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EDITORIAL

Dear readers,

We are pleased to introduce the new volume of the Polish Yearbook of International Law (PYIL), published at a time of considerable uncertainty concerning the future of the international legal order. The post-1945 system is under sustained pressure from armed conflicts, geopolitical rivalry, humanitarian crises, advancements in technology and weakening multilateral cooperation. Russia's war of aggression against Ukraine, the continuing crisis in the Occupied Palestinian Territory and conflicts and tensions in the Persian Gulf, Sudan and Venezuela raise fundamental questions about the capacity of international law and its institutions to preserve international peace and security. Although these situations differ in their legal and political character, they engage core principles of the international legal order, including the prohibition of the use of force, respect for sovereignty and territorial integrity, self-determination, the protection of civilians and accountability for serious violations.

These challenges are particularly evident in the field of international peace and security. The United Nations collective security system remains paramount, yet its effectiveness is constrained by political divisions and structural limitations, including the veto power of the permanent members of the Security Council. International courts and tribunals continue to clarify important questions of law, while regional organisations play an increasingly significant role in conflict prevention, crisis management and the protection of shared values. At the same time, legal clarification cannot, by itself, overcome the political and institutional obstacles to implementation and compliance.

These circumstances invite renewed reflection on the relationship between international law, international institutions and international peace and security. The post-1945 order was never free from conflict or inequality; its enduring significance lies in the effort to subject the exercise of power to common rules and to provide institutional means for peacefully settling disputes. The current crises should therefore be understood not simply as evidence of institutional and normative failure, but also as a test of the resilience and adaptability of that broader project. Unilateral action, selective approaches to international obligations and declining confidence

in multilateral solutions may weaken the authority of international institutions and foster the perception that international law is applied according to political needs. At the same time, these developments underscore why international law remains indispensable: it provides the framework within which States' conduct can be assessed, responsibility established, rights protected and peaceful solutions pursued.

The challenge, therefore, is to consider how the existing order may evolve without abandoning its foundational principles. The future of international peace and security will depend both on the willingness of States to accept legal constraints and on the capacity of international institutions to translate shared principles into effective actions. This challenge also defines the role of legal scholarship. At a time when the contours of the international order are being contested, scholarship must examine not only the content of legal rules, but also the institutions through which they operate, the relationship between law and political power and the conditions under which international law can contribute to conflict prevention and the restoration of peace.

The "General Articles" section reflects this broad agenda. Gaetano Pentassuglia examines the historical and conceptual foundations of self-determination and the idea of the "nation", while Agata Kleczkowska considers the role of international law in situations between peace and war and the challenges posed by nonconventional threats. Kristýna Urbanová addresses the proposed Special Tribunal for the Crime of Aggression against Ukraine, focussing on the issues of jurisdiction, immunity and trials *in absentia*, while Michał Dębowski examines the limits of criminal jurisdiction in international law. Turning to emerging fields of regulation, Katarzyna Malinowska and Bartosz Malinowski provide a comparative study of the legal infrastructure and governance of space activities in Poland, Slovakia and Slovenia. Patrycja Dąbrowska-Kłosińska explores European judicial standards concerning routine immunisation policies for minors, paying particular attention to the relationship between human rights, public health and scientific evidence. Finally, Giuseppe Pascale examines the rebus sic stantibus doctrine and its potential implications for the sunset clause of the Energy Charter Treaty.

The present volume also addresses one of the central concerns of international criminal justice: the recognition and effective protection of the rights of victims of core international crimes. In particular, the contributions in the Special Section – "From East to West: Advancing Victims' Rights in a Global Context", edited by Hanna Kuczyńska from the Institute of Law Studies of the Polish Academy of Sciences (ILS PAS) – examine the evolution of victims' rights and the challenges involved in making existing legal protections effective. The collection originates from the international conference "From East to West: Advancing Victims' Rights in a Global Context", which was organised by the Ukrainian and Polish National

Groups of the International Association of Penal Law (AIDP), in cooperation with the Centre for Research on International Criminal Law at the ILS PAS and the Memory and Justice Centre at Mykolas Romeris University in Vilnius, and held on 27 November 2025. The conference concentrated on the experience of Ukraine, where the scale of crimes committed in the course of Russia's aggression has placed exceptional demands on national and international justice mechanisms. The discussions also highlighted the importance of cooperation among legal scholars, practitioners and civil society in documenting international crimes, supporting victims and survivors and developing more effective, survivor-centred approaches to justice.

This practical dimension is particularly evident in the growing cooperation of Polish and Ukrainian civil society organisations. The establishment in 2024 of the Coalition for Victims, Survivors and Witnesses (KOOS), bringing together Polish organisations which document international crimes and advocate for victims and survivors, illustrates the contribution of civil society to the development of national and international responses to mass atrocities. The Special Section seeks to connect these practical experiences with the broader academic debate on the role of victims in international criminal justice.

The contributions focus primarily on the legal and practical challenges arising from core crimes committed in the context of Russia's aggression against Ukraine. Vladyslava Kaplina examines the Council of Europe's Register of Damage for Ukraine, concentrating on questions concerning evidence, personal data and victim participation, as well as the Register's role as part of a broader reparations mechanism. Iryna Krytska and Oksana Kaplina consider the requirements for effective investigation of war crimes and crimes against humanity, paying particular attention to procedural guarantees and the status and rights of victims in criminal proceedings. Mykhaylo Shepitko, Valery Shepitko, Valentyna Borysova and Aisel Omarova examine the forced transfer and deportation of Ukrainian children through the relationship between core international crimes and the right to identity, including the relevance of these violations to the assessment of responsibility for genocide. Barbara Pauli turns to conflict-related sexual violence and assesses the capacity of Polish criminal law and practice to prosecute such crimes while ensuring a genuinely victim-centred approach. Izabela Trybus and Elena Wasylew address the right to rehabilitation of survivors of torture in Poland, drawing on international standards and identifying shortcomings in the availability of specialised services, identification and referral mechanisms and appropriately trained personnel. Finally, Olena Kharytonova examines legal and institutional responses to conflict-related sexual violence in Ukraine, highlighting the importance of gender-sensitive and victim-centred approaches and the potential for these approaches to inform broader responses to sexual violence.

The volume concludes with our two traditional sections. The first, "Polish Practice", features the judgment of the Supreme Administrative Court of 15 December 2025 concerning the Poland–Norway double taxation treaty. The Court clarified that the treaty's tax relief provisions may apply to income earned by Polish tax residents working aboard ships operated by Norwegian enterprises in international transport, even when that income is not actually taxed in Norway. The judgment is significant because it confirms that treaty relief is not necessarily contingent upon effective taxation in the other Contracting State, potentially allowing eligible taxpayers to benefit from Poland's foreign-income relief rules when Norway does not impose income tax. The second section, "Book Reviews", provides a critical overview of selected current scholarship in the field. It includes reviews of "Polish Contributions to International Criminal Law" (by Dominika Uczkiewicz), "Russia, the Soviet Union, and Imperial Continuity in International Law" (by Michael Riepl) and "Universal Jurisdiction over Core International Crimes: Law & Practice" (by Karolina Wierczyńska).

With regard to our organisational developments, we are pleased to announce that Andrzej Jakubowski (ILS PAS) has joined Karolina Wierczyńska and Łukasz Gruszczyński on the PYIL Editorial Board as a managing editor. We warmly welcome him to the team and look forward to this new stage in the continued development of the journal.

We hope that this volume will provide our readers with an opportunity to reflect on some of the most pressing questions currently facing international law. The contributions brought together here approach these questions from different perspectives and areas of the discipline, while sharing a common interest in the ways in which international law is interpreted, applied and developed in response to contemporary challenges. We are grateful to all the authors and reviewers who have contributed to this volume and to those whose work supports the continued development of the PYIL. We trust that the scholarship presented herein will contribute to further discussion of the role of international law, its institutions and its practitioners in addressing the challenges faced by the international legal order.

Karolina Wierczyńska
Łukasz Gruszczyński,
Hanna Kuczyńska,
Andrzej Jakubowski

GENERAL ARTICLES

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*Gaetano Pentassuglia**

BRINGING THE HISTORY OF IDEAS TO SELF-DETERMINATION: UNDERSTANDING "NATION"

Abstract: *While international legal debates over self-determination have built on established "civic" and "cultural" ideas of a nation, a sustained engagement with the history of legal/philosophical ideas around the meanings of "nation" as an intellectual backdrop to the concept of self-determination has been frequently missing. The present analysis seeks to fill this gap by discussing the idea of a nation as a general conceptual category that, prompted by the tension between legal/philosophical historicism (broadly understood) and contractarian state theories, has influenced across time, not just political thought, but legal thought specifically international legal thought, at least within the European context. It argues that the main political and cultural meanings of "nation" are not exclusively modern creations but do have a long historical pedigree, one that manifests itself in different forms and degrees, from ancient and pre-modern times up until at least the interwar years. It also contends that, within this process, they rest on progressively broad(er) ideas of cultural distinctiveness and political agency, and that they ultimately reflect a plural concept which informs modern conceptions of peoples' self-determination, particularly in relation to free choice, the delimitation and character of the self-determining community, state unity, and a broader sense of humanity.*

Keywords: nation, nationality, self-determination, historicism, international law, interwar years, social pact theories, positivism, history of ideas

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INTRODUCTION: "NATION" – SOURCING THE CONCEPTUAL IMPACT ON SELF-DETERMINATION

It is almost commonplace to link national claims to the right of "peoples" to self-determination. Contemporary legal debates over self-determination have typically revolved around the territorial or "ethnic" dimensions of "peoplehood", that is, what it means to be a people.[1] A large part of those debates has been preoccupied with the question of whether a portion of a given state population (minority or majority alike) is entitled to self-determination as a distinctive national group or whether the focus needs to be exclusively on the population in its entirety. It is equally common knowledge that these variants of the concept of self-determination, though built around the interpretation of hard and soft law texts, reflect broader and modern, "civic" and "cultural" ideas of a "nation" – one built around the "political" state and its institutions, the other seeking to capture the substantive features of the community, within or without an existing state.

Theoretically, the political ideal of national unity has been associated with the spatial dimension of the community – the territory within which its members become conscious of, and wish to retain, their identity – and the utilitarian pursuit by the state (whose all-encompassing political unit is the "nation") of the maintenance of "law and order" and other broad institutional (and economic) ends. By contrast, the "cultural" approach to nationhood (or peoplehood) fundamentally appeals to a distinctive historical community bound together by certain traits across generations, and normally linked to a homeland, regardless of the way(s) in which that community manifests itself politically and/or institutionally. In the context of self-determination debates, institutional responses and scholarly analyses have generally sought to mitigate the potential or real excesses of nationalism, have considered and/or accommodated the position of specific groups and their members, or, at the other end of the spectrum, have dismissed such matters as "tribalism".[2]

What has been frequently missing in such analyses is a sustained engagement with the history of legal/philosophical ideas as an intellectual backdrop to the much later concept of self-determination, and most importantly, with the idea of a nation as a broad and underlying category that has influenced across time, not just political thought, but legal thought specifically international legal thought, at least within the European context. The analysis that follows seeks to fill this gap

[1] *See e.g.* T. Musgrave, *Self-Determination and National Minorities,* Oxford University Press, Oxford: 1997; L. Orgad, *The Cultural Defense of Nations – A Liberal Theory of Majority Rights*, Oxford University Press, Oxford: 2015.

[2] G. Pentassuglia, *Conceptualising National Identity in Self-Determination Practice: A Cross-Cutting International Law Analysis*, 11(1) Hungarian Yearbook of International Law and European Law 238 (2023), pp. 238–242.

by making essentially three, largely interrelated claims. First, it generally argues that the broad, inherited "political/territorial/institutional" and "cultural" meanings of a nation (and later people), far from being exclusively modern creations, do have a long historical pedigree, one that manifests itself in different forms and degrees, from ancient and pre-modern times up until at least the interwar years. More specifically, it contends that, within this process, legal/philosophical historicism (broadly understood), in its constant tension and interaction with contractarian state theories, plays an especially important role in articulating a normative core of national (social) individuality of which law and institutions are an integral part, eventually penetrating international legal scholarship (and practice). Second, it maintains that while pre-modern notions of *natio* (and people) are characteristically based on descent/ethnicity and ordinarily lack a legal/institutional dimension, later substantive articulations of "nation" or "nationality" (and thus people) prompted mainly by historicist thinking (between the sixteenth and nineteenth centuries) are informed by broader ideas of cultural/moral national distinctiveness and political/institutional agency. Third, it claims that the concept of nation – as historically discussed in legal thought and eventually inherited by the modern idea of "people" under international law – ultimately comes into view as a cluster (or plural) concept shaped (in theory or de facto) by the balance between political/territorial/institutional dimensions and substantive cultural/national elements.

Thus, the present discussion does not aim to offer a legal definition of "people" or "nation" or national identity in international law.[3] Rather, it seeks to demonstrate that "nation" operates historically as a general conceptual category whose main cultural and political meanings inevitably inform later and modern conceptions of peoples' self-determination, particularly in relation to free choice, the delimitation and character of the self-determining community, state unity, and a broader sense of humanity.

With this in mind, the inquiry is built around six steps: early semantics – mainly about *gens* and *natio* – the "social" (non-statist/people-driven) ideal of inter*nation*al law, and ideas of individuality (Section 1); the ground-breaking sixteenth-century post-Reformation historical school of law and the rise of national consciousness in that context (Section 2); the early modern period's contractarian (social pact) theories and the later substantive idea of a nation (Section 3); the re-emergence of historical thinking in eighteenth- and nineteenth-century thought (Section 4) and

[3] In 2006 the Council of Europe noted that "it was difficult, not to say impossible, to arrive at a common definition of the concept of "nation"", Recommendation 1735(2006), *The concept of "nation"*, 26 January 2006 (7th Sitting), para. 3, available at: https://www.aelpa.org/documentos/reformas/EACAT/ConsejoEuropaNacion.pdf (accessed 31 March 2026).

its impact on *fin de siècle*, interwar arrangements and scholarly critiques (Section 5); concluding thoughts on the political and cultural layers of "nation" and their reflection on the core and edges of the right to self-determination.

1. IDEAS OF INDIVIDUALITY: EARLY SEMANTICS AND THE NON-STATIST IDEAL OF INTERNATIONAL LAW

Although there was no *jus publicum civitatum* (inter-state law) that could approximate the current notion of international law and the built-in idea of state individuality, the Greek *polis* represented nevertheless one of the very first examples of legal, political and moral distinctiveness in pre-Christian history. By providing a comprehensive code across various domains of life, each *polis*'s political community pursued its own distinctive and self-sufficing (self-determining) sense of the common "good life".[4] The Greek "people" or "stock" in Aristotle's *Politics* (represented in all Greek cities) were thought to markedly differ from the people of other parts of Europe as well as the people of Asia. Aristotle blended predominantly political and moral considerations with matters of general common (Hellenic) descent and culture, in essence echoing political and cultural ideas of (national) individuality found in later centuries and radically different settings.[5]

Yet, it is essentially the Latin notion of *jus gentium* that offers the context for understanding the sort of social groupings that precede the state as we know it today and signal the early origins of international law as being informed by the idea of "peoples and nations, not institutions and organizations."[6] While *jus gentium* operated as natural law common to all *gentes*, the core meaning of *gens* referred to a community of common descent and customs. It differed from the *populus* of ancient Rome understood as a civic/pluralistic citizen body bound together by legislation and mutual advantages.[7] Giambattista Vico's *New Science*, for example, would view the Homeric poems as the prime repository of the laws and customs of the "Hellenic nation" understood in historical/cultural terms and underpinning his view of *jus (naturale) gentium*.[8] The much later translation of *gens* into *Volk* in Germanic languages indicates that the initial concept of *Völkerrecht* in German represents at least the ideal of articulating the law of peoples as social and cultural

[4] Aristotle, *Politics*, Oxford University Press, Oxford: 1995, p. 106.

[5] *Ibidem*, p. 266.

[6] J. Fisch, *Peoples and Nations,* in: B. Fassbender & A. Peters (eds.), *The Oxford Handbook of the History of International Law,* Oxford University Press, Oxford: 2012, p. 28.

[7] This classic concept of (Roman) *populus* can be found in Cicero, *De Re Publica*, I, 25 [39].

[8] G. Vico, *The New Science* (trans. T. G. Bergin and M.H. Fisch), Cornell University Press, Ithaca and London: 1948, Book 3. On Vico's thought and its influence, *see* later sections.

groups.[9] Emerged as an alternative to *gens* and *populus*,[10] the eventual semantic incorporation of *natio* into inter*nation*al law does hint at the term's original, narrow social (essentially ethno-cultural) meaning.

Indeed, although the "law of nations" was first used in the sixteenth century to denote the beginning of the transformation of *jus gentium* into a framework designed to regulate the relationships between modern states, the idea of a nation (*natio*) remains fundamentally a cultural one for much of the Middle Ages and significant parts of the early modern period. In Roman times, *natio* and *gens* have similar meanings based on descent, kinship, and/or language.[11] In the early fifteenth-century Council of Costance held by the Catholic Church, the English clergy defends England's full national autonomy (as a "major", not "minor", nation) on account of descent, tradition, language and territorial connections (*Anglicae nationis vindicatio*, 1417). Importantly, they distinguish between national identity and political loyalty by conceding that broader national communities may be subject to different political rulers. Large dynastic monarchies (French, Spanish, English, etc.) would partially seek to align political institutions with linguistic and cultural values. Yet the idea of nation is largely articulated as a non-politically organised form of identity defined by objective factors, such as regional origin, ethnicity, customs and/or language. The "cultural" nation stood between merely local communities and the universal *res publica Christiana*.[12]

The terminology used in Machiavelli's early sixteenth-century major works, particularly *The Prince*, exemplifies not only the general distinction between cultural and political dimensions of the idea of a nation in the (political and legal) thought of the time, but also their fluid and uncertain interaction. Although Machiavelli uses a variety of terms, such as "state" (*stato*) or "dominion" (*dominio*), to indicate the institutional aspects of political power, he also references "nation", and far more frequently, "province" to convey multiple and overlapping meanings. Used throughout Machiavelli's body of work, "nation" can generally denote either an existing, or seemingly aspiring, state entity (i.e. the French nation, the German nation, etc.),[13] or more narrowly, individuals ("nationals") belonging to a "nation" defined by the city or region of origin (e.g. Florentine nation) and/or descent (e.g. university students

[9] Fisch, *supra* note 6, pp. 29–30.

[10] Unlike the high status of the Roman *populus*, the term "populus" was, not uncommonly, used in the modern age to reference the lower strata of society.

[11] *Natio* meant most frequently a distinct ethnic community. F. Chabod, *L'idea di nazione*, Laterza, Bari: 1961, pp. 19–21.

[12] *See e.g.* R. Romeo, *Idea e coscienza di nazione fino alla prima guerra mondiale. Appunti*, 14(1) Clio Rivista Trimestrale di Studi Storici 5 (1978).

[13] N. Machiavelli, *Discourses on Livy* (trans. H.C. Mansfield and N. Tarcov), The University of Chicago Press, Chicago and London: 1996, Book I, 55, p. 111; Book III, 43, p. 302.

or traders of a certain nationality living abroad). Despite his primary concern with political-institutional affairs and the individuality of existing or emerging states as distinct units, Machiavelli is not oblivious to the original concepts of *natio* and *gens* from which his even narrower idea of a nation derives. This is confirmed by his far wider and nuanced use of "province" compared to "nation". For him, "province" is not only a substitute for "nation" in the same generic (today's "civic") sense of all the inhabitants or citizens of a territory (usually an existing state or city), or less often, merely a territorial sub-unit within a wider dominion, but it can also indicate the equivalent of (ethno-cultural) *gens* in the sense of a commonality (or similarity) of customs, descent, language and institutions.[14] In Machiavelli's vision, ethnic or linguistic issues, or broader cultural (national) ways of life, are not irrelevant to political processes[15] yet remain essentially a free-floating (naturalistic) category in line with the spirit of the time. In fact, such factors feed, directly or indirectly, into a more general and somewhat constant and parallel literature – from Hippocrates and Aristotle to Voltaire, Montesquieu and beyond – around "national characters" and what influences the "nature" of a people, including elements such as geography, climate and the land itself.[16]

That said, the evolution of *natio* from *gens* does not automatically translate into mere Machiavellian statism (i.e. nations as merely institutional creatures). The ever-greater harmonisation of political and cultural values pursued by the early monarchies is increasingly paralleled by claims to live under the laws and customs of the historical community in question against all attempts at assimilation or subordination.

The so-called Declaration of Arbroath signed by the Scottish lords seeking papal recognition of Scottish independence from England in 1320 is a typical example of this. Linked to a series of battles against England between approximately 1296 and 1319 (so-called Scottish war of independence), the Declaration makes a case for the recognition of Robert the Bruce as King of Scots by the Pope. The claim is grounded primarily in the right of nations to be recognised as such and thus to govern themselves under their own laws and customs without external interference, let alone military attack. Indeed, Scottish immemorial "laws and customs" do not feature as exclusively cultural or institutional factors. They are at the heart of a claim

[14] N. Machiavelli, *The Prince* (trans. R. Goodwind), Dante University Press, Boston: 2003, Ch. 3, p. 34; *see* also *Discourses*, Book III, 43, p. 302.

[15] Tellingly, *The Prince*'s last chapter (XXVI) is an appeal to the House of Medici to achieve "Italy's redemption" by freeing it from "the barbarians" (foreign dominators); it ends with a quote from humanist Petrarca's verses of *Italia mia* (ca 1344–1345), which famously reflected a national sentiment built around common language/descent/culture and opposition to foreign rulers on Italian soil.

[16] For examples, *see* above, *Discourses* 1966.

to national distinctiveness (echoing today's "national" self-determination) advanced as a matter of right (though one rooted in political and moral legitimacy rather than international law).[17] "Freedom alone" – the Declaration states – would justify the King's replacement were he to betray the nation of Scotland (whose liberties he had been entrusted to defend) by making it subject to England.[18]

Over two centuries on, in 1581, the States General of the United Provinces of the Low Countries adopted the so-called Act of Abjuration to throw off the sovereignty of Philip II of Spain and replace him with another prince. They did so in the name of the (predominantly Calvinist) people's "ancient customs and privileges" claimed against tyrannical Spanish rule.[19] Although there is no explicit claim to nationhood in the Act, the link between the invoked defence of people's "liberty" in accordance with the "law of nature" and the patriotic meaning of the struggle against Catholic Spain is well-documented.[20] More significantly, the Act justifies the claim by appealing to previous practice "in several countries upon the like occasion, whereof there are notorious instances." The Act effectively builds on a wave of national/patriotic claims (articulated as much in literary efforts as in military ones) against the Holy Roman Empire and/or the authority of the Pope brought about by the Reformation in Germany and intellectually derived from a hybrid mix of the idea of *natio* as narrow common descent and customs (cultural meaning) and the wider view of a political struggle against external "oppression" (political/institutional meaning).[21]

This early focus on distinct groups of human beings, rather than abstract institutions, power or citizenship per se, would of course be hardly conclusive in matters of territorial sovereignty and political authority. Nevertheless, it offers an important glimpse into early ideas of "self-determination", both in terms of substantive communal identity (including the option of *jus emigrandi* for minority population groups living in territories lost to a foreign ruler)[22] and its progressively aligned

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[17] For commentary, *see e.g.* N. MacCormick, *Nation and Nationalism*, in: N. MacCormick (ed.), *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, Clarendon Press, Oxford: 1982, pp. 259–260. For an historical perspective, *see* among others, T. Sparks, *Self-Determination in the International Legal System, Whose Claim, to What Right?*, Hart Publishing, Oxford: 2023, pp. 41–50.

[18] Pope John XXII allowed the anointing of Robert the Bruce as King of an independent Scotland in 1329, following a peace treaty between England and Scotland in 1328 which had committed the English Crown to recognising Scotland's independence and Robert the Bruce as its lawful ruler.

[19] For the text, *see e.g.*, https://tinyurl.com/3hpwmjmk (accessed 31 March 2026).

[20] The Act of Abjuration eventually led to the international recognition of Dutch independence under the Treaty of Westphalia in 1648.

[21] *See e.g.* Chabod, *supra* note 11, pp. 120–121. For some examples, *see* R. Redslob, *Le principe des nationalités*, Collected Courses of the Hague Academy of International Law, Vol. 37 (1931), Sec. II, pp. 9–11.

[22] The option would see multiple iterations in history, including recent conflicts. For an early analysis, *see* J. Kunz, *L'option de nationalité*, Collected Courses of the Hague Academy of International Law, Vol. 31 (1930), pp. 107–176.

political/institutional manifestation, mainly in response to oppressive (external) authority. The gradual transition from the original *jus gentium* to the much later (positive) law of states reveals a loose set of ideas of *individuality*, one that broadly signals the cultural and increasingly political-institutional grounds of emerging national (people's) distinctiveness as the all-encompassing *res publica Christiana* begins to collapse and claims to past customs, liberties and modes of life (real or perceived) intensify. Early and later legal historicism, as well as social pact theories, discussed in Sections 2–4, largely define the intellectual pathways to such individuality, while the alliance of law and history, first articulated in the sixteenth century, is bound to have a deeper and longer-term impact on the national question and its international self-determination articulations (Section 5).

2. THE EMERGENCE OF HISTORY IN LEGAL THOUGHT: TOWARDS NATIONAL CONSCIOUSNESS (16TH CENTURY)

From a national (and self-determination) perspective, two points are key at this stage. On the one hand, the Reformation unleashes broader claims against the legacy of the Roman Empire and the authority of Roman law, in the name of local traditions and laws.[23] Luther's 1520 *An den Christlichen Adel Deutscher Nation* (To the Christian Nobility of the German Nation) is consistent with earlier German humanists' appeal to German customs and laws – "ancient Germanic liberties" – as distinctively indigenous creations.[24] The claim, in other words, is based on a kind of benign historical relativism against universal classical authority. It is the fifteenth-century Italian legal humanist Lorenza Valla who first promoted a philological understanding of (legal) language as particular, conventional, indeed historical, not the expression of natural truth. "[S]ignification [of terms]", he argued, "is derived from custom" – "*ab institutione*" or "*ab artifice*".[25]

It was the French legal humanists, though, who effectively inspired an increasingly systematic legal historicist approach to legislation and practice in the second half of the sixteenth century. Their *mos docendi Gallicus* involves the use of historical studies as a way of giving context to legal assessments (especially in public law) and

[23] For analyses, on which the current section heavily draws, *see e.g.* Redslob, *supra* note 21, pp. 8–9 (including bibliographic materials); D.R. Kelley, *Legal Humanism and the Sense of History*, 13 Studies in the Renaissance 184 (1966); D.R. Kelley, *Foundations of Modern Historical Scholarship*, Columbia University Press, New York: 1970; J.H. Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History*, Columbia University Press, New York and London: 1963; J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*, Cambridge University Press, Cambridge: 1987, Ch. 1.

[24] Kelley, *supra* note 23, p. 190; Chabod, *supra* note 11, pp. 38–44.

[25] Quoted by Kelley, *supra* note 23, p. 185.

legal education more broadly. Crucially, they understood legal history as composed of distinctive streams of concepts and practices which reflect a plurality of legal and national experiences and need to be considered from an increasingly comparative perspective. In his 1561 *De institutione historiae universae et ejus cum jurisprudentia conjunctione prolegomenon*, François Baudouin, one of the movement's most prominent figures, dismissed the conventional distinction between Roman sources and others' legal "barbarism": "If we are Frenchmen, Britons, Germans, Spaniards, or Italians, and if we are able to speak of what is ours, it is necessary that we do not ignore the history of the Franks, Angles, Saxons, Goths, and Lombards; and since our affairs are often confluent with others, we may not remain ignorant of Saracen or Turkish history either."[26] As it widens the range of historical materials available for legal comparison and cross-analysis, the "historical school of law"[27] championed especially by Baudouin, Jean Bodin, and François Hotman, brought the difference between the Roman past and the French national experience into sharp relief.

The defence of the distinctiveness of the French experience against Roman universalism became an argument in public law. Both Hotman and Bodin, while pursuing different political-constitutional objectives (Hotman was a Huguenot prominent critic of the monarchy in defence of local and national/customary traditions, while Bodin supported the monarchy within a rule of law framework), grounded their "anti-Romanist" position firmly in the idea that the French experience was not dictated by Roman law (or indeed anything that sprang from it in the form of *jus gentium*) but was a "peculiar and indigenous" creation,[28] in the same way that German humanists defended Germanic indigenous culture against classical (Roman) authority.[29]

Other French legal humanists built their attack on the authority of Roman law primarily around specific conceptions of national linguistic usage and change. Charles Dumoulin appealed to linguistic usage to defend the French monarchy against Roman universalism. Ètienne Pasquier, while commenting on the political difference between the French monarchy and the Romans' *res publica*, wrote against Latinizing the French language in contrast with the "true and primitive laws of France", which he understood as a diverse body of customs and traditions derived from the diversity of French provinces. Informed by a deep sense of history, he distinguished the spontaneous, internal linguistic change originating in a people's "character" from the corruption of a language "when a nation is subjugated

[26] *De institutione historiae universae*, p. 59.
[27] Kelley, *supra* note 23, pp. 186, 189.
[28] Franklin, *supra* note 23, p. 42.
[29] *See supra* note 24.

by force of arms".[30] Pasquier's sense of linguistic and national difference thus informed and reinforced a dynamic view of natural language cycles prompted by his general historical method.

Despite its variations, the sixteenth-century historical school of law thus contributed to highlighting an altogether new perspective on nations and peoples in legal thought. Its common appeal to the man-made concrete and particular in time and space – "a sense of individuality"[31] as opposed to the unalterable and universal – exposed the unique connections between laws and institutions and entire societies with their cultures and traditions, as opposed to a single true *Zeitgeist* or *Volksgeist*.[32] Reconciled with the inevitable major influences from the classical past and minimal commonalities derived from comparative exercises,[33] this early historical method revealed an unmistakable blend of cultural and political-institutional meanings of national consciousness within legal frameworks (communal distinction and constitutional structures). Rather than grounding national distinctiveness in narrow ideas of descent or ethnicity from the original meaning of *natio*, it uncovered distinctive and not wholly translatable man-made national patterns of which law, institutions, and legal practice were very much an integral part. Three centuries on from Valla's philological studies, Giambattista Vico's *New Science* would systematically develop a wider and deeper notion of history and human institutions – even a new concept of *jus gentium* – steeped in the idea of organic and social patterns of nations.[34]

3. NATIONAL DISTINCTIVENESS AND SOVEREIGN AUTHORITY: FROM GROTIUS TO FICHTE (17TH-18TH CENTURIES)

3.1. History Denied: The Particularity of "People" (or "Nation") in Social Pact Theories

The other major conceptual pathway to peoplehood and nationhood is defined by the relationship between the "people" or "nation" and sovereign authority in the seventeenth and eighteenth centuries. Unlike the historicist approach discussed above, a large strand of this later pathway dispenses with cultural/institutional

[30] Kelley, *supra* note 23, pp. 192–193, 194–197.

[31] *Ibidem*, p. 185.

[32] G. Huppert, *The Idea of Perfect History*, University of Illinois Press, Urbana: 1970; Pocock, *supra* note 23, Ch.1.

[33] Franklin, *supra* note 23, p. 51, for example, notes that Hotman's intention is not to attack Roman influence in general, but rather the assumption that Roman law "must be studied in every jot and tittle as a universal code".

[34] *Supra* note 8, and below, Sections 3.2 and 4.

uniqueness, the particular in time and space, and seeks instead to mediate between the individuality of emerging (state) political communities – to be buttressed by the Peace of Westphalia of 1648[35] – and broader ethical/metaphysical values and imperatives or ideals.

On one basic level, social contract theories in the work of Hugo Grotius and Thomas Hobbes provided a basis for justifying the individual existence of the state, especially in terms of internal and external self-preservation and stability, beyond the prescriptions of natural law informed by universal Christian morality.[36] On Grotius's scheme, as famously articulated in his 1625 *De jure belli ac pacis*, the "people" is not the *natio* or *gens* of ancient, medieval or Renaissance times, but rather an original "multitude" emerging out of the "state of nature" through a postulated social pact. It is in practice only a territorially-defined segment, a sample as it were, of an imagined wider human community coming together to establish specific state institutions tasked to prevent chaos and anarchy.[37] In Hobbes' 1651 *Leviathan*, this approach amplifies since the "multitude" entering a social contract to purse concrete utilitarian (though morally justifiable) objectives, enables the sovereign to become and act as the "people", both internally and in international affairs, which remain in the "state of nature".[38]

John Locke developed this line of thinking by making peoples fuller political and legal/institutional agents. In his 1690 *Second Treatise of Government*, not only did he clearly distinguish the sovereign from the people by grounding the social contract stipulated by the latter exclusively in the moral (and then legal) requirement of the former to protect what he sees as the natural rights of individuals, but he also made the very legitimacy of government and the validity of laws dependent upon the people's and their representatives' consent. The right of the people to resist unjust laws and to remove or alter an unjust government is one of the key and long-standing implications of his thought.[39] Jean-Jacques Rousseau's later theory of popular sovereignty built on Locke's notion of self-government yet presented more radical institutional ramifications. Rousseau's *volonté générale* underpinning

[35] For context, *see* B. Fassbender & A. Peters (eds.), *supra* note 6, *passim*.

[36] H. Grotius, *De Jure Belli Ac Pacis Libri Tres*, in: J. Brown Scott (ed.), *The Classics of International Law*, Clarendon Press, Oxford: 1925, pp. 44, 253.

[37] *Ibidem*, Book I, Ch. III, Section IX, p. 111.

[38] T. Hobbes, *Leviathan*, in: R. Tuck (ed.), Cambridge University Press, Cambridge: 1996; T. Hobbes, *On the Citizen* (trans. M. Silverthorne), in R. Tuck (ed.), Cambridge University Press, Cambridge: 1988. Hobbes' sovereign did not recognise any constraints under international law – only external, legally unenforceable natural law, *Leviathan*, p. 244.

[39] J. Locke, *Second Treatise of Government*, 1690, paras. 149, 155, 168, 207–210, 220–231, 240–243. *See* P. Laslett (ed.), *Locke: Two Treatises of Government*, Cambridge University Press, Cambridge: 1988, pp. 265–428.

government and laws does not amount to majority rule tempered by the protection of key individual rights but is rather the expression of the sovereign will of the people taken as a whole, the very essence (for him) of the "ethical" and rational state.[40] The separation of people and state thus collapses by inverting Hobbes' terms of their (re-)unification – it is the people to become the sovereign, not the sovereign to act as the people. Locke's and Rousseau's theories, despite their, often remarkable, differences, would come to inspire the eighteenth-century self-determination emancipatory claims made in the name of "the people" – conceptualised as the entire (state) population – in North America and France.[41] Together with other proponents of social pact, the "nation" of their general theories pursued individual and collective freedom on broad political/territorial/institutional terms, not historical or cultural distinctiveness.

Kant arguably refined this movement further from within the tradition of German Enlightenment. Though influenced by Rousseau and broadly supportive of the French Revolution, Kant embraced the Hobbesian premise of a malign state of nature from which "individual human beings, peoples, and states" need to exit if they are to achieve any law and order, both internally (at the level of state formation) and within the international society (at the level of *jus publicum civitatum* – states in relation to one another).[42] The "people" that emerges from the state obeys the laws and subjects itself to a "public lawful external coercion", but equally, is represented in government within a republican (i.e. non-despotic) state that operates under a just civil constitution designed to protect individual freedoms.[43] Taken at its most abstract, Kant's moral and legal framework generally posits a "people" or "nation" as a whole (indivisible) entity *á la Rousseau*, yet gives it (as partly anticipated by Locke) a distinctive place within a constitutional structure governed by the separation of legislative and executive power (which makes the sovereign accountable to the people, including in matters of war) and informed by a much less radical concept of representation. In short, the "self-determining" people or nation is quintessentially legal and institutional in character.

Social pact theories would enormously contribute to a political/territorial/institutional understanding of a nation from a self-determination perspective. Locke's right to self-government, including the right to resist an unjust government, and

[40] J.J. Rousseau, *Of the Social Contract and Other Political Writings*, Penguin Books, London: 2012, *passim*, especially Book IV, Ch. 2, pp. 102–103.

[41] Redslob unsurprisingly grounded the "principle of nationalities" partly in the "liberté individuelle" and "la souveraineté du people", Redslob, *supra* note 21, pp. 6–8.

[42] I. Kant, *The Metaphysics of Morals* (trans. M. Gregor), in: L. Denis (ed.), Cambridge University Press, Cambridge: 2017, Part II, Chaps. I–III.

[43] *Ibidem*, *e.g.* paras. 43–49.

Rousseau's theory of popular sovereignty, would prove especially important as they come to encapsulate conceptually the right of a people to political self-determination, free of an oppressive ruler. By placing such whole complex of influential ideas in the wider context of earlier (post-Reformation and pre-revolutionary) forms of resistance to oppression and domination, the later opposition to Napoleonic aggressions and the rise of national independence movements against (foreign) monarchies, and even broader ideas of anti-imperial liberation and economic progress injected by Marxist thought in the late-nineteenth-century,[44] it is unsurprising that post-World War II international law would build its minimum self-determination standard around the *free choice of rulers*, particularly in the context of liberation from alien (colonial) rule. Much later in the century (following the end of the Cold War) the free choice paradigm would be essentially reproduced as part of the debate over internal self-determination, including a putative, emerging "right to democracy", i.e. the right to choose (and thus change) one's government through electoral processes, modelled on the Kantian ideal of *jus civitatis* as a basis of international law, and grounded in a republican (just) constitution.[45] Both such movements philosophically presuppose an exclusively universal parameter (free will, people's choice, or self-government) designed (conceptually) to reproduce a single idea of (moral/legal) freedom. A new nation can emerge from the ashes of previously common bonds (American Revolution), while the "nation" is thought of (or assumed) as being the result of a procedural mechanism, precisely a social pact with its various ramifications (nation-building linked to *uti possidetis*, and/or voting process).

3.2. History Affirmed: The Substantive Idea of a Nation

Whereas the main thrust of social pact theories presents an influential yet instrumental view of a people or nation, another and partly overlapping strand of the debate does *reclaim* its historicity, its substantive uniqueness *vis-à-vis* other peoples or nations, whatever their commonalities. By linking peoplehood or nationhood to a sense of distinct history, institutions, and/or communal traditions, these (broadly cultural) ideas build on the legal historicist turn of the sixteenth century (Section 2) and come to qualify the otherwise abstract universalism of Enlightenment

[44] Marx, for example, thought that Poland's struggle against the Austrians, Russians, and Prussians marked the beginning of a transnational class struggle in Europe against imperialism: e.g. V. Kattan, *To Consent or Revolt? European Public Law, the Three Partitions of Poland (1772, 1793, and 1795) and the Birth of National Self-Determination*, 17 Journal of the History of International Law 247 (2015), p. 279. *See below* Section 5.

[45] A classic piece inspired by Kantian thought is T. Franck, *The Emerging Right to Democratic Governance*, 86(1) The American Journal of International Law 46 (1992); more broadly on the right to self-determination, A. Cassese, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge: 1995.

thinking (below and Section 4). A clear indication of this is already visible in Vico's legal philosophy of history as he linked laws and institutions with the historical *sensus communis* (the collective social/cultural outlook) of entire nations in their distinctive (man-made) attempts to overcome human and natural obstacles. Against natural law (and contractarian) lawyers, Vico insists on the "Natural Law of the Nations" as successive stages of organisation and consciousness that whole societies (not merely individuals) – the *gentes* of his reconceptualised *jus gentium* – generate *for themselves* throughout history.[46] As Vico's "ideal eternal history" (*storia ideal eterna*) takes sixteenth-century nascent and scattered (legal) historicism into more ambitious territory, it also precedes the German Historical School (discussed in Section 4) in tracing law to a dynamic yet organic and cultural pattern unique to each society.

At the same time, the very work of some of the thinkers considered in Section 3.1 indicates a clear tension with their wholly rationalist doctrines. For example, in his 1610 *Liber de Antiquitate Republicae Batavicorum*, Grotius explained Dutch national identity, the provincial sovereignty of Holland and the 1581 independence of the United Provinces from Spain's Philip II by tracing them back to the ancient constitutional traditions, customs, and virtues of the Batavians (an ancient Germanic tribe) and Batavian "state" in Roman times. Grotius' thesis follows in the footsteps of the sixteenth-century historical jurists (whose work he openly recognised in his later *De jure belli ac pacis*[47]) by using a rigorous historiographic approach to uncover Holland's past liberties and identity vis-à-vis internal and external powers.[48]

Rousseau, for his part, broke with the mainstream Enlightenment tradition by believing that "popular sovereignty" requires, not good laws and institutions in the abstract, but laws and institutions that can adapt to the individuality of a people, of its national outlook, whatever commonalities may exist with other nations. "In a word" – he writes – "apart from the maxims common to all, every People contains within itself some cause that orders these in a particular way and makes its legislation suitable for it alone."[49] Rousseau's *volonté générale* is thus enlightened by reason but informed by the people's national character. He criticised Peter the Great of Russia for attempting to turn Russians into "Germans or Englishmen" instead

[46] Vico, *supra* note 8, e.g. paras. 142, 311.

[47] On Grotius' "heavy dependence" upon history, as well as his substantial reliance upon scholars like Bodin and Hotman, *see* Franklin, *supra* note 23, pp. 73–74.

[48] For recent commentary, *see e.g.* H. Grotius, *The Antiquity of the Batavian Republic* (ed./trans. J. Wanzink), Van Gorcum, Assen: 2000, *passim*, especially pp.18–19.

[49] Rousseau, *supra* note 40, p. 54. In his *Considerations on the Government of Poland*, he reinforces the concept by praising the ancient legislators for infusing national values and culture into their institutions (e.g. Vico's Homeric poems, *supra* note 8, "recited to the Greeks in solemn assembly"), *ibidem*, Ch. II, p. 250.

of speaking to their national spirit, just as he famously urged the Poles to be who they are, not French or English, but Poles raised to love their country and ancient laws and customs in the name of the "will of the people" against foreign powers.[50] The ideal of people's internal freedom from kings and aristocrats thus combines with its *external* projection as a (peaceful) *national* state.

Despite his ambitious legal and moral framework, Kant's theory too reveals important internal tensions. For one thing, multitudes-turned-peoples eventually identified with their respective state, so that for Kant, an international state, a "World Republic" – as opposed to a federation of individual states – would contradict the premise of a state built around a single nation, not a nation of nations.[51] Despite this seemingly neutral (legal/institutional) understanding of a people or nation (and despite the term *Volk* used to denote it),[52] Kant explicitly states that "nature wisely separates the nations" along cultural (linguistic/religious) lines, effectively appealing to a more substantive idea of the nation. These national differences, while impeding (at least empirically) the fusion of states into a single superior global entity, are nevertheless said to represent important baselines from which a new equilibrium of forces can be pursued in the interest of peace.[53] The entire Kantian rational schema rests on the right of states, not the right of nations regardless of states,[54] including indigenous peoples recognised (only) as national groups (*Völkerschaften*).[55] Yet it is exceedingly unlikely that his republican state and patriotic government committed to civil liberties, though born of Kant's enlightened rationalism, does not in fact

[50] *Ibidem*, Book II, Ch. 8, p. 47; *Considerations* (*ibidem*, pp. 241-333, particularly p. 254). On Rousseau's influence on constitutional reform in Poland, *see* Kattan, *supra* note 44, pp. 266–267.

[51] I. Kant, *Perpetual Peace: a Philosophical Sketch*, in: Hans Reiss (ed.), *Kant's Political Writings*, Cambridge University Press, Cambridge: 1991, p. 102.

[52] Kant noted that while "every state involves a relationship between a superior (the legislator) and an inferior (the people obeying the laws) … a number of nations [*viele Völker*] forming one state [*einem Staate*] would constitute a single nation [*ein Volk*]", *ibidem*.

[53] *Ibidem*, pp. 113–114.

[54] Kant, *supra* note 42, p. 124. Kant distinguishes "the right of states" from the "right of nations" understood in connection with the ancient and medieval, descent-based meaning of *gens* and *natio* or otherwise outside of *jus publicum civitatum* (*inter-state* framework), which is Kant's view of *jus gentium*. He nevertheless seems to acknowledge that, at least for internal purposes, a nation can be looked upon as one family akin to *gens* or *natio* whose members exit the state of nature by becoming citizens of the state. For Kant's negative implications for sub-national groups, *see e.g.* V. Spencer, *Kant and Herder on colonialism, indigenous peoples, and minority nations*, 7 International Theory 360 (2015).

[55] Kant, *supra* note 42, pp. 124 (outside of the state framework, indigenous groups live in a "lawless" condition), 132 (Kant recognises that the traditional land of an indigenous nation cannot be acquired by another nation without the indigenous nation's consent or by using force against the latter). Spencer, *supra* note 54, pp. 379-381, argues, though, that this anti-colonial postulate is in practice limited by Kant's theory of property rights within a *state* framework.

coincide with the indivisible nation-state arising from the French Revolution and its related cultural overtones.

These conceptual tensions forerun open challenges to received ideas around peoples and nations. Johann Gottfried Herder, a former student of Kant, and Johann Gottlieb Fichte, a younger major contemporary of Kant, best illustrate the point. Whereas Grotius and Rousseau employ thin or weak, foundational social contract theories as they show sensitivity to, or recognise national individuality, Herder embraced historicist thinking by openly dismissing (like Vico) "state of nature" accounts and firmly shifting the focus towards national groups understood as the product of natural sentiments of positive sociability and social unity reflected in accumulated experiences through a common language and cultural/religious traditions.[56] Herder wanted to see the gradual dismantlement of "states-machines" (empires) and the "freeing" of nations trapped within them (thus endorsing Locke's natural right of a people to rebellion). At the same time, he was critical of Kant's quasi-Hobbesian account of sovereignty and legal cosmopolitan framework, which he regarded as having the potential for republican imperialism (despite his own republican preferences) at the expense of national cultures and characters. "[T]he so-called best form of government [cannot] suit all peoples, at once, in the same way"[57] – Herder argues – as he values various forms of indigenous governance otherwise dismissed by Kant as "lawless freedom", France's post-revolutionary attempt to uncover its "living constitution", or Germany's ancient constitutional tradition of self-government.[58] Herder ultimately expands on Kant's general moral concept of *selbstbestimmung* as individual emancipation, and Rousseau's radical view of popular sovereignty, to articulate an idea of "national" self-determination as a patriotic (non-Jacobin, non-imperialist) project of moral/psychological (sentimental) education, political participation and historical self-reflection, which may result in, but is not limited to, the creation of a nation-state.[59] For his part, Fichte absorbed elements of both Kant's and Herder's analyses yet transformed them in his own distinctive way. In Fichte's idealist thought, Kant's seemingly "unrooted" individual autonomy transformed into a universal scheme of mutual relationships, gradually including nationally conscious collective "selves" acting in the world to achieve

[56] On Herder's thought from the (often neglected) self-determination and political/legal angles, *see* E. Piirimäe, *Herder on the Self-Determination of Peoples*, 85 The Review of Politics 514 (2023); E. Piirimäe, *Herder and Enlightenment Politics*, Cambridge University Press, Cambridge: 2023.

[57] Piirimäe (*Herder*), *supra* note 56, p. 297.

[58] Tellingly, Herder supports the eclectic legal-historical analyses of writers such as Grotius, Montesquieu and Gaetano Filangieri (*La Scienza della Legislazione*, Firenze: 1782, Tome I, Book I, writing on the relationship between laws and "the genius and character of peoples", Ch. XIII, pp. 165–166).

[59] Piirimäe (*Herder*), *supra* note 56, Ch. 8.

emancipation from oppression and domination.[60] For Fichte, Kant's self-determining individual could ultimately have been so only in and through the nation. Fichte's acutely felt urgency for the German people to resist the Napoleonic occupation is consistent with his notion that each people has the right to develop in accordance with its own peculiar quality, free of foreign coercion or interference.[61] Although Fichte was deeply influenced by Herder's historicist ideas of human diversity and national cultures, he nevertheless conceptualised national self-determination primarily in the Enlightenment rationalist tradition of rights and freedoms.

Overall, these underlying historical/cultural ideas of a nation would essentially mean, directly or indirectly, the reaffirmation of the centrality of the man-made concrete and particular in time and space, of the "sense of individuality" first articulated by the legal humanists and Renaissance jurists of the past. In terms of the intellectual trajectory of self-determination, this would involve, not so much the free choice of rulers as the delimitation and character of the national community as a substantive, historically evolved group. Such an understanding would qualify, and even challenge, the Hobbesian/Kantian version of peoplehood or nationhood based on enlightened legal rationality – the ideal type of community, law and state – rather than national sentiment.

4. RECLAIMING HISTORY (AND LEGAL REASON): SAVIGNY, MANCINI, AND BEYOND (19TH CENTURY)

Two schools best capture the impact of the historical approach on nineteenth-century international legal thought. One is the German Historical School of Jurisprudence (otherwise known as the Historical School), led by Friedrich Carl von Savigny. The other is the group of Italian international legal scholars who embrace the concept and principle of nationality, first articulated and defended by Pasquale Stanislao Mancini. Savigny and the Historical School ground law in history, not (fictional) conventional mechanisms, let alone divine laws or enlightened ideas of *jus naturale*.[62] Savigny's law is not based on Rousseau's popular sovereignty or general will either, but rather a distinctive *Volksgeist* – a distinctive spirit of the people,

[60] *See e.g.* E. D. Weitz, *Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right*, 120 American Historical Review 462 (2015), pp. 478–479.

[61] On Fichte's impact on international legal thinking, *see* C. De Pascale, *Fichte and the Echo of his Internationalist Thinking in Romanticism*, in: S. Kadelbach et al. (eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, Oxford University Press, Oxford: 2017, pp. 329–351, especially Section II.

[62] *See e.g.* F. C. Beiser, *The German Historicist Tradition*, Oxford University Press, Oxford: 2011, Ch. 5.

its own national consciousness as reflected in customs and traditions.[63] Tracing the source of all law to local (national) conditions was not a new proposition. Vico and Montesquieu, to name a few, had already argued along similar lines. As discussed, Rousseau himself had increasingly emphasised the importance of retaining and nurturing national characters and the need to align legislation with such conditions. Yet Rousseau's *volonté générale* greatly differs from Savigny's *Volksgeist* in at least two key respects. For Savigny and the Historical School, it is not an abstractly construed transindividual will (let alone contingent majorities) that creates the law and the state but the people itself, understood as an objective (organic) social reality, a spiritual community defined by an historically determined common culture and language.[64] Secondly, this act of creation is what lies, invisible, in the spirit of the people; it is not an artificial act of will by any means, it is the people's spontaneous common consciousness that, in turn, translates into a permanent "living law" (customary law) to be captured by jurists and protected by the state.[65]

Intended to represent an alternative to Kant's abstract rationalism, Savigny's conception is, however, qualified by two crucial elements. For one thing, Savigny looks for a synthesis between crude history and abstract reason, between the raw material and social triggers of all law and the need to shape them through formal legal reasoning. At the same time, he does not reduce history to narrow empirical facts or findings. Instead, he places it within a wider idealistic schema. On the one hand, he posited the nation – like Herder and Vico had done before him – as an intergenerational cultural entity, as an organic and evolving historical stream,[66] much like the early sixteenth-century historical jurists had somehow implied. Simultaneously, he understood each national *Volksgeist* as the concrete manifestation of a "spirit of humanity" (*Menschheitsgeist*) that runs through all national communities, since it is only through them that any concrete law can in practice emerge.[67] Savigny's thought, in the end, is not merely an appeal to (real or perceived) "ancient freedoms" from pre-imperial or pre-revolutionary times; it is a systematic attempt

[63] *See e.g.* G. Balladori Pallieri, *Dottrina dello Stato*, 2nd ed., Cedam, Padova: 1964, pp. 40-49; R. Schütze, *German Idealism after Kant: Nineteenth-Century Foundations of International Law*, 25 Journal of the History of International Law 105 (2023), pp. 113–120; L. Nuzzo, *History, Science and Christianity. International Law and Savigny's Paradigm*, in: L. Nuzzo and M. Vec (eds.), *Constructing International Law – The Birth of a Discipline*, Vittorio Klostermann, Frankfurt am Main: 2012, pp. 25–50.

[64] Savigny builds on the concept first outlined by G. Puchta in *Das Gewohnheitsrecht* (Palmsche Verlagsbuchhandlung, Erlangen: 1828, p. 134). In his 1840 *System of Modern Roman Law*, Savigny articulates the concept of a nation as a spiritual community – and the state as its embodiment – informed by a common history and language rather than common descent per se: *System des heutigen Römischen Rechts*, Vol. 1, Veit, Berlin: 1840, pp. 13–21.

[65] On the role of jurists, *see* Nuzzo, *supra* note 63, pp. 42-44; Schütze, *supra* note 63, pp. 117–118.

[66] Savigny, *supra* note 64, pp. 13–21.

[67] *Ibidem*, pp. 18–21.

to reconstruct the parameters of legal theory and history away from the trappings of voluntarism, natural law, or sheer statism. Indeed, in contrast with the "unhistorical" school of jurisprudence, which the Historical School largely associates with state positivism/legislative power derived from contractarian schemes, Savingly firmly argues that "the material of law is given by the total past of the nation, but not by arbitrariness, so that it might happen to be this or another, but by the very essence of the nation itself and its history."[68]

It is important to note that, like Savigny but before him, Georg Wilhelm Friedrich Hegel had dismissed rationalist formalism, especially of the Kantian type, as lacking "some material, some determinacy (...) to supply [law's] content." He too had seen in a specific national *Volksgeist* the material and ethical basis of all law, the upshot of a concrete ethical community, of a concrete nation in its "geographical and anthropological existence", the best guarantee of individuality against what he thought was the shapelessness of cosmopolitanism.[69] Unlike the Historical School, though, Hegel did not give the national *Volksgeist* a customary norm-creating life of its own but equated it with the institutional primacy of the state and state law – the highest ethical expressions of the community. This also explains the differences between Savigny and Hegel in terms of how the national *Volksgeist* affects their conception of international law. Hegel came to emphasise exclusively state individuality by reducing international law to "external state law"– a negative relation of "another to another" which is entirely dependent upon individual state wills, even among civilised nations, because states (as Hobbes believed) remain in the state of nature.[70] By contrast, Savigny and the Historical School viewed each culturally conscious national spirit (the "nation") as contributing to an objective international law insofar as the universal *Menschheitsgeist* that such national spirits variably represent allowed for a broader common legal/cultural consciousness to exist, at least among Christian European states.[71]

Unlike the sixteenth-century broader debate around the historical method, this sense of national individuality propelled directly or indirectly by the Historical School, is bound to have a major impact on the nineteenth-century theoretical

[68] Quoted by Schütze, *supra* note 63, p. 115.

[69] G.W.F. Hegel, *On the Scientific Ways of Treating Natural Law*, in: L. Dickey (ed.), *Political Writings*, Cambridge University Press, Cambridge: 1999, pp. 124, 179. G.W.F. Hegel, *Outlines of the Philosophy of Right* (trans. T.M. Knox), Oxford University Press, Oxford: 2008, p. 317 (Hegel viewed each national *Volksgeist* as necessary individual contributions to the "world spirit" that governs history).

[70] Hegel, *supra* note 69, pp. 234, 304–315 (Hegel goes as far as to argue that there is one dominant national spirit in each epoch of world history which leaves the other national spirits without rights, pp. 317–318).

[71] Savigny, *supra* note 64, pp. 32–34.

framing of international law as a discipline, including private international law.[72] Leading international lawyers of the time, such as August Heffner, Kaltenborn von Stachau, and later, even Lassa Oppenheim, traced international law to a common legal, moral and cultural consciousness in Europe (i.e. amongst distinct European *peoples*) – with "custom" as the backdrop to "all law, whether written or unwritten" – without which, for them, no (international) law could exist.[73] It is clear, though, that each nation was understood in both cultural and political/institutional terms, with rather obvious implications for any sustained ideas of self-determination.

In Italy, Mancini followed Savigny's footsteps, positing a national (cultural) substratum underpinning all law and (ideally at least) the very existence of the state within the international system. Indeed, Mancini's principle of nationality in public and private international law does away with social contract theories or otherwise conceptions of the international legal order grounded in natural law, the balance of power/brute force or mere diplomatic practice. Conceptually, Mancini sought a fresh perspective on international law away from abstract individualism, pervasive religious authority, or crude state pragmatism or authoritarianism.[74] His idea of a nation and nationality as the real backbone of the internal and international legal orders provides a socially/historically conscious view of international law openly built around the principle of national self-determination rather than state power per se.[75] Mancini's concept of a nation heavily drew on Vico's philosophy of history, Savigny's idea of a living, intergenerational *Volksgeist*, as well as Hegel's national consciousness as expressed by the state.[76]

However, the Italian School led by Mancini does have features of its own. Despite Mancini's and his followers' insistence on external, historically grounded factors such as a common territory, descent, traditions and/or language, the principle of

[72] Schütze, *supra* note 63, pp. 120–133.

[73] The later emphasis on states and state-made international institutions does not keep Oppenheim from believing that "the development of mankind is inseparably bound up with the national development of the different peoples and states": L. Oppenheim, *The Future of International Law*, Clarendon Press, Oxford: 1921, p. 13.

[74] For excellent analyses of Mancini's work, *see* E. Catellani, *Les Maîtres de l'école italienne du droit international au XIXème siècle*, Collected Courses of the Hague Academy of International Law, Vol. 46 (1933), pp. 709-825; L. Nuzzo, *Da Mazzini a Mancini: il principio di nazionalitá tra politica e diritto*, 14 Giornale di Storia Costituzionale 161 (2007); L. Nuzzo, *Origini di una Scienza - Diritto internazionale e colonialismo nel XIX secolo*, Vittorio Klostermann, Frankfurt am Main: 2012, Ch. 2; F. Colao, *L' "idea di nazione" nei giuristi italiani tra Ottocento e Novecento*, 30 Quaderni Fiorentini 255 (2001); G. Grieco, *A legal theory for the nation state. Pasquale Stanislao Mancini, Hegelianism and Piedmontese liberalism after 1848*, 24 Journal of Modern Italian Studies 266 (2019).

[75] P.S. Mancini, *Della Nazionalita' come fondamento del diritto delle genti. Prelezione al corso di diritto internazionale e marittimo pronunziata nella Regia Universita' di Torino nel di' 22 gennaio, 1851*, Tipografia Eredi Botta, Torino: 1851.

[76] On Hegel's influence on Mancini's conception of the nation, *see* Greco, *supra* note 74, pp. 277–278.

nationality rests primarily on national consciousness understood as a forward-looking form of moral unity, without which all other factors, whatever their sociological combination, are bound to remain "inerte materia".[77] For Mancini and others, it is this crucial spiritual/psychological element, a collective sense of national belonging, that elevates what might be, at best, a series of external indicia, a "natural" society of some kind, into a political community – a nation in a narrow sense – one actively seeking emancipation from despotism and oppression.[78] In short, the Italian School's *coscienza della nazionalita*, linked to Vico's and subsequently Giancarlo Romagnosi's views of human sociability and progress in law and institutions (Vico's *nascimento* and Romagnosi's similar view of *incivilimento*),[79] comes to inform the "rights of nations" in the nineteenth-century as a collective amplification of the "rights of man" from the Age of Revolution. The "nation" dissolves neither into mere naturalism (however historically informed) nor mere statism in the sense of Hegel's institutional (and ethical) primacy of the state. The nation is neither the product of a spurious and unhistorical social contract nor the mere product of a sovereign decision or will.

Inspired by the political and moral republican teachings of Giuseppe Mazzini on the contribution of culturally and politically conscious nations to Europe and humankind, as well as echoing the national independence aspirations of the Italian *Risorgimento*,[80] the principle of nationality seeks to offer a distinctive legal basis for the self-determination of peoples, most notably those oppressed within empires (Herder's "states-machines"), by rethinking the social foundations of national (internal and external) sovereignty and international law itself. In this attempt to highlight the complementary of history and reason, nationality and humanity, moral unity and constitutional freedoms, Mancini and associates developed Savigny's and Hegel's legal historicism into a positive and ambitious project of renewal, indeed codification, of (public and private) international law consistent with the "rights of peoples", at least within the (Savignian) parameters of a (nineteenth-century) European common consciousness.[81]

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[77] Mancini, *supra* note 75, pp. 38-40.

[78] *Ibidem*, p. 40. *See also* Grieco, *supra* note 74, pp. 281–282. Guido Fusinato reinforces this concept by making the external manifestation of national consciousness, not any ethnic or linguistic necessity, the only key factor: *Il principio della scuola italiana nel diritto internazionale pubblico* (1885), in G. Fusinato, *Scritti giuridici*, Bocca, Torino: 1921, Vol. 1, pp. 213–249; G. Fusinato, *La teoria della nazionalità nel sistema del diritto pubblico internazionale*, Bocca, Torino: 1921, Vol. 2, pp. 333–340.

[79] Romagnosi is deeply influenced by Vico: *see* Grieco, *supra* note 74, pp. 270–271.

[80] *See e.g.* Nuzzo (*Da Mazzini*), *supra* note 74, pp. 161–164.

[81] Mancini would defend the inapplicability of the principle of nationality to overseas (non-European) indigenous populations on the basis that the latter were widely thought to lack the status of nations: Nuzzo, *supra* note 63, p. 129.

This approach, though very influential throughout the century and beyond, raised nevertheless problematic issues that would gradually limit its success in theoretical and practical terms. If it is the nation, not state institutions or power, the most veritable social trigger of sovereignty and international relations, how does national unity relate to state unity from the perspective of international legal personality? If the principle of nationality protects nations against existing states, does it follow that each nation is allowed to create a state of its own, or is an existing state allowed to seek territorial expansion on the grounds of national unity? And, finally, if the *coscienza della nazionalita'* operates, in Mancini's words, as a sentiment of moral unity "capace di costituirsi al di dentro e di manifestarsi al di fuori" (capable of constituting itself internally and manifesting itself externally),[82] to what extent does it affect the character of the state?

Despite Mancini's reference to the nation as a "national personality" in his famous 1851 *prelezione* at the University of Turin, he was adamant, especially in later writings and interventions, that nations did not have legal personality separate from states but rather justify and inform their sovereignty as distinctive subjects of international law. For one thing, as aptly noted by Enrico Catellani in the early 1930s, "[l]es publicistes italiens du XIX siècle font donc ressortir le culte du principe de nationalité comme l'élément génétique le plus parfait de l'Etat... En même temps ils persistent dans la reconnaissance des principes traditionnels quant á la personnalité de l'Etat."[83] At the same time, the principle of nationality does not provide only moral and political legitimacy but is also meant to operate as a constitutional principle capable of overring ordinary state law internally and enabling the external recognition of the rights of nations as part of a wider humanity. The latter dimension would need to involve the constraining of states' treaty-making power, the introduction of means for the peaceful settlement of disputes, the mutual internal recognition of "just" national (foreign) laws in private international law, as well as the making of plebiscite the main institutional translation of the principle of nationality from the point of view of self-determination.[84] However, such important qualifications do little to assuage the more basic concern that, as new states emerge, and as national autonomy is increasingly seen through the lens of national sovereignty (including Italy's independence), the principle of nationality could effectively prove a destabilising factor in the international system, allowing for secessionist and irredentist claims to arise in Europe and elsewhere.

[82] Mancini, *supra* note 75, p. 39.
[83] Catellani, *supra* note 74, p. 726.
[84] Nuzzo (*Da Mazzini*), *supra* note 74, p. 166; Grieco, *supra* note 74, p. 286.

Mancini responded to this criticism by firmly ruling out a legal right to secession or irredentism as a ramification of the principle of nationality, highlighting the latter's intended contribution to the peaceful resolution of conflicts, not the destabilisation of international relations. The notion that each nation was in principle entitled to purse a state of its own did not, in his view, legally imply the breaking up of existing states on that basis alone.[85] Yet the annexation of the Alsace-Lorraine by Germany later in the century, and the academic and political debate that surrounded this case, exposed the challenges of implementing the principle as a way of conclusively settling territorial disputes. The proponents of nationality in Europe did not concede a right of conquest yet admitted the legitimacy of the annexation on cultural and linguistic grounds in response to earlier French aggressive acquisitions and with a view to achieving peace and stability in the area. The critics of the principle noted not only the ambivalence of German identity under French territorial sovereignty but also the legal unreliability of plebiscites to implement self-determination as an alternative to *ipso facto* social determinism.[86]

Whatever its limitations – the lack of a separate legal personality, the inability to ground a legal right to secession or to overcome operational challenges – the inner core (*coscienza*) of the nation championed by the (Mancini-inspired) Italian School and widely endorsed explicitly or implicitly in nineteenth-century Europe[87] impacted the way of thinking about the nature of the state. Even though international law (from Bodin onwards) endows the state (and not the nation) with organic legal personality, is it not the case that any state can only be a national state, meaning that any form of state unity can only derive from some form of national unity? Conceptually, it would be a mistake to read the principle of nationality as a call for a chauvinist, ethnocentric state. Mancini's emphasis on national sentiment as a form of collective moral unity is defined by broader ideas of cultural distinctiveness, not merely ethnographic or racial or linguistic criteria. It is a call for the historicity of national communities in their multiple cultural variants, for the recognition of their being (out of a cultural substratum broadly understood) political

[85] As Italy's Minister of Foreign Affairs in 1883, Mancini dismissed the suggestion that the principle could justify the forcible return of Italian-speaking territories. For context, *see* Nuzzo, *supra* note 63, pp. 127–129; Catellani, *supra* note 74, p. 739.

[86] For diverging views, *see e.g.* G. Rolin-Jaequemyns, *Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international*, 3 Revue de droit international et de législation comparée 288 (1871); G. Padelletti, *L'Alsace et la Lorraine, et le droit des gens*, 3 Revue de droit international et de législation comparée 464 (1871). Padelletti insisted on the limitations of plebiscites, which he thought reflected "momentary passions" rather than authentic national sentiments, compared to territorial cessions approved by Parliament or the *jus emigrandi* to retain one's own nationality (*see supra*, note 22). For similar reservations, *see* Redslob, *supra* note 21, pp. 36–38.

[87] Redslob, *supra* note 21.

communities characterized by "l'assimilation psychologique", and almost invariably, "la superposition et la fusion de plusieurs races."[88] The nation so conceived shifts the focus from narrower data rooted in a common past, arguably preeminent in Savigny's (cultural) conception, to a pro-active political (future-looking) will which expresses the moral unity underlying national unity as an overarching framework where cultural identity and political agency meet. That the "nation-state" – where nationality (national homogeneity) and statehood (ideally) coincide – is increasingly thought to be on this schema the best institutional form of political community in nineteenth-century Europe is beyond dispute. Nevertheless, Mancini himself noted that national unity did not automatically involve state unity, and that in fact states were full subjects of international law regardless of their internal composition or structure.[89] The focus on issues of legal personality left the ramifications of this thinking partly unexplored. If the nation's *coscienza* is *au fond* the expression of a synthetic moral unity rather than ethnic purity/common descent, can the principle of nationality still apply where moral unity does not reflect national unity on purely objective grounds?

While firmly endorsing Mancini's core doctrine of nationality, leading Italian international law scholars such as Terenzio Mamiani and Pasquale Fiore came close to qualifying the idea of a nation in ways that allow for a more pluralistic understanding of it. Both of them confirmed the key cultural/historical and moral elements of Mancini's conception of a nation (separate from the state) defining it as a "certo novero di genti per comunanza di sangue, conformità di genio, medesimezza di linguaggio atte e preordinate alla massima unione sociale."[90] Yet by juxtaposing the nation and the state in their later-century work, and by linking national individuality to the idea of the state as a free political association, they both effectively developed the Mancinian parameters of national unity as moral unity. Like all his contemporaries and predecessors, Mamiani distinguished the state as an institutional fact (and legal subject) from the nation as a more substantive and complex idea of moral unity.[91] Similarly, he distinguished (quite emphatically) the nation from race, highlighting the variable and multiple constellations of factors and sources of national identity with an inner core to be found in common culture

[88] Catellani, *supra* note 74, pp. 713–714.

[89] Mancini, *supra* note 75, p. 44.

[90] Mamiani's definition appears in his *Dell'ottima congregazione umana e del principio di nazionalità* (1856), id., *D'un nuovo diritto europeo*, 3rd ed., De Angelis, Napoli: 1860, p. 263 (a human community which, through common blood, shared character and a common language, is capable of and prepared for the most complete social union).

[91] *Ibidem*, pp. 32–33.

and laws.[92] Mamiani did nevertheless argue that the principle of nationality applied, more broadly, where human communities ("congregazioni di uomini") achieve moral unity by establishing a fatherland (*patria*) by an act of free will, even though this may require the disruption of violent political unions comprising of several states and fatherlands ("piu' Stati e patrie").[93] Fiore fully endorsed Mamiani's definition of a nation and observed that the moral unity underpinning the nation, its *coscienza* beyond random political and territorial circumstances, can *also* emerge in conditions like those of Switzerland, characterised by strong internal linguistic, ethnic, or religious diversity.[94] While Fiore reinforced the generally accepted idea that the nation as a "free and spontaneous aggregation" was more than a collection of natural or merely institutional factors underpinning the national state, he also tentatively unpacked the Mancinian idea of national consciousness to account for scenarios in which national cultural distinctiveness (the cultural nation) can transcend the factual existence of several nationalities or ethnicities.[95] Despite its various scholarly iterations, the principle of nationality was to retain its direct or indirect significance for years to come.[96]

5. THE LEGACY OF THE HISTORICIST TURN: NATION AND NATIONALITIES THROUGH TO THE INTERWAR YEARS

This attempt to reconcile a substantive idea of the nation with formal legal reasoning (with the latter being mainly inherited from Enlightenment thinking and German historical idealism), and even to model the early efforts to codify the fundamentals of international law on such an attempt,[97] arguably sow the seeds (partly at least) of wider debates over national identity that informed the *fin de siècle* and interwar arrangements and scholarly critiques.

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[92] *Ibidem*, p. 254.

[93] *Ibidem*, pp. 31–32. *See also supra* note 86.

[94] P. Fiore, *Nuovo diritto internazionale pubblico secondo i bisogni della civiltà moderna*, Presso la Casa Editrice e Tipog. degli Autori-Editori, Milano: 1865, p. 51.

[95] In fact, the tradition of thought represented by Mancini, and even more so, Fusinato, Mamiani and Fiore, though prioritising the nation/state connection (Colao, *supra* note 74), arguably lent itself to a substantive idea of a nation (or nationality) capacious enough to encompass what we, *in modern times*, identify as diverse societies in merely sociological terms.

[96] Despite his various caveats, Catellani, *supra* note 74, p. 739, tellingly ends his analysis by still presenting the principle as the best guarantee of "un équilibre juridique stable", and the best safeguard against war and conquest.

[97] Schütze, *supra* note 63, p. 135.

For one thing, Woodrow Wilson's post-World War I idea of nationality,[98] owes much to the core notion that *within* the "political" state lie certain social groups (nations or peoples or nationalities) whose historically formed sense of belonging and individuality continually tests the adequacy of legal arrangements. Marxist thought undoubtedly preceded Wilson's at the turn of the century in appealing to the "self-determination of peoples" in its international political programme, and later, for post-Zarist Russia itself, while Otto Bauer (unsuccessfully) offered a view of cultural autonomy designed to keep the Austro-Hungarian Empire intact, though decentralised.[99] But for Marx and Lenin, the national question was, at best, a welcome movement towards dismantling empires and achieving broader emancipation and economic progress.[100] Otto Bauer strictly distinguished cultural autonomy for specific groups from the overarching political self-determination of the working class of all nations, while Stalin's substantive idea of a nation, the closest to its earlier nineteenth-century articulations,[101] hardly translates internationally into anything other than Soviet support for the post-1945 overseas anti-colonial position within the (legally pre-set) territorial framework of *uti possidetis*.

By contrast, the "nation" discussed at Versailles, for all its complexities, ambivalences and/or variety of layers,[102] presented itself as a value of its own, regardless of the creation or recognition of new states or (from a Marxist perspective) wider revolutionary programmes of social liberation. Similarly to Mancini's national self-determination conception, it was deliberately meant to superimpose itself on the formal (positivist/conventional) category of the state and state sovereignty and, to that extent, sought to "transfor[m] the very relationship of international law to its «foundations»".[103] As noted by Nathaniel Berman, many interwar international

[98] US President Wilson's Fourteen Points Address to Congress, 8 January 1918. Wilson famously referenced an "evident principle… of justice to all peoples and nationalities" running through the "whole program" as the foundational principle of "international justice". This was consistent with his (eventually rejected) proposal to recognise national minority/majority equality in the preamble to the League of Nations Covenant. D.M. Hunter, *The Drafting of the Covenant*, G.P. Putnam's Sons, New York: 1928, Vol. II, p. 91.

[99] Weitz, *supra* note 60, pp. 482–485.

[100] V. Lenin, *The Right of Nations to Self-determination*, 1914 (English trans. Foreign Language Publishing House), Moscow: 1946. For the mainly tactical use of Bolshevik "national" self-determination, *see* also L. Mälksoo, *The Soviet Approach to the Right of Peoples to Self-determination: Russia's Farewell to jus publicum europaeum*, 19 Journal of the History of International Law 200 (2017).

[101] J. Stalin, *Marxism and the National and Colonial Question*, Lawrence and Wishart, London: 1936, pp. 5, 8 (he defined a nation as "a historically evolved, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up, manifested in a community of culture").

[102] Pentassuglia, *supra* note 2.

[103] N. Berman, "*But the Alternative is Despair*": *European Nationalism and the Modernist Renewal of International Law*, 106 Harvard Law Review 1800 (1993).

lawyers became acutely aware of the need to take "the principle of nationalities" seriously in the new world order, and to even treat "nationalism [as] the key to any international legal order."[104] Mancini, for his part, sought to transpose his own version of the national *Volksgeist*, the forward-looking national consciousness at the heart of his doctrine of nationality, into the *Institut de Droit International*'s ambitious programme of favouring "the progress" of international law by acting, in a Savignian way, as the "organ of the legal conscience of the civilised world."[105] In a different context and from a different perspective, Albert de Lapradelle would even propose the recognition of "the separatist will of a people" as one exception to the illegality of war in the *Institut's* subsequently abandoned "Declaration of the Rights and Duties of Nations" in the mid-1920s.[106] The ideas behind these moves never succeed in displacing the mainstream assumptions of state positivism, even though Mancini's work would prove more successful in embedding the principle of nationality in the Institute's reform of private international law.[107]

But the (somewhat inevitable) victory of state positivism, the focus on the rights and duties of states understood as self-standing legal units did not come without qualification. The pre-war legacy of (post-Hegelian) state positivism is not wholly indifferent to the nationality concept. Johann Caspar Bluntschli, for example, firmly distinguished the state and its internal and external legal personality from the *Volk* (or *Naturvolk*) as cultural concepts, unable to ground, let alone require, the right to a state. Nevertheless, he broadly agreed with Mancini that states were informed by their nation's "character and spirit", that the nation was in fact not merely a *Naturvolk* but the highest form of political consciousness, and that, once formed, the state, as the political-institutional manifestation of the nation, had the right to protect its language, customs and institutions, as well as promoting its development. In other words, "[t]he nation fulfils this [political] mission by giving the state the character of its essence."[108] The post-war legacy is an equally hybrid one. Whatever we make of the limitations of Wilson's principle of "justice to all peoples and nationalities" and his recognition of new states in "indisputably" national

[104] *Ibidem*, p. 1803.

[105] *Communications relatives à l'Institut de droit international*, 5 Revue de droit international et de législation comparée 703 (1873).

[106] Art. 4 made war illegal except when prompted, internally, by national separatism and, externally, a decision of "international justice": *Annuaire de l'Institut de Droit International* (1925), pp. 238–239.

[107] Nuzzo (*Da Mazzini*), *supra* note 74, pp. 174-180. Crucially, though, "nationality" is here recast as "citizenship", the institutional link with a state.

[108] J.C. Bluntschli, *Allgemeines Staatsrecht geschichtlich begründet*, Literarisch Artischen Anstalt der Cottaschen Buchhandlung, München: 1863, pp. 43, 83. More broadly, J.C. Bluntschli, *Nation und Volk, Nationalitätsprincip*, in: J.C. Bluntschli, K. Brater (eds.), *Deutsches Staats-Wörterbuch*, Expedition des Staats-Wörterbuchs, Stuttgart und Leipzig: 1862, pp. 152–160.

territories,[109] the 1919 Versailles arrangements are far from marking the complete triumph of state positivism and the full authority of the state. In fact, the system to be put in place would neither ground sovereignty in pre-existing and unilateral national claims nor would allow sovereign states to exercise unbounded freedom in protecting their national character.[110] Cultural and civic meanings of nationality (cultural affiliation and citizenship) are allowed to co-exist and interact. If anything, the (largely treaty-based) system's (selected and imperfect) juxtaposition of self-determination and minority protection seeks to transcend both the "explosive" nation and the "faceless" positivistic state in ways that creatively match ideas of national individuality with enhanced legal reason.

Writing in the mid-1930s, Carlile Aylmer Macartney argued that true self-determination could only be achieved through political self-determination based on state-wide feelings of political loyalty. Minority protection thus served the purpose of recognising the groups' "narrow national ideals" in exchange for their firm integration into the political state and ultimately the end of a majority-only vision of national self-determination.[111] Aside from the actual (limited) degree of legal protection offered by the interwar treaties, Macartney's implications are essentially the depoliticization of national minorities (reduced solely to cultural groups) and the denationalisation (deculturation) of the state (reduced to a neutral state, only marginally upgraded from the faceless positivistic state upheld by doctrine). Such implications resemble the cultural/political distinction suggested by Otto Bauer in pre-war times, albeit from the very different Marxist perspective of pursuing a centralised political self-determination of the working class within a still unified Austria-Hungary.

Only a few years before Macartney's commentary, Robert Redslob looked at the "principle of nationalities" from a wider perspective, one that sought not only to identify and explain the various "solutions équitables" for minority protection in pre- and post-war domestic and international legal arrangements but also to make sense of the cultural and political meanings of national identity. If the nation is a variable and spontaneous (psychological) combination of history, language and/or religion, not merely the expression of geography, let alone race, if "[l]a nationalité ne se raisonne pas, elle est une conception intuitive, elle est une foi",[112] how then can national identity be reconciled with political loyalty? Redslob argued that

[109] *Supra* note 98, point XIII (regarding Poland). A. Cobban, *National Self-Determination*, Oxford University Press, Oxford: 1944, pp. 19–22, 22–28, 64–66.

[110] Pentassuglia, *supra* note 2, pp. 243–247.

[111] C.A. Macartney, *National States and National Minorities*, Oxford University Press, London: 1934, p. 278.

[112] Redslob, *supra* note 21, p. 16.

this is not an issue that can be limited to technical legal solutions for selected states, no matter how important they were. Instead, it should have been seen as a general issue faced by all states, the roots of which were to be found "non dans le domaine des règles de droit, mais dans la sphère de la psychologie", that is, through "une compréhension adéquate des valeurs en presence."[113] Unlike Macartney, Redslob rejected the radical distinction between wide (identity-free) political loyalty and narrow, group-specific cultural protection by recognising both the political-institutional aspects of sub-state national ideals (beyond merely historical and cultural consciousness) and the broad cultural/moral foundations of the state (i.e. the nation) taken as a whole. Aside from minority protection and the exceptional solution of autonomy, or even secession, for certain groups with a heightened sense of national identity and separateness, Redslob crucially argued (in the footsteps of Mancini and Savigny) that the state's *own* identity was not limited to "le jeu des droits et des fonctions". It inevitably rested on a "puissance emotive", on an overarching moral and cultural unity, as various historical precedents indicated. It inevitably translated into "un Etat national", beyond the "fantaisie" of a purely rationalistic and utilitarian state that mainstream legal positivists came to embrace.[114] He made the "principle of nationalities" work, dynamically and dialectically, in both directions as it traced it back to the (self-determination) idea of "libre arbitre, la disposition de soi-même."[115] As shown by the 1919 Versailles system, the onerous task of international law is autonomously to reflect this deeper phycological dynamic (refusing exceedingly radical variants of both national identity and statism), however partially and imperfectly given the nature of legal constructions.[116] For Redslob, the state, in its own search for moral unity, was about balancing and harmonising underlying national constellations, perhaps reasonably favouring the dominant nation in its constitutional essentials,[117] provided that there was no radical incompatibility – or that there was even the nesting – between "les deux génies en cause",[118] that there were no historical resentments, and no threats of war from a kin-state. These conditions, especially the last two, would prove chimerical in late-1930s Europe as Nazi Germany readied to exploit the nationality card as a purely political pretext

[113] *Ibidem*, p. 70.

[114] *Ibidem*, p. 73.

[115] *Ibidem*, p. 77.

[116] *Ibidem*; Pentassuglia, *supra* note 2, pp. 243–247.

[117] Redslob, *supra* note 21, p. 77, broadly refers to "la nation cristallisée autour de l'Etat". I borrow from Liav Orgad's concept of constitutional essentials to signal a core space of cultural/normative values underpinning a state's national identity, which Orgad discusses in the context of immigration (Orgad, *supra* note 1, pp. 203-229).

[118] Redslob, *supra* note 21, p. 78. He offers, *inter alia*, the British case of a moral unity across sub-state national diversities (*ibidem*, p. 77).

for launching its military assault on the continent. But Redslob's reading of (legal) history was undoubtedly an extraordinary, expanded attempt to reclaim as much as possible the "law of peoples" from the law of states. The conditions he identified for state unity in the face of national diversity were as relevant to the interwar years as they are still relevant today.

CONCLUSIONS: THE POLITICAL AND CULTURAL LAYERS OF "NATION" AND THEIR IMPACT ON SELF DETERMINATION IN INTERNATIONAL LAW

The present analysis has sought to demonstrate that "nation" operates historically as a general conceptual category whose main (variable) cultural and political meanings inevitably inform later and modern conceptions of peoples' self-determination. It has made three largely interrelated claims. The first general claim is that the broad inherited political/ territorial/ institutional ("civic") and cultural meanings of a nation (and later "people"), far from being exclusively modern creations, do have a long historical pedigree, one that manifests itself in different forms and degrees, from ancient and pre-modern times up until at least the interwar years.

Although we should distinguish a very early naturalistic (essentially ethno-cultural) understanding of *natio* from later ideas interwoven with certain traditions of legal-institutional thought, overall, the idea of a nation across history reflects a constantly shifting balance and even coordination between broad cultural elements and political, institutional and/or territorial dimensions.[119] At one general level, the progressive shift in the meaning of "nation" as a collective and self-conscious political agency conferring authority on political institutions, especially in the eighteenth century, does not in itself disconnect the genealogy of the concept from the earlier manifestations or articulations of national individuality, be they reflected in the evolution of *natio* from *gens*, the processes of cultural unification under the early dynastic monarchies, or the emerging claims to live under the laws and customs of the historical community in question against all attempts at assimilation or subordination.

At the same time, the cultural meaning of "nation" is not limited to merely objective factors but encompasses political-institutional dimensions. Indeed, the analysis contends that legal/philosophical historicism (broadly understood), in its constant tension with contractarian state theories, plays a critical role in shaping a substantive idea of a nation in legal thought centered around common culture and laws,

[119] F. Meinecke, *Cosmopolitanism and the Nation State* (trans. R. B. Kimber), Princeton University Press, Princeton: 1970, especially Chaps I, II; *see also* Romeo, *supra* note 12.

which eventually feeds into international legal scholarship (and practice). Against natural lawyers and state of nature theorists, the historicist approach argues that there exists a normative core of national (social) individuality which, whatever its (obvious) similarities with other national societies, is invariably rooted in distinctive, not wholly translatable cultural patterns, in distinctive historical streams of which law and institutions are an integral part. Thus, central to the idea of a nation is that, unlike other communities with historical or cultural consciousness, and generally in response to some real or perceived (internal or external) domination,[120] the nation "has or aspires to or conceives itself entitled to some form of specifically appropriate governmental or institutional expression", as one distinguished commentator put it.[121] This political-institutional meaning becomes amplified and democratised in the eighteenth century by Rousseau's ideal of popular sovereignty, and it is presented even more flexibly by Herder's broad view of political government and participation, but it is not entirely unknown, albeit in more embryonic (and essentially pre-republican) form, in earlier centuries.[122]

What is very important to note, though – and this brings us to this article's essential second claim – is that while pre-modern notions of *natio* (and people) ordinarily focus on descent/ethnicity and lack a legal/institutional dimension, later substantive articulations of nation or nationality (and thus people) prompted mainly by historicist thinking (between the sixteenth and nineteenth centuries) are informed by *broader* ideas of cultural/moral national distinctiveness, alongside political/institutional agency.

The third interrelated claim is that the nation concept – as historically discussed in legal/philosophical thought and eventually inherited by the modern idea of "people" under international law – effectively comes into view as a cluster (or plural) concept informed (in theory or de facto) by the case-specific relationship between political/territorial/institutional factors and substantive cultural/national elements. Indeed, it is no coincidence that this variable constellation of cultural and political meanings has informed later and modern conceptions of peoples' self-determination, particularly in relation to free choice, the delimitation and character of the self-determining community, state unity, and a broader sense of humanity. As "people" replaces "nation" (now linked to "state") in common international legal terminology, the idea of "people" under international law remains equally shifting

[120] *See e.g.* Section 3.2 on Rousseau's advice to the Poles to preserve the identity of the Polish nation against foreign coercion.

[121] MacCormick, *supra* note 17, p. 260.

[122] *Ibidem*, pp. 260–261; both the Scottish (1320) and Dutch (1581) cases mentioned in Section 1 appealed, in different ways, to consent/freedom, institutions, and culture/tradition. Piirimäe (*Herder*), *supra* note 56, Ch. 7. *See also* Section 2 (Hotman and Bodin).

and elusive, lacking a precise definition, and equally informed (at least in theory or de facto) by a variable relationship between cultural and political/territorial/institutional meanings.[123]

Again, at one level, the tension and entanglement of free choice and substantive approaches to self-determination, as outlined in previous sections, is reflected in the prioritization of subjective or objective factors in addressing national claims. While the political approach lays emphasis on a territorially situated set of individuals' free will, on the people's choice and aspirations (e.g. through plebiscites, referenda, elections, etc.), not their substantive outlook, and the cultural approach values free choice and critical reflection yet assumes peoplehood or nationhood to be for the most part the product of history involving whole societies, political and cultural meanings cannot displace one another from a self-determination perspective since both of them, where taken separately, reveal intrinsic limitations. The political approach may prove too abstract and thus fail to capture an "authentic" people or its genuine will. The cultural approach proves too narrow if, without a politically and institutionally organised choosing "self" and/or a broader idea of cultural (national) distinctiveness, it allows for merely social determinism and ethnocentrism. In this regard, a focus on "ethnic" self-determination or the "ethnic" dimension of "peoplehood" to explain its "cultural" profile, as indicated at the beginning of this article, may prove misleading.

