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

We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law issues.

In 2023, PJIEL will publish a double issue. The submission deadline is 15 September 2023.

The editors

Human Security and Responsibility to Protect – Challenges and Intersections

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As ongoing crises affect international peace and security worldwide and have enormous implications for the global system as a whole (increasing food insecurity and poverty, declining social incomes, limited access to affordable energy, etc.), human security is becoming increasingly important. Although the two concepts – human security and the responsibility to protect (RtoP) – are distinct, they share similar societal origins. They both serve common fundamental values of humanity, such as freedom, equality, solidarity, and respect for human rights. This paper focuses on several questions: How can both human security and RtoP contribute to the protection of fundamental values of humanity? Is it possible to increase the strength and resilience of society to address threats and risks to both concepts in an appropriate and timely manner, especially those that arise as a result of political, social or economic challenges? Since human security and RtoP are not the same, what is the difference between them? If it is agreed that they are similar, where do they overlap? And, given their importance, what actions can states take to promote and strengthen these valuable concepts?

Keywords: human security, responsibility to protect, core crimes, human rights, prevention, state responsibility

1. Introduction

The origins of the concepts of human security and the responsibility to protect (hereinafter: RtoP) are quite similar; both were created to uphold human dignity, well-being, and respect for human rights, to inspire and promote tolerance and to create a dignified present and a secure future for all. Their acceptance and implementation seem logical, expectable, and understandable. Even those who are unfamiliar with these concepts might accept and embrace the positivism of their orientation – security and responsibility in ensuring, maintaining, and supporting safe and sustainable societies. However, current global security brings challenges not seen in decades, the ones that call into question the foundations of the world we are familiar with. Addressing these challenges must be undertaken at multiple levels – local, national, regional, and global – in accordance with international law and the existing obligations of its subjects. Both RtoP and human security focus primarily on national efforts to prevent and counter various threats and strengthen the fundamental values of human rights, and address the undeniable elements of contemporary interdependence and interconnectedness. They are similar and overlap in many segments; however, they are not identical.

RtoP focuses on three interrelated and intertwined responsibilities, *i.e.*, it relies on the so-called 'three pillars' concept.[1] It is seemingly narrow in its application but extremely significant in its content. RtoP encompasses efforts to prevent and suppress so-called core or atrocity crimes, *i.e.*, genocide, war crimes, crimes against humanity, and ethnic cleansing. The first pillar assumes the responsibility of each state to protect its population from these crimes. The second pillar refers to the responsibility of the international community to encourage and assist states in fulfilling their primary responsibility. Finally, the third pillar focuses on the international community's responsibility to take timely and decisive collective action (including military) to prevent the above crimes when a particular state is unable or unwilling to provide protection. RtoP emerged in response to the challenge of finding an appropriate and effective response to gross and, above all, systematic human rights violations, such as those committed in Bosnia and Herzegovina, Kosovo, and Rwanda in the 1990s.[2] Although the concept has been both praised and criticised, the *ratio* behind it is rather simple. No state can justify the commission of core crimes on its territory, nor can the international community remain passive.

While RtoP focuses on protecting the population from the four core crimes, the concept of human security has a broader scope. It aims to improve the effectiveness of a wide range of high-level societal goals by bringing together the three pillars of the UN system, *i.e.*, peace and security, human rights, and development.[3] It aims to enhance human dignity, develop the capacity of individuals and communities to make informed choices, and strengthen the understanding of oneself, one's rights and well-being, and the courage to fight for oneself. Like the concept of human rights, human security plays an important role in motivating and directing attention and in detecting, diagnosing, assessing, and responding to problems.[4] The concept of human security is distinct from RtoP and its implementation; it does not involve the threat or use of force or coercion, nor does it replace state security.[5] It simply puts people at the top of the international policy agenda and makes people, not states, the object of security.[6]

Comparing both institutes, one can conclude that human security is (just) a broader concept that goes beyond conflict prevention or the mere use of force, and this is what clearly distinguishes it from RtoP. However, they both serve common fundamental values of humanity, such as freedom, equality, solidarity or respect for human rights. All of these values are interlinked, mutually reinforcing, and interrelated.[7] At the same time, they have been challenged constantly, today perhaps

[1] UN Secretary-General introduced the three-pillars concept for the first time in his 2009 report (Implementing the responsibility to protect, A/63/677, 12 January 2009). He presented a comprehensive strategy for implementing RtoP that takes a 'narrow but profound' approach: narrow because it focuses exclusively on preventing the four crimes (genocide, war crimes, ethnic cleansing, and crimes against humanity) and protecting populations from them, but profound because it seeks to use all tools available under the UN system, regional and subregional agreements, states and civil society.

[2] The core of the RtoP idea lies in the question given by former UN Secretary-General Kofi Annan in his Millennium Report. Referring to the failure of the Security Council to act decisively during armed conflicts in Rwanda and the former Yugoslavia, he put forward the following question: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to the gross and systematic violation of human rights that offend every precept of our common humanity?" We the Peoples: The Role of the United Nations in the 21st Century, Report of the Secretary-General, A/54/2000, 27 March 2000, para 217.

[3] Report of the Secretary-General, Follow-up to General Assembly resolution 64/291 on human security, 5 April 2012, paras. 23 and 36.

[4] G. Des, *The Idea of Human Security*, in K. O'Brien, A. Lera St. Clair & Berit Kristoffersen (Eds.), Climate Change, Ethics and Human Security, Cambridge University Press, Cambridge, 2010, p. 23.

[5] GA Res. 66/290, 10 September 2012, paras. 3d) and 3e).

[6] A. Hehir, *From Human Security to the Responsibility to Protect: The Co-option or Dissent?*, Michigan State International Law Review, Vol 23, No. 3, 2015, p. 677.

[7] World Summit Outcome Document, A/RES/60/1, 20 September 2005, para. 4. The Outcome Document represents a

more than ever.

The question is how human security and RtoP can contribute to the protection of fundamental values and increase the strength and resilience of society in addressing political, economic or social threats and risks in an appropriate and timely manner. Since they are undoubtedly not the same, what are the key elements of their distinction? Since they are similar, where do they overlap and intersect? Finally, given the importance of states and their undeniable primary responsibility, what actions can they take to promote and strengthen these valuable concepts? All of these questions are at the heart of this paper.

2. Human security – 'freedom from fear and freedom from want'

Human security embraces a simple central idea: moving away from national protection toward individual security. The concept was introduced in 1994 as "freedom from fear and freedom from want."[8] It comprises "the right of people to live in freedom and dignity, free from poverty and despair."[9] It aims to protect "the vital core of all human lives in ways that enhance human freedoms and human fulfilment" and "freedoms that are the essence of life." [10] It emphasises the welfare of 'ordinary' people,[11] and embraces a variety of different 'everyday' matters – not only those of a social, economic, or political nature but also those "of love, culture and faith."[12] Its main elements were presented by the four basic characteristics (universal, people-centred, interdependent, and early prevention) and seven key components (economic, food, health, environmental, personal, community and political security).[13] The creation and maintenance of a strong environment capable of withstanding threats that endanger some of these categories have been placed at the heart of human security.

The success of human security includes not only the protection of people and their empowerment to develop their human potential, strive for equality,[14] or to take care of themselves,[15] but it also comprises a systematic commitment to solidarity.[16] It encompasses all aspects of each and every society that should take the necessary steps to reduce poverty, achieve economic growth, and pre-

result of the 2005 World Summit, the gathering of 170 world leaders, in which both concepts of human security and RtoP had been endorsed and confirmed. See Outcome Document, paras. 138 and 139 for RtoP and para. 143 for human security.

[8] https://hdr.undp.org/system/files/documents//hdr1994encompletenostatspdf.pdf (9 February 2023) p. 24.

[9] GA Res. 66/290, 10 September 2012, para. 3a).

[10] https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C1256D19006A9353-chs-security-may03.pdf (9 February 2023) p. 4.

[11] B. S. Okolo, *Human Security and Responsibility to Protect Approach: A Solution to Civilian Insecurity in Darfur*, Human Security Journal, Vol. 7, 2008, p. 50.

[12] https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C1256D19006A9353-chs-security-may03.pdf (9 February 2023) p. 4.

[13] See more: Report of the Secretary-General, Human Security, A/64/701, 8 March 2010, para. 14.

[14] 2005 World Summit Outcome Document, para. 143. That idea was repeated in General Assembly Resolution 66/290 of 25 October 2012, para. 3.a), but also in the document Transforming Our World: the 2030 Agenda for Sustainable Development (A/RES/70/1), adopted by the UN General Assembly on 25 September 2015, Preamble, para. 8. (hereinafter: 2030 Agenda for Sustainable Development). The text of the latter is available at: https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (9 February 2023).

[15] It is often necessary to change deeply rooted and widespread social, cultural or religious norms, which is undoubtedly not an easy task. See more: https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C-1256D19006A9353-chs-security-may03.pdf (9 February 2023) p. 4.

[16] https://hdr.undp.org/system/files/documents//srhs2022pdf.pdf (9 February 2023) p. 31.

vent conflict. However, human security and contemporary challenges of different matters, such as inconstant food prices, climate changes, financial and economic crises, protection of vulnerable groups against violence, human trafficking, armed conflicts, etc., also require the need for comprehensive, integrated, and people-centred approaches within the international community and variety of organisations.[17] The international community and national societies must continue to address the root causes of the various internal and external risk factors and support and promote community resilience.

Creating a 'human rights friendly' environment means striving for both human and state security.[18] In the everyday discourse, the term 'security' is thought of as the protection of the territorial integrity and sovereignty of the state, the security of the state from external aggressors. This is understandable since international relations have evolved over the centuries as 'state-centred' rather than 'people-centred.' However, considering the consequences of recent developments, the emergence of human rights and the process of globalisation, the concept of security has been expanding and focusing more on people than on the state. The relationship between human security and state security is clear. While human security focuses on events that transcend state borders in their impact on various societies and individuals,[19] state security focuses on the state itself – they overlap and complement each other. The protection of human rights can only be guaranteed by states that have the authority, capacity, and willingness to comply with existing obligations arising from international law. Unfortunately, many states have not yet acceded to key international treaties protecting human rights; some of those that have, are not fulfilling their obligations.

However, states must be able to create a 'safety net' within the national system, whether political, economic, social, cultural, environmental or otherwise, that provides people with "the building blocks for survival and dignity."[20] The human security concept seeks to enhance the sovereignty of states by focusing on the multidimensional aspects of human and, thus, national insecurities. Improved capacities of national institutions to provide early warning, identify root causes, and prevent and mitigate future risks are key elements in promoting human security, peace and stability.[21] Mechanisms of social stability and societal justice (as a result of good governance) are usually followed by improvements in living standards and overall societal development.[22] They also create real opportunities for partnerships between governments and citizens.[23] Knowing that low trust in state institutions and governments fosters conditions in which people can feel less safe,[24] every step taken to promote and build human security holds the prospect of a safer future and more resilient societies.

One may agree that the development of RtoP and human security has undeniably destroyed the traditional concept of state sovereignty.[25] In the 21st century, it is simply no longer enough to think

[17] Report of the Secretary-General, Human Security, A/64/701, 8 March 2010, paras. 3, 4.

[18] https://www.un.org/press/en/2000/20000508.sgsm7382.doc.html (9 February 2023).

[19] N. Thomas & W. T. Tow, *The Utility of Human Security: Sovereignty and Humanitarian Intervention*, Security Dialogue, Vol. 33, No. 2, 2002, p. 179.

[20] https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C1256D19006A9353-chs-secur ty-may03.pdf (9 February 2023) p. 4.

[21] Report of the Secretary-General, Human Security, A/64/701, 8 March 2010, paras. 21-22 and para. 25.

[22] https://www.un.org/millenniumgoals/sgreport2001.pdf?OpenElement (9 February 2023) para. 34.

[23] For more information on the evolution of the action framework of human security, see: https://hdr.undp.org/system/files/documents/srhs2022pdf.pdf (9 February 2023) p. 31.

[24] ibid p. 29.

[25] J. Uusitalo, *Responsibility to Protect and Human Security: Doctrines Destroying or Strengthening the Sovereignty?*, International and Comparative Law Review, Vol. 18, No. 1, 2018, p. 100.

of security only in terms of state security. On the other hand, despite the wide adoption of this "new perspective of security issues,"[26] some authors have argued that the scope of human security is so broad that virtually any type of unforeseen or irregular emergency could be interpreted as a threat to human security. The main criticism of the concept refers to the problem of imagining what is not included in the list of human security issues at all. It is difficult to determine the priority challenges at a given moment. When it comes to feeling insecure, anxious, or scared, most people in recent decades have been more concerned about the stresses of daily life, such as income, health, and job (in)security, rather than about global catastrophic events (natural or man-made). The development of sustainable societies is (still) at the centre of the global development agenda. However, human security is determined by the link among sustainable development, existing humanitarian problems, and efforts to maintain peace. One might even add that, in the third decade of the 21st century, this link is more important than ever.

3. Responsibility to Protect – the three-pillar concept

As a new concept, RtoP was presented for the first time by the International Commission on Intervention and State Sovereignty (ICISS) in its 2001 Report (hereinafter: ICISS Report).[27] The idea behind RtoP introduced in that report emphasises the primary responsibility of the state to protect people from "avoidable catastrophe"[28], *e.g.,* mass murder, rape, and starvation.[29] However, if the state in question is unwilling or unable to fulfil its primary responsibility to protect, secondary responsibility must be borne by the international community. The ICISS Report includes three specific responsibilities: prevention, reaction and reconstruction. Responsibility to prevent addresses both the root causes and direct causes of internal conflict and other man-made crises that endanger populations. The responsibility to react implies responding to situations of compelling human need with appropriate measures, which may include coercive measures such as sanctions and international prosecution and, in extreme cases, military intervention. The third responsibility, aimed at rebuilding society, focuses on providing comprehensive assistance in recovery, reconstruction and reconciliation, particularly after a military intervention, addressing the root causes of the harm that the intervention was intended to halt or avert.[30]

Early in its development, the RtoP concept was clearly challenged by its similarity with the controversial concept of humanitarian intervention. Some authors (still) doubt that RtoP has really come to life and reached the level of a legal principle[31] or believe it is merely a phrase as vague and indefinite as humanitarian intervention.[32] However, the ICISS Report has shifted the debate by using different language. Noting that the concept of humanitarian intervention has not advanced the debate[33] and that the language of earlier debates arguing for the *right* of one state to intervene

[26] R. Trobbiani, *How Should National Security and Human Security Relate to Each Other?*, E-International Relations, April 2013, p. 2.

[27] https://www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/ (9 February 2023) (hereinafter: ICISS Report)

[28] Ibid p. VIII.

[29] Ibid p. VIII.

[30] Ibid p. XI.

[31] A. Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention*, Palgrave Macmillan, London, 2012, p. 19.

[32] J. Lea-Henry, *The Responsibility to Protect (R2P) and the Problem of Political Will*, Polish Political Science Yearbook, Vol. 47, No. 3, 2018, p. 554.

[33] More on the relationship between humanitarian intervention and RtoP see in: A. Buchanan, *Reforming the International Law*

in the territory of another was outdated and unhelpful, the ICISS opted for the term *responsibility* to protect, focusing on protection rather than (the unpopular) reaction and intervention.[34] It also introduced a new approach to state sovereignty and the international community's role in addressing atrocity crimes.

The 'power' of state sovereignty remains paramount; it can be considered one of the strongest values of international law, enshrined in the UN Charter. Since the state is the cornerstone of the international system,[35] sovereignty may be seen as the central structural paradigm of international law.[36] It goes beyond questions of legal discussion; in many cases, it contains moral or even emotional elements of national identity, dignity or freedom and must never be taken lightly.[37] Each and every state "jealously guards its sovereignty."[38] However, it is not and must not be absolute and inviolable. State sovereignty does not represent a mere *right* and power over its subordinates; it also manifests itself as a *responsibility* towards the community. It includes "the obligation of the state to preserve life-sustaining standards for its citizens as a necessary condition of sovereignty."[39] Above all, no government could use the concept of sovereignty to justify (or attempt to justify) human rights violations on its soil. But, on the other hand, the international community should not stand idly by and observe the challenges it faces and the violations committed on the territory of a state in question.

Four years after the ICISS Report was introduced, RtoP was reaffirmed by the Outcome Document of the 2005 UN World Summit.[40] Unlike the ICISS Report, the 2005 Outcome Document limits the scope of protection to the four so-called core crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. It also departs from the triple responsibility of prevention, reaction and reconstruction by introducing the shared responsibility of the state and international community through the so-called three-pillar concept. These pillars are of equal importance and non-sequential.[41]

The first pillar refers to the primary responsibility of the state and its ability (and willingness) to effectively protect its population from core crimes. It includes the prevention of these crimes and

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of Humanitarian Intervention in J. L. Holzgrefe & O. Keohane (Eds.), Humanitarian Intervention: Ethical, Legal, and Political Dilemmas, Cambridge University Press, Cambridge, 2003, pp. 130-173; D. Dagi, *The Responsibility to Protect: Its Rise and Demise*, Journal of Liberty and International Affairs, Vol. 2, No. 3, 2017, pp. 75-76; G. Evans, *From Humanitarian Intervention to the Responsibility to Protect*, Wisconsin International Law Journal, Vol. 24, No. 3, 2006, pp. 703-722.

[34] See more: ICISS Report, 2.4., 2.29.

[35] F. M. Deng, *From Sovereignty as Responsibility to the Responsibility to Protect*, Global Responsibility to Protect, Vol. 2, 2002, p. 353.

[36] M. Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, Yale Journal of International Law, Vol. 35, 2010, p. 4.

[37] S. Fabijanić Gagro, *Responsibility to Protect (R2P) Doctrine*, International Journal of Social Sciences, Vol III, No. 1, 2014, p. 62.

[38] F. Eckhard, *Whose Responsibility to Protect*, Global Responsibility to Protect, Vol. 3, 2011, p. 101.

[39] F. Borgia, *The Responsibility to Protect Doctrine: Between Criticisms and Inconsistencies*, Journal on the Use of Force and International Law, Vol. 2, No. 2, 2015, p. 225.

[40] The final adoption of RtoP had to overcome the opposition or reservations from numerous states, including the two permanent members of the UN Security Council, the Russian Federation and the United States. The United States delegate, John R. Bolton, stated that his country would "not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law." F. Francioni & C. Bakker, *Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali*, TransWorld, Working Paper 15, 2013, p. 6, fn. 3.

