based on the assumption that these rules had originally been established in national legal systems and elevated subsequently to the international level, and as such, they should not be confounded with the principles of international law. It is confirmed, for example, by the record of international arbitration as well as the *travaux préparatoires* and textual history of the Statutes of the Permanent Court of International Justice and the International Court of Justice. Since the provision of the Statute of the Permanent Court of International Justice concerning general principles of law had been phrased at a time, when the principles of international law had not yet been clearly formulated, and it was deliberately left unaltered during the drafting and adoption of the Statute of the International Court of Justice, there is no reason to believe that its original content has been fundamentally modified by the advent of a new period in the history of the law of nations and the consolidation of principles of contemporary international law after the Second World War.

Even though the International Court of Justice hardly ever resorts to general principles, and invokes them in fairly vague terms, its cautiousness and terminological inconsistency should not be seen as a total or partial intertwinement of general principles of law and principles of international law. As already mentioned, the principles of international law entirely dissolve in conventional and customary international law, and do not qualify as an

[50] M. CHERIF BASSIOUNI: A Functional Approach to "General Principles of International Law". *Michigan Journal of International Law*, Vol. 11. No. 3. (1990), 768. (note 4); CONFORTI op. cit. 64.; TOMUSCHAT op. cit. 337–338. See also, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, *I.C.J. Reports* 1951. 23.

independent source of law – as a result, they come under the scope of Article 38, paragraph 1, sub-paragraphs a) and b) of the Statute of the International Court of Justice. Provided that sub-paragraph c) is not redundant, the general principles of law contained therein cannot be equivalent of the principles of international law, hence they obviously originate from domestic law.[51]

State practice also underscores the disparity of general principles of law and principles of international law. The term "principle" has always been used frequently in international intercourse, and it may appear in different contexts and carry different contents. For example, it may refer to general principles of law, principles of international law, general principles of international law, regular rules of international law, norms of soft law, principles of international organizations, and political, economic, moral or other extra-legal principles or programmes of action. Notwithstanding the numerous layers of meaning, various treaties, resolutions and other documents undoubtedly indicate the separation of these categories.[52] None of the carefully drafted texts associates general principles of law with principles of international law.

An alleged convergence of categories could best be demonstrated by the principle of fulfilment in good faith of obligations under international law, because a seemingly comparable provision also exists in domestic law. The principle, however, prevails with a unique content in international law. The General Assembly declaration on the principles of international law first and foremost refers to obligations assumed by states in accordance with the Charter of the United Nations, and mentions obligations under the generally recognized principles and rules of international law and under valid international

[51] Herczegh (1969) op. cit. 91., 97.

[52] For various meanings of the term "principle", see, Charter of the United Nations, preamble, Articles 1, 2, 11, 73 and 74; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. 5 GAOR, Supp. 12. (A/1316), 11; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. G.A. Res. 2625, 25 GAOR, Supp. 28. (A/8028), 121; Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Sub-Soil Thereof, beyond the Limits of National Jurisdiction. G.A. Res. 2749, 25 GAOR, Supp. 28. (A/8028), 24; Charter of Economic Rights and Duties of States. G.A. Res. 3281, 29 GAOR, Supp. 31. (A/9631), 50; Conference for Security and Co-operation in Europe, Final Act. Questions Relating to Security in Europe, 1 (a): Declaration on Principles Guiding Relations between Participating States, Helsinki, 1 August 1975; Rio Declaration on Environment and Development. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1), Vol. I., 3; 2005 World Summit Outcome. G.A. Res. 60/1, 60 GAOR, Supp. 49. (A/60/49) Vol. I., 3. See also, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 1, paragraph 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, preamble. Both promulgated in Hungary by Law-Decree No. 20 of 1989.

agreements in second and third places only – not omitting to recall that in cases of conflict the obligations under the Charter shall prevail.[53] The Helsinki Final Act does not expressly touch upon obligations assumed in accordance with the Charter, but it likewise reiterates the primacy of obligations under that document.[54] Thus it appears unlikely that the principle of fulfilment in good faith of obligations under international law originates from domestic law. That principle came into existence and developed in the law of nations independently of national legal systems, and its roots probably trace back to natural law rather than domestic law. For these reasons, it can be established that theories equating general principles of law with principles of international law or unifying the two categories under the heading of general principles of law are unfounded.

At this point, it is necessary to briefly address the question of overlapping of general principles of law and general principles of international law, as well. It must be admitted that if a general principle of law is reaffirmed in a conventional or customary form, it may be sometimes categorized as a general principle of international law owing to its specific content and widespread recognition. Nonetheless, the "general principles of international law" do not constitute an independent source of law: it is an umbrella term that embraces certain universally accepted and outstandingly important conventional or customary rules, which do not qualify as principles of international law.[55] These rules include, for example, the principle of good faith, the principle of reciprocity, the principle of respect for domestic jurisdiction of states, and the principle of freedom of the seas. Yet if a general principle of law is elevated to among the general principles of international law by means of conventional or customary law-making, and link up in that category with provisions originating from international law, it will affect neither its self-identity nor its domestic law origins. Consequently, general principles of law and general principles of international law may indeed occasionally overlap, but this phenomenon is merely a terminological anomaly,[56] and does not have any significance from the perspective of sources of law. And so the related intermediate theories are deprived of their bases.

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[53] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. G.A. Res. 2625, 25 GAOR, Supp. 28. (A/8028), 124.

[54] Conference for Security and Co-operation in Europe, Final Act. Questions Relating to Security in Europe, 1 (a): Declaration on Principles Guiding Relations between Participating States, Helsinki, 1 August 1975, X.

[55] It may lead to misunderstandings that the phrase "general principles of international law" is frequently used as a synonym of principles of international law in both scientific writings and constitutions.

[56] RAIMONDO op. cit. 41–42.

The conclusion that the general principles of law recognized by civilized nations originate from domestic law inevitably raises the question whether this complex set of private and public, substantive and procedural rules, such as the principle of equity, the prohibition of abuse of rights, the prohibition of unjust enrichment, the protection of acquired rights, the principle of reparation, *res iudicata*, *audiatur et altera pars* or *pacta sunt servanda*, constitute a source of international law. The previous historical account of academic debates reveals that international legal doctrine has been divided over the issue from the outset.

An authoritative negative position holds that general principles derived from domestic law cannot be categorized as a source of international law as they were not created by the concurrent wills of two or more states to govern their international relations. Their international application is actually based on a special rule of customary law that authorizes international judicial bodies, with a view to avoid *non liquet*, to resort by way of analogy to principles borrowed from the technically more advanced national legal systems in the settlement of disputes, where gaps in the system of international law would otherwise render a decision impossible. That rule of authorization was codified in Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice and Article 38, paragraph 1, sub-paragraph c) of the Statute of the International Court of Justice.[57]

It is unquestionable that the general and abstract principles derived from a multitude of concrete interconnected legal norms and permeating the entirety or selected segments of domestic law spring from the legislative will of a single state to regulate domestic social relations, and to provide guidelines for national law-making and legal implementation. These features obviously do not match those of the sources of international law. However, it would lead to premature and tenuous results, if we ceased our investigation here, relying on a brief and superficial analysis of the problem. In order to answer the question concerning their nature as a source of international law, we must disregard the peculiar formation and characteristics of general principles. Instead, it should be thoroughly examined whether there has been any internationally relevant legislative act after the domestic consolidation of these principles, which made them an independent source of international law.

Contemporaneous literature suggests that the necessity to apply domestic legal rules, as a separate source of law, to the international conduct of states had already arisen in the period of traditional international law. These rules had originally been supplied by the products of parallel domestic law-making and other municipal laws and regulations of states, but because of practical and theoretical reasons, their gap-filling function was subsequently taken

[57] Herczegh (1969) op. cit. 97–100.

over by the general principles of law recognized by civilized nations. The development of international law has not terminated the demand for assistance by the technically more advanced national legal systems as progress has two opposing effects: the evolution of conventional and customary law decreases the frequency of gaps and the value of domestic legal solutions, while the expansion of regulation to new areas generates further gaps and increases the need for provisions originating from domestic law.

In case the picture canvassed by traditional legal doctrine broadly corresponds to past realities, the elevation of certain provisions of national legal systems, including general principles of law, primarily served to more comprehensively govern the international conduct of states in fields inadequately regulated by other sources of law rather than to facilitate the settlement of disputes submitted to international judicial bodies by the prevention of *non liquet*.[58] That presupposes international law-making – even if its exact course and time can hardly be ascertained from the distance of approximately one and a half centuries. Its occurrence is confirmed only by its results: the disturbingly chaotic literary reflections and the vague references made by international judicial bodies.

However, it causes little difficulty to outline the hypothesis of a law-making process culminating in the international recognition of general principles of law. This process is definitely based on an automatism, the beginning of which is indicated by the emergence of a customary rule of reception. Accordingly states accept, without exhaustive enumeration or further measures, principles originating from domestic law as an integral part and unwritten source of international law, if they are generally recognized and suitable to govern international relations. Following the emergence of the rule of reception, the incorporation of general principles takes place automatically, provided that the two conjunctive conditions are met.[59] The fulfilment of these conditions is continuously "verified" by the rule of reception, as it will be displayed later, with regard to the question of termination. (It may be inferred by exclusion of other possibilities that the rule of reception forms part of universal customary law. To put it simply, it could not have come into existence in any other way. Its functioning distantly resembles a reversed general transformation or adoption, because it incorporates into international law the legal principles that meet

[58] "The general principles of law, therefore, permanently rectify a more primitive law in the spirit of a more advanced and progressive law." CSIKY op. cit. 43. (Emphasis omitted.)

[59] A different contemporary theory holds that general principles of law cannot be considered as a product of international law-making. They constitute a source of law as a result of their application as legal rules having a separate existence rather than as a result of the mechanism of their creation. BOROS, SÁNDOR BALÁZS: Az általános jogelvek *in foro domestico* érvényesülése a nemzetközi jogban, valamint a méltányosság szerepe. [The Validity of General Principles Recognized *in foro domestico* in International Law and the Role of Equity] *Iustum, Aequum, Salutare*, Vol. V. No. 1. (2009) 118.

the conditions in their entirety, without exhaustive enumeration or further measures by states. Nevertheless, this process involves law-making and creates a new source of law, which is a fundamental difference compared to the two constitutional techniques used for illustration.[60])

The requirement of general recognition certainly does not entail that a principle has to exist in the domestic law of every state of the world: it is sufficient, if the dominant legal systems of principal families of law accept it with identical or similar content.[61] It should be noted that this allegation may prove implausible for extreme positivists, who have been susceptible to regard general principles as a source of law exclusively when they are recognized by every state, claiming that "those are the rules of international law only, to which states in some way consent".[62] However, such an interpretation of general recognition is debatable as it looks for the intentions of states in the wrong place, and erroneously confounds their domestic and international legislative wills. The international legislative will that manifests itself in the rule of reception and elevates general principles to the international level is not an aggregate or a reflection of domestic legislative wills that originally establish the principles concerned. These wills prevail in different realms, pursue different objectives, and carry different contents. Hence the internationally relevant manifestation of legislative intention and engagement should be sought not in domestic law, but in the rule of reception, which does not demand recognition by every state for the elevation of a principle to the international level. Indications are that it is enough, if the dominant legal systems of principal families of law accept it with identical or similar content. The verification of general recognition calls for the implementation of the comparative method,[63] but in the procedure of the

[60] A Hungarian representative of traditional legal doctrine also traced back the legal value of general principles of law to customary law, but he did not make mention of the rule of reception. Instead, he suggested that, in this case, customary law behaved as "a source of law, which designates another source of law". Csiky op. cit. 21–22. On adoption and transformation, see, Ignaz Seidl-Hohenveldern: Transformation or Adoption of International Law into Municipal Law. *International and Comparative Law Quarterly*, Vol. 12. Pt. 1. (1963) 88–124.

[61] In this respect, distant similarities can be found between general principles of law and *ius gentium*. In ancient Roman jurisprudence, the latter category was defined as a set of rules established by natural reason among all men, and observed and employed by all peoples alike. Gaius: *Institutionum commentarii quattuor*, I. 1; Digest, 1. 1. 9. See also, Mosler op. cit. 95.

[62] Csiky op. cit. 15. (Emphasis omitted.)

[63] A contemporary theory holds that this process consists of two operations. The vertical move involves the abstraction of legal principles from domestic rules, while the horizontal move involves the verification of general recognition of principles thus obtained. Raimondo op. cit. 45. *et seq.* A different theory maintains that the test has three elements: it must be verified that the principle concerned has a general nature, it is recognized by civilized nations, and it is capable of being incorporated into international law. Bos op. cit. 262. It is also important to strive to prevent imbalances caused by the dominance of world languages, especially English and French, in the course of this process. Tomuschat op. cit. 339. See also, Bassiouni op. cit.

International Court of Justice, a consensus among judges representing the main forms of civilization and the principal legal systems of the world might as well suffice.[64]

The requirement of suitability to govern international relations must likewise be interpreted in a flexible manner. This condition merely implies that a domestic provision, which is to be reckoned as a general principle, must be capable of producing effects in the international sphere in view of the similarities in the typical behaviour of natural persons and states. In case these conditions are fulfilled, a principle is elevated to the international level, albeit its content is at this point still extremely abstract and raw. It is primarily the task of the judiciary to disclose, specify and elaborate on that content.[65]

Even though the process under deliberation rests on a rule of customary law, it does not yield as an outcome new customary norms for it is not a convergence of general practice and *opinio iuris* of states that creates the domestic provisions elevated to the international level. In fact, states endeavoured by the establishment of the rule of reception to fill the gaps of conventional and customary law by means of generally recognized domestic principles capable of governing international relations. Consequently, on account of its gap-filling function and the differences of various law-making processes, the rule of reception incorporates general principles of law into the system of international law as an independent source of law rather than as customary law. This surely does not preclude a subsequent conventional or customary reaffirmation of certain principles,[66] but it will affect neither their nature as general principles of

809–816.; CONFORTI op. cit. 64–65.; MOSLER op. cit. 95–96.

64 *Supra* note 47.

65 A well-known description of the relevant tasks of international judicial bodies reads as follows: "International law has recruited and continues to recruit many of its rules and institutions from private systems of law. […] The way in which international law borrows from this source is not by means of importing private law institutions »lock, stock and barrel«, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of »the general principles of law«. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions." International Status of South-West Africa, Advisory Opinion of 11 July 1950, *I.C.J. Reports* 1950, Separate Opinion by Sir Arnold McNair, p. 148. Interestingly enough, the activities of the *praetor peregrinus* played an essential role in the development of *ius gentium*, as well.

66 It is often regarded as a fundamental function of general principles of law to facilitate the development of international law. CHENG op. cit. 39.; HERCZEGH (1969) op. cit. 116.; KOVÁCS, PÉTER: *A nemzetközi jog fejlesztésének lehetőségei és korlátai a nemzetközi bíróságok joggyakorlatában* [The Perspectives and Obstacles of the Development of International Law in the Practice of International Courts] Budapest: Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar, 2010. 85–88.; RAIMONDO op. cit. 50. See also, MILAN BARTOŠ: Transformation des principes généraux en règles positives du droit international. In VLADIMIR

law nor the independence of this unique source of law. Similar intertwinements regularly occur between conventional and customary international law without any bearing whatsoever on their respective self-identities.[67]

Due to the exceptionally high degree of abstraction of general principles, their effects can barely be perceived in everyday life: upon the examination of the conduct of members of the international community, we much earlier and more easily come across a relevant conventional or customary norm, than a general principle of law as the former relates to the latter as *lex specialis* relates to *lex generalis*. Therefore, these provisions mostly surface in the wake of the activities of judges, when they encounter gaps in the law during the peaceful settlement of international disputes. It is no coincidence that the literature of general principles focuses on the practice of international judicial bodies as their existence, contents and effects are best observable in that field. Otherwise these provisions are not a particularly effective source of international law.[68]

It should be added that the customary rule of reception is not identical to the rule of authorization, as codified in Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice and Article 38, paragraph 1, sub-paragraph c) of the Statute of the International Court of Justice, which permits international judicial bodies to resort to general principles of law by way of analogy. The rule of reception precedes the rule of authorization in terms of both the time of formation and the logic of functioning. That leads to two further conclusions. Firstly, the rule of authorization sanctions the application of international law rather than domestic law. Secondly, it was not the aforementioned statutes that established the general principles of law – these documents merely rendered them applicable in the procedure of the two courts.

It is excellently demonstrated by a previously recalled remark made by the Permanent Court of International Justice, according to which municipal laws are merely facts from the standpoint of international law.[69] If we project this statement to Article 38, paragraph 3, of the Statute of that court, it becomes evident that "the general principles of law recognized by civilized nations", considered by the majority of drafters of the document as provisions originating from national legal systems, could be important for the judicial settlement of international disputes insofar as they were applied in their international rather

Ibler (ed.): *Mélanges offerts à Juraj Andrassy.* La Haye: Martinus Nijhoff Publishers, 1968. 1–12.; Wolfgang Friedmann: The Uses of "General Principles" in the Development of International Law. *American Journal of International Law*, Vol. 57. No. 2. (1963) 279–299.

[67] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, *I.C.J. Reports* 1986. 93–96.

[68] Van Hoof op. cit. 146–148.

[69] German Interests in Polish Upper Silezia (Germany v. Poland), Judgment No. 7., 25 May 1926. P.C.I.J. Series A, No. 7., 19.

than domestic legal capacity. Article 38, paragraph 1, of the Statute of the International Court of Justice explicitly confirms this assumption by virtue of the only amendment made to the text of the former provision, as a result of which the sentence introducing the enumeration of applicable sources of law, including general principles of law, now reads as follows: "The Court, whose function is to decide *in accordance with international law* such disputes as are submitted to it, shall apply [...]"[70] (It reaffirms the disparity of the rule of reception and the rule of authorization, as well.)

Nonetheless, certain theories refuse to attribute any significance to the reference to international law, claiming that it fails to prove that general principles of law constitute a source of international law.[71] This approach contradicts the fundamental rules of interpretation of international treaties, and may lead to dubious conclusions.[72] These conclusions include, for example, the drawing of a parallel between the application of general principles and the implementation of the choice of law method of private international law[73] in view of the fact that both point to an alien or foreign legal system from the perspective of the forum applying the law. Indeed it amounts to a denial of general principles as an independent source of law to regard their application as a special manifestation of the choice of law method, since in private international law the application of rules of a foreign legal system does not entail their incorporation into the legal system of the forum concerned.[74] Yet this train of thought can be challenged along several dimensions. We hardly need to go into details to notice that there are fundamental differences in the respective bases, techniques and normative backgrounds of application of general principles and foreign legal rules as well as in the contents and characteristics of provisions invoked. Therefore, no matter how appealing this analogy or its connotations may appear, it must be borne in mind that it is deceptive.

Finally, we need to counter a further negative position, which maintains that in spite of the identical wording, the sub-paragraph of the Statute of the International Court of Justice concerning general principles of law has a meaning different from that of the Statute of the Permanent Court of International Justice owing

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[70] Statute of the International Court of Justice, Article 38, paragraph 1. (Emphasis added.)

[71] Cf. HERCZEGH (1969) op. cit. 18–19.

[72] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 31, paragraphs 1 and 4. For more details, see, HARASZTI, GYÖRGY: *A nemzetközi szerződések értelmezésének alapvető kérdései.* [Fundamental Questions of Interpretation of International Treaties] Budapest: Közgazdasági és Jogi Könyvkiadó, 1965.

[73] For a brief overview in Hungarian literature, see, VÖRÖS, IMRE: Alapvetés: a nemzetközi kollíziós probléma. [Introduction: The Problem of Conflict of Laws] In BURIÁN, LÁSZLÓ – CZIGLER, TAMÁS DEZSŐ – KECSKÉS, LÁSZLÓ – VÖRÖS, IMRE: *Európai és magyar nemzetközi kollíziós magánjog.* [European and Hungarian Private International Law] Budapest: Krim Bt., 2010. 34–35.

[74] Cf. HERCZEGH (1969) op. cit. 99.

to the divergent historical circumstances prevailing at the time of adoption of these documents.[75] Even though historical interpretation is a generally accepted supplementary means of interpretation of international treaties,[76] the *travaux préparatoires* of the statutes do not support this allegation. Due to its specific subject, a fundamental change of circumstances could neither modify the original content of the provision, the wording of which was left, as already mentioned, deliberately unaltered in the light of previous positive experiences. (The consolidation of principles of international law after the Second World War certainly did not qualify as a new historical circumstance, because we have ruled out any intertwinement between general principles of law and principles of international law.)

In addition to the introductory sentence of Article 38, paragraph 1, of the Statute of the International Court of Justice, miscellaneous other pieces of indirect evidence attest that general principles of law constitute an independent source of international law. These pieces of evidence include the law of the European Union, a legal order distinct from both international law and the national legal systems of member states, where the development of regulation and the strengthening of integration also necessitated the recognition of general principles as a source of law. The European Court of Justice has played an essential role in this process. Notwithstanding that the founding treaties do not expressly authorize the application of general principles, there is widespread agreement that the normative basis of this practice can be derived from Article 19, paragraph 1, of the Treaty on European Union, and Articles 263 and 340, paragraph 2, of the Treaty on the Functioning of the European Union.[77]

The European Court of Justice has equally taken into consideration the domestic laws of member states, the law of the European Community, and later the law of the European Union, and international law, especially the European regime of human rights protection, for the determination and application of general principles of law. Several clusters of principles have crystallized in the wake of its activities, but a consensus on the exact boundaries of these categories has not been achieved yet. Nevertheless, the extensive case law of the body indicates that the general principles of law that have been incorporated into the law of the European Union, for example, comprise the respect for fundamental

[75] Tunkin op. cit. 154.

[76] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 32.

[77] *O.J.* C 83, 30.3.2010. 27., 162–163., 193. (Formerly: Treaty establishing the European Community, Articles 220., paragraph 1., 230. and 288., paragraph 2.)

rights,[78] the prohibition of discrimination,[79] the protection of legitimate expectation,[80] the requirement of effective judicial control,[81] the prohibition of retroactive effect,[82] *ne bis in idem*,[83] and *pacta sunt servanda*.[84]

The founding treaties barely contain explicit references to general principles. Such references can be found in Article 6, paragraph 3, of the Treaty on European Union, concerning the protection of fundamental rights, and Article 340, paragraphs 2 and 3, of the Treaty on the Functioning of the European Union, concerning the obligation to make good any damage caused by the institutions or their servants in the performance of their duties.[85] This phenomenon can be attributed to various factors, among which the unwritten nature and unique behaviour of general principles probably have prime importance. In sum, it can be declared that general principles of law undoubtedly rank among the primary sources of the law of the European Union, and possess a "constitutional status".[86]

Given that the development of the law of the European Union has been greatly inspired by international law, the recognition as a source of law of general principles partly derived from the national legal systems of member states should not be underestimated regardless of the particular circumstances. If this process came to pass in a short period of time in the European legal order, it could have easily happened in the considerably older and in many ways standard-setting international law, as well. The special characteristics of the law of the European Union do not undermine the validity of this assumption as member states recognized general principles as a source of law not in the

[78] C–29/69, Erich Stauder v. City of Ulm, Sozialamt [1969] ECR 419.; C–11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.; C–4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities [1974] ECR 491.

[79] C–20/71, Luisa Sabbatini, née Bertoni v. European Parliament [1972] ECR 345.; C–149/77, Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena [1978] ECR 1365.

[80] C–112/77, August Töpfer & Co. GmbH v. Commission of the European Communities [1978] ECR 1019.

[81] C–222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary [1986] *ECR* 1651.

[82] C–63/83, Regina v. Kent Kirk [1984] ECR 2689.

[83] C–14/68, Walt Wilhelm and Others v. Bundeskartellamt [1969] *ECR* 1.

[84] C–162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz [1998] *ECR* I–3655.

[85] *O.J.* C 83, 30.3.2010, 19, 193. (Formerly: Treaty on European Union, Article 6, paragraph 2, and Treaty establishing the European Community, Article 288, paragraphs 2 and 3.)

[86] Opinion of Advocate General Trstenjak, delivered on 30 June 2009, C–101/08, Audiolux SA e.a. v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others [2009] *ECR* I–0000, para. 70. See also, C–101/08, Audiolux SA e.a. v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others [2009] *ECR* I–0000, para. 63. For more details, see, TAKIS TRIDIMAS: *The General Principles of EU Law.* Second edition. Oxford–New York: Oxford University Press, 2006.

spirit of supranationality. The institutions of the integration neither created this source of law nor compelled sovereign states to accept it. On the contrary: these institutions, including the European Court of Justice, merely apply the general principles of law, and they do that in accordance with the founding treaties reflecting the will of member states. The special characteristics of the European legal order can at most be perceived in that the European Court of Justice more overtly relies on general principles due to the primacy of the law of the European Union than the International Court of Justice that functions in the realm of the co-ordinative system of international law, and rather prefers cautious and vague statements. (Naturally, the workload of the two bodies also has an impact on the frequency of invocation of general principles, but this factor is at present beside the point.) Thus it appears permissible to conclude to the "original" from the "replica", and draw a parallel between international law and the law of the European Union as regards their attitude towards the general principles of law.

Likewise, certain elements of the practice of international organizations and institutions and states indirectly prove that general principles of law constitute a source of international law. For example, the Secretary-General of the United Nations classified them as one of the principal sources of law in an early memorandum on the codification of international law.[87] The World Trade Organization has adopted a similar approach, and general principles play an important role in its dispute settlement mechanism.[88] Furthermore, principles originating from domestic law have gained special emphasis in international criminal law, where different international and hybrid, *ad hoc* and permanent judicial bodies have routinely resorted to such provisions since the end of the Second World War.[89] (It is worth noting that articles of international human rights instruments concerning criminal procedure often refer to general principles.[90])

National legal systems can also testify that general principles of law are considered as a source of international law. Even though constitutions of the world

[87] Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory Work within the Purview of Article 18, Paragraph 1, of the Statute of the International Law Commission. Memorandum submitted by the Secretary-General, 10 February 1949, U.N. Doc. A/CN.4/1/Rev.1, 22.

[88] James Cameron – Kevin R. Gray: Principles of International Law in the WTO Dispute Settlement Body. *International and Comparative Law Quarterly*, Vol. 50. Pt. 2. (2001) 248–298.

[89] Raimondo op. cit. 73. *et seq.* For example, see, United States of America v. Wilhelm List *et al.*, Judgment of 19 February 1948, Nürnberg Military Tribunal, Vol. 11., 1235.

[90] See, International Covenant on Civil and Political Rights, New York, 16 December 1966, Article 15, paragraph 2; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Rome, 4 November 1950, Article 7, paragraph 2. Promulgated in Hungary by Law-Decree No. 8 of 1976 and Act No. XXXI of 1993, respectively. See also, Natalie Kaufman Hevener – Steven A. Mosher: General Principles of Law and the UN Covenant on Civil and Political Rights. *International and Comparative Law Quarterly*, Vol. 27. Pt. 3. (1978) 596–613.

seem to reaffirm the generally recognized principles and rules of international law with great fondness, the diverse clauses on international law, having more often than not an outrageously confused wording, typically lack direct and express references to the general principles of law recognized by civilized nations. Nonetheless, their interpretation may cover these provisions.[91] For example, Section 7, paragraph 1, of the Constitution of the Republic of Hungary does not mention the general principles of law, but its interpretation by both the Constitutional Court and the legal doctrine counts these principles among the sources of international law.[92] (An already withdrawn bill on the amendment of the Constitution explicitly contained the general principles of law. The attached ministerial reasoning made it absolutely clear that the Republic of Hungary regarded them as an independent source of international law.[93]) However, the constitutional clauses on international law are not the only domestic provisions that need to be surveyed. General principles occasionally appear in connection with the guarantees of criminal procedure in fundamental rights catalogues of constitutions or other laws of constitutional nature, which presumably indicates the influence of major international human rights instruments.[94]

III.

If we accept that general principles of law constitute a source of international law, we inevitably face the question of modification or termination. It should be stated at the outset that modification, in this context, does not designate the indispensable process by which the inherently abstract and raw content

[91] For a European overview and a few relevant conclusions, see, VLADLEN S.VERESHCHETIN: New Constitutions and the Old Problem of the Relationship between International Law and National Law. *European Journal of International Law*, Vol. 7. No. 1. (1996) 29–41.; LUZIUS WILDHABER – STEPHAN BREITENMOSER: The Relationship between Customary International Law and Municipal Law in Western European Countries. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Band 48. Heft 2. (1988) 163–207.

[92] Constitution of the Republic of Hungary, Section 7, paragraph 1: "The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law." For an official interpretation, see, Constitutional Court Decision 53/1993. (X. 13.) AB, *ABH* 1993, 330–331., 335. See also, JAKAB, ANDRÁS – MOLNÁR, TAMÁS – SULYOK, GÁBOR: 7.§ (Nemzetközi jog és belső jog; jogalkotási törvény) [Section 7, paragraph 1. (International Law and Domestic Law; Act on Law-Making)] In JAKAB, ANDRÁS (ed.): *Az Alkotmány kommentárja* [A Commentary on the Constitution] Vol. I. Second, corrected, expanded edition. Budapest: Századvég Kiadó, 2009. 373–375. (Commentary by Tamás Molnár.)

[93] Bill No. T/4486 on the amendment of Act No. XX of 1949 on the Constitution of the Republic of Hungary.

[94] For example, see, Canada: Constitution Act 1982, Part I., Article 11, paragraph g); Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 13, paragraph 6.

of principles originating from domestic law is disclosed and specified by the judiciary. Neither does it amount to modification, if various judicial bodies interpret the same principle within their margin of discretion with negligible differences. Modification in this case denotes any alteration of the content of a general principle, which occurs after its reception into international law and substantially transforms its character in line with the intentions of states.

Since general principles of law originate from domestic law, the question of modification must be examined in the realm of both international law and domestic law. We may draw a surprising conclusion at the very beginning of our investigation: general principles cannot be directly modified by means of international law-making for it is incompatible with the peculiar way of their creation. As already mentioned, these principles are automatically incorporated into international law by a customary rule of reception, if they are generally recognized and suitable to govern international relations. Apart from the establishment of the continuously functioning rule of reception, no other relevant legislative act has taken place in the international level. Hence states could make an attempt to modify the content of a general principle by conventional or customary law-making only.[95] However, neither of these processes can perform the modification of such a provision. They would instead produce a new conventional or customary rule with a content different from the general principle concerned that, on the other hand, would remain unaltered and preserve its independent existence. The explanation is simple: different law-making processes necessarily yield different sources of law.[96] Given that the general principle would retain its original content and independence in spite of the modifying conventional or customary rule, a dual regime would emerge,

[95] The question of modification has already been raised in the practice of the International Court of Justice, as well. A notable separate opinion did not rule out that an international treaty may provide further rights in addition to those that spring from a general principle of law, but the interpretation of treaty stipulations lead the judge to doubt that it had actually happened in the present case. Despite that the wording leaves room for different interpretations, the structure of reasoning indicates that the granting of further rights would have taken place within the framework of the treaty, and would not have modified the principle itself: "That general principle of law concerning the rights or status of shareholders, which underlies not only Italian Company law but also the company law of some other civil law countries, may not be altered by any treaty aimed at the protection of investments unless that treaty contains some express provision to that end. […] Yet there is no reason to interpret the [treaty] *as having granted* […] *any further rights in addition to those* to which the same shareholders would have been entitled under Italian law as well as under the general principles of company law." Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment of 20 July 1989, *I.C.J. Reports* 1989, Separate Opinion of Judge Oda, 86., 88–89. (Insertion and emphasis added.)

[96] With the establishment of the rule of reception, an automatic mechanism emerged in customary international law, the products of which, that is to say the general principles of law, cannot be directly influenced or modified by other customary rules owing to the differences of various law-making processes.

in which potential conflicts would have to be resolved by rules of legal logic, such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori*. That is why conventional or customary rules cannot formally modify, only derogate from general principles that have become undesirable by reason of their contents.

General principles of law can be modified exclusively through the medium of domestic law. Interestingly enough, this process may be attributed not only to national, but also to international legal factors. However, it must be emphasized that in the latter case the conventional or customary rules of international law do not directly modify the general principles as this possibility has just been ruled out – international law here merely induces the modification of these principles though the medium of domestic law. In order to comprehend this process, we need to reach back to the relationship of international law and domestic law. It is commonly known that states incorporate the rules of international law into their national legal systems either by means of the monistic technique of adoption or the dualistic technique of transformation and, at the same time, they must ensure harmony between international law and domestic law.[97] Naturally, the techniques of adoption and transformation too incorporate into domestic law those conventional or customary rules that have been created by states with a view to derogate from the content of a particular general principle of law. Having been incorporated into domestic law, these conventional or customary rules may induce a change in the content of the domestic legal principle, from which the general principle originates, in conformity with the requirement to ensure harmony between international law and domestic law. If this process takes place in a similar manner throughout the dominant legal systems of principal families of law, the customary rule of reception will elevate the domestic legal principle to the international level with its new content, thereby overwriting the general principle of law, from which states previously tried to derogate by conventional or customary law-making. (The process evidently presupposes general international treaties or universal customary rules.)

Certainly, the content of a domestic legal principle can change even without the influence of international law, solely in the wake of domestic legal factors. If the new content becomes generally recognized and invariably enables the international application of the provision, the content of the relevant general principle of law will automatically and correspondingly change in international law by virtue of the rule of reception.[98] Normally, this is a subtle, lengthy and organic evolution, the consequences of which can usually be perceived from a distance of decades or centuries only. Fast and radical changes, however, may

[97] In the Republic of Hungary, this responsibility is set forth by Section 7, paragraph 1, of the Constitution.

[98] In a similar manner, see, CSIKY op. cit. 43.

also occur, which make the legislator face a curious dilemma in the fulfilment of its responsibility to ensure harmony between international law and domestic law. Since states incorporate into their legal systems not only the conventional and customary rules of international law, but also the general principles of law, the latter provisions travel an interesting road: they depart from domestic law, gain reception into international law, and then return to domestic law as rules of international law. Hence these principles prevail in national legal systems in two forms: as general principles of law and as principles of domestic law. It may appear at first sight that any change of the latter automatically and simultaneously modifies the former owing to the functioning of the rule of reception. Still it should not be forgotten that this process takes place only if a change becomes generally recognized in the dominant legal systems of the principal families of law. From the perspective of a particular national legal system a change in the content of a domestic legal principle is followed by a change of the corresponding general principle of law with a delay. Until the general recognition of the new domestic legal content and the ensuing modification of the general principle, the provision will prevail in the national legal system with two different contents. Thus in case of profound and extensive changes, the requirement of harmony between international law and domestic law might as well hinder the modification of a domestic legal principle, and provide an important quality guarantee to preserve the minimum standards of the rule of law.

The termination of general principles of law must likewise be examined in the realm of both international law and domestic law. It should be underlined first that it would be a grave mistake to adopt the conclusions drawn with regard to modification to the question of termination without criticism, and to presume that if general principles can be modified only through the medium of domestic law, than it is also the only feasible way to terminate them. In fact, it is equally possible in the international level to terminate the entire category of general principles of law and to terminate the validity of individual principles. The total elimination of general principles as a source of international law requires either the termination of the customary rule of reception or the substantial modification of its objectives and functioning. However, it is impossible to terminate individual principles directly by persistent objection[99] or international law-

[99] In light of the fact that the customary rule of reception was established more than a century ago, a detailed examination of the concept of persistent objector appears to be futile. Suffice it to note that it would have prevented the elevation of general principles to the international level *in toto*, but it would have had an effect on those states only that had persistently objected to the rule of reception in the course of its formation. (On the issue of recognition of general principles of law by newly independent states, see, S. Prakash Sinha: Perspective of the Newly Independent States on the Binding Quality of International Law. *International and Comparative Law Quarterly*, Vol. 14. No. 1. (1965) 124.

making.[100] There is only one scenario that involves the termination of a general principle on account of circumstances prevailing in the international level – if the provision is rendered unable to govern international relations by changes in the international environment. Let there be no misunderstanding: it is not the mere fact of alteration of international relations that terminates the general principle, but the rule of reception that reacts to this alteration automatically, in absence of further measures by and in accordance with the original legislative will of states. Since international applicability is an essential condition of their recognition as a source of law, there are no existing but inapplicable general principles in the system of international law. If a general principle is no longer able to govern international relations due to changes in the international environment, and so one of the conjunctive conditions required for its elevation to the international level ceases to exist, then it will become invisible to the rule of reception and disappear from international law. (Theoretically speaking, nothing precludes the "revival" of principles that have thus been terminated by subsequent changes in the international environment.)

The termination of individual general principles can be achieved through the medium of domestic law, as well. In order to realize that it is sufficient to breach the requirement of general recognition by removing the principle from a series of national legal systems, or to widely modify its domestic legal content in such a manner that it becomes unable to govern international relations in the future. A generally unrecognized principle may nevertheless continue to exist in the domestic laws of certain states, but it will be invisible to the rule of reception as it fails to meet the previously discussed conjunctive conditions.

Finally, it should be noted that the question of modification or termination is mainly of academic importance. The practical probability of these measures is negligible as the overwhelming majority of principles concerned came into existence several centuries ago, and became inseparable from the normal functioning of law; therefore substantial alterations of any kind seem to be unnecessary and pointless. Moreover it is always more convenient to derogate from an undesirable general principle by means of conventional or customary law-making. Even though derogation would not bring about the modification or termination of that principle, it can effectively make it inapplicable with the help of logical rules, such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori*.

[100] Since states are not at all defenceless against the flow of principles towards international law, and have numerous ways to dispose of undesirable provisions, this statement is not incompatible with the postulation emanating from sovereignty, according to which international law does not bind any state against its will. S.S. Lotus (France v. Turkey), Judgment No. 9., 7 September 1927. *P.C.I.J.* Series A, No. 10., 18. The opposing theory holds that the legal effects of general principles of law can be excluded by contrary manifestation of will due to their *ius dispositivum* character. CSIKY op. cit. 33.

Conclusions

Traditional legal doctrine had shown great interest in the interaction of international law and national legal systems. Contemporaneous treatises reveal that a significant proportion of scholars writing before the end of the 19th century categorized the products of parallel domestic law-making and other municipal laws and regulations concerning the international conduct of states as a source of the law of nations. That attitude, however, perceptibly changed at the beginning of the 20th century: the community of scholars, who considered the internationally relevant domestic enactments as a source of international law, vanished – their place was taken over by the group of authors, who advocated that general principles of law constitute an independent source of law. They were contested by extreme positivists, who were disinclined to take these principles into consideration in spite of the fact that they had been habitually invoked by international judicial bodies, and the Statute of the Permanent Court of International Justice expressly sanctioned their application, as well.

The academic debate continued in the period of contemporary international law, though its scope and structure have altered. Previously ignored and entirely novel problems have surfaced after the Second World War, which made the examination of the legal value of general principles of law, now contained in Article 38, paragraph 1, sub-paragraph c) of the Statute of the International Court of Justice, even more challenging. These problems include, for example, the political and ideological confrontation of western and socialist legal theory, the different explanations pertaining to the relationship of general principles of law, principles of international law and general principles of international law as well as the anachronistic nature of the requirement of recognition by civilized nations.

The substantive analysis of the problem whether general principles of law constitute a source of international law demands an answer to the preliminary question whether they originate from domestic law or international law. Notwithstanding that several prestigious representatives of international legal doctrine claim that these principles originate from international law, and equate them with principles of international law or general principles of international law, the practice of states and international organizations, as reflected by various documents, and several theoretical considerations cast serious doubts on the plausibility of their position. It is worth noting that the attitude of the International Court of Justice does not facilitate the resolution of the dilemma at all, since the body prefers cautious and vague statements whenever it needs to resort to general principles. Still it may be declared that the category of general principles of law contains provisions originating from domestic law only

– a feature that inevitably raises the question whether this complex set of rules constitute a source of international law.

The negative position holds that general principles derived from domestic law cannot be categorized as a source of international law as they were not created by the concurrent wills of two or more states to govern their international relations. This conclusion seems to be premature. Even though these principles were established in national legal systems, we must disregard their peculiar formation and characteristics, and should thoroughly examine whether there has been any internationally relevant legislative act, which made them an independent source of international law. Contemporaneous literature suggests that the necessity to fill the gaps of conventional and customary law by provisions originating from the technically more advanced national legal systems had already arisen in the period of traditional international law. Initially it had entailed the application of products of parallel domestic law-making and other municipal laws and regulations concerning the international conduct of states, but their gap-filling function was subsequently taken over by general principles of law. That presupposes international law-making, the hypothesis of which can be outlined as follows.

General principles of law are automatically incorporated into international law by a customary rule of reception. This rule of reception accepts, without exhaustive enumeration or further measures, principles originating from domestic law as an integral part and unwritten source of international law, if they meet the conjunctive conditions of being generally recognized and suitable to govern international relations. However, the content of these principles is extremely abstract and raw upon arrival to the international level. Therefore, it is primarily the task of the judiciary to disclose and specify that content. Even though the rule of reception forms part of customary law, it incorporates general principles into the system of international law as an independent source of law rather than as new customary norms by virtue of its gap-filling function and the differences of various law-making processes. This surely does not preclude a subsequent conventional or customary reaffirmation of selected principles, but it will affect neither their nature as general principles of law nor the independence of this unique source of law.

