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Editorial

The Centre for European Research and Education is pleased to present the first issue of the Pécs Journal of International and European Law (PJIEL). The PJIEL aims to provide a platform for the publication of analysis and research relating to international law and European law, with specific attention devoted to legal developments in the Western Balkans. The additional Western Balkans focus of the PJIEL originates from the editors' firm belief that the legal developments in the states of the aforementioned geographic area, and the process of their European integration is to be regarded as one of the most crucial and topical issues on the European continent.

The journal is published electronically twice a year by the Centre for European Research and Education of the University of Pécs, Faculty of Law. The PJIEL, as an open access journal, covers international law (public as well as private) and European Union law subjects. Articles are submitted to anonymous peer review before publication. As regards sections, the journal comprises of the following:

- *Articles* : longer studies regarding relevant issues of international and European law;
- *Case notes and analysis*: shorter reflections on recent judicial or other legal developments;
- *Legal developments in the Western Balkans*: Focusing on the states of the Western Balkans, especially (but not limited to) their relations with the European Union;
- *Book reviews*: reviews of books or collected volumes dealing with issues relevant to the journal.

The editors are very grateful for the work provided by the journal's editorial board, and for their ongoing support regarding our efforts to make the PJIEL a truly noteworthy forum for scientific publication. Our editorial board members are Władysław Czapliński *(Warsaw University)*, Gilbert Gornig *(Philipps University of Marburg)*, Tamás Lattmann *(National University of Public Service)*, Nives Mazur-Kumric *(University of Liège)*, András Osztovits *(Károli Gáspár University of the Reformed Church)*, Gábor Sulyok *(István Széchenyi University)*, Jorn van Rij *(InHolland University of Applied Sciences)* and Norbert Tóth *(National University of Public Service)*.

The publisher of the journal, the Centre for European Research and Education (CEERE) was originally established in 1996 and incorporated into the Faculty of Law of the University of Pécs in 2000. It has 14 years of experience in curricula development, providing courses on European integration issues, editing publications, organizing conferences and roundtable debates on EU policies and law. The University of Pécs is one of the biggest state universities in Hungary, and plays a significant role in higher education on national and international level as well as in the academic, economic and social life of the region. As one of the most prestigious legal education institutions of Hungary, the Faculty of Law celebrated the 90th anniversary of its establishment in 2013.

The debut issue of the PJIEL deals with various current issues of international and European law which all deserve scientific. *Adrienne Komanovics* evaluates recent developments regarding the strengthening of UN human rights treaty bodies. *Anikó Szalai* assesses the prospects of a more unified international protection regime for minorities and the rights of indigenous peoples. *Ágnes Töttős* explores the past, present and future of the EU's Seasonal Workers Directive. *Melinda Szappanyos* takes a comparative approach to analysing the content and enforcement of the right to education in higher education in Council of Europe member states and in the Republic of Korea. *Jorn van Rij* looks at human trafficking and prostitution policy from a European criminological perspective. *Norbert Tóth* and *Balázs Vizi* deliver the Western Balkans-focussed article of the issue when they look at the international law obligations

relating to minority rights regarding Kosovo. Finally, *Veronika Greksza* and *Johannes Hermann* provide a review of Christoph Grabenwarter's Commentary of the European Convention on Human Rights.

We encourage you, also on behalf of the editorial board, to consider the PJIEL as a venue for your publications. With your contributions, PJIEL aims to become a trustworthy and up-to-date journal of international and European law. The next formal deadline for submission of articles is 9 February 2015, though submissions are welcomed at any time.

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Strengthening the Human Rights Treaty Bodies: A Modest but Important Step Forward

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In less than a decade, the size of the treaty body system has doubled without commensurate resources. Such an unprecedented increase generated paralyzing backlogs of States parties' reports and individual communications. In addition, the proliferation of human rights treaties and monitoring bodies sometimes resulted in divergent interpretation. Thus, measures to enhance state compliance as well as to ensure coherence among the various provisions covering identical issues can no longer be delayed.

In addressing these challenges, the UN High Commissioner for Human Rights launched a project for strengthening the treaty bodies in 2012. She submitted a report setting out various recommendations. The key proposals of the report included establishing a comprehensive reporting calendar ensuring strict compliance with human rights treaties and equal treatment of all States parties. In addition, the report suggested the enhancement of visibility of processes, as well as a more careful selection of Committee members. Many of these proposals were endorsed by the General Assembly, while others were ignored. Despite its flaws, this process is the first successful strengthening of the human rights bodies in 50 years, and paves the way to effectively tackle the challenges faced by the treaty bodies even though only through an incremental process.

Keywords: human rights; implementation; compliance; human rights instruments; human rights treaty bodies; strengthening of the UN human rights treaty bodies

1. Introduction

The establishment of the United Nations in 1945, and the provisions of the United Nations Charter provided a basis for a comprehensive system of human rights protection. Since then, a great number of treaties have been adopted at universal, as well as at regional level. The focal points of human rights 'legislation' in the UN is the Universal Declaration of Human Rights[1] and the Convention on the Prevention and Punishment of the Crime of Genocide.[2] These were followed by two Covenants, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Apart from these, various subject-specific conventions has been adopted.[3] The provisions of the Covenants are relatively brief, more general and thus granting a relatively wide freedom to Contracting Parties to choose the measures they deem appropriate to realise the goals. The specialised

[1] UDHR adopted by the UN General Assembly on 10 December 1948 in Paris.

[2] Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Resolution 260 (III), Paris, 9 December 1948.

[3] For the list of core international human rights instruments, visit http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx. Details of the treaties will be considered in Part Three titled 'Current Mechanisms'.

conventions, on the other hand, are more elaborate on States Parties' obligations; nevertheless, they still allow certain room for discretion.[4]

The objective of this paper to provide an overview of the complex situation relating to the implementation of, or compliance with, the core universal human rights treaties, as well as the enforcement of the views and judgments of the monitoring bodies set up by the named treaties. Thus, it neither aims to cover other regional mechanism, nor the so-called Charter-based machinery.[5]

Based on Jacobson and Weiss,[6] this paper uses the following terminology. The term 'implementation' will be used to refer to "measures that countries take to effectuate international treaties in their domestic law", whether the treaty is self-executing or not, and thus requires national legislation to transpose the treaty provisions. Compliance refers to "whether countries in fact adhere to the agreement's provisions and to the implementing measures". Thus it covers both substantive and procedural obligations. The authors complement these with the notion of compliance with the spirit of the treaty. Compliance thus includes compliance with matters of substance, compliance with obligations of a procedural nature, and compliance with the broad normative framework of the treaty.[7]

Against this conceptual background, Part Two of this contribution deals with the relation between international and domestic legal order, and the various mechanisms developed by the States to receive international legal norms into their national legal order. Part Three provides a brief general description of the current mechanisms, highlighting the main flaws of the protection of human rights at UN level. Part Four considers the recommendations formulated by the High Commissioner for Human Rights and other stakeholders with a view to enhance compliance by States Parties of their human rights obligations and the effectiveness of monitoring by the treaty bodies. Part Five concludes with the examination of Resolution 68/268 adopted by the General Assembly to respond to these challenges.

2. The Relations Between the International and Domestic Legal Order

As a preliminary issue, it must be recalled that as far as compliance with international treaties and, in relation to that, implementation techniques are concerned, much depends on the relationship between public international law and the domestic legal order of a particular State. In States following the *monist*

[4] *E.g.* in Art. 4 the CERD imposes an obligation on States Parties to criminalise acts of racial discrimination, in Article 6 the duty to provide effective remedies, but it does not prescribe e.g. the actual severity of the penalties, or the methods of effective remedy.

[5] On the UPR see *e.g.* J. Vengoechea-Barrios, *The Universal Periodic Review: A New Hope for International Human Rights Law or a Reformulation of Errors of the Past?* 12 Revista Colombiana de Derecho Internacional 2008, pp. 101-116; E. Domínguez Redondo, *The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session*, 7 Chinese Journal of International Law 2008, pp. 721-734; Komanovics, Adrienne, *The Human Rights Council and the Universal Periodic Review: Is it more than a public relations exercise?* in: Balogh Zsolt György (ed.), Essays of Faculty of Law University of Pécs, Yearbook of 2012, Pécs 2012, pp. 119-146; Komanovics, Adrienne & Mazur-Kumrić, Nives, *The Human Rights Council and the Universal Periodic Review: A novel method of promoting compliance with human rights*, in: Tímea Drinóczi, Mirela Župan, Zsombor Ercsey, Mario Vinković (eds.), Contemporary legal challenges: EU – Hungary – Croatia, Pécs-Osijek 2012, pp. 641-669.

[6] Weiss, Edith Brown and Jacobson, Harold K., *Getting Countries to Comply with International Agreements.* Environment, Jul/Aug 1999, Vol. 41 Issue 6, pp. 16-20 and 37-45, at p. 18. See also Harold Jacobson and Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project*, Global Governance Vol. 1, 1995, pp. 119-48. See also L.J. LeBlanc, A. Huibregtse & T. Meister, *Compliance with the reporting requirements of human rights conventions*, The International Journal of Human Rights, Vol. 14, No. 5, 2010, pp. 789–807, p. 790.

[7] LeBlanc et al. 2010, p. 790.

approach, international treaties will automatically be part of the national law as a result of their ratification. Courts will, however, rely on it only if these treaties can be regarded as self-executing, i.e. "the relevant provision creates a right that can be relied upon directly before it without further steps being needed by way of legislative or other state action".[8] Even then, national courts might be reluctant to make use of what is seen as 'foreign' law.[9] In States following the *dualist* approach, further legislative action is needed subsequent to the ratification of treaties to be enforceable in the national legal order. The rank of the treaty, and other related issues must be set out in the legislation incorporating the treaty in the national legal order.[10]

In relation to international treaties, the United Nations Convention on the Law of Treaties (VCLT), reflecting customary international law, provides in Article 26 that once consent to be bound has been expressed and the treaty has entered into force, the treaty shall be kept by the parties in good faith (the principle of *pacta sunt servanda*). The scope of this principle in the context of human rights treaties was further clarified by the Human Rights Committee. General Comment 31 provides that the obligation to give effect to treaty rights binds all branches of the State, requiring the State to take legislative, administrative, judicial and other measures.

> … All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local, are in a position to engage the responsibility of the State party. The executive branch that usually represents the State party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Although article 2, paragraph 2, allows States parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States parties with a federal structure of the terms of article 50, according to which the Covenant's provisions "shall extend to all parts of federal states without any limitations or exceptions".[11]

In order to ensure respect for the rights of persons and groups, by ratification of or accession to the Covenant States are required to adopt measures to ensure full realization of Covenant rights. In the same General Comment, the Human Rights Committee argued, that

> Article 2, paragraph 2 [of the Covenant], requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2

[8] David Harris, Michael O'Boyle & Colin Warbrick, *Law of the European Convention on Human Rights*. Oxford University Press, Oxford, 2009, p. 24.

[9] Ibid.

[10] Ibid.

[11] Para. 4, General comment No. 31: The Nature of the General Legal Obligation. Adopted on 29th March 2004, its 2187th meeting.

> requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. *Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law*. The Committee takes the view, however, that *Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order*. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.[12]

Despite the *pacta sunt servanda* principle, as laid down generally by the VCLT and specifically by the human rights treaties, States have developed various judicial techniques to avoid having to apply international law, or to deal with cases involving international law. [13]

A further factor influencing compliance with international obligations is the lack of detail or clarity of treaty provisions, which is inherent in international texts having regard to the whole process of international law-making. In such a situation, and without guidance from the treaty bodies, even the most human rights-committed national judges and authorities may interpret or apply international obligations incorrectly.[14] In a situation where an issue has not been ruled upon by human rights treaty monitoring bodies, national courts will have no choice but to adopt their own interpretation, which might vary from State to State.[15] In addition, the meaning attributed to a specific treaty provision by one court in a given State Party might be at variance with the interpretation of the same provision by another national court.

The situation is a bit different if the issue has already been addressed by the treaty bodies: here jurisprudence *can* provide guidance. National courts are, however, clearly *not bound* to follow the interpretation of treaty bodies developed in previous cases. While most UN treaty bodies have the mandate to adopt "views", these are devoid of binding force.[16] Nevertheless, there are a number of arguments in support of the view that States are required to respect and enforce the views issued by these committees. These include the basic obligation of *pacta sunt servanda*, the more specific obligation "to

[12] Ibid., para. 13, emphasis added.

[13] Jan Klabbers, *International Law*, Cambridge University Press, 2013, p. 287. See also H. H. Koh, *Why do Nations Obey International Law?* Yale L.J., Vol. 106 No. 8, 1997, pp. 2599–2659; R. Goodman & D. Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, EJIL, Vol. 19 No. 4, 2008, pp. 725–748; T. M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990; O. C. Okafor, *The African Human Rights System, Activist Forces and International Institutions*, Cambridge University Press, 2007, pp. 12–62 (focusing primarily on relationship between institutions and domestic forces). – See e.g. the so-called 'political questions' doctrine, or the act of state doctrine, Klabbers 2013, p. 301.

[14] "Traditionally, courts are often seen to show a preference for relying primarily on national law in their jurisprudence. However, national courts have developed a growing awareness of their role in applying relevant international standards, though practice differs considerably. "Ilias Bantekas & Lutz Oette, *International Human Rights Law and Practice*, Cambridge University Press, 2013, pp. 79-80.

[15] Harris et al. 2009, p. 25.

[16] "The types of decision differ between treaty bodies and courts. Proceedings before UN treaty bodies and regional human rights commissions are quasi-judicial and such bodies adopt decisions. There is a continuing debate about the legal nature of these decisions, which some bodies refer to as 'views' or 'opinions'. Some observers, and frequently states parties or domestic courts … claim that they are purely recommendatory. The formal arguments put forward in support of this position are not very convincing. While there is general agreement that they are not binding as such, it is appropriate to see these decisions as 'authoritative interpretations' of the respective treaties that determine to what extent, if any, a state has failed to comply with its obligations. As a consequence, states parties are required to take the necessary measures to remedy any violations found and bring their conduct in conformity with their obligation to give effect to treaties, such as required under article 2 ICCPR." (References omitted.) Bantekas & Oette 2013, pp. 296-297.

respect and to ensure" the rights recognized in the relevant human rights treaty (see e.g. ICCPR Article 2), and finally the implicit obligation that a State Party having accepted the possibility of individual communications also accepted the obligation to comply with the recommendations formulated during the consideration of individual communications.[17] It is argued that rejection of the "views" is "good evidence of a State's bad faith attitude towards its ICCPR obligations".[18]

3. Current Mechanisms

3.1. General Description

Since its inception, the UN has been very active in the promotion of human rights. Standard-setting started with the adoption of the Universal Declaration (1948) and was followed by various treaties which, taken together, are also called as the International Bill of Human Rights. Albeit the Declaration is not technically legally binding, it is regarded as the consensus of global opinion on fundamental rights. At the moment, there are nine core international human rights treaties, most of them complemented by optional protocols, focusing on certain sets of rights (civil and political rights; economic, social and cultural rights), expanding on a certain right (prohibition of racial discrimination, prohibition of torture) or providing protection to various vulnerable groups (women, children, migrant workers, disabled persons). Each of these treaties has established a committee of experts to monitor implementation of the treaty provisions by its States parties. Some of the treaties are supplemented by optional protocols dealing with specific concerns, or allowing for individual communications.[19]

[17] Article 5(4) of ICCPR-OP1 provides that the Committee shall forward its views to the State Party concerned and to the individual. – "However, it would be wrong to categorize the Committee's views as mere 'recommendations'. They are the end result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them. It would be incompatible with these preconditions of the procedure if a state that voluntarily has subjected itself to such a procedure would, after first being one of the two parties in a case, then after receiving the Committee's views, simply replace the Committee's position with its own interpretation as to whether there has been a violation of the Covenant or not. …the presumption should be that the Committee's views in Optional Protocol cases are treated as the authoritative interpretation of the Covenant under international law." R. Hanski & M. Scheinin, *Leading Cases of the Human Rights Committee*, 2nd revised edition, Turku: Institute for Human Rights, Åbo Akademi University, 2007, p. 23. See also Keller & Ulfstein, *UN Human Rights Treaty Bodies. Law and Legitimacy*, Cambridge UP, 2012, pp. 92-100.

[18] S. Joseph, J. Schultz & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd edn, Oxford University Press, 2004, p. 24. See also H.J. Steiner, R. Goodman & P. Alston, *International Human Rights in Context: Law, Politics and Morals*, 3rd edn, Oxford University Press, 2008, p. 915; and C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd edn, Oxford University Press, 2008, p. 220.

[19] The text of these core human rights treaties is available at http://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf and http://www.ohchr.org/Documents/Publications/newCoreTreatiesen.pdf.

Table 1: Core Human Rights Treaties

Date of adoption	Core human rights treaties
1965	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
1966	International Covenant on Economic, Social and Cultural Rights (ICESCR)
1966	International Covenant on Civil and Political Rights (ICCPR)
1979	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
1984	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
1989	Convention on the Rights of the Child (CRC)
1990	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)
2006	Convention on the Rights of Persons with Disabilities (CRPD)
2006	International Convention for the Protection of All Persons from Enforced Disappearance (CPED)

The bodies established by the treaties are international committees of independent experts, with a membership ranging from 10 to 25. Members are chosen with a view to equitable geographic distribution and adequate representation of different legal systems and cultures. Members are nominated and elected by the States parties to the relevant treaty from among their nationals for a renewable four years. They serve in their individual capacities.

The mandate of these treaty bodies includes the review of periodic reports and, depending on the treaty and its optional protocol, the consideration of individual or inter-State communications, or the conduct of country-visits.

Table 2: Activities and Functions of Treaty Bodies[20]

Activities and functions of treaty bodies	Treaty bodies									
	CERD	CESCR	HRC	CEDAW	CAT	SPT	CRC	CMW	CRPD	CED
Examination of State reports / Concluding observations	✓	✓	✓	✓	✓		✓	✓	✓	✓
Individual communications	✓	✓	✓	✓	✓		✓	✓	✓	✓
Inter-State complaints	✓	✓	✓	✓	✓		✓			✓
General comments	✓	✓	✓	✓	✓		✓	✓	✓	✓
Inquiry procedure through country visits*		✓		✓	✓	✓	✓		✓	✓
Follow-up procedure	✓	✓	✓	✓	✓	✓				

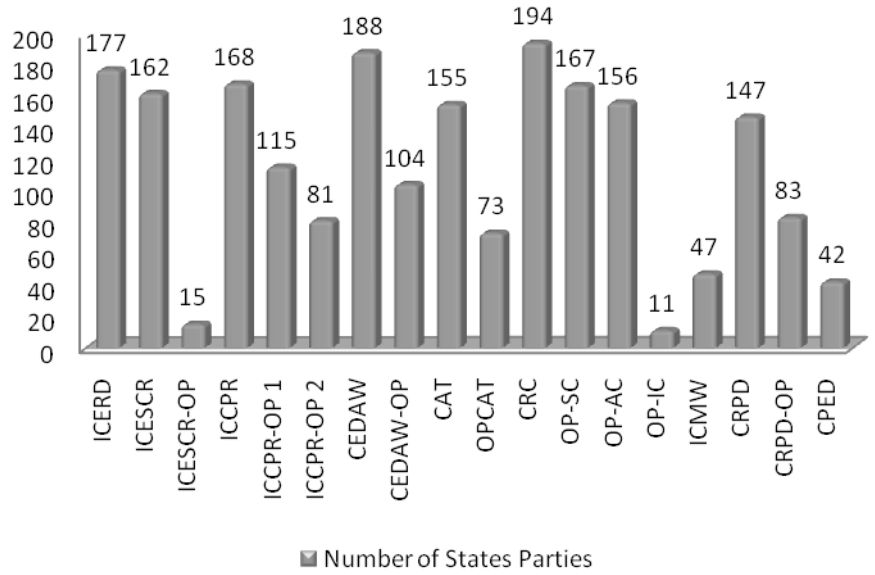
* To investigate well-founded allegations of systematic violations of human rights

As of July 2014, the status of ratification of international human rights instruments is as follows.[21]

[20] Based on International Service for Human Rights (ISHR), *Simple Guide to treaty bodies*, 2010, p. 34. http://www.ishr.ch/guides-to-the-un-system/simple-guide-to-treaty-bodies?task=view, reflecting the situation as of July 2014.

[21] As of 18 July 2014, https://treaties.un.org/Pages/Treaties.aspx?id=4.

Figure 1: Status of Ratification of International Human Rights Instruments



3.2. Challenges

The present situation is characterized by "low rates of compliance, large backlogs of reports, and unequal treatment of States parties."[22] The divergent periodicities of reporting arising from the core treaties create chaotic schedules as well as a heavy burden on States parties. Scarce human resources coupled with increasing workload of treaty bodies cause further delays in the reporting process, resulting in long delays between the submission and consideration of reports. The proliferation of human rights treaties and monitoring bodies is another flaw of the present system which can easily lead to divergent interpretation. Finally, criticism has been expressed in relation to the independence and impartiality, as well as the expertise of treaty body members in the field of the relevant treaty.[23]

In the words of the High Commissioner, the current legal and practical deficiencies of state compliance with treaty-obligations are the following.

> "Currently, … only 16% of States parties report on time[24]; and even with this low compliance rate, four out of nine treaty bodies with a reporting procedure are facing significant and increasing backlogs of reports awaiting consideration. ... The treaty body system is surviving because of the dedication of the experts, who are unpaid volunteers, the support of staff in OHCHR and States' non-compliance with reporting obligations. However, at a time when

[22] Questions and Answers on the Comprehensive Reporting Calendar prepared by the OHCHR, Human Rights Treaties Division, November 2012, available at http://www.ohchr.org/Documents/HRBodies/TB/HRTD/QAReportingCalendar.pdf p. 19.

[23] Questions and Answers on the Comprehensive Reporting Calendar (fn. 22) 2012, p. 4; Report of the United Nations High Commissioner for Human Rights on the strengthening of the human rights treaty bodies pursuant to Assembly resolution 66/254, GA/66/860, 26 June 2012 (hereinafter referred to as the HC Report 2012), pp. 12 and 25-26, and Guidelines on the independence and impartiality of members of the human rights treaty bodies (Addis Ababa guidelines), HRI/MC/2012, Addis Ababa, 25 to 29 June 2012, paras. 3 and 5.

[24] This figure is based on a calculation of reporting during the 2010-2011 biennium.

> human rights claims are increasing in all parts of the world, it is unacceptable that the system can only function because of non-compliance."[25]

Having regard to the poor compliance data, and based on the mandate given by General Assembly Resolution 48/141 to "rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness", the HC embarked upon an investigation on ways to strengthen the treaty body system. In its report of 2012, she made various recommendations, including new methods to ensure strict compliance with human rights treaties and equal treatment of all States parties, enhancing independence and impartiality of members of the human rights treaty bodies, ensuring the consistency of treaty body jurisprudence, increasing coordination between treaty bodies, and enhancing transparency.[26]

Following the launch of the intergovernmental process in 2012, the General Assembly adopted resolution 68/268 in April 2014 to address the challenges exposed by the report of High Commissioner. This part of the paper aims at identifying the flaws and defects of the current system.

3.2.1. Initial and Periodic Reports

Treaty bodies (with the only exception of SPT) receive and consider reports submitted by States Parties aiming at the examination of the level of the State's implementation of and compliance with its obligations under the treaties. Reporting provides an opportunity to take stock of the state of human rights protection within the jurisdiction of the States Parties. Whereas some of their functions are quasi-judicial, nevertheless the treaty bodies are not judicial bodies; they were created to monitor the implementation of the treaties.

In carrying out this task, treaty bodies have developed general comments or recommendations[27] interpreting provisions of their respective treaties both substantially and procedurally. These GCs provide substantive guidance on specific articles of the convention, or provide more general guidance for State Parties on topics such as how to prepare their reports to the treaty bodies.

Non-compliance with reporting obligations is due to various factors. First of all, contracting parties to human rights treaties (all with a very high number of participants) face *heavy reporting duties* (see Table 3). Presuming a State has ratified all nine core treaties and the optional protocols with a reporting procedure, it is obliged to prepare and submit approximately 20 reports within the short period of 10 years.[28] Certainly, such unpredictable and unbalanced schedule of deadlines, coupled with the Universal Periodic Review obligations, requires considerable resources and capacity. Delay in the consideration of State reports by the treaty bodies creates a need for considerable updating of information by the time of the dialogue.[29]

[25] P. 9 of Report of the United Nations High Commissioner for Human Rights on the strengthening of the human rights treaty bodies, Doc. A/66/860.

[26] HC Report 2012, p. 11.

[27] The actual designation differs in the treaties, but both disguises the same phenomenon. CERD and CEDAW use the term 'general recommendation'.

[28] HC Report 2012, p. 21.

[29] Ibid., p. 37.

Table 3: Reporting Periodicity Under the Treaties

Treaty	Initial report due within ...	Periodic reports due every ...
ICERD	1 year	2 years
ICESCR	2 years	5 years*
ICCPR	1 year	4 years**
CEDAW	1 year	4 years
CAT	1 year	4 years
CRC	2 years	5 years
CRC-OP-SC	2 years	5 years or with next CRC report
CRC-OP-AC	2 years	5 years or with next CRC report
ICRMW	1 year	5 years
CRPD	2 years	4 years
CED	2 years	***as requested by CED (art. 29(4)

* Article 17 of the Covenant does not establish a reporting periodicity, but gives the Economic and Social Council discretion to establish its own reporting programme.
** Article 40 of the Covenant gives the Human Rights Committee (HRC) discretion to decide when periodic reports shall be submitted. In general, these are required every four years.
*** Article 29 of the Convention does not establish a reporting periodicity.

Secondly, there is a *chronic under-reporting or long delay in the submission of reports by many States*. As implied in the previous paragraph, this is partly due to the heavy reporting obligations of States Parties to several, or all, universal human rights treaties. In view of this, some treaty bodies allow for late reports to be submitted with subsequent reports in the form of a 'combined' report. Furthermore, since 2006, States are required to submit a so-called *common core document (CCD)*.[30] This common base document provides general information on the State Party, such as basic facts and figures, its political and legal system, and other relevant information which, in turn, is used by all the treaty bodies in their reviews of States Parties' treaty compliance. It serves as a basis for all State reporting obligations under those UN human rights treaties which a particular State has accepted. States Parties are required to keep the CCD as current and up to date as possible. Additional treaty-specific reports are still required, but with somewhat more limited scope than previously.[31] Despite the fact that the use of CCD simplifies the preparation and presentation of national reports, as of July 2014, only 73 States parties have produced a CCD. As of 15 May 2014, twenty-two out of the 196 States Parties have submitted all their reports under the relevant international human rights treaties and protocols.[32] Table 4 contains information about/on non-reporting and late-reporting States.

[30] The core document was introduced in 1991 by the meeting of chairpersons of the treaty bodies as a way of reducing some of the repetition in the reports. Until 2006, this 'core document' submission was voluntary. The guidelines for CCD were reviewed in 2006. See "Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Documents," HRI/MC/2006/3, adopted at the 5th Inter-Committee Meeting of June 19-21, 2006, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2fMC%2f2006%2f3&Lang=en.

[31] "Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents" (HRI/MC/2006/3 and Corr.1).

[32] These are Belgium, Canada, Czech Republic, Fiji, Finland, Germany, Guatemala, Kuwait, Montenegro, Niue, Norway, Paraguay, Peru, Poland, Portugal, Russian Federation, Singapore, Slovakia, Tuvalu, USA, Uzbekistan, and Venezuela. Follow-up to General Assembly resolution 68/268 on strengthening and enhancing the effective functioning of the human rights treaty body system and to the decisions of the twenty-fifth meeting of Chairpersons

Table 4: Overview of Non-reporting and Late-reporting States by Treaties (15 May 2014)[33]

Treaties	No. of States parties (a)	Overdue initial reports (non-reporting)		Overdue periodic reports (late-reporting)		Total overdue report
		Number (b)	*Percentage*	*Number (c)*	*Percentage (c)÷[(a)-(b)]*	*Number*
ICCPR	168	23	13.7	59	60.7	82
ICESCR	162	29	17.9	37	27.8	66
ICERD	177	14	7.3	87	53.4	101
CAT	155	27	17.4	42	32.8	69
CEDAW	188	8	4.3	35	19.4	43
CRC	194	2	1.0	43	22.4	45
ICRMW	47	21	44.7	4	15.4	25
CRPD	144	52	36.1	0	0.0	52
ICPPED	42	20	50.0			20
Total	1,599	308 (19.3%)		307 (33.2%)		615

Since States are frequently delayed in submitting their reports and treaty bodies have also accumulated a serious backlog in the consideration of States Parties' reports, follow-up of concluding observations has gained momentum. While it is inherent in the system that all treaty bodies request States Parties to provide information on implementation of the recommendations contained in previous concluding observations in their subsequent reports, various committees (Human Rights Committee, CEDAW, CAT and CERD) require inter-sessional additional reports from States Parties. Adherence to periodicities would undoubtedly reduce the need for such inter-sessional additional information.

Notwithstanding the persistent high level of non-compliance with reporting obligations, treaty bodies do not have the necessary capacities to keep the pace with incoming reports: in March 2012, *treaty bodies faced backlogs* amounting to a cumulative 281 State Party reports pending consideration.[34] In addition, no automatic increase in resources emanate from new ratifications despite increasing the workload of the treaty body.[35] It has been shown that:

> … at current levels of ratification, if every state party would report as per prescribed periodicity, treaty bodies should review an average of 320 state party reports per year. However, the actual timely reporting compliance rate is at only 16%. Even at this level of noncompliance, the present backlogs are unsustainable.[36]

of the human rights treaty bodies pertaining to reporting compliance by States; Note by the Secretariat on Late and non-reporting by States parties; 4 June 2014; p. 5.

[33] Adapted from the following document: Follow-up to General Assembly resolution 68/268 on strengthening and enhancing the effective functioning of the human rights treaty body system and to the decisions of the twenty-fifth meeting of Chairpersons of the human rights treaty bodies pertaining to reporting compliance by States; Note by the Secretariat on Late and non-reporting by States parties; 4 June 2014; pp. 5-6.

[34] "For those treaty bodies that consider individual communications, the increasing number of petitions (an average of 480 individual communications pending in 2011) has also led to significant delays in this procedure." HC Report 2012, p. 23.