[41] C. O'Donnell, *The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention*, Duke Journal of Comparative & International Law, Vol. 24, 2014, p. 562.

their incitement by using appropriate and necessary means.[42] The efficiency of the first pillar is the key factor for RtoP sustainability. Each state is responsible for protecting the people on its own soil. In the 21st century, this particular responsibility, as well as the issue of human security, is nothing new and does not challenge state sovereignty. If the concept of state sovereignty is understood as the responsibility of the state to act in accordance with existing international law and to fulfil the obligations already undertaken without imposing new obligations on the state, that could be interpreted as 'lowering the shield' of its sovereignty, then the application of the RtoP concept is clearly and understandably justified. The connection between state sovereignty and RtoP is "neither competitive nor oppositional."[43] As stated above, sovereignty is not only the right of a state to exercise power on its own territory but also the responsibility to protect the people from harm or violence. The responsibility of the state derives from its sovereignty[44] since, nowadays, the state should be an "instrument at the service of its people."[45]

On the other hand, when the state is unable or unwilling to assume its own responsibility, the international community, led by the UN, has a responsibility to 'step in' in order to encourage and help states in fulfilling their primary responsibilities and support the United Nations in establishing an early warning system.[46] This particular assistance and encouragement represent the second pillar of RtoP. Measures to implement it have a dual significance. On the one hand, they can help national governments strengthen their primary responsibilities and promote the development of a more tolerant society. Such cooperation can enable the creation of an effective 'network' that encourages and facilitates the flow of information necessary to effectively address challenges on the ground, develop best practices and prevent the escalation of conflict.[47]

The third pillar focuses on the responsibility of the international community to take timely and decisive collective action to prevent atrocity crimes when a particular state is unable or unwilling to exercise and ensure its own responsibility. It refers to peaceful means, such as diplomatic, humanitarian and others, in accordance with the UN Charter.[48] If the implementation of these remains inadequate, the international community is further prepared to react more decisively in order to suppress human rights violations and to take collective action in a timely and decisive manner. Military action is controversial and, above all, unpopular, even if it is to be used only in extreme situations. It is considered the measure of the last resort,[49] exceptional and extraordinary,[50] but nevertheless raises a number of questions.[51] All actions must be taken in accordance with the UN Charter, including Chapter VII, on a case-by-case basis, in cooperation with relevant regional organisations and under the authorisation of the Security Council.[52] Since multilateral sanctions tend to be much

[42] GA Res. 60/1, 2005 World Summit Outcome, 24 October 2005, para. 138.

[43] H. R. Basaran, *Identifying the Responsibility to Protect*, The Fletcher Forum of Worlds Affairs, Vol. 38, No. 1, 2014, p. 204.

[44] F. M. Deng, S. Kimaro, T. Lyons, D. Rotchild & W. I. Zartman, *Sovereignty as Responsibility: Conflict Management in Africa*, Washington, DC, Brookings Institution Press, 1996, pp. 32-33.

[45] https://www.un.org/sg/en/content/sg/articles/1999-09-18/two-concepts-sovereignty (9 February 2023).

46 Ibid

[47] S. Fabijanić Gagro, *The implementation of RtoP When the Protection of Children in Armed Conflicts Within the UN System is Concerned – Who is Responsible?*, Pécs Journal of International and European Law, 2020/2. p. 36.

[48] Although the UN Charter is silent on genocide and mass atrocities, it contains numerous references to promoting and supporting respect for human rights. See, *e.g.*, UN Charter, Arts. 1(3), 13(1), 55, 56, 62(2), etc.

[49] Report of the Secretary-General, Responsibility to Protect: Timely and Decisive Response, A/66/874–S/2012/578, 25 July 2012, para. 60. See also: E. C. Luck, *Why the United Nations Underperforms at Preventing Mass Atrocities*, Genocide Studies and Prevention: An International Journal, Vol. 11, No. 3, 2018, p. 44.

[50] ICISS Report, p. XII.

[51] On the 'controversy' of the Pillar III, see more in: Borgia 2015, pp. 230-233.

[52] World Summit Outcome Document, Art. 139. By February 2023, the Security Council has adopted 89 resolutions that

more persuasive than unilateral ones, the Security Council authorisation can be an essential step.[53]

Despite the changes it has undergone, the influential force[54] of RtoP is still considered a highly sensitive and controversial issue that concerns both the legal and political responsibility of the state(s) concerned and the international community. The power of the Security Council is limited and restricted by the use of the veto. In the 2022 General Assembly debate on RtoP, 65 states expressed concern about the continued inaction of the UN Security Council in situations where states appear to have failed in their primary responsibility to protect. In the face of mounting criticism of the Council's inability to respond to the Russian aggression on Ukraine, many states emphasised the need for Security Council reform and the abandonment of veto power in situations of mass atrocity. Given the difficult times facing the international community, when multilateralism and international law are being put to the test, the use of the veto must not aim to paralyse the Security Council in fulfilling its mandate to maintain international peace and security.[55] Unfortunately, this remains the current challenge. Nevertheless, it is clear that the effective implementation of primary state responsibility can sufficiently prevent the application of other pillars, especially their controversial parts. It is also comprehensible that the success of the implementation of Pillars II and III requires political sufficiency to create political unity, cooperation and coordination and that strengthening the modes of collaboration between the national, regional and international levels remains necessary.[56] It is also obvious that the success of coercive and non-coercive measures requires political unity in the design and consistency, and operational coordination in the application. In this regard, strengthening the modes of collaboration between the national, regional and international levels is necessary.

One could agree that the RtoP "remains confined by the distinctly horizontal nature of the international system, in which human rights abuses are at times subject to monitoring but not enforcement, particularly in situations of major power interest."[57] Others may say that RtoP is a normative consensus,[58] "nothing more than the evolution of the *droit d'ingérence,*"[59] a doctrine integral to the new post-cold war international order,[60] moral commitment in international politics[61] or "a linguistic conceit that reaffirms the *status quo*."[62] According to *Welsh*, the 2005 World Summit deliberately institutionalised RtoP as a political rather than a legal principle.[63] However, since international law

refer to RtoP. See: https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/ (9 February 2023). See also: Report of the Secretary-General, Responsibility to Protect: Prioritising Children and Young People, A/76/844-S/2022/428, 26 May 2022, para. 2.

[53] Luck 2018, p. 33.

[54] S. F. Plunkett, *Refocusing to Revive: The Responsibility to Protect in International Atrocity Prevention*, Georgia Journal of International and Comparative Law, Vol. 48, No. 3, 2020, p. 775.

[55] More about the debate and conclusions of the 2022 UN General Assembly Plenary Meeting on the Responsibility to Protect, Global Centre for the Responsibility to Protect, July 2022 is available at: https://www.globalr2p.org/publications/summary-2022-r2p-debate/ (9 February 2023).

[56] Report of the Secretary-General, Responsibility to Protect: Timely and Decisive Response, A/66/874–S/2012/578, 25 July 2012, para. 37.

[57] S. Jarvis, *The R2P and Atrocity Prevention: Contesting Human Rights as a Threat to International Peace and Security*, European Journal of International Security, 2022, p. 18.

[58] T. G. Weiss, *Humanitarian Intervention: Ideas in Action*, Cambridge: Polity Press, 2016, p. 1.

[59] Borgia 2015, p. 236.

[60] M. Mamdani, *Responsibility to Protect of Right to Punish*, Journal of Intervention and Statebuilding, Vol. 4, No. 1, 2010, p. 55.

[61] A. Paras, *Moral Obligations and Sovereignty in International Relations*, London, Routledge, 2018, pp. 124-125.

[62] Hehir 2015, p. 690.

[63] J. M. Welsh, *Norm Robustness and the Responsibility to Protect*, Journal of Global Security Studies, Vol. 4, No. 1, 2019, p. 54.

does not function in isolation and cannot be separated from politics,[64] RtoP may be seen as part of a complex set of norms designed to meet the challenge of protecting people.[65] Although UN resolutions and declarations are not sources of international law, they can be regarded as interpretations of existing legal regulations.[66] From 2005 until today, states repeatedly reaffirmed their World Summit commitment to RtoP, as have the main organs of the UN. The General Assembly adopted 32[67] and the Security Council 89 resolutions,[68] while the Secretary-General published 14 reports that refer to or elaborate on RtoP issues.[69] Most of them addressed primary state responsibility as the most important. The concept appears to be widely accepted.

However, these reports and documents do not have a binding effect; the lack of an international treaty that explicitly refers to RtoP "excludes the emergence of any conventional obligations,"[70] thus making the normative content of RtoP evolutionary rather than revolutionary.[71] One could argue that the states that express support for RtoP and condemn the commission of atrocities are mostly engaged in a "form of theatrics intended for public consumption" that "minimally affects their behaviour."[72] On the other hand, supporting the idea of RtoP by emphasising the binding effect of state's pre-existing obligations under international law, particularly those arising from human rights, the respect of which is at the core of the concept itself, could undoubtedly encourage its wider implementation and acceptance, and thus its possible stronger influence on the further development of international law. Despite current challenges, the hope remains that the RtoP path will eventually narrow the gap between states' existing obligations and the troubling reality in which the scourges of core crimes threaten human security.

4. Contemporary challenges and intersections

Human security and RtoP are distinct,[73] but undoubtedly related concepts. RtoP is fundamentally derived from human security; the insurance of human security is its original goal.[74] They both focus on human beings as the primary objects of security. The rights and freedoms that are at the core of human security are also at the core of RtoP – the right of people to live in dignity, free from fear, poverty and despair, their equal opportunity to enjoy human rights and to realise their own full

[64] Uusitalo 2018, p. 98.

[65] Jarvis 2022, p. 17.

[66] Welsh 2019, p. 54.

[67] Since 2005 the General Assembly has held eight informal interactive dialogues on RtoP and five debates. In 2021 (for the first time after 2009) General Assembly decided to include RtoP in its annual agenda (The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity, A/RES/75/277, 21 May 2021). During the 2022 plenary meeting (23-24 June), 61 UN member states, one observer mission and the European Union spoke on behalf of 91 countries. See, *e.g.*, Summary of the 2022 UN General Assembly Plenary Meeting on the Responsibility to Protect.

[68] All documents are available at: https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/ (9 February 2023).

[69] The Human Rights Council has addressed the responsibility to protect in more than 60 resolutions. Overall, 61 countries and two regional organisations have appointed focal points for RtoP, and 53 States and the European Union are members of the Group of Friends of the Responsibility to Protect in New York and Geneva. Report of the Secretary-General, Responsibility to protect: prioritising children and young people, A/76/844-S/2022/428, 26 May 2022, para. 2.

[70] Borgia 2015, p. 228.

[71] Payandeh 2010, p. 515.

[72] Hehir 2015, p. 689.

[73] GA Res. 66/290, 10 September 2012, para. 3d):

[74] Uusitalo 2018, p. 90.

potential. In other words, individuals must be protected from acts and threats of violence to live in freedom from fear, but basic human needs must also be met to live a life free from want and thus truly safe.[75]

On the one hand, each state is primarily responsible for maintaining peace and ensuring human security; on the other, not every state can meet its responsibilities. Thus, the question arises: how to improve human security and society's resilience to discrimination, injustice, poverty and inequality, which provide fertile ground for atrocities? One might say that, in (too) many cases, a state alone cannot fully ensure human security. However, it does not relieve the state and its government of the responsibility to strive for the highest possible level of human security under its jurisdiction. Risks and threats may be sudden and unexpected consequences of climate change (*e.g.*, natural disasters, earthquakes, floods, large-scale fires, etc.) that threaten the concept of human security; others may be the result of political or economic challenges or even deliberately orchestrated, such as recessions, conflicts or even atrocity crimes.

The state has an obligation to recognise various risk factors and threats and to be prepared to respond appropriately to security challenges and imminent threats, especially those arising from political, social or economic challenges. Regardless of the nature of the threat, numerous entry points, strategies, and actions can be identified and taken to stop the process and prevent the destabilisation of society. A variety of possible (or even necessary) actions can identify risk factors and threats. It is difficult to list them all; although they represent universal values of contemporary societies, they require a case-by-case approach. However, they can all be considered equally important. The assessment of risks and threats (for both concepts) and the actions that should be taken to maintain and achieve the highest possible level of human security and to strengthen the commitment of states and the international community makes the link between human security and RtoP even clearer. In many cases, the assistance and support provided by the international community become crucial for both concepts. The impact of international action on people must be a central concern of all stakeholders. As noted by the UN Secretary-General, "humanitarian and security considerations are not mutually exclusive, and they both underpin and lend urgency to all the efforts of the international community."[76] This distinction between humanitarian and security concerns in the 21st century could be seen as a "false dichotomy."[77]

First and foremost, promoting both human security and RtoP requires strong and stable institutions capable of addressing root causes in a timely, targeted and effective manner. Such an approach helps reduce human insecurity and ultimately strengthens local capacity and contributes to greater national security.[78] On the other hand, the existence of the fragile or failing state(s) can pose a threat to people, human rights and human security everywhere. The same could also be applied to the RtoP concept. The importance of emphasising the role of human rights institutions and their efforts in strengthening the rule of law, ending impunity, advancing early warning mechanisms, etc., must be additionally emphasised in capacity building.[79] Prevention demands a comprehensive and dedicated understanding of the historical background and current societal conditions, but also the anticipation of future events and constant foresight of potential risks. With respect to atrocities, prevention refers to a more comprehensive and more committed understanding of the origins,

[75] I. Holliday & B. Howe, *Human Security: A Global Responsibility to Protect and Provide*, The Korean Journal of Defence Analysis, Vol. 23, No. 1, 2011, p. 88.

[76] https://www.un.org/disarmament/wp-content/uploads/2018/06/sg-disarmament-agenda-pubs-page.pdf (9 February 2023) p. 18.

[77] Ibid

[78] Report of the Secretary-General, Human Security, A/64/701, 8 March 2010, para. 20.

[79] Fabijanić Gagro 2020, p. 38.

progression, cessation and potential recurrence.[80] In both cases, prevention is an ongoing process that requires sustained efforts to strengthen societies' resilience by ensuring that the rule of law is respected, the justice system is strong, efficient and functional, and that all human rights are protected without discrimination.

A commitment to both – human security and RtoP – also demands enhanced international cooperation and strengthened capacities to assist countries in building, keeping and restoring human security and peace. International cooperation manifests the development of an integrated network of diverse stakeholders and the expertise of a wide range of actors on the local, national, regional and international levels.[81] Effective conflict prevention strategies must be based on a comprehensive multidisciplinary and case-based approach tailored to the specific circumstances of each situation.[82] It aims to build democratic and reliable institutions, constitutional power sharing, support confidence-building measures among different communities or groups, promote civil societies that take into account the diversity and protection of different groups, promote media freedom, respect the rule of law, etc.

The judicial system must be functional, effective, and able to respond to the request for ensuring accountability for human rights violations and ending the culture of impunity.[83] Accountability is a duty, not a choice; efforts to strengthen it are both an important deterrent to future offenders and a necessary response to atrocities already committed.[84] Holding accountable those responsible for violence could simultaneously help empower victims and those at risk of victimisation. It also strengthens the credibility of state institutions, promotes further reconciliation in society[85] and contributes to the creation of a resilient, just and inclusive society.

Measures taken to eliminate economic disadvantage and the lack of economic opportunity also contribute to human security and the strengthening of society. They include development assistance and cooperation to address inequalities in the distribution of resources or opportunities, promote economic growth and opportunity, improve terms of trade, promote necessary economic and structural reforms, and provide technical assistance to strengthen regulatory instruments and institutions.[86]

The element that marks the 'beginning' of all efforts to strengthen the society and "one of the best investments States can make"[87] is education. A strong educational system at all levels must promote and support the ideas of equality, tolerance and non-discrimination. In this way, it contributes to the development of a society based on respect for diversity and suppresses hate speech and inflamma-

[80] Luck 2018, p. 40.

[81] Report of the Secretary-General, Human Security, A/64/701, 8 March 2010, para. 30.

[82] This approach should include both structural and operational measures. Structural measures address the root causes of conflict (*e.g.*, socioeconomic inequalities, denial of fundamental human rights, etc.), while operational measures target crisis prevention (*e.g.*, fact-finding missions, preventive diplomacy, preventive deployment, etc.). Road Map Towards the Implementation of the United Nations Millennium Declaration Report of the Secretary-General, A/56/326, 6 September 2001, paras. 35-36.

[83] Z. Coursen-Neff, *Attacks on Education: Monitoring and Reporting for Prevention, Early Warning, Rapid Response, and Accountability*, in Protecting Education from Attack: A State-of-the-Art Review (Chapter 7), UNESCO, 2010, p. 120; D.S. Koller & M. Eckenfels-Garcia, *Using Targeted Sanctions to End Violations Against Children in Armed Conflict*, Boston University International Law Journal, Vol. 33, No. 1, 2015, pp. 8-12.

[84] Emphasised by representatives of the Republic of Korea and the EU at the 2022 General Assembly Debate of RtoP.

[85] Fabijanić Gagro 2020, p. 38.

[86] ICISS Report, paras. 3.22-3.23.

[87] M. Tavassoli-Naini, *Education Right of Children During War and Armed Conflicts*, Procedia Social and Behavioural Sciences, Vol. 15, 2011, p. 305.

tory rhetoric. Education today could be perceived as the beginning of society's future prosperity but also as the key to raising a tolerant society, resilient to discrimination and atrocities. However, in 2020 and 2021, the Covid-19 crisis brought education systems around the world to a standstill, and school closures exacerbated the global learning crisis. Although distance learning opportunities for students existed in almost all countries, they varied widely in quality and scope and could, at best, only partially replace face-to-face instructions.[88] Given the positive role education plays in fostering social cohesion, the negative impact of the loss of education is severe. Moreover, many children and youth whose education is interrupted in times of crisis never return to formal learning.[89] The global crisis has taken a heavy toll on children and youth, compounded by deprivation and loss, as well as racism, discrimination, and gender inequality.[90] Women and girls must enjoy equal access to quality education, economic resources and political participation, as well as equal opportunities with men and boys for employment, leadership and decision-making at all levels.[91] As noted in the 2030 Agenda for Sustainable Development, the achievement of full human potential and sustainable development is not possible if half of humanity continues to be denied its full human rights and opportunities.[92]

Human security in the 21st century is indivisible. There is no longer a humanitarian disaster that occurs in a faraway country that the rest of the world knows little or nothing about.[93] Therefore, special attention must be paid to digital technologies, as they significantly impact human security. They can do much to enhance capabilities and promote human security, expand human freedoms, increase productivity, and facilitate humanity's response to current challenges. The revolution in information technology has made global communications instantaneous, providing unprecedented access to information worldwide. Never before has the world been as close and as interconnected as it is today. Any information or image from around the world, no matter how disturbing or frightening, is just a click away. No crime, no insecurity, and no disturbance (internal or international) can remain hidden, no matter where it occurs. The democratisation of the media has made it more difficult for governments to commit, cover up or conceal inhumane practices or suffering in their jurisdictions or those of their neighbours.[94] Digital technologies change the dynamics of conflict by enabling activities such as propaganda or espionage. Social media offers countless opportunities for political engagement, participation and influence, either positive or negative. Their platforms can make the voices of groups heard that are otherwise marginalised in public debate. On the other hand, as people have relied on digital technologies more than ever during the Covid-19 pandemic and this connection has become a 'new normal', digital threats have increased.[95] Social media and digital technologies can amplify threats to human security for individuals or groups (*e.g.*, online radicalisation, cybercrime, child sexual exploitation, etc.). They pose new challenges to human security and facilitate harm to people through bullying, harassment, fraud or misinformation.