It should be emphasized that the rule of reception is not identical to the rule of authorization, as codified in the Statutes of the Permanent Court of International Justice and the International Court of Justice. The former established the source of law at issue; the latter made it applicable in the procedure of the two courts. Nonetheless, the rule of authorization, as contained in the Statute of the International Court of Justice, is of utmost importance for our investigation as it unequivocally classifies general principles of law as one of the sources of international law. Miscellaneous other pieces of indirect evidence also attest

that these provisions constitute an independent source of international law. Such pieces of evidence include, for example, the presence of general principles in the law of the European Union, the practice of international organizations and institutions, the activities of international criminal courts, and the indicative behaviour of national legal systems.

The automatic functioning of the rule of reception and the differences of various law-making processes entail that a general principle of law cannot be directly modified in the realm of international law by conventional or customary law-making. Such an attempt would lead to the emergence of a dual regime: it would produce a new conventional or customary rule carrying the modified content of the general principle concerned that, on the other hand, would remain unaltered and preserve its original content emanating from domestic law. Therefore, the modification of these provisions can be performed exclusively through the medium of domestic law. If the content of a domestic legal principle generally changes in national legal systems due to the adopted or transformed rules of international law or domestic legal factors, the customary rule of reception will elevate that principle to the level of international law with its new content, thereby overwriting the former content of the corresponding general principle of law.

The question of termination of general principles of law is more complicated. In the international level, it is equally possible to terminate the entire category of general principles of law and to terminate the validity of individual principles. The latter objective, however, cannot be achieved directly by persistent objection or international law-making: it is possible only if a principle is rendered unable to govern international relations by changes in the international environment, and as a result, it becomes invisible to the rule of reception. Furthermore, the validity of a general principle can be terminated through the medium of domestic law, provided that either of the conjunctive conditions required for its incorporation into international law ceases to exist. In case a principle is no longer generally recognized, or its domestic legal content is widely modified in such a manner that it is no longer able to govern international relations, it will likewise become invisible to the rule of reception and disappear from international law.

It must be admitted that the question of modification or termination of general principles of law is mainly of academic importance. These provisions support the normal functioning of law since time immemorial; therefore the practical probability of substantial alterations of any kind is negligible. Moreover states do not need to modify or terminate an undesirable general principle, if they wish to set it aside. It may be sufficient to derogate from that principle by means of conventional or customary law-making, and then make it inapplicable by

recourse to logical rules, such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori.*

In sum, it may be concluded that general principles of law constitute an independent source of international law. Even though they are frequently qualified as a subsidiary or auxiliary source of law on account of their gap-filling function and insignificant influence on the everyday life of the international community, it does not imply at all that they are inferior to the other sources of international law. In absence of a hierarchy of rules in international law, the category of general principles of law is equal to the other sources of law, including international treaties and customary international law. For that reason, the enumeration contained in Article 38, paragraph 1, of the Statute of the International Court of Justice does not reflect a hierarchy of sources, but indicates the logical train of thought of a judge in search of rules applicable to a given case.[101]

In a formal sense, general principles of law definitely serve as an unwritten source of law, the existence, content and effects of which predominantly manifest themselves in the practice of international judicial bodies. In a material sense, however, the source of law is either the community of states that established the customary rule of reception or the circumstances that necessitated this particular legislative act. General principles of law can at best be considered as a material source of law in terms of the development of international law, although it is most doubtful whether rules are capable of operating as a means of laying down new rules.[102] But it is exactly how this ethereal source of law seizes the attention of generations of international lawyers: every question answered raises even more.

[101] CHENG op. cit. 22.

[102] VIRALLY op. cit. 147.

A NEMZETKÖZI BÍRÓSÁG TANÁCSADÓ VÉLEMÉNYEZÉSI GYAKORLATÁNAK FEJLŐDÉSE

LAMM VANDA[1]

I.

Az államközi kapcsolatokban bizonyos nemzetközi intézmények részéről tanácsadó vélemény adása a 19. század utolsó harmadában a nemzetközi szervezetek elterjedésével párhuzamosan jelent meg, s elsősorban egyes ún. nemzetközi igazgatási uniók alapítóokiratai rendelkeztek erről.[2] Ezek az intézmények azonban – amint erre a szakirodalomban többen rámutatnak – technikai jellegű együttműködési szervezetek voltak, és semmiképpen nem minősíthetők jogi fórumnak.[3]

A nemzetközi bíróságok közül elsőként az Állandó Nemzetközi Bíróság vonatkozásában merült fel az a gondolat, hogy e bíróság jogosult legyen tanácsadó vélemény nyújtására. Az első világháború után létrehozandó új bírói fórum tanácsadó véleményezési eljárásáról a Nemzetek Szövetsége Egyezségokmány ának XIV. cikke rendelkezett, kimondván, hogy

„[…] A Bíróság azonfelül véleményt fog nyilvánítani minden olyan vitás esetben és kérdésben, amelyet a Tanács vagy a Közgyűlés hozzá utal."[4]

Rosenne véleménye szerint az Egyezségokmány idézett rendelkezésével azt célozták, hogy a Tanácsban és a Közgyűlésben helyet foglaló államok jogosultak legyenek kollektíve, az említett szervek tagjaiként valamely vitával vagy kérdéssel kapcsolatban a Bíróság véleményét kikérni, mégpedig egy olyan eljárás keretében, amely eltér attól az esettől, amikor a felek vitájuk eldöntése

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[1] Az MTA levelező tagja, az MTA Jogtudományi Intézet igazgatója.

[2] Ilyen rendelkezés található például az 1874-ben kelt Egyetemes Postaegyezmény 14. cikkében és az 1919-es Léghajózási Egyezmény 34. cikkében.

[3] Vö. GUILLAUME BACOT: Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la C.P.J.I et de la C.I.J. *Revue Générale de Droit International Public,* 1980. 1028.; és ANDREAS ZIMMERMANN – CHRISTIAN TOMUSCHAT – KARIN OELLERS-FRAHM (ed.): *The Statute of the International Court of Justice*. A Commentary. Oxford University Press, 2006. 1403.

[4] Az Egyezségokmány ezen szakaszának létrejöttével kapcsolatban ld. MANLEY O. HUDSON: *The Permanent Court of International Justice* 1920–1942. A Treatise. New York: Arno Press, 1972. 107–108.

végett közvetlenül fordulnak a Bírósághoz. Ezen túlmenően pedig azt akarták, hogy a Bíróság véleménye ne legyen kötelező. Vagyis, lényegében az volt a törekvésük, hogy – Nemzetek Szövetsége említett szerveinek közvetítésével – adott esetben megszerezhessék a Bíróság véleményét, úgy azonban, hogy ez a vélemény semmilyen formában se kösse a véleményt kérő szervet, illetve a véleménykérés mögött meghúzódó államok cselekvési szabadságát.[5]

Az Egyezségokmány XIV. cikke alapján az Állandó Nemzetközi Bíróság Statútumát kidolgozó jogászbizottság hosszan foglalkozott a felállítandó bíróság tanácsadó véleményezési eljárásával.

A jogászbizottság eredetileg azt javasolta, hogy amennyiben a Bíróság egy olyan nemzetközi kérdésben nyilvánít tanácsadó véleményt, amely nincs összefüggésben valamely felmerült vitával, úgy a véleményt egy 3-5 tagú speciális bizottság adja meg. Ha viszont a tanácsadó vélemény egy meglévő vita tárgyát képezi, akkor ugyanolyan szabályok szerint járjanak el, mintha az ügyet peres eljárásban való döntés végett terjesztették volna a Bíróság elé. Vagyis elméleti kérdésekkel a Bíróság tagjaiból álló kamara foglalkozott volna, a „gyakorlatiakkal" pedig a Bíróság teljes ülése. Ez utóbbi esetben a peres eljárásra vonatkozó szabályokat alkalmazták volna, s így sor került volna *ad hoc* bírók részvételére az eljárásban, a felek előadhatták volna érveiket, stb.[6] A jogászbizottság tervezetének a Tanácsban és a Közgyűlésen való vitája során azonban végül is a Statútumból törölték a tanácsadó véleményezési eljárásra vonatkozó szakaszokat.[7] Az Állandó Nemzetközi Bíróság Statútumának eredeti változatában tehát a tanácsadó véleményezési eljárásról nem volt szó, magát a tanácsadó véleményezési eljárást azonban nem zárták ki.[8] Mindezek következtében – amint erről még szó lesz – éveken át a tanácsadó véleményezési eljárásokról csak a Bíróság Eljárási Szabályzata rendelkezett. Miután a nemzetközi közösség államai a tanácsadó véleményezési eljárásokkal kapcsolatban – ellentétben a peres nemzetközi bírói eljárásokkal – nem sok tapasztalattal bírtak, így az Állandó Nemzetközi Bíróság a maga részéről azt a megoldást választotta, hogy

[5] SHABTAI ROSENNE: *The Law and Practice of the International Court.* 1920–2005. Fourth Edition. Leyden–Boston: Martinus Nijhoff Publishers, 2006. 274.

[6] STEPHEN M. SCHWEBEL: Was the capacity to request an advisory opinion wider in the Permanent Court of International Justice than it is in the International Court of Justice. *The British Year Book of International Law,* Vol. 62, 1991. 78.

[7] Vö. HUDSON i. m. 483–484. Schwebel utal arra, hogy a tárgyalások során elvetették azt az argentin javaslatot, amely a Nemzetek Szövetségének tagállamai számára is megengedte volna tanácsadó vélemény kérését a Bíróságtól, s nem foglalkoztak komolyan a Nemzetközi Munkaügyi Szervezetnek azzal a javaslatával sem, hogy e nemzetközi szervezet jogosult legyen a Bíróságtól tanácsadó véleményt kérni. SCHWEBEL i. m. 78.

[8] A Statútum eredeti tervezete 36. cikkében a tanácsadó véleményezési eljárással is foglalkozott. Végül azonban a Statútumból ezeket a rendelkezéseket törölték, mondván, hogy az Egyezségokmány XIV. cikkére tekintettel a Bíróság nem tagadhatja meg a tanácsadó vélemények meghozatalát. Vö. ZIMMERMANN–TOMUSCHAT–OELLERS-FRAHM i. m. 1404.

a tanácsadó véleményezési ügyekre alapvetően – a szükséges változtatásokkal – a peres eljárásokra vonatkozó szabályokat alkalmazta.[9]

Az Állandó Nemzetközi Bíróság első Eljárási Szabályzatának 71–74. cikkei foglalkoztak a tanácsadó véleményezési eljárással, rögzítve, hogy ilyen véleményt a Nemzetek Szövetségének Közgyűlése és Tanácsa kérhet,[10] a véleményeket a Bíróság teljes ülése hozza (tehát nem holmi tanács vagy kamara), a Bíróság tagjai a többségi állásponttól eltérő véleményeiket csatolhatják a tanácsadó véleményhez, a véleménykérésről értesítik a Nemzetek Szövetségének tagállamait, továbbá az Egyezségokmány mellékletében felsorolt államokat, valamint minden olyan nemzetközi szervezetet, amely a Bíróság elé terjesztett kérdések szempontjából releváns információval bír, stb.

A Statútumban végül is csak az okmány 1929-ben történt módosításakor jelentek meg a tanácsadó véleményekre vonatkozó rendelkezések, s ekkor az Eljárási Szabályzat 72–74. cikkeit – néhány apróbb módosítással – átemelték a Statútumba.[11]

A tanácsadó véleményezési eljárás hamar elnyerte a nemzetközi közösség államainak „tetszését", amit mi sem bizonyít jobban, mint az, hogy néhány héttel az első, 1922-ben kelt Eljárási Szabályzat létrejötte után a Nemzetek Szövetségének Tanácsa tanácsadó véleményért fordult a Bírósághoz, s nem egészen négy hónap alatt a bírói testület két tanácsadó véleményezési ügyben hozott döntést.[12]

Az Állandó Nemzetközi Bíróság fennállása alatt ténylegesen 27 esetben nyilvánított tanácsadó véleményt.[13] Valamennyi véleménykérést a Tanács terjesztette elő. Ezen vélemények közül 12 esetben a véleménykérés a Tanács saját kezdeményezésére (*proprio motu*) történt, míg a többi ügyben – bár azokkal formailag a Tanács fordult a Bírósághoz – a véleménykérés valamely másik nemzetközi szervezet, illetve egy vagy több állam javaslatára történt.[14]

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[9] Ezzel kapcsolatban ld. Geneviève Guyomar: *Commentaire du Réglement de la Cour internationale de Justice.* Paris: Éditions A. Pedone, 1983. 646.

[10] Meg kell jegyezzük, hogy a Nemzetek Szövetségének idején mind a Tanácsban, mind pedig Közgyűlésen vita tárgya volt az, hogy e két szervben a tanácsadó vélemény kérésről szükséges-e egyhangú határozatot hozni. Sőt, még az is felmerült, hogy magától a Bíróságtól kérjenek tanácsadó véleményt abban a kérdésben, hogy többségi határozat alapján fordulhatnak-e tanácsadó véleményért a Bírósághoz. Ld. ezzel kapcsolatban Hudson i. m. 488–494.

[11] Ezek lettek a Statútum 65–67. cikkei. Vö. Guyomar i. m. 647.

[12] Ld. ezzel kapcsolatban *Nomination of the Netherlands Workers' Delegate to the Third Session of the International Labor Conference.* Advisory Opinion No. 1. July 31, 1922. és *Competence of the International Labor Organization with respect to Agricultural Labor.* Advisory Opinion No. 2. August 12, 1922.

[13] Az Állandó Nemzetközi Bírósághoz 29 esetben fordultak véleményért, a testület azonban ténylegesen 27 esetben nyilvánított tanácsadó véleményt.

[14] A nemzetközi szervezetek közül különösen a Nemzetköi Munkaügyi Szervezet „jeleskedett", s hat esetben a tanácsadó véleménykérés kezdeményezése a Munkaügyi Szervezettől eredt.

A Nemzetközi Bíróság joggyakorlatában a tanácsadó vélemények aránya a peres ügyekhez viszonyítva kisebb, mint az Állandó Nemzetközi Bíróság idején volt, ugyanakkor azonban a Bíróság tanácsadó véleményezési gyakorlata is jelentős, s számos – nyugodtan állítható – világpolitikai jelentőségű kérdésben nyilvánított véleményt.

Napjainkra a tanácsadó véleményezési eljárás is meglehetősen elterjedtté vált, s a Nemzetközi Bíróságon kívül egyéb nemzetközi bírói fórumok is jogosultak tanácsadó véleményt adni. Így az alapítók felruházták tanácsadó véleményezési joggal például az Emberi Jogok Európai Bíróságát és a Nemzetközi Tengerjogi Törvényszéket. Más kérdés az, hogy e bíróságok gyakorlatában a tanácsadó vélemények még ritkábban fordulnak elő, mint a világbíróság gyakorlatában.

II.

A második világháború után az új világszervezet alapításával és az új nemzetközi bírói fórum létrehozásával foglalkozó tárgyalásokon a tanácsadó véleményekkel kapcsolatos alapvető szabályokat nem módosították.[15] Mindemellett azonban bizonyos változások történtek, amelyek elsősorban az ENSZ Alapokmány 96. cikkében kerültek rögzítésre. Eszerint

„1. A Közgyűlés vagy a Biztonsági Tanács a Nemzetközi Bíróságtól bármely jogi kérdésben tanácsadó véleményt kérhet.

2. A Szervezet minden más szerve és a szakosított intézmények a Közgyűlés által bármikor megadható felhatalmazás alapján a tevékenységi körükben felmerülő jogi kérdésekben szintén tanácsadó véleményt kérhetnek a Bíróságtól."

A Nemzetközi Bíróság vonatkozásában tehát kibővítették a tanácsadó véleménykérésére jogosultak körét, másfelől azonban ezen eljárások vonatkozásában bizonyos olyan korlátokat is beiktattak, amelyek a két világháború között ismeretlenek voltak. Az Alapokmány idézett szakasza értelmében a világszervezet két legfontosabb politikai szerve, a Közgyűlés és a Biztonsági Tanács tanácsadó véleményt kérhet. A Nemzetek Szövetségének Egyezségokmányában foglaltaktól eltérően azonban nem általában „vitás esetben és kérdésben", hanem **„***bármely jogi kérdésben*". Ez a módosítás eléggé egyértelműen azt az óhajt tükrözi, hogy – szakítva a két világháború közötti gyakorlattal – a Bírósághoz ne bármiféle vitás ügyben fordulhassanak tanácsadó véleményért, hanem csak

Ennek oka az volt, hogy – mint ismeretes –, a két világháború között a Munkaügyi Szervezet nem rendelkezett azzal a joggal, hogy saját nevében tanácsadó véleményért fordulhasson a Bírósághoz. Vö. SCHWEBEL i. m. 82.

[15] Ld. ezzel kapcsolatban ZIMMERMANN–TOMUSCHAT–OELLERS-FRAHM i. m. 1405–1406.

kifejezetten *jogi kérdésekben.* A véleményt kérők köre viszont kibővült, amennyiben a Közgyűlés felhatalmazásával más nemzetközi szervezetek és a szakosított intézmények is fordulhatnak tanácsadó véleményért a Bírósághoz, de – s ismét egy korlátozás – nem bármely kérdésben, hanem csak a „*tevékenységi körükben felmerülő jogi kérdésekben*".

Az elmondottakon túl azonban a tanácsadó véleményekre vonatkozó szabályok nem változtak.

Az elmúlt kilenc évtized alatt a tanácsadó véleményeknek különféle csoportjai alakultak ki, s éppen annak következtében, hogy mind az Alapokmány, mind pedig a Statútum ezen eljárásokról alig szól, a tanácsadó véleményekkel összefüggésben nem kevés tisztázatlan kérdés merült fel. E tanulmány kereteit meghaladná ezek elemzése, s így csak néhány problémára térünk ki.

III.

Annak ellenére, hogy valójában a két Nemzetközi Bíróság Statútuma sehol nem mondja ki, hogy a tanácsadó vélemények nem kötik a véleményt kérő szervet vagy szervezetet, általánosan elfogadott, hogy e vélemények nem bírnak kötelező erővel. Az Alapokmány 94. cikke csak a peres ügyekben meghozott határozatok vonatkozásában írja elő, hogy az azokból folyó kötelezettségeiknek a felek kötelesek eleget tenni. A tanácsadó véleményekkel kapcsolatban Hudson azt írja: a vélemények semmilyen tekintetben nem tekinthetők a Statútum 60. cikke szerinti ítéletnek, vagy az 59. cikk szerinti döntésnek.[16] Maga a Nemzetközi Bíróság több esetben hangsúlyozta, hogy véleménye csak tanácsadó jellegű, s mint ilyen nem bír kötelező erővel.[17]

Annak ellenére, hogy a Bíróságnak a véleményezési eljárásban meghozott döntései nem bírtak kötelező erővel, már az Állandó Nemzetközi Bíróság idején is voltak olyan tanácsadó vélemények, amelyek – különféle okok miatt – mégis kötelező erővel rendelkeztek. Mindezt csak erősítette az, hogy a Bíróság tagjaiból kiküldött háromtagú bizottság 1927-ben kelt jelentésében arra az álláspontra helyezkedett, hogy azokban az esetekben, amikor a tanácsadó véleményezési ügyekben felek is vannak, csak névleges különbség van a peres ügyek és a tanácsadó véleményezési ügyek között, s a bizottság tagjai arra a konklúzióra

[16] Hudson i. m. 511.

[17] Ld. ezzel kapcsolatban *A bolgár, a magyar és a román békeszerződés értelmezése*, valamint *Az ENSZ kiváltságairól és mentességeiről szóló egyezmény VI. cikek 22. szakaszának alkalmazhatósága* tanácsadó véleményeket. *Interpretation of Peace Treaties with Nulgaria, Hungary and Romania.* Advisory Opinion of March 30th, *I.C.J. Reports,* 1951. 71. és *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations.* Advisory Opinion of 15 December, 1989. *I.C.J. Reports* 1989, 189.

jutottak, hogy a tanácsadó vélemények csak elméletileg nem bírnak kötelező jelleggel.[18]

A kötelező erővel bíró tanácsadó véleményekkel kapcsolatban számos jogi kérdés merül fel, amelyeknek részletes elemzése meghaladná e tanulmány kereteit, így csak néhány probléma vizsgálatára szorítkozunk.

Az egyik ilyen nyitott kérdés az, hogy a kötelező erővel bíró tanácsadó véleményekben eldöntött kérdések mennyiben tekinthetők *res judicata*-nak.

A két világháború között bizonyos tanácsadó vélemények kötelező jellegével kapcsolatos álláspontok – nézetünk szerint – alapvetően két okra vezethetők vissza. Az egyik ok az volt, hogy már ekkor léteztek olyan nemzetközi szerződéses rendelkezések, amelyek egyértelműen rögzítették, hogy az Állandó Nemzetközi Bíróság által meghozott tanácsadó vélemények kötelező erővel bírnak, a másik tényező pedig arra vezethető vissza, hogy a tanácsadó véleményezési eljárásokkal kapcsolatban hiányzott a kialakult nemzetközi gyakorlat.

A tanácsadó vélemények kötelező jellegét rögzítő szerződésekre példa a viták békés rendezéséről szóló 1924-es Genfi Jegyzőkönyv 5. cikke, amely bizonyos választottbírósági eljárások esetében lehetővé tette a Nemzetek Szövetsége Tanácsának közbeiktatásával az Állandó Nemzetközi Bíróságtól tanácsadó vélemény kérését, kimondva, hogy az így meghozott véleményt a választottbíróság köteles figyelembe venni.[19]

Lényegében a tanácsadó véleményekkel kapcsolatos kialakulatlan gyakorlatnak tudható be az, hogy bizonyos államok előre rögzítették, hogy Állandó Nemzetközi Bíróság által meghozandó tanácsadó véleményt kötelezőnek ismerik el. Ez történt a Franciaország és Nagy-Britannia közötti a tuniszi és marokkói állampolgársági dekrétumokkal összefüggő, a Tanács által beterjesztett tanácsadó vélemény esetében, amikor az érintett két állam előre kötelezte magát, hogy a Bíróság által meghozandó véleményt végre fogják hajtani.[20] Hasonló eset volt a Lengyelország és Danzig közötti, a danzigi postai szolgáltatásra vonatkozó vita ügyében, amellyel összefüggésben szintén a Nemzetek Szövetségének Tanácsa kért tanácsadó véleményt. Ebben az esetben azonban – amint az Bacot írja – az érintettek nem előre, hanem a Bíróság döntésének meghozatalát megelőző napon állapodtak meg, hogy a tanácsadó véleményben

[18] C.P.J.I. Séries E. No.4. p.72. Idézi: BACOT i. m. 1029.

[19] A Genfi Jegyzőkönyv 5. cikke egyebek között a következőket tartalmazza: „Ha a fentebbi 4. cikkben előírt választottbírósági eljárások egyike folyamán az egyik fél azt állítja, hogy a nemzetközi jog szerint a vitás eset vagy annak egy része ennek a félnek kizárólagos joghatósága alá tartozó kérdésre vonatkozik, a választottbírák e pontra nézve a Tanácsa útján ki fogják kérni az Állandó Nemzetközi Bíróság véleményét. A Bíróság véleménye köti a választott bírákat, akik igenlő vélemény esetén csupán annak ítéletükben való megállapítására szorítkoznak."

[20] A két állam közötti vitával összefüggésben a Nemzetek Szövetségének Tanácsa fordult 1922-ben tanácsadó véleményért a Bírósághoz.

foglaltakat kötelezőnek ismerik el.[21] E két esettel kapcsolatban Bacot nyomán érdemes megjegyezni azt, hogy noha a tuniszi és marokkói állampolgársági dekrétumok ügyében a Bíróság tudatában volt annak, hogy a vélemény által érintett államok kötelezőnek tekintik a tanácsadó véleményben foglaltakat; addig a danzigi postai szolgáltatással összefüggő vélemény esetében – miután az érintettek csak a tanácsadó vélemény meghozatala után hozták a Bíróság tudomására, hogy a véleményét kötelezőnek ismerik el – erről a bírói testületnek nem lehetett tudomása. Az Állandó Nemzetközi Bíróság azonban sem az egyik, sem pedig a másik esetben nem tért ki arra a kérdésre, hogy mi történik akkor, ha az államok előre rögzítik, hogy a Bíróság véleményét kötelezőnek ismerik el.

A második világháború után az államközi gyakorlatban mind több olyan nemzetközi szerződéses kikötés jelent meg, amelyekben a szerződő felek közötti viták esetén a Bíróság által tanácsadó véleményezési eljárás keretében meghozott „döntésről" rendelkeznek. Vagyis, – amint erre Roberto Ago rámutat – a véleménynek a felek közötti viszonylatban „kötelező erőt" tulajdonítanak.[22] Ilyenként említhető például több, az ENSZ-családba tartozó nemzetközi szervezet által megkötött székhelyegyezmény, vagy a szervezeteket megillető kiváltságokról és mentességekről szóló egyezmények, amelyek úgy rendelkeznek, hogy az adott szerződéssel kapcsolatos viták esetén ki kell kérni a Nemzetközi Bíróság tanácsadó véleményét, s a Bíróság által meghozott véleményt a szerződő felek kötelezőnek ismerik el.

Az említett szerződésekben található rendelkezések minden bizonnyal arra vezethetők vissza, hogy a nemzetközi szervezetek el vannak zárva annak lehetőségétől, hogy vitás ügyeiket peres eljárás keretében a Nemzetközi Bíróság döntse el. Ugyanakkor azonban valamely nemzetközi szervezet és például a székhelyállam között felmerülhetnek viták, mind a mai napig azonban nem jött létre olyan bírói fórum, amely ezeket eldönthetné. Úgy tűnik tehát, hogy ezt a hiányt próbálták pótolni azzal, hogy az e viták rendezésével kapcsolatos tanácsadó véleményt „döntés"-nek nevezik. Mindez azonban nem jelenti, s nem jelentheti azt, hogy itt *res judicata*-ról lenne szó, legfeljebb az az eset áll fenn, hogy – a Bíróság morális súlyára tekintettel – a „döntést" mind a nemzetközi szervezet, mind pedig az érintett állam tiszteletben tartja. Ebben az esetben a *res judicata* ellen szól az is, hogy valójában maga a Nemzetközi Bíróság – miután az ENSZ egyik főszerve – nem igazán tekinthető „pártatlan harmadik félnek" valamely, az ENSZ rendszerébe tartozó nemzetközi szervezet és egy állam közötti vitában.

Az elmúlt több mint hat évtized alatt ilyen szerződéses kikötések alapján több esetben fordultak tanácsadó véleményért a Bírósághoz. Ilyenként említhe-

[21] Bacot i. m. 1036.

[22] Roberto Ago: „Binding" advisory opinions of the International Court of Justice. *American Journal of International Law.* 1991. 439.

tő például *Az ENSZ kiváltságairól és mentességeiről szóló egyezmény VI. cikke 22. szakaszának alkalmazhatóságának ügye* (Mazilu ügy), valamint az *Emberi Jogi Bizottság speciális rapporteur-je jogi eljárás alóli mentességére vonatkozó* tanácsadó vélemény (Cumaraswamy ügy), amelyekben az ENSZ kiváltságairól és mentességeiről szóló egyezményről volt szó. Vagyis mindkét esetben egy olyan nemzetközi szerződéssel összefüggésben kértek a Nemzetközi Bíróságtól tanácsadó véleményt, amely előre rögzítette, hogy a vélemény az érintettekre nézve kötelező lesz. De megemlíthető még *Az 1947. június 26-án létrejött ENSZ székhelyegyezmény szerinti választottbírósági eljárás alkalmazhatósága* néven ismert tanácsadó vélemény, amely az ENSZ és a székhely állama, az Egyesült Államok közötti, a Palesztin Felszabadítási Szervezet New York-i Megfigyelő Irodájával kapcsolatos vita választottbírói rendezésére vonatkozó kötelezettséggel függött össze.

A hatályos nemzetközi jog alapján semmi nem tiltja, hogy egy tanácsadó vélemény által érintettek vállalják, hogy a Bíróság véleményében foglaltakat magukra nézve kötelezőnek ismerik el. Az ilyen kijelentésekkel kapcsolatban azonban felmerül a kérdés, hogy az azokban foglaltak mennyiben kötik a nyilatkozót. Nyilvánvalóan e kötelezés semmiképpen nem alapulhat a Statútumon, s egyfajta egyoldalú aktusként foghatók fel, amelynek alapján a nemzetközi közösség tagjai joggal bízhatnak abban, hogy a nyilatkozó önként vállalt kötelezettségét jóhiszeműen hajtja végre és nyilatkozata szerint fog eljárni. Ebben az esetben tehát a tanácsadó véleményben foglaltak kötelező jellege nem az Alapokmányon, vagy a Statútumon alapul, hanem a nyilatkozattevő egyoldalú vállalásán, vagyis a nyilatkozat annyiban köti a nyilatkozót, mint bármely más egyoldalú aktus. Hangsúlyozni kell azonban, hogy bármiféle ilyen előzetes nyilatkozattól függetlenül, a Bíróság nem térhet el a tanácsadó véleményezési eljárására vonatkozó szabályoktól, s tanácsadó véleményezési eljárását nem „alakíthatja át" peres eljárássá.

IV.

A Nemzetközi Bíróság tanácsadó véleményezési gyakorlatában sajátos csoportot képeznek az adminisztratív bíróságok ítéleteinek felülvizsgálatával kapcsolatos ügyek. Ezen ügyek az 1950-es évek első felében jelentek meg, s a sorban az első volt *Az ENSZ Adminisztratív Bírósága által hozott ítéletek jogi hatálya* című tanácsadó vélemény, amikor a Bíróságnak tanácsadó véleményezési eljárás keretében nemzetközi szervezetek és azok tisztviselői közötti, az adminisztratív bíróságok által meghozott ítéletekkel kellett foglalkoznia. Az adminisztratív bíróságok ítéleteit érintő első tanácsadó vélemény nyomán az ENSZ Közgyűlése 957/X. sz. 1955. november 8-án kelt határozatával módo-

sította az ENSZ Adminisztratív Bíróságának Statútumát, beiktatva abba a nevezetes XI. cikket, amely lehetővé tette, hogy tanácsadó véleményezési eljárás keretében bizonyos szempontból felülvizsgálhassák az Adminisztratív Bíróság ítéleteit. Az új rendelkezések értelmében, ha az Adminisztratív Bíróság ítélete által érintett tagállam, természetes személy vagy az ENSZ főtitkára vitatja az Adminisztratív Bíróság döntését, úgy az ítélet hozatalától számított 30 napon belül az Adminisztratív Bíróság Ítéleteit Felülvizsgáló Bizottsághoz fordulhat, hogy az az ügyben a Nemzetközi Bíróságtól kérjen tanácsadó véleményt. Ez a Bizottság egyébként egyfajta szűrő szerepét töltötte be, s a kérelem vételétől számított 30 napon belül kellett döntenie arról, hogy a tanácsadó vélemény kérésére vonatkozó előterjesztés komoly alapokon nyugszik-e.

A későbbiekben az Adminisztratív Bíróság Ítéleteit Felülvizsgáló Bizottság döntése alapján több tanácsadó véleményezési ügy került a Nemzetközi Bíróság elé. Az ügyek közül érdemes megemlíteni *A Nemzetközi Munkaügyi Szervezet Adminisztratív Bíróságának az UNESCO elleni ügyekben hozott ítéletei* című tanácsadó véleményt, amelyben a Nemzetközi Bíróság – annak kapcsán, hogy eleget tegyen-e a véleménynyilvánítási kérelemnek – részletesen foglalkozott a tanácsadó vélemények e csoportjának sajátosságaival. A bírói testület rámutatott arra, hogy miután az Adminisztratív Bíróság Statútumának XII. cikke értelmében a Bíróság véleménye „kötelező", ennek következtében az ilyen ügyekben meghozott döntése joghatásait tekintve túlmegy a tanácsadó véleményeknek az ENSZ Alapokmányában és a Nemzetközi Bíróság Statútumában meghatározott hatókörén. A Bíróság szerint az Adminisztratív Bíróság Statútumának említett rendelkezését úgy kell felfogni, mint amely meghatározza az ügyben érintett UNESCO Végrehajtó Tanácsa számára azt, hogy a Bíróság véleménye alapján miképpen járjon el. Ez a rendelkezés azonban semmiképpen sem érinti a Nemzetközi Bíróság működésével összefüggő kérdéseket, azokat továbbra is a Statútum és az Eljárási Szabályzat határozza meg, s „[…] az a tény, hogy a Bíróság véleménye kötelező, a tanácsadó vélemény megadásának nem képezi akadályát."[23]

A későbbiekben több hasonló ügy került a Bíróság elé, így *Az ENSZ Adminisztratív Bírósága 158. sz. ítéletének felülvizsgálása* (Fasla ügy)*, Az ENSZ Adminisztratív Bírósága 273. sz. ítéletének felülvizsgálása* (Mortished ügy), valamint *Az ENSZ Adminisztratív Bírósága 333. sz. ítéletének felülvizsgálása* (Jakimec ügy), s valamennyi esetben az eljárás alapját az Adminisztratív Bíróság Statútumának nevezetes XI. cikke képezte: [24]

[23] Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the UNESCO. Advisory Opinion of October 23ud, 1956. *I.C. J. Reports,* 1956. 84.

[24] Az ügyek között annyi volt a különbség, hogy a 158. és a 333. sz. ítélet felülvizsgálatára vonatkozó kezdeményezés az Adminisztratív Bíróság ítélete által érintett tisztviselőtől eredt, míg a 273. sz. ítélet felülvizsgálatára vonatkozó kérelmet az Adminisztratív Bíróság Ítéleteit

Az ENSZ Adminisztratív Bírósága döntéseinek tanácsadó véleményezési eljárás keretében való felülvizsgálata egészen az 1990-es évek közepéig volt lehetséges.

Ezeket az eljárásokat egyébként sok bírálat érte,[25] hiszen – az igazat megvallva – a Bíróság az államközi kapcsolatok szempontjából igen csak jelentéktelen kérdésekkel volt kénytelen foglalkozni, amikor például arról kellett döntenie, hogy egy volt ENSZ tisztviselőnek járó repatriálási juttatás ügyében az Adminisztratív Bíróság betartott-e minden eljárási szabályt. Egyébként voltak olyan javaslatok is, hogy a nemzetközi szervezetek tisztviselőinek ügyei vonatkozásában létesítsenek a különböző adminisztratív bíróságok által delegált személyekből álló felülvizsgálati fórumot, s ennek folytán az ilyen ügyek kikerülhettek volna a Nemzetközi Bíróság tanácsadó véleményezési eljárása alól. Az ENSZ Közgyűlése végülis 50/54 sz. 1995. december 11-i határozatával törölte az Adminisztratív Bíróság Statútumának XI. cikkét, kimondva egyben, hogy 1996. január 1-je után ennek alapján újabb eljárásra nem kerülhet sor.[26] A Közgyűlés 50/54 sz. határozata nyomán az a helyzet állt elő, hogy – amint erre Charles N. Brower és Pieter H. F. Bekker rámutat[27]– a kötelező erővel bíró tanácsadó vélemények eljárásának jogi alapja az adminisztratív bíróságok statútuma helyett lényegében áthelyeződött az ENSZ kiváltságairól és mentességeiről szóló egyezmény 30. cikkére. Mindezek után 2009. december 31-i hatállyal maga az Adminisztratív Bíróság is megszűnt,[28] s a világszervezet és az ENSZ tisztviselők közötti viták rendezésére egy új kétszintű bírósági rendszert hoztak létre,[29] amelyben a Nemzetközi Bíróságnak már semmiféle szerep nem jutott.

Felülvizsgáló Bizottságnál egy ENSZ tagállam, az Egyesült Államok kezdeményezte. A Nemzetközi Bíróságnak a nemzetközi szervezetek tisztviselőivel kapcsolatos tanácsadó véleményeivel összefüggésben ld. C. F. AMERASINGHE: Cases of the International Court of Justice relating to employment in international organizations. In VAUGHAN LOWE – MALGOSIA FITZMAURICE (ed.): *Fifty years of the International Court of Justice. Essays in honour of Sir Robert Jennings.* Grotius Publications – Cambridge University Press, 1996. 193–209.

[25] Ld. ezzel kapcsolatban AGO i. m. és ROSALYN HIGGINS: A comment on the current health of Advisory Opinions. In LOWE–FITZMAURICE i. m.

[26] A Közgyűlés 50/54 sz. 1995. december 11-i határozatával törölte az Adminisztratív Bíróság Statútumának XI. cikkét, s kimondta, hogy 1996. január 1-je után ennek alapján újabb eljárásra nem kerülhet sor.

[27] CHARLES N. BROWER – PIETER H. F. BEKKER: Understanding „Binding" Advisory Opinions of the International Court of Justice. In NISUKE ANDO – EDWARD MACWHINNEY – RÜDIGER WOLFRUM (ed.): *Liber Amicorum Judge Shigeru Oda.* The Hague–London–New York: Kluwer Law International, 2002. 353.

[28] Ld. ezzel kapcsolatban a ENSZ Közgyűlés 61/261, 62/228 és 63/253 sz. határozatait.

[29] Az új rendszer UN Internal Justice System néven működik. Első fokon a UN Dispute Tribunal jár el, másod fokon pedig a UN Appeals Tribunal.

Vagyis ezzel véget vetettek annak a gyakorlatnak, hogy a Nemzetközi Bíróság lényegében kötelező erővel bíró tanácsadó véleményben felülvizsgálhassa az ENSZ Adminisztratív Bíróságának döntéseit.

V.

Az 1990-es évek közepén mind a szakirodalomban, mind pedig a Bíróságon belül nagy vitát váltott ki a tanácsadó vélemény keretében való absztrakt jogértelmezés kérdése, amikor a nukleáris fegyvereknek fegyveres konfliktusban való alkalmazásának jogszerűségével kapcsolatban először az Egészségügyi Világszervezet, majd pedig az ENSZ Közgyűlése a nukleáris fegyverekkel való fenyegetés, illetve azok alkalmazásának jogszerűsége tárgyában fordult tanácsadó véleményért a Bírósághoz.

E két tanácsadó vélemény – amelyek közül a Bíróság az Egészségügyi Világszervezet kérését joghatóság hiányában elutasította[30] – egyebek mellett azért jelentett újdonságot, mert ebben az esetben nem egy konkrét vitával kapcsolatban kérték a Bíróság állásfoglalását, hanem egy absztrakt jogértelmezési kérdésben.

A Nemzetközi Bíróság számára kétségtelenül semmi nem tiltja, hogy absztrakt jogértelmezési kérdéssel foglalkozzon, s amint azt maga a bírói testület legelső tanácsadó véleményében, *Az Egyesült Nemzetek tagjává való felvétel feltételei*ben leszögezte: „Az Alapokmány 96. cikke és a Statútum 65. cikke értelmében a Bíróság tanácsadó véleményt adhat minden – akár absztrakt, akár nem absztrakt – jogi kérdésben."[31] A tagfelvételi ügyben – bár maga a Bíróság foglalkozott az absztrakt jogértelmezés problémájával – egyértelműen világos volt, hogy a Közgyűlés azért fordult a Bírósághoz, mert egy konkrét helyzet megoldásához szerette volna a bírói testület segítségét igénybe venni. Vagyis a tanácsadó véleménykérés mögött egy konkrét ügy húzódott meg, amelyre vonatkozó kérdést a Közgyűlés absztrakt megfogalmazásban tette fel a Bíróságnak.

A nukleáris fegyverek alkalmazásának jogszerűségével kapcsolatban azonban nem valamely konkrét vita, ügy, vagy helyzet, stb. kapcsán felmerült jogi kérdésről volt szó. A nukleáris leszerelés kérdése ugyanis már hosszú évek óta szerepelt a világszervezet különböző szervei, köztük a Közgyűlés napirendjén,

[30] Legality of the Use by a State of Nuclear Weapons in Armed Conflict. Advisory Opinion of 8 July 1996. *I.C.J. Reports,* 1996. 66. A Bíróság álláspontja szerint az Egészségügyi Világszervezet kétségtelenül rendelkezett azzal a joggal, hogy a Bíróságtól tanácsadó véleményt kérjen, s a feltett kérdés jogi volt. Ugyanakkor azonban a tanácsadó vélemény kérése olyan kérdéseket érintett, amelyek nem tartoznak e szakosított intézmény tevékenységi körébe.

[31] Conditions of Admission of a State to Membership in the United Nations. Advisory Opinion of May 28th 1948. 61.

s – legjobb tudomásunk szerint – a világ egyetlen felelős politikusa sem vallotta nyíltan azt, hogy a nukleáris fegyverek használata jogszerű lenne.