[35] Comprehensive cost review of the human rights treaty body system, Geneva, April 2013, pp. 3 and 10.

[36] Ibid., p. 11.

Table 5: Backlog of Treaty Bodies, as of December 2012[37]

	Number of concluding observations	Number of decisions and views	In-hand backlog of States Parties reports	Petitions pending consideration
Human Rights Committee	14	80	32	360
CERD	22	1	22	6
CESCR	12	n/a	50	n/a
CRC	36	n/a	107	n/a
CEDAW	20	6	30	15
CRPD	4	3	32	7
CED	1	n/a	4	n/a
CAT	17	25	25	100
CMW	4	n/a	5	n/a
TOTAL	130	115	307	488

To streamline examination of State reports, and following the practices established by CAT in 2007, two more treaty bodies (HRC and CMW) have adopted the optional reporting procedure of List of Issues Prior to Reporting (LOIPR).[38]

Long interval between submission and consideration has various drawbacks: it creates double reporting obligation for States Parties as relevant information will need to be updated at the time of examination, resulting in wasting the costs of translating State Party reports. In addition, States without the certainty that their report will be considered timely, or rather, with the certainty that their report will *not* be considered according to periodicities will be tempted to be less focused in their reports. Finally, treaty bodies are inclined to treat the reports in a comprehensive manner, covering all issues instead of focusing on major and/or timely issues.[39]

In view of in-hand backlog (the backlog of reports submitted but not considered), the General Assembly is frequently requested by the treaty bodies to increase their capacity through the granting of additional meeting time and related resources. These requests have sometimes been granted fully or partly, while in other cases they have not been acted upon.[40]

Finally, *the volume of documentation* represents another challenge to the efficient functioning of the human rights treaty bodies. In the last years, various measures have been taken to reduce the use of interpretation and documentation. Thus, in 2006, the Harmonized guidelines on reporting under the international human rights treaties established that "if possible, common core documents should not exceed 60-80 pages, initial treaty-specific documents should not exceed 60 pages, and subsequent

[37] Adapted from Comprehensive cost review 2013, p. 11.

[38] HC Report 2012, p. 31 – "This new reporting procedure (referred to as "lists of issues prior to reporting") consists of the preparation and adoption of a list of issues to be transmitted to a State party in advance of the submission of its periodic report: the State's response to this list will constitute its periodic report under the Convention, instead of a standard report submitted under traditional reporting guidelines. The State party that reports under this procedure will have fulfilled its reporting obligations under the Convention." Treaty bodies' lists of issues prior to reporting (targeted/focused reports), adopted at the Eleventh inter-committee meeting of the human rights treaty bodies, Geneva, 28–30 June 2010, HRI/ICM/2010/3, para. 8. – This procedure was later renamed as the simplified reporting procedure, see HC Report 2012, para. 4.3.1.

[39] Questions and Answers on the Comprehensive Reporting Calendar, 2012, p. 4.

[40] Comprehensive Cost Review, 2013, p. 10.

periodic documents should be limited to 40 pages". Still, the total cost of the current treaty body system amounts to 48.36 ? USD,[41] which could be reduced by the reduction of the working languages (and the translation costs) as well as the streamlining of annual reports.

3.2.2. Individual Complaints

Several treaty bodies have the power to consider individual communications. In this regard, the treaty bodies' activities are similar to that of a judicial forum, albeit their final views are not legally binding and there is no way to enforce their recommendations. The mechanism follows a general pattern.

Thus, the treaty body first examines the admissibility of the complaint (also called as communication). The complaint must meet, *inter alia*, the following conditions: the State Party has ratified the relevant treaty and explicitly recognized the competence of the treaty body to consider individual communications (*ratione personae*); the alleged violation relates to one of the rights listed in the applicable treaty and the State Party has not declared a reservation to the particular article (*ratione materiae*); the communication originates from the victim of the alleged violation; the author of the complaint has exhausted all domestic remedies; and the communication is not manifestly ill-founded.[42] If the complaint is deemed admissible, the Committee will send the complaint to the State Party, asking for clarification or a response by the State.

The treaty body will then consider the merits of the case in closed session. The Committee may find that no violation has taken place (and the procedure comes to an end), or on the contrary, that the State Party has violated the complainant's rights. In the latter case, the Committee formulates its views as well as recommendations, and calls upon the State to give effect to its recommendations. The treaty bodies stipulate a period of either 90 or 180 days within which the State party is requested to provide information regarding implementation of the relevant decision.

As with State reports, scarce human resources lead to considerable backlogs in the consideration of individual communications, which is made worse by the fact that certain States do not cooperate with the Committees despite frequent reminders to submit their comments.[43]

3.2.3 Independence and Expertise of Committee Members

As mentioned earlier, the treaty bodies are composed of 10 to 25 members, depending on the treaty, and are nominated and elected by the States Parties to the relevant treaty from among their nationals for a renewable four years. Here, the problems include substantive as well as procedural issues, such as:

- the selection and nomination of members are not transparent;
- members often have positions or links that might cast doubts on their impartiality, independence, and credibility;
- the elected members do not always have the necessary expertise,
- and may not be able to meet the demands of such positions (availability, and coping with the workload).[44]

[41] In 2012. See Comprehensive Cost Review 2013, p. 4.

[42] For the exhaustive list of admissibility criteria see the relevant treaty provisions. The list of core human rights treaties is provided in Table 1 above.

[43] HC report 2012, p. 23.

Having reviewed the major challenges, the next part gives a brief description of the recommendations formulated during the treaty body strengthening review process.

4. Recommendations

In the course of the process aiming at strengthening the treaty bodies, the High Commissioner for Human Rights formulated various proposals,[45] including the following:

- to create a comprehensive reporting calendar,
- to simplify and align the reporting process,
- to strengthen the individual communications procedures,
- to strengthen the independence and expertise of treaty body members,
- to strengthen the implementation of the treaties, and
- to enhance the visibility and accessibility of the treaty bodies.

These recommendations as well as proposals formulated by other stakeholders (treaty bodies, States, United Nations entities, civil society and national human rights institutions) during the treaty strengthening process will be examined in turn.

4.1. Comprehensive Reporting Calendar: Predictability and Stability in Reporting

The HC recalled that the current reporting deadlines created an unpredictable and unbalanced schedule of deadlines for the treaty bodies as well as States Parties. States Parties are lagging behind in submitting their reports, while the treaty bodies are delayed in the examination of these reports. Inevitably, the objective of the reporting procedure is adversely affected by such long delays. Thus, the HC proposed a single *Comprehensive Reporting Calendar*, based on a periodic five-year cycle. This cycle would involve a maximum of two reports per year for a State which is party to all the nine core human rights treaties. Furthermore, every report submitted would be examined one year following its submission.[46]

4.2. Simplified and Aligned Reporting Process: Introduction of the Simplified Reporting Procedure (SRP)

The proposal for *simplified reporting procedure*, to date known as List of Issues Prior to Reporting (LOIPR),[47] would assist States to meet their reporting obligations while improving the quality of reporting. At the moment, the reporting procedure consists of four stages (the submission of the report by the State; preparation of LOIs by the treaty body; submission of written replies by the State; constructive dialogue), which could be streamlined. According to the HC proposal, the basis of the state reporting

[44] Ibid., pp. 74-80.

[45] Ibid.

[46] HC report GA/66/860; Questions and Answers on the Comprehensive Reporting Calendar 2012, p. 3.

[47] This procedure was introduced by the Committee against Torture, followed by the Human Rights Committee and the Committee on Migrant Workers; all receiving positive feedback from States Parties. In fact, this procedure has led to shorter State reports. See Intergovernmental process on strengthening the Human Rights Treaty Body System. Thematic discussions and informal-informal meetings. 11-17 April 2013, p. 5.

would be the Common Core Document,[48] which would be then followed by a three-step cycle: first, the treaty body would send a questionnaire focusing on recommendations of the previous concluding observations. SRP questionnaires would not exceed 25 questions / 2500 words. Then the State party would submit its report based on the SRP questionnaire, followed by a dialogue conducted on the basis of the State party's report in reply to the questionnaire. This procedure, coupled with strict adherence to page limitations[49] would, in turn, reduce translation costs, as well as accelerate and facilitate the smooth working of treaty bodies.

Figure 2: Traditional Reporting Progress[50]

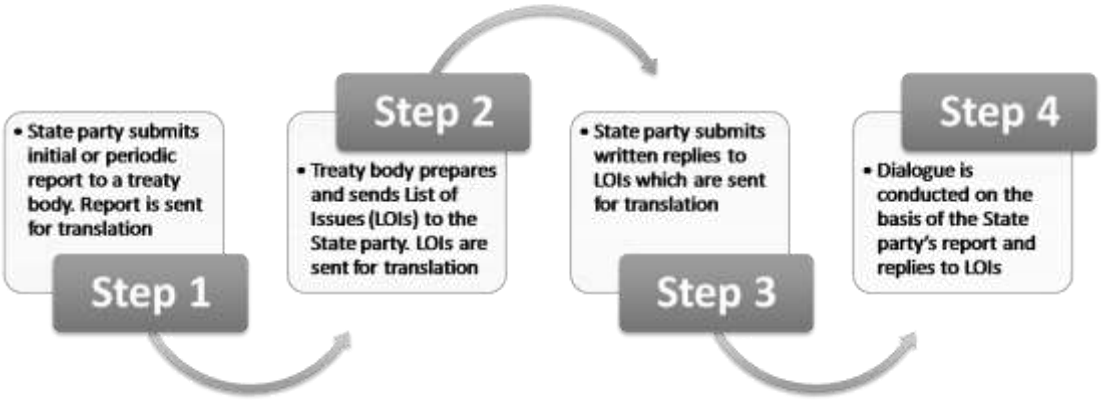
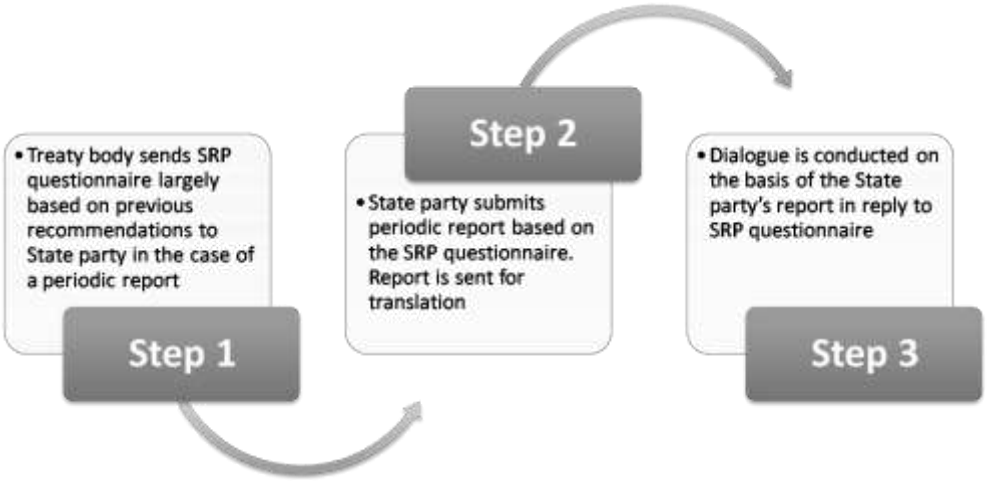


Figure 3: Simplified Reporting Procedure[51]



[48] Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a Common Core Document (CCD) and treaty-specific documents, HRI/MC/2006/3 and Corr. 1. – As of July 2014, 73 States have produced a CCD; taking China, China–Hong Kong and China–Macau as three separate items. See http://www2.ohchr.org/english/bodies/coredocs.htm.

[49] See page 13 of the Harmonized guidelines on reporting under the international human rights treaties (2006) and footnote 32. According to OHCHR data, in 2011, 64% of the periodic reports, and 33% of the initial reports exceeded the applicable page limit (40 and 60 pages, respectively). See p. 56 of HC Report 2012.

[50] Adapted from HC Report 2012, p. 50.

[51] Ibid.

In order to improve the efficiency of constructive dialogue, in its report the HC recommended better time management, increased discipline, stronger chairing and strict limitations on the number and length of interventions. In addition, treaty bodies should refrain from making innumerous recommendations and focus on priority issues.[52]

Further institutionalized cooperation with other UN partners, and increased level of interaction among treaty bodies, national human rights institutions (NHRIs) and civil society organizations (NGOs) would contribute to the promotion and protection of human rights. Meaningful interaction with stakeholders is often hampered by limited awareness, lack of capacity and resources, and in some cases alleged reprisals suffered by NHRIs and civil society organizations. The HC proposed formal meetings of treaty bodies with NGOs and NHRIs, which would ensure their full and inclusive participation at all stages of the reporting process.[53]

4.3. The Individual Communications and Inquiry Procedure

Human rights treaty bodies, with the exception of SPT, have the mandate to consider individual communications, in many cases dealing with and formulating views on provisions which are covered by various human rights treaties. Such provisions include e.g. the prohibition of racial discrimination, discrimination based on gender, or torture. Such a situation leads to the multiplication of individual communications' procedures and diverging decisions. To ensure consistency of jurisprudence, the HC report suggested the alignment of working methods of all treaty bodies with a complaint procedure. Such common guidelines could cover various issues, including the separation of admissibility and merits, the practice of granting interim measures, standardized deadlines for submissions, aligned procedure in relation to the facilitation of friendly settlements, and the inclusion in final decisions of individual as well as general remedies. Furthermore, the HC recommended the mutual reliance and cross-referencing of views and concluding observations of the various treaty bodies, as well as systematic references to the jurisprudence of regional human rights mechanisms.[54]

With regard to the unique method of on-site visits established by the OPCAT and carried out by the Subcommittee on Prevention of Torture, the HC recommended various measures to increase its capacity (i.e. increase in its membership) and ensure more regular visits.[55] Obviously, the yearly 3 visits on average do not allow the SPT to comply with its mandate to provide "an innovative, sustained and proactive approach to the prevention of torture and ill treatment".[56]

[52] HC Report 2012, p. 56.

[53] HC Report 2012, pp. 63-66.

[54] This would be facilitated by the establishment and maintenance of a treaty-body database. HC Report 2012, pp. 70-73.

[55] The SPT has carried out an average 2.5 regular visits a year (two visits in 2007, 2012 and 2013; three visits in 2008, 2009, 2010 and 2011. Two visits are planned for 2014). See http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/CountryVisits.aspx. The current number of regular visits would take place to each State Party (73 as of July 2014) only every 29 years. HC Report 2012, p. 73. – The comparison of this data with that of its European counterpart clearly demonstrates the limitations of the SPT. On average, the Council of Europe anti-torture Committee (CPT) announces ten regular 'periodic' visits per year, and carries out a yearly 7-8 *ad hoc* visits in addition to the regular ones. (Data from 1998 to 2013, using the data available on http://www.cpt.coe.int/en/visits.htm.) (Aggregated data from 1990 to 2013: approximately 15 (14.75) visits per year. Data from 1998 to 2013: approximately 18 (17.875) visits per year.) The CPT was set up under the Council of Europe's "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", which came into force in 1989.

[56] See http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx.

4.4. Independence of Experts

Independence and impartiality of treaty body members are of paramount importance during the consideration of State party reports and communications; as well as in the course of country visits and inquiries. The attitude of treaty bodies' experts are influenced by numerous factors, such as a member's nationality, place of residence, current and past employment, membership of or affiliation with an organization, or family and social relations. In the performance of their duties, experts must avoid situations where a real or perceived conflict of interest might arise. As regards the composition and membership of treaty bodies, a survey carried out in 2012 established the following.

> Taken together, the treaty bodies have 172 members. Analysis of their composition shows: (a) frequent affiliation to the executive branch in members' professional backgrounds; (b) gender imbalance; and (c) uneven geographic representation. Fifty-five members have an affiliation to the executive in their state of origin and one quarter of those also occupy official functions – Chairperson, Vice-Chairperson, or Rapporteur – in their respective treaty body.
>
> Only 39% of the elected members are women. The highest rates of gender imbalance are found in the Committee on the Elimination of Discrimination against Women (22 out of 23 members are women) and the Committee on Enforced Disappearance (nine out of ten members are men).
>
> Members from European states occupy 35% of all the seats. All other regions have a significantly lower proportion.
>
> Overall, if the number of states parties to a particular treaty is compared to the representation of that region in the membership of the treaty bodies, states from Africa and Asia and Pacific are under-represented, while states from Europe and the Middle East and North Africa are over-represented.[57]

Self-regulatory guidelines have been adopted by the Human Rights Committee as early as 1999, to safeguard the perception of independence and impartiality.[58] This was followed in 2011 by the adoption of guidelines on the independence and impartiality of treaty body members ('the Addis Ababa guidelines') by the Chairs of the United Nations treaty bodies.[59] The major proposals, which relate to the selection procedures at national and international level, as well as the expertise and availability of treaty body members, are the following.

- States Parties are expected to select candidates through an open and transparent selection process from the persons who has the relevant capacities and willingness to take on the responsibilities of membership.
- The independence and impartiality of treaty body members is compromised by the political nature of their affiliation with the executive branch of the State. Consequently, States should avoid the nomination of persons whose independence might be adversely affected by their positions, or those who might be exposed to pressures or conflict of interest.
- In addition, the independence of treaty body members must be preserved *during* their term of office as well.
- Candidates should have proven record of expertise in the relevant area.

[57] Geneva Academy In-Brief No. 1: The Independence of UN Human Rights Treaty Body Members, 2012, p. 6.

[58] A/53/40, vol. I, annex III.

[59] Guidelines on the independence and impartiality of members of the human rights treaty bodies ("the Addis Ababa guidelines"), A/67/222 Annex 1.

- The achievement of more diverse committees (in geographical and gender terms) is also suggested.
- The nominee should be able to take on the workload involved in membership.[60] In order to help prospective members, the OHCHR offered to prepare a handbook with all the relevant information pertaining to membership of treaty bodies, including the election process, expectations, workload, practical information relating to their function such as procedures, working methods, etc.[61]
- As far as election at international level is concerned, the HC proposed an open public space for all States Parties to present their potential candidates or nominees for treaty bodies, which would hopefully result in an enhanced quality of nominations, with a view to enhance an open and transparent election process.[62]

4.5. Implementation of the Treaties

The implementation of treaty body recommendations and views remains the primary responsibility of States Parties. In this regard, much depends on the willingness and capacity of States to implement their obligations arising from participation in human rights treaties. In her report, the HC formulated various proposals to enhance effective realization. Thus, previous concerns and recommendations should be the point of departure for the new *concluding observations* so as to ensure a clear assessment of the progress made by the State Party since the previous review. In addition, strict adherence to deadlines is also of paramount importance: certainty that the next reports will be examined as scheduled provides an important incentive to State Parties to take the necessary implementing measures.

Another proposal centred on the quality of concluding observations. It was suggested that treaty bodies formulate (more) focused concluding observations in order to make compliance simpler and more realistic. From a quantitative perspective, reduced number as well as reduced length of the concluding observations would contribute to achieve greater efficiency and impact.[63] As far as the substance of the concluding observations is concerned, it was suggested to make them country specific and targeted; and to avoid recommendations of a general nature, the implementation of which cannot be measured, and give concrete guidance instead.

Inasmuch as implementation and actual compliance with obligations is at the heart of all legal norms, the HC recommended *the strengthening of the follow-up procedures*. While all treaty bodies require States Parties to provide information on the implementation of recommendations contained in previous concluding observations in their subsequent periodic reports, only a few treaty bodies require the submission of written report in between the periodic reports.[64] The HC argued that if the comprehensive reporting calendar was adopted, meaning that the next periodic reports would be examined as scheduled,

[60] HRC Report 2012, p. 79: "There have been instances where a member never attended any session for extended periods of time due to conflicting professional engagements in their home country and a few cases in which there was no quorum, either in pre-sessional working group or in plenary, so that decisions needed to be postponed, leading to a waste of meeting time."

[61] HC Report 2012; Agenda Thematic Discussion, February 2013, pp. 9-10.

[62] HC Report 2012, pp. 74-80.

[63] *E.g.* maximum 20 recommendations and/or 2,500 words. Intergovernmental process on strengthening the Human Rights Treaty Body System. Thematic discussions and informal-informal meetings. 11-17 April 2013, available at http://www.ohchr.org/Documents/HRBodies/TB/HRTD/ConsolidatedDocumentApril2013.pdf, p. 5.

[64] The Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women, see HC Report 2012, p. 80. See also e.g. HRC – Rule 70 of Rules of procedure of the Human Rights Committee, CCPR/C/3/Rev.10.

and provided that states would strictly adhere to those dates, there would be no need for such inter-sessional information. Failing that, the follow-up procedures should be simplified and improved through the adoption of common guidelines.[65]

4.6 Transparency - Measures to Enhance the Visibility and Accessibility of the Treaty Body System

With a view to enhance visibility, disseminate the work undertaken by the treaty bodies, and increase the coherence of the implementation of human rights mechanisms, the OHCHR created the Universal Human Rights Index, which is a publicly available electronic tool.[66] The database provides easy access to country-specific human rights information emanating from international human rights mechanisms in the United Nations system: the treaty bodies, the Special Procedures and the Universal Periodic Review.

In addition to this, the establishment of a well-functioning, up-to-date and easily searchable treaty body *jurisprudence database* could play a preeminent role in securing easy access to human rights jurisprudence to States Parties, the civil society, academics and other stakeholders.[67]

Other transparency enhancing measures listed in the HC report are as follows.

- All public meetings of the treaty-bodies, including the consideration of State reports, general discussions and discussions of draft general comments, should be webcasted in social media networks too.
- Furthermore, the use of videoconferencing would reduce travel and related costs, while at the same time would give greater opportunities to national civil society actors to engage with treaty bodies.
- Finally, in order to better disseminate the treaty body outputs and interactions, the OHCHR expressed its readiness to make its website more user-friendly.[68]

4.7. Further Proposals Aiming at Cost Reduction

Some of the proposals outlined above have a potential cost-reduction impact (e.g. videoconferencing, reduction of the working languages and the translation costs). In order to get a full picture of the costs related to the treaty body system as such, the co-facilitators of the Intergovernmental Process of the General Assembly on "strengthening and enhancing the effective functioning of the human rights treaty body system" requested detailed information on a number of costing issues. The related costs, which were laid out in a background note in April 2013, are composed of the following items.[69]

- Conference services. This item has two limbs: (1) *meetings support* consisting of interpretation, summary record drafting, meeting room attendants, sound technicians and captioning; and (2) *documentation*, consisting of editing, translation, formatting, printing, distribution and Braille.
- Travel of treaty body members and daily subsistence allowance (DSA).

[65] HC Report 2012, pp. 80-82.

[66] Ibid., p. 34. The index is available at http://uhri.ohchr.org/en.

[67] Intergovernmental process on strengthening the Human Rights Treaty Body System. Thematic discussions and informal-informal meetings. 11-17 April 2013, p. 10.

[68] HC Report 2012, pp. 89-92.

[69] "Comprehensive cost review of the human rights treaty body system", Background note, Geneva, April 2013.

- Treaty body staff support,
- UN Information Service.

In 2012, the total cost amounted to USD 49.16 million. According to the Background Note, documentation is a key category where cost reductions can be made. Thus, strict adherence to page limitations and reduction of working languages would have an appreciable impact on the budget. Another field where expenses could be spared is the annual reports of treaty bodies.[70] At the moment, the annual reports of the treaty bodies reach 500 pages, reproducing all concluding observations and other adopted texts. The translation costs could be significantly reduced if these comprehensive reports would be replaced by a purely procedural report including only a reference to those documents, but not the actual texts.[71]

In the light of the above, on 9 April 2014 the General Assembly adopted resolution 68/268 on the "Strengthening and enhancing the effective functioning of the human rights treaty body system". The resolution has addressed a wide variety of issues, while others were ignored. The strengths and weaknesses of Resolution 68/268 will be analysed in the next section.

5. Addressing the Challenges: GA Resolution 68/268 of 2014

Resolution 68/268 of the General Assembly took up various proposals formulated during the intergovernmental process, while others were ignored. Analysis begins with the examination of the key provisions of the resolution.

In order to eliminate the current backlog of reports, the GA invited States Parties to submit one combined report to satisfy their reporting obligations to a given treaty body for the entire period, as well as the treaty bodies to consider all State party reports awaiting consideration.[72]

In addition, the GA proposed various capacity-building measures, including advisory services, technical assistance and capacity-building, to assist States parties in fulfilling their obligations under international human rights treaties.[73]

With a view to modernize the treaty body system and make it viable in the long term, the GA endorsed the efforts to introduce the system of Common Core Documents coupled with the Simplified Reporting Procedure; and invited the treaty bodies to adopt short, focused and concrete concluding observations.[74] The GA supported the alignment and harmonization of working methods of the treaty bodies, including an aligned methodology for the constructive dialogue, and an aligned consultation process for the elaboration of general comments.[75] Furthermore, the GA decided to secure additional meeting time to the treaty bodies, the amount of which would be reviewed biennially.[76]

Several measures are listed in the resolution, aiming at the reduction of costs. Thus, the GA decided that the annual reports of treaty bodies are not to contain documents published separately and referenced

[70] Comprehensive cost review of the human rights treaty body system (April 2013, p. 15.).

[71] Agenda and Background Documentation on Thematic discussion and Informal Consultations, New York, 19-20 February 2013, available at http://www.ohchr.org/Documents/HRBodies/TB/HRTD/AgendaThematicDiscussionFeb2013.pdf, p 7.

[72] Paras. 32 and 33.

[73] Paras. 17 to 21.

[74] Paras. 1, 3 and 6.

[75] Paras. 5, 14 and 38.

[76] Paras. 26 and 27.

therein; and established word limits for all documentation of the human rights treaty bodies as well as State Party documentation.[77] In addition, the GA decided to allocate a maximum of three official working languages for the work of the human rights treaty bodies.[78] Finally, the GA requested the OHCHR to provide, at the request of a State Party, the opportunity for members of its official delegation not present at the meeting to participate in the consideration of the report of that State party by means of videoconference in order to facilitate wider participation in the dialogue.[79]

The GA also decided "in principle", with the aim of enhancing the accessibility and visibility of the human rights treaty bodies to webcast, as soon as feasible, the public meetings of the treaty bodies.[80]

The GA reflected on the selection and qualifications of treaty body members. It "encouraged" States Parties to nominate experts of high moral standing and recognized competence and experience in the field of human rights, and emphasised the need, in the election of treaty body experts, to give due consideration to the equitable geographical distribution, the representation of the different forms of civilization and the principal legal systems, balanced gender representation and the participation of experts with disabilities in the membership of the human rights treaty bodies.[81]

The GA strongly condemned all acts of intimidation and reprisals against those engaging with the treaty bodies, and urged States to take all appropriate action to prevent and eliminate such human rights violations.[82]

Finally, the GA also decided to consider the state of the human rights treaty body system no later than six years from the date of adoption of the present resolution, to review the effectiveness of the measures taken.[83]

As the then High Commissioner Navi Pillay said, the Office of the HCHR and the treaty body Chairpersons "have accomplished what many deemed impossible: the first successful strengthening of the human rights treaty bodies in 50 years" which has been a "tremendous journey". Nevertheless, the joy is not entirely unfettered.

First of all, a GA resolution is not binding on member states.[84] Related to this is the fact that many paragraphs of the resolution contain soft formulations, such as those where the GA "encourages" or "recommends" human rights treaty bodies or States parties to introduce certain measures.

The reasons behind non-compliance with treaty obligations are manifold, ranging from budgetary constraints to the heavy burden put on states by the reporting obligations (coupled with reporting obligations under the UPR), and to outright defiance. While efforts of the General Assembly to assist States Parties in various ways in fulfilling their international obligations is welcome, it must be

[77] Paras. 4, 15 and 16.

[78] Para. 30.

[79] Para. 23.

[80] Para. 22.

[81] Paras. 10 and 13. See also para. 35, reaffirming the importance of the independence and impartiality of members of the human rights treaty bodies.

[82] Para. 8.

[83] Para. 41.

[84] Some decisions of international organizations relate to the internal workings of the organization, while others are directed at the members of the organization. Generally speaking, decisions of the first type are binding, while in the case of decisions addressed to members much depends on whether that organization is empowered by its constituent document to take binding decisions. In the case of GA resolutions, they do not create obligations for member States. At most, these can be regarded as evidence of the existence of the *opinio iuris*, an important element of customary international law. On the nature of UN GA resolutions, see e.g. Malcolm D. Evans (ed.), *International Law*, Oxford 2003, pp. 141 and 283; or Ian Brownlie, *Principles of Public International Law*, Oxford 2008, p. 15.

remembered that even under present conditions States Parties could comply with their reporting obligations – if they wanted to. Measures to enhance the efficiency of the treaty bodies alone are not sufficient to make up for the lack of political will of those States Parties which chronically fail to meet their reporting obligations. In order to exert pressure, treaty bodies should be given the power to continue to consider States Parties even in the absence of a report.