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[88] https://www.unicef.org/media/121251/file/UNICEF%20Annual%20Report%202021.pdf (9 February 2023) p. 9.

[89] See more: Report of the Secretary-General, Responsibility to Protect: Prioritising Children and Young People, A/76/844-S/2022/428, 26 May 2022, para. 15.

[90] New Threats to Human Security in the Anthropocene: Demanding Greater Solidarity, UNDP Special Report, 2022, p. 113.

[91] *E.g.*, 20 countries involved in peace negotiations and peace processes in 2021 adopted a national action plan for women, peace and security to promote women's participation in these processes. I. Navarro Milián, J. M. Royo Aspa, J. Urgell García, P. Urrutia Arestizábal, A. Villellas Ariño & M. Villellas Ariño, *Alert 2022! Report on Conflicts, Human Rights and Peacebuilding*, Escola de Cultura de Pau, Barcelona, 2022, p. 8.

[92] 2030 Agenda for Sustainable Development, para. 20.

[93] ICISS Report, paras. 1.21; 1.29.

[94] Holliday & Howe 2011, p. 88.

[95] New Threats to Human Security in the Anthropocene: Demanding Greater Solidarity, UNDP Special Report, 2022, pp. 67-75.

5. Conclusion

People strive for peace and security. These values enable humanity to realise the full potential of their human rights, to efficiently address all critical issues of equality, education, food, health, economic security and social justice, to adequately respond to challenges of climate change and to support the sustainable development in which humans are placed in the centre of (national and international) policy agendas. No country can enjoy development without security and *vice versa*.[96] Development promotes resistance to various forms of threats to human security – poverty, diseases, all kinds of discrimination within society, conflicts, terrorism, environmental degradation, etc. It is crucial in helping states prevent or reverse the erosion of their own capacities to maintain peace, prosperity and security[97] and promote peaceful, just and inclusive societies.

The current challenges to ensuring political dialogue, peace, and security increase human insecurity worldwide; efforts to maintain a 'normal daily life' are at risk, perhaps now more than ever. Armed conflicts of nowadays are impacting prosperity and social conditions, exacerbating poverty, food insecurity, and access to affordable energy across the globe.[98] In recent years human security has been enormously challenged; the Covid-19 pandemic threatened all dimensions of our well-being and heightened our sense of fear. It has become apparent that risks and threats do not recognise or respect national borders. It has also become clear that, despite differences between large and small countries, rich and poor nations, etc., human security arises from the fundamental fears and desires inherent to all human beings. It is a bottom-up system,[99] and although efforts to address risks and threats must be monitored and undertaken on a case-by-case basis, they can become a global challenge.

For both concepts – human security and RtoP – there is no one-size-fits-all template; each state must recognise and identify different root causes and risk factors and be prepared to respond appropriately to human security challenges and to defend effectively against societal insecurity or human rights violations.

Although the core crimes of RtoP tend to occur in armed conflicts, primarily because the destructive turmoil of armed conflict provides a conducive environment for such behaviours, in many cases, risk factors for atrocities have developed previously in (seemingly) peaceful environments. The increase in discrimination, intolerance and other human rights violations does not occur suddenly or overnight; they are the result of long-term social, sociological, economic, cultural, religious, and historical disruptions, the inability or unwillingness of societies to recognise or prevent them, *i.e.*, to respond appropriately in a timely manner.[100]

Supporting and strengthening human security would be the most effective way to prevent human suffering and crises. However, although the validity of RtoP remains intact,[101] its influence could be seen as "relatively minor and ultimately no more consistent in its application as a preventive tool."[102] Despite its potential, RtoP is constrained by the *status quo* dynamics of the current inter-

[96] 2030 Agenda for Sustainable Development, Preamble.

[97] Note by the Secretary-General, A/59/565, 2 December 2004, pp. 12-13.

[98] https://s3.amazonaws.com/sustainabledevelopment.report/2022/2022-sustainable-development-report.pdf, p. VII, (9 February 2023).

[99] Hehir 2015, p. 678.

[100] Fabijanić Gagro 2020, p. 37.

[101] Welsh 2019, pp. 53; 55.

[102] Jarvis 2022, p. 11.

national system, which is characterised by the lack of human rights enforcement on the one hand and the undeniably strong and conflicting interests of world powers on the other. As the UN Secretary-General pointed out in 2016, the UN "must redouble its own efforts to mainstream the RtoP […] Business as usual will not be sufficient."[103] The gap between the commitment to RtoP and daily life and reality has been clearly recognised, and efforts to close this gap must include stronger and more effective implementation of RtoP in practice. However, methods to achieve this goal have remained ineffective.

It is also important to emphasise that recognising risk factors and taking action to ensure an equitable, inclusive and resilient society does not create or impose new or additional (international law) obligations on states; human security and RtoP are merely an evolution of the existing international obligations. The primary responsibility of the state to ensure human security and to take effective steps to prevent human rights abuses will remain paramount. States continue to play the primary role in creating a rules-based system in which societal relations are mutually supportive, harmonious and accountable.

However, the success of both concepts requires not only resilient societies but also geopolitical strength and unity in the design, coherence, and operational coordination of their application. It can be argued that the international community has failed in recent years to respond consistently and effectively to human security challenges and the occurrence of atrocities. Increased cooperation at all levels remains necessary. However, the ongoing conflicts, disturbances, disasters and overall security challenges are a constant reminder of the gap that still exists between expectations, promises and reality.

[103] Report of the Secretary-General, Mobilising Collective Action: The Next Decade of the Responsibility to Protect A/70/999–S/2016/620, 22 July 2016, para. 60.

Data Against Hate – Processing of Personal Data Revealing Racial or Ethnic Origin for the Purpose of Combating Hate Crime in the European Union

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Combating hate crime and preventing discrimination on the grounds of racial or ethnic origin is a commitment of the European Union, and has been the subject of significant legislative and policy action over the past decades. However, the judgments of the European Court of Human Rights and the policy review have made it clear that these measures have not achieved their objectives, and one of the main reasons for this is the problem of identifying the groups concerned. Data relating to racial or ethnic origin is a special category of personal data that enjoys special protection under the EU data protection regime, but it is also very complex to handle. This data set expresses the identity of the data subject and is therefore partly subjective and difficult to measure. In addition, the volume, quality and source of the data required for each purpose is challenging, while the legal framework for the process is also different: general data processing issues are governed by the GDPR, while law enforcement cases are governed by the Criminal Justice Directive. Although regional human rights organisations clearly support for the collection of racial or ethnic data for its political benefits, EU case law is fragmented. But could legislation or enforcement be the main cause of this worrying situation? Are legal or social science tools the key to more effective data management? The paper attempts to answer these questions by describing the elements of the system and by presenting the practicalities. The analysis also leads to the necessary intervention points and a system of possible measures.

Keywords: hate crime, racial or ethnic origin, institutional discrimination, affirmative actions, processing of personal data, European Union, General Data Protection Directive, Law Enforcement Directive

1. Introduction

It is beyond doubt today that groups that differ from the majority in terms of their origin, language, culture, religion or physical characteristics, and which typically have their own identity, are an integral part of complex and open societies. However, belonging to such a community implies much more for all concerned than simply a specific and patterned biological or cultural difference: it also implies specific social attachment structures and a complex set of relationships, with both negative and positive feedbacks. However, recognising this and strengthening relationships has not always been easy, and providing the necessary and effective support remains a challenge today.

Minority groups include a particularly high proportion of people from racial or ethnic commu-

nities, and have therefore played a prominent role in social and political processes for centuries. Unfortunately, historical experience has shown that in most cases this has meant vulnerability. On the European continent, around 100 million people currently belong to one of more than 400 minority communities. Within this group, almost 10 % of the total population of the European Union – 40 million citizens – belong to a national or ethnic minority or to one of the 60 regional language groups used alongside the official languages.[1] The communities vary in number, cultural traditions, social status and economic opportunities. In addition to the Flemish, Catalans, Hungarians, Welsh and Lapps, who have considerable socio-political influence in their own countries, smaller groups such as the Occitans, Frisians, Sami, Rusyns or the large number of Muslim and Roma communities living throughout the continent are carriers of cultural values in their own right, but are also vulnerable groups in view of their specific situation, and states must have a meaningful concept for shaping their destiny.

In the light of the objectives and organisational characteristics of the European Union, the preservation of the cultural identity of minority communities and the range of state action in this area are the responsibility and well-guarded prerogative of the Member States. However, in view of the principles of non-discrimination and equality declared in the Treaties, in particular Articles 2 and 10 of the Treaty on European Union (TEU), Articles 19 and 67(3) of the Treaty on the Functioning of the European Union (TFEU) and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union (Charter), the Union has taken important steps over the last two decades to address the social situation of racial or ethnic communities. A series of legislative and policy measures have sought to reduce the processes of discrimination which, in addition to the obligations arising from the EU's founding treaties, Member States have already undertaken to combat by joining regional human rights organisations, in particular the Council of Europe and the Organisation for Security and Cooperation in Europe.[2]

The current EU system of legal protection for members of racial or ethnic minorities consists of three pillars: the anti-discrimination directives of the 2000s, the hate crime framework that has been in place since 2008, and a mixed policy toolbox of implicitly reinforcing measures to make these work. However, the effectiveness of this structure is questionable, according to recent expert research.[3]

However, a series of bi-annual surveys carried out by Eurobarometer, the most authoritative regular measurement platforms that deal with the subject, and large-scale surveys by the European Union Agency for Fundamental Rights (FRA) consistently show that "persistent and widespread discrimination, intolerance and hatred in the European Union threaten to marginalise and alienate many people belonging to minorities who otherwise feel a strong attachment to their country of residence and trust in its institutions."[4] The latest EU-MIDIS II survey, which provides a comprehensive overview of the issue, found that 39% of Muslim respondents and 41% of Roma respondents felt that they had been discriminated against because of their origin in the five years prior to the survey.[5] Subjective perceptions of threat were even higher, at almost 60% for both communities in the EU

[1] https://www.fuen.org/en/article/Autochthonous-minorities-in-Europe (4 May 2023).

[2] J. Wouters & M. Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials,* Oxford University Press, Oxford, 2021.

[3] *E.g.* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0139&from=EN (4 May 2023). K. Liu & C. O'Cinneide, *The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC, A legal analysis of the situation in EU Member States,* European Union, 2019.

[4] K. Szajbély & T. Török, *Az Európai Unió második felmérése a kisebbségekről és a hátrányos megkülönböztetésről – tények és tanulságok,* Közjogi Szemle, 2018/1. p. 17.

[5] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf (4 May 2023).

Member States concerned. A worrying trend is the consistently low proportion of people who ask for help from a public authority in cases of discrimination, harassment or hate crime: again according to EU-MIDIS II data, 12% of Muslim respondents and 6% of Roma respondents asked for help from a public authority or institution.[6]

This extreme latency is confirmed by other FRA research on hate crime victims.[7] Victims generally do not know where to turn for help or are not confident that taking action will be beneficial. In addition, fear and shame are often a barrier to seeking help. The pandemic has exacerbated this trend: according to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2020-2021 survey, there were 7,000 reported hate crimes on the European continent, 87% of which were racist and xenophobic.[8] At the same time, the latency of hate crime has increased over this period: while minority groups are twice as likely to be victims of hate crime as members of the majority society, academic research shows that only 10% of their cases are reported to the authorities. [9]

In addition to the surveys, the anomalies in the application of the law by the state in dealing with hate crimes and discrimination situations have also been highlighted, in particular in the thematic decisions of the European Court of Human Rights, such as Angelova and Iliev v. Bulgaria, Balázs v. Hungary, Fedorchenko and Lozenko v. Ukraine, Šečić v. Croatia and Stoica v. Romania.[10]

The relative failure of a decades-long process and the new challenges, the results of the 2019 European Parliament elections, but especially the planning of the 2021-27 budget, have prompted the EU institutions to reconsider whether the measures taken so far are sufficient. In this context, it is important to examine how Member States are implementing legislation and policies to promote equality and non-discrimination and to combat hate crime effectively, and how progress in this area can be better monitored and measured. In 2018, the High Level Group on non-discrimination, equality and diversity agreed to set up a sub-group on equality data (composed of experts from 13 Member States). With the support of the FRA, they developed a set of non-binding guidelines on how to progressively improve the collection and use of equality data to help them monitor the implementation of relevant legislation, policies and measures they are developing in this area. At the root of the problem, the EU monitoring bodies and the relevant expert documents identified uncertainty about the targeting of measures and the lack of identifiability of the groups concerned.[11]

As this situation violates the EU's fundamental principles of legal certainty, the principle of the legitimate use of EU funds and transparency, an intensive professional dialogue has developed in recent years on how and to what extent racial or ethnic data should be used, but this has mainly focused on the technical legal use of the data.[12]

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[6] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf (4 May 2023).

[7] *E.g.* FRA, *Fundamental Rights Report 2017, 2020, 2021*; FRA, *Antisemitism – Overview of data available in the European Union 2016–2020*; FRA, *Compendium of practices – Hate Crime.*

[8] Based on OSCE ODIHR Hate Crime Database, Data from years 2020-2021, https://hatecrime.osce.org/hate-crime-data (4 May 2023).

[9] P. Bárd, *Prerequisites for the effective fight against hate crimes,* Hungarian Journal of Legal Studies, Vol. 61, No. 3, 2021.

[10] https://gyuloletellen.hu/sites/default/files/gyem_ejebjoggyak.pdf (4 May 2023).

[11] *E.g.* European Commission, *A Union of equality: EU anti-racism action plan 2020-2025*, COM(2020) 565 final; European Commission, *A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime*. COM(2021) 777 final; https://fra.europa.eu/en/publication/2021/hate-crime-reporting (4 May 2023); S. van der Aa, R. Hofmann & J. Claessen, *A Comparative Perspective on the Protection of Hate Crime Victims in the European Union,* Erasmus Law Review, 2021/3.

[12] *E.g.* T. Huddleston, *Equality data indicators: Methodological approach Overview per EU Member State,* Publications Office of the European Union, Luxembourg, 2017.; L. Farkas, *The meaning of racial or ethnic origin in EU law: between stereotypes and identities*, Publications Office of the European Union, Luxembourg, 2017; High Level Group on Non-discrimination, Equality and

Racial and ethnic hate crimes are message crimes because they are also intended to intimidate a community by targeting an individual. For this reason, they have a dual characteristic: the offender has deliberately chosen the target of the crime because of a protected characteristic, and during committing an ordinary crime, immediately before or after the crime, the offender has expressed hostility towards the protected characteristics of the targeted person, group or property. The critical issue is the objective ascertainability of group membership and the possible range of data to support it.

In the following pages I will examine the data management issues involved in the detection and prosecution of hate crime, then present the data management framework that supports the fight against discriminatory situations that are key to the general prevention of hate crime, and finally discuss the need for personal and generalised data in social policy processes to prevent both phenomena, particularly in the development of affirmative action measures. In addition to regulation, I will try to highlight the structural problems of data management resulting from the absence of legislation or even from anomalies in the application of the law.

2. Barriers to coordinated action: diversity of conceptual regimes and multiple layers of regulation

The collection and publication of data on racial or ethnic origin is encouraged by all relevant international conventions and their monitoring bodies, such as the UN Committee on the Elimination of All Forms of Racial Discrimination in its policy statements[13] and thematic consultations[14], the OSCE in its technical guidelines and guidelines[15] and the ET in its thematic comments and country reports[16]. These documents regularly draw attention to the importance of professionally sound and democratically implemented data collection and, where the nature of the document allows, tailor their recommendations to the specific circumstances of the State concerned.

However, data on racial or ethnic origin are of a highly complex nature, making them difficult to understand and manage. The very conceptual definition of race, ethnicity and descent is a challenge, as is the question of the freedom to assume or choose an identity. Identity is an intellectual and emotional complex that is largely determined historically, culturally and sociologically, and in most life situations does not require a legal definition. However, where it does become legally relevant, it comes into the intersection of several fundamental rights and state objectives. From a data protection perspective, the individual or community rights of the data subject and the interests

Diversity, *Guidance note on the collection and use of equality data based on racial or ethnic origin*, Publications Office of the European Union, Luxembourg, 2021; A. L. Pap & E. Kovács Szitkay, *Registering and Profiling Race and Ethnicity in Science and Law Enforcement: a Constitutional Law Approach,* in Law and Forensic Science: A Global Challenge – Acts of the 2nd International Conference, Diritto Piú, Rome, 2022.

[13] *E.g.* General recommendation No. 35. Combating racist hate speech (2013); General recommendation No. 36. Preventing and combating racial profiling by law enforcement officials (2020).

[14] *E.g.* Racial Discrimination in Today's World: Racial profiling, ethnic cleansing and current global issues and challenges (SR.2600, 2017); Racist hate speech (R.2196, 2012), Thematic discussion on „special measures / affirmative action" (SR.2081, 2008).

[15] *E.g.* The Tallinn Guidelines on National Minorities and the Media in the Digital Age (2019); Hate Crime Data Collection and Monitoring: A Practical Guide (2014); The Ljubljana Guidelines on Integration of Diverse Societies (2012).

[16] *E.g.* ACFC Thematic Commentary No. 4 (2016) The Framework Convention: a key tool to managing diversity through minority rights The Scope of Application of the Framework Convention for the Protection of National Minorities ACFC/56DOC(2016)001; ACFC Thematic Commentary No. 2 (2008) The effective participation of persons belonging to national minorities in cultural, social and economic life and int he public affairs ACFC/31DOC(2008)001.

of the state are in conflict:

a) In the case of hate crime prosecution and anti-discrimination measures, the state's aim is to protect a legal institution, i.e. to use state (criminal) power to act against the disruption of social order. Regardless of whether the victim has declared his or her identity or whether the other party has simply assumed it, the victim thus suffers a legal disadvantage that the State must remedy in addition to the guarantees contained in the legislation: the source of the data is irrelevant, the objective is factuality.

b) The system of affirmative actions is a structure interpreted as a response to an economic, social or political situation that has been structurally applied or repressed in the past. The beneficiaries may be the group and its members, but the measures are definite: since their aim is to compensate for a disadvantage, they can only be applied until the disadvantage is removed and only to the extent that they do not violate the fundamental rights of others. In this case, the person concerned can only exercise the rights on the basis of a declaration of his or her identity, i.e. he or she can decide to make a declaration or not.

c) The use of sensitive data for political purposes often conflicts with the principles and possibilities of data protection. In the case of research aimed at revealing the situation of the group as a whole or at informing a general decision, the State should be allowed to have access to objective information. In this case, it is suggested that substitute data be obtained, while stressing the primacy of voluntary identification.