A nukleáris fegyverekkel kapcsolatban nemcsak az Egészségügyi Világszervezet, hanem az ENSZ Közgyűlése is tanácsadó véleményért fordult Bírósághoz. Ennek a kérésnek a bírói testület már helyt adott, felvállalva az absztrakt jogértelmezési feladatot rámutatott arra, miszerint az a tény, hogy a Bíróságnak feltett kérdés nem egy speciális vitára vonatkozik, nem eredményezheti azt, hogy a Bíróság a kért vélemény megadását visszautasítsa. A bírói testület a maga részéről döntésében különbséget tett a peres eljárásokra és a tanácsadó véleményekre vonatkozó előírások között. Hangsúlyozva, hogy tanácsadó véleményezési funkciójának – legalábbis közvetlenül – nem az államok közötti viták megoldásaa célja, hanem az, hogy jogi tanácsot adjon a véleményt kérő szerveknek és intézményeknek.[32] Vagyis a Bíróság hajlandó volt az absztrakt jogértelmezési kérésnek eleget tenni, noha a Bíróság több tagja igencsak ellenezte a vélemény megadását. Oda bíró olyannyira ellenezte, hogy kezdeményezésére a Bíróság külön előzetes szavazást tartott arról, hogy véleménykérésnek eleget tegyenek-e vagy sem.[33]

A nukleáris fegyverekre vonatkozó tanácsadó véleménykérés mögött az húzódott meg, hogy – mint már említettük – a nukleáris leszereléssel és a nukleáris fegyverek teljes betiltásával az ENSZ Közgyűlése évek óta foglalkozott, anélkül azonban, hogy e téren különösebb előrehaladás történt volna. A tanácsadó vélemény kérés kezdeményezői – a javaslatot Indonézia terjesztette elő az el nem kötelezett államok részéről, de az indítvány mögött felsorakoztak bizonyos nem kormányközi nemzetközi szervezetek is – nyilvánvalóan a nukleáris fegyverek betiltásának ügyét szerették volna kimozdítani a holtpontról azzal, hogy az ENSZ legfőbb bírói fórumának állásfoglalását próbálták megszerezni annak reményében, hogy a Bíróság a nukleáris fegyverek alkalmazása, vagy az azokkal való fenyegetés a nemzetközi jogba ütközését mondja ki. Nem véletlen, hogy annak idején a Nemzetközi Bíróság megkeresését a nukleáris hatalmak igencsak ellenezték,[34] s végül is a véleménykérésről szóló 49/75 K határozat is

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[32] Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion of 8 July 1996. *I.C.J. Report,* 1996. 236.

[33] Oda bíró a vélemény megadásával annyira nem értett egyet, hogy az egész ügyet a tanácsadó véleményezési eljárás karikatúrájának nevezte. Legality of the Use by a State of Nuclear Weapons in Armed Conflict. Advisory Opinion of 8 July 1996. Dissenting Opinion of Judge Oda. *I.C.J. Reports,* 1996. 369.

[34] Másokkal együtt a javaslat ellen foglalt állást az Egyesült Államok, az Egyesült Királyság, Franciaország és Oroszország, Kína pedig nem vett részt a szavazáson. De ellenezte, illetve tartózkodott a szavazástól több semleges állam is. Magyarország az ellenzők között volt. Egyébként maguk az el nem kötelezett államok is megosztottak voltak abban a kérdésben, hogy szükség van-e a Bíróság véleményére.

csak szoros szavazati eredménnyel került elfogadásra.[35] A Bíróság véleménye azonban nem azt tartalmazta, amit a véleménykérést támogatók hallani szerettek volna, hiszen a Bíróság – visszafogottan és diplomatikusan fogalmazva ugyan –, de kimondta azt, hogy a nemzetközi jogban nincsenek olyan szabályok, amelyek tiltanák, vagy megengednék a nukleáris fegyverek alkalmazását, vagy az azokkal való fenyegetést, ugyanakkor azonban a nemzetközi jog mai állapotára tekintettel a Bíróság nem tud végleges következtetésre jutni abban a kérdésben, hogy a nukleáris fegyverekkel való fenyegetés, vagy azok alkalmazása jogszerű-e vagy jogellenes az önvédelem olyan szélsőséges körülményei között, amikor az állam léte a tét. [36]

A nukleáris fegyverekkel való fenyegetéssel és e fegyverek alkalmazásával kapcsolatban az államok egy olyan kérdésben vártak a Bíróságtól határozott állásfoglalást, amelyről maguk – különféle okok miatt – hosszú évek óta képtelenek voltak megállapodásra jutni, noha az atomsorompó-szerződés 6. cikkében kifejezetten rögzíti, hogy

> „E Szerződés minden egyes részese kötelezi magát, hogy jóhiszemű tárgyalásokat folytat a nukleáris fegyverkezési verseny mielőbbi megszüntetése és a nukleáris leszerelés érdekében hozandó hatékony intézkedésekről, valamint egy szigorú és hatékony nemzetközi ellenőrzés mellett megvalósítandó általános és teljes leszerelési szerződésről."

Úgy tűnik tehát, hogy a nemzetközi közösség államainak egy része a Bíróság véleményével szerette volna pótolni a megállapodás hiányát, ami végső soron egyfajta jogalkotói funkciót kölcsönöz a testületnek.[37] Igaza volt tehát Oda bírónak, amikor rámutatott arra, hogy a Bíróságtól valójában a saját álláspontjának megerősítését várta a Közgyűlés, hiszen kevés volt a valószínűsége annak, hogy a Bíróság döntésében kimondaná: a nukleáris fegyverekkel való fenyegetés vagy e fegyverek alkalmazása igenis jogszerű.[38]

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[35] A véleménykérést 78 állam támogatta, 43 ellenezte, s 38-an tartózkodtak.

[36] Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion of 8 July 1996. *I.C.J. Report,* 1996. 266.

[37] Lényegében erre utalt Oda bíró is, amikor azt írta, hogy a feltett kérdésre adott válasz a genfi és New York-i politikai tárgyalások funkciója, s nem a hágai fórumé, amely a hatályos nemzetközi jog értelmezését csak tényleges szükség esetén adja meg. Legality of the Use by a State of Nuclear Weapons in Armed Conflict. Advisory Opinion of 8 July 1996. Dissenting Opinion of Judge Oda. *I.C.J. Reports*, 1996. 373.

[38] Uo. 332–333.

VI.

A Nemzetközi Bíróság gyakorlatában a tanácsadó vélemények sajátos csoportjaként említhetők azok a vélemények, amelyek *erga omnes* jellegűek; álláspontunk szerint e vélemények két csoportja között tehető különbség.

Az egyik csoportot azok a tanácsadó vélemények alkotják, amelyekben a Nemzetközi Bíróság általában a fennálló jog vonatkozásában tesz bizonyos megállapításokat, s – amint erre Rosenne rámutat – ezek *erga omnes* jellegűek. Hiszen például a Bíróságnak *Az Egyesült Nemzetek szolgálatában elszenvedett károk miatti kártérítésről* szóló véleményének nyilvánosságra hozatala óta senki sem kérdőjelezheti meg az ENSZ és a hozzá hasonló nemzetközi szervezetek jogképességét és jogalanyiságát, vagy *Emberi Jogi Bizottság speciális rapporteur-je jogi eljárás alóli mentességére vonatkozó* tanácsadó vélemény megszületése óta vitathatatlan, hogy bizonyos ENSZ-megbízottakat, akik nem ENSZ-tisztviselők, megilletik az ENSZ kiváltságairól és mentességeiről szóló egyezmény szerinti kiváltságok és mentességek.[39]

Az *erga omnes* vélemények másik csoportja a nemzetközi közösség egészére vonatkozóan – a vélemény jellegéből adódóan hol visszafogottabban, hol erőteljesebb hangsúllyal – bizonyos magatartásokat ír elő. A vélemények sorából erre példaként említhető a *Dél-Afrikának a Biztonsági Tanács határozatával ellentétesen fenntartott namíbiai jelenlétének jogi következményei* néven ismert tanácsadó vélemény, amelyben a Bíróság kimondta, hogy az ENSZ tagállamai kötelesek elismerni Dél-Afrika namíbiai jelenlétének jogellenességét, s kötelesek tartózkodni minden olyan magatartástól és különösen a dél-afrikai kormánnyal való minden olyan kapcsolattól, amely bármilyen formában ezen jelenlét jogszerűségének az elismerését jelentené.[40] Ezen túlmenően a véleményben a Bíróság meghatározta – hangsúlyozva ugyan, hogy ezt csak „tanácsképpen" teszi –, hogy a nemzetközi közösség államai a Dél-Afrikával való kapcsolatok mely kategóriáitól kötelesek tartózkodni.[41] Ebben az ügyben egyébként a Bíróság odáig ment, hogy a nem-tagállamok vonatkozásában is megállapított bizonyos kötelezettségeket.[42]

Az *erga omnes* kötelezettségeket tartalmazó vélemények közül nagy port kavart néhány évvel ezelőtt a Nemzetközi Bíróságnak 2004 nyarán a megszállt palesztin területeken épített fal tárgyában meghozott tanácsadó véleménye, amellyel kapcsolatban találóan jegyzi meg Lori Fisler Damrosch és Bernard H.

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[39] Vö. ROSENNE i. m. 1702.

[40] Vö. Legal Consequences for States of the Continued presence of South Africa in Namibia (south West africa) Nothwithstanding Security Council Resolution 276 (1970). Advisory Opinion of 21 June 1971. *I.C.J. Reports,* 1971, 54.

[41] Uo. 55–56.

[42] Ld. ezzel kapcsolatban a tanácsadó vélemény 3. pontját.

Oxman, hogy ez volt az a ritka eset, amikor a Bíróság egy tanácsadó véleménye világszerte a lapok címoldalára került.[43]

Ez az ügy – politikai jelentőségére tekintettel – ismét a figyelem előterébe helyezte a tanácsadó vélemények jogi jellegének problémáját, s a szakirodalomban többen felvetik bizonyos tanácsadó vélemények kötelező jellegének kérdését, illetve azt, vajon nem egy új típusú véleményről van-e szó.[44] Anélkül, hogy a megszállt palasztin területeken épített falra vonatkozó tanácsadó vélemény kapcsán felmerülő sokféle jogi kérdéssel részletesen foglalkoznánk,[45] itt csak annyit jegyeznénk meg, hogy ebben az ügyben a Nemzetközi Bíróság sok szempontból hasonlóan járt el, mint a namíbiai tanácsadó véleményben. Ebben az esetben is – hasonlóan a Namíbiával foglalkozóhoz tanácsadó véleményhez – a bírói testület kimondta, hogy egy állam, Izrael, a nemzetközi joggal ellentétesen járt el, amikor a megszállt palesztin területeken, valamint Kelet-Jeruzsálemben és körülötte falat épített, továbbá Izrael köteles a nemzetközi jogsértést, vagyis a fal építését abbahagyni, az elkészült részeket lebontani, stb., sőt a fal építése következtében előállt károkért kártérítéssel tartozik[46]

Ezen túlmenően – miután az izraeli jogsértések, mégpedig a palesztin nép önrendelkezési jogának és bizonyos humanitárius jogi szabályoknak a megsértése *erga omnes* kötelezettségeket érintenek – a Bíróság a nemzetközi közösség államai vonatkozásában is bizonyos következtetésekre jutott, amelyek a következők voltak: valamennyi állam köteles tartózkodni attól, hogy a megszállt palesztin területeken – beleértve a Kelet-Jeruzsálemben és a körülötte – épített fal következtében előálló jogellenes helyzetet elismerje, továbbá annak fenntartásához bármiféle támogatást vagy segítséget nyújtson. Ebben a véleményben is megtalálhatók – hasonlóan a namíbiai véleményhez – olyan kitételek, amelyek nem csak az ENSZ tagállamaira írnak elő kötelezettségeket, itt azonban a Bíróság a polgári lakosság védelméről szóló 1949. évi genfi egyezményben részes államokat szólítja fel, hogy – figyelemmel az ENSZ Alapokmányában foglaltakra és a nemzetközi jogi szabályokra – érjék el, hogy Izrael tartsa be ezen egyezményben foglalt humanitárius nemzetközi jog szabályokat.[47]

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[43] Lori Fisler Damrosch – Bernard H. Oxman: Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory. *American Journal of International Law,* 2005. 1.

[44] Vö. Kovács Péter: Ítélet tanácsadó vélemény köpönyegében – avagy van-e harmadik típusú eljárás a Nemzetközi Bíróság előtt? *Iustum Aequum Salutare,* IV. 2008/1. 5–22.

[45] A tanácsadó véleménnyel kapcsolatban az *American Journal of International Law* 2005. januári (vol. 99. No. 1) számában több tanulmányt adott közre.

[46] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 9 July 2004. *I.C.J. Reports,* 2004., ld. a vélemény A-C pontját.

[47] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 9 July 2004. *I.C.J. Reports,* 2004. 199–200., ld. a vélemény D pontját.

A vélemény igen erőteljes hangneméből, s Izraelt kötelező rendelkezéseiből egyes szerzők a tanácsadó vélemény kötelező jellegére következtetnek. A magunk részéről – anélkül, hogy e kérdéssel kapcsolatos bonyolult problémákba belemennénk – itt csak annyit szeretnénk megjegyezni, hogy bizonyos tanácsadó véleményekben bármennyire is erőteljesen fogalmazott a Nemzetközi Bíróság, ezek a vélemények nem bírnak – a peres ügyekben meghozott ítéletekhez hasonló – jogi erővel.

A megszállt palasztin területeken épített fal ügye felszínre hozott egy másik problémát is, mégpedig a Biztonsági Tanács és a Közgyűlés közötti viszony kérdését, miután az Alapokmány 12. cikke értelmében ha valamely viszály vagy helyzet fennállásakor a Biztonsági Tanács az Alapokmány által reá ruházott feladatokat végzi, a Közgyűlés az adott viszály vagy helyzet tekintetében nem tehet ajánlásokat, kivéve, ha a Tanács ez iránt meg nem keresi. A palesztin fal ügyében a Nemzetközi Bíróság előtt az a kérdés merült fel, hogy a Közgyűlés által a Nemzetközi Bíróságtól való tanácsadó véleménykérésre vonatkozik-e az Alapokmány 12. cikke. A Nemzetközi Bíróság a maga részéről világossá tette, hogy a tanácsadó véleménykérése nem minősül „ajánlásnak," s a Közgyűlés részéről nincs szó *ultra vires* aktusról.[48] Mind e mellett azonban nyitva hagyta azt a kérdést, hogy a tanácsadó véleményekre mennyiben vonatkozik az Alapokmány 12. cikke.[49]

A megszállt palesztinai területeken épített fal ügye egyébként tipikus példája annak az esetnek, amikor a Bíróság olyan megállapításokat tett, amelyeket valójában egy másik ENSZ főszervnek – a jelen esetben a Biztonsági Tanácsnak – kellett volna kimondania.

VII.

Összefoglalásként elmondható: annak ellenére, hogy a tanácsadó véleményekről a kezdet-kezdetén még csak rendelkezések sem voltak az Állandó Nemzetközi Bíróság Statútumában, a véleményadás az évek során egy általánosan elfogadott és nem egy esetben igencsak fontos jogi kérdésekben alkalmazott eljárássá vált. Érdekes módon, míg a peres ügyekkel kapcsolatos eljárás az elmúlt kilenc évtized alatt szinte érintetlen maradt, a tanácsadó vélemények vonatkozásában kimutathatók bizonyos változások.

A két Nemzetközi Bíróság kilenc évtizedes gyakorlata során kialakult a tanácsadó véleményeknek többféle csoportja, s elfogadottá vált az is, hogy lehetnek olyan vélemények, amelyek nemcsak a véleményt kérő szerv, vagy szerve-

[48] Ld. ezzel kapcsolatban Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 9 July 2004. *I.C.J Reports,* 2004. 148–150.

[49] Vö. ZIMMERMANN–TOMUSCHAT–OELLERS-FRAHM i. m. 1407.

zet számára jelentenek útbaigazítást, hanem általános érvényű, a nemzetközi közösség egészét érintő *erga omnes* megállapításokat tartalmaznak.

Mindenképpen a tanácsadó véleményezési eljárás fejlődéseként fogható fel, hogy bizonyos szerződéses kikötések alapján a tanácsadó véleményekben foglaltak kötelező jellegel bírnak.

A tanácsadó vélemények nagy előnye, hogy a meglehetősen rugalmas szabályozásnak köszönhetően, a Nemzetközi Bíróság álláspontja bizonyos jogi kérdésekben kikérhető, anélkül, hogy a véleményben foglaltakat a véleményt kérő szerv vagy szervezet köteles lenne követni. Éppen ezért a tanácsadó vélemények gyakoribb igénybevétele segíthetné a nemzetközi szervezetek munkáját, sőt, kívánatos lenne a tanácsadó véleménykérésre jogosultak körének bővítése, ami elsősorban az ENSZ főtitkára vonatkozásában már többször felmerült. Ezzel szemben azonban felhozható az, hogy ha a főtitkárt felruháznák a tanácsadó véleménykérés jogával, úgy az – amennyiben a véleménykéréssel a Közgyűlés vagy a Biztonsági Tanács nem ért egyet – a két főszerv és a főtitkár közötti konfliktus forrása lenne.

The evolution of the practice of consultative opinions of the ICJ

(Summary)

Although in the first version of the Statute of the Permanent Court of International Justice, adopted in 1921, there was no single article on advisory opinions and untill the late 1920s only the Rules of Court provided on advisory opinions, the request of advisory opinions became a rather wide spreading practice at the time of the Permanent Court and first of all the Council of the League of Nations made use of that possibility rather often. After the second world war that practice continued although the percentage of advisory opinions in the cases dealt by the International Court of Justice was less than those between the two world wars. However, both Courts delivered some very important opinions which could be considered as a landmark in the development of international law. According to the article the greatest advantage of that procedure lies in the fact that it gives the possibility to the requesting organ to get the Court's view on different legal questions without the obiligation to follow or implement the findings of the Court.

The paper examines the development of the practice of the two world courts regarding advisory opinions. It treats the special groups of advisory opinions thus those which have binding effect under some treaty provisions, the opinions given under the Statute of the UN Administrative Tribunal, the opinions on abstract questions and those of having *erga omnes* effects.

VÁLASZOLHATOTT VOLNA MÁSKÉNT HÁGA? A NEMZETKÖZI BÍRÓSÁG TANÁCSADÓ VÉLEMÉNYE KOSZOVÓ FÜGGETLENSÉGÉRŐL

VALKI LÁSZLÓ[1]

A bíróságnak feltett kérdés

Amikor a Nemzetközi Bíróság nyilvánosságra hozta a Koszovóval kapcsolatos tanácsadó véleményét,[2] az emberek zászlókat lobogtatva vonultak ki az utcára Pristinában, és hazafias jelszavakat skandáltak. Úgy érezték, hogy Hága nekik adott igazat. Véglegesen eldöntötte azt a kérdést, hogy – önrendelkezési jogukat gyakorolva – joguk volt-e elszakadniuk az egykori Jugoszláviától, és önálló államot alapítaniuk. Aligha lehet zokon venni tőlük, hogy ünnepeltek, hiszen a televízió képernyőjén azt látták, hogy a tekintélyes testület tagjai bevonulnak a díszes hágai terembe, majd elnökük, Hisashi Owada a következő mondatot olvassa fel: *„A Nemzetközi Bíróság megítélése szerint a koszovói ideiglenes önkormányzati intézmények 2008. február 17-ei függetlenségi nyilatkozata nem sérti az általános nemzetközi jogot és a Biztonsági Tanács 1244. számú határozatát."*

A koszovói albánoknak fogalmuk sem volt arról, hogy a Nemzetközi Bíróság (a továbbiakban: NB) valójában semmilyen véleményt nem nyilvánított az önrendelkezési jogukról vagy az ország függetlenné válásának jogszerűségéről. A testület mindössze annyit állapított meg, hogy a koszovói ideiglenes nemzetgyűlés nyilatkozata, amely kikiáltotta a tartomány függetlenségét, nem ellentétes a nemzetközi joggal. Hága tehát egy tartományi parlamenti határozat meghozatalának jogszerűségéről nyilatkozott, és egy szót sem ejtett arról, hogy annak milyen jogkövetkezményei lennének. Például hogy 2008 óta valóban független, szuverén államnak tekinthető-e Koszovó?

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[1] Egyetemi tanár, Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar, Nemzetközi Jogi Tanszék.

[2] „Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo". *International Court of Justice,* http://www.icj-cij.org/docket/files/141/15987.pdf, 2010. július 22.

A pristinai televízió egyébként korántsem állt egyedül Owada kijelentésének értelmezésével, hiszen a világ valamennyi tévécsatornája ugyanezt a mondatot játszotta be, és ugyanígy értelmezte azt. Természetesen egyetlen elektronikus médium sem képes arra, hogy egy bejelentés után néhány perccel elvégezze a 43 oldalas jogi szakszöveg elemzését. Ugyan ki észlelte volna azonnal a hágai nemzetközi jogászok állásfoglalásának enyhén szólva hiányos voltát? Nyilván csak nagyon kevesen, de a bíróság feltehetően éppen erre számított.

Az NB talán azt a benyomást akarta kelteni, hogy elismerte a koszovóiak önrendelkezési jogát, és jogszerűnek tekintette Koszovó függetlenné válását is. Ezzel pedig mintegy jóváhagyta annak a 69 államnak – köztük az Egyesült Államoknak, Nagy-Britanniának, Franciaországnak és hazánknak – a döntését, amelyek az elmúlt két esztendőben hivatalosan is elismerték Koszovót. A bírák persze tudták, hogy a másnapi lapokban már részletesebb elemzések lesznek olvashatók, köztük olyanok is, amelyek majd rámutatnak a vélemény hiányosságaira. A testület tagjai azonban tisztában voltak a médiatársadalom működésének törvényeivel, jelen esetben azzal, hogy másnap már mindenki csak az első mondatra fog emlékezni.

Az is lehet azonban, hogy a bírák nem tudtak dűlőre jutni a Közgyűlés kérdésére adandó válaszról. A bíróságon belül lefolyt vitákról semmilyen hiteles információ nem áll ugyan a nyilvánosság rendelkezésére, az azonban tény, hogy Si Dzsu-Jong, a bíróság kínai tagja az írásbeli és szóbeli álláspontok előterjesztése után – de jóval a mandátumának lejárta előtt – bejelentette lemondását. Május 28. után már nem is vett részt a testület tevékenységében, így nem is szavazott. A többi 14 bíró közül tízen voksoltak az idézett szöveg elfogadása mellett, négyen pedig ellene. Si (és a kínai kormány) rendkívül határozottan Szerbia területi integritásának fenntartása mellett foglalt állást. Ennek tulajdonítható, hogy szárnyra keltek olyan hírek, amelyek szerint ha a kínai bíró tovább marad, kisebbségbe kerültek volna azok, akik Koszovó függetlenné válásáról valamilyen pozitív üzenetet akartak küldeni a világnak. Ennek viszont ellentmond, hogy Si 84 éves, és ez még a közmondásosan hosszú életű kínaiak között is magas kornak számít. Ellentmond továbbá az is, hogy a Biztonsági Tanács már márciusban kitűzte utódja megválasztásának időpontját, Si távozása tehát nem valamilyen váratlan döntés eredménye volt.[3]

A bíróság mindazonáltal szükségét érezte annak, hogy indokolja, miért is járt el ilyen módon. Azt állította, hogy csak a neki feltett kérdésről kívánt véleményt nyilvánítani. Ezzel a hiányos válaszért máris az ENSZ-re hárította a felelősséget. Kétségtelen, hogy a Közgyűlés csupán azt kérdezte a bíróságtól:

[3] „UN Security Council Sets June Date for Filling Vacancy at International Court of Justice". *People's Daily Online,* http://english.people.com.cn/90001/90777/90856/6924822.html, 2010. március 19. A hírt így közölték az egész kínai sajtóban, anélkül, hogy indokolták volna Si távozását. Utódja természetesen szintén kínai lett.

„Összhangban van-e a nemzetközi joggal a koszovói ideiglenes önkormányzati intézmények által tett egyoldalú függetlenségi nyilatkozat?”[4] A Közgyűlés tehát nem azt kérdezte – vonta le a következtetést némi éllel a bíróság –, hogy joga volt-e Koszovónak elszakadnia Szerbiától, hanem azt, hogy az ideiglenes pristinai szervnek jogában állt-e az ország függetlenségének kikiáltása. Azaz „a bíróságnak nem az előbbi, hanem az utóbbi kérdést tették fel”, állapította meg a NB.[5]

Ezt a kérdést a bíróság akár néhány mondatban is megválaszolhatta volna. Azt ugyanis a nemzetközi jog nem tiltja, és nem is tilthatja, hogy valaki kikiáltsa mondjuk a „Dunántúli Köztársaságot” – nyilatkozott másnap Kajtár Gábor.[6] A valódi kérdés ugyanis az, hogy mi történik azt követően. Tényleg létrejön-e egy új állam, és lesz-e olyan kormány a Földön, amely elismeri az új köztársaságot? Nyilván nem, de a NB úgy látta, hogy ennél azért többet kell mondania. Ezért egy irreleváns problémát kezdett elemezni, nevezetesen azt, hogy a koszovói nép nevében az ideiglenes nemzetgyűlés nyilatkozott-e, vagy annak tagjai az államelnökkel kiegészítve írták-e alá a függetlenségi deklarációt. Nem érdemes követni a bíróság okfejtését, ezért itt csak annyit szeretnék rögzíteni, hogy az NB az utóbbi álláspontra helyezkedett.

Értelmezhette volna a bíróság szélesebben is a feltett kérdést? Minden bizonnyal. A NB-t semmi sem akadályozta volna meg abban, hogy érdemi választ adjon, hiszen a statútumában erre nézve nem található korlátozó szabály. A NB felett továbbá nem áll semmilyen nemzetközi szerv vagy szervezet, amely felülbírálhatná aktusait. Úgy értelmezheti tehát a neki feltett kérdést, ahogy akarja, a szakmai jó ízlésen kívül más nem korlátozza. A NB korábbi ítéleteiben vagy tanácsadó véleményeiben egyébként néhány alkalommal maga is eltért a kérdés konkrét szövegétől, mégpedig vagy azért, mert azt nem megfelelően fogalmazták meg, vagy azért, mert az nem a valódi jogi problémára utalt.[7] Ezt ugyan – jegyezte meg a bíróság – most is megtehette volna, a Közgyűlés által feltett kérdés azonban annyira egyértelmű és világos volt, hogy semmilyen bővítő értelmezésre nem volt szükség.[8] A tanácsadó véleményhez fűzött egyes bírói nyilatkozatok azt mutatják, hogy a bíróságon belül minderről nézeteltérés alakult ki. A NB egyik legnevesebb tagja, Bruno Simma például kijelentette,

[4] A Közgyűlés 2008. október 8-án hozott 63/3. sz. határozata. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/470/97/PDF/N0847097.pdf?OpenElement

[5] 56. bek.

[6] Rossz volt a szerbek kérdése. Interjú Kajtár Gáborral. *Népszabadság,* 2010. július 23. Lásd még: Kajtár Gábor: Merre tovább Koszovó?. *Élet és Irodalom,* 2010. július 30.

[7] 50. bek. Így járt el az NB pl. 1980-ban, az Egészségügyi Világszervezet és Egyiptom vitájában, illetve 1982-ben, az ENSZ adminisztratív ügyekben illetékes bíróságának egyik ítéletével kapcsolatos állásfoglalásában.

[8] 51. bek.

hogy „a bíróság intellektuális értelemben sokkal jobb véleményt fogalmazhatott volna meg, olyat, amelynek nagyobb relevanciája lett volna a napjainkra kialakult nemzetközi jogrend szempontjából”.[9] Simma szerint a NB-nek arról kellett volna véleményt nyilvánítania, hogy „a nemzetközi jog meghatározott feltételek fennállta esetén megengedi-e [egy adott népnek], hogy kikiáltsa függetlenségét, netán fel is jogosítja arra”.[10]

Az eredeti kérdés megfogalmazója maga Szerbia volt, amely annak idején azt kérte a Közgyűléstől, hogy forduljon tanácsadó véleményért a bírósághoz. (Egy tagállam ugyanis közvetlenül nem tehet fel kérdést a testületnek.) A szerbek valójában arra voltak kíváncsiak, hogy a NB szerint joga volt-e Koszovónak a kiválásra, és más államok jogszerűen ismerték-e el az új állam létrejöttét. Belgrád nyilván azt szerette volna hallani, hogy a kiválás sérti Szerbia szuverenitását és területi integritását, Koszovó független államként való elismerése pedig jogellenes beavatkozás Szerbia belügyeibe. Rossz lett volna a szerbek kérdése?[11] Kétségtelenül nem volt jó, de Belgrádnak olyan kérdést kellett feltennie, amelyet majd meg is szavaznak a Közgyűlésben. Nyilván sohasem kapott volna többséget egy olyan kérdés, amelynek alapján a bíróságnak el kellett volna marasztalnia a Koszovót elismerő államokat. Annak is tudatában volt Belgrád, hogy a kialakult helyzeten – azaz a jogilag független Koszovó létrejöttén és fennmaradásán – már aligha tud változtatni. Úgy gondolta azonban, hogy az eljárás megindítása a kormány eltökéltségét demonstrálja a hazai közvélemény előtt, egy esetleges kedvező bírósági vélemény birtokában pedig tárgyalásokat kezdhet a szerb többségű észak-koszovói területek sorsáról. Belgrád 2008 tavaszán valószínűleg informális konzultációkat folytatott több ENSZ-tagállammal, majd azok eredményei alapján terjesztette elő az idézett megfogalmazást. Jellemző, hogy az a Közgyűlésben még így is csak csekély többséget kapott: 77-en voksoltak mellette, hatan – köztük az Egyesült Államok – ellene, 74-en pedig tartózkodtak a szavazástól.[12]

Szerbia természetesen csalódott a bíróság állásfoglalásában. Csalódtak azok is, akik azt várták, hogy a NB tanácsadó véleményében végre tisztázza azt a Simma által is említett alapvető jelentőségű nemzetközi jogi és politikai kérdést, hogy egy nép milyen feltételekkel élhet önrendelkezési jogával. A szerbek, illetve a nemzetközi jogászok csalódottsága érthető, de nem indokolt. Megítélésem szerint ugyanis *a hágai bíróság a mai nemzetközi jogi normák alapján nem lett volna képes arra, hogy jobb, vagy használhatóbb választ adjon a Koszovó füg-*

[9] „Declaration of Judge Simma”. *International Court of Justice,* http://www.icj-cij.org/docket/files/141/15993.pdf, 5. bek.

[10] 1. bek.

[11] Lásd a Kajtár-interjú címét: „Rossz volt a szerbek kérdése”, i. m.

[12] Az utóbbiak között voltak azok az EU-tagállamok is, amelyek már elismerték Koszovó önállóságát.

getlenné válásával kapcsolatos kérdésre. A következőkben ezt az álláspontot szeretném indokolni.

Az önrendelkezési jog egyoldalú érvényesítése

Jóllehet természetesnek tűnik az, hogy a koszovói albánoknak mindig is joguk volt – vagy lett volna – az önrendelkezésre, hiszen a tartományban kilencvenszázalékos többséget alkottak, de ezt nem támasztották alá az elmúlt évtizedekben kialakult szokásjogi normák. Az önrendelkezési jog először az ENSZ alapokmányában jelent meg, de csupán egy utalás formájában. *„Az Egyesült Nemzetek célja az* – olvasható az 1. cikkben –, *hogy [...] az [államok] között a népeket megillető [...] önrendelkezési jog elvének tiszteletben tartásán alapuló baráti kapcsolatokat fejlessze..."* Nem volt világos, hogy milyen emberi közösség tekinthető az önrendelkezési jog alanyának, és hogy e jognak mi a tartalma. Joga van-e bármely népnek – így például egy föderáció területén levő etnikumnak – az önálló állam alapítására, vagy csak a gyarmati népek élhetnek ezzel a joggal? Mi történjék akkor, ha az önrendelkezési jog az – alapokmány által ugyancsak deklarált – állami szuverenitással kerül összeütközésbe? Vajon ilyenkor a területi sérthetetlenség tiszteletben tartásának kötelezettsége megelőzi-e az önrendelkezési jogot, vagy fordítva?

Ezekre a kérdésekre könnyű volt választ adni akkor, amikor a Habsburg és az Oszmán Birodalom vagy a német gyarmati uralom felszámolásáról volt szó. Wilson elnök az első világháború végén még nyugodtan zászlajára tűzhette az önrendelkezési jog eszméjét, hiszen annak érvényre juttatásával szemben csak a török szultán vagy az osztrák meg a német császár tiltakozhatott, ők azonban a világháború végén már nem voltak abban a helyzetben, hogy megvédjék saját „területi integritásukat". Csak a második világháború után vált általánosan elfogadottá az az elv, mely szerint minden gyarmati népnek joga van arra, hogy rendelkezzen saját sorsáról.

Az önrendelkezési jog egy évtizeddel később az emberi jogok részévé is vált, de a nyitott kérdések változatlanul fennmaradtak. Az 1966-ban elfogadott két emberi jogi egyezségokmány ugyanis csak azt nyilvánította ki, hogy *„minden népnek joga van az önrendelkezésre".*[13] Azt azonban, hogy pontosan mit jelent a „nép" fogalma, azóta sem határozták meg. Jóllehet a közbeszédben többnyire a nemzetek önrendelkezési jogáról esik szó, a nemzetközi dokumentumok – mint láttuk, maga az ENSZ alapokmánya is – a népek önrendelkezési jogának

[13] A New Yorkban 1996. december 16-án elfogadott *.A polgári és politikai jogok nemzetközi egyezségokmánya* (http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=97600008.TVR) és *A gazdasági, szociális és kulturális jogok nemzetközi egyezségokmánya* (http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300003.TV), 1. cikk 1. bek.

fogalmát használják. A nép pedig nem más, mint egy adott területen élő emberek összessége. Hogy mekkora területen? Akkorán, amekkorán. A nép fogalma semmilyen kapcsolatban sem volt az etnikummal, és voltaképpen ma sincs. Ennek részben az az oka, hogy a nemzetközi közösség sohasem érezte magát képesnek a nemzet fogalmának meghatározására. Ebben annak idején közrejátszott az is, hogy a gyarmati függetlenségi harcok jelentős részét – különösen Afrikában – olyan törzsek és törzsszövetségek vívták, amelyek a legjobb esetben is csupán az elején voltak még a nemzetté váláshoz vezető hosszú történelmi folyamatnak. Ami a nemzeti kisebbségeket illeti, azok az általános nemzetközi jogi felfogás szerint nem tekinthetők „népnek". A kisebbségek csupán „kisebbségi jogokkal" rendelkeznek, és ezt első ízben éppen az 1996-ban elfogadott *polgári és politikai jogok nemzetközi jogi egyezségokmánya* biztosította számukra.[14]

Akkoriban mindenki egyetértett abban, hogy az önrendelkezési jognak elsőbbsége van a birodalmak vagy a gyarmattartó hatalmak szuverenitásának és területi integritásának elvével szemben. De, tették hozzá, kizárólag az ő esetükben. Abban a pillanatban ugyanis, amikor valamely „rendezett" körülmények között élő népnek jutott eszébe a kiválás gondolata, az érintett állam rögtön szuverenitása tiszteletben tartásának kötelezettségéről kezdett érvelni, éppúgy, mint ahogyan azt utóbb Koszovóval kapcsolatban Belgrád tette. Ennek elsődleges oka az volt, hogy a gyarmati felszabadulási folyamat idején önállóvá vált államok semmi esetre sem akartak tovább osztódni. Kormányaik az adott nép által lakott egész területen fenn akarták tartani hatalmukat, függetlenül attól, hogy miként is alakultak ki annak határai. Azt mindenki tudta ugyan, hogy az afrikai vagy távol-keleti határokat a 18. és 19. században a legkevésbé sem etnikai vagy kulturális alapokon, hanem a gyarmatosító hatalmak egymás közötti küzdelmei eredményeként vonták meg. Azt állították azonban, hogy államuk megszilárdulásához és fejlődéséhez elengedhetetlen területi sérthetetlenségük tiszteletben tartása. Így történt ez Nigériában is, amelyből több évvel az önállóság elnyerése után az egyik legnagyobb és legfejlettebb, mintegy tízmilliós lélekszámú ibó nép megpróbált kiválni. Mint emlékezetes, 1967 és 1970 között ők vívták a kontinens legsúlyosabb áldozatokkal járó függetlenségi háborúját a lagosi kormányerőkkel szemben. A nemzetközi közösség enyhén szólva nem volt egységes a konfliktus megítélésében. Az ibókat az amerikaiak, míg a kormányt a franciák és a szovjetek támogatták. Hogyan reagáltak volna a többi-

[14] *A polgári és politikai jogok nemzetközi egyezségokmánya,* 27. cikk. Az egyezségokmány előkészítő irataiból kitűnik, hogy a kormányok képviselői a nép fogalmát nem akarták kiterjeszteni a kisebbségekre. Ezt támasztja alá a Badinter-bizottságnak e tanulmányban idézett véleménye is, amely szerint a Jugoszláviából levált államokban élő szerbeknek csak kisebbségi jogaik vannak. Hasonló álláspontot van KARDOS GÁBOR: *Kisebbségek: konfliktusok és garanciák.* Budapest: Gondolat, 2007. 50.

ek, ha a „szakadárok" győznek? Vajon elismerték volna-e a független Biafra Köztársaságot? Nem tudjuk, mivel a háború az ibók vereségével és legalább 1,2 millió ember pusztulásával végződött.

A fejlődő világban lejátszódott ilyen és ehhez hasonló események mindenesetre aggodalmat keltettek a nemzetközi közösségben. Sokan tették fel azt a kérdést, hogy mi történne akkor, ha más, hasonlóan vegyes etnikumú afrikai népek követnék az ibók példáját, és el akarnának szakadni saját szuverén államuktól. Nem mellesleg, mi történne akkor, ha hasonló folyamatok indulnának el a fejlett világban, így akár Európában is. Akkoriban senki sem látta még előre, hogy mi történik majd a kilencvenes években Jugoszláviában, az azonban nyilvánvaló volt, hogy az érzelmeket bárhol könnyen felkorbácsolhatják. Amikor például De Gaulle 1967-ben egy Kanadában tartott beszédében a „szabad Québec"-et éltette, Ottawa rövid úton távozásra szólította fel a tábornokot, mondván, hogy beavatkozott a kanadai belügyekbe. A két ország között ekkor súlyos feszültség alakult ki.

Sokan arra a következtetésre jutottak, hogy a nemzetközi jogban korlátozni kellene az önrendelkezési jog érvényesítésének a lehetőségét. Több politikus és nemzetközi jogász is úgy foglalt állást, hogy az önrendelkezési jog csak addig illeti meg a népeket, amíg meg nem alapították szuverén államukat. Ezt követően azonban felejtsék el, hogy valaha is volt ilyen joguk, hiszen arra a végtelenségig nem hivatkozhatnak. Azok a népek pedig, amelyek már hosszabb ideje élnek egy önálló állam határain belül, eleve ne is reménykedjenek az elszakadás lehetőségében. Ami például Québecet illeti, az említettek felhívták a figyelmet arra, hogy mivel az egykori brit domínium 1931-ben elnyerte függetlenségét, az ott élő népek egyszer már gyakorolhatták az önrendelkezés jogát. A québeci franciák, mondták, örüljenek annak, hogy megszabadultak a brit uralomtól, és ha ezt 1931-ben elmulasztották volna, ne akarjanak még az angol anyanyelvű kanadaiaktól is elszakadni.[15]

Ez a felfogás 1970-ben öltött testet az ENSZ Közgyűlés által elfogadott, *az államok baráti kapcsolatait szabályozó nemzetközi jogi elvekről* szóló nyilatkozatában.[16] Ez lényegében azt mondta ki, hogy korlátlan önrendelkezési joggal

[15] Az ügy 1998-ban a kanadai legfelsőbb bíróság elé került, amely kijelentette, hogy Québec egyoldalúan nem szakadhat el Kanadától, mivel azt számára a nemzetközi jog nem biztosítja. Az egyoldalú elszakadás joga ugyanis a bíróság szerint korlátozott, nem jelenthet fenyegetést az állam területi integritására, és „nem illeti meg szuverén államok összetevő részeit" sem. „Judgement of the Supreme Court of Canada. Reference re Secession of Quebec, [1998] 2 S.C.R. 217". *Supreme Court of Canada,* http://scc.lexum.umontreal.ca/en/1998/1998scr2-217/1998scr2-217.html, 2008. augusztus 20.

[16] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. Resolution 2625 (XXV) GA, 24 October 1970 http://www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm. A „baráti kapcsolatok" kifejezés az ENSZ-alapokmány 1. cikkéből származott.

csak a gyarmati vagy más idegen uralom alatt levő népek élhetnek. A nyilatkozat úgy fogalmazott, hogy erre a jogra hivatkozva nem szabad támogatni vagy ösztönözni azokat a törekvéseket, amelyek *„szuverén és független államok teljes vagy részleges felosztására, területi integritásuk és politikai egységük megsértésére irányulnak”*. Más szóval a legfőbb védendő érték a mindenkori szuverén állam egysége és területi sérthetetlensége, azaz a *status quo*. A nyilatkozat csak egyetlen kivételt említett: ha egy állam kormányzata nem képviselné az *„egész népet”,* mert annak egy részével szemben faji vagy más jellegű diszkriminációt alkalmaz, akkor gyakorlatilag feléledne a jogaiban sértett nép önrendelkezési joga. Ilyen esetben tehát az utóbbi jogszerűen kísérelhetné meg a központi hatalomtól való elszakadást.