Although international law has historically prioritized territoriality (e.g. *uti possidetis/territorial* integrity) and its attendant political processes, the "people" category remains in principle open to a variety of (explicit or implicit) conceptions (mostly linked to the ways of *implementing* self-determination), as the international community relentlessly faces substantive national claims within political communities, at state and sub-state levels, and civic and cultural meanings continue to colour to varying degrees the legal right to self-determination and the protection of sub-state national groups.[124] The substantive idea of a nation discussed here from an historical perspective ultimately problematises a de facto formalistic view of self-determination as well as the reductionist (largely Marxist-oriented) variant of

[123] *See* also J. Fisch, *The Right of Self-Determination of Peoples – The Domestication of an Illusion*, Cambridge University Press, Cambridge: 2015, Ch. 3.

[124] *See e.g.* Council of Europe, Recommendation 1735(2006): *The concept of "nation"*, available at: https://www.aelpa.org/documentos/reformas/EACAT/ConsejoEuropaNacion.pdf (accessed 31 March 2026); Additional Protocol on the Rights of Minorities to the European Convention on Human Rights, 1 February 1993, Rec. No. 1201, Doc. No. 6772 (1993); UN General Assembly, Resolution 61/295: United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007; I. Brownlie, *The Rights of Peoples in Modern International Law*, in: J. Crawford (ed.), *The Rights of Peoples*, Oxford University Press, Oxford: 1988, pp. 5–6, 16.

that idea as a generic/tactical emancipatory claim.[125] Ruled out unilateral secession as a legally acceptable expression of national (or people's) individuality (other than perhaps in the ever-elusive Lockian form of resisting injustice),[126] as well as the right of nations to a state of their own (including *terre irredente*) or to a distinct legal personality separate from states, the interwar regime would at least create an opportunity in international legal scholarship to recognise the need for, not only minority protection as a corrective to majority-focused (national) self-determination, where available, but also a thorough reassessment of the foundations of *state unity* beyond merely civic or merely cultural (or ethnic) conceptions of the nation. Here again, and from a self-determination perspective, Redslob's interwar work crucially highlighted the common social (substantive) bond affecting the entire self-determining political community. In today's terms, he built on the nineteenth-century tradition of thought on the principle of nationality to offer an enriched image of national identity as a broad and dynamic concept – as a normative/cultural core, not the affirmation of ethnic or ideological uniformity – that can explain and absorb demographic changes.[127]

Admittedly, "nation" has sometimes led to the radicalisation of the concept, with an obvious fallout for international law, in terms of the moral supremacy of the nation over the individual or other groups (Rousseau/Hegel) and/or the absolutist supremacy or radical autonomy of the state over, or in relation to, other states or entities (Fichte/Hegel), reflected especially in the rise of militaristic imperialism and subsequent colonisation. Yet one should not conflate those conceptions – or aspects of those conceptions – with the concept itself, nor should one conflate the concept with its deliberate exploitation by political actors for purposes of their own, or even less so, with elements of the morality and legality of the time (expressed, for example, in Mancini's later defense of the inapplicability of the principle of nationality to non-European territories). All the key traditions of thought embracing a substantive idea of the nation, within or without the state (Herder), derive from a broader idea of *humanity* which recognises national diversity as one crucial aspect of human diversity. At its core, the nation, however particular in time and space,

[125] *Contra* M. Koskenniemi, *see* G. Pentassuglia, *Group Identities and Human Rights: How Do We Square the Circle in International Law?*, in: A.M. Biró (ed.), *Populism, Memory and Minority Rights: Central and Eastern European Issues in Global Perspective*, Martinus Nijhoff Publishers, Leiden: 2018, pp. 294–295.

[126] The Aaland Islands Question (On the Merits), Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106, 1921; *Reference Re Secession of Quebec* [1998] 2 SCR 217, paras. 134–135.

[127] For a similar concept (arguably similarly to various nineteenth-century international legal scholars of "nationalities", *supra* note 95), *see* A.D. Smith, *Nationalism: Theory, Ideology, History,* Polity Press, Cambridge: 2010, pp. 13–15, 29. On nationality/national identity and ethnicity, *see also* Pentassuglia, *supra* note 2, pp. 267–268.

nevertheless reflects the broader moral Kantian goal of respecting autonomous human beings in what they (many of them) regard as integral to their sense of communal belonging and necessary to articulate concrete forms of mutual recognition and solidarity through laws and institutions which underpin their individual freedoms.[128] The contemporary legal vocabulary of human rights, of which the right to self-determination is one of its foundational pillars, has inevitably inherited and sought to absorb, however tentatively, that underlying national claim. It has done so within the well-established limits of inter-state non-use of force, decolonisation, societal pluralism and non-discrimination.[129]

While international law has elevated the general concept of self-determination to a "constitutional" norm of *jus cogens* against the right of governments, it is no exaggeration to argue that the legacy of the philosophical-legal debate around the idea of a nation assessed in the foregoing sections continues to pressure, directly or indirectly, both the core and the edges of that concept. If it is certainly the case that, as a matter of international *law*, no state can trample on the *political and cultural* self-determination of its people(s), let alone of that of those groups falling under the jurisdiction of another state, and that, crucially, substantive national claims or practices can today inform the scope and reach of self-determination vis-à-vis the rights of others,[130] this is due to the enduring dimensions of national belonging unearthed by philosophers, historical jurists and policy-makers throughout the centuries against assumptions of generic legal and/or moral uniformity.

[128] *See e.g.* MacCormick, *supra* note 17, p. 261.

[129] Pentassuglia, *supra* note 2, pp. 267–268.

[130] For various examples, ibid. It is worth noting that at such key junctures in history as the 1919 Versailles settlement or the former Yugoslavia settlement in the 1990s, legal standards in the field were treated as "fundamental laws" of a constitutional nature or even deemed to be part of *jus cogens*.

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NEITHER PEACE NOR WAR: INTERNATIONAL LAW IN TIMES OF NONCONVENTIONAL THREATS

Abstract: *The article aims to initiate a discussion on whether and, if so, what kind of changes are needed for international law to remain an effective instrument of response for the international community in the face of hybrid threats. Thus, it is also a question of how international law should be shaped in future to safeguard the international rule of law and help democratic societies remain resilient against attacks from totalitarian regimes. To this end, the article is divided into two parts. The first suggests that while international law remains applicable, its existing structures and doctrines are strained by the nature of the security challenges Europe currently faces, necessitating legal adjustments. The second proposes three changes that scholars should consider for further discussion and that could render international law more adequate in times when nonconventional threats are becoming the primary means of conflict between States.*

Keywords: countermeasures, fundamental standards of humanity, hybrid threats, principle of non-intervention, Russia

INTRODUCTION

In September 2025, German Chancellor Friedrich Merz said that Europe "is not at war [...] but no longer at peace" with Russia.[1] A month later, Polish Minister of

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Defence Władysław Kosiniak-Kamysz asserted that "[w]e need to change the way of thinking that we live neither in a time of war nor in a time of peace."[2] A similar statement was also made by NATO Secretary General Mark Rutte by the end of 2024, although he appeared to refer to a broader group of potential adversaries, including not only Russia but also China, North Korea and Iran.[3] While such proclamations may be regarded as a neat figure of speech, it is increasingly difficult to ignore that they accurately describe the complex reality in which Europeans currently live. While this difficulty is visible on many levels – political, economic, diplomatic and military – it also affects the ability to assess the security challenges that Europe currently faces from the perspective of international law.

This short article aims to initiate a discussion on whether and, if so, what kind of changes are needed for international law to remain an effective instrument of response for the international community in the face of different non-conventional threats, often collectively called hybrid threats,[4] including disinformation,[5] cyber-attacks,[6] physical operations against infrastructure, financing cultural groups and think tanks, election interference and many more. Thus, it is also a question of how

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[1] *Europe 'no longer at peace' with Russia, says Germany's Merz*, Reuters, 29 September 2025, available at: https://www.reuters.com/world/europe-no-longer-peace-with-russia-says-germanys-merz-2025-09-29/ (accessed 31 March 2026).

[2] P. Wyżga, K. Bogdańska, *Władysław Kosiniak-Kamysz: Polska musi być gotowa na najgorsze, ale zbroi się na pokój* [Władysław Kosiniak-Kamysz: Poland must be ready for the worst, but it is arming itself for peace], WP, 25 October 2025, available at: https://wiadomosci.wp.pl/wladyslaw-kosiniak-kamysz-polska-musi-byc-gotowa-na-najgorsze-ale-zbroi-sie-na-pokoj-7213950444972992a (accessed 31 March 2026).

[3] *Speech by NATO Secretary General Mark Rutte at the Concert Noble, Brussels*, 12 December 2024, available at: https://www.nato.int/en/news-and-events/events/transcripts/2024/12/12/to-prevent-war-na-to-must-spend-more (accessed 31 March 2026).

[4] Following the definition of the European Centre of Excellence for Countering Hybrid Threats, "hybrid threats" are understood herein as harmful activities planned and carried out with malign intent to undermine a target, such as a State or an institution, through a variety of means, often combined (*Hybrid threats as a concept*, available at: https://www.hybridcoe.fi/hybrid-threats-as-a-phenomenon/ (accessed 31 March 2026)).

[5] Disinformation can be defined as false or manipulated information deliberately spread with the intent to influence public opinion and cause harm to specific actors (such as groups of people or States) or to more abstract concepts such as democracy, public trust in independent journalism or health care (*see e.g.* European Commission, *A multi-dimensional approach to disinformation: Report of the independent high level group on fake news and online disinformation*, March 2018, available at: https://digital-strategy.ec.europa.eu/en/library/final-report-high-level-expert-group-fake-news-and-online-disinformation, p. 5; C. Wardle, H. Derakhshan, *Information Disorder Toward an interdisciplinary framework for research and policymaking*, Council of Europe Report DGI(2017)09, 27 September 2017, available at: https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-researc/168076277c, p. 20; K. Bontcheva, J. Posetti (eds.), *Balancing Act: Countering Digital Disinformation While Respecting Freedom of Expression*, September 2020, available at: https://unesdoc.unesco.org/ark:/48223/pf0000379015 (all accessed 31 March 2026), pp. 3 and 25).

[6] A "cyberattack" is understood herein as a "deliberate, unauthorised insertion of […] computer code into software-operated machines in order to accomplish the tasks the programmer engineered the

international law should be shaped in future to safeguard the international rule of law and help democratic societies remain resilient against attacks from totalitarian regimes. To this end, this article is divided into two parts. The first suggests that while international law remains applicable, its existing structures and doctrines are strained by the nature of the security challenges that Europe currently faces, necessitating proper adjustments. The second proposes three changes that scholars should consider for further discussion and that could render international law more adequate in times when hybrid threats are becoming the primary means of conflict between States.

While this essay focuses on examples of hybrid threats employed by Russia against EU and NATO Member States, one has to note that other parts of the world are also targeted by similar non-conventional threats, including Taiwan, Latin America, and the Middle East and North Africa (MENA).[7] But despite such security threats being a genuinely global phenomenon, in Latin America and MENA, they are largely driven by cybercrime, with elements of malicious operations emerging but less systematically documented. On the other hand, hybrid operations against NATO and EU Member States are not only well-coordinated, but also employed with a strategic objective of undermining the rule of law and democratic resilience. That is why the European perspective is unique, due to the large number and variety of disruptive operations, their everyday character and the fact that mostly all of them originate from one state actor: Russia.

1. NEITHER PEACE NOR WAR – WHAT DOES IT MEAN FOR INTERNATIONAL LAW?

Under international law, it is clear which legal rules apply to peaceful relations between States and which (namely, international humanitarian law) apply in the event of an international armed conflict (IAC).

In general, there are two definitions of an IAC: on the one hand, some States and scholars define it as a confrontation between the armed forces of two or more

code to perform" (D.P. Fidler, *Cyberattacks and international human rights law*, in: S. Casey-Maslen (ed.), *Weapons under International Human Rights Law*, Oxford University Press, Oxford: 2014, p. 303).

[7] *See e.g. Hybrid threat activity in the MENA region: State and non-state actors seeking status and expanding influence*, Hybrid CoE Research Report 5, March 2022, available at: https://www.hybridcoe.fi/wp-content/uploads/2022/03/20220316-Hybrid-CoE-Research-Report-5-Hybrid-threats-MENA-web.pdf; J. Aukia, *China's hybrid influence in Taiwan: Non-state actors and policy responses*, Hybrid CoE Research Report 9, April 2023, available at: https://www.hybridcoe.fi/wp-content/uploads/2023/04/20230406-Hybrid-CoE-Research-Report-9-Chinas-hybrid-influence-in-Taiwan-WEB.pdf (both accessed 31 March 2026).

States;[8] on the other hand, IAC is described as any use of force by one State against another.[9] If one assumes that the first of these variants is proper, the current toll of Russian actions against EU and NATO Member States cannot be described as an IAC until Russian tanks and infantry step into the territory of Poland, the Baltic States, Finland, etc. The second definition appears more promising for describing the current state of Russian actions, though not without problems. In the past, State representatives described certain hybrid operations as a "use of force". When making a statement on the response of the Russian government to the attempted assassination of Sergei and Yulia Skripal in Salisbury in March 2018, UK Prime Minister Theresa May said that the incident "represents an unlawful use of force by the Russian state against the United Kingdom."[10] In the middle of the migration crisis on the Polish–Belarusian border, the Polish government spoke about "unprecedented aggression of Belarus against Poland and the whole European Union."[11]

Such statements, however, are very rare. In November 2025, two individuals working on the commission of the Russian intelligence service detonated explosives on a section of the railway line in central Poland.[12] Fortunately, the gap in the rail-

[8] *See e.g.,* E. Crawford, *Armed Conflict, International*, in: *Max Planck Encyclopedia of International Law*, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e429?prd=EPIL, para. 2; D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163-II Recueil des Cours 117 (1979), p. 131; *Manual of Armed Forces Law, Volume 4: Law of Armed Conflict*, available at: https://www.nzdf.mil.nz/assets/Uploads/DocumentLibrary/DM-69-2ed-vol4.pdf (both accessed 31 March 2026), para. 5.2.9.

[9] *See e.g., Article 2,* in: *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, Cambridge University Press, Cambridge: 2021, pp. 92–93; M. E. O'Connell, *Defining Armed Conflict,* 13(3) Journal of Conflict & Security Law 393 (2008), pp. 397–398; ICTY, *Prosecutor v. Tadić*, Appeal on Jurisdiction, No. IT–94–1–AR72, 2 October 1995, para. 70; C. Greenwood, *Scope of Application of Humanitarian Law*, in: D. Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford: 2008, p. 46; H.-P. Gasser, *International Humanitarian Law: an Introduction*, in: H. Haug (ed.), *Humanity For All: The International Red Cross and Red Crescent Movement*, Paul Haupt Publishers Berne, Stuttgart/Vienna 1993, pp. 510–511; *Law of Armed Conflict - Manual*, Joint Service Regulation (Zdv) 15/2, available at: https://www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf, para. 203; *Manual of the Law of Armed Conflict*, available at: https://usnwc.libguides.com/ld.php?content_id=47416967 (both accessed 31 March 2026), para. 1.33.

[10] *PM Commons statement on Salisbury incident response*, 14 March 2018, available at: https://www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-response-14-march-2018 (accessed 10 January 2026).

[11] *Belarusian hybrid attack on the EU*, 9 November 2021, available at: https://www.gov.pl/web/sluzby-specjalne/belarusian-hybrid-attack-on-the-eu (accessed 31 March 2026).

[12] A. Easton, J. Lukiv, *Two Ukrainians working for Russia behind rail sabotage, Polish PM says*, BBC, 18 November 2025, available at: https://www.bbc.com/news/articles/c4gknv8nxlzo; S. Walker, J. Krupa, *Poland railway blast was unprecedented act of sabotage, says Donald Tusk*, The Guardian, 17 November 2025, available at: https://www.theguardian.com/world/2025/nov/17/poland-railway-blast-was-unprecedented-act-of-sabotage-says-donald-tusk (both accessed 31 March 2026).

way track was detected in time; otherwise, it could have been catastrophic if a train travelling on that line at full speed had derailed. Polish representatives spoke then "only" of acts of sabotage and did not claim that the incident amounted to a violation of the prohibition of the use of force.[13] In fact, how should the destruction of a small part of the railway infrastructure in one State, conducted on the order of another, which could have caused a train derailment but ultimately did not, be qualified from the perspective of international law? Regardless of the different options that may be explored, it seems that labelling such an operation as the use of force would not be justified.

Likewise, one can mention here various cyberoperations conducted by Russia. According to Microsoft's Digital Defense Report 2025, "[o]utside of Ukraine, the top ten countries most affected by Russian cyber activity all belong to NATO – a 25% increase compared to last year."[14] Just to name some of the most recent developments, Russia-related hackers conducted cyberoperations against Belgium,[15] Finland,[16] Poland[17] and the UK.[18] Although the attacks targeted energy infrastructure, health care organisations and websites of the State's organs, among other things, neither of the affected States characterised them as a violation of the prohibition on the use of force. Even though such a legal qualification is theoretically possible, neither of these cases seems to fulfil its criteria, due to the fact that a "cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force."[19] That in turn requires taking into account a number of factors such as "consequences involving physical harm

[13] *Speech by Deputy Prime Minister and Minister of Foreign Affairs Radosław Sikorski in the Sejm*, 19 November 2025, available at: https://www.gov.pl/web/diplomacy/speech-by-deputy-prime-minister-and-minister-of-foreign-affairs-radoslaw-sikorski-in-the-sejm; *PM Tusk in Parliament: Russia Behind Sabotage Attacks in Poland*, 18 November 2025, available at: https://www.gov.pl/web/primeminister/pm-tusk-in-parliament-russia-behind-sabotage-attacks-in-poland (both accessed 31 March 2026).

[14] *Microsoft Digital Defense Report 2025*, available at: https://cdn-dynmedia-1.microsoft.com/is/content/microsoftcorp/microsoft/msc/documents/presentations/CSR/Microsoft-Digital-Defense-Report-2025.pdf#page=1 (accessed 31 March 2026), p. 47.

[15] *Pro-Russian hackers targeted Belgian government institutions ahead of European summit*, Belga News Agency, 19 December 2025, available at: https://www.belganewsagency.eu/pro-russian-hackers-targeted-belgian-government-institutions-ahead-of-european-summit (accessed 31 March 2026).

[16] *Yle: Russian hacker group targets Finnish government in cyberattacks*, Helsinki Times, 25 September 2025, available at: https://www.helsinkitimes.fi/finland/finland-news/domestic/28002-yle-russian-hacker-group-targets-finnish-government-in-cyberattacks.html (accessed 31 March 2026).

[17] *Poland Stops Cyberattacks on Energy Infrastructure*, 15 January 2026, available at: https://www.gov.pl/web/primeminister/poland-stops-cyberattacks-on-energy-infrastructure (accessed 31 March 2026).

[18] *Rachel Reeves: Russia behind some of recent UK cyber attacks*, ITV, 23 September 2025, available at: https://www.itv.com/news/2025-09-22/rachel-reeves-russia-behind-some-of-recent-uk-cyberattacks (accessed 31 March 2026).

[19] M.N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge: 2017, p. 330.

to individuals or property",[20] the "immediate results" of the cyber operation,[21] the "degree to which cyber operations intrude into the target State or its cyber systems contrary to the interests of that State",[22] the possibility of evaluating the cyber operation through specific metrics such as the amount of data corrupted, the percentage of servers disabled, etc.[23] or "[t]he extent of State involvement in a cyber operation."[24] Although some of these conditions have been fulfilled in the cases mentioned above (e.g. some cyberoperations targeted a domain name of a particular State or a particular State organ),[25] their severity and invasiveness were limited and some were carried out by groups whose actions would be difficult to attribute to the Russian Federation.

Thus, whether one assumes that armed conflict involves a clash between the armed forces of two States or any use of force, in the legal sense there is no ongoing IAC between any EU or NATO member and Russia. But does this mean that Europe is living in peaceful times? That would not be true either. Attempts to derail trains, parcels exploding at logistics depots,[26] swarms of drones carrying explosives and violating airspace,[27] balloons flying over civilian airports[28] or arson attacks on shopping centres[29] do not precisely match the vision of peace. On the contrary, such a reality forces State organs to change their regular modes of operation, reorganise their structures or submit proposals for changes in the law to respond appropriately and in a timely manner to the constantly emerging threats to the State's security.[30] At the same time, such acts of sabotage prompt fear among societies and begin

[20] *Ibidem*, p. 334.

[21] *Ibidem.*

[22] *Ibidem*.

[23] *Ibidem*, p. 335.

[24] *Ibidem*, p. 336.

[25] *Ibidem*, p. 335.

[26] *Exploding parcels in Europe part of plot to target US flights, officials say*, Euroactive, 31 July 2025, available at: https://www.euractiv.com/news/exploding-parcels-in-europe-part-of-plot-to-target-us-flights-officials-say/ (accessed 31 March 2026).

[27] *Airspace Violation Repelled: Poland's Procedures Prove Effective*, 10 September 2025, available at: https://www.gov.pl/web/primeminister/airspace-violation-repelled-polands-procedures-prove-effective (accessed 31 March 2026).

[28] P. Kirby, *Lithuania declares emergency situation over Belarus balloons*, BBC, 9 December 2025, available at: https://www.bbc.com/news/articles/c39pr3d10wlo (accessed 31 March 2026).

[29] J. Whitehead, *Poland accuses Russia of arson over 2024 shopping centre fire*, BBC, 12 May 2025, available at: https://www.bbc.com/news/articles/cgegj1rvq84o (accessed 31 March 2026).

[30] *See e.g.*, K. Krasuski, Z. Wanat, *Polish Lawmakers Fail to Overturn Veto on Crypto Assets Bill*, Bloomberg, 5 December 2025, available at: https://www.bloomberg.com/news/articles/2025-12-05/polish-lawmakers-fail-to-overturn-veto-on-crypto-assets-bill?embedded-checkout=true; A. Sytas, *Lithuania declares state of emergency over balloons from Belarus*, BBC, 9 December 2025, available at: https://www.reuters.com/world/lithuania-declares-state-emergency-over-smuggler-balloons-belarus-2025-12-09/ (both accessed 31 March 2026).

to influence individuals' everyday life choices.[31] If the threat of further unpredictable attacks begins to guide the judgments of governments and ordinary people, then the term "neither peace nor war" becomes an accurate description of the new reality.

These and similar phenomena are not new; their origins can be traced back to antiquity.[32] It is also difficult to claim that modern international law has not had sufficient time to develop appropriate legal norms and resilience mechanisms to address disinformation, espionage and different acts of sabotage, as such techniques were standard during the Cold War and part of the Soviet Union's arsenal. And yet, the dichotomy between peace and an IAC was sufficient to describe the rights and obligations of States just three decades ago. One could then ask what has changed and how the situation differs today from that faced by States in the recent past. The answer to such a question is undoubtedly complex and would require a proper analysis of multiple political, economic and historical factors. From an international law perspective, though, the most significant change appears to be the technological shift. Thirty years ago, individuals could not have been recruited for sabotage acts via encrypted messaging apps and paid in bitcoin by patrons living thousands of kilometres away; swarms of drones were not flying over the airports in a situation where planes are the everyday means of transport for millions of people; and well-coordinated campaigns of posts spread with the skilful use of social media algorithms could not have influenced the outcome of democratic elections. In other words, technology has changed the world, as have the threats the international community faces. What has not changed is international law.

2. THREE CHANGES TO BE CONSIDERED

It would be unrealistic to propose revising the UN Charter, amending existing treaties or creating a brand-new international organisation that would directly address all the threats contributing to a state of "neither peace nor war", as reforms of the current framework of collective security were attempted in the past, and they proved unsuccessful.[33] Instead, the aim of this essay is to propose initiating a debate among

[31] *Speech by President von der Leyen at the European Parliament plenary debate on a united response to recent Russian violations of the EU Member states' airspace and critical infrastructure*, 8 October 2025, available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_25_2316 (accessed 31 March 2026).

[32] *See e.g.*, J. Lacey, *Conquering Germania: A Province Too Far*, in: W. Murray, P. R. Mansoor (eds.), *Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present*, Cambridge University Press, Cambridge: 2012, pp. 18–44.

[33] *See e.g.* B. Fassbender, *All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council*, 7 Max Planck Yearbook of the United Nations Law 183 (2003); S. Ches-

scholars on introducing a set of changes in international law that would make it more resilient in a "neither peace nor war" situation.

The proposal to recognise a middle state between peace and IAC is not entirely new; since the emergence of the prohibition on the use of force, international law scholars have long debated the existence of a state of "non-belligerency". Before the emergence of the prohibition, when war was a universally admissible means of waging disputes, every State had the right to resort to force for whatever reason. Thus, the statuses of a State that attacked first and one that was only defending itself were equal in the eyes of the law,[34] as neither of them violated legal norms by using forcible measures. That is where the prohibition of the use of force introduced a fundamental change: it prompted the differentiation of belligerents into wrongdoers, i.e. those who attacked first, violating the prohibition of the use of force, and victims, i.e. States which were forced to defend themselves against an illegal attack.[35] As some scholars claim, this change had to affect the strict distinction between neutrality and belligerency, since the prohibition of the use of force permits States to take a stand against the wrongdoer and to help the victim of the illegal use of force.[36] This is the essence of "non-belligerency":[37] non-belligerent States are supposedly allowed to deviate from the core obligations of neutrality – abstention, prevention and impartiality – in order to help the victim of the illegal use of force without becoming a party to an armed conflict.[38] It is true that the legal scholarship does not unanimously agree on the existence and exact scope of non-belligerency as a third category between being a co-belligerent and remaining neutral; there is also hardly any evidence that non-belligerency is supported by treaties or customary law.[39]

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terman, *Untied Nations? Saving the UN Security Council*, 36(4) European Journal of International Law 1089 (2025).

[34] M.N. Schmitt, *Providing Arms And Materiel To Ukraine: Neutrality, Co-Belligerency, And The Use Of Force*, Articles of War, 7 March 2022, available at: https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/ (accessed 31 March 2026).

[35] *Ibidem.*

[36] *See* S.A.G. Talmon, *The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine (April 6, 2022)*, 20 Bonn Research Papers on Public International Law 1 (2022), pp. 18–19, 21.

[37] *See e.g.* T. Komarnicki, *The Place Of Neutrality in the Modern System Of International Law*, 80 Recueil des cours 395 (1952), p. 482; M. Bothe, *The Law of Neutrality*, in: D. Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford: 2008, p. 573; A. Gioia, *Neutrality and Non-belligerency*, in: H.H.G. Post (ed.), *International Economic Law and Armed Conflict*, Martinus Nijhoff Publishers, Dordrecht/Boston/London: 1994, pp. 66–67; D. W. Bowett, *Self-defence in International Law*, The Lawbook Exchange, Clark, NJ: 2009, pp. 174–175; R. Ingber, *Co-Belligerency*, 42 The Yale Journal of International Law 67 (2017), p. 89.

[38] N. Ronzitti, *Italy's Non-Belligerency During The Iraqi War*, in: M. Ragazzi (ed.), *International Responsibility Today*, Martinus Nijhoff Publishers, Leiden/Boston: 2005, p. 198.

[39] A. Kleczkowska, *Neutrality, Non-belligerency, Belligerency: The Status of states Assisting Ukraine in the International Armed Conflict between Ukraine and Russia*, in: M. Balcerzak, E. Cała-Wacinkiewicz

However, the mere fact that both States and scholars are discussing the possibility of a legal status for such a position indicates that new developments in security can stimulate such debates, even if, at first, these discussions remain an intellectual exercise and do not take the form of firm legislative proposals.

The three changes proposed for international law scholars to consider, described below, were selected because they relate to three important aspects of non-conventional threats: legal qualification of such threats as violations of international law; ensuring the safety of ordinary citizens amid everyday hybrid operations; and the possibility of effectively and instantly responding to hybrid threats in line with international law. One could certainly enumerate many more legal questions to be addressed, particularly the problem of attributing violations of international law to a specific State in order to hold it responsible. To attribute certain violations of international legal norms to Russia, such violations must have been committed either by State organs or a person or entity which is empowered by Russian law to exercise elements of governmental authority or which is acting on Russia's instructions or under its direction or control.[40] Russia, however, often utilises various non-state actors who, despite financial, political, organisational or familial ties to Russian State organs, do not fit into any of those definitions, making it impossible to attribute certain actions to Russia in a legal sense.[41] On the one hand, the question of attribution is therefore not only a legal question, but also a matter of gathering factual evidence of the connections between different actors and Russia; on the other hand, it is secondary to the problem of Russia's violations of international law, because if certain conduct cannot be labelled as a breach of law, there will be no need to further consider attribution. From this perspective, the three proposed changes are not only more feasible to implement and directly connected to legal considerations, but also require an urgent response, given the challenges they pose to societal resilience. In a broader sense, the discussion of those issues can serve as a model for how to proceed and search for relevant legal solutions to additional questions which may arise.

Firstly, States should agree on a new approach to coercion as an element of the principle of non-intervention. In general, coercion may be defined as an act designed

(eds.), *Legal Perspectives on the Russia-Ukraine War: International and Polish Approaches*, Routledge, New York/London: 2025, pp. 20–29.

[40] International Law Commission, Responsibility of States for Internationally Wrongful Acts, II (Part Two) Yearbook of the International Law Commission (2001), Arts. 4–5, 8.

[41] *See e.g.* E. Volāns et al., *Handbook on the role of non-state actors in Russian hybrid threats*, Hybrid CoE Paper 27, December 2025, available at: https://www.hybridcoe.fi/wp-content/uploads/2025/12/Hybrid-CoE-Paper-27-Handbook-on-the-role-of-non-state-actors-in-Russian-hybrid-threats.pdf (accessed 31 March 2026).

to deprive another State of its freedom of choice.[42] Traditionally, scholars have distinguished two forms of coercion: firstly, there is "dictatorial" coercion, which consists of "compelling another State to do or not to do something."[43] It involves issuing a demand that is backed by a threat, meaning an explicit or implicit promise of harm whose execution depends on whether the target State fulfils the demanded conditions.[44] The second form is "forcible" coercion, or "taking control of a certain matter and forcibly imposing a condition of things."[45] In other words, "the intervening state replaces the will of the victim state with its own by carrying out the unauthorized act itself instead of pressuring someone else to do anything."[46] Given these descriptions of coercion, the majority of hybrid operations undertaken by one State against another cannot be classified as coercion. When it comes to disinformation campaigns aimed at meddling in the electoral process, for example, in order for them to be labelled as a violation of the principle of non-intervention, they would have to be accompanied by either a threat whose aim would be to compel a State to call a specific election result, or the foreign State taking control of all media outlets and official sources of information about candidates and elections, depriving voters of independent sources of information in order to manipulate them into supporting a specific candidate.[47] Consequently, such a definition of coercion would not include, for example, using thousands of fake accounts on an

[42] *Costa Rica's Position on the Application of International Law in Cyberspace*, available at: https://tinyurl.com/mw99u3jb (accessed 31 March 2026), para. 24; Schmitt, *supra* note 19, p. 317, para. 18.

[43] L. Oppenheim, *International Law: A Treatise*, vol. 1, Longmans, Green and Co., London/New York: 1905, p. 181; M. Roscini, *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, Oxford University Press, Oxford: 2024, p. 152; M. Milanovic, *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, 117(4) The American Journal of International Law 601 (2023), p. 605; X.W. Tay, *Reconstructing the Principle of Non-Intervention and Non-Interference-Electoral Disinformation, Nicaragua, and the Quilt Work Approach*, 40 Berkeley Journal of International Law 39 (2020), p. 46; Q. Rolando, *Diritto Internazionale Pubblico*, G. Priullla Editore, Palermo: 1956, p. 216; *International Law in Future Frontiers*, 19 May 2022, available at: https://www.gov.uk/government/speeches/international-law-in-future-frontiers; UNGA, *Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by states submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security*, established pursuant to General Assembly Resolution 73/266, 13 July 2021, UN Doc. A/76/136, p. 57; *The Application of International Law to State Activity in Cyberspace*, available at: https://tinyurl.com/mvhrht5k (both accessed 31 March 2026), para. 9.

[44] Roscini, *supra* note 43, p. 153.

[45] *Ibidem,* p. 152. *See also* Milanovic, *supra* note 43, p. 605.

[46] Roscini, *supra* note 43, p. 155.

[47] *See e.g.* M.N. Schmitt, *Foreign Cyber Interference in Elections: An International Law Primer, Part I*, EJIL:Talk!, 16 October 2020, available at: https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-i/ (accessed 31 March 2026). *See also* J.D. Ohlin, *A Roadmap for Fighting Election Interference*, 115 AJIL Unbound 69 (2021), p. 70.

online platform or spreading propaganda in support of specific candidates through a media outlet that is overtly or covertly sponsored by a foreign State.

It is important to note that international law scholars have proposed advocating for a broader, more flexible approach to the notion of coercion in cases of disinformation. These proposals suggest that the determination of "coercion" should consider a range of factors, such as which values were affected by the outcome of the disinformation campaign, how many individuals were impacted and to what extent was the freedom to act and make certain choices constrained due to the lack of accurate information.[48] Moreover, some States have endorsed such a qualification of disinformation, including in their positions on applying international law to cyberspace.[49]

Even though it is much too early to conclude this brief analysis by saying that there is consensus among States that coercion is not limited only to "dictatorial" or "forcible" conduct, the discussion about disinformation and the principle of non-intervention may serve as an example of how gradually the new security threats may contribute to changing the interpretation of fundamental principles of international law. Thus, if it is possible with respect to one type of hybrid threat, legal scholars should also initiate similar discussions regarding other operations, and should encourage States

[48] M.S. McDougal, F.P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 Yale Law Journal 771 (1958), pp. 781–782; B. Sander, *Democracy Under The Influence: Paradigms of state Responsibility for Cyber Influence Operations on Elections*, 18(1) Chinese Journal of International Law 1 (2019), pp. 22–23; B. Baade, *Fake News and International Law*, 29(4) European Journal of International Law 1357 (2018), p. 1364; S. Wheatley, *Foreign Interference in Elections under the Non-intervention Principle: We Need to Talk about "Coercion"*, 31 Duke Journal of Comparative & International Law 161 (2020), pp. 191–192; A. Rotondo, P. Salvati, *Fake News, (Dis)information, and the Principle of Nonintervention: Scope, limits, and possible responses to cyber election interference in times of competition*, The Cyber Defense Review 209 (2019), pp. 211–212; W. Ossoff, *Hacking the Domaine Réservé: The Rule of Non-Intervention and Political Interference in Cyberspace*, 62(1) Harvard International Law Journal 296 (2021), p. 309; M.N. Schmitt, *"Virtual" Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law*, 19(1) Chicago Journal of International Law 30 (2018), p. 51; N. Tsagourias, *Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace*, EJIL: Talk!, 26 August 2019, available at: https://www.ejiltalk.org/electoral-cyber-interference-self-determination-and-the-principle-of-non-intervention-in-cyberspace/ (accessed 31 March 2026).

[49] *See e.g. Costa Rica's Position on the Application of International Law in Cyberspace*, *supra* note 42, para. 25; UN Doc. A/76/136, *supra* note 43, pp. 34–35; *General Staff of Iranian Armed Forces Warns of Tough Reaction to Any Cyber Threat*, Nournews, 18 August 2020, available at: https://nournews.ir/En/News/53144/General-Staff-of-Iranian-Armed-Forces-Warns-ofTough-Reaction-to-Any-Cyber-Threat; *Application of International Law to State Activity in Cyberspace*, *supra* note 43, para. 10; The Republic of Poland's position on the application of international law in cyberspace, 19 December 2022, available at: https://www.gov.pl/web/diplomacy/the-republic-of-polands-position-on-the-application-of-international-law-in-cyberspace (both accessed 31 March 2026), p. 4; UNGA Verbatim Record, 1st Committee, 7 December 1965, UN Doc. A/C.1/SR.1399, para. 11; UNGA Verbatim Record, 1st Committee, 7 December 1965, UN Doc. A/C.1/SR.1398, para. 29; UNGA Verbatim Record, 1st Committee, 3 December 1965, UN Doc. A/C.1/SR.1395, para. 23; UNGA Verbatim Record, 1st Committee, 8 December 1965, UN Doc. A/C.1/SR.1402, para. 24.

to participate in that debate. The positive outcome of such a discussion could possibly have enormous significance, as it could enable the qualification of at least some hybrid threats as violations of the principle of non-intervention and, thus, of international law.

Secondly, States should agree that no hybrid operation may infringe on fundamental standards of humanity. This phrase is used after Resolution 1998/29 of the Commission on Human Rights[50] and the Analytical Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21; and it is a successor to the term "minimum humanitarian standards".[51] "Fundamental standards of humanity" would not only include the standards of international human rights law and international humanitarian law, but would also recognise that "in cases not covered by human rights and humanitarian instruments, all persons and groups remain under the protection of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience."[52] These latter two terms refer to the Martens Clause,[53] and despite their vagueness they are introduced here intentionally. In the Martens Clause, the precise content of "the laws of humanity, and the requirements of the public conscience" was left "to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community."[54] That is also why these two terms are well-suited to the context of hybrid threats, where tactics and modes of operation constantly change.

What would these fundamental standards of humanity mean in practice? They would oblige States to, for example, not conduct hybrid operations in a manner that affects individuals who are not members of the military, law enforcement or other organs responsible for State security.[55] This is not to say that drones flying over a nuclear submarine base[56] are acceptable, but that militaries and law enforcement

[50] Commission on Human Rights Resolution 1998/29, 17 April 1998, para. 1.

[51] The term "minimum humanitarian standards" was criticised for a number of reasons. *See* UN Economic and Social Council, Minimum humanitarian standards: Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, 5 January 1998, UN Doc. E/CN.4/1998/87, para. 5; UN Economic and Social Council, Minimum humanitarian standards: Report of the Secretary-General, 28 January 1997, UN Doc. E/CN.4/1997/77/Add.1, paras. 47, 54.

[52] *Declaration of Minimum Humanitarian Standards*, 2 December 1990, available at: https://www.ifrc.org/Docs/idrl/I149EN.pdf (accessed 31 March 2026), preamble.

[53] *See e.g.* Convention (II) with respect to the Laws and Customs of War on Land, in: J. Brown Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, Oxford University Press, London: 1915, pp. 101–102.

[54] Dissenting Opinion of Judge Shahabuddeen in ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep 1996, p. 406.

[55] The proposals on what "fundamental standards of humanity" mean in practice come from the modified *Declaration of Minimum Humanitarian Standards Adopted, supra* note 52.

[56] *France takes anti-drone measures after flight over nuclear submarine base*, France 24, 5 December 20025, available at: https://www.france24.com/en/live-news/20251205-france-takes-anti-drone-meas-

officers are trained and equipped to deal with such threats, as opposed to ordinary citizens. Next, "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances."[57] Also, "[a]cts or threats of violence the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited."[58] Medical and religious personnel and objects must be respected and protected.[59] In other words, fundamental standards of humanity would prohibit attacking passenger trains, civilian airports or shopping centres; putting into circulation packages with incendiary devices,[60] or tampering with critical infrastructure – including power stations and waterworks – in a way that could affect the safety and well-being of individuals.[61]

One may ask whether existing international law already protects the persons and objects enumerated above, rendering this proposal unnecessary. The answer, in the context of hybrid operations, is that it does not – or at least not effectively. International human rights law, while guaranteeing the right to life and physical integrity, is of limited application in cases such as those described above. This is because States primarily owe obligations to all individuals on their territory and subject to their jurisdiction.[62] Therefore, Russia cannot be held responsible for violations of the right to life as a result of the acts of sabotage committed by its proxies in Estonia, Lithuania or Poland. And while there has been growing acceptance that human rights obligations are also applicable extraterritorially[63] when the State exercises power or effective control over an individual or when an individual is in an area subject to the State's control,[64] neither of these conditions is true in the cases under consideration. Likewise, despite international humanitarian law requiring that civilians be distinguished

ures-after-flight-over-nuclear-sub-base (accessed 31 March 2026).

[57] *Declaration of Minimum Humanitarian Standards*, Art. 5(3).

[58] *Ibidem*, Art. 6.

[59] *Ibidem*, Art. 14.

[60] G. Blackburn, *Poland detains eight over suspected Russia-linked sabotage, says PM Tusk*, Euronews, 21 October 2025, available at: https://www.euronews.com/2025/10/21/poland-detains-eight-over-suspected-russia-linked-sabotage-says-pm-tusk (accessed 31 March 2026).

[61] B. Żurawicz, *Wtargnęli na teren stacji uzdatniania wody. "Ingerencja w najważniejsze obiekty"* [They broke into the water treatment plant. "Interference with key facilities"], TVN24, 16 September 2025, available at: https://tvn24.pl/krakow/krakow-intruzi-na-terenie-wodociagow-dwie-osoby-zatrzymane-st8652190 (accessed 31 March 2026).

[62] *See* Art. 2(1) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171. *See also* UNCHR, *General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant"*, 26 May 2004, CCPR/C/21/Rev.1/Add. 13, para. 10.

[63] M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, Oxford University Press, Oxford: 2011, p. 8.

[64] *Ibidem*, p. 119–173; ECtHR, *Banković and others v. Belgium and Others* (App. No. 52207/99), 12 December 2021, para. 7.

from combatants,[65] prohibiting attacks that target civilians or civilian objects[66] and banning the use of weapons which are by nature indiscriminate,[67] it is not applicable to the cases described herein, since – as argued above – no IAC exists between Russia and NATO/EU Member States. Thus, the result is a genuine normative gap: conduct that threatens civilian safety and well-being, when executed through hybrid means below the threshold of IAC and outside the reach of extraterritorial human rights jurisdiction, may go unaddressed by any primary rule of international law.

The legal status of fundamental standards of humanity would be the main challenge. Needless to say, the most effective way of implementing the standards would be through a customary norm. On the one hand, all States would be bound by, and eventually held responsible for, noncompliance with such a norm. On the other hand, being unwritten, the norm would remain flexible and responsive in the event of new threats or modes of operation emerging. However, there is one, albeit significant, problem with fundamental standards of humanity – what conduct would it exactly require from States? Thus, the same issue as with the Martens Clause reoccurs here: "the laws of humanity, and the requirements of the public conscience" are too broad and vague to form the basis of a State's obligation.[68] Moreover, despite the fundamental standards of humanity or minimum humanitarian standards applicable to situations beyond armed conflicts having been long discussed by States, it remains doubtful that they have attained the status of a customary norm.[69] This should not lead to the conclusion, however, that these standards are without legal significance or that they should be abandoned. Given the genuine normative gap identified above – where hybrid operations that threaten civilian safety and well-being escape the reach of both international humanitarian law and international human rights law – the need for a governing primary rule is not merely theoretical, but urgent. States committed to the rules-based international order should not treat the standard as a distant aspiration, but should work to create the contours of the emerging norm.

Thirdly, States need to be equipped with more effective means for reacting to hybrid threats. Today, the most common means of responding to arson or attacks

[65] Arts. 48, 51(2) and 52(2) of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3.

[66] *Ibidem*.

[67] *Ibidem*, Art. 51(4).

[68] E. Crawford, *The Modern Relevance of the Martens Clause*, 6 ISIL Yearbook of International Humanitarian and Refugee Law 1 (2006), p. 21.

[69] *Declaration of Minimum Humanitarian Standards (1990): Introduction by Asbjørn Eide and Allan Rosas (1997)*, available at: https://www.abo.fi/wp-content/uploads/2018/03/IMR-Declaration-of-minimum-standards-web-2018.pdf (accessed 31 March 2026), pp. 1–5.

on critical infrastructure are retorsions, which are unfriendly but legal measures. Although they are adequate to express frustration regarding various hybrid operations, they are usually insufficient to induce compliance with international law or deter future actions.

Another unilateral tool available to States is countermeasures. Their use, however, is subject to several procedural conditions established in customary law[70] and subsequently listed by the International Law Commission. One of the most problematic steps in the process of applying countermeasures seems to be that, before they are enforced, an injured State must first call upon the responsible State, giving it notice of its claim, in which it has to specify in particular the conduct that the responsible State should take to cease the wrongful act (if it is continuing) and the form of reparation.[71] If the responsible State does not cease the wrongful act or the dispute does not become pending before a court or tribunal which has the authority to make decisions binding on the parties,[72] and the injured State ultimately decides to resort to countermeasures, before taking any such steps, it must first notify the responsible State of such a decision and offer to negotiate with that State.[73] Thus, by providing notice of a claim or notifying the responsible State, the injured State must reveal that it is aware of the wrongful act and that it is preparing a response to that act. In the case of hybrid threats, issuing such notifications to the responsible State before concrete measures are adopted would not only delay the adoption of a proper response, but also deprive the injured State's answer of the element of surprise.

Much stricter requirements for countermeasures than for retorsions are an obvious consequence of the fact that, unlike retorsions, countermeasures comprise measures that violate international law. Thus, all the conditions of legality listed by the International Law Commission are intended to protect the international community from escalation, chaos and abuse caused by the overbroad and reckless use of measures that breach legal norms. The aim of this proposal is not to diminish the importance of these conditions for the legality of countermeasures, but rather to adapt them to the current needs of the international community.

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[70] *See e.g.* statements on countermeasures presented by States in their positions on the use of international law in cyberspace in Cyber Law Toolkit, *National position*, available at: https://cyberlaw.ccdcoe.org/wiki/Category:National_position (accessed 31 March 2026); Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member states from economic coercion by third countries, [2023] OJ L 1, preambular para. 13.

[71] International Law Commission, *supra* note 40, Art. 43.

[72] *Ibidem*, Art. 52(3).

[73] *Ibidem*, Art. 52(1).

Bearing all this in mind, the international community should consider waiving the obligation to submit the notice of claim and to notify the responsible State of the ultimate decision to undertake countermeasures, or at least to mitigate them to the extent necessary to avoid delaying a proper response. Even without these two steps in the process of employing countermeasures, the remaining conditions of their legality would still prevent countermeasures from becoming an uncontrolled form of revenge against the responsible State. One can consider the following scenario: one State conducts a cyberattack against another, affecting the latter State's critical infrastructure or deeply interfering with its electoral process in a way that changed the outcome of an election. The cyberattack constitutes a violation of international law and can be attributed to the responsible State (i.e., constitutes an internationally wrongful act). In such a case, the injured State is entitled to respond with a countermeasure, including one conducted in cyberspace, even if that response would otherwise amount to a violation of the principles of non-intervention, the right to self-determination, or others. Even if the obligation to submit a notice of claim and to notify the responsible State of the decision to undertake countermeasures were waived, in such a case the countermeasure must still only induce the responsible State to comply with the legal obligations it owes the injured State, must be limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State and must be taken in such a way as to permit the resumption of performing the obligations in question. The countermeasure must not violate the prohibition of the threat or use of force, obligations to protect fundamental human rights, obligations of a humanitarian character prohibiting reprisals or other obligations under peremptory norms of general international law. It must also be proportionate and be terminated as soon as the responsible State has complied with its obligations.[74] Moreover, an injured State may take a countermeasure only against a State responsible for an internationally wrongful act, to the exclusion of third States.[75]

One could ask whether broadening the scope of possible uses of unilateral measures would be counterproductive, as it would only reinforce arguments that international law is a primitive system of law based on self-help[76] and, consequently,

[74] *See* International Law Commission, *supra* note 40, Arts. 49-54; Schmitt, *supra* note 19, pp. 111–134.

[75] T. Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in: L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law,* Edward Elgar Publishing, Cheltenham: 2016, p. 34.

[76] *See e.g.* M. Noortmann, *Enforcing International Law: From Self-Help to Self-Contained Regimes*, Routledge, London/New York: 2005, p. 2; A. Van Wynen Thomas, A.J. Thomas, Jr., *Non-Intervention: The Law and its Import in the Americas*, Southern Methodist University Press, Dallas: 1956, p. 85; A. Pellet, A. Miron, *Sanctions*, in: *Max Planck Encyclopedias of International Law*, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e984 (accessed 31 March 2026),

constitute a regression to such institutions as the collective security system within the UN, which was supposed to protect the international community against unilateral revanchism. However, for some time now, the collective security system – with the UN Security Council at its apex – has not been functioning in accordance with the aims for which it was established. It is a different matter how to reform or replace such broken institutions and organs, but since it does not seem that any such profound reform is possible any time soon, the international community – including international law scholars – should focus on adjusting the viable existing tools available to States to meet the current challenges.

CONCLUSIONS

The aim of this short essay is to initiate a discussion about how international law, and consequently the part of the international community that seeks to safeguard the international rule of law, can become more resilient towards nonconventional threats that States are facing these days. This refers specifically to threats targeting NATO and EU Member States that originate from Russia, collectively termed hybrid threats. These threats affect the functioning of State institutions, pose serious risks to life and to the operation of critical infrastructure and spread fear among societies; nonetheless, they do not constitute an IAC. Moreover, while the atmosphere in Europe can hardly be described as peaceful, peacetime norms continue to apply to such phenomena from an international law perspective. Since defining hybrid threats as a new intermediate state between peace and IAC would be very difficult or even impossible from a legal point of view, this essay proposes three types of changes that could be introduced to the existing legal framework, rendering international law at least a little more resilient in the face of hybrid threats: redefining coercion as an element of the principle of non-intervention, making fundamental standards of humanity applicable to every hybrid operation and waiving the obligations to notify the responsible State as a condition for the legality of countermeasures. There is no doubt that these proposals require further discussion on their details, legal status and scope of application, and hopefully this essay can initiate such a debate.

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para. 7; J.L. Kunz, *Sanctions in International Law*, 54(2) The American Journal of International Law 324 (1960), p. 325; A. Whelan, *Reciprocity in Public International Law*, Cambridge University Press, Cambridge: 2023, p. 4; L. Fisler Damrosch, *Enforcing International Law Through Non-forcible Measures*, 269 Recueil des Cours 9 (1997), p. 23.

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THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE: JURISDICTION, IMMUNITIES, AND TRIALS IN ABSENTIA

Abstract: *This article examines the Special Tribunal for the Crime of Aggression against Ukraine, created by Ukraine and the Council of Europe in June 2025. The Special Tribunal was designed to address the jurisdictional gap of the International Criminal Court, which – due to the limitations of the Rome Statute – cannot exercise jurisdiction over the crime of aggression in relation to Ukraine. The article analyses the Special Tribunal's subject matter and territorial and temporal jurisdiction. The article further examines the issue of personal immunities and the provision regarding trials in absentia.*

Keywords: Ukraine, crime of aggression, Special Tribunal, accountability

INTRODUCTION

On 25 June 2025, Ukraine and the Council of Europe concluded an agreement establishing the Special Tribunal for the Crime of Aggression against Ukraine. The first initiatives to create a special international criminal tribunal with jurisdiction over the crime of aggression emerged almost immediately after the onset of Russia's aggression against Ukraine.[1] The establishment of the criminal tribunal represents the outcome of extensive efforts by certain states, legal experts and civil

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[1] P. Sands, *Putin's use of military force is a crime of aggression*, Financial Times, 28 February 2022, available at: https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c (accessed 31 March 2026).

society, primarily to address the jurisdictional gap of the International Criminal Court (ICC) in prosecuting the crime of aggression against Ukraine. This work was largely carried out by the socalled Core Group, which gradually expanded to include 40 states, predominantly European ones, but also encompassed states such as Canada.[2] This article discusses the Special Tribunal's jurisdiction in terms of subject matter, territory and time. It also addresses the question of personal immunity and considers the Special Tribunal's framework for conducting trials *in absentia*.

1. THE NEED FOR THE SPECIAL TRIBUNAL

Since February 2022, Ukraine has been subjected to a full-scale military invasion by the Russian Federation, which followed the earlier annexation of Crimea and Russia's proxy war in the Luhansk and Donetsk regions.[3] Despite certain attempts of the Russian Federation to justify its actions by referring to some circumstances that may indicate an alleged right of self-defence, the military invasion of Ukraine constitutes a clear violation of the rules of *ius ad bellum*.[4] Almost immediately after the Russian invasion of Ukraine began, a debate emerged regarding the need to ensure that individuals bear criminal responsibility for this unlawful use of force against Ukraine.[5] At the centre of this discussion was the question of which level is appropriate for investigating and adjudicating the crime of aggression –domestic or international – and whether such proceedings should be conducted by the ICC or a new ad hoc international tribunal, or through a hybrid mechanism.[6]

With respect to the exercise of domestic jurisdiction, both Ukraine and the Russian Federation have incorporated the crime of aggression into their respective criminal codes.[7] However, the debate over the domestic jurisdiction for the

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[2] C. Wenaweser, S. Alavi, *A Special Tribunal for the Crime of Aggression Against Ukraine: Origins, Debates, and Implications*, Yale Journal of International Law, 7 February 2026, available at: https://tinyurl.com/3dymadxc (accessed 31 March 2026).

[3] E. Tsybulenko, J.A. Francis, *Separatists or Russian Troops and Local Collaborators? Russian Aggression in Ukraine: The Problem of Definitions*, in: S. Sayapin, E. Tsybulenko (eds.), *The Use of Force against Ukraine and International Law*, TMC Asser Press, The Hague: 2018, pp. 123-144.

[4] UN General Assembly (GA) Resolution, Aggression against Ukraine, A/RES/ES-11/1, 18 March 2022; UN GA Resolution, *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*, 13 October 2022, A/RES/ES-11/4,; UN GA Resolution, 2 March 2023, A/RES/ES-11/6; International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022.

[5] Sands, *supra* note 1.

[6] T. Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, Just Security Blog, 10 March 2022, available at: https://tinyurl.com/5a2tyxb4 (accessed 31 March 2026).

[7] A. Reisinger Coracini, *Extended Synopsis: The Crime of Aggression under Domestic Law*, in: C. Kress, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 1038.

crime of aggression has long been accompanied by doubts as to whether it may be exercised by a state other than the aggressor state itself. This is primarily because assessing the crime of aggression as a matter of individual criminal responsibility necessarily entails an assessment of whether a foreign state has committed an act of aggression.[8] Concerns regarding the exercise of domestic jurisdiction for the crime of aggression had already been expressed in the 1992 report of the ILC Working Group on International Criminal Jurisdiction, which stated that "[i]t may be very difficult for a national court, which may be a court of a party to the conflict in question, to determine in an impartial manner whether particular conduct constituted aggression, for example."[9] Moreover, there was the question of whether domestic jurisdiction is precluded by the existence of state immunities reflecting the principle *par in parem imperium non habet*, or by immunities accorded to the relevant individuals – whether functional or personal in nature.[10] Although some of these obstacles may not have been insurmountable and could have been at least partially addressed, there has been a strong belief that a judicial mechanism with international backing and components would reduce the risk of bias and strengthen the court's legitimacy.[11]

With regard to the ICC, Russia is not a party to the Rome Statute, and at the outset of the invasion neither was Ukraine. However, Ukraine had previously twice accepted the ICC's jurisdiction according to Art. 12(3) of the Rome Statute. Firstly, Ukraine had accepted the jurisdiction of the ICC over crimes committed on its territory between 21 November 2013 and 22 February 2014.[12] With its second declaration, Ukraine removed the time limitation, granting jurisdiction for crimes committed from 20 February 2014 onward.[13] On this basis, the ICC has already issued arrest warrants three times. In March 2023, it issued arrest warrants for Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova for the war

[8] C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge: 2021, pp. 258-352.

[9] ILC, *Report of the Working Group on the Question of an International Criminal Jurisdiction,* II(2) Yearbook of the International Law Commission (1992).

[10] Dannenbaum, *supra* note 6.

[11] T. Dannenbaum, *A Special Tribunal for the Crime of Aggression?,* 20 Journal of International Criminal Justice 859 (2020); Ł. Kułaga, *Domestic and International Criminal Jurisdiction in the context of the initiative for a Special Tribunal for the Crime of Aggression*, 43 Polish Yearbook of International Law 339 (2023).

[12] *The declaration of Ukraine to the ICC*, 9 April 2014, available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf (accessed 31 March 2026).

[13] *The declaration of Ukraine to the ICC*, 8 September 2015, available at: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (accessed 31 March 2026).

crime of unlawful deportation of children.[14] A year later, in March 2024, it issued arrest warrants for Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov for the war crime of directing attacks at civilian objects, the war crime of causing excessive incidental harm to civilians or damage to civilian objects and the crime against humanity of inhumane acts.[15] In June 2024 came the third set of arrest warrants, for Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov for the war crime of causing excessive incidental harm to civilians or damage to civilian objects and the crime against humanity of inhumane acts.[16] Ukraine ultimately ratified the Rome Statute in October 2024 and is currently a State Party to the International Criminal Court.[17] However, because of the jurisdictional framework governing the crime of aggression under the Rome Statute, the ICC does not possess jurisdiction over this crime in relation to the situation in Ukraine.[18] This is the strongest reason for establishing an ad hoc tribunal regarding the crime of aggression in Ukraine.

2. FOUNDATION AND JURISDICTION OF THE SPECIAL TRIBUNAL AND ITS RELATIONSHIP WITH THE ICC

The Special Tribunal was established by an agreement between Ukraine and the Council of Europe. In light of the principle of legality, it is necessary to clarify whether this agreement provides a sufficient legal basis for the Special Tribunal to be regarded as a court established by law.As a sovereign state, Ukraine may exercise criminal jurisdiction on the basis of the principle of territoriality, and nothing prevents it from doing so voluntarily in cooperation with an international organisation.[19] The situation is more complex regarding the Council of Europe (CoE). Its Statute does not expressly confer legal personality on the organisation, nor does it refer to any competence in matters relating to the exercise of criminal jurisdiction.[20] However, under the doctrine of implied powers, an international organisation may exercise powers that are not expressly set out in its founding treaty, provided that

[14] The ICC's Press Release, 17 March 2023, available at: https://tinyurl.com/nhb296xd (accessed 31 March 2026).

[15] The ICC's Press Release, 5 March 2024, available at: https://tinyurl.com/ytu44ydf (accessed 31 March 2026).

[16] The ICC's Press Release: 25 June 2024, available at: https://tinyurl.com/5axk2evf (accessed 31 March 2026).

[17] The ICC's Press Release, 17 July 2025, available at: https://tinyurl.com/4hf34rve (accessed 31 March 2026).

[18] C. McDougall, *The Imperative of Prosecuting Crime of Aggression Committed against Ukraine*, 28(2) Journal of Conflict and Security Law 203 (2023), p. 212.

[19] O. Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, Opinio Juris, 30 March 2022, available at: https://tinyurl.com/3pfewbwx (accessed 31 March 2026).

[20] Statute of the Council of Europe, London, 5 May 1949.

such powers are "essential to the performance of its duties".[21] Pursuant to Art. 1(b) of the CoE Statute, the aim of the CoE is to safeguard "maintenance and further realisation of human rights and fundamental freedoms." According to Art. 15(a) of the CoE Statute, the Committee of Ministers "shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements." In this context it is also worth noting that the Preamble of the CoE Statute provides that the member states are "convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation." In light of the provisions cited above, it may be reasonably argued that the CoE has an implicit power to conclude an agreement with Ukraine concerning responsibility for the crime of aggression. Russia's aggression against Ukraine may be viewed as a violation of human rights, and the strengthening of accountability mechanisms may therefore fall within the core objectives of the CoE, leading to peace based on justice, as proclaimed in the Preamble.[22]

However, the participation of the CoE and the legal basis for it also entail certain limitations. Unlike the UN Security Council, the CoE does not possess the authority to impose binding obligations on its member states. The jurisdiction of the Special Tribunal was therefore derived directly from Ukraine's territorial jurisdiction, with the CoE merely assisting in its institutional organisation.[23] As the CoE cannot compel states to cooperate with a tribunal, each state must conclude its own bilateral agreement with the Special Tribunal. These agreements are further complemented by the Enlarged Partial Agreement, which serves as a flexible administrative and financial framework allowing both CoE and non-CoE states to manage the Special Tribunal's budget and operations without imposing rigid legal obligations on all member states. This instrument establishes a Management Committee to oversee governance and a Secretariat to ensure specialised oversight, while relying on a combination of membership dues and voluntary contributions.[24]

According to Art. 1 of the Statute of the Special Tribunal for the Crime of Aggression against Ukraine (the Statute), the Special Tribunal's *ratione materie* jurisdiction is limited exclusively to the crime of aggression against Ukraine. This limitation of

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[21] ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Rep 1949, p. 11.

[22] Owiso, *supra* note 19; A. Peters, *Implied powers under the Council of Europe Statute, Seminar on the Special Tribunal for the Crime of Aggression against Ukraine – What role for regional organisations such as the Council of Europe?*, 10 April 2024, available at: https://rm.coe.int/peters-cahdi-seminar-coe-competence/1680af60d6 (accessed 31 March 2026).

[23] Owiso, *supra* note 19; F. Hoffmeistr, *The Special Tribunal for the Crime of Aggression against Ukraine Legal assessment and policy recommendations*, Asser Institute, June 2025, available at: https://tinyurl.com/yfz8erju (accessed 31 March 2026), p. 26.

[24] Hoffmeistr, *supra* note 23.

subject-matter jurisdiction is directly linked to the fact that, with respect to other international crimes committed on the territory of Ukraine – namely war crimes, crimes against humanity and genocide – jurisdiction already lies with the ICC. The Special Tribunal is therefore conceived not as a substitute, but as a complementary mechanism to an existing international criminal institution, designed specifically to address the accountability gap concerning the crime of aggression.[25]

The relationship between the Special Tribunal and the ICC is further elaborated in Art. 46 of the Statute. Firstly, according to Art. 64(1) there is a general duty of the Special Tribunal to cooperate with the ICC. More importantly, paragraph 2 stipulates that "[w]henever a person subject to an arrest warrant by the International Criminal Court is detained in the detention facilities of the International Criminal Court, the Special Tribunal shall give priority to the proceedings before the International Criminal Court." This provision indicates the subsidiary nature of the Special Tribunal and reflects a deliberate effort to prevent possible jurisdictional conflicts in favour of the ICC. When considering the practical implications of Art. 46 of the Statute, it is particularly relevant that the ICC has already issued an arrest warrant against Vladimir Putin for the war crimes of unlawful deportation of population (children) and unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.[26] Vladimir Putin is therefore a person "subject to an arrest warrant by the International Criminal Court" within the meaning of Art. 46(2) of the Statute. Consequently, it may reasonably be inferred that the Special Tribunal would be obliged to give priority to the proceedings before the ICC. Given the strong symbolic significance attached to prosecuting aggression as the "supreme international crime",[27] it remains an open question to what extent such a scenario – where priority would be afforded to proceedings before the ICC, potentially at the expense of trials for the crime of aggression before the Special Tribunal – would be perceived as satisfactory, particularly by the broader Ukrainian society.

The Statute contains its own definition of the crime of aggression, which closely resembles, yet does not fully replicate, the definition set out in the Rome Statute. Art. 2(1) and (2) of the Statute read as follows:

> (1) For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct

[25] Council of Europe, Press release, 25 June 2025, available at: https://tinyurl.com/adrextef (accessed 31 March 2026).

[26] ICC, *supra* note 14.

[27] MT Judgment (1946), Vol. 22, p. 427.

> the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
>
> (2) For the purpose of paragraph 1 of this article, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

This part of the definition of the crime of aggression in the Statute is identical to the corresponding definition enshrined in the Rome Statute. In line with the Rome Statute, it distinguishes between the "crime of aggression", which relates to an individual's criminal responsibility, and an "act of aggression", which is the conduct of a state.[28] The Statute of the Special Tribunal also mirrors the Rome Statute in the leadership requirement, i.e. only persons in a position "effectively to exercise control over or to direct the political or military action of a State" can bear a criminal responsibility for the crime of aggression. This component is unique to the crime of aggression and distinguishes this crime from other crimes under international law.[29] As a consequence an ordinary soldier actively executing the act of aggression against Ukraine will not bear criminal responsibility for the crime of aggression, though the person could be prosecuted for other crimes under international law. In accordance with the Rome Statute's definition, the "act of aggression" must be committed by a state against a state. The protected legal interest of the crime of aggression is the sovereignty and territorial integrity of a state, or in other words, its statehood[30] – in this case that of Ukraine. The definition excludes criminal responsibility for persons acting on behalf of non-state actors. As a consequence of this definition, the leaders or other members of separatist paramilitary forces cannot bear criminal responsibility for the crime of aggression against Ukraine, unless their relevant relationship to the state – in this case, the Russian Federation – is also established.

However, the subsequent two paragraphs of Art. 2 of the Statute set out a definition of the crime of aggression that departs from the wording of the Rome Statute:

> (3) For the purpose of determining whether an act of aggression, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, the Special Tribunal shall

[28] McDougall, *supra* note 8, p. 85.

[29] C. Kress, L. von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 Journal of International Criminal Justice 1179 (2010), p. 1189.

[30] McDougall, *supra* note 8, p. 133.

> take into account United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 and all relevant UN GA resolutions with respect to Ukraine, including those recited in the preamble of the Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine (Agreement).
>
> (4) For the purpose of this Statute, in the context of the aggression against Ukraine, an act of aggression which is determined by its character, gravity and scale to constitute a manifest violation of the Charter of the United Nations, shall also be deemed to constitute a war of aggression.

Unlike the previous parts of the definition, Art. 2(3) of the Statute departs slightly from the Rome Statute, doing so in several respects. Firstly, it introduces qualifying criteria for determining whether an act of aggression, by its character, gravity or scale, constitutes a manifest violation of the UN Charter. By contrast, the corresponding provision in Art. 8*bis*(2) of the Rome Statute enumerates specific categories of a state's conduct that constitute acts of aggression. It follows from the wording that the qualifying criteria are not intended for the Special Tribunal's determination of whether an act of aggression has occurred in the first place, but rather to assess whether an act of aggression already established by the Special Tribunal also meets the threshold of a manifest violation of the UN Charter. Nevertheless, it is argued here that this difference is unlikely to have much effect in practice on the assessment of what constitutes an act of aggression or manifest violation of the UN Charter.[31]

Secondly, for the purpose of assessing which acts of aggression constitute a manifest violation of the UN Charter, the Statute not only refers to GA Resolution 3314 (XXIX) of 14 December 1974, but also extends this reference to encompass all relevant United Nations GA resolutions with respect to Ukraine, including those recited in the preamble of the Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal. A narrower approach was taken in the Rome Statute, since it determines which acts qualify as acts of aggression by direct reference to United Nations GA Resolution 3314 (XXIX) of 14 December 1974 only. This distinction is a logical consequence of the different scopes of the two instruments: whereas the Rome Statute is directed towards indeterminate possible future acts of aggression, the Statute of the Special Tribunal exclusively addresses the crime of aggression committed against Ukraine. Accordingly, the Special Tribunal's Statute provides that, when assessing whether an act

[31] K.J. Heller, *The New STCoA: The Good, the Bad, the Curious, and the Terrible*, Opinio Juris, 11 July 2025, available at: https://tinyurl.com/2hrdpcbb (accessed 31 March 2026).

of aggression amounts to a manifest violation of the UN Charter, the relevant GA resolutions pertaining specifically to the situation in Ukraine shall be relied upon.[32]

Further, Art. 2(4) of the Statute operates with the concept of a "war of aggression" as opposed to the term "act of aggression" used in the Rome Statute. It has been argued[33] that this terminological choice may represent a partial return to the Nuremberg standard, where the definition of crimes against peace centred on the planning, initiation or waging of a war of aggression.[34] Heller, however, disagrees with the reference that the operative part of the Statute's definition of the crime of aggression is identical to that of Art. 8*bis* of the Rome Statute and argues that if anything the wording expands the concept of a war of aggression.[35] As indicated above, by employing the concept of an "act of aggression" as the constitutive element of the crime of aggression, the Rome Statute marked a departure from earlier instruments. In the Statutes of both the Nuremberg and Tokyo Tribunals, crimes against peace were defined in terms of the planning, initiation etc. of "a war of aggression".[36] Moreover, Art. 5 of UN GA Resolution 3314 on the Definition of Aggression provides that a "war of aggression" constitutes a crime against international peace. In this context it has been argued that the Rome Statute's reliance on acts of aggression represents a departure from customary international law and that it its definition is broader because not all acts of aggression amount to wars of aggression.[37] Hoffmeister presents the view that employing the term "war of aggression" may facilitate broader support for the Special Tribunal among those states that might otherwise be inclined to endorse it, yet have been critical of the Rome Statute's definition on the grounds that it does not, in their view, fully reflect customary international law in this context.[38] While this might be true on a political level, it is argued here that the wording of Art. 2(4) of the Statute does not represent a return to the Nuremberg standards, but establishes a legal fiction whereby in the context of the aggression against Ukraine acts of aggression that simultaneously meet the threshold of a manifest violation of the UN Charter are to be regarded as constituting a war of aggression.[39]

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[32] Hoffmeistr, *supra* note 23.

[33] G. Pecorella, *The Crime of Aggression: A Preliminary Look at Ukraine's Special Tribunal*, International Law Blog, 1 July 2025, available at: https://tinyurl.com/kzcsx32r (accessed 31 March 2026).

[34] Art. 6(a) of the Charter of the International Military Tribunal.

[35] Heller, *supra* note 32.

[36] Art. 6(a) of the Charter of the International Military Tribunal; Art. 5(a) of the Statue of International Military Tribunal for the Far East.

[37] McDougall, *supra* note 8, pp. 192, 199.

[38] Hoffmeistr, *supra* note 23.

[39] The same view seems to be expressed by G. Nuridzhanian, *The newly established Special Tribunal for the Crime of Aggression against Ukraine: Jurisdiction, immunities and due process*, SSRN, 24 July 2025,

Regarding temporal jurisdiction the Statute does not contain any explicit rule. The fact that the Statute does not provide any initial date for the temporal jurisdiction means that the Special Tribunal will not be limited to assessing only the full-scale invasion that was initiated in February 2022. Instead, it will be able to also examine prior acts. This is particularly significant with regard to the annexation of Crimea, which took place in the winter and spring of 2014.[40] In this regard, it is noteworthy that the Preamble of the Agreement Establishing the Special Tribunal lists four GA resolutions concerning the situation in Crimea before the full-scale invasion of 2022.[41]

The Statute also does not specify any end date for the temporal jurisdiction. While it can be inferred from a present perspective that the Special Tribunal primarily targets acts related to Crimea and the ongoing Russian invasion of Ukraine, the absence of such a definitive endpoint opens the door to considering potential future acts of aggression against Ukraine. The experience with the ad hoc Tribunal for the former Yugoslavia, particularly cases related to Kosovo, has already demonstrated that a lack of a fixed end date for the temporal jurisdiction can lead to investigations of incidents that are not anticipated when a Tribunal is established.

Art. 1 of the Statute provides that the territorial jurisdiction of the Special Tribunal is based on Ukraine's territorial jurisdiction. According to the principles of territorial jurisdiction, any state may prescribe and enforce rules over the conduct occurring within its territory.[42] The territorial jurisdiction of states represents the current state of customary international law and is recognised in all legal systems; it is therefore agreed here that it represents the strongest basis for jurisdiction.[43] In the case of the crime of aggression against Ukraine, it is highly probable that a significant proportion of the individuals who may bear responsibility for this crime did not cross Ukraine's borders and were not on its territory at the time. Therefore, it will be necessary to examine the conditions under which the criterion that the act occurred within Ukraine's territory can be satisfied in the context of such cross-border criminal conduct.

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available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5359650 (accessed 31 March 2026).

[40] Heller, *supra* note 31; Nuridzhanian, *supra* note 39, p. 10.

[41] Preamble of the Agreement, recitals 1-4. listing the following UN GA resolutions: i.e. Resolution A/RES/68/262, 27 March 2014; A/RES/71/205, 19 December 2016; A/RES/73/194, 17 December 2018; and A/RES/76/70, 9 December 2021.

[42] J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford University Press, Oxford: 2019, p. 440.

[43] A. Prayer, *The Territorial Principle as a Basis for State Criminal Jurisdiction: Particularly with Regard to Cross- Border Offences and Attempts, and to Multiple Parties to an Offence Acting in Different Countries*, 23(2) International Criminal Law Review 175 (2023), pp. 176, 177.

Since the territorial jurisdiction of the Tribunal is based on Ukraine's territorial jurisdiction, it is appropriate to refer to Art. 6(2) of the Criminal Code of Ukraine, which provides that "[a]n offence shall be deemed committed in the territory of Ukraine if it has been initiated, continued, completed or discontinued in the territory of Ukraine."[44] It therefore follows that it is sufficient to show that one legal element of the crime of aggression occurred within the territory of Ukraine; the fact that the alleged perpetrator was located outside of the territory is irrelevant. Such construction of Ukrainian territorial jurisdiction is uncontroversial and can be found in a number of national laws or international instruments. For example, the Pre-Trial Chamber I, in its decision on jurisdiction in the situation in Bangladesh/Myanmar, referred to the Criminal Codes of Afghanistan, Australia, Czechia and Timor-Leste and to the European Convention on Extradition, the Criminal Law Convention on Corruption and the African Union Convention on Preventing and Combating Corruption.[45] All the referred legislation or conventions construed territorial jurisdiction in a way that the conduct occurs on the territory "wholly or partly" or "wholly or in part", etc. As a consequence, a mere part of the criminal conduct occurring in the respective territory triggers the respective territorial jurisdiction.

3. PERSONAL IMMUNITIES

The issue of immunities, and particularly the question of whether a treaty-based tribunal may set aside the personal immunities of leaders of non-member states, has been at the centre of numerous scholarly debates in recent years.[46] The customary-law status of personal immunities is particularly significant in the context of the

[44] Criminal Code of Ukraine, available at: https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text (accessed 31 March 2026).

[45] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,* ICC-RoC46(3)-01/18, PTC I, 6 September 2018, fn 109–110.

[46] M. Lipovský, *What is "a certain international criminal court" and does the choice of a fully international or internationalized (hybrid) court/chambers matter for the crime of aggression committed against Ukraine?*, 43 Polish Yearbook of International Law 213 (2023); G. Daugirde, *Crime of Aggression Against Ukraine: Legality and Legitimacy of Domestic Prosecutions in Third States*, 43 Polish Yearbook of International Law, 299 (2023); M. Biszczanik, *The Inadmissibility of Jurisdictional Immunity of Persons Responsible for the Commission of International Crimes in Terms of Domestic Universal Jurisdiction Proceedings*, 43 Polish Yearbook of International Law 311 (2023); Kułaga, *supra* note 11; C. McDougall, *Why Ukraine Needs an International – Not Internationalised – Tribunal to Prosecute the Crimes of Aggression Committed Against It*, 12(2) Polish Review of International and European Law 65 (2024); Supreme Court of Ukraine, Case No. 415/2182/20, Decision, 28 February 2024; J. Trahan, *The Role of the UN Security Council & General Assembly In Responding to the Invasion of Ukraine*, 12(2) Polish Review of International and European Law 23 (2024); G. Bogush, *Committed by Men: Individual Criminal Responsibility for Aggression Against Ukraine*, 12(2) Polish Review of International and European Law 93 (2024).

crime of aggression. As discussed above in the context of subject-matter jurisdiction, the crime of aggression is classified as a so-called leadership crime, which may only be committed by a "person in a position effectively to exercise control over or to direct the political or military action of a State."[47] It follows that the members of the so-called troika (the incumbent head of state, head of government or minister of foreign affairs) could fall into both categories, i.e. being leaders under the definition of the crime of aggression and simultaneously subjects of personal immunity from the criminal proceedings due to their position.

Art. 23 of the Statute governs the regime of immunities in relation to proceedings before the Special Tribunal. The provision draws a clear distinction between functional and personal immunities. In respect of functional immunities, Art. 23(4) expressly stipulates that they are inapplicable before the Special Tribunal. In contrast, with regard to personal immunities, Art. 23(6) of the Statute adopts a different approach, stating that

> [w]here the indictment concerns a head of State, head of government or minister of foreign affairs, the Pre-Trial Judge shall not confirm the indictment and shall order the proceedings be suspended until that person no longer holds that office or an appropriate waiver has been presented to the Special Tribunal. During the suspension, the Pre-Trial Judge shall not otherwise act upon the indictment.

It is evident that under Art. 23 of the Statute, personal immunities operate to shield members of the troika from criminal proceedings before the Special Tribunal. According to Arts. 23 and 25 of the Statute, the Prosecutor is permitted to prepare and submit an indictment against a sitting head of state, foreign minister or head of government; however, the Pre-Trial Judge is subsequently barred from confirming such an indictment. The inability of the Pre-Trial Judge to confirm an indictment against members of the troika has a direct procedural consequence: no arrest warrant can be issued for these individuals, since under Art. 25(3) of the Statute the Pre-Trial Judge is only empowered to issue an arrest warrant once an indictment has been confirmed. Beyond these restrictions, Art. 24(4) further limits prosecutorial powers by prohibiting the use of any investigative measures involving coercion with regard to the members of troika. This means that, even with respect to individuals protected by personal immunity, the Prosecutor is authorised to conduct investigations, to include collecting evidence, summoning persons under investigation and witnesses and questioning

[47] Art. 2(1) of the Special Tribunal Statute.

them. However, these actions must not be carried out in a manner that "amounts to measures of constraint".

The suspension of proceedings is not necessarily permanent. Pursuant to Art. 23(5) of the Statute, it endures only for as long as the member of the troika holds the relevant office or until the Special Tribunal receives an appropriate waiver of immunity. Both conditions reflect the principles of customary international law. Firstly, it follows from customary international law that personal immunities shield the individuals concerned solely during their tenure in office.[48] Once the official leaves their position, the procedural bar is lifted, allowing the Special Tribunal to continue the proceedings. The possibility for a state – in this case, the Russian Federation – to issue a waiver of immunity against the interests of the protected individual reflects the underlying rationale of personal immunities. These immunities are not designed to serve as a personal privilege, but rather as a safeguard for the state itself, ensuring the uninterrupted performance of its functions and the maintenance of diplomatic relations through its highest officials.[49] Beyond the possibility of the Russian Federation issuing a waiver, it is theoretically conceivable – under international law – that an "appropriate waiver" could also be effected by the UN Security Council acting under Chapter VII of the UN Charter. Neither of these options for obtaining a waiver appears realistic under the current political circumstances. Russia's domestic position and its status as a permanent member of the Security Council – which comes with veto power – render both scenarios highly improbable at present.

The fact that the Special Tribunal was established with the mandate to prosecute individuals "who bear the greatest responsibility for the crime of aggression", while current members of the troika enjoy personal immunities, has already been strongly criticised by some authors. In this context, McInnes argues that Art. 23(5) represents a troubling departure from the approach adopted by previous international tribunals. According to her, it constitutes a legal innovation that diverges from the prevailing state of international law, reflecting a compromise driven by political realities, since the provision was introduced to secure sufficient political support among states for establishing the Special Tribunal, even at the cost of limiting its jurisdiction over those who bear the greatest responsibility.[50] This view is grounded in the assumption that personal immunities shield members of the troika

[48] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, 14 February 2002, ICJ Rep 3, para. 61.

[49] *Ibidem*, para. 54.

[50] K. McInnes, *The Strongman's Clause Article 23(5), the Rule-Based International Order, and Ukraine Tribunal's Troubling Precedent*, Opinio Juris, 1 September 2025, available at: https://tinyurl.com/5fsebetk (accessed 31 March 2026).

only from the exercise of domestic jurisdiction, while such immunities do not apply before international courts. The rationale is that these immunities derive from the principle of sovereign equality of states – a principle that governs inter-state relations but does not extend to international judicial bodies.[51]

A different position is adopted in this article, where it is asserted that Art. 23(5) of the Statute reflects the current state of international law, under which personal immunities apply even before a number of international courts and tribunals. This is particularly the case where such courts have been established by international treaty and exercise jurisdiction over members of the troika from states that are not parties to the founding treaty.[52]

According to the International Court of Justice (ICJ) in *Arrest Warrant of 11 April 2000*, personal immunities may be set aside by "certain" international criminal courts, but the ICJ left the key questions unanswered. It did not clarify what qualifies as such a "certain" international court, why these tribunals can disregard immunities while states cannot and, most importantly, to what extent this applies to officials of non-party states. This ambiguity makes it difficult to unequivocally determine whether treaty-based courts can override immunities of leaders from states that are not parties to those treaties. It is true that the ICJ listed the ICC, a treaty-based court, as an example of "certain" international courts which can set aside personal immunity. However, the ICJ never said that the ICC can do so with regard to nationals of non-party states. On this point, the ICJ offered no clarification. Given the fragmentary nature of the statement – further compounded by its *obiter dictum* character – it is highly problematic to draw a definitive, far-reaching conclusion that a treaty-based tribunal may disregard the immunities of officials from non-member states.[53] In the Jordan Appeal, the ICC Appeals Chamber asserted in strong terms that Art. 27(2) of the Rome Statute represents a "clear rule of customary international law". A closer examination of its reasoning, however, together with subsequent parts of the judgment and the Joint Concurring Opinion, shows that the Chamber ultimately did not base its conclusions on the purported status of customary law. Instead, it leaned primarily on Security Council Resolution 1593.[54] In addition, I have already argued elsewhere in detail that adopting the so-called surrogacy argument would enable

[51] *Ibidem.*

[52] K.J. Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A critical analysis*, 26(1) Journal of Genocide Research 1 (2024).

[53] S. Nouwen, *Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities*, 78(3) Cambridge Law Journal 596 (2019).

[54] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Judgment in the Jordan Referral Re Al-Bashir Appeal), ICC-02/05-01/09-397-Corr, 6 May 2019 (Jordan Appeal judgment), paras. 144–146.

the states to circumnavigate their obligations under international law.[55] While international law can evolve and state practice may eventually give rise to new customary norms, it is not for the courts to create such customs on behalf of states. From the reason stated above, the approach taken by the Art. 23(5) of the Statute is welcomed here as a reflection of the current state of international law.

4. TRIALS IN ABSENTIA

Among the Statute's most distinctive provisions is the rule, set forth in Art. 28, which vests the Special Tribunal with the authority to conduct judicial proceedings *in absentia*. This constitutes a significant departure from the framework established for the ICC under the Rome Statute.[56] Nevertheless, this arrangement reflects the domestic legal framework of Ukraine, whose Criminal Procedure Code permits criminal proceedings to be conducted *in absentia.* Perhaps the most well-known such trial by a Ukrainian court was that against former President of Ukraine Viktor Yanukovych, who fled to Russia after the Maidan protests. Eventually, Yanukovych was found guilty of complicity in the crime of aggression.[57] Ukraine began to employ the mechanism of *in absentia* criminal proceedings on a large scale following the 2022 invasion. This expanding domestic practice has given rise to a number of debates concerning whether the guarantees of a fair trial are fully upheld within the framework of such proceedings.[58] The Special Tribunal's authority to conduct trials *in absentia* was supported by Ukraine, whose representatives have been expecting that its decisions would be recognised and enforced not only by Ukraine, but by the broader international community.[59]

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[55] K. Urbanová, *Relevance of Personal Immunities before Treaty-Based International Criminal Courts*, in: M. Lipovský, P. Šturma (eds.), *Special Judicial Mechanism for the Crime of Aggression Committed against Ukraine*, Brill, Nijhoff: 2025, chapter 6. For opposing opinion *see* Lipovský, *supra* note 46, pp. 213–238.

[56] Art. 63(1) of the Romes Statute provides: "[t]he accused shall be present during the trial."

[57] Kyiv Court of Appeals, Decision of 2 October 2020, Case No. 756/4855/17 (Proceeding No. 11-kp/824/314/2020); I. Marchuk, *Domestic Accountability Efforts in Response to the Russia-Ukraine War. An Appraisal of the First War Crimes Trials in Ukraine*, 20 Journal of International Criminal Justice 787 (2022), p. 791.

[58] Marchuk, *supra* note 57, p. 791. N. Naidiuk, *In absentia: Is Ukraine Upholding the Right to Fair Trial?*, IWPR, 12 December 2025, available at: https://iwpr.net/global-voices/absentia-ukraine-upholding-right-fair-trial; M. Micholson, *Ukraine's Precarious Pursuit of Justice Through* In absentia *Trials*, Lawfare, 18 June 2025, available at: https://tinyurl.com/yn2jehwp (both accessed 31 March 2026).

[59] Prosecutor General's Office, *Statement of Deputy Attorney General Andriy Leshchenko*, 19 September 2025, available at: https://tinyurl.com/bdh8538f. *See also Special Tribunal for the Crime of Aggression against Ukraine: Frequently Asked Questions*, updated 15 May 2026, available at: https://tinyurl.com/bddrd8u (both accessed 15 May 2026).

The possibility of conducting *in absentia* criminal proceedings before international criminal courts and tribunals was expressly incorporated into the Statute of the International Military Tribunal (IMT). Art. 12 of the Statute of the IMT expressly permitted trials *in absentia:*

> [t]he Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.[60]

This provision indicates that the IMT possessed a broad authority to conduct *in absentia* proceedings, not only in situations where the accused could not be located, but also whenever the Tribunal, for any reason, deemed it necessary to do so – thus granting the IMT a notably wide margin of discretion in this regard.

In the proceedings against major Nazi war criminals, the trial of Martin Bormann was conducted *in absentia*, as he had been declared a fugitive and his whereabouts remained unknown throughout the process. In his absence the Tribunal appointed Bormann a counsel, who argued that Bormann was dead; nevertheless, the IMT proceeded to hear the case in his absence and found Bormann guilty of war crimes and crimes against humanity (though not guilty for crimes against peace), and sentenced him to death. The IMT stated that if Bormann was ultimately found alive, the Control Council for Germany would be entitled to take any mitigating circumstances into account and, if appropriate, to reduce his sentence.[61]

Unlike the Statute of the IMT, the Statutes of neither the International Criminal Tribunal for the former Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) authorised the tribunals to conduct trials *in absentia*. To the contrary, both Statutes expressly granted the right of the accused "to be tried in his presence, and to defend himself in person."[62] These provisions were generally

[60] Charter of the International Military Tribunal, annexed to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted and entered into force 8 August 1945), 82 UNTS 279.

[61] The International Military Tribunal, *USA, France, UK, and USSR v. Hermann Wilhelm Goring et al.*, Judgment, 1 October 1946, available at: https://www.legal-tools.org/doc/f41e8b/ (accessed 31 March 2026), pp. 171, 340. More generally *see* Q. Wright, *The Law of the Nuremberg Trial*, 41 American Journal of International Law 38 (1947).