It can be seen that information on racial or ethnic origin, like Schrödinger's cat, is a relativistic factor: it can only be interpreted if it is observed and evaluated in the context of the given legal relationship. They can therefore only be interpreted in their totality and in a results-oriented manner. This is a great responsibility and difficulty in the application of the law. Indeed, specific personal data relating to racial or ethnic origin may be manifest and relevant, manifest and irrelevant, specific and relevant, and specific and irrelevant. This requires a complex analysis of the situation, looking at the intention of the data subject or the intention of the intruder, the context and situation, the individual or group concerned, the purpose of the use, the scientific facts supporting the use, and other sources available to the controller.

3. Intersection of sectoral and data protection rules in the European Union

3.1. General rules

From the perspective of European law, the situation is complex. On the one hand, the fight against hate crime (through criminal law and cooperation in criminal matters), equal treatment (through anti-discrimination legislation) and equal opportunities (through affirmative action) are three intertwined policy areas that require distinctly different legal instruments. On the other hand, there is a synergy – or the legislator's intention to create synergies – between several areas of law, which, however, for both doctrinal and practical reasons, require the processing of personal data of different scope, quality and quantity. Moreover, these different technical needs must or should be channelled into a single EU data protection framework, which should in any case be uniformly applicable in all Member States.

The current EU data protection regime is the result of the data protection reform process initiated by the Lisbon Treaty, replacing the previous complex set of rules. The General Data Protection Directive (GDPR)[17], which entered into force in 2016 but has only been applicable since 2018, and the parallel Law Enforcement Directive (LED)[18], which regulates activities excluded from its scope – law enforcement, defence, national security – in parallel, promised a renewal of the collection and quality of sensitive personal data, which it has only partially fulfilled.

Article 16(1) of the TFEU guarantees the right to the protection of personal data and, like the above, creates the possibility of adopting secondary sources of law. According to Article 8(1) to (3) of the Charter on the protection of personal data, "Everyone has the right to the protection of personal data relating to him. Such data may be processed only fairly and in good faith, for specified purposes, on the basis of the data subject's consent or for some other legitimate ground provided for by law. Everyone has the right to know the data collected about him or her and the right to have it corrected. Compliance with these rules must be subject to control by an independent authority."[19] At the same time, Article 21, which regulates the prohibition of discrimination, already contains a taxonomy of central and substitute concepts, such as race, colour, ethnic or social origin, language, religion or belief, membership of a national minority, property status.

The GDPR sets out a strict three-part framework for sensitive data.

The first element is that the processing of personal data revealing racial or ethnic origin is prohibited under Article 9(1). Recital (51) further explains this hard and fast rule, stating that "Personal data which are, by their nature, particularly sensitive in relation to fundamental rights and freedoms merit specific protection as the context of their processing could create significant risks to the fundamental rights and freedoms. Those personal data should include personal data revealing racial or ethnic origin (…)". The second element is the set of exceptions: the GDPR allows for ten exceptions to the above rule, which are listed in a taxonomy. However, these are not just flexible exceptions for practical situations, but a complex system of safeguards, backed up by guarantees and requiring further legislation. Article 9(2), Recitals 51 to 53 and 71 set out the cornerstones and instruments of this system in a complementary manner. Thus, notwithstanding the prohibition, personal data concerning racial or ethnic origin may exceptionally be processed: (a) with the explicit consent of the data subject; (b) for the fulfilment of obligations arising from legal requirements relating to employment or social security; (c) for the purposes of the vital interests of the data subject; (d) for the purposes of the legitimate activities of an association or a non-profit organisation; (e) manifestly made public by the data subject (f) for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity; (g) substantial public interest; (h) assessment of the working capacity of the employee, health or social care system, medical diagnosis (i) public interest in the field of public health, and (j) archiving, historical research, statistical purposes in the public interest. The third element is the additional built-in guarantee. Recital (51) also clarifies the obligation to comply with the GDPR general system of guarantees. "In addition to

[17] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119.

[18] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119.

[19] R. G. Hanek & L. Farkas, *The potential of the Charter in fighting hate: Enforcing international human rights standards through victims' rights,* Robert Schuman Centre for Advanced Studies Centre for Judicial Cooperation, European University Institute, RSCAS 2020/75.

the specific provisions applicable to such processing, the general principles and other rules of this Regulation shall apply, in particular as regards the conditions for lawful processing. Exceptions to the general prohibition on processing such special categories of personal data should be explicitly provided for, including where the data subject gives his or her unambiguous consent or with regard to certain specific processing needs, in particular where the processing is carried out in the context of their legitimate activities by associations or foundations whose purpose is to enable the exercise of fundamental freedoms."

Moreover, in addition to the three criteria above, the controller must comply with the basic principles of data processing[20] (Article 5), have an adequate legal basis[21] (Article 6) and explicitly provide for a derogation from the general prohibition.

Because of its specific scope, the LED imposes an even stricter restriction than the above. In addition to all the safeguards recognised in the GDPR, it narrows the scope for exceptions: processing of personal data revealing racial or ethnic origin is only allowed, subject to appropriate safeguards for the rights and freedoms of the data subject, if it is strictly necessary and (a) permitted by EU or Member State law; (b) necessary to protect the vital interests of the data subject or of another natural person; or (c) such processing relates to data which have been explicitly made public by the data subject. The Directive also specifically emphasises that the consent of the data subject should not in itself constitute a legal basis for the processing of such special categories of personal data by competent authorities (Recital 37). It is important to emphasise that although the LED is "only" a Directive, Member States are not allowed to derogate from the above mandatory rules in any meaningful way.

The GDPR established the European Data Protection Board (EDPB), which helps to ensure that data protection law is applied consistently across the EU and works to ensure effective cooperation between data protection authorities. As well as issuing guidance on the interpretation of the GDPR's basic concepts, it can also issue binding decisions in cross-border data processing disputes, ensuring that EU law is applied consistently to avoid the same case being treated differently in different jurisdictions.

3.2. Direct action against hate crime and anti-discrimination measures

Situation of discriminations, which can be seen as a precursor to hate crime,[22] lie at the intersection of the rights of the state, the victim and the victimised, and it is therefore worth understanding the nature of the legislation before analysing data protection.

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[20] These are: the principles of legality, fairness and transparency, purpose limitation, data minimisation, accuracy, limited storage, integrity and confidentiality and accountability.

[21] These are: (a) the data subject has given his or her consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is a party or for the purposes of taking steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary for the protection of the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

[22] See in detail Gordon W. Allport's gradient theory of prejudice in the book *The Nature of Prejudice*. G. W. Allport, *The Nature of Prejudice,* Addison-Wesley Pub. Co., Reading, 1954.

Although both the TEU and the TFEU provide for the implementation of the principle of equal treatment, the two areas of intervention under discussion are traditionally linked to national legislation, and for decades the objectives of the Communities have been to play a coordinating role and to introduce targeted action plans. However, the reforms introduced by the Amsterdam Treaty have also created a dynamic for human rights-based action on equal treatment.

The 2008 Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law[23] established a framework for an effective, proportionate and dissuasive criminal law response to hate speech and hate crime at EU level. It required Member States to criminalise hate speech and provided for Member States to include racist and xenophobic motivation as an aggravating circumstance for offences other than hate speech. The Framework Decision was complemented by the Victims' Rights Directive of 2012[24], which aims, inter alia, to provide justice, protection and support to victims of hate crime and hate speech. The necessary legislative process has been fully completed in the Member States, but the Commission has repeatedly drawn attention over the past decade to the very uneven quality of national legislation and to cumbersome and problematic implementation. [25] Partly in response to these concerns, a High Level Group on Racism, Xenophobia and Other Forms of Intolerance was set up in 2016 to directly support Member States' efforts to effectively implement the Framework Decision. In order to enrich the explicit legal instruments against hate speech and hate crimes, the Commission has also taken the initiative to include these two offences in the list of offences with an EU dimension in 2021.[26]

The European Community's anti-discrimination measures are older and more fragmented than the above: they date back to 2000, when Article 13 of the Treaty of Amsterdam, which brought about a change in the approach to human rights, empowered the Community to take appropriate action to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation, in addition to discrimination based on sex. On this basis the Racial Equality Directive (RED)[27] was adopted in 2000, followed by the Employment Equality Directive (EED)[28]. While the former prohibits racial discrimination in a range of areas of life (employment, education, social protection, social advantages, healthcare, access to goods and services, housing), the latter, with a different regulatory logic, focuses on employment and prohibits discrimination on the grounds of religion or belief, age, disability and sexual orientation. The complex, so-called horizontal directive is still not in force for political reasons, so the general principle of equal treatment is implicitly part of comprehensive strategies.[29] From a data protection perspective, the regulations do not contain a specific provision, so they should be treated according to the LED in hate crime situations and

[23] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328.

[24] Directive (EU) 2012/29 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.

[25] On 1 December 2014, the Commission was given responsibility for monitoring the transposition of Framework Decisions by Member States. E.g.: (COM(2014) 27 final).

[26] Communication from the Commission tot he European Parliament and the Council: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime. COM(2021) 777 final.

[27] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

[28] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

[29] *E.g.* A Union of equality: EU anti-racism action plan 2020-2025 [COM(2020) 565 final]; A Union of Equality: EU Roma strategic framework for equality, inclusion and participation and its accompanying proposal for a revised Council recommendation on national Roma strategic frameworks for equality, inclusion and participation [SWD(2020) 530 final]; The European Pillar of Social Rights Action Plan [COM(2021) 102 final].

the GDPR in discrimination situations. As the aim of the legislation is to protect European values and to enforce the criminal power of the state, the voluntary declaration of the origin of the person concerned would be overshadowed anyway, which is underlined by the LED with the mentioned exclusion clause. It is important to note that this is confirmed by the quantity and quality of the data requested: for the prosecuting authority, the perceptions of the perpetrator must be taken into account first and foremost, as this was the – also legally assessed – motive for committing the act. Previous public acknowledgement of racial or ethnic origin, or a personal statement in this regard, is irrelevant to the offence and therefore irrelevant from a data protection perspective. Processing is possible – after establishing the appropriate legal basis and purpose – in the case of the GDPR for the establishment, exercise or defence of legal claims, or on the basis of judicial activities and substantial public interest, under the LED, under EU or national criminal law. The EDPB's interpretation adds that there must be specific legal and technical safeguards to address specific risks and that processing should only be allowed if it is strictly necessary and proportionate under certain conditions.[30] The monitoring of the implementation of the Directive and the application of the Regulation[31], with the involvement of the supervisory authorities, paid particular attention to the review of the processing of sensitive data, in particular with regard to the quality of the relevant legislation and the existence of a system of safeguards. This did not reveal any structural or glaring errors and no anomalies in the application of the law in relation to the processing of data on racial or ethnic origin reported by the EDPB[32] or by the national supervisory authorities.[33]

3.3. Affirmative actions and policy objectives

Alongside repressive and reparative state intervention, preventive and social justice measures for equal treatment play a key role in democratic states.

Article 5 of the RED establishes as a fundamental principle that, with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting special measures intended to eliminate or compensate for disadvantages linked to racial or ethnic origin. „Affirmative action can play an important role in adressing the lack of substantive equality within societies: formal equality alone does not necessarily meet the specific needs of certain groups of people. Measures can be taken to combat discrimination against persons belonging to racial or ethnic minorities. Union law does not prevent Member States from adopting specific measures to prevent or compensate for disadvantages linked to discrimination based on racial or ethnic origin, where a protection clause exists."[34]

The main data processing issue in this case is the voluntary nature of the data subject's declaration and the conflict of public interest. EU law and the majority of Member States have taken the view that the only cases where the data subject should be obliged to declare his or her identity are in order to obtain benefits from the budget or to receive assistances. However, the possibility of establishing the authenticity of identity, multiple identities and the possibility of changing identity may

[30] EDPB, *Recommendations 01/2021 on the adequacy referential under the Law Enforcement Directive (2021).*

[31] See also: P. Vogiatzoglou & T. Marquenie, *Assessment of the implementation of the Law Enforcement Directive,* European Parliament, Brussels, 2022.; European Commission, *Evaluation report on the implementation of the General Data Protection Regulation two years after its application, B9-0211/2021.*

[32] EDPB, *annual reports 2018-2021.*

[33] EDPB, *Overview on resources made available by Member States to the Data Protection Authorities and on enforcement actions by the Data Protection Authorities (2021), EDPB, First overview on the implementation of the GDPR and the roles and means of the national supervisory authorities (2019).*

[34] A Union of equality: EU anti-racism action plan 2020-2025 [COM(2020) 565 final] p. 25.

pose a problem of principle.

Article 3 of the Council of Europe's 1994 Framework Convention for the Protection of National Minorities states that "every person belonging to a national minority shall have the right freely to choose whether or not to be treated as a minority and shall not suffer any disadvantage as a result of that choice or of the exercise of the rights attaching to that choice". [35]

At the same time, the 1990 Copenhagen Final Act of the Conference on Security and Cooperation in Europe (CSCE) declares that „Belonging to a national minority shall be a matter of free choice for the individual and no disadvantage may result from the exercise of that choice (...). Persons belonging to national minorities shall have the right freely to express, preserve and develop their ethnic, cultural and religious identity. (...) No person belonging to a national minority shall be disadvantaged on the basis of whether or not he exercises these rights."[36] This is confirmed by the Organisation for Security and Co-operation in Europe's (OSCE) Ljubljana Guidelines on the Integration of Diverse Societies, published in November 2012, which states in Part II, point 6: "Identity is based on the principle of free and voluntary choice. Minority rights include the right of members of minority communities to choose whether or not to be treated as members of the communities. They must not suffer any disadvantage as a result of that choice - or refusal to choose. The freedom to make this choice shall not be restricted".[37]

One important issue to be adressed in relation to legislative decisions on affirmative action is the theoretical possibility and practical experience of generalised statistical data collection.

The main international advocates for the introduction and application of affirmative actions are the European Commission against Racism and Intolerance (ECRI) and the Advisory Committee for the Framework Convention on National Minorities (AC FCNM), which have defined the systematic collection of data on race or ethnicity as a fundamental element of the protection of minority rights since the beginning of their activities. At the same time, a new methodological proposal was formulated with a view to creating national databases that were as comprehensive and complete as possible: the concept of proxy data was born. This essentially sociological and statistical tool has been recognised in the legal context and its use in policy-making has begun. As early as 1998, for example, ECRI Recommendation No. 4 called for the collection of comprehensive and consistent statistical data in order to assess the effectiveness of policies aimed at ethnic minority groups. The document points out that, in addition to general population surveys, "targeted surveys asking about the experiences and perceptions of potential victims of racism and discrimination provide a new and valuable source of information (...) and the results of surveys can be used in a number of ways to highlight the problem and improve the situation".[38]

In its fourth thematic comment, the AC FCNM, reiterating the above, also cautioned States parties "not to rely solely on official statistics and data, which, for various reasons, may not fully reflect reality. The results should be regularly reassessed and analysed in a flexible manner, in close consultation with minority representatives. Authorities should also use information from other sources, including labour force and other surveys, as well as the results of available independent qualitative and quantitative research on access to rights for persons belonging to national minorities".[39] The

[35] COE, Framework Convention for the Protection of National Minorities (ETS No. 157.) (1994).

[36] CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension (1990).

[37] OSCE, The Ljubljana Guidelines on Integration of Diverse Societies (2012).

[38] ECRI General Policy Recommendation N°4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims (1998) p. 3.

[39] The Framework Convention: a key tool to managing diversity through minority rights, Thematic Commentary No. 4 the

UN Economic Commission for Europe's 2020 Guidelines also confirm the possibility of using proxy data: "Ethnic identity can be measured by a variety of indicators, including ethnic descent or origin, ethnic group membership, cultural affiliation, nationality, racial self-identification, skin colour, minority status, tribe, language, religion or various combinations of these concepts".[40]

While the concept is correct from the perspective of social sciences, there may be legality concerns under the GDPR and LED. Indeed, the data protection regime specifically regulates profiling, which is the process of using data from different sources to make predictions about people by drawing conclusions about an individual based on the characteristics of other statistically similar individuals. Under the GDPR, profiling is the automated processing of personal data for the purpose of evaluating personal characteristics, in particular for the purpose of analysing or making predictions about natural persons.[41] The use of the word 'evaluation' implies that profiling involves some kind of assessment or judgement about the individual. The scope of automated decision making is different and may overlap with or be partly derived from profiling. Automated decision making itself is the ability to make decisions using technological tools without human intervention. Automated decisions may be based on any data, such as data provided directly by the natural persons concerned, data observed about natural persons, derived or inferred data, such as a pre-existing profile of a natural person. Automated decisions may be made with or without profiling; profiling may be made without automated decisions. However, profiling and automated decision making are not necessarily separate activities. What starts as a simple automated decision making process may become a profiling-based process depending on how the data is used.

Controllers may process special categories of personal data only if they fulfil one of the conditions set out in Article 9(2) and one of the conditions set out in Article 6. This includes special categories of data derived or inferred from profiling. Indeed, profiling may generate special categories of data from data that are not special categories in themselves, but become special categories when combined with other data. However, since both the GDPR (Article 22) and the LED (Article 11) prohibit the processing of special categories of data relating to racial or ethnic origin through such processes, this type of data can be processed neither for the original purpose nor in a derived manner.

However, recitals 26 and 21 of the GDPR and the LED provide an exception to the general prohibition on data processing and profiling by stating that data protection principles do not apply to anonymous information relating to an unidentified or identifiable natural person and to personal data that has been rendered anonymous in such a way that the data subject is not or no longer identifiable. It therefore applies to the processing of such anonymous information, including for statistical or research purposes.

The source of proxy data may be, depending on its use, census data, administrative, institutional or organisational records, general or specific statistical surveys, specialist research (demographic, sociological, criminological, etc.), individual reports or even perceptual observation. The table below, based on research by Lilla Farkas, illustrates how, in addition to explicit data on racial or ethnic origin, some EU surveys use proxy data to provide a general racial or ethnic profile of par-

scope of application of the Framework Conventiopn for the Protection of National Minorities ACFC/56DOC(2016)001 section 2.18.

[40] United Nations Economic Commission for Europe (UNECE): Poverty Measurement Guide to Data Disaggregation. United Nations, New York, 2020. p. 33.

[41] Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (wp-251rev.01) pp. 7. and 15.

ticular communities.[42]

	RED monitoring[43]	ICERD monitoring[44]	EU Labour Force Survey [45]	EU Statistics on Income and Living Conditions [46]	EU Living Conditions [47]	European Social Survey [48]	European Health Interview-Survey [49]	EU – MIDIS II[50]	EU Population and Houses Census [51]	EU Anti-Gypsyism Survey [52]
racial origin	x	x			x	x		x	x	x
ethnic origin	x	x			x	x			x	x
skin colour		x			x					x
origin		x			x					x
nationality			x	x			x	x	x	x
place of birth			x	x			x		x	
parents' place of birth				x						
national minority					x	x			x	x
religion						x			x	x
language						x			x	x
place of residence, living environment					x	x	x			
experience of discrimination					x	x		x		

Table 1: Practical use of proxy data for racial or ethnic profiling of communities for professional research purposes

[42] L. Farkas, *The meaning of racial or ethnic origin in EU law: between stereotypes and identities*, Publications Office of the European Union, Luxembourg, 2017, p. 11.