Table 6: Number of Overdue Reports in Total by Country (15 May 2014)[85]

Number of overdue reports in total	States parties	Number of States parties
10	Mali	1
9	Cape Verde, Lesotho, Niger, Panama, San Marino	5
8	Belize, Malawi, Nigeria, Saint Vincent and the Grenadines (4 States parties)	4
7	Bahrain, Botswana, Libya, Namibia, Nicaragua, Pakistan, Romania, Seychelles, South Africa, Vanuatu	10
6	Algeria, Bangladesh, Bolivia (Plurinational State of), Côte d'Ivoire, Democratic Republic of the Congo, Dominica, Equatorial Guinea, Guinea, Guyana, Honduras, Lebanon, Senegal, Syrian Arab Republic, Zambia	14
5	Afghanistan, Antigua and Barbuda, Benin, Brazil, Chad, Congo, Egypt, Eritrea, Gabon, Georgia, Malaysia, Mauritania, Mozambique, Philippines, Saudi Arabia, Swaziland, Timor-Leste, Trinidad and Tobago, Tunisia, Uganda	20
4	Bahamas, Barbados, Burkina Faso, Burundi, Cuba, Democratic People's Republic of Korea, Djibouti, Ghana, Guinea-Bissau, Hungary, India, Indonesia, Jamaica, Lao People's Democratic Republic, Liechtenstein, Luxembourg, Serbia, Somalia, Sri Lanka, Zimbabwe	20
3	Argentina, Azerbaijan, Bhutan, Bosnia and Herzegovina, Central African Republic, Comoros, Croatia, Gambia, Grenada, Latvia, Liberia, Maldives, Malta, Mauritius, Monaco, Nauru, Nepal, Papua New Guinea, Republic of Moldova, Rwanda, Saint Kitts and Nevis, Sierra Leone, Slovenia, Solomon Islands, Suriname, Togo, United Arab Emirates, United Republic of Tanzania, Yemen	29
2	Andorra, Angola, Australia, Bulgaria, Cambodia, Chile, Costa Rica, Cyprus, Denmark, Dominican Republic, Ecuador, Estonia, France, Iceland, Iran (Islamic Republic of), Iraq, Ireland, Italy, Jordan, Kiribati, Madagascar, Marshall Islands, Mexico, Micronesia (Federated States of), Morocco, Myanmar, Oman, Palau, Saint Lucia, Switzerland, Tajikistan, Thailand, Tonga, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland	36
1	Albania, Armenia, Austria, Belarus, Brunei Darussalam, Cameroon, China, Colombia, Cook Islands, El Salvador, Ethiopia, Greece, Haiti, Holy See, Israel, Japan, Kazakhstan, Kenya, Kyrgyzstan, Lithuania, Mongolia, Netherlands, New Zealand, Qatar, Republic of Korea, Samoa, Sao Tome and Principe, Spain, Sudan, Sweden, The former Yugoslav Republic of Macedonia, Turkmenistan, Uruguay, Viet Nam	34

It must be observed that word limits established for UN and State documentation do not necessarily result in better State reports or concluding observations. Furthermore, the GA missed the opportunity to decide on the introduction of dual chambers, which could have facilitated the timely consideration of State reports and individual communications, which – partly due to further ratifications – are on the rise.[86]

[85] Late and non-reporting by States parties, Note by the Secretariat submitted to the twenty-sixth meeting of chairpersons of the human rights treaty bodies, 4 June 2014, pp. 6-7. Hungary has four overdue reports.

[86] "The proposal is to encourage treaty bodies to work in double chambers or two working groups when possible. This would split its membership in two, with half of its membership attending each chamber for the review of a State Party report. The chamber could either both review the report in full and adopt concluding observations or the review could take place in dual chambers and the concluding observations then be discussed in plenary with all members participating. Based on the experience from CRC and CEDAW a double chamber system can increase the number of State Parties reports reviewed by session between 70 to 80% …" See "Intergovernmental process on

While the resolution recognizes the important and vital work of civil society organisations and activists in promoting and protecting human rights, stronger language could have been used to prevent and address reprisals and intimidation of human rights defenders. In practice, defenders working on women's rights and issues of sexual orientation and gender identity or who challenge 'traditional values' and cultural and religious practices, land and environment rights, or defenders who work to expose corruption or combat impunity for gross violations face a number of threats and restrictions. These range from use of force against peaceful protesters, to arbitrary detention, to defamation and smear campaigns, to online and offline surveillance, and the use and abuse of counter-terrorism laws and measures to silence dissent.[87]

The resolution has the dual aim of eliminating the backlog of State reports (late and non-reporting States), as well as eliminating the backlog of the treaty bodies and to prevent the recurrence thereof. Currently the relative efficiency of the treaty bodies is only possible because of the very large number of overdue reports. At the current rate of ratification of treaties and optional protocols providing for individual communications, the system would collapse if all (or most) States would respect periodicity and report timely. Therefore, Resolution 68/268 is an important, albeit modest step in the improvement of the international human rights system. Nevertheless, the key element in this regard is the willingness and real determination of States, and their leaders, to observe their international obligations.

6. Conclusion

The reasons behind non-compliance with human rights treaty obligations are manifold, ranging from budgetary constraints to outright defiance. The international community has no real means at its disposal to enforce these treaty obligations. Nevertheless, as in any legal system, compliance may originate from the view that it is necessary for the smooth functioning of the community. Rules may be respected not because of the severity of the sanctions arising from breach, but based on the belief that the protection of human rights corresponds with the interests and values of the State. In practice, motivations for compliance vary between States, including the fact that, generally speaking, States are reluctant to explicitly challenge international obligations. In addition, a grave violation of international law will seriously affect the credibility, functioning and international image of a State.

Thus, the broad conclusion must be that while international law appears devoid of proper means of enforcement, a great number of States are sensitive about issues of their international standing and prestige. In democratic States, governments can only act in a manner that is acceptable to their electorate. Having said that, in reality international law comprises only a few, and in many cases soft, methods of enforcement. The reform process described above, if consistently carried through, could meaningfully enhance this unfortunately circumscribed array of means.

strengthening the Human Rights Treaty Body System. Thematic discussions and informal-informal meetings. 11-17 April 2013", available at http://www.ohchr.org/Documents/HRBodies/TB/HRTD/ConsolidatedDocumentApril 2013.pdf, p. 6.

[87] See the interview of 16 July 2014 with Michel Forst, who was appointed as the new UN Special Rapporteur on Human Rights Defenders in June 2014, available at http://www.ishr.ch/news/new-special-rapporteur-human-rights-defenders-sets-out-his-vision. According to ISHR, "human rights defenders in all regions continue to face serious threats, from physical attacks against women human rights defenders in Pakistan, to worsening legislative restrictions on civil society in Ethiopia, to reprisals against those who seek accountability for human rights violations at the UN in Sri Lanka, to the surveillance of activists working on business and human rights in the US, Canada and Mexico." See at http://www.ishr.ch/news/civil-society-identifies-key-issues-new-special-rapporteur-human-rights-defenders.

List of abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCD	Common Core Document
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW-OP	Optional Protocol to CEDAW
CRC	Convention on the Rights of the Child
CRC-OP-AC	Optional Protocol to CRC on the involvement of children in armed conflict
CRC-OP-IC	Optional Protocol to CRC on a communications procedure
CRC-OP-SC	Optional Protocol to CRC on the sale of children, child prostitution and child pornography
CRPD	Convention on the Rights of Persons with Disabilities
CRPD-OP	Optional Protocol to CRPD
GA	General Assembly of the United Nations
HC	High Commissioner for Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP 1	Optional Protocol to ICCPR
ICCPR-OP 2	Second Optional Protocol to ICCPR, aiming at the abolition of the death penalty
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICESCR-OP	Optional Protocol to ICESCR
ICJ	International Court of Justice
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
OHCHR	Office of the High Commissioner for Human Rights
OP-CAT	Optional Protocol to CAT
SC	Security Council of the United Nations
UN	United Nations

Same Target from Different Angles? Anti-discrimination, Protection of Minorities and the Rights of Indigenous Peoples in the UN

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In the past decades the United Nations (UN) elaborately dealt with the issues of discrimination, besides adopting many resolutions, three major documents came to life: the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the 2007 Declaration on Indigenous Peoples. This paper shows the evolution of the three different angles of protection, compares the documents, analyses the differences and discusses whether the included rights could be integrated into one regime of protection.

Keywords: anti-discrimination, minorities, indigenous, United Nations

1. Historical Antecedents

At the creation of the Charter of the United Nations one of the main aims was to eliminate the deficiencies of the system of the League of Nations. Besides the many positive effects of that aim, one of the negative results was that the protection of minorities fell into the background. The peace treaties of World War I established the international protection of minorities, which was guaranteed by the League of Nations. Besides the peace treaties the legal basis for the protection was secured by bilateral agreements and declarations made at the Council of the League.[2] However, it would be an error to think that owing to the League of Nations this was a universal system. It was a purely Central Eastern European phenomenon.

The UN Charter does not refer to minorities, although it has provisions about the prohibition of discrimination and the protection of human rights. At the beginning of the operation of the United Nations the issue of the protection of minorities had still been on the agenda, in 1946 the UN Commission on Human Rights created - as its advisory body - the Sub-Commission on Prevention of Discrimination and

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[2] *See, e.g.:* Péter Kovács, *The Protection of Minorities under the Auspices of the League of Nations*, in Shelton Dinah (Ed.), The Oxford Handbook of International Human Rights Law, Oxford University Press, Oxford - New York, 2013, pp. 305-341.; Erzsébet Szalayné Sándor, *International law in the service of the protection of minorities between the Two World Wars*, Minorities Research, Vol. 6, 2004, pp. 106-128.; Erzsébet Szalayné Sándor, *The Role of the League of Nations and the UN in the Protection of Minorities under International Law*, Minorities Research, Vol. 1, 1999, pp. 108-122.

Protection of Minorities (hereinafter: Sub-Commission).[3] Several UN organs were mentioned as the one which should clarify the status of the former system of minority protection.[4] Finally, the "finger-pointing" of the Commission on Human Rights and the Sub-Commission at each other and at other bodies of the UN resulted in the decision of the Economic and Social Council, which requested a study of the issue from the UN Secretary-General in 1948. The study was not yet ready when - in the same year - the General Assembly adopted resolution 217/C (III), titled "Fate of minorities". It declared in a concise resolution that although the UN cannot remain indifferent to the fate of minorities, the text of the Universal Declaration of Human Rights should not specifically refer to them or provide for separate rights. According to the resolution, the justification for this is that "it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises". However, in order to minimize the effect, it requested the Sub-Commission to prepare a thorough study of the problem of minorities, in order that the UN may be able to take effective measures for their protection.[5]

This study by the Sub-Commission, the famous Capotorti Report,[6] had only been prepared by 1979, probably owing - among others - to the study issued by the Secretary-General in 1950. The study, after the examination of several aspects, declared that the system of minority protection created between the two world wars had generally ceased to exist, it had become unnecessary in several states, furthermore, the institution backing it (that is the League of Nations) terminated as well. The Secretary-General tried to emphasize that this does not mean that minorities are entitled to no protection, since they are also protected by human rights. These declarations closed the door before the universal protection of minorities even prior to it having any chance of commencement.[7]

By the beginning of the 1950s several other phenomena occurred in the world, which also hindered the possibility of the creation of a universal legal system of minority protection. The maintenance of the colonial system often occurred via the reign of a minority, on half of the territories of the world the majority population was the one in need of protection and of their own state. An especially striking case of that was the apartheid regime in South Africa. Neither the states', nor science's representatives could unequivocally agree on the definition of minority. Owing to the unsubstantiated content of the right to self-determination several states were afraid that if any extra rights are guaranteed to the minority, then sooner or later they would claim the right to secession. During the Cold War, the Central- and Eastern European states burdened with the issue of national minorities found themselves in the sphere of influence of the Soviet Union, which also diminished the chances of a universal agreement in the topic. Furthermore, some of the concerned European states (e.g.: Romania, Finland, Hungary, Austria and Italy) had only been admitted to the United Nations in 1955, thus until then they could not participate in the discussions of minority protection at the different organs of the UN.

Thanks to these, the common denominator reachable in the protection was the declaration of the prohibition of discrimination and the adoption of universal human rights.

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[3] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Economic and Social Council resolution 9 (II) of 21 June 1946. It operated between 1947 and 2006, its name was changed in 1999: Sub-Commission on the Promotion and Protection of Human Rights.

[4] *See, e.g.:* Péter Kovács, *International law and minority protection: Rights of Minorities or Law of Minorities?* Akadémiai Kiadó, Budapest, 2000.

[5] Fate of minorities, GA Res. 217/C (III), 16 December 1948.

[6] Francesco Capotorti: *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384c.

[7] Study of the Legal Validity of the Undertakings concerning Minorities, UN Doc. E/CN.4/367, 1950.

2. The Evolution of the Prohibition of Discrimination in the Resolutions of the UN General Assembly

From the beginning of the 1950s the expression of minority rarely occurs in the resolutions of the General Assembly,[8] states deal with the issue from the viewpoint of the prohibition of discrimination. Already at the first session they cited that the UN Charter prohibits persecution and discrimination based on race, against which all governments must act.[9] After the acceptance of the Genocide Convention and the Universal Declaration of Human Rights in 1948 the issue of racial discrimination had been touched upon mainly in connection with the colonial/trust territories. From the 1950s the relevant resolutions of the General Assembly ran on different paths: 1) ensuring the right to self-determination to the trust territories, 2) fight against racial discrimination (naturally, many resolutions parallel deal with both[10]), 3) the case of South Africa. The analysis of the right to self-determination and the apartheid regime in South Africa is unnecessary here, thus only those resolutions are of interest here, which are expressly about the prohibition of racial discrimination.

The actions of the General Assembly, relating to the prohibition of racial discrimination, covered on the one hand the inclusion of the ban in multilateral human rights conventions, on the other hand they elaborated a special convention, and thirdly they adopted non-compulsory resolutions. The 1948 Genocide Convention prohibits the most serious forms of racial discrimination. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, adopted in 1966, ban all forms of discrimination.

The states adopted in 1965 the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: CERD), which entered into force three years later. The preparation of this Convention started in 1962 in the General Assembly, when it requested the UN Commission on Human Rights and its Sub-Commission to prepare a draft declaration and a draft convention in the same topic.[11] The United Nations Declaration on the Elimination of All Forms of Racial Discrimination was ready a year later[12], and the drafting of the Convention was also rapid, compared to other UN conventions.[13] Besides these, the General Assembly addressed the issue in several of its resolutions, and from 1960 it included in its agenda the fight against the manifestations of racial and national hatred. These resolutions urge governments to amend their discriminative legislation, to raise awareness about the dangers of hate-speeches and discriminative conduct based on race and nationality, to act against hate speech in the media, education and other platforms, as well as to cooperate with international organizations and the

[8] An exception is the UN General Assembly resolution 730 (VIII), which mandates the UN Secretary-General to provide technical assistance and advice to any UN member state for the protection of minorities and the fight against discrimination. GA Res. 730 (VIII), 23 October 1953.

[9] GA Res. 103 (I), 19 November 1946.

[10] *E.g.:* Racial discrimination in Non-Self-Governing Territories, GA Res. 644 (VII), 10 December 1952., GA Res. 1328 (XIII), 12 December 1958.; Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories, GA Res. 2144 (XXI), 26 October 1966.

[11] Preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination, GA Res. 1780 (XVII), 7 December 1962.

[12] United Nations Declaration on the Elimination of All Forms of Racial Discrimination, GA Res. 1904 (XVIII), 20 November 1963.

[13] The convention was adopted by the UN General Assembly in 1965 in resolution 2106 (XX), and was signed in 1966.

civil sector in order to eliminate racial and national hatred and discrimination.[14]

The importance of the existence of the Declaration, since there's a convention as well, and despite its lack of being legally binding, is that it shows the model conduct for the members of the UN and had an influence on the development of customary international law. For the entering into effect of the 1965 Convention, ratification by 27 states was enough, and participation in it is still not universal.[15] In the interest of the implementation of the Declaration the General Assembly stated that racial discrimination and apartheid endangers international peace and security, violates fundamental human rights and significantly impedes economic and social development. It highlighted that the preparation of studies, education and raising awareness are the tasks of not only governments, but the bodies of the UN, governments and the civil sector.[16] These were strengthened in several subsequent resolutions, 21 March was declared the international day of the fight against racial discrimination,[17] 1971 was declared the international year for that cause,[18] furthermore, even an international decade was initiated[19] and a world conference convened, all dedicated to this fight.[20]

Most of the excellent-on-paper ideas have not been fully executed in practice. For example in the time frame between 1983 and 1989 no planned program was executed owing to the lack of funding for it.[21] States offered only insignificant amount of money for the voluntary fund created for the execution of the programs.[22]

Not only resolutions supporting the Declaration were adopted by the General Assembly, but from the 1960s at almost every session such resolutions were accepted which condemn intolerance based on race, ideologies that incite hatred, Nazism, fascism, totalitarian views and practices. In these documents the General Assembly recommends states to implement the rights guaranteed by the Universal Declaration of Human Rights into their domestic legal system, to ratify the human rights conventions, to remember the horror of World War II, and to punish the perpetrators of crimes based on ethnicity, such as genocide and apartheid. Furthermore, it calls upon states not to provide state support for non-governmental

[14] Manifestations of racial and national hatred, GA Res. 1510 (XV), 12 December 1960; Manifestations of racial prejudice and national and religious intolerance, GA Res. 1779 (XVII), 7 December 1962; GA Res. 2019 (XX), 1 November 1965; GA Res. 2143 (XXI), 26 October 1966.

[15] At present (July 2014) the convention has 176 member states, while there are 194 generally recognized states on Earth.

[16] Measures to implement the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, GA Res. 1905 (XVIII), 20 November 1963; GA Res. 2017 (XX), 1 November 1965.

[17] Elimination of all forms of racial discrimination, GA Res. 2142 (XXI), 26 October 1966.

[18] Measures to achieve the rapid and total elimination of all forms of racial discrimination in general and of the policy of apartheid in particular, GA Res. 2446 (XXIII), 19 December 1968; Programme for the observance of 1971 of the International Year for Action to Combat Racism and Racial Discrimination, GA Res. 2544 (XXIV), 11 December 1969. This was repeated in 2001 as well: International Year of Mobilization against Racism, Racial Discrimination, Xenophobia and Related Intolerance, GA Res. 53/132, 9 December 1998.

[19] The first one commenced in 1973, then the next ones in 1983 and 1993. Decade for Action to Combat Racism and Racial Discrimination, GA Res. 2919 (XXVII), 15 November 1972; Second Decade to Combat Racism and Racial Discrimination, GA Res. 38/14, 22 November 1983; Third Decade to Combat Racism and Racial Discrimination, GA Res. 48/91, 16 February 1994.

[20] *E.g.:* Results of the World Conference to Combat Racism and Racial Discrimination, GA Res. 33/100, 16 December 1978.

[21] Report of the Secretary-General to ECOSOC, UN Doc. No. E/1990/50. para. 31.

[22] *About this see e.g.:* Second Decade to Combat Racism and Racial Discrimination, GA Res. 45/105, 14 December 1990. para. 23-25.

organizations which participate in such actions or commit such crimes.[23]

Besides the annually recurring resolutions reporting about the programs, the General Assembly adopted individual resolutions in the topic. In the spring of 1993 it condemned all forms of ethnic cleansing and race-based hatred, stating that these represent the serious violation of international humanitarian law.[24] In 2003 it highlighted that racist, hatred-inciting speech is not part of the freedom of expression, that ethnic, cultural and religious diversity promotes democracy and condemned the recent phenomenon that xenophobia has gradually been increasing in the political discourse.[25] In 2007 it condemned the denial of the Holocaust.[26]

The newest significant resolution in connection with the topic was adopted by the General Assembly in 2011, titled "United against racism, racial discrimination, xenophobia and related intolerance". This political declaration was adopted unanimously, states confirmed that further fight is needed against racial hatred and stated that it is the states which have the primary responsibility for that.[27]

Besides resolutions initiated by the General Assembly itself, from the 1970s it formed part of its work to discuss and accept the report of the Committee set up in the framework of CERD.[28] Compared to the previously mentioned ones, these resolutions do not contain much novelty. Nevertheless, the effort of the Committee should be mentioned that the rights guaranteed by CERD shall also be applied to minorities and indigenous peoples. This resulted in the resolution of the General Assembly declaring that states should interpret the 1965 Convention in such a way so as to apply it to minorities and indigenous people as well.[29] The financial hardships of the 1980s and the disillusion with the UN left their mark on the work of the Committee: for the session of 1985-86 the Committee was not even convened, let alone making the annual report, because most of the member states have not paid their compulsory contribution, which would have provided the financing of it.[30] The financial crisis of the Committee lasted until the beginning of the 1990s, until then only shortened sessions were held, and several programs were cancelled.[31] In the past 20 years, the General Assembly emphasized in relation to the reports of the Committee, that the early

[23] E.g.: Measures to be taken against Nazism and other totalitarian ideologies and practices based on incitement to hatred and racial intolerance, GA Res. 2839 (XXVI), 18 December 1971; Measures to be taken against Nazi, Fascist and neo-Fascist activities and all other forms of totalitarian ideologies and practices based on racial intolerance, hatred and terror, GA Res. 38/99, 16 December 1983, GA Res. 40/148, 13 December 1985, GA Res. 41/160, 4 December 1986; Measures to combat contemporary forms of racism, racial discrimination, xenophobia and related intolerance, GA Res. 50/135, 30 January 1996, GA Res. 54/153, 29 February 2000; Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance, GA Res. 64/147, 26 March 2010.

[24] 'Ethnic cleansing' and racial hatred, GA Res. 47/80, 15 March 1993.

[25] The incompatibility between democracy and racism, GA Res. 58/159, 22 December 2003.

[26] Holocaust denial, GA Res. 61/255, 26 January 2007.

[27] United against racism, racial discrimination, xenophobia and related intolerance, GA Res. 66/3, 22 September 2011.

[28] The first report: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 2648 (XXV), 30 November 1970.

[29] *E.g.:* Report of the Committee on the Elimination of Racial Discrimination, GA Res. 37/46, 3 December 1982. Points 6, 11.

[30] Committee on the Elimination of Racial Discrimination, GA Res. 41/105, 4 December 1986.

[31] *See e.g.:* Report of the Committee on the Elimination of Racial Discrimination, GA Res. 42/57, 30 November 1987; Report of the Committee on the Elimination of Racial Discrimination, GA Res. 45/88, 14 December 1990; Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights, GA Res. 47/111, 5 April 1993; Report of the Committee on the Elimination of Racial Discrimination, GA Res. 49/145, 23 December 1994.

warning mechanism elaborated by the Committee[32] and the closer cooperation with other organs of the UN dealing with human rights are worthy of appraisal.[33] However, it expressed its concern for that several states are not fulfilling their reporting obligations undertaken in the convention.[34] Furthermore, the General Assembly requested from the states not to make any reservations to CERD,[35] and to regularly check the existing reservations and possibly withdraw them.[36] By the beginning of the 2000s the gender-based approach has also appeared in the work of the Committee, since it has become evident that racial discrimination is frequently linked to discrimination against women.[37] In 2008 the General Assembly expressed that the protection of human rights would be more effective if the separate organs and commissions belonging to the UN system hold joint meetings regularly, and prepare uniform requirements and standards with respect to the reports of the states, and share their experiences with each other.[38]

3. The Appearance of the Protection of Minorities in the Resolutions of the UN General Assembly

As it has already been mentioned in the historical antecedents, the UN General Assembly has rarely dealt with the topic of traditional minority protection from the 1950s. Its attention was focused on the codification of human rights and the prohibition of discrimination. Only one exception can be found: In 1953, in resolution 730, the General Assembly requests the Secretary-General to provide technical assistance to the governments – if needed – for the elimination of racial discrimination and the protection of minorities. Such technical assistance can be the drafting of law, planning administrative and judicial procedures and preparation of educational materials.[39]

The topic entered the agenda of the General Assembly again in 1991, when it asked the UN Commission on Human Rights to finalize the declaration about the rights of minorities, and to hand it in to the General Assembly for adoption (through ECOSOC). The preamble of the resolution declares that the UN has an important role in the protection of minorities, and apart from Article 27 of the International Covenant on Civil and Political Rights further universal-level protection is necessary.[40]

A year later the General Assembly adopted the Declaration on the Rights of Persons Belonging to

[32] *E.g.:* Report of the Committee on the Elimination of Racial Discrimination, GA Res. 49/145, 23 December 1994. Point 5.

[33] *E.g.:* Report of the Committee on the Elimination of Racial Discrimination, GA Res. 50/137, 21 December 1995. Point 3.

[34] *E.g.:* Report of the Committee on the Elimination of Racial Discrimination, GA Res. 53/131, 9 December 1998. Point 4.

[35] *E.g.:* Report of the Committee on the Elimination of Racial Discrimination, GA Res. 51/80, 12 December 1996. Point 18.

[36] *E.g.:* Report of the Committee on the Elimination of Racial Discrimination, GA Res. 55/81, 4 December 2000. Point 5.

[37] Report of the Committee on the Elimination of Racial Discrimination, GA Res. 57/194, 18 December 2002. Point 8.

[38] Report of the Committee on the Elimination of Racial Discrimination, GA Res. 63/243, 24 December 2008. Point 11.

[39] Technical assistance in the fields of prevention of discrimination and protection of minorities, GA Res. 730 (VIII), 23 October 1953.

[40] Non-discrimination and protection of minorities, GA Res. 46/115, 17 December 1991.

National or Ethnic, Religious and Linguistic Minorities (hereinafter Declaration on Minorities or DOM).[41] Its introductory sentences, among others, emphasize that the protection of minorities promotes political and social stability in the concerned state and contributes to the friendship and peaceful relations among states. The state shall promote the preservation of the ethnic, national, linguistic and religious identity of the minority.[42] Individuals belonging to a minority can freely practice their own culture, religion, language, participate in the life of the society, in legislation concerning them as well as the whole society, furthermore they are entitled to the freedom of association and to maintain relationship and contact with other individuals belonging to the same minority group (whether they are living in the same country or abroad).[43] The Declaration on Minorities does not only guarantee rights for the individual, but also for the minority as a group.[44] Members of the minority are entitled to all human rights and fundamental freedoms, without any discrimination, and in full equality before the law. States should take appropriate measures to enable the members of the minority to learn their mother tongue, history, culture, tradition and customs, except for those practices, which are in violation of international standards or national law. The state should facilitate that members of the minority participate in the economic life and development.[45] States shall cooperate in the interest of the protection of minorities, furthermore, it shall plan national policies and programs to ensure the rights.[46] Protection of the rights of minorities shall not be interpreted or understood as a violation of the requirement of equal human rights to everyone.[47] The specialized agencies and other organizations of the UN system shall also contribute to the full realization of the protection of minorities.[48]

After that the General Assembly has adopted resolutions regularly about the need to promote and effectively popularize the Declaration on Minorities. It requested from the Secretary-General and the UN Commission on Human Rights to provide assistance to states in connection with the drafting of legislation related to minority protection, for the peaceful settlement of disputes and in order to prevent disputes. The General Assembly suggested that states should undertake the protection of minorities in binding bi- and multilateral agreements, and expressed its support for the civil sector and non-governmental organizations to further and promote the protection of minorities and everything that is included in the DOM.[49] The General Assembly requested from the states to include all the measures made in favour of the minorities in their country reports about the implementation of human rights conventions.[50] The General Assembly appointed the UN High Commissioner for Human Rights to cooperate with the UN programs and bodies in order to promote and popularize the rights of persons belonging to a minority and to realize more

[41] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992.

[42] Ib. Art. 1.

[43] Ib. Art. 2.

[44] Ib. Art. 3.

[45] Ib. Art. 4.

[46] Ib. Art. 5-7.

[47] Ib. Art. 8.

[48] Ib. Art. 9.

[49] *E.g.:* Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 48/138, 20 December 1993; Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 50/180, 22 December 1995.

[50] Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 51/91, 12 December 1996.

effective protection.[51] The Secretary-General regularly has to report to the General Assembly the improvement in the implementation of the resolution and the state of minority protection in education and political decision-making.[52] The General Assembly called upon states to protect the religious and cultural places which are important for the concerned minorities.[53] In 2005, the UN High Commissioner for Human Rights established an expert position expressly dealing with minority protection.[54] Since 2011 the post is filled in by Ms. Rita Izsák, a member of the Hungarian Roma minority.[55] In 2007, for the even more improved implementation of the Declaration, the Human Rights Council created the Forum on Minority Issues, which annually convenes all the actors concerned in the field for a conference-like meeting.[56]

4. The Protection of Indigenous and Aboriginal Peoples in the Resolutions of the UN General Assembly

Apart from two resolutions, the General Assembly had not dealt with the situation and rights of indigenous peoples until the 1980s. The first one of the above-mentioned two resolutions was adopted in 1949, and it recommended to the Economic and Social Council – together with other organs of the UN and other organizations – to study the possibilities of social and economic development of South American aboriginal populations. However, the reader starts to doubt the humanitarian aim behind the resolution already by the fourth sentence, because it states that "the material and cultural development of those populations would result in a more profitable utilization of the natural resources of America to the advantage of the world".[57] The other mentioned resolution was adopted in connection with the South West African situation: In 1956 the Union of South Africa, as the occupier of the territory, ordered the eviction of the aboriginal population belonging to the Red Nation from the Hoachanas Native Reserve. Since this action meant the violation of several international agreements, the General Assembly condemned it in a resolution and demanded the return of the evicted people to their native land and the respect for that land as a native reserve.[58]

Three decades of silence followed, which was broken by two resolutions in the middle of the 1980s. In the first one a fund was founded for the support of indigenous communities,[59] while the second one

[51] Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 54/162, 17 December 1999. Points 8-10.

[52] Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 56/162, 19 December 2001. Point 16.

[53] Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 58/182, 22 December 2003. Point 8.

[54] Commission on Human Rights Resolution 2005/79, 21 April 2005.

[55] *See:* United Nations Human Rights, Office of the High Commissioner for Human Rights, Independent Expert on Minority Issues, http://www.ohchr.org/EN/Issues/Minorities/IExpert/Pages/IEminorityissuesIndex.aspx (Downloaded: 17 July 2014).

[56] *See:* United Nations Human Rights, Office of the High Commissioner for Human Rights, Forum on Minority Issues, http://www.ohchr.org/EN/HRBodies/HRC/Minority/Pages/ForumIndex.aspx (Downloaded: 17 July 2014).

[57] Study of the social problems of the aboriginal populations and other under-developed social groups of the American continent, GA Res. 275 (III), 11 May 1949.

[58] The Hoachanas Native Reserve, GA Res. 1357 (XIV), 17 November 1959.