[62] Art. 21(4)(d) of the Statute of the Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, established by UNSC Res 827 (1993), 25 May 1993, as amended; Art. 20(4)(d) of the Statute of the International Criminal Tribunal for Rwanda, established by UNSC Res 995 (1994), 8 November 1994, as amended.

understood as prohibiting trials *in absentia* before the ICTY and ICTR.[63] However, given the persistent difficulties in securing the physical presence of suspects – most notably before the ICTY – both ad hoc tribunals introduced Rule 61 into their respective Rules of Procedure and Evidence (RPE). This rule introduced an exceptional procedural mechanism at the pretrial stage, applicable in situations where an arrest warrant could not be executed. Under the circumstances of Rule 61, the Judge was authorised to order that the indictment be submitted by the Prosecutor to the Trial Chamber. The Prosecutor was allowed to present the evidence before the Trial Chamber, and the Trial Chamber was authorised to confirm the indictment and issue an international arrest warrant.[64] This rule was invoked in practice only by the ICTY, and even then it was predominantly during the early years of its operation, when international cooperation with the Tribunal was still insufficient. The procedure attracted the greatest attention in the case against Karadžić.[65] However, Rule 61 did not result in trials *in absentia* before the ICTY and the ICTR at the trial stage.

As noted above, the Rome Statute does not permit the trial phase to be conducted in the absence of the accused.[66] In the pre-trial stage, the hearing on confirmation of charges may be conducted in the absence of the person being charged,[67] and according to the amended RPE, the Trial Chamber may allow the accused to be present through the use of video technology during the trial and upon their written request.[68] However, none of this amounts to trials *in absentia*.

An exception that significantly differed from the legal framework of contemporary international criminal institutions was the Statute of the Special Tribunal for Lebanon (STL), which expressly allowed for trials *in absentia*. According to Art. 22 of the STL Statute, the STL was authorised to conduct trials *in absentia* if the accused: (i) waived their right to be present, (ii) was not handed over to the Tribunal by the authorities of the concerned state and (iii) absconded or otherwise could be found, and all reasonable steps were taken to secure their appearance.[69] Eventually,

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[63] A. Cassese, *International Criminal Law: Cases and Commentary*, Oxford University Press, Oxford: 2011, p. 392.

[64] M. Gureghian Hall, *Confirmation of Charges* in absentia *at the International Criminal Court and the Right to be Present*, Journal of International Criminal Justice 1 (2026, online first), pp. 3–5.

[65] *Ibidem*.

[66] Art. 63(1) of the Romes Statute. *See also* Pre Trial Chamber II (ICC), *Prosecutor v. Joseph Kony*, Decision on the Prosecution's Request to Hold a Confirmation of Charges Hearing in the Kony case in the Suspect's Absence, ICC-02/04-01/05-466, 23 November 2023, paras. 59–70.

[67] Art. 61(2) of the Rome Statute.

[68] Rule 134bis, ICC, RPE.

[69] *See also* P. Gaeta, *To Be (Present) or Not To Be (Present): Trials in absentia before the Special Tribunal for Lebanon*, 5(5) Journal of International Criminal Justice 1165 (2007); M. Gardner, *Reconsidering*

the main terrorism cases concerning originally five, and later four, alleged perpetrators were held in absentia.[70]

Although trials *in absentia* have been an exception in the practice of international criminal tribunals, such trials are not prohibited under international law.[71] Ukraine is a party to the European Convention on Human Rights. The European Court of Human Rights (ECtHR) held that the accused can waive their right to be present at a trial. However, it must be shown that the waiver is unequivocal,[72] the accused must be aware of the nature of the accusation and the consequences of their absence[73] and the accused must be given the right to have a defence counsel[74] and to a re-trial.[75]

The wording of Art. 28 of the Statute reflects the aforementioned requirements of ECtHR case law, because it authorises the Special Tribunal to conduct proceedings in the accused's absence if the accused unequivocally waives their right to be present and if all reasonable steps have been taken to secure their presence and the interests of justice so require. It also follows from Art. 28(2) of the Statute that the accused must be duly notified of the charges and proceedings, provided with legal representation and given the right to a re-trial unless they accept the judgment. In principle, the Statute therefore complies with the case law of the ECtHR; whether the Special Tribunal truly satisfies these standards shall be seen in its actual practice. Although trials *in absentia* may assist the Special Tribunal's work at a time when it is not factually possible to apprehend suspects, I would argue for a cautious approach to their use. Should the Special Tribunal come to rely predominantly on trials *in absentia*, while any convictions are never followed by the accused being arrested, confidence in criminal accountability and the Special Tribunal's overall effectiveness could be significantly eroded.

Trials in absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence, 43 George Washington International Law Review 91 (2011).

[70] STL, Appeal Chamber, *Prosecutor v Ayyash, Badreddine, Oneissi and Sabra*, Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial in absentia Decision, STL-11-01/PT/AC/AR126.1, 1 November 2012; *Fremuth ML. Prosecutor v. Ayyash et al.* (Special Trib. Leb.), International Legal Materials 2021;60(3), pp. 357–447.

[71] M. Lipovský, *Proceedings in absentia in International Criminal Law and the Mechanism for Accountability for the Crime of Aggression Committed against Ukraine*, in: M. Lipovský, P. Šturma (eds.), *Special Judicial Mechanism for the Crime of Aggression Committed against Ukraine*, Brill, Nijhoff: 2025, p. 204.

[72] ECtHR, *Sejdovic v Italy* [GC] (App. No. 56581/00), Judgment, 1 March 2006, para. 86.

[73] *Ibidem,* para. 99.

[74] *Ibidem,* para. 91.

[75] *Ibidem,* paras. 82-84, ECtHR, *Demebukov v Bulgaria* (App. No. 68020/01), Judgment, 28 February 2008, para. 45; *Sanader v Croatia* (App. No. 66408/12), Judgment, 12 February 2005, para. 78.

CONCLUSION

Although the ICC can exercise jurisdiction over war crimes and crimes against humanity committed on Ukrainian territory, the jurisdictional regime under the Rome Statute prevents the ICC from prosecuting the crime of aggression in the context of Russia's invasion of Ukraine. The Special Tribunal thus emerges as a mechanism intended to fill a critical accountability gap.

The article examined the Special Tribunal's jurisdiction. Its subjectmatter jurisdiction is narrowly defined, ensuring complementarity with the ICC's ongoing proceedings concerning other international crimes. Its territorial and temporal jurisdiction are rather extensive, enabling the Special Tribunal to examine not only conduct related to the fullscale invasion, but also earlier conduct, such as the 2014 annexation of Crimea.

A part of the analysis addressed the contentious issue of personal immunities. The Special Tribunal adopts a model which respects the personal immunities of sitting members of the troika. While this approach has been criticised, the article suggests that it reflects the way immunities operate before treatybased international courts when representatives of nonparty states are involved. The article also explored the Special Tribunal's ability to conduct trials *in absentia*, a feature that distinguishes it from most contemporary international criminal courts. While the mechanism raises concerns about fairtrial guarantees, it was shown that, at least in theory, the Statute reflects the jurisprudence of the ECtHR. Whether the Special Tribunal will be able to meet these standards in practice is yet to be determined.

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LIMITS OF CRIMINAL JURISDICTION IN INTERNATIONAL LAW

Abstract: *Criminal jurisdiction is subject to the norms of international law, which can be divided into treaty and non-treaty norms. Non-treaty norms are vague and have been extensively elaborated. The findings are far from converging. The limits of jurisdiction have been analysed on three levels: legislative jurisdiction, judicial jurisdiction and enforcement jurisdiction. The impact of the following actual or postulated norms on criminal jurisdiction has been examined: the rule of reason, the principle of sovereign equality and its derivative – principle of non-intervention, the principle of equity, the principle of respect for the duty of allegiance, lawful combatant privilege, the principle of proportionality, the prohibition against abuse of rights, the principle of nemo plus iuris ad alium transferre potest quam ipse habet and the principle of responsibility to protect. Research has shown that self-standing limitations on jurisdiction represent a minority of these principles. Judicial and enforcement jurisdiction may also be subject to treaty limitations. The exercise of jurisdiction is subject to other limitations. The international-law limits of criminal jurisdiction are more stringent than in other fields of law.*

Keywords: jurisdiction, sovereignty, equity, criminal jurisdiction, rule of reason

INTRODUCTION

It is beyond doubt that criminal jurisdiction is subject to international regulation.[1] Although much ink has been spilt on the issue of the international-law limits of

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criminal jurisdiction, the most fundamental questions remain unresolved. There is no consensus on whether the norms of international law that restrict criminal jurisdiction are identifiable.[2] Nor have the principles giving rise to such constraints been identified. Despite being extensively elaborated, in particular the list of non-treaty norms limiting jurisdiction remains far from established.[3]

Answers to these questions are expected from penalists. Instead of clear-cut solutions to problems pertaining to their field, they are presented with a vast body of inconsistent literature produced by publicists. This leads penalists to adopt certain selected works as their point of departure; however, this may provide an incomplete picture, leaving any resulting conclusions open to challenges.[4]

The aim of this article is to identify the international-law limits of criminal jurisdiction. Delimiting the precise content of each principle serving as such a limit is not the aim of the study. Identifying the sources of such limits is controversial enough to be given special attention.[5] Despite the controversies, the discussion on the limits of criminal jurisdiction seems not to be heated, which may produce a false image

[1] Permanent Court of International Justice (PCIJ), *The Case of the S.S. Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ (ser. A) No. 10, p. 19; M.N. Shaw, *Prawo międzynarodowe* [International law], Książka i Wiedza, Warszawa: 2011, p. 411; J. Kranz, *Pojęcie suwerenności we współczesnym prawie międzynarodowym* [The concept of sovereignty in contemporary international law], Dom Wydawniczy Elipsa, Warszawa: 2015, pp. 97, 101 and 231; F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111(I) Recueil des Cours. Académie de Droit International 8 (1964), pp. 10–11 and 17; M. Płachta, *Jurysdykcja państwa w sprawach karnych wobec cudzoziemców* [State jurisdiction in criminal matters over foreigners], 1-2 Studia Prawnicze 97 (1992), p. 97; W.S. Dodge, *Jurisdictional Reasonableness under Customary International Law: The Approach of the Restatement (Fourth) of US Foreign Relations Law*, 62 Questions of International Law 5 (2019), p. 6; K.S. Gallant, *International Criminal Jurisdiction. Whose Law Must We Obey?*, Oxford University Press, Oxford: 2022, p. 89; O. Kahn-Freund, *General Problems of Private International Law*, 143(III) Recueil des Cours. Académie de Droit International 165 (1974), p. 177; N. Boister, *An Introduction to Transnational Criminal Law*, Oxford University Press, Oxford: 2018, p. 245.

[2] M. Wasiński, *Jurysdykcja legislacyjna państwa w prawie międzynarodowym publicznym* [Legislative jurisdiction of a state in public international law], 3 Państwo i Prawo 56 (2002), p. 64; Płachta, *supra* note 1, p. 98; L. Gardocki, *Zagadnienia internacjonalizacji odpowiedzialności karnej za przestępstwa popełnione za granicą* [Questions of the internationalisation of criminal liability for crimes committed abroad], Wydawnictwa Uniwersytetu Warszawskiego, Warszawa: 1979, p. 26. Lech Gardocki's views evolved. *Cf.* L. Gardocki, *The Principle of Universality*, 76 Nordisk Tidsskrift for Kriminalvidenskab 57 (1989), p. 61. *See also* J. Piskorski, *Odpowiedzialność karna cudzoziemców w Polsce* [Criminal liability of aliens in Poland], Dom Wydawniczy ABC, Warszawa: 2003, pp. 105 and 111.

[3] Mann, *supra* note 1, p. 127.

[4] This can be illustrated by a monograph by Dominik Zając, in which he relies on the view that criminal jurisdiction is limited by the rule of reason, whose status is questioned in this article. D. Zając, *Odpowiedzialność karna za czyny popełnione za granicą* [Criminal liability for acts committed abroad], Krakowski Instytut Prawa Karnego, Kraków: 2017, pp. 89–111 and 231–271.

[5] These controversies can be illustrated by the fact that among publications of international reach there are statements suggesting that territory or territory together with personality are the only permitted bases of jurisdiction. *See* C. Staker, *Jurisdiction*, in: M.D. Evans (ed.), *International Law*, Oxford University Press, Oxford: 2014, p. 315. Others include more bases as recognised connection factors. *See* Gallant,

of unanimity. The method of the study was to organise and supplement scholarly and judicial statements on the subject matter. The first section provides a definition of jurisdiction, while the second draws attention to the distinction between treaty and non-treaty norms on jurisdiction. Subsequent sections briefly discuss the principles coming into play as sources of limitations on criminal jurisdiction. The findings are then synthesised in the summary. Customary norms of international law relating to immunities are included in the conclusions of the research. They are not given separate attention in the research section due to the lack of controversy over the fact that they limit judicial jurisdiction.

1. THE CONCEPT OF JURISDICTION

In contemporary approaches, the concept of state jurisdiction is seen as the capacity to independently regulate, by means of law, the situation of subjects, objects or events subject to the authority, taking into account international-law obligations.[6] It is sometimes stressed that an action of a state, in order to constitute an act of exercising jurisdiction, must be recognised as such by other subjects of international law.[7]

Publicists distinguish between three categories of jurisdiction:

1. legislative jurisdiction (*compétence législative*), comprising the legislative competence of the state;
2. judicial jurisdiction (*compétence judiciaire*), encompassing the competence of the judicial authorities to interpret the law and to decide on the legal situation of individuals; and
3. enforcement jurisdiction (*compétence exécutive*), which includes the use of coercion to enforce the obligations imposed upon individuals.[8]

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supra note 1, pp. 27, 143, 307 and 551-552. There are also approaches in which no nexus is required (due to the claimed freedom to exercise jurisdiction). *See* Gardocki (*The principle*), *supra* note 2, pp. 58–60.

[6] Kranz, *supra* note 1, p. 30. *See also* Mann, *supra* note 1, p. 9; Płachta, *supra* note 1, p. 97; Gallant, *supra* note 1, p. 6; Shaw, *supra* note 1, p. 410.

[7] W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, Harvard University Press, Cambridge: 1942, pp. 81–83.

[8] T. Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* [The principle of universal jurisdiction in international law], EuroPrawo, Warszawa: 2008, p. 20; L. Chen, *An Introduction to Contemporary International Law. A Policy-Oriented Perspective*, Yale University Press, New Haven: 1989, p. 234; K. Wierczyńska, *Przesłanki dopuszczalności wykonywania jurysdykcji przez Międzynarodowy Trybunał Karny* [Conditions of the admissibility of exercising jurisdiction by the International Criminal Court], Scholar, Warszawa: 2016, p. 18; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public international law. Systemic questions], CH Beck, Warszawa: 2014, p. 291; Shaw, *supra* note 1, pp. 413–414; Staker, *supra* note 5, pp. 312–313; M. Akehurst, *Jurisdiction in International Law*, 46 The British Yearbook of International Law 145 (1972–1973), p. 145; Kahn-Freund, *supra* note 1, pp. 165–166; Cook, *supra* note 7, p. 71; Dodge, *supra* note 1, pp. 6–7; Gallant, *supra* note 1,

Some scholars omit legislative[9] or enforcement jurisdiction.[10]

Having discussed the concept of jurisdiction, it is necessary to reflect on how international law shapes the framework within which jurisdiction operates. There are two clashing views on that matter. The first holds that a state can establish and exercise jurisdiction at will, and that the role of public international law is to set the limits and exercise of jurisdiction. According to the second view, public international law is the source of a state's power to exercise jurisdiction in cases with a cross-border element.[11] Both approaches are theoretically possible.

In fact, states, acting through their leaders, do not regard jurisdiction as having been conferred on them by public international law. States act as creators of international law, not vice versa.[12] The Permanent Court of International Justice, in its judgment of 7 September 1927 in the *Lotus* case, favoured the former view. Given the historical development of international law, despite the harsh criticism this judgment has been subjected to,[13] one has to agree that the view taken in the *Lotus* judgment reflects the state of the law, which has remained unchanged since the judgment was delivered.[14] International practice also favours the view that states have the freedom to shape the scope of their competences – i.e. in international relations there is no international legal principle of legalism (understood as the requirement to act on a legal basis).[15] In consequence, a state is allowed to do anything that is not prohibited by international law.[16]

The limits of jurisdiction should be distinguished from restrictions on the exercise of jurisdiction.[17] The latter do not deprive a state of jurisdiction; they may result from a state's international obligations to refrain from exercising jurisdiction or to transfer part of its competences.

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pp. 7 and 16–17; C. Ryngaert, *Jurisdiction in International Law*, Oxford University Press, Oxford: 2015, pp. 9–10; Wasiński, *supra* note 2, p. 57.

[9] *Юрисдикция государства* [State jurisdiction], in: B.M. Klimenko, V.F. Petrovskij, J.M. Rybakov (eds.), *Словарь международного права* [Dictionary of international law], Международные Отношения, Москва: 1982, pp. 232–233.

[10] Chen, *supra* note 8, p. 234; Staker, *supra* note 5, pp. 312–313. *Cf.* Płachta, *supra* note 1, p. 97.

[11] Ryngaert, *supra* note 8, pp. 29–30 and 128–129; Gallant, *supra* note 1, p. 67.

[12] *See* Gallant, *supra* note 1, pp. 67–68.

[13] Ryngaert, *supra* note 8, p. 34.

[14] Gallant, *supra* note 1, p. 69; Ryngaert, *supra* note 8, p. 33.

[15] Gardocki (*The principle*), *supra* note 2, pp. 58-60; Gallant, *supra* note 1, p. 68.

[16] *See* W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie* [Public international law in outline], Wolters Kluwer Polska, Warszawa: 2017, p. 143.

[17] Jerzy Kranz distinguished limits to competence and limits to the exercise of competence – J. Kranz, *Suwerenność państwa i prawo międzynarodowe* [Sovereignty of a state and international law], in: W.J. Wołpiuk (ed.), *Spór o suwerenność* [Dispute over sovereignty], Wydawnictwo Sejmowe, Warszawa: 2001, pp. 108–109 and 133; Kranz, *supra* note 1, p. 110.

The constraints imposed on jurisdiction by prohibitive norms of international law tend to be imprecise. They are only exceptionally a treaty matter.[18] They primarily stem from customary law and general principles of law.[19] Expressions of the consensual practice of states and *opinio iuris*, necessary for forming a customary law norm, consist of diplomatic protests[20] and other forms of traditional international practice, including treaties and notes, exchanged in connection with the consular notification procedure.[21] It has also been submitted that acts of internal practice may also be a means of ascertaining customary norms of international law.[22]

2. TREATY AND NON-TREATY NORMS

Norms of international law governing criminal jurisdiction can be categorised into treaty and non-treaty norms. This section outlines the distinct characteristics of both categories.

The development of treaty jurisdictional provisions varies depending on the field of law.[23] In criminal law, they do not form a coherent system. Mostly, they oblige states to place certain matters within the scope of their judicial jurisdiction.[24] Such norms derive from international agreements to supress crime of international concern or to cooperate in criminal matters.[25] These conventions often contain an *aut dedere aut iudicare* clause, which obliges signatories to exercise judicial jurisdiction.[26] The limitations of jurisdiction are found in immunity treaties, status of forces agreements (SOFAs; international agreements on the legal status of one state's armed forces stationed in the territory of another), treaties conferring on international organisations and judicial bodies exclusive jurisdiction in certain matters and conventions on the law of the sea conferring on flag states exclusive

[18] Kranz, *supra* note 1, p. 103.

[19] Research in International Law under the Auspices of the Faculty of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29(3) American Journal of International Law 437 (1935), p. 444.

[20] Akehurst, *supra* note 8, p. 176; Z. Cybichowski, *Międzynarodowe prawo karne. Kompetencja sądów do ścigania przestępstw zagranicznych* [International criminal law. The competence of courts to prosecute foreign crimes], Wydawnictwo Seminarjum Prawa Publicznego (Państwowego i Międzynarodowego) Uniwersytetu Warszawskiego, Warszawa: 1927, p. 42.

[21] Gallant, *supra* note 1, pp. 113–115.

[22] Ibidem, pp. 28 and 101–113. In 1984 Frederick Alexander Mann pointed out that material of international origin for the study of jurisdictional state practice is extremely scarce, while material of intrastate origin is vast. F.A. Mann, *The Doctrine of Jurisdiction Reconsidered after Twenty Years*, 186 Recueil des Cours. Académie de Droit International 9 (1984), p. 53.

[23] Ryngaert, *supra* note 8, p. 145–146.

[24] They also contain provisions providing for the optional criminalisation of certain acts. Boister, *supra* note 1, p. 250.

[25] Gallant, *supra* note 1, pp. 86 and 522–523.

[26] *Ibidem*, pp. 583-584; Ryngaert, *supra* note 8, pp. 123 and 125.

judicial and enforcement jurisdiction over criminal and disciplinary matters relating to incidents on the high seas.[27] All these provisions limit judicial jurisdiction. Only SOFAs could theoretically limit legislative jurisdiction at the same time, though they do not so in practice.

Restrictions on jurisdiction are not created by treaties conferring on international organisations competence over matters that previously belonged to state jurisdiction. The transfer of competence only results in a change of its holder, without affecting its scope. Such transfer is revocable.[28] Thus, it is called "delegation", "entrustment" or "conferral".[29] It is a limitation on the exercise of jurisdiction by the entity which transfers its competence. The two preceding paragraphs demonstrate that there are no treaty restrictions on legislative jurisdiction.

Non-treaty norms of international law which limit jurisdiction form a narrow set, composed of customary norms and general principles of law. Conversely to treaty norms, they are mostly prohibitive.[30] Before they are discussed individually, separate attention should be paid to the attempts to pack international non-treaty limitations of jurisdiction into a single customary norm of international law.

3. THE RULE OF REASON

Such an attempt has been the postulated principle referred to as the "rule of reason". As demonstrated in this section, the rule of reason dominated the discourse on the limits of criminal jurisdiction over the last 50 years. It was based on the assumption that international law determines which state has jurisdiction in each case. This principle was discussed almost exclusively in the context of legislative jurisdiction.[31] The rule of reason was sometimes distinguished from the "principle of genuine connection".[32] In practice, the application of these two principles did not differ. Under the rule of reason, jurisdiction was to be vested in the state that had a direct connection with and a sufficiently important interest in the facts in question.[33] This general standard was supplemented by a general test of close connection,[34] or detailed criteria to determine the relative importance of the connections

[27] Art. 11 of the Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962), 450 UNTS 11, and Art. 97 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3.

[28] Kranz, *supra* note 1, p. 216.

[29] *Ibidem*, p. 213.

[30] Ryngaert, *supra* note 8, p. 22.

[31] Dodge, *supra* note 1, p. 7.

[32] Gallant, *supra* note 1, pp. 539–548.

[33] Mann, *supra* note 1, pp. 49 and 83. *Cf.* Mann, *supra* note 22, pp. 24, 29 and 31.

[34] Mann, *supra* note 1, p. 126.

between the states concerned and a given field or individual facts. The proposed lists of connecting factors were neither exhaustive nor fixed. Some authors favoured well-established nexuses and were cautious about non-specific nexuses affected by political conditions.[35] A criminal-law variant of such a list has also been elaborated:

1. the act being committed within the territory of a state or its direct effect occurring in that territory;
2. the relationship between the offender and the victim state;
3. the nature of the offence, particularly its impact on the state;
4. the extent to which the act in question is criminalised in other countries and the prevalence of such a regulation;
5. the type of legal interests infringed or threatened by the offence;
6. the criminal regulation's relevance to the international political, legal and economic system;
7. the regulation's conformity with the traditions of the international legal system; and
8. the extent to which another state may have an interest in regulating the same act.[36]

This method has been referred to as "jurisdictional balancing",[37] "interest balancing",[38] "weighing of interests", "balancing of interests"[39] and so on.[40]

The rule of reason gained popularity.[41] In 1987, the American Law Institute published the *Restatement (Third) of the Foreign Relations Law of the United States*.[42] Section 403 laid out the principle of jurisdictional reasonableness.[43] The drafters of the Restatement (Third) took the position that it was a norm of public international law.[44] Nonetheless, no practice of states other than the United States of

[35] Mann, *supra* note 22, pp. 20 and 91.

[36] Płachta, *supra* note 1, pp. 117–118.

[37] Shaw, *supra* note 1, p. 437.

[38] J.H. Knox, *A Presumption Against Extrajurisdictionality*, 104(3) American Journal of International Law 351 (2010), p. 361; H.L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57(3) American Journal of Comparative Law 631 (2009), p. 646.

[39] A.V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34(4) International and Comparative Law Quarterly 724 (1985), pp. 730–731.

[40] Płachta, *supra* note 1, p. 117.

[41] Chen, *supra* note 8, p. 249. The balancing method gained the approval of the Supreme Court of the United States in *Lauritzen v. Larsen* [1953], 25 May 1953, 345 U.S. 571, pp. 582, 583 and 586.

[42] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, Philadelphia: 1987.

[43] Ryngaert, *supra* note 8, p. 146.

[44] Dodge, *supra* note 1, p. 5; Buxbaum, *supra* note 38, p. 648.

America was cited in support of this principle, and the cited practice of American courts was limited to rulings recognising the rule of reason as a comity requirement.[45]

The rule of reason has met with international criticism.[46] It has been also opposed within the United States of America.[47] The doctrine of jurisdictional balancing was ultimately rejected by American courts.[48]

In 2018 the American Law Institute published the *Restatement (Fourth) of the Foreign Relations Law of the United States*.[49] The Restatement (Fourth) frames the rule of reason as a requirement that the regulating state has a genuine connection to the subject matter.[50] However, it does not seem to posit the principle as a norm of international law, but as a guideline to assess the lawfulness of exercising jurisdiction.[51] The fact that it is no longer recognised as a norm of international law has met with the approval of scholars.[52]

To sum up, the rule of reason is not a norm of international law.[53] The paucity of state practice and the lack of *opinio iuris* relating to it lead to the conclusion that it is impossible to distinguish a customary norm of international law that would subject the jurisdictional claims of states to the requirement of reasonableness.[54] Moreover, from a historical perspective, it seems that the attempt to make the rule of reason a norm of international law has failed. Despite its proclamation, the judicial organs of states have not adhered to it in a unanimous sense of legal obligation.[55]

A careful analysis of the literature uncovers views resembling residual forms of the rule of reason, so it persists in the international discourse. The widespread view remains that a state cannot exercise jurisdiction over facts with which it has no

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[45] Dodge, *supra* note 1, p. 9; Ryngaert, *supra* note 8, p. 167.

[46] E.J. de Arechaga, *Современное международное право* [Contemporary international law], Прогресс, Москва: 1983, pp. 271-274; Shaw, *supra* note 1, pp. 439–440.

[47] *See* Ryngaert, *supra* note 8, pp. 167 and 185; Lowe, *supra* note 39, pp. 730–731 and the literature cited therein. *See also* Buxbaum, *supra* note 38, p. 648; Knox, *supra* note 38, p. 380; Gallant, *supra* note 1, pp. 287 and 547.

[48] Shaw, *supra* note 1, pp. 437–438; *McCulloch v. Sociedad Nacional de Marineros de Honduras* [1963], 18 February 1963, 372 U.S. 10, p. 19; *Laker Airways Ltd v. Sabena, Belgian World Airlines* [1984], 6 March 1984, 731 F2d 909, pp. 948–955; *Hartford Fire Ins Co v. California* [1993], 28 June 1993, 509 U.S. 764, pp. 797–798; *F Hoffman-La Roche v. Empagran SA* [2004], 14 June 2004, 542 U.S. 155, p. 164.

[49] American Law Institute, *Restatement of the Law (Fourth), The Foreign Relations Law of the United States*, Philadelphia: 2018.

[50] Dodge, *supra* note 1, pp. 6, 12, 15–16 and 18.

[51] *Ibidem*, pp. 12–13.

[52] Gallant, *supra* note 1, p. 287, fn 595.

[53] *See* Ryngaert, *supra* note 8, pp. 180–181. Ryngaert claims that more specific general principles of law than the rule of reason can be distinguished in the field of jurisdiction. And the rule of reason has not yet been fully formed (pp. 184–187).

[54] Ryngaert, *supra* note 8, pp. 143 and 182; Dodge, *supra* note 1, p. 13; Gallant, *supra* note 1, p. 536.

[55] Dodge, *supra* note 1, p. 10. *Cf.* Gallant, *supra* note 1, pp. 570–571.

internationally recognised connecting factor.[56] It is also argued that the connecting factors – on which the principles of territoriality, nationality, protective, passive nationality and universal jurisdiction are based – are so firmly established in state practice that they themselves form a collective norm of international law setting the limits of the permissible exercise of jurisdiction.[57]

This view stands in contradiction to the state of international law pronounced in the *Lotus* case. It would lead to the conclusion that, in the field of jurisdiction, everything which is not expressly permitted to a state is prohibited. It also raises the question of whether atypical nexuses that may be devised in future will be compatible with international law. Such a prohibition would stifle the development of international law in the field of jurisdiction.[58]

It should be concluded that there is no single customary norm in international law that prohibits a subject of international law from exercising jurisdiction beyond the cases of recognised connecting factors. Having ascertained that there is no single norm of international law encompassing all limitations on criminal jurisdiction stemming from it, it is now time to discuss the individual norms that come into play as sources of constraints on jurisdiction.

4. THE PRINCIPLE OF THE SOVEREIGN EQUALITY OF STATES AND THE PRINCIPLE OF NON-INTERVENTION

The principle of the sovereign equality of states appears under this name in Art. 2(1) of the Charter of the United Nations.[59] Jerzy Kranz notes that this name is misleading: the content of the principle would be better captured by the name "equal sovereignty".[60] State sovereignty itself is not a legal norm, but an object of protection of public international law.[61]

The principle of the sovereign equality of states consists of the obligation to treat all states as equal, the recognition that each state enjoys full sovereignty and the obligation to respect their legal personality, territorial integrity and

[56] Staker, *supra* note 5, p. 315; Gallant, *supra* note 1, pp. 541–543. *See also* Kranz, *supra* note 1, p. 32.

[57] Gallant, *supra* note 1, p. 26, fn 97, pp. 27, 143, 307 and 551–552. *See also* Ryngaert, *supra* note 8, p. 35.

[58] W. Meng, *Neuere Entwicklungen im Streit um die Jurisdiktionshoheit der Staaten im Bereich der Wettbewerbsbeschrängungen*, 41 Zeitschrift für Ausländisches Offentliches Recht und Völkerrecht 469 (1981), p. 471.

[59] United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS xvi.

[60] Kranz, *supra* note 17, pp. 104-105 and 139-140; Kranz, *supra* note 1, pp. 81 and 230; J. Kranz, *Państwo i jego suwerenność* [The state and its sovereignty], 7 Państwo i Prawo 3 (1996), p. 5.

[61] R. Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym* [State sovereignty. Reconstruction and significance of the idea in international law], Zakamycze, Kraków: 2004, p. 146; Kranz, *supra* note 1, pp. 50, 89 and 227–228; Kranz, *supra* note 60, p. 24.

political independence.[62] It is expressed in the Latin maxim "*par in parem non habet imperium*".

It is essential to reflect on how the principle of sovereign equality could limit jurisdiction. One can encounter reasoning that derives from the sovereign equality of states a thesis that the limits and exercise of state competence are set by the competences of other states.[63] In fact, the competences of many states may overlap. The thesis that the external manifestations of sovereignty find their limits in the sovereignty of other states seems to put it better.[64] Similar statements are also encountered in the context of criminal jurisdiction. It is argued that states, when determining the territorial scope of their own criminal laws, cannot leave them unlimited; they must respect the sovereignty of foreign states.[65]

The principle of sovereign equality of states has its derivatives. One of them is the prohibition against exercising authority in the territories of other states without their consent.[66] Acts of exercising jurisdiction cannot be performed on foreign territory except under a convention or customary norm permitting it.[67] This principle operates primarily at the level of enforcement jurisdiction. The prohibition against a state enforcing its law in foreign territory is strongly emphasised in both jurisprudence and literature.[68] For the sake of clarity it should be noted that mere legislation or adjudication is not tantamount to enforcement.

The customary norm discussed in the preceding paragraph is not coextensive with the principle of non-intervention, another customary rule. It stems from the obligation to respect the legal personality of each state. It prohibits intervention; intervention under international law is *ex definitione* illegal.[69] It consists of another state exerting pressure that interferes with the exercise of exclusive competence, involving the use or the threat of using armed force or disproportionate non-military coercive measures without entitlement in international law.[70] An intervention

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[62] Góralczyk & Sawicki, *supra* note 16, p. 147.

[63] Kranz, *supra* note 1, pp. 101 and 231.

[64] Kwiecień, *supra* note 61, p. 146.

[65] B. Kunicka-Michalska, *Art. 5*, in: G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General part. A commentary], CH Beck, Warszawa: 1999, pp. 313–314.

[66] Kwiecień, *supra* note 61, p. 146. *See* PCIJ, *Island of Palmas Case (Netherlands v. USA)*, Award, 4 April 1928, 2 RIAA 829, pp. 829 and 838.

[67] PCIJ, *The Case of the S.S. Lotus (France v. Turkey)*, pp. 18–19.

[68] *Ibidem*; R.Y. Jennings, *General Course on Principles of International Law*, 121(II) Recueil des Cours. Académie de Droit International 323 (1967), p. 516; Dodge, *supra* note 1, p. 7; Shaw, *supra* note 1, p. 414; Gallant, *supra* note 1, p. 20; A. Chase, *Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice*, 11(3) The International Lawyer 555 (1977), p. 556; P.C. Jessup, *Transnational Law*, Yale University Press, New Haven: 1956, p. 59; Boister, *supra* note 1, pp. 3 and 281; Buxbaum, *supra* note 38, p. 664.

[69] Kranz, *supra* note 1, pp. 142 and 233.

[70] Kranz, *supra* note 17, p. 127; Kranz, *supra* note 1, 143; Kranz, *supra* note 60, p. 22.

need not have a tangible effect; pressure itself may amount to an intervention.[71] An attempt to influence legal relations in another state may be considered a violation of that state's sovereignty.[72] More precisely, it can be read as challenging the exclusive nature of that state's competence.[73] An action amounts to an intervention only if it usurps the sovereign authority of another state.[74] It is therefore too far-fetched to claim that one state's attempts to legislate with regard to persons residing in another state infringe on the right of that state to exercise jurisdiction over those persons in its own territory.[75]

The principle of sovereign equality and its derivative, the prohibition against intervention, are real limits of jurisdiction. Firstly, they limit the scope of jurisdiction, protecting competences linked to the essence of statehood and forming the reserved domain (*domaine réservé*). Secondly, they exclude the possibility of legislating and applying law to such an extent that the acts of lawmaking or application would constitute a disproportionate measure of non-military coercion or could influence the situation in that state.[76] Thirdly, by establishing a prohibition against exercising public authority in the territory of other states, they prohibit performing official acts there.[77]

5. THE PRINCIPLE OF EQUITY

Another principle which is sometimes said to be an international-law limit on jurisdiction is the principle of equity.[78] It is argued that the principle of equity in international law operates as a general principle of law.[79] The concept of equity in international jurisprudence is found in disputes over the delimitation of the continental shelf, over the use of waters of boundary rivers and over compensation, providing a guideline in awarding an appropriate sum whenever the extent of the damage cannot be accurately determined.[80] However, the claim that the principle

[71] Kranz, *supra* note 1, p. 144.

[72] Gallant, *supra* note 1, p. 293.

[73] Kranz, *supra* note 1, p. 132.

[74] Akehurst, *supra* note 8, p. 146.

[75] *Cf.* Staker, *supra* note 5, p. 315.

[76] *See* Ryngaert, *supra* note 8, p. 194.

[77] *Cf. Ibidem*, pp. 154–156.

[78] Zając, *supra* note 4, pp. 99-102; Ryngaert, *supra* note 8, p. 157.

[79] Czapliński & Wyrozumska, *supra* note 8, p. 138; Zając, *supra* note 4, pp. 99–100; Ryngaert, *supra* note 8, pp. 157–158.

[80] Czapliński & Wyrozumska, *supra* note 8, pp. 138-142. *See* ICJ, *Continental Shelf Case* (*Case Concerning the Coninental Shelf, Tunisia v. Libyan Arab Jamahiriya*), Judgment, 24 February 1982, ICJ Rep 1982, pp. 57–61, paras. 66–72; *North Sea Continental Shelf Cases*, Judgement, 20 February 1969, ICJ Rep 1969, p. 3; *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda –*

of equity is a norm of public international law should be taken with caution. The usage of the concept of equity shows that it is substantially influenced by the concept of equity in common-law legal orders.

The equity system in common-law legal orders has traditionally been a normative system separate from positive law. The characteristic features of the equity system are its separation from strictly understood law (common law), the aim of ensuring that the legal system is both operative and fair, the discretionary nature of decisions taken on the basis of equity,[81] the protection of good faith derived from the protection of good conscience,[82] the absence of protection of bad faith (unconscionability),[83] flexibility,[84] the creation of legal titles that do not derive from common law[85] and the subordination to certain guiding principles, expressed in the form of maxims of equity. Notable maxims of equity include "those who seek equity must do equity",[86] "those who come to equity must come with clean hands",[87] "equity treats as done that which ought to be done",[88] "equity follows the law",[89] "equity will not assist a volunteer",[90] "equity is equality",[91] "equity looks to substance rather than form"[92] and "where the equities are equal, the first in time shall prevail."[93]

Thus, if the term *equity* appears in an English-language text on international law, one needs to reflect on the essence of the concept the author has in mind. Some authors make it clear that they are referring to the concept of equity as it is understood in the common-law tradition.[94] Posing the question of whether equity is part of the law, describing the relation between equity and the law,[95] treating

Reparations, Judgment, 9 February 2022, ICJ Rep 2022, p. 13; PCIJ, *Case Relating to the Diversion of the Water From the Meuse (Netherlands v. Belgium)*, Judgment, 28 June 1937, PCIJ (ser. A/B) No. 70, p. 3.

[81] R. Edwards, N. Stockwell, *Trusts and Equity*, Pearson, Harlow: 2004, p. 4; P.S. Davies, G. Virgo, *Equity & Trusts. Text, Cases, and Materials*, Oxford University Press, Oxford: 2019, p. 6–7.

[82] Including in particular a "bona fide purchaser for value without notice". Edwards & Stockwell, *supra* note 81, p. 4.

[83] Davies & Virgo, *supra* note 81, pp. 7–8.

[84] There is a contemporary tendency to give equity even greater flexibility. *See* M. Yip, J. Lee, *The Commercialisation of Equity*, 37(4) Legal Studies 647 (2017), pp. 668–671.

[85] For an overview of equitable rights *see* Davies & Virgo, *supra* note 81, pp. 11–15.

[86] *Ibidem*, pp. 15–16.

[87] *Ibidem*, pp. 16–17.

[88] *Ibidem*, pp. 17–18.

[89] *Ibidem*, pp. 18–19.

[90] *Ibidem*, p. 19.

[91] *Ibidem*, pp. 19–21.

[92] *Ibidem*, p. 21.

[93] *Ibidem*, pp. 21–22.

[94] A. Cassese et al., *Cassese's International Law*, Oxford University Press, Oxford: 2020, p. 197.

[95] *Ibidem*, pp. 197–198; R. Lapidoth, *Equity in International Law*, 81 Proceedings of the Annual Meeting (American Society of International Law) 138 (1987), pp. 138 and 143–144; V. Lowe, *The Role of Equity in International Law*, 12 Australian Year Book of International Law 54 (1988); S.K. Chattopadhyay, *Equity*

equity as a judicial tool for correcting positive law,[96] referring to a number of principles within equity ("equitable principles" or "principles of equity"),[97] ascribing equity the task of preventing injustice and filling gaps[98] or referring to maxims of equity developed in common-law culture[99] all suggest that an author is discussing a concept rooted in the common-law tradition of equity.

The concept of equity in the culturally conditioned sense of the term used herein occurs frequently in the international literature, leaving its mark on it. This has important implications for readers. Firstly, understood in this way, equity is not a legal norm but a system of certain general principles. Secondly, equity does not have a predetermined content, but is rather a way of resolving disputes, characterised by flexibility and discretion.[100] Thirdly, the influence of the common-law notion of equity on the concept of equity in international law cannot be determined precisely. It was therefore rightly concluded that the concept of equity in international law is subject to such divergent interpretations that an analysis of the concept can serve as a warning of how dangerous it is to assume that a given term in international law necessarily has one fixed meaning.[101]

It should be assumed that there is no settled "principle of equity" in international law. Nonetheless, the concept of equity functions in international legal theory and practice. It denotes a set of general principles and guidelines performing supportive, complementary and corrective functions in international law for interpretation and dispute resolution. As such, it always refers to other legal concepts and norms.[102] The view that equity forms part of international law in the same way that considerations of morality, conscience and good faith form part of the internal

in International Law: Its Growth and Development, 5(2) Georgia Journal of International and Comparative Law 381 (1975), p. 382; PCIJ, *Case Relating to the Diversion of the Water From the Meuse (Netherlands v. Belgium)*, Individual Opinion of Hudson, 28 June 1937, PCIJ (ser. A/B) No. 70, pp. 76–78.

[96] Lapidoth, *supra* note 95, p. 139; M.W. Janis, *The Ambiguity of Equity in International* Law, 9(1) Brooklyn Journal of International Law 7 (1983), pp. 19–20 and 22; Cassese et al., *supra* note 94, p. 198; Lowe, *supra* note 95, pp. 74 and 79.

[97] Lapidoth, *supra* note 95, pp. 139 and 142; Janis, *supra* note 96, pp. 9–11, 13–15, 18, 20–23, 25–26, 28–29 and 31; Cassese et al., *supra* note 94, pp. 197–198; Lowe, *supra* note 95, pp. 61, 72–75 and 80–81; A. Bufalini, *Remarks on the role of equity in determining war reparations before the International Court of Justice*, 95 Questions of International Law 25 (2022), pp. 25-42; Chattopadhyay, *supra* note 95, pp. 383–394, 387–397, 399–402 and 404–405; ICJ, *North Sea Continental Shelf Cases*, p. 3.

[98] Lapidoth, *supra* note 95, p. 147; Lowe, *supra* note 95, pp. 56, 58, 61–63, 69; Chattopadhyay, *supra* note 95, pp. 387, 389 and 397.

[99] Janis, *supra* note 96, p. 11, fn 13; Lowe, *supra* note 95, p. 80.

[100] This understanding of equity was apparent in: ICJ, *North Sea Continental Shelf Cases*, p. 3, para. 93.

[101] Janis, *supra* note 96, p. 7.

[102] Lowe, *supra* note 95, p. 79.

laws of states[103] seems apposite. The grounds for believing that equity constitutes a general principle of law (within the meaning of Art. 38(1)(c) of the Statute of the International Court of Justice) seem too tenuous. Determining the content of such a principle would raise insurmountable obstacles.

The concept of equity cannot alone *in abstracto* limit the scope of state jurisdiction, for two reasons. Firstly, it always refers to the interpretation or application of other norms of international law. Secondly, the concept is by its very nature imprecise. It is difficult to derive any intelligible limitation from it in isolation of individual cases. The concept of equity may interact with the prohibitive norms of international law limiting jurisdiction by shaping their scope and influencing decisions on the exercise of jurisdiction in individual cases.

6. CUSTOMARY NORMS OF INTERNATIONAL LAW OF ARMED CONFLICT

Some customary norms of international law of armed conflict are also invoked as limitations of legislative jurisdiction (and consequently, judicial and enforcement jurisdiction). One of them is a customary norm of international law that an alien must not be required to betray the state of which they are a national or to render active service, especially military service, against that state.[104] This principle stems from the duty of allegiance of a citizen to their home state, recognised by international law. This principle is codified in the Geneva Conventions. The Conventions protect residents of occupied territories from being compelled to serve in the armed or auxiliary forces of the occupying power. Prisoners of war and civilians are protected against compulsory work other than that listed in the Conventions.[105] This principle is a limitation of jurisdiction. It excludes lawmaking within a specific scope.

Another limitation arises from the lawful combatant privilege. According to this norm, a soldier in an international armed conflict on enemy territory is not bound by the criminal law of the enemy state as long as the soldier complies with the international law of armed conflict. This principle applies primarily to conduct related to the hostilities, such as killing, causing a serious danger or destroying property. It

[103] H. Lauterpacht, *General Rules of the Law of the Peace*, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Cambridge University Press, Cambridge: 1978, p. 257. *See also* Lowe, *supra* note 95, p. 55.

[104] Gallant, *supra* note 1, p. 341.

[105] Art. 50 of the Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 135; Arts. 40 and 51 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287.

does not apply to non-international armed conflicts.[106] This norm also excludes the jurisdiction of the state to regulate within a specific scope, related to armed conflict.

7. THE PRINCIPLE OF PROPORTIONALITY

Another principle – purportedly a norm of international law limiting state jurisdiction – is the principle of proportionality.[107] To analyse the content of the principle of proportionality, it must be stated what should be proportionate in relation to what. It has been proposed in the context of jurisdiction that the rule of proportionality requires that regulation should be proportionate in relation to needs (implying that it is the relation of regulation to needs which constitutes the relationship which should be marked with proportionality).[108] The validity of such a customary norm of international law would imply that international law controls the exercise of a state's legislative jurisdiction in terms of expediency. This would constitute a denial of state political independence. Another proposed relationship is that between interference in the internal affairs of another state and its interests.[109] In this view, proportionality merely further defines the rule of non-intervention and does not create an independent principle of law.

It has been noted that the principle of proportionality has so far played a minor role in international law. The principle has never been applied in international legal practice in the field of jurisdiction. It is denied the status of a general principle of international law.[110] It has gained a specific meaning in European Union law, however.

To summarise, the requirement of proportionality shapes the content of the principle of non-intervention. In European Union law, the principle of proportionality, together with the principle of subsidiarity, limits the exercise of jurisdiction by the Union and, to the extent covered by European Union law, by the Member States.[111]

8. THE PROHIBITION AGAINST ABUSE OF RIGHTS

The prohibition against abuse of rights (*abus de droit*) is another norm invoked as a source of limits to state jurisdiction.[112] It is also cited as the prohibition against

[106] Gallant, *supra* note 1, p. 342.

[107] Zając, *supra* note 4, pp. 102–103; Ryngaert, *supra* note 8, pp. 158–159; Boister, *supra* note 1, pp. 248–249.

[108] Zając, *supra* note 4, p. 103.

[109] Ryngaert, *supra* note 8, pp. 158–159; Wasiński, *supra* note 2, p. 64.

[110] Ryngaert, *supra* note 8, pp. 158–159.

[111] J. Maśnicki, in: A. Łazowski, A. Zawidzka-Łojek (eds.), *Podręcznik prawa Unii Europejskiej. Instytucje i porządek prawny. Prawo materialne* [Textbook of European Union law. Institutions and legal order. Substantive law], Instytut Wydawniczy EuroPrawo, Warszawa: 2018, pp. 30 and 33–36.

[112] Zając, *supra* note 4, pp. 104–105.

abuse of competence (*détournement de pouvoir*).[113] It is regarded as a general principle of law. With regard to state jurisdiction, the prohibition against abuse of rights refers primarily to abuses of the freedom to exercise jurisdiction, as articulated by the Permanent Court of International Justice in the *Lotus* judgment.[114]

The prohibition on abuse of rights shapes the prohibition against intervention,[115] but its role is undoubtedly not limited to this. In the field of jurisdiction, enacting a law aimed at causing harm to another state without serving any legitimate interest is considered an abuse of the freedom to exercise legislative jurisdiction.[116]

Deciding whether the prohibition against abuse of rights is a restriction of jurisdiction or merely of the exercise of jurisdiction is problematic. On the one hand, the fact that an abuse of rights is covered by the prohibition makes it a violation of the legal norm that prohibits it. For this reason, an abuse of jurisdiction has effects identical to overstepping the scope of jurisdiction, which amounts to a violation of a prohibitive norm of international law.[117]

On the other hand, the prohibition against an abuse of rights does not establish a prohibition in a sphere defined in abstract terms. A finding of an abuse of rights can only be made based on analysis of the objectives of a specified act of the state. Thus, it could be inferred that the prohibition refers to the manner in which jurisdiction is exercised.

It must be assumed that the prohibition against abuse of rights results in the absence of a right. Abuse of jurisdiction is tantamount to a lack of jurisdiction. Therefore, the prohibition against abuse of rights sets a limit of jurisdiction. It excludes jurisdiction in cases where its exercise would not serve a legitimate purpose and would simultaneously be aimed at distorting the situation of another state.

9. THE PRINCIPLE OF *NEMO PLUS IURIS AD ALIUM TRANSFERRE POTEST QUAM IPSE HABET*

The principle of *nemo plus iuris ad alium transferre potest quam ipse habet* forms part of international law as a general principle of law.[118] Any delegation of powers falling within the jurisdiction of the state to an international organisation or tribunal is subject to this principle. The bases of their authority are the consent of

[113] Kranz, *supra* note 1, p. 28.

[114] Ryngaert, *supra* note 8, pp. 160–161; M. Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 McGill Law Journal 389 (2002), pp. 397–404 and 410–419.

[115] Ryngaert, *supra* note 8, p. 161.

[116] Akehurst, *supra* note 8, p. 189.

[117] *See* Akehurst, *supra* note 8, pp. 168 and 189.

[118] Góralczyk & Sawicki, *supra* note 16, p. 70.

a state and the delegation of its powers.[119] This principle exists in European Union law as the principle of conferral.[120] In fact, no limitation on jurisdiction or its exercise follows from this principle. In the context of jurisdiction, it functions as a reminder that, after the transfer of competence, its scope remains no greater than before the transfer.

10. RESPONSIBILITY TO PROTECT

The scope of jurisdiction is not limited by the doctrine of responsibility (duty) to protect.[121] This duty would oblige states to make, apply and enforce laws, thus limiting their freedom to exercise jurisdiction in cases of mass atrocities. Currently, however, the doctrine of responsibility to protect does not form a norm of international law. From the legal perspective, it is regarded as a *de lege ferenda* proposal.[122]

CONCLUSION

To recapitulate, legislative criminal jurisdiction is limited only by the norms of customary international law: the principle of sovereign equality of states; its derivative, the principle of non-intervention;[123] the principle of prohibition against abuse of rights; in international law of armed conflict, the principle of protection against coercion to service for the military power of the enemy state; and the principle of the privilege of the lawful combatant. Judicial jurisdiction is subject to the same international-law limitations as legislative jurisdiction[124] and, in addition, to limitations arising from customary and treaty norms providing immunities and other treaty exemptions from the jurisdiction of courts. Enforcement jurisdiction is subject to the same limitations as judicial jurisdiction. The principle of the sovereign equality of states further limits enforcement jurisdiction to the territory of a state, and for other territories the consent of the state to which a territory belongs is

[119] A. von Bogdandy, I. Venzke, *International Judicial Institutions in International Relations. Functions, Authority, and Legitimacy*, in: B. Reinalda (ed.), *Routledge Handbook of International Organization*, Routledge, Abingdon: 2013, pp. 468–469.

[120] Maśnicki, *supra* note 111, p. 30.

[121] *Cf.* Zając, *supra* note 4, p. 84. At this point the reader is referred to the literature on the subject: A.J. Bellamy, T. Dunne, *R2P in Theory and Practice*, in: A.J. Bellamy, T. Dunne (eds.), *The Oxford Handbook of the Responsibility to Protect*, Oxford University Press, Oxford: 2016, pp. 3–14; N. Rodley, *R2P and International Law: A Paradigm Shift?*, in: A.J. Bellamy, T. Dunne (eds.), *ibidem*, pp. 186–202.

[122] Ryngaert, *supra* note 8, p. 162. *Cf.* M. Labonte, *R2P's Status as a Norm*, in: A.J. Bellamy, T. Dunne (eds.), *The Oxford Handbook of the Responsibility to Protect*, Oxford University Press, Oxford: 2016, pp. 134–139 and 145-146.

[123] *See* Boister, *supra* note 1, p. 247; Buxbaum, *supra* note 38, pp. 656–657.

[124] Gallant, *supra* note 1, p. 21.

required. The exercise of all three types of jurisdiction is subject to the requirement of proportionality. In European Union law, the exercise of jurisdiction is further constrained by the treaty-based principle of subsidiarity. These conclusions have been drawn from the scholarly literature and jurisprudence, reflecting the state of the law. With the exception of enforcement jurisdiction, there are no norms in international law that limit the scope of a state's jurisdiction to its own territory.[125]

[125] Płachta, *supra* note 1, p. 98.

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BUILDING THE LEGAL INFRASTRUCTURE FOR SPACE: A COMPARATIVE STUDY OF SPACE LAW AND GOVERNANCE IN POLAND, SLOVAKIA AND SLOVENIA

Abstract: *The space sector in the Central and Eastern European (CEE) region is undergoing a dynamic transformation – from traditional component suppliers to aspiring players with their own national space programmes. The space industry is experiencing significant growth in many independent contexts, driven by growing demand for satellite data, expansion of satellite systems manufacturing and the evolving military dimension of space exploration. In the face of these changes, effective and transparent governance of the space sector is essential, particularly in terms of ensuring a clear division of responsibilities between public authorities and providing ongoing oversight of national activities in space. CEE countries face unique challenges due to their historical context and gaps in space governance.*

This article analyses space governance in some of the countries of the CEE region under the current legal framework, taking into account the different regulatory paths adopted by individual CEE countries and the Western legislative models that have been used; it also provides recommendations for decision-makers in countries without regulations.

The authors have adopted the following structure for the article. The introduction covers the historical context, presenting the legacy of the space industry from the socialist period and defining the geographical scope, the contemporary space ambitions of the CEE region and the research questions and methodology. This is followed by

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a discussion of the international framework, including United Nations treaties, as well as the impact of membership in the European Space Agency and the European Union. The subsequent sections present the governance model and a comparative analysis of the national legal frameworks of countries that have adopted space legislation. The analysis primarily covers the space activities, their licensing, liability and insurance mechanisms, and it considers requirements for sustainable development.

Keywords: space law, CEE region, space law in Poland, space law in Slovenia

INTRODUCTION

The space industry is experiencing unprecedented growth across both civil and military sectors. In the downstream segment,[1] demand for satellite data is rising sharply across multiple industries, while the upstream segment[2] continues to attract traditional government missions alongside an expanding private sector. Two principal factors underlie this transformation: the emergence of so-called "New Space",[3] which is dominated by private companies introducing innovative technologies, reducing costs and broadening accessibility, and the accelerating militarisation of space driven by geopolitical conflict.[4] Both trends are compelling Europe to undertake fundamental reforms of its space policy, law and institutional architecture if it is to assert itself as an autonomous space power.

Two challenges are particularly acute. Firstly, despite holding a leading position in several areas – notably rocket propulsion – Europe's competitiveness gap with the United States and China continues to widen.[5] Secondly, Russia's war against Ukraine has dramatically accelerated the militarisation of space. Until recently, the European Union (EU) and the European Space Agency (ESA) had concentrated their strategies almost exclusively on civil space applications. Only in the wake of the war have EU Member States (MSs) moved to strengthen autonomous security and

[1] The use of satellite data for communication, navigation and observation purposes.

[2] The production and launch of space objects into space.

[3] P. Achilleas, *Foreword – Global change in space governance*, in: B. Bartóki-Gönczy, G. Sulyok (eds.), *The new space era – legal and political perspectives*, Ludovika University Press, Budapest: 2024, p. 9.

[4] B. Bartoky-Gonczy, K. Malinowska, *Paradigm shift in the European Union's space policy: institutional restructuring and its possible consequences for the CEE region*, 7 Frontiers in Political Science 1 (2025).

[5] M. Draghi, *The Future of European Competitiveness*, European Commission, 9 September 2024, Parts A and B, available at: https://commission.europa.eu/topics/competitiveness/draghi-report_en\; European Space Agency, *Report on the Space Economy 2024* (2024), available at: https://space-economy.esa.int\ (both accessed 31 March 2026).

defence capabilities in space,[6] prompting the adoption of a dedicated space defence strategy, the proposed EU Space Act[7] and ongoing institutional reform to address the security challenges arising from conflict on European territory.

The countries of Central and Eastern Europe (CEE) – sometimes described as the "forgotten pioneers of space"[8] – have made a significant contribution to the history of space exploration. Although their space activities began under Soviet influence, many CEE states have since established national space programmes and are now developing space legislation. Today, all CEE countries are affiliated with the ESA, either as full member states or as cooperating states, and are navigating a new wave of challenges associated with private enterprise and the New Space paradigm.[9]

The CEE region occupies a distinctive position within the broader European context. During the early decades of space exploration, CEE countries operated within the Soviet sphere, serving its strategic interests, while Western European nations pursued independent national programmes, eventually founding the ESA in 1975. Although the Soviet era produced a solid technological foundation that the post-Soviet space sector has drawn upon, CEE countries were left significantly behind in terms of industrial competitiveness. Cooperation with the ESA began in the 1990s, progressing from scientific collaboration to participation in major space missions and, ultimately, full ESA membership.

For the purposes of this study, the CEE region comprises Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.[10] Only the most legislatively and institutionally advanced among these countries are examined in detail; however, the conclusions are intended to offer a broader regulatory roadmap applicable to the region as a whole. The article examines the development of national space legislation and governance frameworks in CEE against the backdrop of evolving EU space policy – with particular attention

[6] European Commission, High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council. European Union. Space Strategy for Security and Defence, Brussels, 10.3.2023, JOIN(2023) 9 final.

[7] Proposal for a Regulation of the European Parliament and of the Council on the safety, resilience and sustainability of space activities in the Union (EU Space Act), COM(2025), 25 June 2025.

[8] K. Malinowska et al., *Challenges of Entering the Space Market: Case of Entrepreneurs in Central Eastern Europe*, 12 New Space 8 (2024).

[9] G. Denis et al., *From new space to big space: How commercial space dream is becoming a reality*, 166 Acta Astronautica 431 (2020), p. 433; Z. Ewell, *New Space. A Risk-Acceptance Culture, As SpaceX and others privatize space flight, how do the risks of space travel change?*, Leader's Edge Magazine, 30 September 2020, available at: https://www.leadersedge.com/p-c/newspace-a-risk-acceptance-culture (accessed 31 March 2026).

[10] OECD, *Glossary of Statistical Terms: Central and Eastern European Countries (CEECs)* (2003), available at: https://stats.oecd.org/glossary/detail.asp?ID=303 (accessed 31 March 2026).

on the paradigm shift from exclusively civil space applications towards dual-use technologies and the needs of sustainable development.

1. METHODOLOGY

To achieve the objectives of this study, the authors analysed official EU documents, including primary and secondary sources of EU law, together with EU policies and strategies in the field of space. With regard to international law, the examined materials include binding international legal instruments as well as non-binding documents such as guidelines and recommendations adopted by the United Nations. At the national level, the study draws on space legislation of the leading CEE countries in this field – Poland, Slovakia and Slovenia (the only ones in the region that have adopted national space legislation) – while governance arrangements across the broader CEE region are also taken into account. The analysis is further grounded in a review of the current scholarly literature.

Two principal methods are employed: the historical method and legal analysis. The former is used to trace the evolution of the European approach to space, changes in institutional architecture and the space heritage of CEE MSs. The latter is applied to the interpretation of legal acts and legislative instruments.

The article is structured as follows. The third section examines the evolution of the space sector across the CEE region. The fourth section presents a comparative analysis of national space legislation and legislative proposals in selected CEE countries, alongside an assessment of their administrative and governance structures.

2. HISTORY AND EVOLUTION OF THE SPACE SECTOR IN CENTRAL AND EASTERN EUROPE AS A BACKGROUND TO THE DEVELOPMENT OF SPACE LAW AND ADMINISTRATION

The development of space activities in CEE countries was largely overshadowed by the Soviet Union's dominance in space technology.[11] This was due to several factors: the advanced state of Soviet space technology, the significant resources required to develop such technologies, the close links between rocket programmes and strategic weapons systems and the political subordination of these countries to the Soviet Union. As a result, the development of space technology in the CEE

[11] C. Burgess, B. Vis, *Interkosmos: The Eastern Bloc's Early Space Program*, Springer International Publishing, Cham: 2016.

region was of little importance, with the Soviet Union providing ready-made solutions.[12] In 1967, cooperation between the Soviet Union and its satellite countries in the CEE region was formalised through an agreement between their academies of sciences, known later as the Interkosmos programme, which created a framework for cooperation between the Soviet Union and countries such as Bulgaria, Czechoslovakia, Hungary, Poland, Ukraine and Romania. Under the Interkosmos programme, the Soviet Union offered free launch services and space on its satellite platforms for scientific instruments from participating countries. It also provided access to its ground stations and the opportunity for cosmonauts from these countries to participate in manned space missions. In return, the Soviet Union gained access to data collected by instruments from countries cooperating within Interkosmos.[13] Furthermore, from a military point of view, the Soviet Union was interested in space instruments developed by Interkosmos countries in the CEE region.[14]

After the fall of the Iron Curtain in 1991, the economic, political and social situation changed radically, which also affected the space sector of the countries under its influence. Many countries had to quickly restructure their social and economic systems. At that time, CEE countries lacked a clear national strategy for space research and the space industry. The collapse of the Soviet Union opened up new opportunities, particularly the strategic move to join the European Space Agency, which was a turning point for the countries of CEE.[15] The drive for integration with the ESA stemmed from the need to leverage accumulated knowledge within a larger, more structured organisation. Although earlier cooperation with the USSR contributed to scientific progress, it did not foster the development of a strong space industry in individual CEE countries. Joining the ESA provided a clear framework for utilising regional expertise, reflecting the shared desire of CEE countries to join a larger organisation with clearly defined goals regarding space exploration.

Currently, the countries of the CEE region find themselves in a unique situation, on the one hand possessing a space heritage acquired behind the Iron Curtain, and on the other hand struggling with difficulties integrating into the value chains of the ESA. Is being a CEE country a disadvantage or an opportunity to build a truly modern space industry in the region that is capable of meeting the challenges of the changing space landscape? Perhaps it is the countries of the CEE region that will

[12] K. Ziółkowski, *Piętnaście lat działalności Centrum Badań Kosmicznych* [Fifteen years of activity of the Space Research Centre], 2(602) Urania 38 (1992).

[13] P. Elsztein, *Polska w Kosmosie* [Poland in Space], Wydawnictwo Komunikacji i Łączności, Warszawa: 1978, p. 59.

[14] Burgess & Vis, *supra* note 11.

[15] D. Sagath, M. Adriaensen, C. Giannopapa, *Past and present engagement in space activities in Central and Eastern Europe*, 148 Acta Astronautica 132 (2018).

be able to adopt modern national laws that respond to the needs of today's information society and strengthen the countries' defence systems.[16]

The governance of the space sector[17] in the CEE region is also becoming increasingly complex. The organisation of the space sector varies significantly across these countries. In most cases, responsibility for space policy remains divided among multiple administrative bodies, with no clear indication of who is ultimately responsible for a given area. This leads to inefficiency in the administration of the space sectors in most CEE countries. For example, when it comes to cooperating with NASA, Poland was for a long time the only signatory to the Artemis Accords in the region.[18] This changed with the signing of the agreements by Czechia (2023) and Romania (2022).

Although CEE countries share a common history of early space exploration and a similar start in the world of democratic space conquest, each of them finds itself in a slightly different situation in terms of implementing their space strategy and national space programme, providing institutional support for the local space industry and establishing a national space agency. However, there are also some similarities, such as maintaining relations with the ESA and, until recently, lacking national space legislation (with the exception of Poland, Slovenia and Slovakia).

Apart from each CEE country pursuing its own niche in the space sector, efforts are also underway to foster regional cooperation as a counterweight to the technologically established nations of Western Europe. A notable example is the Memorandum of Understanding among the Visegrád Group countries on enhancing cooperation in space research and the peaceful use of outer space, signed in December 2021. The Memorandum seeks to deepen collaboration between Poland, Czechia, Hungary and Slovakia through regular consultations on shared positions in the EU, ESA and UN forums, as well as expert-level exchanges on the European and global space ecosystem. In practical terms, this encompasses sharing knowledge and experience, supporting academic, scientific and industrial cooperation in space-related research and innovation, facilitating joint consortia to strengthen competitiveness in international programmes and raising the visibility of Visegrád space cooperation beyond the region. Such initiatives may help to lower the high

[16] K. Malinowska et al., C*entral and Eastern European Space Sector in the Wider European Space Ecosystem*, in: A.P. D'Costa (ed.), *New Space Economy Handbook*, Oxford University Press, Oxford: 2026, p. 976.

[17] D.L. Oltrogge, I.A. Christensen, *Space governance in the new space era*, 7(3) Journal of Space Safety Engineering 432 (2020).

[18] The Artemis Accords. Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, available at: https://www.nasa.gov/wp-content/uploads/2022/11/Artemis-Accords-signed-13Oct2020.pdf?emrc=6a08e462651a9 (accessed 31 March 2026).

barriers to entry that have historically confined the space sector to larger states and established global actors.[19]

3. NATIONAL SPACE LEGAL FRAMEWORKS IN THE CEE REGION

3.1. International foundations of space law in the CEE region

The core of international space law consists of five treaties developed under the auspices of the United Nations since the 1960s. The foundational instrument is the Outer Space Treaty,[20] whose principles were elaborated in four subsequent agreements: the Liability Convention,[21] the Rescue Agreement,[22] the Registration Convention[23] and the Moon Agreement.[24] Together, the Space treaties form the principal component of the *corpus juris spatialis*.[25] Four of them – all except the Moon Agreement – have been ratified by the majority of CEE countries, including all three that have adopted national space legislation.[26]

[19] Memorandum of Understanding of the Visegrad Group Countries on Enhancing Cooperation in the Field of Space Research and Peaceful Use of Outer Space, 13 December 2021.

[20] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967), 610 UNTS 205 (Outer Space Treaty). *See also* K. Myszona-Kostrzewa, Z. Kulińska-Kępa (eds.), *Prawo kosmiczne międzynarodowe, europejskie i krajowe* [International, European, and national space law], CH Beck, Warszawa: 2025; M. Polkowska, *Eksploracja Kosmosu: zagadnienia prawno-polityczne* [Space exploration: Legal and political issues], EuroPrawo, Warszawa: 2021.

[21] Convention on International Liability for Damage Caused by Space Objects (adopted 29 March 1972, entered into force 1 September 1972), 961 UNTS 187 (Liability Convention).

[22] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (adopted 22 April 1968, entered into force 3 December 1968), 672 UNTS 119 (Rescue Agreement).

[23] Convention on Registration of Objects Launched into Outer Space (adopted 14 January 1975, entered into force 15 September 1976), 1023 UNTS 15 (Registration Convention).

[24] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 18 December 1979, entered into force 11 July 1984), 1363 UNTS 3 (Moon Agreement).

[25] L.J. Smith, *The principles of international space law and their relevance to space industry contracts*, in: L.J. Smith, I. Baumann (eds.), *Contracting for Space: Contract Practice in the European Space Sector*, Ashgate Publishing, Farnham: 2011, p. 48; S. Hobe, *The Impact of New Developments on International Space Law (New Actors, Commercialisation, Privatisation, Increase in the Number of "Space-faring Nations")*, 15(3-4) Uniform Law Review 869 (2010); M. Couston, *Droit Spatial*, Editions Ellipses, Paris: 2014, p. 9; I. Tobjasz, *Historyczne aspekty i aktualne uwarunkowania działalności w przestrzeni kosmicznej* [Historical aspects and current conditions of activities in outer space], 2(10) Obronność. Zeszyty Naukowe 163 (2014), p. 167.

[26] The adoption of the five space treaties has not been universal in the CEE region (OECD definition). Latvia and Albania are not parties to these treaties, Estonia ratified only the Outer Space Treaty, while the Moon Treaty was signed only by Romania (UN COPUOS, *Status of International Agreements relating to activities in outer space as at 1 January 2025*, A/AC.105/C.2/2025/CRP.9).

The Outer Space Treaty obliges states to authorise and continuously supervise the activities of non-governmental entities in outer space and to exercise jurisdiction and control over space objects and personnel.[27] The Liability Convention regulates state liability for damage caused by space objects, differentiating between strict and fault-based liability depending on where the damage occurs; crucially, liability is attributed exclusively to the launching state, regardless of whether the damage was caused by that state or by entities under its jurisdiction.[28] This framework provides an important basis for national rules on allocating liability between states and private operators, both as a rationale for state legislative intervention and as a model for shaping the liability regime within the space sector. The Registration Convention complements the liability regime by requiring states to register space objects, thereby establishing the jurisdictional basis for its enforcement.[29] The treaty regime is supplemented by bilateral and multilateral agreements, UN General Assembly resolutions and communications from UNOOSA and UNCOPUOS. Although constituting soft law only, these instruments play a significant role in the global space law system and frequently serve as models for national space legislation.[30]

Despite the broad ratification of the Space Treaties, to date only approximately 39 countries have enacted dedicated national space legislation – including just three CEE countries. Most ratifying states thus have not yet transposed their international obligations into domestic law. This gap is particularly significant in the context of Art. VI of the Outer Space Treaty, which requires states to bear international responsibility for national space activities and to ensure their authorisation and continuous supervision. Although the Treaty contains no explicit obligation to legislate at the national level, such an obligation can be inferred unambiguously: in any state governed by the rule of law, the authorisation and supervision of private entities cannot be arbitrary or ad hoc, but must rest on pre-established legal rules – a requirement rendered all the more pressing by the dynamic growth of the private

[27] I. Marboe, F. Hafner, *Brief Overview over national Authorisation Mechanisms in Implementation of the UN International Space Treaties*, in: F.G. von der Dunk (ed.), *National Space Legislation in Europe*, Brill, Leiden/Boston: 2011, p. 31; P. Dempsey, *National Laws Governing Commercial Space Activities: Legislation, Regulation, & Enforcement*, 36 Northwestern Journal of International Law & Business 1 (2016), pp. 7–9.

[28] *See in particular* J. Rajski, *Odpowiedzialność międzynarodowa za szkody wyrządzone przez obiekty kosmiczne* [International responsibility for damage caused by space objects], Państwowe Wydawnictwo Naukowe, Warszawa: 1974.

[29] Registration has two main purposes: (1) it aims to enable the identification of a space object, its components or debris and (2) it places the space object under the jurisdiction and control of the launching state; *see e.g.* I. Marboe, *National law*, in: F.G. von der Dunk, F. Tronchetti (eds.), *Handbook of Space Law*, Edward Elgar, Cheltenham: 2015, p. 133.

[30] See Documents and resolution database, available at: https://tinyurl.com/4v7hnwhm (accessed 31 March 2026).

space sector.[31] In 2013, the UN reinforced this expectation through a non-binding recommendation encouraging national regulation of space activities, accompanied by the Sofia Model Law,[32] which sets out minimum elements for national authorisation and supervision regimes.[33] The considerable variation in national space regulations across jurisdictions reflects both the absence of binding international instruments on authorisation and supervision and, within the European Union, the EU's lack of competence to harmonise space law.

3.2. EU space law

For many years, the regulation of upstream space activities remained outside the scope of EU interest. Regulatory activity concerned only the use of satellite services, primarily telecommunications. The liberalisation and privatisation of telecommunications markets in the late 1980s enabled the European Commission to act as a regulatory authority in the satellite telecommunications market,[34] resulting in the adoption of the so-called Satellite Directive in 1994.[35] The Directive extended the rules of the internal market to satellite telecommunications, applying the Directive on terminal equipment[36] and the Directive on competition in telecommunications services markets.[37] Similarly, the satellite market – including satellite Earth observation – was covered by the 1996 Database Directive,[38] which extended copyright protection to satellite images, thereby protecting the commercial interests of Earth observation service providers.

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[31] B. Bartóki-Gönczy, *National space law – European best practices for an effective and competitive national regulatory environment*, in: F. Cecon et al. (eds.) *Proceedings of the Central and Eastern European eDem and eGov Days 2024*, Association for Computing Machinery (ACM), New York: 2024, p. 43; B. Malinowski, *Regulatory Dilemmas of Suborbital Flight*, Springer, Cham: 2024.

[32] UN Resolution No. 68/74 of 11 December 2013 – Recommendations on national legislation for the peaceful exploration and use of outer space; International Law Association (ILA), Space Law Committee, 'Resolution 6/2012: Sofia Guidelines for a Model Law on National Space Legislation' in *75th ILA Conference Reports* (ILA, Sofia, 30 August 2012) 40; also published as UN Doc A/AC.105/C.2/2013/CRP.6 (26 March 2013) (Sofia Model Law).

[33] R. Hoffmann, *Legislating the Final Frontier – Trends and Challenges of National Space Law*, in: B. Bartóki-Gönczy, G. Sulyok (eds.), *The New Space Age – Legal and Policy Perspectives*, Ludovika University Press, Budapest: 2024, p. 186.

[34] *See* Towards a Dynamic European Economy – Green Paper on the Development of the Single Market for Telecommunications Services and Equipment, COM(87) 290 final.

[35] Commission Directive amending Directive 88/301/EEC and Directive 90/388/EEC, in particular with regard to satellite communications, OJ L 268.

[36] Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets for telecommunications terminal equipment, OJ L 131.

[37] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192/10.

[38] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20.

Despite ongoing EU harmonisation efforts, MSs remain independent actors in the field of space. From a legal standpoint, this derives from the Treaty on the Functioning of the European Union (TFEU), which grants the EU only limited powers to regulate space activities. Art. 189 TFEU[39] authorises the EU to "promote scientific and technical progress, industrial competitiveness and the implementation of its policies", and to this end it is empowered to develop a European space policy, support research and technological development, coordinate efforts for the exploration and use of space and establish necessary measures – which may take the form of a European space programme – while explicitly excluding the harmonisation of MSs' laws and regulations. The EU's powers in this field are parallel to those of MSs, meaning that they retain their national competences even where the EU acts in the same area and to the same extent (Art. 4(3) TFEU). MSs therefore remain free to determine their national space policy and to adopt national space legislation. Under the current circumstances, the prohibition on harmonising European space law has increasingly come to be seen as an obstacle to meeting European societies' interests in security and competitiveness, particularly given that space has been recognised as a strategic domain.

Notwithstanding these limitations, one measure being pursued to implement the EU's space and defence strategy is an EU space law framework. The concept was first announced in late 2022 in a communication from the Economic and Social Committee[40] and was subsequently presented as an integral part of the strategy in March 2023, which explained the rationale as follows:

To enhance the safety and resilience of space operations and services in the EU, as well as their security and sustainability, the Commission will consider presenting a proposal for an EU space law. This will promote the development of resilience measures in the EU, the exchange of information on incidents, and cross-border coordination and cooperation.

There is now little doubt that EU space law would establish a consistent approach across the Union, building on the joint communication on the EU approach to space traffic management.[41] The strategy further proposes that EU space

[39] OJ C 326, 26.10.2012, pp. 47–390.

[40] Opinion of the European Economic and Social Committee on the proposal for a regulation of the European Parliament and of the Council establishing a Union programme on secure communications for the period 2023-2027 (COM(2022) 57 final – 2022/0039 (COD)) and the Joint Communication to the European Parliament and the Council: An EU approach to space traffic management – the EU contribution to solving a global challenge; (JOIN(2022) 4 final), OJ C 486, 21.12.2022, pp. 172–184 (the Opinion).

[41] Joint Communication to the European Parliament and the Council: An EU approach to space traffic management – the EU contribution to solving a global challenge. JOIN/2022/4 final.

law should complement the implementation of the NIS 2 Directive,[42] the Cyber Resilience Act[43] and existing cybersecurity frameworks, by establishing specific standards and procedures for cybersecurity in the space sector. According to the mission letter of Commissioner-designate Kubilius, the law would also aim to harmonise licensing requirements in line with the Draghi report.[44] It should be noted, however, that Art. 189 TFEU explicitly excludes the harmonisation of MSs' laws and regulations – a restriction that reflects the strong reluctance of MSs, at the time of the Lisbon Treaty, to relinquish sovereignty in the field of space.[45] In the authors' view, what may be expected in practice is therefore another instance of "creeping harmonisation", achieved by recourse to the internal market's legal basis under Art. 114 TFEU.[46]

If adopted in the form of a regulation – as is currently anticipated – EU space law will leave MSs considerably less freedom to act at the national level. Based on historical experience, the MSs that have already adopted a comprehensive national space law may be forced to revise their legal frameworks. In the case of CEE, where only Poland, Slovenia and Slovakia have enacted dedicated space legislation, the remaining countries wishing to adopt a national space law will face two options: either await the adoption of EU space law in order to determine where national legislation may usefully supplement it or act now on the basis of the known policy assumptions underlying the proposed framework – that is, with a primary emphasis on safety, resilience and sustainability. In the authors' view, the latter approach would better serve the development of the European space sector. While it would likely require subsequent adjustment of national laws to align with the final text of EU space law – as occurred in other fields, notably data protection – waiting for

[42] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directives (EU) 2018/1972 and repealing Directive (EU) 2016/1148 (NIS 2 Directive) PE/32/2022/REV/2. OJ L 333, 27 December 2022.

[43] Proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020, COM (2022) 454 final.

[44] L. Moeller, *Draghi Report – Missed Opportunity for Inclusiveness and Engagement of all European Actors in Space, ESPI Director's Perspective*, September 2024, available at: https://www.espi.or.at/perspectives/draghi-report/ (accessed 31 March 2026).

[45] S. Potter, *Approaching Harmonisation: Examining the European Union's Efforts to Create a Common EU Space Law and Assessing its Potential Legal Foundations*, European Union Working Papers, No. 77/2023, p. 16. and D. Linden, *The Impact of National Space Legislation on Private Space Ventures: Regulatory Competition versus Harmonisation*, 8(1) Journal of Science Policy & Governance 1 (2016), p. 8.

[46] *See further* S. Weatherill, *Competence Creep and Competence Control*, 23(1) Yearbook of European Law, 1 (2004).

the European instrument does not appear advantageous, given the urgent security and resilience needs that the space sector poses for the EU economy as a whole.

To date, 15 EU MSs have adopted national space legislation, which fall into two broad categories. The first comprises countries that have codified only certain aspects of space activities rather than regulating them comprehensively (such as Germany). The second comprises countries that have established a unified legal framework governing the conduct, supervision and registration of space activities in a single comprehensive act (Sweden,[47] Spain,[48] Belgium,[49] France,[50] the Netherlands,[51] Austria,[52] Denmark,[53] Luxembourg,[54] Greece,[55] Finland,[56] Portugal,[57] Slovakia,[58] Slovenia,[59] Italy[60] and Poland). Most of the latter countries supplement the law with implementing regulations in order to codify detailed, often technical rules.

[47] Act on Space Activities (1982:963).

[48] Royal Decree No. 278/1995 of 24 February 1995 issued by the Office of the President of the Council of Ministers of Spain.

[49] Act of 17 September 2005 on activities related to the launch, operation or control of space objects.

[50] Act No 2008-518 of 3 August 2008 on space activities, La loi du 1et aout 2023 de programmation militaire (LPM) 2024-2030.

[51] Regulation of the Dutch Minister of Economic Affairs of 7 February 2008, No WJZ 7119929, containing provisions governing applications for authorisation to conduct space activities and the registration of space objects.

[52] Austrian Federal Act of 2011 on Space Activity Licences and the Establishment of a National Space Register, (Austrian space law) [Bundesgesetz über die Genehmigung von Weltraumaktivitäten und die Einrichtung eines Weltraumregisters], StF: BGBl. I Nr. 132/2011 (NR: GP XXIV RV 1466 AB 1585 S. 135. BR: AB 8628 S. 803.), Ausgegeben am 27. Dezember 2011.

[53] The Danish Space Act of 2016 (Act No. 409 of 11 May 2016), and the implementing regulation on requirements for the approval of space activities in connection with the Danish Space Act of 2016 [Lov om aktiviteter i det ydre rum], LOV nr 409 af 11/05/2016, Sagsforløb 2015/1 LF 128.

[54] Act of 15 December 2020 on space activities (Loi du 15 décembre 2020 portant sur les activités spatiales et modifiant: 1° la loi modifiée du 9 juillet 1937 sur l'impôt sur les assurances dite « Versicherungssteuergesetz » ; 2° la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu, Mémorial A1086, N° doc. parl. 7317).

[55] Law No. 4508 on the licensing of space activities – registration in the national register of space objects – establishment of the Hellenic Space Agency and other provisions (Νόμος 4508/2017 (ΦΕΚ 200/A/22-12-2017)).

[56] The Finnish Space Activities Act of 2018 (Suomen säädöskokoelma 63/2018, 12.1.2018), and the Regulation of the Finnish Ministry of Economic Affairs and Employment on Space Activities (Suomen säädöskokoelma 74/2018, 23.1.2018).

[57] Decree-Law No. 16/2019 of 22 January of the Portuguese Presidency of the Council of Ministers (Diário da República n.º 15/2019, Série I de 2019-01-22, pp. 454 – 462).

[58] Act No. 378/2024 on the regulation of space activities (č. 378/2024 Z. z.).

[59] Act of 16 March 2022 on space activities (ZVDEJ), No. 003-02-1/2022/78.

[60] Italian Law No 89 of 13 June 2025 Disposizioni in materia di economia dello spazio [Provisions on the Space Economy], Gazzetta Ufficiale n. 144 del 24 giugno 2025.

3.3. The shape of space law in CEE

When examining the common features of the legal landscape governing space activities in CEE countries, the most striking observation is the absence of dedicated space legislation in most of the region. Only three CEE countries – Poland, Slovakia and Slovenia – have adopted a comprehensive space law, notwithstanding the fact that all countries in the region show commitment to developing a regulatory framework for space activities and tend to have ratified the space treaties and joined the European Space Agency.

Against this backdrop, an ongoing debate concerns whether the absence of space legislation should automatically be regarded as a barrier to entrepreneurs seeking to enter the space market. Views on this question are divided. On the one hand, space law – which, in accordance with Art. VI of the Outer Space Treaty, invariably introduces licensing and supervision requirements – may be perceived as a regulatory burden, and its absence can be read by entrepreneurs as a signal of economic freedom. On the other hand, the absence of a national space law also means the lack of a risk-sharing mechanism under which the state may guarantee, at least in part, coverage for damage caused by space objects belonging to licensed operators. Moreover, the absence of specific regulation exposes the state itself to considerable risk: under the Outer Space Treaty, states bear full international responsibility for damage caused by their nationals in outer space, irrespective of whether domestic legislation exists. What legal experts thus identify as a regulatory gap, entrepreneurs may regard as a competitive opportunity – a view reflected in statements by industry representatives arguing that the CEE region may hold a comparative advantage over Western Europe precisely because of the lighter regulatory burden on space technology start-ups.[61]

In this context, it is worth examining the principal features of these Polish, Slovak and Slovenian laws – with respect to the scope of regulation, the main licensing conditions, sustainability requirements and liability and insurance frameworks – in order to assess how each responds to the specific needs of the space sector in the CEE region. The aim of such an analysis is to draw conclusions that may inform and guide the remaining countries of the region in their own legislative endeavours, while having in mind that the subject and scope of the national space law should first of all be adapted to the stage of development, capabilities and ambitions of the national space industry[62] and aligned with what is expressed in the national space

[61] Survey conducted among entrepreneurs in the Polish space sector, *see* M.T. Kłoda et al., *Polskie prawo kosmiczne – wyzwania i kompromisy* [Polish space law – challenges and compromises], 3(170) Przegląd Sejmowy 95 (2022).

[62] I. Marboe, *National Space Law*, in: F von der Dunk (ed.), *Handbook of Space Law*, Edward Elgar Publishing, Cheltenham: 2015, p. 185.

strategy and the assumptions of the national space programme (if one exists). For this reason, models from other countries should be adopted with caution, as they may prove unsuitable for the geographical, political and economic factors of the country and region.

3.3.1. Polish space law

Almost 15 years after the first legislative attempts, Polish space law finally became part of the global *corpus juris spatialis* when, on 13 February 2026, the Act on Space Activities was adopted by the Polish Parliament and subsequently signed by the president.[63] The Act fulfils not only Poland's international obligations as a party to the Outer Space Treaty, but also the goals set out in the Polish space strategy.[64] The ambition of the Polish legislature is above all to make space law a lever for developing the Polish space sector and ensuring the stability and predictability that are essential conditions for investment. The Act is the product of extensive efforts to reconcile the interests of the state – primarily public safety considerations – with the needs of space entrepreneurs, the prospects for sectoral development and the imperatives of sustainable development. Its underlying objective is to create a legal framework that is both realistic and facilitative rather than burdensome.

The Act regulates space activities and, to a limited extent, suborbital activities, insofar as they take place in outer space. To this end, it employs a broad, general definition of space activities (Art. 8), which encompasses the launch or attempted launch of a space object into outer space; the operation of a space object in outer space; the control of a space object in outer space; and the removal of a space object, including by deorbitation. Outer space is defined as the space more than 100 kilometres above mean sea level. The Act is also intended to apply to new categories of space activities, such as in-orbit servicing and space resource extraction. It does not cover near-space activities taking place below the boundary of outer space; such activities are intended to be regulated either as a new and separate chapter within the aviation law framework or through wholly separate legislation. Activities at high altitudes that take place at least partly in outer space will, however, be classified as space activities.[65] The licensing system confers on the president of the Polish Space Agency the power to authorise and supervise space activities, although the Agency

[63] Act of 13 February 2026 on Space Activities, Journal of Laws 2026, item 465.

[64] Polish National Space Strategy – resolution adopted by the Council of Ministers on 26 January 2017 (Polish Monitor, 17 February 2017, item 203).

[65] Explanatory memorandum to the draft act on space activities (Druk sejmowy nr 2078), available at: https://orka.sejm.gov.pl/Druki10ka.nsf/0/DAE8099475AB816BC1258D6200548D7A/%24File/2078-uzasadnienie.docx (accessed 31 March 2026).

operates as an executive body of the Ministry of Development and Technology (Art. 11).

A further central element of the Act is the system of liability for damage in space, regulated in Chapter 3 (Arts. 27–30). These provisions are designed to cover all types of space activities and to link them to the assumption of the state's partial liability. In the context of a rapidly developing space industry, it is reasonable for the state to assume a share of the risk – for example, by guaranteeing liability in excess of the sum insured under a civil liability insurance policy (Art. 30). This does not apply where damage has been caused intentionally or where activities have been carried out without authorisation. Closely related to the liability framework is the obligation to maintain insurance, regulated separately in Chapter 4 (Arts. 31–34). The Act requires entities conducting space activities to carry liability insurance cover as a condition for obtaining a licence; the required sum insured and the period of validity are to be specified in each individual licence. The Act establishes only a maximum threshold – the amount of cover required may not exceed EUR 60 million – and the specific insurance requirement will be determined based on an individual risk assessment conducted during the licensing process. This approach enables the legislature to calibrate insurance requirements to the actual level of risk and thereby avoid creating disproportionate barriers for new market entrants. Scientific and educational activities, as well as missions conducted in the interests of national security, are exempt from the insurance obligation; in such cases, the state assumes full liability for any damages. A notable feature of the liability regime is the partial extension of its scope to the supply chain associated with the operator. This solution was inspired by French and US space law (Art. 27(3)).