A nyilatkozat senkire sem volt ugyan kötelező, tartalma viszont nemsokára az általános nemzetközi szokásjog részévé vált. Az új értelmezési lehetőség birtokában sem lehetett azonban eldönteni néhány, a későbbi változások által felvetett kérdést. Amikor például a Kelet-Pakisztánban élő bengáliak függetlenségi háborút kezdtek a Nyugat-Pakisztánban székelő központi hatalom ellen, a konfliktus nemzetközivé szélesedett. India néhány hónap múlva jelentős fegyveres erőkkel avatkozott be a küzdelembe, ami eldöntötte Kelet-Pakisztán sorsát. Az államok ekkor azzal a kérdéssel szembesültek, hogy elismerhetik-e azt a Bangladest, amelynek népe elvben egyszer már élhetett önrendelkezési jogával (Pakisztán 1947-ben vált függetlenné). A probléma csak politikai értelemben oldódott meg azzal, hogy a nemzetközi közösség egyéves töprengés után elismerte Bangladest, sőt felvette az ENSZ-be is. Az önrendelkezési jog tartalmának bővebb kifejtése azonban ekkor is elmaradt.

A külső fegyveres támogatással kapcsolatban mégis kialakult egy általánosan elfogadott álláspont. Amikor Ciprus északi részét 1974-ben megtámadták és megszállták a török csapatok, majd kikiáltották az „Észak-Ciprusi Török Köztársaság”-ot, azt a nemzetközi közösség – Ankarát leszámítva – nem ismerte el, arra hivatkozva, hogy az új állam erőszakos, tehát jogellenes úton keletkezett. (Ugyanez volt a helyzet jóval később Dél-Oszétia és Abházia esetében is. A 2008-as grúziai háborút nem Putyinék, hanem Szaakasviliék kezdték ugyan, a nemzetközi közösség azonban nem volt hajlandó elismerni az új „államokat”, tekintve, hogy létrejöttüket az orosz csapatok bevonulásának köszönhették.[17])

Koszovó ugyan 2008-ban békés körülmények között nyilvánította magát függetlenné, a tartomány azonban 1999-ben külső fegyveres támadás eredményeként szakadt el Jugoszláviától. Ráadásul ez a támadás sem volt jogszerű, tekintve, hogy azt a NATO BT-felhatalmazás nélkül indította meg. (A felhatalmazás nélküli humanitárius intervenciót a nemzetközi jog azóta sem tekinti jogszerűnek.) Ennek alapján tehát nem lett volna szabad elismerni Koszovó

[17] Eddig csak Oroszország, Nicaragua, Venezuela és Nauru ismerte el a két entitást, az utóbbiak pedig egymást is elismerték.

függetlenségét? A bíróság ebben a kérdésben sem foglalt állást, de nem is foglalhatott, mert az 1999-es koszovói háborút olyan BT-határozat zárta le, amely – mint arra mindjárt visszatérek – részben új helyzetet teremtett.

Mindenesetre 2008-ban és azt követően a nemzetközi közösségnek arról kellett volna állást foglalnia, hogy a koszovóiaknak joguk van-e *egyoldalúan* kikiáltaniuk a függetlenségüket. A hangsúly az aktus egyoldalú voltán van. Ha ugyanis valamelyik nép az addig főhatalmat gyakorló kormányzat egyetértésével válik önállóvá, akkor nemzetközi jogi problémák nem vetődnek fel. A gyarmatok például többnyire az anyaországok egyetértésével váltak önállóvá, függetlenül attól, hogy közöttük korábban esetleg fegyveres harcok folytak. 1991-ben a Szovjetunió tagköztársaságai is a moszkvai központi hatalom kifejezett vagy hallgatólagos beleegyezésével válhattak ki.[18] Akkor alakultak ki csupán ellentétek, amikor ez az egyetértés hiányzott. Az első látványos konfliktus 1965-ben zajlott le, amikor a rhodesiai fehértelepes rezsim egyoldalúan kikiáltotta az ország függetlenségét. A Biztonsági Tanács azonnal felszólította az államokat arra, hogy tartózkodjanak a rasszista kormányzat által vezetett államalakulat elismerésétől, és azok eleget is tettek a felszólításnak.[19] A nemzetközi közösség az országot csupán másfél évtizeddel később ismerte el, amikor Salisburyben bevezették a többségi kormányzást. Később, hosszú fegyveres küzdelmek után, az ENSZ közreműködésével alakult ki egyetértés például Eritrea Etiópiától, Kelet-Timornak pedig Indonéziától való elszakadása ügyében.

A nemzetközi közösség reakcióiból azonban nem lehetett messzemenő következtetéseket levonni az egyoldalú kiválás jogszerűségére nézve. Egy általános nemzetközi szokásjogi norma, az *uti possidetis*[20] elvének kialakulása azonban jelentős mértékben korlátozta a kiválás lehetőségét. Először az 1920-as években, néhány dél-amerikai állam határvitájában mondta ki több nemzetközi bírósági ítélet, hogy az egykori gyarmatokat egymástól elválasztó határokat a függetlenség megteremtése után sem szabad megváltoztatni. Később, 1986-ban két afrikai állam határvitájában a hágai Nemzetközi Bíróság egyenesen arra a következtetésre jutott, hogy az *uti possidetis* elve az általánosan elismert nemzetközi jog – azaz a szokásjog – részévé vált. Ez nyilvánvaló túlzás volt ugyan, hiszen ezt megelőzően Európában vagy Ázsiában sohasem alkalmazták ezt az elvet. A határokat az NB szerint azonban azért kell változatlanul hagyni, hogy „megvédjék az új államok függetlenségét és stabilitását, amelyet a [gyarmati]

[18] Litvánia kivételével, amely már 1990 márciusában kikiáltotta a függetlenségét.

[19] BT 216. (1965) sz. határozata. http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/222/87/IMG/NR022287.pdf?OpenElement. Ekkor vált használatossá a nemzetközi jogban a UDI *(unilateral declaration of independence)* fogalma.

[20] A római jogi eredetű fogalom jelentése: „ahogyan birtokoltátok."

igazgatási rendszer megszűnése után szakadár mozgalmak […] fenyegetnek”.[21] A bíróság gyakorlatilag ugyanazt mondta ki, mint az államok baráti kapcsolatait szabályozó nemzetközi jogi elvekről szóló, már idézett 1970-es ENSZ-nyilatkozat: a határokat az érintett országok függetlenné válása után csak közös egyetértéssel lehet megváltoztatni, még akkor is, ha a korábbi határok történetesen nem voltak azonosak az etnikai határokkal.

Mondanom sem kell, hogy a nemzetközi közösség elsősorban nem nemzetközi jogi megfontolásokból tette magáévá az *uti possidetis* elvét. A vezető hatalmak ugyanis már a gyarmati felszabadulási folyamat idején is attól tartottak, hogy bármilyen határmódosítás végeláthatatlan konfliktussorozatot indít el, amelynek nem lesznek képesek gátat vetni. Nemcsak az újonnan megalakult államok követelik majd „történelmi” vagy etnikai határaik elismerését, hanem azok is, amelyektől az említettek elszakadtak. Ebben nyilvánvalóan a második világháború tanulságai játszottak meghatározó szerepet. Azok a politikai osztályok, amelyek az elmúlt fél évszázadban meghatározták a vezető hatalmak külpolitikáját, még nem feledkeztek meg a világháború közvetlen előzményeiről. Így például azokról a területi követelésekről, amelyeket Hitler Csehszlovákiával, Sztálin Finnországgal vagy Magyarország a szomszédos országokkal szemben támasztott. Nem feledkeztek meg arról sem, hogy a világháború végén megvalósított békerendezéskor a szövetséges hatalmak olyan területi változásokat, illetve határmódosításokat szentesítettek, amelyeknek nem volt etnikai alapjuk (jóváhagyták például a Molotov–Ribbentrop-paktum Szovjetunió számára kedvező következményeit, míg semmissé nyilvánították a két bécsi döntést, amely Magyarországnak kedvezett). Az említett elitek – nem ok nélkül – amiatt aggódtak, hogy az 1945-ben meghúzott európai határvonalak újabb konfliktusok forrásaivá válhatnak. Aggodalmaik a Szovjetunió és Jugoszlávia 1990–91-ben zajló felbomlásának idején rendkívüli mértékben felerősödtek. Ekkor már attól tartottak, hogy Oroszország megpróbálja majd magához csatolni Ukrajna vagy a Baltikum oroszok lakta területeit, és Belgrád is ugyanezt teszi a horvátországi és boszniai szerb településekkel. Éppen ezért Nyugaton a kezdetben szívesebben látták volna a két föderáció egyben maradását, majd amikor kiderült, hogy ez lehetetlen, felbomlásukat minden eszközzel igyekeztek békés mederben tartani. Úgy vélték, hogy e cél elérésének leghatékonyabb eszköze az *uti possidetis* elvének betartatása. Az utóbbiban már az egész nemzetközi közösség egyetértett.

Amíg a Szovjetunió esetében még csak informális diplomáciai lépéseket tehettek, addig Jugoszlávia esetében már formálisan és nemzetközi jogilag is értelmezhető módon rögzítették álláspontjukat. Az Európai Közösség már 1991 augusztusában kijelentette, hogy „sohasem ismeri el azokat a [belső] határvál-

[21] „Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali). 1986 ICJ Rep. 554. International Court of Justice, December 22, 1986”. *JSTOR,* http://www.jstor.org/pss/2202413.

tozásokat, amelyek nem békés úton és nem megegyezés alapján jöttek létre", és végig ehhez is tartotta magát.[22] Egy hónappal később a Biztonsági Tanács szintén egyetértését fejezte ki az elvvel,[23] majd az EK jogi tanácsadó testülete, a Badinter-bizottság állapította meg, hogy a függetlenné váló tagköztársaságoknak az *uti possidetis* elvét éppúgy tiszteletben kell tartaniuk a külső (tehát a köztük és harmadik országok között fennálló), mint a belső határokat, amelyek így nemzetközi határokká válnak.[24] A bizottság persze nem tett mást, mint hogy néhány hónappal az Európai Közösségben és az ENSZ Biztonsági Tanácsában meghozott politikai döntések után olyan jogi állásfoglalást dolgozott ki, amely megegyezett az előbbiek tartalmával. Ismét tanúi lehettünk tehát annak a jelenségnek, hogy a politikai szféra előbb dönt, és ezt követően fordul – már csak indokolásért – a jogászokhoz. Mindenesetre a bizottság által megfogalmazott precedensértékű állásfoglalások végképp megalapozták e szokásjogi norma általános, valamennyi kontinensre kiterjedő érvényességét.

Szerbia nem járt kifejezetten jól ezzel a megoldással. Egy memorandumban ki is fejtette, hogy az *uti possidetis* elvét Jugoszláviában nem lehet alkalmazni, mivel a köztársaságok közötti határokat annak idején az etnikai hovatartozásra tekintet nélkül, politikai célokat követve vonták meg. A szerb kormány szerint a föderáción belüli határok végleges rögzítése sértené a népek önrendelkezési jogát.[25] Erre hivatkozva Belgrád formálisan is feltette a kérdést a Badinter-bizottságnak: van-e önrendelkezési joguk a Horvátországban és Bosznia-Hercegovinában élő szerbeknek? Szabadon dönthetnek-e arról, hogy Szerbiához csatlakoznak? A válasz elutasító volt. A bizottság jellemző módon úgy fogalmazott, hogy „a mai nemzetközi jogból" nem lehet ugyan pontosan következtetni ennek a jognak a tartalmára nézve, az azonban bizonyos, hogy gyakorlása „nem járhat határmódosítással".[26] Nem vizsgálhatjuk most azt a

[22] „Statement by an extraordinary EPC Ministerial Meeting concerning Yugoslavia. EPC Press release 82/91. Brussels, August 27, 1991". *KÜM Dokumentációs Főosztály; Declaration on the „Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" (16 December 1991).* http://207.57.19.226/journal/Vol4/No1/art6.html.

[23] A BT 713. sz. határozata. 1991. szeptember 25. http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/49/IMG/NR059649.pdf?OpenElement).

[24] A bizottság szerint „ellenkező megállapodás hiányában a korábbi határok a nemzetközi jog által védett határokká válnak. Ez következik a területi *status quo*, közelebbről az *uti possidetis* tiszteletben tartásának elvéből, amelyet kezdetben a [dél-]amerikai és az afrikai dekolonizáció folyamán alkalmaztak, és amely azóta a Nemzetközi Bíróság Burkina Faso és Mali határvitájának ügyében 1986-ban hozott ítélete szerint a nemzetközi jog általánosan elismert elvévé vált." „Arbitration Commission, Opinion No. 4, January 11, 1992". *International Legal Materials,* Vol. 31. (1992).

[25] Az 1992. január 2-án kelt memorandum szövegét idézi Marc Weller (szerk.): *The Crisis in Kosovo 1989–1999.* International Documents and Analysis, Vol. 1. Cambridge: Documents and Analysis Publishing Ltd., 2000. 590.

[26] Arbitration Commission, Opinion No. 3. http://www.jstor.org/pss/20693759.

kérdést, hogy mi történt volna akkor, ha az említett testületek – illetve a mögöttük álló hatalmak – valamivel rugalmasabb álláspontot foglaltak volna el. Elégedjünk itt most meg annak a rögzítésével, hogy a nemzetközi közösség a kilencvenes évek elején görcsösen ragaszkodott az önrendelkezési jog ennyire szűk és szigorú értelmezéséhez. Ettől egyes nyugati hatalmak csak 2008-ban, a független Koszovói Köztársaság megalakulásakor tekintettek el.

Koszovó önrendelkezési joga

Sajátos módon az előbb idézett dokumentumok egyetlen szót sem szóltak Koszovóról. Hosszabb ideig úgy tűnt, mintha csak a tagköztársaságok kívántak volna élni önrendelkezési jogukkal. Pedig a tartományban már Jugoszlávia felbomlásának elején is megjelentek az albán elszakadási törekvések. 1991-ben az ideiglenes koszovói koalíciós kormány óvatosan arról érdeklődött az EK-nál, hogy elismerné-e Koszovó függetlenségét. A válasz nemleges volt. Az EK arra hivatkozott, hogy Koszovó nem tagköztársaság, hanem csak tartomány, így nem jogosult a kiválásra. Valójában persze senki sem tudta (és akarta) megindokolni azt, hogy miért éppen a köztársasági státusnál kellene megvonni cezúrát. Ha a kétmilliós, etnikailag nagyjából homogén Szlovénia függetlenné válhatott, miért ne tehette volna meg ezt az ugyanekkora, kilencven százalékban albán többségű Koszovó? Természetesen ezúttal is politikai döntés született. A Nyugat – amúgy érthetően – arra törekedett, hogy megfékezze a délszláv népek közötti háborúkat, ezért a szerb uralommal szemben passzív ellenállást tanúsító, de alapjában véve békés Koszovóval nem foglalkozott.

Így aztán Koszovó státusa továbbra sem változott. Az 1995-ös daytoni békeszerződés a boszniai háború befejezéséről szólt, és nem érintette a tartományt. Ez az állapot egészen 1997-ig maradt fenn, amikor is a Koszovói Felszabadítási Hadsereg (UCK) terrorakciókat indított a szerb központi hatalommal szemben. A válasz hasonló volt, és végül az úgynevezett Patkó-tervben öltött testet, amely a koszovói albánság erőszakos elűzésére, helyenként megsemmisítésére irányult. A NATO, mint emlékezetes, hosszas és eredménytelen diplomáciai erőfeszítések után ennek megakadályozására indította el a Milosevics-rendszerrel szemben rövid időre tervezett, végül 73 napig tartó légi hadjáratát. Ezt követően született meg az első olyan nemzetközi jogi érvényű döntés, amely kihatással volt Koszovó státusára is. Ez volt a BT 1244. számú, rendkívül ellentmondásos határozata, amelyre Owada elnök is hivatkozott.[27]

[27] A BT 1244. számú, 1999. június 10-én hozott határozata, amely szokatlan módon magában foglalt két függeléket is. Az egyik a G8-ak külügyminiszterei által négy nappal korábban elfogadott rendezési elveket, a másik pedig a Belgrád által is megerősített katonai-technikai egyezményben foglaltakat tartalmazta.

Ez a határozat egyfelől megerősítette Jugoszlávia „szuverenitásának és területi integritásának tiszteletben tartását", másfelől azonban olyan előírásokat tartalmazott, amelyek Koszovó felett teljesen kizárták a jugoszláv szuverenitás gyakorlását. A határozat ugyanis felszólította Jugoszláviát „erőszakos és elnyomó" tevékenységének azonnali megszüntetésére, és valamennyi katonai, rendőri és félkatonai alakulat gyors kivonására. Ezzel egyidejűleg elrendelte a KFOR bevonulását, valamint a tartomány ENSZ-igazgatás alá helyezését. Koszovó papíron tehát továbbra is Belgrád főhatalma alatt maradt, gyakorlatilag viszont nemzetközi igazgatás alá került. Ez a helyzet nem változott Koszovó függetlenségének 2008-as kikiáltásig. Természetesen a szerb kormány és mindazok, akik ellenezték Koszovó elismerését, a rendelkezések első részére hivatkoztak. A másik oldal viszont rámutatott arra, hogy a tartomány számára a BT-határozat csak ideiglenes státust határozott meg. Hogy melyik félnek volt igaza? Ez nemzetközi jogilag megállapíthatatlan. Az azonban valószínűsíthető, hogy a BT, illetve a G8 tagjai hosszabb távon az önálló Koszovó megteremtésére gondoltak. A dokumentum ugyanis egy olyan „átmeneti demokratikus és autonóm önkormányzat" megteremtését írta elő, amelynek hatáskörét aztán a „végső fázisban" át kell ruháznia a „politikai rendezés" keretében létrehozandó intézményekre. Ami Koszovó végleges státusát illeti, a határozat a *rambouillet-i „megállapodásra"*[28] utalt. Ezt – a békés rendezés feltételeit tartalmazó – dokumentumot a nyugati szövetségesek terjesztették a szerbek és a koszovóiak elé. A dokumentumhoz azonban az amerikaiak az utolsó pillanatban egy függeléket csatoltak, amely feltételül szabta volna, hogy Jugoszlávia egész területét a NATO szállja meg. Belgrád ezt természetesen elutasította, így a „megállapodást" csak a koszovói delegáció írta alá, ami persze kevés volt a megállapodás hatálybalépéséhez. Mindazonáltal a dokumentum főszövege értelmében három év múlva nemzetközi konferenciát kellene tartani a térségről, amelyen a résztvevők – egyebek között a „nép akarata" alapján – meghatároznák a koszovói helyzet „végleges rendezésének" módját. A nép akaratát nyilván egy népszavazás tükrözte volna, amelynek kimenetele senki előtt sem lehetett kétséges.

Az 1244-es határozat értelmében egy idő múlva újabb döntést kellene hozni a független koszovói állam megteremtéséről, de hogy közelebbről kinek, azt a BT nem mondta meg, és a végleges státusról szóló döntés meghozatalának jogát sem tartotta fenn magának. Ezeket a tényeket egyébként tanácsadó véleményében érdekes módon maga a bíróság is elismerte, bár nem vont le belőlük messzemenő következtetéseket.[29] A bíróság mindenesetre, mint láttuk, néhány

[28] „Interim Agreement for Peace and Self-Government in Kosovo". http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html, 1999. január 27.

[29] 98–100., 112., 114. bek. A balkáni ügyekben 1994 óta informálisan közreműködő, az európai és amerikai BT-tagokat is magában foglaló *összekötő csoport* ugyanakkor 2005-ben kijelentette, hogy Koszovó végleges státusáról csak a Biztonsági Tanács dönthet. Lásd „S/2005/709.

érdemi állásfoglalást is beleírt a véleményébe, nyilván azért, hogy utána nyugodtan kijelenthesse azt, hogy a függetlenségi nyilatkozat nem volt ellentétes a nemzetközi joggal.

A későbbi fejlemények ismeretében sokan tették fel azt a kérdést, hogy a nyugati hatalmak a 73 napos bombázás, majd Milosevics meghátrálása után miért nem rendezték véglegesen Koszovó státusát, más szóval, miért nem nyilvánították azt azonnal önállónak. Miért teremtettek olyan helyzetet, amelynek ellentmondásos jellege csak újabb, megoldhatatlan konfliktusok forrásává válhatott? A válasz alighanem abban keresendő, hogy ezúttal Oroszország részvételével kívánták a helyzetet rendezni. Moszkva pedig nem volt kifejezetten könnyű partner, hiszen a Szovjetunió felbomlása után az orosz külpolitikát a nacionalisták és a „nyugatosok" harca, a nagyhatalmi státusz visszaszerzésére való törekvés és a NATO-val kapcsolatban kialakult fenyegetettségi érzések jellemezték. Jelcin 1995-ben élesen elítélte a boszniai háborúnak véget vető fegyveres NATO-beavatkozást, és különös aggodalommal tekintett az Egyesült Államok növekvő európai aktivitására. A koszovói válság 1997-es kiújulásának idejére Moszkva együttműködési készsége minimális szintre csökkent. Ez különösen abban jelent meg, hogy Moszkva a BT-ben – egyébként Kínával együtt – vétót helyezett kilátásba arra az esetre, ha a NATO a fegyveres erőszak alkalmazását próbálná meg jóváhagyatni a testülettel. A Nyugat ekkor Oroszország részvétele nélkül kísérelte meg térdre kényszeríteni Milosevicset. Ez azonban csak részben sikerült. Kiderült ugyanis, hogy a szerb-barát politikát folytató Oroszország nélkül a válság nem rendezhető. Így alakult ki az a figyelemre méltó helyzet, hogy a koszovói háború második szakaszában már Csernomirgyin orosz miniszterelnök közvetített a szemben álló felek között. A tárgyalások alatt kiderült, hogy nemcsak Belgrád, hanem Moszkva is ragaszkodik a Koszovó feletti szerb szuverenitás fikciójának fenntartásához, és abból semmilyen körülmények között nem hajlandó engedni. Ilyen körülmények között az észak-atlanti szövetség hatalmai nem tehettek más, mint hogy belemenjenek abba a kompromisszumos megoldásba, amelyet az előbbiekben vázoltam. Diplomaták és nemzetközi jogászok bizonyára sokat csiszolhattak volna még a BT-határozat szövegén, az érintetteket azonban sürgette az idő. A NATO tényleg szerette volna mielőbb abbahagyni Jugoszlávia bombázását, amely már-már annak létét fenyegette, Oroszország pedig nem látta volna szívesen az észak-atlanti szövetség szárazföldi haderőinek tervezett megjelenését a magyar határoktól délre fekvő területeken.[30]

Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo". *United Nations Security Council,* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20S2005%20709.pdf, 2005. november 10.

[30] Ezt Magyarország sem látta volna szívesen, többek között azért, mert a szárazföldi támadást csak hazánk területéről lehetett volna elindítani.

Azzal egyébként, hogy Moszkva elfogadta a Koszovó későbbi függetlenné válására utaló kitételeket is, az oroszok némiképp elengedték Milosevics kezét. A szerb diktátor abban reménykedhetett, hogy Oroszország azért továbbra is vétót emel az önállóság ellen. Milosevics csak részben tévedett. Neki a következő esztendőben már távoznia kellett ugyan a hatalomból, Oroszország azonban később sem volt hajlandó megszavazni Koszovó függetlenségét. Ennek számos oka lehetett. Mindenekelőtt az a tartós félelem, amely a soknemzetiségű Oroszországban a koszovói precedenssel kapcsolatban kialakult. (Igaz, ez nem feltétlenül tükröződött az ottani hivatalos nyilatkozatokban. Moszkva például arról tájékoztatta a bíróságot, hogy „az Orosz Föderáció népei önrendelkezési jogukat köztársaságok, autonóm területek, valamint nemzeti-kulturális autonómiák révén gyakorolják. Oroszország annak az egységes államnak a látványos példája, amelyen belül különböző népek és etnikai csoportok békésen élnek egymás mellett […] [U]gyanezeket az elveket kell alkalmazni más országok esetében is […] Koszovó helyzetének megítélésével kapcsolatban mindig ebből indultunk ki.”[31]) Az orosz elutasításban szerepet játszhatott az is, hogy 2001 után súlyosan megromlott az amerikai–brit kettős és Oroszország közötti viszony. Az oroszokat visszaszorítani próbáló, neokon beállítottságú Bush-adminisztráció aligha számíthatott annak a Putyinnak a támogatására, aki az elődjénél is többet akart tenni a régi nagyhatalmi státusz visszaállítása érdekében. Jól kivehető volt az is, hogy számos állam – köztük Kína, India, Brazília, Spanyolország, Románia, Szlovákia, Görögország, Spanyolország, Izrael – sem nézné jó szemmel egy jogi vagy politikai precedens létrejöttét.

Figyelemre méltó tény, hogy *ekkor már régóta senki sem beszélt – legalábbis hivatalosan – Koszovó önrendelkezési jogáról*. 2008-as függetlenségi nyilatkozatában maga a pristinai nemzetgyűlés sem hivatkozott az önrendelkezési jogra,[32] és a Koszovót elismerő 69 állam egyike sem állította azt, hogy az ottani nép önrendelkezési jogát ismerte volna el. Az utóbbiak egyszerűen kijelentették, hogy önálló államként ismerik el a Koszovói Köztársaságot.

Az történt, hogy az önrendelkezés fogalma a gyarmati rendszer megszűnése után nem sokkal gyakorlatilag eltűnt a nemzetközi közösség szótárából, legalábbis ami az állami szótárat illeti. A kurdok, a baszkok és más, hasonló helyzetben levő népek továbbra is az önrendelkezés eszméjét tűzték ugyan a zászlajukra, de a fővárosokban már semmi empátiát nem mutattak e jog iránt. Jugoszlávia/Szerbia esetében is mindenki csak az ország területi integritása tiszteletben tartását, illetve Koszovó elszakadásának jogát emlegette, at-

[31] „Written Statement by the Russian Federation”. *International Court of Justice,* http://www.icj-cij.org/docket/files/141/15628.pdf, 2009. április 16. 5. bek.

[32] „Kosovo Declaration of Independence”. *Republic of Kosovo Assembly,* http://www.assembly-kosova.org/?cid=2,128,1635, 2008. február 17. Más kérdés, hogy az albán vezetők politikai nyilatkozataikban mindig népük önrendelkezési jogának érvényesítéséről beszéltek.

tól függően, hogy melyiket akarta előnyben részesíteni a másikkal szemben. Tudomásom szerint a fent idézett, 1991-es európai közösségi nyilatkozat volt az utolsó, amely elismerte a koszovóiak önrendelkezési jogát.[33] Mint láttuk, már Badinterék sem tettek róla említést, de mélyen hallgatott arról a 2007-ben elkészült Ahtisaari-jelentés is, amely pedig a *Javaslat Koszovó státusának átfogó rendezésére* címet viselte.[34] A jelentés csak annyit mondott, hogy az Ahtisaari által vezetett bizottság minden elképzelhető változatot – így a Szerbiába való visszatérés *(reintegration)* lehetőségét is – megvizsgált, de nem találván más életképes megoldást, a független Koszovó megteremtését indítványozta. A jelentés szerint az új államnak a térségben kialakult felettébb bizonytalan helyzet miatt egy ideig még nemzetközi katonai és civilszervezetek (EU, NATO, EBESZ) felügyelete alatt kellene ugyan maradnia, elismerése után azonban önállóan köthetne szerződéseket más államokkal, felvételét kérhetné nemzetközi szervezetekbe, azaz teljesen úgy nézne ki, mint bármely más szuverén állam. Ahtisaari javaslatát azonban nemcsak Belgrád, hanem a BT két állandó tagja, Oroszország és Kína is elutasította, így mindenki előtt világos volt, hogy a Koszovó sorsáért aggódó nyugati hatalmaknak választaniuk kell: vagy fenntartják a tartomány nemzetközi igazgatását, vagy egyoldalúan lépnek fel az önálló állammá válás érdekében. A Bush-kormányzat az utóbbit választotta, és 2008-ban keresztülvitte az elképzelését.

A tartomány függetlenségének kikiáltása, illetve annak ösztönzése kockázatos lépés volt. Nem annyira Oroszország vagy más, ellentétes állásponton lévő országok miatt. Azok ugyanis egy ideje már tudomásul vették a koszovói folyamatok visszafordíthatatlanságát. Tisztában voltak azzal, hogy Szerbia Koszovó felett immár kilencedik éve csak fiktív szuverenitást gyakorol, és azzal is, hogy a tartomány már egészen bizonyosan nem kerülhet vissza egykori anyaországához. Tiltakozásuk határozott volt ugyan, de érdemben nem kellett erőteljes reakciójuktól tartani. Az igazi kockázat abban rejlett, hogy 2008 februárjában még senki sem tudhatta, hogy milyen hatásuk lesz a koszovói fejleményeknek a szerbiai belpolitikára. Néhány hónappal később, májusban ugyanis nagyon kevesen múlt az, hogy az előre hozott választások után tartott koalíciós tárgyalásokon kisebbségbe kerültek a nacionalista, oroszbarát erők, így a kormányba progresszív, európai perspektívában gondolkodó politikusok kerültek. Ehhez hozzájárulhatott az is, hogy Koszovó végleges elszakadását a szerb politikai elit túlnyomó része – függetlenül attól, hogy örült-e annak vagy sem – szintén elkerülhetetlennek tartotta.

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[33] „Statement by an extraordinary EPC Ministerial Meeting…" i. m.

[34] „Comprehensive Proposal for Kosovo the Status Settlement". *United Nations Security Council,* http://www.unosek.org/docref/Comprehensive_proposal-english.pdf, 2007. március 26.; „Report of the Special Envoy of the Secretary-General on Kosovo's Future Status". *United Nations Security Council,* http://www.unosek.org/docref/report-english.pdf, 2007. március 26.

Összegzés

Az elmondottakból arra lehet következtetni, hogy az önrendelkezési jog tartalma a múlt század hetvenes–nyolcvanas évei óta nem módosult, és ezen a helyzeten Koszovó függetlenné válása sem változtatott. A nemzetközi jogban így továbbra is érvényes az a szokásjogi norma, amely szerint csak az elnyomott népek élhetnek egyoldalúan az önrendelkezési jogukkal, és ők is csak a korábban megvont tagköztársasági – és nem tartományi – határok között.

Tartja magát az a norma is, amely szerint a külső erőszakos beavatkozás eredményeként létrejött függetlenség nem ismerhető el. Azok a soknemzetiségű államok, amelyek továbbra is tartanak a szeparatizmustól, mindmáig elutasítják a területükön élő különböző etnikumok vagy vallási csoportok önrendelkezési jogát. Vagy, mint láttuk, kijelentik, hogy népeik éppen saját államuk keretei között kívánnak élni önrendelkezési jogukkal.

Ezek után mit tehetett volna a Nemzetközi Bíróság? Megállapíthatta volna, hogy az önrendelkezési jog – korlátozott volta miatt – nem terjed ki a koszovói népre, amely ezek szerint jogellenesen alapította meg saját független államát? Tudtára adta volna a nemzetközi közösség 69 államának, hogy egy jogellenesen létrejött államot ismert el, és ezzel beavatkozott a Szerb Köztársaság belügyeibe? Kijelentette volna, hogy az 1244-es számú BT-határozatnak az a rendelkezése, amely Jugoszlávia területi sérthetetlenségére vonatkozott, ma is kötelező norma, míg a másik, a tartomány státusának átmeneti jellegéről szóló már nem? Figyelmen kívül hagyta volna azt a tényt, hogy maga a koszovói nemzetgyűlés sem hivatkozott az önrendelkezés jogra? Azt javasolta volna, hogy Koszovóban állítsák helyre a két évvel korábbi status quót?

Ezekre a kérdésekre nem lehet igennel válaszolni. Ezért állítottam azt ennek az írásnak az első részében, hogy a hágai bírák a Közgyűlés kérdésére nem fogalmazhattak volna meg a mostaninál jobb választ. Egyrészt azért, mert ha egy ilyen súlyú konfliktusban a nemzetközi közösség ennyire megosztott, akkor kizárólag politikai döntés születhet, azt pedig nem a bíróságnak kell meghoznia. Ráadásul ennek a konfliktusnak egy korábbi szakaszában már született politikai döntés, mégpedig a legmagasabb szinten, a Biztonsági Tanácsban. Másrészt a bíróságnak nem álltak rendelkezésére olyan nemzetközi jogi normák, amelyek alapján nyugodt lelkiismerettel foglalhatott volna állást. Éppen azoknak a szokásjogi normáknak nem volt a birtokában a hágai testület, amelyek az önrendelkezési jog *egyoldalú* érvényesítésére vonatkoznak.

Így nem meglepő, hogy a hágai Nemzetközi Bíróság Koszovó ügyében olyan véleményt fogalmazott meg, amely első látásra mintha elismerte volna a függet-

lenség kikiáltásának jogszerűségét, miközben a „beavatottak" számára világos volt, hogy nem ezt tette.[35]

The International Court of Justice on Kosovo's Right of Self-Determination

(Summary)

International public opinion has been dominated by the view that the advisory opinion of the International Court of Justice favoured Pristina, arguing that Albanian rightfully exercised their right to self-determination in seceding from Serbia and forming their own state. The Court, however, has in no way addressed this issue. It merely stated that the declaration of independence by the interim Kosovar national assembly is not in contradiction with international law. The ICJ offered its opinion on the legality of a declaration by a provincial parliament and failed to address the question of what consequences such a declaration might have. These include, obviously, whether Kosovo may be regarded as an independent and sovereign state and whether its recognition by over fifty states was in accordance with international law. The judges of the court, however, are not to be faulted for this turn of events. They could not have responded better to the question of the Assembly. When the international community is divided to such an extent over an issue, no decision but a political one can be reached, and it is not the duty of the Court to reach a political decision. The contemporary international legal order lacks the common law norms to determine under what circumstances unilateral invocations of the right of self-determination may be considered legitimate and how these may be applied to specific cases.

[35] Koszovó függetlenségét 2010. július 22. óta a kézirat lezárásáig, november 20-ig csak három újabb állam ismerte el, jóllehet korábban számos kormány kijelentette, hogy a bíróság véleményétől teszi függővé erről szóló döntését.

THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON THE "ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO" (22 JULY 2010) AND SECURITY COUNCIL RESOLUTION 1244 (1999)

ÁRPÁD PRANDLER[1]

I. Introduction

At the very outset it should be emphasised that the Advisory Opinion itself, as well as the declarations, dissenting and separate opinions attached thereto, constitute quite a lengthy volume, even without speaking about commentaries, studies and articles written about it after its adoption by the International Court of Justice. That is why I cannot and will not claim to offer a comprehensive picture about the Opinion. Instead I confine myself to dealing only with one of the important aspects of the Opinion, i.e. with its position on and evaluation of the given resolution of the Security Council mentioned in the title above. As we know, this resolution established an international civil and security presence in Kosovo, it temporarily suspended the exercise of Serbia's authority and created an interim regime. Paragraph 11 of the resolution, "Described the principal responsibilities" of the international presence in Kosovo, inter alia, as follows:

- Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo;
- Facilitating a political process designed to determine Kosovo's future status;
- In the final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.

[1] *Ad litem* judge at the ICTY, professor, former director of the International Law Department of the Hungarian Ministry for Foreign Affairs.

Before dealing with the substantive issues I would like to emphasise that I am going to explain my position strictly in my personal, private capacity, without prejudice to my duties at the ICTY, where I work now as an ad litem judge, or to the Ministry of Foreign Affairs of the Republic of Hungary where I used to work before my present function in The Hague.

II. The major finding of the Court

To start with I would like to quote the General Conclusion of the Court which, in paragraph 122 of the Opinion states that, "The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law."[2]

From among the three components of the conclusion of the Court, as referred to above, I would like to single out one important question, and this is the finding of the Court that the adoption of the declaration of independence did not violate Resolution 1244 of the Security Council. In paragraph 119 of the Opinion, "The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999)." This conclusion has been further strengthened by the argument, inter alia, that the resolution did not contain a "Prohibition against declaring independence", and finally, it concluded that, "The language of the resolution is at best ambiguous in this regard".[3]

Furthermore, according to the Opinion, "The text of the resolution explains that the main responsibilities of the international civil presence will include organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement."[4] Let me add here that I also quoted this task above, see the end of paragraph 1.

According to the Opinion itself, the reference to, "A political settlement cited above, does not modify this conclusion". (I.e. the conclusion of the Court that this part of the Resolution cannot be construed as to include a prohibition against the declaration of independence). That is why, in the view of the majority, the

[2] See: page 43 of the Opinion.

[3] See paragraph 118, 42.

[4] Paragraph 11 (c) of the Resolution.

Court finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration from issuing a declaration of independence".

III. The adoption of the Advisory Opinion; Dissenting and Separate opinions

It is worthwhile to recall that while the Opinion was adopted by ten judges (President Owada, Judges Al -Kasawneh, Buergental, Simma, Abraham, Keith, Sepulveda-Amor, Cancado Trindade, Yusuf, Greenwood) and opposed by the four judges whose opinions have been briefly mentioned above. At the same time it should also be pointed out that, due to a change in the person of the Chinese judge (Judge Shi took part in the oral proceedings but he resigned in May 2010), there was no Chinese participation in the decision-making, although one may guess which position would have been taken by the new Chinese judge.

Let me finally refer to Judge Kenneth Keith's position. Although Judge Keith went along with the majority position and voted for the Advisory Opinion, in his Separate Opinion he underlined, inter alia, that:

– The Security Council had a predominant role in this subject-matter, which is underlined by its Resolution 1244 and the establishment of UNMIK, and the role of the General Assembly was confined to the budget-related matters;
– According to the Case Law of the International Court of Justice the very question which is being asked should come from the "Institution" which needs the answer for an eventual "action". That is why, in his view, the question should have been asked by the Security Council.

It goes without saying that the four judges who voted against the adoption of the Opinion based their dissenting opinions and argumentations to a large extent on the provisions and exigencies of Security Council Resolution 1244 /1999.

Judge Peter Tomka, Vice-President of the Court, in paragraph 23 of his declaration states that 'Security Council resolution 1244 did not displace the Federal Republic of Yugoslavia's title to the territory in question". On the contrary, the resolution expressly states in paragraph 10 that the Security Council reaffirms "The commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region". Furthermore, in paragraph 25 of his declaration, he underlines that "The political solution to the Kosovo crisis shall be based on the general principles enumerated in the annexes 1 and 2 of the resolution". Let

me add that both annexes refer explicitly to the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia.

Judge Tomka also emphasised that upon the recommendation of the Contact Group for a Settlement of the Status of Kosovo it was also confirmed by the President of the Security Council in his letter addressed to the Secretary-General that, "Le Conseil de securité démeurera activement saisi de la question et devra approuver la décision finale sur le statut du Kosovo". (See: In document S/ 2005/709, annex.)

It is interesting to note that according to the Report of the Special Envoy (i.e. Mr. Martti Ahtisaari) of the Secretary-General on Kosovo's future status the reintegration (that is within Serbia) was not a viable option, but at the same time, "A continued international administration is not sustainable". That is why he concluded that, "Independence with international supervision is the only viable option".[5] Let me emphasise that it was an important call for "Independence with international supervision".

In his dissenting opinion Judge Koroma stressed, first of all, that Resolution 1244 was violated because, inter alia,

– "The resolution calls for a negotiated settlement, which the authors (i.e. those who adopted the declaration of independence) have circumvented;
– This declaration tries to bring to an end the international presence in Kosovo which can only be ordered by the Security Council."

Furthermore, in Judge Koroma's view, territorial integrity prevails over the principle of self-determination. That is why, according to his position, the unilateral declaration of independence amounts to the secession of Kosovo.

Judge Bennouna, in his dissenting opinion emphasised, among others:

– First of all, the question (i.e. the question asked by the General Assembly) should have been asked and answered by the Security Council;
– The opinion of the Court will not assist the General Assembly because it cannot change Resolution 1244 or interpret it;
– Admitting this claim would undermine the image of the Court;
– Any unilateral Declaration of independence should have been approved by the Security Council, which, of course was not in the position to do so, due to the well-known opposing views among its members, especially among its permanent members;
– The competence of the Security Council was violated because the determination of the final status of Kosovo, in accordance of the resolution, is in its purview;
– Last but not least Judge Bennouna raised the issue of the practical effect of the advisory opinion. In his view, "The Court has minimized the purport

[5] Doc. S/2007/168, 3–4.

and scope of its Opinion, since it has limited it to the declaration as such, severed from its effects. It may therefore be asked: how can this Opinion, wherein it is concluded that a declaration adopted by some one hundred individuals, self-proclaimed representatives of the people, does not violate international law, guide the requesting organ, the General Assembly in respect of its own action."[6]

It was, of course, expected that Judge Skotnikov would be adamantly opposed to the majority view. He quoted, as his point of departure, the opinion of the former legal adviser of the Foreign and Commonwealth Office, Michael C. Wood, according to which: "Only the Security Council, or some body authorized to do so by the Council, may give an authentic interpretation of a Security Council resolution in the true sense".[7]

Judge Skotnikov was also opposed to the majority view according to which "General international law contains no applicable prohibition of declaration of independence".[8] According to his view, "This is a misleading statement, which, unfortunately, may have an inflammatory effect. General international law simply does not address the issuance of declarations of independence. They may become relevant in terms of general international law only when considered together with the underlying claim for statehood and independence. The only law applicable for the purpose of answering the question posed by the General Assembly is the lex specialis created by Security Council Resolution 1244."