[59] United Nations Voluntary Fund for Indigenous Populations, GA Res. 40/131, 13 December 1985. The fund still exists, its task is to financially support the representatives of the indigenous groups in order to facilitate their participation in the public meetings of the relevant working groups of the UN.

acknowledged the role and significance of indigenous entrepreneurs, for whom the General Assembly requested from other UN organs and agencies (the World Bank among them as well) to establish such programs and projects, which would support and better facilitate indigenous undertakings.[60] Nevertheless, the active discussion of the topic only started at the end of the Cold War, in 1990 the General Assembly – upon the proposal of the Economic and Social Council – decided to declare 1993 the International Year of the World's Indigenous Peoples. In the focus of the international year the human rights of the indigenous and their problems relating to the environment, development, education and health were set.[61] The aim of the international year was, among others, to provide technical and financial assistance for the indigenous peoples in order to further their development.[62] Similarly to the events in connection with the prohibition of discrimination and the rights of minorities, the UN declared an international day, international decades (the first one between 1994 and 2004, the second between 2005-2015) for the protection of indigenous, it appointed goodwill ambassadors, established a fund for the realization of programs, and asked the organs of the UN to examine the relating indigenous issues during their own work.[63] ECOSOC established the Permanent Forum on Indigenous Issues in 2000, in order to facilitate the more effective consideration of the needs and interests of the indigenous in the decision-making of the bodies of the UN. The Forum is the advisory body of the ECOSOC, but the General Assembly also pays attention to its work.[64]

Similarly to the rights of minorities, a declaration was adopted about the rights of the indigenous by the UN General Assembly in 2007. It was drafted by the Human Rights Council.[65] The Declaration on the Rights of Indigenous Peoples (hereinafter Declaration on Indigenous or DIP) closely resembles to the Declaration on Minorities, with some differences. While DOM lists the rights on 3 pages (Preamble plus 9 articles), DIP is 10 pages long (Preamble and 46 articles). The Declaration on Indigenous is more express about guaranteeing the rights not only for the person, but collective rights as well for the whole group,[66] furthermore, it reinforces that indigenous are entitled to the right to self-determination.[67] It refers to international human rights conventions,[68] stating that their scope covers the indigenous also, and expressly lists several human rights and freedoms.[69] Some of its articles are familiar from the resolutions and treaties on the prohibition of discrimination as well as on the protection of minorities, for example: prohibition of forced assimilation,[70] the right to practice their own culture,[71] the right to property and to live on their own territory/land,[72] freedom of religion,[73] right to their own education,[74] the right to

[60] Indigenous entrepreneurs in economic development, GA Res. 41/182, 8 December 1986.

[61] International Year for the World's Indigenous People, GA Res. 45/164, 18 December 1990.

[62] International Year for the World's Indigenous People, GA Res. 46/128, 17 December 1991; International Year for the World's Indigenous People, GA Res. 47/75, 14 December 1992.

[63] International Decade of the World's Indigenous People, GA Res. 48/163, 21 December 1993; International Decade of the World's Indigenous People, GA Res. 49/214, 23 December 1994; Second International Decade of the World's Indigenous People, GA Res. 59/174, 20 December 2004.

[64] *E.g.:* Indigenous people and issues, GA Res. 57/193, 18 December 2002.

[65] United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 September 2007.

[66] Ib. Art. 1, 9.

[67] Ib. Art. 3-4.

[68] Ib. Art. 1.

[69] Ib. Art. 2, 44. Prohibition of discrimination; Art. 6. Right to citizenship, nationality; Art. 7. Right to life and freedom; Art. 15. Right to human dignity; Art. 16. Freedom of media and right to information; Art. 17. Right to work; Art. 18. Right to participate in political life (political rights).

[70] Ib. Art. 8.

[71] Ib. Art. 9, 11, 13, 31, 33, 34.

[72] Ib. Art. 10, 26-30.

relationship and contact with other members of the same indigenous people, whether living in the same country or abroad.[75] DIP uniquely says that states shall consult and cooperate in good faith with the representatives of the indigenous peoples.[76] Increased protection shall be provided for elders, women, children and people with disabilities.[77] It contains such rights, which only appear in relation to the protection of indigenous peoples: right to traditional medicine and health practices, including the use and conservation of their medicinal plants, animals and minerals;[78] right to have a distinctive spiritual relationship with their land and nature;[79] to have their land free from hazardous materials and military activities;[80] the right to determine the responsibilities of individuals to their communities;[81] and the right to the recognition, observance and enforcement of treaties and agreements concluded with them.[82] For the full realization of DIP indigenous peoples have the right to receive financial and other support from the state, to participate in the relevant decision-making and legislative process, as well as the UN and other intergovernmental international organizations shall contribute to that aim.[83]

Although the regulation seems to be very detailed and specific, the Declaration underlines that it only sets the minimum standards, and its implementation and interpretation shall be in conformity with the principles of justice, democracy, human rights, equality, non-discrimination, good governance and good faith.[84]

In the past few years, which passed since the adoption of the Declaration, the General Assembly has dealt with the situation of the indigenous,[85] and will hold a high-level conference in New York (Autumn 2014), with the aim of thoroughly examining the topic.[86]

5. Complementing or Unnecessarily Repeating?

The three major documents, that are the 1965 Convention on the Elimination of Racial Discrimination (CERD), the 1992 Declaration on Minorities (DOM) and the 2007 Declaration on Indigenous Peoples (DIP), created by the UN General Assembly, are compared in the following tables.

The Convention is slightly different, while the other two bear great resemblance. Although anti-

[73] Ib. Art. 12.

[74] Ib. Art. 14.

[75] Ib. Art. 36.

[76] Ib. Art. 19, 32.

[77] Ib. Art. 22.

[78] Ib. Art. 24.

[79] Ib. Art. 25.

[80] Ib. Art. 29-30.

[81] Ib. Art. 35.

[82] Ib. Art. 37.

[83] Ib. Art. 38-42.

[84] Ib. Art. 43, 46.

[85] *E.g.:* Indigenous issues, GA Res. 63/161, 18 December 2008; Rights of indigenous peoples, GA Res. 66/142, 19 December 2011; Rights of indigenous peoples, GA Res. 67/153, 20 December 2012.

[86] Organization of the high-level plenary meeting of the sixty-ninth session of the General Assembly, to be known as the World Conference on Indigenous Peoples, GA Res. 66/296, 17 September 2012. For further information see the website of the event: http://wcip2014.org/.

discrimination was the main reason for the adoption of all three, the historical circumstances can be traced. In the case of the CERD the memories of the Holocaust, and the reality of colonialism and apartheid urged its adoption. The Declarations are the product of the post-Cold War era, while the DOM was inspired by Article 27 of the ICCPR, the DIP is motivated by the historical injustices and the development of the right to self-determination.

The bases of protection in the CERD are race, colour, descent, national, ethnic origin, while in the DOM it's the national, ethnic, religious, linguistic minority and in the DIP indigenous people. All three of them contain regulation not only at the level of individuals, but for groups as well.

When examining the subject of the obligation one finds that the CERD obliges not only the state, but persons, groups, institutions also. In the case of the two Declarations it's only the state that is addressed.

The Convention deals with the issue of positive discrimination, stating that it is allowed until equality is reached. The Declarations do not mention positive discrimination, although DOM expresses in Article 8 (3) that "measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality".

Since the Convention is a legally binding document it contains provisions for its enforcement: the Committee on the Elimination of Racial Discrimination. Understandably, the two Declarations – as lacking binding force – did not establish an organ for enforcement. Nevertheless, some UN bodies check its implementation.

	CERD 1965	DOM 1992	DIP 2007
Main reasons	· Holocaust (WWII) · colonialism · apartheid	· human rights for all · regional frameworks · ICCPR Art. 27.	· anti-discrimination · historic injustices · right to self-determination
Bases of protection	· race · colour · descent · national · ethnic origin	· national · ethnic · religious · linguistic minority	· indigenous people
Subject of protection	· individuals · groups · institutions	· individuals · groups	· individuals · community
Subject of obligation	· state · persons · groups	· state	· state
Positive discrimination	Allowed only until equality is reached	_____	_____
International enforcement	Committee	_____ *(HRC Sub-Commission on the Promotion and Protection of HR)*	_____ *(UN Permanent Forum on Indigenous Issues)*

All three documents include a wide range of actions required from the state. These can be actions at the legislative-legal level, or at social level, or in the international community. While CERD forms part of the human rights legislation, the two Declarations seem to imply that the contained rights are not part of the human rights regime, since the rights guaranteed there should be applied besides the applicable human

rights. Naturally, this also means that application of the Declarations does not relieve a state from guaranteeing human rights to the members of minorities or indigenous communities. That distinction also shows that while human rights are primarily considered to address the individual, the rights of minorities and indigenous appear also at the level of the community.

Actions Required from State	CERD 1965	DOM 1992	DIP 2007
Legal Level	legislation, review policy; prevent, condemn, prohibit and eradicate apartheid practices; condemn all propaganda based on racial superiority	protection of existence and identity; legislation; national programs & policy planning; secure that *besides* human rights	ensure all human rights; non-discrimination; just & fair redress; take effective measures to improve (w/involvement of the indigenous); extra attention to vulnerable groups; legal recognition & protection of land; protect their environment; respect former agreements concluded w/ them
Social Level	combat prejudice; encourage NGOs and movements; take measures in social, cultural, economic, educational, etc. fields	create favourable conditions *(to learn mother tongue, culture, history, tradition, religion; to develop and participate in economic progress)*	combat prejudice and discrimination; promote tolerance; consult & cooperate in good faith effectively; technical & financial assistance
International Level	promote UDHR and CERD	int. cooperation, promote DOM	int. cooperation

Although all three documents have a special subject, they repeat several of the human rights which are guaranteed in other human rights conventions. This does not seem to be necessary since all of them state that all human rights are applicable to the protected subjects. All three of them contain some highlighted rights; the Convention expressly prohibits genocide and apartheid, while the two Declarations underline the right to existence and to have special identity. On the first look DIP seems to guarantee a “big weapon”, that is the right to self-determination. However, on closer inspection one finds that it is even more constrained than the same right expressed in the two International Covenants of 1966. The reason for that is the second sentence of Article 3 interpreting that as the right to freely determine political status and economic, social and cultural development. This inner side of the right to self-determination is also strengthened in Article 4 (right to autonomy or self-government in matters of local affairs) and in Article 46 (1), which guarantees the territorial integrity and political unity to all states.

The documents list civil, political, economic and social human rights, furthermore the two Declarations contain some added rights, such as the right to use mother tongue and own language, to have contact with other members of the community, and the right to determine the responsibility of the individual toward the community.

All three documents contain specific exceptions from the guaranteed rights. The CERD allows differentiation between the nationals and non-nationals of the state (Art. 1). DOM states that specific practices in violation of national law or international standards can be banned and contains the vague reference of “wherever possible” in relation to taking appropriate measures to securing the possibility of

learning mother tongue (both in Art. 4). DIP allows relocation with free, prior, informed consent and just and fair compensation (Art. 10), limitation of rights is acceptable if it is in accordance with domestic law and international human rights obligations (Art. 46).

	CERD 1965	DOM 1992	DIP 2007
Highlighted HR	· non-discrimination · prohibition of genocide, apartheid	· right to their existence & special identity	· all HR · right to self-determination (inner!) · right to their existence & special identity
1st gen.	· equality before the law · political rights *(suffrage, participation, association)* · right to personal safety · civil rights *(nationality, marriage, property, opinion, religion)*	· political rights *(participation, suffrage, association)* · practice religion	· right to their own land & property · practice religion · right to personal & group-level safety
2nd gen.	· economic & social rights *(work, housing, services, education)* · right of free movement and access	· enjoy their culture	· economic & social rights *(work, education, media, services)*
Other	_____	· use own language, *(both public and private)* · contact with other minorities · contact with own people	· autonomy, self-government, distinct institutions · practice, revitalize, teach culture, tradition, religion, language · right to own health practices · right to spiritual relationship to land & nature · right to determine the responsibility of individual toward the community · contact w/own people
Exceptions	· citizens & non-citizens *(nationality, naturalization, citizenship)*	· "specific practices in violation of national law or international standards" · "opportunities to learn mother tongue – wherever possible"	· "free, prior, informed consent with just and fair compensation"

Nowadays UN General Assembly resolutions include the society in the interest of the protection of rights in a wider range, reference to the civil sector and to the role of non-governmental organizations, education and media are more frequent, than it was during the Cold War. Cooperation and exchange of experiences and good practices are also more common between the organs of the UN, furthermore this can be stated about the relationship between those organs of the UN which deal with human rights and other international organizations. The international community has recognized that protection of peace does not start with the "stopping" of an aggressor, but small stirs of the society shall be observed, dangerous trends shall be mapped, and attention should be paid to vulnerable groups (like minorities, women, children etc.).

In the past decades the UN tried to establish this protection through treaties and resolutions. Both the CERD and the Declarations on minorities and indigenous set minimum standards, however, only the first one is legally binding, the other two are of advisory, maybe soft law character. Nevertheless, the effect and significance of these resolutions should not be underestimated, since they were adopted by the representatives of all the states in the world (in the UN General Assembly), and the resolutions indicate the trend of state practice, and hopefully influences positively the development of customary international law in the field.

The social situation is different at the different corners of the world, for example significant indigenous community exists in South America, although they are in minority.[87] Furthermore, some of these states experienced a high-scale importation of slaves from Africa, who also represent a significant percentage of the population today.[88] Often the population of African countries consists of several different ethnic or national groups and none of them comprises the majority.[89] This phenomenon is also characteristic of a few Asian states.[90] In Europe, typically national minorities (less in number) exist beside the main nation of the state (forming the majority population).

In accordance with the fact that only such universal-level legislation can be accepted which covers the ethnic, national minorities, as well as the linguistic and religious minorities. Thus the realization of this protection cannot be separated from the operation of the state, it is part of the requirement of good governance.

The UN documents treat the situation of the indigenous peoples separately from minorities, however, this does not mean that the indigenous are not entitled to protection under the Declaration on Minorities or, for example, under Article 27 of the International Covenant on Civil and Political Rights. Theoretically, the difference between the protection of indigenous and minorities is that the former one has group/community-level rights, while the latter one has only at the individual level, however, the text of

[87] *E.g.:* The Mexican population consists of 65 % Mexican or Mestizo (of mixed European and Indian origin), 18 % indigenous Indian, 16 % white and 1 % other. Encyclopaedia Britannica: Mexico – Ethnic groups, http://www.britannica.com/EBchecked/topic/379167/Mexico/27384/Ethnic-groups (Downloaded: 17 July 2014).

[88] *E.g.:* Almost 8 % of the Brazilian population is Black, and more than 43 % Brown (of mixed European and black, or Indian origin). The percentage of indigenous does not reach half percent of the population. World Population Review, Ethnicity and race in Brazil, http://worldpopulationreview.com/countries/brazil-population/ (Downloaded: 17 July 2014).

[89] This is spectacular in Kenya: 22 % Kikuyu, 14 % Luhya, 13 % Luo, 12 % Kalenjin, 11 % Kamba, 6 % Kisii, 6 % Meru, 15 % other African, 1 % other non-African. World Population Review, Kenya – population, http://worldpopulationreview.com/countries/kenya-population/ (Downloaded: 17 July 2014). For a detailed analysis of indigenous and minority rights in Kenya see Korir Sing'Oei Abraham: Kenya at 50: unrealized rights of minorities and indigenous peoples. Report of the Minority Rights Group International, 2012. http://resourcecentre.savethechildren.se/sites/default/files/documents/5773.pdf (Downloaded: 27 September 2014)

[90] *E.g.:* It is disputed how many ethnic groups can be found in India (the numbers vary between 2 to 4), nevertheless they speak about 30 different languages (Hindi is spoken only by 41 % of the population).

the Declaration on Minorities does not mirror that theory. Further important difference is that the indigenous are entitled to the right to self-determination, while the minority is not. Nevertheless, in practice we saw the opposite of that, for example in the case of Albanians in Kosovo. Furthermore, the practice of inner self-determination very much resembles the practice of minority rights at a community level (for example participation in political decision-making and legislation, the possibility of self-government).

State practice typically uses one of the following approaches toward the minorities (as well as toward the indigenous): elimination, assimilation, toleration, protection and integration.[91] International law prohibits the elimination and forced assimilation, and human rights conventions and the Declarations prescribe protection. The well-established protection creates integration in a good sense, where the ethnically, religiously and/or linguistically plural society lives together peacefully and in a healthy manner, cooperates, maintains its diversity, but has the sense of belonging together.

Protection of the indigenous is especially important in those states where they are in minority, thus their situation resembles to the situation of minorities. As it has been demonstrated the legislation covering them is also very similar. Based on that, it can be imagined that their protection would be possible under *one* international treaty. However, this idea has not yet entered the UN General Assembly.

[91] *See e.g.:* Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. No. E/CN.4/Sub.2/AC.5/2005/2, 4 April 2005. Point 21.

The Past, the Present and the Future of the Seasonal Workers Directive

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This study aims at highlighting those legal and political issues that raised the most concerns during the negotiations of the Seasonal Workers Directive by giving an insight to the events behind the scenes. The research does not intend to describe every element of the Directive; instead it wants to reveal the specificities of the Seasonal Workers Directive. It therefore introduces the meaning of seasonal and circular migration from the aspect of the Directive; and also gives an insight of what challenges resulted from the fact that it is the first Directive on legal migration to cover short-term stay. The alignment of the provisions of the Directive with the Schengen acquis therefore is discussed in details.

Apart from solely legal issues the study also touched upon forms of how the Directive wishes to protect seasonal workers from exploitation and provide a stable legal basis with a tailor-made set of rights for them.

The frame used in the study for discussing these issue starts with the introduction of the plan and the adoption of the Directive, and ends with some thoughts on the challenges of implementation by two chosen Member States, namely Poland and Finland because of their unique national situations. Consequently, the study wishes to touch upon the past, present and the future of the Seasonal Workers Directive, as well.

Keywords: legal migration, seasonal workers, circular migration, equal treatment.

1. Introduction

"Despite the economic crisis with resulting high unemployment, EU economies face vacancies across the skill spectrum. At the low end there is a structural need when it comes to seasonal work. This is due to the fact that the EU workforce generally sees seasonal work as unattractive. This need is sometimes plugged through the mobility of EU workers especially from newer Member States to older ones. Nevertheless, seasonal workers can be seen everywhere: mushroom picking in the Netherlands, ski resorts in Austria, coastal tourism in Spain or in the olive groves of Italy. Seasonal work is also key to Central and Eastern European Member States who often meet their needs with nationals of countries bordering the EU, e.g. Ukrainians in Poland."[1]

[1] Alex Lazarowicz, A success story for the EU and seasonal workers' rights without reinventing the wheel, EPC Policy Brief, 28 March 2014, p. 1.
http://www.epc.eu/documents/uploads/pub_4309_eu_and_seasonal_workers__rights.pdf.

In spite of the fact that there is a clear need for admitting third-country nationals for seasonal work throughout Europe, the specificities of the already existing national schemes actually worked against an easy adoption of the Seasonal Workers Directive (2014/36/EU). The lack of willingness on behalf of many Member States to agree on harmonized rules at EU level was clearly reflected by the fact that 12 subsidiarity votes,[2] or better known as "yellow cards" against the Directive by national parliaments were submitted. Although it was not enough to stop the legislative procedure, but clearly contained a significant alert that the legislative procedure would not be an easy one.

It was only the continuation more difficult than the outset of the legislative procedure. This study aims at highlighting those legal and political issues that raised the most concerns during the negotiations by giving an insight to the events behind the scenes. The research does not intend to describe every element of the Directive, instead it wants to reveal the specificities of the Seasonal Workers Directive, such as what is meant by seasonal and circular migration, what challenges it meant to cover short-term stay, and how the Directive intends to protect seasonal workers. The frame used in the study for discussing these issue starts with the introduction of the plan and the adoption of the Directive, and ends with some thoughts on the challenges of implementation by two chosen Member States, namely Poland and Finland because of their unique national situations. Consequently, the study wishes to touch upon the past, present and the future of the Seasonal Workers Directive, as well.

2. The Birth of the Seasonal Workers Directive

2.1. The Background Framework Plan

The European Commission primarily aimed to approach the legislation of legal migration of third country nationals from an economic point of view. Accordingly, the Commission proposed a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities on 11 July 2001.[3] No matter how noble the intention of the Commission was to create an EU-wide harmonised system for a very wide range of third-country migrants, i.e. to follow a horizontal approach in order to cover both the groups of employees and self-employed persons, the negotiation of the Directive revealed many problems. "The proposal, which closely followed the 1999 Tampere Programme's milestones, was finally withdrawn because representatives of certain EU Member States expressed deep concern about the possibility of having 'more Europe' in these nationally sensitive fields."[4]

Turning to other categories of migrants instead of workers and entrepreneurs, the proposals of the Commission, launched according to the instructions set out by the Tampere European Council, on sets of harmonized rules on third-country nationals coming for purposes such as family reunification, studies and research had been more successful as for the negotiations in the Council and resulted in a number of

[2] A new tool in the hands of the national parliaments introduced by the Lisbon Treaty enforcing Article 3b of TEU, the Protocol on the application of the principles of subsidiarity and proportionality is annexed to the TEU and TFEU.

[3] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities /COM/2001/0386 final – CNS 2001/0154/.

[4] S. Carrera et al, Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020, CEPS Policy Brief No. 240, 5 April 2011, p. 3.

directives adopted between 2003 and 2005. Directive 2003/86/EC[5] on family reunification adopted as the first legal migration directive harmonizes criteria for family reunification between third-country nationals and therefore embraces family reunification as a right of migrants. Directive 2003/109/EC[6] creates a European regime for acquiring EU long-term residence status after five years of legal residence in a Member State. Directive 2004/114/EC[7] focusing mainly on migrants coming for pursuing studies and Directive 2005/71/EC[8] setting up a unique procedure for the admission of researchers reflect the EU's preference for knowledge-based migration.

The Hague Programme of November 2004, continuing the implementation of the initiatives of the 1999 Tampere Programme, stressed that legal migration plays an important role in strengthening the knowledge-based European economy, economic development and also contributes to the implementation of the Lisbon Strategy. In order to facilitate the adoption of a new draft Directive on economic migration, the European Commission initiated an extensive consultation with its 'Green Paper on an EU approach to managing economic migration'[9] with Member States, other European institutions, international organizations and NGOs, and other interested parties as to what would be the best type of legislation at Community level in relation to the reception of economic migrants from third countries.

The primary objective of the consultation launched by the Green Paper was to find the most appropriate form of regulation in the Community on the reception of migrants for economic purposes from third countries, and to discover what would be the added value of the establishment of such a Community framework. The Hague Programme also referred to the Green Paper and the consultation, which would form the basis of a policy plan on legal migration including admission procedures capable of responding promptly to the changing labour market demand.

The result of this consultation was the continuation of the sectorial, or more precisely selective approach of laying down migration rules for certain chosen groups of migrants instead of covering a wider scope of third-country nationals by a harmonised set of criteria. "The main justification was that, by doing this, the common European policy would be in line with the political priorities and legal regimes applying in most EU Member States."[10] The Political Plan on Legal Migration[11] was the way in which the Commission envisaged a framework directive – together with four further directives covering four specific groups of economic migrants. Carrera's view on the new Policy Plan clearly highlights the differences between the new perspective and the initial proposal of 2001: "The main result of the approach advocated by the "Policy Plan on Legal Migration" has been the emergence of a hierarchical, differentiated and obscure

[5] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, pp. 12–18.

[6] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, pp. 44–53.

[7] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004, pp. 12–18.

[8] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289, 3.11.2005, pp. 15–22.

[9] COM (2004) 0811final: Green paper on an EU approach to managing economic migration.

[10] Carrera, p. 4.

[11] Communication from the Commission on a policy plan on legal migration, COM (2005) 669 final.

European legal regime on labour immigration which accords different rights, standards and conditions for entry and stay to different groups and countries of origin of TCN."[12]

The plan of five directives resulted in actually four proposals from the Commission among which the first to reach a maturity for adoption was Directive 2009/50/EC[13] creating the so-called EU Blue Card. The framework directive (Directive 2011/98/EU[14]) not touching upon admission criteria, but definitely bringing major change in procedural rules as well as rights was only adopted two years later. Two more draft directives – the proposal for a Directive on intra-corporate transfers[15] and the proposal for a Directive on seasonal workers[16] - were proposed by the Commission in 2010. Their adoption had long been awaited as a result of the negotiations needed between the co-legislators Council and European Parliament under the ordinary legislative procedure that was extended to the field of legal migration by the Lisbon Treaty. Finally the Directive on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (Directive 2014/36/EU)[17] and the Directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Directive 2014/66/EU)[18] were both adopted in the first half of 2014.

2.2. The Adoption of the Directive

Directive 2014/36/EU of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (hereinafter referred to as Seasonal Workers Directive) was officially adopted on 26 February 2014 after three and a half years of negotiations. The legislative procedure contained elements that partly encouraged a fast rhythm of legislation, but all in all features hindering the quick adoption of the new legal act dominated the procedure.

The European Commission launched its proposal[19] for a Directive on 3 July 2010 as an element of implementing the Policy Plan on Legal Migration set out in 2005. The Policy Plan acknowledged that "seasonal workers are regularly needed in certain sectors, mainly agriculture, building and tourism, where many immigrants work illegally under precarious conditions. (…) The aim is to provide the necessary

[12] Carrera, p. 3.

[13] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, pp. 17–29.

[14] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011, pp. 1–9.

[15] Proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer /COM/2010/0378 final - COD 2010/0209/.

[16] Proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment /COM/2010/0379 final - COD 2010/0210/.

[17] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28/03/2014, pp. 375–390.

[18] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, pp. 1–22.

[19] COM(2010) 379 final.

manpower in the Member States while at the same time granting a secure legal status and a regular work prospective to the immigrants concerned, thereby protecting a particularly weak category of workers and also contributing to the development of the countries of origin. Even in presence of high unemployment, this category of immigrant workers rarely conflict with EU workers as few EU citizens and residents are willing to engage in seasonal activities."[20]

According to the Impact Assessment annexed to the proposal of the Directive the national provisions in this field differ to a great extent as for the definition of seasonal employment, the time frame of seasonal work, the procedure rules of admission as well as the rights provided for seasonal workers. Accordingly, the main purpose of the proposal of the Directive is to introduce transparent provisions concerning the entry and stay of seasonal third-country national workers, furthermore making it easier for them to enter the territories of the EU for the purpose of seasonal employment and harmonizing the procedural rules of the Member States. In order to achieve these goals, primarily there is a need for introducing a common definition for seasonal employment, furthermore for creating a facilitated procedure for the admission of seasonal workers based on a common set of criteria. A further aim of the proposal was to help preventing the exploitation of seasonal workers and consequently it proposed to set out basic minimum rights to be provided for such workers.

As the proposal of this Directive was submitted together with the draft Directive on intra-corporate transferees (ICTs), the two proposed legal acts were handled in a package both by the Commission, and also, even more so, by the European Parliament regardless of the differences of the target groups of the two proposals. One of the major aims of the EP during the legislative procedure, namely not letting the facilitation of the entry and rights of low-skilled workers be neglected, is clearly shown by the fact that although the Council's relevant Working Party[21] developed a compromise proposal earlier in the case of the draft Directive on ICTs, the European Parliament quickened its steps concerning the Seasonal Workers Directive. Their tools of enhancing the adoption of the Council's position concerning the proposal on Seasonal Workers Directive even included not showing real interest in starting informal trilogues in the ICT Directive as long as the Member States do not reach an agreement in the Council's Working Party on a compromise proposal concerning seasonal workers.

While such political and inter-institutional games definitely put pressure on the Council, it was not only the wide range of existing national provisions slowing down the legislative procedure, but legal and conceptual deficiencies of the Commission's proposal, as well. Such challenges of the adoption of the new legal act, elaborated more in the next Chapter, clearly had a major effect on the length of the legislative procedure.

3. The Unique Elements of the Seasonal Workers Directive

The Proposal of the Directive on seasonal workers was not only unique as it touched upon migration of low or unskilled workers for the first time and put not only the aim of raising the competitiveness of the EU in the centre, but the proposal aimed at fighting exploitation and also complied with the EU's development policy by facilitating circular migration. In particular, its provisions were introduced in a

[20] Communication from the Commission on a policy plan on legal migration COM (2005) 669 final, p. 7.

[21] Working Party on Integration, Migration and Expulsion, Formation Migration – Admission.

way to encourage the circulation of migrants staying only for a temporary period, and therefore the Directive is not expected to lead to brain drain[22] in emerging or developing countries.

Therefore, while there have been several legal questions raised by both co-legislators during the more than three years of negotiations, such as for example the question of legal basis,[23] this study focuses only on issues that originate from the unique nature of the Seasonal Workers Directive.

3.1. Seasonal and Circular Migration

The definition of seasonal worker[24] includes carrying out an activity dependent on the passing of the seasons, which type of activity has also been defined in the Directive, meaning "an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations."[25] Consequently the Directive itself does not contain a close list of seasonal work or seasonal activities, but takes into account the differences of Member States, in particular their climate and economy, and therefore obliges the Member States, when transposing the Directive, to consult with social partners, where appropriate, and list those sectors of employment which include activities that are dependent on the passing of the seasons. "Activities dependent on the passing of the seasons are typically to be found in sectors such as agriculture and horticulture, in particular during the planting or harvesting period, or tourism, in particular during the holiday period."[26,27]

[22] Yet, it is a bit controversial to emphasize the nature of fighting brain drain in case of this Directive, as the target group of migrants is of low or non-skilled migrants.

[23] The legal basis proposed by the Commission for the proposed directive is Art. 79(2)(a) and (b) TFEU, which falls under Title V on the Area of Freedom, Security and Justice of Part Three of the TFUE, entitled Union Policies and Internal Actions. It has been raised during the negotiations that either it should be changed to or this legal basis should be applied parallel with Art.153(1) (a), (b) and (g) TFEU, which falls under Title X on Social Policy of Part Three of the TFEU, entitled Union Policies and Internal Actions. The reason for the additional legal basis is stated as being that the proposal for a directive does not regulate only issues of migration, but also questions of employment rights of the categories of workers concerned. The common official justification of such expressions of need was the fact that the proposal for the directive does not regulate only issues of migration, but also questions of employment rights of the categories of workers concerned. Yet, the purpose of such change was supposedly very different. Those arguing for the parallel use of the two legal bases, namely the Employment Committee of the EP, that the Area of Freedom, Security and Justice is subject to Protocol No 21 on the position of the United Kingdom and Ireland and Protocol No 22 on the position of Denmark. Under those protocols, Denmark never takes part in the adoption of measures and the United Kingdom and Ireland have a choice whether or not to participate. Further voices, mainly of certain Member States lobbied for the complete change of legal basis to Art. 153 of TFEU as in such issues of Social Policy the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

Contrary to all these voices para 42 of the decision on Case C-178/03 *Commission* v *European Parliament and Council* stated that if examination of the act "reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.".

For further elaboration see the Opinion of the Committee on Legal Affairs of the EP on the Verification of the legal basis of the proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, 23.11.2011.