An important feature of the Act is its ambitious approach to safety and the sustainable development of the space sector. It provides that space activities must be conducted in a manner that ensures comprehensive protection of both the public interest and the natural environment. In particular, such activities must not endanger security and defence interests. Operators are also required to minimise risks to human life, health and property – a fundamental condition for the safety of space operations. The Act further requires that the conduct of space activities take into account the need for the long-term sustainable use of outer space for peaceful purposes, including by eliminating or minimising negative impacts on the Earth's environment and on outer space itself, through the prevention of space debris in particular.

Space objects must additionally meet specific technical standards, covering mechanical strength and resistance to the conditions of outer space, propellant and oxidiser stability, engine reliability, energy source stability, communications between

the space object and ground control, the precision of navigation and control systems and thermal control. These requirements apply to all types of space missions, including those conducted by the state. In order to promote transparency and consistency in the application of technical requirements, the president of the Agency is required to publish a list of recommended standards on the Agency's website – a solution designed to harmonise industry practices and facilitate compliance.

Overall, the Polish Act on Space Activities satisfies the requirements of the space treaties and reflects the principal characteristics that the international space law doctrine identifies as necessary features of national space legislation. It is consistent with the Polish space strategy and fits coherently within the national legal order – notably with aviation law, given its intention to regulate suborbital flights in that framework. It establishes a legal system designed to maintain safety both on Earth and in outer space and a liability regime that links the national legal framework with Poland's international obligations. On this basis, Polish space law appears well positioned to avoid creating undue barriers for entrepreneurs entering the space market: its subject matter and scope are formulated broadly and flexibly, liability for damage is shared in part by the state and insurance requirements are calibrated in each case to the actual risk involved.

3.3.2. Slovak space law

In November 2024, the parliament of the Slovak Republic adopted the Act on the Regulation of Space Activities, which entered into force on 1 February 2025.[66] Slovakia thereby became the second Central European country (after Slovenia) to enact national space legislation, joining the growing group of European states that have adopted dedicated space laws over the past decade. The Act forms an integral part of the Slovak Space Strategy 2030+, entitled "Space as an engine of growth", which sets out the country's vision for its engagement in the space economy and the development of a competitive space industry.[67]

The Slovak Act covers "regulated space activities" (section 2), defined as encompassing the commissioning of a space object – including the associated preparatory and supervisory work – as well as its launch, control and return to Earth. Although the Act does not explicitly address territorial or personal jurisdiction, subsequent provisions make it clear that the Slovak law applies to activities carried out by Slovak

[66] Act No. 378 of 28 November 2024 on the regulation of space activities and on the amendment to Act of the National Council of the Slovak Republic No. 145/1995 Coll. on administrative fees, as amended.

[67] Ministry of Education, Science, Research and Sport of the Slovak Republic, A conceptual framework of space activities in the Slovak Republic For years 2020+; Slovak Space Office, available at: https://spaceoffice.sk/ (accessed 31 March 2026).

nationals or legal entities registered in Slovakia, to activities conducted on Slovak territory and to activities on vessels and aircraft registered in Slovakia.[68]

As regards the authorisation system, the Ministry of Transport has been designated as the competent authority, since Slovakia has opted not to establish a separate space agency. The conditions for obtaining authorisation are wide-ranging: the activity must not endanger national security, public safety or public health; it must ensure compliance with Slovakia's international obligations and foreign policy commitments; it must respect the prohibition on the militarisation of outer space; and the operator must demonstrate the requisite technical expertise, submit a space debris mitigation plan and a plan for the safe termination of space activities, comply with ITU regulations on frequencies and orbital positions, maintain civil liability insurance and possess sufficient financial resources (section 3(2)). Certain exemptions from these requirements are provided for defence-related activities, which need only comply with ITU regulations and insurance requirements (section 3(4)). The Act also establishes a national register of space objects, maintained by the Ministry of Transport, which transmits the relevant information to the UN Secretary-General in accordance with the Registration Convention (sections 9–10).

Sustainability requirements constitute an important element of the regulatory framework, expressed through the obligation to submit both a space debris mitigation plan and a safe-termination plan as conditions for authorisation, thereby preventing the creation of uncontrolled objects in orbit. This reflects Slovakia's international commitments and its growing awareness of the challenges associated with the pollution of Earth's orbital environment. In this context, the Act provides for an exemption from the insurance obligation for satellites meeting ecological criteria – specifically, those weighing less than 100 kg and constructed of materials guaranteed to burn up in the atmosphere upon re-entry (section 11(3)). The exemption does not apply where a risk analysis indicates a high probability of damage. This solution, inspired by Slovenian law – which sets a comparable threshold of 150 kg – is designed to encourage operators of low-mass satellites to design environmentally responsible missions. The Act further provides for the state's right of recourse against the operator, subject to a financial limit of EUR 60 million, though the cap is not applicable where the damage has been caused intentionally.

[68] J. Handrlica, M. Novotná, *The Dawn of National Space Legislation in Central Europe and the New Act on Space Activities in the Slovak Republic*, 15 Juridical Tribune – Review of Comparative and International Law 614 (2025).

Overall, the Act represents a significant step towards a transparent, predictable legal environment for commercial space activities in Slovakia, fulfils the country's international obligations under the Outer Space Treaty and related conventions and provides a sound foundation for the development of the Slovak space industry. From the perspective of sustainability in particular, Slovak space law may serve as a useful benchmark: it reflects the Sofia Guidelines (2012), draws on European best practices in space legislation and establishes a clear, transparent authorisation and registration system.[69] One area of potential concern, however, is the minimum insurance threshold of EUR 60 million, which may constitute a significant barrier for smaller operators.

3.3.3. Slovenian space law

Slovenia joined the ranks of space-faring nations relatively recently: in September 2020, its first two satellites – Nemo HD and TRISAT – were launched, and on 16 March 2022 Slovenia adopted its Space Activities Act together with an implementing Decree on the Implementation of the Space Activities Act.[70]

The Space Activities Act comprehensively regulates the following areas (Art. 1): the licensing of space activities, including the conditions and procedures for issuing licences; the maintenance of a national register of space objects; the definition of operators' obligations; the system of liability for damage caused by space objects; and the mechanisms for supervising compliance with the Act. The Act applies to four categories of space activities (Art. 2): those carried out on Slovenian territory; those related to objects registered in the Slovenian register; those carried out outside Slovenia on vessels or aircraft registered in Slovenia; and those conducted by Slovenian nationals or legal persons established in Slovenia, regardless of where those activities take place. The Act introduces precise definitions of key concepts (Art. 3). A space object is defined as an object launched or intended for launch into space, including its component parts. Space activities encompass the launch of a space object into outer space, its operation and operational control in outer space and its return to Earth, including safe landing or controlled destruction. Space debris is defined as space objects remaining in orbit after the end of their operational life, objects generated as a result of space activities and objects that are no longer operational.

[69] M. Hoffmann, J. Kolnik, *Protecting Sustainability by National Law: The 2024/25 Space Act of the Slovak Republic*, IISL Colloquium on the Law of Outer Space, held 29 September – 3 October 2025, Sydney, Australia; available at: https://www.proceedings.com/083103-0028.html (accessed 31 March 2026).

[70] I. Ramuš Cvetkovič, *Introduction and Evaluation of Slovenian Space Activity, Policy, and Legislation Considering International Space Law*, 1(1) Central European Academy Law Review 41 (2024).

The competent licensing authority is the ministry responsible for technology (Art. 4). The conditions for obtaining a licence (Art. 5) include the operator's knowledge of space technologies and financial capacity to carry out the planned activities; compliance with the requirements of international standardisation bodies; and the absence of any threat to national defence, public order, the safety of persons and property, intelligence and security operations, public health or the environment. The operator is required to submit a risk assessment covering all of the above categories. In line with the UN Space Debris Mitigation Guidelines, operators must present measures to reduce the generation of space debris, plan a safe end-of-mission – which may include controlled re-entry, deorbitation, atmospheric burn-up or transfer to a graveyard orbit – and obtain a statement from the Ministry of the Environment confirming that the planned activity will not adversely affect the environment.

The Act establishes a national register of space objects (Art. 14), maintained by the relevant ministry. Its principal purposes are to collect data on space objects launched under Slovenian jurisdiction, transmit that data to the UN Register and ensure the flow of information to the UN Secretary-General. The public register is maintained as an electronic database, ensuring transparency and enabling effective information management.

An important feature of Slovenian space law is the operator liability regime. The Act distinguishes between two types of liability: strict liability for damage caused by a space object on the Earth's surface or to a ship or aircraft in flight and fault-based liability for damage caused in outer space – reflecting the framework of the 1972 Liability Convention. The Act also establishes a state recourse mechanism: where the Republic of Slovenia pays compensation for damage at the international level, it is entitled to seek reimbursement from the responsible operator, subject to a cap of EUR 60 million (corresponding to the compulsory insurance limit); above that threshold, the financial risk is borne by the state.

The Act requires operators to have civil liability insurance cover of at least EUR 60 million prior to launch (Art. 6), covering damage to persons, property and the environment. A system of incentives for operators of small satellites meeting certain environmental criteria provides for two categories of full exemption – applicable to ultra-light satellites and satellites in high orbits – and three categories of reduced insurance requirements, applicable to small constellations and certain propelled satellites in low and high orbits. A condition for reduced requirements is that the satellite be designed to burn up completely upon atmospheric re-entry, encouraging the use of easily combustible materials and minimising the risk of space debris (Art. 6(3)(a)).

The Act establishes a graduated system of information obligations for licensed operators. Alongside standard reporting duties, operators are required to respond immediately to crisis situations posing a threat to human safety, the environment, public order or national security. A further category of obligations concerns operational changes and, notably, the termination of space activities – including compliance with end-of-mission requirements such as deorbitation or transfer to a graveyard orbit – enabling the competent authority to update the national register and monitor ongoing compliance.

The Slovenian Space Activities Act serves as an important reference point for other CEE countries considering the adoption of national space legislation. Its added value lies in a regulatory framework that is genuinely supportive of small satellites and start-ups, a practical approach to the implementation of international obligations and procedural flexibility combined with high safety standards. Although the insurance threshold is high – as in Slovakia, the minimum stands at EUR 60 million – the Act offers a comprehensive system of exemptions and reductions calibrated to the specific parameters of the mission and the operator concerned.

4. INSTITUTIONAL STRUCTURES OF THE SPACE SECTOR IN CEE

As shown in section 4, only a few countries of the CEE region have adopted a national space law. This does not mean, however, that the others are absent on the space scene. On the contrary – most CEE countries have started their regulatory journey by establishing governance institutional structures which will eventually be complemented by comprehensive space regulatory framework. Therefore, almost all the CEE countries have implemented their own space strategies, which include elements of science, research and development or international cooperation. In this regard, certain patterns of space-sector governance are evident in the region, and they depend greatly on such indicators as historical heritage, relatively low levels of public and private investment in the space sector, a lack of awareness among local authorities of the potential of the space sector, a continuing lack of prioritisation of the space sector and limited cooperation between institutions and industry.[71] This is subject to sweeping changes according to the needs of security and defence aspects, the growth of private entities in the space ecosystem and the high risks associated with their activities, making it difficult to manage and govern space.

As mentioned in the introduction, CEE countries are in a special, not necessarily favourable situation, as they developed their space capabilities behind the Iron

[71] Malinowska, *supra* note 8.

Curtain for decades. The consequences of this legacy are now evident in the lack of developed tools for governing space activities, both institutional and private. Along with the gap in national space legislation, there is also a lack of appropriate national space agencies with the authority to coordinate national space sectors. Responsibilities for coordinating space activities are often divided among a dozen or so different entities. It is also common for these responsibilities to be shared between the relevant ministry and the national space agency, which can lead to an unclear division of responsibilities and thus too many ambiguities or unnecessary procedural complications that can have a negative impact on the development of the national sector. Furthermore, although a space agency is formally an independent legal entity (as in Poland), it may at the same time be subordinate to the relevant ministry. Such a governance structure can significantly hamper the decision-making process and the implementation of space policies or programmes. In most of them, space activities are coordinated within the main ministry, but it is also clear that these competences are delegated among various ministries responsible for specific elements of space. A small number of the countries analysed have a special national space agency established by a separate law or within the framework of national space legislation.[72]

As regards the model of space governance in CEE, most countries rely on joint coordination between several ministries and various related public agencies. Considering the concept of space governance in Western European countries, it appears that the "New Space" countries of CEE are following the same path. An issue that deserves more attention is whether the growing dependence on space technology and its civilian and military applications requires a rethinking of the role of space agencies. Nowadays, the question arises as to whether they should be given greater independence and coordination powers, rather than being subordinate to various ministries. This issue is illustrated by the following table, which indicates for each country the competent ministries and whether there are dedicated space agencies responsible for the governance of space activities.

[72] *E.g.*, the Polish Space Agency was established by the Act of 26 September 2014 on the Polish Space Agency. Journal of Laws of 2020, item 1957, later amended by the Act of 13 June 2019 amending the Act on the Polish Space Agency and the Act on Government Administration Bodies (Journal of Laws of 2019, item 1248).

Table 1.1 Division of competences for space governance in CEE countries[73]

COUNTRY	RESPONSIBLE MINISTRY	NATIONAL AGENCY/ OTHER ENTITY
Poland	Ministry of Economic Development and Technology	Polish Space Agency (Polsa)
Hungary	Ministry of Foreign Affairs and Trade	Department for Space Activities, Hungarian Ministry of Foreign Affairs and Trade
Czechia	Main ministry: Ministry of Transport Ministry of Education, Youth and Sport Ministry of Defence and Office of the Government of the Czech Republic Ministry of Industry and Trade Ministry of the Environment Ministry of Foreign Affairs other relevant public entities or ministries and governmental bodies	Czech Space Office
Slovakia	Distributed among 10 ministries: Ministry of Transport and Construction Ministry of Education, Science, Research and Sport Ministry of the Interior of the Ministry of Foreign and European Affairs of the Slovak Republic Ministry of the Environment of the Slovak Republic	Slovak Space Office
Slovenia	Ministry of Economy, Tourism and Sport	Slovenian Space Office
Croatia	Ministry of Science and Education	-
Bulgaria	Ministry of Innovation and Growth	-
Romania	Ministry of Education, Research, Youth and Sport	Romanian Space Agency (Rosa)
Lithuania	Ministry of Economy and Innovation	Lithuanian Space Office/Agency for Science, Innovation and Technology
Latvia	Ministry of Economics/Ministry of Education and Science	Latvian Space Office
Estonia	Ministry of Economic Affairs and Communications	Estonian Space Office

[73] K. Malinowska, K. Hopej, *Governance of the Space Sector in the CEE Region. Role of the space agencies*, Conference Paper, CEA, Budapest: 2024.

CONCLUSIONS – THE UNIQUE HERITAGE AND CHALLENGES OF THE CEE REGION REGARDING SPACE LAW AND GOVERNANCE

This study has analysed the legal and institutional governance of the space sector in Central and Eastern Europe against the backdrop of dynamic change in the global space industry, the growing militarisation of space and the evolving regulatory framework of the EU. The CEE region is characterised by a distinctive trajectory of space sector development – from the legacy of the Interkosmos programme and structural dependence on the Soviet Union, through political transformation and the difficulties of the post-transition period, to the current dynamic integration with ESA and the pursuit of technological independence. This development path creates both structural challenges and opportunities to build a modern, flexible space industry capable of responding to the demands of the New Space era.

A comparative analysis of the space law of three CEE states reveals a number of significant common features, reflecting both shared international obligations and the particular characteristics of the region's emerging space sector. All three have established a licensing-based authorisation system, a national register of space objects and a liability regime linking the operator's responsibility to the state's obligations under the Outer Space Treaty and the Liability Convention. A noteworthy point of convergence between the Polish and Slovak laws – both adopted more recently – is the explicit definition of outer space as the space more than 100 kilometres above sea level, thereby resolving a longstanding ambiguity in international law, providing legal certainty for operators and following the standards of the newest national space laws. On the question of insurance, an important structural divergence is observable: Polish law sets a maximum insurance threshold of EUR 60 million, subject to reduction on the basis of an individual risk assessment conducted during the licensing process, whereas both Slovenian and Slovak law establish a minimum requirement of EUR 60 million. This distinction is not merely technical: it carries material implications for market access. A mandatory minimum of EUR 60 million may constitute a significant barrier for the start-ups and small and medium-sized enterprises that increasingly populate the CEE space sector, whereas the Polish approach of adjusting the required insurance cover to the individual risk profile of each mission is arguably better suited to the realities of an emerging space market.

All three laws were adopted ahead of the proposed EU Space Act, and they therefore represent autonomous national responses to the international obligation to regulate space activities. Nevertheless, each places considerable emphasis on sustainability and the long-term responsible use of outer space – through mandatory space debris mitigation plans, end-of-mission requirements and, in the case of Slovenia and Slovakia, incentive mechanisms tied to the mass and design of satellites.

In this respect, the three CEE laws may be said to anticipate and align with the sustainability pillar of the forthcoming EU Space Act. A further shared feature – and one that goes beyond the currently proposed EU Space Act – is the treatment of military missions. Each country has provided exemptions for defence-related activities from certain regulatory requirements; yet both Polish and Slovak law retain the obligation for such missions to comply with sustainability requirements, including space debris mitigation standards. This approach reflects a broader recognition that the long-term viability of outer space as a shared resource cannot be subordinated to short-term security considerations, and it sets a standard that the EU legislator may ultimately be called upon to follow.

A final observation on the legal framework concerns the governance and administrative architecture underpinning space activities in the three countries. A common pattern across the CEE region is the fragmented distribution of institutional competences among multiple ministries and governmental bodies. In Poland, the Polish Space Agency operates as an executive body of the Ministry of Development and Technology, while national security and defence matters fall within the purview of the Ministry of Defence and radio frequency management issues to separate regulatory authorities. A similar dispersion of competences is observable in Slovakia, where the Ministry of Transport serves as the primary licensing authority, yet must coordinate with the ministries responsible for defence, foreign affairs, education and the environment at multiple stages of the authorisation process. Slovenia's model, though comparatively streamlined, likewise distributes oversight functions across several bodies. This institutional fragmentation carries practical consequences: it may impede effective governance, slow licensing procedures and – critically – complicate coherent communication between the public sector and an increasingly dynamic commercial space industry. For start-ups and innovative enterprises seeking rapid regulatory clearance, the absence of a single, well-resourced and genuinely autonomous space authority with cross-cutting competences represents a structural disadvantage compared to more established space-faring nations.

The study's findings confirm that the principal challenge to the development of the space sector in CEE is the absence of a coherent legal and institutional framework. Only three countries in the region have adopted comprehensive space legislation, while responsibility for the sector in the remaining states is dispersed across numerous ministries without a clear division of competences or transparent rules of operation. This fragmentation generates administrative inefficiency and hinders both the development of domestic industry and the fulfilment of international obligations under the Space Treaties. The comparative analysis of Polish, Slovak and Slovenian legislation further demonstrates that effective space law must be tailored to the specificities of the domestic industry and its stage of development:

mechanically transposing solutions from Western jurisdictions may prove ill-suited given the different geographical, political and economic conditions of the CEE region. Striking the right balance between security requirements and support for innovation – particularly for start-ups and companies operating in the New Space sector – is therefore crucial.

The increased legislative and political activity of the EU adds a further dimension to the regulatory landscape. The forthcoming EU Space Act creates the prospect of harmonisation, the removal of internal market barriers and the risk of curtailing the regulatory autonomy of Member States. For CEE countries that have yet to adopt national space legislation, a strategic dilemma arises: to await the adoption of the EU Space Act – at the cost of a potential competitive disadvantage – or to act immediately on the basis of the known policy assumptions underlying the future European framework, namely safety, resilience and sustainable development. In the authors' view, the latter course offers greater long-term benefit, even if it entails subsequent adjustment of national laws to align with the final text of the EU Space Act.

Across all three of the examined national laws and the proposed EU Space Act, sustainability requirements are consistently and prominently addressed – encompassing space debris mitigation standards, technical requirements for atmospheric burn-up and mandatory end-of-mission plans. This reflects a growing awareness of the long-term consequences of space exploration and the legal embodiment of intergenerational responsibility. Notably, and in contrast to the proposed EU Space Act – which excludes military space missions from its scope – the space laws of the CEE countries examined here do not exempt government or defence missions from sustainability obligations. This represents a more stringent and, in the authors' view, more principled approach, – one that the EU legislator would do well to consider as the Space Act continues through the legislative process. As the CEE space sector matures and the volume of licensed activities grows, streamlining administrative structures, ensuring clear lines of institutional responsibility and fostering a genuine regulatory partnership with industry will be the defining governance challenges of the decade ahead.

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EUROPEAN JUDICIAL STANDARDS ON ROUTINE IMMUNISATION FOR MINORS COMPARED: PROTECTION OF HUMAN RIGHTS AND PUBLIC HEALTH THROUGH SCRUTINY OF INTERNATIONAL SCIENTIFIC KNOWLEDGE AND EPIDEMIOLOGICAL EVIDENCE**

Abstract: *This article uses comparative method to explore national case law in Europe which adjudicates on challenges to legal frameworks for public health and vaccination based on human rights claims. It recognises that courts have become important actors in multi-level health governance where judicial scrutiny is needed to manage misinformation, populism and vaccine hesitancy at the state–society interface. It argues that judicial decisions ensure the protection of both public health and human rights values through a construction of lawful limitations of rights that is based on the proportionality assessment, which recognises the authority of domestic/international scientific evidence and medical expert knowledge, and which considers local and societal factors. The article also shows that courts are faced with a need to possess extensive epidemiological knowledge and an understanding of vaccine hesitancy and the social determinants of health in order to assess national laws on vaccine mandates*

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and to ensure that the outcomes of judgments are fair and justified. Finally, the text posits that courts contribute to a process of legitimation of international scientific evidence in domestic legal orders while creating judicial standards of review on routine immunisation policies for minors.

Keywords: judicial review of epidemiological evidence, comparative immunisation policies, children's right to health, public health and human rights, World Health Organisation

1. BACKGROUND AND RESEARCH AIMS: PUBLIC HEALTH, HUMAN RIGHTS, THE WORLD HEALTH ORGANIZATION AND JUDICIAL REVIEW OF IMMUNISATION POLICIES

The immunisation of children through vaccines is a major achievement of modern public health and also one of the most successful and cost-effective measures for preventing diseases.[1] Routine immunisation policies at state level constitute a critical tool for ensuring a population's health, and they fulfil the children's right to health by guaranteeing minors access to free vaccines.[2] Historically, vaccines have built adequate levels of community immunity in societies, have eliminated some lethal/disabling diseases – at least in some regions – and have introduced preventive shields against others.[3]

Although the importance of routine vaccination is widely accepted, especially for children, Europe had long been known for a strong scepticism of vaccine safety (so-called vaccine hesitancy[4]), at least for the past two decades and before the

[1] *See* W.K. Mariner, *Law and Public Health: Beyond Emergency Preparedness*, 38 Journal of Health Law 247 (2005). *See also* Y.T. Yang, D.R. Reiss, *Vaccine Law and Policy*, Springer, Cham: 2023 (particularly Chapter 7: *Vaccine Regulation in Global Comparison*).

[2] *See generally* R. Pierik, M. Verweij, *Inducing Immunity: Justifying Immunization Policies in Times of Vaccine Hesitancy*, MIT Press, Cambridge, MA: 2024.

[3] *See* S.A. Plotkin (ed.), *History of Vaccine Development*, Springer, New York: 2011. *Cf. also* I. Milne, *Stacking the coffins: Influenza, war and revolution in Ireland, 1918–19*, Manchester University Press, Manchester: 2018.

[4] Vaccine hesitancy means a "delay in acceptance or refusal of vaccines, despite availability of immunisation services", see for a full definition *Summary WHO Strategic Advisory Group of Experts on Immunization conclusions and recommendations on Vaccine Hesitancy*, January 2015, available at: https://www.who.int/docs/default-source/immunization/demand/summary-of-sage-vaccinehesitancy-en.pdf. *Cf. also* European Commission, *Special Eurobarometer Survey 488 Report Europeans' attitudes towards vaccination*, April 2019, available at: https://tinyurl.com/4w4nujfw, and ECDC Report, *Threat of outbreaks in EU/EEA countries due to persistent gaps in vaccination coverage*, 24 April 2023, available at: https://tinyurl.com/mufv27z6 (all accessed 30 June 2026).

COVID-19 pandemic.[5] The consequences of the phenomenon for public health were lower rates of routine vaccination (insufficient vaccine coverage), leading to lower herd immunity thresholds (less societal immunity) and outbreaks of vaccine-preventable diseases (e.g. measles).

The World Health Organization (WHO) classified vaccine hesitancy among the top health threats even in 2019, and since then huge efforts have been undertaken at state, regional and global levels to reverse a tendency of lowering rates of scheduled and emergency vaccination.[6] The COVID-19 pandemic catalysed the phenomenon, but also demonstrated the critical importance of equitable, free and rapid access to vaccines.[7] The WHO continues to support states in scaling up their routine vaccine agendas.[8]

In Europe, similar efforts were undertaken by the European Centre for Disease Prevention and Control (ECDC, an EU agency) in cooperation with the WHO Europe (a regional office), while vaccine coverage gaps remain for diseases as dangerous as measles and polio.[9] In short, the role of international and regional organisations has been two-fold. They offer support in networking, co-ordinating and exchanging information among national contact points, and they assemble and produce expert knowledge and recommendations in the form of soft law.[10] The latter role corresponds with the fact that the specific realisation of routine immunisation policies both for minors and adults typically take place through domestic legal orders and differ across public health regulation and health care systems.[11]

Thus, at national level, the avoidance of childhood vaccination brought about two principal trends which can be identified from a legal standpoint. Firstly, a trend towards more coercive public health regulations on vaccination for minors can be

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[5] The reasons behind this fact vary, *see e.g.* D.A. Salmon, et al., *Vaccine Hesitancy: Causes, Consequences, and a Call to Action*, 49(6 Suppl 4) American Journal of Preventive Medicine S391 (2015). *See also* M. Frischhut, *Communicable and Other Infectious Diseases: The EU Perspective*, in: D. Orentlicher, T.K. Hervey (eds.), *The Oxford Handbook of Comparative Health Law*, Oxford University Press, Oxford: 2020, pp. 89-91.

[6] WHO, *Ten threats to global health in 2019*, 10 January 2019, available at: https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019 (accessed 31 March 2026).

[7] *Cf.* J. King et al., *Mandatory Covid-19 vaccination and human rights*, 399 Lancet 220 (2022).

[8] WHO, *Stronger together: milestones that mattered in 2025, Continued scale-up of vaccination programmes*, 23 December 2025, available at: https://www.who.int/news-room/spotlight/stronger-together-milestones-that-mattered-in-2025 (accessed 31 March 2026).

[9] ECDC, *European Immunization Week 2025: Closing vaccination gaps, reaching every community*, 25 April 2025, available at: https://tinyurl.com/53wra43d; ECDC, *Measles in Europe*, 28 April 2025, available at: https://www.ecdc.europa.eu/en/publications-data/measles-europe (both accessed 31 March 2026).

[10] *Cf. e.g.* C. Jarrett et al., *SAGE Working Group on Vaccine Hesitancy, Strategies for addressing vaccine hesitancy – A systematic review*, 33(34) Vaccine 4180 (2015).

[11] R. Martin, A.L. Dak Wai, *Comparative national public health legislation*, in: D. Roger et al. (eds.), *Oxford Textbook of Public Health*, 5th ed., Oxford University Press, Oxford: 2011, section 4.2.

seen in Europe. While vaccination for children had traditionally been mandatory in the post-communist states of Central and Eastern Europe, some states have modified voluntary schemes into obligatory ones (e.g. Germany and France) while others have introduced a requirement for proof of vaccination before admission to childcare institutions.[12] As of 2026, 13 European states maintain obligatory children immunisation schemes and 17 states have voluntary ones which in some states are based on strict recommendations (e.g. Austria).[13]

Secondly, the scepticism of some people towards immunising minors has led to parallel processes of challenging vaccination mandates through national judicial proceedings.[14] Those lawsuits concerned either public health laws where the immunisation of children had been and/or has recently become mandatory before constitutional/administrative courts, or parental conflicts over immunisation through civil/family courts in those states where vaccination is optional and where constitutional disputes rarely appear because laws do not prescribe obligatory vaccination. The legal actions involved human rights-based arguments referring to parental and children's rights, the rights to privacy and bodily integrity and the rights to education and religious freedom.[15] National judicial claims in Europe seem to have intensified since the beginning of the 21st century, which corresponds to the publication of falsified studies about the safety of a vaccine against mumps, measles and rubella in the late 1990s.[16]

I became interested in the judicial reasoning behind those cases because I wanted to examine how judges approach the protection of human rights *and* public health objectives. Then, I noticed that justifications of human rights limitations in distinct jurisdictions by various courts are similar and quite consistently refer to international scientific knowledge and recommendations of the WHO. Thus, I became

[12] S. Farina et al., *Childhood Mandatory Vaccinations: Current Situation in European Countries and Changes Occurred from 2014 to 2024*, 12(11) Vaccines 1296 (2024). *Cf.* for the U.S. context, W.E. Parmet, *Shifting Vaccination Politics — The End of Personal-Belief Exemptions in California*, 373 The New England Journal of Medicine 785 (2015).

[13] *Cf.* ECDC, *Vaccine Scheduler*, available at: https://vaccine-schedule.ecdc.europa.eu/ (accessed 31 March 2026).

[14] R. Pierik, *On Religious and Secular Exemptions. A Case Study of Childhood Vaccination Waivers*, 17(2) Ethnicities 220 (2017). *Cf. e.g.* for the Polish context, A. Fiutak, *Odpowiedzialność przedstawiciela ustawowego za niewykonanie szczepienia obowiązkowego* [Liability of a legal representative for failure to perform mandatory vaccination], 9 Medyczna Wokanda 160 (2017), pp. 160-164; J. Kosonoga-Zygmunt, *Glosa do wyroku Sądu Najwyższego z dnia 8 stycznia 2016 r., sygn. V KK 306/15* [Commentary on the Supreme Court judgment of 8 January 2016, Case No. V KK 306/15], 11 Prokuratura i Prawo 170 (2016).

[15] *See* for the US context, W.E. Parmet, *Informed Consent and Public Health: Are They Compatible When It Comes to Vaccines*, 8(1) Journal of Health Care Law & Policy 71 (2005); D.R. Reiss, N. Karako-Eyal, *Informed Consent to Vaccination: Theoretical, Legal, and Empirical Insights*, 45(4) American Journal of Law & Medicine 357 (2019).

[16] In 1998, *see* H.J. Larson, *The biggest pandemic risk? Viral misinformation*, 562 Nature 309 (2018).

intrigued in comparing the state-level case law and its link to international health governance, drawing upon Kathryn Sikking's powerful arguments albeit in a different context that global governance often happens in domestic courts and that comparative law methodology is necessary to study the roles of those courts in transnational realities.[17]

I asked the following research questions: What are the justifications for courts' deference to national public health policies on immunisation for minors? What type of evidence do courts rely on to build lawful human rights limitations when they consider rights claims? What is the nature of review towards evidentiary bases?

Some previous research in the field has argued that courts may be central actors in fostering access to essential medicines, particularly in low- and middle-income countries, e.g. in Latin America.[18] The relevant scholarship addressed primarily judicial opinions concerning free access to vaccines for children to be guaranteed by a given state as an individual entitlement under the right to health.[19] There has been less scholarly work on comparative case law, including in the European context, settling refusals of routine vaccination (denying medical care) and the respective role of judicial review in relation to the lawful limitations of human rights in case of legitimate public health objectives and the collective right to health underpinned by international scientific evidence and epidemiological knowledge.[20]

I also aimed to provide a fuller picture of comparative European judicial standards on child immunisation mandates and to expose the roots of the 2021 *Vavřička*

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[17] K. Sikking, *Memo for the Workshop on The Object and Methodology of Global Governance*, European University Institute, Florence, Italy, January 2013, on file with the author. *See also* K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, W.W. Norton and Company, New York: 2011.

[18] *See e.g.* A.E. Yamin, O. Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33(2) Hastings International and Comparative Law Review 101 (2010); L. London, *What is a human-rights based approach to health and does it matter?*, 10(1) Health and Human Rights Journal 65 (2008).

[19] *Cf.* H. Hogerzeil et al., *Is access to essential medicines as part of the fulfilment of the right to health enforceable through the courts?*, 368 The Lancet 305 (2006); E. Žiobienė, *Challenges to the Protection of the Child's Right to Health*, in: A. Limantė, R. Vaičiūnienė, (eds.), *Children's Rights in Central and Eastern Europe. European Union and its Neighbours in a Globalized World*, Springer, Cham: 2025.

[20] On judicial review of scientific evidence, *see generally, e.g.* R. van Gestel et al., *Judicial Policy Making, Empirical Data and Scientific Evidence Can Courts Manage the Twenty-First Century?*, Edward Elgar Publishing, Cheltenham: 2026; N. de Sadeleer (ed.), *Implementing the Precautionary Principle*, 2nd ed., Earthscan: 2018. For the older accounts *see e.g.* A. Alemanno, *EU Risk Regulation and Science: The Role of Experts in Decision-making and Judicial Review*, in: E. Vos (ed.), *European Risk Governance: Its Science, Its Inclusiveness and Its Effectiveness*, Connex, Mannheim: 2008, pp. 59-63; A. Biondi, K. Harmer, *Scientific Evidence and the European Judiciary*, in: A. Biondi et al. (eds.), *Scientific Evidence in European Environmental Rule-Making*, Kluwer Law International, Alphen aan den Rijn: 2009, pp. 51-60; E. Barbier de la Serre, A.-L. Sibony, *Expert Evidence before the EC Courts*, 45(4) Common Market Law Review 941 (2008).

judgment of the European Court of Human Rights (ECtHR),[21] because before that decision the human rights protection standards of the ECtHR in this area were fragmented and incomplete.[22] The research design also considered the fact that earlier European scholarly studies on the legal aspects of vaccinating minors typically concentrated either on regulatory public health law, philosophical issues, national tort law analysis or powers and values under EU law,[23] as well as on examining the proportionality of the above-mentioned ECtHR judgment.[24]

Importantly, the comparative findings about case law from various domestic normative systems also fill a knowledge gap in the EU context regarding the judicial standards in the field of public health, immunisation polices and related legal disputes based on human rights claims – given that the EU lacks legal competence in the matter of children vaccine mandates pursuant to Art. 168 of the Treaty on the Functioning of the European Union[25] and that there have been no precisely related rulings from the EU Court of Justice.[26] Only some claims concerning mandatory immunisation during the COVID-19 pandemic have actually been litigated in EU courts: either directly against EU institutions[27] or through the preliminary

[21] ECtHR, *Vavřička and Others v. the Czech Republic* (App. Nos. 47621/13 and 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), Judgment, 8 April 2021, para. 277.

[22] See the HR Committee Decision, *Boffa and 13 Others v. San Marino* (App. No. 26536/95); and the ECtHR judgments in *Solomakhin v. Ukraine* (App. No. 24429/03) and *Jehovah's Witnesses of Moscow and Others v. Russia* (App. No. 302/02).

[23] *See e.g.* D. Orentlicher, T.K. Hervey (eds.), *The Oxford Handbook of Comparative Health Law*, Oxford University Press, Oxford: 2020; R. Pierik, *Vaccination Policies: Between Best and Basic Interests of the Child, between Precaution and Proportionality*, 13(2) Public Health Ethics 201 (2020); A. Milon, R. Bouvet, *Scientific Uncertainty in Courts. A France-Germany Comparative Perspective on Litigation surrounding Hepatitis B Vaccination*, 26(1) European Journal of Health Law 5 (2019); A. de Ruijter, *EU Health Law & Policy The Expansion of EU Power in Public Health and Health Care*, Oxford University Press, Oxford: 2019; E.M. Speakman, S. Burris, R. Coker, *Pandemic legislation in the European Union: Fit for purpose? The need for a systematic comparison of national laws*, 121(10) Health Policy 1021 (2017).

[24] *Cf.* R. McWhirter, M. Clark, *Expertise, Public Health and the European Convention on Human Rights: Vavřička v Czech Republic*, 86(4) Modern Law Review 1035 (2023); A. Alekseenko, *Implications for Covid-19 vaccination following the European Court of Human Right's decision in Vavřička and others v. Czech Republic*, 22(1) Medical Law International 75 (2022), pp. 79–84; I.Y. Nugraha et al., *Vavřička and Others v. the Czech Republic*, 116(3) American Journal of International Law 579 (2022); A. Krasser, *Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR*, 15(2) ICL Journal 207 (2021); A. Nilsson, *Is Compulsory Vaccination Compatible with the Right to Respect for Private Life? A Comment on Vavřička and Others v. the Czech Republic*, 28 European Journal of Health Law 323 (2021).

[25] *See generally*, S. Garben, *Article 168 TFEU*, in M. Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, online ed., Oxford Academic, New York: 2019.

[26] See the inadmissibility order in case C-459/13 *Milica Široká v. Slovakia*, ECLI:EU:C:2014:2120; and also a case declared inadmissible: C-765/21 *Azienda Ospedale-Università di Padova*, EU:C:2023:566, para. 44; and C-161/21 *Comune di Camerota*, EU:C:2021:833.

[27] *Cf.* T-710/21 *Robert Roos and Others v. European Parliament*, EU:T:2022:262; C-458/22 P *Robert Roos and Others v. European Parliament*, EU:C:2023:871.

ruling procedure with regard to national mandates to vaccinate, discrimination and equal treatment in employment and occupation.[28] Those cases also bring to the fore broader questions of protecting both individual human rights and public health from transboundary epidemics and health threats in the European Union.

Finally, this research is vital in the times of a multilateralism crisis coupled with decreasing societal trust in public institutions and democratic deficit in global governance more generally.[29] It touches upon significant challenges faced by international organisations, including the need to maintain the credibility of scientific knowledge produced by collaborative expert groups within those organisations, as well as the securitisation and privatisation of public health.[30]

In order to pursue its aims, the article links legal analysis with an interdisciplinary conceptual lens. The novelty of the text is its particular multi-discipline analytical framing, which links fields that are usually treated separately (judicial review of human rights claims; public health regulation and epidemiological evidence; vaccine hesitancy; and legitimacy of international organisations) despite being closely interlinked. This phenomenon is easily overlooked. It shifts attention to a comparative examination of domestic judicial decisions across European jurisdictions and courts' engagement with epidemiological reasoning regarding the immunisation of children and international scientific evidence produced by national/WHO expert bodies.

Thus, the paper moves beyond typical analyses of the limits of individual human rights versus compulsory vaccination and the application of the proportionality principle by national courts or international tribunals, and discusses the role of diverse judicial bodies within a broader context of multi-level health governance. It shows that those courts became important actors in interpreting and enforcing justified human rights limitations and public health normative frameworks within governance structures. The interdisciplinary lens is also vital to expose the relationship between the role of national courts and their human rights-based review versus the non-binding nature of scientific evidence (e.g. soft law) generated by specialised international bodies.

The originality of the paper also lies in its focus on the field of *public health human rights*, exposing an often unspoken mutual reinforcement between protecting public health and protecting human rights, as well as theorising relations

[28] See the judgment of 18 June 2026 in C-522/24 *Ministero della Difesa I*, ECLI:EU:C:2026:498, and pending C-386/25 *Ministero della Difesa II*. *See also* C-219/24 *A and Others v. Tallinna linn*, paras. 51–54 in the context of COVID-19, anti-discrimination, health and safety at work.

[29] *See* L. Gruszczynski et al. (eds.), *The Crisis of Multilateral Legal Order: Causes, Dynamics and Implications*, Routledge, Abingdon: 2022.

[30] *See* A. Müller, S. Behrendt (eds.), *Emergency Regimes for Global Health Law, Policy, and Institutions*, Edward Elgar, Cheltenham: 2026.

between various interdependent human rights in the context of protecting collective health and children's right to health.

The text comparatively appraises the judicial standards applicable in Europe, as defined by the boundaries of the Council of Europe and including domestic courts and the ECtHR (see Table 1).

The paper proceeds as follows. Section 2 explains in detail the conceptual framework and methodology employed in the text. Section 3 contains the appraisal and discussion of the comparative judicial standards in Europe on routine immunisation policies for minors public health and human rights protection. Section 4 concludes the article.

2. CONCEPTS AND METHOD

The text is grounded in the comparative method with an interdisciplinary lens; both of these are unavoidable to demonstrate the role of courts in protecting both human rights and public health in multi-level public health governance.[31] The lens is also helpful to present the complexity of issues which are involved in domestic immunisation policies, the protection of individual rights and constitutional state powers. This section describes the applicable concepts, the comparative method and reasons for its use (section 2.1.); and clarifies how comparators and court cases were selected and analysed (section 2.2.)

2.1. Conceptual framework and methodology

The article employs concepts from fields which are critical to the understanding of its aims and arguments: public health regulation and epidemiology in constitutional analysis,[32] vaccine hesitancy[33] and a human rights-based approach to health.[34] The text links those concepts with the legal conceptualisation of a standard of review[35] in order to examine judicial reasoning and the intensity of scrutiny of state/

[31] *Cf.* the justification for interdisciplinary conceptual framework in P. Dąbrowska-Kłosińska, *Electronic Systems of Information Exchange as a Key Tool in EU Health Crisis and Disaster Management*, 10(4) European Journal of Risk Regulation 652 (2019). *See also* note 17 above.

[32] *See* W.E. Parmet, *Public Health and Constitutional Law: Recognizing the Relationship*, 10(1) Journal of Healthcare Law and Policy 13 (2007), pp. 19–24; G.J. Annas, W.K. Mariner, *(Public) Health and Human Rights in Practice*, 41(1) Journal of Health Politics, Policy and Law 129 (2016).

[33] *See* Editorial in B. Hickler et al., *Special Issue on Vaccine Hesitancy*, 33 Vaccine 4155 (2015).

[34] For an historical-interpretive account, *cf.* P. Hunt, *Interpreting the International Right to Health in a Human Rights-Based Approach to Health*, 18(2) Health and Human Rights Journal 109 (2016).

[35] *See* L. Gruszczynski, W. Werner, *Introduction*, in: L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014, pp. 4–5.

governmental public health policy/action which has been applied by various courts to assess the conformity of public health measures (immunisation) with national constitutions and laws and legally binding international norms.[36] The text refers to typical understandings of judicial review. That is, it is differentiated into deferential (i.e. deferring to state powers) and restrictive (i.e. intruding over state powers) according to its scope, intensity and the type of court or jurisdiction.[37]

In the area of research (judicial claims challenging routine immunisation for minors), the experience from non-European jurisdictions suggests that courts defer to state public health measures while taking into account both domestic constitutional limits (individual rights) and scientific factors.[38] At the same time, some authors in the field of public health and human rights have presented contrasting claims that judges either misunderstand or scrutinise epidemiological evidence, health risk and science.[39] Accordingly, the text tests those hypotheses through comparison in order to build a theoretical and normative arguments based on the findings.[40]

With regard to a specific comparative method, the article additionally draws upon the legal methodology of the comparative interpretive approach (CIA), developed by Scheinin and colleagues,[41] and a qualitative analysis of judicial reasoning and institutional documents of international (WHO) and regional (EU-ECDC) organisations. CIA insists that an effective comparison of human rights case law requires a comparison of decisions, an interpretation of the reasoning therein and the contextualisation of the measures and human rights instruments in question in order to expand knowledge thereof and predict future outcomes of judicial

[36] *Cf.* R. Grote, *Judicial Review*, in: R. Grote et al. (eds.), *Max Planck Encyclopaedia of Comparative Constitutional Law*, Oxford University Press, Oxford: 2017, pp. 16–19.

[37] *See* W.K. Mariner, *Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States*, 22(6) German Law Journal 1039 (2021).

[38] *See* W.K. Mariner, G.J. Annas, L.H. Glantz, *Jacobson v Massachusetts: It's not your great-great-grandfather's public health law*, 95(4) American Journal of Public Health 581 (2005); *cf.* B. Toebes, *Human Rights and Public Health: Towards a Balanced Relationship*, 19(4) International Journal of Human Rights 488 (2015).

[39] *Cf.* W.E. Parmet, P.D. Jacobson, *The Courts and Public Health: Caught in a Pincer Movement*; 104(3) American Journal of Public Health 392 (2014); S. Galea, G.J. Annas, *Aspirations and Strategies for Public Health*, 315(7) JAMA 655 (2016).

[40] *See* the taxonomy of reasons for the use of a comparative method by C. McCrudden, *What Does it Mean to "Compare", and What Should It Mean?*, in: S. Besson, L.H. Urscheler, S. Jubé (eds.), *Comparing Comparative Law,* Publications of the Swiss Institute of Comparative Law, Schulthess Éditions Romandes, Geneva/Zurich: 2017, pp. 72–78.

[41] T. Orlin, M. Scheinin, *Introduction*, in: T. Orlin, A. Rosas, M. Scheinin (eds.), *The Jurisprudence of Human Rights Law: A comparative interpretative approach*, Syracuse University Press, Syracuse: 2000, pp. 1–18.

decisions. The approach presupposes a comparison from a multitude of sources and a possibility that pluralist legal interpretations will be revealed by an analysis.[42]

Finally, the article refers to the notions of a legitimacy and legitimation of international organisations in the context of adjudication based on international scientific evidence.[43] It does so to consider the significance of references to expert knowledge of international organisations in the national judicial reasoning under analysis, especially to the WHO's recommendations on routine immunisation, and also in the context of EU/ECDC strategies for national health authorities to increase vaccination uptake.[44] Accordingly, I follow Tallberg and Zürn[45] in their sociological understanding of "political legitimacy as beliefs within a given constituency or other relevant audience that a political institution's exercise of authority is appropriate. [...]" (p. 585). They claim that a *process* is referred to as *legitimation* "[w]here actors deliberately seek to make a political institution more legitimate, by boosting beliefs that its rule is exercised appropriately" (p. 585). Further, in their conceptualisation, "legitimacy is distinct from authority. While authority refers to the recognition that an institution has the right to make decisions and interpretations within a particular area, legitimacy refers to the perception that these rights are appropriately exercised" (p. 586). Moreover, conformance to procedural ideals influence legitimacy beliefs, and so "procedure" is one of the institutional standards of legitimacy for international organisations.[46]

2.2. Selecting Comparators and Analysing Cases

In accordance with the above conceptual frames and aims of the article, the comparators (a choice of legal systems) and court cases (a choice of judgments within those legal systems) were picked with consideration (see Table 1).[47] Firstly, the comparators and court cases were selected using different sampling strategies and the most

[42] *Ibidem*, pp. 17–19.

[43] *See* J. Tallberg, M. Zürn, *The legitimacy and legitimation of international organizations: introduction and framework*, 14(4) Review of International Organization 581 (2019).

[44] *See* WHO, *Table 2: Summary of WHO Position Papers – Recommended Routine Immunizations for Children*, 1 December 2025, available at: https://www.who.int/publications/m/item/table-2-who-recommendations-for-routine-immunization; WHO, *Guidance for the Development of Evidence-Based Vaccination-Related Recommendations*, version 8, 31 January 2017, available at: https://tinyurl.com/5a93m-rkx, pp. 38-43; ECDC, *Let's talk about protection: enhancing childhood vaccination uptake*, April 2016, updated April 2026, available at: https://tinyurl.com/37hn5832 (all accessed 30 June 2026).

[45] Tallberg & Zürn, *supra* note 43, pp. 583–594.

[46] *Ibidem*, pp. 593–594.

[47] For the comparison, selection and research design I referred to K. Linos, M. Carlson, *Qualitative Methods for Law Review Writing*, 84(1) The University of Chicago Law Review 213 (2017), pp. 220–230; and also V.C. Jackson, *Comparative Constitutional Law: Methodologies*, in: M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford: 2012, p. 64; R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53(1) American Journal of Comparative Law 125 (2005).

different case design technique in order to be able to establish generality/causation and minimise bias.[48] The selection involved both systematic and randomised sampling and theoretically informed sampling which were theorised through material, personal and temporal features.[49] Secondly, the case law was selected through searches of electronic databases, both academic and institutional, including websites of constitutional/supreme courts which were available in or convertible to English.[50]

Ratione materiae. The scope of selection was initially identified through a regional criterion (Europe). The regional dimension was defined by the international health and human rights framework (WHO Europe and Council of Europe). It included EU and non-EU states, both former and aspiring, and varying in size, public health culture, legislation (mandatory/optional vaccination), geographic location, courts/claims systems and types of proceedings (e.g. continental/common law). However, all the states shared the characteristic of experiencing claims against legal mandates and courts deferring to policies on the immunisation of children.

The scope of the sample was demarcated by the characteristic of the contestation of routine schedules, i.e. public-law mandates or individual decisions regarding immunisation, and human rights-based claims. The material scope was further defined by the following qualities: public health prevention from health threats, including transborder health threats, and normal conditions. This is why the examination, in principle, did not include judgments related to COVID-19,[51] patient injuries or tort jurisprudence.[52]

The sampling process included those states from the European continent where the routine vaccination of children is mandatory in general or for admission to school[53] and where I was able to find relevant judgments of constitutional tribunals/courts, which typically consider rights claims in domestic systems.[54] As

[48] Linos & Carlson, *supra* note 47, pp. 222–225 and 230–231.

[49] *Ibidem*, *supra* note 47, pp. 220–230. *See also* Jackson, *supra* note 47, p. 64 and Hirschl, *supra* note 47, pp. 139–142.

[50] *See also* B.M. Meier et al., *Bridging International Law and Rights-based Litigation: Mapping Health-related Rights through the Development of the Global Health and Human Rights Database*, 14 Health and Human Rights: An International Journal 1 (2012).

[51] *Cf.* D. Greco, *Commentary: COVID-19 compulsory vaccination for certain worker categories and the socio-economic consequences of non-compliance before Italy's Constitutional Court: a public health and human rights analysis*, 1(1) Journal of Global Health Law 106 (2024).

[52] *See generally*, A. Kirkland, *Vaccine Court, The Law and Politics of Injury*, NYU Press, New York: 2016.

[53] Bulgaria, Croatia, Czechia, France, Hungary, Italy, Latvia, Poland, Slovakia, Slovenia, Bulgaria, non-EU Balkan States, Ukraine, plus Belgium (only polio vaccine is mandatory) and Germany (only measles vaccine is mandatory for school entry since 2020), *see* https://ourworldindata.org/childhood-vaccination-policies (accessed 30 June 2026).

[54] Some decisions were not included in the analysis due to an inaccessibility of full text, but the merits of those decisions did not essentially differ from the here-considered case-law, see: the Lithuanian Supreme Administrative Court ruling of 5 July 2016, Administrative Case No. I-6-662/2016, where the

a result, I selected six judgments of constitutional tribunals as adequate for the comparison (from Czechia, Slovenia, Italy, Moldova, Serbia and France; see the first page of Table 1).

While carrying out the systematic search, I came across judicial decisions from states where the vaccination of children is only recommended, and the decisions resulted from proceedings in civil/family courts between parents who disagreed on the issue. I found a number of judgments of national high/supreme courts (Ireland, Germany, UK/Northern Ireland and UK/England) and randomly selected additional decisions (one per state).

I also decided to include a peculiar decision of the Granada Tribunal from Spain, a state with optional childhood immunisation but where an autonomous government (Andalusia) requested a vaccination mandate accepted by the court. This administrative court decision was paired with a decision by a Polish administrative court. The choice of Poland where vaccines are mandatory was justified by the fact that there is a considerable administrative case-law on vaccination refusals in this country while I could not include its constitutional case-law in the sample.[55]

This allowed me to include the next six rulings from diverse states and courts including administrative, civil and common-law courts, from both unitary and federal jurisdictions, and those with devolved public health powers (e.g. the UK or Spain; see the second page of Table 1).

However, judicial decisions from states where the immunisation of children is not mandatory, and where health-related litigation is culturally unusual and relatively rare – for example, the Netherlands[56] and Nordic/Scandinavian states – were not included.[57]

Ministerial Order stating exclusion of non-vaccinated children from pre-schools was annulled, but on formal grounds – because it was not a parliamentary law, p. 21 (available at: https://www.lvat.lt/data/public/uploads/2018/01/lvat-annual-report-en.pdf); the Constitutional Court of Croatia decision of 30 January 2014 rejected the proposals to institute proceedings against state law which realises the constitutional right to health in form of positive obligation to vaccinate, Case No. U-I-5418/2008, Official Gazette No. 22/14; available at: https://tinyurl.com/2aj94z98; the Constitutional Court of the Slovak Republic judgment of 14.12.2014, in case PL. ÚS 10/13, where state compulsory vaccination was uphold, available at: https://tinyurl.com/mwfntrp3 (all accessed 30 June 2026).

[55] I did not include the Polish Constitutional Tribunal in the comparative constitutional research because of the doubts with its independence and legality of procedures which has existed since end-2015.

[56] E. Lampera et al., *Structural Reform Litigation, Regulation and the Right to Health in Colombia*, in: F. Bignami, D. Zaring (eds.), *Comparative Law and Regulation: Understanding the Global Regulatory Process*, Edward Elgar, Cheltenham: 2016, p. 342.

[57] *See* A. Bårdsen, *The Nordic Supreme Courts as Constitutional Courts; main features as seen from the Norwegian perspective*, Joint seminar between the Constitutional Court of Austria and the Supreme Court of Norway, Vienna, 29-30 October 2015, available at: https://tinyurl.com/5yayh25. A search of the Norwegian Supreme Court website revealed tort-related case-law only, *see* https://tinyurl.com/2zknpzmv (both accessed 30 June 2026).

Ratione temporis. The temporal scope of the sample was delimited by the 20-year period preceding the ECtHR judgment[58] which interpreted the European human right standards in routine immunisation (2021), and so comprised the period from 2001 to 2021. The time-frame was also connected with the fact that the falsified study which highly contributed to vaccine hesitancy in Europe was published in 1998, and so the beginning of the study period is three years later, when the study was already widely known.[59]

Ratione personae. The personal scope was designed to include cases which had been initiated through a variety of claims and by different actors invoking human rights-based claims (individual, NGO-based, MEP-based or federal/regional).

In summary, the decisions analysed in the paper relate to vaccination mandates and policies, financial and criminal sanctions, the exclusion of unvaccinated children from schools or day care centres and parental disagreements over routine immunisation of their children. It encompasses the case law from 12 European jurisdictions and one international court (ECtHR).

Next, the comparisons across cases was performed in the following way. The analytical categories employed to examine and appraise the reasoning of the judicial decisions were informed by the hypotheses and research questions (see Section 1). Accordingly, the reasonings were scrutinised against four principal criteria: (i) the justification employed for limitations on individual rights; (ii) references to scientific evidence and/or expert knowledge; (iii) the courts' approach to epidemiological evidence; and (iv) the intensity of judicial review (see Table 1, columns III–VI). The analysis also included the categorisation of types of legal claims and proceedings and modes of national policy towards vaccines and public health regulation in all the jurisdictions under study (Table 1, columns I–II).

To explain further, I used the qualitative criteria to analyse whether the courts support vaccination policies and what justification they use, including the type of review, references to policy documents and the evidence behind the contested vaccination measures. By doing so, I also explored how judicial reasoning can be located in the context of recommendations/ strategies addressing vaccine hesitancy and whether it somehow relates to its psychosocial determinants. The analysis of both the international institutional documents (WHO/ECDC) and judicial reasoning was thus qualitative, transdisciplinary and critical in light of the relevant scholarship as well as contextual, i.e. taking into account social and environmental factors. The next section proceeds to detail those findings.

[58] *See supra* note 21.

[59] Lancet retracted the text in 2010 only, *see* L. Eggertson, *Lancet retracts 12-year-old article linking autism to MMR vaccines*, 182(4) Canadian Medical Association Journal E199 (2010). *See also supra* note 16.

3. JUDICIAL REVIEW OF POLICIES FOR ROUTINE IMMUNISATION OF CHILDREN IN EUROPE: PROTECTING PUBLIC HEALTH AND HUMAN RIGHTS

A comparative analysis of judgments offers an interesting picture (see Table 1),[60] which prompted the observations presented in the subsequent three subsections.

3.1. Comparative Analysis of Judicial Reasoning: National Laws, Human Rights Claims and Public Health Justification

A result of all the judicial opinions under consideration was a decision in favour of the routine immunisation of minors enforcing national vaccination programmes and laws. In that sense, all courts deferred to policy-makers, medical knowledge and scientific expertise regarding the design and implementation of the policy for the routine immunisation of children (mandatory/optional). In principle, judicial bodies prioritised public health justification and interventions mandating vaccines, and enforced sanctions that were prescribed in a national legal system (e.g. France, Poland or Spain). In two states, the cases also concerned the governmental policies to exclude non-vaccinated children from schools (Czechia and Moldova), and in two other states they concerned severe sanctions applied for refusing vaccination (emergency, forced vaccination during a regional measles epidemic in the Spanish region of Andalusia and a criminal sanction for parents refusing vaccines in France).

Moreover, all the examined judicial decisions decided in favour of domestic immunisation policies, seeing them as necessary strategies to address a decrease in vaccine uptake and to reach a desired vaccination coverage among populations (immunity threshold). The justifications (column III) for the lawful limitation of human rights (e.g. the right to privacy or the right to bodily integrity) in those decisions recognised as relevant grounds the values that are inherent in national health systems: the health, welfare and life of minors (e.g. Czechia, Ireland and the UK) and preventing the spread of infectious/serious/fatal diseases which endanger populations (e.g. Slovenia, Italy, Serbia, France, Poland and the UK).

All the judicial rulings reviewed the rights-based claims and accepted compulsory vaccination as lawful and necessary (column III). Almost all the courts assessed and accepted the limitation of parental rights through the explicit application of the proportionality principle in view of the need to protect the life of children and the health of society from threats.

Additionally, the proportionality for mandating vaccination was also justified through the right to health framing: the protection of public/societal and children's health from the threat of infectious, vaccine-preventable diseases. In three cases,

[60] Any further references to the analysis of judicial reasoning concern Table 1.

the protection of vulnerable groups was also emphasised explicitly (e.g. Moldova, Spain and the ECtHR). However, the legal bases for invoking the right to health varied. That is, the courts referred to a number of national/international norms: either international human rights treaties or obligations of national governments to protect health stemming from domestic constitutional laws (columns II–III).

The decisions of family courts also mandated vaccination when resolving parental disputes under optional schemes of national public health law. Those courts also followed a proportionality review in light of protecting the best interests of children and their welfare. In two cases (Germany and Ireland) the courts simply accepted that there was no evidence of risk for a child according to expert knowledge (columns IV–V), while in two others (UK/England and UK/Northern Ireland), they intensely scrutinised the available vaccine types and their suitability for a given child (age, health conditions and social determinants of health).

Finally, the proportionality analysis in the judicial decisions linked the assessment of individual welfare/best interests of children and collective/societal interests with epidemiological evidence, medical/scientific knowledge and risk/benefit analyses of vaccines, as well as non-scientific factors in a given local context (columns III–V). Those issues are considered in the next section.

3.2. Adjudication on Expert Knowledge, Epidemiological Evidence and Authority of International Scientific Evidence

A further appraisal of the comparative judicial standards under consideration reveals that the deference of courts to immunisation policies/public health laws was accompanied by either reference to or scrutiny of existing medical and epidemiological evidence and expert knowledge supporting vaccination, both national and international, namely of the WHO (within a broader assessment of the proportionality of vaccination mandates and obligations).

The majority of judgments referred to WHO documents in their reasonings: in six cases they were direct references (Czechia, Italy, Slovenia, Poland, UK/England and the ECtHR), while in another two cases they were indirect (Moldova and Serbia) (column IV). The former included references to WHO documents explaining the benefits of vaccines and general immunisation goals, the recommended vaccination coverage or statistics of decreased coverage (e.g. WHO "Seven Key Reasons of Immunisation", WHO Europe objectives, WHO Immunisation Policy, WHO bulletins or the Global Vaccine Action Plan). The indirect references cited Recommendation 1317 (1997) of the Parliamentary Assembly of the Council of Europe on Vaccination in Europe, which refers to the WHO's role in international co-ordination of vaccination.

In addition, the judicial reasonings of the selected judgments contained thorough reviews of state-specific situations and the epidemiological evidence (columns IV–V). The vast majority of courts had a clear understanding of either a correlation between the desired level of vaccination in society that would ensure herd immunity for specific diseases (e.g. measles) and would lessen the incidence of diseases and morbidity or a cause–effect relationship between low vaccination coverage and the outbreak and spread of diseases (the courts usually referred to an exact percentage of coverage). For example, the Italian Constitutional Court discussed both the difference between optimal (90%) and critical (95%) thresholds to achieve herd immunity for measles, as well as trends in vaccination coverage in Italy. Similar understanding, awareness of epidemiological knowledge and discussion can be traced in the reasonings of courts in Czechia, Slovenia, Moldova, Serbia, Spain, Poland and the UK.[61]

Accordingly, all judicial decisions proved a general understanding of macro-level reasons for vaccination (achieving herd immunity) and well-defined benefits of immunisation versus the possible risk of side effects (columns IV–V). Clearly, as stated by all the judgments, the courts could not find any definitive evidence which would deny benefits of vaccination as a public health measure. The majority of courts recognised that in the case of routine child immunisation, the current state of medical knowledge evidently justifies vaccination. In the latter context, they referred to the development of medical research and the possibility of policy reviews (France, Italy and the ECtHR) and cited peer-reviewed studies (Slovenia, the UK and Czechia). Some courts highlighted the widespread/undisputed medical consensus and standards of evidence with regard to vaccines' preventive effect and efficacy (e.g. Germany, Moldova, the UK and the ECtHR) (columns IV–V).

The above comparative analysis indicated that judicial decisions on immunisation policies recognised the authority of scientific evidence, expert knowledge and medical consensus in their reasoning on the lawful limitations of human rights. Moreover, the courts who referred to the recommendations of WHO and national bodies/experts can be said to contribute to the legitimation of international scientific evidence in domestic legal orders. In other words, through references to those documents, they consider the WHO to be a legitimate source of scientific knowledge on vaccination mandates and immunity thresholds. At the same time, although the examined judicial reasonings clearly endorsed immunisation goals as recommended by the WHO, there were no explicit references to be found in judgments to more concrete, WHO-adopted documents of either disease-specific position papers or

[61] *See also* an extensive discussion by the German Constitutional Court in cases 1 BvR 469/20, 1 BvR 472/20, 1 BvR 471/20, and 1 BvR 470/20, *see infra* note 88.

specific recommendations from the Strategic Advisory Group of Experts on Immunization (SAGE) (columns IV–V).

Consequently, it should be said that the courts' reasonings in litigation of routine immunisation in European jurisdictions also offer an opportunity to contribute further to the legitimation of both national and international scientific/expert knowledge.

Two additional points should be raised here. Firstly, judicial bodies need to possess reflexive epidemiological knowledge in order to be able to critically interpret evidence provided by state authorities in specific circumstances and contexts. For example, courts should be capable of acknowledging uncertainty in case of any limitations in the evidence, including for at-risk groups which may be affected by routine immunisation (e.g. pregnant women, newborns or different age groups).

This can prove especially necessary in the adjudication of claims regarding either new or experimental medical products. When faced with litigation regarding different types of novel vaccines, courts may be required to read inconclusive scientific evidence with underlying requirements for more extensive research and revised evidence following new scientific discoveries and data; on such basis they may be compelled to demand sound, up-to-date evidence from national authorities. The reasoning of the Italian and Slovenian Constitutional Courts can illustrate this: those courts emphasised the necessity of confronting mandatory vaccination with new, dynamically developing, medical research and a review of the evidence concerning risks/benefits versus the side effects of vaccines. The ECtHR judgment also emphasised the dynamism in medical science. The UK courts, on the other hand, openly discussed false evidence and consequently rejected retracted scientific studies based on falsified research while admitting that there was no possibility of a scientific negative knowledge dynamic, i.e. zero-risk proof (column V).

The second point is that recognising the authority of scientific/expert knowledge and judicial participation in processes of their legitimation through rendering reasoned judgments on the immunisation of minors would benefit from stronger procedural requirements for scientific evidence in proceedings. That is, courts could carry out a restrictive review of the features of institutional processes and expert bodies who provide the evidence.[62] In this sense, courts could be more demanding against a procedure which offers one of the institutional standards for legitimate activity of international organisations.

[62] *Cf.* K. Sulyok, *Science, Legitimacy and the Judicial Function - A Need for More Intrusive Standards of Review, in: G. Kajtár*, B. Çali, M. Milanovic (eds.), *Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals*, Oxford University Press, Oxford: 2022.

This would also require a better awareness of the institutional structure and processes of the WHO, where immunisation recommendations are made. The yardstick of the EU standards requiring transparency, independence and excellence of scientific evidence and expert bodies could perhaps be useful and inspiring[63] – particularly given the very long tradition of co-operation between national/regional/international experts within the WHO and WHO Europe in generating knowledge about the effectiveness and safety of vaccines, which may in some sense resemble the EU system of expert bodies.

For example, SAGE is a consultative body of the WHO which adopts policy recommendations on vaccines and immunisation.[64] SAGE members (up to 20) are experts from diverse fields, nationalities and regions (e.g. epidemiology, public health, vaccinology, paediatrics, internal medicine, infectious diseases, immunology, drug regulation and vaccine safety) who are selected and appointed by the WHO following an open call for experts.[65]

SAGE Working Groups develop their policy recommendations (strong and conditional) through a meta-analysis of existing research. The resulting document can be adopted as a WHO position paper to provide normative guidance to Member States for use by national public health officials and immunisation programme managers.[66] The SAGE reports endorsed by the WHO are disease-specific and indicate the levels of desired vaccination coverage to ensure herd immunity.[67] SAGE can also establish working groups on dedicated tasks which can appoint and collaborate with external experts. The declarations of independence and disclosure of conflicts of interests are published on the WHO's website.[68]

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[63] *See* P. Dabrowska-Klosinska, *Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union*, in: Gruszczynski & Werner, *supra* note 35, especially pp. 202-208. *Cf. also* L. Knuth, E. Vos, *When EU Courts meet science: Judicial review of science-based measures post-Pfizer*, in M. Dawson et al. (eds.), *Revisiting Judicial Politics in the EU*, Edward Elgar, Cheltenham: 2024, pp. 191–228; C. Sobotta, *How the Court of Justice of the European Union deals with scientific knowledge and what this means for Member State court practice*, European Expertise & Expert Institute, 7 January 2020, available at: https://tinyurl.com/4mrjw527 (accessed 30 June 2026).

[64] WHO, *Strategic Advisory Group of Experts on Immunisation (SAGE)*, available at: https://www.who.int/groups/strategic-advisory-group-of-experts-on-immunization; *SAGE Terms of reference*, June 2022, available at: https://tinyurl.com/43p38tv2 (both accessed on 30 June 2026).

[65] *Ibidem*. WHO, *Development of WHO immunization policy and strategic guidance: methods and processes applied by the Strategic Advisory Group of Experts on Immunization (SAGE) to develop evidence-based recommendations*, 2024, available at: https://iris.who.int/server/api/core/bitstreams/8d534089-f6b2-4771-9568-66b4aaab62e4/content (accessed 30 June 2026).

[66] *See* WHO, *supra* note 44.

[67] *See also* Z. Jakab, *Better Health for Europe: more equitable and sustainable*, WHO, Geneve: 2019, available at: https://tinyurl.com/mshj73ze (accessed 30 June 2026).

[68] P. Duclos et al., *Establishing global policy recommendations: the role of the Strategic Advisory Group of Experts on immunization*, 10(2) Expert Review of Vaccines 163 (2011).

3.3. Role of Judicial Review in Case Law on Routine Immunisation for Minors and Beyond

The preceding sections showed that the courts deferred to state policies on vaccination and national/international scientific evidence in the analysed case law. Yet, at the same time, a thorough appraisal of the judicial reasonings demonstrated that the judicial bodies exercised a quite strict review towards the evidentiary basis of routine immunisation policies for minors, including a review of societal and non-scientific factors (columns V–VI). It was evident that the legal challenges to routine vaccination forced the courts to also indirectly respond to vaccine hesitancy. This leads to the consideration of the role of judicial review in times of misinformation and societal fears. This section considers such issues.

The analysis of judicial reasoning for the purpose of this text revealed that most of the courts recognised the existence of disinformation surrounding the immunisation of children and the reality of anti-vaccination views. Two courts dismissed fears and objections as irrelevant (Germany and Poland), two courts discussed parental objections resulting from morality, fears or private research (UK/England and UK/Northern Ireland), two courts recognised ethical issues in the disputes (Czechia and Moldova) and one of these last two sought an opinion from the Committee on Human Rights and Biomedicine (Czechia). Relatedly, two dissenting opinions (Czech Constitutional Court and the ECtHR) emphasised the need for broader debates about the safety of vaccination, including for pregnant women, the accessibility of suitable vaccines and paternalism in health care.

Next, four courts considered no-fault state liability for vaccine injuries in their assessment. In the reasoning of the Italian Constitutional Court, the existing compensation scheme was part of the justification for limiting rights. The Czech Constitutional Court emphasised the need for such scheme, as did the ECtHR; only the Slovenian court mandated the law be revised to establish a no-fault state liability scheme for injuries. It was decided in order to adequately protect the right to judicial review for individuals who wish to establish contraindications to vaccination (column VI) – at the time of the judgment, the court perceived legal procedures for individuals to be unclear.

Further, the equal participation of interested parties in proceedings was generally ensured, which can be seen as a means of presenting differing views in proceedings. In all but one constitutional case, non-governmental organisations submitted their views, and in all cases other branches of government participated in the proceedings, depending on the state system. Yet, there is no clear indication of the practice of courts towards requiring governments to fulfil positive obligations of the children's right to health and consider various means of achieving the recommended coverage (apart from mandates). While many of the judgments acknowledged fears

of vaccines and sociopolitical discussions, it is much less easy to identify a common trend in the reasonings about those issues or about the possibility/need to include the views of other relevant actors. This is likely due to national procedural and constitutional constraints regarding judicial review, but also other, non-legal limitations.

For example, no evidence was found in the analysed case law of any consultation with or participation of ombudsmen representing children's interests, although in many rulings the best interests of the child were at the centre of the proportionality analysis. Moreover, there were examples of courts acknowledging non-medical views, sometimes based on the participation of various actors (political representatives or civil society), but it was difficult to trace a consistent trend in their consideration/acceptance/dismissal, and various courts responded differently to manifestations of vaccine hesitancy (column VI; Czechia, Slovenia, Italy, Moldova, the UK and the ECtHR).[69]

Furthermore, the examination of the case law offered little guidance of potential procedural means and existing legal remedies for courts to oblige governments to organise comprehensive education/training systems for those refusing routine vaccination.[70] Arguably, judicial bodies protecting the right to health, including children's right to health, should be able to impose positive obligations on governments to ensure that they implement adequate strategies tailored to national and local contexts to intervene against hesitancy, e.g. training for health care workers or education and awareness-raising about vaccination and compensation schemes for injuries.[71] In the difficult era of populism and digital fake news, it is regrettably insufficient to protect children's right to health through references to scientific knowledge and medical evidence supporting vaccine safety, and to enforce immunisation policies through mandates and sanctions for non-vaccination. In other words, the reality of disinformation may demand a better addressing of societal factors that impact the effectiveness of immunisation polices and a better understanding of the social determinants of health from the judiciary (e.g. education or access to vaccines).

Simultaneously, the details of references to epidemiological, scientific and public health risk factors in the case law (columns IV–VI) suggest that judicial reasoning

[69] *Cf.* N. MacDonald, *SAGE Working Group on Vaccine Hesitancy. Vaccine hesitancy: Definition, scope and determinants*, 33 Vaccine 4163 (2015). See also e.g. *Summary of SAGE conclusions and recommendations on Vaccine Hesitancy, WHO 2015 (SAGE Report 2015)*, available at: https://tinyurl.com/j7x7rbjy (accessed 30 June 2026).

[70] *See* F. Godlee, *What should we do about vaccine hesitancy?*, 365 BMJ 4044 (2019); *cf.* WHO, *Report of the SAGE Working Group on Vaccine Hesitancy*, 1 October 2014, pp. 44–45.

[71] *Cf.* ECDC, *Catalogue of interventions addressing vaccine hesitancy*, 2017, 1; ECDC, *Let's talk about hesitancy*, Stockholm: 2016, pp. 3, 6, 9.

indeed played some role in transferring knowledge among litigants about vaccines by clarifying disinformation about immunisation for children.

Although it may sound very demanding for the judiciary and entailing an expansive scope of review considering the limits of traditional institutional and democratic standards, the pressures and stresses of the 21st century resulting from populism and the spread of fake news necessitate reflection about adjusting those roles. Judicial bodies might play an important role not only in assessing the conformity of vaccination policies with rights-based claims, but also in recommending normative strategies aimed at increasing vaccination rates along with legal interpretations, especially in times of disinformation about the safety of vaccines and the populist actions of some governments.[72]

Those considerations also prompt a need to better understand the actual capability of courts to respond to vaccination challenges by generating more trust in public authorities.[73] This is crucial because targeting disinformation on vaccine safety, side effects and effectiveness (individual hesitancy determinants) is a trust-building intervention against hesitancy.[74] Further research is needed for a better transdisciplinary translation between the concepts and terminology employed in psychology, law, human rights and public health to develop more comprehensive postulates and opinions.

CONCLUSIONS

The article shows that vaccination has become a highly litigated public policy issue. Across numerous European jurisdictions, judicial opinions have been issued with regard to refusals and disagreements over the immunisation of children. Consequently, vaccination as a part of public health policy becomes additionally legally visible through courts' litigation of rights-based claims and hesitancy about vaccination mandates. This visibility can have positive and negative effects: on the one hand, multi-dimensional judicial standards are created under conditions of pluralist

[72] *See e.g.* a recent example of the judicial intervention in the process of much criticised changes in national vaccination policy in the United States: M. Halpert, *Judge blocks RFK Jr's changes to US childhood vaccine schedule*, BBC News, 17 March 2026, available at: https://www.bbc.com/news/articles/cj4zrrx-lqq4o; K.L. Wallace, *Federal judge temporarily blocks RFK Jr.'s vaccine agenda – an epidemiologist answers questions parents may have*, The Conversation, 20 March 2026, available at: https://tinyurl.com/h3wvavyf (both accessed 30 June 2026).

[73] *See also* the dissenting opinion of the judge K. Wojtyczek to the ECtHR judgment, *supra* note 92, para. 16.

[74] *See* ECDC, *Let's talk about hesitancy*, op. cit., pp. 6, 9.

human rights interpretations;[75] on the other hand, the amount of proceedings at national level may prompt the mistaken impression among the public that routine vaccines for children are not safe and may undermine trust in public health systems. This is why it is crucial to analyse and explain those standards and judicial reasonings.

The comparative case law showed that courts always deferred to public health measures. While doing so, they constructed lawful limitations of individual rights (e.g. the right to privacy and bodily integrity, the right to education or parental rights) of the persons concerned (minor patients and parents) based on a proportionality assessment of state interference, its appropriateness and necessity and the protected interests. As a justification for the interference, they typically cited references to international expert scientific knowledge (the WHO and national immunisation programmes), epidemiological and medical evidence and often the safety and benefits of vaccines, which are crucial for ensuring children the right to health and their best interests and welfare. By doing so, the courts contribute to the protection of both public health and human rights values.[76]

Accordingly, the article argues that misinformation about the safety of vaccines and the resulting refusals of vaccination among society, which became legally visible through litigation, led to judicial bodies becoming important actors in multi-level health governance, ensuring that both public health objectives and the human rights of individuals are protected and fulfilled.

The text also claims that judicial reasoning which considers the proportionality of lawful limitations of human/constitutional rights clearly recognises, and thus reinforces, the authority of domestic/international scientific evidence at national level. Judicial bodies contribute to a process of legitimation of such evidence and knowledge through their reasonings in domestic legal orders, which may be said to even have the potential of increasing the legitimacy of scientific evidence produced by international organisations and expert bodies within societies.

This can happen on the condition that judicial bodies engage more in enforcing the institutional standards of legitimacy through procedural requirements: a more detailed inquiry into the character of expert bodies providing evidence (independence and excellence) and a continuous review of the evidence (medical and epidemiological). This would also mean a more restrictive review of governmental policies against transparency and burden of proof. The EU standards for the quality of

[75] *Cf.* C. McCrudden, *The Pluralism of Human Rights Adjudication*, in: L. Lazarus et al. (eds.), *Reasoning Rights Comparative Judicial Engagement*, Hart Publishing, Oxford: 2014, p. 3.

[76] *Cf. also* M. Frischhut, *The Ethical Spirit of EU Values*, Springer, Cham: 2022, p. 34.

scientific evidence which the courts and the executive branch rely on in food safety and medical product case law could provide a useful yardstick in that context.[77]

Finally, the text posits that courts are faced with a requirement for extensive knowledge about epidemiology and vaccine hesitancy and a clear understanding of the social determinants of health in order to assess national laws on vaccine mandates and to ensure that the outcomes of judgments are fair and justified.

ANNEX: TABLE 1[78]

Comparative case law regarding judicial review of public health, routine immunisation and human rights in Europe[79]

I – state court & claim	**II – national law and policy**	**III – justification for limiting rights**	**IV – scientific / expert knowledge**	**V – epidemiology**	**VI – judicial review**
1. Czech Constitutional Court[80] individual claim	compulsory, routine vaccination of minors	health and life of children as a prioritised value in the rights system (art. 12 ICESCR, art. 11 ESC art. 32, 35 CFR) + proportional limitation of parental rights'	interprets vaccination coverage: "the desired level of approx. 95%", WHO document "Seven Key Reasons" of Immunisation + PACoE	interprets herd immunity and statistic of decreased morbidity after vaccination in proportionality test	deference to experts and policy regarding mandates; acceptance of state-of-the-art knowledge in medicine and pharmacology

[77] *See supra* note 63 and the works cited therein.

[78] The original research data result from the project Themis (EU Horizon 2020 MSCA grant agreement No 746014) and from the separate research in 2024 and 2025.

[79] Legal references and abbreviations: Parliamentary Assembly Council of Europe 1997 Recommendation 1317 (PACoE); International Covenant of Economic, Social and Cultural Rights (ICESCR); European Social Charter (ESC); EU Charter of Fundamental Rights (CFR); United Nations Convention on the Rights of the Child (UNCRC).

[80] Judgment Pl. US 19/14, 27.01.2015, paras. 46, 57, 59, 79, 81, 86.

I – state court & claim	II – national law and policy	III – justification for limiting rights	IV – scientific / expert knowledge	V – epidemiology	VI – judicial review
2. Italian Constitutional Court[81] Veneto Region claim against central government	compulsory, routine vaccination of minors; constitutional right of children to health and their interests + Senate Commission interaction with WHO regional office to discuss mandatory vaccines	threats to public health from vaccine-preventable illnesses: individual and societal health; children's right to health and their interests+ proportional limitation of parental rights	National Vaccination plan, WHO statistics 2017 of vaccine coverage for Italy (93%); WHO concerns about regress in vaccination coverage in Italy, WHO Europe objectives and plans	analysis of trends in vaccine coverage & decrease vs measles outbreaks in time; discusses if 95% herd immunity threshold is "optimal" or "critical"	deference to policy, refers to vaccine safety current state of scientific knowledge, possible suspension of mandates in view of new science; dynamic medical research; state compensation scheme
3. Slovenian Constitutional Court[82] NGO claim	compulsory, routine vaccination of minors; restrictive review constitutional right to health	prevent spread of infectious diseases & epidemics; art. 24 UNCRC right to health, health of minors + proportional limitation of parental rights	WHO Immunisation policy, programmes, goals and strategies; national plans align with international obligations	refers to desired 90%–95% level of vaccination coverage to ensure herd immunity, highlights decrease in diseases thanks to vaccination + need for revision as lack of state compensation scheme	deference to medicine on types & mandates of vaccines, restrictive review of evidence, safety and benefits vs side effects; unclear procedures for individuals

[81] Judgment No. 5/2018, 22.11.2017, paras. 3.4–3.8, 4.1, 6.2–6.3, 8.2.

[82] Decision in Case No. U-I-127/01, 12.02.2004, paras. 14–16, 19–25, 26–27.

I – state court & claim	**II – national law and policy**	**III – justification for limiting rights**	**IV – scientific / expert knowledge**	**V – epidemiology**	**VI – judicial review**
4. Moldovan Constitutional Court[83] Member of Parliament claim	compulsory, routine vaccination of minors as a condition for school admission	protection of public health from infectious diseases; protection of vulnerable groups, low risk of vaccines; art. 12 ICESCR art. 11 ESC children's health + proportional limitation of parental rights	National Immunisation programme aims at 95% vaccination coverage; refers to PACoE Recommendation 1317 (indirectly WHO)	accepts university expert opinion: 95% as aim of vaccination coverage; recognises the link between lower vaccination rates and spread of disease	deference to experts and policy regarding mandates; vaccination benefits, recognises "widespread consensus in the medical scientific community" + sociopolitical debate on vaccination and ethical dilemma
5. Serbian Constitutional Court[84] a number of individual claims	compulsory, routine vaccination of minors; constitutional right to health	prevention of infectious diseases which endanger population; art. 24 UNCRC + proportional limitation of parental rights	refers to PACoE Recommendation 1317 (indirectly WHO) "reactivate comprehensive public vaccination programme"	refers to need for herd immunity (95%) and recognises the link between lowest vaccination coverage in ten years to risk of disease outbreaks	defers to policy choice to mandate vaccination and to medicine, Institute of Public Health experts

[83] Decision No. 26, Session No. 136a / 2018, 30.10.2018, paras. 27–30, 49–53, 60–65.
[84] Decision IУз-48/2016, 26.10.2017, paras. II–III.

I – state court & claim	II – national law and policy	III – justification for limiting rights	IV – scientific / expert knowledge	V – epidemiology	VI – judicial review
6. French Constitutional Council[85] court's referral of individual claim	compulsory routine vaccination of minors, criminal and financial sanctions; constitutional obligation to protect health of all; incl. children & mothers	combating extremely serious and contagious diseases; + proportional limitation of parental rights	constitutional obligation to protect health of all, incl. children & mothers		deference to experts and policy obliged to take account of developments in epidemiological, medical and scientific knowledge
7. Spanish Regional Administrative Court (Granada) [86] Andalusian Government request for a judicial order	compulsory, emergency vaccination for measles (35 minors); power of administration to control transmissible diseases constitutional right to health	urgent sanitary reasons & to prevent threats to vulnerable populations (infants & adults); right to health + proportional limitation of parental rights	national vaccination programme	accepts governmental evidence about preventive effect of measles vaccine provided adequate age and coverage is ensured + action must be subject to judicial review	refers to risk–benefit analysis: statistical data regarding side effects of measles vaccine vs measles complications or deaths + sets human rights conditions for vaccination
8. Polish Regional Administrative Court (Warsaw)[87] individual claim	compulsory, routine vaccination of minors, financial sanctions, constitutional obligation to protect health of all	need to fight epidemic diseases	national vaccination programme based on WHO recommendations	deference to policy based on epidemiological data on illnesses + safeguards: obligatory medical check before vaccination	deference to policy based on current scientific and medical knowledge, but dismisses parental fears as irrelevant

[85] Decision No. 2015-458 QPC, 20.03.2015, paras. 8–10.
[86] Decision No. 362/2010, 24.11.2010, paras. 1–4.
[87] Judgment VII SA/Wa 665/15, paras. 17–47.

I – state court & claim	**II – national law and policy**	**III – justification for limiting rights**	**IV – scientific / expert knowledge**	**V – epidemiology**	**VI – judicial review**
9. German Federal Court of Justice[88] individual claim	disagreement between parents over routine, optional vaccination of minors	assessment of best interests of a child	national vaccination recommendation of the Robert Koch Institute recognised as "medical standard"	refers to risk-benefit analysis, risk of infection of disease vs side effects	recognises "existing scientific knowledge", no specific risk for a child, refers to mother's fears as not requiring analysis
10. Irish Supreme Court[89] individual claim	disagreement between parents over routine, optional vaccination of minors	right to life, children's welfare principle; best interests of a child	Health & Safety Executive booklet national programme	no risk-to-child evidence	accepts expert views and GP recommendations
11. UK/ Northern Ireland High Court[90] individual claim	disagreement between parents over routine, optional vaccination of minors	risk of fatal diseases; children's health and welfare, best interests of a child and public good, art. 24 UNCRC + proportional limitation of parental rights	UK universal immunisation schedule ("green book") opinion of NI Chief medical officer, deference to policy	reviews expert opinion on reasons for vaccines (herd immunity) and avoiding disease, "undisputed expert & medical evidence"	recognises medical consensus on vaccine necessity & safety; reviews expert evidence on vaccines offered in the UK and their suitability for a child in question, incl. risks and benefits; rejects retracted study; recognises mother's fears of side effects

[88] Decision No. 82/207, XII ZB 157/16, 03.05.2017, paras. 1–3. See also the Order of the German Constitutional Court of 21 July 2022 in cases 1 BvR 469/20, 1 BvR 472/20, 1 BvR 471/20, and 1 BvR 470/20, Press Release No. 72/2022, *Unsuccessful constitutional complaints challenging statutory obligations to provide proof of measles vaccination in day care settings*, 18.08.2022.

[89] Appeal No. 274/2013, 19.12.2013, paras. 16–19, 30–36, 41–42.

[90] Judgment [2020] NIFam 12, KEE11292, 30.07.2020, paras. 10, 14–19, 24–26, 31, 33–46.

I – state court & claim	II – national law and policy	III – justification for limiting rights	IV – scientific / expert knowledge	V – epidemiology	VI – judicial review
12. UK/ England High Court[91] individual claim	disagreement between parents over routine, optional vaccination of minors	children's health and welfare, best interests of children + proportional limitation of parental rights (reasonable carer test)	refers to WHO findings on the safety of the diphtheria vaccine and to the 2008 WHO Bulletin on benefits of vaccines	review of viral infections & their incidence; evidence on vaccine efficacy to prevent diseases & side effects of vaccines; reviews expert opinion on reasons for vaccines (herd immunity); accepts scientific consensus	reviews knowledge & research as conclusive, admits failures, e.g. narcolepsy reviews, retracted studies, impossibility of proving scientific negative knowledge dynamic; recognises father's objections, preference for expert evidence
European Court of Human Rights[92] (5 joint individual claims from Czechia; no violation of human rights)	routine, compulsory vaccination of minors as a condition for school admission; right to privacy; right to education and freedom of religion (inadmissible)	protection against diseases posing serious risk to health & vulnerable groups, best interests of children + proportional limitation of parental rights	national law, WHO Global Vaccine Action Plan 2013 & Global Immunisation Vision and Strategy, public health policy; pressing social need for vaccination	consensus of ECHR parties and international bodies on vaccination advantages and highest coverage; no consensus on implementation model; risk of lower herd immunity	accepts national policy choice and medical evidence, flexibility & dynamism in medical science; vaccines for 9 diseases considered safe and effective by scientific community; compensation scheme

[91] Judgments: [2018] EWFC 56, 22.08.2018, paras. 8–40, 54–66, 89–92 and [2020] EWCA Civ 664: "the alleged link between MMR and autism has been definitely disapproved", para. 85.