Finally, he stressed that, "In no way does the Advisory Opinion question the fact that resolution 1244 remains in force in its entirety".[9] This means – according to Skotnikov – that a "Political process designed to determine Kosovo's future status envisaged in this resolution[10] has not run its course and that a final status settlement is yet to be endorsed by the Security Council".

IV. Conclusions

In summary, I would like to emphasise the following:

– I wish to reiterate that it was not my intention to deal with all aspects of the Advisory Opinion but only with the basic arguments and views concerning Security Council Resolution 1244.

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[6] Paragraph 65 of the dissenting opinion.

[7] Michael C. Wood: The interpretation of Security Council Resolutions. *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998. 82.

[8] In paragraph 84 of the Advisory Opinion.

[9] See paragraphs 91 and 92 of the Advisory Opinion.

[10] Paragraph 11/e.

– In order to get an overall, well-balanced view of the background and possible impact of the Advisory Opinion, one should study all the arguments and the great quantity of publications published even before the memorial conference devoted to former Judge and Academician Géza Herczegh.
– Even if I try to be as neutral and circumspect as I could be in all aspects, I do not and cannot deny that I sympathise with those views which emphasise the prevalence and fundamental importance of the resolution concerned and the primordial role of the Security Council under Chapter VII of the United Nations Charter.
– At the same time, being a realist concerning major developments in international relations, I believe that certain progress and conciliation could be achieved even between those political forces, countries and entities which have thus far been diametrically opposed to each other.
– Notwithstanding the possible achievement of reconciliation, I still maintain my personal conviction and position that the future course of international relations and the role of State actors should not be directed towards the fragmentation of the given structure of interstate relations but, on the contrary, all efforts should be made for the further development of subregional, regional and universal cooperation among States through the strengthening of international organisations and through the progressive development of international law.

V.
Natural environment and international law

Environnement et droit international

THE INTERNATIONAL RIVER LAW IN THE EARLY 2000'S

JÁNOS BRUHÁCS[1]

1. Introduction

Professor Herczegh's scientific *oeuvre* has an important chapter on international river law. He dealt with the regime of navigation on the Danube, established by the 1948 Belgrade Convention. This study[2] interprets and considers the legal arguments raised by the participants of the Belgrade diplomatic conference, as well as it summarizes the functions of the Danube Commission. Professor Herczegh researched also the other branch of international river law.[3] Within the framework of the law of non-navigational uses of international watercourses, he described the first international organization in this field, i.e. *la Commission technique permanente du régime des eaux du Danube* (CRED), established by the 1920 Trianon Peace Treaty, he presented also the network of boundary waters conventions concluded by Hungary with the neighbouring countries, and especially he analyzed the 1966 ILA Helsinki Rules on the Uses of the Waters of International Rivers.

From the 1970's to 2010 the development of the two branches of international river law shows important differences. General international rules relating to river navigations are practically unchanged. Except for some new problems, e.g. the opening of Danube-Main-Rhine canal[4] and the slight modification of the regime of the Danube by the 1996 Budapest Protocol, the situation on the level of *lex specialis* is the same. A new research should wait for the conclusion of the envisaged Danube navigation convention. By contrast the law of non-

[1] Professor emeritus, University of Pécs, Faculty of Law, former director of the department of international law.

[2] HERCZEGH, G.: The 1948 Belgrade Conference and the new international regime of navigation on the Danube. (Hungarian) *Állam-és Jogtudományi Intézet Értesítője,* 1958. 271–302.

[3] HERCZEGH, G.: Some Legal Questions Relating to the Utilization of International Watercourses. (Hungarian) *Állam- és Jogtudomány,* 1968. 12–30.

[4] See J. BRUHÁCS: Le regime international de la navigation sur le Danube. *Studia Iuridica* (Pécs) 1986.

navigational uses of international watercourses is growing dynamically: *new water management agreements* were concluded, e.g. the 1992 ECE Helsinki Convention[5] and its additional protocols[6], the 1994 Meuse Protection Agreement[7] and the 1994 Lake Victoria Fisheries Organisation Convention[8]. Moreover, the old legal regimes were superseded by new conventional rules, e.g. the 1995 Mekong River Basin Agreement[9], the 1994 Danube Protection Convention[10], the 1997 Luso-Spanish Convention, the 1999 Rhine Protection Convention[11], and last but not least the codification was finished by the conclusion of the 1997 New York Convention[12] on the law of non-navigational uses of international watercourses, which is not yet in force. The International Court of Justice (ICJ) is participating also in the development of this field by its judgements in the case concerning the Gabčikovo–Nagymaros Project (Slovakia v. Hungary)[13], in the case of San Juan river (Costa Rica v. Nicaragua)[14] or in the case concerning pulp mills on the river Uruguay (Argentina v. Uruguay).[15]

Contrary to the enormous richness of the law of non-navigational uses of international watercourses or simply: international water law, the object and purpose of this study seems to be modest. The particular character of conventional international water law[16] requires an inductive approach due to the special, thus different hydrological, technical and political circumstances of water management, which practically precludes the possibility of a general analysis in depth. For such research the rules of general international law are more suitable. Considering also the commentaries on the 1997 New York Convention, as a possible continuity with professor Herczegh's above mentioned study on the 1966 ILA Helsinki Rules, this paper is limited to the 2004 *ILA's Berlin Rules* on Water Resources.[17]

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[5] 31 *ILM* (1992) 1312.

[6] BRUHÁCS, J.: The 2003 Kijev Protocol: redivivus or innovation. (Hungarian) *Jogtudományi Közlöny*, 2005. 83–93.

[7] 34 *ILM* (1995) 831.

[8] 36 *ILM* (1997) 671.

[9] 34 *ILM* (1995) 864.

[10] *Int'l Envt. Rep.* 35:0251 (1994)

[11] *EC Official Journal*, L289, 16. 11. 2000.

[12] *G.A. Res.* 51/226 (1997), Annex.

[13] *ICJ, Report* 1997.

[14] *ICJ, Report* 2009.

[15] *ICJ, Report* 2010.

[16] See J. BRUHÁCS: *The Law of Non-Navigational Uses of International Watercourses.* Budapest–Dordrecht, 1993. 52–58.

[17] *ILA Report of the Seventy-First Conference* 2004. 334–411.

Without doubt these Rules, the commentaries and the underlying collective works can be qualified as serious scientific accomplishment. They include the abstract treatment of the subject-matter, so preferred by the learned works, they can play a unifying role which should counteract the fragmentation of international water law, due to *lex specialis*, i.e. the different conventional water management regimes. Unfortunately, the Berlin Rules cannot attract attention: unlike to the 1966 Helsinki Rules, which have been considered to be one of the most significant results ever achieved by the ILA, consequently have had remarkable influence upon State practice and codification of this branch of international law.[18]

Presumably, this situation may be attributed to various reasons. Outside the intrinsic problems of Berlin Rules to be analysed *infra*, the fact has to be emphasised that there is a tendency relating to the exclusion of the application of customary international law with help of the recognition of the so-called self-contained regime.[19]

2. Presentation of the Berlin Rules

The Berlin rules are the compilation and progressive development of the 1966 Helsinki Rules and the rules as set forth in near dozen subsequent resolutions[20] of the ILA. This compilation is supplemented by the rules of international environmental law and that of *lato sensu* international human rights including international humanitarian law applicable to water resources. Subsequently, the material scope (*ratione materiae*) of Berlin Rules is extended: "These Rules express international law applicable to the management of the waters of international drainage basins and applicable to all waters, as appropriate." (art. 1) This extension results in different *consequences.*

[18] *See* 1997 New York Convention, Preamble.

[19] *See* ICJ judgement in the San Juan river case. *ICJ Report* 2009, § 35.

[20] 1972 *New York* resolution on the flood control. (*Report of the fifty-fifth conference* 43–86.), 1976 *Madrid* resolutions on the protection of water resources and water installations in time of armed conflicts as well as on the international water resources administration (*Report of the fifty-seventh conference* XXXV–XXXVI and XXXVII.) 1980 *Belgrade* resolutions on the regulation of the flow of international watercourses as well as on the relationship of international watercourses with other natural resources and environmental elements (*Report of the fifty-ninth conference* 362–373. and 373–391.), 1982 *Montreal* resolution on the rules of water pollution in an international drainage basin (*Report of the sixtieth conference* 533–548.), 1986 *Seoul* resolutions on the international groundwater resources as well as on the complementary rules applicable to international water resources (*Report of the sixty-second conference* 251–274. and 275–294.), 1996 *Helsinki* resolutions on the private law remedies for transboundary damage to international watercourses as well as on the supplementary rules on pollution (*Report of the sixty-seventh Conference* 403–411. and 412–415.)

– The Berlin Rules have an extreme and complex *content.* They deal with the principles governing the management of all waters (chap. II), the rules relating to the internationally shared waters (chap. III), the rights of persons (chap. IV.). The subsequent chapters contain the protection of aquatic environment, the impact assessments, the responses to extreme conditions, the rules on groundwater, the protection of waters and water installations during war or armed conflict, the prescriptions for international cooperation and administration, the State responsibility, the private legal remedies and finally a *renvoi* on the settlement of international disputes.[21]
– Except for general statements and principles there are parts in the Berlin Rules concerning exclusively the waters of international drainage basins (chap. III., X., XI., XII. and XIV.), as well as there are mixed parts (chap. V., VI., VII., VIII., and XIII.) dealing with the international and national water resources. This *duality* or dichotomy of the Berlin Rules is due to the different purposes and objects of international law-making. The traditional customary international norms govern interstate relations originated from the transfrontier effects of interferences (use, pollution, etc.) with the conditions of international watercourses. Thus these rules are based on bilateral and multilateral water management agreements, the determination of which requires an inductive approach. On the contrary, the other part of Berlin Rules may be attributed to general or regional environmental or human rights treaties. In this context the method of deduction can prevail.
– It is necessary to emphasize the differences in the legal nature of norms in Berlin Rules. The so-called traditional rules have a reciprocal character[22], their role is to resolve the collisions of sovereignty between the upstream and downstream countries, mainly from the economic viewpoint. On the contrary, the rules derived from the international environmental law and especially that from the international human rights regime have a parallel or collateral nature, i.e. they can exclude the reciprocity. This accomplishment reflects on the recognition of interests and universal values on behalf of the international community as well as the acceptance of the necessity relating to for an international cooperation.
– The above mentioned differences give rise to *practical consequences.* E.g. uncertainty prevails with regard to the regime of groundwater: are its rules extrapolated or do they have an independent development. An other example concerns the private legal remedies: they exist in transfrontier

[21] The enumeration does not contain chapter IX dealing with navigation. The rules on timber-floating as set forth in Helsinki Rules are absent from the Berlin Rules.

[22] *See* BRUHÁCS (1993) op. cit. 54–56.

context as an international obligation, but within the framework of national water resources they are based on municipal law. It has to be mentioned also that some definitions, like the conjunctive management or integrated management (arts. 3. and 4.) would be difficult to interpret in transfrontier context. In these latter cases the rules concern the individual uses of international watercourses completed by international cooperation. Of course there are exceptionally integrated uses as well.[23]

– The mixture of legal norms of different types can affect the *normativity* of rules formulated in Berlin Rules. Contrary to the statement that they are expressed as present legal obligations ("shall")[24], in reality these are rules of *different degree,* like *de iure condito* international obligations (e.g. art 12: equitable utilization, art. 16: no harm rule, art. 18: public participation and access to information, art. 27: obligation to prevent, eliminate, reduce or control pollution, art. 68: State responsibility, as well as some procedural prescriptions, arts. 57-58: on the notification, consultation), *in statu nascendi* obligations (e.g. art. 7: sustainability, art. 24: precautionary approach /*sic!*/), and lastly: *de iure condendo* obligations (e.g. art. 17: right of access to water, art. 64: establishing basin wide or other joint management). This horizontal division is complicated by the phenomenon of *soft law* which can be appreciated with regard to many articles of Berlin Rules (e.g. art. 11: general obligation of cooperation, art. 19: education, art. 66: compliance review). It should be emphasized that the tension with regard to the normativity of rules formulated in Berlin Rules can explain the unexpected content of *obligation for consultation*: "In conducting consultations and negotiations […] basin States shall proceed in good faith to give reasonable regard to the rights and legitimate interests of the other basin involved […] in order to arrive at an equitable and sustainable resolution of the situation" (art. 58, § 3).[25] Considering the fundamental difference between the legal rights and legitimate interests, the 1957 award of arbitral tribunal in the *Lake Lanoux* case categorically states: the legal rights are binding to observe, the legitimate interests are duly considering.[26]

[23] Bruhács (1993) op. cit. 164–168.

[24] *Report* (2004) 339.

[25] This prescription essentially coincides with the analogous article of 1997 New York Convention (art. 17. § 2).

[26] The French text of award, *RGDIP,* 1958. 117.

3. The Berlin Rules as the identification of customary international law relating to the water resources

It is doubtless that the ILA from the 1966 Helsinki Rules to the 2004 Berlin Rules always endeavoured to collect, systematize and express *de iure condito* norms of customary international law in force as well as to formulate *de iure condendo* norms, i.e. recommendations. The Berlin Rules are the compilation and the consolidation of the ILA's prior work.

It is formally true that the rules formulated by the ILA are teachings of the most qualified publicists, thus they are only subsidiary means for determination of rule of law.[27] Nevertheless, having postulated that the Berlin Rules adequately reflect the present state of customary international law governing this field, their stated rules are binding upon the members of international community. Otherwise the ILA's work can be qualified as the quasi-authentic expression of the customary rules concerning the water management.

The previously mentioned hypothesis relating to the quasi-authentic statement of customary international rules, accomplished by the Berlin Rules should be invalidated due to the procedure of their identification. According to the representative international agreements[28] are "sources and examples of principles incorporated into these Rules"[29]. This narrow approach, i.e. the quasi-exclusiveness of water management agreements could raise the compatibility with the general requirements for the formation of general customary international law, determined by the ILA 2000 London Statement[30], which interprets *lato sensu* the types of acts constituting relevant state practice. Nevertheless the importance of this remark is not to be overestimated, because the Helsinki Rules and subsequent resolutions are considered duly the other types of State conducts. This remark relating to the "old rules" of Berlin Rules may be questioned with regard to the extensively revised and new rules[31], in particular in the field of norms deriving from international environmental law and international human rights law. Despite the strictness of logical deduction it might be questioned that either the sufficiency of State practice, i.e. its uniform, extensive and representative character or the existence of *opinio iuris sive necessitatis* can be proved in a satisfactory manner.

Due to their general nature the indentified customary rules have a *subsidiary character*. As Berlin Rules states: "Nothing in these Rules affects rights or

[27] According to the Statute of ICJ, art. 38. point 1/d.

[28] *See* Sources of the International Law Association Rules on Water Resources, http://www.ila-hq.org/ (last visited 1 March 2011).

[29] *2004 Report* 340.

[30] *Report of the Sixty-ninth conference* 712–777.

[31] Ibid. 336.

obligations created by treaty or special custom." (art. 1, § 2). This provision applies the maxim *lex specialis derogat lege generali,* i.e. a specific rule prevails over a general rule. This statement may not be without exception. The commentary[32] refers to the existence of peremptory norms of general international law (*jus cogens*). This question is the object of the next point.

The importance of the identification of customary rules in the field of *lato sensu* interpreted water management[33] may be assessed by their *functions*. *Prima facie* three functions could be distinguished. The *first* means the role to fill the conventional gaps, i.e. the absence or insufficiency of water management agreements among the riparian States. Then these customary rules create rights and obligations for these States. The filling gaps function has to be completed by an other aspect as well. The waters management agreements are in general bilateral. According to the maxim *res inter alios acta nec nocere nec prodesse potest*[34], such agreements do not touch the rights or obligations of third States, it may nevertheless materially affect them.[35] Protection of legal rights and interests of third riparian States can be accomplished only with rules of customary international rules.

The *second* function of rules of customary international law is to furnish an appropriate framework for negotiation aimed at conclusion of international water agreements, which role is difficult to appreciate in general.

It is also necessary to mention a possible *third* function. By virtue of the 1969 VCLT comprise for the purpose of interpretation "any relevant rules of international law applicable in the relations between parties" (art. 31, § 3/c) shall be taken into account. This may be called as systemic interpretation. Evidently, the rules of customary international law are implied in this formula. It seems that this manner of treaty interpretation is rather a theoretical approach, its role in the international jurisdictional practice is diminishing. Although there are notable exceptions (e.g. *Lake Lanoux* award, Gabčikovo–Nagymaros judgment[36]) it seems that the ICJ and the international arbitral tribunals prefer to exclude this manner of interpretation from their considerations by help of *renvoi* to the self-contained regime[37]. This may be a convenient way of dodging the use of customary international rules.

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[32] Ibid. 343.

[33] Management „is used to include development, use, protection, allocation, regulation and control of waters, regarding the quality and quantity of waters…" (Ibid.)

[34] *See* 1969 Vienna Convention on the Law of Treaties, (VCLT) art. 34.

[35] A. Aust: *Modern Treaty Law and Practice.* (second ed.) Cambridge: UP, 2007. 257.; Ph. Cahier: Le problème des effects des traités a l'égard des Etats tiers. *RCADI*, T. 143 (1974-III) 597–598.

[36] *Supra* notes 12 and 26.

[37] *See* the last judgement of ICJ in the San Juan river case or Uruguay river case (*supra* notes 13 and 14).

4. Peremptory norms of general international law in international water law

The commentary refers to *jus cogens* without explication.[38] With regard to the possible presence of peremptory norms, some fields of Berlin Rules can deserve special attention: the protection of waters and water installations during war or armed conflict (chap. X) on one side, the rules relating to the rights of persons and eventual consequences of the principle of self-determination of peoples in the international water law (chap. IV) on the other side. In other words the legal character of rules derived from the *international humanitarian law* and from the *international human rights law* has to be analysed, completed by the interpretation of *self-determination* owing to the peoples.

The *obligation to cooperate* in good faith (art. 11) should be also mentioned in this context. Evidently the cooperation among the riparian States has a key-role for the water management in international water basins, it means more exactly *condition sine qua non*. This postulate is of such generality that it cannot form the basis of legal rights and obligations.[39] Obviously a principle without strict legal content cannot be transformed into peremptory norm of general international law. This conclusion may be confirmed by the fact that the procedural obligations belonging to the abstract cooperation principle have evidently not *jus cogens* character.

Before embarking on the analysis relating to the eventual existence of peremptory norms (*jus cogens*) in international water law it seems appropriate to make some *preliminary remarks.* First of all it has to be emphasized that there are no official documents establishing the list of peremptory norms of general international law. The existence of peremptory norms in international legal order is an exceptional occurrence,[40] owing to the special structure of international community. This situation cannot exclude the possibility of endeavour to determine approximately the circle of such norms. In course of such research the former art. 19 on international crimes of the provisional draft-articles on State responsibility[41], the art. 50 on the counter-measures and other relevant articles with their commentaries of the 2001 final draft-articles,[42] the determinations of factors that constitute an international offences[43] as well as the *obiter dicta* of international case-law (ICJ, ECHR, ACHR, ICTY)

[38] *Supra* note 32.

[39] ST. MCCAFFREY: *The Law of International Watercourses: Non-navigational Uses.* Oxford UP, 2001. 401–404.

[40] ILC Commentary on art 50, § 2. *See Yearbook* 1966, vol. II. 248.

[41] *Yearbook ILC*, 1996, vol. II. 188–194.

[42] GA Res. 56/83, Annex.

[43] E.g. 1998 Rome Statute of the ICC.

has to be considered[44]. The material criteria of traits, e.g. the protection of international *ordre public* or the so-called quasi-constitutional nature certain of rules[45], the preservation of fundamental interests[46] or fundamental values[47] of the international community which may justify the recognition of *jus cogens* quality with regard to certain general principles have to be deliberated. The *effects*[48] of *jus cogens* can manifest in treaty law,[49] in law of unilateral act,[50] with regard to the municipal legislations it can raise with regard to the decisions of Security Council,[51] moreover it can exclude the application of some international agreements (e.g. antiterrorist or extradition agreements) or rules of customary international law (e.g. immunity from jurisdiction).[52] Its more important role can be identified in the field of international responsibility.[53]

4.1. The aspects of international humanitarian law

The 1997 *New York Convention* on the law of non-navigational uses eludes the question relating to the existence of peremptory norms in the field of international law. It has been stressed that the Convention itself does not purport to provide rules of a *jus cogens* character.[54] Nevertheless its article 29 provides that international watercourses and works relating to them "shall enjoy the protection accorded by the principles and rules applicable in international and non-international armed conflicts". This article simply serves as a reminder that the *jus in bello* regime contains important provisions concerning international

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[44] A. Cassese: *International law.* (second ed.) Oxford: UP, 2005. 202.

[45] *See* R. Kolb: *Theorie du ius cogens international.* Paris: PUF, 2001. 68–82. and 100–115.

[46] On the basis of the 1976 ILC's draft on the international crimes (art. 19). *Yearbook* 1976, vol. II. Part Two, 95. On the relationship between the international crime and the *jus cogens*. *See* the commentary of art. 19, § 17, ibid. 102.

[47] *See* 2005 Resolution of Institute de droit international on obligation *erga omnes* in international law (preamble). *Annuaire* T. 71 II.

[48] E. Suy: Article 53 – Convention de 1969. In O. Corten – P. Klein (dir.): *Les Conventions de Vienne sur le droit des traités. Commentaire article par article.* Bruxelles: Bruylant, 2006. 1918–1920.

[49] Arts. 53 and 64 of 1969 VCTL.

[50] ILC 2006 Guidelines (art. 5) *Yearbook* 2006, vol. II.

[51] *See* Ahmed Ali Yusuf et Al Barakat Foundation c. Conseil de l'UE et Commission, des Communautés Européennes, Tribunal de première instance. C.J.C.E, 21 sept. 2005, aff. T–306/01.

[52] Cassese op.cit. no. 39, 205–208.

[53] *See* 2001 ILC draft, art. 26, arts 40–41 and art. 50 (A/RES. 56/83, Annex).

[54] S.C. McCaffrey – M. Sinjela: The 1997 United Nations Convention on International Watercourses. *A.J.I.L.* 92, 1998. 97–98.

watercourses.[55] By means of this diplomatic solution the problem of peremptory norms has been transferred to the field of international humanitarian law. Hereafter the true question is whether peremptory norms can be identified in the international humanitarian law, especially in the 1977 Additional Protocols.

Professor *Herczegh* recognizes that the fundamental principles of international humanitarian law have certainly *jus cogens* character.[56] Presumably the principle of distinction between the civilian population and combatants as well as between civilian objects and military objectives[57] can be qualified as peremptory norms. This constatation can be confirmed by the requirement of increased protection concerning some civilian objects.[58] Thus professor *Herczegh's* statement acknowledges rather indirectly the peremptory character of certain rules relating to the use of non-navigational uses of international watercourses.

In contrast with the 1997 New York Convention, the *Berlin Rules* contain prescriptions on the protection of waters and waters installations during war or armed conflict,[59] based on the 1976 ILA Madrid Resolution.[60] Thus the question of peremptory norms is raised in the framework of international water law, i.e. in relation of the statement concerning the subsidiary provisions of Berlin Rules.

The articles of chapter X can derive from the relevant special rules of 1977 Additional Protocol[61] and its basic rules.[62] Due to the analogy between the articles of 1977 Additional Protocol and the chapter X of Berlin Rules, their peremptory norms' character can be judged jointly.

The articles of chapter X in Berlin Rules which correspond to the fundamental rules of international humanitarian rules therefore belong to the empire of international *jus cogens*. This conclusion may be confirmed by a *renvoi* to the

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[55] ILC 1994 Report, *Yearbook*, vol. II. 315.

[56] HERCZEGH, G.: *The development and the recent problems of the international humanitarian law.* (Hungarian) Budapest, 1981. 112.

[57] Ibid. 193. et seq.

[58] Ibid. 227.

[59] *See* art. 50: rendering water unfit for use; art. 51: targenting waters or water installations; art. 52: ecological targets, art. 53: dams and dykes.

[60] *Report of the Fifty-seventh Conference*, 237–238.

[61] Art. 54, § 2: protection of objects indispensable to the survival of the civilian population (e.g. drinking water installations and supplies and irrigations works); art 56: protection of works and installations containing dangerous forces (e.g. dams and dykes), repeated by II. Additional Protocol, art. 16.

[62] Art. 35, § 3: its prohibited […] to cause […] damage to the natural environment, art. 56: protection of the natural environment. The former has an intrinsic approach, the latter has an antropocentric approach. *See* K. MOLLARD-BANNELIER: *La protection de l'environnement en temps de conflit armé.* Paris: Pédone 2001. 81.

international responsibility of States as well as that to the 1998 Rome Statute of the International Criminal Court.

– The 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts[63] states that countermeasures cannot affect the obligations originated from peremptory norms (art. 50, § 1/c.), like obligations of humanitarian character prohibiting reprisals (art. 50, § 1/c).
– The 1998 Rome Statute determines in art. 8 the following acts as war crimes:

> "iii. wilfully causing serious injury to body or health […]
> iv. intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment (*sic!)* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated and […]
> xvii. employing poison or poisoned weapons."

It is true that the rules of international humanitarian law and their presence in international water law belonging to the empire of peremptory norms are *relativized* due to the acceptance of military exigencies and by a number of uncertainties about their interpretations. But these insufficiencies cannot exclude them from the status of international *jus cogens.*

4.2. The status of rules derived from the international human rights within the international water law

The 2004 Berlin Rules contain the right to water (art. 17), the public participation in the process of decision-making concerning the management of waters with the right to information[64] (arts. 4 and 18). The principle of sustainability (art. 7) implies the protection of future generations.[65] In the background of these *human rights* the general requirement of *democracy* may be perceptible. The commentary states that the legitimacy of decisions depends on the consent of the governed[66], whereby the principle of the *self-determination* of people could be also raised.

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[63] GA. Res. 56/83, Annex commentary.

[64] A. Kiss – J-P. Beurier: *Droit international de l'environment.* Paris: Pedone, 2000. 96. ("[…] une formulation à la fois realiste et précise du droit à l'environnement")

[65] Art. 7, commentary, 354.

[66] Art. 18, commentary, 367.

It is evident that there are some fundamental human rights belonging to the circle of peremptory norms of general international law.[67] Nevertheless it is necessary to consider that the mentioned human rights within the international water law do not belong to the so-called hard core of this field, to the fundamental human rights. Moreover, their legal base is without precise contours as well as these rights are to be progressive realized, therefore the states are not under a present or immediate duty.[68] This latter remark means that these are not legal rights, rather the mission of States.

4.3. Peremptory norms in international water law due to the principle of self-determination of peoples

It seems to be recognized that the principle of self-determination of peoples has the status of *jus cogens*.[69]

There are some articles in the Berlin Rules which *prima facie* could be integrated into the principle of self-determination owing to peoples within the framework of so-called *internal self-determination.* E.g. the right to participate in the decision relating to the water resources (arts 4 and 18) which has the goal to fill or minimize the so-called democratic deficit.[70] Indirectly, the requirement of sustainability (art. 7) has a component of self-determination in favour of future generations.[71] The former rules raise a question: despite the evident logical relationship between the right to participate and the fundamental element of self-determination, as the ICJ put it in Western Sahara case[72], the question is

[67] *See* 2001 Draft-articles (*supra*, note 61) art 50, § 2/b.

[68] Art. 17, commentary, 366–367.

[69] *See* e.g. J.DE ARECHAGAE: International Law in the Past Third of a Century. *RCADI* T. 159 (1978–I.) 66.; CASSESE op.cit. (no. 39) 244. and 304.; P. M. DUPUY: *Droit international public.* (9e ed.) Paris: Dalloz, 2008. 143.; H. HANNIKAINEN: *Peremptory Norms/Jus Cogens in International Law. Historical Development, Criteria, Present Status.* Helsinki, 1988. 354–424.; R. WOLFRUAM: Art. 2. In B. SIMMA (ed.): *The Charter of the United Nations.* (2nd edition) Oxford: UP, 2002. 62.; Draft Articles on Responsability of States for Internationally Wrongful Acts, Commentaries (AGDO 56eme session, Supplement no 10 /CA/56/10/) 305., § 5.; Tacitly 1989 Arbitral Award in Guinea-Bissau/Senegal case (la détermination de la frontiere maritime) *RGDIP* 1990. 230–231., § 37.; East Timor (Portugal v. Australia) Judgment *ICJ Rep.* 1995. § 29 based on the equation between peremptory norms and *erga omnes* obligation (see *ILC commentaries* 298–303); and (indirect manner) Kosovo Advisory Opinion, *ICJ Rep.* 2010. § 81.

[70] *Commentaries* 349. and 367.

[71] Ibid. 354. See 1988 Goa Guidelines on inter-generational equity. 27 *ILM* 1108 (1989)

[72] The self-determination „requires a free and genuine expression of the will of the people concerned". *ICJ Rep.* 1975. 12., § 58–59.

whether they have the position of independent international norms which have not yet reached the status of *jus cogens*.[73]

It is necessary to consider an other dimension of the self-determination as well, namely the right to water (art. 17) which refers to the central importance of water in people's lives. The consequence of this statement seems to be clear. As the 1976 Madrid Resolution states: "It should be prohibited to deprive […] a people of its water resources to such an extent that a threat to the health or the economic or physical conditions of survival is created" (art. VIII. § 1)[74]. The rapporteur's example is the dispositions of the Versailles Peace Treaty on the derivation of Rhin in favour for France.[75] The Berlin Rules fail to do its incorporation, but they refer only to the "vital human needs".[76]

Nevertheless, this question may require an interpretation. The art. 1, common to the two UN Covenants on Human Rights states: "All peoples may, for their own ends, freely dispose of their natural wealth and resources […] In no case may a people be deprived of its means of subsistence." (§ 2) This disposition combines the political dimension of self-determination with the *economic component.*

Can the absence of such disposition in the 1975 Helsinki Final Act relating to equal rights and self-determination of peoples (VIII)[77] means that the economic part of self-determination is a prerogative of colonial peoples, only valid in the context of so-called external self-determination or it has a general meaning for all peoples? In other words has it an effective content with regard to the internal self-determination as well? Despite the doubt and ambiguities relating to this aspect, it is necessary to emphasize that the deprivation from water resources, based on the free and genuine will of people seems to be unimaginable. According to the *jus cogens* status of the principle of self-determination such international treaty would be invalid which means more than an unequal or leonine treaty, very debated in the 1968-69 Vienna Conferences.[78]

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[73] *See* arbitral award in Guinea-Bissau/Senegal case *dictum* reasonable to apply by analogy (235., § 4.)

[74] *Report*, 1976. XXXVI. According to Professor Berber this is a peremptory norm. See *Report* 1974/75. 142.

[75] Ibid.

[76] *Report*, 2004. art. 14, commentary, 364.

[77] 14 *ILM* 1295 (1975).

[78] Aust op.cit. no. 35,. 320.

4.4. Peremptory norms in international water law in light of the international minority regime

This subpoint wants to deal exclusively with a special aspect of the international minority regime, which had a special importance in professor Herczegh's *oeuvre*.[79] Evidently this item can not be interpreted within the framework of self-determination of peoples. It is a *communis opinion* that *minorities*[80] have no right to the self-determination[81] which seems to be less categorical in the ICJ's *obiter dictum* referring to a sharp difference of views relating to the right of minority from the State or the right of "remedial secession".[82]

The minorities have the protection of international *jus cogens* in an other dimension. The total or large-scale deprivation of minorities from its water resources means a factor that constitute an offence: "deliberately inflicting on the groups conditions of life calculated to bring about its physical destruction in whole or in part" (art. 4/c). The genocide prohibited by the 1948 Convention belongs evidently to the circle of peremptory norms of general international law.[83]

5. The implementation of customary norms stated in Berlin Rules

The Helsinki rules prescribe: "States shall, where appropriate, enact laws and regulations to accomplish the purposes set forth in these Rules and shall adopt efficient and adequate administrative measures, including managements plans, and judicial procedures for the enforcement of these laws and regulation" (art. 2, § 1). The tasks of States are broadened by undertaking of educational and research programs as appropriate to assure the necessary technical capacity which are beyond the classical problems with regard to the implementation of legal norms.

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[79] *See* e.g. G. HERCZEGH: Droits de l'homme – droits des minorités. In *Boutros Boutros-Ghali Amicorum discipulorumque Liber*. Bruxelles: Bruylant, 1998. 1149–1172.

[80] Berlin Rules deal with the protection of particular community (art. 20) i.e. the indigenous and tribal peoples Commentary. 370–371.

[81] *See* HRC, General Comment 23 (1994) on Issues relating to art. 27 of the Covenant on Civil and Political Rights.

[82] Kosovo Advisory Opinion (*supra* note 53) § 82.

[83] E.g. CASSESE op.cit. no. 39. 199. and 203.; SUY op.cit. note 46.; DUPUY op.cit. note 67, 466., 468. p. 1912, as well as the judgments of ICTY Furundzija : IT-95-17/1-T/1998/ §§ 145–157, Milosevic: IT-97-24-T/2002/ § 20.

The requirement to fulfil the international obligations by adequate municipal legislation is in conformity with the majority of norms stated in Berlin Rules. Their formulae draft such obligations like "take all appropriate measures".[84]

The strictness of these obligations is reduced by the requirement of due diligence. Apart from this content these obligations belong to the category of *non self-executing norms* because they require municipal legislation for implementation. Because of the danger of misunderstanding it is necessary to distinguish three procedures: i/ the domestication of international obligations without special legislation (monist approach) or by transformation (dualist approach) which is without prejudice to the following distinction; ii/ self-executing or non self-executing nature of norms and iii/ the *direct effects* of national or international rules, i.e. whether they create legal rights and obligations for private persons.[85] Only these two latter questions seem to be relevant in this analysis. Apart from the extensibility of such nature of contractual obligations[86] to the obligations originating from customary international law, it seems to be enough to make some remarks:

a) There are such obligations which do not require municipal legislations, e.g. with regard to the conclusion of water regime agreements (art. 1, § 2), the procedural obligations (arts. 56–61), the establishment of joint management (art. 64), the State responsibility (art. 68), the settlement of international disputes (arts. 72–73). In this context, the subjects of these obligations of implementation are the riparian States.
b) The implementation of certain obligations relating to internationally shared waters can be realized without interference by municipal legislation, because its performance can be ensured by the organs of the State. The most important decisions, relating to the water management plans, grand scale of the construction of hydroelectric power plants, the response to extreme conditions, etc. are made at governmental level.[87] In this context the questions is to judge the acts of State organs;

[84] E.g. art. 7 (sustainability), art. 8 (minimalization of environmental harm), art. 20 (protection of particular communities), art. 22 (protection of ecological integrity), art. 24 (to ensure ecological flows), art. 26 (with regard to hazardous substances), art. 32 (responses to extreme conditions), art. 41 (protecting aquifers), etc.

[85] Dupuy op.cit. note 67, 403.

[86] T. Burgenthal: Self-executing and non self-executing treaties in national and international law. *RCADI,* vol. 235 (1992) 303.

[87] Naturally there are exceptions, e.g. 1950 agreement (Austria and Germany) on Donaukraftwerke – Jochenstain Aktiengesellschaft (UN Textes legislations no. de vente 63 V. 4. no. 138) 1957 convention (Italy and Schwitzerland) on Spöll (ibid. no. 235).

c) According to the *pacta sunt servanda principle*[88] the Berlin Rules have some prescription which *prima facie* would be included in the list of self-executing norms with direct effects. E.g. right to water (art. 17), right to public participation (art. 18), access to courts and remedies for damage to persons (arts. 69-70). Nevertheless their possible self-executing character and therefore their *direct effects*[89] are excluded by the general statement, mentioned in the introduction, and sometimes by their formulae as well. Therefore apart from their precise content, the relevant intention can not be found.

d) There are also customary obligations having non self-executing character e.g. the *principle of equitable and reasonable utilization* which may be implemented without municipal legislation. In case of a framework principle, its concretisations, by the determination of its content depends on international law-making, i.e. on the conclusion of a water regime agreement or on the result of consultations between the riparian States.

e) In order to diminish the confusion, the relationship between a norm having self-executing character and its direct effects may be summarized as follows: the non self-executing provisions cannot be directly applied within the national legal systems without being supplemented by additional national legislation for there to be complemented.[90] Moreover there are non self-executing obligations to be supplemented by international law-making, and last but not least these may be possible non self-executing provisions with direct effects, i.e. certain international rules have been held to create legal rights (e.g. in the field of human rights regime with regard to the procedural law, or *delicta iuris gentium*).

Summing up what has been said the interconnections between the self-executing or non self-executing nature of international obligations as well as their direct applicability are far from the classical clarity.

6. The relationship between the principle of equitable and reasonable utilization and the no harm rule

From the beginning of the ILA's work (and the other learned society) as well as in the course of codification the question of this relationship between the principle of equitable and reasonable utilization and the no harm rule was the

[88] J. SALMON: Art. 26 – convention de 1969. In O. CORTEN – P. KLEIN: *The pacta sunt servanda rules both the treaties and the general international law.* 1085.

[89] *See PCIJ* Advisory opinion (Jurisdiction of the Courts of Danzig) (Series B no 15), 17.

[90] AUST op. cit. note 35, 197.; CASSESE op. cit. note 39, 227.

most debated issue and an evergreen problem. Different *solutions* were to be applied. The 1961 Salzburg Resolution[91] of Institute de droit international as well as the 1997 New York Convention on the law of non-navigational uses of international watercourses[92] established a coexistence of two independent rules, a parallelism[93] due to such couple. The 1966 Helsinki Rules incorporated the no harm rule into the principle of equitable and reasonable utilization with the integration of compensation as one of relevant factors (art. V, § 2/j).[94] Subsequently by the 1982 Seoul Resolution the no harm rule was converted into a complementary and subordinate principle of the omnipresent rule of equitable and reasonable utilization[95] (art. 1). Having established a monism the question of primacy is evidently raised. The primacy of no harm rule was recognized by the provisional draft-articles of ILC.[96]

The 2004 Berlin Rules establish an independency between the two principles to solve the problem: the right to the equitable and reasonable use can be exercised having due regard for the obligation not to cause significant harm (art. 12) and inversely the avoidance of transboundary harm means due regard for the right to make equitable and reasonable use (art. 16). A complex obligation has established a medal with double side, or, rather, two concentric circles, from which the no harm rule is more broad. I think that the Berlin Rules go a long way towards the optimal result. Nevertheless it seems that the problem is more complicated. The answer depends on the *interpretation of damage or harm,* identified in art. 3, points 4 and 8.

Different types of damage or harm have to be distinguished in order to separate the prohibited and non-prohibited possibilities.

a) *De minimis* damages or harms are irrelevant.

b) There are damages or harms *outside of the framework of equitable and reasonable principle.* They mean the *lato sensu* ecological harms originating from the violation of the ecological integrity (art. 22) of the assurance of ecological flows (art. 24), or the prevention relating to the introduction of hazardous substances into the waters (art. 26), etc. The *sui*

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91 *Annuaire de l'Institut de droit international*, vol. 49, Part 2. 370–373.

92 GA Res. 51/227 (1997), Annex. See Bruhács, J.: The 1997 New York Convention on the law of international watercourses (Hungarian) *JURA*, 2000. Vol. 6. No. 1–2. 46–51.

93 On the couple of principles as implementation-method see G.de Lacharriere: *La politique juridique exterrieur.* Paris: Economica, 1983. 96–100.

94 See Bruhács (1993) op.cit. 159–171.

95 *Report* of 62nd, 275–294. See ILC's final draft articles on the law of non-navigational uses… (*YILC* 1994, vol. II), 236 et seq.

96 *YILC* 1991, vol. II. 66. et seq.

generis character of such damages can be broadened by the consequences of the requirement relating to the precautionary approach.[97]

c) The damages or harms caused by the *extreme situations* are also outside of equitable and reasonable utilization principle. *Prima facie* they could be qualified as *vis maior* as one of circumstances excluding wrongs. But it is necessary to consider the general obligation of due diligence.[98] E.g. the use of international watercourses for the discharge of floods shall be free providing such discharge is not incompatible with the object of flood control and does not adversely affect the rights or interests of other States (art. 34, § 6).

There are other factors aggravating the *tensions* between the equitable and reasonable utilization principle and no harm rule.

a) *Prima facie* the content or limits of the former are ambiguous, due to its non self-executing nature, on the other hand the ecological harms have a doubtful and long-term character.

b) The damages resulting from pollutions and from other activities are caused practically by the activities of private persons. Having refused the so-called objective liability of territorial State, such activities cannot establish the responsibility of States (art. 68).

Summarizing the above remarks two situations may be distinguished: there are cases when the activity causing damages or harms realises an internationally wrongful act and other cases when the damages cannot be qualified as an illegitimate act or omission.