[24] See Art. 3(b) of Directive 2014/36/EU.

[25] Art. 3(c) of Directive 2014/36/EU.

[26] Preamble (13) of Directive 2014/36/EU.

"Taking into account certain aspects of circular migration as well as the employment prospects of third-country seasonal workers beyond a single season and the interests of Union employers in being able to rely on a more stable and already trained workforce, the possibility of facilitated admission procedures should be provided for in respect of bona fide third-country nationals who have been admitted as seasonal workers in a Member State at least once within the previous five years, and who have always respected all criteria and conditions provided under this Directive for entry and stay in the Member State concerned. Such procedures should not affect, or circumvent, the requirement that the employment be of a seasonal nature."[28] It should be emphasized that the Directive intends to generate new migration flows of seasonal nature[29] as it only applies to third-country nationals residing outside the territory of the Member States.[30] Yet, in line with the aim of facilitating circular migration of those law-abiding seasonal workers is set out in Article 16 of the Directive.

There has been an extensive debate both within the EU Council's competent Working Party as well as between the EP and the Council on how to determine the way of facilitation. The Commission's proposal intended to provide for two, but compulsory ways of facilitation, according to which Member States should have either, upon application, issue up to three seasonal worker permits covering up to three subsequent seasons within one administrative act ('multi-seasonal worker permit'), or provide a facilitated procedure for third-country nationals who were admitted to that Member State as seasonal workers and who apply to be admitted as such in a subsequent year.[31] Even though the final text of the Directive offers more options for facilitation, such options are listed as a 'may clause', that is while there is a clear obligation for Member States to provide for a set of rules on facilitated entry, the content of these rules is not determined in a harmonized way at EU level, only the most preferred options are listed as follows, providing more flexibility for Member States: "(a) the grant of an exemption from the requirement to submit one or more of the documents referred to in Articles 5 or 6; (b) the issuing of several seasonal worker permits in a single administrative act; (c) an accelerated procedure leading to a decision on the application for a seasonal worker permit or a long stay visa; (d) priority in examining applications for admission as a seasonal worker, including taking into account previous admissions when deciding on applications with regard to the exhaustion of volumes of admission."[32]

As some of the Member States may already facilitate circular migration by bilateral or multilateral agreements with non-EU countries, it is important to emphasize that this Directive shall apply without prejudice to more favourable provisions of such agreements. Consequently such bilateral or multilateral agreements shall continue to apply as long as their provisions provide for more favourable rules for

[27] Such an approach is in line with the proposal of the Commission, as well. See Preamble (10) of COM(2010) 379 final.

[28] Preamble (34) of Directive 2014/36/EU.

[29] This purpose was although not that obvious for the LIBE Committee of the EP as in its draft report it suggested a new Paragraph under Art. 2: "For a transitional period of two years following its transposition by Member States, this Directive shall apply to third-country nationals present on the territory of a Member State who do not fulfil, or no longer fulfil, the conditions for stay or residence in that Member State and who apply for a seasonal worker permit in that Member State." (See Amendment 18 of the Draft Report of the Committee on Civil Liberties, Justice and Home Affairs, 8.6.2011.) Therefore the EP tried to lobby for extending the scope of the Directive to those already residing illegally and therefore making the Directive a tool for the first harmonized way of legalizing stays of third-country nationals. This, however, still remains in the competence of each Member State.

[30] See Art. 2(1) of Directive 2014/36/EU.

[31] See Art. 12(1) of COM(2010) 379 final.

[32] Art. 16(1) of Directive 2014/36/EU.

seasonal workers, including their rights.[33] Therefore it is suggested for Member States having entered into bilateral or multilateral cooperation that they review their agreements in order to determine whether there are certain aspects of the agreement that need to be omitted in order to apply the Directive's provisions instead in order not to deprive a group of seasonal workers under the scope of the agreements, of their rights provided for by the Directive.

3.2. Covering Short-term Stays

The negotiations of the Directive were long-lasting due to the fact that it was the first set of EU rules on legal migration that concerns not only stays exceeding 90 days, but also stays not exceeding 90 days. Unfortunately the Commission's proposal was silent on how to proceed technically when the stays do not exceed three months as it only set out that "for stays exceeding three months, seasonal workers who fulfil the admission criteria as set out in Article 5 and for whom the competent authorities have taken a positive decision shall be issued with a seasonal worker permit."[34] Therefore the Commission only focused on pursuing single application procedure already set out in Directive 2009/50/EC and Directive 2011/98/EU, but did not investigate the issue substantially.

So what composed the substance of the problem? While Article 10 on the seasonal worker permit only concerns stays exceeding three months, the conditions for entry and stay set out in Article 5, the grounds for refusal in Article 6 and the reasons of withdrawal and non-renewal in Article 7 had been proposed by the Commission for all stays regardless of its length as long it is covered by the scope of the Directive. However, such provisions should have been aligned with[35] the *Schengen acquis* and in particular with the Visa Code[36] as there is already a closed system of EU rules concerning stays not exceeding 90 days within a 180-day period. As such provisions, being completely harmonized mainly by regulations at EU level, do not allow for a diversion unless expressively stated, the Seasonal Workers Directive would have been contradictory to the Visa Code containing a close list of entry and stay as well as grounds for refusal and withdrawal due to the lack of alignment of the proposed provisions with the already existing scheme for short-term stays.

Unfortunately, as such alignment had not been done by the Commission in its proposal it had to be solved mainly by the competent Working Party of the Council. There were several options outlined for solving the problem, so the issue needed a conceptual decision before proceeding further with the detailed rules. One and probably the most drastic option could have been to lower the expectations concerning the issues covered and omit rules on entry and stay while focus only on the rights of seasonal workers. Yet, it would have been far from the original aim of establishing a common system of admission for seasonal workers, furthermore it would have necessitated a completely different legal basis and legislative procedure as it would only concern social policy issues.

Further, less dramatic option was to only cover stays exceeding three months similarly to the already existing Directives on legal migration. However, as seasonal employment lasts typically for a shorter period and therefore most of the target group would not be covered and consequently the aim of the

[33] See Art. 4(1)b) of Directive 2014/36/EU.

[34] Art. 10 (1) of COM proposal.

[35] See Preamble (19) of Directive 2014/36/EU.

[36] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243, 15/09/2009, pp. 1–58.

Directive would not be reached. It has also occurred that the new Directive could repeat the provisions of the Visa Code for stays not exceeding 90 days, yet it would cause a legally problematic situation as the same rules would be set out in both a regulation and a directive and therefore the directly applicable nature of the provisions of the regulation could be questioned.

The solution expected to bring the most added value proved to be a complex one, but finally received the approval of both legislators. According to this, in case of seasonal workers coming for stays not exceeding 90 days, the admission criteria set out in the Directive only concerns the employment related provisions, and while as for other aspects the Visa Code shall continue to apply.[37] On the contrary for stays exceeding 90 days the Directive defines both immigration and employment conditions.[38]

The complexity of the adopted rules does not only lie in the alignment of the *Schengen acquis* with the Directive's provision, but in providing flexibility due to the requests of Member States to be able to apply most of the elements of their already existing national systems on seasonal and temporary migration. Such requests included, among others, the length of the seasonal period to be determined within a given timeframe as well as being able to issue long-stay visas for the target group. Consequently, those fulfilling the conditions for admission may come for a period determined by each Member State individually between five and nine months in any 12-month period.[39] Member States are also free to continue issuing long-stay visas instead of seasonal worker permits for those staying for longer than 90 days, while for stays not exceeding 90 days, Schengen visas are to be issued by Member States applying the *Schengen acquis* in full.[40]

"This resulted in this section of the Directive being entirely re-written in order to encompass all the possibilities for admission for seasonal work, and not provide for a one-size-fits-all solution. The final text now clearly lays out (Article 12) exactly how authorisations for seasonal employment will function both in terms of short and long stays, including the seasonal worker permit option in the latter category. It has also encompassed the options that include the issuing of work permits and long-term visas into the two categories, resulting in a total of six possible routes to seasonal employment."[41]

3.3. The Protection of Seasonal Workers

The earlier results of EU harmonization of provisions managing legal migration focused on various issues, such as the appreciation of family as a value (Family Reunification Directive), the acknowledgment of successful integration of long-term migrants (Long-term Residence Directive) as well as the promotion of knowledge based migration (Students Directive and Researchers Directive). Yet, there is one thing in common: these aims all put values into the focus of legislation. On the contrary, the elements of the Political Plan on Legal Migration put interests into their focus, namely the facilitation of economic growth and competitiveness. However, one accompanying aim behind the idea of the Seasonal Workers Directive is still closer to values than interests as the Directive aims at protecting seasonal workers from being exploited and ensuring a stable legal status for them.

[37] See Preamble (20) and Art. 5 of Directive 2014/36/EU.

[38] See Preamble (21) and Art. 6 of Directive 2014/36/EU.

[39] See Art. 14(1) of Directive 2014/36/EU.

[40] See Art. 12 of Directive 2014/36/EU.

[41] Lazarowicz, p. 2.

3.3.1. The Provisions on Accommodation

There are various elements of the proposal that could be contributed to the aim of protecting seasonal workers. One can even be found among the conditions of admission, namely the provisions on accommodation. Article 14 of the proposal suggested the application of the following rule: "Member States shall require employers of seasonal workers to provide evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living.[42] If seasonal workers are required to pay rent for such accommodation, its cost shall not be excessive in relation to their remuneration." The problematic element of this proposal of the Commission was that employers would have had to provide evidence about the appropriate accommodation not only in case the employer would provide accommodation, but basically in all the cases. It has to be noted that practically in the majority of cases it is worker's hostel or some other forms of accommodation arranged by the employer for the seasonal or temporary workers, but there may be exceptions, such as in the cases of those being accommodated by family or friends, or those renting their own places. Therefore it would be an unreasonable burden on the employers to bear the burden of proof even if they have nothing to do with the arrangements of accommodation.

In the meantime it was acknowledged that seasonal workers should be protected from having to live among poor conditions, therefore according to the compromise solution the following provision was approved by both legislators: "Member States shall require evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living according to national law and/or practice, for the duration of his or her stay. The competent authority shall be informed of any change of accommodation of the seasonal worker."[43] Furthermore where accommodation is arranged by or through the employer provisions concerning the rent, the rental contract as well as the health and safety standards have also been set out in the Directive.[44]

3.3.2. The Equal Treatment Provisions of the Directive

The sectorial approach the EU does not only differentiate between certain groups of third-country national concerning criteria of admission, but concerning the areas of rights to which the principle of

[42] The expression of providing "adequate standard of living" already appears in Art. 17(2) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) as well as in Article, yet with a different obligation of the state. While in case of asylum seekers it is the duty of the Member States to provide an accommodation that meets the condition of adequate standard of living, in case of seasonal workers the state authorities only need to check whether the employer provided it or not. To this effect the provision set out in Art. 7(1)(a) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification stands closer to what the Seasonal Workers Directive envisions : "When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned."

[43] Art. 20 (1) of Directive 2014/36/EU.

[44] Art. 20 (2) of Directive 2014/36/EU: (a) the seasonal worker may be required to pay a rent which shall not be excessive compared with his or her net remuneration and compared with the quality of the accommodation. The rent shall not be automatically deducted from the wage of the seasonal worker; (b) the employer shall provide the seasonal worker with a rental contract or equivalent document in which the rental conditions of the accommodation are clearly stated; (c) the employer shall ensure that the accommodation meets the general health and safety standards in force in the Member State concerned.

equal treatment is applied. It is based on the intention of attracting certain groups by laying down preferential rules on admission as well as providing a wide list of rights, while as for other groups of migrants the aim is to only keep them on the territory of the EU for a definite time. Such differentiation of migrants can not only raise ethical problems, but can cause further challenges when it comes to setting out specific legal provisions.

A very expressive example of the legal aspect of this issue has raised tensions in case of the Seasonal Workers Directive, as well. The provision of family allowances serves the primary purpose of strengthening families and encouraging their formation and extension as they are the basic foundations of a society. It is therefore a typical form of investing in the future of the state. Consequently the question justifiably arises, whether such support should be provided to families who are only temporary elements of the host society. If we agree that there are reasons justifying the lack of extending equal treatment to such right, another challenge is to define what constitutes temporary period and therefore where is the line between those claiming rightfully the reception of such benefits and those lawfully being excluded from the enjoyment of this right.

It is worth to examine the situation and specificities of seasonal workers in a more detailed way. The maximum time they are allowed to spend in an EU Member State is between five to nine months in a 12-month period at the end of which they are obliged to leave the territory of the EU. Furthermore the Seasonal Workers Directive does not provide for the right to family reunification either.[45] Based on all these features it is not typical for seasonal workers to reunite with their families on the territory of the EU, or even if they do so, they do not stay for a long period. Consequently there are powerful arguments in the hands of Member States why they are not ready to extend equal treatment clauses to the field of family allowances.

Based on such reasoning Article 23 of the Seasonal Workers Directive not only lists a number of areas concerning which seasonal workers shall receive equal treatment with the citizens of the host country, but also sets out certain optional restrictions, namely the exclusion of family benefits and unemployment benefits; the limitation of the application of equal treatment to education and vocational training which is directly linked to the specific employment activity and the exclusion of study and maintenance grants and loans or other grants and loans; and with respect to tax benefits the limitation of its application to cases where the registered or usual place of residence of the family members of the seasonal worker for whom he/she claims benefits, lies in the territory of the Member State concerned.

Nevertheless the access to certain rights remains a complex and sensitive question involving ethical, economic and legal aspects.[46] Based on human rights aspects the Council and the Member States are continuously accused of not extending the principle of equal treatment completely in case of third-country nationals. On the other hand Martin Ruhs using a realistic approach examines the economic aspects of rights; he even gave the title "*The Price of Rights*" to his book.[47] According to him rights not only have an internal value, as the human rights approach states, but they play and important role in shaping the effect

[45] It is in line with Art. 3(1) of the Council Directive 2003/86/EC on the right to family reunification: "This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status."

[46] The *Kamberaj* case (C-571/10) showed that even in case of the long-time applied Directive 2003/109/EC questions can arise concerning in terms of what exact rights a limitation can be applied.

[47] Martin Ruhs, *The Price of Rights: Regulating International Labour Migration*, Princeton University Press, USA 2013.

of migration. Consequently the rights provided by the main host countries depend to a great extent on their effect on the society of the host country.[48] Ruhs therefore proposes a so-called *core rights approach* trying to find a viable option for following the rights-based approach, but in a way that it would not result in such an oppositional behaviour on behalf of the host society that providing a wide range of rights actually resulted in the complete undermining of immigration of third-country nationals.

3.3.3. The Possibility of Extension and Change of Employer

Article 11 (2) of the proposal sets out that within the maximum period of seasonal employment, and provided that the criteria of admission are still met, seasonal workers shall be allowed to extend their contract or to be employed as seasonal worker with a different employer. The Commission's explanation on these provisions reveal the fact that they are to serve the aim of the protection of seasonal workers: "Explicit provision is made that within the maximum duration of stay an extension of the contract or a change of employer for seasonal work is possible. This is important for the reason that seasonal workers who are tied to a single employer may face the risk of abuses. Also, the possibility to extend the stay within the specified period of time may reduce the risk of overstaying. Finally, extension allows higher earnings and remittances sent by third-country seasonal workers which, in turn, can contribute to the development of their countries of origin."

Member States have raised several negative comments on these suggestions both form a practical as well as from a legal point of view. Firstly, as labour market issues remain in the competence of Member States, they can apply labour market tests even in case of seasonal workers, and not only when admitting them first in the country, but also during the renewal procedure. As the maximum length of seasonal employment shall be determined between five to nine months by each Member State, if the seasonal worker is first admitted for a shorter period and wishes to extend their stay, or the seasonal worker intends to change employer, the length of the renewal procedure cannot guarantee that it will be worth starting such a procedure. The question of renewal also generates a legal problem due to the obligation of aligning the provisions with the *Schengen acquis*. More specifically, if the original intended period of stay was less than 90 days and a Schengen visa was issued for the purpose of seasonal employment, it is impossible to extend this visa for the purpose of continuing the seasonal work. Consequently the Directive had to play with the words in order not to overrule the *Schengen acquis* and therefore the adopted provisions mention the extension of stay instead of the extension of the visa. It therefore allows Member States to issue long-term visa or seasonal worker permit in case the stay with a Schengen visa for seasonal employment should be extended.[49]

[48] Ruhs, p. 19.

[49] According to Art. 15 Member States shall allow seasonal workers one extension of their stay, where seasonal workers extend their contract with the same employer. Member States may decide, in accordance with their national law, to allow seasonal workers to extend their contract with the same employer and their stay more than once. Member States shall also allow seasonal workers one extension of their stay to be employed with a different employer. Member States may decide, in accordance with their national law, to allow seasonal workers to be employed by a different employer and to extend their stay more than once.

3.3.4. The Obligations of the Employers and the Member States

The Directive also sets out many obligations for employers as well as sanctions (Article 17) when they fail to comply with their obligations; furthermore it also obliges the Member States to have effective monitoring, assessment and inspections (Article 24). This can also be helped by the employees' complaints as Member States shall also ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers directly or through third parties (Article 25).

Nevertheless, there is a risk of going from one extreme to the other and create a set of rules that would be hard to comply with and therefore would rather discourage the employer from employing seasonal workers lawfully. As the rapporteur of the EP LIBE Committee, Claude Moraes put it: "Strict rules should be in place and enforced, but we also have to make sure that the Directive, as a whole, does not actively discourage employers from using it. We are well aware of the risk of rendering the Directive ineffective on implementation through either a lack of sanctions or sanctions which are misplaced or too burdensome. Finding the right balance is therefore an imperative for us."[50]

4. The Predicted Problems of National Implementations

As a result of the continuous lobby of the Member States, the European Parliament finally agreed to allow 30 months for the transposition of the Directive; therefore Member States shall bring into force their national laws, regulations and administrative provisions necessary to comply with the Seasonal Workers Directive by 30 September 2016. Although it may seem to be an easy to task to align the already existing national provisions on seasonal or temporary workers with the Directive, as many of the Member States already have specific rules for short-term employment, it may indeed imply just as numerous challenges for Member States as establishing a completely new scheme of admission, for example in the case of the EU Blue Card. It is due to the fact that "policy complexity, however, tends to delay transposition."[51]

4.1. The Simplified Procedure of Poland

In Poland a scheme called '*simplified procedure'* has been applied since 2006[52] dedicated to short-term labour migrants of certain countries bordering Poland as well as further Eastern Partnership countries. Presently this scheme is applied for the citizens of Armenia, Belarus, Georgia, Moldova, Russia and the Ukraine. The scheme allows citizens of these countries to perform work in Poland for six months within the twelve consecutive months without work permit provided they are in possession of declaration of

[50] Claude Moraes & Anny Bhan, Debunking the myths of the EU Seasonal Workers Directive, ENAR, http://www.enargywebzine.eu/spip.php?article286.

[51] Simon Hix & Bjorn Hoyland, The Political System of the European Union, Palgrave Macmillan, UK 2011, p. 33.

[52] Ordinance of the Minister of Labour and Social Policy of 30 August 2006 on taking up employment by foreigners without the need to obtain a work permit (Dz. U. of 2006, No. 156, item 1116) allowing the nationals of the Russian Federation, Ukraine and Belarus to work without work permits in only one sector of economy, which suffered the most from the lack of workforce, i.e. in agriculture – they could work for a period of maximum 3 months in any consecutive 6 months.

employer registered in the local labour office.[53] The scheme is the most popular formula of employment of foreigners in Poland and is mainly applied in the sectors of agriculture and construction. According to the recommendation set out in the document "Migration policy of Poland – current state of play and further actions" adopted in 2012 the scheme should be further pursued and developed. During this development the implementation of the Seasonal Workers Directive will also affect the future shape of the simplified scheme.

"The simplified system makes it possible for the Polish employers to legally employ foreigners registered in a district labour office competent for the place of residence or seat of the declarant, free of charge and in most cases immediately. The registered statement is handed over to a foreigner and is the basis for applying for a visa. In addition to minimum formalities required, the advantages of the system include its flexibility and the fact that it is adequate to the demand." This scheme already contains features appearing in the Seasonal Workers Directive, such as the possibility to re-enter and take up employment on the same conditions; and the possibility to change employers, which facilitates mobility while providing seasonal work. Indeed, "surveys conducted with seasonal workers have shown that according to the employees after the introduction of this solution their safety and working conditions improved which is related to the possibility of taking up employment with another employer and imposes competition between employers. The surveys have also shown that the scale of foreigners' employment in the grey market was reduced."[54] Similarly, an analysis[55] carried out by the Institute of Public Affairs concluded that the design of the simplified system works very well in the case of seasonal labour, and the foreigners employed under this procedure form the most numerous group of foreign legal workforce.[56]

Yet, the future of the successful simplified procedure depends much on the concept that legislators will follow when transposing the Seasonal Workers Directive due to the fact that it was the sole decision of Poland to open the labour market originating from certain countries, no international agreement has been concluded for this reason. As according to the Directive it is only international agreements allowing for more favourable provisions concerning, among others, the admission criteria, the Polish government has therefore a choice to take. It either modifies its simplified procedure to align it with the provisions of the Seasonal Workers Directive or enters into bilateral or multilateral agreements with the source countries of this scheme. Fortunately, there is no stand-still clause in the Directive related to the introduction of more favourable provisions, therefore it could be a wise step from Poland to enter into agreements instead of erasing the simplicity of this scheme in which most of its added value lies.

4.2. The Situation of Berry Pickers in Finland

[53] The functioning of the simplified system is based on paragraphs 27 and 27a of the Ordinance of the Minister of Labour and Social Policy of 2 February 2009 amending the Ordinance on taking up employment by foreigners without the need to obtain a work permit. (Dz. U. No. 21, item 114).

[54] Temporary and circular migration in Poland: empirical evidence, current policy practice and future options Reference Years: 2004-2009 Prepared by: Polish National Contact Point to the European Migration Network, May 2011, p. 23.

[55] The report of the Institute of Public Affairs Strategie przetwania. Adaptacja ukraińskich migrantów zarobkowych do polskiej rzeczywistości instytucjonalnej [Survival strategies. Adaptation of Ukrainian economic migrants to the Polish institutional reality], 2009.

[56] „2011 saw a 44% increase of such declarations, to almost 260,000. 92% of the declarations by Polish employers were for Ukrainians." International Migration Outlook, OECD 2013, p. 284. http://www.oecd.org/els/mig/POLAND.pdf.

Every year, over 4,000 foreigners arrive in Finland to pick berries, the largest group bay far, 3,500 persons in 2013, comes from Finland. The reason for Thai berry-pickers going to Finland is their productive work and the fact that the season of harvesting forest berries in Finland coincides with the unproductive farming period in Thailand. Contrary to the fact that Thai workers have been arriving to Finland in the past ten years, problems of various degrees still exist. Even the European Commission in its report[57] on Finland recommended the intervention of the authorities by ensuring that the occupational safety and health authorities monitor their situation.

"The process in which Thai pickers are brought to Finland to harvest forest berries has many stages, and in many parts, it is dubious by the Finnish standards. The manner in which a number of actors profit from the pickers has some questionable elements and the only one in the whole process with a significant personal risk is the picker."[58] Such questionable elements lie in the ambiguity of the berry pickers' actual position in the labour market, as they are neither regarded as working in an employment situation, nor as doing their activity in entrepreneurship.

Some companies use direct contracts with the pickers in which the pickers take the obligation of only selling berries to the company that invited them to Finland. Although it is usually the company or a coordinator arranging the fight tickets, accommodation and transport of the foreign berry pickers, no employment relationship is formally formed. Companies therefore do not feel responsible for providing safe working environment and further rights of employees, while pickers clearly depend on the company inviting them and paying for the berries they pick. In a more indirect situation the companies inviting the pickers to the country take part in arrangements where the coordinator recruiting the pickers deposits a security with an agricultural bank, which grants loans to a great share of the pickers while the security system allows the coordinator to pay back the loan.

A statement that is true for both relations between the company and the pickers is that "there is little difference between this practice and features that meet the criteria for human trafficking, however, any conflicts may result in this boundary being crossed."[59] Therefore a solution must be found in order to change this unprotected situation of the berry pickers. One tool for this could be the implementation of the Seasonal Workers Directive as it requires an employment contract concluded with an employer established in the Member State where the work is carried out.

5. Conclusions

I agree with the statements of the so-called supranational politics approach, being also reflected by the negotiations on the Seasonal Workers Directive "that the rules governing decision-making in the EU shape policy outcomes, sometimes in the way governments can predict and at other times in ways they cannot predict easily. For example, if QMV is introduced in a particular policy area, the set of policies that can be adopted is increased significantly, and governments can find themselves unexpectedly on the losing side on a key issue. Similarly, extending the legislative powers of the European Parliament under

[57] CR(2013) 19.

[58] Merkku Wallin, Proposals for solving problems associated with the conditions of foreign pickers of forest berries, Report summary, 28.2.2014, p. 2.

[59] Wallin, p. 5.

the co-decision/ordinary legislative procedure, gives new veto- and agenda-setting power to a majority in the European Parliament."[60]

The Council definitely had to experience this new power of the European Parliament and therefore enter into constructive debates with its new co-legislator in the field of legal migration. However, unfortunately the majority of the legislative procedure was occupied rather by doing the job the Commission would have had to do, namely aligning its proposal with the already existing EU rules on short-term migration.

Although it was clearly a challenging but exciting task for all the migration law experts having taken part in this legislative procedure to find all the elements of the legal framework into which this piece of legislation should be fitted in as well as to look for the most ideal solution, this has also prolonged the legislative procedure and therefore made the Member States miss the opportunity of a major harmonization. "Although high minimum standards are in place on rights, not a whole lot of harmonisation has been achieved, especially not with regards to the authorisations. Accommodating existing Member States' systems was the name of the game, so there was no reinventing the wheel."[61]

On the other hand, during the legislative procedure it became obvious that harmonization as for the authorization is secondary to the aim of establishing a firm legal status for seasonal workers throughout the EU, therefore while flexibility characterizes many provisions of the Directive, being the first directive on labour migration that covers low-skilled or unskilled workers who come for less than three months, it is clearly a major step forward. However, much depends on the effectiveness of transposition of the Seasonal Workers Directive into national laws that we still have to await for until the fall of 2016.

[60] Hix & Hoyland, p. 17.

[61] Lazarowitz, p. 4.

Content and Enforcement of the Right to Education in Higher Education – Does Being European Make a Difference?

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Nine words represent the basic difference in the content of the right to education in higher education between the Member States of the Council of Europe and non-European States on international level. First, the content of the right to education in higher education should be drawn out, with the help of international documents mentioning the right to education. After clarifying the content, this paper intends to collect together, briefly analyse and compare the opportunities of enforcement of the right to education on national and international level, giving priority to the latter. To be able to give a fairly detailed picture and more relevant information a comparison seems to be beneficial. Therefore, definitions and opportunities of enforcement will be collected and compared in European higher education systems and in the Republic of Korea.

Keywords: right to education, higher education, European Court of Human Rights, Republic of Korea, enforcement

1. Introduction

„No person shall be denied the right to education."[1] These nine words represent the difference between non-European States and the Member States of the Council of Europe[2] in terms of the right to education in higher education (HE). But does this short sentence make a real difference?

Although it is usual to start a paper on human rights with a definition of the right in question, in the case of this paper it should immediately be noted that international documents mentioning the right to education generally do not clarify the content of this right with respect to HE. The reality of human rights law does not pay particular attention to HE either: world reports and documents born under various reporting systems focus on the problems of the right to education time to time, and recommendations are

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[1] 1952, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris, Art. 2, Phrase 1, (Protocol).

[2] Since these nine words come from the Protocol, evidently, this paper considers the Member States of the Council of Europe as European countries. The special regime of the European Union is not subject of the present paper.

elaborated, but these reports almost never deal with HE.[3] Still, the existence and the necessity of the respect for and enforcement of the right to education in HE is beyond doubt.

The reality of the respect for a human right is almost impossible to measure, not only objective indicators are missing, but the reality is so complex, that generalisation with huge distortion is inevitable. However, there is an indicator which is still unable to describe the whole status of a human right, but can give an overall picture on its respect: the opportunities of enforcement. Thus, after clarifying the content of the right to education, this paper also intends to collect together, briefly analyse and compare the opportunities of enforcement of the right to education in HE on national and international level, giving priority to the latter.

To be able to give a fairly detailed picture and more relevant information, a comparison seems to be beneficial. Therefore, definitions and opportunities of enforcement will be collected and compared in European HE systems and in the Republic of Korea (ROK).The selection of the ROK for this comparison requires explanation. Since the research question of this paper supposes that being European means a difference in terms of the right to education in HE systems, it is evident to compare European reality to a non-European reality. There are several States where the education system is not functioning properly and its problems are evident from global reports, thus seem to be a good choice. However, considering the existing regional and universal human rights protection systems, the ROK is still a better option, since in Asia, human rights, including the right to education are not protected on regional level at all. Thus the protection level supposedly making a difference in the reality of the right to education is missing. While other parts of the world, despite of trying hard, appear to be unsuccessful in establishing regional protection systems, the ROK is not even Member State of the only Asian international organization recently started to focus on human rights, the Association of South-East Asian Nations (ASEAN).[4] On the other hand, though the efficiency of education systems (based on the abilities of students) is measured up to secondary education level and not on university level, recently, the ROK has the best results,[5] what makes it an ideal starting point for the present research, and a sample for other States.[6] Finally, the basis of the theory and practice of HE in the ROK is completely different from Europe in many aspects, including the different cultural background (Confucianism), which influences Korean HE system is many ways.[7]

[3] *E.g.* during the first 4 years cycle of the Universal Periodic Review Mechanism of the Human Rights Council, in connection with the right to education, no document mentioned HE explicitly. But it also must be noted that several documents mentioned education in general. See Melinda Szappanyos, *Víz és jog, A vízhez való jog érvényesíthetősége az ENSZ keretében*, Veszprémi Humán Tudományokért Alapítvány, Veszprém, 2013, pp. 84-85.

[4] Yuval Ginbar, *Human Rights in ASEAN – Setting Sail or Treading Water?* Human Rights Law Review, Vol. 10, No. 3, 2010, pp. 505-511.