[92] Judgment of 08.04.21, Vavřička and Others v. the Czech Republic, Applications nos. 47621/13 and 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15.

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THE *REBUS SIC STANTIBUS* CLAUSE AS AN "ANTIDOTE" TO THE SUNSET CLAUSE IN THE ENERGY CHARTER TREATY?

Abstract: *States Parties to the Energy Charter Treaty (ECT) risk encountering serious difficulties in transitioning from fossil fuels to green energy sources in order to better protect the environment and climate, as this would clearly be at odds with the ECT. Withdrawing from the ECT might not even solve the problem, since Art. 47(3) ECT contains a sunset clause requiring any withdrawing State to comply with the obligations to protect foreign investment in its economic system for 20 years after withdrawal. This article aims to contribute to the ongoing debate on whether, once other legal avenues have been ruled out, States can invoke the rule on change of circumstances as a last-resort option to terminate the ECT in its entirety, including the sunset clause in Art. 47(3) thereof. It concludes that this last-resort option is unlikely to be helpful. Indeed, under scrutiny, it seems that the condition of unforeseeability – which is required inter alia for both the customary rule on change of circumstances and Art. 62 of the Vienna Convention on the Law of Treaties to apply – cannot be met in this case.*

Keywords: Energy Charter Treaty, *rebus sic stantibus* clause, treaty termination, investment treaties, climate change

INTRODUCTION

States wishing to withdraw from the Energy Charter Treaty (ECT) would prefer to be able to do so without being obliged to abide by the withdrawal provisions in

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Art. 47 ECT, primarily due to the presence of a sunset clause in its para. 3. This would enable several problems to be overcome relatively quickly. One such problem is the compatibility of the ECT with the environmental and climate protection measures now being implemented or planned by many ECT States Parties, including the transition from fossil fuels[1] to green energy sources. This problem is the subject of an ongoing debate, with the economic, legal and political aspects being heatedly discussed.[2]

This article aims to inform this debate and clarify certain legal aspects thereof by assessing the last-resort option of invoking the rule on change of circumstances – traditionally known as the *rebus sic stantibus* clause – to terminate the entire ECT, including the sunset clause in its Art. 47(3). The most common idea is that in this case the change of circumstances would be materially constituted by the growing scientific and social international awareness of the link between the current environmental and climate crises and the use (and abuse) of fossil fuels, which in turn has led to the urgency and importance of transitioning to green energy sources.[3]

First of all, I will provide some background information on the ECT (section 1). Once the main alternatives to the withdrawal framework set out in Art. 47 ECT have been ruled out (section 2), I will attempt to clarify whether recourse to the rule on change of circumstances could be a viable way of achieving the objective of terminating the ECT in its entirety, an exercise that will require a preliminary discussion about the rebus sic stantibus clause. In particular, its content will be assessed, with a special focus on the conditions to be fulfilled for its application, and its customary nature will be determined, in order to overcome the objection that it can only be invoked by States Parties to the 1969 Vienna Convention on the Law of Treaties (VCLT), whose Art. 62 is precisely devoted to the rule on change of

[1] In this article, the terms "fossil fuels" and "hydrocarbons" are used interchangeably. However, for the sake of clarity, it should be noted that fossil fuels (coal, oil and gas) are energy sources derived from ancient organic matter, whereas hydrocarbons are chemical compounds made up of hydrogen and carbon. While most fossil fuels are hydrocarbons, some – such as coal – are not.

[2] *See e.g.* the open letter promoted by the University of Warwick and signed by over 100 academics, which was sent to the then UK Minister for Energy Policies: *Letter to Energy Secretary Grant Shapps Urging UK Government to Exit Energy Charter Treaty*, 9 February 2023, available at: http://warwick.ac.uk/fac/soc/law/research/centres/chrp/governance/energycharter. See also the similar *Open Letter from Climate Leaders and Scientists to Signatories of the Energy Charter Treaty*, dating back to 2020 and currently still open for signature at http://endfossilprotection.org (both accessed 31 March 2026).

[3] It has also been argued that the use of the *rebus sic stantibus* clause to terminate the ECT can be justified on the basis that a swift and substantial transition away from fossil fuels is now required to ensure that States can meet their obligations under the 2015 Paris Agreement on Climate Change. *See* E. Jackson, *The Energy Charter Treaty: Letting the Sun Set on Sunset Clauses*, 33(3) Review of European, Comparative & International Environmental Law 619 (2024). It must be noted, however, that the 2015 Paris Agreement contains no obligation expressly concerning fossil fuels.

circumstances (section 3). I will then address another possible objection and seek to establish whether the rule on change of circumstances also applies to the broad category of treaties containing provisions on termination or withdrawal. The ECT falls into this category because its Art. 47, before setting out the sunset clause in para. 3, lays down in paras. 1 and 2 the conditions and procedure for States Parties to exercise their right to withdraw (section 4). Once all of the preliminary issues have been dealt with, I will move on to verifying whether the change of circumstances concerning the ECT complies with the conditions laid down in the relevant rule (section 5). A doubt as to whether the specific condition of the unforeseeability of the change of circumstances is met in this case will be examined closely. If such a doubt proved to be well founded, even the last-resort option of invoking the change of circumstances would be unhelpful for States wishing to withdraw from the ECT in its entirety (section 6). The paper will end with some concluding remarks.

1. THE ECT, ITS GRADUAL COLLAPSE AND THE WITHDRAWAL PROVISIONS IN ITS ART. 47

The ECT was signed in Lisbon on 17 December 1994 and came into force on 16 April 1998. In brief, its purposes are to provide a multilateral framework for energy cooperation while promoting and supporting trade relations and foreign investment in the fossil fuels sector, as well as to facilitate the settlement of inter-State and investor-State disputes relating to fossil fuel investment. At the time the ECT was being negotiated, Western European States wanted to secure a supply of energy resources from Eastern European States. Conversely, the latter – particularly the States that had emerged from the dissolution of the Soviet Union – were keen to obtain a steady flow of much-needed investment.[4]

Over time, many non-European States have gradually acceded to the ECT. Additionally, the direction of investment flows has partly reversed. Last but not least, a number of circumstances relating to environmental and climate protection have changed. The one that mostly matters here, and that will be taken into account in the following pages, is the growing scientific and social international awareness that the excessive use of hydrocarbons is linked to environmental degradation and climate change. This has resulted in an urgent and important need to transition to green energy sources.

In 1994 it was clear to the negotiating States that environmental degradation and climate change were taking place. However, at first glance, it might seem plausible

[4] For more information about the ECT and for the ECT-related documents and news mentioned herein, please visit the official ECT website at www.energychartertreaty.org.

that they did not foresee the rapid and far-reaching consequences of these phenomena, and above all their link with the use of hydrocarbons. Indeed, the preamble to the ECT shows that the States Parties considered the measures set out within it to be consistent with the existing legal instruments for protecting the environment and the climate. In particular, in its penultimate paragraph, the ECT preamble recalls "the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its Protocols, and other international environmental agreements with energy-related aspects."

In subsequent years, in light of the increasing knowledge among scientists and societies of the link between the environmental and climate crises and the use of fossil fuels, the appropriateness of revising and modernising the ECT to make it more environmentally friendly became a subject of debate. Once it was clear that reconciling opposite views would be difficult due to resistance from some States – primarily Eastern European and non-European States – the debate shifted towards the idea of a mass withdrawal of the "environmentalist States" – primarily EU Member States (MSs) – from the ECT.[5]

The debate became more heated in 2018, when the Court of Justice of the European Union (CJEU) issued its landmark *Achmea* judgment and ruled that arbitration proceedings for the settlement of investment disputes established under investment treaties between EU MSs (intra-EU investment arbitration proceedings) were incompatible with EU law.[6] In an attempt to reorganise the treaty obligations of its MSs in the field of foreign investment, the EU inter alia started searching for the most effective strategy to enable them to withdraw from the ECT collectively and in a coordinated manner.[7]

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[5] It should be noted that, in the meantime, on 3 December 2024, after 15 rounds of negotiations, the Energy Charter Conference officially approved the text of the "modernised ECT", which aims to strengthen commitment to the energy transition and climate action, and reaffirms States' right to regulate areas such as climate change mitigation and adaptation. The modernised ECT has been provisionally applied since 3 September 2025, except in the many States that have submitted declarations opposing its provisional application. In particular, some EU MSs do not seem satisfied with the modernised ECT. It will enter into force once it has been ratified by at least three quarters of the ECT States Parties.

[6] Case C-284/16 *Slovakia v. Achmea BV* [2018] ECLI:EU:C:2018:158. In light of this judgment, in May 2020 the EU promoted the conclusion of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union. As its title suggests, the Agreement terminates this entire category of treaties. Its text is available at eur-lex.europa.eu/eli/agree_eums/2020/529/oj?locale=en. But that was not the end of the story. The following year, the CJEU delivered its even more significant *Komstroy* judgment: Case C-741/19 *Moldova v. Komstroy LLC* [2021] ECLI:EU:C:2021:655. Here, the EU judges explicitly referred to the ECT and clearly established that the arbitration clause in Art. 26 ECT cannot form the legal basis for initiating intra-EU investment arbitration proceedings.

[7] For a reasoned analysis of the various legal strategies that the EU has attempted to adopt, *see* L. Marotti, *L'Unione europea e le strategie di "disconnessione" dall'Energy Charter Treaty*, 106(1) Rivista di diritto internazionale 155 (2023).

However, Italy had already autonomously withdrawn from the ECT in 2016. Despite the EU's efforts, France, Germany and Poland followed suit in 2023; Luxembourg and Slovenia in 2024; and Denmark, the Netherlands, Portugal and Spain in 2025. Failing to coordinate its MSs, the EU had no choice but to announce its own withdrawal from the ECT on 27 June 2024, to take effect on 28 June 2025, alongside the withdrawal of EURATOM from the ECT.[8] During the writing of this article, the news was announced on the official ECT website that another EU MS – Lithuania – had submitted written notification of its decision to abandon the ECT on 7 August 2025, meaning that it will take effect on 8 August 2026. In the meantime, some non-EU MSs have also withdrawn from the ECT.[9]

As observed, Art. 47 ECT deals with withdrawal. Para. 1 states that, from the fifth year after the ECT enters into force, States Parties may withdraw simply by sending a notification to the Minister of Foreign Affairs of Portugal (the depositary). Para. 2 adds that withdrawal will take effect one year after the notification is received or on an alternative date if specified. But para. 3 contains a sunset clause, which clarifies that the ECT will still apply with regard to the withdrawing States' obligations to protect foreign investment already made in their economic system for 20 years after withdrawal. Foreign investors will consequently be entitled to take legal action against the withdrawing States in the event of any breach of their obligations during this period. As a matter of fact, the possibility of withdrawing from the ECT is acknowledged, but somewhat diluted – perhaps even too much – given that the withdrawing States would still be bound by the ECT for 20 years after withdrawal.[10]

The EU has recently tried to respond to this situation with the adoption of Decision (EU) 2025/1904 of the European Parliament and the Council of 10 September 2025 on the approval of the Agreement on the Interpretation and Application of the ECT. Under the terms of the Agreement, EU MSs shall interpret the ECT as lacking a legal basis for intra-EU investment arbitration proceedings. As a result, the Agreement also specifies that Art. 47(3) ECT will never extend to such proceedings

[8] *See* L. Pantaleo, *The EU's Withdrawal from the Energy Charter Treaty between Treaty Law and International Responsibility Issues*, 26(4) Journal of World Investment and Trade 981 (2025).

[9] Among the non-EU MSs, the United Kingdom withdrew on 27 April 2025. Russia and Australia had previously terminated the provisional application of the ECT on 30 July 2009 and 15 October 2021, respectively. By contrast, the provisional application of the ECT to Belarus ended on 24 June 2022, following a decision by the Energy Charter Conference in response to Belarus' support for Russia's invasion of Ukraine.

[10] A similar sunset clause to that in Art. 47(3) is contained in Art. 45(3)(b). The latter relates to the termination of the provisional application of the ECT. It has operated with regard to Australia and Russia, both of which only provisionally applied the ECT, while it cannot take effect for Belarus. As mentioned in the previous footnote, the provisional application of the ECT by Belarus ended due to a decision adopted by the Energy Charter Conference.

and could never have done so. In other words, the sunset clause contained therein will not have and could never have had any legal effect on intra-EU relations in the event of EU MSs withdrawing from the ECT.

The Agreement will likely make intra-EU investment relations more sensitive to environmental and climate issues. Nevertheless, it is not enough. It clearly cannot affect economic relations between EU MSs and investors from non-EU MSs, or vice versa. It is common knowledge that significant investment continues to flow into EU MSs under the ECT from investors in countries such as Azerbaijan, Japan, Kazakhstan, Türkiye or Ukraine, to name but a few, and vice versa.

2. POSSIBLE ALTERNATIVES TO THE WITHDRAWAL PROVISIONS IN ART. 47 ECT

To prevent ECT States Parties from remaining substantially bound by the ECT for 20 years after deciding to release themselves from their treaty obligations, which in turn would greatly delay their transitioning to green energy sources and pursuing effective environmental and climate protection policies, as well as expose them to the risk of multimillion-dollar claims brought by foreign investors, it would be better if the ECT could be terminated through legal avenues other than the withdrawal provisions in its Art. 47. This would avoid the application of the sunset clause contained in para. 3 thereof. However, the main alternative avenues, which can all be traced back to provisions in the 1969 VCLT, are not entirely convincing. I will now briefly try to explain why.

Firstly, it is difficult to imagine a State being able to withdraw only from the sunset clause in Art. 47(3) ECT while still continuing to be a party to the ECT, with the real and ultimate aim of withdrawing definitively from the ECT in its entirety after having shirked its obligations under the sunset clause. Indeed, this would not be in line with Art. 44 VCLT, which establishes the general principle of indivisibility of treaties, stipulating that any cause of invalidity, suspension or termination can only apply to a treaty in its entirety. It is true that Art. 44(3) VCLT exceptionally allows the grounds of invalidity, suspension or termination to relate to specific sections or provisions of a treaty. However, some conditions must be met. To begin with, the relevant sections or provisions must be separable from the rest of the treaty with regard to their implementation, which seems almost impossible, if not illogical, with reference to Art. 47(3) ECT. In addition, it must be apparent from the treaty, or otherwise established, that the invoking State's acceptance of the relevant sections or provisions was not an essential basis for the counterparties' consent to be bound by the same treaty as a whole. It can be assumed here that each State Party's acceptance of Art. 47(3) ECT was essential for the other States Parties

to express their consent to be bound by the ECT in its entirety. Neither the ECT text nor its *travaux préparatoires* provide evidence to the contrary. Moreover, it is highly unlikely that the States Parties would have agreed to be bound by the ECT in its entirety while accepting the possibility of a future significant imbalance, such as that resulting from one or more of them not being bound by Art. 47(3) anymore.[11]

Secondly, and reversing the factors, it seems equally implausible that a State would be able to invoke Art. 56(1) VCLT to terminate the "minimum treaty regime" brought about by the obligations still in force according to Art. 47(3) ECT after withdrawing from the ECT. Art. 56(1) VCLT provides that a treaty without provisions concerning termination or withdrawal may not be denounced. However, alongside this statement of principle, there are two exceptions. The first one is found in sub-paragraph (a), which clarifies that a treaty may nevertheless be subject to denunciation if it is established that the parties intended to admit such a possibility. As for the second exception, sub-paragraph (b) affirms that the right to denunciation may also stem from the nature of a treaty.[12] That said, Art. 56(1) VCLT only applies to treaties without termination or withdrawal clauses and this is not the case with the ECT, as it regulates the right of withdrawal in paras. 1 and 2 of its Art. 47, with the sunset clause in para. 3 completing the framework. In any event, Art. 47(3) performs a function that makes it inconceivable that the negotiating States originally envisioned the possibility of withdrawing from the "minimum treaty regime" laid down for a 20-year period following any withdrawal from the ECT, or that the nature of Art. 47(3) is per se that of a treaty provision permitting withdrawal therefrom.

Thirdly, and more importantly, the idea of "neutralising" the sunset clause in the ECT through the conclusion of inter se agreements has been widely recommended. Under Art. 41 VCLT, two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if the possibility of modification is provided for or not prohibited by the treaty. In the latter case, however, the modification is only possible if it does not affect the enjoyment of the other parties' rights or their performance of obligations under the treaty and if it does not relate to a provision from which derogation would be incompatible

[11] Under Art. 44(3) VCLT a third condition requires, albeit in somewhat unclear terms, that no injustices arise towards the counterparties from the fact that the invoking State continues to apply the remaining sections or provisions of the treaty. This condition seems to overlap with the second one. It could be reiterated that it is highly unlikely that the ECT States Parties would have accepted the possibility of a future significant imbalance among them, where the term "imbalance" may basically mean "injustice".

[12] Art. 56(2) contains the procedural indication that a party must give at least 12 months' advance notice of any intention to denounce or withdraw from a treaty on the basis of one of the two exceptions listed in para. 1.

with the effective execution of the object and purpose of the treaty as a whole. The ECT does not provide for the possibility of concluding inter se agreements. At the same time, it does not prohibit that possibility. As a result, the two aforementioned conditions apply. Therefore, the idea under scrutiny here appears to be legally challenging. Indeed, sunset clauses are generally considered necessary in order for parties to investment treaties to enjoy rights and perform obligations, and to contribute to the effective execution of these treaties' object and purpose. Moreover, for their part, arbitral tribunals have almost always seemed inclined to exclude the said idea, allowing for an extremely narrow margin for the inter se modifications of the ECT, which cannot be extended to the sunset clause.[13]

In light of the foregoing, as emphasised by Tibisay Morgandi and Lorand Bartels in their seminal article, invoking the rule on change of circumstances as a ground for terminating the ECT would then remain the last-resort option. In their opinion, this rule could "overwhelm" the entire ECT, including its sunset clause.[14]

3. THE CONTENT AND NATURE OF THE RULE ON CHANGE OF CIRCUMSTANCES

The rule on change of circumstances – i.e. the *rebus sic stantibus* clause – has always existed in international law and attracted the attention of scholars. It can be said to be coeval with the Westphalian model of international law. Nevertheless, its content is more precise today than in the past, when only its "core" existed. This precision has mainly been driven by State practice and *opinio* that have emerged over the last 50 years or so. I have already carried out an accurate legal and historical analysis of the said State practice and *opinio* in a recently published book.[15]

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[13] For further and recent analyses, *see* N. Braoudakis, R. Craveia, C. Baldon, *Neutralising the ECT Sunset Clause Inter Se*, 39(2) ICSID Review 347 (2024); S. Mayr, *How to Put an End to Intra-EU Investment Arbitration under the Energy Charter Treaty (Fast): Amendment, Withdrawal, Modification?*, 30(2) European Foreign Affairs Review 223 (2025); Pantaleo, *supra* note 8, pp. 984-990; Jackson, *supra* note 3, pp. 624–625. In addition, for a review of the case law of arbitral tribunals, which is however mainly devoted to the non-amendability of the ECT provisions on the arbitral settlement of disputes, *see* G. Lampo, *The Relationship between Intra-EU Investment Arbitration under the Energy Charter Treaty and the Lisbon Treaty in Light of Article 41 VCLT*, in: G. Pascale, S. Tonolo (eds.), *The Vienna Convention on the Law of Treaties. The Treaty on Treaties in Contemporary International Law*, ESI, Napoli: 2021.

[14] T. Morgandi, L. Bartels, *Exiting the Energy Charter Treaty under the Law of Treaties*, 34(1) King's Law Journal 1 (2023). For a very similar conclusion, *see also* Jackson, *supra* note 3, pp. 626–629. Meanwhile, many reports, documents and blogposts have appeared online discussing the potential role of the rule on change of circumstances in terminating the ECT in its entirety, including its sunset clause.

[15] For more details on State practice and *opinio* concerning the rule on change of circumstances, *see* G. Pascale, *Il mutamento delle circostanze nel diritto dei trattati*, ESI, Napoli: 2024. This section and the following one are essentially based on the results presented in that book.

That analysis has helped shed new light on the conditions to be met for the applicability of this rule. It can be submitted that a change of circumstances may cause the termination (or the suspension) of a treaty[16] or specific provisions within it, provided that the change: (i) relates to circumstances that each party considered essential when consenting to be bound by the treaty; (ii) is fundamental in the sense that it has caused a radical change in the scope of the obligations still to be performed, mostly in terms of their increased onerousness; (iii) has not occurred as a result of an unlawful act previously committed by the invoking State; and (iv) was not foreseeable at the time the treaty was concluded.

The review of State practice and *opinio* has also provided fresh precision and certainty as to the nature of the rule on change of circumstances. It can now be confirmed that the rule in question is definitely of a customary nature.[17] This outcome is evidenced above all by the frequency with which States have invoked a change of circumstances to terminate or suspend a treaty, taking care to prove compliance with the above-described conditions. The customary nature of the rule on change of circumstances is also shown by the many instances in which the counterparties did not deny that a change of circumstances could have caused the termination or suspension of a treaty, but instead raised objections related to the failure to fulfil a given condition for the effective operation of the rule.

Interestingly, even international jurisprudence has committed to the position that incorporates the rule on change of circumstances into customary international law. Notably, in its twin judgments on jurisdiction delivered in 1973 in the *Fisheries*

[16] The analysis of State practice and *opinio* reveals that a change of circumstances may affect all categories of treaties, including those that establish international organisations, those that allow the provisional application of other treaties and those that contain rules giving rise to obligations *erga omnes partes* (such as human rights treaties). The rule on change of circumstances may also be referred to other international legal acts with binding force, such as unilateral acts, declarations of acceptance of the compulsory jurisdiction of international courts and tribunals and acts of international organisations. However, this rule cannot apply to general international law, i.e. customs and general principles of law, or of course to political understandings. Finally, it must be acknowledged that a change of circumstances occurring after a treaty has been ratified but before it enters into force may prompt the relevant States to withdraw their ratifications or renegotiate the treaty text. Although all of the above aspects are very interesting, they will not be explored further as they are not central to the topic under discussion here.

[17] Historically, many scholars have referred to the rule on change of circumstances as having a treaty nature, i.e. an unwritten provision inherent in every treaty. This was essentially a *fictio iuris*. Notably, the main proponent of this position was Georg Jellinek, who took up some ideas previously developed by Alberico Gentili, while remaining faithful to the vision of international law advocated by Hegelian philosophy in the 19th century. The renowned author drew inspiration from the Latin maxim *conventio omnis intelligitur rebus sic stantibus* to propose the idea of the inherent presence of a *rebus sic stantibus* clause in every treaty, thereby coining a locution that would subsequently become widely used in legal scholarship. For a summary on this subject, *see* A. Vamvoukos, *Termination of Treaties in International Law. The Doctrines of Rebus Sic Stantibus and Desuetude*, Clarendon Press, Oxford: 1985, p. 17 ff.

Jurisdiction case, the International Court of Justice (ICJ) first recognised the existence of this customary rule.[18] This conviction was reiterated by that same Court 24 years later, in its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case.[19] The following year, the Court of Justice of the then European Communities (CJEC) came to the same conclusion in its *Racke* judgment, which was issued in the context of a preliminary ruling procedure.[20]

It can be now suggested that the written formulation of the rule on change of circumstances in Art. 62 VCLT has influenced the practice and especially the *opinio* of States, as well as international jurisprudence.[21] As a result, today the customary rule on change of circumstances and Art. 62 VCLT seem to overlap in many respects – though not completely.[22]

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[18] *Fisheries Jurisdiction (United Kingdom v. Iceland; Federal Republic of Germany v Iceland)*, Judgments, 2 February 1973, ICJ Rep 1973, para. 36.

[19] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Rep 1997, para. 104.

[20] Case C-162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, para. 24.

[21] Art. 62 VCLT reads as follows:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

[22] As stated in the text, the customary rule on change of circumstances and Art. 62 VCLT seem to overlap in many respects, *though not completely*. It is incidentally observed later in this section that both the ICJ and the CJEC have also stressed that. However, the two courts did not clarify their affirmations. According to Pascale (*supra* note 15, pp. 337–365), three aspects differentiate the customary rule on change of circumstances from Article 62 VCLT. Firstly, although the ILC indicated that the term "circumstances" in Art. 62 VCLT should be interpreted as including both international and domestic circumstances, customary law appears to prevent treaties from being terminated based on a change of circumstances within the invoking State. Secondly, the prohibition of invoking a change of circumstances as a ground for terminating a treaty that establishes a boundary, which is set out in Art. 62(2)(a) VCLT, does not contribute to defining the content of the customary rule on change of circumstances. Thirdly, given that the procedure for generally asserting all causes of the invalidity, termination and suspension of treaties have been included in Arts. 65–68 VCLT, Art. 62 does not specifically provide for any such procedure. In contrast, the corresponding customary rule seems to dictate a procedure based on the interested State invoking the change of circumstances and the counterparties *acknowledging*, either expressly or tacitly,

It is true that States have rarely made explicit recourse to Art. 62 VCLT. Nonetheless, the conditions that States wishing to invoke a change of circumstances have usually abided by, and those that objecting States have usually relied on, largely correspond to the conditions set out in Art. 62 VCLT. Thus, since 1969, it is as if States have convinced themselves that the customary rule on change of circumstances corresponds to the treaty rule in Art. 62 VCLT.

This belief has undoubtedly been facilitated by the attitude taken by the ICJ, which may be considered a "promotional" attitude so to speak. As mentioned above, in its twin judgments in the *Fisheries Jurisdiction* case, significantly rendered in 1973 – i.e. four years after the adoption of the 1969 VCLT – the ICJ for the first time recognised the existence of the rule on change of circumstances in customary international law. It can now be added that the ICJ also indicated in those same judgments that Art. 62 VCLT represents, in many respects, the codification of this customary rule. It is peculiar that the ICJ neither searched for nor relied on State practice and *opinio* to substantiate its assertion. The ICJ only stated that

> [i]nternational law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 VCLT, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.[23]

The ICJ confirmed this outcome in its 1997 *Gabčíkovo-Nagymaros Project* judgment. The aforementioned paragraph from the *Fisheries Jurisdiction* judgments was essentially copied verbatim.[24] The following year, the then CJEC, in a sort of dogmatic statement within its *Racke* judgment, reiterated as well that Art. 62 VCLT may, in many respects, be regarded as a codification of the customary rule on

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the termination effect of this change of circumstances, in order to avoid disputes. It is no coincidence that I use the word "acknowledge" instead of "consent". These are different words and have different legal meanings. Be that as it may, scrutinising procedural issues more in-depth here is of little use for the rest of the discussion, given that the application of the rule on change of circumstances to terminate the ECT is merely hypothetical. To verify the viability of this hypothesis, it is first necessary to establish whether all the conditions for applying the rule are met. Since, as stated in section 6, one of these conditions – that of unforeseeability – is not met, procedural issues can be confirmed once again to be of little relevance.

[23] *Fisheries Jurisdiction*, para. 36.

[24] *Gabčíkovo-Nagymaros Project*, para. 104.

termination of treaties due to changed circumstances, thereby establishing that it could be invoked even by international legal persons not bound by the VCLT.[25]

4. APPLICABILITY OF THE RULE ON CHANGE OF CIRCUMSTANCES IN THE PRESENCE OF TREATY PROVISIONS ON TERMINATION OR WITHDRAWAL, PARTICULARLY WITH REGARD TO INVESTMENT TREATIES

In the past, most scholars agreed that recourse to the rule on change of circumstances was hindered by any provisions in a treaty's text that aimed to establish a condition of termination, a final deadline or the power of withdrawal. They defended this position by arguing that the presence of such provisions in a treaty: (i) implied the establishment of such clear and precise limits for that treaty as to leave no room for other causes of termination;[26] (ii) required the unreserved acceptance of unforeseen risks, given that the parties had consciously chosen to regulate only certain risks;[27] (iii) indicated the willingness of the parties to exclusively follow a certain method to terminate the treaty;[28] and (iv) offered precautions similar to those underlying the rule on change of circumstances, and perhaps even better regulated and detailed.[29]

The International Law Commission (ILC) had initially considered these reasons to be acceptable. In Draft Articles 21-23, presented in the Second Report of the third Special Rapporteur on the Law of Treaties, Sir Gerald Fitzmaurice, the rule on change of circumstances was described as being capable of terminating only treaties intended to last indefinitely and lacking a termination or withdrawal provision.[30]

However, the fourth Special Rapporteur, Sir Humphrey Waldock, later proposed abandoning this perspective. This was also in light of data stemming from State practice. The ILC accepted his proposal. More generally, according to Waldock,

> when a treaty is expressly given a duration of ten, twenty, fifty or ninety-nine years, it cannot be excluded that a fundamental change of circumstances may occur which radically affects the

[25] *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, para. 24. In this particular case, it was of interest for the CJEC to demonstrate that the European Communities, not being bound by the VCLT, could in any case invoke a change of circumstances to terminate a trade agreement previously concluded with Yugoslavia.

[26] M. de Taube, *L'inviolabilité des traités*, 32(2) Recueil des cours 295 (1930), p. 373.

[27] C. Dupuis, *Liberté des voies de communication internationales*, 2(1) Recueil des cours 129 (1924), p. 343; C. Dupuis, *Règles générales du droit de la paix*, 32(2) Recueil des cours 5 (1930), p. 84.

[28] D. Anzilotti, *Corso di diritto internazionale*, Athenaeum, Roma: 1928, p. 413.

[29] U Borsi, *Ragione di guerra e stato di necessità nel diritto internazionale*, 10(1) Rivista di diritto internazionale 157 (1916), p. 178.

[30] G. Fitzmaurice, *Second Report*, pp. 32–33 (text of Draft Articles 21–23) and p. 56 ff. (for commentaries).

> basis of the treaty obligations. The cataclysmic events of the present century show how radically circumstances may change within a period of only ten or twenty years. If the doctrine is put, as it was put by the previous Special Rapporteur, on the general ground of equity and justice, it is not evident why a distinction should be made between "perpetual" and "long term" treaties. The inference which he draws as to the intention of the parties to exclude earlier termination is perfectly legitimate, if the doctrine is regarded from the point of view of the "implied condition" theory; but it does not seem to be so, if the doctrine is regarded as an objective rule of law founded upon the equity and justice of the matter. Moreover, [...] practice does not altogether support the view that the doctrine is confined to "perpetual" treaties.[31]

Draft Article 59 (which would eventually correspond to Art. 62 VCLT) was finalised in 1966 without being limited to treaties that do not include termination or withdrawal provisions.[32] As confirmation, Art. 42(2) VCLT provides that a treaty may be terminated in accordance with both its provisions and the termination causes listed in the VCLT itself. Art. 42(2) therefore allows the rule on change of circumstances to operate independently of any termination or withdrawal provisions in the treaty.

Indeed, it is difficult to see how the application of the rule on change of circumstances with regard to a treaty could be prevented by the existence in that treaty of any provisions on termination or withdrawal.[33] In addition to what Special Rapporteur Waldock pointed out, it is possible to claim that treaty-based termination or withdrawal mechanisms should not necessarily be treated as *lex specialis* vis-à-vis the rule on change of circumstances, as they regulate different situations and rely on different rationales, despite their common ultimate objective. To confine oneself to the most obvious aspect, a change of circumstances occurs when exogenous events occur that are not based on the will of the States. By contrast, it is

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[31] H.M. Waldock, *Second Report*, pp. 83–84. Among the other ILC members, see in particular the opinions of M. Lachs and G. Tunkin, reproduced in 1 Yearbook of the International Law Commission (1963), respectively at p. 140 and p. 253. In line with Waldock's view, *see also* T.O. Elias, *The Modern Law of Treaties*, Oceana Publishing, Dobbs Ferry: 1974, p. 122, and G. Haraszti, *Treaties and the Fundamental Change of Circumstances*, 146(3) Recueil des cours 1 (1975), p. 71.

[32] See the commentary to Draft Article 59 in 2 Yearbook of the International Law Commission (1966), p. 259.

[33] O.J. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61(4) American Journal of International Law 895 (1967), p. 912, seems to come to the same conclusion. Furthermore, R.A. Müllerson, *The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests, and International Law*, 50(3) International & Comparative Law Quarterly 509 (2001), p. 530, writes that "it may seem that in the presence of an expressly provided possibility of denunciation, references to the *clausula rebus sic stantibus* are superfluous. However, the latter has a different content and context of application. Express provisions providing for the possibility of the denunciation of a treaty do not exclude the use of another concept available for treaty termination – that of changed circumstances."

precisely the will of the States involved in treaty negotiations that leads to provisions on termination or withdrawal being included in the text of that treaty, as if they reflect an *ex ante* allocation of potential risks. Moreover, and more generally, as previously mentioned, most treaties today contain provisions on termination or withdrawal.[34] If these provisions were to prevent the application of the rule on change of circumstances, then this rule would have to be assigned very limited or purely residual functions.

In any case, it must be conceded that, from a probabilistic and statistical point of view, the chances of the rule on change of circumstances being invoked to terminate a treaty endowed with a termination or withdrawal provision are low. The conditions required for applying the rule on change of circumstances would be more difficult for States to fulfil than the conditions and procedures established by termination or withdrawal provisions, which are generally straightforward to be invoked and enforced, making them attractive to States looking to quickly abandon a treaty.[35]

Be that as it may, it is argued here that, in certain situations, States may benefit from invoking a change of circumstances. For example, imagine a case in which the future event coinciding with the condition of termination established in the treaty provision never occurs. Alternatively, consider a State that feels the need to withdraw before the date or period when the option of withdrawal can be implemented. It may also happen that the withdrawal procedure proves impracticable or takes too long for some reason. In short, it must be acknowledged that the rule on change of circumstances can sometimes represent a useful escape clause for States.

From this perspective, *the rebus sic stantibus clause* seems to offer a viable avenue particularly for terminating investment treaties, despite the withdrawal provisions they usually include.[36]

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[34] For more information, *see* J.A. Hill, *Aust's Modern Treaty Law and Practice*, Cambridge University Press, Cambridge: 2023, p. 287 ff. The most notable exceptions are some particularly solemn treaties, or treaties with such a broad scope that including a withdrawal clause would be inappropriate. Examples include the 1945 Charter of the United Nations, the 1958 Geneva Conventions on the Law of the Sea, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1981 African Charter on Human and Peoples' Rights and the 1997 Convention on the Right to Non-navigational Use of International Watercourses.

[35] *See* D.F. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43(2) Columbia Journal of Transnational Law 459 (2005), p. 475, and T. Giegerich, *Article 62*, in: O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, II ed., Springer, Berlin/Heidelberg: 2018, p. 1153.

[36] *See* O. Bayrak, *Economic Crises and the Fundamental Change of Circumstances in Investment Arbitration*, 35(1–2) ICSID Review 130 (2020), and M.M. Mbengue, *Article 62 of the VCLT. Fundamental Change of Circumstances*, in: A. Kulick, M. Waibel (eds.), *General International Law in International Investment Law. A Commentary*, Oxford University Press, Oxford: 2024, p. 233 ff.

These provisions are now almost always accompanied by sunset clauses. The latter can be considered complementary to the former, taking effect should a State decide to abandon an investment treaty. As mentioned above with specific regard to the ECT, sunset clauses typically stipulate that the withdrawing State's treaty obligations regarding the protection of foreign investment made in its economic system prior to withdrawal remain in force for a long period after withdrawal. This offers foreign investors guarantees of stability and predictability in respect of a return on their investment.[37]

In the presence of a sunset clause, the withdrawal from an investment treaty on the basis of the relevant treaty provisions essentially "freezes" the withdrawing State's participation in that treaty. The withdrawing State would then have to wait a long time before implementing any measures that could allegedly harm foreign investment and lead to a violation of the sunset clause. Such a violation would allow both the other States Parties and especially foreign investors to take legal action against the withdrawing State. This situation would not change even if the withdrawing State intended to adopt urgent and important measures that would benefit the whole international community and any human societies – i.e. measures concerning the fight against climate change or the protection of the environment – but which would allegedly harm the interests underlying foreign investment already made in its economic system.[38] The aforementioned events surrounding the ECT are very significant in this respect.

5. THE RULE ON CHANGE OF CIRCUMSTANCES AS A LAST-RESORT OPTION TO TERMINATE THE ETC WITHOUT ACTIVATING THE WITHDRAWAL PROVISIONS IN ITS ART. 47

In principle, one could concede that in the case under scrutiny there is a change of circumstances that is materially driven by the increasing scientific and social international awareness of the urgent and important need to combat environmental degradation and climate change, particularly by abandoning hydrocarbons – whose contribution to the current environmental and climate crises is very clear today – and transitioning to green energy sources. The idea is that, had the States been

[37] For more on sunset clauses in investment treaties and the consequent problems emerging when States Parties denounce these treaties, *see* T. Voon, A.D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31(2) ICSID Review 413 (2016).

[38] For more on the problems arising from States withdrawing from treaties containing this type of clause, particularly problems concerning third parties, *see* M. Buscemi, L. Marotti, *Obblighi procedurali e conseguenze del recesso dai trattati: quale rilevanza della Convenzione di Vienna nella prassi recente?*, 102(4) Rivista di diritto internazionale 939 (2019), pp. 969–974.

aware in 1994 of the extreme damage to the environment and the climate caused by supporting trade in hydrocarbons and promoting investment in non-renewable energy, they would not have entered into the ECT, or at least they would have aligned its provisions with greater sensitivity to the environment and climate. This idea could meet *almost* all four of the conditions required for the application of the rule on change of circumstances listed in the first part of section 3.

Firstly, it can be submitted that the change here under consideration relates to circumstances that the ECT States Parties deemed essential for them at the time they consented to being bound by the ECT. The legal scholarship has shown that the circumstances essential for the conclusion of a treaty are those that represented the logical and historical prerequisite for it, to the extent that any change in them (including their possible cessation) would render that treaty devoid of any function, in accordance with the Latin maxim *cessante ratione legis cessat lex ipsa*. In other words, in order for the changed circumstances to qualify as essential, there must be a link between them and the purpose of the treaty.[39] As described in section 1, the purpose of the ECT was to promote and support investment and trade in the field of fossil fuels. Moreover, when the ECT was concluded, it was assumed that this purpose would be pursued stably, or thanks to the sunset clause certainly for at least 20 years after any State withdrew from the ECT. This is no longer valid. The clear awareness of the bond between hydrocarbons and environmental and climate degradation, and the measures that many ECT States Parties consequently wish or are required to adopt, affects the ECT's ability to stably support and promote investment and trade in the fossil fuels sector.

Secondly, it can be acknowledged that the change of circumstances concerning the ECT is a fundamental one. It can be inferred from an analysis of State practice and *opinio* that the fundamental character of a change of circumstances depends on the extent of the alteration in the scope of the treaty obligations still to be performed. As mentioned in section 3, the condition of fundamental character can be claimed to be fulfilled only if the change of circumstances has had the effect of *radically* altering the scope of the treaty obligations still to be performed,[40] mostly by making those obligations more onerous for one of the parties,[41] and thus causing

[39] *See* Fitzmaurice, *supra* note 30, p. 63. *See also* Giegerich, *supra* note 35, p. 1163, and Pascale, *supra* note 15, pp. 201–204.

[40] *See* F. Capotorti, *L'extinction et la suspension des traités*, 134(3) Recueil des cours 417 (1972), p. 543, who writes that "il faut que le changement […] soit 'fondamental', c'est-à-dire qu'il ait eu pour effet de transformer radicalement la portée des obligations qui restent à exécuter en vertu du traité".

[41] In any case, Giegerich, *supra* note 35, pp. 1164–1165, accurately points out that "the extent of obligations still to be performed can be radically transformed either directly or indirectly. Direct transformation means that the onerousness of the obligation has increased, whereas indirect transformation means that the value to be gained by further performance is diminished."

an imbalance between them.[42] With regard to the ECT, the starting point is the increased cost due to multimillion-dollar disputes brought against many ECT States Parties by foreign investors whose economic activities are or can allegedly be affected by the State's measures intended to abandon fossil fuels and transition to green energy sources in order to ultimately protect the environment and climate. In this sense, the change of circumstances at stake appears to be of a nature that has radically increased the onerousness of the obligations that States still have to perform under the ECT, and can therefore qualify as fundamental.

Thirdly, ECT States Parties may rely on the increasing awareness of the link between the current environmental and climate crises and the use of fossil fuels in order to invoke a change of circumstances and terminate the ECT, especially because it seems that none of them has previously caused it to occur through an unlawful act. One scholar suggested the view that, if a State Party to a treaty has caused a change of circumstances even without violating any international rule, that State cannot in any event invoke that change of circumstances to terminate that treaty.[43] If this were the case, then none of the ECT States Parties could invoke the change of circumstances in question, since they all contributed to its realisation to some extent. However, this view seems today contradicted by State practice. Furthermore, in the VCLT regime, it is clearly stated when lawful conduct by a State is to be considered "punishable", as for instance in the case of Art. 48(2), which affirms that error may not operate as a cause of relative invalidity of treaties if invoked by a State that has "contributed by its own conduct to the error".[44]

6. A DOUBT AS TO WHETHER THE CONDITION OF THE UNFORESEEABILITY OF THE CHANGE OF CIRCUMSTANCES IS MET WITH REGARD TO THE ECT

There is uncertainty concerning the fulfilment of the condition of unforeseeability required for the rule on change of circumstances to apply with regard to the ECT.

[42] Therefore, in the VCLT system, the adjective "fundamental", which is even found in the English title of Art. 62, should be read in conjunction with its para. 1(b), which specifies that a change of circumstances can only bring about the termination of a treaty if it has the effect of radically altering the scope of the treaty obligations that the States Parties still have to perform. In any case, it is not possible to agree with A. Hêche (*Les conditions d'application de la clausula rebus sic stantibus*, 47(1) Revue belge de droit international 322 (2014)), whose view is that the condition of the fundamental character of a change of circumstances is not provided for by the relevant customary rule, but only by Art. 62 VCLT.

[43] A. Poch de Caviedes, *De la clause 'rebus sic stantibus' à la clause de révision dans les conventions internationales*, 118(2) Recueil des cours 110 (1966), p. 184.

[44] For details, *see* Pascale, *supra* note 15, pp. 220–222.

According to that condition, a change of circumstances must be both unforeseen and unforeseeable. Therefore, a State cannot terminate a treaty due to a change of circumstances if that change was foreseen and regulated in the treaty itself, for example through a specific clause or even simply through general references to the potential change in the treaty's text or *travaux préparatoires*. It is also established that, if it were proven that a State had the means to reliably or statistically predict that a change of circumstances would occur and yet did not act accordingly, then that change shall be considered irrelevant, as it was foreseeable or – without much difference – implicitly foreseen but deemed by the concerned State as unable to affect its treaty obligations.[45]

As already stated, during the 1994 negotiations that led to the ECT, the States Parties were aware of the need to protect the environment and the climate, even though perhaps they did not fully understand the link between the use of fossil fuels and the damage to the environment and climate, and the resulting urgency and importance of transitioning to green energy sources. This lack of knowledge does not appear to be sufficient for the condition of unforeseeability to be met. On the contrary, it can be assumed that the change of circumstances here under consideration was both foreseen and foreseeable at that time.

Firstly, as stated in section 1, references to notable international treaties on environmental and climate protection can be found in the preamble of the ECT. These references prove that the negotiating States were aware, even if not in detail, that supporting and promoting trade and investment in the fossil fuels sector would somehow have an impact on the environment and climate. Secondly, the outcomes of scientific research concerning the urgency and importance of tackling environmental degradation and climate change, inter alia by means of abandoning fossil fuels, were most likely available by 1994. Suffice it to recall the reports published by the Intergovernmental Panel on Climate Change (IPCC) under the auspices of the United Nations during the 1990s. Although no explicit statement on the need to transition to green energy sources can be found in these reports, the IPCC did strongly advocate a significant shift away from fossil fuels. For example, in its First Assessment Report (1990), the IPCC confirmed that emissions from the combustion of fossil fuels were substantially increasing the concentration of greenhouse gases in the atmosphere, thereby causing warming. The Report warned that this would have significant impacts on natural and human systems, and emphasised the important need to urgently reduce emissions.[46]

[45] *Ibidem*, pp. 208–214.

[46] The First Assessment Report (1990) and all other IPCC reports can be found on the IPCC official website: www.ipcc.ch/reports (accessed 31 March 2026).

As a result, the reasoning proposed by the ECT Secretariat in a note published on the official ECT website on 3 November 2022 appears to be correct. In that note, the ECT Secretariat reminds ECT States Parties of the exceptional nature of the *rebus sic stantibus* clause and quotes a paragraph from the ICJ's 1997 *Gabčíkovo-Nagymaros Project* judgment. From this quotation one can infer that the ECT Secretariat also believes that the urgent and serious need for States to abandon fossil fuels in order to combat environmental degradation and climate change was not entirely unforeseen and/or unforeseeable in 1994.[47]

Indeed, in its judgment in the *Gabčíkovo-Nagymaros Project* case – with regard to the 1977 Treaty entered into by Czechoslovakia and Hungary for the construction of a system of locks along the Danube River – the ICJ stated that a change of circumstances must have been "completely unforeseen" (i.e. unforeseen and unforeseeable) in order to apply. The ICJ also added that new developments in environmental knowledge and environmental law could not be said to have been "completely unforeseen". It then proceeded to affirm that "the formulation of Arts. 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions". In other words, in the Court's view, the references to vague obligations regarding respect for nature in those provisions of the 1977 Treaty made it clear that both Czechoslovakia and Hungary were aware of the foreseeability of the future formation of international norms concerning the protection of the environment. This awareness meant that the rule on change of circumstances, which Hungary had invoked in light of subsequent new rules of international environmental law being established, could not be applied to terminate the 1977 Treaty.[48]

CONCLUDING REMARKS

As things stand, a State wishing to withdraw from the ECT may not rely on the urgency and importance of shifting away from fossil fuels and transitioning to green energy sources in order to combat environmental degradation and climate change as valid grounds for invoking the rule on change of circumstances. Indeed, the condition of unforeseeability would not be met. This negative outcome is in line with those concerning the other legal avenues discussed in section 2 with regard to the termination of the ECT. They all seem to be dead ends.

[47] ECT Secretariat, *Sunset Clause (Article 47 of the ECT) in Relation to Article 62 of the Vienna Convention on the Law of Treaties (VCLT)*, 3 November 2022.

[48] *Gabčíkovo-Nagymaros Project*, para. 104.

More generally, although States are the masters of treaties, they cannot disregard the *pacta sunt servanda* rule, which famously is the *Grundnorm* of the entire law of treaties.[49] They must be also aware that the *rebus sic stantibus* clause is designed to act as an "antidote" to the latter rule more than to sunset clauses included in investment treaties. It is no coincidence that the *pacta sunt servanda* rule and the *rebus sic stantibus* clause are often referred to as two sides of the same coin, as if they were two aspects of the same rule. Consequently, the *rebus sic stantibus* clause must be invoked with caution, and great attention must be paid to all the conditions required for its application. Otherwise, the law of treaties as a whole would risk being seriously jeopardised.

To conclude, this article has contributed to the ongoing debate on the potential use of the rule on change of circumstances as a last-resort legal option to terminate the ECT, and has hopefully demonstrated why even this option must ultimately be ruled out, despite initially appearing sufficiently plausible to warrant further investigation. At the end of the day, States Parties wishing to abandon the ECT would have no choice but to rely on Art. 47 and, as a result, to accept the application of the sunset clause contained in it. The ECT States Parties wanted this when they negotiated and adopted the ECT, and now they must respect their own will. This also explains why several EU MSs decided to withdraw from the ECT autonomously and pursuant to Art. 47 ECT, despite the EU having spent several years searching for a coordinated withdrawal solution capable of overriding Art. 47 ECT.

[49] J. Klabbers, *A Moral Holiday: Withdrawal from the Energy Charter Treaty*, ESIL Reflections, 15 December 2022, available at: https://tinyurl.com/mwuum6kp (accessed 31 March 2026). This author notes that, however, from the States' perspective, *pacta sunt servanda*, but not all treaties deserve to last forever.

SPECIAL SECTION: "FROM EAST TO WEST: ADVANCING VICTIMS' RIGHTS IN A GLOBAL CONTEXT"

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FROM CONFLICT TO REPARATIONS: THE COUNCIL OF EUROPE'S REGISTER OF DAMAGE FOR UKRAINE

Abstract: *Russia's full-scale invasion of Ukraine has brought unprecedented human, material and infrastructural losses. In response to the need for an international reparations mechanism, the Council of Europe established the Register of Damage for Ukraine (RD4U), mandated to receive, process and record claims relating to damage, loss or injury caused by Russia's aggression against Ukraine since 24 February 2022.*

While the RD4U represents the first Register of its kind within the framework of the Council of Europe and one of the few worldwide, it also raises certain concerns. These include unfortunate past examples of compensation mechanisms in other conflicts; the difficulty of obtaining the aggressor's consent to compensate for damages; issues regarding the financing of the mechanism; concerns related to standards of proof and data security. This article discusses these potential challenges and concludes that although the RD4U and the broader attempts to establish a fully operational compensation mechanism for Ukraine must be welcomed, it is important to ensure that this initiative takes into account the errors of the past and avoids resulting in yet another powerless international mechanism.

Keywords: Council of Europe; Register of Damage for Ukraine; reparations for damages caused by armed conflict; international responsibility of States; Russia's aggression against Ukraine

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INTRODUCTION

Russia's full-scale invasion of Ukraine, which began on 24 February 2022, is considered by some to be the largest armed conflict in Europe since World War II. In the first several months alone, the number of Ukrainian citizens fleeing to Europe surpassed 5.3 million.[1] As of February 2026, more than 5.37 million Ukrainian refugees have been recorded across Europe, with total global displacement estimated at over 5.9 million.[2] In addition, more than 3.7 million people remain internally displaced within Ukraine, while 12.7 million people have been identified by the UN High Commissioner for Refugees as being in need of urgent assistance and protection services.[3]

Constant attacks by the Russian armed forces have led to widespread death and suffering. As of 31 January 2026, the number of civilian casualties amounted to 15,172 people – including 766 children – since the war began, and more than 41,000 individuals have been reported as injured (including more than 2,540 children).[4]

There are more than 200,000 recorded instances of war crimes, as well as numerous cases of torture, inhumane treatment and sexual violence, together with vast destruction of residential buildings and critical infrastructure across the country and other immense economic losses.[5]

In February 2025, the Kyiv School of Economics launched a report which analysed damages sustained by various sectors in Ukraine. According to the authors, the total damage inflicted on Ukraine's infrastructure due to Russia's full-scale invasion has reached nearly USD 170 billion. Since early 2024, this figure has increased by USD 12.6 billion due to continued destruction from missile strikes and other hostilities. The five most affected sectors remain housing, infrastructure, energy, assets

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[1] L. Harding, *'We couldn't stand it': the Ukrainians travelling for days to flee Russian bombs and rockets*, The Guardian, 8 March 2022, available at: https://www.theguardian.com/world/2022/mar/08/we-couldnt-stand-it-the-ukrainians-travelling-for-days-to-flee-russian-bombs-and-rockets; Frontex, *5.3 million Ukrainians have entered EU since the beginning of the invasion*, 2 June 2022, available at: https://www.frontex.europa.eu/media-centre/news/news-release/5-3-million-ukrainians-have-entered-eu-since-the-beginning-of-the-invasion-HbXkUz (both accessed 31 March 2026).

[2] Operation Data Portal, *Ukraine Refugee Situation*, available at: https://data.unhcr.org/en/situations/ukraine (accessed 31 March 2026).

[3] UNHCR, *Ukraine*, available at: https://tinyurl.com/ykrwzzuf (accessed 31 March 2026).

[4] Statista, *Number of civilian casualties in Ukraine during Russia's invasion verified by OHCHR from February 24, 2022 to January 31, 2026*, available at: https://www.statista.com/statistics/1293492/ukraine-war-casualties/ (accessed 31 March 2026).

[5] European Union, *Holding Russia Accountable*, available at: https://tinyurl.com/4dc7dbw3 (accessed 31 March 2026).

of enterprises and industry, agriculture and land resources.[6] At the moment, with the intensification of attacks, the total number is likely to be significantly higher.

In November 2022, the UN General Assembly adopted Resolution A/RES/ES-11/5 "Furtherance of remedy and reparation for aggression against Ukraine", where it recognised that Russia must be held accountable for its violations of international law in Ukraine, including by way of making reparations.[7] Additionally, the Resolution recognised the need for an international reparations mechanism and recommended setting up an international register of damage as a first step.[8]

Following this Resolution, the Council of Europe, an institution that since the very start of the Russian aggression against Ukraine has taken decisive, multifaceted actions in response,[9] agreed to serve as the platform for creating such a mechanism. In May 2023, at the Council of Europe's Summit of Heads of State and Government held in Reykjavik, the decision to establish the Register of Damage for Ukraine (RD4U or Register) was announced.[10] It is the first Register of its kind within the framework of the Council of Europe and one of a few worldwide.

The Register is an important step towards accountability for the damage and suffering caused by Russia's aggression against Ukraine, and it represents one of the first practical steps for holding Russia accountable for its actions. It also paves the way for a future comprehensive international compensation mechanism. Agapova also points out that "establishing the Register sets a precedent for international responses to aggression, highlighting the importance of collaborative mechanisms in addressing complex geopolitical challenges."[11]

Although the author strongly welcomes the creation of the RD4U, as well as other steps taken by the international community to hold Russia accountable for the damage caused to the country and its people, this article will outline certain concerns and reflections about potential challenges that the international community may face and should take into account when establishing such a mechanism. For this purpose, the article is divided into three sections. The first one provides a brief

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[6] D. Andrienko et al., *Report on Damages to Infrastructure from the Destruction Caused by Russia's Military Aggression Against Ukraine as of November 2024*, February 2025, available at: https://kse.ua/wp-content/uploads/2025/02/KSE_Damages_Report-November-2024---ENG.pdf (accessed 31 March 2026).

[7] UM General Assembly Resolution A/RES/ES-11/5, *Furtherance of remedy and reparation for aggression against Ukraine*, 14 November 2022, available at: https://digitallibrary.un.org/record/3994481?v=pdf (accessed 31 March 2026).

[8] *Ibidem*.

[9] A. Mężykowska, *Establishment of the Registry of Damage: The first element in ensuring Russia's financial accountability for the aggression against Ukraine*, 12(3) ESIL Reflections (2023).

[10] Committee of Ministers, *Fourth Summit of Heads of State and Government of the Council of Europe*, available at: https://www.coe.int/en/web/cm/reykjavik-summit (accessed 31 March 2026).

[11] O. Agapova, *International register of damage: The guarantee of recovering justice in Ukraine*, 10(1) Journal of Liberty and International Affairs 97 (2024), p. 104.

description of the RD4U, including its structure and functioning. The second describes the process of claims analysis, while the third identifies possible challenges related to both the RD4U and the future compensation mechanism.

1. GENERAL REMARKS ABOUT THE RD4U'S FUNCTIONING

The RD4U was established within the framework of the Council of Europe by Resolution CM/Res(2023)3, which created the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine.[12] Such partial agreements allow cooperation between both Council of Europe members and other countries and intergovernmental organisations. This approach (previously used in some other Council of Europe initiatives, e.g. the Pompidou Group and the EPAS) allows the Council of Europe to extend cooperation way beyond its members. As of today, 44 States and the European Union have joined the Register – 41 as participants and 4 as associate members (i.e. Australia, the EU, Japan and the USA).[13]

Participants of the Register have full membership rights, including voting rights in the Conference of Participants, and commit themselves to making annual assessed contributions to the Register's budget. Associate Members are not required to make annual contributions. They do not have voting rights in the Conference but can participate, make written and verbal statements and are encouraged to make voluntary contributions to the Register's budget. However, there is an exception to the rule – if an associate member voluntarily contributes an amount equivalent to what its assessed contribution would have been had it joined as a participant, it is granted full voting rights for that specific financial year.[14]

The Register is responsible for receiving and processing claims and related evidence. This includes categorising, classifying and organising claims based on defined criteria. Through its Board, the Register assesses claims and determines their eligibility. Eligible claims are recorded in the Register for future examination and evaluation.[15]

[12] Council of Europe, *Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine*, 12 May 2023, available at: https://tinyurl.com/2s4dbw9b (accessed 31 March 2026).

[13] The full list can be found at https://rd4u.coe.int/en/membership (accessed 31 March 2026).

[14] *Ibidem*.

[15] RD4U, *Mandate and Functions*, available at: https://www.rd4u.coe.int/en/mandate-and-functions (accessed 31 March 2026).

To be recorded in the Register, claims must relate to damage, loss or injury caused to natural or legal persons or the State of Ukraine (including its regional and local authorities, state-owned or controlled entities) which occurred:[16]

- on or after 24 February 2022
- in the territory of Ukraine, within its internationally recognised borders, including territorial waters
- as a result of internationally wrongful acts of the Russian Federation in or against Ukraine.

The Register is not an institution that examines claims for the purpose of compensation attribution. Those functions will belong to a future international compensation mechanism: the International Claims Commission for Ukraine (ICCU). The Convention establishing the ICCU was adopted on 16 December 2025. Once it receives 25 ratifications by States or regional integration organisations, it will enter into force and the Commission will be formally established. The ICCU will examine, assess and decide upon claims and determine the amount of compensation due to victims.[17] Its decisions will be transferred to a compensation fund – the third and final element of the compensation mechanism. Once the full compensation mechanism is operational, the work of the Register will continue as part of it, and all recorded claims and evidence will be transferred to it.

The Register opened for the submission of claims on 2 April 2024. As of March 2026, claims could be submitted in 15 categories, all of them available only to natural persons: 1) A1.1 (involuntary internal displacement); 2) A1.2 (involuntary displacement outside of Ukraine); 3) A2.1 (death of an immediate family member); 4) A2.2 (missing immediate family member); 5) A2.3 (serious personal injury); 6) A2.4 (sexual violence); 7) A2.5 (torture, inhuman or degrading treatment or punishment); 8) A2.6 (deprivation of liberty); 9) A2.7 (forced labour or service); 10) A2.8 (forcible transfer or deportation of children); 11) A2.9 (forcible transfer or deportation of adults); 12) A3.1 (damage or destruction of residential property); 13) A3.2 (damage or destruction of non-residential immovable property); 14) A3.3 (loss of housing or residence); 15) A3.6 (loss of access or control of immovable property in the temporarily occupied territories).[18] As of April 2026, claims by States (category B) and legal entities (category C) can also be submitted, bringing the number of claims to 21. Twenty-two more claim categories are to be opened in future.

[16] *Ibidem*. These are three eligibility criteria. The fourth one relates to the subject-matter – the claim must fall within one of the categories defined by the RD4U.

[17] Council of Europe, *Frequently Asked Questions – Convention establishing an International Claims Commission for Ukraine*, available at: https://www.coe.int/en/web/portal/convention-establishing-an-international-claims-commission-for-ukraine (accessed 31 March 2026).

[18] RD4U, *Submit a claim*, available at: https://rd4u.coe.int/en/submit-a-claim (accessed 31 March 2026).

Such division of categories reflects the whole spectrum of possible harms caused by Russia's aggression. As can be seen, they range from displacement and injuries to property damage and loss of housing. One can assume that the categories were created based on a balance between "classic" violations of international humanitarian law (e.g. destruction of property and civilian losses) and human rights-based harms (e.g. sexual violence and deprivation of liberty). In this way, all possible types of harm are documented, especially those that take place in connection with Russia's aggression against Ukraine (e.g. forced deportation of children). Additionally, future adjudication is facilitated by grouping similar claims, thus enhancing the efficiency of the mechanism.

Besides, one can notice that the list also includes some novel categories, such as loss of access to health care and loss of access to education (A4.1 and A4.2, respectively). This undoubtedly marks a significant evolution in the practice of mass-claims mechanisms. While previous mechanisms (e.g. Iraq–Kuwait or the UNRoD) focused primarily on economic losses, physical damage and displacement – rarely addressing systemic violations of social rights – the RD4U expands the understanding of reparations, aligning them with understandings of human rights obligations during armed conflicts. Another important consequence is that in this way, the RD4U acknowledges the long-term societal impact of Russia's aggression against Ukraine. At the same time, these categories raise complex questions about evidence finding (threshold of proof) and causation.

As of January 2026, the Register had received 100,000 claims, of which over 30,000 have already been processed and recorded.[19] The largest shares relate to displacement and the damage or destruction of residential property, underscoring the vast human suffering and material losses caused by Russia's ongoing aggression against Ukraine.

2. THE PROCESS OF ANALYSING CLAIMS

Complaints can be submitted via the Diia portal, Ukraine's mobile application and web portal for the provision of public services. Now it is the only channel through which claims to the RD4U can be submitted.

After submission, the process entails three stages:[20]

1. **Screening** – the submitted files are checked for malware and viruses. The Register then confirms that the files can be opened and read. An advantage of

[19] RD4U, *Register of Damage receives 100,000 claims submitted by individuals affected by Russia's aggression against Ukraine*, 19 January 2026, available at: https://tinyurl.com/3vxuwack (accessed 31 March 2026).

[20] For a detailed overview of the whole process, *see* RD4U, *Rules Governing the Submission, Processing and Recording of Claims*, RD4U-Board(2024)04-final-EN, available at: https://tinyurl.com/5n6z4byw (accessed 31 March 2026).

the complaint system is the possibility to resubmit a claim if it presents certain digital issues (e.g. if the Register cannot decipher the text in a document).

2. **Processing** – the Secretariat receives the claim and reviews it under four eligibility criteria. During this process, claims are divided into various groups according to type, size and similarity of legal and factual issues, among other criteria. This guarantees consistency in the Secretariat's treatment of complaints and improves the effectiveness of the RD4U. At this stage, the Secretariat may request clarification or additional information from a claimant. Once the review is complete, the Secretariat prepares recommendations for the Board and forwards them together with the claims to the Board.
3. **The Board's Consideration and Decision** – this step is the most important in the Register's work, comprising in-person meetings of the Board to consider claims and to decide on a single question: whether to record a claim in the Register. Additionally, the Board meets virtually or exercises its decision-making in writing.

   The Board does not conduct independent investigations, deploy fact-finding missions or engage in OSINT-based evidence-gathering. It is empowered solely to determine the eligibility of claims to be recorded in the Register based on evidence submitted by victims (claimants) and the Secretariat's recommendations. Adjudicative powers are left to an institution that is yet to be created: the ICCU.

   Following the Board's analysis, it may decide on one of four possible outcomes: 1) record the claim in the RD4U; 2) return the claim to the Secretariat with instructions for further processing; 3) reject the claim without prejudice, which allows the claimant to resubmit the claim with additional information or after changes are made; or 4) reject the claim with prejudice, which precludes resubmission of the same claim. The Board's decision is final. Once issued, the claimant is notified of the decision through Diia.
4. **Recording of Claims** occurs after a positive decision by the Board. As soon as the next two elements of the compensation mechanism are established, the Register will forward them for future examination and adjudication.

3. POSSIBLE CHALLENGES IN THE RD4U'S FUNCTIONING

The author envisages several challenges in both the RD4U and the whole compensation mechanism for Ukraine's implementation and operation: 1) the unfortunate experience of compensation mechanisms prior to the creation of the RD4U; 2) the will of the aggressor, which may be a cornerstone in the mechanism's implementation;

3) financing of the mechanism; and 4) data security concerns. Each of these challenges is discussed below.

The first challenge refers to other (partially unsuccessful) attempts to establish compensation mechanisms following international conflicts. The UN has already created similar procedures, e.g. the UN Compensation Commission (UNCC) for Iraq's invasion of Kuwait and the UN Conciliation Commission for Palestine (UNCCP). The UNCC, although generally considered a successful compensation instrument, having processed millions of claims and paid billions of USD to individuals, Western and Kuwaiti corporations and governments for losses using proceeds from Iraqi oil sales, essentially provided victor's justice. The UNCCP, in turn, thoroughly documented Palestinian refugees' losses, but ultimately failed to either provide compensation or to secure the return of refugees.[21]

The compensation mechanism for Ukraine that is being created is structurally similar to the Kuwaiti model. However, the creators of the former have tried to address the shortcomings of the latter in order to create a truly effective compensation tool for victims of the aggression against Ukraine. For example, victims are able to submit complaints directly to the RD4U without interference from national authorities, and the mechanism shows a strong victim-orientated approach. This helps reduce bureaucratic barriers and enhance victim's accessibility to the mechanism. An additional advantage is the possibility to submit a claim in Ukrainian, which helps those individuals who do not speak English from being precluded from claim submission for lack of foreign language skills. In future, the Register plans to add an option to submit claims in English as well.

The main differences between the past compensation mechanisms and the RD4U are described in Table 1.

The second and third challenges concern implementation and budgeting. Although the mechanism has received significant support from foreign partners (both in Europe and beyond) and its operation is meant to be binding, the possibility to be a true compensation mechanism will ultimately depend on Russia's willingness to cooperate. The Council of Europe, the EU and individual States are not capable of covering war damages estimated to be over USD 524 billion caused by a third country (Russia).[22]

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[21] For more about both mechanisms, *see, inter alia*, A. Gattini, *The UN Compensation Commission: Old Rules, New Procedures on War Reparations*, 13(1) European Journal of International Law 161 (2022); J. Franco, *The Palestine Commission: the forgotten chapter in United Nations peacemaking and peacekeeping in the Arab-Israeli conflict*, 60(5) Middle Eastern Studies 763 (2024).

[22] R. Siddiqui, *The $524 Billion Question: Can Europe's New Commission Make Russia Pay?* Modern Diplomacy, 16 December 2025, available at: https://moderndiplomacy.eu/2025/12/16/the-524-billion-question-can-europes-new-commission-make-russia-pay/ (accessed 31 March 2026).

Table 1. Comparison of the RD4U and compensation mechanisms of the past*

Mechanism	Legal basis	Mandate and scope	Submission system	Evidence	State Cooperation	Financing	Some weaknesses
UNCC (Iraq–Kuwait)	UNSC Res. 687 (1991)	Compensation for Iraq's invasion of Kuwait	State-consolidated submissions; no direct individual access to the UN	Standardised categories; simplified evidence analysis	Full cooperation imposed on Iraq by the UNSC	Iraqi oil revenues	"Victor's justice"; arbitrary evaluation in some cases; collective punishment
UNCCP (Palestine)	UNGA Res. 194 (1948)	Economic rehabilitation of Palestinian refugees; overseeing compensation; other tasks	No individual claims process	Extensive documentation, but no effective outcome	Eventually was paralysed by incompatible demands of the parties	No compensation fund ever created	More symbolic function than operational
UNRoD (Wall in OPT)	UNGA Res. ES-10/17 (2007)	Register of damage caused by the Wall in the Occupied Palestinian Territory	Claims submitted directly to the UNRoD	Standardised claim form along with supporting evidence; holistic analysis; difficulty in obtaining evidence	Extremely limited cooperation from Israel	No financial compensation	Purely a documentation tool; lack of transparency; lack of participation from Palestinian and international civil society organisations (CSOs) in the claims process
Eritrea–Ethiopia Claims Commission (EECC)	Algiers Peace Agreement (2000)	Inter-state claims for loss, damage or injury by governments against each other	No individual access; claims submitted by States only and on behalf of individuals	Strict standards of proof; adversarial proceedings	Cooperation varied and was accompanied by political tensions	Funded by parties of the conflict	Expedited procedures; limited participation of victims; political tensions persisted and neither of the parties paid
CRPC in Bosnia & Herzegovina	Dayton Peace Agreement (1995)	Consider and rule on property claims of displaced Bosnians	Direct access for victims	Strict standards of proof, but heavy caseload	No enforcement mandate	Original plan – financed by the sale of abandoned properties, the State and donors, but it was never established	Slow processing due to heavy caseload; administrative bottlenecks; lack of enforcement and compensation
Rd4U	CoE Resolution CM/Res(2023)3	Recording damage from Russia's aggression; first step of compensation mechanism	Direct individual submissions; State submissions to be launched soon	Digital evidence; flexible standards; Board does not "investigate" but may request clarification	No cooperation from Russia expected	Funded by participating States	Cybersecurity risks; political uncertainty of future compensation

* To read more about these claiming mechanisms and their weaknesses, see, *inter alia*, C. Giorgetti, P.W. Pearsall, H. Ruiz-Fabri (eds.), *Research Handbook on International Claims Commissions*, Edward Elgar Publishing, Cheltenham: 2023, particularly chapters 5, 6, 7, 14 and 15; J. Franco; A. Mężykowska, *Register of Damage for Ukraine. First Step Towards an International Compensation Mechanism for Victims of Russian Aggression*, in: M. Balcerzak, E. Cała-Wacinkiewicz (eds.), *Legal Perspectives on the Russia-Ukraine War*, Routledge, Abingdon: 2025, pp. 74–88.

Under the law of State responsibility, the obligation to make reparations exists independently of the responsible State's consent. The Draft Articles on State Responsibility (ARSIWA) provide that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation or satisfaction, either singly or in combination" (Art. 31).[23] Moreover, Art. 32 highlights that the responsible State may not rely on the provisions of its internal law as justification for failing to comply with its obligations under this part. Even though one may claim that ARSIWA is a non-binding instrument, it is widely considered a reflection of customary international law.[24] Additionally, the Permanent Court of International Justice (PCIJ) claimed that "that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[25]

Because of Russia's refusal to pay reparations, as well as possible vetoes on any UN Security Council decisions to secure reparations, Ukraine and international allies are exploring other possible sources of funding.[26] One suggestion is to use frozen Russian assets. Following Russia's full-scale invasion of Ukraine in February 2022, the G7, EU countries and Switzerland froze approximately EUR 300 billion in Russian State assets.[27] Although Art. 49 ARSIWA allows an injured State to take countermeasures against the State responsible for an internationally wrongful act in order to induce that State to comply with its obligations and restore compliance with international law between the parties to the conflict,[28] there are some legal, economic and political objections to this idea.

The first objection concerns the State immunity, since under normal circumstances State assets are protected and cannot be used. There are exceptions, for instance, under Art. 42 ARSIWA, which establishes that

> [a] State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State,

[23] International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, 2001.

[24] *See*, *inter alia*, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, para. 163.

[25] PCIJ, *Factory in Chorzów case (Germany v. Poland)*, Judgment, 13 September 1928, PCIJ (ser. A) No. 17, p. 47.

[26] Committee of Ministers, *Committee of Ministers approves draft convention establishing an International Claims Commission for Ukraine*, 22 October 2025, available at: https://www.coe.int/en/web/portal/-/committee-of-ministers-approves-draft-convention-establishing-an-international-claims-commission-for-ukraine (accessed 15 March 2026).

[27] A. Vohra, *Russia's frozen assets – everything you need to know*, DW, 17 December 2025, available at: https://www.dw.com/en/russias-frozen-assets-everything-you-need-to-know/a-75180873 (accessed 31 March 2026).

[28] *See* fn 23.

> or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.[29]

If we consider that G7 countries and the EU (including EU Member States individually) are "specially affected" by Russia's aggression against Ukraine, due to threats to European and regional security, disruption of global trade, the significant refugee flow into these countries or by Russia's seizure of assets of foreign companies,[30] then countermeasures taken by these countries can be justified.

If, however, we consider these States to not be "specially affected", then the question becomes whether they can still invoke international responsibility as third parties. According to Art. 48 ARSIWA,

> [a]ny State other than an injured State is entitled to invoke the responsibility of another State [...] if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.[31]

In our particular case, Russia's actions violated *jus cogens* norms and *erga omnes* obligations (the prohibition of aggression). Based on this approach, one may agree that third States can take countermeasures against Russia to accelerate the termination of the aggression and guarantee reparations to Ukraine.[32]

Moiseienko admits that "[t]he considerations that are likely to weigh most heavily on governments' minds are economic and political, not legal."[33] He shares concerns about the potential impact of confiscatory measures on foreign investors' confidence in the European financial system, the risk of setting a precedent that can be used for seizing central bank reserves in other contexts and potential

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[29] *Ibidem*.

[30] N. Could-Davies et al., *On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine*, International Institute for Strategic Studies, 20 May 2024, paras. 43-46, available at: https://www.iiss.org/research-paper/2024/05/on-proposed-countermeasures-against-russia-to-compensate-injured-states-for-losses-caused-by-russias-war-of-aggression-against-ukraine/ (accessed 31 March 2026).

[31] *See* fn 23.

[32] *See*, among other authors, A. Moiseienko, *Legal: The Freezing of the Russian Central Bank's Assets*, 34(4) European Journal of International Law 1007 (2023); M.T. Veber, *EU sanctions and Russia's frozen assets*, November 2025, available at: https://tinyurl.com/yr2vdtbn (accessed 31 March 2026).

[33] A. Moiseienko, *Frozen Russian State Assets: The Key to Enforcing the Largest Financial Debt of Our Times*, Verfassungblog, 4 April 2025, available at: https://verfassungsblog.de/frozen-russian-state-assets/ (accessed 31 March 2026).

threats to security and peace between third countries.[34] Overall, we can agree that the possibility to use assets is legally available, but taking into account various reasons (some of which have been mentioned above), the international community has shown disagreement with using Russia's frozen assets.[35]

The fourth challenge is related to aspects inherent to mass-claims processing, particularly regarding standards of proof and evidence verification. In its functioning, the RD4U will have to strike a balance between ensuring accessibility for victims and the submission of reliable and verifiable documents. Submitting claims through Diia is a good way to facilitate victims' access, but at the same time, the RD4U requires sophisticated authentication tools, the possibility to cross-reference national registries and penalties for false claims and other matters.

The UNCC faced a similar issue and resolved it by adopting somehow relaxed standards of proof for certain categories of claims. It adopted presumptions of harm and allowed witness testimony to be presented instead of written documents and personal explanations without the support of written documents.[36]

Consequently, the Secretariat and Board should develop a clear evidentiary threshold, adopt transparent methodology for evidence analysis and establish a heightened cross-check process using satellite images, OSINT and State registries. The last source has already been implemented, as the RD4U can automatically verify data (such as kinship and deaths) directly from some national databases.

The last challenge concerns potential threats to the data analysed and stored within the RD4U. Although on its website the Register claims to ensure the protection of claims and information submitted, maintaining strict confidentiality in accordance with Art. 11 of its Statute,[37] claimants will be required to explicitly consent to the collection, processing, storage and transfer of their personal data and confidential information when submitting claims to the Register.[38]

The nature of the Register – recording claims for compensation for damage, loss and injury inflicted by Russia's actions in Ukraine – necessarily means storing sensitive private data such as the victims' personal information, detailed documentation of destruction and injuries and evidence of war crimes and other violations of international law. This makes it a potential target of hostile cyber-attacks by either

[34] *Ibidem.*

[35] A. Moiseienko, *Seizing Foreign Central Bank Assets: A Lawful Response to Aggression?* SSRN, 2023, pp. 63–65, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4420459 (accessed 31 March 2026).

[36] B. Karnaukh, T. Khutor, *Evidentiary Standards of the UN Compensation Commission: Takeaways for Ukraine*, 7(3) AJEE Journal 1 (2024), pp. 10–12.

[37] *See* fn 12.

[38] RD4U, *General*, available at: https://tinyurl.com/5n856fnj (accessed 31 March 2026).

Russia or an affiliated actor aiming to destroy or compromise evidence, intimidate claimants, undermine the credibility of the future compensation mechanism or disrupt its functioning.

This concern should be especially preoccupying since Russia has been actively using hybrid warfare globally.[39] For instance, some authors highlighted that Russia has been employing large-scale and well-planned hybrid war operations both in Ukraine and in other conflicts by using specific narratives to psychologically influence the civilian population and/or carry out other destructive actions directed at the opposing State(s) and government(s).[40]

Additionally, each piece of the immense number and variety of data processed by the Register (e.g. photos, videos, documents, medical and property records and geolocation data) brings its own vulnerabilities, thus requiring a very complex security architecture. Such complexity increases the risk of platform weaknesses, inconsistencies in data handling and gaps in the file-validation system.[41] Mass-claims mechanisms have historically struggled with such issues, and the RD4U is no exception. Ensuring that every uploaded file is authentic, safe and properly stored requires continuous maintenance and updates.

Although the functioning of the RD4U is not subject to the General Data Protection Regulation (GDPR), it is still beneficial for the Register to take into account the GDPR's principles, as foreseen in Art. 5, in order to guarantee the most efficient treatment of personal data, especially taking into account the amount of sensitive data received and stored by the Register.

Long-term storage presents another layer of vulnerability. The RD4U is intended to operate for many years, as claims continue to be submitted, processed and stored. The digital world evolves significantly over such extended periods, while encryption standards become outdated and cyber-attack techniques become more sophisticated. The database must be accompanied by a robust IT team capable not only of anticipating potential future problems (which is likely impossible to do), but also ensuring continuous technical auditing and adapting to emerging threats.

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[39] D. Milmo, *Russian cyber-attacks against Nato states up by 25% in a year, analysis finds*, The Guardian, 16 October 2025, available at: https://www.theguardian.com/world/2025/oct/16/russian-cyber-attacks-against-nato-states-up-by-25-in-a-year-analysis-finds (accessed 31 March 2026).

[40] M. Banasik, *Russia's Hybrid War in Theory and Practice*, 2(1) Journal on Baltic Security 157 (2016), pp. 177–178; J. Hajduk, T. Stępniewski, *Russia's Hybrid War with Ukraine: Determinants, Instruments, Accomplishments and Challenges*, 78(2) Studia Europejskie 37 (2016), p. 48–49.

[41] For more on Big Data threats, see, *inter alia*, E. Damiani, *Big Data Threat Landscape and Good Practice Guide*, January 2026, particularly part 4, available at: https://www.enisa.europa.eu/sites/default/files/publications/Big%20Data%20Threat%20Landscape.pdf (accessed 31 March 2026).

CONCLUDING REMARKS

Overall, we cannot but welcome the creation of the RD4U and the efforts to create a fully operational compensation mechanism for Ukraine. It represents a significant innovation in the field of international reparations. Unlike other compensation mechanisms, it is a victim-centred mass-claims register with a fully digital and nationally integrated submission system. These features reflect an extraordinary attempt to avoid the structural weaknesses that rendered earlier mechanisms under-inclusive, non-transparent or ultimately ineffective.

At the same time, it is an ambitious endeavour – to address even partially the many needs of the victims of Russia's aggression against Ukraine inevitably involves dealing with multiple legal and operational challenges, as outlined in the previous sections, that will shape its long-term effectiveness.

The creation of detailed claim categories, both usual (e.g. regarding injuries and property damage) and novel ones (regarding access to health care or education), shows an evolution in the understanding of the possible harm caused by armed conflicts which undoubtedly will set a precedent for future mechanisms. Simultaneously, this necessitates well-defined standards of evidence and methodology for verification that are capable of addressing realities of the highly technological world and the dangers of Russia's hybrid warfare.

On top of this, the RD4U has to operate in complete lack of cooperation from Russia, the responsible State, which has historically undermined the effectiveness of similar mechanisms. Thus, Ukraine and the international community are trying to find ways to address Russia's non-cooperation (using Russia's frozen assets and issuing reparations loans), but these measures remain politically and legally contested.

The officials responsible for developing the internal regulations of the Register have both a significant responsibility and an opportunity to ensure that this effort considers the errors of the past and does not result in yet another powerless international mechanism. Although the Register is merely a database at the moment, for it to succeed it must be accompanied by an institution capable of granting compensation awards to the victims, as well as the ICCU and the relevant fund which hopefully will come about in the near future, enabling the Register to fulfil its intended role as the first step of a compensation mechanism for Ukraine.

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CRITERIA FOR EFFECTIVE INVESTIGATION OF WAR CRIMES AND CRIMES AGAINST HUMANITY IN LIGHT OF MINIMUM STANDARDS FOR VICTIMS' RIGHTS, SUPPORT AND PROTECTION

Abstract: *The timeliness of the article is demonstrated by the fact that modern criminal proceedings and their associated mechanisms should serve as an effective means for protecting the rights of victims, especially when it comes to those who have suffered from crimes against humanity and war crimes. The issue is especially urgent given Ukraine's intention to join the EU, which requires that Ukrainian criminal procedural law be approximated to EU law, in in the context of minimum standards for ensuring the rights, support and protection of victims of crime. With this in mind, the research is focused on three aspects: firstly, which criteria for the effectiveness of investigations in light of the procedural obligations of the state under Arts. 2 and 3 of the European Convention on Human Rights directly affect the interests of victims and how national criminal procedural legislation should be amended to better comply with them; secondly, ways of approximating Ukrainian legislation in terms of EU law on minimum standards for the rights, support and protection of victims; and thirdly, the experience of certain European countries in improving criminal procedural law in this regard.*

Keywords: war crimes, crimes against humanity, effective investigation, minimum standards of victims' rights, procedural obligations of the state

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INTRODUCTION

Given the exceptional importance of the human rights guaranteed by Arts. 2 and 3 of the European Convention on Human Rights (ECHR),[1] it is quite clear that even in situations involving existential threats, the state must continue to duly fulfil its positive substantive and procedural obligations arising from the current interpretation of Arts. 2 and 3. This is further emphasised by Art. 15 of the Convention, which does not permit states to derogate from their obligations under Art. 2 (with certain exceptions which are not relevant to the subject of our study) and Art. 3, even during a state of emergency. This is particularly true due to the fact that, as noted in the contemporary literature, the civilian population continues to suffer the brunt of armed conflicts, often being the primary victim of violations of international humanitarian law (examples of which include deliberate attacks on the civilian population, killings, enforced disappearances, torture, cruel treatment and insults to personal dignity, rape and other forms of sexual violence, the forced displacement of civilians and the destruction of vital civilian infrastructure and property). Interpreting the relevant standards for effective investigation becomes particularly significant in the context of protecting the rights of victims of such war crimes and crimes against humanity.

The composition of this article reflects the specific nature of the implementation of certain criteria (standards) for effective investigation, particularly in the context of protecting the rights of victims of war crimes and crimes against humanity. For this reason, the focus is not on explaining the essence and characteristics of each criterion, but rather on the details of ensuring just one of them: the involvement of victims. Furthermore, to ensure a comprehensive analysis of issues relating to international armed conflict, it is appropriate to consider not only provisions arising from human rights law, but also those relating to international humanitarian law and international criminal law.

In view of this, it is appropriate to first examine the interaction between international humanitarian law and international human rights law in the context of a tate's positive procedural obligations to conduct effective investigations. Such an analysis should be based on both existing academic research and the relevant case law of the European Court of Human Rights (ECtHR), the authors' were formulated. Along with this, it is important to take into account the case law of the ECtHR in order to assess the relevance of the criteria for effective investigations an armed conflict.

The main body of the article is devoted to an analysis of two key aspects that may influence the implementation of the criterion of effectiveness regarding the

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (signed 4 November 1950, entered into force 3 September 1953), 213 UNTS 221.

involvement of victims, namely the rules on jurisdiction based on the victim's whereabouts and the victim's participation in proceedings f preventing secondary victimisation. The latter aspect, in the authors' view, should be examined not only in light of the ECtHR's practice, but also taking into account international humanitarian law (with a view to future court proceedings concerning the relevant category of international crimes), as well as specific EU documents (given Ukraine's aspirations for European integration).

1. THE PROCEDURAL OBLIGATIONS REGARDING THE INVESTIGATION OF CRIMES COMMITTED IN THE CONTEXT OF AN INTERNATIONAL ARMED CONFLICT

In light of this issue, attention may be drawn to the study by H.O. Khristova, who examines two groups of positive obligations of the state arising an armed conflict: "positive obligations of the state in the event of loss of control over part of its territory" and "positive obligations in the context of conflict 'under special conditions' (conditions of armed conflict and counter-terrorism operations)." As the author herself explains, the second case concerns positive obligations arising from the state's use of lethal force during military operations, as well as positive obligations regarding the human rights of persons affected by the conflict, which are implemented within the territory under the state's full jurisdiction.[2] Meanwhile, it should be pointed out that the researcher focuses on those positive obligations that arise additionally in the context of an armed conflict. However, other obligations of the state, including positive procedural obligations under Arts. 2 and 3 ECHR, continue to exist in the same way, although they may be modified to some extent where state representatives face objective difficulties in fulfilling them as a consequence of ongoing hostilities.

1.1. Interaction between international humanitarian law and international human rights law in the context of a positive procedural obligations to conduct effective investigations

Above all, attention should be paid to the general approaches to the connection between international humanitarian law and international human rights law. In

[2] H. Khrystova, *Про позитивні зобов'язання держави стосовно прав людини в умовах збройного конфлікту та його наслідків* [On the State's positive obligations regarding human rights in the context of armed conflict and its consequences], available at: https://rm.coe.int/native/168072b3cf (accessed 31 March 2026).

light of this and based on an analysis of a number of academic studies,[3] it is possible to draw the following conclusions.

1. These two branches of international law should not be viewed as contradictory, as they complement and reinforce one another. This makes it possible both to avoid gaps in the application of the law and to strengthen the protection of fundamental human rights.
2. Although the scope of regulation in these areas of law overlaps to some extent, certain issues are governed entirely by international humanitarian law, whilst others are regulated solely by international human rights law. Their application should therefore be coordinated and comprehensive, rather than mutually exclusive.
3. In the context of an international armed conflict, international humanitarian law operates as a *lex specialis*, which primarily affects the determination of the persons to whom the relevant law applies without further exceptions or reservations, as well as the identification of the territorial scope of its application.
4. The assessment of the interaction between these fields should be individualized and flexible for each specific situation; where there is a potential conflict, priority should be given to the provisions that ensure a higher level of protection for fundamental human rights, taking into account the *lex specialis* principle and the requirements of a systematic interpretation of international treaties.
5. Given that both fields of international law are generally aimed at preventing human suffering and serious violations of fundamental rights, international human rights law may play a supplementary role where there is a need to fill gaps in cases where the rules of international humanitarian law are too general or insufficiently detailed.