The above outlined situation is more complicated by the question of the *right to future utilization*. Following the solution of Helsinki Rules the Berlin Rules state that the present uses cannot preclude by a claim of other riparian States for the future utilization (art. 15).[99] There are not vested rights. This solution seems be problematic both from the theoretical and practical viewpoint.

a) For the sake of completeness it's necessary to refer also to the damages caused by wars, according to chapter X.

b) It is considering the damages resulting from the violation of human rights in this field.

c) Last but not least it is important to concentrate the damages and harms

[97] *See* generally XIMENA FUENTES: Sustainable Development and the Equitable Utilization of International Watercourses. *BYBIL* 69 (1978) 119.

[98] With regard to the aquifers States shall take all appropriate measures to prevent any pollution (art. 41, § 1) at the same time the precautionary principle requires than that no pollution be allowed. (*Report* 71st, 388.)

[99] Art. 15, commentary, 364.

within the *framework of equitable and reasonable utilization.* This legal right of riparian States implies necessarily the limitation of the theoretical total uses of waters, therefore it means at least, *lucrum cessans.* These damages are not prohibited *per definitionem* by the no harm rule. The situation would be more complicated if the limits of equitable and reasonable utilization are determinated by a water management agreement and the functioning of stipulated regime causes damages.[100] In this case could we speak about the liability for the damage resulting from the acts not prohibited by international law?

Apart from a detailed interpretation[101] two remarks seem to be necessary to make.

– The abandonment of a claim based on sovereignty cannot be presumed.[102]
– The second remark raises the practical difficulties resulting from the possible modification of *status quo* relating to the management of international watercourses. It can refer to the Nile dispute or the situation among the Soviet successor States as well as the possible attitude of China as upstream country with regard to the Mekong and other rivers in South-Asia.

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Omitting the summary of conclusions from this study a general remark seems to be enough. Besides the specialists of international water law the ILA 2004 Berlin Rules merit to devote attention of international lawyers because of their intellectual attractions.

[100] *Per analogiam* Trail Smelter's effect. See R. Quantin-Baxter: Second Report. 1981. *YILC,* vol. II. Part One.

[101] The Berlin Rules do not determine the legal base of right to the equitable and reasonable utilization. See the formula of art. 12.

[102] Lake Lanoux award (note no. 26) 99.

IN DUBIO PRO NATURA: THE DISSENT OF JUDGE HERCZEGH

JAMES CRAWFORD[1]

Introduction

As observed by Jutta Brunnée and Ellen Hey,[2] the 1997 *Gabčíkovo–Nagymaros Project* judgment[3] marked a number of "firsts" for the International Court of Justice. It was the first time the Court had used its power under Article 66 of the Rules of Court to undertake a visit *in situ* and inspected the locations along the river Danube that were the site of the disputed Project. It was the first time the Court was called upon to consider the relationship between international environmental law and the established law of treaties. It was the first time that the Court expressly considered the concept of sustainable development. It was also the first, and only, time over the course of his 10-year career on the Court that Judge Géza Herczegh dissented.

The *Gabčíkovo–Nagymaros* case aroused considerable interest abroad but intense interest in Hungary (and, I suppose, also in Slovakia). Some hoped that the Court might deliver a resounding victory for emerging principles of law in favour of environmental protection;[4] others that it uphold the sanctity of treaties against "green" protesters. But ultimately the Court's decision was "not a clear

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[2] JUTTA BRUNNÉE – ELLEN HEY: Symposium: The Case Concerning the Gabčíkovo–Nagymaros Project Introduction. *Yearbook of International Environmental Law* 8 (1997) 2.

[3] *Gabčíkovo–Nagymaros Project (HungarylSlovakia), Judgment, I.C.J. Reports 1997*, 7. ("*Gabčíkovo–Nagymaros* Judgment").

[4] As one commentator put it: "If the court doesn't hide behind treaty issues, it will have to address the [environmental dispute] head on." Michelle L. Schwartz, Natural Heritage Institute, quoted by Dean E. Murphy, 'Slovakia, Hungary Struggle over Path of the Danube Environment', *Los Angeles Times,* 24 September 1997.

victory for either party."[5] Nor was it unanimous. Of the fifteen Judges,[6] only four (Vice-President Weeramantry and Judges Guillaume, Kooijmans and Shi) voted in favour of every paragraph of the *dispositif*. Twelve separate or dissenting opinions or declarations were appended to the judgment. Nonetheless, the Court held, by clear majorities for the most part, that both Hungary and Slovakia had breached their obligations under the Treaty. It found unlawful both Hungary's unilateral suspension and subsequent abandonment of construction work at Nagymaros and Dunakiliti,[7] as well as Slovakia's subsequent unilateral diversion of the Danube as part of Variant C.[8] Significantly, the Court concluded that, despite everything that had happened on both sides, and the wide discrepancy between the status quo and what the 1977 Treaty provided, the Treaty was still in force, still governed the relationship between the parties, and that its object and purpose must be carried out in good faith by both parties.[9] The Court affirmed the "integrity of the rule *pacta sunt servanda*"[10] and implicitly rejected Hungary's contention that "the previously existing obligation not to cause substantive damage to the territory of another state had...evolved into an *erga omnes* obligation of prevention of damage pursuant to the 'precautionary principle'".[11] In doing so, the Court denied that environmental law principles could trump treaty law.

For Judge Herczegh, this was the core of the Court's judgment with which he could not agree, and of which he was particularly critical, stating unequivocally that "...the most basic ecological considerations were not accorded the weight they deserved."[12] Judge Herczegh's dissent has gone largely unnoticed. The purpose of this paper is to rectify that lacuna. Comparing and contrasting the dissent of Judge Herczegh with the approach taken by the majority and in particular, the most vocal member of the majority, Vice-President Weeramantry, it will be suggested that Judge Herczegh's views have perhaps been unfairly neglected.

For Judge Herczegh, the *Gabčíkovo–Nagymaros* case was unique. He was born to Hungarian parents in Nagykapos (in present-day Slovakia) in 1928. I can only infer what insights his personal history must have brought to bear on this

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5 IDA L. BOSTIAN: Flushing the Danube: The World Court's Decision Concerning the Gabčíkovo Dam. *Colorado Journal of International Environmental Law and Policy* 9 (1998), 401., 414.

6 President Schwebel, Vice-President Weeramantry and Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans and Rezek; and Judge *ad hoc* Skubiszewski.

7 *Gabčíkovo–Nagymaros* Judgment, para. 59.

8 Ibid. para. 88.

9 Ibid. paras. 115., 133.

10 Ibid. para. 114.

11 Ibid. para. 97.

12 Dissenting Opinion of Judge Herczegh, 177.

dispute. But there is more to Judge Herczegh's dissent than mere nationalism. The dissent offers insights into the practical operation of the precautionary principle at the international level. Appropriately, his dissent was strongly fact-driven; it also serves to highlight the potential dangers of statements of general principle which do not really grapple with the dispute before the Court. The point is not that Judge Herczegh differed from the majority on questions of law: for the most part, he did not. He was, on the other hand, more ready to put the law into practice.

The History of the Dispute

At the heart of the dispute was the 1977 Treaty concerning the Construction and Joint Operation of the Gabčíkovo–Nagymaros Barrage System. Pursuant to the Treaty Hungary and Czechoslovakia were to construct two sets of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute a "single and indivisible operational system of works".[13] The works were to comprise a reservoir upstream of Dunakiliti (covering both Hungarian and Czechoslovak territory); a dam at Dunakiliti, on the Hungarian side; a bypass canal in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks and a hydroelectric power plant designed to operate in peak mode; and, further downstream, the Nagymaros System of Locks and a second hydroelectric power plant.[14]

The Project was not without controversy. Its design reflected the "industrial gigantism of the Stalinist era"[15] and construction was characterized by a series of stop-starts, whereby the Hungarian Government – facing significant internal criticism[16] – sought to slow down and then speed up completion of the Project.[17]

[13] Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic concerning the Construction and Joint Operation of the Gabčíkovo–Nagymaros System of Locks (signed at Budapest 16 September 1977; entered into force 30 June 1978) Article 1 ("1977 Treaty").

[14] See *Gabčíkovo–Nagymaros* Judgment, 20. (para. 18.)

[15] Aaron Schwabach: Diverting the Danube: The Gabcikovo-Nagymaros Dispute and International Freshwater Law. *Berkeley Journal of International Law* 14 (1996) 290., 293.

[16] See the historical account in Schwabach op. cit. 296.

[17] "On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending Article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 which amended the Agreement on mutual assistance), to accelerate the Project." *Gabčíkovo–Nagymaros* Judgment, 7., 25. (para. 21.)

Hungary's ultimate decision to abandon the works was explained by the Court as follows:

> "As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti."[18]

Czechoslovakia (in reality through the then regional government in Slovakia and associated Bratislava companies) had meanwhile continued the Project works at Gabčíkovo, which by April 1991 were close to 90 % complete.[19] Attempts to negotiate a satisfactory solution to Hungary's environmental concerns failed,[20] and in November 1991, Slovakia began construction of a "provisional solution", subsequently known as "Variant C", which entailed the unilateral diversion of the Danube to enable the continued operation of the Gabčíkovo works as a "run-of-the-river" hydroelectric plant.[21]

On 25 May 1992, and on the basis that Hungary could not accept "irreversible damage afflict[ing] the ecological and environmental resources of the region, first of all the presently available and potential drinking water reserves of millions of people […] [and the] degradation, and […] extinction threaten[ing] the vegetation and fauna of the region",[22] Hungary purported to terminate the 1977 Treaty. Hungary cited as one of its reasons for termination the fact that "the Government of the Czech and Slovak Federal Republic continues the construction of the so-called provisional solution"[23] which prevented further negotiation and "violates the territorial integrity of the Hungarian State by diverting the natural course of the Danube."[24]

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[18] Ibid. para. 22.

[19] Declaration of the Government of the Republic of Hungary on the Termination of the Treaty Concluded Between the People's Republic of Hungary and the Socialist Republic of Czechoslovakia on the Construction and Joint Operation of the Gabčíkovo–Nagymaros Barrage System 32 ILM 1260 (1993) 1270 (Antecedents, para. 19) ("Declaration of Termination").

[20] *Gabčíkovo–Nagymaros* Judgment, 33. (para. 37.)

[21] *Gabčíkovo–Nagymaros* Judgment, 20. (para. 23.)

[22] Declaration of Termination, 1261.

[23] Ibid.

[24] Ibid.

On 2 July 1993, Hungary and a now-independent Slovakia instituted proceedings before the Court on the basis of a Special Agreement signed in Brussels on 7 April 1993. In brief, the parties asked the Court to determine (a) whether Hungary had a legal right to suspend work on the diversion of the Danube at Dunakiliti, and to suspend and then abandon the work on the Nagymaros dam in 1989; (b) whether in November 1991 Slovakia had the right to proceed with construction of the "provisional solution" (known as "Variant C") and whether in October 1992 it was entitled to put Variant C into operation; and (c) the legal effect of Hungary's purported termination of the 1977 Treaty by way of its Declaration in May 1992.[25]

The Decision of the Court

Hungary submitted, *inter alia*, that a state of "ecological necessity"[26] existed in 1989 which served either to justify termination of the 1977 Treaty or served to preclude the wrongfulness of the termination. Hungary also submitted that Czechoslovakia had breached rules of general international law; in particular, the principle of prevention and the precautionary principle.[27] Hungary submitted that:

> "The precautionary principle is the most developed form of the general rule imposing the obligation of prevention. Its proclamation at a universal level can be considered one of the most important results of the 1992 Rio de Janeiro Declaration on Environment and Development. Principle 15 provides:
>
> > 'In order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be use as a reason for postponing cost-effective measures to prevent environmental degradation.'"[28]

[25] See Special Agreement between the Republic of Hungary and the Slovak Republic for Submission to the international Court of Justice of the Differences between Them Concerning the Gabčíkovo–Nagymaros Project, Jointly Notified to the Court on 2 July 1993, 5–6.

[26] *Gabčíkovo–Nagymaros* Judgment, 35. (para. 40).

[27] See Memorial of the Republic of Hungary, 2 May 1994, paras. 6.56–6.69.

[28] Memorial of the Republic of Hungary, 2 May 1994, para. 6.64. de Janeiro Declaration on Environment and Development, 14 June 1992, UN Doc A/CONF 151/26, vol I, 8.

By a significant majority of 14 votes to one, the Court found that Hungary was not entitled to suspend or subsequently abandon the works at Nagymaros or Dunakiliti. The Court did not accept Hungary's contention that a state of necessity existed sufficient to preclude the unlawfulness of Hungary's termination of the Treaty.[29]

Regarding the implementation of Variant C, the Court found that while Slovakia's breach was "caused" by Hungary's earlier breach, it was nonetheless independently unlawful as a breach of the principle of equitable and reasonable utilisation in relation to a boundary river.[30] The Court held that Variant C was not authorized by the Treaty and could not, as Slovakia argued, be considered an approximate application of the Treaty made justifiable by Hungary's abandonment of the works at Nagymaros.[31]

By distinguishing the actual commission of a wrongful act from the preparatory conduct which did not, in itself, qualify as a wrongful act, the Court concluded that Czechoslovakia was entitled to proceed to the *construction* of Variant C in November 1991,[32] but at the same time that it was not entitled to put that Variant into *operation* in October 1992.[33] This distinction between preparation and performance was unconvincing, to say the least: as noted by one commentator, "it means that Hungary would have had to unrealistically assume, up until the day of diversion, that Slovakia might back out of its plan, thus limiting Hungary's responsive options."[34]

Judge Herczegh was critical of the Court's position, and held that not only the putting into operation by Czechoslovakia of the provisional solution, but also proceeding to this solution, constituted a serious breach of the 1977 Treaty.[35]

Without doubt, this was the most contentious issue for the Court. President Schwebel and Judges Bedjaoui, Fleischhauer, and Ranjeva (alongside Judge Herczegh) viewed the construction of the provisional solution as inseparable from its being put into operation. As explained by Judge Ranjeva, the distinction was artificial; how could the construction of Variant C be acknowledged as lawful when the very purpose, putting it into operation, was unlawful.[36]

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[29] *Gabčíkovo–Nagymaros* Judgment, 45–46. (paras. 57–59.)

[30] Ibid. 54. (para. 78.)

[31] Ibid. 53. (para 76.)

[32] By nine votes to six, President Schwebel, Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek dissenting.

[33] By ten votes to five, Judges Oda, Koroma, Vereshchetin, Parra-Aranguren, Judge ad hoc Skubiszewski dissenting.

[34] BOSTIAN op. cit. 401., 418.

[35] Dissenting Opinion of Judge Herczegh, 197.

[36] Dissenting Opinion of Judge Ranjeva, 170.

Nonetheless, some judges contended that Slovakia was entitled both to construct Variant C and to put it into operation. For example, Judge Koroma regarded it a genuine attempt to implement the 1977 Treaty so as to realize its aim and objective,[37] whereas Judge Vereshchetin considered Variant C to be a lawful countermeasure.[38] Judge *ad hoc* Skubiszewski expressed the view that the ICJ...

> "should have distinguished between, on the one hand, Czechoslovakia's right […] to execute and operate certain works on its territory and, on the other, its responsibility towards Hungary resulting from the diversion of most of the waters of the Danube into Czechoslovak territory."[39]

President Schwebel was unable to agree that the construction of Variant C was divisible from its being put into operation, and thus voted against the operative paragraph. He was also "not persuaded that Hungary's position as the Party initially in breach deprived it of a right to terminate the Treaty in response to Czechoslovakia's material breach, a breach which […] was in train when Hungary gave notice of termination."[40]

This point of timing was crucial. The Court concluded that Hungary's Declaration – issued prior to the diversion – did not have the legal effect of terminating the 1977 Treaty and related instruments;[41] noting that a different finding would have set a dangerous precedent for the integrity of the principle of *pacta sunt servanda*. Depending on their views regarding the lawfulness of the provisional solution, the Judges also disagreed with regard to the Court's decision on compensation, as well as the legal consequences of the judgment. However Judge Herczegh found that Slovakia's unlawful conduct, in proceeding to Variant C, justified (and made effective) Hungary's termination of the Treaty. Judge Herczegh consequently voted against the parts of the *dispositif* which referred expressly to the Treaty, but voted in favour of mutual compensation by Slovakia and by Hungary for the damage sustained by each.[42]

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[37] Separate Opinion Judge Koroma, 148.

[38] Dissenting Opinion of Judge Vereshchetin, 219–226.

[39] Dissenting Opinion of Judge *ad hoc* Skubiszewski, 232.

[40] Declaration of President Schwebel, 85.

[41] By 11 votes to four (President Schwebel, Judges Herczegh, Fleischhauer, Rezek dissenting).

[42] The Court found by 12 votes to three (Judges Oda, Koroma, Vereshchetin dissenting) that Hungary should compensate Slovakia for the damage Slovakia had sustained as a result of the suspension and abandonment of works at Dunakiliti and Nagymaros; and in turn Slovakia should compensate Hungary for the damage Hungary had sustained "on account of the putting into operation of the 'provisional solution' and its maintenance in service". See *I.C.J. Reports*, 83.

A number of separate and dissenting opinions dwelt upon the issue of the termination of the 1977 Treaty. Several judges (Schwebel, Herczegh and Fleischhauer) concluded that Hungary was justified in terminating the 1977 Treaty, because proceeding to the provisional solution constituted a serious breach of the 1977 Treaty. In the opinion of Judge Fleischhauer, Hungary, as the party initially in breach, was not deprived of a right to terminate the 1977 Treaty in response to Czechoslovakia's material breach, because international law does not condone retaliation that goes beyond the limits of proportionality.[43] On the other hand, Judge Rezek considered the 1977 Treaty no longer in existence, since it had been abrogated by the attitude of the two parties.[44] Rather the principle of good faith must lead to the fulfilment of reciprocal duties remaining from the 1977 Treaty.[45]

In terms of practical result, the Court engaged in a kind of "set-off": noting that the issue of compensation could satisfactorily be resolved if each of the parties were to renounce or cancel all financial claims and counter-claims against the other. However, this did not apply to the settlement of accounts for the construction of the works at Čunovo, which, according to the majority,[46] had to be resolved in accordance with the 1977 Treaty and related instruments: If Hungary "was to share in the operation and benefits of the complex constructed in Slovakian territory, it had to pay a proportionate share of the building and running costs".[47] In effect, issues of responsibility were set to one side, but to sustain its rights as co-riparian – to regain the river and its entitlement to a share of the hydropower generated from it– Hungary had to pay its share of the cost of what was now (with a reduced upstream reservoir and no downstream reservoir allowing for full-scale peak power) essentially a run-of-river scheme.

Application of the doctrine of necessity

Although the doctrine of "state of necessity"[48] had been recognised by earlier international courts and tribunals,[49] it was not until *Gabčíkovo–Nagymaros* that

[43] Dissenting Opinion of Judge Fleischhauer, 213.

[44] Declaration of Judge Rezek, 86.

[45] Ibid. 87.

[46] By 13 votes to two (Judges Herczegh and Fleischhauer dissenting)

[47] NICO J SCHRIJVER – VID PRISLAN: Gabčíkovo–Nagymaros Case (Hungary/Slovakia). *Max Planck Encyclopedia of International Law*, April 2008 available at: http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e135&recno=1&searchType=Quick&query=Gab%C4%8D%C3%ADkovo-Nagymaros..

[48] In later works referred to as simply, "necessity". See S HEATHCOTE: 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity. In J. CRAWFORD – A. PELLET – S. OLLESON (eds.): *The Law of International Responsibility.* Oxford: OUP, 2010.

[49] The Neptune (1797) 4 Int. Adj. M.S., 372., see BIN CHENG: *General Principles of Law.*

its customary law status was confirmed. However, the decision also reinforced the doctrine's "exceptional character",[50] setting the groundwork for future decisions which, like *Gabčíkovo-Nagymaros*, have recognised the existence of the doctrine but have more or less consistently found that it did not apply to the facts at hand.[51]

As the lone voice of dissent on this key issue, Judge Herczegh's opinion presents the case for the existence of a state of necessity on the part of Hungary with regard to the construction of the Nagymaros dam. While agreeing with the Court's position in regards to the requisite conditions for a state of necessity to exist, he diverged on the question of application of the doctrine, noting:

> "This Judgment of the Court […] stresses the importance of respecting the environment, but then does not take due account of the application of that principle to the construction and operation of the G/N Project."[52]

He agreed that the state of necessity is a very narrow concept in general international law:

> "Invoking a state of necessity is not a way to terminate treaty obligations lawfully, that is, to terminate an international treaty. However, the party in question will be released from the consequences of the violation of international law, since it acted in a state of necessity […] The question is therefore whether the criteria for a state of necessity are fulfilled in relation to the construction of the Nagymaros dam?" [53]

As confirmed by the majority, the "basic conditions" for the existence of a state of necessity are set out in what was then ILC Draft Article 33 and form part of customary international law: an "essential interest" of the State must have been threatened by a "grave and imminent peril"; the act undertaken in contravention of the State's international law obligations must have been the

Cambridge: Grotius Publications, 1987, 70.; *Russian Indemnity (Russia/Turkey)* 11 November 1912, 12 RIAA 44; see also discussion by the ILC of the Torrey Canyon incident: R Ago, Addendum to the Eighth Report on State Responsibility, U.N. Doc. A/CN.4/318/ADD.5–7, para 35 (describing the incident); see also Report of the International Law Commission on the Work of its Thirty-Second Session, U.N. Doc. A/35/10 (1980), Doc.A/CN.4/SER.A/1980/Add.1 (Part 2), para 15.

[50] Heathcote op. cit. 499.

[51] See for example *MV Saiga (No. 2)* (Saint Vincent and the Grenadines v Guinea), International Tribunal for the Law of the Sea (1999) 38 ILM 1323; Legal Consequences for the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion. *I.C.J. Reports 2004*, 136.

[52] Dissenting Opinion of Judge Herczegh, 176.

[53] Ibid. 183.

"only means" of safeguarding that interest; the act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State must not have "contributed to the occurrence of the state of necessity".

Judge Herczegh entirely concurs with the Court's finding that a state of necessity can only be accepted on an exceptional basis and only invoked under strictly defined, cumulatively satisfied, conditions, but significantly, he "cannot accept the conclusions drawn in this case by the Court" as to its application.[54]

It is at this point which the divergent approaches of Judge Herczegh and the majority become most apparent. While the Court acknowledges that "concerns […] for its natural environment can constitute an essential interest of the State",[55] Judge Herczegh takes a less abstract approach:

> "It should be noted in this context that more than 500 bank-filtered wells which satisfy about two-thirds of Budapest's drinking water requirements are situated on the island of Szentendre, downstream of Nagymaros. The water from those wells is fit for consumption without any purification procedure being necessary. *The provision of drinking water for the Hungarian capital* – which has two million inhabitants (that is, one-fifth of the country's population), *qualitatively and quantitatively, certainly constitutes an essential interest* for Hungary."[56]

Unlike Judge Herczegh, the Court went on to conclude that the peril of environmental damage was not imminent; [57] that in any event, Hungary had contributed to the occurrence of the state of necessity arising[58] and that there were other means available to Hungary to avert the risk of environmental damage.[59] The Court stated:

> "[…] Hungary on several occasions expressed, in 1989, its 'uncertainties' as to the ecological impact of putting in place the Gabčíkovo–Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

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[54] Ibid. 188.

[55] *Gabčíkovo–Nagymaros* Judgment, 41. (para. 53.)

[56] Dissenting Opinion of Judge Herczegh, 183. (emphasis in original).

[57] *Gabčíkovo–Nagymaros* Judgment, 43–44. (paras. 55–56.)

[58] Ibid. 45–46. (para 57.)

[59] Ibid. 44–45. (para 56.)

> The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a 'peril' in the sense of a component element of a state of necessity. The word 'peril' certainly evokes the idea of 'risk': that is precisely what distinguishes 'peril' from material damage. But a state of necessity could not exist without a 'peril' duly established at the relevant point in time: the mere apprehension of a possible 'peril' could not suffice in that respect. It could moreover hardly be otherwise, when the 'peril' constituting the state of necessity has at the same time to be 'grave' and 'imminent'. 'Imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'."[60]

Judge Herczegh was critical of the Court's conclusions, stating that:

> "Unfortunately, the Court has not drawn the obvious conclusion from that definition [of necessity] as far as the construction of the Nagymaros dam is concerned. There could be no doubt that the erosion of the bed of the Danube downstream of Nagymaros would be the certain and inevitable consequence of the dam. These were not 'uncertainties', as could be claimed in relation to other ecological consequences of the G/N Project, but certainties as to the foreseeable effects of the construction of the dam."[61]

Sarah Heathcote suggests that the majority judgment uses the word peril to "evoke the notion of risk as opposed to damage which has already materialized"[62] and the principle of necessity "thus serves as a preventative mechanism, to manage crises which if not averted, will lead to grave harm."[63] Indeed the Court's own formulation of the doctrine of necessity touches upon aspects of the precautionary principle without either approving or applying it. Perhaps unusually, the Parties had been in agreement as to the content of the precautionary principle as a question of general international law.[64] It is all the

[60] *Gabčíkovo–Nagymaros* Judgment, 42. (para 54.)

[61] Dissenting Opinion of Judge Herczegh, 184.`

[62] Heathcote op. cit. 497.

[63] Ibid.

[64] Where they disagreed was on the question of whether the principle was binding on the Parties or whether even as a non-binding, guiding precept, the Parties had acted in accordance with the principle in any event. See Counter-Memorial submitted by the Slovak Republic, 5 December 1994, paras. 9.80–9.94; Memorial submitted by the Republic of Hungary, 2 May 1994, paras. 6.57–6.65.7.05,7.76; Counter-Memorial submitted by the Republic of Hungary, 5 December

more surprising that the Court chose to sidestep the application of the principle.

Boyle suggests that the Court's conclusions were to be expected…

> "It requires no imagination to see that ecological impacts could constitute an essential interest for the purposes of justifying a plea of necessity under Article 33 of the draft ILC articles on state responsibility. It is equally unsurprising that the plea failed on the facts of this case because the peril was not 'grave and imminent' in the manner of a sinking oil tanker or an exploding nuclear reactor."[65]

The difficulty with such an approach is that it precludes any application of the precautionary principle, because the latter relates to risks that are by definition no more than possibilities and are as yet unproven. As Judge Herczegh said:

> "The imminence of the peril in question depended on the construction of the Nagymaros clam: without the dam, there would be no grave peril, either imminent or long-term; once the dam had been constructed, it would no longer have been appropriate to speak of a peril, but rather of grave and permanent damage occurring for so long as the dam existed – a dam built by the very State whose population and territory would have been its victims. To claim that the suspension of works on the Nagymaros dam was not justified by a state of necessity, since the peril was not imminent, means in reality that Hungary should have completed the dam and waited for the bank-filtered wells on the island of Szentendre to dry out because of the erosion of the river bed and for the supply of drinking water to the Hungarian capital to be called critically into question. The Court, in deciding the case, ought to have taken account of the damage that would have occurred if the Party in question had not taken the necessary preventive measures. States are under an obligation of prevention and not merely of reparation."[66]

The majority's refusal to apply the precautionary principle is also evident in its controversial distinction between preparatory conduct (construction of the Cunovo dam, in and of itself not unlawful) and the commission of a wrongful act (putting the dam into operation). As Canelas de Castro points out, the purpose of the precautionary principle is to avoid the commencement of an activity which seriously risks causing harm when it is completed, even

1994, para. 4.24; and Reply of the Republic of Hungary, 20 June 1995, paras. 1.51–1.58

[65] A. E. BOYLE: The Gabcikovo–Nagymaros Case: New Law in Old Bottles. *Yearbook of International Environmental Law* 8 (1997) 13., 17.

[66] Ibid. 185.

where there is no scientific certainty that harm will occur.[67] In any event, Judge Herczegh concluded that the peril facing Hungary in respect of the Nagymaros dam was certain and inevitable:

> "[The Court] has concluded that, with respect to both Nagymaros and Gabčíkovo,
>
> > 'the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and […] Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted' (para. 57.).
>
> This is absolutely not the case. As far as Hungary was concerned, what was at stake was the safeguarding of an essential interest against a peril which was grave and imminent, that is to say certain and inevitable, and any measures taken to counteract that peril would have radically transformed the scope of the obligations to be performed under the Treaty. By suspending and abandoning the works at Nagymaros, Hungary has not impaired an essential interest of Czechoslovakia, and it is precisely by constructing the dam at Nagymaros that it would have contributed to an unequalled state of necessity and to a situation catastrophic for its capital. The existence of the peril alleged by Hungary was recognized – at least in part – by the other Party, and Hungary therefore did not act in an arbitrary manner."[68]

In his assessment of the doctrine of necessity, Judge Herczegh appears to have directly applied the precautionary principle, although he does not explicitly acknowledge this. The Court agreed with him on the definition and preconditions for necessity, and agreed that environmental interests can and do constitute an essential interest worthy of protection. However, as he observed:

> "The Court, in the 'prescriptive' part of its Judgment, states: 'Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms

[67] Paulo Canelas de Castro: The Judgement in the Case Concerning the Gabcikovo–Nagymaros Project: Positive Signs for the Evolution of International Water Law. *Yearbook of International Environmental Law* 8 (1997) 21., 29.

[68] Dissenting Opinion of Judge Herczegh, 188.

> and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.' (Para. 140.)
> It is regrettable that the Court did not follow this principle even in the reasoning which led to its reply to the first question put to it in the Special Agreement."[69]

Sustainable Development in the Separate Opinion of Vice-President Weeramantry

The Court ultimately found that Hungary could have responded to the ecological dangers within the framework of the Treaty and the original Project.[70] Judge Herczegh was critical of the Court for failing to apply the principles of environmental protection to the case at hand. But the divergence between the theoretical and the practical is no more acutely visible than in the Separate Opinion of Vice-President Weeramantry.

Judge Weeramantry was one of only four members of the Court who voted in favour of every part of the Court's *dispositif*, including in respect of the first question; yet his separate opinion has long been cited as the vanguard of environmental law and the principle of sustainable development. The Court was not as clear in its support for sustainable development as a principle of law – referring rather obliquely to a "concept" of sustainable development and the "need to reconcile economic development with protection of the environment".[71] Yet Canelas de Castro speculates that "Judge Weeramantry, who is after all part of the majority, echoed, perhaps even unveiled, the Court's thinking when he spoke of sustainable development as a principle with normative value".[72]

Judge Weeramantry undertakes a lengthy exposition of the "wisdom of the past" for the "enrichment of the developing principles of environmental law".[73] In undertaking his historical survey, he appeals to the approach of Grotius, noting that "[r]ather than laying down a set of principles *a priori* for the new discipline of international law, he sought them also *a posteriori* from the experience of the past, searching through the whole range of cultures available to him for

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[69] Dissenting Opinion of Judge Herczegh, 179.

[70] *Gabčíkovo–Nagymaros* Judgment, 43–44. (paras. 55–56.)

[71] Ibid.

[72] DE CASTRO op. cit. 21., 28.

[73] Separate Opinion of Vice-President Weeramantry, 96–97.

this purpose."[74] Over six pages, he details the irrigation systems utilised in Sri Lanka between the 1st and 4th centuries B.C. He makes the surprising claim that "[u]nder this irrigation system, major rivers were dammed and reservoirs created, on a scale and in a manner reminiscent of the damming which this Court saw on its inspection of the dams in this case."[75] He claims that the complex irrigation system established in Sri Lanka "show[s] that the concept of sustainable development was consciously practised over two millennia ago with much success."[76]

Yet while Judge Weeramantry argues that the concept of sustainable development is "more than a mere concept, but […] a principle with normative value",[77] and "an integral part of modern international law",[78] he concludes that Czechoslovakia was entitled to proceed to construct Variant C. He states at the outset of his Separate Opinion that: "[h]ad the possibility of environmental harm been the only consideration to be taken into account […] the contentions of Hungary could well have proved conclusive."[79] However, he prefers to apply the principle of sustainable development with the balance tipped firmly in favour of development. He suggests that the principle of sustainable development is a principle of customary international law, sufficiently well-supported by relevant *opinio juris*.[80] e relies on Principle 3 of the Rio Declaration, which affirms the "human right" to development. But he does not cite Principle 15, which supports the precautionary approach. Instead he suggests, in effect, that it is rarely if ever acceptable to postpone development on the basis of environmental concerns:

> "How does one handle these considerations? Does one abandon the Project altogether for fear that the latter consequences might emerge? Does one proceed with the scheme because of the national benefits it brings, regardless of the suggested environmental damage? Or does one steer a course between, with due regard to both considerations, but ensuring always a continuing vigilance in respect of environmental harm?"[81]
>
> But this is a false dichotomy. The precautionary principle acts to resolve a situation of uncertainty; it is not an alternative to

[74] Ibid. 96.

[75] Ibid. 100.

[76] Ibid.

[77] Ibid. 88.

[78] Ibid. 89.

[79] Ibid. 88.

[80] Ibid. 95.

[81] Ibid. 89

> sustainable development but should form part of the assessment of whether a particular development project is sustainable. Sustainable development, according to Judge Weeramantry, is an open balancing act weighing two equal and opposite functions: "It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment."[82] He goes on to state:
>
> "To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result.
> Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development."[83]
>
> "The people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. They are likewise entitled to the preservation of their human right to the protection of their environment."[84]

Judge Herczegh engages in precisely such a balancing act in relation to the works at Dunakiliti. Whereas the majority had conflated the construction of the Dunakiliti works into its assessment of the Nagymaros works, Judge Herczegh separates the Project into its constituent parts. In relation to Dunakiliti, the situation is perceived as less certain, and weighing up the competing interests of the Parties, he acknowledges that the suspension of the works at Dunakiliti impaired the interests of Czechoslovakia "inasmuch as they related to the commissioning of the almost completed Gabčíkovo power plant". But he ultimately concludes that the environment must be protected over economic interests:

> "[…] However, the interests of Czechoslovakia were of a financial nature, theoretically easy to compensate, whereas those of Hungary related to the safeguarding of its ecological balance and the difficult

[82] Ibid. 92.

[83] Ibid. 90.

[84] Ibid.

> and uncertain struggle against damage to its environment. *In dubio pro natura*."[85]

Judge Herczegh undertakes a balancing exercise in assessing sustainable development, yet because he is informed by the precautionary principle – *in dubio pro natura* – his conclusion favours protection of the environment. Judge Weeramantry, on the other hand, omits to apply the principle of sustainable development to the facts of the case. He undertakes his analysis of the Project under an apparent presumption that all development is positive. He is content to find solace in the terms of Articles 15 and 19 of the 1977 Treaty, noting that "[b]oth Parties to the Treaty recognized the need for the developmental process to be in harmony with the environment and introduced a dynamic element into the Treaty which enabled the Joint Project to be kept in harmony with developing principles of international law."[86] Judge Herczegh took a less nostalgic view:

> "The mode of operation involved and involves risks which were not altogether unknown to those responsible for drawing up the plans for the G/N Project, but its designers reasoned within the confines of what was known in the 1960s and 1970s – and that way of thinking is today considered outmoded, and rightly so. They accordingly minimized the risks, whilst at the same time having an imperfect understanding of the damage they could cause, and therefore of the possible solutions."[87]

In this context "the key question is not whether the Treaty contained certain provisions protecting the environment, but whether those provisions had been effectively implemented during the construction of the G/N Project."[88]

By contrast, although Judge Weeramantry argues that "[t]here is a duty lying upon all members of the community to preserve the integrity and purity of the environment",[89] he does not apply that duty to Slovakia (or, for that matter, Hungary) or undertake the balancing exercise which his Separate Opinion advocates. As Adriana Koe asks: "[w]hich aspects (if any) of environmental concern have to be sacrificed in favour of development of the Danube to facilitate power generation? Is there a hierarchy of concerns to be applied? At what point does construction in the name of development become non-acceptable to environmental law? Can the flooding of an alluvial plain or the diversion of

[85] Dissenting Opinion of Judge Herczegh, 187.

[86] Separate Opinion of Vice-President Weeramantry, 93.

[87] Dissenting Opinion of Judge Herczegh, 177.

[88] Ibid. 178.

[89] Separate Opinion of Vice-President Weeramantry, 110.

a river be defended by the criterion of development?"[90] Judge Herczegh was willing to answer such questions.

Conclusion

According to Canelas de Castro:

> "By way of general evaluation, it can be said that the Court found a way to avoid the two perils always attending the exercise of its function, the one of 'petrifying' the law and thus of obstructing necessary progress and the one of judicial activism – giving in to the temptation of making the law what it should be."[91]

The question remains as to how useful such an approach truly is. Klabbers has suggested that the Court was sending an "encrypted message that read something like 'whatever you think we are saying, we will not forget the environment'".[92] But why not send a clear message, rather than an encrypted one, if that was indeed the Court's intention? The Court's strong environmentally-friendly language appears at odds with its conclusions – particularly in the case of Vice-President Weeramantry – and as a result the decision sets "daunting standards for any nation that wishes to abrogate an international agreement because of environmental dangers".[93]

Judge Herczegh was able to steer a course through this difficult terrain, not by reliance on different principles of law, but through the application of the precautionary principle as a means of balancing competing interests. As he noted, the Court's judgment lacked precision, as the Court had "not taken care to distinguish between the 'wrongs'"; had conflated the Project works; and had not distinguished between the Treaty itself and the contractual arrangements for its implementation,[94] and in doing so had failed to "assess how serious the unlawful conduct attributed to both Parties was in order to make the necessary

[90] ADRIANA KOE: Damming the Danube: The International Court of Justice and the Gabčíkovo–Nagymaros Project (Hungary v Slovakia). *Sydney Law Review* 20 (4) (1998) 612., 623.

[91] DE CASTRO op. cit. 30.

[92] JAN KLABBERS: The Substance of Form: The Case Concerning the Gabčíkovo–Nagymaros Project, Environmental Law and the Law of Treaties. *Yearbook of International Environmental Law* 8 (1997) 32., 34.

[93] BOSTIAN op. cit. 421.

[94] Dissenting Opinion of Judge Herczegh, 180.

inferences."[95] Of the Court's general failure to grapple with the facts of the case, Judge Herczegh stated:

> "As a judicial organ, the Court was admittedly not empowered to decide scientific questions touching on biology, hydrology, and so on, or questions of a technical type which arose out of the G/N Project; but it could – and even should – have ruled on the legal consequences of certain facts alleged by one Party and either admitted or not addressed by the other, in order to assess their respective conduct in this case."[96]

Judge Herczegh went on to demonstrate the incongruity of reasoning inherent in the Court's approach:

> "The Court, whilst refusing to accept that Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the G/N Project relating to Nagymaros, recognizes – albeit indirectly – that Hungary's position is well founded, when it manages to assert, in the 'prescriptive' part of its Judgment, that the Nagymaros dam should not be built: 'with the effective discarding by both Parties of peak power operation, there is no longer any point in building it' (para. 134); 'the construction of the Nagymaros dam would have become pointless' (para. 138). Moreover, it must be acknowledged that the ecological considerations that now weigh against the dam are the same as those holding in 1989. If it has finally been concluded that the dam should not have been built in 1997, this is because in reality it should not have been built in 1989, either."[97]

In the end, Judge Herczegh's dissenting opinion did not suggest that principles of environmental protection should prevail over treaty law, but rather it provides a worthwhile demonstration of the practical implementation of the precautionary principle. In dissent he was willing to apply emerging principles of law and not merely endorse them in the abstract.

[95] Ibid. 194.

[96] Ibid. 177.

[97] Ibid. 189.

IMPLEMENTATION OF THE 25TH SEPTEMBER, 1997 JUDGEMENT OF THE INTERNATIONAL COURT OF JUSTICE – COMPARING THEORETICAL PERSPECTIVES AND PRACTICE

MARCEL SZABÓ[1]

The International Court of Justice has delivered its judgement in the Gabcikovo-Nagymaros Barriage System Case on the 25th of September, 1997. This debate between Hungary and Slovakia are rooted in a 1977 treaty between Hungary and Czechoslovakia about the construction and joint operation of a barrage system to be established on the section of the River Danube, the two countries share. According to the 1977 plans, the system included two barrages one actually built and by the Slovak party and another one planned at Nagymaros. The later has never been finished due to the termination of the peak power mode and Hungarian environmental concerns.

The Nagymaros construction work, set out by the 1977 treaty, has been suspended by the Hungarian party in May, 1989, which suspension have also been applied to the Hungarian work on Czechoslovakian territory at the end of June, same year. The Hungarian party was unable to convince Czechoslovakia to suspend its work until finishing thorough environmental examinations. Czechoslovakia – experiencing that Hungary would most probably deny its further participation in the finalisation of the project – decided to unilaterally complete the barrage system, while considerably diverging from the original plans described alongside the treaty constituting the earlier agreement of the parties.

Variant C was the result of such divergence. This basically means the implementation of barrage system in Slovak soil, which made possible diverting the Danube – without due authorisation thereto from Hungary – and also the unilateral operation of the power plant. Due to fears of a unilateral Czechoslovakian diversion of the river, Hungary terminated the 1977 treaty in 1992, in order to avoid a unilateral Checzoslovak installation of the project. In

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spite of the Hungarian termination, Czechoslovakia has diverted the Danube on 23rd October, 1992, and put into operation the Gabcikovo barrage.