[43] EU: Report from the Commission on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (2021) COM(2021) 139 final.

[44] UN CERD: General Guidelined Regarding the Form and Contents of Reports to be Submitted by State Parties under Article 9, Paragraph 1, of the Convention (2000).

[45] Eurostat: European Union Labour Force Survey (LFS) (1983-).

[46] Eurostat: European Union Statistics on Income and Living Conditions (EU-SILC) (2003-).

[47] Eurostat: Living conditions in Europe (2020).

[48] EU: European Social Survey (EU-ESS) (2001-).

[49] EU: European Health Interview Survey (EHIS) (2006-).

[50] EU: Second European Union Minorities and Discrimination Survey (EU-MIDIS II) (2019).

[51] 763/2008/EC regulation on population and housing censuses (2008).

[52] FRA: A persisting concern: anti-Gypsyism as a barrier to Roma inclusion (2019).

So-called "equality data", produced from proxy data, is an important element of the anti-discrimination and equal opportunities policy system.

According to the High Level Group on Non-discrimination, Equality and Diversity, Subgroup on Equality Data, "Equality data is a powerful tool to support the fight against discrimination and exclusion. This includes in particular the disbursement of resources linked to the EU Structural and Investment Funds, where the horizontal EU principles set out in Article 10 TFEU must be fully respected. However, this requires Member States to have systems in place to ensure compliance with their fundamental rights obligations, such as monitoring through the systematic collection of reliable and objective data".[53] The complex research and presentation on the use of the dataset was carried out in 2017 by Thomas Huddleston, research director at the Migration Policy Group, on behalf of the European Commission.[54] The author has reviewed the legislative and regulatory environment of all the Member States of the then 28-member European Union. His aim was to review the issue along three themes: whether the relevant laws and directives allow for the collection of equality data on all aspects of life; whether equality data are collected adequately and regularly; and whether equality data are used regularly by policy actors to promote equality. In its analysis, it assessed the situation in each of the five categories.

The five data dimensions of the survey represent the texture of the data collected on each protected characteristic:

- "regulation" assesses the quality of Member States' laws and implementing regulations that allow for and guarantee the processing of sensitive data and ensure it in different legal contexts;
- "credibility" is an indicator of the involvement of the communities concerned in the planning processes and the proportion of data that is directly and indirectly accessible;
- "reliability" is a technical characteristic, indicating in particular the elaboration of the set of definitions and methodologies, the consistency of the data, the range of data controllers and the comparability of the data at national and Member State level;
- "complexity" shows how many policy areas are covered by the protected characteristic as an indicator;
- "usefulness" shows the role it plays in local or national legislation, monitoring of enforcement practices and underpinning judicial action.

The overall findings of the research painted a bleak picture of the activities of the then 28 Member States in relation to equality data, as shown in the table below.

[53] High Level Group on Non-discrimination, Equality and Diversity, Subgroup on Equality Data (SED), *Guidelines on improving the collection and use of equality data*, Publications Office of the European Union, Luxembourg, 2021, p. 6.

[54] T. Huddleston, *Equality data indicators: Methodological approach Overview per EU Member State,* Publications Office of the European Union, Luxembourg, 2017.

	regulation	credibility	reliability	complexity	usefulness	average of categories
age	17 %	60 %	75 %	80 %	29 %	52 %
disability	33 %	50 %	55 %	71 %	32 %	48 %
ethnic origin	**19 %**	**50 %**	**55 %**	**62 %**	**31 %**	**43 %**
racial origin	**18 %**	**17 %**	**22 %**	**32 %**	**14 %**	**21 %**
religion, belief	15 %	51 %	29 %	43 %	16 %	31 %
sexual orientation	13 %	31 %	22 %	30 %	17 %	22 %
gender identity	13 %	21 %	15 %	24 %	13 %	17 %

Table 2: Selected quality indicators of the equality data in the member states of the European Union in 2017

Although the general collection of equality data is allowed in all Member States, with certain exceptions, most have not been able to make effective use of this option. The effectiveness of equality data collection is directly and positively correlated with the development of anti-discrimination legislation, definitions and equality policies, as well as general public awareness of minority groups.

Professional definitions and specific data management processes are poorly regulated and underused beyond the monitoring of basic processes related to gender, age, disability and ethnic origin. This is both a cause and a consequence of the lack of consultation with the communities concerned and the limitation of self-determination. According to the study, data on "objectively" measurable characteristics, i.e. age, gender, are more complete, reliable and comprehensive, while the more "subjective" – and therefore difficult to define and identify – data on ethnicity, religion or other belief or disability are less part of the general survey and therefore, although more detailed in terms of actuality, are not systematically collected. Data on racial origin and sexual orientation or gender identity are scarce in most Member States. According to Huddleston, only Finland and the Netherlands have effective systems for collecting equality data to promote equality in practice, although Ireland and Portugal follow closely despite weaknesses in data regulation, reliability, complexity and use.[55]

The handling of personal data relating to racial or ethnic origin was a key focus of the research, so that it could be analysed separately. The table below shows, by Member State[56], the ratios of the five data qualities for the two priority characteristics, as well as the lowest and highest values for each of the protected characteristics in that Member State.[57]

[55] Ibid p. 5-6.

[56] The United Kingdom left the European Union on 31 January 2020, but the exit was followed by a transition period until 31 December 2020, as agreed by the parties. The 2017 survey still includes data for the country.

[57] Source of data: T. Huddleston 2017. pp. 25-52.

MS	racial origin	ethnic origin	lowest value	highest value
AT	4 %	48 %	race, identity	age
BE	15 %	65 %	race	age
BG	16 %	46 %	orientation, identity	age
CY	8 %	8 %	orientation, identity	age
CZ	9 %	37 %	race, identity	disability
DE	9 %	44 %	orientation, identity	disability
DK	4 %	40 %	race	age
EE	4 %	57 %	identity	ethnicity
ES	14 %	35 %	belief	disability
FI	81 %	84 %	race	age
FR	22 %	36 %	identity	age, disability
GR	28 %	28 %	orientation, identity	age
HR	15 %	53 %	orientation, identity, ethnicity	disability
HU	15 %	62 %	identity	age
IR	14 %	57 %	race	age
IT	23 %	26 %	race, belief	disability
L	18 %	33 %	identity	age
LT	7 %	26 %	identity	age
LV	0 %	0 %	race, ethnicity, orientation, identity	disability
M	9 %	8 %	orientation, identity	disability
NL	67 %	67 %	all	all
P	64 %	64 %	orientation, identity	disability
PL	7 %	32 %	orientation, identity	disability
RO	9 %	34 %	identity	age
S	5 %	31 %	race	disability
SK	0 %	15 %	race	age
SLO	3 %	23 %	race, identity	age
UK	99 %	99 %	identity	age, disability, race, ethnicity
avg.	**20 %**	**41 %**		

Table 3: Extent of collection and processing of reliable data on racial or ethnic origin in each EU Member States in 2017

The sectoral results confirm the general findings of the research.

- The measurement of race is particularly marginal in the 28 Member States surveyed, with only 4 countries having a total of over 30% and 14 having a quality of less than 10%. In 12 cases, this was the least well-documented area, with only gender identity (18 countries) showing a higher level of under-representation in the total.

- For ethnic origin, 20 countries had an overall score above 30%, most of them in the 50% range, and only 3 had the least documented protected characteristic.

- Age and disability were measured and analysed at a high level of quality in most countries: they were the most documented factors in 17 and 13 cases respectively.

As indicated above, the vast majority of European countries continue to prioritise the collection of objective-based, documented and directly accessible data, with well-developed definitions, methodologies and collection mechanisms in this area. In the case of subjective data, two segments, ethnicity and religion, which are socially valued and therefore politically positioned, have emerged strongly, particularly in Member States with a large number of indigenous nationalities for historical or sociological reasons, or with strong religious affiliation and social positioning of churches. In the case of racial origin, sexual orientation and gender identity, there is a lack of regulation, data are typically obtained from indirect sources through proxy data, the involvement of the communities concerned is not common, the definition and methodological set is poorly developed and the areas are only peripherally covered in some general surveys. This is probably due to the latency and, in most countries, the lack of broad policy constraints and opportunities in the case of sexual identities. In the case of race, the visibility of those affected and the need for social intervention are not in question. However, the Western and Southern European countries concerned show similarly poor results in this area, indicating both methodological shortcomings and social and political distance from the community situation.

3.4. The impact of subjective factors beyond the law

In the light of the above, while the legal framework for the proper handling of the relevant data is, at least in principle, a reasonable and predictable structure, i.e. well regulated, in practice it may be confronted with a number of sociological and methodological problems. Equally important is the human factor: insecurity, inattention or institutional discrimination on the part of law enforcers can (further) undermine the effectiveness of implementation. It is important to note that although the role of victims is paramount in the prosecution of hate crimes, for the purposes of our topic we can only speak of them as passive subjects. For this reason, I will not address the issues relating to them below.[58]

The most common challenge to the application of the law is "Murphy's law of discrimination". According to the construction formulated by András László Pap, but also clearly observable in everyday legal practice, "it is a peculiarly Eastern (Central) European phenomenon when the misinterpretation of data protection rules unjustifiably serves to protect offenders. If the perpetrators are motivated by explicitly exclusionary, discriminatory intentions, the concept of a minority group or membership of a minority group, or the identification of the persons concerned, does not usually

[58] Detailed analyses of their situation can be found in the literature, for example https://www.osce.org/files/f/documents/c/5/447028.pdf (4 May 2023). C. J. Lyons, *Stigma or Sympathy? Attributions of Fault to Hate Crime Victims and Offenders*, Social Psychology Quarterly, Vol. 69, No. 1, 2006, pp. 39-59.

cause them any problems of definition – the interpretation of racial, ethnic or national categories is a challenge only for the defence lawyers, the law enforcement authorities and, above all, the academics".[59]

Methodological procedures and professional protocols can help to address the situation professionally. A good example is the 2009 joint report of the Hungarian Minority Ombudsman and the Data Protection Ombudsman on ethnic data processing, in which they developed an objective perception criteria for discrimination and hate crimes. In the model, in the absence of specific data but in the presence of proxy data, i.e. at least two primary criteria[60] or one primary and at least one secondary criterion[61], the relevant legislation could be automatically applied.[62]

Less common than the above problem, but more serious because of its purposefulness, is the phenomenon of institutional discrimination. The result can be threefold: firstly, consistently prejudicial or discriminatory behaviour on the part of staff; secondly, an institutional mode of operation and institutional culture that does not take into account the situation of members of society with weak advocacy capacities; and thirdly, a situation of deprivation of resources in which the needy are excluded from even the minimum care facilities.[63] Tackling institutional discrimination involves both taking firm actions against individual cases, and promoting complex and structural changes in organisational culture and personal attitudes.

4. Summary

The European Union has made significant progress in the direct and indirect fight against hate crime since the start of the data protection and anti-discrimination reform launched by the Lisbon Treaty. As seen above, the stability of the data protection legal framework, despite its complexity, can support policy action. In the case of processing for criminal purposes, which is based – as a rule – on legal provisions and confirmatory measures requiring a declaration by the individual, the triple guarantee system, the continuous correspondence between the principles and the monitoring activities of Member States' authorities and law enforcement agencies also allow for effective implementation and necessary practical corrections. However, this requires a combination of two factors: professionals who can harmonise and interpret the legal framework and the social context, and building the trust of the communities concerned. The exceptionally high latency rates in this area and the failure of authorities to initiate proceedings are not due to obstacles to data protection, but to a lack of trust on the part of community members and the effects of institutional discrimination often experienced by the authorities involved.

The main challenge is the uncertainty and legal inefficiencies related to the complex data underlying the legal framework, namely equality data. These data, which are essential for affirmative action and policy-making, are generalised and used for scientific and statistical purposes, therefore

[59] A. L. Pap, *Genealogy in Law as a Technology for Categorizing, Contesting and Deconstructing Monoracialism,* Genealogy Vol. 7, No. 1, 2023.

[60] Skin colour, ethnic dress, other external features, common surname, first name, nickname, parents' names and origin, place of residence (segregated settlement or part of a settlement known to be inhabited by minorities), communication, language use, accent.

[61] Social situation, education, family model, employment status, type of employment, religious affiliation or behaviour, receipt of social benefits.

[62] http://www.kisebbsegiombudsman.hu/data/files/158627216.pdf (4 May 2023).

[63] A. L. Pap, *Hate crimes, underpolicing, institutional discrimination: Hungarian cases, ECHR reflections,* MTA Law Working Papers, 2017/13. pp. 20-23.

the GDPR and the LED protect and allow their processing on a large scale, with appropriate safeguards. The downside is the shortcomings in the application of the law, which affect both the direct policy objectives and the indirect objectives of hate crime prosecution. In the light of the SED's extensive expertise, the following critical areas of jurisprudence can be identified.[64]

1) Failures in enforcement are mainly due to misinterpretation of the data protection framework, lack of sufficient financial resources and lack of awareness of the importance of data collection.

2) Unfortunately, in addition to the above, deliberate abuse can also be observed: the systematic abuse of minority protection institutions creates a situation of ethno-corruption, and malicious or negligent abuse can also be observed.

3) Methodological problems occur in a wide range. Coordination, i.e. a harmonised approach to the collection and use of data, is a crucial factor, which should be ensured through the comparability of data between different data sources. This is partly due to internal imbalances, i.e. the imbalance in the collection of data according to different differentiation bases and the imbalance in the collection of data in different areas of life. The lack of involvement of stakeholders and their advocacy organisations creates an environment that makes it difficult or impossible to take an identity. Finally, the over-reliance on surrogate data significantly reduces the identifiability of target groups.

The European Union can help to remedy these shortcomings by intervening in two ways. In the case of technical and legal documents (in particular directives and action plans), methodological principles for the generalised collection of data on racial or ethnic origin should be laid down and a normative monitoring procedure for data management should be included. Based on the same principle, proposals and supporting documents could be used to ensure requirements for the collection and processing of equality data. Relevant technical opinions and decisions of the courts and the EDPB should be monitored and used in the Commission's law development activities to strengthen jurisprudence.

In addition, in line with the principle of subsidiarity, it is of paramount importance to ensure targeted intervention by Member State legislators to prevent abusive practices and to build a relationship of mutual trust with data subjects and their representative bodies in order to reduce delays and ensure access to credible data. The relevant legal practitioners should be provided with appropriate infrastructural and procedural tools, as well as education, training and adequate professional support to prepare them for the subjective challenges of intercultural communication.

[64] SED 2021, pp. 9-11.

Trends of National Implementation of the Rome Statute: Theoretical Perspectives

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The complementarity system relates to the primary responsibility to investigate and prosecute the core crimes; thus it envisages a strong collaboration between the national justice system and ICC. Theoretically, it might be impressive, however, how the interaction may be achieved remains the difficult question. Even during the negotiation phase of the Rome Statute, the member States envisage complementarity to be the core element because of the sovereignty aspect. However, in some national cases, we also found that the national judicial system accepted the definition of the core crimes in whole or in part or by extending it, but prosecuted the crime domestically without any international involvement and influence. In this article, we are going to discuss different trends of national implementation of the Rome Statute based on the principle of complementarity to understand the perspective from its core. In this article, three emerging models of complementarity will be discussed, which are quite new phenomena in the present world. From these emerging models, the author will focus more on the proactive model as it mirrors the perspective on mutual inclusivity more than others. Finally, the article will imply legal frameworks and institutional capacity-building concepts for States to implement Rome Statute nationally through mutual inclusivity.

Keywords: complementarity, Rome Statute, national criminal jurisdiction, International Criminal Court

1. Emerging Models of Complementarity

Complementarity is the dominant feature of the Rome Statute where the responsibility to investigate and prosecute is upon the State parties unless and until they lack certain conditions. Although there is a permanent international criminal court established under the Rome Statute 1998, the primary jurisdiction is upon the States, which was a reversal to previously established tribunals or courts, which had primacy over the domestic courts.[1] However, the ICC is complementary to national jurisdiction. This means despite establishing an international forum (ICC), the international community expects the states to take the primary responsibility to investigate and prosecute the core crimes on their national territory.

After observing the customary State practices, three models emerge, which are passive, positive, and proactive complementarity models. ElZeidy (2011)[2] mentioned that the concepts of these

[1] O. C. Imoedemhe, The Complementarity Regime of the International Criminal Court, Springer International Publishing, Cham, 2017, p.197.

[2] M. M. El Zeidy, *The genesis of complementarity*, in C. Stahn and M. M. El Zeidy, (Eds.), The International Criminal Court and

emerging models of complementarity systems date back to 1919 to the peace treaties of World War I. He mentioned three models which are the amicable, the mandatory, and the optional models.[3]

For the Nuremberg and Tokyo International Military Tribunals, the amicable model was the best option considering the nature of the crime, where the task has been divided and accomplished by both IMTs by amicable means. An example of the mandatory model could be found in the chapeau of Article 17,[4] where it is mentioned that it was mandatory for the States to investigate and prosecute the cases arising from their jurisdiction. The penalty provisions of the Treaty of Versailles held that if the German trials are unsatisfactory, the Allied authorities shall carry out their proceedings.[5] Thus, the primary responsibility has been given to the State party where the crimes have been committed. Similarly, the Rome Statute echoed these provisions in 1998. On the other hand, an optional model is when the State is waiving its right to investigate and prosecute the crime in a way of self-referral to an international tribunal, e.g., the ICC. It is opposite to the mandatory model however it is voluntary practice.[6]

So, from the above models drawn up by ElZeidy (2011), we can find that the most mutually inclusive interpretation of the complementarity system is the amicable model. This model suggests interaction and performance by both national and international institutions mutually, in an amicable manner. Thus, it is also suggested that the State should incorporate the provisions of the Rome statute and prepare its institution for performing the tasks of investigation and prosecution of international crimes by ensuring a prompt and proper way of justice. In case the State has institutional preparedness to perform its tasks, then the emergence of the optional model of complementarity will not even occur.

Similarly, in light of ICC, we found three emerging models which are passive, positive, and proactive models of complementarity.

1.1. Passive Complementarity

The narrow view of the understanding of complementarity is the passive complementarity model where ICC is the last resort, and domestic courts/institutions will have the primary jurisdiction to investigate and prosecute the core crimes. While drafting the Rome Statute, this was the same view of all participating nations too.[7] However, Anne-Marie Slaughter[8] mentioned it differently, "One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself - arresting and trying tyrants and torturers worldwide - but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice - either a nation tries its own or they will be tried in The Hague - it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle."[9]

Complementarity: From Theory to Practice, Cambridge University Press, Cambridge, 2011, pp. 124-126.

[3] Imoedemhe 2017, p. 43. Also, Treaty of Versailles 1919, Article 228-230.

[4] El Zeidy 2011, p. 125.

[5] El Zeidy 2011, p. 126.