[5] Organisation for Economic Co-operation and Development, *PISA 2012 Results: Creative Problem Solving: Students' Skills in Tackling Real-Life Problems*, Vol. V, PISA, OECD Publishing. p. 13. http://www.oecd.org/pisa/keyfindings/PISA-2012-results-volume-V.pdf (7 July 2014).

[6] BBC News, *Is South Korean education 'best in world'?* 2 December 2013, http://www.bbc.com/news/world-asia-25193551 (7 July 2014).

[7] Jeong-Kyu Lee, *Impact Of Confucian Concepts Of Feelings On Organizational Culture In Korean Higher Education*, Radical Pedagogy, Vol. 3, Issue 3, December 2001, pp. 1-23.

2. Basics of the Right to Education in HE – Sources and Content

Even though the promotion of the right to education and numerous problems of its protection are mainstream issues in world politics and human rights law, the content of this human right has not been subject of profound research.[8] The elements of the content of the right to education in HE are even more obscure and hardly identifiable. Only a few points seem obvious, based on the Universal Declaration of Human Rights (UDHR),[9] the authentic interpretation of human rights:[10]

- It is not compulsory;
- It is not free; (because only primary education must be compulsory and free)
- It is equally accessible to all on the basis of individual capacity;
- Its main purpose is the development of personality; and promotion of understanding and tolerance. Education of any level thus has two main purposes, the development of one's personality and learning to function in a free society and be able to interact according to the basic principles of respect and tolerance.

The collection of international legal sources regarding the right to education does not seem challenging. International human rights treaties should be collected as a first step. Almost all human rights treaties born under the Organization of the United Nations (UN) and regional international organizations protect one or more aspects of the right to education. There are universal human rights treaties protecting it as a general human right entitling every human being (International Covenant on Economic, Social and Cultural Rights[11]); there are ones declaring it as a basic human right of a specific group of humans (e.g. Convention on the Rights of the Child[12]) and treaties ensuring one aspect of this human right, e.g. the parents' freedom to choose religious and moral education of their children (International Covenant on Civil and Political Rights[13]). But an important thing should be taken into consideration, even though an international treaty declares the right to education, not every element of the regulation does necessarily apply to HE. For example the CRC contains the definition of the child, subject of the rights protected by the CRC, according to which "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".[14] Since the acceptance into HE requires elementary and secondary education as a prerequisite, we can confidently say that people enrolled in HE are not „children". Therefore, the articles of the CRC not mentioning explicitly HE usually can be used only as indirect references. Similarly, considering the close relationship between human rights treaties adopted under the aegis of the UN, when a treaty, for example the ICCPR, mentions the parents' role in

[8] Angela Fischer, *The content of the Right to Education – Theoretical Foundations*, Working Paper, Economic, Social and Cultural Rights Series, Center for Human Rights and Global Justice, No. 4, 2004, pp. 5-6.

[9] GA Res. 217 A (III) 10 December 1948, *Universal Declaration of Human Rights*, Art. 26, Para 1, (UDHR).

[10] Office of the High Commissioner for Human Rights, *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*, p. 4, http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (7 July 2014).

[11] 1966, International Covenant on Economic, Social and Cultural Rights, GA Res. A/RES/2200(XXI), 993 UNTS 4, Art. 13, (ICESCR).

[12] 1989, Convention on the Rights of the Child, GA Res. A/RES/44/25, 1577 UNTS 3, Art. 28, (CRC).

[13] 1966, International Covenant on Civil and Political Rights, GA Res. A/RES/2200(XXI), 999 UNTS 172, Art. 18, Para. 4.

[14] CRC, Art. 1.

the choice of the form of education of their *children,*[15] it is not considered as an element of the right to education in *HE*.

It is to be noted, that treaties protecting the human rights of one specific group of people (women, persons with disabilities, migrant workers) mention only one aspect of the right to education (in general, speaking of all levels of education): equal opportunities. In the following chart universal human rights treaties (and the UDHR), as sources of the right to education in HE, are collected together.[16]

<table>
<tr><td>Compulsory[17]</td><td colspan="3">UDHR
Art. 26, Para 1.</td><td colspan="3">ICESCR
Art 13, para 2, point a)</td></tr>
<tr><td>Free</td><td colspan="3">UDHR
Art. 26, Para 1.</td><td colspan="3">ICESCR
Art 13, para 2, point c)
(progressive introduction of free education</td></tr>
<tr><td>Purpose</td><td colspan="2">UDHR
Art. 26, Para 2.</td><td colspan="2">ICESCR
Art. 13, para 1</td><td colspan="2">CRPD
Art. 24, Para 1.</td></tr>
<tr><td>Equally accessible based on merits</td><td>UDHR
Art. 26, Para 1.</td><td>ICESCR
Art 13, para 2, point c)</td><td>CRC
Art 28, para 1, point (c)</td><td>CMW[18]
Art 43, Para 1., point a) + Art 45, para 1, point a)</td><td>CRPD[19]
Art. 24, Para 2., point a)</td><td>ICERD[20]
Art. 5, Point e) v)</td><td>CEDAW[21]
Art 10.</td></tr>
</table>

If we compare the universal level sources to the European human rights treaties, it is remarkable that the latter give a lot less details on the content of this human right. Though the international treaty protecting economic, social and cultural rights within the Council of Europe mentions the right to education, but limits it to vocational training.[22]

[15] ICCPR, Art. 18, Para 4.

[16] Given the fact, that it is not a universal human rights treaty, but an important source of the right to education in HE, one treaty was left out from the chart, but mentioned here. 1960, Convention against Discrimination in Education, UNESCO, Art. 4, point a).

[17] Generally, treaties oblige States to make primary and/or secondary education compulsory and/or free, but do not declare the same obligation in case of HE. Therefore, in the chart those articles are mentioned, which declare free and/or compulsory basic education, and does not list HE with the same features.

[18] 1990, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, GA Res. A/RES/45/158, 220 UNTS 3, (CMW).

[19] 2006, Convention on the Rights of Persons with Disabilities, GA Res. A/RES/61/106, 2515 UNTS 69, (CRPD).

[20] 1965, International Convention on the Elimination of All Forms of Racial Discrimination, GA Res. A/RES/2106(XX), 660 UNTS 212, (ICERD).

[21] 1979, Convention on the Elimination of Discrimination Against Women, GA Res. A/RES/34/180, 1249 UNTS 14, (CEDAW).

[22] 1961, European Social Charter, CETS No. 35, Art. 10; 1966, European Social Charter (revised), CETS No. 163, Art. 10. Thought the recent trend requires greater mobility between vocational training and HE, these two are still

The detection of all international instruments without legal binding force, promoting the right to education is a lot more demanding task, if not impossible. Several bodies and organs actively discuss the protection of this human right, including the UN human rights bodies and also institutions in charge of the protection on regional level. Not only governmental, but also non-governmental organizations deal with the promotion of the right to education, producing valuable international instruments, including briefing papers, fact sheets and reports.

National constitutions generally ensure the right to education to everyone under the State's jurisdiction. Besides the constitution, other legal sources regulate the realization of the right to education. Though the regulations are very different country by country, they usually use international instruments as starting points. Using the same categories, elaborated above for the collection of universal human right treaties, European national constitutions[23] can be compared to each other and to the constitution of the ROK. The majority of the Member States of the Council of Europe declared the right to education in its constitution (30 out of 47) and also made basic education compulsory (27 out of 47). 34 States made basic education (sometimes secondary education is included into basic education) free, among these, four States guaranteed HE for free (Greece, Moldova, Romania, Ukraine) explicitly or by not limiting the scope of free education to the basic levels and/or stating that public education is free of charge. Only two States (Andorra and Spain) mentioned the purpose of education (including HE), which reflects on international documents. Ten countries declared that education is equally accessible for everyone, based on merits. Some constitutions dealt with other aspects of HE too, most frequently they guaranteed academic freedom and the autonomy of HE, and stated that private educational institutions can be established according to law.[24] The Constitution of the Republic of Korea[25] guarantees the compulsory and free basic education and the "autonomy of institutions of higher learning".[26] Based on the comparison it can be confidently stated that the basic regulation of the right to education is similar in European countries and the ROK.

3. Enforcement of the Right to Education in HE

3.1. National Level – Is there a Difference?[27]

Usually HE institutions have certain autonomy in regulating their operation, but this autonomy can be practiced only within a legal framework. The basis of this framework is the national constitution declaring the right to education and a body of national legislation, regulating HE in details. This

separated from each other. Lukas Graf, *The Hybridization of Vocational Training and Higher Education in Austria, Germany, and Switzerland*, Budrich UniPress Ltd., Opladen, Berlin & Toronto, 2013, pp. 14-16. This paper focuses exceptionally on HE.

[23] The English translation of most of the constitutions of the Council of Europe Member States is available at http://www.legislationline.org/documents/section/constitutions. When the English translation was not available, the French version was used.

[24] Interesting that Greece in its constitution declared that HE education can be conducted only in public, State-run institutions.

[25] Constitution of the Republic of Korea, 17 July 1948, http://korea.assembly.go.kr/res/low_01_read.jsp?boardid=1000000035 (10 August 2014) Art. 31.

[26] Ibid, Art. 31, Para 4.

[27] The author would like to thank to Zsófia Sinka for her contribution to the research and translation related to the Korean legislation on HE.

legislation, besides declaring the principle of equality, usually regulates the rights and obligations of students and other stakeholders in HE, students' right to remedy within the institution, and the opportunity to turn to the judicial system with a complaint against the institution's final decision, under certain conditions.[28] Interestingly, though the Higher Education Act of the ROK[29] and its Enforcement Decree[30] contain a few elements mentioned above, including the rights and obligations of different stakeholders (e.g. duties of faculties[31] and students' right to self-governing activities[32]), principle of equality,[33] and the discipline on students,[34] but do not mention students' right to remedy at all. The Enforcement Decree lists what should be regulated by the institution itself, but does not mention it either.[35] This means that when a complaint procedure is established in an institution, it does not have a basic regulation in legislation; and institutions can lawfully decide not to regulate it at all. In European States, against the final decision of the institution, students can seek legal action in court. As in any of these States judicial power is vested in courts also in the ROK,[36] thus it must be the case in the latter as well, but it is not regulated in the legislation concerning HE.

Ombudsmen usually have competence to examine human rights abuses, even though their „actions are geared primarily towards the accountability of 'the system' rather than towards upholding the rights of the single individual. Monitoring the administrative actions of the executive or public sector does, however, bring forward issues which bear on human rights protection."[37] The characteristics of this position make the ombudsmen capable of handling complaints concerning the right to education in HE effectively, therefore, their number grew quickly in the last few decades.[38] An ombudsman in HE is "a person or persons independent of the educational institution who investigate(s) complaints against the institution and make(s) a decision on the individual case which may or may not be binding on the institution, together with recommendations on what constitutes good practice in such situations."[39] The special features of university ombudsmen are different from country to country (e.g. term of office, nomination process, supervision), but what is common: even if they cannot solve the abuse of the right to

[28] See for example the Act CXXXIX of 2005 on Higher Education of Hungary, http://www.nefmi.gov.hu/letolt/nemzet/naric/act_cxxxix_2005.pdf (16 August 2014), Secs. 46-51, Secs. 73-75.

[29] Higher Education Act, Republic of Korea, 2009, Ref. 7309. Available in English at http://www.moleg.go.kr/english/korLawEng;jsessionid=Gcb1Me48oc1JemBfpguy0LybVYGlTgJow6q8HUXiiv2WyKqmSpPKSbax3VD4h0S0.moleg_a2_servlet_engine2?pstSeq=52242&brdSeq=33&pageIndex=57 (16 August 2014) (Higher Education Act).

[30] Enforcement Decree of the Higher Education Act, Republic of Korea, 2009, Ref. 6617. Available in English at http://www.moleg.go.kr/english/korLawEng;jsessionid=Gcb1Me48oc1JemBfpguy0LybVYGlTgJow6q8HUXiiv2WyKqmSpPKSbax3VD4h0S0.moleg_a2_servlet_engine2?pstSeq=52242&brdSeq=33&pageIndex=57 (16 August 2014) (Enforcement Decree).

[31] Higher Education Act, Art. 15.

[32] Ibid, Art. 12.

[33] Enforcement Decree, Art. 31, Para (1).

[34] Higher Education Act, Art. 13.

[35] Enforcement Decree, Art. 4.

[36] Consitution of the Republic of Korea, Art. 101, Para. 1.

[37] Anand Satyanand, *The Ombudsman Concept and Human Rights Protection*, Victoria University Wellington Law Review, Vol. 29, 1999, p. 22.

[38] Kenneth L. Stewart, *What a University Ombudsman Does A Sociological Study of Everyday Conduct*, The Journal of Higher Education, Vol. 49, No. 1, 1978, p. 1.

[39] Nicholas Saunders, *(Yet) another ombudsman: Student complaints, and appeals revisited*, Perspectives: Policy and Practice in Higher Education, Vol. 6, No. 2, 2002, p. 56.

education, they can act as an independent mediator and avoid unnecessary judicial procedures.[40] In the ROK the ombudsman position was integrated into the Anti-Corruption and Civil Rights Commission (ACRC) in 2008.[41] Besides working out and execute anti-corruption strategies, this commission investigates complaints of civil and political rights abuses.[42] HE public institutions fall under the competence of the ACRC.[43] According to its latest annual report, the ACRC made 21 corrective recommendations in the area of Administration, Culture & Education, based on complaint procedure.[44] Unfortunately, the report does not give more details on the complaints submitted in education. But based on the legislation it seems to be evident, that in case of a violation of the right to education in HE, a complaint can be submitted to the ACRC (or to the local ombudsman[45]) under conditions established by the legislation.[46]

3.2. Universal Level – Is there a Difference?

Except for the CMW, the ROK is a Contracting Party to all enumerated universal human rights treaties, similarly to the majority of the Member States of the Council of Europe. Consequently, State obligations in the protection of the right to education in HE are the same. These treaties do not only enumerate human rights to be protected, but establish procedural obligations as well. Not only have the treaties themselves established procedural obligations, but also the optional protocols attached to them. The collection of all participation in treaties of European countries is not the purpose of this paper, considering that these States participate in human rights protection through very various ways. To achieve the goals of this research, it is enough to state that European countries have various procedural obligations depending on the participation in different universal treaties. But because the 47 Member States of the Council of Europe as a group are compared to the ROK, it seems necessary to collect the possible procedural obligations and mark (in the chart with different background colour) those which were accepted by the latter.[47]

[40] Franz Marhold: *Mass Higher Education and Students' Issues: Ombudsmen as a Remedy?*, in Kristl Holtrop & Josef Leidenfrost (Eds.), Student – Institutional Relationships in Times of New University Management: Academic Ombudsmen in European Higher Education, European Network for Ombudsmen in Higher Education, Occasional Paper No. 1, p. 46.

[41] ACRC Korea, Annual Report, 2012, p. 5.

[42] Asian Ombudsman Association, *Factsheet, Anti-Corruption & Civil Rights Commission, Republic of Korea*, 8 April 2010, p. 1, http://asianombudsman.com/ORC/factsheets/KoreaOmbudsmanFactsheet.pdf (16 August 2014).

[43] Act on Anti-Corruption and the Foundation of the Anti-Corruption & Civil Rights, Republic of Korea, 2011, Ref. 1592. Art. 2, Para. (1), point b).

[44] ACRC Korea, Annual Report, 2013, p. 33.

[45] Act on Anti-Corruption and the Foundation of the Anti-Corruption & Civil Rights, Chapter III.

[46] Ibid, Art. 39.

[47] The chart contains the procedural obligations related to the international treaties collected together as sources. The obligations of the ROK are emphasised with different background.

Reporting obligation	ICESCR[48]	CRC Art. 44, Para. 1.	CRPD Art. 35, Paras. 1-2.	ICERD Art. 9, Para. 1.	CEDAW Art. 18, Para. 1.
Opportunity for individual complaints	ICERD Art. 4. + declaration is needed	Optional Protocol to CEDAW[49] Art. 2.	Optional Protocol to the ICESCR[50] Art. 7.	Optional Protocol to the CRC on a communications procedure [51]	Optional Protocol to the CRPD[52] Art. 1, Para. 1.
Opportunity for Inter-State Complaints	Optional Protocol to the ICESCR Art. 10				
Inquiry Procedure	Optional Protocol to the ICESCR Art. 11.				

Though it seems that the ROK did not accept many procedural obligations besides the reporting systems included in the treaties themselves, this fact cannot be considered as a significant difference if we treat the Member States of the Council of Europe as a group. Evidently, there are Member States of the Council of Europe, which did undertake a lot more obligations, but for example the Republic of Moldova has the same procedural obligations. Moreover, the expert bodies examining the reports and individual complaints are independent and work based on guidelines, to secure the consistent interpretation and enforcement of human rights. Consequently, there is a difference between *some* European States and the ROK on universal level.

3.3. Regional Level – Is there a Difference?

There is definitely a difference, as we have seen above, since there is an international treaty declaring that "*No person shall be denied the right to education.*" and this treaty applies to all Member States of the Council of Europe. Even though this sentence is very short, we cannot forget that behind it, there is the European mechanism for the protection of human rights, especially the European Court of Human Rights (ECtHR or Court).

The fact that the Court interpreted the Convention for the Protection of Human Rights and Fundamental Freedoms[53] (ECHR) and its protocols not using the principle of interpretation of the 1969 Vienna

[48] In case of the ICESCR the reporting obligation is not in the treaty itself, but established by a resolution of the Economic and Social Council of the UN. ECOSOC, resolution 1988/4, 24 May 1988, point 6.

[49] 1999, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, GA Res. A/RES/54/4, 2131 UNTS 83.

[50] 2008, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Res. A/RES/63/117.

[51] 2011, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, GA Res. A/RES/66/138.

[52] 2006, Optional Protocol to the Convention on the Rights of Persons with Disabilities, GA Res. A/RES/61/106.

Convention,[54] but an evolutive interpretation instead, is well-known,[55] thus requires no evidence. In the case of the right to education though, as the ECtHR noted itself, the Court had a difficult task in determining the content and the scope of application of this right, because the article declaring the right is rather brief, unlike some other precise provisions of the ECHR.[56]

To get an overall picture on the position of the Court on the content of the right to education in HE, the case-law should be analysed. Because the case-law related to the right to education is quite vague, and the focus of this paper is HE, the scope of the research had to be limited. The Protocol mentions two aspects of the right to education: besides declaring the right with a brief sentence, it also established the right of parents to decide on the religious and philosophical content of their children' education. Since the database of the ECtHR case-law lists these two rules of the article separately,[57] the research did not examine cases, indexed under the second sentence of the article in question. To further limit the scope of the research, those judgements were taken into consideration, which dealt with HE. With these restrictions only four cases of the ECtHR can be used to analyse the right to education in HE.

Among the cases concerning HE, two were submitted to the Court stating exceptionally the violation of the right to education,[58] the others stated the breach of several articles of the ECHR and the Protocol. Interestingly, out of the four applications, three were submitted against Turkey.[59] According to the Court, the right to education was violated in half of the cases. All judgements were issued after the entry into force of the Protocol No. 11,[60] therefore the European Commission on Human Rights could not contribute to the reasoning. In contribution to these four, there is another judgement to be taken into consideration as one of the most important early judgements of the Court in terms of the right to education, the *"Belgian linguistics case"*.[61] Through these judgements the ECtHR elaborated the right to education by interpreting the article in question in a creative way.

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[53] 1950, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as amended by Protocols No. 11 and No. 14, CETS No. 5.

[54] 1969, Vienna Convention on the Law of Treaties, 1155 UNTS 344, Art. 31.

[55] Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, German Law Journal, Vol. 12, No. 10, pp. 1730-1745. Alastair Mowbray, *The Creativity of the European Court of Human Rights*, Human Rights Law Review, Vol. 5, No. 1, 2005, pp. 59-60.

[56] *Case „Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium* (Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), ECtHR (1968). Part I, B, 3, point 28. („Belgian linguistics case").

[57] Categories used by the HUDOC database within the right to education (in general) group: right to education; respect for parents' philosophical convictions and respect for parents' religious convictions.

[58] Mürsel Eren *v.* Turkey (Application no. 60856/00) ECtHR (2006); Tarantino and Others *v.* Italy (Applications nos. 25851/09, 29284/09 and 64090/09) ECtHR (2013).

[59] Leyla Sahin *v.* Turkey (Application no. 44774/98) ECtHR (2005); Mürsel Eren *v.* Turkey and Irfan Temel and Others *v.* Turkey (Application no. 36458/02) ECtHR (2009).

[60] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No. 5, Strasbourg, 11 May 1994.

[61] Though the "Belgian linguistics case" does not deal with HE, still the basic content of the right to education was elaborated by the Court in this judgement. This case is also considered as a cornerstone in terms of language rights and minority rights. Roberta Medda-Windischer, *The European Court of Human Rights and minority rights*, Journal of European Integration, Vol. 25, No. 3, 2003, p. 11.; 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*, Global Review of Ethnopolitics, Vol. 1, No. 1 2001, p. 51.

3.3.1. Scope of Application of the Right

In the first relevant judgement concerning the right to education, the Court had to explicitly express that Art. 2 of the Protocol does indeed contain a human right with a content determinable and consequently, establish obligations for the Contracting Parties.[62] The Court also noted that the Protocol „guarantees […] a right of access to educational institutions existing at a given time".[63] Thus even though the judgement in question was basically related to secondary education, the ECtHR did not exclude HE from the scope of application of the right to education. Despite of this clear position, the practice of the Commission was not completely consistent and did not entirely follow the Court's judgement.[64] In the case of *Leyla Sahin v. Turkey* the ECtHR confirmed again that the right to education is a human right to be protected in HE as well.[65]

3.3.2. Content of the Right & State Obligations

The content of the right to education was determined in the *"Belgian linguistics case"*, but summarized with respect to HE by the *Leyla Sahin v. Turkey* judgement. Based on these judgements the right to education contains the following elements:

- "[R]ight of access to educational institutions existing at a given time";[66]
- Right to "have the possibility of drawing profit from the education received, that is to say, the right to obtain […] official recognition of the studies […] completed."[67]
- Equal "treatment of all citizens in the exercise of their right to education".[68]

The ECtHR firmly states from the beginnings of the related case-law that Contracting Parties are not obliged to establish and/or to subsidize educational institutions. The obligations of States start to exist when the institution is established.[69] The main obligation of the Contracting Parties with respect to the right to education is to regulate education system making sure that "such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention."[70]

3.3.3. Limitation of the Right to Education

Though Contracting Parties to the ECHR are obliged to respect and ensure the right to education, they also have the responsibility to regulate, which regulation necessarily involves some restrictions on the

[62] „Belgian linguistics case", Part I, B, point 3.

[63] Ibid, Part I, B, point 4.

[64] Leyla Sahin *v.* Turkey, Part II, B, point 139.

[65] Ibid, Part II, B, points 141-142.

[66] „Belgian linguistics case", Part I, B, point 4; Leyla Sahin *v.* Turkey, Part II, C, point 152.

[67] Ibid.

[68] Leyla Sahin *v.* Turkey, Part II, C, point 152.

[69] „Belgian linguistics case", Part I, B, point 3.

[70] Ibid, Part I, B, point 5.

right to education.[71] The Court elaborated the conditions of a lawful limitation of the right to education based on the structure of other articles in the ECHR. A restriction is compatible with the ECHR, if it is foreseeable for the people entitled by the right, pursues a legitimate aim, and the principle of proportionality has been respected.[72] In addition, "[s]uch restrictions must not conflict with other rights enshrined in the Convention and its Protocols either".[73]

In case of the right to education the Court's task in deciding the legitimacy of an aim is more difficult, than in case of some other rights protected by the ECHR, because Art. 2 of the Protocol does not list the legitimate aims of a possible limitation. According to the ECtHR, States enjoy a certain margin of appreciation in the regulation of educational institutions, but "the final decision as to the observance of the Convention's requirements rests with the Court."[74] In the four cases concerning the right to education in HE the ECtHR accepted the "aims of protecting the rights and freedoms of others and maintaining public order",[75] and "of achieving high levels of professionalism, […] which is a general interest" as legitimate.[76] In these two cases the Court did not find violation of the right to education. In the case of *Irfan Temel and Others v. Turkey*, the Court found the lack of a legitimate aim, but did not consider the question in details, because the key issue was the principle of proportionality.[77] Because the restriction was way too exaggerated, the Court found the violation of the right to education. In the fourth case the Court found a violation of the right to education in the lack of foreseeability, therefore did not even examine the existence of a legitimate aim.[78]

4. Summary: Content and Enforcement of the Right to Education in HE – Europe v. ROK

The definition of the right to education in HE is not different in European countries and in the ROK. But the content of the right is determined in more details in the previous, giving a more solid body for interpretation, which makes enforcement easier, regardless of its level. If we take all sources into consideration, the following statements may be made regarding (based on universal treaties and national constitution) the right to education in HE in the ROK:

- It is not compulsory;
- It is not free. Even though the participation in HE is not for free, the State is obliged to try to introduce free education progressively on this level too.

[71] Leyla Sahin *v.* Turkey, Part II, C, point 154.

[72] Ibid.

[73] Ibid, Part II, C, point 155.

[74] Ibid, Part II, C, point 154.

[75] Ibid, Part II, C, point 158.

[76] Tarantino and Others *v.* Italy, Part I, B, point 48.

[77] Irfan Temel and Others *v.* Turkey, Part II, B, point 42.

[78] Mürsel Eren *v.* Turkey.

- It is equally accessible to all on the basis of individual capacity "without distinction as to race, colour, or national or ethnic origin".[79] Equal opportunity should also be provided for people with disabilities and for women.[80]
- Its main purpose is the development of personality and promotion of understanding, human rights and tolerance.
- "Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed."[81]

Owing to the case-law of the ECtHR, Member States of the Council of Europe have more reference points about the content of the same human right. From the judgements it is clear that the right to education applies to HE and entitles everyone without distinction to access HE institutions (based on individual capacity and consideration of the needs of the society) and to draw profit from HE on equal basis. The Court also gave guidance for the limitation of the right stating that it is acceptable if it is foreseeable, pursues a legitimate aim and proportionate. In summary, even the difference in sources are nine words, in reality, the guidance for the protection of this human right is a lot more punctual for European States.

The differences in the universal level enforcement are not evident, because it varies State by State. In this case the reason of the difference in the efficiency of protection is not the Membership in the Council of Europe, thus not "being European", but the States' individual decision to take part in international treaties. National level enforcement is not different in structure. The right to education is protected by HE institutions at first place; complementary to this, the ombudsman, governmental offices and the judicial system have a role in the enforcement. The right to education in HE in the ROK is protected to similar extent at universal and national level as in European countries. But in the case of the ROK the regional level of protection is completely missing.

5. Lessons for the ROK

Yes, definitely there is a difference. But simply answering a research question by the analysis of the European case-law and the comparison between European countries and a less known Asian country cannot be meaningful, if the country in disadvantage is unable to draw useful conclusions. In the followings, based on the European experiences, a number of recommendations are drawn out for the ROK to contribute to the more effective protection of the right to education in HE.

5.1. More Effective National & Regional Protection

There are opportunities to enforce the right to education in HE, as we have seen above. But in Korean HE institutions complaint mechanisms are almost never used.[82] It has a cultural reason, namely that Confucianism still deeply influences the structure and characteristics of HE. "Teachers generally control

[79] ICERD, Art. 5.

[80] The ROK is not Contracting Party to the CMW, therefore the protection of migrant workers falls under the prohibition of discrimination.

[81] Constitution of the Republic of Korea, Art. 31, Para (4).

[82] Unlike in Europe, no statistics are available and all the procedures, if any, are confidential.

their students through both legitimated authority and moral norms that are somewhat analogous to those between parents and children […]. Based on these Confucian values, students usually follow their teachers' instructions without any criticism."[83] Criticizing a teacher is as unimaginable for a student as it is to a younger faculty member or administrative staff. Consequently, the use of officially available complaint mechanisms is more than rare. However, internationalization can gradually change the attitude of Korean students (incoming and outgoing students).[84] Moreover, as we have seen above, the basic legislation on HE does not mention the students' right to remedy. To significantly change the attitude of Korean students, human rights education and time is required. The elimination of the difference in legislation needs the positive decision of the bodies participating in national law-making (Korean National Assembly, Ministry of Education, Science and Technology).

It seems to be obvious that even though the difference between European countries and the ROK in the enforcement of the right to education in HE on universal level is not significant on universal level, but there is a difference, with respect to the majority of European States. Giving a suggestion for making the universal protection of the right to education in HE more effective is the simplest. Even if the reality of the protection does not change, or does not change entirely, enforcement would be more efficient with the ratification of more international human right treaties, which establish more procedural obligations for States. The elimination of this difference depends on the Korean government and National Assembly of the Republic of Korea.

5.2. More Effective Regional Protection

Important to note that the prerequisite of a regional protection system is the existence of a regional international organization charged with human rights protection. Though the need for the establishment of an Asian intergovernmental organization, along with a regional protection system, is not a new concept in academic literature,[85] still no basic steps were taken in reality. Naturally, the establishment of a protection mechanism (including the treaty protecting human rights, the bodies responsible for it, and the rules of the procedure) depends on political consensus. Based on the experiences of the ECtHR a few suggestions can be made.

Text of the article protecting the right to education – declaration. As we have seen, one short sentence made a huge difference in the European protection, but the reason of this difference is mainly the creative thinking of the ECtHR. From the preparatory work of the ECHR it is obvious, that European States refused to accept the obligation of establishing and subsidizing educational institutions.[86] It is reasonable to think that such a costly obligation would be rejected also by Asian countries. Therefore, declaring the right to education with a more concrete, detailed content (*e.g.* explicitly stating that the right to education

[83] Lee 2001, p. 14.

[84] Seonjin Seo & Mirka Koro-Ljungberg, *A Hermeneutical Study of Older Korean Graduate Students' Experiences in American Higher Education: From Confucianism to Western Educational Values*, Journal of Studies in International Education, Vol. 9, No. 2, 2005, pp. 182-183.

[85] Hao Duy Phan, *A Blueprint For a Southeast Asian Court Of Human Rights*, Asian-Pacific Law & Policy Journal, Vol. 10, No. 2, 2008-2009, pp. 384-433; Quazilbash Ali Mohsin, *NGOs Efforts Towards the Creation of a Regional Human Rights Arrangement in the Asia-Pacific Region*, ILSA Journal of International and Comparative Law, Vol. 4, 1997-1998, pp. 603-614.