After mediation from the European Union the parties have agreed to submit their debate to the ICJ, and request the Court to adjudge on the one hand if the 1977 treaty remained in force after its Hungarian termination, and also if Slovakia was entitled to put into operation by the diversion of the Danube the project elements connected to the Gabcikovo facility, yet designed and established unilaterally.

This paper examines, how the international legal literature has reacted to the 25 September, 1997 Judgement, and that according to legal scholars, what necessary steps should have been taken to solve the dispute by the implementation of the judgement. The most important provisions of the judgement can be summarised as follows: "Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon"[2] The judgement thus concluded, that the 1977 treaty remained in force, and it ruled the relation of the parties. Nonetheless, the 1977 treaty called upon the parties to "ensure the achievement of the objectives" of the treaty. The judgement also clarified what are those still valid objectives of the treaty: energy production, navigation, ice-discharge and protection of the natural environment.[3] An equally important provision of the treaty reads as "the obligations of performance which related to the construction of the System of Locks – in so far as they were not yet implemented before 1992 – have been overtaken by events"[4] The ICJ declared even more clearly: "not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it".[5] The position of the court is thus clear. There is no need to finish any of the facilities that formed part of the original treaty, yet finally have not been constructed.

The Court also found it important that the parties should implement the facilities constructed by exclusively the Slovak party into the treaty framework, in order to complete and put into operation the system of locks. In other words, the factual situation developed since 1989 has to be made part of the treaty, in order to ensure the achievement of the objectives thereof, inasmuch as possible.[6] The Court thus basically wished to see the material situation, operated jointly

[2] Judgement, para.155 (2) B.

[3] Judgement, para. 135.

[4] Judgement para. 136.

[5] Judgement para. 134.

[6] Judgement para. 136.

by the parties, on a correct treaty base. One important modification was however mentioned compared to the *status quo:* the parties should reconsider the environmental impacts of the Gabcikovo power plant. Particularly so, they have to find an appropriate solution to the quantity of water discharged into the Old Danube bed and its side branches.[7]

Although the parties have jointly breached each other's rights, and therefore they owe each other moral and pecuniary damages, the ICJ recommended that the parties should mutually renounce or cancel such claims,[8] but they should settlement of accounts for the construction and operation of the works must be effected.[9]

1. Position of international legal literature on the situation to be developed after the Judgement

Many commentators of the 25 September, 1997 Judgement of the ICJ have stressed that provision, which provides for the implementation of the factual situation developed since 1989 into the framework of the preserved yet evolving treaty relations in order to achieve its objectives as much as possible. On this ground it seems notable what facts and legal aspects have been proposed by scholars to the attention of Hungary and Slovakia implementing the judgement. Jochen Sohnle underlined: "as the procedure itself evidences, the arguments of the Court are not based on separation of facts and law, rather on the dialectic motion of those."[10] Strong connection between the factual and legal findings of the Court have been marked also by A. E. Boyle in the observation regarding the parties are under obligations to the act according to the objectives and tasks of the 1977 treaty, but they cannot disregard the existing situation.[11]

[7] Judgement para. 140.

[8] Judgement para. 153.

[9] Judgement para. 155.

[10] Jochen Sohnle: Irruption du Droit de l'Environment dans la Jurisprudence de la CIJ. *Revue Generale de Droit International Public* 102/1998, 1.

[11] A. E. Boyle: The G\N case: New Law in Old Bottles, Symposium: The Case Concerning the GIN Project. *Yearbook of International Environmental Law* 8 (1997) 14.

2. Modified factual situation

Commentators have drawn the attention of the negotiating parties to the following facts:

a) Nagymaros has not been built, and the Court does not see any ratio in its future construction
b) Slovakia had already put into operation the facilities constructed unilaterally, and this project have been being in operation for five years at the time of the judgement.
c) Diversion of the Danube have a continous impact on the ecology of wetland habitats around Szigetköz
d) Water quantity discharged to the Old Danube bed and its side branches is not sufficient.

Ad. a.

According to Adriana Koe: "By the time the dispute was brought before the International Court of Justice, the Gabcikovo Power Plant had been operational for nearly five years, fed by a reservoir at Cunovo (not Dunakiliti) and operated at run of the river mode, not in the peak hour mode originally envisaged. The works at Nagymaros had not been built, and there was no longer any necessity for their construction. "[12] Similar position was taken by Jochen Sohnle: "Hungary is freed from the obligation to build the Nagymaros dam, and that ceases to be a threat to the drinking water reserves to Budapest"[13] Finally, Ida L. Bostian notes: „Hungary is not required to build any dams, much less a dam at Nagymaros or Pilismarot that would enable Gabcikovo to run at peak mode. Building a new dam seems economically foolish as well, as it would cost Hungary an estimated $5 billion dollars (half of its annual budget) but only provide 80 megawatts of electricity at a time when Hungary is exporting energy. In addition, Hungary would likely see many of the same detrimental effects that were associated with the original Project."[14]

Ad. b.

Another cornerstone of the new system to be developed lies in the fact, that the system unilaterally established by Slovakia has been being in operation for five years at the time of the judgement. From the fact of the illegal operation, international lawyers commenting the judgement have generally come to the

[12] ADRIANA KOE: Damming the Danube: The International Court of Justice at the G/N Project. *Sidney Law Review* 20 (1998/4), 621.

[13] SOHNLE op. cit. 1.

[14] IDA L. BOSTIAN: Flashing the Danube: The world Court's Decision Concerning the G/M Dam. *Colorado Journal of International Environmental Law and Policy* 9 (1998) 2, 423.

conclusion that as one of the priorities of the negotiations of the parties should decide if "Variant C could be made to operate in a manner that conforms to the 1977 Treaty, transforming it from a de facto status to part of the treaty-based water management regime."[15] Daniel Reichert-Facilidies has also proposed that Hungary should agree to jointly operate Variant C, obviously after due assessment of the environmental impacts of the project.[16]

Ad. c.

The Court has acknowledged the key role of the environmental impacts of the barrage system, and also the the diversion of the Danube has a continous impact on the ecology of wetland areas of Szigetköz. According to Stephen Stec and Gabriel E. Eckstein the Court acknowledged the serious impacts of the diversion, yet they also note that the Court could have possibly done more for the evaluation of the extent of these impacts.[17]

Ad. d.

The judgement marks, that the parties must find a suitable solution for the quantities of water to be discharged into the Old Danube bed and its side branches, in both countries.[18] The ICJ has clearly initiated the modification of the standing situation during the implementation negotiations of the parties. Adriana Koe notes in this regard: "the Court directed the parties to derive a satisfactory solution in regards to the volume of water to be released into the old river bed and side arms, observing that: »in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment [mindful] of the limitations inherent in the very mechanism of reparation of this type of damage«"[19] As Peter H. Becker has pointed out, consideration of the recent environmental situation must be accompanied by a satisfactory solution to the quantities of water to be discharged in the Old Danube bed and its side branches. The parties therefore must negotiate bearing in mind the modified factual situation and obviously they have to equally take care of the modified legal framework. Most important elements of these legal changes have also been identified by legal scholars.

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[15] Koe op. cit. 622.

[16] Daniel Reichert-Facilidies: Down the Danube: The Vienna Convention ont the Law of Treaties and the Case Concerning the G–N project. *International Comparative Law Quarterly* Vol. 47, 1998 október, 840.

[17] Stephen Stec – Gabriel E. Eckstein: Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning Gabčíkovo–Nagymaros Project. *Yearbook of International Environmental Law* 8 (1997) 45.

[18] Judgement para. 140.

[19] Koe op. cit. 621.

3. Modified legal framework

Parties should take into account during their negotiations conducted in good faith the legal situation, that has changed according to the following:

a) the 1977 treaty is in force, and it rules the relation of the parties
b) the 1977 treaty must be interpreted extensively
c) the parties are obliged to set up an agreement, that take into consideration the international norms of environmental protection and the basic principles of the law of international watercourses

Ad. a.

It is generally true, that commentators of the judgement delivered by the ICJ in the Danube case agree in that the relation between the parties is subject to the rules of the 1977 treaty. As Charles B. Bourne observed: "The ICJ had reached the conclusion that the 1977 Treaty was still in existence, that the parties were obliged to enter into negotiations with a view to implementing it…"[20]A similar position has been taken by Ida L. Bostian. It could be noteworthy to mention the observation made by Jan Klabbers, who mentioned the Court's pragmatism as the reason for its recognition of the existence of the 1977 treaty. "One of the intriguing parts of the case resides in the fact that the Court was willing to find that the 1977 Treaty continued to be in force, all environmental arguments notwithstanding. […] The Court must have thought that maintaining it would be the best thing to do in order to help settle the dispute."

Ad. b.

Jochen Sohnle describes in his essay the differences of the interpretaion delivered by the parties: a more literal, rather historical Slovak interpretation compared to the more pragmatic Hungarian position. He considered that traditional international law grounds interpretation in the original will of the parties, while contemporary development – emerged from the litigation surrounding international human rights treaties – is focusing on the possibility of the evolution of certain treaty documents.[21] As Johann G. Lammers noted, the considering the co-operative context of the 1977 treaty, it is in itself a motivation for the identification of a mutually acceptable solution.[22]

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[20] CHARLES B. BOURNE: The Case Concerning the G/N Project: An Important Milestone in International Water Law, Symposium: The Case Concerning the G/N Project. *Yearbook of International Environmental Law* vol. 8. 1997, 9.

[21] SOHNLE op. cit. 1.

[22] JOHANN G. LAMMERS: Te G/N Case Seen in Particular from te Perspective of te Law of International Watercourses and te Protection of te Environment. *Leiden Journal of International Law* 11 (1998) 2, 314.

Paulo Canelas de Castro states, that the Court is clearly applying a teleological method regarding the 1977 treaty, which makes going beyond verbatim interpretation possible.[23] The above are excellently summarised by Stephen Stec and Gabriel E. Eckstein: "Nevertheless, the judgement did open the door to an interpretation of Treaty implementation that could radically alter the original scheme."[24] The attention of the commentators has slipped over section 141 of the judgement, which reads: „It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses."

The official Hungarian Position Paper on the Judgement emphasises, that there are three pillars for the agreement of the parties set out by the judgement, only one of them being the 1977 treaty, the other two are the law of international watercourses and the rules of international environmental law. The ICJ really observed, that "newly developed norms of environmental law are relevant for the implementation of the Treaty"[25], and used the basic terminology of the law of international watercourses – e.g. regarding the equitable and reasonable distribution of the resources[26] – to support its solution delivered to the parties.

Commentators have also pointed out, the Court mentioned norms of international environmental law too, what is more, the application thereof has been expressively emphasised. The Court considered their application appropriate in the negotiations of the parties. It is also apparent, that commentators have not always found relevant provisions of the judgement satisfactory, and several criticisms have been worded regarding sufficient confrontation with the rules of environmental law, particularly regarding the application of the precautionary principle in the judgement.

Accordingly, Owen McIntyre noted: "It is perhaps unfortunate that the Court did not avail of the opportunity to deliberate at length on the status, normative content and potential application of the environmental requirements invoked by Hungary, i. e. not to cause substantive damage to the territory of another state and the precautionary principle, despite the fact that neither party contended that these had evolved into norms of ius cogens capable of overriding the Treaty."[27] A. E. Boyle also highlights the norms of international environmental

[23] Paulo Canelas de Castro: The Judgement in the Case Concerning the G/N Project: Positive signs for the Evolution of International Water Law, Symposium: The Case Concerning the G/N Project. *Yearbook of International Environmental Law* vol. 8. 1997, 26.

[24] Stec–Eckstein op. cit. 42.

[25] Judgement para. 112.

[26] Judgement para. 78.

[27] Owen McIntyre: Case Law Analisys: Environmental Protection of International Rivers Case Concerning the G/N Project. *Journal of Environmental Law*, Vol. 10 No. 1, 88.

law and of international watercourses as applicable alongside the 1977 treaty. In his position the Court warned the parties to consider newly developed norms of environmental law, since it is really the 1977 treaty, which regulates the future rights and obligations of the parties, but not in any case as an isolated norm, but as one "in dynamic conjunction with other rules and principles of international law", regarding particularly international watercourses, sustainable development and protection of the environment, generally.[28]

4. About the system to be established

Commentators generally agreed in the existence of a system, which however requires modifications.[29] Parties agreed, that the achievement of the objectives of the 1977 treaty, is only possible to a reasonable extent, according to the judgement.[30] According to the position of René Lefber,[31] negotiations about the new system shall be conducted bearing in mind the modified conditions, while Daniel Reichert Facilidies remarks,[32] that re-negotiations should and must be done by application of the environmental impacts of the project.

A common noteworthy point in the commentators' views is the question if the Court laid an obligation to accept an actual solution proposal on the parties. In this regard Jan Klabbers observed, that settlement of the dispute cannot be excepted from law, so the Court cannot take the necessary powers for the solution from the parties. The only possibility law has in such matters is to show the options the parties may choose from in the course of solution of their debate. The Court followed this logic in its judgement, and finally delivered a judgement which enables the parties to decide the means of implementation themselves.[33] Contrary to this, Phoebe N. Okowa states, that the Court has not ordered a clearly defined obligation to be performed by Hungary and Slovakia, because it lacked authorisation thereto under the Special Agreement.

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[28] BOYLE op. cit. 14.

[29] JAN KLABBERS: The Substance of Form: The Case Concerning the G/N Project, Environmental Law and the Law of Treaties, Symposium: The Case Concerning the G/N Project. *Yearbook of International Environmental Law* vol. 8. 1997, 40.; STEC–ECKSTEIN op. cit. 48.; LAMMERS op. cit. 313.; Peter H. Bekker op. cit. 276.; MALGOSIA FITZMAURICE: The G/N Case: The Law of Treaties. *Leiden Journal of International Law* 11 (1998) 2, 342.

[30] LAMMERS op. cit. 313.; BEKKER op. cit. 276.

[31] RENÉ LEFBER: The G-N project and the Law of Tate Responsibility. *Leiden Journal of International Law* 11 (1998) 3, 621.

[32] DANIEL REICHERT FACILIDIES: Down the Danube: The Vienna Convention on the Law of Treaties and the Case Concerning the G-N project. *International Comparative Law Quarterly* Vol. 47. 1998 október, 840.

[33] KLABBERS op. cit. 40.

Malgosia Fitzmaurice presented a very original approach. According to this opinion, the Court faced a situation, where the circumstances have changed considerably, yet not in an extent required for the application of the respective rules on termination of treaties, as defined by the Vienna Convention. The treaty has not terminated, yet its adoption to the changed circumstances is necessary. In this regard Fitzmaurice also adds, that in a continental legal system judges may amend the provisions of a contract, if they become disproportionately harmful to any of the parties. Common law does not offer such an option, judges may only propose to the parties to amend their own contract.

As Fitzmaurice observed, the ICJ had taken the later approach in its 25th September judgement. The Court expressed its wish that the parties should amend the provisions of their treaty, according to the directions it had prescribed. It is apparent, that such directions are opposable to the parties under common law, yet it is questionable, if the message reached the parties by means of international law.

5. About the implementation of the September 25th Judgement of the ICJ

It has been already more than fourteen years of negotiations between Hungary and Slovakia. Initially it seemed, that Hungary is ready to give up its positions defended in front of the ICJ, and it might consent to the construction of a new power plant in the Danube bench, meanwhile also waiving its claims about the quantity of water to be discharged in the original riverbed.

Negotiations seemed to be concluded with such results in the first few months of 1998. The outcomes of these talks between Mr. Nemcsók and Mr. Baco have been formulated in a framework agreement, signed ad referendum by the respective heads of delegation. Due to the outrage this agreement caused in Hungary, the government led by Gyula Horn, in power at that time had resigned from approving it. The next government, the one of Viktor Orbán has expressively rejected approval of that agreement, a position which was consequently maintained by all upcoming governments, regardless of their political affiliations.

As Slovakia faced the turn of the negotiations less beneficial to it, it requested the ICJ to declare that Hungary was not acting in good faith. Slovakia also requested from the Court to oblige Hungary to execute the verbatim original version of the 1977 if there is no agreement reached within a given period.

After the failure of the agreement drafted by the parties Hungary intented to mutually decide the legal consequences of the ICJ judgement, and attempted several times to hand over a draft treaty on the implementation of the judgement

or a settlement proposal, all of these based on the existing situation plus more water to be discharged to the original Danube bed.

The Hungarian interpretation of the judgement was summarised in the so-called Position Paper that was forwarded to Slovakia in early 1999. Slovakia has rejected the talks on the interpretation of the judgement, and rather had maintained its proposal to conduct pragmatic negotiations between the parties. The detailed Slovak position was delivered to the Hungarian party in 2004, on a round of negotiations taking place after a two-year-long interruption. The document handed over at the meeting was called The complex position of Slovak party, detailed the Slovak interpretation of the judgement.

Do the parties have to negotiate about the construction of the Nagymaros power plant?

As a result of the negotiations on the implementation of the judgement of the ICJ, commentators have unravelled the Achilles-heel of the judgement of 25th September, 1997. This is embodied in sections 136 and 137. According to section 136, those elements that have not been implemented by 1992, have been overtaken by the events. "It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Cunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures." Section 137 however continues: "Whether this is indeed the case is, first and foremost, for the Parties to decide".

Maybe it was not even examined during the drafting of the judgement, that there is a possible ambiguity in the meaning of the conjunction "when", that may result in two different explanation. It may be interpreted as meaning "if" or "inasmuch as" and it may be understood as meaning "since" or "after all". According to Meriam Webster, the player is disqualified, when he breaks the rules. On the other hand, in phrases like why use water, when you may drown, the conjunction means "since". In its written statement of its position regarding the request of Slovakia for an additional judgement, Hungary has already underlined, that the means of the utilisation of the existing facilities is to be determined by the parties, yet no facility already existing needs to be demolished, and the facilities not yet implemented need not to be constructed.

This official position of the Hungarian party regarding the ICJ judgement has been repeated in Annex 4 of the minutes of the January 28th, 1999 round of the negotiations, which states again that the facilities not yet implemented need not be constructed. The Hungarian party believed that in case it agrees to further operate the already existing facilities, that will be sufficient to achieve a similar agreement from the Slovak party to withdraw its formally still existing

claim regarding construction of the Nagymaros barrage. This approach was represented by the opening speech of László Székely at the meeting on 10th March, 1999.

Summarising the above, the Hungarian position on the interpretation of the judgement is that the obligations to be performed under the 1977 treaty have been overtaken by the events, *since the objectives of the treaty can be achieved by the operation of the existing facilities.* The Slovak party intented to interpret the aforementioned section 136 of the judgement, that the events have overtaken the obligations to be performed under the 1977 treaty, inasmuch as the objectives thereof can be achieved by the existing facilities. According to the position of Slovakia, if the objectives of the treaty can be achieved by the facilities implemented until 1992, then those have to be operated, not demolished and replaced by new construction.[34]

In the interpretation of the Slovak party this statement refers exclusively to the so-called Variant C, the facilities around Cunovo, which is intended to be the substitution for the facilities planned but never implemented under the original treaty in Hungarian territory, around Dunakiliti. This substitution is however contrary to the treaty, yet it make the operation of the Gabcikovo power plant possible. The judgement cannot be interpreted this way regarding the Nagymaros dam, in the position of the Slovak party. According to this position, in that case, when no facilities are constructed supporting the objectives of the treaty, then negotiations have to take place, and all necessary measure must be done for the achievement of the objectives of the treaty.[35]

The rather schematic argumentation is not so hard to apply to the Nagymaros constructions. As a result of the renunciation of the peak power mode, and due to environmental concerns the Nagymaros barrage system has not been implemented. Accordingly, in Slovakia's position, there is no facilities present suitable for the achievement of the objectives of the treaty – apparently, this objective would be electricity production – therefore the parties should negotiate in order to completely meet the objectives set out in the 1977 treaty. This approach, which seems rather formalist, is basically grounded on the presumption, that any facilities may be removed from the Facility List of the 1977 treaty by mutual consent of the parties. The same way removed facilities may be substituted by others, inasmuch as those are capable of achieving the objectives of the 1977 treaty in the same extent.

According to the position of the Slovak party electricity production at the Nagymaros barrage system can only be disregarded, if the parties would substitute it with some other facility having similar capacities. As a consequence,

[34] Complex position of the Republic of Slovakia, 12.

[35] Ibid.

the Slovak party maintains, that the only open issue at the negotiations shall be the question of the peak power mode. The position of Slovakia is, that although the Slovak party is ready to continue the negotiations, and possibly depart from the original treaty, this does not mean that the Nagymaros part of the project or a substitution thereto shall not be implemented according to the objectives of the 1977 treaty.[36]

The argumentation of the Slovak party for the implementation of the judgement is grounded in the assumption, that the 1977 treaty being in force results in a consequence, that any departure from the solutions applied therein is only possibly, if the new technical construction is equally achieving the original treaty objectives as the original plans. This has the noteworthy result of Slovakia claiming the implementation of the peak power mode derived from the 1977 treaty. The Complex Position of the Slovak Party states, that the objectives of the treaty and the implementation of the judgement of the ICJ demand, that the conditions of the peak operation of the Gabcikovo power plant shall be established according to the 1977 treaty.[37]

This is erroneous, as the ICJ judgement itself already declared, that the parties have abandoned peak power mode, and that is the reason for the lack of the need to implement the Nagymaros facilities.[38] By the presentation of the position of the Slovak party our examination came to the starting point. What grounds do justify the Hungarian denial to negotiate about the Nagymaros barrage system, if this installation was a part of the 1977 treaty which is still in force between the parties? What are the legal consequences and applicability of the 1997 judgement of the ICJ, if the Court had not granted any evident legal means for departure from the 1977 treaty, which the same judgement declares to be overtaken by events?

Final conclusions

The International Court of Justice has delivered its judgement in the Gabcikovo-Nagymaros Barriage System Case on the 25th of September, 1997. The parties have engaged in negotiations for 14 years, and they clarified how they interpret the judgement of the ICJ, and when they reached diametrically opposing positions, they tried to pragmatically identify the mutually acceptable solutions. It seems however, that these rounds of the negotiations have also failed, and the parties have put their last hopes in the external proposals and expert reports

[36] Complex position of the Republic of Slovakia, 19.

[37] Complex position of the Republic of Slovakia, 16.

[38] Judgement para. 134.

presented by both parties. As this procedure failed as well, it seems there is a considerable chance that the ICJ may again help the parties to reach a mutually acceptable and equitable solution to the dispute regarding the interpretation and application of the 1977 treaty, the operation of the barrage system, the unilateral diversion and unequal use of the Danube.

VI.
International law, EU-law and jurisprudence of the Hungarian Constitutional Court

Droit européen, droit international et la jurisprudence de la Cour Constitutionnelle hongroise

MILYEN MÉRTÉKBEN NEMZETKÖZI JOG AZ EURÓPAI UNIÓ JOGA A MAGYAR ALKOTMÁNYOS GYAKORLATBAN?

BLUTMAN LÁSZLÓ[1]

Herczegh Géza professzor köztudottan a mérsékelt dualizmus híve volt a nemzetközi jog és belső jog viszonyát tekintve.[2] A magyar alkotmányos gyakorlat, elsősorban a 4/1997. AB határozat, és a 2005. évi L. törvény nyomán, e szerint rendezkedett be, (bár ő már nem volt az Alkotmánybíróság tagja akkor, amikor az erre vonatkozó lényeges határozatok megszülettek).[3] A 2004. évtől kezdve, viszont elsődleges jogforrási kérdés, hogy a gyakorlatnak ez a szerkezete, miképpen fér meg a magyar jogrendszerbe belépő uniós joggal; különösen az uniós jognak azon részével, mely nemzetközi jogi (nemzetközi szerződési) formában jelenik meg.

A cím arra a lényeges problémára utal, hogy mi az Európai Unió jogának jogforrási helye a magyar alkotmányos rendszerben, beleértve a többi jogforráshoz való viszonyát is. Különösen lényeges a nemzetközi joggal való kapcsolata: ez abból adódik, hogy az Európai Unió joga részben nemzetközi jogi formában (pl. nemzetközi szerződésként) jelenik meg a magyar jogrendszerben, ami kétségtelenül felvet elhatárolási problémákat. Feltétlenül meg kell megkülönböztetni a kettőt? Valószínűleg ez elkerülhetetlen. A Magyarországra kötelező nemzetközi jogra utaló alkotmányos szabály, az Alkotmány 7. § (1) bekezdése, valamint az Európai Unió jogára közvetettebben utaló szabály, az Alkotmány 2/A. §-a, lényegesen különbözik, mely eltérést jelent e normarendszerek alkotmányos he-

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[1] Tanszékvezető, egyetemi tanár, Szegedi Tudományegyetem, Állam- és Jogtudományi Kar, Nemzetközi Jogi és Európajogi Tanszék.

[2] A nemzetközi jog alkotmányos helyzetére, egyben a monizmus-dualizmus lényegére, átfogó, informatív áttekintést ad, pl. BODNÁR LÁSZLÓ: A nemzetközi jog és az államon belüli jog viszonya az új alkotmányban. In *Nemzetközi jog az új alkotmányban.* (Szerk. Bragyova András) Budapest: MTA Állam- és Jogtudományi Intézet, 1997. 35–73., vagy VÖRÖS IMRE: Az Európai Megállapodás alkalmazása a magyar jogrendszerben. *Jogtudományi Közlöny* 1997/5. 229–237.

[3] 4/1997. (I. 22.) AB határozat (nemzetközi szerződéseket kihirdető jogszabály utólagos alkotmányossági vizsgálata) ABH, 1997. 41.; valamint 2005. évi L. törvény a nemzetközi szerződésekkel kapcsolatos eljárásról.

lyét illetően is. Ugyanakkor a két szabály eltérő következményeket is hordoz, például az Alkotmánybíróság hatáskörét illetően.

Mindez indokolttá teszi a két normarendszer elhatárolását, és ezen elhatárolás kapcsán az Európai Unió jogforrási helyének vizsgálatát. Milyen mértékben érvényesül nemzetközi jogként az Európai Unió joga a magyar alkotmányos rendszerben? Az alkalmas kiindulópont az, ha egy pillantást vetünk az Alkotmánybíróság sarktételeire, amit az Unió (vagy korábban az Európai Közösségek) jogával kapcsolatban kialakított.

1. Az Alkotmánybíróság két sarktétele az Unió jogának jogforrási helyével kapcsolatban

Az Európai Unió joga és a Magyarországra nézve kötelező nemzetközi jogszabályok viszonyánál az 1053/E/2005. AB határozatból érdemes kiindulni, ahol a testület megállapította, hogy „szerződési eredetük dacára, az Európai Unió alapító és módosító szerződéseit nem nemzetközi szerződésként kívánja kezelni."[4] Ezt a tételt látszólag megismétli, ténylegesen azonban lényegesen bővíti egy másik ügyben a közösségi jog vonatkozásában, mely bízvást áttehető általában az Unió jelenlegi jogára is: „[…] e szerződések, mint elsődleges jogforrások, és az Irányelv, mint másodlagos jogforrás, közösségi jogként a belső jog részei hi Az Alkotmánybíróság hatáskörének szempontjából a közösségi jog nem minősül az Alkotmány 7. § (1) bekezdésében meghatározott nemzetközi jognak."[5] E sarktételeket később a testület számos határozatban megerősítette.[6]

A fenti álláspontnak az a legfontosabb következménye, hogy a belső jog és az uniós jog között eshetőlegesen megmutatkozó normakonfliktusok az alkotmányossági kérdések közül kiszorulnak. Az uniós jog és a belső jog konfliktusának vizsgálatára az Alkotmánybíróságnak az Abtv. 1. § c) pont alapján akkor lenne hatásköre, ha az uniós jog nemzetközi jognak minősülne.[7]

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[4] 1053/E/2005. AB határozat (szerencsejáték szervezése) ABH 2006, 1824., III.2. pont. Az indítványban felhozott normakonfliktus, a belső jog és az uniós jog viszonyrendszerét az alkotmánybírósági hatáskörök tükrében felvázoló mátrixban elhelyezve, a 9-B konfliktusmezőt érintette, ld. BLUTMAN LÁSZLÓ – CHRONOWSKI NÓRA: Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában II. *Európai Jog* 2007/4. 17–18.

[5] 72/2006. (XII. 15.) AB határozat (egészségügyi közalkalmazottak jogállása) ABH 2006, 819. III.11. pont. Az indítványban – e tekintetben – felhozott normakonfliktus, a *Blutman–Chronowski*-mátrixban elhelyezve, a 9-B konfliktusmezőben helyezkedett el, ld. BLUTMAN–CHRONOWSKI i. m. 17–18.

[6] Pl. 32/2008. (III. 12.) AB határozat (EUIN-megállapodás) ABH 2008, 334. V.2.4. pont; 143/2010. (VII.14.) AB határozat (Lisszaboni Szerződés) *Magyar Közlöny* 2010/119. 21937–21950., IV.1. pont.

[7] BLUTMAN LÁSZLÓ – CHRONOWSKI NÓRA: Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában I. *Európai Jog* 2007/2. 7–8.

Az Alkotmánybíróság tehát az Unió jogát a nemzetközi joggal szemben határozza meg, és egyben a magyar belső jog részének tekinti. Ez az álláspont legjobban a dualizmus kereteiben értelmezhető. Csak az lehet kötelező szabály a magyar jogrendszerben, mely valamilyen módon annak részévé válik. Mivel az uniós jog egy részét alkalmazni kell a belső jogban, annak valamilyen módon része kell, hogy legyen, vagy részévé kell, hogy váljon. A nemzetközi jogszabályok esetében, a nemzetközi szerződéseknél ezt megoldja a belső jogforrási formába foglalás (transzformáció, azaz belső jogforrási formába iktatása e szabályoknak), vagy a nemzetközi szokásjog esetében az „általános transzformáció", melyet az Alkotmány 7. § (1) bekezdése végez el. De mit lehet kezdeni egy uniós irányelvvel? Egyik módszer sem működik. Így a dualista keretekben az egyetlen logikus lépés, hogy eleve a belső jog részének tekintsük az uniós jogi normákat, és az Alkotmánybíróság ebbe beleértette a nemzetközi szerződésekként megjelenő uniós jogszabályokat is (kifejezetten az alapító szerződéseket, mint elsődleges uniós jogot, hallgatólagosan és következményszerűen pedig az egyéb, nemzetközi jogi formában megjelenő másodlagos uniós jogszabályokat). Persze ez a megoldás első pillantásra is további, lényeges problémákat vet fel.

E problémák közül a következőket érdemes itt kiemelni. (i) Az egyik gond a Magyarországra nézve kötelező nemzetközi szerződések, valamint a nemzetközi szerződések formájában megjelenő uniós jogszabályok elhatárolása, hiszen a megkülönböztetés alapján ezek másfajta jogforrásként viselkednek. (ii) Az irányelvek belső jogként kezelése sem probléma nélkül való. A hatályos irányelv ugyanis egy olyan jogszabály, melyet a tagállamok belső jogában általában nem kell a jogalkalmazásban alkalmazni, vagy ha igen, ennek sajátlagos feltételei vannak. A magyar belső jogban fennálló doktrínák a hatályos jogszabályok feltétlen alkalmazását kívánják meg a jogalkalmazásban (szűk kivételek vannak, például alkotmányellenesség észlelése, vagy ellentétes magasabb szintű jogszabály léte). Az irányelvek esetében viszont új doktrínák megfogalmazására van szükség a belső jogban, például a hatályos jogszabályok alkalmazhatóságával kapcsolatban (az alkalmazhatóság feltételei, annak kizártsága; hasonlóan a nemzetközi szerződések belső jogban való érvényesülésével kapcsolatos *self-executing*-jelleg problémájához). (iii) Még tovább kell tekinteni: mivel az uniós jog részének minősülnek nem kötelező szabályok is (ajánlás, vélemény), a magyar belső jog részévé váltak olyan hatályos normák, melyeket nem kell alkalmazni, bár lehetnek joghatásaik. Ehhez megint új, a belső jogban eddig ismeretlen jogalkalmazási doktrínák kialakítására van szükség.

A fentiekben az elsőként említett probléma, mely közvetlenül kapcsolódik a jelen tanulmány témájához, indokol egy pillantást arra, hogy az uniós jogban milyen jogszabályok jelennek meg nemzetközi jogként, ezen belül is legfőképpen nemzetközi szerződés formájában.

2. Nemzetközi jogi tartalmú jogszabályok az uniós jogban

Az Európai Unió jogának részét képezik olyan jogszabályok, melyeknek nemzetközi jogi tartalmuk van, ezen belül is nemzetközi szerződések formájában jöttek létre. A jelen tanulmány céljai szerint az ilyen uniós jogszabályoknak öt kategóriáját érdemes megkülönböztetni.

(A) Ide tartoznak mindenekelőtt az ún. *alapító szerződések*, melyekkel a tagállamok létrehozták az Uniót, annak szervezeti, eljárási, és hatásköri kereteit.[8] (Az alapító szerződések kifejezésbe beleértendőek az eredeti szerződéseket módosító szerződések is.)[9]

(B) Vannak ún. *vegyes nemzetközi szerződések*, melyet az Unió és a tagállamok közösen kötnek harmadik államokkal (azaz nem tagállamokkal).[10] Erre azért van szükség, mert e szerződések tárgya részben uniós hatáskörben van, másik részben tagállami hatáskörben maradt, tehát csak közösen lehet nemzetközi kötelezettséget vállalni.[11]

(C) *Az Unió által, harmadik államokkal önállóan kötött nemzetközi szerződések* bizonyos fajtáinál az egyes tagállamok kiköthették, hogy a szerződéshez szükséges a saját alkotmányos követelményeiknek megfelelő, külön megerősítés (ratifikáció). Ennek elsősorban a Lisszaboni Szerződés hatálybalépése előtt volt gyakorlati jelentősége (l. alább, az Alkotmánybíróság

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[8] Az alapító szerződések kifejezés alatt elsődleges uniós jogforrásokként leggyakrabban az Európai Uniót alapító szerződést (Maastricht (1992/1993; a továbbiakban EU-Szerződés), és az Európai Unió működéséről szóló szerződést (Róma 1957/1958; korábbi nevén az Európai Közösséget alapító szerződés; a továbbiakban EUM-Szerződés) értik, melyek az eredeti alapító szerződésekből és a rájuk épülő módosító szerződésekből kapják jelenleg hatályos szövegüket. Az alapító szerződések köre ténylegesen ennél jóval tágabb, erre ld. BLUTMAN LÁSZLÓ: *Az Európai Unió joga a gyakorlatban.* Budapest: HVG-ORAC, 2010. 39–40.

[9] Az alapító szerződések kifejezés alá az eredeti szerződéseket módosító szerződések azért tartoznak bele, mert jogforrási szinten nincs egységes szerződésszöveg. Például a módosító szerződésként létrejött Amszterdami Szerződés (1997/1999), vagy Nizzai Szerződés (2001/2003) továbbra is hatályban van, akárcsak a rájuk épülő Lisszaboni Szerződés (2007/2009). (Az alapító szerződéseknek megjelent ugyan az egységes szerkezetbe foglalt szövege az Európai Unió Hivatalos Lapjában, legutóbb a 2010. március 30-i számban, de a szöveg nem hivatalos, hanem tájékoztató jellegű, ld. *Hivatalos Lap* C-83. 2010. 03. 30. A hatályos szöveg úgy állapítható meg, hogy a módosító szerződéseket a módosított szerződések szövegére kell vonatkoztatni.

[10] A vegyes szerződéseknek nemcsak az Unió a részese, hanem az Unió mellett a tagállamok, vagy egyes tagállamok is. A vegyes szerződések létére az EUM-Szerződés 207. cikk (3) bekezdése (volt 133. cikk (6) bekezdés) kifejezetten utal (közös kereskedelempolitika).

[11] Esetenként nem egyszerű annak eldöntése, hogy a Unió egyedüli hatáskörrel rendelkezik-e egy nemzetközi szerződés megkötésére, mert csak uniós hatáskörbe tartozó kérdés a szerződés tárgya, vagy a tagállamok is jogosultak a Unió mellett részt venni önállóan, ld. pl. a nemzetközi gumiegyezmény megkötésével kapcsolatos tanácsadó véleményt, 1/78 Vélemény (Nemzetközi gumiegyezmény) [1979] EBHT 2871. Az uniós hatásköri kérdésekre, és ezek jellegzetességeire általában ld. BLUTMAN i. m. 164–185.

ún. EUIN-határozatát.)[12] A Lisszaboni Szerződés a tagállami kikötésnek ezt lehetőséget elhagyta, egy kivétellel (l. EUM-Szerződés 218. cikk (8) bekezdését).

(D) *Az Unió*, minden tagállami kikötéstől és aktustól függetlenül, *maga is köt nemzetközi szerződéseket* (illetve korábban az Európai Közösség is hozott létre számos ilyen jogszabályt) harmadik államokkal.[13]

(E) A szükséges fenntartásokkal ugyan, de itt kell megemlíteni azokat az *uniós szabályokat, melyek elfogadása a tagállamok külön megerősítéséhez kötött* (pl. EUM-Szerződés 25. cikk (2) bekezdés, 223. cikk (1) bekezdés, 262. cikk, 311. cikk (2) bekezdés; EU-Szerződés 48. cikk (6) bekezdés,). Itt nem nemzetközi szerződéses formáról van szó, hanem *a Tanács határozatairól*, de a nemzetközi jogra jellemző eljárás folyamán, tagállami megerősítések (ratifikációk) feltételével lehet elfogadni e jogszabályokat.

E megkülönböztetéseknek azért van jelentősége, mert megjelenésük a magyar alkotmányos rendszerben eltérő megítélést kívánhat, és eltérő következményekkel járhat, az Alkotmánybíróság által eddig kialakított álláspont tükrében is. Az egyik leglényegesebb kérdés, hogy az adott uniós jogi norma lehet-e más, belső normák alkotmányos mércéje az Alkotmány 7. § (1) bekezdése alapján (mint nemzetközi jog), vagy nem szolgálhat ilyen mérceként az Alkotmány 2/A. § (1) bekezdése alapján, mint uniós jog.[14] Például, az ún. vegyes szerződések minek minősülhetnek majd egy esetleges alkotmánybírósági eljárásban? Szét lehet-e szedni a rendelkezéseiket nemzetközi jogi és nem nemzetközi jog (uniós jogi) normákra attól függően, hogy uniós vagy tagállami hatáskörbe tartoznak? Amennyiben nem, (és valószínűleg ez a tarthatóbb álláspont), akkor nemzetközi jognak vagy uniós jognak minősíthetők? Mivel ilyen vegyes szerződést a testület még nem bírált el érdemben, ezért mindez a jövő kérdése.

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[12] Az EU-Szerződés volt 24. és 38. cikke alapján, a közös kül- és biztonságpolitika, valamint a rendőrségi, és a büntetőügyekben történő igazságügyi együttműködés területén az Unió nemzetközi szerződéseket köthetett harmadik államokkal, nemzetközi szervezetekkel. A tagállamok a Tanácsban, a szerződés megkötésére vonatkozó határozathozatalnál köthették ki az egyedi megerősítést (ratifikációt).

[13] E szerződések a tagállamokra is kötelezőek, ld. pl. C-61/94 Bizottság v Németország (Nemzetközi Tejtermék Megállapodás) [1996] EBHT I-0398, 15. pont vagy T-115/94 Opel Austria GmbH v Tanács [1997] EBHT II-0039, 101. pont. A tagállami kötelezettség nem csak az Unió által kötött nemzetközi megállapodás elfogadásáról szóló tanácsi rendeletből folyik, hanem közvetlenül a szerződés rendelkezéseiből is, az EUM-Szerződés 216. cikk (2) bekezdése (volt 300. cikk (7) bekezdése) alapján.

[14] Az uniós jog és az Alkotmány 7. § (1) bekezdése közötti egyes összefüggésekre nézve ld. Bodnár László: Alkotmány, nemzetközi szerződés, EU-jog (avagy a közjogi harmonizáció deficitje). In *Magyarország és Európa az ezredfordulón.* (szerk. Andrássy György – Cseresnyés Ferenc) Pécs, 2001. 25–32.

Mindazonáltal a fenti felbontás alapján e szabályok alkotmánybírósági vizsgálata igen sokarcúvá válhat. A következőkben arra szeretnék rámutatni, hogy a nemzetközi jogi formában megjelenő uniós jogszabályok magyar jogforrásbeli helyének alapjául szolgáló jogszabályi, vagy a gyakorlatban kialakult tételek nehezen egyeztethetőek össze.

3. A 72/2006. AB határozatban megfogalmazott doktrína szűkítése

A 72/2006. AB határozatban jelent meg teljes vértezetben „az uniós jog, uniós jogként a belső jog része" doktrína,[15] mely meghatározza mind a mai napig az Alkotmánybíróság alapállását a kérdésben. Ez a doktrína azonban az uniós jog részét képező nemzetközi szerződésekre alkalmazva (ld. előző pont, így különösen az alapító szerződések tekintetében) a maga általánosságában nehezen összeegyeztethető más tételekkel, és jelentős korrekcióra szorul. Ezek az ellentétek úgy mutatkoznak meg, hogy az Alkotmánybíróság mégis kénytelen valamilyen szempontból nemzetközi jognak tekinteni ezeket, az uniós jog részét képező jogszabályokat. A doktrína szűkítése három jelentős lépésben történt meg az Alkotmánybíróság gyakorlatában.