[6] ibid

[7] C. Hall, *Positive complementarity in action*, in C. Stahn and M. M. El Zeidy, (Eds.), The International Criminal Court and Complementarity: From Theory to Practice, Cambridge University Press, Cambridge, 2011, p 1017.

[8] Dean, Woodrow Wilson School of Public and International Affairs, Princeton University.

[9] https://archive.globalpolicy.org/intljustice/general/2003/1221resort.htm#author (14 December 2022)

The narrow view does not only confer the duty upon the States to investigate and prosecute but also to provide a responsibility and obligation to have national preparedness and expertise to confer justice. Also, it is an obligation upon the States to define international crimes in their national legal systems. As mentioned in the Rome Statute 1998, there are some triggering factors when ICC can start its investigation and prosecution process.[10] The passive complementarity model suggests that the ICC remain dormant until and unless its jurisdiction is triggered by States or by UN Security Council referrals.[11] In these circumstances, the ICC prosecutor shall use the *proprio motu* power and initiate an investigation of the crime which leads to prosecution. It was perceived that the prosecutor may rarely use its power to initiate investigation and prosecution because that may conflict with the principle of [States'] sovereignty and non-intervention. However, during the era of the *ad hoc*, the mindset was like States have to take primary jurisdiction to carry out the justice process however their action was passive as they have seen ICC, only as an institute with expertise and ingenious organization to investigate and prosecute the core crimes. Thus, during that period of time, it has been seen that the establishment of *Ad hoc* tribunals which is conferring justice at the domestic level with international expertise and resources. As the States' responsibility is quite passive because of their lack of knowledge and understanding about complementarity which ultimately leads to State referrals, thus we're calling this model as Passive Complementarity Model.

The situation in some African countries represents the passive complementarity model. Countries like Uganda[12], the Democratic Republic of Congo[13], the Central African Republic[14], and Mali[15], due to their lack of knowledge and understanding of complementarity, national preparedness, and expertise, referred the cases to ICC as State referrals. Even the Prosecutor granted the request to initiate *the proprio motu* investigation process in the situation in Kenya[16] and Georgia[17], which was beyond the mindset of parties during the *Ad hoc* era. Thus, these situations lead to the positive complementarity model.

1.2. Positive Complementarity

On 16 June 2003, the very first Chief Prosecutor, Mr. Luis Moreno-Ocampo, at the ceremony for his undertaking of the duty, expressed the idea of a positive complementarity model the following way:

"The Court is complementary to national systems. This means that whenever there is genuine State action, the court cannot and will not intervene. But States not only have the right, but also the primary responsibility to prevent, control and prosecute atrocities. Complementarity protects national sovereignty and at the same time promotes state action. The effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, com-

[10] The Rome Statute of the International Criminal Court, 1998, Article 17 (Unwillingness, inability, undue delay, Statutory limitations etc.) (hereinafter: Rome Statute)

[11] Imoedemhe 2017, p. 45.

[12] https://www.icc-cpi.int/news/icc-president-uganda-refers-situation-concerning-lords-resistance-army-lra-icc (December 2022).

[13] https://www.icc-cpi.int/drc (15 December 2022).

[14] https://www.icc-cpi.int/news/icc-prosecutor-receives-referral-concerning-central-african-republic (15 December 2022).

[15] https://www.icc-cpi.int/news/icc-prosecutor-fatou-bensouda-malian-state-referral-situation-mali-january-2012. (15 December 2022).

[16] https://www.icc-cpi.int/situations/kenya. (15 December 2022).

[17] https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants. (15 December 2022).

plementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[18]

It is very clear from his statement that this model puts the national jurisdiction ahead of the ICC, rather than competing with the national criminal jurisdiction. In the Diplomatic Corps, he mentioned, the key strategic decision includes:

> *"1. a collaborative approach with the international community, including cooperative states, international organizations, and civil society;*
>
> *2. a positive approach to complementarity, rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible;*
>
> *3. While states have the first right to prosecute, and we will encourage them to do so, there may be situations where a state and the Office agree that consensual "division of labour" is appropriate (for example where a national system is fractured or where the impartiality or expertise of the. Court is needed). There is no doubt of admissibility in such scenarios, since Article 17 is clear that cases are admissible in the absence of national proceedings;*
>
> *4. At times, the territorial state may oppose ICC investigation. In such cases, I can use my proprio motu power, but it will be difficult to deploy investigators to the field, and difficult to carry out arrests. Thus, the positive approach to cooperation and complementarity is indispensable. Uganda and Congo are two examples of this approach.*
>
> *5. A policy of targeted prosecution, focusing on those who bear the greatest responsibility;*
>
> *6. A small and flexible office, relying on extensive networks of support with States, civil society, multilateral institutions, academics, and the private sector. This approach enables us to better represent 92 States Parties and to benefit from ideas and perspectives from around the world."*[19]

In the report on Prosecutorial Strategy[20] (14 September 2006), OTP brings back the aspects of the positive complementarity model. Consequently, on the Report of the Bureau on stocktaking,[21] it mentioned:

> *"Positive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support, and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis."*

[18] https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (15 December 2022).

[19] https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf. (15 December 2022).

[20] https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf. (15 December 2022).

[21] https://www.icc-cpi.int/sites/asp/files/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (15 December 2022).

To uphold positive complementarity, the ICC assists the States in three aspects. First, is *legislative support*, which involves guidance in formulating the necessary legislative framework and assistance to get through national obstacles for adopting such legislation. Second, *assistance in technical matters and capacity building*, where the ICC may render assistance in training the national law enforcement agencies, also judges, investigators, forensic experts, and prosecutors in carrying out their duties, as well as building national capacity for victim and witness protection. Even by providing international judges and prosecutors, the ICC can help the national legal jurisdiction or hybrid courts in prosecuting core crimes. The idea is to make the national justice process comply with international standards and the requirement of transparency. Third, *physical infrastructure*, where ICC may assist the State in building courthouses and prison facilities and building capacity to keep their operation sustainable.[22]

The question may arise whether the ICC is acting as a "development agency" or not.[23] ICC doesn't have enough resources nor financial solvency to act as an organization for developing physical infrastructure or a technical capacity-building entity. It has its limited judicial mandate which is the investigation and prosecution of the core crimes.

However, we can see a shift in the first review conference held in Kampala, Uganda in 2010.[24] The notion of positive complementarity championed by the first Chief Prosecutor was limited to the cooperation between State and ICC, whereas the *Report of the Bureau on Stocktaking* (on the Review Conference of 2010), formulated by the OTP suggests cooperation among State parties, civil societies, and NGOs.[25] Though it is unclear how the interdependency works among the parties, which needs further clarification. But it is quite clear that the States need [some] assistance to be able to investigate and prosecute core crimes. The question remains who will ensure and how that entity will ensure that the coordination is working well or needs more exertion?

Therefore, for making positive complementarity work, the OTP's action is not only limited to inspiring the State parties to undertake the responsibility to investigate and prosecute the core crimes, but also to have a methodical tactic to empower the national criminal jurisdiction. It is worth mentioning that the aspirations from the OTP are significant without any doubt, but to make the positive complementarity model work, they are not enough on their own. Thus, we have to turn to examine the proactive complementarity model.

1.3. Proactive Complementarity

The basic idea of the proactive complementarity model is to enable both member States and ICC to involve in the investigation and prosecution process at the domestic level by implementing the complementarity features of the Rome Statute. Thus, it involves the States requesting to ICC for their expertise and practical proficiency to make the national judiciary empowered to try the core crimes at their domestic level. A pragmatic collaboration between States and the ICC is imperative to make the proactive complementarity model work.

[22] https://www.icc-cpi.int/sites/asp/files/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (15 December 2022).

[23] Report of the Bureau on Stocktaking: Complementarity Annex IV ICC-ASP/8/Res.9, adopted at the 10th plenary meeting, on 25 March 2010, para. 4.

[24] https://asp.icc-cpi.int/reviewconference/summaries-and-reports (15 December 2022).

[25] https://asp.icc-cpi.int/sites/asp/files/asp_docs/RC2010/RC-11-Annex.V.d-ENG.pdf (15 December 2022).

In this model, complementarity works as a catalyst, as it is providing serious responsibility to try core crimes upon the national authorities, and the court is playing a twofold role: where it's motivating States to strengthen their national judicial system, and supporting Member States to deliver justice, following the Rome Statute.[26] The OTP also suggests a similar approach by establishing external relations and outreach tactics to encourage and facilitate States to perform their responsibility to render justice.[27] Due to the *principle of non-intervention* and *state sovereignty*, the Member States do not want the ICC's intervention in their national jurisdictions, so the ICCs' triggering factors act as the catalyst.

But this approach can create an unintended distance between the Member States and ICC, which may result in non-compliance or/and non-cooperation by the parties. For example, two scenarios may occur. First, after getting the prosecutor's notification, if the State doesn't take any steps to carry out the investigation process, the case may return to the Prosecutor after one month. Secondly, after getting the prosecutor's notification, the State may initiate the investigation process, but the question remains whether the action can then be termed as genuine or not. In the *Saif Al Islam*[28] and *Muthaura et al*[29] cases, the State wasn't able to produce a proper investigation process and sufficient evidence of specificity and probative value. Therefore, their pleas for inadmissibility were rejected by Pre-Trial Chamber I.

So here we can see the "complementarity paradox", a perfect phrase by Paola Benvenuti (1999)[30], where [most of the time] the States are connected with the crime itself, but for making complementarity work effectively, States' cooperation is also needed. She raised the question that why would they (the State) carry out the investigation process willingly on the first hand, and su0bsequently cooperate with ICC.[31]

Now the question is how to conceptualize the catalyst effect of the ICC in the proactive complementarity regime. To address this question, we have to look at *Article 93 (10)* on other forms of cooperation:

> *"10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct that constitutes a crime within the jurisdiction of the Court, or which constitutes a serious crime under the national law of the requesting State.*
>
> *(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:*
>
> *a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation, or a trial conducted by the Court;*
>
> *b. The questioning of any person detained by order of the Court;*
>
> *(b) (ii) In the case of assistance under subparagraph (b) (i) a:*

[26] SC 4835th meeting, S/PV.4835.

[27] https://www.icc-cpi.int/sites/asp/files/asp_docs/library/organs/otp/030905_Policy_Paper.pdf. (15 December 2022).

[28] Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April. ICC-01/11-01/11-695.

[29] https://www.icc-cpi.int/defendant/muthaura (11 January 2023)

[30] P. Benvenuti, *Complementarity of the International Criminal Court to National Criminal Jurisdictions*. 1999, p. 21.

[31] Ibid p. 50.

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents, or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of Article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute."[32]

Here it is clear that the ICC and the State have to ensure a mutually inclusive independent relationship by providing cooperation and assistance for conducting investigations and trials. Here the ICC Statute mentions assistance from the ICC to States, but reverse assistance is also needed to ensure effective proactive complementarity, which is known as 'reverse cooperation', in the words of Federica Gioia.[33]

According to the above discussion, it is clear that the *principle of complementarity* and the *principle of cooperation* are the two important factors for ICC to function effectively and proactively. Rome Statute does mention a two-way process to address cooperation, from State to ICC and from ICC to State. As mentioned in Article 92(10), upon request from the State, ICC may cooperate with and assist State Party in conducting an investigation or trial of the cases which constitute core crimes and may also constitute a serious crimes under the national law of the requesting State.[34] The assistance may include the transmission of statements, documents or other types of evidence obtained for an investigation or trial.[35] It is provided that for such assistance (for example, the transmission of documents, etc.), States' consent is necessary and in some cases subject to the provisions of Article 68.[36] Furthermore, in the case of non-State parties, upon request, the ICC may assist them in the same manner.[37] Via such assistance and support from ICC, the State party can establish its genuine willingness to carry out the investigation and prosecution nationally.

To understand the assistance more clearly, the case of *The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*[38] needs to be mentioned, where Kenya filed a request for assistance under Article 90(1) and Rule 194. The scope of the request was "for the transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the Post-Election Violence in Kenya, including into the six suspects presently before the ICC", however, the appeal got rejected.[39] The Trial Chamber provided that the 'request for assistance' under Article 90(10) and Rule 194 cannot be invoked when the case is at the court, rather it has to be submitted *in advance* while requesting for the admissibility challenge.

Importantly, any such assistance and cooperation can be filed as a "request", because of safeguard-

[32] Rome Statute, Article 93(10)

[33] F. Giola, *Complementarity and 'Reverse Cooperation*. in C. Stahn and M. M. El Zeidy, (Eds.), The International Criminal Court and Complementarity: From Theory to Practice, Cambridge University Press, Cambridge, 2011, pp. 807–829.

[34] Rome Statute, Article 90(10) (a)

[35] Rome Statute, Article 90(10) (b) (i)

[36] Rome Statute, Article 90(10) (b) (ii)

[37] Rome Statute, Article 90(10) (c)

[38] Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute. ICC-01/09-02/11 OA.

[39] Ibid para. 114.

ing the States' sovereignty and independence. Therefore, ICC cannot intervene unless and until the State is formally and expressly requesting ICC for their assistance and cooperation. The State may or may not take that advantage, it's completely up to them. Initial understanding of proactive complementarity may sound coercive but according to Gioia (2011), she suggested a friendly approach of complementarity where the ICC doesn't act as a censor to the domestic courts but encourage effective circulation of competence and capability between States and ICC.[40] For facilitating constructive interplay between ICC and States, proactive complementarity indeed provides operative and efficient means to allow ICC to fulfill its mandate. It may face difficulties while coordinating between the States and ICC and there are ample legal risks for compromising the consequent admissibility of a case before the ICC. Therefore, as Imoedemhe (2017) suggested, "a cautious strategy of proactive complementarity be adopted, with appropriate limits in order to achieve its full benefits and minimize its potential challenges."[41]

2. The Concept of Genuine National Proceedings in International Law

The term "genuine" is one of the crucial factors determining whether a national proceeding of international crimes is merely a sham proceeding or an authentic one. The admissibility aspects of the 1998 Rome Statute already discussed the issue of "genuineness". However, this term plays a vital role in determining the jurisdiction of the Member States and the international institutions (e.g., ICC). From the State's perspective, it always tries to show that the trial and investigation process is genuine, therefore no interference from international institutes is required, whereas from the ICCs' perspective if the performance of genuineness is below the threshold, the ICCs interference is expected by setting aside the national process. Therefore, it is one of the most important qualifiers representing the States' requirement to perform and the ICCs' limit for exercising its jurisdiction.

Before briefly discussing the concept of genuineness, it is important to note that this concept is very crucial: to bring the perpetrators to justice, a genuine legal proceeding whether national or international, is required to establish justice in a society. Otherwise, due to the non-genuine adjudication, there will be impunity gaps, leading to injustice and international [political] interference. Here the caveat is not all the national proceedings can be termed as "not genuine" only because of some shortcomings in the national effort if the States' are acting in good faith. However, if the suspect is escaping the trial by abusing the national proceeding, then it is again creating impunity gaps, and international interference is required. Therefore, we see the threshold of the concept of "genuineness" is very subtle yet plays a significant role in the justice process.

The term "genuineness" means true, legitimate, authentic, sincere, not counterfeit, and not feigned which means it is something that is truly what it purports to be.[42] Accordingly, we can see two aspects of the meaning. The subjective aspect is sincerity or authenticity, whereas the objective aspect represents it should be something that is claimed to be. Thus factually, if a State carries out the national proceedings through the objective aspect, even with the wrong intention, it may pass ICCs' intervention, whereas with good intention, if a State fails to apply the objective aspects to its national process, it may pre-empt ICC interference.[43]

[40] Gioia 2011, p. 817.

[41] Imoedemhe 2017, p. 50.

[42] https://www.oxfordlearnersdictionaries.com/definition/english/genuine (17 January 2023)

[43] J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, Brill, Leiden, 2008, p. 216.

2.1. Process and outcome

Article 17 of the 1998 Rome Statute provides:

> *"1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*
>
> *(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
>
> *(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*
>
> *(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;*
>
> *(d) The case is not of sufficient gravity to justify further action by the Court.*
>
> *2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:*
>
> *(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;*
>
> *(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*
>
> *(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.*
>
> *3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."*[44]

The reading of Article 17 on issues of admissibility delivers an idea that it focused more on the "genuine" nature of the proceeding, rather than the outcome. Even though according to Article 17(3), it may require certain outcomes such as the inability of a State for carrying out the proceedings or obtaining the evidence or/and testimony etc. However, some jurists claimed that in this Article the word – "genuinely" is not referred to as a verb [in order to carry out the proceeding] but as an adverb to the words – unable and unwillingness – for example, genuinely unable and genuinely unwilling.[45]

By definition, genuine proceedings shall produce genuine, acceptable, and correct findings. How-

[44] Rome Statute, Article 17

[45] Stigen 2008, p. 216.

ever, the correctness of the material will not determine the admissibility of such a case, rather it is the law and fact made in the proceeding which matters. Therefore, some aspects are to be checked to determine whether the criminal proceeding is genuine or not. First, whether the State has ensured a legal and institutional framework or not; second, resorting to the truth of the crime being committed; third whether the State incorporated substantial and procedural legislations or not; fourthly, whether the State is applying the given legislation impartially and independently or not to establish justice.[46]

2.2. National Limitations and Cultural Differences

Essentially the idea of the complementarity regime of the Rome Statute acknowledged the fact that the national criminal proceedings might be different from each other as the 1998 Rome Statute is a blend of both civil law and common law. Another fact is each country has its own legal and cultural differences. Therefore, the checkpoint for determining whether the State has any intention to bring the perpetrators of atrocity crimes to justice or not has to be the intention. If there is a clear idea that there is a lacking of such characteristics which can hardly be called a process based on the complementarity regime such as if the State is trying to shield the perpetrator/s, only that time the ICCs' intervention is required, as per the complementarity principle.

But always it must be remembered that the proceedings can be drastically different from State to State, and in these circumstances, whether the States are performing their subjective duties (sincerely and authentically) and objective (to what it has purported to be) duties to bring the perpetrators to justice in good faith or not, has to be the key point. The State may likely have a clear sign to establish justice through such proceedings but the proceeding itself is different from the "sophisticated" proceedings which are referred to in the Rome Statute as a standard.

In its *Paper on some policy issues*, the ICC prosecutor has said, "A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes. In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions, and cultures. The Office will develop formal and informal networks of contacts to encourage States to undertake State action, using means appropriate in the particular circumstances of a given case. For instance, in certain situations, it might be possible and advisable to assist a State genuinely willing to investigate and prosecute by providing it with the information gathered by the Office from different public sources."[47]

Article 17(2) (a)(b)(c) identifies the subjective aspects of the term – "genuinely" as the main intention behind the criminal proceedings. It also identifies there must not be any delay, and the process must be independent and impartial. Article 17(3) identifies the objective aspects of the word - "genuinely". It provides that the State must be able to obtain the perpetrator and/or necessary evidence and testimony for carrying out its criminal proceeding. However, it is worth mentioning that the idea of genuineness is not fully explained by the Statute or is ill-defined, in comparison with the ideas of "unwillingness" and "inability". Whether a single statute is capable of clarifying the definition wholly or not, remains a question, but it is open to interpretation through the guidance outside statute.