A notable example of the complementary application of international humanitarian law and European human rights law is the ECHR's findings, set out in the judgment in *Ukraine v. Russia (re Crimea)* [GC]. In this case, the ECtHR demonstrated the flexibility of its analysis and the need for a case-by-case assessment. In particular, the ECtHR took into account the unjustified speed with which the Russian

[3] L. Doswald-Beck, *The right to life in armed conflict: Does international humanitarian law provide all the answers?*, 88 International Review of the Red Cross 881 (2006); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004, p. 136; N. Madzigon, *Right to Life: ECtHR Practice and IHL Rule*s, 2(3) Visegrad Journal on Human Rights 99 (2020); A. Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19(1) European Journal of International Law 161 (2008); G. Washefort, *The Alchemy of the Right to Life during the Conduct of Hostilities: A Normative Approach to Operationalizing the 'Supreme Right'*, 34(3) European Journal of International Law 615 (2023).

authorities and their proxies acted to replace Ukrainian legislation throughout the territory of Crimea without any justification for doing so, as well as the all-encompassing nature of such actions. In view of this, the judgment found a violation in this case specifically of the norms of international humanitarian law, which in turn led to the finding that all subsequent actions carried out in the occupied territory were "unlawful" within the meaning of the category of "legality" under human rights law.[4]

As legal scholarship rightly notes, the investigative requirements of international human rights law remain highly relevant even during armed conflict, despite international humanitarian law operating as lex specialis. This is because human rights law plays a supplementary role, establishing the criteria for an effective investigation where international humanitarian law lacks specific guidance. It is therefore valid to observe that the evolution of human rights must be taken into account in the context of investigations, even when it comes to the application of international humanitarian law as a *lex specialis* regarding the use of force in situations of armed conflict. Nevertheless, whilst the criteria for the effectiveness of an investigation (particularly independence, impartiality, reasonable speed, and thoroughness in the collection of evidence) must remain unchanged, their application to situations of armed conflict may raise complex issues and requires special consideration.[5]

In light of this, the final document following the seminar "Opening of the Judicial Year" (2016), entitled "International and national courts confronting large-scale violations of human rights – Genocide", notes that, in the ECHR's view, the obligation to investigate under Art. 2 may also be adapted to other contexts, for example, where an investigation is conducted in the context of a conflict or takes place after a conflict but concerns causing deaths during the war. For example, this interpretation of the obligation to investigate became significant when applied against Bosnia and Herzegovina in cases concerning missing persons, particularly *Palić v. Bosnia and Herzegovina*, which dealt with the investigation of a prolonged disappearance following the end of the war. In this context, the ECtHR concluded that the state had not breached its positive procedural obligations, since even after the conflict in Bosnia and Herzegovina, the national legal system was unable to consider cases of disappearance until 2005. At the same time, the Court commended the measures taken since 2005 (such as the establishment of the War Crimes Section of the Court of Bosnia and Herzegovina and the adoption of the National War Crimes Strategy),

[4] ECtHR (GC), *Ukraine v. Russia (re Crimea)* (App. Nos. 20958/14 and 38334/18), 25 June 2024, Legal summary, available at: https://hudoc.echr.coe.int/eng?i=002-14347 (accessed 31 March 2026).

[5] G. Gaggioli, *A legal approach to investigations of arbitrary deprivations of life in armed conflicts: The need for a dynamic understanding of the interplay between IHL and HRL*, 36 QIL Zoom-in 27 (2017), pp. 31-32.

as well as the specific measures taken by the state in this case – identifying Palić's remains and conducting an independent and effective criminal investigation into his disappearance/death – even in the absence of punishment for those responsible due to objectively justified reasons.[6]

Furthermore, given the somewhat technical nature of the provisions of international humanitarian law regarding investigations, their implementation can be clarified by interpreting them through procedural human rights safeguards.[7] However, it should be kept in mind that members of the armed forces will generally remain under the jurisdiction of their own state should there be a need to criminally prosecute them. Additionally, the effectiveness of an investigation is likely to be significantly reduced because the alleged offenders have either returned to their own state or due to certain jurisdictional limitations, which imposes specific requirements on the state's procedural obligation to conduct an effective investigation.[8]

1.2. Ensuring effective investigations in situations of international armed conflict

It should be recognised that the degree to which the relevant criteria for effectiveness are met may vary even in relation to cases of death, enforced disappearances or other serious violations of fundamental human rights, as provided for in Arts. 2 and 3 ECHR. This might depend on when the relevant investigation takes place – after the armed conflict or whilst it is still ongoing. This conclusion is supported by an analysis of the ECtHR's judgment in *Đaković v. Serbia*.[9]

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[6] *International and national courts confronting large-scale violations of human rights – Genocide, Crimes against Humanity and War crimes*, background paper for seminar Opening of the Judicial Year, January 2016, available at: https://www.echr.coe.int/documents/d/echr/seminar_background_paper_2016_part_1_eng (accessed 31 March 2026).

[7] D. Loizou, N. Kornioti, *Armed conflict and international humanitarian law in the jurisprudence of the European Court of Human Rights*, Strasbourg Observers, 1 August 2025, available at: https://strasbourgobservers.com/2025/08/01/armed-conflict-and-international-humanitarian-law-in-the-jurisprudence-of-the-european-court-of-human-rights/ (accessed 31 March 2026).

[8] F. Tan, M. Zwanenburg, *Case note: One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, Appl No 38263/08*, 22(1) Melbourne Journal of International Law 136 (2021), pp. 153–154.

[9] In this case the Court rejected the Government's arguments justifying the length of the proceedings on the grounds of the complexity of war crimes cases, since the relevant delays on the part of the authorities occurred a peace had prevailed for decades the conflict. Instead, the Government failed to identify any specific security-related obstacles to substantiate its claim. As the ECtHR noted in paragraph 50 of this judgment, even though the applicant's father had died during a situation of general violence, the delays in the investigation could not be justified by complex security circumstances, since the investigation was initiated in 2007, more than 10 years after the conflict ended, in circumstances which cannot reasonably be described as having been affected by security concerns. ECtHR, *Đaković v. Serbia* (App. No. 30749/22), 17 February 2026, paras. 45 and 50.

Contrary to this, it is clear that, in the context of investigations into war crimes and crimes against humanity committed on Ukrainian territory during the international armed conflict that continues to rage, the requirements for ensuring the effectiveness of such investigations are likely to be substantially different, given the existence of objective obstacles.

Additionally, it is worth emphasising that the positive procedural obligation to conduct an effective investigation remains. Therefore, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life or the prohibition ill-treatment. This crucial point was highlighted in *Hanan v. Germany* [GC][10] and *Georgia v. Russia (II)* [GC].[11] It is equally important to underscore the conclusion of the ECtHR in *Ukraine and the Netherlands v. Russia* [GC], where the Court pointed out that the obligation to carry out an effective investigation under Art. 2 of the Convention is broader than the corresponding obligation in international humanitarian law. However, this obligation remains just as relevant and also arose under international humanitarian law, especially if there are concerns that a serious breach of international humanitarian law might have occurred.[12]

2. IMPACT OF RULES REGARDING INVESTIGATIVE JURISDICTION ON THE INVOLVEMENT OF VICTIMS IN PROCEEDINGS AS A CRITERION FOR EFFECTIVE INVESTIGATION

To begin with, a brief overview of the national legal framework will help to illustrate the essence of the issue under consideration. Following the start of the full-scale invasion, the Ukrainian legislature was faced with the need to adapt legislation – including criminal procedural law – to the current realities. The process of amending regulatory provisions continues to this day, as evidenced by the additions in 2024 and 2025 to Part 1 of Art. 615 of the Criminal Procedure Code of Ukraine (the purpose of which is to regulate a special regime for criminal proceedings under martial law), with new paragraphs concerning the ability of prosecutors at certain levels to decide on changes to jurisdiction where there are appropriate grounds.

Specifically, the introduction of one of these amendments was clearly aimed at increasing the involvement of the victims' close relatives in the pre-trial investigation. The point is that prosecutors, as procedural supervisors, the power to change

[10] ECtHR (GC), *Hanan v. Germany* (App. No. 4871/16), 16 February 2021, para. 204.

[11] ECtHR, *Georgia v. Russia (II)* [GC] (merits) (App. No. 38263/08), 21 January 2021, para. 326.

[12] ECtHR, *Ukraine and the Netherlands v. Russia* [GC] (merits) (App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22), 9 July 2025, para. 485.

the jurisdiction of certain criminal offences, including murder, enforced disappearance, violations of the laws and customs of war and crimes against humanity, but only on the condition – given the general meaning of the relevant provision that the victim has gone missing under special circumstances, and not in relation to any other manifestations of the offences provided for in Arts. 115, 438 and 442-1 of the Criminal Code of Ukraine. In light of this, it is appropriate to clarify that the definition of a person who has gone missing under special circumstances is set out in para. 12 of Part 1 of Art. 1 of the Law of Ukraine "On the Legal Status of Persons Missing under Special Circumstances", an analysis of which indicates disappearance "in connection with an armed conflict, military operations, the temporary occupation of part of the territory of Ukraine, or natural or man-made emergencies."[13]

It is appropriate to point out the prerequisite for such a change in jurisdiction, which is a motion submitted to the prosecutor by a victim who is a family member of a person who has gone missing under special circumstances. It should be clarified that, in accordance with the aforementioned law, the category of family member includes a wide range of persons:

> husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, full brother, full sister, grandfather, grandmother, great-grandfather, great-grandmother, grandson, granddaughter, great-grandson, great-granddaughter, adoptive parent or adopted child, guardian or carer, a person under guardianship or care, as well as persons who live together, are bound by a common household and have mutual rights and obligations, including persons who live together but are not married.[14]

Ultimately, it should be noted that in such cases, the prosecutor's powers lie in the ability to change the territorial jurisdiction – specifically, from the place where the criminal offence was committed (i.e. the place from which the person in question was allegedly disappeared) to the place of residence of the victim who is a family member of the person missing under such circumstances.[15]

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[13] Закон України "Про правовий статус осіб, зниклих безвісти за особливих обставин" [The Law of Ukraine "On the legal status of persons missing in special circumstances"], 12 July 2018, № 2505-VIII, Bulletin of the Verkhovna Rada of Ukraine (Official Gazette) 38 (2018), p. 5, art. 280, available at: https://zakon.rada.gov.ua/laws/show/2505-19 (accessed 31 March 2026).

[14] *Ibidem*

[15] Закон України "Про внесення змін до Кримінального процесуального кодексу України щодо особливостей досудового розслідування кримінальних правопорушень, пов'язаних із зникненням осіб безвісти за особливих обставин під час дії воєнного стану" [The Law of Ukraine "On amendments to the Criminal Procedure Code of Ukraine concerning the specifics of pre-trial investigation of criminal offences related to the disappearance of persons under special circumstances during martial law"],

There is no doubt that this provision was intended to encourage greater involvement of family members of missing persons in such criminal proceedings, and to ensure that they have a better understanding of the progress and outcomes of the investigation. In particular, the drafters of this bill stated in the Explanatory Note to it the need to "establish special conditions for conducting pre-trial investigations, which allow for a prompt and effective response to reports on missing persons and to ensure access for applicants (victims) who are close relatives and family members of the missing person to legal mechanisms in wartime conditions."[16]

Nevertheless, this interpretation of victims' involvement in criminal proceedings appears rather narrow and literal, as the victims' ability to participate actively in the proceedings and their procedural rights generally do not depend on the location of the pre-trial investigation, given modern technological capabilities (for example, the possibility of participating remotely, electronic document management and thus the possibility of submitting applications, motions and complaints without being physically present).

In contrast, it is more important to adopt and implement legislation that allows victims to participate actively in criminal proceedings (including international proceedings), for example, as auxiliary or private prosecutors or co-plaintiffs, as this is an integral part of successful criminal prosecution.[17]

Having analysed the European experience of the Netherlands, Germany, Sweden and Finland, Aksamitowska highlights the following key procedural rights of victims in criminal proceedings concerning war crimes, which demonstrate due compliance with the criterion of effective investigation, i.e. the involvement of victims: presence at the trial; access to the main materials of the criminal proceedings; the right to question or participate in the questioning of witnesses and the accused; the right to file complaints, applications for recusal and other procedural documents and to submit evidence; the right to legal representation and to receive free oral and/or written translation; and certain other rights.[18]

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22 July 2025, № 4555-IX, Bulletin of the Verkhovna Rada of Ukraine (Official Gazette) 48 (2025), p. 4, art. 208, available at: https://zakon.rada.gov.ua/laws/show/4555-20#n69 (accessed 31 March 2026).

[16] Пояснювальна записка до проєкту Закону "Про внесення змін до Кримінального процесуального кодексу України щодо особливостей досудового розслідування кримінальних правопорушень, пов'язаних із зникненням осіб безвісти за особливих обставин під час дії воєнного стану" [Explanatory note to the draft law "On amendments to the Criminal Procedure Code of Ukraine concerning the specifics of pre-trial investigation of criminal offences related to the disappearance of persons under special circumstances during martial law], available at: https://itd.rada.gov.ua/086163be-7ca8-4e0d-a664-8be8542ae273 (accessed 31 March 2026).

[17] K. Aksamitowska, *War Crimes Units: Legislative, Organisational and Technical Lessons*, The Hague (September 2021), p. 4, available at: https://www.asser.nl/media/795205/karolina-aksamitowska-war-crimes-units-legislative-organisational-and-technical-lessons-eng.pdf (accessed 31 March 2026).

[18] *Ibidem*, pp. 29-31.

Consequently, the formal location of the pre-trial investigation does not directly affect the extent to which victims are involved in the process, nor does it reveal the conceptual substance of this standard or criterion of effectiveness. Particularly, this is addressed in *Al-Skeini and Others v. the United Kingdom* [GC], which emphasises the need for the victim's next of kin to be involved in the criminal proceedings to the extent necessary to protect their legitimate interests.[19]

The ECtHR also emphasised in the aforementioned *Ukraine and the Netherlands v. Russia* [GC] the significance of adhering to this criterion in order to fulfil the procedural obligation to conduct an effective investigation in the context of an armed conflict[20] Moreover, in cases involving crimes related to missing persons, it is particularly important to ensure the so-called "right to the truth" for the victims' family members and heirs regarding the circumstances of the incident, especially in the context of mass violations of such fundamental rights as the right to life.[21]

Furthermore, as can be concluded from the above-mentioned judgment in *Palić v. Bosnia and Herzegovina*, the key requirement for the state is that the authorities respond appropriately and take the situation seriously once it has been brought to their attention. In that case, where the applicant (the wife of a missing person) claimed that the authorities had for many years refused to engage with, acknowledge or assist her efforts to ascertain what had happened to her husband, the Court emphasised that the applicant had received the first official information regarding her husband's fate more than five years after his disappearance; at the same time, the applicant received compensation for non-pecuniary damages, and the remains of her husband, Mr Palich, were eventually identified. Consequently, an independent and effective criminal investigation was carried out, albeit with some delays, and the ECtHR therefore found no violation of Art. 3 of the Convention.[22]

It is also necessary to identify a number of issues that may arise from the considered amendment to Ukraine's criminal procedural legislation and, conversely, may undermine the effectiveness of pre-trial investigations for a specific range of offences in terms of their thoroughness and reasonable speed. Firstly, it is obvious that the territorial units of the pre-trial investigation authorities in areas close to the line of contact have greater professional experience in investigating crimes related to the disappearance of persons under special circumstances than units in other regions of Ukraine. Secondly, Ukrainian legislation (Art. 55 of the Criminal Procedure Code of Ukraine in particular) allows for several family members to participate as

[19] ECtHR, *Al-Skeini and Others v. the United Kingdom* (GC) (App. No. 55721/07), 7 July 2011, para. 165.

[20] ECtHR, *Ukraine and the Netherlands v. Russia* [GC], para. 489.

[21] ECtHR, *Lejla Fazlić and Others v. Bosnia and Herzegovina and 4 Others applications (dec.)* (App. Nos. 66758/09, 66762/09, 7965/10, 9149/10 and 12451/10), 3 June 2014, para. 37.

[22] ECtHR, *Palić v. Bosnia and Herzegovina* (App. No. 4704/04), 15 February 2011, para. 51.

victims simultaneously, which could potentially create a conflict when determining the issue of territorial jurisdiction if such relatives reside in different localities and simultaneously file applications to change the jurisdiction to their places of residence. Thirdly, the relevant provision of national criminal procedural law cannot be applied to family members residing outside Ukraine; consequently, their right to change the jurisdiction in such cases is overlooked by the legislature. Fourthly, the conduct of a pre-trial investigation in situations concerning missing persons is clearly not limited to questioning the victims and processing the motions they file. Instead, the majority of investigative activities must most often be carried out near the place of the victim's possible disappearance. In other words, if jurisdiction shifts from the place where the criminal offence was committed to a family member's place of residence, the pre-trial investigation is likely to become more complicated, which may ultimately negatively impact its results.

Consequently, the right of family members to be involved in and directly influence criminal proceedings is not absolute, and certainly should not be reduced to their mandatory physical" proximity to the pre-trial investigation. Instead, it is crucial to enshrine in law the rules and mechanisms for their practical implementation regarding procedural safeguards for victims' rights, which will facilitate their active participation in criminal proceedings, including remotely via special technological means.

3. PREVENTING THE SECONDARY VICTIMISATION OF VICTIMS OF WAR CRIMES AND CRIMES AGAINST HUMANITY IN LIGHT OF THE DEFENDANT'S RIGHT TO CROSS-EXAMINATION (ART. 6.3(D) ECHR)

To gain a general understanding of the issue, it is advisable to begin by referring to certain European documents aimed at protecting the rights and interests of victims in criminal proceedings. According to Art. 20(b) of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA,

> [w]ithout prejudice to the rights of the defence and to the discretion of the court, Member States shall ensure that, during criminal investigations [...] the number of interviews with victims is kept to a minimum and that interviews are conducted only where strictly necessary for the purposes of the criminal investigation.

In the case of interviews with child victims during criminal proceedings, Art. 24(1)(a) of this Directive further provides that "all interviews with a child victim may be audio-visually recorded, and such recorded interviews may be used as evidence in criminal proceedings."[23] As follows from the Preamble to this document, such approaches to taking statements from victims are intended to prevent the risks of their re-victimisation and secondary victimisation. It should be mentioned that, according to the EU Strategy on Victims' Rights 2020–2025, secondary victimisation can be regarded as the negative consequences for victims that may arise from their participation in criminal proceedings, including contact between victims and offenders, the judicial authorities and/or the general public.[24]

This aspect is also addressed in the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse specifically, its Art. 35(2) indicates the desirability of states taking the necessary legislative or other measures to ensure that the questioning of a child victim or, where appropriate, a child witness, can be recorded on video and that such video evidence will be accepted as evidence in court in accordance with the provisions of its national legislation.[25]

I n cases where victims of war crimes and crimes against humanity face potential secondary victimisation, it is undoubtedly the most rational and appropriate approach to adhere to the strategy of "seeking information from other sources", developed as an ethical imperative for criminal investigations into sexual and gender-based violence, which requires that priority be given to other evidence rather than obtaining testimony from the victims.[26]

It is equally important to mention a number of ECtHR judgments which also raise the issue of secondary victimisation of victims (particularly children) in the context of the state's compliance with its obligations under Art. 3 ECHR during the investigation of a crime. Interestingly, in such cases, the problem may arise not with the fulfilment of procedural obligations, but with the substantive obligations of the state, since, conversely, "excessive zeal" by law enforcement agencies and the prosecution could demonstrate the respondent complete disregard for the victim's suffering, having failed to protect their personal integrity during criminal

[23] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, pp. 57–73.

[24] EU Strategy on victims' rights (2020-2025), COM(2020) 258 final.

[25] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted 25 October 2007, CETS 201.

[26] S. Barbour, *Supporting Accountability for Sexual Violence in the Syria and Iraq Conflicts Innovations, Good Practices, and Lessons Learned through Private Criminal Investigations*, 18(2) Journal of International Criminal Justice 397 (2020), p. 405.

proceedings against the alleged perpetrators of their sexual assault, thereby causing them secondary victimisation and violating Art. 3 of the Convention. This is the subject of the judgment in *B. v. Russia*, for example, where, due to the significant number of repeated interviews with the applicant (a minor victim of sexual violence) – particularly that the judge gave no reasons for his decision to question the applicant, failed to take into account her particular vulnerability as a child and disregarded expert recommendations against her participating in the court hearing, as well as the loss of the pre-trial video recording of the victim's, which could have been used in place of her court testimony – the ECtHR noted that the minimum threshold of severity had been reached, and it pointed out the lack of domestic provisions that would protect the interests of child victims in such cases (paras. 68–72).[27] The Court reached similar conclusions in another judgment, in *Y. v. Slovenia* (paras. 109–113).[28]

Thus, in accordance with European human rights standards, the use of audio and video recordings of victims' statements is generally permitted in order to prevent their secondary victimisation in cases involving specific categories of crime. However, this must not undermine the defendant's right to a defence and therefore requires compliance with certain conditions and rules. The academic literature highlights certain advantages of using video recordings during the initial questioning of a victim, not only from the perspective of the victim's personal protection, but also that of safeguarding the interests of justice. The point is that it is precisely during the initial interview that individuals are able to provide the most evidentiary information relevant to the investigation,[29] particularly when the interviewees are children, where repeating the interview may only reduce the accuracy of their testimony due to so-called "witness fatigue".[30]

Given that the authors are primarily examining this issue from the perspective of victims of war crimes and crimes against humanity, it is equally essential to consider how this matter is addressed in international criminal law – specifically, in the Rome Statute and the Rules of Procedure and Evidence of the International Criminal Court. In particular, Art. 69(2) of the Rome Statute provides for an exception to the general rule requiring a witness to give evidence personally in court – for example, by substituting audio or video recordings as evidence. It also points to the

[27] ECtHR, *B. v. Russia* (App. No. 36328/20), 7 February 2023, paras. 68–72.

[28] ECtHR, *Y. v. Slovenia* (App. No. 41107/10), 28 May 2015, paras. 109–113.

[29] R. Brink, *Secondary Victimization and Mass Atrocity Trials - Should Female SGBV Victim-Witnesses Be Summoned to Testify In-Person?*, 7(3) Journal of Psychology and Neuroscience 1 (2025), p. 4.

[30] P. Santtila, J. Korkman, N.K. Sandnabba, *Effects of Interview Phase, Repeated Interviewing, Presence of a Support Person, and Anatomically Detailed Dolls on Child Sexual Abuse Interviews*, 10(1) Psychology, Crime & Law 1 (2004), p. 32.

need to comply with two key conditions: firstly, such measures must not prejudice the rights of the accused or be incompatible with them; secondly, such exceptions must be specified in the Rules of Procedure and Evidence.[31]

Indeed, the amended version of Art. 68 of this document allows the International Criminal Court to use pre-recorded witness testimony in certain cases: (a) where the and the defence have had the opportunity to question the witness during the recording; (b) where the testimony does not relate to proving circumstances connected with the actions and conduct of the accused; (c) where the pre-recorded testimony is from a person who is no longer available due to death or a declaration of death, or due to other obstacles that cannot be overcome with due diligence; and (d) where the pre-recorded testimony is from a person who has been subjected to unlawful interference.[32]

In view of the above, the admissibility of using video recordings of victims' testimony from their initial questioning during the pre-trial investigation in lieu of direct examination in court must be based on a number of key factors.

(1) The need for such an approach must be primarily driven by the aim of protecting the rights of vulnerable categories of victims of war crimes and crimes against humanity, as well as preventing their secondary (repeated) victimisation. For Ukraine, this is critically important at present, given the corresponding priority in the activities of law enforcement and judicial bodies.[33]

(2) A mere video recording is not sufficient, as it is that the defence be able to ask their questions (at least in writing) in the course of such a preliminary interrogation.[34]

(3) The reasons why it is not possible to interrogate the victim directly in court must primarily relate to the victim's fear of contacting the accused, the victim's unavailability for objective reasons, or unlawful pressure exerted on the victim by the accused or persons acting in the accused's interests.

(4) Other alternatives capable of protecting victims from secondary victimisation without depriving the defendant of the right to cross-examine must be considered. Such alternatives could include remote questioning where the parties and the court

[31] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

[32] Assembly of States Parties to the Rome Statute of the International Criminal Court, Rules of Procedure and Evidence (1st Session, ICC-ASP/1/3 and Corr.1 3–10 September 2002), part II.A

[33] H. Spitsyna, I. Iemets, *Protecting the Rights of War Crimes Victims: Determining Ways to Prevent Their Secondary Victimization*, 9(1) Archive of Criminology and Forensic Sciences 84 (2024), p. 91.

[34] ECtHR, *D. v. Finland* (App. No. 30542/04), 7 July 2009, para. 50; *Paić v. Croatia* (App. No. 47082/12), 29 March 2016, para. 47.

are able to observe or questioning an anonymous witness (without disclosing the true identity to the defence and concealing their appearance).

CONCLUSIONS

Although the existence of an international armed conflict may indeed be regarded as an existential threat to the state and the nation, it does not relieve the state of its responsibility to fulfil its positive obligations, particularly the procedural obligation to investigate crimes that violate the human right to life and the right to not be subjected to illtreatment or prohibited conduct, which must meet standards of effectiveness.

However, whilst in the context of an international armed conflict international humanitarian law acts as a *lex specialis*, this branch of law does not itself establish specific requirements or criteria for conducting an effective investigation into war crimes and crimes against humanity. Consequently, the standards of investigation developed and interpreted in international human rights law must be applied in a complementary manner, with particular reference to the practice of the ECtHR regarding Arts. 2 and 3 ECHR. At the same time, it is important to bear in mind that, in the context of active hostilities, the threshold for the effectiveness of an investigation is likely to be lowered due to the existence of objective obstacles to ensuring the promptness of the investigation and thoroughness in the collection of evidence, for example.

The involvement of victims in criminal investigations, when assessing their effectiveness in relation to war crimes and crimes against humanity – particularly in cases involving deprivation of life and persons missing in action – may further develop into the right of close relatives "to the truth", as this often involves mass violations of one of the fundamental human rights under exceptional circumstances. Moreover, the very conceptual meaning of victims' involvement as a criterion of effectiveness should not be interpreted too narrowly or literally as the physical proximity of victims or their close relatives to the location of the pre-trial investigation. Instead, what is of decisive importance is the scope of the procedural rights granted to victims in criminal proceedings concerning war crimes and crimes against humanity, which enables them to participate actively in the process, including remotely – using modern digital technologies.

Together with this, the interests of victims of war crimes and crimes against humanity, particularly with regard to preventing secondary (or repeated) victimisation, might sometimes require exceptions to the general rule on cross-examining witnesses enshrined in Art. 6(3)(d) ECHR, which forms part of the right to a fair trial for the accused. Specifically, such an exception could be using a video recording

of the victim's testimony from their initial questioning in the pre-trial investigation. Meanwhile, to resolve the conflict of interests between the rights of participants in the criminal proceedings, it is necessary to take into account a number of key factors, such as a victim-centred approach and the prevention of secondary victimisation as the primary objective behind derogating from the general rule on obtaining direct testimony in court; the reasons preventing the victim from being present during the court proceedings; the opportunity for the defence to question the victim during the pre-trial investigation; and other alternatives that could equally prevent secondary victimisation.

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FORCED TRANSFER OF CHILDREN IN INTERNATIONAL LAW: CORE INTERNATIONAL CRIMES, THE RIGHT TO IDENTITY AND CONTEMPORARY CHALLENGES (UKRAINIAN CASE)**

Abstract: *The relevance of this article is demonstrated by the atrocities of the Russia – Ukraine war related to children. According to the initiative Bring Kids Back, approximately 20,000 Ukrainian children were deported and/or forcibly transferred by Russia since 2014. In this article we try to explore the correlation between core international crimes, the right to identity and the deportation/forcible transfer of children. The structure of this article is determined by its task. In the first part we examine features of genocide, crimes against humanity and war crimes. The second part of the article is devoted to the right to identity, the history of its development in international law and its implementation in Ukrainian legislation. The following part provides examples of real cases of Ukrainian children who were deported/forcibly transferred by Russia. The final part investigates*

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the psychological consequences for children who are victims of deportation/forcible transfer. The article concludes by arguing that widespread violations of Ukrainian children's right to identity, together with the deportation/forcible transfer of children, should be treated as central evidence in assessing Russia's responsibility for genocide in Ukraine.

Keywords: forcible transfer, deportation, international crime, right to identity, psychological consequences

INTRODUCTION

The protection of children's rights in every civilised state plays a special role, since children are the future for every family and the state as a whole. Preparation for adult life, attitude towards parents and upbringing in the spirit of democracy, protection of rights and freedoms makes the fragile future optimistic. Aggression and war increase the level of aggression and cruelty in the society of both the aggressor and the defending state. Children, who especially perceive war and any related crimes, become a special victim of such a war. The consequence of such international crimes is psychological trauma that affects a person throughout their life.

A particularly dangerous and difficult aspect for children, their families and the state subjected to aggression is the forced transfer of such children from their motherland to the occupying state, separation from their parents, placement in other families, "re-education" through the influence of hostile propaganda, stays in military camps, militarisation and conscription into the enemy's army. The mechanism of committing the core international crimes includes violating many rights of children. However, a special place is occupied by the right to identity through citizenship, name and family relations. This right also affects the connection with language, traditions, motherland, culture, religion and history. In the complex, replacing a child's individuality substitutes the person, creates a parallel reality and, if there is a mass impact on children, destroys the Ukrainian people. If military training is added, such children are capable of forming an enemy army against Ukraine and the civilised world in future, even without knowing about the genetic connection with their motherland.

It is obvious that children separated from their families at any age experience such separation with great difficulty, receiving psychological trauma for life. The fate of such children may be different, but psychological trauma, stress, and nervous breakdowns can accompany such individuals throughout their lives. That is why the return of Ukrainian children to their families and motherland as soon as

possible is necessary to stop the violation of their rights and the commission of international crimes.

1. FORCED TRANSFER OF CHILDREN UNDER CONTEMPORARY NATIONAL AND INTERNATIONAL CRIMINAL LAW

On 17 March 2023 Pre-Trial Chamber II of the International Criminal Court (ICC) issued warrants of arrest for Vladimir Putin and Maria Lvova-Belova in the context of the situation in Ukraine. They are allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied territory of Ukraine to the Russian Federation (under Arts 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute[1]).[2] This ICC decision is logical due to the established scale of the illegal deportation of children to the territory of the Russian Federation.

According to the Ombudsman of Ukraine, this process was launched at the beginning of the full-scale invasion of Ukraine in 2022, when children from the age of 16 began to be mobilised in the temporarily occupied territory in the Donetsk and Luhansk regions. The training of such children through military exercises began in 2017. Such recruited and mobilised children are considered victims of violations of international law.[3] In 2025, Russia allocated the largest amount of funds specifically to summer camps for children in occupied Crimea, including children from the temporarily occupied Zaporizhzhia and Kherson regions, in order to replenish military resources and carry out intensive propaganda.[4] According to the Ombudsman of Ukraine, Dmytro Lubinets, about 600,000 schoolchildren live in the occupied territories of Ukraine, of which 43,000 between the ages of 8 and 17 were

[1] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

[2] ICC, *Press release: Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, 17 March 2023, available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed 31 March 2026).

[3] Ombudsman of Ukraine, *Уповноважений: окупаційна влада ЛДНР мобілізує дітей з так званих «патріотичних клубів» до лав незаконних збройних формувань* [The occupying power of the People's Liberation Army mobilizes children from so-called "patriotic clubs" to join the ranks of illegal armed groups], 16 April 2022, available at: https://tinyurl.com/kythunpj (accessed 31 March 2026).

[4] К. Глянько, *У 2025-му РФ рекордно профінансувала "літній відпочинок" у Криму, перетворюючи табори на центри військової підготовки* [In 2025, the Russian Federation financed a record amount of "summer vacation" in Crimea, turning camps into military training centers], Suspilne Media, undated, available at: https://tinyurl.com/yckepk72 (accessed 31 March 2026).

recruited into the all-Russian military/patriotic movement "Yunarmiya",[5] which includes the use of military uniforms, weapons training, hand-to-hand combat and military tactics and hierarchy. All these actions of the Russian Federation, committed during the Russian aggression, constitute the most serious international crimes, which require special attention due to the serious violations of children's rights. Depriving children of their right to identity plays a key role in the mechanism of unlawful deportation and Russification of Ukrainian children.

Article 49 of the fourth Geneva Convention, from 1949,[6] prohibits the forcible transfer and deportation of protected persons (except in certain cases, where evacuation is permitted). Similarly, an occupying power must not transfer or deport parts of its civilian population to territory it occupies. This provision correlates with the Rome Statute in regards to genocide (Art. 6(e)), crimes against humanity (Art. 7(1)(d)) and war crimes (Art. 8(2)(a)(vii) and Art. 8(2)(b)(viii)).

Geneva Convention IV and the Rome Statute are linked to customary international humanitarian law (rules 129–30). The 26th International Conference of the Red Cross and Red Crescent adopted two resolutions stressing the prohibition of forcibly transferring civilian population. State practice establishes an exception to this prohibition, in cases where the security of the civilians is involved or imperative military reasons (such as clearing a combat zone) require evacuation, for as long as the conditions warranting it exist.[7] However, the transferring of Ukrainian children to the territory of Russia cannot be recognised as an evacuation because it is a mass phenomenon, not an exceptional and temporary measure, and does not ensure the safety of children outside the zone of active hostilities.

2. THE EVOLUTION OF CHILDREN'S RIGHT TO IDENTITY IN NATIONAL AND INTERNATIONAL LAW

The Constitution of Ukraine proclaims the basic principle of the legal status of a child in the modern world: a child, regardless of their origin, has equal rights with other children (part 1 of Art. 51). This principle corresponds to the provisions of the UN's Convention on the Rights of the Child from 1989 (CRC)[8] and the Eu-

[5] Ж. Безп›ятчук, *Юнармія. Як Росія робить собі солдатів з українських дітей* [Yunarmiya. How Russia makes soldiers out from Ukrainian Children], BBC News Ukraine, 3 November 2025, available at: https://www.bbc.com/ukrainian/articles/c4g7ey6gdp8o.amp (accessed 31 March 2026).

[6] Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287.

[7] J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge: 2005, p. 460.

[8] UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3.

ropean Convention on the Legal Status of Children Born Out of Wedlock.[9] The CRC provides that the parents of a child born out of wedlock have the same obligations to support the child as if they had been born in wedlock.

According to Art. 1 CRC, "child" refers to every human being under the age of 18 years unless majority is attained earlier under the applicable law. It should be noted that both the Family Code of Ukraine and the provisions of the Draft Law of Ukraine "On Amendments to the Civil Code of Ukraine in Connection with the Update (Recodification) of the Provisions of Family Law" have retained this approach.

All children are equal in their rights from birth. A non-exhaustive list of the rights of children includes the right to life, to a name, to acquire a nationality, to parental care and to preserve their identity (individuality); the right to be heard in any proceedings concerning them; the right to freedom of conscience and religion; the right to private and family life; inviolability of the home; privacy of correspondence; the right to the highest attainable standard of health care; social security benefits; a standard of living adequate for the child's development; education; leisure; and special protection from abduction and sale, physical forms of exploitation, physical and mental violence and participation in hostilities; as well as the state's obligation to take all necessary measures to promote the physical and mental recovery and social integration of a child who has become a victim of abuse or crime.

In cases of unlawfully depriving a child of some or all of the elements of their identity, the state of which the child is a national is obliged to provide the child with appropriate assistance and protection, with a view to promptly restoring their identity (Art. 8(2)). This obliges parties to the CRC to respect children's right to preserve their identity – including nationality, name and family ties – without unlawful interference. Where a child is unlawfully deprived of any of the elements of their identity, parties must provide the necessary assistance and protection for the prompt restoration of the child's identity.

The full-scale invasion of the Russian Federation into the territory of Ukraine led to the temporary occupation of the territory of a sovereign state and the forced transfer of people from these territories, including children. Thus, the rights and freedoms of citizens were violated, and it became impossible for them to realise their human rights on the basis of proportionality, respect for human dignity and the rule of law. Therefore, the problem of ensuring the rights and freedoms of citizens of Ukraine who found themselves in such a situation, including children, is urgent. This involves returning forcibly transferred children to territory controlled

[9] European Convention on the Legal Status of Children Born Out of Wedlock (adopted 15 October 1975, entered into force 11 August 1978), ETS No. 085.

by Ukraine, and, if possible, reuniting them with family members. Of course, this entails the need to establish the facts of international crimes against children – which may include signs of genocide and crimes against humanity – as well as searching for children and releasing them from places of illegal detention or captivity. In these cases, the process of identification, i.e. establishing the identity of the child,[10] will help ensure the rights of a particular child.

In accordance with Ukrainian law, correlated with the CRC, the care of children who have suffered as a result of various forms of violence is entrusted to the state, which obliges it to ensure children's survival, protection and development. This concept is enshrined in the Constitution of Ukraine, the Family Code of Ukraine and other regulatory laws. Thus, by the Resolution of the Cabinet of Ministers of Ukraine dated 5 April 2017, the procedure for granting the status of a child who has suffered as a result of hostilities and armed conflicts was approved, which is in force under martial law in an updated version from 1 September 2025.[11]

3. IS THE FORCED TRANSFER OF UKRAINIAN CHILDREN GENOCIDE?

Bohdan Yermokhin, a 16-year-old from Mariupol, was one of 31 children unlawfully removed from the Donetsk Children's Home to the Moscow region in May 2022. He had already lost both parents when the city fell. Russian forces first transferred him to occupied Donetsk and then deeper into the Russian Federation under the guise of "temporary evacuation". Within months, he had been issued a new passport, placed in a Russian school and integrated into a new family, despite having a sister in Ukraine seeking his return. Even when Bohdan tried to make his own way back, travelling more than 1,000 kilometres towards the border, the Russian authorities intercepted him and sent him back to his new "family".[12] What had begun as an evacuation in name quickly became something else in substance: the gradual replacement of a child's identity.

Bohdan's story is emblematic of a much broader pattern. According to Ukraine's official initiative Bring Kids Back, at least 20,570 Ukrainian children have been forcibly transferred or deported to the Russian Federation or territories under its

[10] V. Shapar, *Сучасний тлумачний психологічний словник* [Modern Explanatory Dictionary of Psychology], Prapor, Kharkiv: 2007, p. 640.

[11] See https://zakon.rada.gov.ua/laws/show/268-2017-п#Text (accessed 31 March 2026).

[12] V. Andrieva, *Ukrainian orphan teenager's story from Mariupol heard at US Congress*, Ukrainska Pravda, 20 April 2023, available at: https://www.pravda.com.ua/eng/news/2023/04/20/7398748/ (accessed 31 March 2026).

control since 2014, most of them after February 2022.[13] In this section, we argue that these practices should be understood not only as prohibited population transfers and serious violations of children's rights, but also as acts falling under Art. 2(e) of the Genocide Convention.[14]

Since the invasion, the UN has become increasingly concerned with Russia's actions. Shortly before the writing of this paper, on 9 March 2026, the UN Human Rights Council's Independent International Commission of Inquiry characterised the deportation and forcible transfer of Ukrainian children as war crimes, crimes against humanity and serious human rights violations.[15] The Commission emphasised several features of Russia's conduct. Firstly, the relocations have not been temporary evacuations, as permitted under international humanitarian law, but have instead taken on a permanent character through the placement of children into foster or adoptive families or into long-term institutional care. Secondly, Russian authorities have failed to inform parents, legal guardians, relatives or the Ukrainian authorities of the children's deportation or transfer and have not sought their consent. Thirdly, no effective system has been established for the identification, tracing and repatriation of transferred children. Finally, the Commission found that the deportations and forcible transfers from Russian-occupied areas of Ukraine have been widespread and systematic, implemented as part of a state policy at the highest levels of the Russian Federation.

Despite these positive developments, we argue that the UN should go even further in its condemnation and should situate Russia's conduct within the broader framework of international law. As we have pointed out, Art. 8 CRC defines the child's identity and requires parties to the convention to provide appropriate assistance and protection with a particular emphasis on speedily re-establishing a child's identity where it has been unlawfully interfered with.

Moreover, Art. 49 of Geneva Convention IV prohibits individual or mass forcible transfers, including deportations, regardless of their motive. Article 50 states that an occupying power should facilitate the proper working of all institutions devoted to the care and education of children, take all the necessary steps to facilitate identifying children who are orphaned or separated from their parents as a result

[13] The official website of Bring Kids Back is available at: https://www.bringkidsback.org.ua/ (accessed 31 March 2026).

[14] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

[15] Independent International Commission of Inquiry on Ukraine, Conference Room Paper: Situation of human rights in Ukraine stemming from the Russian aggression (UN Human Rights Council, 61st session, UN Doc A/HRC/61/CRP.8, 2026) available at: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session61/a-hrc-61-crp-8.pdf (accessed 31 March 2026).

of war, registering their parentage and making arrangements for their maintenance and education, if possible by persons of their own nationality, language and religion.

Finally, Art. 78 of Additional Protocol I of the Geneva Convention[16] specifies practical measures during armed conflict. It provides that each evacuated child should be issued an identity card recording, inter alia, the child's name, sex, date and place of birth, nationality, parents' names, next of kin, language, religion and home and present address, and that a copy of this card must be transmitted to the Central Tracing Agency of the International Committee of the Red Cross. Importantly, Russia has failed to implement any of these safeguards,[17] as children were transferred without proper consent, separated from their families and placed in environments where the conditions for temporary evacuation, family reunification and preservation of identity were not ensured.[18]

This consistent flouting of international law, we argue, invites serious consideration of the Genocide Convention, whose Art. 2(e) defines genocide as including the act of "forcibly transferring children of the group to another group", when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. While the provision does not explicitly articulate a child's right to identity, it implicitly recognises the gravity of forcibly altering that identity.[19] Reports on Ukrainian children deported to the Russian Federation describe re-education in the Russian language, culture and history, prohibitions on speaking Ukrainian and systematic efforts to sever links with their Ukrainian families and communities. As the Parliamentary Assembly of the Council of Europe has concluded, these transfers appear to be "planned and organised in a systematic way" as state policy, with the aim of annihilating "every link to and feature of [the children's] Ukrainian identity."[20]

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[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3.

[17] Committee on the Rights of the Child, *Concluding observations on the combined sixth and seventh periodic reports of the Russian Federation*, 1 March 2024, UN Doc CRC/C/RUS/CO/6-7, available at: https://www.ecoi.net/en/file/local/2104741/G2402626.pdf (accessed 31 March 2026).

[18] C. Breen & A. Gillespie, *Russia's alleged deportation of Ukrainian children has caused a UN standoff – what international law says and why it* matters, The Conversation, 6 April 2023, available at: https://theconversation.com/russias-alleged-deportation-of-ukrainian-children-has-caused-a-un-standoff-what-international-law-says-and-why-it-matters-202430 (accessed 31 March 2026).

[19] J. Tobin & J. Todres, *The Right to Preservation of a Child's Identity*, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford Law Pro: 2019 (online ed.), available at: https://doi.org/10.1093/law/9780198262657.003.0009, p. 284.

[20] Parliamentary Assembly of the Council of Europe (PACE), *The forcible transfer and 'russification' of Ukrainian children shows evidence of genocide, says PACE*, 27 April 2023, available at: https://pace.coe.int/news/9075/the-forcible-transfer-and-russification-of-ukrainian-children-shows-evidence-of-genocide-says-pace (accessed 31 March 2026).

However, the main difficulty in defining an act as genocide is finding an explicit manifestation of intent. As established in the jurisprudence of the International Criminal Tribunals for Rwanda (ICTR)[21] and for the former Yugoslavia (ICTY),[22] as well as that of the International Court of Justice (ICJ),[23] genocidal intent may be inferred from the general context, the scale of atrocities, the systematic targeting of a group and the existence of a state or organisational policy; however, such intent must be the only reasonable inference that can be drawn from the evidence.

Clearly, Russia's intent in deporting Ukrainian children can be inferred from the broader context and the systematic nature of the conduct. Those children are forcibly transferred from occupied territories to Russia through a coordinated, state-organised process involving filtration, relocation across vast distances and subsequent integration into Russian families and educational systems aimed at assimilating and re-educating them. The longer children remain within this system, the greater the risk that their linguistic, cultural and national identity will be irreversibly altered.[24]

In this light, the role of education in shaping, preserving or altering a child's identity becomes especially significant. Article 29(1)(c) CRC states that one aim of education is to develop respect for the child's own cultural identity, language and values and the national values of the country in which the child is living. The Committee on the Rights of the Child has clarified that "education" in this sense extends far beyond formal schooling. It encompasses the broad range of life experiences and learning processes through which children develop their personalities, talents and abilities and learn to participate fully in society.[25]

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[21] ICTR, *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998, paras. 521–524, and 523, available at: https://www.refworld.org/jurisprudence/caselaw/ictr/1998/19275?utm; *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), ICTR-95-1-T, 21 May 1999, paras. 93 and 527, available at: https://www.refworld.org/jurisprudence/caselaw/ictr/1999/62079 (both accessed 31 March 2026).

[22] ICTY, *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, 2 August 2001, paras. 580–581, 594–595, 597–598, available at: https://www.refworld.org/jurisprudence/caselaw/icty/2001/40159?utm (accessed 31 March 2026).

[23] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 43, paras. 370–373, 376; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment, 3 February 2015, ICJ Rep 3, paras. 145–148, 417, 426–427.

[24] V. Pylypenko, *Transferring of the Ukrainian Children to Russia as Genocidal Act*, Cambridge Core Blog, 24 January 2023, available at: https://www.cambridge.org/core/blog/2023/01/24/transferring-of-the-ukrainian-children-to-russia-as-genocidal-act/; A. Umland, *Russia's Forcible Transfers of Unaccompanied Ukrainian Children: Responses from Ukraine, the EU and Beyond*, SCEEUS Report No. 1, 2024, available at: https://sceeus.se/publikationer/russias-forcible-transfers-of-unaccompanied-ukrainian-children-responses-from-ukraine-the-eu-and-beyond/ (both accessed 31 March 2026).

[25] Committee on the Rights of the Child, *General Comment No. 1 (2001): Article 29(1) – The Aims of Education*, 17 April 2001), CRC/GC/2001/1, available at: https://tinyurl.com/352kj53s (accessed 31 March 2026).

Presumably due to the international pressure brought about by Bohdan Yermokhin's highly visible case, Russia did eventually decide to repatriate this young man on 19 November 2023. It seems the combined efforts of Bring Kids Back, Qatar and UNICEF were successful.[26] Whilst his story ended well, there are many other stories of deported or forcibly transferred children still ongoing. It seems that Bohdan's case is an exception rather than the rule. Out of 20,570 children deported and/or forcibly transferred to date, only 2,063 have been returned as of March 2026.[27] Thus, as we write, Russia remains committed to deporting Ukrainian children and removing their identity in a genocidal act.

4. PSYCHOLOGICAL CONSEQUENCES FOR CHILDREN WHO ARE VICTIMS OF FORCED TRANSFER

Approximately 1.6 million children are living under occupation and being taught that they are Russians; their identity is being erased. And it is clear why the emphasis is on children: the psyche of children is more malleable and easier to break than that of an adult with a fully formed worldview.[28] The imposed Russian citizenship results in a number of obligations in children: to serve in the armed forces of the Russian Federation after reaching adulthood, to study in schools according to Russian educational standards and to show loyalty to the aggressor state.[29] Methods of persuasion, suggestive influence and psychological violence are used on children.

In 2022, during Russia's full-scale invasion of Ukraine, 11-year-old Sashko Radchuk lived with his mother in Mariupol. Once the Russians occupied the city, he

[26] T. Peter, Y. Kovalenko, *Ukrainian teen who was taken to Russia from occupied Mariupol returns to Ukraine*, Reuters, 19 November 2023, available at: https://www.reuters.com/world/europe/ukrainian-teen-who-was-taken-russia-occupied-mariupol-returns-ukraine-2023-11-19/ (accessed 31 March 2026).

[27] "Children of War" State Portal for Missing and Displaced Children, available at: https://childrenofwar.gov.ua/en/ (accessed 31 March 2026).

[28] О. Хут, Викрадені українські діти: що відомо про масштаби, механізми і наслідки. Інтерв'ю з правозахисницею Олександрою Матвійчук [Kidnapped Ukrainian children: what is known about the scale, mechanisms and consequences. Interview with human rights activist Oleksandra Matviychuk], Farvater Skhid, 30 December 2025, available at: https://farvatermedia.com/interviews/vykradeni-ukrainski-dity-shcho-vidomo-pro-masshtaby-mekhanizmy-i-naslidky-interviu-z-pravozakhysnytseiu-oleksandroiu-matviichuk/ (accessed 31 March 2026).

[29] *(Не)повернення дітей: Україна перед найбільшим викликом з часів незалежності. Ukrainian Child Rights Network* [(Non)return of children: Ukraine faces its biggest challenge since independence. Ukrainian Child Rights Network], 2024, p. 72, available at: https://childrights.org.ua/wp-content/uploads/2024/10/nepovernennia-ditey.-ukraina-pered-naybilshym-vyklykom-z-chasiv-nezalezhnosti-2.pdf (accessed 31 March 2026).

was separated from his family, filtered through and taken to Donetsk. It was planned to give him up for adoption to a Russian family.[30]

The return of deported children is a long, complex process. Deported children and their parents are victims of the Russian regime. On 3 December 2025, during the 11th extraordinary special session of the UN General Assembly, the resolution "Return of Ukrainian Children" was adopted. This decision is a signal that the world sees the crime against Ukrainian children, understands its scale and demands an immediate response.[31]

In Ukraine, special centres for working with children ("Barnahus")[32] are of great importance in the structure of child-friendly justice, where affected children can be provided with appropriate assistance (medical, therapeutic, psychological, etc.).[33] In one of the rooms of a Barnahus (there are four rooms in total), the children can be interviewed. The unconditional principle of the Barnahus model is goodwill and a friendly attitude towards children affected by violence and abuse.[34]

The Child Protection Centre (based on the Barnahus model) aims to create conditions that minimise the consequences of traumatisation and provide comprehensive social, psychological, legal, medical and other types of assistance and services to children who are victims or witnesses of criminal offences.

In certain cases, there is a need to collect information from children who have suffered violence. In this case, it is advisable to use a so-called "green room", a specially equipped, child-friendly space. It consists of two adjacent rooms: one where a psychologist works with the child and a separate room where an employee of the pre-trial investigation bodies and other persons are located, observing through special glass and a video surveillance system. Green rooms use a whole system of measures to create appropriate conditions in accordance with international standards.

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[30] О. Консевич, Окупація дитинства: як Україна бореться за повернення додому депортованих дітей [Occupation of childhood: how Ukraine fights for the return home of deported children], EU Neighbours East, 23 February 2026, available at: https://euneighbourseast.eu/uk/news/stories/okupacziya-dytynstva-yak-ukrayina-boretsya-za-povernennya-dodomu-deportovanyh-ditej/ (accessed 31 March 2026).

[31] United Nations, *Press release: General Assembly demands return of Ukrainian children by Russia*, 3 December 2025, available at: https://tinyurl.com/ysnnbe3e (accessed 31 March 2026).

[32] Procedure for implementing a pilot project on the introduction of child protection centers (according to the Barnahus model). Approved by Order of the Ministry of Justice of Ukraine, the Prosecutor General's Office, the Ministry of Internal Affairs of Ukraine, the Ministry of Social Policy of Ukraine, the Ministry of Health of Ukraine of 26 July 2024 No. 2218/5/180/523/352-N/1306, available at: https://zakon.rada.gov.ua/laws/show/z1151-24#Text (accessed 31 March 2026).

[33] The Barnahus Model. General characteristics and implementation in Ukraine: a collection of materials on the implementation of the Barnahus Model in Ukraine. Reference edition, p. 52.

[34] V. Shepitko, *Юридична психологія : словник-довідник* [Legal Psychology: dictionary and handbook], Pravo, Kharkiv: 2025, p. 17.

They help establish proper emotional (psychological) contact with children during interviews.[35]

During the administration of justice, psychological knowledge can be applied in various forms: consultations with psychologists regarding the child, involving psychologists in investigative and judicial actions and psychological examinations.

The study of the psyche of war-affected children is possible within the framework of forensic psychological examination. In the Scientific and Methodological Recommendations on the Preparation and Appointment of Forensic Examinations and Expert Studies (paragraph 6.4), it is indicated that the main task of psychological examination is to determine the individual's character traits and personality; the motivational factors behind their mental life and behaviour; their emotional reactions and states; patterns of their mental processes; and their developmental level and its qualities. Forensic psychological examinations can be conducted on both infants and juveniles, according to paragraph 6.1 of these Scientific and Methodological Recommendations.

Psychologists can conduct a psychodiagnostic examination of a child, which includes an assessment of their mental state and ability to testify and to experience stressful situations.[36] The current state of psychology allows us to speak about quite broad possibilities of forensic psychological examination, but there are specific features of expert examination of the psyche of minors. Therefore, if it is necessary to examine the psyche of minors, it is advisable to invite specialists in the field of child and adolescent psychology.

CONCLUSIONS

The violation of children's right to identity during the Russian aggression and the ongoing Russian – Ukrainian war has become one of the ways to commit the core international crimes. In a situation where thousands of Ukrainian children were forcibly transferred to the territory of the occupying state, the destruction of their connection with their parents, families, motherland, culture, religion and history became important in order to destroy the Ukrainian population in the occupied territory, to replace it with a Russian one and to replenish the gene pool of the Russian

[35] *Ibidem*, pp. 81 and 82.

[36] V. Onatska, T. Savkina, *Інтердисциплінарний підхід у судово-психологічній експертизі у справах про насильство над дітьми. Правосуддя, дружнє до дитини, постраждалої від насильства: актуальні питання судової психологічної експертизи* [Interdisciplinary approach in forensic psychological examination in cases of violence against children. Justice for a child victim of violence: current issues of forensic psychological examination], 2025, pp. 111–113.

people through "education" with propaganda and total information influence on the new "Russified" generation.

The authors concluded that the mass scale and false goals of the transfer of Ukrainian children to the occupying state prove that it cannot be assessed as an "evacuation". The violation of children's rights during such a transfer, combined with their military training in order to replenish the Russian army, indicate the real goals of the Russian authorities in the occupied territories. This leads to the commission of core international crimes against children and the civilian population as a whole. In our opinion, the most dangerous type of such crimes is genocide, since it involves the destruction of the Ukrainian people by destroying their traces in the occupied territories, including the violation of the right of children to identity and connection with their parents, families and motherland. According to statistical data and the examples given, it was possible to establish that only in some cases were such children able to return to their families and motherland. The presence of children in an unfamiliar and hostile environment, in "new" families with a significant influence from propaganda and information violence, will lead to a situation of parallel realities and the continued psychological traumatisation of children. When such children return to Ukraine, they need additional attention and special psychological assistance.

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VICTIMS FIRST: SURVIVOR-CENTRED APPROACH IN POLISH LAW AND PRACTICE**

Abstract: *A survivor-centred approach (SCA) seeks to minimise secondary victimisation and provide safeguards for victims. Elements of an SCA can be identified in numerous international legal instruments, as well as in non-binding policy documents. This article examines whether the Polish legal system is normatively and institutionally equipped to prosecute conflict-related sexual violence (CRSV) in accordance with SCA standards. The analysis focusses on two interrelated dimensions. Firstly, it identifies the legal bases governing the interviewing of victims with victim-centred principles. Secondly, drawing on qualitative research and the findings of the National Preventive Mechanism, it evaluates the extent to which Polish practice incorporates safeguards consistent with SCA requirements. The analysis demonstrates that while Polish law does contain several significant normative mechanisms aligned with an SCA, important gaps persist at both the legal and institutional levels. Shortcomings in practice – such as insufficient training, limited resources and organisational constraints – undermine the effective implementation of existing safeguards. The article concludes that both legislative refinement and stronger institutional capacity are necessary to ensure that the prosecution of CRSV in Poland fully reflects victim-centred standards.*

Keywords: conflict-related sexual violence, interviews, victim-centred approach, criminal law

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INTRODUCTION

In recent years Poland has become a place of refuge for a significant number of individuals fleeing conflict, including victims of international crimes.[1] Their presence on Polish territory not only allows their experiences to be documented, but also creates a unique opportunity – yet simultaneously a legal and institutional challenge – to pursue accountability for these crimes before the Polish justice system.[2] That is the reason why evidence is currently being collected in Poland connected with the international crimes being committed on the territory of Ukraine.[3]

Non-governmental organisations (NGOs) indicate that there are individuals staying on Polish territory who have survived conflict-related sexual violence (CRSV),[4] but that many are reluctant to report the crimes to the authorities. This reluctance stems from a lack of trust that they will be treated with dignity and respect and will receive comprehensive medical assistance, including access to services such as pregnancy termination. Stories about cases of mistreatment, secondary victimisation

[1] The term "victim" is used throughout this text in accordance with its established legal and academic usage. At the same time, it should be noted that some scholars and practitioners have pointed to the potentially stigmatising or burdening effects of the term, arguing that it may emphasise experiences of harm, vulnerability or passivity in ways that can overshadow individual agency and resilience. Awareness of these concerns is important when discussing persons affected by violence, although the conventional terminology is retained here for the sake of consistency and alignment with the relevant literature.

[2] Helsińska Fundacja Praw Człowieka (HFHR), *Uchodźcy z Ukrainy a prawo międzynarodowe* [Refugees from Ukraine and international law], OKO.press, 21 June 2024, available at: https://oko.press/helsinska-fundacja-praw-czlowieka-uchodzcy-z-ukrainy-prawo-miedzynarowowe (accessed 31 March 2026).

[3] *Prokurator Krajowy: są dowody na zabójstwa cywili, kradzieże i tortury w Ukrainie* [National Prosecutor: there is evidence of murders of civilians, thefts and torture in Ukraine], PAP News Agency, 24 February 2023, available at: https://www.pap.pl/aktualnosci/news,1541086; *Bodnar: jesteśmy coraz bliżej powołania Trybunału ds. Zbrodni Agresji przeciwko Ukrainie* [Bodnar: we are getting closer to establishing a Tribunal for the Crime of Aggression against Ukraine], PAP News Agency, 11 October 2024, available at: https://www.pap.pl/aktualnosci/bodnar-jestesmy-coraz-blizej-powolania-trybunalu-ds-zbrodni-agresji-przeciwko-ukrainie; P. Rochowicz, *Polska ściga zbrodniarzy wojennych. Albo stara się stworzyć takie wrażenie* [Poland prosecutes war criminals. Or tries to create such an impression], Rzeczpospolita, 15 January 2025, available at: https://www.rp.pl/prawo-karne/art41666961; HFHR, *Konferencja: jurysdykcja uniwersalna* [Conference: universal jurisdiction], available at: https://hfhr.pl/aktualnosci/konferencja-jurysdykcja-uniwersalna (all accessed 31 March 2026).

[4] The term "conflict-related sexual violence" refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilisation, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict. This link may be evident from the perpetrator, who is often affiliated with a State or non-State armed group, which includes terrorist entities or networks; the victim, who is frequently an actual or perceived member of a persecuted political, ethnic or religious minority, or targeted on the basis of actual or perceived sexual orientation or gender identity; an atmosphere of impunity, which is generally associated with State collapse; cross-border consequences, such as displacement or trafficking; and/or violations of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of sexual violence and/or exploitation, when committed in situations of conflict. *See* UN Security Council, *Conflict-Related Sexual Violence: Report of the Secretary-General*, UN Doc S/2019/280, 29 March 2019.

or practical obstacles faced by victims is often shared informally among victims. As a result, many of them do not seek help through official channels, which leads to underreporting, a lack of accountability for perpetrators and the further marginalisation of victims.[5]

However, having the Polish authorities prosecute CRSV is indispensable not only for ensuring the accountability of perpetrators, combating impunity and preventing future violations, but also for unequivocally reaffirming the fundamental principle that sexual violence can never be regarded as an inevitable by-product of armed conflict.[6] In light of the reasons why victims are often reluctant to report such crimes, it is imperative that investigations and prosecutions of CRSV be conducted in accordance with a survivor-centred approach (SCA). Such an approach is crucial because it strengthens victims' confidence in the justice system and encourages their willingness to report offences and engage in legal proceedings. By fully respecting the rights, dignity and needs of victims and providing them with appropriate support, an SCA constitutes a sine qua non for the effective administration of justice and the restoration of trust in public institutions.

It is important to mention that Poland may exercise jurisdiction over CRSV on several grounds, including the active[7] and passive nationality[8] principles and the protection of fundamental interests of the State.[9] In the procedural sense, Art. 113 of the Criminal Code provides the basis for universal jurisdiction and reflects Poland's obligation under international law to prosecute core international crimes.[10] In substantive law, such acts may fall under Art. 197 of the Polish Criminal Code, which criminalises rape, as well as Arts. 118,[11] 118a and 123(2), which criminalise genocide, crimes against humanity and war crimes. Poland follows a monist approach to international law, as reflected in Arts. 9 and 91 of the Constitution of the Republic of Poland. Under this constitutional framework, ratified and promulgated

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[5] K. Sukhomlynova, statement during IV Dolnośląski Kongres Kobiet "Wybory kobiet", panel: *Gwałt jako zbrodnia wojenna i zbrodnia przeciwko ludzkości: jak dokumentować przemoc seksualną i wspierać ocalałe/-łych przebywające/-cych na terenie Polski* [Rape as a war crime and a crime against humanity: how to document sexual violence and support victims residing in Poland], 9.11.2024.

[6] D. Mukwege, *The Power of Women: A Doctor's Fight to End Violence Against Women Around the World*, Hachette UK, London: 2022.

[7] *Kodeks karny* [Criminal Code], Journal of Laws 2025, No. 383, as amended, Art. 109.

[8] *Ibidem*, Art. 110.

[9] *Ibidem*, Art. 112.

[10] P. Grzebyk, H. Kuczyńska, K. Wierczyńska, *Ściganie zbrodni międzynarodowych – uwagi dotyczące konieczności wprowadzenia zmian w polskim prawie karnym* [The prosecution of international crimes within the Polish legal system: A need for reform], 2(230) Studia Prawnicze 7 (2024), p. 23.

[11] I. Zgoliński, *Artykuł 118*, in: V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [The Penal Code: Commentary], 4th ed., Wolters Kluwer, Warszawa: 2023; J. Kosonoga-Zygmunt, *Artykuł 118*, in: J. Majewski (ed.), *Kodeks karny. Komentarz* [The Penal Code: Commentary], Wolters Kluwer, Warszawa: 2024.

international treaties become part of the domestic legal order, are directly applicable and take precedence over statutes in the event of a conflict. As a result, domestic provisions on international crimes are supplemented by international treaties which define the elements of specific war crimes.

The prosecution of rape committed in peacetime under domestic criminal law differs from the investigation and prosecution of rape classified as an international crime, especially when committed outside the territory of Poland. In such cases, the ability of Polish authorities to conduct a criminal investigation is constrained by the absence of territorial and personal jurisdiction. Although certain international crimes may be subject to universal jurisdiction, its exercise faces significant legal and practical challenges. Consequently, under the current circumstances, the activities of Polish prosecutorial authorities are primarily limited to preserving evidence by collecting victims' testimonies. This material may be used in future domestic proceedings before Polish courts or transmitted for use by the International Criminal Court, the Prosecutor General's Office of Ukraine or other states exercising universal jurisdiction.[12]

This obligation, and the actual opportunity to fulfil it, lead to a fundamental question: can international crimes, particularly CRSV, be prosecuted in Poland in a manner that is consistent with an SCA?[13] The article examines to what extent, if at all, Polish procedural and substantive law and practice incorporate an SCA into interviewing techniques and assesses mechanisms designed to safeguard victims' rights, provide adequate support and ensure their meaningful participation in proceedings.

1. METHODOLOGY

To address the gap in knowledge concerning the extent to which Polish procedural and substantive law and practice incorporate a survivor-centred approach into interviewing techniques in cases involving victims of sexual violence, this study draws on qualitative data obtained through semi-structured interviews. In November 2025, two in-person interviews were carried out with representatives of Polish NGOs providing support to victims of international crimes. Given the limited number of organisations in Poland that provide specialised assistance to victims of CRSV – especially during testimony and while cooperating with authorities – this can be

[12] HFHR, *supra* note 3.

[13] The VCA requires that victims be treated in a manner that is non-discriminatory and specific and that respects the rights and prioritises the needs of victims, including particularly vulnerable groups. *See more* UN Security Council, Resolution 2467, UN Doc S/RES/2467 (2019), 23 April 2019.

seen as a relatively representative sample. Respondents were identified through a snowball sampling method.

The interviews were designed to capture practice-orientated knowledge concerning the functioning of the justice system's mechanisms for victims of CRSV. A qualitative research design was chosen as the most appropriate methodological approach for this study due to the nature of the research problem. Qualitative methods are particularly suitable for examining complex problems. Semi-structured interviews, as a qualitative technique, allow for flexibility in exploring these complex interactions while maintaining a consistent thematic focus across respondents. The choice of qualitative methodology is therefore justified by its capacity to generate an in-depth analysis of institutional practices and perceived challenges.

The study is subject to several limitations. The small number of interviews reflects the limited number of specialised NGOs operating in this field in Poland, particularly those which provide expert assistance to victims of CRSV and cooperate with prosecutorial authorities. Consequently, the possibility of obtaining a broader empirical dataset is structurally constrained.

The article also considers the findings of the National Preventive Mechanism against Torture (NPM). The task of the NPM is to identify risk factors that may lead to torture or other forms of cruel, inhuman or degrading treatment. These anti-torture safeguards are likewise relevant to SCA standards, as they help ensure the dignity, safety and respectful treatment of individuals participating in legal proceedings. For example, during visits to police stations, the NPM examines whether interviews with participants in criminal proceedings are conducted under conditions that guarantee privacy. Ensuring such conditions is important not only for safeguarding against torture – protecting individuals from the misuse of information by third parties and providing witnesses with psychological comfort through confidentiality – but is also particularly crucial in cases involving victims of sexual violence, since the absence of privacy may discourage them from disclosing traumatic experiences and may increase the risk of secondary victimisation. Detailed information regarding the methodology applied by the Mechanism is set out in the introductory section of its report.

This article demonstrates that Polish procedural and substantive law is not yet fully equipped to conduct proceedings in accordance with an SCA, and that practice still requires significant improvement. The thesis is that although basic legal provisions exist to address SCA standards, both law and practice fall short of fully implementing the standards necessary to protect victims' rights, safety and dignity.

The article first explains what an SCA entails, highlighting its principles, objectives and the practical measures which ensure that victims are treated respectfully and safely. Next, drawing on interviews with practitioners and an analysis of the

NPM report, it is shown that Polish law provides only a partial framework for an SCA and that, in practice, key safeguards are inconsistently applied. These observations will underscore the gaps that must be addressed to align Poland's criminal proceedings with victim-centred standards.

2. SURVIVOR-CENTRED APPROACH AND INTERVIEWING TECHNIQUES

Given the topic of this article and central role of the survivor-centred approach in shaping contemporary standards for interviewing, it is necessary to clarify its conceptual foundations at the outset. The concept emerged from the transitional justice literature as a movement aiming to minimise trauma and focussing on victim needs rather than prosecution.[14] Based on that, international organisations have begun to endorse approaches that place victims at the centre of justice processes. For example, in the 2010 Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice, one of the guiding principles highlights the importance of "ensuring the centrality of victims in the design and implementation of transitional justice processes and mechanisms."[15]

Moreover, although the term "victim-centred approach" is not explicitly used, its application can be identified in binding legal instruments of international criminal law: it is formulated in general terms in Art. 68 of the Rome Statute,[16] and in a much more detailed and operationalised manner in EU Directive 2012/29/EU.[17] It is further reinforced by soft-law and policy instruments, including the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[18] as well as the International Criminal Court Office of the Prosecutor Policy Papers on Sexual and Gender-Based Crimes,[19] which emphasise dignity, safety and the avoidance of re-traumatisation.

However, there is no single legal instrument that comprehensively codifies all standards related to this approach. Accordingly, the list of SCA elements applied

[14] V.V. Weis, *Who can organize and exercise effective resistance? A southern criminology perspective on the victimology of state crime*, 27(3) Theoretical Criminology 381 (2023).

[15] *Ibidem.*

[16] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, Art. 68.

[17] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, [2012] OJ L 315.

[18] United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Resolution 40/34, 29 November 1985.

[19] International Criminal Court (ICC) Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014; ICC Office of the Prosecutor, *Policy on Gender-Based Crimes*, December 2023.

in this article constitutes an analytical framework developed by the author for the purposes of this study. This framework is constructed through a synthesis of relevant guidance materials. Attention is given to the principles set out in documents produced by the Office for Democratic Institutions and Human Rights, as they offer a structured and detailed framework for implementing a survivor-centred approach in practice. The analysis also draws on the Practice Note "A Survivor-centred Approach to Documentation for Criminal Accountability", published by the International Accountability Platform for Belarus, as this document specifically addresses the documentation of international crimes. Moreover, both documents focus on the same method of conducting interviews in line with a victim-centred approach, namely the PEACE method. While these documents do not present a unified model, they converge on comparable methodological principles for conducting interviews in line with a survivor-centred approach, including those associated with the PEACE method, which informs the operationalisation of the framework used in this article.

In general, an SCA emphasises the rights of the victim, ensuring that all policies, actions and decision-making processes are guided by the principle of treating each victim with dignity and respect. It is grounded in the recognition that all victims are entitled to equal access to care and support, while also acknowledging their individual differences and unique experiences. This perspective accepts that responses to violence may vary significantly, depending on personal characteristics, resources, coping mechanisms and specific needs. It further affirms the victim's right – considering their age and circumstances – to receive relevant information, decide who should be informed about their experience and influence subsequent steps. Central to this approach is also the obligation to believe victims and to treat them with sensitivity, compassion and empathy.[20]

One of the stages in which this approach is most evident is the questioning of the victim.[21] When conducting interviews or formal examinations of a victim, the interviewer should be adequately trained in SCA and trauma-informed techniques.[22] Advanced, non-coercive methods should be applied to prevent retraumatisation and revictimisation, while responding to the victims' needs and priorities.[23]

[20] ICC Office of the Prosecutor, *Policy on Gender-Based Crimes*, December 2023, available at: https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf (accessed 31 March 2026).

[21] OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Trauma-Informed Interviewing: skills and techniques for monitors*, online course, available at: https://freedomlab.io/courses/trauma-informed-interviewing-skills-and-techniques-for-monitors/ (accessed 31 March 2026).

[22] *Ibidem*.

[23] International Accountability Platform for Belarus, *Practice Note. A survivor-centred approach to documentation for criminal accountability*, May 2025, pp. 6–7, available at: https://iapbelarus.org/app/uploads/2025/06/SCA-Paper_EN.pdf (accessed 31 March 2026).

One of the interview techniques grounded in an SCA is the PEACE model of investigative interviewing, which presupposes that interviews shall be conducted in an ethical, reliable manner while maximally reducing the risk of secondary victimisation. The PEACE model consists of five stages: Preparation and Planning, Engage and Explain, Account, Closure and Evaluation.[24]

At the *preparation and planning* stage, the interviewer should determine and analyse the personal characteristics of the victim (e.g. age, gender, religion, cultural background, language proficiency, disabilities and mental health status) insofar as these factors may influence the course of the interview. The interviewer must also consider the individual's psychological and physical condition, ensure the presence of a psychologist or trusted person where appropriate and guarantee that the interview is conducted in a suitable, secure and confidential environment.[25]

During the *engage and explain* phase, it is essential to establish a rapport based on trust. The interviewer should clearly explain their role, set out the ground rules of the interview and clarify how the information will be used in the proceedings.[26]

In the *account* phase, the victim should be afforded the opportunity to present a free narrative of events, without interruption and without suggestive prompting. Questions should be open-ended and non-directive. The interviewer must take into consideration the specific characteristics of traumatic memory, including its potential fragmentation, lack of chronological order and memory gaps. Clarification of details should be sought where necessary, and challenges to the account should be introduced only where strictly required.[27]

The *closure* phase should summarise the account and notify the interviewee regarding the subsequent course of the proceedings and available forms of support. The final stage of the PEACE model – *evaluation* – serves to assess whether victim-centred standards have been upheld and whether the interview was conducted in a manner that avoided secondary victimisation.[28]

Furthermore, the PEACE model identifies several additional standards for conducting interviews, the implementation of which may significantly reduce the risk of secondary victimisation. These include conducting the interview in conditions that ensure safety and confidentiality, in premises inaccessible to third parties not

[24] OSCE ODIHR, *Trauma-Informed Interviewing: Do's and Don'ts. Skills and Techniques for Monitors, online course and connected documents*, available at: https://freedomlab.io/courses/trauma-informed-interviewing-skills-and-techniques-for-monitors/ (accessed 31 March 2026).

[25] *Ibidem*, p. 7.

[26] *Ibidem.*

[27] *Ibidem.*

[28] *Ibidem.*

involved in the case;[29] enabling the victim to choose the gender of those participating in the interview, especially the interviewer;[30] limiting the interview to a single session, with audio-visual recording to ensure accuracy and prevent repeated questioning;[31] ensuring communication in a language understood by the injured party; and securing the participation of specialists possessing knowledge of cultural factors that may influence the manner in which events are recounted, perceptions of the justice system or the willingness to cooperate with law enforcement authorities.[32]

From the perspective of international criminal law, particularly within the practice of the ICC, an SCA functions as a key procedural principle guiding the handling of CRSV. In essence, it requires that all stages of proceedings – investigation, prosecution and reparations – take into account the rights, needs and experiences of victims. In practice, this means adapting investigative methods to avoid retraumatisation, employing trained personnel and integrating a gender-sensitive perspective. The approach also influences evidentiary assessment and legal interpretation, allowing for a more context-aware understanding of sexual and gender-based crimes. Overall, the survivor-centred approach ensures that accountability for CRSV is pursued in a manner that respects victims' dignity, enhances the effectiveness of prosecutions and contributes to the development of international standards and best practices.[33]

3. PROCEDURAL FRAMEWORK

When discussing an SCA, it is crucial to integrate an analysis of procedural norms to demonstrate how legal rules translate into practices that safeguard the rights and well-being of victims during criminal proceedings. In the Polish context, these procedural safeguards are anchored in the Code of Criminal Procedure (CCP).

The basic procedural framework for reporting and prosecuting sexual violence is regulated in the CCP. In the first step of the procedure, the victim reports the offence to the police. The police are under a legal obligation to accept the report and to limit their initial actions to recording the essential facts necessary to initiate criminal prosecution.[34] The public prosecutor subsequently assumes supervision over

[29] International Accountability Platform for Belarus, *supra* note 23.

[30] *Ibidem*.

[31] United Nations, *Principles on Effective Interviewing for Investigations and Information Gathering* (the Méndez Principles), May 2021, Principle 5, para. 176.

[32] OSCE ODHIR, *supra* note 21, p. 7.

[33] ICC Office of the Prosecutor, *Policy on Gender-Based Crimes*, December 2023, available at: https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf (accessed 31 March 2026).

[34] *Kodeks postępowania karnego* [Code of Criminal Procedure], Journal of Laws 2025, item 46, as amended. Art. 185c.

the proceedings,[35] and within 14 days a judicial hearing is organised for examining the victim before a court. The prosecutor, a court-appointed psychologist, defence counsel and the legal representative of the victim have the right to participate in the hearing. The examination must be recorded so it can then be presented before the trial court. Repeated questioning of the victim is permissible only in two exceptional circumstances expressly provided for by statute.[36]

The principal normative basis for this procedure is Art. 185c CCP, which entered into force on 27 January 2014 pursuant to the Act of 13 June 2013 amending the Criminal Code and the CCP. This provision establishes a special interrogation procedure for victims in cases concerning offences defined in Arts. 197–199 of the Criminal Code.[37]

The provision was subsequently amended by a 2019 reform.[38] According to the explanatory memorandum to the amending bill, the purpose of the amendment was to equalise the procedural guarantees afforded to injured parties examined as witnesses under Art. 185c CCP with the protection provided in Art. 185a CCP, which concerns injured parties who had not attained the age of 15 at the time of the offence.[39] The personal scope of Art. 185c encompasses two categories of injured parties: minors who have reached the age of 15 and adults.[40] The legal scholarship has uniformly assessed this amendment as aiming to prevent secondary victimisation, understood as the renewed experience of trauma in connection with participating in proceedings.[41]

The protective character of this procedure is reflected in the following provisions: upon the request of the injured party, the participation of an expert of the sex indicated by that person must be ensured; the catalogue of persons authorised to be present during the examination is exhaustive; and the participation of the accused in such proceedings is excluded, while at the main hearing the audio-visual recording of the examination is played back and the written record thereof is read out.[42]

Beyond the CCP, other relevant documents also regulate the conduct of criminal proceedings and investigative practices. At the stage of police proceedings, standards

[35] *Ibidem,* Art. 326.

[36] *Ibidem,* Art. 185c.

[37] M. Kurowski, *Artykuł 185c*, in: D. Świecki (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany* [Code of Criminal Procedure. Volume I. Updated commentary], LEX/el., 2025.

[38] Druk sejmowy nr 3251, Sejm VIII kadencji, p. 26.

[39] *Ibidem,* p. 9.

[40] K. Sychta, *Artykuł 185a, 185b, 185c, 185e, 185f*, in: J. Zagrodnik (ed.), *Kodeks postępowania karnego. Komentarz* [Code of Criminal Procedure. Commentary], Wolters Kluwer, Warszawa: 2024.

[41] *Ibidem*; Kurowski, *supra* note 37, p. 9.

[42] C. Kulesza, *Artykuł 185c*, in: K. Dudka (ed.), *Kodeks postępowania karnego. Komentarz*, 3rd ed., Wolters Kluwer, Warszawa: 2023.

for dealing with persons who have experienced sexual violence are set out in the document "Procedure for Police Conduct with a Person Who has Experienced Sexual Violence". The procedure provides the obligation to ensure confidentiality by inviting the injured person to a location that is inaccessible to third parties and prohibits the formulation of any comments regarding the incident or the appearance or behaviour of the injured person. The officer receiving the report shall draw up a record of the notification of the offence and inform the injured party – in a clear, accessible manner, both orally and in writing – of their rights, the subsequent stages of the proceedings (including the need to secure evidence or undergo medical examinations and any available preventive and therapeutic measures) and their right to indicate a person to be present during the proceedings, provided this does not impede them. Where possible, the examination should be conducted by a trained officer of the same sex, unless the victim expresses a different preference. The procedure also provides for access to a database of entities offering specialised legal, psychological and family assistance and, where necessary, for the provision of replacement clothing.

A detailed normative specification of the standards governing examinations conducted pursuant to Arts. 185a–185c is contained in the Regulation of the Minister of Justice.[43] This executive act clarifies both the organisational and procedural aspects of the measure, specifying the duties of the court, the prosecutor and the expert psychologist and defining the principles of cooperation between these entities in the preparation and conduct of the examination.

Regarding the expert psychologist, the Regulation lists activities aimed at ensuring adequate support for the person being examined and minimising the risk of secondary victimisation. The expert shall conduct a preliminary interview, including an assessment of the witness's physical and psychological condition and the identification of their individual procedural needs. Where necessary, the expert must propose techniques conducive to reducing emotional tension and help determine the techniques and types of questions to be used, considering the psychophysical characteristics of the witness. Following the proceedings, the expert shall undertake measures designed to alleviate the emotional tension associated with participating in an examination.

[43] *Rozporządzenie Ministra Sprawiedliwości z dnia 22 września 2024 r. w sprawie przesłuchań prowadzonych na podstawie art. 185a–185c i art. 185e Kodeksu postępowania karnego oraz warunków, jakim powinny odpowiadać pomieszczenia przeznaczone do tych przesłuchań* [Regulation of the Minister of Justice of 22 September 2024 on examinations conducted under Articles 185a–185c and Article 185e of the Code of Criminal Procedure and on the conditions to be met by premises designated for such examinations], Journal of Laws 2024, item 1477.

The court bears the obligation to properly plan the course of the examination, by ensuring sufficient time for the expert psychologist to conduct the preliminary interview, allowing for possible breaks and considering the need to engage an interpreter where required. The summons to appear for examination explains that the witness may familiarise themself in advance with the interview room at the court and how to contact the person responsible for granting access to it.

The obligation to identify relevant social and cultural circumstances rests upon the prosecutor at the preparatory stage of the proceedings, and upon the court at the jurisdictional stage. The procedural authority is further required to determine whether the presence of persons referred to in Art. 51(2) or (3) CCP (a legal representative or a person who permanently cares for the victim), or of another adult indicated by the witness, would restrict the witness's freedom of expression. To reduce formalism and the stress-inducing character of the examination, the Regulation prohibits participants from wearing official attire and precludes the court from dictating the testimony into the court record during the examination.

Prior to the examination, the court is obliged to explain to the witness – with regard to their age, developmental stage, emotional condition and communicative abilities – the roles of the participants in the proceedings. At the same time, the court informs the witness that the examination is being recorded and specifies the entities authorised to access the recording. These provisions constitute an important element in the implementation of an SCA in procedural standards.

The Regulation also lays down minimal infrastructural requirements for friendly interview rooms, including a separate entrance, access to a nearby toilet, subdued colour schemes, adjustable lighting and equipment designed to reduce stress (e.g. stress-relief items). Waiting areas should be equipped so as to enable the active use of waiting time (books, magazines or art supplies, and in the case of foreign nationals, publications should be in a language understood by the witness, where possible). Access to water and hygiene products must also be ensured. At the same time, educational materials concerning violence and sexual abuse are not to be displayed in the waiting area, to avoid imposing additional emotional burdens on the victim.[44]

The analysis of the CCP, the Procedure for Police Conduct with a Person Who has Experienced Sexual Violence and the Regulation of the Minister of Justice of 22 September 2024 reveals that several structural elements of an SCA are already embedded within the domestic procedural framework, although they are not explicitly conceptualised as such. These elements are primarily aimed at reducing secondary victimisation and limiting the need for repeated testimony. The framework also incorporates safeguards related to procedural participation and support,

[44] *Ibidem*.

including the involvement of a psychologist, clear information to victims and consideration of the victim's preferences regarding the gender of their interviewer. In addition, the Regulation introduces environmental and organisational safeguards for ensuring privacy and comfort and reducing stress during interviews, including requirements concerning interview room conditions and restrictions on formal courtroom practices.

4. IDENTIFIED PRACTICE

Given the normative framework, which suggests the presence of certain elements of a survivor-centred approach in the Polish procedural regulations, it is necessary to examine the extent to which these provisions are effectively implemented in practice. A purely doctrinal analysis of legal rules is insufficient to assess their actual impact without considering how they are applied by competent authorities and experienced by the affected individuals in real-life proceedings. Table 1 is based on interviews conducted with representatives of NGOs and the findings of a report of the Polish NPM. It is intended to provide an overview of the current practice.

Table 1. Analysis of police and prosecutorial practice, based on qualitative research and the report of the National Prevention Mechanism

SCA elements	Analysis of practice	
	Police	**Prosecutor**
Knowledge of interviewing techniques	According to a report prepared by the Polish NPM, police officers in Poland generally do not know modern interviewing techniques such as PEACE or KREATIV. Interviews are conducted intuitively, following a pattern of free-form statements interspersed with the officer's questions.[45]	The unit of prosecutors investing international crimes related to Russia's aggression against Ukraine underwent training in trauma-informed interviewing by the Polish Centre for Torture Survivors.[46] Information obtained from other NGOs participating in the hearings indicates that this knowledge is being applied in practice.

[45] Krajowy Mechanizm Prewencji Tortur, *Raport Krajowego Mechanizmu Prewencji Tortur z wizytacji jednostek Policji, przeprowadzonych w okresie od 5 sierpnia do 11 grudnia 2025 r.* [National Mechanism for the Prevention of Torture, Report of the National Mechanism for the Prevention of Torture on visits to Police units conducted from August 5 to December 11, 2025], available at: https://bip.brpo.gov.pl/sites/default/files/2026-06/Raport%20-%20jednostki%20Policji%202025.pdf (accessed 31 March 2026)

[46] Prokuratura Krajowa*, Szkolenie prokuratorów mazowieckiego pionu PZ PK z zakresu metodologii prowadzenia rozmów z ocalałymi z tortur oraz gwałtów wojennych* [National Prosecutor's Office, Training for prosecutors of the Masovian PZ PK division on the methodology of conducting interviews with survivors of torture and wartime rape], 30 October 2024, available at: https://www.gov.

SCA elements	Analysis of practice	
	Police	**Prosecutor**
Conditions for conducting interviews	Most police stations in Poland do not have dedicated rooms for conducting interviews. Such activities are typically carried out in offices used by police officers for their daily work, which are often shared with other officers. In practice, it is not uncommon to conduct multiple interviews relating to different cases in the same room.[47]	Prosecutors from the unit dealing with international crimes likewise do not have access to a designated safe room. Moreover, the entrance to their office is guarded by soldiers carrying firearms, a setting that may itself be retraumatising for victims of serious violence.[48] Prosecutors are aware of this challenge and endeavour to take it into account when organising interview conditions. Accordingly, the prosecutor's office has ensured access to an external room that meets the requirements of a safe and confidential environment.
Presence of psychologist or assistant	No data are available; the NPM does not address this issue in its report.[49]	Support persons may be present if an NGO intermediates in the case. The prosecutor's office does not provide social workers or psychologists – it does not have such resources.
Gender	As indicated in the NPM report, there are organisational and staffing shortages in the police force nationwide.[50] For this reason, it is likely that the implementation of this requirement may face difficulties.	During investigations, the norm of the victim choosing the gender does not extend to prosecutors themselves. Even if it did, the absence of female prosecutors within the prosecutorial team dealing with international crimes effectively deprives victims of any real possibility of making such a choice.
Linguistic and cultural differences	In proceedings involving foreign nationals, the police sometimes resort to informal solutions at the initial stages, such as relying on individuals who are not certified interpreters or on private translation tools.[51]	At the prosecutorial stage, translation services are provided.[52] Within the specialised team investigating crimes committed in Ukraine, a female interpreter of Ukrainian origin has been engaged, facilitating a better understanding of the victims' cultural context.

pl/web/prokuratura-krajowa/szkolenie-prokuratorow-mazowieckiego-pionu-pz-pk-z-zakresu-metodologii-prowadzenia-rozmow-z-ocalalymi-z-tortur-oraz-gwaltow-wojennych (accessed 31 March 2026).

47 Krajowy Mechanizm Prewencji Tortur, *supra* note 45, p. 13.

48 Mukwege, *supra* note 6, p. 3.

49 *Ibidem*.

50 *Ibidem*.

51 *Ibidem*.

52 Regulation of the Minister of Justice of 22 September 2024, *supra* note 43, p. 11.

SCA elements	Analysis of practice	
	Police	**Prosecutor**
Recording of interrogations	Generally, audio-visual recordings of hearings are not made. Exceptions to this practice are rare.[53]	The hearings are lengthy. They are recorded in real time, and afterwards the victim must read through everything.

Analysis of practical implementation of the SCA policy

Despite a clear legislative trend towards the implementation of SCA standards, the current regulations do not encompass all elements mentioned in the relevant guidelines as necessary for their full realisation. Neither the CCP nor the relevant regulations and guidelines establish an obligation to train authorities in interviewing techniques or to formulate questions before conducting an examination. Nor is there a normative requirement to ensure the participation of specialists with knowledge of the cultural differences that may affect the course of the proceedings and the effective exercise of the right of access to a court. Although paragraph 3 of the Regulation of the Minister of Justice of 22 September 2024[54] imposes an obligation to identify relevant social and cultural circumstances, it does not specify the procedural consequences arising from the establishment of such circumstances. Therefore, it is necessary to introduce concrete measures such as clear procedural guidelines which would ensure that these circumstances are meaningfully taken into account in practice.