3.1 A doktrína szűkítése: előzetes normakontroll hatálybalépés előtt

Amennyiben „az uniós jog, uniós jogként a belső jog része", mi következik ebből az uniós keretekben, nemzetközi szerződés formájában elfogadott jogszabályok előzetes normakontrolljára vonatkozóan? A 32/2008. AB határozat (EUIN-megállapodás) egyfajta választ adott erre.[16] Előzetesen– az Unió gyakorlatából kiindulva – feltételezzük, hogy az Unió által kötött, de a tagállamok megerősítő aktusait kívánó EUIN-megállapodás az uniós jog része (osztályozásunk alapján C-típusú uniós nemzetközi jogi jogszabály).[17] Amennyiben e szerződés (hatályba nem lépett) uniós jognak tekintendő, akkor nem minősülne

[15] A határozatban ez még közösségi jogként jelent meg, azonban a Lisszaboni Szerződéssel az egész (régi) uniós jog „közösségiesedett" a közös kül- és biztonságpolitika kivételével. Az ilyen átfogalmazás ellen semmilyen elvi kifogás nem mutatkozik.

[16] 32/2008. (III. 12.) AB határozat (EUIN-megállapodás) ABH 2008, 334.

[17] Az Európai Unió, valamint az Izlandi Köztársaság és a Norvég Királyság között az Európai Unió tagállamai, valamint Izland és Norvégia közötti átadási eljárásról szóló megállapodás (EUIN-megállapodás), ld. a kihirdetésére a kormány T/3164. (2007.05.25.) sz. törvényjavaslatát (visszavonva 2010.05.17.); forrás: <www.mkogy.hu>. A megállapodás uniós jognak minősült a volt EUSz 24. cikk (6) bekezdése alapján, jelenleg pedig az EUM-Szerződés 216. §-a alapján, ld. még 96/71 R. & V. Haegeman v Bizottság [1972] EBHT 1005, 5. pont.

(hatályba nem lépett) nemzetközi szerződésnek a 72/2006. AB határozat tükrében. Jogszabály előzetes normakontrollja viszont legnagyobbrészt törvény és nemzetközi szerződés tekintetében lehetséges, az Abtv. 1. § a) pontja értelmében. Ebből következően, az EUIN-megállapodáson nem lehetne előzetes normakontrollt végezni, hiszen nem minősül nemzetközi szerződésnek a magyar alkotmányos gyakorlatban a 72/2006. AB határozat alapján.[18]

Ezért az Alkotmánybíróság a 32/2008. AB határozatban kénytelen volt szűkíteni a 72/2006. AB határozatban lefektetett doktrínát ahhoz, hogy el tudja végezni az EUIN-szerződés előzetes normakontrollját. Az erre vonatkozó határozatrész tanulságos: „[…] az EUIN-megállapodás nemzetközi jogi szerződésnek minősül. Az a tény, hogy az egyik oldalon az Európai Unió szerepel szerződő félként, nem jelenti azt, hogy az EUIN-megállapodás az Alkotmány 2/A. § értelmében közösségi jogi normának minősülne, hiszen nem az ún. alapító és módosító szerződések szerinti európai uniós, illetve európai közösségi hatásköröket változtatja meg, hanem az egyes tagállamok, illetve Izland és Norvégia viszonylatában létesít kötelezettségeket. Az ilyen természetű megállapodásokat maga az Európai Unió is úgy tekinti, hogy azok nemzetközi szerződések, amelyekre tehát a nemzetközi jog szabályai vonatkoznak."

Ebből a következő lényeges következtetések adódnak.

(i) A magyar jogban a nemzetközi szerződéseknek legalább két fajtája mutatkozik: az Alkotmány 7.§ (1) bekezdése alá eső nemzetközi szerződések, és a 2/A. § alá eső néhány nemzetközi szerződés (tulajdonképpen. az uniós alapító szerződések).

(ii) Mivel az EUIN-megállapodás *az uniós jog szerint* egyértelműen és világosan az uniós jog része, az Alkotmánybíróság fenntartja azt a jogát, hogy az Alkotmány alkalmazása céljából, az Alkotmány 2/A. § (1) bekezdést értelmezve, ettől eltérő minősítést alkalmazzon, és ne tekintse azt az uniós jog részének.[19]

(iii) Mindebből az is következik, hogy az EUIN-megállapodás a magyar jogban az Alkotmány 7. § (1) bekezdése alá eső nemzetközi szerződés, így belső jogszabályok alkotmányosságának vizsgálatakor maga is alkotmányos mércévé válhat (szemben pl. az uniós alapító szerződésekkel).

(iv) Egy nemzetközi szerződés (nemzetközi jogi norma) csak akkor minősül uniós jognak az Alkotmány 2/A. § értelmében, amennyiben az uniós hatásköröket megváltoztatja, egyébként az Alkotmány 7. § (1) bekezdése alá

[18] A határozatból kivehetően az indítvány részben az EUIN-megállapodás, mint nemzetközi szerződés egyes rendelkezéseinek előzetes alkotmányossági vizsgálatára irányult, részben a kihirdető törvény, mint törvény egy rendelkezésének előzetes alkotmányossági vizsgálatára; vö. az Abtv. 35. § és 36. § alkalmazásával.

[19] Pusztán azért, mert az Unió nemzetközi szerződésként kezeli az EUIN-megállapodást, nem jelenti azt, hogy ne lenne az uniós jog része.

esik (feltételezvén, hogy a testület nem kívánt a nemzetközi szerződéseknek egy harmadik kategóriát is létrehozni).

Mindebből kiindulva, az Európai Unió harmadik államokkal kötött, tagállami megerősítésre szoruló szerződései (a fenti osztályozásom szerint C-típus), valamint az Európai Unió és a tagállamok által közösen, harmadik államokkal kötött szerződései (vegyes szerződések – B-típus) nagy valószínűséggel az Alkotmány 7. § (1) bekezdéséhez tartoznak, mivel ezek formálisan nem módosítanak uniós hatásköröket (inkább ilyen hatáskörökön belüli további szabályalkotásról van szó). Azonban ez a megoldás furcsa helyzethez vezethet akkor, ha ezen szerződésekhez kapcsolódnak végrehajtó uniós jogi aktusok. Ebben az esetben (a magyar gyakorlat szerint) a szerződés maga nem lesz az uniós jog része, de az azt végrehajtó uniós aktus viszont igen. Amennyiben egy ilyen szerződés az Alkotmány 7. § (1) bekezdése alapján mérceként szolgál valamely belső jogszabály alkotmányosságának megítéléséhez, csakis az uniós végrehajtó aktussal együtt lehet majd értelmezni az utólagos alkotmányossági vizsgálat céljára. Ekkor az uniós jog egy része érdemben alkotmányos mércévé válhat, szemben az 1053/E/2005. AB határozatban megfogalmazott törekvéssel, mely a belső jog és az uniós jog konfliktusát nem alkotmányos kérdésként kívánja kezelni.

Az EUIN-határozatban lefektetett álláspont, tehát további jelentős módosításra szorul, különben határesetekben ellentmondásos helyzetekhez vezethet.[20]

3.2 A doktrína szűkítése: népszavazás megerősítendő nemzetközi szerződésről

Amennyiben a 32/2008. AB határozat fenti, témánk szempontjából fontos részét helyesen értelmeztem, az uniós jogon belül nemzetközi szerződéses formában létrejövő jogszabályok közül alapvetően csak az uniós hatásköröket módosító, alapító szerződések (a módosító szerződésekkel egyetemben) tekinthetők az uniós jog részének a magyar alkotmányos gyakorlatban a 72/2006. AB határozat alapján (A-típusú uniós nemzetközi jogi szabályok). Mindez azonban további szűkítésre szorul, amelynek szükségét az ide tartozó, egyes szerződésekkel kapcsolatos népszavazási kezdeményezések hozták elő. Így a 61/2008. AB hatá-

[20] Ugyanakkor a tagállami megerősítéshez kötött uniós jogi aktusok uniós hatáskört módosíthatnak, de nem öltik kifejezetten nemzetközi szerződés formáját. Itt az a kérdés vetődik fel, hogy bár ezek nyilvánvalóan az uniós jog részét képezik az Alkotmány 2/A. § szerint, de az Alkotmánybíróság gyakorolhat-e előzetes normakontrollt e jogi aktusoknál, tekintettel a tagállami megerősítés szükségességére, noha nincs szó formálisan nemzetközi szerződésekről.

rozatban éppen egy (módosító) alapító szerződéssel, a Lisszaboni Szerződéssel kapcsolatos népszavazási kezdeményezést kellett elbírálni.[21]

Az Alkotmány 28/B. § (1) bekezdése alapján országos népszavazás tárgya az Országgyűlés hatáskörébe tartozó kérdés lehet. Az uniós alapító szerződések módosításáról a döntés Magyarország vonatkozásában kétségtelenül az Országgyűlés hatáskörébe tartozik, de lehetne-e népszavazást tartani akkor, ha eltekintünk attól, hogy a formálódó uniós jogszabály nemzetközi szerződéses formát kap. Aligha, ugyanis az Alkotmány 28/C § (5) bekezdés a kizáró feltételeknél nem vet számot még a születőben lévő uniós jogi normákkal, és erre vonatkozóan a népszavazás feltételeivel. Az ilyen típusú ügyekben nyilvánvalóvá vált az, hogy a 72/2006. AB határozatba foglalt doktrínát nem lehet úgy alkalmazni, hogy a nemzetközi szerződés formájában formálódó uniós jognál el lehessen tekinteni annak nemzetközi szerződéses jellegétől. Így a nemzetközi szerződés létszakaira vetítve időben is korlátozni kellett a 72/2006. AB határozat hatókörét olyan értelemben, hogy a nemzetközi szerződés formájában születő uniós jogi normát a nemzetközi szerződésekre vonatkozó szabályok szerint kell kezelni annak hatálybalépéséig, például a népszavazási kezdeményezések elbírálása során.

Ezt az időbeni korlátozást a testület *expressis verbis* megtette. Kiemelte, hogy a korábbi tételek csak azokra a szerződésekre vonatkoztak, amelyek az uniós jogrendszerben már hatályosak,[22] és nem vonatkoznak a hatályba még nem lépett uniós alapító (módosító) szerződésekre, mint nemzetközi szerződésekre. Ezeket a nemzetközi szerződésekre vonatkozó szabályok alapján kell értékelni. A 61/2008. AB határozatban tett megállapítások nem előzmény nélküliek. Ezeket már érdemben megalapozta az a két AB határozat, melyek az Unió Alkotmányos Szerződésére vonatkozó népszavazási kezdeményezést ítélték meg az Országos Választási Bizottság határozatainak felülvizsgálata során.[23]

Mindez azt, jelenti, hogy az Alkotmánybíróság az Unió alapító szerződéseit nemzetközi szerződésként kezeli a hatálybalépésük pillanatáig. Ez a 72/2006. AB határozatban foglalt doktrína időbeli szűkítése: az alapító szerződés csak a hatálybalépés pillanatától lesz „uniós jogként a belső jog része", előtte a nemzetközi szerződésekre vonatkozó szabályok alkalmazandók rá a magyar alkotmányos gyakorlatban.

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[21] 61/2008. (IV. 29.) AB határozat (LSz-népszavazás) ABH 2008, 546.

[22] Ld. az idézett határozat III. 3. pontját.

[23] 58/2004. (XII.14.) AB határozat (ASz-népszavazás) ABH 2004, 822. IV.2. pont; 1/2006. (I.30.) AB határozat (ASz-népszavazás) ABH 2006, 39. IV.2.1 pont.

3.3 A Lisszabon-határozat: a doktrína feladása?[24]

„Az uniós jog, uniós jogként a belső jog része" doktrína, az alapító szerződések jogforrási helyével összefüggésben, újabb kihívással nézett szembe a Lisszaboni Szerződés alkotmányos vizsgálata során.[25] A jogforrási problémát jellemzően ismételten egy hatásköri kérdés hozta elő: van-e akadálya a szerződést kihirdető törvény utólagos, érdemi alkotmányossági vizsgálatának. Miképpen veti ez fel a Lisszaboni Szerződés, mint alapító szerződés jogforrási helyének problémáját?

Amennyiben a Lisszaboni Szerződés „uniós jogként a belső jog része" (és nem nemzetközi szerződésként része a belső jognak), akkor nem a kihirdető törvénnyel épül be a belső jogba, hanem *sui generis* módon, közvetlenül az Alkotmány 2/A. § (1) bekezdése alapján, mint uniós jogszabály. Ekkor a kihirdető törvény funkcióját veszti, így nem lehet alkotmányossági vizsgálat tárgya sem. Egy erőteljes kisebbségi vélemény (Paczolay P. és Lévay M.) éppen ez alapján tagadta, hogy az Alkotmánybíróság alkotmányossági vizsgálatot végezhetne annak hatálybalépése után, uniós alapító szerződésen. Ez egyenesen következik a 72/2006. AB határozatból, mely lényegében azon az alapon áll, hogy egy uniós alapító szerződés saját jogon érvényesül a belső jogban, tehát nem kell külön kihirdetni sem (*sui generis* doktrína). A nemzetközi jog és belső jog viszonyának kereteiben ez egy színtiszta monista elmélet, ahol nem kell külön transzformáló állami aktus (kihirdetés, azaz belső jogforrási formába foglalás) ahhoz, hogy egy nemzetközi eredetű norma beépüljön a belső jogrendbe.[26] Ez alapján az Alkotmány 2/A. § (1) bekezdése alá eső nemzetközi szerződéseknél monista, az Alkotmány 7. § (1) bekezdése alá eső nemzetközi szerződéseknél dualista szemlélet érvényesülne. Persze ezen elmélet legnagyobb ellenérve az Alkotmány 2/A. § (2) bekezdése, mely kihirdetésről szól, tehát az irányadó alkotmányos szövegből a dualista elmélet következik. Ez arra enged következtetni, hogy a 72/2006. AB határozatban foglalt tétel az alapító szerződések tekintetében nem egyeztethető össze az Alkotmány 2/A. § (2) bekezdésével, illetve a dualista alkotmányos gyakorlatot általában megfogalmazó 4/1997. AB határozattal.

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[24] A doktrína feladását az uniós jog részét képező nemzetközi jogi formában megjelenő szabályok kategóriájára értem.

[25] 143/2010. (VII.14.) AB határozat (Lisszaboni Szerződés) *Magyar Közlöny* 2010/119. 21937–21950.

[26] A magyar joggyakorlatban e transzformálást beiktatás helyett általánosan kihirdetésnek nevezik, ami fogalmilag helytelen, ld. BLUTMAN LÁSZLÓ: A nemzetközi szerződések törvénybe iktatása: homokszemek a gépezetben. *Közjogi Szemle* 2010. március, 8–10. Tekintettel az általános nyelvhasználatra, az Alkotmány 2/A. § (2) bekezdésének, valamint a 2005. évi L. törvény szóhasználatára, ezzel a fenntartással a jelen tanulmányban magam is a „kihirdetés" kifejezést használom.

Miképpen oldotta meg az Alkotmánybíróság ezt a helyzetet? Az a tény, hogy a Lisszaboni Szerződést a kihirdető törvény részeként vizsgálta,[27] arra utal, hogy a testület az A-típusú, alapító szerződések vonatkozásában is feladta az „uniós jogként a belső jog része" doktrínát. A Lisszaboni Szerződés (és így általában az alapító szerződések) e szerint a kihirdető törvény erejénél fogva nemzetközi szerződésként érvényesül a belső jogban, és nem *sui generis* módon. Más kérdés, hogy ez az álláspont viszont nem egyeztethető össze a 72/2006. AB határozatban foglalt alaptétellel.

Mindennek a gyakorlatban is megmutatkozó következményei lehetnek. Például választ kell találni arra a kérdésre, hogy hol kell keresni a Lisszaboni Szerződés irányadó, hiteles szövegét a magyar joggyakorlatban történő alkalmazás céljaira? Amennyiben a *sui generis* érvényesülést valljuk, akkor az Európai Unió Hivatalos Lapjának magyar nyelvű változatában,[28] amennyiben a 143/2010. AB határozatban megnyilvánuló többség álláspontját osztjuk, akkor a Magyar Közlönyben, a kihirdető törvény szövegében.

Rá kell mutatni arra, hogy az itt jelzett ellentmondásos helyzet az Alkotmánybíróság gyakorlatában burkoltan már 2006-ban is érzékelhető volt. A 10/2006. AB határozat ugyanis a közösségi, illetve uniós alapító szerződések azon szövegéből indult ki, melyet a kihirdető, 2004. évi XXX. törvény tartalmazott, sőt a testület az uniós (akkor közösségi) kötelezettségvállalást nemzetközi szerződéses kötelezettségvállalásnak tekintette a népi kezdeményezésre vonatkozó szabályok alkalmazásánál.[29] Ez arra utalt, hogy a testület az alapító szerződéseket mégiscsak nemzetközi szerződésként vette figyelembe, és a belső jogban való érvényesülésüket a kihirdetéshez kötötte, így a kihirdetett szöveget vette irányadónak és hitelesnek. Ez már nehezen összeegyeztethető a néhány hónappal később hozott 1053/E/2005. AB határozattal. Ezután viszont, az 1053/E/2005. AB határozat nyomán, még 2006-ban, a 72/2006. AB határozatban kiteljesedett a *sui generis* doktrína, miszerint „az uniós jog, uniós jog-

[27] Az érdemben elvégzett alkotmányossági vizsgálat, az uniós joggal kapcsolatos lehetséges normakonfliktusokat feltérképező mátrixban elhelyezve, a 6-B konfliktusmezőt érintette, ld. Blutman–Chronowski i. m. (II.) 17–18.

[28] Ennél a változatnál további probléma az lenne, hogy a Hivatalos Lap melyik szövegváltozata lenne az irányadó. Nem értek egyet azzal, a 143/2010 AB határozatban megjelenő álláspont-tal, hogy az alapító szerződéseknek, a Hivatalos Lap 2010. március 30-i számában megjelenő egységes szövege hiteles (hivatalos) szöveg lenne, mert ez csak tájékoztató jellegű. Ezzel ellentétesen foglal állást a határozatban a többség, ld. III. 2. pont, *MK* 2010/119. 21939., illetve a különvélemény is, 2. pont, *MK* 2010/119. 21947. Véleményem szerint, az uniós hiteles szöveget abban a korábbi számban kell keresni, mely a Lisszaboni Szerződés eredeti szövegét, (és nem az egységes szöveget) közli (*HL* C306., 2007. 12. 17.).

[29] 10/2006. (II.28.) AB határozat (magyar termékek aránya) ABH 2006, 216. II.2. pontja, valamint III.2. pontja. A felmerülő problémákra részletesebben ld. Blutman–Chronowski i. m. (I.) 7–8.; ugyancsak ld. Trócsányi László – Csink Lóránt: Alkotmány v. közösségi jog: az Alkotmánybíróság helye az Európai Unióban. *Jogtudományi Közlöny* 2008/2. 63–69.

ként a belső jog része", amelyben nincs helye a kihirdetésnek (és ennek okán a kihirdetett szövegnek sem).

4. Összegzés

A 72/2006. AB határozatban tett megállapítás, mely az uniós jog jogforrási helyére vonatkozik a magyar jogrendszeren belül, jelentős módosuláson ment át a nemzetközi jogi formában megjelenő uniós jogszabályok tekintetében. Az Alkotmánybíróság rákövetkező gyakorlata csaknem teljesen kiszorította a doktrína hatóköréből ezeket az uniós jogszabályokat (bár nem szabad szem elől téveszteni, hogy a doktrína szűkítése két esetben alapító szerződésekkel, egy esetben tagállami megerősítést kívánó, az Unió által kötött nemzetközi szerződésnél merült fel). Ettől függetlenül, az Unió szervei által alkotott egyéb, (nem nemzetközi jogi formában létrejövő) jogszabályokra a doktrína továbbra is fenntartható, bár további kiegészítést igényel, elsősorban az irányelvek, valamint a vélemények és ajánlások belső jogban való használatának megkönnyítése céljából.

A választ, hogy jelenleg a magyar alkotmányos gyakorlatban mennyire tekinthető nemzetközi jognak az uniós jog, az alábbi, összefoglaló táblázat foglalja össze.

		A) alapító szerződések	B) vegyes nk. szerződések	C) az Unió által kötött, megerősítendő nk. szerződések	D) az Unió által kötött nk. szerződések	E) megerősítést igénylő uniós aktusok
aláírástól a megerősítésig	népszavazás	nk. szerződésként:igen, 61/2008. ABh; Alk. 28/B. § (1) bek.			uniós jogként: nem (nincs tagállami aláírás, megerősítés)	?-ként: ? (nincs aláírás, csak határozat)
	előzetes alk. vizsg.	nk szerződésként: igen, 32/2008. ABh; Abtv. 36. § (1) bek.				?-ként: ?
a megerősítéstől hatálybalépésig	népszavazás	nk szerződésként: nem, 61/2008. ABh; Alk. 28/B. § (1) bek.				?-ként: nem
	előzetes alk. vizsg.	nk szerződésként: nem, Abtv. 36. § (1) bek.				?-ként: nem
hatálybalépés után	alk. vizsg. mércéje	uniós jogként: nem 72/2006. ABh	nk. szerződésként: igen (?) 32/2008. ABh; Alk. 7.§ (1) bek.		uniós jogként: nem 72/2006. ABh	uniós jogként: nem (?) 72/2006. ABh
	alk. v. tárgya (utólagos alk. v.)	a kihirdető tv.: igen 143/2010. ABh	a kihirdető törvény: igen 4/1997. ABh; Alk. 32/A. (1) bek.		uniós jogként: ?	uniós jogként: ?

To What Extent is the Law of the European Union International Law within the Hungarian Constitutional Practice?

(Summary)

The wider topic of this article is the European Union law as a source of law within the Hungarian constitutional system, in particular, the constitutional position of EU legal rules adopted in the form of international law (e.g. international treaties). In this area, the problem lies in that under the Constitution and practice of the Constitutional Court the international law and EU law have different constitutional positions as sources of law. According to Decision 72/2006 of the Constitutional Court the law of the Union (as law of the Union) is part of the Hungarian domestic law. The Court defines EU law against international law for the purposes of its jurisprudence. But how to deal with the international legal rules which are at the same time part of the EU law?

The article distinguishes between five classes of Union acts taking the form of international law: (i) founding treaties (ii) mixed international agreements concluded jointly by the Union and Member States with third States; (iii) international treaties concluded by the Union with third States and approved (ratified) by the Member States according to their constitutional requirements; (iv) international treaties concluded by the Union with third States; (v) acts of the Union (e.g. Council's decisions) to be approved (ratified) by the Member States according to their constitutional requirements.

In light of this classification does the paper analyse the relevant decisions of the Constitutional Court and conclude that the doctrine articulated in the Decision of 72/2006 of 15 December 2006, namely that the law of the Union (as law of the Union) is part of the Hungarian domestic law, has undergone substantial modification. Subsequent practice of the Court has significantly narrowed down the scope of the doctrine as regards the EU acts taking the form of international law. Nevertheless, for other types of the Union acts the doctrine is still sustainable, but requires further amplification or possibly amendment with particular regard to directives, opinions and recommendations in order to facilitate their use within the Hungarian domestic law.

THE INTERPRETATION OF EU LAW – AT THE BORDER OF CONSTITUTIONAL LAW AND INTERNATIONAL LAW?

Elisabeth Sándor-Szalay[1]

1. European Union – an autonomous and unified legal order

For a long time now, the international community has regarded the legal material produced in the time period between the signing of the founding treaty of the European Coal and Steel Community and the Lisbon Treaty as the autonomous and unified legal order of European integration. The separate legal personalities of the three Communities[2] established in the first decades of integration have not kept the actors involved from regarding themselves as the representatives of a unified legal order. The European Court of Justice itself has stated already quite early on that the legal order of the three European Communities is not a kind of regional international law, but an autonomous and unified legal order, which is an entity separate not only from international law, but from the national legal orders of the Member States as well. [3] Presumably the view of the Court of Justice was the assumption that a delimitation of Community law from the structurally and functionally quite different system of international law was necessary from both a political and a functional perspective. The argumentation

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[2] The European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community.

[3] Case 6-64 Flaminio Costa v. E.N.E.L (ECR 1964, 1251). The often quoted text reads as follows: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of aw which binds both their nationals and themselves."

and logic employed by the Court of Justice seemed convincing enough in its time that it was accepted by the Member States.[4]

The autonomy rooted in the aforementioned stance of the Court and the general acceptance by the Member States has opened the doors for the self-induced development of Union (formerly Community) law. The classic methods of interpretation, the state-centred approach and the stereotypes of the functioning of international law have thus not limited the subsequent progress of the law of European integration. Utilizing the relative freedom ensured by this self-induced development, the Court of Justice has developed its own unique practice of interpretation, focusing on the prevailing aims of integration. In the process of the interpretation of Union law, the importance of adherence to the intentions of the authors of the Treaties, or the historical circumstances of their creation has faded considerably. The rules of general international law are only applicable in the frame of union law if EU law expressly provides for this.

This paper sets out to give a brief insight into correlations of the practice of legal interpretation in the European Union. The highly efficient operation of this unique member of the international community is no doubt determined by the distinctive practice of interpretation that positions EU law at the borderline of international and constitutional law.

2. Legal interpretation at the border of constitutional law and international law

2.1. The unique method of interpretation developed by the EU institutions

Over six decades, the EU has become an international organization demonstrating numerous state-like attributes. Although rooted in international treaties, its institutional and legal structure, its powers and goals have long since transformed it into an autonomous entity. This autonomy is laid bare quite well by the practice followed in connection with the interpretation and concretization of the legal order of the Union.

The rules of interpretation contained in Article 31 of the 1969 Vienna Convention have for a long time been considered inadequate for interpreting EU legal norms. The institutions of the Union have developed a unique set

[4] It has to be noted however, that the acceptance cannot be regarded as a process devoid of any disputes and quarrels, especially regarding the viewpoints of the national constitutional courts, which has defined the „unfriendly" relationship between these courts and the Court of Justice for decades to come. For an in-depth analysis see *inter alia* CHRONOWSKI, NÓRA: *„Integrálódó" alkotmányjog*. Budapest–Pécs: Dialóg Campus, 2005.

of 'meta-rules'[5] during the everyday application of EU law, which reflect the specialities of European integration and are also in tune with the prevailing aims and goals of integration.

Before analyzing the grammatical, systematical, historical and teleological methods of interpretation in the context of EU law, a few general statements need to be made:

a) It would be misleading to regard the unique understanding of the well-known traditional methods of interpretation merely as tools which can only be used to demonstrate the result of interpretation already inherent in the EU legal norms. In the EU legal order, the aim of interpretation is not only to show the existing content: a legally justifiable decision needs to be deduced from all the relevant elements of the situation and the context of the wording of a given norm. It needs to be shown that the result of interpretation – the decision taken – is justifiable in accordance with the rational application of the rules of interpretation, and moreover, that a better or more justifiable decision does not exist at all.

b) A distinction needs to be made between the methods used for constructing arguments, on the one hand, and the rules of primary EU law regulating the admissibility of these methods. It is a question of methodology, whether a certain interpretation can be deduced from the wording of a regulation of a legal norm, or whether the result must be seen as an act of developing the law further via interpretation. But whether the judicial development of law is permissible regarding a given subject is much more a question of a 'constitutional' nature. For example, in connection with sanctions based on EU law, such extensive interpretation is squarely forbidden ('nulla poena sine lege'), whereas it is permissible regarding many other areas.

c) The Court of Justice of the European Union[6], which – according to Article 19 TEU (formerly Article 220 TEC) – shall ensure that in the interpretation and application of the Treaties the law is observed, and acts as the final and authentic forum of interpretation of EU law, has over the past decades developed a unique methodology of interpretation characteristic only of Union law. The Court mostly utilizes arguments and methods of interpretation also known and used in national law. The methods and arguments are, however, weighed differently, according to a unique, EU-centric point of view. On the other hand, the Court also employs

[5] Thomas Oppermann – Claus Dieter Classen – Martin Nettesheim: *Europarecht.* München: C. H. Beck Verlag, 2009, 195.

[6] On the role of the Court of Justice in legal interpretation see: Rudolf Streinz: Die Auslegung des Unionsrechts durch den EuGH. Eine kritische Betrachtung. In Stefan Griller – Heinz Peter Rill (Hrsg.): *Rechtstheorie: Rechtsbegriff – Dynamik – Auslegung.* Wien–New York: Springer, 2004, 387.

methods and argumentation techniques unknown in national legal orders. Owing to the set of 'meta-rules' rooted in the 'virtual constitution' of the European Union (the written and unwritten sources of primary EU law), the sovereignty-centric interpretation applied in general international law is overshadowed by a goal- and purpose-centric methodology of Union law interpretation.[7]

d) Apart from the authentic interpretation by the Luxembourg Court, another interpretation of Union law usually also emerges: the European Commission aims to orientate those who apply the law, by providing a kind of 'official' interpretation in its official statements and positions.[8] Although such proclamations by the Commission are not legally superior to statements by any other institution, still, an increased importance is attributed to the legal opinion of the Commission, no doubt as a consequence of the its role as the 'guardian of the Treaties'.

2.2. Problems of grammatical interpretation

In the EU legal order, similarly to national law or international law, the starting point of interpretation is always the text of Treaty or the secondary legal norm. The method used aims to reveal the usual and natural meaning of words in the context of a given sentence. In many areas, however, concepts have emerged which are to be used independently from their general meaning in a given language community. The completion of this task at the EU level is extremely difficult, given that the Union operates with 23 authentic and 23 official languages: the Treaties are authentic in 23 languages, secondary EU legal norms are drafted and published in 23 official languages. The fact that the circle of working languages is often reduced does not make grammatical interpretation of EU law any easier. The Court of Justice has in some cases made a particular statement by having regard to the 'acte claire' doctrine (of French origin): according to this principle, in the case of a clear and unambiguous wording, no further methods of interpretation need to be applied.[9] In other cases the Court will not be content with the outcome, and introduce a further method: for example it utilised the teleological method to acknowledge the direct effect of certain directives, even though the definition of directives in Article 288 TFEU (ex Article 249 EC-Treaty) can be seen as mostly clear and unambiguous.[10]

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[7] See most recently Case T–251/00 Lagardère and Canal v. Commission, *ECR* 2002, II–4825, 72.; or Case T–22/02 and T–23/02 Sumitomo Chemical, *ECR* 2005, II–4065, 41.

[8] See for example Case C–57/95 France v. Commission, *ECR* 1997, I–1627.

[9] See for example Case 79/77 Kühlhaus Zentrum v Hauptzollamt Hamburg, *ECR* 1978, 611., 619.

[10] See for example Case 101/78 Granaria BV v Council and Commission, *ECR* 1979, 01081, 623.

2.3. Systematical interpretation: yes – historical interpretation: barely

Should the grammatical approach not yield a binding result, then the arguments rooted in the system of the founding Treaties and the secondary sources of EU law come to the foreground. The Court of Justice regularly uses this method, which is acknowledged in constitutional law and international law as well.[11] Essentially, systematical argumentation aims to prove that a possible decision would be incompatible with another rule of the EU legal system, or on the contrary that it supports and confirms another rule of Union law. The systematical and teleological (see below) methods of interpretation are in fact in this case intertwined.

Sytematical interpretation rests on the requirement of a unified system of EU law.[12] Within this method of interpretation, an enhanced emphasis is laid on interpreting secondary EU norms in conformity with the primary sources of Union law.[13] The hierarchy of sources of law requires on the one hand that secondary norms be interpreted in such a way that they are in conformity with the relevant sources of primary law. On the other hand, arguments derived from secondary sources of law may in many cases be relevant in concretizing the subject-matter of certain sources of primary law. This latter, converse direction obviously may not produce a binding result – although the interaction between primary and secondary sources of EU law is not always clear-cut.[14]

While interpreting norms of the EU legal order, unlike the grammatical, systematical and teleological systems of argumentation, historical interpretation of EU Treaties and legal acts is only made use of in a very restricted manner. The original intent of the lawmaker could obviously be of interest.[15] However, historical interpretation in the context of EU law can prove problematic from a methodological point of view. These problems then in turn deteriorate the weight of the arguments derivable via this method. To name only a few of these problems: who shall be regarded as the lawmaker in the complex and multilateral process of concluding international treaties[16], how can the situations lacking full consensus be identified, what value should be attributed to the views present at

[11] See for example Case 101/63 Albert Wagner v Jean Fohrmann and Antoine Krier, *ECR* 1964, 417.

[12] See for example Case C–499/04 Werhof v. Freeway Traffic Systems, *ECR* 2006, I–2397.

[13] See for example Case C–314/89 Siegfried Rauh v Hauptzollamt Nürnberg-Fürth, *ECR* 1991, I–1647.

[14] See for example Case C–471/04 Finanzamt Offenbach am Main-Land v Keller Holding GmbH, *ECR* 2006, I–2107.

[15] See for example Case 15/60 Gabriele Simon v Commission, *ECR* 1961, 239, and Case 1/72 Rita Frilli v Belgium, *ECR* 1973, 457.

[16] For an anglo-saxon perspective see Nial Fennelly: Legal Interpretation at the European Court of Justice, 20 Fordham Int'l L.J. 656 (1996), http://ir.lawnet.fordham.edu/ilj/vol20/iss3/4 .

the time of the construction of the norm, when the lawmakers evidently could not have foreseen the current state of affairs? Historical interpretation is often not much more than simple speculation[17], still, it needs mentioning that, especially baring the most recent reform of the Treaties and the new European legal order emerging as a consequence in mind, historical interpretation is now possible and necessary more often than usual. This is the case as the Constiutional Treaty, which can be regarded as a forerunner of the Reform Treaty, and the finally adopted version of the Lisbon Treaty have quite a number of similarities content-wise, and the circumstances of their adoption differ considerably from earlier amendments of the Treaties.[18]

Owing to the abovementioned concerns, not much value is attributed to the historical method of interpretation. This is further accentuated – from a kind of constitutional point of view – by the fact that the institutions of the European Union themselves regards the EU legal order as a dynamically evolving, constantly shifting construct, subject to the (also changing) goals of European integration.

2.4. Teleological interpretation: a principle reinforcing the constitutional character of the Treaties

When interpreting EU law, increased significance is attributed to the teleological method of interpretation, which takes its cue from the aims and goals of European integration and the European Union. According to this method, when faced with multiple possible outcomes of interpretation, the one should be supported with the help of which the normative goal can be achieved.[19] It is well known that the Court of Justice uses the teleological method with additional emphasis in comparison to other methods, thus clearly reinforcing the constitutional character of the founding Treaties. The increased role of the teleological method of interpretation also makes it possible to accept the dynamic nature of the Treaties, in line with the interpretation of European integration as a process – as already pointed out by the Court of Justice in 1963 in the landmark Van Gend en Loos case.[20] It is of course also true that the Court of Justice has in some cases used the teleological method of argumentation in a somewhat daring manner.

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[17] For an opposing view see WALTER GEORG LEISNER: Die subjektiv-historische Auslegung des Gemeinschaftsrechts. Der „Wille des Gesetzgebers" in der Judikatur des EuGH. *EuR* 2007/6, 689.

[18] See MATTIAS WENDEL: Renaissance der historischen Auslegungsmethode im europäischen Verfassungsrecht? *ZaöRV* 68 (2008), 803.

[19] See for example Case C–434/97 Commission v. France, *ECR* 2000, I–1129.

[20] Case 26/62 Van Gend & Loos, *EBHT* 1963, 24.

This statement is underlined by those judgments which were delivered by the Court of Justice regarding the uniform interpretation and application of EU law, the direct effect of certain provisions of the founding Treaties, the supremacy of EU law or the liability of Member States for damages towards private persons in connection with the breach of Union law.

When using teleological interpretation, the Court of Justice develops its argument most often in accordance with the pre-defined normative aims. In these cases, the Court refers to "the spirit and the scheme" of the Treaties, or passes it's judgments based on the aim of the legal norm or the objective aim of the lawmaker. To take the point of view that the teleological method operates by utilizing predefined goals would flawed or at least not be entirely true. It is true that the Treaties provide numerous points of reference that are helpful in indentifying the prevailing aims and goals of integration – but, it is also a fact that the EU institutions which are in a position to make (interpretational) decisions – especially the Court of Justice – in most cases have to themselves decide which goal of integration can be regarded as "relevant" in a normative sense at a given time and in a given place, in a specific individual case.

The Court has in this regard introduced numerous functional and material viewpoints into the methodology of teleological interpretation. The intention of the Court for example to interpret the powers of the EU in such a way so as to provide the Union with a possibility to act that allows for the most effective realization and implementation of EU policies, rests on a functional argument: such tendencies are underlined by the 'principle of the functioning of the Community' or the principle of 'institutional balance'. The most talked-about principle of effectiveness, the so-called 'effet utile' principle has become the most defining point of view of teleological interpretation in the case law of the Court of Justice.[21] According to the 'effet utile' principle, the norm has to be interpreted in a sufficiently broad manner, opening up the way towards reaching the most practical and 'useful' outcome of interpretation – to achieve this, the interpreter has to utilize all available possibilities emanating from the norm in order to come to the appropriate conclusion.[22]

The intent of the Court to hammer home the idea that the principles of democracy and the rule of law need to prevail within the European Union rest on rests on a material viewpoint – this is another strongly emphasized standpoint in the teleological system of argumentation utilized by the Court. This point of view has not only prompted the Court to institute and protect the system of the

[21] See for example Case 8/55 Fédéchar Charbonniére de Belgique v High Authority, *ECR* 1955/56, 312.

[22] Rudolf Streinz: Der „effet utile" in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften. In Ole Due – Marcus Lutter – Jürgen Schwarze (Hrsg.): *Festschrift für Ulrich Everling.* Baden-Baden: Nomos Verlagsgesellschaft, 1995. 1491.

general principles of EU law, but was also used in the concrete interpretation of secondary EU legal norms.

When defining and concretizing the content of normative goals, and considering different alternatives of interpretation, the comparative technique of interpretation also plays an important role. The method is used mostly when comparing different national legal systems, but sources of international law are also taken into account.

The method of teleological interpretation has given way to such functional arguments which are relevant from the point of view of the division and delimitation of competences among the institutions of the European Union, such as whether its is reasonable (and if yes, to what extent) to overstep grammatical interpretation and venture into the realm of judicial lawmaking – keeping in mind the relationship between traditional judicial powers and democratic lawmaking.

2.5. The correlation between the outcome of interpretation and legal certainty

The previously demonstrated method may lead to different outcomes in a given case. In cases before the Court of Justice, it is very rare that a decision of interpretation is really – in the strictest sense of the word – mandatory. It is much more common, that the utilization of the different methods of interpretation and techniques of argumentation lead to more than one different, but still supportable outcomes. In these cases, the question is which the most convincing one from among all the possible and equally supportable versions is. In taking this final step, prejudication might be necessary – in the good sense of the word. The starting point is that an already taken decision in its own time and context has been the most convincing one among the supportable outcomes. The requirement of legal certainty is of course a crucial condition: the system of legal remedies of the European Union, as an essential element of a system aiming to maintain its own operability, can only truly fulfil its role if a decision in a given case is able to function as a guideline for the future for legal entities. This is especially true regarding the Court of Justice of the European Union, as its judgments need to be followed all throughout the EU.

If at a later point in time a decision partly or wholly divergent from the previous outcome seems rational and practical, then its needs to be shown that the situation at hand differs substantially from the previous situation. If, however, there exists a significant similarity between the preceding and the current situation, then it needs to be proven why from among all the supportable outcomes why an outcome different from the previously most convincing one

needs to be selected in the situation at hand. The burden of proof in this case obviously rests on the actor wishing to support the need to depart from the previously cemented outcome of interpretation.

Mechanical or schematical rules for selecting and justifying the choice of decision from among the supportable outcomes practically do not exist. A necessary 'sense of justice', familiarity with previous judicial interpretation, sufficient knowledge of the relevant facts of a situation and a high level of discursive faculty and preparedness can guarantee that the from among the reasonably supportable outcomes, the entity entitled to take a decision will choose the most convincing version, and thus come to the a conclusion in a given situation that is most in line with the aims and goals of European integration.

3. Concluding remarks

The body of law serving as the basis of European integration has, over the course of six decades of development, been extended, supplemented and modified. The decades long fragmentation of the primary sources of EU law and the varying intensity of regulation of the secondary sources depending on the area of law in question has led to a wide-ranging, detailed but dispersed body of law. The internal rationale of integration however needs uniform interpretation and – as far as possible – uniform application in the Member States. The practice of interpretation outlined in the present paper developed and matured with in the notion of this duality in mind. The European Union strives also with the help of this unique practice of interpretation to live up to the standard of the rule of law. The ordinary legislative procedure and a number of other legal novelties introduced by the Lisbon Treaty provide a possibility for the abstract-general lawmaking to move in the direction of a more simple and transparent body of law.