[46] Ibid

[47] https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA-962ED8B6/143594/030905_Policy_Paper.pdf (18 January 2023)

One can argue why not the ICC's own substantive and procedural framework should be taken as a standard. If we look deeper, the 1998 Rome Statute is a blend of both civil law and common law systems, thus application of such an instrument is difficult in every possible jurisdiction. Moreover, the national jurisdiction is not well-equipped with the various resources as the ICC. Furthermore, the standard the ICC is holding, the same standard should not be expected at the domestic level due to socioeconomic, political, and infrastructural reasons. But impliedly the standard can be followed by the States as an ideal standard to keep the proceeding in its optimum form, however, strict regulation of standard is not needed because of underlying purposes[48].

2.3. The Rationale for Implementing Legislation

The 1998 Rome Statute does not provide any express obligation on the State parties for implementing its provisions on the national level, except in a few circumstances under Article 70(4)(a)[49] – regarding penalizing offenses against the administration of justice, and Article 86 to 92[50] - regarding the obligation to cooperate. Therefore, incorporation of the atrocity crimes in national criminal jurisdiction is not an express obligation on the Member States. Some jurists even suggested that the integration of the Rome Statute in the national criminal jurisdiction is not needed.[51]

So, do these lacunas justify the non-incorporation of the States for applying the 1998 Rome Statute? Not necessarily. Even before the incorporation of the ICC Statute, the crimes mentioned in the Rome Statute were already a part of general international law and recognized by the States, so as the obligation to bring perpetrators to justice. Article V of the Genocide Convention 1948, Articles 49,50,129 and 146 of the four Geneva Convention 1949 respectively, Articles 85 to 87 of the Additional Protocol I, Article 6 of the Torture Convention 1984 and other international treaties expressly convey this obligation to enact the provision in the national jurisdiction. As a result, the obligation to incorporate such laws derives from the treaty laws customarily. Reference can be made from Article 1 of the 1998 Rome Statute that it does not expressly require national implementation; however, it echoed the idea of the complementarity principle through which the primary duty has been given to the Member States. Therefore, it implied the need for implementation whether the States can investigate and prosecute such crimes mentioned in Articles 6-8 of the Statute in their national jurisdictions, unless and until the State is unwilling or unable to carry out such responsibility.

According to the case of *Saif Al Islam Gaddafi,*[52] the Pre-Trial Chamber I (PTCI) clarified that the lack of legislation on crimes against humanity doesn't render the case admissible before the ICC, however, the PTCI mentioned that the reason for the admissibility was Libya's inability to pros-

[48] To ensure justice for the perpetrators of the international crimes.

[49] Rome Statute, Article 70(4)(a) "Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals".

[50] Rome Statute, Article 86-92.

[51] S. Nouwen, *Complementarity in Uganda: domestic diversity or international imposition,* in C. Stahn and M. M. El Zeidy, (Eds.), The International Criminal Court and Complementarity: From Theory to Practice, Cambridge University Press, Cambridge, 2011, p. 1127. Also, F. Megret, *Too much of a good thing? Implementation and the uses of complementarity*, in C. Stahn and M. M. El Zeidy, (Eds.), The International Criminal Court and Complementarity: From Theory to Practice, Cambridge University Press, Cambridge, 2011, pp. 361–390.

[52] Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" of 5 April, ICC-01/11-01/11-695.

ecute such crimes in their territory.[53] Moreover, the PTCI stated that Libya was unable to provide an adequate degree of evidence and probative value which validates that the investigation process has covered the *same conduct*.[54] The PTCI referred to two Kenyan cases (*The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,*[55] and *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*)[56] which was dealing with "same person same conduct" principle. The chamber held:

> *"The defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under Article 17(1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court"*[57]

So, if we go through both the aspects of the Statute itself and the court's ruling, it seems that the comprehensive legislation is quite indispensable for the ICC to perform its complementarity mechanism. As the two pillars – the State and the ICC – are balancing the interplay of cooperation and implementation. Because by implementing the legislation, the State is having the primacy over ICC to perform investigation and prosecution in their national sovereign territory. When international crimes are reflected in the domestic jurisdiction, it becomes easier to investigate and prosecute the case/s with international legal characterization.

3. Legislation on Cooperation

Parts 9 & 10 of the 1998 Rome Statute expressly discusses the cooperation legislation where the Member States are expected to cooperate in good faith. Whether a new cooperation mechanism needs to be established or not, remains a matter of debate. The argument may arise that the States may use the pre-existing cooperation mechanism available to them already.

A careful reading of Parts 9 & 10 gives us three areas of cooperation, which are (1) mechanism for arresting and surrendering with the request of the court, (2) adequate and prompt support to the court for investigation and prosecution, and (3) general enforcement.[58] Unlike the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for former Yugoslavia (ICTY), the ICC doesn't allow trials *in absentia*.[59] Thus ICCs' success depends on how the partner States are reciprocating their compliance with the provisions related to the arrest and surrender of the suspects to ensure their appearance in court.

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[53] Ibid, para 30, 34, retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_01904.PDF (accessed 05 May 2023).

[54] Ibid para 88.

[55] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statue, ICC-01/09-01/11.

[56] Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11.

[57] Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11.

[58] The forms of cooperation include general compliance with the ICC requests for cooperation (Article 87); Surrender of persons to the Court (Article 89); Provisional arrests pursuant to ICC requests (Article 92); identification or location of persons or items, taking and production of evidence, service of documents, facilitating witnesses' and experts' attendance before the ICC, temporary transfer of persons, examination of sites (e.g. mass graves), execution of search and seizure Orders, protection of witnesses, freezing of sequestration of property and assets (Article 93); and enforcement of sentences (Article 103–107)

[59] Rome Statute, Article 63.

In the *Blaskic*[60] case, the ICTY stated that "enforcement powers must be expressly provided and cannot be regarded as inherent in an international tribunal".[61] However, the ICC does not have a police force, or/and cannot arrest somebody anybody. Thus, there is no such enforcement mechanism of international criminal legal jurisprudence. Thus, for such a cooperation regime, the court has to rely upon the horizontal cooperation mechanism among the States. as a result, it solely depends on the sovereign decision of the State itself whether they want to cooperate or not.

The 1998 Rome Statute mostly talks about mutual horizontal assistance from the States to the court. However, through the complementarity regime, it also came up with the concept of *sui generis* cooperation among like-minded States. That means the Statute has a mixed regime of cooperation, which is more horizontal, not vertical as that of the ICTR or ICTY. As the ICC Statute is a treaty thus reconciling the conflicting interests are must. Even ICC can seek help (cooperation) from a non-State party to provide assistance in the criminal proceeding on an appropriate basis.[62]

As mentioned before, it is not always the ICC that will seek cooperation from the States, but it may be the case that the State is seeking "reversed cooperation", according to Gioia (2011).[63] And this factor is quite essential to perform proactive complementarity. Thus, the cooperation regime is not just there to benefit ICC, but it is the vis-à-vis element for both the court and the State. And for such to happen there must be a bridge to refill the gap, and incorporation of such legislation may be the way to establish such a cooperation regime.

It is important to note that without cooperation, the ICC cannot perform its duty in full. However, the mechanism differs from State-to-State practices - how they will be cooperating with each other. Therefore, it can be suggested that along with the Rome Statute, a cooperation legislation/mechanism has to be incorporated as well to keep the inter-play sustainable. The next section will discuss the complementarity legislation and how the State can incorporate atrocity crimes into their national criminal jurisdiction.

3.1. Complementarity Legislation

Incorporation of the atrocity crimes referred by the 1998 Rome Statute in the national criminal jurisdiction is not only an expectation, but also it makes the legal basis for the States to perform their duty to try such crimes at their domestic level. We have to understand that the main differentiating point for the trial of an ordinary crime and an international crime is its intention with international classification and characterization. And to balance any possible lacunas, complementarity legislation is an imperative mechanism. It carries some potential challenges at a domestic level. Furthermore, atrocity crimes are already recognized as *jus cogens* internationally, thus it is imposing the duty upon the States to ratify the legislation. So, either the State can extradite the perpetrators or prosecute them at their domestic level, and in complementarity, the latter is more focused.

Hence, the idea of *aut dedere aut judicare*[64] brings twofold requirements. Firstly, development of the legislative competence is the primary duty to ensure, so that national criminal jurisdiction explicitly criminalizes atrocity crimes – genocide, crimes against humanity, war crimes, and crimes of

[60] https://www.icty.org/x/cases/blaskic/cis/en/cis_blaskic.pdf (19 January 2023)

[61] https://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html (accessed 05 May 2023), more case documents can be found in https://ucr.irmct.org/scasedocs/case/IT-95-14#appealsChamberDecisions, 19 January 2023.

[62] Rome Statute, Article 93(10).

[63] Gioia 2011, pp. 807-828.

[64] Either extradite or prosecute.

aggression. Without such legislative competence, prosecution or investigation will not be possible in the domestic jurisdiction. Secondly, ensuring the institutional capacity building to prosecute and investigate the atrocity crimes domestically. Therefore, the State must ensure that the institute has the capacity, adequate training, proper access to international resources etc. In the next segments, the integration methods will be discussed which a State can follow to incorporate atrocity crimes into the national criminal jurisdiction.

3.2. Minimalist Approach

When a State applies the ordinary [or military] criminal jurisdiction to address the conduct in question by solely relying upon domestic crimes such as murder, rape, destruction of property etc, that is called the minimalist approach.[65] Here the State is not incorporating any international crimes, but they are simply applying its categorizations in conduct.

The Supreme Court of Peru, in 2009 convicted former president Alberto Fujimori for murder, serious bodily harm, and kidnapping, however, they recognized that the accused could have fallen under the crimes against humanity too, but due to their limited jurisdiction, they followed the ordinary criminal code to adjudicate the case.[66] To note, Peru is a member State of the 1998 Rome Statute, they signed the Statute on 7 December 2000 and deposited their instrument of ratification on 10 November 2001,[67] yet they didn't have the crimes incorporated in their national criminal jurisdiction.

Similarly, Libya's connection with the International Criminal Court is complicated by the fact that it is not a signatory to the Rome Statute. It is debatable whether a nation that is not a signatory to the treaty is obliged by the ICC's mandates or not. Akande (2012) interpreted this issue by pointing out that the basis of Libya's responsibility to the ICC is UN Security Council Resolution 1970 (2011), which refers Libya's case to the Court and obligates Libya to comply with the Court's requests.[68]

It is evident that Libya and Sudan have an international legal responsibility to assist the Court, and that obligation stems from the UN Charter. Akande (2012) mentions that despite the fact that Libya is not a signatory to the ICC statute, it is a UN member state and hence subject to Resolution 1970 (2011). A non-party state is not normally bound by the ICC's demands since it has not accepted the Rome Statute. However, in the instance of Libya, the States' responsibilities to the court are settled because UN Security Council Resolutions are enforceable on all UN member States. As the Rome Statute expressly specifies that the Security Council has the authority to submit matters to the ICC, Resolution 1970 (2011) binds Libya to the Rome Statute even though the state of Libya is not a party to it.[69] Afterward, even though Libya approached the court with this minimalist approach to investigate and prosecute *Saif Al-Islam Gaddafi*, the Pre-Trial Chamber I held that state authorities were unable to perform their duties, thus the admissibility challenge was rejected.

It is important to note that the approach could be found mostly in dualist states. There are some cas-

[65] Imoedemhe 2017, p. 72.

[66] https://img.lpderecho.pe/wp-content/uploads/2016/12/Sentencia-del-Tribunal-Constitucional-caso-Fujimori-Legis.pe_.pdf (19 January 2023)

[67] https://asp.icc-cpi.int/states-parties/latin-american-and-caribbean-states/peru (19 January 2023)

[68] D. Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, Journal of International Criminal Justice, Vol. 10, No. 2, 2012, pp. 299-324.

[69] Christian Rodriguez, *Libya and the International Criminal Court: A Case Study for Shared Responsibility*, https://pitjournal.unc.edu/2023/01/15/libya-and-the-international-criminal-court-a-case-study-for-shared-responsibility/, 19 January 2023.

es where the States incorporated the atrocity crimes with harsher sentences, e.g., Denmark, which may reflect the seriousness of the crime but not always reflect the scale, conduct and pattern of the international crimes.[70] The dilemma of the minimalist approach is - that crime and its prerequisites along with conformity of the penalty - are not active in international standards, as it does not serve the best interest of the States which are reluctant to incorporate the core crimes in their jurisdiction.

3.3. Express Criminalization Process

The Rome Statute may be specifically incorporated into national legislation through a wide and open-ended reference as a means of express criminalization of international crimes. The static or literal transcribing technique and the dynamic criminalization approach - both forms of express criminalization can be taken into consideration in State practice.

The static method entails repeating the definitions of genocide, crimes against humanity, and war crimes found in Articles 6, 7, and 8 of the Rome Statute when transposing international crimes into domestic law. The law specifies the punishments that apply to the offenses in question and contains phrasing that is the same as that of the Rome Statute. This approach has been used by countries including the United Kingdom, Malta, Jordan, and South Africa among others to adopt complementarity legislation. The static transcription method complies with the legality principle since it specifies precisely and reliably whatever conduct is regarded as an international crime and what penalties are associated with it. Additionally, it makes the task easier for those responsible for enforcing the law. Assistance about the fundamental components of international crimes as outlined in the 1998 Rome Statute is provided by adopting the identical terms of the Statute in domestic legislation. The drawback is that it could not account for recent advancements in international criminal law. As a result, modifications would need to be made to adjust for relevant developments.

Criticism of this method could be the States may incorporate only the crimes and its definition, as New Zealand, Uganda and Kenya did; however, variation could be found where the State (Australia), not only adopted the text of the given crime but also adopted the ICC Elements of Crime in whole.[71]

Another method is the dynamic criminalization method where the conduct of the crime mentioned in the Rome Statute has been reformulated, rearticulated, and reworded in order to make the integration process with domestic crimes easier. Thus, the legislation may provide some clarification to the atrocity crimes, however, there is a chance for limiting the scope of the crime/s, or/and overly defining the crime/s and its conduct. All the core crimes i.e., genocide, crimes against humanity, war crimes and crimes of aggression obtained jus cogens status and became a part of general international law. However, while domesticating the atrocity crimes, we can expect the definition of the crimes to be identical to the standard definition. Unfortunately, we can see a notable example of differences in the definition of the crime itself, which is significantly expanding or limiting the scope of the application of the crime.

Tamás Hoffmann has analyzed the crime of genocide in its almost countless domestic varieties by showing how the international definition may be integrated into states' national and international practice.[72] He briefly discusses the limiting scope of the crime of genocide mentioning as an ex-

[70] Imoedemhe 2017, p. 73.

[71] Imoedemhe 2017, p. 74.

[72] T. Hoffmann, *The Crime of Genocide in Its (Nearly) Infinite Domestic Variety*, in M. Odello & P. Łubiński (Eds.), *The Concept of*

ample that "racial" groups are not included in the definition of genocide in Bolivia, Ecuador, Guatemala, Paraguay, and Peru; "national" groups are missing from the criminal code of Nicaragua; while "ethnic" groups are excluded from the criminal law frameworks of Costa Rica, El Salvador, and Oman. He even mentioned some countries omitted or restricted the underlying offenses of the crime of genocide, such as the Czech Republic, Georgia, Guinea Bissau, Poland, and the Special Administrative Region of Macao have completely omitted the mental harm requirement by only criminalizing "serious bodily injury".[73] Moreover, he mentioned that some countries seemingly expand the list of protected groups, but these additions do not result in a different scope of application, such as Australia, Liechtenstein, and the US.[74] In his article, he provided three reasons for such changes in the definition which are the domestic version of genocide as a means to ensure historical justice, domestication of international criminal law, path dependency where States followed another State's legal instrument and blindly incorporated it, finally the translation and drafting error. In his research, he identified out of 196 countries, only 41 countries have an identical definition of the crime of genocide, whereas 100 countries have varying degrees of differences and 55 countries have not even implemented the crime of genocide in their national criminal jurisdiction.[75] Therefore, the method could be criticized for its lenient approach that may end up with uncountable means of the practice of the same crime by the States.

Through the above-mentioned discussion, the best possible approach could be the "dynamic criminalization method", even though it poses risks of speculation of a variety of practices of the same crime. And this approach is quite compatible with the 1998 Rome Statute and its complementarity principle as well.

4. Conclusion

This paper focused on different theoretical concepts and trends of complementarity to understand their core tenets. Although it is not an obligation of the Member States to adopt the 1998 Rome Statute, however for implementing the legislation and proper functioning of international [criminal] justice, it is imperative to incorporate (ratify) such legislation in the national criminal jurisdiction. the case of *Saif Al Islam Gaddafi* was discussed to demonstrate that implementing legislation plays an important part, and it also upholds the principle of *same conduct same person* test.

Of the three emerging models of complementarity, the proactive model mirrors the perspective of mutual inclusivity more than others. And for proactive complementarity to function, the two pillars of the International Criminal Court have to be well established: both cooperation and complementarity. Jon Heller takes the view that complementarity is a double-edged sword,[76] thus we see that implementing legislation through the dynamic criminalization method possess risks of speculation of various national practices of the same crime, however, it seemed the best possible way so far.

Legal scholars always suggested making sure the implementation legislation is enacted to the Member States. According to Amnesty International, 40 State parties enacted some form of imple-

Genocide in International Criminal Law - Developments after Lemkin, Routledge, Oxon, 2020, pp. 69-96.

[73] Hoffmann 2020, p. 7.

[74] Hoffmann 2020, p. 8.

[75] Hoffmann 2020, p. 25.

[76] K. J. Heller, *The shadow side of complementarity: the effect of article 17 of the Rome Statute on national due process*, Criminal Law Forum Vol. 17, 2006, pp. 255–280.

menting legislation.[77]

Out of them, only 22 Member States incorporated in their legal systems both complementarity and cooperation legislation.[78]

The ratification of the 1998 Rome Statute demonstrates the intention of the Member States for combating impunity gaps for the core crimes and carry an international responsibility. However, it is to remember that mere ratification cannot serve the complementarity regime of the Statute, the State parties must incorporate both complementarity and cooperation legislation to serve.