Furthermore, there is no statutory guarantee of the right to choose the sex of the authority conducting the proceedings, particularly the judge or prosecutor. The only such standard concerns the police, and it takes the form of guidelines with limited binding force. Similarly, there are no clearly defined statutory requirements concerning the material conditions under which proceedings are to be conducted in police units and prosecutors' offices, including standards relating to premises, confidentiality or preventing secondary victimisation.

In practice, several shortcomings can also be observed. Firstly, there is an absence of institutionalised training programmes for police officers and prosecutors aimed at equipping them with the necessary skills to handle cases involving vulnerable victims. Secondly, conditions for conducting interviews in a manner that ensures confidentiality and a sense of safety are not consistently provided; instead, such conditions frequently rely on the goodwill of individual officers or prosecutors and the infrastructural capacity of the institution. Thirdly, prosecutors often lack access to professional psychologists trained in psychotraumatology to assist

[53] Krajowy Mechanizm Prewencji Tortur, *supra* note 45, p. 13.

[54] Regulation of the Minister of Justice of 22 September 2024, *supra* note 43, p. 11.

in conducting sensitive interviews. Finally, there is a noticeable shortage of female prosecutors within units tasked with investigating international crimes, which may impact the comfort and willingness of certain victims to participate in proceedings.

CONCLUSIONS

Conducting proceedings in accordance with an SCA is of fundamental importance, as it not only pursues the objective of prosecuting and securing the conviction of perpetrators, but also places due emphasis on safeguarding the well-being and dignity of victims. Such an approach recognises victims as rightsholders rather than merely sources of evidence.

The current legal framework in Poland contains a number of mechanisms that are, at least in principle, compatible with an SCA. In particular, the law provides for a single interview to be conducted with a victim, as soon as possible after the offence is reported and with the questioning being limited to the minimum necessary scope. Procedural safeguards further allow third persons – including a psychologist – to be present during the interview, and they exclude the suspect or accused from directly participating. Importantly, an expert psychologist is required to conduct a preliminary assessment of the witness, including an evaluation of their physical and psychological condition and the identification of individual procedural needs. These elements reflect an awareness of the risks of secondary victimisation and align, at least partially, with international standards concerning the treatment of vulnerable victims.

At the same time, certain gaps within the legal framework remain evident. In particular, the obligation to identify cultural factors that may affect the course of the interview should not rest solely on judges and prosecutors. Instead, it should be entrusted to qualified experts, such as court-appointed interpreters, who could prepare the interviewers in advance, provide ongoing support during the interview and, where necessary, contribute to a post-interview assessment. Furthermore, the absence of any legal guarantees allowing victims to choose the gender of the prosecutor or judge constitutes a significant limitation, particularly in cases involving sexual and gender-based violence. These shortcomings suggest the need for targeted legislative amendments.

However, as the research demonstrates, the most significant obstacles to the effective implementation of an SCA arise in practice rather than legislation. These include the absence of specialised training in modern interviewing techniques, the lack of systematic recordings of police interviews and the insufficient availability of dedicated interview rooms. Additional challenges stem from staffing shortages, which often make it impossible to ensure that the interviewer is of the same gender

as the victim, as well as difficulties in securing the participation of qualified psychologists at the prosecutorial stage.

Addressing these deficiencies requires a comprehensive strengthening of institutional capacity. In practical terms, it is necessary to introduce systematic and mandatory training for police officers and prosecutors involved in interviewing victims, with a particular emphasis on trauma-informed approaches and contemporary interviewing methods. At the same time, police officers and prosecutors should be relieved of the burden of independently ensuring appropriate interview conditions, such as adequately equipped interview rooms and the elimination of unnecessary third parties, as these ought to be guaranteed at the institutional level. Ensuring sufficient staffing levels is equally crucial, in order to guarantee that victims have ready access to interviewers of all genders, as well as to specialised professionals such as psychologists.

Finally, attention should be paid to strengthening the institutional framework needed to effectively apply both existing and future standards. It is necessary to build professional skills, develop clear procedures and provide sufficient resources, without which a survivor-centred approach cannot be applied consistently in practice. This is especially important in international criminal law, where crimes often involve large numbers of victims and severe trauma, making the protection of victims and their meaningful participation essential to proceedings.

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HEALING AS JUSTICE FOR SURVIVORS OF TORTURE: IMPLEMENTING THE RIGHT TO REHABILITATION IN POLAND

Abstract: *Survivors of torture, conflict-related sexual violence and other violations of international law – many of whom are forcibly displaced – face significant barriers in accessing rehabilitation and psychosocial support in Poland. The current measures are incomplete and not integrated into a unified public policy framework. The analysis is based on Poland's obligations under the UN Convention against Torture and the practices of the UN Committee against Torture. It states that the right to rehabilitation applies to all survivors within Poland's jurisdiction, regardless of where the violations occurred or who committed them. The analysis finds that Poland lacks specialised, multidisciplinary services, effective identification, referral systems and adequately trained staff. It also describes how procedures that ignore trauma can increase the risk of retraumatisation. The article emphasises that survivor-centred and trauma-informed approaches are essential. Using case studies and practical experience from NGOs working with Ukrainian refugees and others, the article shows that civil society bears most of the responsibility for organising and providing rehabilitation. The authors highlight good practices developed by NGOs and other professionals. They propose recommendations for health services, justice institutions, public administration and NGOs which would focus on creating a coordinated, multidisciplinary system for early identification, safe referral and the comprehensive rehabilitation of survivors.*

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Keywords: trauma-informed care, referral system for survivors of torture, comprehensive approach to justice, accountability for international crimes, survivor-centred approach

INTRODUCTION

Poland is currently home to close to one million refugees from Ukraine.[1] Many arrived having endured torture and ill-treatment. People from Belarus, fleeing a regime whose systematic use of torture is well documented, are also present.[2] Some torture survivors[3] in Poland have experienced sexual violence, which in the context of armed conflict may also amount to torture and may violate international humanitarian law and international human rights law.[4] For all survivors of torture, justice often remains out of reach. Prosecutions are rare and slow. Reparations are a distant prospect. Even when accountability is eventually secured, no court ruling can undo the physical injuries, the psychological trauma or the daily challenge of building a new life in a foreign country: finding work, remaining self-reliant and reclaiming one's dignity. The article argues that achieving comprehensive justice for survivors of torture and other serious violations of international law requires looking beyond courtroom proceedings. It requires fulfilling the right to rehabilitation. Rehabilitation – encompassing medical, psychological, legal and social support – is not a supplement to justice; it is an integral part of it and is legally guaranteed under the international human rights treaties that Poland has ratified. It is also urgent: healing must begin now.

Poland has been at the forefront of accountability efforts since the earliest days of the war. Four days after Russia's full-scale invasion began, Polish prosecutors opened a criminal investigation into international crimes committed by Russia.[5]

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[1] UNHCR, *Poland Fact Sheet* (September 2024), available at: https://www.unhcr.org/sites/default/files/2024-11/bi-annual-fact-sheet-2024-09-poland.pdf (accessed 31 March 2026).

[2] Office for Foreigners, *Raport na temat obywateli Białorusi* [Report on Belarusian nationals in Poland], April 2025, available at: https://www.gov.pl/attachment/ee780adf-52c0-4569-806e-9dd76fe26922 (accessed 31 March 2026).

[3] For ease of reference, "torture survivors" is used here to include survivors of torture and of other cruel, inhuman or degrading treatment or punishment, as defined in the Convention against Torture (UN CAT), unless the context indicates otherwise.

[4] International Committee of the Red Cross, *Q&A: Sexual Violence in Armed Conflict*, 24 August 2014, available at: https://www.icrc.org/en/document/sexual-violence-armed-conflict-questions-and-answers; OHCHR, *Conflict-Related Sexual Violence in Ukraine (and related reporting)*, available at: https://ukraine.ohchr.org/en/conflict-related-sexual-violence-ukraine-EN; ICC, *Elements of Crimes* (2011), available at: https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf (all accessed 31 March 2026).

[5] National Prosecutor's Office, *Komunikat o polskim i międzynarodowym śledztwie dotyczącym rosyjskiej inwazji na Ukrainę* [Statement on the Polish and international investigation into the Russian invasion of Ukraine], February 2025, available at: https://tinyurl.com/mr45nu9d (accessed 31 March 2026).

Poland was also a founding member of the Joint Investigation Team, along with Lithuania and Ukraine – and later joined by four other EU Member States, Eurojust, Europol and the ICC – to coordinate the collection and preservation of evidence and to facilitate prosecutions at national and international level.[6] This is a meaningful contribution to accountability. However, accountability is only one aspect of justice. Survivors in Poland – whether or not they have testified – are entitled to rehabilitation: access to medical care, psychological support, legal aid and social services that restore their health, autonomy and dignity and that facilitate their full reintegration into society. Poland is actively investigating Russia's international crimes in Ukraine, but has yet to establish a system to help survivors in their recovery. Both are obligations under international law, and neither can be delayed.

Most refugees who arrived in Poland sought work and tried to support themselves. The majority of working-age Ukrainian refugees were employed in 2024 – and their presence positively contributed to the Polish economy.[7] Many of those who arrived, however, carry injuries that are not always visible. Torture can leave lasting physical and psychological harm. Some survivors manage to work despite what they have endured. Others cannot, because their injuries make it impossible. All of them, regardless of their circumstances, may need support to heal and to rebuild their lives in a country that is not their own.

There is a clear legal framework underpinning the duty of states to provide such support to survivors of torture. Poland ratified the Convention against Torture (UN CAT) in 1989. Art. 14 obliges every State Party to ensure that survivors of torture can access rehabilitation.[8] In November 2024, Poland ratified the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).[9] Art. 24(5) of that Convention recognises the right to reparation, including the means for as complete rehabilitation as possible for victims and their families.[10] The UN Committee against Torture (CAT) has repeatedly raised the

[6] Eurojust, *Joint Investigation Team into Alleged Crimes Committed in Ukraine*, available at: https://www.eurojust.europa.eu/joint-investigation-team-alleged-crimes-committed-ukraine (accessed 31 March 2026); *see also* H. Kuczyńska, M. Nasiłowski, *The Polish Investigation into Core Crimes Committed in Ukraine: Practical Aspects of the Functioning of the JIT*, 43 Polish Yearbook of International Law 323 (2023).

[7] Deloitte for UNHCR, *Analysis of the Impact of Refugees from Ukraine on the Economy of Poland*, 2nd ed., June 2025, available at: https://data.unhcr.org/en/documents/details/116621 (accessed 31 March 2026).

[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85, Art. 14. Poland ratified the Convention on 26 July 1989 (Journal of Laws 1989, No. 63, item 378).

[9] Ministry of Justice of the Republic of Poland, *Poland Ratifies the UN Convention on Enforced Disappearances*, 5 November 2024, available at: https://www.gov.pl/web/justice/poland-ratifies-the-un-convention-on-enforced-disappearances (accessed 31 March 2026).

[10] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010), 2716 UNTS 3, Art. 24(5).

concern that Poland lacks specialised rehabilitation services. Its 2019 Concluding Observations urged the government to bring national practice into compliance with Art. 14, specifically recommending the establishment of specialised rehabilitation services for torture survivors.[11] Six years on, the gap remains.

This article makes three arguments. First, rehabilitation is not a discretionary policy choice but a binding legal obligation under treaties which Poland has ratified. Second, the current Polish system is fragmented, underfunded and ill-equipped to address the needs of torture survivors – and fails to fulfil that obligation. Third, a survivor-centred, multidisciplinary rehabilitation approach is both legally required and practically achievable.

The article draws on two sources. The first is direct clinical work with survivors of torture and conflict-related sexual violence in Poland. The second is reports published by Polish NGOs documenting survivor testimonies, the challenges they face in accessing justice and rehabilitation services and policy gaps – including research conducted by the Helsinki Foundation for Human Rights (HFHR) and other publicly available reports and data.[12] Together, these sources inform the analysis of systemic failures, the recommendations for reform and the conclusions on what a survivor-centred framework should contain.

1. REHABILITATION AS A RIGHT

Understanding Poland's obligations starts with clarifying what the right to rehabilitation means in international law and why it is significant in Poland's current situation. Following Russia's full-scale invasion of Ukraine in February 2022, Poland became a host country for nearly one million Ukrainian refugees. Russia bears the primary obligation to provide full and effective reparation, including rehabilitation, to survivors of the grave violations of international law committed by its forces – and to the families of those killed, forcibly disappeared or otherwise harmed.[13] But

[11] UN Committee against Torture, *Concluding Observations on the Seventh Periodic Report of Poland*, UN Doc CAT/C/POL/CO/7, 29 August 2019, para. 39.

[12] Helsinki Foundation for Human Rights (HFHR), *In Search of Justice: The Rights of Victims and Survivors of Serious Violations of International Law Committed during the Full-Scale Aggression of the Russian Federation against Ukraine*, Warsaw: 2024, available at: https://hfhr.pl/en/publications/in-search-of-justice; HFHR, *Accountability for International Crimes as a Condition for Lasting Peace in Ukraine*, Warsaw: 2024, available at: https://hfhr.pl/en/publications/accountability-for-international-crimes-as-a-condition-for-lasting-peace-in-ukraine (both accessed 31 March 2026).

[13] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, UN Doc A/RES/60/147.

Poland carries its own obligation to ensure that survivors of torture on its territory can access rehabilitation.

The scope of this obligation is broad. Under Art. 14 UN CAT, as clarified by CAT General Comment No. 3 (2012), states must ensure that all survivors of torture and ill-treatment have access to redress and full rehabilitation without discrimination, including refugees and asylum seekers.[14] This is a binding obligation that Poland must fulfil for survivors within its jurisdiction. It is not limited to violations committed on the State Party's territory or by the agents of that state, and it is equally important where a survivor cannot effectively obtain redress in the place where the violation occurred. This includes all survivors of torture and ill-treatment residing in the country, including people seeking international protection. As explained in sections 2 and 4, Poland has so far failed to meet this obligation for any of these groups.

Rehabilitation is more than medical treatment. It is the process of restoring health, autonomy and participation in community life. General Comment No. 3 (2012) defines it as comprehensive and multidisciplinary, combining medical, psychological, legal and social support.[15] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (2005) identify rehabilitation as a core element of reparation – alongside restitution, compensation, satisfaction and guarantees of non-repetition.[16]

Poland's failure to implement Art. 14 UN CAT is part of a wider pattern. The CAT's Concluding Observations on Poland have raised concerns about the absence of a standalone criminal offence of torture and the lack of specialised rehabilitation services across successive review cycles – without an adequate response from the Polish authorities.[17] Polish criminal law contains structural gaps in its alignment with international treaty obligations. The absence of a standalone criminal offence

[14] UN CAT, *General Comment No. 3 (2012): Implementation of Article 14 by States Parties*, 13 December 2012, UN Doc CAT/C/GC/3, paras. 22–23. *See* N. Sveaass et al., *Rehabilitation in Article 14 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 51(1) International Lawyer 1 (2018); N. Sveaass, *Gross Human Rights Violations and Reparation under International Law: Approaching Rehabilitation as a Form of Reparation*, 4(1) European Journal of Psychotraumatology 1 (2013); A. Shkembi, A. Dura, *Prohibition against Torture in International Law: United Nations Treaty Body*, 2(8) Academic Journal of Interdisciplinary Studies 61 (2013).

[15] UN CAT (*General Comment No. 3*), *supra* note 14, paras. 11–12.

[16] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, UN Doc A/RES/60/147, Principle 21.

[17] UN CAT, *supra* note 11, paras. 9-10 and 39; UN CAT, *Concluding Observations on the Fifth and Sixth Periodic Reports of Poland*, 29 August 2013, UN Doc CAT/C/POL/CO/5-6, paras. 8–9. The CAT's concerns about the absence of a standalone torture offence and inadequate provision of rehabilitation have been raised across successive review cycles.

of torture, a requirement under UN CAT, has been identified by the CAT and other actors as a central legislative deficiency that Poland has yet to address.[18] Poland's failure to build a functioning rehabilitation system for torture survivors is not an isolated shortcoming. It reflects a broader difficulty in translating international human rights obligations into domestic practice.

2. SURVIVOR-CENTRED JUSTICE: WHAT IT REQUIRES

2.1. Recognising survivors' rights and needs when they share testimonies

Given the scale of violations documented as having been committed by the Russian Federation in Ukraine, it is reasonable to expect that among the one million refugees present in Poland, a significant number will have endured violence. Between August 2022 and December 2023, the HFHR spoke with more than 1,800 refugees from Ukraine and conducted over 100 in-depth interviews to document the testimonies of people who had survived or witnessed torture, arbitrary detention, sexual violence and other violations of international humanitarian and human rights law.[19] Most of the interviewees were employed, yet their physical injuries and trauma made daily life difficult.

> **Jurij's story of surviving torture:**[20] *Jurij is from a part of southern Ukraine now under Russian occupation. In 2023, he was arbitrarily detained for days by armed men linked to Russian security services. He was beaten repeatedly, subjected to electric shocks, threatened and deprived of access to food and water. After his release, he fled Ukraine through Russia and finally reached Poland, where his wife and children had already found safety. Jurij reached out to HFHR to give his testimony. He said, "I want my story to be known. I do not want my pain to be for nothing." During the interview, when asked about the after-effects of torture, he quietly mentioned that the beatings had shattered his teeth and jaw. In Poland, he waited months for a doctor's appointment*

[18] P. Grzebyk et al., *Efektywne ściganie zbrodni międzynarodowych w Polsce* [Effective prosecution of international crimes in Poland], HFHR, Warszawa: 2024, pp. 5–6 and 43–44; Polish Commissioner for Human Rights, *Wystąpienie generalne do Ministra Sprawiedliwości w sprawie penalizacji tortur jako odrębnego przestępstwa* [General Submission to the Minister of Justice on the Criminalisation of Torture as a Standalone Offence], 30 August 2024, available at: https://bip.brpo.gov.pl/pl/content/rpo-tortury-oddzielne-przestepstwo-ms-odpowiedz (accessed 31 March 2026).

[19] HFHR, *In Search of Justice: The Rights of Victims and Survivors of Serious Violations of International Law Committed during the Full-Scale Aggression of the Russian Federation against Ukraine*, Warsaw: 2024, available at: https://hfhr.pl/en/publications/in-search-of-justice (accessed 31 March 2026).

[20] This article draws on excerpts from testimony published in the media and by the Polish organisation Polska Pomoc Medyczna, *Pomoc dla ocalałego z rosyjskich tortur [Help for a survivor of Russian torture]*, available at: https://pmm.org.pl/pomoc-dla-ocalalego-z-rosyjskich-tortur/ (accessed 31 March 2026).

before learning that the Polish health care system could not help him. There is no mechanism for recognising torture survivors as being entitled to priority care – only persons with disabilities, war veterans and honorary blood donors hold such status. When he finally saw a doctor, he was told the state health care fund did not cover the treatment he needed. HFHR's caseworker spent nearly a year contacting NGOs and medical professionals. Eventually, a Polish NGO organised a crowdfunding campaign, which allowed Jurij to begin private dental treatment. He is now receiving care.

Jurij's case exposes the failure of the system. Access to rehabilitation should not depend on a caseworker's determination or a stranger's donation. It is a right. Survivors living in Poland – whether or not they engage with the justice system as victims and witnesses of international crimes – need access to medical care, psychological support and social assistance. These are not supplementary services; they are components of the legally guaranteed right to rehabilitation under Art. 14 UN CAT.

Section 1 established that Art. 14 UN CAT requires Poland to ensure access to full redress – including rehabilitation – for all survivors of torture and ill-treatment in the country, whether the abuse occurred abroad or in Poland. This section turns to implementation. Poland has not incorporated torture as a standalone offence in its Criminal Code.[21] That gap has direct consequences for obtaining redress. Without a specific offence of torture, Polish criminal law does not reflect the gravity of the harm that international law recognises, and fails to establish torture as a distinct type of criminal offence in domestic law.[22] The absence of a standalone criminal offence of torture is one of the central structural deficiencies requiring legislative correction.[23] As a result, survivors of torture – whether the violence occurred in Poland or abroad – face the same structural barriers to accountability and full redress that Art. 14 guarantees, including rehabilitation.

Legal reform is necessary to ensure that domestic law reflects the full gravity of torture, but it is not enough. Poland must also build a system of comprehensive, multidisciplinary support delivered by professionals who are trained to recognise and respond to its consequences. That system rests on two complementary frameworks: the survivor-centred approach and the trauma-informed approach.

[21] UN CAT, *supra* note 11, paras. 9–10

[22] *Ibidem*, para. 9. *See also* UN Subcommittee on Prevention of Torture, *Report on the Visit to Poland*, UN Doc CAT/OP/POL/1 (2018); Polish Commissioner for Human Rights, *Position on the Criminalisation of Torture as a Separate Offence in Polish Law*, available at: https://bip.brpo.gov.pl/en/content/torture-should-be-separate-crime-ministry-justice-shares-chrs-position-change-law-needed (accessed 31 March 2026).

[23] Grzebyk et al., *supra* note 18, pp. 5–6.

2.2. Protecting survivors during criminal proceedings

This article addresses the experiences of Ukrainian refugees who survived torture during armed conflict. Many are now participating in accountability processes, sharing testimonies and providing evidence in support of criminal investigations in Poland or elsewhere. This engagement requires that two points be clarified.

Firstly, the right to rehabilitation applies to all survivors regardless of whether they participate in those processes. It is unconditional – and must be provided without any requirement that survivors seek judicial remedies or testify.[24] Secondly, when survivors engage with the justice system, it must be designed to protect them. Survivors who give testimony face additional risks to their safety, their psychological well-being and their social stability. Participating in proceedings can help restore dignity and a sense of justice, but only where procedures are carefully designed to prevent retraumatisation.[25] A justice system that engages with survivors of torture must therefore treat them not only as witnesses, but also as people with ongoing medical, psychological and social needs.[26]

The survivor-centred approach[27] is a foundational framework for working with survivors of torture, sexual violence, human trafficking and other forms of violence associated with armed conflict and forced migration. It places the dignity, autonomy and agency of the survivor at the centre of every intervention – whether medical, psychological, legal or institutional. Its core principles are survivors' right to decide on the type and scope of support at their own pace; the use of language free from blame or moral judgment; strict confidentiality governed by a need-to-know principle; informed consent at every stage, with the right to withdraw at any time; and the active prevention of retraumatisation. Crucially, it means working with survivors, not for them – recognising their agency and restoring their sense of control. This is the foundation of psychological recovery. In legal procedures – interviews, forensic examinations and testimony – a survivor-centred approach requires informed consent at every stage, allowing the presence of a support person, ensuring

[24] IRCT, *Global Standards on Rehabilitation*, Copenhagen: 2020, available at: https://irct.org/gsr/ (accessed 31 March 2026). *See also* UN CAT (*General Comment No. 3*), *supra* note 14, para. 11.

[25] UN Special Rapporteur on Torture, *Charter of Rights of Victims and Survivors of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2 January 2026, UN Doc A/HRC/61/42, Art. 4(a) (right to safe, confidential spaces to share testimonies) and Art. 5(b) (right to complain with guaranteed privacy, health, safety and dignity, and protection from revictimisation and retaliation).

[26] REDRESS, *A Survivor-Centred Approach to Seeking Reparation for Torture*, Practice Note 11, February 2024, available at: https://redress.org/wp-content/uploads/2024/02/Practice-Note-11-on-SCA_WEB.pdf (accessed 31 March 2026).

[27] UN, *United Nations Field Missions, Preventing and responding to Conflict-Related Sexual Violence* (2019), available at: https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/02/DPO-DPPA-SRSG-SVC-OHCHR-Policy-on-Field-Missions-Preventing-and-Responding-to-CRSV-2020.pdf (accessed 31 March 2026).

adequately trained personnel and avoiding confrontational, suggestive, judgmental or blaming questions.

The trauma-informed approach requires professionals to understand how trauma affects psychosocial functioning and to organise their practice accordingly. It draws on established clinical guidelines, including those developed by SAMHSA.[28] In practice, this means recognising responses to trauma – dissociation, shutdown, freezing or hypervigilance – and actively working to prevent retraumatisation. Retraumatisation occurs when a survivor encounters stimuli or circumstances that trigger reactions similar to the original trauma. It does not require a new act of violence. Common triggers include stigmatising or blaming language, repeated interviews, breaches of confidentiality and medical procedures that physically resemble torture or sexual violence – including dental and gynaecological examinations. The resulting symptoms can be severe: panic, anxiety, dissociation, flashbacks, shame, helplessness and physiological reactions such as tachycardia, muscle tension and nausea. Each episode deepens the traumatic imprint. Over time, retraumatisation can cause survivors to withdraw from legal proceedings entirely – and with them, their testimony.

Preventing retraumatisation requires a clear explanation of procedures in advance, minimisation of repeated interviews, consistent use of non-stigmatising language and conditions that allow the survivor to feel safe. These are not administrative details; they are internationally recognised professional standards – set out in the Istanbul Protocol and embedded in both the survivor-centred and trauma-informed approaches – that state institutions are expected to apply when working with survivors of torture.[29] If the standards are not followed, the institutions designed to deliver justice risk causing harm instead.

Psychosocial support for survivors of torture and sexual violence takes many forms: providing individual and group therapy, issuing expert opinions, preparing survivors for testimony, accompanying them during interviews and legal proceedings and providing emotional support throughout the process. Preparing a survivor to testify is among the most demanding of these. It is a clinical process in its own right. It helps the survivor learn stabilising techniques, identify personal resources and understand what to expect. When done well, giving testimony can be empowering: it is an act of agency, of having one's experience recognised and of

[28] Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (2014), available at: https://tinyurl.com/3p8t28nk (accessed 31 March 2026).

[29] UN OHCHR, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2nd rev. ed., HR/P/PT/8/Rev.2, UN, New York-Geneva: 2022.

contributing to justice. But recounting traumatic events carries real risks. Anxiety can escalate quickly, impairing memory and the ability to communicate. Without the right conditions – including the survivor's control over the pace and breaks – survivors may be unable to give their full testimony, or they may withdraw from the legal proceedings altogether. Psychosocial support before, during and after testimony is not an addition to the justice process. It is what makes meaningful participation in it possible.

The professionals working with survivors also need support. Prosecutors repeatedly exposed to accounts of extreme violence are themselves at risk of vicarious trauma[30] or secondary traumatic stress,[31] which can reduce emotional capacity, heighten irritability and affect the tone and quality of questioning. Clinical experience also shows that survivors who appear stable during testimony may experience acute distress afterwards and seek emotional reassurance from the prosecutor, who then becomes the unintended recipient of activated trauma. Prosecutors must be able to refer survivors to trained professionals immediately. Access to psychotraumatological support is therefore necessary not only for survivors, but also for the legal professionals working with them.

In Poland today, both frameworks are largely absent from the institutions that survivors encounter. During professional training on war-related trauma, practitioners frequently report fear, anxiety and a sense of unpreparedness when engaging with survivors. Psychologists contracted through the public health care system and court-appointed expert psychologists often lack the relevant training. The burden then falls to NGO specialists – who provide services without sustainable funding and at significant personal cost.

The consequences of this gap are concrete. For example, survivors who were subjected to sexual violence do not receive immediate gynaecological care. Interviews conducted in so-called safe rooms become retraumatising when those rooms are located near courtrooms where survivors may encounter the perpetrators, or when interviewers ask questions such as "what were you wearing?" Asylum and legal procedures involve inappropriate questioning, untrained interpreters and long waiting periods. Torture survivors, persons who have experienced sexual violence and minors who have been incorrectly classified as adults are placed in detention centres. These are not isolated failures; they are systemic ones.

[30] L.A. Pearlman, K.W. Saakvitne, *Trauma and the Therapist: Countertransference and Vicarious Traumatization in Psychotherapy with Incest Survivors*, W.W. Norton, New York: 1995.

[31] C.R. Figley, *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized*, Brunner/Mazel, New York: 1995.

3. CIVIL-SOCIETY EFFORTS TO PROMOTE SURVIVORS' RIGHTS

The legal obligation to provide rehabilitation rests with the state. In Poland, in the absence of a state-led system, civil society organisations (CSOs) have taken on a dual function: supporting survivors in accessing basic psychosocial and medical services and documenting the violations they survived, thereby contributing to both rehabilitation and accountability. CSOs collect and preserve information about violations of international law, facilitate access to justice and ensure that survivors who would otherwise be invisible to state institutions can be heard.[32] The 2022 ICC–Eurojust Guidelines for Civil Society Organisations Documenting International Crimes and Human Rights Violations for Accountability Purposes formalised this role – and were themselves developed in the context of the Joint Investigation Team probing alleged crimes in Ukraine.[33]

In Poland, CSOs have performed precisely this dual function. Testimonies collected by CSOs support the investigations by Polish prosecutors. However, this work carries certain risks. Where digital tools are used without trauma-informed standards, CSO documentation can heighten the risk of retraumatisation. Mitigating this risk requires professional standards, institutional coordination and a clear allocation of responsibilities between civil society and the state.[34]

The obligation to ensure rehabilitation under Art. 14 UN CAT – and the obligation to investigate and prosecute international crimes – rests with Poland. CSO documentation supports accountability processes and ensures that survivors' voices reach prosecutors and courts. It cannot substitute for a functioning identification and referral system, adequate funding for rehabilitation services or trained state professionals. Where the state has not built that system, survivors bear the

[32] F. D'Alessandra, *The Ten-Year Revolution: Civil Society Documentation in International Criminal Justice*, 22(2) Journal of International Criminal Justice 311 (2024).

[33] ICC Office of the Prosecutor and Eurojust, *Guidelines for Civil Society Organisations Documenting International Crimes and Human Rights Violations for Accountability Purposes* (September 2022), available at: https://www.eurojust.europa.eu/joint-investigation-team-alleged-crimes-committed-ukraine (accessed 31 March 2026); K. Kowalczewska, *Demokratyzacja dokumentowania zbrodni międzynarodowych na potrzeby postępowań sądowych. Zasady minimalizacji ryzyk w kontekście Protokołu z Berkeley oraz Wytycznych Biura Prokuratora Międzynarodowego Trybunału Karnego, Eurojustu i Genocide Prosecution Network* [Democratization of documenting international crimes for the purposes of judicial proceedings. Risk minimization principles in the context of the Berkeley Protocol and the Guidelines of the Office of the Prosecutor of the International Criminal Court, Eurojust, and the Genocide Prosecution Network], in: K. Wiśniewska (ed.), *Prawo na straży pokoju. W poszukiwaniu efektywnych mechanizmów ochrony praw ofiar współczesnych konfliktów zbrojnych*, Krakowski Instytut Prawa Karnego, Kraków: 2025, pp. 69–104.

[34] K. Kowalczewska, *Heightened Risk of Revictimization as a Challenge Stemming from Digitalization and Democratization of International Criminal Justice Efforts: Case Study of the Polish Civil Society Organisations in the Aftermath of Russian Aggression on Ukraine*, in: M. Ochi, R. Barbosa & L. Bai (eds.), *Victim-Centered Criminal Justice*, Maklu Publishers, Antwerpen-Apeldoorn-Portland: 2024, pp. 99–128.

consequences; increasingly, NGO workers are also carrying that burden without sustainable support.[35]

The Coalition for Victims, Witnesses and Survivors (KOOS) brings together several organisations working across the full spectrum of survivors' needs.[36] OPORA in Poland, a Ukrainian diaspora group, provides legal and psychological support to refugee survivors and has experience screening refugees for legal violations at scale.[37] The Polish Centre for Torture Survivors trains professionals in trauma-informed practices and provides direct support to survivors of torture and conflict-related sexual violence.[38] The Foundation Sunflowers raises awareness among the legal community of victims' rights and international-law standards, and it assists Ukrainian survivors in securely registering their testimonies on a digital platform connected to the International Criminal Court.[39] The Lemkin Centre at the Pilecki Institute documents atrocities for the historical record, including the collection of testimonies of survivors of conflict-related sexual violence committed by Russian forces in Ukraine.[40] HFHR monitors individual survivor cases, provides legal aid, facilitates referrals to services and advocates for policy change.[41]

Together, the Coalition's member organisations have reached thousands of survivors seeking justice, many of whom require psychosocial, medical and legal assistance. Yet without governmental coordination or reliable funding, even this collective effort remains fragmented. Civil society cannot substitute for a functioning state system. It can only highlight how urgent the need for one has become.

4. WHAT EXISTS TODAY: A FRAGMENTED ARCHITECTURE NOT DESIGNED FOR SURVIVORS

Poland's rehabilitation-related services are dispersed across several unrelated systems, none of which were designed to support survivors of torture. More fundamentally, there is no institutional awareness of – let alone compliance with – the obligations

[35] CAT (*General Comment No. 3*), *supra* note 14, para. 26.

[36] HFHR, *Accountability for International Crimes as a Condition for Lasting Peace in Ukraine*, Warsaw: 2024, available at: https://hfhr.pl/en/publications/accountability-for-international-crimes-as-a-condition-for-lasting-peace-in-ukraine (accessed 31 March 2026).

[37] OPORA in Poland (War Crimes Documentation Centre), available at: https://warcrimescenter.org/en (accessed 31 March 2026).

[38] PCTS Foundation – Polish Centre for Torture Survivors, available at: https://pcts.org.pl (accessed 31 March 2026).

[39] Project Sunflowers (Foundation Sunflowers), available at: https://reportwarcrime.org (accessed 31 March 2026).

[40] M. Andruszewska et al., *"Like it or not, it's your duty, my beauty". Unpunished Crimes: Sexual Violence of the Russian Occupying Forces Against Ukrainian Women,* Instytut Pileckiego, Warszawa: 2025.

[41] Helsinki Foundation for Human Rights, available at: https://hfhr.pl/en (accessed 31 March 2026).

resulting from Art. 14 UN CAT and CAT General Comment No. 3 (2012). The absence is not merely practical. It is conceptual: state institutions do not recognise torture survivors as a distinct category of rightsholders and therefore do not treat rehabilitation as a legal obligation they are required to fulfil. Moreover, in Poland, there is a lack of experience and specialised courses in working with survivors, so practitioners do not have the knowledge of how to work effectively.

For asylum seekers, the Office for Foreigners is responsible for general medical care and limited psychological support, delivered through a contract with Petra Medica.[42] These services address basic health needs; they do not provide the specialist, trauma-focussed rehabilitation that torture survivors require. For individuals residing in Poland under other legal bases – including Ukrainians holding a PESEL UKR number[43] and other foreign nationals – the primary formal mechanism is the Justice Fund (*Fundusz Sprawiedliwości*), managed by the Minister of Justice.[44] Its Victim Support Centres can offer general legal and psychological assistance, but they were not created with torture survivors in mind. They lack specialist rehabilitation pathways, and their staff are not trained in trauma-informed approaches.

Since January 2023, the National Health Fund (*Narodowy Fundusz Zdrowia*, NFZ) has been running a pilot programme in 18 centres across Poland to provide therapeutic support for individuals affected by trauma, including war trauma and refugee experience.[45] However, the services are often linguistically inaccessible to survivors, outreach to locations where they live is limited and staff frequently lack training in trauma-informed approaches.

A recent legislative amendment introduced a partial but significant step forward. The March 2026 amendment to the Act on Granting Protection to Foreigners provided that beneficiaries of temporary protection who can demonstrate that they were subjected to torture or rape are entitled to a certificate issued by the Head of

[42] The Office for Foreigners (*Urząd do Spraw Cudzoziemców*) administers health care for asylum seekers through contracted providers; for the current contractual arrangements, *see* the Office for Foreigners website: https://udsc.gov.pl/en (accessed 31 March 2026).

[43] A national identification number issued to Ukrainian nationals granted temporary protection in Poland under the Act of 12 March 2022 on Assistance to Ukrainian Citizens in Connection with the Armed Conflict on the Territory of Ukraine (Journal of Laws 2022, item 583).

[44] Ministry of Justice of the Republic of Poland, *Fundusz Sprawiedliwości* [Justice Fund], available at: https://www.funduszsprawiedliwosci.gov.pl/en/about-jf/ (accessed 31 March 2026). The Fund was established pursuant to Art. 43 of the Executive Penal Code Act of 6 June 1997 and is governed by the Minister of Justice's Regulation of 13 September 2017 on the Victims and Post-release Assistance Fund (Journal of Laws 2017, item 1760).

[45] NFZ, *Program pilotażowy dla osób z doświadczeniem traumy i ich rodzin [A pilot program on therapeutic interventions for individuals with trauma experience] (programme running 1 January 2023 – 30 June 2026)*, available at: https://www.nfz.gov.pl/dla-pacjenta/programy-profilaktyczne/program-pilotazowy-trauma (accessed 31 March 2026).

the Office for Foreigners confirming their status as a survivor.[46] The certificate grants priority access to free medical care. It is the first formal recognition in Polish law of torture and rape survivors as a distinct group with specific legal entitlements – and, as such, a good starting point for broader policy development, which should be fully aligned with Poland's obligations under the UN CAT.

The amendment warrants monitoring. The certificate procedure requires supporting documentation, including medical records and information about any report made to law enforcement.[47] For survivors fleeing active conflict, such documentation will often be unavailable. Any procedure that treats it as a prerequisite risks excluding those most in need. The amendment also addresses only access to medical care; it does not create a referral pathway to the multidisciplinary rehabilitation services that Art. 14 UN CAT requires. How it functions in practice, and whether it can serve as a foundation for more comprehensive reform, requires continued attention.

In principle, these structures could function as access points. In practice, because none were designed for torture survivors, none identify or prioritise survivors or provide the multidisciplinary rehabilitation required under the UN CAT. The main gap is the absence of any national identification or referral mechanism. No institution – prosecutors, police, border guards, reception centres, health care professionals or Justice Fund centres – screens for torture victims or refers survivors to specialised services.[48] This gap impacts all survivors within Poland's jurisdiction: those escaping conflict zones and mass atrocities abroad, as well as those subjected to acts of torture and ill-treatment within Poland. Even where survivors interact with multiple institutions, they remain invisible to the system. The burden of navigating fragmented services falls entirely on the survivor – precisely those who are least equipped to bear it.

No official statistics exist on the number of torture survivors identified by Polish state institutions, because no functioning identification system exists. In 2023 and

[46] *Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej* [Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland], Journal of Laws 2025, item 223 as amended, Art. 112c(4) pt 2(a). Torture is defined by reference to Art. 1 of the Convention against Torture; rape is defined consistently with the amendment of 6 June 1997 to the Penal Code, Journal of Laws 1997, No. 88, item 553, as amended on 28 June 2024.

[47] The procedure requires submission of, inter alia, medical records, a psychologist's certificate and information about any report made to law enforcement; see the application form issued by Urząd do Spraw Cudzoziemców [Office for Foreigners], *Wniosek o wydanie zaświadczenia, że jestem ofiarą tortur lub gwałtu* [Application for a certificate confirming status as a survivor of torture or rape], 2026.

[48] European Council on Refugees and Exiles (ECRE), *Asylum Information Database (AIDA), Country Report: Poland – 2024 Update*, ECRE, Brussels: 2025, section on "Identification of Vulnerable Applicants", available at: https://asylumineurope.org/reports/country/poland/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/identification (accessed 31 March 2026).

2024, the Office for Foreigners confirmed that it had no data on torture survivors among asylum seekers. NGOs confirmed that the identification system established by law does not function in practice.[49] This gap is not incidental; it reflects a systemic failure to recognise torture survivors as a distinct category of rightsholders with specific, legally guaranteed entitlements. Addressing it requires not incremental adjustments to existing services, but the deliberate construction of a system that places survivors at its centre.

5. WHAT POLAND SHOULD DO

Meeting Poland's obligations requires action on two levels. The first is legislative. Poland has not incorporated torture as a standalone criminal offence, leaving a gap between its treaty obligations and domestic law. Establishing that offence – and the procedural rules governing the investigation of such crimes, including special interview procedures for survivors – is a prerequisite for a functioning accountability and rehabilitation system. The second level is institutional: the creation of a comprehensive, multidisciplinary rehabilitation framework.

Such a system is not only theoretically possible. During testimony facilitated by the National Prosecutor's Office, the Polish Centre for Torture Survivors and another NGO provided full psychotraumatological support throughout the process. The survivor was informed in advance of the date, location and procedure. He gave informed consent, was acquainted with available stabilisation strategies and had a foundation attorney as his legal representative. Representatives of the Prosecutor's Office were trained in and attentive to trauma-related issues. An interpreter was present throughout. During the interview, the survivor controlled the pace, the breaks and the language being used. The procedure took place in a safe, welcoming environment. The testimony was obtained safely, effectively and without retraumatisation. This is what survivor-centred justice looks like in practice. It is replicable. It requires training, coordination and political will.

Poland's multi-agency response to domestic violence – the nationwide *Niebieska Linia* [Blue Line] helpline and the Blue Card protocol – provides a useful, though incomplete structural model.[50] Despite persistent problems such as underfunding and gaps in specialised services, it shows that multi-agency referral systems are feasible in the Polish context. Extending and adapting these mechanisms to cover

[49] *Ibidem*. *See also* UN CAT, *supra* note 11, paras. 25(d) and 26(d).

[50] *Niebieska Linia* (Polish Nationwide Emergency Service for Victims of Domestic Violence Blue Line), available at: https://www.niebieskalinia.pl/en (accessed 31 March 2026).

survivors of torture crimes would require political will, stable resources and a clear recognition that specialist rehabilitation is not optional but legally required.

A survivor-centred and trauma-informed system should include the following elements:

- a network of vetted, trained specialists – coordinated by the relevant ministry – providing medical, psychological, legal and social services in an integrated setting;
- stable financing, including a dedicated funding line within the Justice Fund to support both public and NGO providers of rehabilitation-related services;
- a multidisciplinary referral mechanism connecting police, prosecutors, courts, health services and social services, so that survivors are directed to appropriate care without having to navigate the system alone;
- mandatory professional training in trauma-informed approaches, grounded in the Istanbul Protocol[51] and the Murad Code[52] for all professionals who may encounter survivors – including health care workers, legal professionals, police officers and social workers;
- psychotraumatological support for survivors as well as the prosecutors and legal professionals working with them, who are themselves at risk of vicarious trauma and secondary traumatic stress;
- monitoring through measurable indicators developed together with experienced NGOs.

None of these elements is novel. Comparable systems exist elsewhere in Europe, combining civil society expertise with public funding and institutional recognition – precisely the combination Poland currently lacks.[53]

CONCLUSION: HEALING AS JUSTICE

Poland has failed to fulfil a binding legal obligation. Art. 14 UN CAT requires every State Party to ensure that survivors of torture within its jurisdiction can access rehabilitation. The CAT has indicated this across successive review cycles. Poland has not built the system that the obligation requires. Survivors, many of whom came

[51] UN Office of the High Commissioner for Human Rights, *supra* note 29.

[52] Institute for International Criminal Investigations and Nadia's Initiative, G*lobal Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence (Murad Code)*, published 13 April 2022, available at: https://www.muradcode.com (accessed 31 March 2026).

[53] Comparable rehabilitation systems for torture survivors exist across Europe and globally. For an overview of national models, see the IRCT network of 173 member centres in 80 countries: https://irct.org/our-members/. For examples of state-integrated models, *see* DIGNITY (Denmark): https://dignity.dk/en/clinic/; and Freedom from Torture (United Kingdom): https://www.freedomfromtorture.org/about-us (all accessed 31 March 2026).

forward to give testimony and trusted Polish institutions with their most painful experiences, risk being left without the medical care, psychological support and legal assistance that international law guarantees them as a matter of right.

The 2026 amendment recognising torture and rape survivors as a distinct group entitled to medical care is a step in the right direction, though it is not enough. Poland still lacks a national identification and referral mechanism, trained specialists and stable funding for multidisciplinary services. Russia bears the primary obligation to provide full reparations for the crimes its forces have committed. Poland's obligation is separate: it does not depend on whether Russia pays, or on whether perpetrators are identified, prosecuted or convicted.[54] And it is urgent. Many survivors have no means to access care on their own. Without a functioning state system, the right to rehabilitation exists on paper but not in practice. For survivors of torture, rehabilitation is not a supplement to justice. It is what justice looks like in practice – and it cannot wait.

[54] CAT (*General Comment No. 3*), *supra* note 14, para. 3. The CAT has confirmed that the right to redress applies "regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted", and that the obligation to provide redress rests on the State Party rather than on the individual perpetrator or the state responsible for the violation.

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VICTIM-CENTRED APPROACH TO CONFLICT-RELATED SEXUAL VIOLENCE: LEGAL AND INSTITUTIONAL RESPONSES IN UKRAINE

Abstract: *This article examines the development of legal and institutional responses to conflict-related sexual violence (CRSV) in Ukraine in the context of Russia's full-scale invasion. Drawing on empirical data from the Office of the Prosecutor General of Ukraine and reports of international monitoring bodies, the study analyses documented patterns of CRSV committed against civilians and prisoners of war since 2022. The article focusses on the evolution of Ukraine's national policy and institutional framework addressing these violations, including the creation of specialised prosecutorial structures, interagency coordination mechanisms, mobile investigative teams and survivor support systems.*

Particular attention is devoted to legislative reforms and institutional innovations aimed at strengthening access to justice and ensuring a victim-centred response, including the establishment of coordination mechanisms for victim and witness support and the introduction of interim reparations programmes providing recognition and assistance to survivors independently of criminal proceedings. The analysis demonstrates that these measures have contributed to the gradual emergence of victim-centred standards within the Ukrainian justice system.

Building on this analysis, the article introduces the concept of a "membrane" to explain how legal and institutional innovations developed in response to CRSV can diffuse into the broader justice system and influence approaches to sexual and gender-based violence more generally.

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Keywords: conflict-related sexual violence, gender-based violence, victim-centred approach, transitional justice, reparations

INTRODUCTION

Sexual violence has historically accompanied armed conflicts, yet for centuries it remained largely invisible within both international law and domestic criminal justice systems. Only in the late 20th century did international legal frameworks begin to recognise conflict-related sexual violence as a specific grave breach of international humanitarian and criminal law.[1] The jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR),[2] followed by the adoption of the Rome Statute of the International Criminal Court,[3] played a decisive role in redefining sexual violence as a serious international crime and establishing legal mechanisms for its prosecution.

Despite these normative developments, the gap between legal recognition and effective accountability remains considerable. Survivors frequently encounter structural barriers to justice, including stigmatisation, limited access to legal institutions, evidentiary difficulties and institutional reluctance to investigate crimes involving military actors. As a result, conflict-related sexual violence continues to be among the most underreported and under-prosecuted categories of international crime.[4]

Russia's full-scale invasion of Ukraine since 24 February 2022 has brought renewed attention to these challenges. Numerous reports by Ukrainian authorities, international organisations and civil society groups have documented incidents

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[1] *See* G. Gaggioli, *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law*, 96(894) International Review of the Red Cross 503 (2014); M. Das, S. Singh, *Crimes of Sexual Violence within International Criminal Law: A Historical Outline*, 14(1) Journal of Politics and Law 1 (2021); K. McLoughlin et al. (eds.), *Feminist Judgments: Reimagining the International Criminal Court*, Cambridge University Press, Cambridge: 2025.

[2] ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Trial Judgement, 10 December 1998; *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Appeal Judgement, 21 July 2000; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-T & IT-96-23/1-T, Trial Judgement, 22 February 2001; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998; *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Appeal Judgement, 1 June 2001.

[3] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

[4] United Nations Population Fund (UNFPA), *Sexual Violence in Conflict: Overlooked, Under-Reported and in Danger of Being "Normalized"* (2024), available at: https://www.unfpa.org/news/sexual-violence-conflict-overlooked-under-reported-and-danger-being-%E2%80%9Cnormalized%E2%80%9D; UN Women, *2025 UN Security Council Briefing on Sexual Violence in Conflict*, 19 August 2025, available at: https://knowledge.unwomen.org/en/digital-library/videos/2025/08/2025-un-security-council-briefing-on-sexual-violence-in-conflict (both accessed 31 March 2026).

of sexual violence committed against civilians and prisoners of war.[5] These crimes have occurred in detention facilities, during house searches, in occupied territories and in other situations characterised by profound power asymmetries and coercive environments.

At the same time, Ukraine has undertaken an extensive process of legal and institutional adaptation aimed at addressing conflict-related sexual violence (CRSV). Unlike many post-conflict contexts in which institutional responses emerge only after hostilities cease, Ukraine has attempted to develop preventive and accountability mechanisms while the conflict itself continues. These initiatives include legislative reforms, specialised prosecutorial structures, inter-agency coordination mechanisms and innovative programmes designed to provide immediate assistance and recognition to survivors.

This article examines how victim-centred approaches to conflict-related sexual violence have shaped Ukraine's evolving legal and institutional responses during the Russian Federation's armed aggression. It argues that the institutional architecture developed in response to CRSV – including specialised investigative mechanisms, inter-agency coordination frameworks, victim-support systems and interim reparations programmes – has become a catalyst for broader transformations within the Ukrainian justice system. To conceptualise this process, the article introduces the notion of a "membrane" – a specific intermediary layer through which impulses of transformation pass into and gradually influence the broader domestic criminal justice framework.

1. EMPIRICAL DOCUMENTATION AND INTERNATIONAL MONITORING OF CONFLICT-RELATED SEXUAL VIOLENCE IN UKRAINE

According to the Office of the Prosecutor General of Ukraine, as of 31 March 2026, 395 incidents of CRSV committed against the civilian population had been documented. Of these, 248 cases concerned women, 147 concerned men

[5] *See* Office of the Prosecutor General of Ukraine, *Сексуальне насильство, пов'язане з конфліктом* [Conflict-related sexual violence], available at: https://gp.gov.ua/ua/posts/seksualne-nasilstvo-povyazane-z-konfliktom-yak-rozpiznati-i-protidiyati; Human Rights Watch, *World Report 2025: Ukraine*, available at: https://www.hrw.org/world-report/2025/country-chapters/ukraine; Center for Civil Liberties, *Find a Balance Between Informing the Public and Respecting the Victims*, available at: https://ccl.org.ua/en/news/find-a-balance-between-informing-the-public-and-respecting-the-victims-natalia-yashchuk-and-anna-trushova-at-the-international-forum-on-sexual-violence/; Pilecki Institute, *"Like It or Not, Suffer, My Beauty": Unpunished Crimes. Sexual Violence against Women in Occupied Ukraine*, available at: https://instytutpileckiego.pl/en/instytut/aktualnosci/raport-podoba-ci-sie-nie-podoba-cierp-moja-piekna-nieukarane (all accessed 31 March 2026).

and 23 concerned children.[6] At the same time, these figures do not reflect the full scale of the crimes. Given the particularly latent nature of sexual violence – caused by distrust of justice institutions, fear of social stigmatisation and condemnation, the threat of renewed occupation and possible retaliation and limited or entirely absent access to temporarily occupied territories – the actual prevalence is clearly substantially higher.[7]

The systematic nature of these violations is further corroborated by contemporary United Nations monitoring mechanisms, including the annual report of the UN Secretary-General on conflict-related sexual violence – which functions as a system-wide coordination and reporting instrument – and the documentation produced by the Office of the United Nations High Commissioner for Human Rights. These mechanisms are of particular evidentiary significance due to their institutional independence, global monitoring mandate and reliance on continuously updated field-based documentation.

The UN Report of the Secretary-General on conflict-related sexual violence (S/2025/389 of 15 July 2025)[8] states that the human rights monitoring mission in Ukraine documented 209 cases of CRSV in 2024.[9] These included rape, attempted rape, threats of rape and castration, genital mutilation, the application of electric current to the genitals, beatings of the genitals and forced nudity. The victims included 156 men, 46 women, 6 girls and 1 boy. The report indicates that such acts were committed by members of the Russian armed forces, law-enforcement agencies and penitentiary personnel.[10] These crimes were documented both against Ukrainian civilians and against prisoners of war held in temporarily occupied territories of Ukraine or in the territory of the Russian Federation. It was established that Ukrainian prisoners of war were subjected to sexual violence at various stages of captivity, where such acts were used as instruments of humiliation, psychological pressure and the extraction of confessions or information. Civilians in detention

[6] Office of the Prosecutor General of Ukraine, *Conflict-Related Sexual Violence*, available at: https://www.gp.gov.ua/ua/posts/rezultati-diyalnosti (accessed 31 March 2026).

[7] M. Bastick, M. Ghittoni, *Security Sector Reform and Conflict-Related Sexual Violence: Understanding the Impacts of Peacetime GBV Capacity-Building*, pp. 29–40, available at: https://reliefweb.int/report/mali/security-sector-reform-and-conflict-related-sexual-violence-understanding-impacts-peacetime-gbv-capacity-building (accessed 31 March 2026); Y. Bielousov, I. Didenko, *Evolving Dynamics in the Investigations of Conflict-Related Sexual Violence Prompt Changes in the Office of the Prosecutor General*, in: K. Levchenko, S. Hubin, O. Hubina (eds.), *Ukraine Is Not Silent: Chronicles of Fighting Against War-Related Sexual Violence (2022–2024)*, Folio, Kharkiv: 2025, pp. 112–132.

[8] United Nations, *Report of the Secretary-General on Conflict-Related Sexual Violence*, 15 July 2025, UN Doc. S/2025/389, pp. 22–23, available at: https://undocs.org/S/2025/389 (accessed 31 March 2026).

[9] *Ibidem*.

[10] *Ibidem*.

were subjected to sexual violence during arrest, hospitalisation and subsequent stages of detention.[11]

Of particular concern are documented incidents of sexual violence committed against civilians outside places of detention in temporarily occupied territories. These facts indicate the involvement of representatives of the Russian Federation's occupation administration. Reports referred, inter alia, to violent intrusions into private homes, unlawful occupation of homes over prolonged periods, the forced, guarded confinement of men and the simultaneous rape of women in their presence. In some cases, the husbands of rape victims were killed. In 2024, the Independent International Commission of Inquiry on Ukraine found that representatives of the occupation authorities of the Russian Federation committed rape and other forms of sexual violence against women and girls aged 15 to 83 during house searches and while victims were held in detention.[12]

The human rights monitoring mission continues to record numerous reports of systematic torture and ill-treatment of Ukrainian prisoners of war, including widespread sexual violence. Similar practices were also applied to civilians in detention. Since 2022, cases of CRSV have been documented as having been committed by representatives of the Russian authorities, including the Federal Penitentiary Service, the Russian armed forces and the Federal Security Service. Such crimes were documented against Ukrainian prisoners of war in 50 official and 22 unofficial places of detention, and against civilians held in 32 official and 40 unofficial places of deprivation of liberty in the temporarily occupied territories of Ukraine and in the Russian Federation. Monitoring is significantly impeded by systematic restrictions on access to detention facilities for international observers, including representatives of the United Nations.[13]

The Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the human rights situation in Ukraine for the period from 1 June to 30 November 2025[14] states that between late May and August 2025, Ukraine and the Russian Federation conducted the largest exchanges of prisoners of war and civilian detainees since 2022, resulting in the release of more than 3,000 persons on both sides. The released Ukrainian prisoners of war reported that throughout 2025 torture, ill-treatment – including sexual violence – and deaths in custody continued to occur, including in places of detention on the territory of

[11] *Ibidem*.

[12] *Ibidem*.

[13] *Ibidem*.

[14] OHCHR, *Report on the Human Rights Situation in Ukraine, 1 June–30 November 2025*, available at: https://ukraine.ohchr.org/en/Report-on-the-Human-Rights-Situation-in-Ukraine-1-June-30-November-2025 (accessed 31 March 2026).

the Russian Federation, despite the temporary reductions in violence immediately prior to the exchanges. Overall, since 24 February 2022, the Office of the High Commissioner has documented 664 cases of CRSV committed by Russian officials against 523 men, 124 women, 15 girls and 2 boys. Among the victims were 449 Ukrainian prisoners of war (422 men and 27 women), 135 civilians in detention (94 men, 40 women and 1 boy) and 84 civilians in residential areas (8 men, 60 women, 15 girls and 1 boy).[15] At the same time, 79 cases of conflict-related sexual violence committed by Ukrainian officials against 67 men and 12 women were also documented, including against 48 Russian prisoners of war and prisoners of war from third countries, as well as 31 persons detained in connection with the conflict.[16] These figures underscore both the large scale and systematic nature of CRSV in the context of the war and the need for impartial documentation and accountability.

2. INSTITUTIONAL ARCHITECTURE FOR ADDRESSING CONFLICT-RELATED SEXUAL VIOLENCE

The Ukrainian model for addressing CRSV did not emerge solely as a reaction to Russia's full-scale invasion in 2022. Its conceptual foundations began to develop early in the conflict that followed Russia's aggression against Ukraine in 2014. Even before 2022, in response to that aggression, Ukraine adopted strategic documents aimed at preventing gender-based violence and strengthening institutional responses to CRSV. A key step was the development of the Strategy for the Prevention of and Response to Conflict-related Sexual Violence in 2018 with the support of UN Women and the United Nations Human Rights Monitoring Mission.[17] The strategy included recommendations concerning criminal prosecution, professional training for investigators and prosecutors and inter-agency coordination mechanisms. Around 2019–2020, Ukraine introduced the positions of gender advisers in key ministries and regional administrations, a process that was also catalysed by the work of the Government Commissioner for Gender Equality Policy.[18] Further develop-

[15] *Ibidem*.

[16] *Ibidem*.

[17] *Стратегія запобігання та протидії сексуальному насильству, пов'язаному з конфліктом, в Україні* [Strategy for the Prevention and Response to Conflict-Related Sexual Violence in Ukraine], 2018, available at: https://ukraine.un.org/sites/default/files/2020-09/crsv%20strategy%20ua_0.pdf (accessed 31 March 2026).

[18] Resolution of the Cabinet of Ministers of Ukraine No. 390, *Про Урядового уповноваженого з питань гендерної політики* [On the Government Commissioner for Gender Policy], 7 June 2017, available at: https://zakon.rada.gov.ua/laws/show/390-2017-%D0%BF#Text (accessed 31 March 2026).

ment occurred through the National Human Rights Strategy,[19] adopted in 2021, and through the National Action Plan for the implementation of United Nations Security Council Resolution 1325 on Women, Peace and Security.[20] Ukraine became the first state in the world to adopt such a plan during an ongoing armed conflict (2016). The second National Action Plan, covering the period up to 2025, adopted in 2020 and updated in 2022,[21] focussed on providing training to the security and defence sector, prosecution authorities and the judiciary in order to respond to incidents of CRSV, as well as on ensuring access to justice and comprehensive support for survivors.

In the context of crimes committed during Russia's aggression against Ukraine, CRSV effectively became a starting point for the formation of a broader concept of transitional justice and is now used as a point of departure for further work by both civil society and the State on a comprehensive model of transitional justice. A significant factor in the reform process was the proactive position of survivors and of the human rights community. Their persistence demonstrated to State institutions and to society the central principle of transitional justice: "Nothing about us without us." The visibility and voices of survivors of CRSV played a key role in the development of the normative and institutional architecture for preventing and responding to such crimes.

A particularly important stage of institutional development occurred in 2022 with the establishment of a Framework of Cooperation between the Government of Ukraine and the United Nations on the Prevention of and Response to Conflict-related Sexual Violence.[22] Within this framework, an Interagency Working Group on Countering Sexual Violence Related to Russia's Armed Aggression

[19] *Національна стратегія у сфері прав людини* [National Human Rights Strategy], approved by Presidential Decree of Ukraine No. 119/2021, 24 March 2021, available at: https://www.president.gov.ua/documents/1192021-37537 (accessed 31 March 2026).

[20] Order of the Cabinet of Ministers of Ukraine No. 113-r, *Про затвердження Національного плану дій з виконання резолюції Ради Безпеки ООН 1325 "Жінки, мир, безпека" на період до 2020 року* [On Approval of the National Action Plan for the Implementation of United Nations Security Council Resolution 1325 "Women, Peace, Security" for the Period until 2020], 24 February 2016, available at: https://zakon.rada.gov.ua/laws/show/113-2016-%D1%80#Text (accessed 31 March 2026).

[21] *Національний план дій з виконання Резолюції Ради Безпеки ООН 1325 «Жінки, мир, безпека» на період до 2025 року* [National Action Plan for the Implementation of UN Security Council Resolution 1325 "Women, Peace and Security" until 2025], approved by Resolution of the Cabinet of Ministers of Ukraine No. 1544, 28 October 2020 (as amended in 2022), available at: https://zakon.rada.gov.ua/laws/show/1544-2020-%D1%80 (accessed 31 March 2026).

[22] *Framework of Cooperation between the Government of Ukraine and the United Nations on the Prevention and Response to Conflict-Related Sexual Violence*, 2022, available at: https://tinyurl.com/537uxzke (accessed 31 March 2026).

against Ukraine was created.[23] The Working Group includes representatives of public authorities, international organisations and civil society organisations representing survivors. Five specialised subgroups were established to address key policy areas: countering trafficking for the purpose of sexual exploitation in conflict; providing comprehensive assistance to survivors; ensuring access to justice and accountability; strengthening the capacity of the security and defence sector to prevent sexual violence; and addressing reparations and compensation mechanisms. In November 2025, an updated Implementation Plan for 2026–2027 was approved.[24]

The work of the Interagency Working Group became a catalyst for important legislative reforms aimed at strengthening the protection of victims of CRSV, ensuring access to support and reparations and aligning Ukrainian legislation with international criminal-law standards. In particular, Ukraine introduced, for the first time, a legal definition of sexual violence related to the armed aggression of the Russian Federation against Ukraine,[25] established mechanisms for interim reparations[26] and documentation of harm,[27] expanded access to specialised support services for survivors[28] and ratified the Rome Statute of the International Criminal

[23] *Підсумковий документ за результатами виконання Імплементаційного плану на виконання Рамкової програми співробітництва між Урядом України та ООН щодо запобігання та протидії сексуальному насильству, пов'язаному з конфліктом* [Final Document on the Implementation of the Implementation Plan for the Framework of Cooperation between the Government of Ukraine and the United Nations on the Prevention and Response to Conflict-Related Sexual Violence], available at: https://www.kmu.gov.ua/storage/app/sites/1/uploaded-files/UN-UKRAINE-ua-no-QR.pdf (accessed 31 March 2026).

[24] *План реалізації Рамкової програми співробітництва між Урядом України та Організацією Об'єднаних Націй щодо запобігання та протидії сексуальному насильству, пов'язаному з конфліктом на 2026–2027 роки* [Implementation Plan of the Framework of Cooperation between the Government of Ukraine and the United Nations on the Prevention and Response to Conflict-Related Sexual Violence for 2026–2027], available at: https://www.kmu.gov.ua/storage/app/sites/1/ind-57-gender-policy/plan-realizaciyi-ramkovoyi-programi-spivrobitnictva-2026-2027.pdf (accessed 31 March 2026).

[25] Law of Ukraine No. 4067-IX, *Про правовий і соціальний захист осіб, постраждалих від сексуального насильства, пов'язаного із збройною агресією Російської Федерації проти України, та надання їм невідкладних проміжних репарацій* [On Legal and Social Protection of Persons Affected by Sexual Violence Related to the Armed Aggression of the Russian Federation against Ukraine, and the Provision of Urgent Interim Reparations], 20 November 2024, available at: https://zakon.rada.gov.ua/laws/show/4067-20#Text (accessed 31 March 2026).

[26] *Ibidem*.

[27] Law of Ukraine No. 4071-IX, *Про облік осіб, життю та здоров'ю яких завдано шкоди внаслідок збройної агресії Російської Федерації проти України* [On the Register of Persons Whose Life and Health Were Harmed as a Result of the Armed Aggression of the Russian Federation against Ukraine], 20 November 2024, available at: https://zakon.rada.gov.ua/laws/show/4071-20#Text (accessed 31 March 2026).

[28] Law of Ukraine No. 4073-IX, *Про внесення змін до деяких законодавчих актів України щодо удосконалення механізму запобігання та протидії домашньому насильству та насильству за ознакою статі* [On Amendments to Certain Legislative Acts of Ukraine on Improving the Mechanism for Preventing and Combating Domestic Violence and Gender-Based Violence], 20 November 2024, available at: https://zakon.rada.gov.ua/laws/show/4073-20#Text (accessed 31 March 2026).

Court[29] together with corresponding amendments to domestic criminal legislation.[30] The reforms also contributed to the recognition of rape and other forms of sexual violence as constitutive acts of genocide and crimes against humanity under Ukrainian criminal law, while further advancing the incorporation of international accountability standards – including command responsibility – into the national legal framework.[31]

An innovative element of Ukraine's institutional response has been the implementation of a pilot project providing urgent interim reparations to survivors of conflict-related sexual violence in cooperation with the Global Survivors Fund.[32] Within this project, 1,208 applications were submitted, including 819 applications from men, 362 from women and 27 concerning children. As of 17 November 2025, reparations had been approved for 978 individuals, including 655 men, 302 women and 21 children, and payments had been disbursed to 654 survivors.[33] A defining feature of this model is that reparations are granted independently of the completion of criminal proceedings. They function as immediate recognition of harm and provide support to survivors based on a presumption of trust in their testimonies rather than awaiting final judicial verdicts. The pilot project formed the basis for adopting a law on the legal status of survivors and urgent interim reparations, and Ukraine is currently developing the necessary secondary legislation for its implementation. It is also relevant that, within the EU-approved EUR 90 billion "Ukraine

[29] Law of Ukraine No. 3909-IX, *Про ратифікацію Римського статуту Міжнародного кримінального суду та поправок до нього* [On the Ratification of the Rome Statute of the International Criminal Court and the Amendments thereto], 21 August 2024, available at: https://zakon.rada.gov.ua/go/3909-20 (accessed 31 March 2026).

[30] Law of Ukraine No. 4012-IX, *Про внесення змін до Кримінального та Кримінального процесуального кодексів України у зв'язку з ратифікацією Римського статуту Міжнародного кримінального суду та поправок до нього* [On Amendments to the Criminal Code and the Criminal Procedure Code of Ukraine in Connection with the Ratification of the Rome Statute of the International Criminal Court and the Amendments thereto], 9 October 2024, available at: https://zakon.rada.gov.ua/go/4012-20 (accessed 31 March 2026).

[31] *Ibidem*.

[32] Global Survivors Fund, *Ukraine's Urgent Interim Reparations: Historic Milestone Must Become Reality for All Survivors of Conflict-Related Sexual Violence*, available at: https://tinyurl.com/mt34veef (accessed 31 March 2026).

[33] *Рамкова програма співробітництва між Урядом України та ООН щодо запобігання та протидії сексуальному насильству, пов'язаному з конфліктом: досягнення та подальші кроки (12 засідання Комісії з питань координації взаємодії органів виконавчої влади щодо забезпечення рівних прав та можливостей жінок і чоловіків)* [Framework of Cooperation between the Government of Ukraine and the United Nations on the Prevention and Response to Conflict-Related Sexual Violence: Achievements and Next Steps (12th Meeting of the Commission on Coordination of Interaction of Executive Authorities on Ensuring Equal Rights and Opportunities for Women and Men)], presentation, available at: https://www.kmu.gov.ua/storage/app/sites/1/ind-57-gender-policy/fin-prezentaciia-onovlenogo-ip-2.pdf (accessed 31 March 2026).

Support Loan 2026",[34] EUR 30 billion in macro-financial assistance is intended as budgetary support that may enable Ukraine to finance urgent needs, including compensation mechanisms.

The institutional reforms also included the creation of a specialised prosecutorial department within the Office of the Prosecutor General for procedural guidance of investigations and prosecution in cases of sexual violence related to conflict,[35] the deployment of mobile investigative groups in liberated territories[36] and the establishment of the Coordination Centre for Victims and Witness Support with regional branches.[37] A specialised prosecutorial unit later underwent structural reorganisation and was integrated with other units. Obviously, the preserving of the institutional expertise developed since 2022 remains crucially important.

In 2023, the Strategic Plan for the Implementation of the Prosecution Service's Mandate in the Sphere of International Crimes[38] was adopted, including measures to protect vulnerable groups affected by CRSV. Within the practice of the Office of the Prosecutor General, a survivor-centred and trauma-informed approach is increasingly applied. This approach prioritises the safety, health and dignity of survivors, adapts investigative procedures to their needs, guarantees inclusiveness and non-discrimination, enables them to retain control over sensitive personal data and seeks to prevent stigmatisation and secondary victimisation.

The experience developed in Ukraine in countering CRSV is significant not only for addressing crimes committed in the context of the Russian Federation's armed aggression, but also for the broader transformation of national approaches

[34] European Parliament, *Parliament Approves €90 Billion Ukraine Support Loan Package*, Press Release, 11 February 2026, available at: https://www.europarl.europa.eu/news/en/press-room/20260206IPR33903/parliament-approves-EU90-billion-ukraine-support-loan-package (accessed 31 March 2026).

[35] Ukrainian Women's Fund, *Специфіка розслідування випадків сексуального насильства, пов' язаного з війною, змушує Генпрокуратуру трансформуватися* [The Specificity of Investigating Cases of Conflict-Related Sexual Violence Forces the Prosecutor General's Office to Transform], 25 September 2023, available at: https://uwf.org.ua/speczyfika-rozsliduvannya-vypadkiv-seksualnogo-nasylstva-povyazanogo-z-vijnoyu-zmushuye-genprokuraturu-transformuvatysya/ (accessed 31 March 2026).

[36] K. Levchenko, S. Hubin, O. Hubina (eds.), *Україна не мовчить: хроніка протидії сексуальному насильству, пов'язаному з війною (2022–2024)* [Ukraine Is Not Silent: Chronicle of Countering Conflict-Related Sexual Violence (2022–2024)], Folio, Kharkiv: 2024, p. 179, available at: https://tinyurl.com/y2nzyj2j (accessed 31 March 2026).

[37] *Підсумки роботи Координаційного центру підтримки потерпілих і свідків за 2024 рік* [Results of the Coordination Centre for Victims and Witnesses Support for 2024], 18 January 2025, available at: https://gp.gov.ua/ua/posts/pidsumki-roboti-koordinaciinogo-centru-pidtrimki-poterpilix-i-svidkiv-za-2024-rik (accessed 31 March 2026).

[38] *Стратегічний план щодо реалізації повноважень органів прокуратури у сфері кримінального переслідування за вчинення міжнародних злочинів на 2023–2025 роки* [Strategic Plan for the Implementation of the Powers of the Prosecutor's Office in the Field of Criminal Prosecution for International Crimes for 2023–2025], 15 September 2023, available at: https://tinyurl.com/yeznpkue (accessed 31 March 2026).

to combating sexual and gender-based violence. Statistical data concerning criminal offences against sexual freedom and sexual integrity under Section IV of the Special Part of the Criminal Code of Ukraine reveal important dynamics. In 2022, 615 offences were recorded, 484 notices of suspicion were issued and 374 cases were referred to court.[39] In 2023, 921 offences were recorded, 797 notices of suspicion were issued and 649 cases were referred to court.[40] In 2024, 846 offences were recorded, 725 notices of suspicion were issued and 570 cases were referred to court.[41] In 2025, 1,053 offences were recorded, 877 notices of suspicion were issued and 663 cases were referred to court.[42] The attrition rate within the criminal justice system therefore increased from 27.4% in 2022 to 37.04% in 2025.

These figures suggest two parallel tendencies. On the one hand, war acts as a structural amplifier of gender inequality and as a catalyst for normalising violence. On the other hand, Ukraine also shows a positive trend: increased visibility and reporting of sexual violence. The ratification of the Istanbul Convention, which entered into force for Ukraine on 1 November 2022,[43] strengthened the normative framework and legitimised greater institutional attention to the issue. Preparatory legislative reforms had already been adopted in 2017 to facilitate the Convention's implementation.[44] Its ratification during Russia's full-scale invasion reflects a new strategy for addressing contemporary challenges, where the traditional evolutionary development of law is increasingly complemented by proactive and nonlinear

[39] Office of the Prosecutor General of Ukraine, *Про зареєстровані кримінальні правопорушення та результати їх досудового розслідування* [On registered criminal offences and the results of their pre-trial investigation], available at: https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2 (accessed 31 March 2026).

[40] *Ibidem*.

[41] *Ibidem*.

[42] *Ibidem*.

[43] Law of Ukraine No. 2319-IX, *Про ратифікацію Конвенції Ради Європи про запобігання насильству стосовно жінок і домашньому насильству та боротьбу з цими явищами* [On ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence], 20 June 2022, available at: https://zakon.rada.gov.ua/go/2319-20 (accessed 31 March 2026).

[44] Law of Ukraine No. 2229-VIII, *Про запобігання та протидію домашньому насильству* [On Prevention and Counteraction to Domestic Violence], 7 December 2017, available at: https://zakon.rada.gov.ua/go/2229-19; Law of Ukraine No. 2866-IV, *Про забезпечення рівних прав та можливостей жінок і чоловіків* [On Ensuring Equal Rights and Opportunities for Women and Men], 8 September 2005 (as amended 7 December 2017), available at: https://zakon.rada.gov.ua/go/2866-15; Law of Ukraine No. 2227-VIII, *Про внесення змін до Кримінального та Кримінального процесуального кодексів України з метою реалізації положень Конвенції Ради Європи про запобігання насильству стосовно жінок і домашньому насильству та боротьбу з цими явищами* [On Amendments to the Criminal Code and Criminal Procedure Code of Ukraine to Implement the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence], 6 December 2017, available at: https://zakon.rada.gov.ua/go/2227-19 (all accessed 31 March 2026).

normative transformations characteristic of a hypermodern paradigm[45] that relies not only on past experience, but also on forecasting and risk assessment.

3. THE "MEMBRANE" CONCEPT: CONFLICT-RELATED SEXUAL VIOLENCE AS A DRIVER OF LEGAL TRANSFORMATION

In effect, the issue of conflict-related sexual violence has become one of the key drivers of the evolution of Ukraine's human rights protection system. It has contributed to the reconsideration of traditional approaches to criminal justice, the development of institutional infrastructure for combating such violence, the establishment of training systems for prosecutors, judges and legal aid professionals, the introduction of victim-centred procedures, the development of trauma-informed investigative and adjudicative practices and the formation of a more inclusive and gender-sensitive legal policy. In this sense, efforts to counter CRSV can be conceptualised as a kind of "membrane" – a semi-permeable normative and institutional layer through which the impulses generated in response to CRSV diffuse into the broader domains of criminal justice, legal and social policy and human rights protection.

Such a membrane functions first and foremost as a selector of standards. The development of mechanisms for addressing CRSV effectively "pushes" the system to establish a higher threshold of due process guarantees: victim-centeredness, trauma-informed approaches and specialised evidentiary practices. Through this membrane, flexible approaches to the evaluation of testimony enter the broader criminal justice system, including the strengthened role of expert assessments of trauma, rules designed to minimise secondary victimisation and formats enabling victims to participate remotely in criminal proceedings. Once institutionalised in the context of CRSV, these standards become compatible – and therefore "permeable" – for related categories of offences, including ordinary criminal sexual offences and other forms of gender-based violence.

This membrane also operates as an instrument for correcting asymmetries of power. A gendered understanding of CRSV highlights structural social inequalities and exposes fundamental imbalances of power, thereby orientating the legal system towards considerations of substantive equality and justice rather than merely procedural formalism. In this context the pro persona principle naturally emerges: where gaps or conflicts in legal regulation exist, the interpretation and design of procedures should favour the option that maximises the protection of victims' dignity, safety and access to justice. The membrane thus functions as an

[45] M. Saliternik, S. Shlomo Agon, *International Law and Time Between Three Paradigms*, 39(2) Leiden Journal of International Law 355 (2026).

"institutional pump": CRSV mobilises resources and expertise, enabling a shift from fragmented responses towards stable institutional mechanisms such as coordination centres, an inter-agency cooperation framework, service networks and reparations mechanisms. These resources can later be scaled across the broader field of combating gender-based violence, as channels for circulating standards have already been established.

The membrane also constitutes a channel of convergence, facilitating interaction and gradual harmonisation of international and national legal approaches and standards. The regulatory and institutional responses developed in the field of CRSV place domestic legal systems in direct dialogue with international criminal law, international human rights law and international humanitarian law. In practice, the investigation and prosecution of CRSV inevitably require that international legal concepts such as the contextual understanding of coercion, the recognition of structural power asymmetries, survivor-centred evidentiary standards and the prohibition of discriminatory stereotypes be incorporated into domestic law. As these standards are internalised through legislation, prosecutorial guidelines, judicial training and institutional practice, they become embedded within the broader architecture of the national legal system. The membrane therefore enables the diffusion of international norms not through abrupt transplantation, but through gradual institutional adaptation driven by the practical demands of investigating and adjudicating CRSV. At the same time, convergence operates in the opposite direction. Experiences of national jurisdictions confronting CRSV – particularly during ongoing conflict – generate innovative procedural solutions and institutional models that can later inform international standards. In Ukraine, interdisciplinary mobile documentation teams, interim reparations schemes operating independently of criminal proceedings and specialised coordination structures illustrate legal experimentation under conditions of intense institutional pressure. Such innovations demonstrate how national responses can contribute to the evolution of international best practices, particularly in fields such as transitional justice, victim participation and reparations policy. In this sense, the membrane does not merely transmit norms from the international to the domestic level; it also enables upward feedback, allowing national practice to shape global understandings of effective responses to sexual and gender-based violence.

Consequently, the membrane functions as a dynamic interface between legal orders rather than a one-directional channel for diffusing norms. By mediating between international legal standards and domestic institutional realities, it supports a process of normative co-evolution, in which both levels progressively adjust to one another. Legal responses developed in the context of CRSV therefore contribute to a broader convergence of legal cultures – strengthening the alignment of domestic

criminal justice systems with international human rights principles while simultaneously enriching international legal frameworks through empirically grounded institutional practice.

The practical operation of this membrane is reflected in legislative and institutional reforms adopted in Ukraine, particularly within criminal procedure and prosecutorial practice. In 2022, a specialised department for investigating CRSV-related war crimes was established,[46] providing meaningful practical implementation of confidentiality standards that had long existed in criminal procedural legislation but had rarely been applied consistently.[47] Prosecutors and investigators now not only protect personal data, but also advise survivors on additional security measures, including the use of altered identity data during criminal proceedings to reduce the risks of stigmatisation, retaliation and secondary victimisation. These developments demonstrate how standards initially developed in the CRSV context increasingly shape broader understandings of procedural fairness, victim participation and trauma-informed justice.

The same dynamic is evident in procedural adaptations addressing challenges arising in the prosecution of international crimes. While Ukrainian criminal procedure remains grounded in fair trial guarantees and due process rights, including for members of the Russian armed forces accused of international crimes, the absence of legal cooperation with the Russian Federation requires extensive reliance on *in absentia* proceedings. Existing legislation mandates the publication of notices of suspicion, which may contain victims' personal data, creating significant risks for CRSV survivors. This has prompted prosecutorial practices aimed at safeguarding victims' identities in criminal proceedings in order to preserve their privacy and security, while also demonstrating the need to codify confidentiality safeguards in the Criminal Procedure Code of Ukraine. Draft Law No. 9351[48] therefore proposes stronger confidentiality guarantees, including holding closed hearings in CRSV

[46] Bielousov & Didenko, *supra* note 7.

[47] *Забезпечення безпеки потерпілих і свідків при розслідуванні СНПК.* [Ensuring the safety of victims and witnesses in the investigation of conflict-related sexual violence], JustTalk, 6 September 2023, available at: https://justtalk.com.ua/post/zabezpechennya-bezpeki-poterpilih-i-svidkiv-pri-rozsliduvanni-snpk-discussion-paper (accessed 31 March 2026).

[48] Draft Law of Ukraine No. 9351, *Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення порядку здійснення досудового розслідування та судового розгляду у кримінальних провадженнях щодо злочинів, які пов'язані із сексуальним насильством, яке вчинене в умовах збройного конфлікту* [On amendments to the Criminal Procedure Code of Ukraine regarding the improvement of pre-trial investigation and trial procedures in criminal proceedings concerning crimes related to sexual violence committed in conditions of armed conflict], 5 June 2023, available at: https://itd.rada.gov.ua/billinfo/Bills/Card/41960 (accessed 31 March 2026).

cases investigated under Art. 438 CCU "War Crimes"[49] as public prosecution cases, where such procedural mechanisms have remained limited, and concealing victims' identifying data, since disclosure may create risks of stigmatisation or re-traumatisation. These measures ensure that survivors unwilling or psychologically unable to testify publicly can nevertheless access justice without compromising their safety or dignity.

Alongside procedural reforms, significant progress has been made in establishing standards of cooperation with expert and international communities. With the support of the Office of the UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Ukrainian authorities have developed specialised Investigative Guidelines[50] addressing specific forms of sexual violence. Interdisciplinary training programmes and coordination sessions involving prosecutors, legal aid providers, police officers, psychologists and other professionals harmonised investigative and prosecutorial practices nationwide,[51] progressively embedding international standards of victim-centred investigations, trauma-informed interviewing and evidentiary approaches within domestic institutional practice.

The membrane effect is equally reflected in broader systems of victim recognition, reparations and social protection. Law No. 4067-IX[52] introduced, for the first time in Ukrainian legislation, a legal definition of sexual violence related to the armed aggression of the Russian Federation against Ukraine and established categories of affected persons. Moving beyond a purely punitive model, the law created a legal basis for urgent interim reparations independent of criminal conviction. Survivors are entitled to immediate assistance, information on their rights and available remedies and free rehabilitation services tailored to their individual needs, including comprehensive medical, psychosocial and social support. This represents a substantial shift from a prosecution-orientated framework towards a victim-centred and restorative model of justice, although the full implementation of these guarantees remains ongoing.

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[49] Criminal Code of Ukraine [*Кримінальний кодекс України*], Law of Ukraine No. 2341-III of 5 April 2001, available at: https://zakon.rada.gov.ua/laws/show/2341-14#Text (accessed 31 March 2026).

[50] Office of the Prosecutor General of Ukraine, *Пам'ятки з розслідування СНПК* [Guidelines on the investigation of conflict-related sexual violence], available at: https://www.gp.gov.ua/ua/posts/pam-yatki-z-rozsliduvannya-snpk (accessed 31 March 2026).

[51] International Alliance on Preventing Sexual Violence in Conflict, *Підхід, орієнтований на постраждалих: Кращі практики членів міжнародного альянсу по запобіганню сексуальному насильству, пов'язаному з конфліктом* [Survivor-centred approach: Best practices of members of the International Alliance on Preventing Conflict-Related Sexual Violence], 2026, p. 25, available at: https://mvs.gov.ua/upload/2/2/7/8/7/6/pidxid-orijentovanii-na-postrazdalix.pdf (accessed 31 March 2026).

[52] Law No. 4067-IX, *supra* note 25.

The institutional dimension of this transformation has been reinforced through the development of new support and coordination infrastructures. In 2023, the Coordination Centre for Victim and Witness Support was established under the Office of the Prosecutor General, providing psychological and legal assistance to victims and witnesses of war crimes and other international crimes, facilitating interaction with investigators, prosecutors and courts and promoting victim-sensitive practices. In 2024, the Centre expanded through nine regional branches, further institutionalising victim support mechanisms.[53] At the same time, Law No. 4071-IX[54] established the State System for Recording Information on Damage Caused to Personal Non-property Rights as a Result of the Armed Aggression of the Russian Federation, including CRSV-related harm, while Law No. 4073-IX[55] formally recognised CRSV survivors as beneficiaries entitled to specialised support services. The "Platform for Assistance to Survivors", developed in partnership with civil society organisations, UNFPA and other international actors, further extends access to information on assistance programmes and support services – particularly for individuals unable to obtain in-person assistance – and has reportedly reached approximately 300,000 users.[56]

A comparable transformative dynamic is also observable in the convergence of domestic and international criminal law. Law No. 3909-IX[57] ratified the Rome Statute of the International Criminal Court and its amendments, strengthening Ukraine's integration into the international accountability framework for genocide, crimes against humanity, war crimes and the crime of aggression. Complementing this process, Law No. 4012-IX[58] substantially amended Ukrainian criminal legislation by expressly recognising rape and other forms of sexual violence as forms of serious harm in the context of genocide and incorporating rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence into the newly introduced provisions on crimes against humanity. The amendments also introduced command responsibility, further aligning domestic law with international criminal-law standards. Although Art. 438 CCU ("War Crimes") has not undergone comparable revision, largely to preserve legislative continuity, Ukrainian prosecutorial and judicial practice consistently qualifies CRSV under this provision as a war crime involving violations of the laws and customs

[53] *Results of the Coordination Centre for Victims and Witnesses Support for 2024*, *supra* note 37.
[54] Law No. 4071-IX, *supra* note 27.
[55] Law No. 4073-IX, *supra* note 28.
[56] International Alliance on Preventing Sexual Violence in Conflict, *supra* note 51, p. 27.
[57] Law No. 3909-IX, *supra* note 29.
[58] Law No. 4012-IX, *supra* note 30.

of war.[59] Further specification of CRSV-related offences and closer harmonisation with the Rome Statute therefore remain important directions for future reform.[60]

CONCLUSION

The evolution of Ukraine's response to conflict-related sexual violence demonstrates how a legal system operating under conditions of armed aggression may simultaneously pursue accountability and institutional transformation. The gradual introduction of mechanisms for inter-agency coordination, interim reparations and victim-centred and trauma-informed approaches signals an effort to move beyond a purely punitive paradigm towards a more comprehensive model of transitional justice. Although these measures remain embedded within the extraordinary context of Russia's armed aggression, they nonetheless reflect a broader normative shift within the national legal framework, bringing domestic criminal-justice responses into closer alignment with contemporary international standards for the protection of victims of sexual and gender-based violence.

Viewed through this lens, initiatives addressing conflict-related sexual violence may perform a function that extends far beyond the immediate demands of wartime accountability. As argued in this article, the institutional approaches developed in response to such violence may operate as a "membrane", diffusing into the broader sphere of combating gender-based violence and advancing the transformation of the criminal justice system. Consequently, the long-term significance of Ukraine's response lies not only in its capacity to address crimes committed during the conflict, but also in its potential to catalyse enduring transformations within the architecture of criminal justice.

[59] Supreme Court of Ukraine, *Пам'ятка щодо кваліфікації випадків сексуального насильства, пов'язаного з конфліктом (СНПК)* [Guidelines on the qualification of cases of conflict-related sexual violence (CRSV)], available at: https://tinyurl.com/yjp2des9 (accessed 31 March 2026).

[60] Interfax-Ukraine, *Закон щодо імплементації норм міжнародного права стане потужним інструментом протидії воєнним злочинам – керівник "департаменту війни"* [The law on the implementation of international law norms will become a powerful tool for countering war crimes, says the Head of the "War Department"], available at: https://interfax.com.ua/news/political/1165895-amp.html (accessed 31 March 2026).