[86] „Belgian linguistics case", Part I, B, point 3.

involves the right to access to educational institutions and also entitles everyone to draw profit from education) seems hardly possible. But even if the declaration is laconic, mentioning that the right to education is to be applied in all levels of education, including HE would not create financial or political risk.

Text of the article protecting the right to education – limitation. Though the text on the content of the right to education is sensible from political and financial point of view, the possible limitations can be more concretely regulated. Following the formulation of the ECHR, three elements could be incorporated in the paragraph regulating the limitation.[87] The conditions of "prescribed by law" (including the requirement of foreseeability) and "necessary in a democratic society" (proportionality) should definitely be part of the text. The enumeration of legitimate aims is more complex. In the analysed cases the ECtHR accepted the protection of the rights and freedoms of others, the maintenance of public order, and achievement of high levels of professionalism in education as legitimate aims. Besides these, there are two more legitimate aims common in ECHR articles, the protection of public safety and of health or morals. All these could be accepted as legitimate aims for limiting the right to education.

The nature of the protection system. Since the author of this paper is convinced that among the regional protection systems the European is the most effective, therefore would propose to establish a court protecting human rights. Naturally, the establishment of a regional protection system of any kind, which takes the various geographical, political and financial environment into consideration, would be beneficial for Asia. Definitely, the lack of regional protection makes the biggest difference between the Member States of the Council of Europe and the ROK. Unfortunately, the elimination of this difference requires more than the positive attitude and decision of the Korean government. The establishment of a regional organization and protection system is unimaginable without international cooperation of Asian countries and the support of the international community.

[87] This proposal considers Articles 8 to 11 of the ECHR, which were used as examples by the ECtHR itself in the analysed cases. *See* Tarantino and Others *v.* Italy, Part I, B, point 45.

Human Trafficking and Prostitution Policy - A European issue?

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There are many definitional, practical and legal difficulties surrounding the topic of human trafficking. The topic itself is diffuse as are the ways it is dealt with on an international, European and national level. To make things worse, reviewing the reasons why people are being trafficked, sexual abuse is, with a representation of 96%, the foremost reason and it can be argued that countries policy on prostitution could increase or decrease human trafficking. The question arises if this issue needs to be and effectively could be dealt with on a European level and what types of difficulties this brings forth. The legal definitions on human trafficking shall be discussed as well as the three main types of applied prostitution policies and this discussion shall be placed within the current 'active' European approach to fight human trafficking.

Keywords: Human Trafficking, Prostitution Policy, European Union

1. Introduction

On the 25th of February 2014, the European Parliament agreed upon the non-binding resolution on combating Violence Against Women (2013/2004(INL) submitted by Mary Honeyball.[1] This resolution favours the Nordic model of legalising the sale of sex while criminalising the buying of sex, over other models currently applied by countries within the European Union. This however is not without discussion as the positive effects are heavily discussed and criticised. This European recognition of the seriousness of human trafficking and sexual exploitation is an important step in the fight against human trafficking. Sexual exploitation, being the foremost important reason for human trafficking to take place and victimising mostly young women and girls seems a logical area to focus interest on. Before a deepening can take place however, it is necessary to take a closer look at the concept of human trafficking from a more general perspective.

2. Human Trafficking: A Definitional Dilemma

The issue of human trafficking, especially that of women for the purpose of sexual exploitation has risen up on the political agenda and is increasingly becoming more critical for countries to act upon ever since the European Court of Human Rights, in the case of Rantsev v. Cyprus and Russia[2] established that human trafficking is a breach of Article 4 of the European Convention of Human Rights (ECHR).[3]

[1] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0126+0+DOC+XML+V0//EN (22/08/2014).

[2] Rantsev v. Cyprus and Russia, App. No. 25965/04, Eur. Ct. H.R. (2010).

[3] UNODC (2010), Kara, S (2011) p.124.

Human trafficking, however, cannot be understood outside of the social, economic, historical and political conditions of the phenomenon itself as well as the different European countries. These conditions are:

- Increasing globalisation and inequality within and between advanced industrial societies and those countries where poverty is epidemic;
- War and conflict in various regions of the world;
- The global subjugation of women;
- The growth of telecommunications and expansion of information technology;
- The trans-nationalisation of the sex industry;
- The reconfiguration of Europe.[4]

This article will address the latter two conditions as the foremost points of interest within the political debate regarding the issue of human trafficking. This debate has been ongoing ever since human trafficking and women's rights have been on the international agenda which is since the beginning of the 20th century. After an interest standstill due to the two great wars, interest was renewed in the early 60's - 70's of the previous century and from that moment on it has been high on the political agenda and subject of continues debate. One of the key discussions focusses on formulating a workable and generally accepted definition of the trafficking of human beings (in most literature abbreviated as THB). In 2001 the definition for THB was formulated in the (Palermo) Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children and states: 'Transnational Human Trafficking is the recruitment, moving or reception, of a person under coercive or deceptive conditions for the purpose of exploitation'.[5] This now widely accepted definition of human trafficking has been supplemented by the elements of act, means and purpose which are as follows:

- recruitment, transportation, transferring, harbouring or receipt of a person (act);
- means of threat, use of force, coercion, abduction, fraud, deception (means);
- purpose or act of exploitation, including sexual exploitation, forced slavery and slavery like practices (purpose).[6]

This addition, just like the definition provided in the Palermo protocol, uses the term exploitation which in itself is seen as an unclear concept. Exploitation, as defined in article 1 of the Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings is: "*At a minimum, exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*" and this equals Article 3a of the UN protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime except for including a general purpose of exploitation and except for the trafficking in human beings for the purpose of the removal of organs. This narrowed down definition leaves room for further discussion, especially within the conceptualisation of sexual exploitation. In 1991, Susan Edwards defined sexual exploitation as: *"A practise by which (a) person(s) achieve sexual gratification or financial gain or advancement through the abuse of a person's sexuality by abrogating that person's human right to dignity, equality,*

[4] Melrose, M. & Barrett, D. (2006) p. 115.

[5] Rijken, C. (2009).

[6] Werson, H. & Goutbeek, F. (2005).

autonomy and physical and mental well-being".[7] This more in-depth feministic definition makes it possible to directly link sexual exploitation with a breach of fundamental human rights[8] knowingly, Article 3 ECHR, the prohibition on torture, inhuman or degrading treatment, Article 4 ECHR, the prohibition of slavery, servitude, forced or compulsory labour and Article 8 ECHR, the right to respect for private life.[9] Basically relevant are same three key components as discussed before, knowingly: The act (what is done), the means (how it is done) and the exploitative purpose (why it is done).[10]

The current European standard and definition on the trafficking of human beings has been set out in Directive 2011/36/EU Article 2 §1 and states: 'The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.

Paragraphs two and three of Article 2 define the two key elements of vulnerability and exploitation as follows: "*Vulnerability is a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved*" (§2) and "*exploitation is prostitution or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities or the removal of organs*" (§3). Due to the gross breach of human dignity and the physical and mental integrity of its victims human trafficking is seen as a direct violation of Article 4 ECHR.[11]

Europe and more specific, the European commission feels the need to take a leading role in the fight against human trafficking, as there is a lack of harmonisation of legal frameworks to combat human trafficking effectively and efficient.[12] The Stockholm program entitled: "*The An Open and Secure Europe Serving and Protecting Citizens*"[13] and more specific the set-out strategy entitled: "*The Eradication of Trafficking in Human Beings 2012-2016*" is one of the steps taken to ensure its leadership and guidance . For this a European Union anti-trafficking coordinator has been appointed in the person of Myria Vassiliadou whose task it is to coordinate the implementation of the strategy laid out in the Stockholm program and supplementing strategies.[14] Synchronous, the European Commission's implemented various decisions. Decision 2011/36/EU Directive on preventing and combating trafficking in human beings and protecting its victims (which replaces Council Framework Decision 2002/629/JHA affirms in Article. 3 that trafficking in human beings comprises serious violations of fundamental human rights and human dignity of victims) is the one currently in force. The main issue however is the implementation of these actions by member states.[15] In order to achieve these goals the European Commission's Decision of March 2003 set up a consultative group, known as the 'Experts Group on Trafficking in Human Beings' (2003/209/EC).

[7] Barry, K. (2013).

[8] Rijken, C. & Volder, E. de (2010).

[9] Stoyanova, V. (2011).

[10] Aranowitz, A., Theuermann, G. & Tyurykanova, E. (2010) p.17.

[11] Bik, R. (2013).

[12] Hancilova, B. & Massey, C. (2009).

[13] OJC 115, 4.5.2010, p.1.

[14] European Commission (2012).

[15] Mendes Bota, J. (2014).

In turn, the Council of Europe has been active in adopting various anti-trafficking initiatives since the 1980's. Amongst them are the 1991 seminar on Action Against Trafficking in Women, considered as a violation of human rights and human dignity, the 2005 convention on Action against Trafficking in Human Beings (CETS NO. 197) which aims to Prevent trafficking, Protect the Human Rights of victims of trafficking and Prosecute the traffickers and is applicable to all forms of trafficking whoever the victim and whatever the sort/type of exploitation. These three P's are now situated at the centre of all actions against human trafficking.[16] Apart from the conventions, recommendation NO. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation and the LARA project (2002-2003). Besides these initiatives the council also tries to raise awareness on the problem of human trafficking as such and on the recognition of victimisation. They urge for victim support in all effects and try to initiate a system of prevention by using the concept of responsabilisation which means that this strategy of crime control aims to shift primary responsibility for crime prevention and public security away from the state and towards businesses, organisations, civil society, individuals, families and communities.[17]

Beside these initiatives, the Parliamentary Assembly of the Council of Europe has adopted the following trafficking and forced prostitution relevant texts:

- Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member States;
- Recommendation 1526 (2001): A campaign against trafficking in minors to put a stop to the east European route;
- Recommendation 1610 (2003): Migration connected with trafficking and prostitution.

Both the anti-trafficking coordinator and the commission have access to a Group of Experts on Action against the Trafficking of Human Beings (GRETA) which exists out of independent experts and members of the Committee of the Parties. GRETA will monitor, evaluate and may give recommendations to member states which lack effort in the implementation of anti-trafficking legislation.

3. A topic surrounded by narratives

One of the foremost issues regarding the conceptual discussion on human trafficking is what is described by Snajdr as a master narrative which he [in line with the authors cited by him: Lyotard (1984) and Bamberg (2003)], sees as a pre-existing form of interpretation which is reproduced out of a sociocultural context and therefore normalised.[18] This can be supplemented by the idea suggesting that the fight against trafficking is driven by activists using mass media to construct a false truth on trafficking and its victims.[19]

According to Oude Breuil *et. al.* there is more than one narrative as all of the actors represent the phenomenon of human trafficking for the sex industry in different ways.[20] This representation is based

[16] Mattar, M.Y. (2008).

[17] Muncie, J. (2008) p. 357.

[18] Snajdr, E. (2013).

[19] Tyldum, G. (2010).

[20] Oude Breuil, B.C., Siegel, D., Reenen, P. van, Beijer, A. & Roos, L. (2011) p.31.

upon socio-political, cultural and historical contexts which, as mentioned previously stand at the heart of the debate. In general there are three dimensions in which the narratives, based upon these contexts, are being produced. The first one is the legal narrative which focusses on international and national law and which is shaped by polarisation between the abolitionist and the sex work debate on human trafficking and prostitution. The second, the enforcement narrative relates to the situation as it is being perceived by law enforcement. Within this narrative the following misconceptions exist; on the one hand the existence of stereotypes, *i.e.*, a trafficking situation always exists out of a situation of clearly distinguishable victims and perpetrators, and on the other hand the emphasis on repression which implies that detection and prosecution are the main goals within combating trafficking with an emphasis on the idea of traffickers being part of complexly organised networks.[21] The third narrative is ethnographic and based upon the fact that so little research on the topic has been done but what has been done adds knowledge of the accurate situation to the discussion and alters perceptions on the first two by using the concept of the self-becoming prophecy[22] as an explanation for the wrongful assumptions out of the first two narratives. Bovenkerk *et. al.*[23] suggest that criminals are aware of the existence of these narratives and they know how to make good use of them as a scare-tactic or by becoming a mythological being without actually having to act.[24] Finally history itself has helped to shape and reinforce these narratives[25] as the focus with anti-trafficking campaigns have always been on female victims as sexual exploitation is commonly seen as the most degrading and intrusive type of trafficking conceivably possible.[26] This has led to situations in which international agreements failed as they were set out to fight forced prostitution and neglecting other forms of sexual exploitation like domestic servitude and arranged marriages.[27]

Many of the difficulties in researching human trafficking arise out of a) the sheer amount of available data and b) the major differences within this data on the topic of human trafficking and c) the continuing limitations of verifying the available data.[28] One of the points of interest is the discrepancy in estimates concerning trafficking victims and traffickers and the number of prosecutions. This has attributed to the hidden and criminal nature of trafficking[29], definitional ambiguities[30], poor methodology[31] and a total lack of understanding of the trafficking process.[32]

These issues create a soil for the concept of moral panic and the underlying vicious circle of short-term action-reaction policy.[33] This type of policy bears the danger to neglect both victims' and suspects' rights

[21] Ibid.

[22] Thomas, W.I. & Thomas, D.S. (1928) p.572.

[23] Bovenkerk, F., Siegel, D. & Zaitch, D. (2003).

[24] Oude Breuil, B.C., Siegel, D., Reenen, P. van, Beijer, A. & Roos, L. (2011) p.42.

[25] Goderie, M. & Boutellier, H. (2011).

[26] Alvarez, M.B. & Alessi, E.J. (2012).

[27] Ray, N. (2006).

[28] Musto, J. (2013).

[29] Wylie, G. (2006).

[30] Newman, E., & Cameron, S. (2008).

[31] Sanghera, J. (2012).

[32] Segrave, M., Milivojevic, S., & Pickering, S. (2009)'*Sex trafficking: international context and response*'Devon: Willan Publishing; Roguski, M. (2013) '*Occupational health and safety of migrant sex workers in New-Zealand*' Wellington: Kaitiaki Research and Evaluation p. 19.

[33] Sanghera 2005 p.185 as cited by Oude Breuil, B.C., Siegel, D., Reenen, P. van, Beijer, A. & Roos, L. (2011) p. 32.

and treatment as it only focusses on increasing the perceptions of safety and the peoples' general consent. This abolitionist view[34] as implemented by the United States (US) as applied policy on both immigration and prostitution gives a good example of this ideology.[35] Billions of dollars are spent on border control and keeping unwanted strangers from entering American territory. However, the lucky few who are able to obtain illegal entry, with or without the aid of smugglers, are from that moment on vulnerable and easily exposed to exploitation as they have lost the interest of the government and are seen as nothing more than unwanted criminalised aliens without any rights to facilities etc.[36]

4. Human Trafficking and Prostitution Policy

The traditional three P's: "*Prevention, Protection and Prosecution*" as formulated within CETS NO. 197, also stand at the basis of the United States (US) Trafficking Victim's Protection Act.[37] These three P's emphasise the idea of victims' protection, this however is a wrongful presumption as protection exists out of incarcerating an illegal minor alien who is forced to work as a prostitute, for her own well-being and protection[38] the initial goals should be questioned as this person is clearly a victim who is entitled to help and a treatment as such. In this example, to be more specific, the person is not only a victim of human trafficking but also a victim of a failing system.[39] In turn this type of social victimisation can heighten victim's reliance on sex-trade facilitators and traffickers as they can protect them from the system itself and avoid incarceration and all negatives linked to it.[40] Within the implementation of European guidelines and within *i.e.* prostitution policy by a system of prohibition, member states should take these secondary effects in consideration.

It is currently the trend for authorities/governments of member states to adapt ideas from the Swedish model.[41] This model is based on the ideology of the sexual difference model which recognises essential differences between the genders and argues that the law should be gender sensitive and support the equal valuing and cultural status of women.[42] Even in the Netherlands politicians are calling for a shift towards the Nordic thought. The question which arises is: Why? Let start by looking at the basis for the Swedish model which was set out in 1986 during the UNESCO conference in Madrid.[43] This was the first time a discussion was started which mentioned the criminalisation of buyers of sexual services rather than punishing the ones selling it.[44] It was stated that men who buy sex from women commit a violent act against them and therefore they should be punishable by law.[45] This idea of repression disguised as feminist prevention served as compensation for a lack of gender equality in Sweden in that period of time.

[34] Outshoorn, J. (2005).

[35] Bernstein, E. (2010).

[36] Musto, J. (2013).

[37] Mattar, M.Y. (2008).

[38] Musto, J. (2013).

[39] Bernstein, E. (2010); Mir, T. (2013).

[40] Musto, J. (2013).

[41] Pierette Pape, Europeans Women's Lobby Européen des femmes 23/01/2014.

[42] Bekteshi, V., Gjermeni, E. & Hook, M. van (2012) p.487.

[43] Polisen (2000).

[44] Gould, A. (2001).

[45] Skillbrei, M.L. & Holmström, C. (2011).

Scholars, policy makers and all others who oppose a system of legalisation portray this model as the solution as it would not only create a basis for equality between the sexes but it would also reduce human trafficking and sexual exploitation of its victims.[46] The latter however is not supported by any statistics as Sweden is one of the countries who have been unable to produce and supply recent and more important, relevant and validated information on the nature and extent of human trafficking and forced prostitution to Eurostat and other data gathering institutions.[47] The Swedish model is nowadays less prominent as it has merged into a Nordic system as Iceland, Norway and Finland have opted for an adapted version of the Swedish model.[48] As the Swedish model has been known to criminalise clients, it has also increased the risk of victimisation of sex workers. This model was set up to be effective not only in Sweden but also to be exported which could be seen as successful strategy considering the current trends in prostitution policy in France and the United Kingdom next to the broad Nordic implementation of the Swedish model.[49] To avoid similar situations of increased vulnerability and victimisation amongst sex-workers, an option could be to legalise prostitution but to criminalise crimp, to place a ban on pimping so to speak as this stresses out the causal relationship between victim and perpetrator and could make it easier and more effective to act upon. This relationship is less visible when assessing prostitution out of an economic model and more specific the woman as an entrepreneur and the punter as a consumer.

Basically all currently adapted prostitution policies, in terms of political and social considerations and application, are gender based and set up with the intention and aim to abolish or limit sexual abuse and victimisation emanating from human trafficking.[50] Apart from the Scandinavian model, the Utrecht Conference on Trafficking in Persons of 1994 called for a system of decriminalisation of prostitution in order to improve working conditions and health and safety aspects for the people involved in the sex industry. This conference and the thoughts it portrayed served as the basis for the Dutch policy of legalising work as a sex worker and the lifting of the brothel ban. This concept in turn was based upon a healthcare orientated consideration within the ideology of total female emancipation, as women should be able to freely choose a profession in sex work and operate freely within society, free of pimps, extortion etc. This orientation was based upon the liberal principles set out by Mill 'over himself, over his own body and mind'[51], rather than the Swedish criminal law approach which was based upon the exploitation hypotheses which sees women solely as mere victims. This exploitation hypothesis consists of three pillars. The first pillar is radical separatist lesbian feminism which argues that all heterosexual sex is exploitation. The second derives from the ideology of Marx and therefore called Marxist feminism which states that all work is exploitation and the third pillar is religious evangelism that argues that all non-procreational sex is wrong[52] and by doing so harms victims of human trafficking.[53]

There are serious contradictions between these two apparently opposite directions, both represent a position in the on-going battle of second wave feminism which started in the late 1970's and now is renewed within the field of human trafficking.[54] On the one hand, you have neo-abolitionism, the

[46] Bindel, J. & Kelly, L. (2003).

[47] Skillbrei, M.L. & Holmström, C. (2013).

[48] Skillbrei, M.L. & Holmström, C. (2011).

[49] Skillbrei, M.L. & Holmström, C. (2013).

[50] O'Brien, C. (2009).

[51] Brooks-Gordon, B. (2010) p.555.

[52] Ibid p.254.

[53] Chelsen Vicari , Christian Post 16/01/2014.

[54] Roguski, M. (2013).

followers of which uphold the idea of sex work never being voluntary.[55] This is based upon the exploitation hypothesis, and because of this notion, neo-abolitionists perceive all forms of sex-work to be a form of patriarchal oppression and essentially an act of violence towards women.[56] While on the other side you have the anti-abolitionist movement which is propagated by sex workers' rights groups, who perceive sex work as a consensual choice. The contradictions in both standpoints made it difficult to construct an all accepted view on trafficking and 'forced' sex work, as sex work in the eye of a neo-abolitionist can never be a free choice and therefore always is forced and women need to be protected from it by the authorities.[57] Across the ocean in the United States of America, the neo-abolitionists claimed a victory with the enactment of the Victim of Trafficking and Violence Protection Act (VTVPA), which provided a legislative ground to combat trafficking in persons prohibiting all forms of prostitution. While countries like Canada, Australia and New Zealand were leaning more towards an anti-abolitionist direction. In the basis every discussion on modern day slavery, whether it involves sexual exploitation or not is not a battle against abstract economic forces of crime but a political and moral struggle over the kind of society we want to live in.[58]

The two things these three totally different ideologies have in common are the following. On the one hand, they all aim to abolish the sexual exploitation of women. On the other, the period of time during which they were devised and utilized. Both the Dutch orientation based on legalisation/regulation and the policy of prohibition in the United States of America, came into effect in 2000, while the Swedish adopted their system of abolition a year before in 1999. This equals the moment the UN protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime was concluded and which eventually entered into force in 2003.

Human trafficking being a worldwide phenomenon and a type of serious transnational organised crime with serious social effects, it is almost impossible to understand why different governments and other relevant parties have been opposing each other so long on different routes of fighting this social issues. Only recently, in 2010, the Council of the European Union has adapted its priorities and intends to focus on a more fundamental and hands-on approach to act upon this type of serious organised crime which infringes upon fundamental human rights as stated in the Stockholm Programme and Directive 2011/36/EU.[59] This European turnaround opens the way for another discussion which could eventually lead to what is described by MacKinnon as adequate policy.[60] This policy is made up of three elements, the first being decriminalizing and supporting people in prostitution, the second being the criminalisation of buyers of sex from trafficking victims and finally, effectively criminalizing third-party profiteers.[61] This MacKinnion concept uses the shared protective feminist ideology of women's protection as a basis while it applies the anti-abolitionist thought of decriminalisation and legislation, as seen in the Netherlands, and combines it with the Nordic orientation based upon the neo-abolitionist thought.

[55] Chuang, J.A. (2006).

[56] Lee, M. (2011).

[57] Roguski, M. (2013).

[58] Neil Howard, The Guardian 07/11/2014.

[59] Rijken, C. (2009).

[60] MacKinnon, C.A., (2011).

[61] MacKinnon, C.A., (2011) p. 307.

This theoretical idea however is more easily said than done as proven by the recent attempt by the European Union to choose a standpoint favouring the Nordic approach to be implemented as a European prostitution policy and a way to structure the fight against human trafficking. This however failed to pass voting at the European parliament at the beginning of this year.

5. Conclusion

The European Union could be a key player in the fight against human trafficking but only if it is willing to respect and harmonise members states backgrounds and interests to such an extent that a compromise can be reached. Unfortunately, despite numerous efforts most actions are still directed and dealt with out of a national perspective either shaped through prostitution policy, or more populist tendencies. It is time for the European Union to set aside national differences and to look beyond political populist interest and concentrate on setting up an effective and widely supported policy, not based on sex work, but rather on increasing cooperation between law enforcement agencies or establishing an anti-human trafficking European taskforce which coordinates international cooperation actively instead of passively by gathering and sharing relevant information.

References

Alvarez, M.B. & Alessi, E.J. (2012) 'Human Trafficking is More Than Sex Trafficking and Prostitution: Implications for Social Work' in: *Affilia* (27)142 pp. 142-152.

Aranowitz, A., Theuermann, G. & Tyurykanova, E. (2010) *'Analysing the business model of trafficking in human being to better prevent the crime'* Ueberreuter: OSCE.

Barry, K. (2013) *'Abolishing prostitution: A feminist human rights treaty'* accessed via (http://www.womensmediacenter.com/feature/entry/abolishing-prostitution-a-feminist-human-rights-treaty) 14/08/2013.

Bekteshi, V., Gjermeni, E. & Hook, M. van (2012) 'Modern day slavery: sex trafficking in Albania' in: *International journal of social policy*, 32(7/8) pp. 480-494

Bernstein, E. (2010) 'Militarized Humanitiarism Meets Carceral Feminism: The Politics of Seks, Rights and Freedom in Contemporary Antitrafficking Campaigns' in: *Journal of Women in Culture and Society* (36) 1 pp. 46-71.

Bik, R. (2013) *'Referentiekader Mensenhandel'* Den Haag: Politie.

Bindel, J. & Kelly, L. (2003) *'A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia, Ireland, The Netherlands and Sweden'* London: Child on Women Abuse Studies Unit of London Metropolitan University.

Bovenkerk, F., Siegel, D. & Zaitch, D. (2003) 'organised Crime and ethnic reputation manipulation' in: *Crime, Law and Social Change* (39)1 pp. 23-38.

Brooks-Gordon, B. (2010) 'Sex Work' in: Brookman, F, Maguire, M., Pierpont, H & Bennett, T. *'Handbook on Crime'* Devon: Willan Publishing pp.542-576.

Chuang, J.A. (2006) 'The United States as global sheriff: Using unilateral sanctions to combat human trafficking' in: *Michigan Journal of International Law* 27 pp.437-494.

Chuang, J.A. (2010) 'Rescuing trafficking from ideological capture: Prostitution reform and anti-trafficking law and policy' in: *University of Pennsylvania Law Review158* pp.1655-1728.

European Commission (2012) *'The EU strategy towards the Eradication of trafficking in Human Beings 2012-2016'* Brussels: COM.

Goderie, M. & Boutellier, H. (2011) 'Een gevalsstudie van mensenhandel' in: *Proces* (2).

Gould, A. (2001) 'The Criminalization of Buying Sex: the Politics of Prostitution in Sweden' in: *Journal of Social Policy* 30 pp. 437-456.

Hancilova, B. & Massey, C. (2009) *'Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States'* Vienna: ICMPD.

Kara, S. (2011) 'Designing More Effective Laws Against Human Trafficking' *in: Northwestern Journal Of International Law 9(2),* pp. 123-147

Lee, M. (2011) *'Trafficking and global crime control'* London: Sage Publications.

MacKinnon, C.A., (2011) 'Trafficking, Prostitution and Inequality' in: *Harvard Rights-Civil Liberties Law Review* (46) pp. 271-309.

Mattar, M.Y. (2008) 'Comparative models of reporting mechanisms on the status of trafficking in human beings' in*: Vanderbilt journal of transnational law*, 41(1355), pp. 1355-1416.

Melrose, M. & Barrett, D. (2006*)* 'The Flesh trade in Europe: Trafficking in Women and Children for the Purpose of Commercial Sexual Exploitation' *in: Police Practice and Research: An International Journal 7(02)* pp. 111-123.

Mendes Bota, J. (2014) 'Prostitution, trafficking and modern day slavery in Europe'. Parliamentary Assembly Doc. 13446, 20-03-2014.

Mir, T. (3013) 'Trick or treat: why minors engaged in prostitution should be treated as victims, not criminals' in: *Family Court Review* 51 (163) pp.1-23.

Muncie, J. (2008) 'Responzabilization' in: McLaughlin, E. & Muncie, J. *'The Sage Dictionary of Criminology'* London: Sage pp.357-358.

Musto, J. (2013) 'Domestic minor sex trafficking and the detention-to-protect pipeline' in: *Dialect Anthropol*, accessed via Springerlink.com.

Newman, E., & Cameron, S. (2008) 'Introduction: Understanding human trafficking' in: Cameron, S. & Newman, E. (eds.) *'Trafficking in humans: Social, cultural and political dimensions'*. Tokyo: United Nations University Press.

O'Brien, C. (2009) 'An analysis of global sex trafficking' in: *Indiana Journal of Political Science* Winter 2008-2009 pp.7-19 .

Oude Breuil, B.C., Siegel, D., Reenen, P. van, Beijer, A. & Roos, L. (2011) 'Human trafficking revisited: legal, enforcement and ethnographic narratives on sex trafficking to Western Europe' in: *Trends Organised Crime* (14) p. 30-46 accessed via Springerlink.com.

Outshoorn, J. (2005) 'The political debates on prostitution and trafficking of women' in*: Social Politics International Studies in Gender, State and Society* 12(1) pp.141-155

Polisen (2000) *'Trafficking in women. Situation report no.3'* accessed via.

(http://polisen.se/Global/www%20och%20Intrapolis/Informationsmaterial/01%20Polisen%20nationellt/Engelskt%20informationsmaterial/Trafficking_1998_/Trafficking_report_3_20001231.pdf) 27/10/2013.

Polisen (2012) *'Trafficking in human beings for sexual and other purposes. Situation report 13'* accessed via

(http://polisen.se/Global/www%20och%20Intrapolis/Informationsmaterial/01%20Polisen%20nationellt/Engelskt%20informationsmaterial/Trafficking_1998_/Trafficking_report_13_20130530.pdf) 20/03/2014.

Ray, N. (2006) 'Looking at trafficking through a new lens' in: *Cardozo Journal of Law and Gender* 12 pp.909-929.

Rijken, C. (2009) 'A human rights based approach to trafficking in human beings' In: *Security and Human Rights* 3, pp. 212-222.

Rijken, C. & Volder, E. de (2010) 'The European Union's struggle to realize a human rights-based approach to trafficking in human beings: A call on the EU to take THB-sensitive action in relevant areas of law' in: *Connecticut Journal of International Law* (25) 49 pp. 48-80.

Roguski, M. (2013) *'Occupational health and safety of migrant sex workers in New-Zealand'* Wellington: Kaitiaki Research and Evaluation.

Sanghera, J. (2012) ' Unpacking the trafficking discourse' in: Kempadoo, K., Sanghera, J. & Pattaniak, B. *'Trafficking and prostitution reconsidered: perspectives on migration, sex work, and human rights'* Boulder: Paradigm Publishers.

Segrave, M., Milivojevic, S., & Pickering, S. (2009)*'Sex trafficking: international context and response'* Devon: Willan Publishing.