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JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT (SAC)

of 15 December 2025
(Case No. II FSK 785/22)
[avoidance of double taxation; taxation of seafarers' income]
Presiding judge: SAC Judge Tomasz Kolanowski (rapporteur)
SAC Judges: Jan Rudowski, Beata Cieloch, Anna Dumas, Jerzy Płusa, Hieronim Sęk, Tomasz Zborzyński

THESIS

The method for avoiding double taxation referred to in Article 22(1) of the Convention between the Republic of Poland and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed in Warsaw on 9 September 2009 (Journal of Laws of 2010, No. 134, item 899), as amended by the Protocol of 5 July 2012 (Journal of Laws of 2013, item 680), applies to the income of seafarers referred to in Article 14(3) of that Convention, regardless of the manner in which a contracting state waives taxation of such income.

The Supreme Administrative Court, composed of Presiding SAC Judge Jan Rudowski, SAC Judges : Beata Cieloch, Anna Dumas, Tomasz Kolanowski (rapporteur), Jerzy Płusa, Hieronim Sęk and Tomasz Zborzyński, judicial assistant Wojciech Zagórski as Court Clerk, after hearing on 15 December 2025 in the Financial Chamber the cassation appeal lodged by the Director of the Tax Administration Chamber in Gdańsk against the judgment of the Regional Administrative Court in Gdańsk of 5 April 2022 (Case No. I SA/Gd 1599/21), in the case brought by B.S. and K.S. against the decision of the Director of the Tax Administration Chamber in Gdańsk of 29 September 2021 [...] concerning personal income tax for the year 2016:

1. dismisses the cassation appeal
2. orders the Director of the Tax Administration Chamber in Gdańsk to pay B.S. and K.S. the amount of PLN 4,050 [...] as reimbursement of the costs of the cassation proceedings.

From the following reasoning:

1. BACKGROUND OF THE CASE

1.1. Course of the proceedings

The subject of the cassation appeal is the judgment of the Regional Administrative Court in Gdańsk of 5 April 2022 (Case No. I SA/Gd 1599/21), by which the court of first instance annulled the decision of the Director of the Tax Administration Chamber in Gdańsk of 29 September 2021 that had been issued in the case concerning B.S. and K.S. with respect to personal income tax for the year 2016.

The court of first instance first discussed the provisions concerning the tax abatement referred to in Article 27g of the Act of 26 July 1991 on Personal Income Tax (Journal of Laws of 2012, item 361, as amended; hereinafter the "PIT Act"). It then cited Article 14(3) of the Convention between the Republic of Poland and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed in Warsaw on 9 September 2009 (Journal of Laws of 2010, No. 134, item 899), as amended by the Protocol of 5 July 2012 (Journal of Laws of 2013, item 680; hereinafter the "Convention").

Next, the court presented an interpretation according to which the phrase "may be taxed" used in that provision means that the state in which the taxpayer performs work does not have the exclusive right to tax such income. Referring to the judgment of the Supreme Administrative Court of 31 May 2011 (Case No. II FSK 1759/10; the judgments cited in the reasoning are available in the Central Database of Administrative Court Judgments at orzeczenia.nsa.gov.pl), the court held that subjecting the remuneration of Polish seafarers to tax liability in Norway while Norway simultaneously applies a tax exemption to seafarers' remuneration (regardless of their residence) does not, in principle, exclude the possibility of taxing such income in Poland. Accordingly, the income of a person residing in Poland referred to in Article 14(3) of the Convention may be taxed both in Norway and in the state of residence, i.e. Poland (cf. the judgment of the Supreme Administrative Court of 2 December 2015 [Case No. II FSK 2406/15], published in the Central Database of Administrative Court Judgments).

The court then cited Article 22(1)(a)–(d) of the Convention, which regulates the methods for avoiding double taxation. Without conducting a broader analysis of Article 14(3) of the Convention, the court agreed with the Appellants as to its applicability in the case and, consequently, as to their entitlement to benefit from the tax abatement under domestic law in conjunction with Article 22(1)(d) and Article 14(3) of the Convention.

The court considered the key issue for resolving the case to be whether Article 14(3) of the Convention applied in light of the interpretation of the term "a ship operated in international traffic by an enterprise having its place of effective

management in Norway", and specifically whether the entity T. could be regarded as operating the ship on which the Appellant worked in 2016.

The court annulled the tax authority's decision and ordered that this issue be examined.

1.2. Cassation appeal and response to the cassation appeal

In the cassation appeal, the authority alleged:

I. infringement of the following procedural provisions that substantially affected the outcome of the case:

a) Article 145 § 1(1)(a) and (c), Article 134 § 1 and Article 151 of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts (Journal of Laws of 2024, item 935, as amended; hereinafter the "LPAC"), by allowing the complaint and annulling the decision of the appellate authority, although the authority's decision was not affected by any of the defects indicated by the Court and, in particular, did not violate the substantive or procedural provisions referred to in the reasoning of the judgment

b) Article 145 § 1(1)(c) LPAC in conjunction with Articles 121, 122, 191 and 187 of the Act of 29 August 1997 – the Tax Ordinance (Journal of Laws of 2021, item 1540, as amended; hereinafter the "Tax Ordinance"), through an incorrect assessment of the evidentiary proceedings conducted by the authority and an erroneous legal assessment of the facts established by the authorities, and by concluding that the authorities had violated Articles 122, 187, 191 and 121 § 1 of the Tax Ordinance by making a selective and arbitrary assessment of the evidence and by failing to make a comprehensive assessment of all evidence gathered in the case, which also constituted a breach of the principle of conducting proceedings in a manner that inspires confidence in public authorities; whereas the authorities correctly assessed the evidence gathered in the case and properly evaluated it legally by concluding that the Convention could not apply in the case due to the taxpayer's income from employment aboard a ship not being taxed in Norway, which rendered unnecessary any broader interpretation of the entity operating the ship beyond that which was adopted in the contested decision of the authority

c) Articles 141 § 4 and 133 § 1 of the LPAC, through defective reasoning of the judgment consisting in the Court's omission of the authority's arguments concerning the lack of grounds for applying the Convention and in making an improper assessment of the evidence, particularly by completely disregarding evidence in the case file comprising explanations provided by the Norwegian tax administration, which excluded the taxation in Norway of income earned by the taxpayer from employment aboard a ship. According to the authority, those explanations had the status of an official document. The Court also failed to consider, in the context of

applying the provisions of the Convention, the circumstance that the taxpayer's income from employment aboard the ship had not been taxed.

II. infringement of substantive law through erroneous interpretation and improper application:

a) Article 145 § 1(1)(a) LPAC in conjunction with Article 14(3), Article 3(1)(f) and Article 22(1)(b) and (d) of the Convention, through their incorrect interpretation and, consequently, improper application, by concluding that:

- the authority refrained from interpreting those provisions with regard to the entity operating the ship and nevertheless refused to apply them in the present case
- the applicability of the Convention to seafarers' income is not determined by the ship's flag (more broadly, ownership), the issue of "tax liability" in Norway or the place of registration, but rather by the place of effective management of the ship, provided that the ship is operated in maritime transport

whereas, since the income of seafarers working aboard ships not registered in the NIS or NOR registers is not subject to tax liability in Norway, the conditions set out in Article 22(1) of the Convention are not fulfilled. That provision applies exclusively to seafarers working aboard ships registered in the NIS, because only their income is subject to tax liability in Norway, while it is simultaneously exempt from taxation under Norwegian domestic law, especially since Article 22(1)(d) of the Convention directly refers to Norwegian domestic law governing income taxation.

b) Article 145 § 1(1)(a) LPAC in conjunction with Article 14(3) and Article 22(1)(b) and (d) of the Convention through incorrect interpretation, which consequently led to a violation of Article 27g(1) and (2) in conjunction with Article 27(9) and (9a) of the PIT Act, by concluding that the applicability of the Convention is determined not by the existence of tax liability, but by the place of effective management of the ship, whereas double taxation and the application of the Convention can only arise where the taxpayer's income is taxable both in Poland and in Norway; in the present case, however, the explanations of the Norwegian tax administration indicate that no tax liability arose in Norway in connection with the taxpayer's employment aboard the ship.

The administrative authority requested that the contested judgment be set aside in its entirety and that the complaint be dismissed or, alternatively, that the contested judgment be set aside in its entirety and the case remitted to the court of first instance for reconsideration. The authority also requested that evidence be admitted that would confirm the absence of the Appellants' tax liability in Norway.

In response to the cassation appeal, counsel for the Appellants requested that it be dismissed and that the costs of the cassation proceedings be awarded.

1.3. Legal question

By an order of 19 February 2025 (Case No. II FSK 785/22), the Supreme Administrative Court, acting pursuant to Article 187 § 1 of the LPAC, decided to refer the following legal issue raising serious doubts to a panel of seven judges of the Supreme Administrative Court for resolution:

"Under the wording used in Article 14(3) of the Convention between the Republic of Poland and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed in Warsaw on 9 September 2009 (Journal of Laws of 2010, No. 134, item 899), as amended by the Protocol of 5 July 2012 (Journal of Laws of 2013, item 680), which provides that 'remuneration derived in respect of an employment exercised aboard a ship operated in international traffic by an enterprise of a Contracting State may be taxed in that State', does the method for avoiding double taxation in Poland referred to in Article 22(1)(a)–(d) of that Convention apply where a resident of Poland who derives such income is not, under the domestic law of Norway, subject to tax liability in Norway in respect of that income?"

2. REASONING OF THE ORDER REFERRING THE LEGAL QUESTION FOR EXAMINATION BY A PANEL OF SEVEN JUDGES PURSUANT TO ARTICLE 187 § 1 OF THE LPAC

2.1. Divergence in the case law of administrative courts

When examining the cassation appeal, the Supreme Administrative Court found that the key issue for resolving the present case concerned interpretative doubts as to whether the mechanism for avoiding double taxation set out in Article 22(1)(a)–(d) of the Convention applies at all to income referred to in Article 14(3) of the Convention in a situation where the person deriving such income from employment exercised aboard a ship (a seafarer) is a Polish tax resident and, under the domestic law of Norway, is not subject to tax liability in that state with respect to such income.

This constitutes the fundamental legal issue upon which depends the possibility of applying, first, the provisions of the Convention and, subsequently, the domestic provisions concerning tax abatement. Only after resolving this issue is it possible to examine the status of the Norwegian enterprise employing the Appellant as an operator of a seagoing vessel.

The court of first instance held that the aforementioned provisions of the Convention were applicable because, pursuant to Article 22(1)(d) thereof, the Appellant, as a resident of Poland, derived income which, in accordance with the Convention, may be taxed in Norway; however, under Norwegian domestic law, such income is

exempt from taxation. However, in the interpretation and application of the provisions identified in the operative part of the order, two divergent lines of case law have emerged within the jurisprudence of the administrative courts, including that of the Supreme Administrative Court itself.

2.2. Position according to which the Convention does not apply to seafarers working aboard a ship not registered in Norwegian registers

In the judgment of the Supreme Administrative Court of 22 March 2022 (Case No. II FSK 689/21; published in the Central Database of Administrative Court Judgments), which is representative of the first line of case law, it was held that the information provided by the Norwegian tax administration, together with an analysis of Norwegian tax law, demonstrated that a seafarer's income earned in 2014 from employment aboard a ship which is not registered in Norway (NIS or NOR) was not subject to limited tax liability in Norway.

Since the disputed income was not subject to limited tax liability in Norway, the provisions of the Polish–Norwegian double taxation convention concerning the avoidance of double taxation did not apply in the case. In other words, where a taxpayer's income is taxable only in one country (Poland), there are no grounds whatsoever for alleging possible double taxation.

As the Appellant seafarer performed his work outside Norway and was not a Norwegian resident, then, according to the information provided by the Norwegian tax administration, Norwegian taxes were neither required to be applied nor actually applied to his remuneration. He was not subject to limited tax liability in Norway in respect of income earned from work performed aboard a ship flying the flag of the Bahamas. This circumstance excluded the possibility of Norway taxing the income of a natural person (a seafarer) derived from work aboard that ship. Consequently, Articles 14(3) and 22(1)(b) and (d) of the Convention did not apply to the Appellant seafarer's income.

2.3. Position according to which the Convention applies to seafarers working aboard a ship not registered in Norwegian registers

Conversely, in the judgment of the Supreme Administrative Court of 16 November 2022 (Case No. II FSK 419/22; published in the Central Database of Administrative Court Judgments), which is representative of the second line of case law, it was held that account must be taken of the regulation specifically addressed to seafarers in Article 14(3) of the Convention.

It was noted that, in the case under consideration, the Appellant seafarer was not a resident of Norway and was subject to unlimited tax liability in Poland. By virtue of the Protocol signed in Oslo on 5 July 2012, the contracting states (Poland

and Norway) amended the Convention. The Supreme Administrative Court stated that the interpretation of Articles 14(3) and 22(1)(d) of the Convention, as amended in 2012, was crucial. The Court indicated that the amendment to Article 14(3) of the Convention made it possible to tax the remuneration of Polish seafarers earned from employment exercised aboard a ship operated in international traffic by a Norwegian enterprise.

That provision does not require the ship to be registered in a Norwegian register. Norwegian domestic law shows that Norway has not made use of this possibility. However, under Article 14(3) of the Convention, Norway may do so at any time.

A consequence of the amendments introduced to Article 14(3) of the Convention was the addition of letter (d) to Article 22(1) of the Convention, concerning a Polish resident whose income may be taxed in Norway under the Convention, but which is exempt from taxation under Norwegian domestic law.

3. POSITION OF THE PROSECUTOR OF THE NATIONAL PUBLIC PROSECUTOR'S OFFICE

In a submission dated 30 September 2025, the Prosecutor of the National Public Prosecutor's Office requested the adoption of the following resolution:

"Under the wording used in Article 14(3) of the Convention between the Republic of Poland and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed in Warsaw on 9 September 2009 (Journal of Laws of 2010, No. 134, item 899), as amended by the Protocol of 5 July 2012 (Journal of Laws of 2013, item 680), which provides that 'remuneration derived in respect of employment exercised aboard a ship operated in international traffic by an enterprise of a Contracting State may be taxed in that State', where a resident of Poland who derives such income is not, under Norwegian domestic law, subject to tax liability in Norway in respect of that income, the method for avoiding double taxation in Poland referred to in Article 22(1)(a)–(d) of that Convention does not apply."

4. POSITION OF THE ADMINISTRATIVE AUTHORITY

In a position submitted on 2 September 2025, the authority critically assessed the application of double taxation agreements. It stated that such agreements do not take precedence over statutes in their application. With regard to the issue covered by the legal question, the authority conducted its own interpretation of Norwegian law and concluded that the scope of that provision of the Convention extends

only to those seafarers who perform work aboard ships registered in the Norwegian International Ship Register (NIS).

Furthermore, in a submission dated 27 September 2025, the authority indicated, inter alia, that no agreement on avoiding double taxation can constitute "an autonomous basis for taxing income in any state that is party to such agreement, nor can it impose a tax liability, i.e. taxation of income in that state, if such liability does not arise under the tax law regulations of that state."

The authority referred to Article 4a of the PIT Act, which provides that the scope of the unlimited tax liability applicable to Polish residents may be "modified" by double taxation agreements (and not vice versa). According to the authority:

"In order to tax income in a given state, there must exist a legal basis for doing so in the internal tax law of that state (a statutory provision imposing tax liability). Therefore, only the existence in the tax provisions of a given state of tax liability with respect to specific income (which, as a rule, constitutes the basis for taxing such income in that state) provides grounds for applying the provisions of a double taxation agreement in that respect (if such an agreement has been concluded)."

The authority further stated that the question of whether the source state exercises its right to tax income (in this case, income from work aboard a seagoing vessel) is determined by the tax law regulations in force in Norway. Those regulations, however, do not subject the income of Polish seafarers to tax liability, except for income earned by seafarers working aboard ships registered in the NIS.

5. POSITION OF THE APPELLANTS

The Appellants responded to the authority's submission by stating that the authority's assertions distort the very basis for concluding double taxation agreements and that the "theories" presented by the authority undermine the purpose of applying the provisions of such agreements.

At the same time, counsel for the Appellants requested that evidence be admitted and examined in the form of documents attached to the submission. These documents consisted of interministerial correspondence (between the Ministry of Finance and the Ministry of Infrastructure, as well as between the Ministry of Finance and the Norwegian Shipowners' Association). This correspondence indicated the motives guiding the Ministry of Finance, in consultation with the Norwegian side, when amending the Convention. It follows from the correspondence that the purpose of the amendment was to equalise the situation of all seafarers employed by Norwegian shipowners by introducing the proportional credit method and enabling them to benefit from tax abatement.

6. ON THE APPLICATION OF ARTICLE 187 § 3 OF THE LPAC AND THE ASSUMPTION OF JURISDICTION BY A PANEL OF SEVEN JUDGES

It is necessary to explain the grounds on which the Supreme Administrative Court, sitting as a panel of seven judges and acting pursuant to Article 187 § 3 of the LPAC by the order issued at the hearing on 9 June 2025, did not adopt a resolution but instead assumed jurisdiction over the present case for examination.

The Court stated that the divergence in case law identified in the order of 19 February 2025 did not result from administrative courts adopting different interpretations of the relevant regulation, but rather reflected differing factual circumstances that determined the ultimate outcome of applying that regulation through subsumption to the various factual circumstances of individual cases, as explained in greater detail in the following parts of the reasoning.

At the same time, bearing in mind the legal significance of the issue for the practice of applying the law – correctly identified in the order referring the matter to a panel of seven judges of the Supreme Administrative Court – and considering the need to preserve the uniformity and consistency of the case law of the Polish administrative courts within the scope of the issue concerned, the Court found it justified to assume jurisdiction over the present case pursuant to Article 187 § 3 of the LPAC.

7. SUPPLEMENTARY POSITIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

7.1. Position of the Minister of Finance and Economy

In the opinion of the Minister of Finance and Economy dated 19 November 2025, the position according to which the application of the agreement on avoiding double taxation concluded between Poland and Norway depends on whether the taxpayer, being a Polish tax resident, was subject to limited tax liability in Norway finds no support either in the applicable legal provisions or in the international practice of applying and interpreting the provisions of double taxation agreements.

In the case of seafarers earning income from work aboard a ship operated in international traffic by an enterprise having its place of effective management in Norway, under the legal framework applicable to income earned up to 31 December 2020, which is the subject of the present case, the relevant tax rule is Article 14(3) in conjunction with Article 22(1)(a) and (d) of the Polish–Norwegian Convention.

Article 14(3) of the Convention applies where the following conditions are met in the factual circumstances of the case:

– the income is derived from employment exercised aboard a seagoing vessel;
– the vessel is operated in international traffic (according to the definition of international traffic in Article 3(1)(g) of the Convention);
– the vessel is operated by a Norwegian enterprise.

If, pursuant to Article 14(3) of the Convention, a seafarer's income may be taxed in Norway, double taxation is avoided in Poland by means of the primary method, namely the exemption with progression method referred to in Article 22(1)(a) and (c) of the Convention.

However, pursuant to Article 22(1)(d) of the Convention, notwithstanding the provisions of letter (a), double taxation is avoided by applying the credit method referred to in letter (b) of that paragraph where a person residing or established in Poland derives income which may be taxed in Norway under the Convention, but which is exempt from taxation under Norwegian domestic law. This means that where Norway, despite having the right to do so, does not impose tax on the income of a Polish tax resident (because such income is exempt from tax under Norwegian domestic law), Poland is obliged to change the method of avoiding double taxation to the ordinary credit method.

At no stage in determining the rules for taxing Polish tax residents earning income in Norway does the Polish–Norwegian Convention require it to be established whether the taxpayer was subject to limited tax liability abroad.

The Minister of Finance and Economy pointed out that the situation of competing tax liabilities in two states was also discussed, from the perspective of justifying the application of methods for avoiding double taxation provided for in treaties, in paragraph 37 of the Commentary to Articles 23A and 23B of the OECD Model Convention (hereinafter the "OECD MC"). However, the Commentary to the OECD MC does not indicate that such a situation constitutes a condition for applying a double taxation agreement.

In legal scholarship, there is likewise no argument that a taxpayer's being subject to limited tax liability in the other state is a necessary condition for applying a double taxation agreement. The Minister cited theses reaching the opposite conclusion, namely that the application of methods for avoiding double taxation is not dependent on the other state actually exercising its right to taxation provided for in a treaty.

In the opinion of the Minister of Finance and Economy, the interpretation of the term "exempt from tax" referred to in Article 22(1)(d) of the Convention should primarily take into account the purpose and context of that provision. Its purpose is to prevent situations of double non-taxation under the Convention. The scope of that provision should encompass all situations in which income is not taxed in Norway. The term "exempt from tax" used in Article 22(1)(d) of the Convention, as applicable to income earned up to 31 December 2020, should therefore be

interpreted in light of the purpose of that provision and within the context arising from the Convention, i.e. taking into account the various forms of non-taxation provided for under Norwegian law, and not merely the narrow understanding of the term "tax exemption" that may be adopted under Polish tax law.

The Minister also stated that the position expressed in the General Interpretation of the Minister of Development and Finance of 31 October 2016 concerning the application of the relief referred to in Article 27g of the PIT Act to seafarers residing in Poland and deriving income from employment aboard ships operated in international traffic within the meaning of double taxation avoidance agreements remains valid. According to that interpretation, the payment of tax abroad is not a necessary condition for the application of a method for eliminating double taxation and, consequently, for the application of the relevant agreement on avoiding double taxation from which such method derives. Therefore, the non-payment of tax abroad cannot, in itself, constitute grounds for refusing to apply a double taxation agreement.

The Vienna Convention on the Law of Treaties, concluded in Vienna on 23 May 1969 (Journal of Laws of 1990, No. 74, item 439; hereinafter the "VCLT"), provides in Articles 31 and 32 for the possibility of referring to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of the general rule of interpretation described above, or to determine the meaning where such interpretation leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. This additionally confirms the necessity of understanding the term "exempt from tax" in the context of international tax law, and therefore more broadly than under the domestic law of a given state.

Finally, the Minister of Finance and Economy pointed out that the ruling in the present case will have fundamental significance for the application of all double taxation agreements to which Poland is a party. In every case where Poland has a binding agreement with another state, doubts could arise as to whether the application of that agreement depends on the taxpayer being subject to limited tax liability in the other state.

According to the Minister of Finance and Economy, such a situation should be regarded as highly undesirable, as it would create uncertainty for both taxpayers and tax authorities regarding the law in Poland.

7.2. Position of the administrative authority

In its submission of 3 December 2025, the authority, referring to the case under consideration, stated that the evidence examined by the Regional Administrative Court in Gdańsk unequivocally demonstrated that there was no conflict between

unlimited tax liability (in Poland) and limited or unlimited tax liability (in Norway), and therefore the Convention did not apply to the case at all.

Since Norway excludes the possibility of taxing the income earned by the Appellant aboard a ship managed by a Norwegian entity (personnel management), neither the Polish tax administration nor any other authorities or persons may impose upon that state a change in its position in this regard.

The possibility (right) to tax income must result from the binding legal provisions in a given state. Any attempt to interfere with Norwegian tax legislation is not only impermissible but, above all, impossible to carry out. According to the authority, the Regional Administrative Court in Gdańsk completely disregarded the fact that the Convention (or any other double taxation agreement) does not constitute an autonomous basis for taxing income in a state that is party to such an agreement. In order to tax income in a given state, there must exist a legal basis in that state's tax legislation (a statutory provision imposing tax liability).

The reasoning of the decision of the Director of the Tax Administration Chamber in Gdańsk of 29 September 2021 demonstrated that Norwegian tax provisions prevent the taxation of a Polish seafarer working aboard a ship that does not fly the Norwegian flag (i.e. not registered in the NIS or the NOR).

The vessel "N." flew the flag of the Bahamas, and therefore, according to the explanations provided by the Norwegian administration, the Appellant's income from work aboard that vessel could not be taxed in Norway. Consequently, Article 14(3) of the Convention (or any other provision of the Convention) did not apply to such income. Accordingly, the authority argued that the view expressed in the contested judgment, which required the identification of the "enterprise" referred to in that provision, was unfounded.

The aforementioned Article 14(3) of the Convention merely sets out a general conflict-of-laws rule, indicating which state (Poland or Norway) has priority in taxing income derived from work aboard a seagoing vessel where tax liability in respect of that income arises in both states.

Therefore, no additional meaning should be attributed to the wording in that provision that refers to the place of effective management of the enterprise. According to the authority, this wording merely serves as a kind of "connecting factor" for identifying the state entitled to taxation of income, which does not at all mean that the source state will actually exercise that right. This is evidenced, inter alia, by the phrase "may be taxed" in Article 14(3) of the Convention. Whether the source state exercises its right to taxation (here, of income from work aboard a seagoing vessel) is determined by the applicable tax law (in force in Norway).

Whether T. constitutes the enterprise operating the vessel in international traffic within the meaning of Article 14(3) of the Convention, or whether another

enterprise (not identified during the proceedings) should be regarded as such, is irrelevant and immaterial for the resolution of the case.

Had the Appellant performed work aboard a ship registered in Norway, then – despite the absence of an actual tax payment – he would have been entitled to benefit from tax abatement, because the substantive exemption of such income in Norway excludes the obligation to pay tax, but does not eliminate tax liability in that state.

This fact is crucial for the possibility of benefiting from tax abatement in Poland.

7.3. Concluding position of the Appellants

In their submission of 8 December 2025, the Appellants stated that the Convention is intended to prevent double taxation but does not itself determine whether income is subject to taxation in a given state. In light of the excessively formalistic interpretations adopted by the Polish tax authorities, which – according to the Appellants – depart from the purpose of the Protocol amending the Convention, the authorities should clarify the meaning of the following concepts:

1. the arising of tax liability in Norway
2. the exemption of a particular category of persons from taxation of their income.

It is necessary to clarify the understanding of the concept of exemption from taxation in Norway and the manner in which that concept should be interpreted consistently with the purpose of the Protocol. Norway agreed to amend the method for avoiding double taxation in Poland on condition that Poland apply a tax relief mechanism resulting in the effective non-taxation in Poland of income earned aboard ships managed by Norwegian enterprises.

The Supreme Administrative Court, sitting as a panel of seven judges, considered as follows.

8. LEGAL FRAMEWORK

Act of 26 July 1991 on Personal Income Tax (Journal of Laws of 2015, item 2032):

Article 3(1)

Natural persons who have their place of residence within the territory of the Republic of Poland shall be subject to tax liability on their entire income (revenues), regardless of the location of the sources of such revenues (unlimited tax liability).

Article 3(1a)

A person shall be deemed to have their place of residence within the territory of the Republic of Poland if that person:

1. has within the territory of the Republic of Poland a centre of personal or economic interests (centre of vital interests) or
2. stays within the territory of the Republic of Poland for more than 183 days in a tax year.

ARTICLE 27(1)

Subject to Articles 29–30f, income tax shall be levied on the tax base according to the following tax scale: [...].

ARTICLE 27(8)

Where a taxpayer referred to in Article 3(1), in addition to income subject to taxation pursuant to paragraph 1, also earned income from activities performed outside the territory of the Republic of Poland or from sources of revenue located outside the territory of the Republic of Poland, which is exempt from tax under double taxation agreements or other international agreements, the tax shall be determined as follows:

1. the income exempt from tax shall be added to the income subject to income tax, and tax shall be calculated on the aggregate amount of such income according to the scale specified in paragraph 1
2. the percentage rate of tax to the aggregate amount of income thus calculated shall be determined
3. the percentage rate determined pursuant to point 2 shall be applied to the income subject to income tax.

ARTICLE 27(9)

Where a taxpayer referred to in Article 3(1) also derives income from activities performed outside the territory of the Republic of Poland or from sources of revenue located outside the territory of the Republic of Poland, and the applicable double taxation agreement does not provide for the application of the method specified in para. 8, or where the Republic of Poland has not concluded a double taxation agreement with the state in which the income is earned, such income shall be combined with income from sources located within the territory of the Republic of Poland. In such a case, the amount of income tax paid in the foreign state shall be deducted from the tax calculated on the aggregate amount of income. However, such deduction may not exceed the part of the tax calculated before the deduction which proportionally corresponds to the income earned in the foreign state.

ARTICLE 27(9A)

Where a taxpayer referred to in Article 3(1) derives income exclusively from activities performed outside the territory of the Republic of Poland or from sources of revenue located outside the territory of the Republic of Poland, which is not exempt from tax under double taxation agreements, or where the Republic of Poland has not concluded a double taxation agreement with the state in which the income is earned, the rules set out in para. 9 shall apply accordingly.

ARTICLE 27G [TAX ABATEMENT]

ARTICLE 27G(1)

A taxpayer subject to the tax liability referred to in Article 3(1), settling tax in accordance with the principles set out in Article 27(9) or (9a), in respect of income earned outside the territory of the Republic of Poland during the tax year:

1. from the sources referred to in Articles 12(1), 13 or 14 or
2. from property rights in the scope of copyrights and related rights within the meaning of separate regulations, arising from artistic, literary, scientific, educational or journalistic activity performed outside the territory of the Republic of Poland, excluding income (revenue) derived from the use or disposal of such rights, shall have the right to deduct from the income tax calculated in accordance with Article 27, reduced by the amount of the contribution referred to in Article 27b, an amount calculated in accordance with para. 2.

ARTICLE 27G(2)

The deductible amount shall constitute the difference between the tax calculated in accordance with Article 27(9) or (9a) and the amount of tax calculated on the income from the sources referred to in para. 1 by applying to such income the rules set out in Article 27(8).

ARTICLE 27G(3)

The deduction shall not apply where the income from the sources referred to in para. 1 was earned in countries or territories listed in the regulation issued pursuant to Article 25a(6).

ARTICLE 27G(4)

Paragraphs 1–3 shall apply accordingly to the tax calculated pursuant to Article 30c.

Convention between the Republic of Poland and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and the Protocol thereto, signed in Warsaw on 9 September 2009 (Journal of Laws 2010 No. 134, item 899; version in force from 2 April 2013)

ARTICLE 3(1)(G)

For the purposes of this Convention, unless the context otherwise requires:

[...]

(g) the term "international traffic" means any transport by a ship or aircraft, except where the ship or aircraft is operated solely between places situated within a Contracting State.

ARTICLE 3(2)

As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that

time under the law of that State for the purposes of the taxes to which the Convention applies, with any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

ARTICLE 14(3)

Notwithstanding the preceding provisions of this Article, remuneration derived from employment exercised aboard a ship operated in international traffic by an enterprise of a Contracting State may be taxed in that State.

ARTICLE 22(1)

In the case of Poland, double taxation shall be avoided as follows:

(a) Where a resident of Poland derives income which, in accordance with the provisions of this Convention, may be taxed in Norway, Poland shall exempt such income from tax, subject to the provisions of subparagraph (b) of this paragraph.

(b) Where a resident of Poland derives income or capital gains which may be taxed in Norway, in accordance with the provisions of Articles 10, 11, 12, 13 or para. 7 of Article 20 of this Convention, Poland shall allow as a deduction from the tax on the income or capital gains of that person an amount equal to the tax paid in Norway. However, such deduction shall not exceed that part of the tax, as computed before the deduction is given, which is attributable to the income or capital gains derived from Norway.

(c) Where, in accordance with any provision of this Convention, income derived by a resident of Poland is exempt from tax in Poland, Poland may nevertheless, in calculating the amount of tax on the remaining income or capital gains of such resident, take into account the exempted income.

(d) Notwithstanding the provisions of subparagraph (a), double taxation shall be avoided by applying the credit method referred to in subparagraph (b) of this paragraph where a resident of Poland derives income which may be taxed in Norway, in accordance with the provisions of this Convention, but which, under the domestic law of Norway, is exempt from tax.

9. WITH RESPECT TO THE GROUNDS OF THE CASSATION APPEAL

9.1. Preliminary remarks

In view of the case being referred for examination by a panel of seven judges of the Supreme Administrative Court, it became necessary to address the grounds raised in the authority's cassation appeal. These grounds determine the scope of review in cassation proceedings. The cassation appeal contains allegations of violations of both procedural law and substantive law. In such circumstances, procedural

objections are, as a rule, examined first. Typically, such objections concern defects in the establishment of the facts of the case, which makes it appropriate to consider them before allegations concerning substantive law.

However, the specific nature of the present case requires that the allegations concerning substantive law be discussed and addressed first. This is because the scope of any evidentiary proceedings, as well as the determination of whether the Appellant's income is subject to taxation in Poland, depends on the interpretation of the Convention and the Polish tax statute.

Before assessing the grounds of the cassation appeal, it should be noted that a position in the case was submitted by an authority that is not a party to the proceedings, namely the Minister of Finance and Economy. The Supreme Administrative Court observes that although the newly introduced Article 106 § 3a of the Law on Proceedings before Administrative Courts authorises an administrative court only to request a position from an authority that is not a party to the proceedings, it should be accepted that this competence also includes taking into account such a position where it is submitted to the court on that authority's own initiative. Such a situation occurred in the present case. On this basis, in resolving the disputed issues arising in the proceedings, the Supreme Administrative Court took into consideration the arguments presented by the Minister of Finance and Economy, who, pursuant to Article 11(1)(1) of the Act of 16 November 2016 on the National Revenue Administration (Journal of Laws of 2025, item 1131, as amended), is an authority of the National Revenue Administration (KAS). Under that Act (Article 12), the minister competent for public finance coordinates and cooperates in shaping state policy within the scope of KAS tasks. In order to ensure the efficient and effective performance of KAS tasks, the minister competent for public finance coordinates their implementation and supervises KAS organisational units, and in particular may:

- request information, materials, explanations and documents regarding the performance of tasks by KAS organisational units
- commission analyses within a specified scope.

(ARTICLE 12C(1)(1) AND (2) OF THE ACT)

The Minister's position is particularly desirable in cases involving serious legal doubts concerning the application of tax law, especially in matters falling within the Minister's competence regarding cooperation in the drafting of double taxation agreements concluded by Poland, as discussed below.

At this point, it should be emphasised that the view presented by the Minister in the present case remains, in essential respects, contrary to the position adopted by the tax authority.

9.2. Application of the Convention to the income of Polish seafarers

At the outset, it was necessary to determine whether the Convention, and in particular Article 14(3) thereof, applies to a Polish seafarer deriving income from employment aboard a seagoing vessel operated in international traffic by a Norwegian enterprise, where the vessel is not registered in a Norwegian register. In its position, the authority clearly emphasised that there was no need in the present case to determine the entity operating the vessel in international traffic. According to the authority, the taxpayer neither paid tax in Norway nor was subject there to limited tax liability. By contrast, in the view of the Appellants and the Minister of Finance and Economy – a view shared by the Supreme Administrative Court – neither being subject to limited tax liability in Norway nor the actual payment of tax in Norway constitutes a necessary condition for the application of the Convention.

It should be recalled that in 2012 the Convention was amended through revisions to Article 14 and Article 22(1). This amendment was significant insofar as it altered the rules governing the taxation of seafarers working aboard vessels connected with Norway. Prior to the amendment, the Convention applied to income earned by seafarers aboard ships registered in the NIS and NOR. However, as follows from the explanatory memorandum to the bill introducing the amendments to the Convention, the practice of shipowners registering vessels under low-cost flags gave rise to difficulties concerning the taxation of seafarers earning income aboard ships not registered in Norway.

(Parliamentary print No. 818 of the 7th term of the Sejm, available at https://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=818)

Accordingly, Article 14(3) of the Convention was amended so as to cover income earned by seafarers aboard seagoing vessels operated in international traffic by enterprises having their seat in Norway. This did not alter the legal situation of seafarers earning income from work aboard ships registered in Norway, because Norwegian domestic law exempts such income from taxation.

As regards the remaining category of seafarers satisfying the conditions set out in Article 14(3) of the Convention and not working aboard ships registered in Norway, Article 22 of the Convention was also amended in order to exempt their income from taxation by changing the applicable method for avoiding double taxation. As a consequence, the so-called tax abatement regulated in the Polish Personal Income Tax Act became applicable to their income.

The Supreme Administrative Court held that the Minister of Finance and Economy was correct in stating that, for the application of a double taxation agreement, an actual conflict between unlimited and limited tax liability (that is, the actual simultaneous taxation of the same income in both countries) is not required.

The crucial condition for applying a double taxation agreement is the potential for taxation of a given person in both states, arising from their respective domestic tax laws. Such a situation exists in the present case. There is a general conflict between taxation in the state where the source of income is located (income from work aboard a vessel operated by a Norwegian enterprise) and taxation in the state of tax residence (Poland) – in other words, a residence–source conflict.

The Minister of Finance and Economy presented views from legal scholarship indicating that they do not support the proposition that being subject to limited tax liability in another state is a necessary condition for the application of a double taxation agreement. On the contrary, it emphasised that the relevant condition is the potential for taxation in the source state (by referring to the views expressed by K. Vogel in E. Reimer, A. Rust, K. Vogel, *On Double Taxation Conventions*, 4th ed., 2015, pp. 1587 and 1596 as well as H. Litwińczuk, *International Tax Law*, Warsaw 2020, pp. 367–368 and 372).

It should be noted, however, that in the present case such source taxation resulting from limited tax liability may potentially arise, because the provisions of the Convention allow Norway to tax such income. The consequence of this is the establishment of a conflict-of-laws rule that will apply if Norway decides to exercise its right to tax such income.

The Minister of Finance and Economy also correctly referred to the OECD MC. The Supreme Administrative Court merely observed that Articles 23A and 23B apply to numerous factual situations described in the Commentary that depart from the general principles to which the authority limits itself in its position.

9.3. Consequences of the amendment to the Convention for the Taxation of Seafarers' Income

The explanatory memorandum to the bill ratifying the Protocol amending the Convention stated that:

"The subject of the amendment is the deletion of the second sentence of Article 14(3) of the Convention. This provision, contained in the Convention concluded between Poland and Norway on 9 September 2009, provides for the taxation of seafarers employed aboard ships registered in the Norwegian International Ship Register (NIS) exclusively in their state of residence. The purpose of the Protocol is to introduce into the Convention the general principles of taxation for this group of taxpayers (provided for in the first sentence of Article 14(3)), which, in the case

of Polish residents employed aboard Norwegian seagoing vessels, due to exemptions existing under Polish and Norwegian domestic law, will result in the exclusion of this occupational group from taxation."

To summarise, as a result of the amendment to the Convention:

The provision specifically concerning seafarers working aboard ships registered in the Norwegian ship register was removed.

A general rule was introduced, resulting from the amended first sentence of Article 14(3) of the Convention, according to which income earned by seafarers from employment aboard a seagoing vessel operated in international traffic by a Norwegian enterprise is taxable in Norway; this is the provision that determines the applicability of the Convention.

The place of registration of vessels became irrelevant for the application of the Convention.

Following the amendment and the application of the general rule under Article 14(3) of the Convention, seafarers working aboard ships registered in Norway still do not pay tax because their income from such employment benefits from an exemption from taxation under Norwegian law. By contrast, Norway does not tax the remuneration of seafarers working aboard Norwegian-operated ships not registered there (such income is exempted from taxation).

As a consequence of introducing the exemption-with-progression method, Poland is not precluded under the Convention from taxing income earned in Norway that is not effectively taxed in the source state. This also applies where the Polish resident simultaneously earns no other income from sources located in Poland.

To summarise this part of the analysis, it may be stated that the Convention applies to the income of two categories of Polish seafarers: those working aboard ships registered in the Norwegian register and those working on other ships operated in international traffic by Norwegian enterprises.

The first group is subject to taxation in Norway; however, the tax at the source amounts to "0", as they benefit from an exemption on their income. As regards the second group, the Norwegian tax provisions do not apply to their income at all. Consequently, such income could potentially be taxed in Poland; however, the tax abatement applies to them because the Convention changed the method for eliminating double taxation and, as a result, the tax abatement under the Polish PIT Act applies to such income.

As was correctly noted in the explanatory memorandum to the draft act ratifying the Protocol, the Convention itself does not lead to double non-taxation of seafarers' income. This results from the domestic laws of the contracting states – parties to the Convention – through the exemption from taxation granted to one group of seafarers (in Norway) and the abatement granted to the other group (in Poland).

Accordingly, the legal and tax situation of seafarers has become dependent on the domestic law of the contracting states: in the first case, on the exemption provided under Norwegian law, and in the second case, on the application of the tax abatement under Polish law. Therefore, any change resulting in the taxation of such income did not require an amendment to the Convention and depended solely on domestic legislation. It must be clearly emphasised that, contrary to the authority's assertions, the Convention did not create any tax exemption, since such exemptions resulted from the domestic legislation of the contracting states. The correctness of such an interpretation of the Convention is also confirmed by the circumstances surrounding the conclusion of the Protocol amending the Convention.

Since double taxation agreements are international treaties, they are subject to the rules of interpretation set out in the Vienna Convention on the Law of Treaties ("VCLT"). Furthermore, agreements based on the OECD MC usually contain a provision (based on Article 3(2) of the OECD MC) stating that, unless the context otherwise requires, any term not defined in the OECD MC shall have the meaning that it has under the law of the state applying the OECD MC for the purposes of the taxes to which it applies. At the same time, the meaning arising from the tax legislation of that state takes precedence over the meaning given to it by other provisions of national law. This means that priority should be given to the meanings assigned by the treaty itself. If a particular term is not defined in a specific double taxation agreement, recourse should be had to the meaning assigned by the tax law of the contracting state, only where the context does not otherwise require. It is therefore not desirable to define such provisions by reference to their ordinary meaning using dictionary definitions.

As provided by the general rule of interpretation set out in Article 31(1) of the VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. The VCLT provides that, for the purpose of interpreting a treaty, the context includes the text, its preamble and annexes, any agreement relating to the treaty made between all the parties in connection with the treaty and any instrument made by one or more parties in connection with the treaty and accepted by the other parties as being related to the treaty. Together with the context, account shall also be taken of any subsequent agreement between the parties regarding the interpretation of the treaty or its application, any subsequent practice in the application of the treaty establishing the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between the parties. A special meaning shall be given to a term if it is established that such was the intention of the parties. Article 32 of the VCLT, in turn, provides that recourse may be had to supplementary means of interpretation, including the preparatory

work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure or (b) leads to a result which is manifestly absurd or unreasonable.

It must be emphasised that the normative amendment to the Convention was significant. Accepting the authority's position would mean that no change whatsoever occurred in the legal situation of Polish seafarers, despite the fact that the wording of the provisions was amended and the amendment was extensively discussed in the explanatory memorandum to the ratifying statute, in the General Interpretation of the Minister of Finance and in the current position of the Minister of Finance and Economy.

That authority (the minister competent for public finance matters) participates in the conclusion of double taxation agreements pursuant to § 2 et seq. of the Regulation of the Council of Ministers of 28 August 2000 on the implementation of certain provisions of the Act on International Agreements, issued on the basis of the Act of 14 April 2000 on International Agreements (Journal of Laws No. 39, item 443; see in this respect K. Dybiec, "Negotiation of Double Taxation Agreements", in I. Mirek, T. Nowak (eds), *Financial Law after the Political Transformation: International and European Tax Law*, Łódź 2013, pp. 358–367).

Similarly, the materials submitted by the Appellants, consisting of correspondence between Norwegian shipowners and the Minister of Finance, confirm the correctness of the above interpretation of the Convention.

On the basis of the available materials related to the amendment of the Convention, it may therefore be concluded that the intention behind the amendment was to create a legal framework under which the remuneration of a Polish seafarer might not be subject to taxation at all. Naturally, this applies where the remuneration was earned in connection with employment exercised aboard a ship operated in international traffic by a Norwegian enterprise.

An issue that must also be determined is the condition specified in Article 22(1)(d) of the Convention for applying the amended method of eliminating double taxation, namely the exemption of seafarers' employment income in Norway. The above considerations concerning the amendment of the Convention remain relevant in this respect. Additionally, it may be noted that, in the absence of a definition of the term "exempt from tax" under the international agreement, the intention of the contracting parties is of particular importance and, as indicated above, that the intention was to eliminate the taxation of remuneration earned by seafarers employed by a Norwegian enterprise in connection with employment aboard a ship operated in international traffic.

In this context, the term "exempt" refers to income in respect of which Norway refrains from levying tax. Such a conclusion also follows from an analysis of the English-language version of the Convention, which is decisive in this respect pursuant to the provisions of the Convention itself and Article 33(1) and (2) of the Vienna Convention on the Law of Treaties. Specifically, Article 22(1)(d) of the Convention uses the phrase "exempt from tax". In English-language legal scholarship, the concept of "tax exemption" is attributed a broad meaning. By way of example, J. W. Martin points out that it may be understood narrowly – as an explicit statutory exclusion from the scope of taxation – as well as broadly, in the economic sense, as the avoidance of a financial burden ("The 'tax exemption' may be used in the narrow sense of an explicit exclusion from the scope of a tax or in the broad economic sense of omission from a levy" – J. W. Martin, *The Social Aspects of Tax Exemption, The Annals of the American Academy of Political and Social Science*, 1936, Vol. 183, *Government Finance in the Modern Economy*, pp. 48 et seq.).

In the American legal system, the origins of the institution of tax exemption are associated with both the taxation of Native Americans and issues concerning the division of taxing powers between state and federal authorities with respect to American citizens (see in this regard F. J. Goodnow, "The Nature of Tax Exemptions", *Columbia Law Review* 1913, Vol. 13, No. 2, pp. 104–120; G. E. Putnam, "Income Tax Exemption", *The Bulletin of the National Tax Association*, 1920, Vol. 6, No. 3, pp. 75 et seq.; regarding this terminology, see also M. Wołowiec, "Discretionary Nature of the Tax Authority's Decision in the Matter of the Tax Write-Offs", *Bulletin of the Association of Graduates and Friends of the Faculty of Law of the Catholic University of Lublin* 2022/19, p. 350).

The Minister of Finance also addressed the disputed issue in the General Interpretation of 31 October 2016, which points to the possibility of applying the tax abatement where seafarers derive income from work performed aboard a ship and have not paid tax abroad (*Official Journal of the Ministry of Development and Finance*, 2016.12 of 4 November 2016).

The Minister expressly disagreed with the thesis that paying tax in the other state constitutes the overriding prerequisite for applying the proportional credit method. "No element of the structure of this method provides that the payment of tax is a qualifying condition for its application. Failure to pay tax in the source state merely means that, when applying the proportional credit method, the taxpayer is unable to deduct foreign tax because no tax burden has in fact been incurred. In order for the conventional method of avoiding double taxation to apply, it is sufficient that the convention grants the source state the possibility to tax such income."

This view should be shared and treated as a general principle. Nevertheless, the multiplicity of agreements and factual situations, including those related to the MLI

Convention (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting), requires that each factual and legal situation be examined carefully. It must also be borne in mind that the interpretation concerns seafarers who are Polish tax residents.

In conclusion, the Minister stated that "the right to the relief referred to in Article 27g of the Act shall be available to a seafarer who performs work aboard a seagoing vessel operated in international traffic by an enterprise of Norway. Fulfilment of the conditions specified in Article 14(3) of the Convention will result in the applicability of the provisions of that Convention, and consequently also the relief referred to in Article 27g of the Act."

Applying the above to the present case, it should be noted that it is essential to determine whether the information obtained from the Norwegian tax administration demonstrates that the Appellant earned remuneration in connection with employment exercised aboard a seagoing vessel operated in international traffic by a Norwegian enterprise. In such circumstances, the income should potentially be taxable in Norway. Meanwhile, the Norwegian authorities indicate that, since the Appellant performs work outside Norway and is not a Norwegian resident, he is not subject to taxation in Norway. This merely means that, despite having such a possibility, Norway has chosen not to tax that income.

The Supreme Administrative Court states that the burden rests on the taxpayer to demonstrate that he satisfies the conditions for his income to be recognised as exempt under the Convention. Where doubts arise as to whether the taxpayer is entitled to benefit from the proportional credit method, the tax authority may examine this issue in tax proceedings, during which it is entitled to contact to the Norwegian tax administration in order to verify the information that was submitted.

Accordingly, in the proceedings to be conducted anew by the tax authorities, it will be necessary to determine whether the taxpayer derived income while working aboard a seagoing vessel operated by a Norwegian enterprise in international traffic.

10. A VESSEL OPERATED BY A NORWEGIAN ENTERPRISE IN INTERNATIONAL TRAFFIC WITHIN THE MEANING OF THE CONVENTION

The Supreme Administrative Court observes that, for the resolution of the present dispute, it is necessary to determine the meanings of *the entity operating the vessel* and of *international traffic*. When re-examining the case, the authorities shall take into account the interpretation of these concepts presented in this judgment.

As correctly explained in the judgment of the Regional Administrative Court in Gdańsk of 5 November 2025 (Case No. I SA/Gd 631/25; published in the Central

Database of Administrative Court Judgments), "the place of effective/actual management of the enterprise operating the vessel is, in other words, the place from which key decisions concerning the activity of a given entity are taken, for example in the field of crewing the vessel. Enterprises operating vessels, due to the number of vessels and the competencies of personnel, divide vessel management into ownership management (seat of the company's management board) – general management; technical vessel management – technical management; and operational vessel management – operational management. Management consists in the operational exploitation of the vessel, whereas technical management does not affect the day-to-day operation of the vessel."

The Court continued: "In international transport, due to the multiplicity of entities operating the vessel, it is necessary to narrow the meaning of this term. [... R]egardless of the terminology that may be applied to an entity operating a vessel without owning it (shipping company, ship's operator, etc.), what is important is whether such an entity exercises operational control over the vessel, i.e. whether it decides on the essential elements of the vessel's operation, these elements being decisions, from the carrier's perspective, concerning the acceptance of cargo and approval of the route of carriage. By contrast, [...] issues such as whether a given entity is responsible for the vessel's safety, its technical condition or the completion of the crew and provision of services to the crew, are of secondary importance."

Attention should also be drawn to the issue of time chartering (Article 188 of the Maritime Code) and the content of the charterparty agreement. "The charterer determines both merely and fundamentally the manner in which the vessel is to be employed. While the owner or shipowner retains possession of the vessel (exercised by the vessel's master), matters relating to carriage often remain exclusively within the charterer's discretion. In the case of a short-term charter, where the charterparty specifies the type of cargo to be carried and the area of operation (routes of carriage), the charterer generally cannot be regarded as the entity operating the vessel. However, in the case of a long-term charter, this cannot be excluded (C. Łuczywek, D. Pyć, I. Zużewicz-Wiewiórowska – authors of the commentary to Article 188 of the Maritime Code, WKP 2022, available at lex.pl, provide the example of a vessel chartered for 25 years), where the clauses of the charterparty grant the charterer freedom in disposing of the vessel. In such circumstances, the charterer may be regarded as the entity operating the vessel."

If the powers of the Norwegian entity (T.) are limited to matters of technical operation and crew services, it cannot be ruled out that another entity is in fact the operator of the vessel. On the other hand, if the scope of those powers corresponds to the above-described definition of vessel operation, then that entity should be

regarded as one of the operators of the vessel. It is essential, however, that the vessel be operated in international traffic.

As regards the issue addressed in this reasoning – defining the concept of international traffic – the Court shares the view of the Minister of Finance and Economy that this concept should be interpreted in accordance with the definition in the relevant double taxation agreements, including the agreement with Norway. In the present case, however, there is no dispute that the Appellant worked aboard a vessel operated in international traffic; therefore, there are no grounds for further consideration of this issue.

11. REMAINING GROUNDS OF THE CASSATION APPEAL

In the principal part of its reasoning, the Supreme Administrative Court addressed the issue of interpreting the provisions that may apply in the case concerning the taxation of seafarers' income under substantive law, particularly the provisions of the Convention (the wording of which that was applicable to the period at issue).

The Supreme Administrative Court interpreted those provisions and also indicated the course of action to be followed by the authorities, as determined precisely by that interpretation. In the present case, the interpretation of the provisions determines the scope of the evidentiary proceedings required, insofar as there are grounds for challenging the annual tax settlement submitted by the Appellants.

In this context, the grounds of the cassation appeal alleging violations of procedural law must be regarded as unfounded. Their wording and formulation moreover indicate that the Director of the Tax Administration Chamber in Gdańsk also made their effectiveness dependent upon the validity of the allegations concerning violations of substantive law. In the individual grounds, the Director referred to the proper assessment of the evidence collected in the case and to the authorities' "correct legal assessment thereof through the finding that the Convention could not apply in the case due to the lack of taxation in Norway of the taxpayer's income derived from employed work aboard a vessel".

Likewise, the alleged infringement of Articles 141 § 4 and 133 § 1 of the Law on Proceedings before Administrative Courts was said to consist in the "defective reasoning of the judgment manifested by the Court's omission of the authority's arguments concerning the absence of grounds for applying the Convention". The Supreme Administrative Court held that the reasoning of the contested judgment contains all the elements required under Article 141 § 4 of the Law on Proceedings before Administrative Courts. A court's failure to address every argument raised during the proceedings does not constitute a violation of that provision. Such an obligation concerns only those arguments whose omission could affect the substance

of the ruling. The Regional Administrative Court in Gdańsk addressed all material issues, including the correctness of applying the Convention.

Accordingly, in light of the unfounded nature of the allegations concerning violations of substantive law, the allegations concerning violations of procedural law likewise proved unfounded.

CONCLUSION

When re-examining the case, the authority shall comply with the guidance given in the reasoning of this judgment. In particular, it shall definitively determine by which enterprise operating the vessel in international traffic the Appellant was employed. Depending on that determination, the authority shall either apply the Convention and the Personal Income Tax Act, conclude that another double taxation agreement applies or determine that the Appellant derived income in a country with which Poland has not concluded such an agreement. In making these determinations, the authority shall rely on the findings and legal conclusions set out in the present reasoning.

In view of the foregoing, the Supreme Administrative Court, pursuant to Article 184 of the Law on Proceedings before Administrative Courts, dismissed the cassation appeal. The costs of the cassation proceedings were awarded pursuant to Article 204(2) in conjunction with Article 205 § 2 of the Law on Proceedings before Administrative Courts, in conjunction with § 14(1)(2)(a) and § 14(1)(1)(c) of the Regulation of the Minister of Justice of 22 October 2015 on fees for the activities of legal advisers (Journal of Laws of 2023, item 1935, as amended).

BOOK REVIEWS

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*Dominika Uczkiewicz**

Patrycja Grzebyk, Bartłomiej Krzan, Karolina Wierczyńska, *Polish Contributions to International Criminal Law*,

Brill/Nijhoff, Leiden, Boston: 2025, pp. xi + 463
ISBN: 978-90-04-71268-3

The monograph *Polish Contributions to International Criminal Law*, co-authored by Patrycja Grzebyk, Bartłomiej Krzan and Karolina Wierczyńska, constitutes a comprehensive study dedicated to the contribution of Polish scholars, diplomats and institutions to the development of public international law and international criminal law. The book was originally published in Polish by the Publishing House of the Institute of Justice in 2023, and subsequently in 2025 as an English-language edition by Brill. It exhaustively reconstructs the century-long history of Polish legal thought, restoring the memory of key experts and initiatives that played a pivotal role in shaping the definitions of international crimes, the principles of individual criminal responsibility and the procedures for their enforcement.

The book is divided into two parts: a historical section and a thematic section. The first part analyses the development of Polish doctrine in chronological order. Chapter I (1918–1939) focusses on the regaining of independence, the participation of Poles in the Versailles Peace Conference, their work on the Commission on the Responsibility of the Authors of the War and their activities in international legal organisations, in particular the International Association of Penal Law. Chapter II (1939–1945) outlines the efforts of the Polish government-in-exile (operating in London between September 1939 and July 1945) and of the agencies of the Underground State in occupied Poland to document Nazi crimes. This section also

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discusses the involvement of Polish legal scholars-in-exile during the Second World War in drafting principles for prosecuting international crimes, as expressed in the St James' Palace Declaration of 13 January 1942 and in the operations of the United Nations War Crimes Commission (UNWCC). Chapter III (1945–1989) details the Polish reception of the Nuremberg law, the Polish delegation's participation in the proceedings before the International Military Tribunal as well as the Polish investigative bodies' coordination of the evidence-collecting of wartime crimes in Poland (i.e. the Chief Commission for the Investigation of German Crimes in Poland) and in Germany (i.e. the Polish Military Mission in Germany), the jurisprudence of the Polish Supreme National Tribunal and the engagement of Polish delegates within the UN during the Cold War. Chapter IV (1989–2018) analyses the period of political transformation, including Tadeusz Mazowiecki's role as the UN Special Rapporteur on Human Rights in the former Yugoslavia, Poland's commitment to establishing the International Criminal Tribunal for the former Yugoslavia, initiatives in drafting the Rome Statute of the International Criminal Court,[1] Polish judges among international bodies and the activities of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. All the chapters are organised according to a logical structure, linked by sections devoted to legislation, the judiciary and academic life in the respective periods. The second part of the book is thematic, focussing on the genesis of the definitions of international crimes and the principles governing the prosecution and punishment of their perpetrators. Chapters V–IX present the conceptual evolution of the definitions of core crimes and the Polish contribution to criminalising the crime of aggression, war crimes, crimes against humanity and genocide. Chapters X–XII discuss procedural aspects of international criminal law and the stance of the Polish legal scholarship regarding the rules of exercising criminal jurisdiction, individual responsibility for international crimes and the non-applicability of statutory limitations to international crimes.

The authors of the monograph made use of carefully selected sources: the rich domestic and foreign secondary literature and archival research conducted both in Poland and abroad, including the Wiener Library in London, the General Sikorski Institute, the Peace Palace Library in The Hague, the UN Archives in Geneva and the Central Archives of Modern Records in Warsaw. Of key significance are the preparatory works (*travaux préparatoires*) of international conventions, UN General Assembly resolutions and reports from expert bodies, such as the International Law Commission and the UNWCC. Extensive use was also made of jurisprudence,

[1] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002). 2187 UNTS 90.

both international and the rich body of decisions from domestic Polish common courts and the Supreme National Tribunal, which are rarely cited in the foreign literature. In light of such scrupulous archival research, it would have been valuable to supplement the compiled sources with the original text of the Polish indictment at the Nuremberg Trial discussed in Chapter II. Basing the discussion of the report titled *German Crimes Against Poland: Official Report of the Polish Government to be Submitted to the International Military Tribunal* (1945)[2] on Gabriel Finder and Alexander Prusin's commentary led to the repetition of incomplete information regarding the report's authorship[3] (it was signed by Poland's delegate to the UN-WCC, Mieczysław Szerer, and drafted jointly by Szerer and Manfred Lachs, not by Lachs alone) and the inclusion of the notion of "intended systematic genocide" in the document. The term "genocide" was not actually used in the report *German Crimes against Poland*, which nevertheless describes with scrutiny the methods of systematic extermination of ethnic and national groups employed by the occupying authorities in Poland. It is also worth drawing attention to a unique source utilised in the monograph: interviews which the authors conducted with distinguished experts, Polish practitioners and theoreticians of international law.

Owing to its chosen theme and methodology – which combines legal theory, systemic analysis and comparative methods while recognising "historical interpretation as an element that is necessary to the comprehension of law" – the monograph fits squarely into a new wave of research on international criminal law that connects legal theory and history, institutional history and biographical perspectives. In a work that is fundamental to shaping this direction of international legal scholarship[4] (i.e. moving away from strict doctrinal and systemic interpretation towards reconstructing the historical context in which specific ideas arose and uncovering the motivations of their authors), Martti Koskenniemi argued that understanding international law requires not only knowledge of theory and doctrine, but also of the history of the individuals who shaped it. Over the past two decades, this call has been reflected in numerous publications by foreign scholars, including Mark Lewis, Kerstin von Lingen, Philippe Sands, Mark Mazower, Immi Tallgren and Frédéric Mégret.[5] The time frame adopted by the authors of *Polish Contributions*

[2] Republic of Poland, *German crimes against Poland. Official report of the Polish Government to be submitted to the International Military Tribunal*, London: 1945.

[3] G. Finder, A. Prusin, *Justice behind the Iron Curtain. Nazis on Trial in Communist Poland*, University of Toronto Press, Toronto-Buffalo-London: 2018, p. 57.

[4] M. Koskenniemi, *The Gentle Civilizer of Nations The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge: 2001, pp. 5–7.

[5] M. Lewis, *The Birth of the New Justice. The Internationalization of Crime and Punishment 1919–1950*, Oxford University Press, Oxford: 2014; K. von Lingen, *"Crimes against Humanity". Eine Ideengeschichte der Zivilisierung von Kriegsgewalt 1864–1945*, Ferdinand Schöningh, Padeborn: 2018; P. Sands,

to International Criminal Law is broader than that of the aforementioned studies, which focus mainly on the first few decades of the 20th century, the origins of the UN and the early post-war period, which serves as a major asset of this monograph. The broad chronological framework expands the research field and allows one to trace the trajectory of key concepts (such as the criminalisation of aggression, war crimes, the persecution of minorities, crimes against humanity, genocide or the definition and penalisation of terrorism) over a longer horizon. This invites questions about the continuity and evolution of ideas whose roots go back over a century, while assessing their relevance in subsequent decades up to modern times, including during treaty negotiations that were not always successful.

Another major asset of the monograph is its commemoration of forgotten figures who participated in (and frequently initiated) work on fundamental instruments of international law. These include draft frameworks for prosecuting war crimes prepared even before 1945 (including within the UNWCC), the Convention on the Prevention and Punishment of the Crime of Genocide,[6] the Convention for the Protection of Cultural Property in the Event of Armed Conflict[7] and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[8] Both parts of the book – historical and thematic – examine the involvement of Polish lawyers and investigative bodies in documenting international crimes committed during WWII and prosecuting their perpetrators before the International Military Tribunal in Nuremberg, the Supreme National Tribunal and Polish domestic courts; in this context, the reception and interpretation of Nuremberg law in Poland is also addressed. The authors demonstrate that Polish jurists and diplomats – even those operating within the Eastern Bloc during the Cold War – exerted a real influence on definitions within international criminal law and codification processes at the UN. By emphasising the importance of Polish contributions to the development of this discipline, the work serves as a valuable contribution to deconstructing dominant narratives and breaking away from existing research paradigms that marginalise Central and Eastern Europe. Such an approach allows the book's conclusions to be read within the framework of Second World Approaches to International Law (SWAIL), a new, critical stream of

East West Street: On the Origins of Genocide and Crimes Against Humanity, Orion Publishing, London: 2017; F. Mégret, I. Tallgren (eds.), *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents*, Cambridge University Press, Cambridge: 2020.

[6] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

[7] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956), 249 UNTS 240.

[8] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted 26 November 1968, entered into force 11 November 1970), 754 UNTS 73.

research on international law and international relations.[9] The book undeniably fills many gaps in the history of international law, as well as in Polish legal history and biographical studies, which in recent years have helped recall the meritorious, though often forgotten figures of Polish legal theory and practice.[10]

The innovative nature of the approach adopted in the book is demonstrated by how it supplements the fragmentary narratives dominant in previous studies and systematically organises scattered knowledge regarding Polish international legal thought after 1918 and its representatives' contributions to the development of international criminal law. The work sheds new light not only on the achievements of well-known figures such as Rafał Lemkin and Hersch Lauterpacht, but also on Emil Stanisław Rappaport, Ludwik Ehrlich, Stefan Glaser, Jerzy Sawicki, Manfred Lachs, Tadeusz Cyprian and Helena Wiewiórska. It describes the engagement of the Polish delegates and representatives during UN treaty negotiations and sessions of the International Law Commission, and it provides a detailed account of Polish participation in international criminal justice, including the work of the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and the EULEX Mission in Kosovo. Although many of the individuals featured in the study are introduced only by name and position, the authors deserve immense praise for establishing the identities of so many experts involved over the course of a century in advancing the discipline of international criminal law. Any remaining gaps regarding the details of their biographies and individual contributions (particularly of the women rediscovered through the book) can be taken as an impetus for further research inspired by the authors of this outstanding monograph.

[9] M. Wasiński, P. Labuda, *Special Issue Editorial: Second World Approaches to International Law*, 28(2-3) International Community Law Review 89 (2026).

[10] *See e.g.* A. Przyborowska-Klimczak et al. (eds.), *Polska nauka prawa międzynarodowego. Dziedzictwo przeszłości i wyzwania współczesności* [Polish scholarship of international law: The legacy of the past and contemporary challenges], KUL, Lublin: 2022; P. Grzebyk, R. Tarnogórski (eds.), *Siła prawa zamiast prawa siły. Ludwik Ehrlich i jego wkład w rozwój nauki prawa międzynarodowego oraz nauki o stosunkach międzynarodowych* [The rule of law instead of the law of force: Ludwik Ehrlich and his contribution to the development of international legal scholarship and international relations], PISM, Warszawa: 2020; D. Uczkiewicz, *Accountability for War Crimes in the Policy of the Polish Government-in-Exile: A Legal and Historical Analysis*, Brill-Nijhoff, Leiden-Boston: 2026; Sands, *supra* note 5; P. Madajczyk, *The Biographical Landscapes of Raphael Lemkin*, Routledge, Abingdon-on-Thames: 2024 and the biographical literature on Lemkin and his contemporaries cited there.

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*Michael Riepl**

Lauri Mälksoo, *Russia, the Soviet Union, and Imperial Continuity in International Law*,

Oxford University Press, Oxford: 2025, pp. x + 241
ISBN: 978-0-198-95593-1

Since 2022 many authors have been speaking about a "return" of Russian imperialism. But was it ever gone? Lauri Mälksoo's latest book, *Russia, the Soviet Union, and Imperial Continuity under International Law*, provides an answer. The author is one of the most authoritative voices when it comes to Russia's relationship with international law. In fact, the current book may be called a sequel to his monograph *Russian Approaches to International Law* (2015). In that book, he mostly focussed on the Tsarist era, when Russia promoted its notion of "civilizational distinctness" in international law. In *Russia, the Soviet Union, and Imperial Continuity under International Law*, in turn, Mälksoo pays special attention to the Soviet period (1917–1991) to prove "imperial continuity" between Tsarist Russia, the Soviet Union and today's Russian Federation. More precisely, he argues that certain legal concepts served to justify imperialist practices since the Tsarist Empire. Contrary to popular belief, this imperial legacy was not discontinued after the Russian Revolution (1917), even though the Soviets employed strong anti-imperialist rhetoric. Rather, imperial ideas lived on and continued to shape the legal discourse as well as the state identity in the Soviet Union as well as in today's Russian Federation. In other words: The Empire did not return; it never left!

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1. METHODOLOGY AND SOURCES – TAKING LEGAL SCHOLARSHIP SERIOUSLY

Mälksoo's main sources are works by eminent Russian legal scholars, including Imperial scholars such as Petr Shafirov (1670–1739) and Fedor Martens (1845–1909), Soviet scholars such as Evgeny Pashukanis (1891–1937), Evgeny Korovin (1892–1964) and Grigory Tunkin (1906–1993), as well as contemporary Russian jurists. Despite this focus on academia as a main source, Mälksoo's book is not trapped in the ivory tower. One can only agree with the author that the opinion of eminent Russian scholars was rarely *only* academic. Rather, both their role and their statements may be seen as "semi-official".[1] Many wore two hats. Shafirov, the author of the "first Russian work on international law",[2] served as vice-chancellor of the Empire. Martens was not only a professor at the University of St. Petersburg, but also a skilled diplomat and *inter alia* the legal mastermind behind the Hague Peace Conferences (1899 and 1907). In the Soviet Union scholars were not free to express views that differed from vital state interests. Rather, their role was "widely seen as helping and defending their country with arguments echoing the government's foreign policy views."[3] After a brief period of academic freedom, scholars in today's Russia again risk repression for challenging their government's position. They may be labelled foreign agents or worse. In this sense, Mälksoo is right in assuming that Russian scholarship has often been "semi-official".

On this solid methodological footing, the book takes on the herculean task of analysing 350 years of Russian/Soviet legal discourse and connecting it to state practice. It advances chronologically. The first two chapters deal with Tsarist Russia, while the following four chapters cover the Soviet period between 1917 and 1991. The final chapter is dedicated to post-Soviet Russia. In his analysis, Mälksoo draws lines between events that lie thousands of kilometres and hundreds of years apart. Is this even possible without being superficial? Yes, it is – and this probably represents the book's most stunning achievement. At no point does the reader feel lost or overburdened by information. It takes an author with exceptional knowledge in the fields of history, geography, linguistics and law to condense so many developments into a comprehensible train of thought. One gets the impression that the author has spent years collecting gears, springs and bolts to finally assemble these parts into an engine that runs smoothly. It also helps that Mälksoo excels at a skill all too rare in academia: brevity.

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[1] Quote from L. Mälksoo, *Russia, the Soviet Union, and Imperial Continuity in International Law*, Oxford University Press, Oxford: 2025, p. 24.

[2] *Ibidem*, p. 37.

[3] *Ibidem*, p. 24.

In addition, Mälksoo acts as a translator between different eras and regions. On the one hand, this may be understood literally. He extensively draws on Russian scholarship that would otherwise be unavailable to non-Russian speakers. Even those who know the language might not have access to some of the older books or manuscripts. But Mälksoo is also a translator in the cultural sense. He explains the idiosyncrasies of Soviet (and to a lesser extent, Russian) scholarship to an international audience. For example, the author repeatedly underscores that contradictions in Soviet scholarship were not accidental. They formed an integral part of Marxist dialectics: arguing *for* state continuity, yet *against* the continuity of certain obligations; acceding to a treaty *without* signing it; *granting* Russia's nationalities sovereignty by *taking away* parts of their autonomy. Western-educated lawyers will have trouble wrapping their heads around such paradoxes. Many Soviet lawyers, however, would have agreed with Stalin: "Yes, it's 'contradictory'. But this contradiction is Life, and completely reflects Marxist dialectic."[4]

2. MAIN THESIS – THE SOVIET UNION AS THE MISSING LINK FOR ESTABLISHING IMPERIAL CONTINUITY

Mälksoo's main thesis may be summarised as follows: Many eminent scholars in Tsarist Russia, the Soviet Union and today's Russian Federation have been interpreting international law in a similar, idiosyncratic way. This discourse has strong imperialist, at times even colonialist elements. This is what the author understands by "imperial *continuity*". It is commendable that Mälksoo does not use labels such as "imperialism" and "colonialism" lightly and interchangeably. He takes the time to define them in the introduction. With this semantic toolkit ready, he explores the imperial continuities in detail.

The most striking example of imperial continuity is the Russian/Soviet approach to treaty law – more specifically the use of *clausula rebus sic stantibus*. According to this principle, a treaty may cease to be binding (or may be modified) if the fundamental circumstances that existed when it was concluded have changed dramatically and unexpectedly. This principle is the antipode to *pacta sunt servanda*, i.e. the idea that treaties cannot be changed unilaterally and its commitments must be performed in good faith. Mälksoo shows in remarkable detail how both Tsarist and Soviet scholars emphasised *clausula rebus sic stantibus* as opposed to *pacta sunt servanda*. In 1870, for example, Russia announced that it would redeploy its military fleet to the Black Sea only 14 years after the Sea had been declared neutral in the Treaty of Paris (1856). Fedor Martens – like many other Russian/Soviet scholars

[4] Cited in Mälksoo (*ibidem*), p. 141.

after him – retroactively justified this step by invoking *clausula rebus sic stantibus*. While other European Powers reinforced the principle of *pacta sunt servanda* in the Treaty of London (1871), Martens argued that Russia had a right to reject any treaty if it "ran counter to [Russia's] basic rights as an independent power."[5] The *principle clausula rebus sic stantibus* remained popular among Soviet scholars, especially in the interwar period (1918–1939). Mälksoo provides a number of examples where Soviet scholars such as Korovin and Pashukanis insisted on its importance.

What does *clausula rebus sic stantibus* have to do with imperialism? Here, too, Mälksoo provides an answer. Flexible treaties benefit expanding empires. If states can renounce treaties whenever they like, every peace becomes a truce and every border becomes provisional. In such a system, smaller states lose out. Mälksoo concludes: "This was imperialist international law which structurally favored the stronger parties, empires, at least in its highly dynamic concept of treaties."[6] The author shows how this logic culminated in the conclusion of the Molotov–Ribbentrop Pact between Nazi Germany and the Soviet Union (23 August 1939). In its secret protocol, the parties carved out German and Soviet spheres of control and thereby violated the internationally recognised borders of six states (Latvia, Lithuania, Estonia, Poland, Finland and Romania) as well as the Covenant of the League of Nations (of which the USSR was a member until December 1939). Only after 1945, as Soviet foreign policy switched from expansion to consolidation, does Mälksoo note a gradual shift from *clausula rebus sic stantibus* towards *pacta sunt servanda*. After the Second World War, the Soviet Union became a saturated empire and had a vested interest in preserving the status quo.

Another noteworthy example of imperial continuity concerns the issue of national autonomy and self-determination. Mälksoo demonstrates that – with very few exceptions – Russian and Soviet scholars have called for centralisation rather than decentralisation of the state. The late Tsarist Empire which Lenin famously called "a prison of peoples" was not inclined to grant more autonomy to its many nationalities. Likewise, the Provisional Government (March–November 1917), composed of liberals and moderate Socialists, postponed such changes to the Constituent Assembly, which only met once in January 1918 before being dissolved by the Bolsheviks.[7] At this point, the author could have elaborated more that most nationalities in the Russian Empire had not even demanded national independence

[5] Cited in Mälksoo (*ibidem*), p. 55.

[6] *Ibidem*, p. 58.

[7] In this respect, Mälksoo quotes from a highly interesting memorandum written in 1919 by the former head of the legal department of the Ministry of Foreign Affairs of the Provisional Government, Andrei Mandelstam (1869–1949). The memorandum shows that many Russian liberals also shared certain imperialist narratives – see *ibidem*, pp. 79 et seq.

before 1918. Only a few peoples, such as the Finns and Poles, articulated this wish early on. In fact, most nationalities favoured other solutions to the "national question": a democratic federation with territorial autonomy and/or extra-territorial autonomy as promoted by the so-called Austro-Marxists.[8] Lenin's right to self-determination, which included a right of separation from Russia, went far beyond that. For this very reason, the Bolsheviks have often been called progressive. Mälksoo's book, however, counters this myth. He readily admits that the Bolsheviks promoted a strong right of self-determination in their foreign policy. Closer to home, however, they envisaged an "independence of a certain kind". The Bolsheviks only accepted self-determination if it furthered their ultimate goal of a socialist revolution. Thus, within Russia's former imperial borders, Lenin's concept of self-determination rather meant the continuation of imperialism: It tried to impose a new kind of centralised system which virtually none of the nationalities desired. Thus, Mälksoo is right when he speaks of an "appropriation of the language of self-determination" which remained "a legal-theoretical fiction" in practice.[9] It remains one of the great ironies of the 20th century that the Soviet Union would nevertheless act as an "incubator of nations".[10] In the words of the sociologist Rogers Brubaker: "The annals of unintended consequences are rich indeed, but seldom have intention and consequence diverged so spectacularly as they did in this case."[11]

Apart from *clausula rebus sic stantibus* and self-determination, Mälksoo also highlights other areas of continuity, e.g. regarding the topics of state succession vs state continuity, the principle of maintaining a balance of power and the idea of Russia's status as a "great power" (*velikaya derzhava*). These ideas are interconnected and share a common origin. International law was shaped by Russia's foreign policy, and this foreign policy often pursued territorial expansion. More than once, Mälksoo argues, the conquest of new regions was portrayed as the restoration of a rightful ownership. This was certainly true for the Tsarist Empire, but also for Soviet Russia and the early Soviet Union, which sought to reestablish the former imperial borders – often under the guise of promoting socialism. Concepts like *clausula rebus sic stantibus* were used to justify such behaviour. Only after 1945 was international law used to maintain the status quo, until the collapse of the Soviet Union. Today,

[8] The Transcaucasian nationalities, for example, stubbornly refused to *de jure* secede from Russia even after the October Revolution. See also the earlier report of the Russian ethnographer Lev Shternberg (1910), who noted the "remarkable absence of national separatism" in Asiatic and most of European Russia, cited in F. Hirsch, *Empire of Nations: Ethnographic Knowledge and the Making of the Soviet Union*, Cornell University Press, Ithaca: 2005, p. 32.

[9] Mälksoo, *supra* note 1, p. 94.

[10] V.A. Kivelson & R.G. Suny, *Russia's Empires*, Oxford University Press, New York: 2017, p. 281.

[11] R. Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe*, Cambridge University Press, Cambridge: 1996, pp. 25–26.

Putin's complaint that "some republics left the centre with more than what they came with" illustrates that Russia is currently not a saturated power.[12] Mälksoo also addresses this point and describes how the annexation of Crimea and the full-scale invasion of Ukraine were justified with age-old legal concepts: *clausula rebus sic stantibus* regarding the violation of the 1994 Budapest Memorandum and the 2003 border treaty with Ukraine and self-determination (of Russians abroad), whose enforcement cannot amount to aggression. The wheel has come full circle.

SUMMARY – BUT WHAT ABOUT...?

Mälksoo argues convincingly that imperialist ideas have been permeating Russian/Soviet scholarship and foreign policy. His book represents a sober (and sobering) account of how leading Russian/Soviet scholars prepared, supported and justified imperialism. One question, however, remains unanswered. Is Russia truly special in this regard? To what extent do other states – at least other *powerful* states – act similarly?

Mälksoo acknowledges that Russia of course does *not* have a monopoly on imperialism, nor on justifying imperialism through law. Even in his introduction the author stresses that "[t]he rhetoric of US President Trump about Canada, Gaza, Panama, and Greenland indeed demonstrates that imperialism is not confined to Russia." Throughout the book Mälksoo manages to weave in comparisons with other imperial powers. His focus on Russia is nevertheless justified for two reasons. Firstly, the Russian/Soviet approach appears to be truly unique in some areas (e.g. *clausula rebus sic stantibus*). Secondly, the *continuity* of imperialism from Russia to the Soviet Union was previously understudied. Somehow, certain Soviet narratives managed to outlive the Soviet Union itself. Among them is the myth that the Bolsheviks radically and irreversibly renounced imperialism in 1917; and consequently that the position of today's Russian Federation is not – in part – the product of imperialist expansion. The relevance of this question is not limited to Ukraine. Most recently, for example, a debate flared up between Russian and Kyrgyz historians after Kyrgyz textbooks used the word "colonialism" to describe Soviet rule.[13]

Whether other states – such as the USA – also interpret international law in an imperial manner is a separate question. In all fairness, this is not a question that *any single* book could answer. Rather, Mälksoo's work should be seen as an invitation to other scholars. His monograph certainly has the potential to spark lively debates

[12] Cited in Mälksoo, *supra* note 1, p. 3.

[13] C. Putz, *A Textbook Debate: Why Russian Historians Told Kyrgyz Historians to Ditch the Term "Colonialism"*, The Diplomat, 28 May 2026, available at: https://thediplomat.com/2026/05/a-textbook-debate-why-russian-historians-told-kyrgyz-historians-to-ditch-the-term-colonialism/ (accessed 31 March 2026).

in the field of comparative law. *Russia, the Soviet Union, and Imperial Continuity under International Law* represents an outstanding piece of scholarship that manages to condense complex developments into digestible conclusions. Well written, insightful and concise, it gives interested readers access to a field of legal discourse previously reserved for a handful of specialists. Now, we can only hope that others will follow Mälksoo's example.

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*Karolina Wierczyńska**

Lachezar Yanev, Harmen Van Der Wilt (eds.), *Universal Jurisdiction over Core International Crimes Law & Practice*,

Edward Elgar Publishing, Cheltenham/Northampton: 2025, pp. 615

It is rare for an academic book to be so beautifully produced: a hardcover book with a highly legible typeface and generous margins that ensure effortless reading. The texts are visually well-structured, featuring margin numbers that allow for seamless navigation from the index and footnotes located exactly where they belong: at the bottom of the page (rather than at the end of the text or, worse still, hosted separately on a website – which is absurd in my opinion). In short, the monograph reviewed herein represents a superb standard of publishing, and in this regard, Edward Elgar Publishing deserves the highest praise from a grateful reader.

However, the book is compelling not only because it represents a superb standard of publishing and looks beautiful on the shelf. What I consider to be its greatest asset is the theme of universal jurisdiction, which has surged in popularity over the last few years and is immensely important, if not pivotal, for states seeking to prosecute international crimes. Furthermore, universal jurisdiction features in the draft convention on the prevention and punishment of crimes against humanity, ensuring that related discussions will remain highly dynamic over the next few years as work on the convention progresses.

States have always struggled with universal jurisdiction, as it was a highly contested issue: not static or unified, but historically an evolving concept. As Boe summarised, "[r]ather than being an easily definable concept, the term [universal jurisdiction] turns out to be *a chiffre* for a complex normative framework of contested and controversial rules, justifications and conditions relating to special types of

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extraterritorial jurisdiction under international law."[1] As the book precisely shows, states are taking different positions in conceptualising universal jurisdiction. More than 100 states have introduced universal jurisdiction into their national penal regulations as grounds for prosecuting international crimes, while only a few dozen have actually sought to prosecute international crimes on this basis. Universal jurisdiction remains controversial: some states view it as an infringement on their sovereignty, sparking political and diplomatic pushback, while others highlight practical hurdles, namely the high costs and evidentiary challenges involved. Furthermore, only a few jurisdictions allow for trials *in absentia* for perpetrators of international crimes. Additionally, some states which are actually capable of initiating proceedings based on universal jurisdiction choose to act on different jurisdictional grounds.

Let's take Poland as an example. Article 113 of the Polish Penal Code incorporates universal jurisdiction. Pursuant to this provision,

> [r]egardless of the regulations in force in the jurisdiction where the offence was committed, Polish criminal law applies to a Polish national, or to a foreigner with regard to whom no extradition decision has been issued, in respect of an offence committed abroad, which the Republic of Poland is obliged to prosecute under international agreements, or of the offence referred to in the Rome Statute of the International Criminal Court, concluded in Rome on 17 July 1998 (Journal of Laws of 2003, item 708 and of 2018, item 1753).[2]

To date, this provision has been interpreted by legal scholars in the same manner as under the previous Penal Codes of 1932 and 1969. Even under the current legal framework, some scholars of criminal law maintain that the principle of universal jurisdiction can only apply to perpetrators who are currently on the territory of the Republic of Poland, as such provision was included in Art. 10 of the Penal Code of 1932:[3]

> § 1. The Polish criminal law shall apply to a foreigner who committed an offence not mentioned in (5), (8) and (9) abroad, if the perpetrator is in the territory of the Polish State and if no decision was made to extradite him/her, and the conditions under (6) or (7) are met.
>
> § 2. The prosecution shall be ordered by the Minister of Justice.

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[1] L. Yanev, H. van der Wilt, *Universal Jurisdiction over Core International Crimes Law & Practice*, Edward Elgar Publishing, Cheltenham/Northampton: 2025, p. 25.

[2] Translated version of Polish Penal Code is available at: https://tinyurl.com/3pek7aku (accessed 30 June 2026).

[3] Translated Penal Code of 1932, available at: https://iura.uj.edu.pl/Content/1532/PDF/Penal%20Code%20ENG.pdf (accessed 30 June 2026).

Although this provision is no longer in force (and many proceedings under universal jurisdiction are *in absentia*), Polish prosecutors act as if it were; consequently, the principle of universal jurisdiction does not serve as grounds for prosecuting a perpetrator who is not on the territory of Poland. Additionally, Poland's Code of Criminal Procedure strictly guarantees the right of the accused to be present at the start of a trial. Therefore, investigations run by Poland in the context of the war in Ukraine can never result in a judicial verdict in Poland and can only serve as a helpful tool for other proceedings, such as those connected with a Joint Investigation Team investigating crimes committed as a result of Russia's aggression.

Summing up, it seems that Polish practice, and the necessary legislation, has to evolve. The book *Universal Jurisdiction over Core International Crimes Law & Practice* may be of great assistance, as it actually presents how different forms of extraterritorial jurisdiction developed under the rubric of universal jurisdiction and how states understand and justify universal jurisdiction differently.

The book begins with Yanev's "Introduction: The Search for 'Universal Justice'", which explains the purpose, aims and audience of the book, and with Boe's chapter, titled "Universal Jurisdiction Concept and Conceptions", which focusses on the interpretations of universal jurisdiction's scope, meaning, role and significance.

Part two, titled "States' Exercise of Universal Jurisdiction Law and Practice", can be referred to as the main body, as it contains analyses of the conceptualisation of universal jurisdiction as a basis for proceedings in international crimes cases (with at least one completed trial grounded on universal jurisdiction) – representing 13 states across three continents, listed in alphabetical order. The idea of those chapters was to present national legislation on core international crimes and the universal and extraterritorial jurisdiction jurisprudence of the core crimes. Australia is described by Monique Cormier, Austria by Andreas Sauermoser, Belgium by Mathias Holvoet, Canada by Joseph Rikhof, Denmark by Andreas Laursen, Finland by Mikaela Heikkilä, France by Caroline Fournet, Germany by Simon M. Meisenberg, the Netherlands by Lachezar Yanev, Norway by Carola Lingaas, Anette Gaaseby and Jo Stigen, Spain by Enrique Carnero Rojo, Sweden by Marc Klamberg and Switzerland by Res Jorge Schuerch and Andreas Mueller.

Among the above-mentioned states, there are clear leaders in their approach to universal jurisdiction. However, the authors highlight several reasons why states hesitate to apply this principle. The primary issue is not a paucity of potential cases, but rather various obstacles in investigating and prosecuting international crimes. These hurdles – which significantly diminish the appetite to invest in such cases – include political factors, a lack of personal and financial resources, a shortage of specialised investigators, difficulties in obtaining and protecting witnesses, the participation of victims and the requirement for the perpetrator to be present

on the territory. Interestingly, some authors also focus on states' deviations from international law, demonstrating how domestic courts adapted in such situations.

The concluding section of the monograph contains a chapter by Harmen van der Wilt titled "Universal Jurisdiction's Coming of Age", in which the findings are summarised. He addresses the scope and limitations of universal jurisdiction, as well as states' compliance with international standards and instances of deviation. In the final part, van der Wilt presents his reflections and recommendations, focussing on national legislation and domestic courts.

What the book lacks is a broader perspective on states that ultimately must dare to exercise universal jurisdiction, such as Ukraine, Poland or Lithuania, due to ongoing conflicts in their vicinity or because they have absorbed large numbers of refugees. Although their experience in prosecuting contemporary international crimes may be minimal, some of these states have experience in prosecuting international crimes in the aftermath of World War II; it would have been valuable to analyse why they are not leaders in universal jurisdiction today, and what obstacles they face.

The monograph is full of interesting considerations. It allows the reader to track states' approaches to universal jurisdiction, as well as their attempts – both successful and unsuccessful – to prosecute perpetrators of international crimes from a comparative perspective. Ultimately, it offers a broad overview of different states' experiences in this field. It will prove useful to students and seasoned academics alike, as well as to practitioners and theorists. My admiration for the book's visual presentation is matched by my appreciation of its substantive rigor. I would recommend it to anyone building a library in the field of international criminal law.

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