Skillbrei, M.L. & Holmström, C. (2011) 'Is there a Nordic Prostitution Regime?' in: *Crime and Justice* 40(1), pp. 479-517.

Skillbrei, M.L. & Holmström, C. (2013) *'The 'Nordic model' of prostitution law is a myth'* accessed via (http://theconversation.com/the-nordic-model-ofprostitution-law-is-a-myth-21351) 16/12/2013.

Skillbrei, M.L. & Holmström, C. (2013) *'Prostitution Policy in the Nordic Region. Ambiguous Sympathies'* Surrey: Ashgate.

Snajdr, E. (2013) 'Beneath the master narrative: human trafficking, myths of sexual slavery and ethnograpic realities' in: *Dialect Anthropol*, accessed via Springerlink.com

Stoyanova, V. (2011) 'Complementary Protection for Victims of Human Trafficking under the European Convention of human Rights' in: *Goettingen Journal of International Law* (3)2 pp. 777-817.

Thomas, W.I. & Thomas, D.S. (1928) *'The child in America: behaviour problems and programs'* New York: Knopf.

Tyldum, G. (2010) 'Limitations in Research on Human Trafficking' in: *International Migration* 48(5) pp.1-13.

UNODC (2010) 'The Globalization of Crime. A transnational organized crime assessment' New York: United Nations Publication.

Werson, H. & Goutbeek, F. (2005) 'Protocol for Identification and Assistance to Trafficked Persons and Training Kit' Anti-Slavery International.

Wylie, G. (2006) ‘Doing the impossible? Collecting data on the extent of trafficking’ in: Anker, C.L. van de & Doomernik, J. (eds.) *‘ Trafficking and Women’s Rights’* New York: Palgrave Macmillan.

Obligations Arising from Public International Law Relating to the Rights of Minorities – Some Observations on the Case of Kosovo*

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This article intends to highlight certain questions relevant to the understanding of the current international legal situation of Kosovo particularly in fields of ensuring human and minority rights and international treaty obligations relating thereto. Additionally some pieces of Kosovo's domestic legislation on minority issues shall also be reviewed. This article's main question is how a State with limited recognition and restricted capacity to accede international treaties shall manage obligations arising primarily from treaties for stabilizing and improving her status within the international community.

Keywords: Kosovo, minority rights, human rights, public international law, EU law, treaty obligations, unilateral acts of States, recognition of States

1. Regulating the Status of Minorities in the Post-Socialist Region of Europe by Means of International Legal Norms - A Brief Historical Overview

After the communist regimes of certain Central and Eastern European countries[1] had been collapsed, some atavistic, even already forgotten but still unresolved questions popped up on the agenda of these former COMECON[2] States and their societies. Furthermore some federal States in the region in question had been broken off and split up around the year of 1990, for instance the Soviet Union in 1991, Czechoslovakia in 1993, and Yugoslavia through the nineties ending with the secession of Kosovo from Serbia in 2008. By this process described above, a lot of new states were created without any previous or

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[1] Such as the German Democratic Republic, Czechoslovakia, Poland, the Soviet Union, Hungary, Yugoslavia, Albania and Bulgaria.

[2] Council for Mutual Economic Assistance was established in 1949 by states from the Eastern bloc, led by the Soviet Union.

only a very limited and short-term statehood in the past. In these newly emerged countries political and legal institutions are often weak and many of them maintain as a final goal to establish a homogenous nation-state, regardless of the cultural diversity of their societies. In addition (national and/or ethnic) minority groups living in these States are also mobilised on ethnic basis and are politically active. Many of them started to represent their interests and campaigned for more rights either by moderate or more radical ways. Both phenomena, i.e. the wish to become a nation-state and the movements of minority groups have common roots. According to Claus Offe, this process was about the decision on identity, citizenship, State and borders of the State and the nation[3]. That means, the 'politics of identity' had a key-role in forming the political framework of not only the movements of minorities but political parties of the – sometimes new – majorities as well. In some cases the campaign for a nation-state caused bloody and serious clashes between groups having distinct identity and different cultural or linguistic factors[4]. During the 1990s the issue of minorities was being become a question of state security and regional stability besides the connotations relating to its human rights dimension. These facts endorsed the rethinking of tools used in Western European states (e.g. the relationship between majority and minority, the problems of kin-states and kin-minorities, various types of autonomy etc.) Furthermore in former communist states of Central and Eastern Europe the issue of national and ethnic minorities had been smothered artificially during so many decades, and was treated as a taboo, and that is why – *inter alia* – the problems were exploded so dramatically in the nineties. This process was emptying in the emergence of racial and/or ethnic extremism, and in some cases the belief in national superiority was fostered by implicit or explicit governmental measures. 1989 was an important cornerstone not only from the aspect of Central and Eastern Europe but from the view of Europe as a whole as well regarding to the issue of minorities at least. Nevertheless there was a rather impressive development of rules on minority affairs on the international level till the downfall of communist regimes but after these events the issue of regulating minority rights on an international plane got an additional impetus. Testifying this, it is enough to refer to the law-making process made under the aegis of the Council of Europe and also to the efforts made by the CSCE (later known as the OSCE) on these matters.

2. General Remarks on the Current International Legal Status of Kosovo

Taking into consideration the complexity of minority issues in the context of Kosovo, it is inevitable to assess briefly the question of Kosovo's present status under international law. As it is well-known Kosovo declared her independence by seceding from Serbia in 2008 and this unilateral act is still a subject of much debate among the members of international community. 110 UN member states have recognized the independence of Kosovo so far of which 23 states are members of the EU as well.[5] This means approximately 57 % of the UN members and 82 % of the EU members are now officially recognizing Kosovo as an independent subject of the international legal system.

Public international law has a quite dubious viewpoint relating to the issue of state-recognition in general, since there are no really obvious norms on this field, only customary international law regulates this issue and that is why – *inter alia* – the question of Kosovo's unilateral declaration of independence is regarded as an issue still under debate. Proving this statement it is enough to refer the request for an advisory opinion from the International Court of Justice by the UN General Assembly in 2008 on the 'Accordance

[3] Offe, Claus: '*Capitalism by democratic design? Democratic theory facing the triple transition in East Central Europe*' in: *Social Research*, 1991. Vol. 58, no. 4. p. 869.
[4] See the case of Yugoslavia, the Republic of Moldova, or Chechnya for instance.
[5] http://www.kosovothanksyou.com/ (15/08/14).

with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo'. In theory the International Court of Justice could have withheld giving an advisory opinion at any time during the advisory process under certain circumstances. In addition the question of state-recognition is being complicated due to some facts notably its inter se characteristics so that the legal consequences of state-recognition arising only between the states concerned which means the unilateral act of recognition cannot create rights and obligations to third legal subjects. Therefore without judging the validity and legality of the unilateral declaration of independence by Kosovo under international legal norms, the current situation can be described as follows. The Republic of Kosovo is regarded as an independent and sovereign member of the international community by States already recognized its statehood and Kosovo can do any legal and non-legal state acts relating to these countries. Since Kosovo can be considered as an unrecognized State by several other states that expressly refused to recognize the independence of Kosovo so that it has neither international legal personality nor international legal capacity regarding to these States in question. Summing up the facts, Kosovo has an entire international legal capacity (including the most important possibilities namely the conclusion of international treaties and the establishment of diplomatic and consular relations etc.) towards states who already recognized its independence. While contrarily, Kosovo has quite a limited international legal capacity towards countries, which refused to recognize her statehood.

In principle recognition *in se* is not a necessary requirement of independence or statehood. The criteria of statehood is laid down in Article 1 of the Montevideo Convention on Rights and Duties of States (1933)[6] which identifies the basic requirements in the possession of a permanent population, defined territory, government and the capacity to enter into relations with other states. Kosovo in principle meets these conditions; however there are strong limitations in its administrative and military competences: Kosovo does not have its own military, security is guaranteed by NATO KFOR and even if with rather limited mission, the presence of UN Mission in Kosovo and EULEX also pose a limitation to Kosovo's sovereignty. Furthermore the lack of general consensus considering Kosovo's statehood among European states impedes the country from joining international organisations – thus limiting its ability to fully participate in international relations. So, even if theoretically Kosovo could be regarded as an independent state, in fact it is exposed to serious limitations in exercising the rights and duties deriving from that statehood under international law. This is particularly relevant for undertaking international obligations in the field of human or minority rights. Kosovo could not yet join the most relevant international treaties in this field and even if Kosovar authorities declared their unilateral obligation to observe the duties deriving from these treaties Kosovo cannot fully participate in the monitoring procedures.

Despite the pending discussion on the international recognition of Kosovo's statehood, it is quite obvious for the moment, that the government of Kosovo and the Assembly of Kosovo exercise almost full[7] administrative and legal jurisdiction over the territory and population of Kosovo. This means for instance that the implementation of the legislation on linguistic rights of communities is the responsibility of central and local state authorities in Kosovo.

[6] See: Convention on Rights and Duties and States, Article 1. http://www.oas.org/juridico/english/treaties/a-40.html Last accessed on 28.09.2014.

[7] Due to the Serb enclaves in the North, with limited territorial authority and due to the presence of UNMIK, KFOR and EULEX with limitations on security, police and judicial competencies.

3. Communities, Minorities in Kosovo and Note on Terminology

The questions related to the co-existence and rights of ethnic and national communities has been determining for Kosovo society in the past decades. Obviously in the light of the 1998-1999 war, and the heavy conflicts – occasionally erupted in open violent acts, like in 2004 – between the Serbian and Albanian population of Kosovo, issues related to the situation of minorities in general have always been highly sensitive. In this aspect, the independence of Kosovo, declared in 2008 was closely linked to the fate of minorities in independent Kosovo.[8] As a matter of fact, already under international administration (under UNMIK[9] between 1999 and 2008) the legislation of Kosovo was designed to reflect a tolerant, multi-ethnic, multi-lingual society. The Constitution of the Republic of Kosovo, adopted after obtaining independence, declares amongst others, that "*The Republic of Kosovo ensures appropriate conditions enabling communities, and their members to preserve, protect and develop their identities.*"[10] Art. 5 of the Constitution generously established two (Albania and Serbian) official languages at national level and other languages with official status at local level.

Probably the most visible sign of this multi-ethnic approach to stabilizing Kosovar society is the legal terminology used for national and ethnic minority groups. While international documents and the most widespread practice in domestic legislation of European states is to use the term of "minority" for groups which differ from the majority in their linguistic, cultural, national or ethnic identity and which enjoy specific rights,[11] the Assembly of Kosovo refrained to use this term, which may have negative connotations for minorities (especially for the Serbians) and opted for the use of 'communities' suggesting even by this terminology the equality between Albanian and non-Albanian populations of the country.[12]

In this article, thus the terms 'community', 'minority community' and 'minority' will be used alternatively.

4. Attitudes of Kosovo Relating to Norms of International Minority Rights Law

Following from the legal situation described above, the Republic of Kosovo – with some minor exceptions – has no really possibility to accede to international organizations. Obviously one of the most challenging issues are that the majority of the relevant multilateral international conventions relating to minority rights were elaborated by international organizations whose members are divided upon the

[8] See among others the so-called Ahtisaari-plan: United Nations Comprehensive Proposal for the Kosovo Status Settlement, 27 March 2007. S/2007/168/Add.1.
[9] United Nations Interim Administration Mission in Kosovo. See more at www.unmikonline.org
[10] Art. 58.1. of the Constitution of the Republic of Kosovo. Entered into force on 15 June 2008.
[11] To cite the most acknowledged definition of the term offered by Francesco Capotorti, UN Special Rapporteur in 1979: „a minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language." UN Doc E/CN.4/Sub.2/384/Rev.1. 1979. 5-12.
[12] However there is a broader use of the term 'community' in Kosovo, besides referring to the minorities of the country, it is also used as referring to *all* ethnic, linguistic groups in Kosovo, regardless of their numerical position. Cf.: *Communities in Kosovo. A guidebook for professionals working with communities in Kosovo*. (Pristina, ECMI Kosovo, 2009).

question of the legality of the declaration of independence by Kosovo. Due to these facts Kosovo is usually not allowed to accede to international organizations – mainly due to political and not legal reasons – dealing with – amongst others – minority rights which leads to problems relating to the recognition of the binding force of international conventions containing minority rights including particularly the International Covenant on Civil and Political Rights (adopted by the UN in 1966) and the relevant instruments of the Council of Europe such as the European Charter for Regional and Minority Languages of 1992 and the 1995 Framework Convention for the Protection of National Minorities. According to the mechanisms relating to CoE legal instruments only member states are allowed to accede to its treaties and perhaps that is why Kosovo could not become a state party to the international legal texts drafted by the Council of Europe so far. Nevertheless, already before declaring independence, there seemed to be a need for establishing an independent and unbiased overview of the situation of minorities in Kosovo based on the existing international minority rights standards. For this purpose, the UNMIK concluded an agreement with the Council of Europe in 2004 on extending CoE monitoring activities to Kosovo in relation to the Framework Convention.[13] The agreement was based on the declared willingness of UNMIK and the provisional self-government institutions in Kosovo in implementing the FCNM on the territory of Kosovo. Still today the implementation of FCNM in Kosovo is based on this agreement and even if today the Kosovar government takes overwhelming part in delivering the deriving obligations, the regular "state report" on the progress of implementation is prepared and submitted by UNMIK.

In spite of other possible ways of acceding to these treaties Kosovo chose an interesting but fairly not optimal method to be bound by these instruments, namely certain unilateral declarations made by the official State authorities. In fact acceding to treaties is not the only possible way to undertake international obligations. According to the 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations' drafted by the International Law Commission of the United Nations in 2006: (Similarly to the capacity of concluding treaties) 'Any State possesses capacity to undertake legal obligations through unilateral declarations'[14] and 'declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.'[15] In theory this means Kosovo can undertake obligations arising from an international convention by declaring unilaterally her intentions to do so without formally acceding any of these instruments. Accordingly, the Constitution of Kosovo in its article 22 declares the following:

'Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are *directly applicable* (emphasis added) in the Republic of Kosovo and, in the case of conflict, has priority over provisions of laws and other acts of public institutions:

- Universal Declaration of Human Rights;
- European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;

[13] Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities. 2004.

[14] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations of 2006 by the ILC. Section 2.

[15] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations of 2006 by the ILC. Section 1.

- *International Covenant on Civil and Political Rights and its Protocols;*
- *Council of Europe Framework Convention for the Protection of National Minorities;*
- *Convention on the Elimination of All Forms of Racial Discrimination;*
- Convention on the Elimination of All Forms of Discrimination Against Women;
- Convention on the Rights of the Child;
- Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; (emphasis added)

Furthermore the Law on the Use of Languages in Kosovo in its – legally non-binding – preamble states:

'(It is) Based on the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages,' in addition the Parliament of Kosovo 'is taking into account the Hague Recommendations regarding the Education Rights of National Minorities and the Oslo Recommendations regarding the Linguistic Rights of National Minorities, the Guidelines on the use of Minority Languages in the Broadcast Media (…)'.

However the preamble of the Law on the Use of Languages in Kosovo may not be considered as a legal declaration since the parliament wished only to note that during the drafting process of the law in question several relevant international norms were being taken into consideration. The case of the Constitution is slightly different though because of the declarative character of its article quoted above. After all the only question is whether domestic laws such as the Constitution of Kosovo can be considered as legally binding unilateral declarations under international law, or not? According to the current international norms on this field the answer can be both in the positive and in the negative. No doubt that the Constitution was issued by a law-making body namely the Assembly of Kosovo and not by a person representing the state in its international relations. Even though a parliament has quite restricted powers and possibilities on this field, it is clear enough that Kosovo intends to take into consideration the rules of international minority rights law including language rights as well.

5. Principle of Non-discrimination and Language Rights – Kosovar Domestic Legislations Based on International and/or European Rules and Standards

The situation of national minority communities in Kosovo has become a key issue in legislation both before and after obtaining independence. Already under UNMIK administration, the provisional institutions of self-government in Kosovo, i.e. both the provisional Assembly of Kosovo and the provisional government actively worked on the establishment of a coherent legal framework for the equal rights of communities in Kosovo.[16] Still under UNMIK administration, the Assembly of Kosovo adopted the Anti-discrimination Law[17] and the Law on the Use of Languages.[18] Both pieces of legislation rely on the acknowledged principles of equality and minority language rights as formulated in international and EU documents. The anti-discrimination law reflects the most important elements of non-discrimination

[16] See on detail: Aleksandra Dimitrijević: *Minority Rights in the Context of Kosovo*. Pristina, 2004.
[17] The Anti-Discrimination Law 2004/3.
[18] Law on the Use of Languages 02/L-37.

legislation adopted within the EU (see the so-called Employment Directive[19] and the Race Directive[20]): such as the definition of the concept of discrimination, the definition of protected groups and personal characteristics, the judicial procedure applicable for the violation of the law, including the procedures of issuing fines, etc. This law prohibits discrimination based on – among others – national or ethnic origin, language, and its area of application extends to both the public and the private sectors, the procedure for evaluating complaints is entrusted on independent bodies. Although from the perspective of persons belonging to minorities, the legal regulation of the prohibition of discrimination can only be tested in its implementation, which may raise concerns regarding the effective competencies of the authorities designated by the law for implementation. Nevertheless one of the main positive elements in this law is that not only individuals, but also civil organizations, NGOs representing the victims are entitled to turn to the authorities for requesting investigation of complaints of discrimination. The main obstacle for the thorough activation of the anti-discrimination law, however, lies in the low level of citizens' awareness of their rights and in the malfunctions of the institutional guarantees of the rule of law.

Furthermore, it shall be underlined that the prohibition of discrimination is always the first step only in safeguarding the identity of minority communities. As it was formulated already by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (later, until 2006 known as the Sub-Commission on the Promotion and Protection of Human Rights)[21] there shall be a clear distinction between the concepts of 'prevention of discrimination' and 'protection of minorities': "*Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish. Protection of minorities is the protection of the non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.*"[22]

Even if in the context of Kosovo, as it was explained above, the constitutional framework does not use the phrase 'minorities', but recognizes communities in Kosovo, it is still obvious that all the non-Albanian communities are in non-dominant, minority position. Thus for fulfilling the constitutional commitments of Kosovo to treat all communities equally, there is a need to go beyond the prohibition of discrimination and to guarantee specific rights for non-dominant communities.

In this context, the other law, which was adopted for the protection of minority communities before gaining independence, the law on the use of languages is of outstanding importance for the recognition of minority or community rights in Kosovo. The law recognized Albanian and Serbian languages as official languages; it declares the full equality of the two languages on the entire territory of Kosovo.[23] Besides the regulation of official languages, the law recognizes the right of citizens' who speak other than the official languages to preserve their linguistic identity. At municipal level, the law recognizes Bosnian, Roma and Turkish languages as official languages if the number of people speaking one of these languages reaches 3% of the population in the municipality. Albanian and Serbian languages enjoy equal status in all Kosovo institutions, thus at the level of central institutions as well: at government or parliamentary sessions both national official languages can be freely used, and "every person has the right to communicate with, and to receive available services and public documents from, the central institutions

[19] 2000/78/EC Directive.
[20] 2000/43/EC Directive.
[21] This UN body ceased to exist in 2006 and it was replaced by the Human Rights Council Advisory Committee.
[22] U.N. Doc. E/CN.4/52, Section V.
[23] Art. 1 (ii). of the Law on the Use of Languages.

of Kosovo in any of the official languages".[24] In a similar way, at municipal level, the official languages of the municipality can be used equally in the communication with municipal institutions, in official documents and in their contacts with citizens. Municipal regulations and decisions shall be issued in all official languages of the municipality.[25] Furthermore the law regulates the use of languages in public enterprises, in judicial proceedings, in education and media. For supervising the implementation of the regulations on the use of languages, the law requires the Government of Kosovo to establish a Language Commission. The main task of Language Commission is to supervise the effective use of official languages in public institutions, and to overview the implementation of the language rights of communities, to issue recommendations and proposals, and to report on the violation of language rights to the government and the parliament.[26] The composition of the Language Commission is based on the administrative instruction issued by the Prime Minister (however no information was available for us on the work of the Commission).

In general this language law reflects the main principles acknowledged at international level for the protection of persons who speak minority languages and the regulation is in full coherence with the constitutional and international obligations of Kosovo.[27] Nevertheless the main problems in the effective implementation of the law are the lack of appropriate social and political awareness and the administrative obstacles in implementation: *e.g.* the functioning and efficiency of the Language Commission was for long doubtful.[28]

6. Conclusions

Even if the issue of guaranteeing minority rights has a core character in securing both the internal social stability and improving the international leeway of Kosovo, it is not an easy task to undertake international obligations on this field in case of a statehood being disputed. The still inevitable importance of minority rights and the balance between the communities living in Kosovo is clearly understood – amongst others – if one reads the provisions of the 2013 Brussels Agreement signed by the prime ministers of Kosovo and Serbia. The vast majority of the contemporary international legal obligations on minority rights are of a treaty-based character. This looks rather problematic if the communities of Kosovo are at stake. Lack of unanimous recognition, Kosovo is hardly able to undertake obligations stemming from international treaties. As regard to the most important international treaties elaborated under the auspices of the United Nations for instance, a State may accede to these conventions *typically* if she is already a member of the UN. Kosovo's eventual UN membership seems to be uncertain at the moment since two of the permanent members of the Security Council – the Russian Federation and the People's Republic of China – oppose the recognition of Kosovo as a State, yet. In addition the decision on membership is considered as an 'important question' by the General Assembly's Rules of Procedure and it needs a two-thirds majority of affirmative votes. Nonetheless there are other ways to become a party to these conventions too. In case of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and under its article 11 for example "[a]ny non-member State to which an invitation to sign has

[24] Art. 4.
[25] Arts. 7-8.
[26] Art. 32.
[27] Art. 58.2 of the Constitution of the Republic of Kosova prescribes the respect for the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter of Regional or Minority Languages. <http://kushtetutakosoves.info/> Last accessed on 10.05.2010.
[28] *The Beginning of Implementation of the Law on the Promotion and Protection of Rights of Communities and Their Members in the Republic of Kosovo*. Humanitarian Law Centre, Belgrade, December 2008. p. 86.

been addressed by the General Assembly "may also become a party to this convention. Since a qualified majority is not required in this case, a resolution could in theory be adopted by the General Assembly because the majority of the UN members have already recognized Kosovo as a sovereign State. The other relevant universal treaties contain the same clause as well. However the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: ICERD) and the 1966 International Covenant on Civil and Political Rights (hereinafter: ICCPR) allows other ways to become a party of these treaties, respectively. On the one hand a State which is not a member of the UN but party to the Statute of the International Court of Justice may also accede to these treaties. Otherwise the procedural preconditions of being a party to the ICJ's Statute are very similar what we saw in the case of the admittance to the UN. Despite these facts, Kosovo – in theory - could accede to both of the conventions mentioned above. According to the relevant provisions of them, members of any of the UN's specialized agencies are also allowed to sign these treaties and Kosovo is a member if the International Monetary Fund and the organizations of the World Bank Group including the IBRD, the IFC and the IDA since 2009. Theoretically there are no major legal obstacles in front of the accession of Kosovo to both the ICCPR and the ICERD. More precisely, the obstacles – if any – are rather of a political than of a legal nature. Likewise the UN, Kosovo has no prospects to join the rest of the specialized agencies of the UN except the WHO and the WIPO. The application to the WHO is decided upon by a simple majority vote of the Health Assembly, whilst the membership in WIPO is possible also on the basis of a membership in any of the specialized agencies. Interestingly, Kosovo seems not to be interested in joining the latter two organizations as well as to accede to the ICCPR and the ICERD and considers the unilateral declarations on these issues as appropriate instead.

As regard to the CoE's two main international treaties on minority rights, only CoE members are allowed to accede them as a rule. In theory Kosovo could join the Council of Europe – from a legal aspect at least – since approximately 72 percent of the CoE members already recognize her independence and statehood. According to the London Statute of the CoE the Committee of Ministers is authorized to send an invitation to European States for joining the organization by a decision of a two-thirds majority. No doubt, Kosovo makes efforts to join the CoE however lack of success so far and presumably because of political-diplomatic reasons. Though the substance of the relevant international treaties is applicable in Kosovo due to certain unilateral declarations of hers, the interest of the international community and certainly the minorities living in Kosovo would be the formal accession of Kosovo to as many of the treaties in question as possible because of the following reasons. Firstly, democratic principles and values such as the principle of diversity, rule of law including legal certainty require a clear and transparent legal framework and background in Kosovo. Additionally without formally accepting these treaties the international monitoring mechanisms are not able to work thoroughly and properly in Kosovo. Even if – as in the case of the FCNM – there is a provisional solution for monitoring the implementation of a certain international standards, these are only single cases[29] and do not offer a solution: it is still difficult to assess Kosovo's responsibility in fulfilling international obligations.

[29] There is not a similar procedure for monitoring the implementation of the Language Charter.

Review

Christoph Grabenwarter: The European Convention on Human Rights – A Commentary[1]

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The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), is the most influential international treaty yet to have been concluded under the aegis of the Council of Europe. Since entering into force on 3 September 1953, this treaty has become the single most important guarantor of respect for and observance of human rights in Europe. Thanks to the mechanisms by which it is enforced and the practice of the institutions established in its wake, it has proved highly effective in the protection of human rights. The importance of the Convention is underscored by the fact that states wishing to become members of the Council of Europe must first sign the Convention and accept both the right of individual application and the jurisdiction of the European Court of Human Rights.[2] Based in Strasbourg, this Court guarantees that the human rights enshrined in the Convention are upheld. Procedures regarding infringements of human rights can be brought before the Court both by the signatory states of the Convention and by individual persons. Since the signatory states generally comply with the Court's judgements, a common regional human rights protection norm system has evolved. Accordingly, the Strasbourg Court is often called the 'constitutional court of Europe'.[3]

Although several English-language commentaries on this influential Convention already exist, a concise yet comprehensive handbook-style commentary was lacking until very recently. This gap has now been filled by Dr. Dr. Christoph Grabenwarter's *European Convention on Human Rights – Commentary*. Published in early 2014, its aim is to help those who work with the Convention to understand the workings of the ECHR and the Court's case law.[4] Christoph Grabenwarter, university professor of Public Law, Business Law and International Law at the Vienna University of Economics and Business, and judge at the Austrian Constitutional Court, is also the author of a German-language textbook on the

[1] Christoph Grabenwarter, *European Convention on Human Rights – Commentary*, München 2014.

[2] Cf. Parliamentary Assembly of the Council of Europe, Resolution 1031 (1994) on the honouring of commitments entered into by member states when joining the Council of Europe, par. 9.

[3] Conway W. Henderson, *Understanding International Law*, Chichester 2010, p. 308.

[4] Cf. the preface of the commentary (Christoph Grabenwarter, *European Convention on Human Rights – Commentary*, München 2014, p. V).

ECHR[5] which has become a key reference work for students and practitioners in German-speaking countries and elsewhere.

The reviewed commentary offers basic and at the same time in-depth information on the application of the Convention and on the case law of the Strasbourg Court. It is addressed at readers who seek thorough knowledge of human rights protection in Europe, i.e. practitioners and legal scholars. This sets it apart from other commentaries such as *Cases, Materials, and Commentary on the European Convention on Human Rights* by Alastair R. Mowbray.[6] Mowbray's work is a textbook aimed also at students of law, and as such it covers not only the articles of the Convention but also more generally the creation of the Convention and the emergence of the Strasbourg Court. Christoph Grabenwarter's commentary assumes the reader's knowledge of these areas. The reviewed work also differs significantly from the well-known and widely popular ECHR commentary by Pieter van Dijk, which offers the reader even more exhaustive information.[7] For undergraduate students seeking primarily to become acquainted with the ECHR, Christoph Grabenwarter's aforementioned textbook is recommended preferably.

Christoph Grabenwarter's ECHR commentary is notable for its subject matter, for the quality of its content and for its editing and writing style. It provides commentary on those articles of the Convention and its Protocols which lay down human rights (regarding the Convention: Art. 1-14 ECHR). These articles are cited in both English and French (the only two authentic versions of the Convention), which helps the reader to understand and interpret each given article. The annotations of individual articles include a bibliography related to that article and an overview of leading cases. After each case the author indicates the relevant aspect of the human right in question. This format allows for easy orientation in the case law, for example regarding the several aspects of the right to a fair trial (Art. 6 ECHR). The commentary illustrates not only the most eminent cases but also the latest case law. When discussing a judgment, the author generally focusses on those statements issued by the Court which help the reader to understand the essence of its decision. In particular, he omits the circumstances ('the state of affairs'), the argumentation put forward by the parties and the summary of the Court's decision. In taking these steps to condense the lengthy reasoning behind the Strasbourg Court's decisions in many cases, the author has done the reader a great service. The discussion of each human right begins with an introduction which provides the reader with a general picture of the article in question. This introduction includes the relevance of the right, the possibility of derogation from the right and the effect of the right on the Charter of Fundamental Rights of the European Union. Depending on the nature of the human right in question, the introductory section is generally followed by a discussion of the scope of protection, the interferences and finally the justification of infringements. In addition to the annotation of the articles of the Convention which lay down human rights, the commentary's appendix contains the full text of the ECHR in English, as amended by Protocols Nos. 11 and 14, including Protocols Nos. 1, 4, 6, 7, 12 and 13. The Rules of Court are also provided, as is the Annex to the Rules (concerning investigations) and Practice Directions. The information contained in the appendix and covering, among other things, written pleadings, just satisfaction claims, secured electronic filing and the request for anonymity makes this commentary an indispensable compendium for practitioners appearing before the Court.

Christoph Grabenwarter's ECHR commentary fulfils its aim, as it is described above. Its high-quality content, clear editing and perspicuous style are perfectly suited to the needs of the target readership. The

[5] Christoph Grabenwarter & Katharina Pabel, *Europäische Menschenrechtskonvention*, 5th ed., München 2012.

[6] Alastair R. Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights*, 3rd ed., Oxford 2012.

[7] Pieter van Dijk & Fried van Hoof & Arjen van Rijn & Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th ed., Antwerpen 2006.

commentary is a very accessible and user-friendly reference book for lawyers who need reliable information about the functioning of the ECHR and of the Strasbourg Court in a concise yet comprehensive form. To this extent, a commentary which offers effective support in such a challenging field as human rights protection in Strasbourg is now available.