[77] Australia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Colombia, Congo (Republic of), Costa Rica, Croatia, Denmark, Estonia, Finland, France, Georgia, Germany, Iceland, Latvia, Liechtenstein, Lithuania, Mali, Malta, the Netherlands, New Zealand, Niger, Norway, Peru, Poland, Portugal, Romania, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, United Kingdom. Whereas 31 State parties have drafted their implementing legislation - Argentina, Benin, Bolivia, Botswana, Brazil, Central African Republic, Democratic Republic of Congo, Dominica, Dominican Republic, Ecuador, Gabon, Ghana, Greece, Honduras, Hungary, Ireland, Italy, Jordan, Kenya, Korea (Republic of), Lesotho, Luxembourg, Mexico, Nigeria, Panama, Samoa, Senegal, Uganda, Uruguay, Venezuela, Zambia. On the contrary, only 29 State parties didn't even draft any implementing legislation including Afghanistan, Albania, Andorra, Antigua and Barbuda, Barbados, Belize, Burkina Faso, Cambodia, Cyprus, Djibouti, East Timor, Fiji, Gambia, Guinea, Guyana, Liberia, Macedonia (FYR), Malawi, Marshall Islands, Mauritius, Mongolia, Namibia, Nauru, Paraguay, Saint Vincent and the Grenadines, San Marino, Sierra Leone, Tajikistan, Tanzania. See more: https://www.amnesty.org/en/wp-content/uploads/2021/06/ior400112009en.pdf (accessed 05 May 2023).

[78] Australia, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Croatia, Denmark, Estonia, Finland, Georgia, Germany, Iceland, Liechtenstein, Lithuania, Malta, the Netherlands, New Zealand, Slovakia, South Africa, Spain, Trinidad and Tobago, United Kingdom; 08 State parties only implemented complementarity legislation including Burundi, Colombia, Congo (Republic of), Costa Rica, Mali, Niger, Portugal, Serbia and Montenegro; only 10 State parties implemented cooperation obligation including Austria, France, Latvia, Norway, Peru, Poland, Romania, Slovenia, Sweden, Switzerland. See more: https://www.amnesty.org/en/wp-content/uploads/2021/06/ior400112009en.pdf (accessed 05 May 2023).

An Odd Solution – Comments on the Margins of a Recent Debate on National Minority Suffrage: ECtHR judgement in Case Bakirdzi and E.C. v. Hungary

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This case note analyses the judgment of the European Court of Human Rights in the case of Bakirdzi and E.C. v. Hungary. The judgment pertains to the effective participation of minorities in public affairs in the context of electoral rights. In its ruling, the ECtHR found a violation of Article 3 of the First Additional Protocol to the ECHR, read alone and in conjunction with Article 14 of the Convention. The judgment underlines important principles as to preferential arrangements regarding the participation of national minorities in the electoral process.

Keywords: effective participation in public affairs; electoral threshold; equal suffrage; national minority list; parliamentary election; preferential parliamentary representation; prohibition of discrimination; right to free choice; right to free elections; secret suffrage; suffrage

1. Introduction – the background of the judgement

Pursuant to Article 2 (2) of the Fundamental Law, the participation of the thirteen national minorities living in Hungary in the work of Parliament is regulated by a cardinal law. On the basis of this provision, Act CCIII of 2011 on the Election of Members of Parliament (hereinafter: Election Act) introduced a system of national minority representation from 2014, in which members of national minorities may apply for registration in the central register of voters as national minority voters with effect also extending to the election of Members of Parliament, on the basis of their self-identification, in accordance with section 85 (1) and section 86 (c) of Act XXXVI of 2013 on the Election Procedure (hereinafter: Election Procedure Act).

Pursuant to section 12 (2) of the Election Act, voters residing in Hungary who are registered in the electoral roll as national minority voters may vote (a) for a single mandate constituency candidate and (b) for the list of their national minority, or, in the absence of such list, for a party list. In contrast with that, other voters resident in Hungary may vote for one single mandate constituency

candidate and one party list.[1] In the election of Members of Parliament, each national minority may have only one closed national minority list drawn up by the national-level self-government of that national minority. Voters registered as national minority voters may only vote for their national minority's list and may not influence the order of candidates on the list.

According to section 16 (d) of the Election Act, national minority lists enjoy a preferential quota and may obtain a preferential mandate. The preferential quota shall be one quarter of the number of votes required to obtain a mandate from a party list in the given year. In accordance with section 18 (1) of the Election Act, a national minority that has set up a national minority list but has not obtained a seat on it shall be represented in Parliament by a national minority advocate.

The applicants living in Budapest, namely K. Bakirdzi belonging to the Greek national minority and E.C. of Armenian national minority[2] applied, on the basis of sections 85 (1) and 86 (c) of the Election Procedure Act, for registration in the national minority register as national minority voters prior to the election of the Members of Parliament on 4 April 2014, with effect also extending to the election of the Members of Parliament. In that year, all national minority self-governments established national minority lists. In 2014, no national minority list received enough votes to win a preferential mandate. The preferential quota necessary for obtaining a preferential mandate was 22,022 votes. In 2014, no national minority list received enough votes to win a preferential mandate.

Without recourse to domestic legal remedies, the applicants individually applied to the ECtHR,[3] which examined the applications in a single procedure, given the similarity of the subject matter.

2. Procedure before the ECtHR

2.1. Admissibility of the applications

In its submission, the Hungarian government pointed out that the applicants had not appealed to the regional election commissions against the decisions of the local election commissions to register them as national minority voters with effect for the election of Members of Parliament. If the appeal had been rejected, the Hungarian government argues that the applicants would have had the possibility of a judicial remedy. They could have lodged a constitutional complaint against the courts' decisions under section 26 (1) of Act CLI of 2011 on the Constitutional Court (Constitutional Court Act). However, the applicants failed to exhaust domestic remedies. The applicants argued that their removal from the national minority registers could not have remedied their injuries.[4]

The Hungarian Government also argued that the applicants could have appealed against the decision of the polling station commission to the competent election commission and then to the National Election Commission (NEC). The NEC's decision could have been challenged before the Curia and the Curia's decision could have been the subject of a constitutional complaint. However, the applicants also failed to pursue these remedies. In the context of an objection to the decision of the polling station commission, they pointed out that it can be necessarily lodged in the context of

[1] Section 12 (1) of the Election Act.

[2] See the list of applicants in the annex to the *Bakardzi and E.C. v. Hungary* (App. no. 49636/14 and 65678/14) ECtHR (2022) (hereinafter: Judgment).

[3] See the annex to the Judgment for the deadline for submitting applications.

[4] Judgment, para. 28, 30.

the counting of the votes and not in relation to the application of a provision of law allegedly being contrary to the Fundamental Law.[5]

The ECtHR rejected the Hungarian Government's objections concerning the failure to exhaust domestic remedies and declared the applications admissible.[6]

2.2. Decision in the merits of the case

The applicants complained under Article 3 of the First Additional Protocol to the European Convention on Human Rights (ECHR) and Article 14 of the ECHR that, although the Hungarian authorities intended to promote the participation of national minorities in the legislature, the measure had the opposite effect and led to the disenfranchisement of the groups concerned, since under the relevant legislation national minorities have no real possibility to reach the preferential quota and thus obtain a preferential mandate.[7]

It was further argued that a fundamental element of free elections is genuine choice. National minority voters, however, had no real opportunity to vote. On the one hand, because national minority voters were excluded from voting to the party list, and on the other, they could only vote for a closed list of their own national minority.[8]

The applicants also complained of the fact that limiting the national minority voters' choice to a closed national minority list also violated the secrecy of the vote. Once they had identified themselves as national minority voters at the polling station, it was immediately known to everyone how they were voting.[9]

According to the applicants, the measures were discriminatory, as they were treated differently from other voters because of their national minority.[10]

In its submission, the Hungarian government argued that the preferential mandate constituted positive discrimination, the legitimate aim of which is to increase the political participation of national minorities in Hungary.[11]

According to the Hungarian government, the principle of equal suffrage would be violated if a national minority voter could vote for both a national minority list and a party list. With this in mind, the restriction introduced in the national legislation to avoid multiple national minority votes can also be considered a legitimate aim justifying the restriction of the national minority voters' right to vote to the national minority list.[12]

Finally, the Hungarian Government has also stressed that it is up to the free choice of voters whether they apply to be registered in the list of voters as a national minority voter with effect also for the election of Members of Parliament. As pointed out, they could subsequently change their reg-

[5] Judgment, paras. 29-30.

[6] Judgment, paras. 31-34.

[7] Judgment, para. 35.

[8] Judgment, para. 36.

[9] Judgment, para. 37.

[10] Judgment, para. 38.

[11] Judgment, para. 39.

[12] Judgment, para. 40.

istration at any time.[13]

In the context of the preferential quota system, the ECtHR referred to a previous case and pointed out that the ECHR does not oblige contracting parties to provide for positive discrimination in favour of national minorities.[14] In a similar earlier case, the Court has already noted that Article 15 of the Council of Europe Framework Convention on National Minorities, while recognising the freedom of discretion granted to the State in electoral matters, emphasises the participation of national minorities in public affairs. The ECtHR, taking into account the opinions of the Advisory Committee on the Framework Convention on National Minorities and the Venice Commission, has taken the view, however, that the parties to the Framework Convention on National Minorities have a wide margin of discretion as to how to approach the objective set out in Article 15 of the Framework Convention on National Minorities, i.e. the promoting the effective participation of persons belonging to national minorities in public affairs, and stressed that the ECHR, interpreting the issue even in the light of the Framework Convention on National Minorities, does not require different treatment in favour of the political parties belonging to national minorities in the context of participation in public affairs.[15]

The ECtHR noted that in the system under examination, national minority lists could only obtain the requisite number of votes to obtain a preferential mandate from the ballot of voters belonging to the given national minority community who were registered as national minority voters, including for the election of Members of Parliament. This rule, however, placed them in a significantly different position from other party lists, which could obtain votes from the total eligible electorate. According to the ECtHR, the legislation also infringed the right of applicants to associate for political purposes through their votes, since national minority lists could only be endorsed by voters belonging to the national minority community concerned.[16]

The ECtHR considered it essential to stress that the disadvantage in the electoral process was not based on the national minority voters' own choice to associate themselves with a narrow political interest group of the population, but on the legislator's decision to restrict who could cast a ballot on national minority lists.[17]

The ECtHR accepted the applicants' argument that in Hungary the number of voters belonging to specific national minorities was not high enough to reach the preferential electoral threshold even if all voters belonging to that national minority were to cast their vote for the respective minority list.[18]

The ECtHR has stressed that States may condition access to parliamentary representation upon the showing of a modicum of support, and the ECHR does not require States to adopt preferential thresholds in respect of national minorities. However, in the event that States do set a quorum for national minorities, consideration needs to be given whether that threshold requirement makes it more burdensome for a national minority candidate to gather the requisite votes for a national minority seat than it is to win a seat in Parliament from the regular party lists and whether – in turn – that electoral threshold has a negative impact on the opportunity of national minority voters

[13] Judgment, para. 41.

[14] *Magnago and Südtiroler Volkspartei v. Italy,* no. 25035/94, the decision of the European Commission of Human Rights of 15 April 1996.

[15] *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016), para. 43; Judgment, para. 54.

[16] Judgment, para. 55.

[17] Judgment, para. 56.

[18] Judgment, para. 57.

to participate in the electoral process on an equal footing with other members of the electorate . The legislature must assess whether the statutory scheme creates a disparity in the voting power of members of national minorities.[19]

As regards the freedom of national minority voters to choose, the Court pointed out that, as a condition of their registration as national minority voters, applicants had only two options: (a) to vote for their national minority list as a whole or (b) to abstain from voting. National minority voters could not choose between the different party lists, nor did they have any influence on the order in which the candidates were elected from the national minority list.[20]

In the context of closed party lists, the Court has held, referring to a previous case, that they cannot in themselves be considered to unduly restrict the political choices of voters.[21] However, in the case of closed national minority lists, the ECtHR considered it essential to examine the extent and nature of the effect on the applicants' electoral rights (Judgement, 62 to 63).

In the ECtHR's view, the fact that national minority voters, irrespective of their political views, could only cast their vote for their closed national minority list made the system under examination different from electoral systems with closed list. (Judgement, 64)

The system for national minority voters did not, in the ECtHR's view, allow the applicants to genuinely reflect their will as electors, or to cast their ballot in the promotion of political ideas, to associate with others for political purposes. National minority voters could not express their political views; they could only indicate at the ballot box the fact that they sought representation in political decision-making as members of a particular national minority community.[22]

The ECtHR expressed doubts as to whether a system in which a vote may be cast only for a specific closed list of candidates, and which requires voters to abandon their party affiliations in order to have representation as a member of a minority ensures the free expression of the opinion of the people in the choice of the legislature.[23]

In the context of the secrecy of the ballot, the ECtHR reiterated that if a voter chooses to request to be included in the national minority register with effect for the election of Members of Parliament, he or she has only one choice and in practice receives a ballot paper containing the national minority list instead of a choice of party lists on the ballot paper.

In the ECtHR's view, this means that those present at the polling station at the relevant time, in particular the members of the relevant election commissions would come to know that the elector had cast a vote for the candidates on the national minority list. Furthermore, national minority voters could be linked to their votes during the counting of the ballot, especially in polling districts where the number of national minority voters was limited.

According to the ECtHR, the system allowed the details of who a national minority voter had voted for to be known to everybody, i.e. the right to full secrecy was not available for the applicants as national minority voters, and they could not exercise their right to vote without prejudice to the

[19] Judgment, paras. 58-59.

[20] Judgment, para. 61.

[21] *Saccomanno and Others v. Italy* (App. no. 11583/08) ECtHR (2012), para. 63.

[22] Judgment, para. 65.

[23] Judgment, para. 66.

right to secrecy.[24]

The ECtHR also stressed that national minority voters should be granted the same protection as other voters, and that secrecy should be maintained for both groups.[25]

In conclusion, the ECtHR found that the above features of the Hungarian legislation had the effect of significantly limiting the applicants' in their electoral choice, with the obvious likelihood that their electoral preferences would be revealed, and that the system fell with unequal weight on them because of their status as national minority voters.[26]

Finally, the ECtHR emphasised that if the legislator decides, in the absence of an international obligation to do so, to establish a system aimed at eliminating or reducing *de facto* inequalities in political representation, it is only natural that measure should contribute to the participation of national minorities on an equal footing with others in the choice of the legislature, rather than perpetuating the exclusion of minority representatives from political decision-making at a national level. In the ECtHR's view, the system introduced in Hungary has limited the opportunity of national minority voters to enhance their political effectiveness as a group and threatened to reduce rather than enhance diversity and the participation of national minorities in political decision-making.[27]

The ECtHR unanimously held that the above restrictions on the applicants' voting rights, considering their total effect, constituted a violation of Article 3 of the ECHR First Additional Protocol read alone and taken in conjunction with Article 14 of the Convention.[28]

The ECtHR held, by six votes to one, that a finding of the infringement was in itself sufficient just satisfaction for the non-material damage suffered by the applicants. The ECtHR did not award the applicants any non-pecuniary compensation.

2.3. Concurring and dissenting opinions

Judges *Marko Bošnjak* and *Davor Derenčinović* attached a concurring opinion to the majority decision.

The judges who formed the concurring opinion, while agreeing with the substance of the judgement and the reasoning on freedom of choice and secrecy of the ballot, did not support the reasoning on the threshold requirement for national minorities in the context of Article 3 of the First Additional Protocol to the ECHR, as well as the almost complete absence of reasoning on the violation of Article 14 of the Convention.[29]

In the judges' view, the reasoning relating to the threshold requirement goes well beyond the guarantees laid down in the First Additional Protocol to the ECHR. They pointed out that the States' margin of appreciation in this regard is very broad and that a violation of the Convention can only be established in cases where the freedom of choice of the voters or the secrecy of the ballot were at stake. Although national legislation on the participation of national minorities in elections may

[24] Judgment, para. 70.

[25] Judgment, para. 71.

[26] Judgment, para. 72.

[27] Judgment, para. 73.

[28] Judgment, para. 74.

[29] Judgment, Concurring opinion, para. 1.

be subject to scrutiny and criticism by the relevant international actors (Advisory Committee on the Framework Convention on National Minorities and the Venice Commission), to claim that such a national policy constitutes a violation of the ECHR First Additional Protocol is rather far-fetched and it is not really necessary in the context of the case.[30]

The judges who elaborated the concurring opinion also point out that the reasoning of the judgement on the preferential threshold is clearly different from the reasoning of the ECtHR applied in a similar case.[31]

In their concurring opinion, the judges stressed that the preferential access to the mandate for national minorities in Hungary exceeds the requirements currently provided for by the relevant international legal standards. While the system does not guarantee political representation of national minorities in the form of a seat in Parliament, effective participation in public affairs is ensured by the participation of national minority spokerspersons in the work of the Parliament.[32]

The judges attaching the concurring opinion to the judgement of the ECtHR supported the relevant finding in relation to Article 14 ECHR, because making a distinction between the situation of national minority voters (lack of choice, prejudice to the secrecy of the ballot) and that of the electorate as a whole was not justified. In their view, however, the judgement does not contain an application and analysis to the facts of the case of the general principles relating to Article 14 of the Convention, which makes it difficult to understand how the fundamental safeguards against discrimination in the election context have been applied in this case.[33]

Judge *Ioannis Ktistakis* attached a partial dissenting opinion to the judgement.

In the opinion of the judge who delivered the dissenting opinion, bearing in mind that the applicants were not politicians or members of political parties, but ordinary voters, it is difficult to accept that a finding of infringement by the ECtHR can in itself constitute sufficient just satisfaction. According to the judge, this decision of the ECtHR may deter applicants from pursuing their complaints before national and international courts, in order to fight for their rights recognised by the Convention.

3. Ratio decidendi

The ECtHR unanimously found a violation of Article 3 of the First Additional Protocol to the ECHR, read alone and in conjunction with Article 14 of the Convention.

Three principles underlie the decision. The preferential threshold introduced by the State to promote the effective participation of national minorities in public life must not make the collection of votes for the election of a national minority more burdensome than for the election of a candidate from a party list and must not have a negative impact on the possibility for national minority voters to participate in the electoral process on equal terms with other voters. On the other hand, an electoral system in which national minority voters, irrespective of their political views, can only cast their vote for their closed national minority list does not allow them to genuinely express their electoral will, nor does it ensure the free expression of the people's opinion in the election of the legislature.

[30] Judgment, Concurring opinion, para. 3.

[31] *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016); Concurring opinion, para. 4.

[32] Judgment, Concurring opinion, para. 6-7.

[33] Judgment, Concurring opinion, para. 10.

Lastly, an electoral system whose specific features risk making the vote of a voter belonging to a national minority indirectly accessible to all does not guarantee the right to vote in secrecy.

4. Comments on critical parts of the judgement

4.1. Exhausting legal remedies – the question of constitutional complaint

In relation to the applications submitted without recourse to domestic remedies, the question arises as to why the ECtHR, by invoking Article 35 (1) ECHR – according to which a case may be referred to the ECtHR only after all domestic remedies have been exhausted in accordance with generally recognised rules of international law – rejected the Hungarian Government's objections and declared the applications admissible and did not reject them on the basis of Article 35 (4) ECHR.

The provision on the exhaustion of domestic remedies is an indispensable and fundamental rule for the functioning of the system of protection established by the ECHR.[34] The rationale of the restrictive rule is that the ECHR should first of all provide national authorities, mainly courts, with the possibility to remedy an alleged violation of a right guaranteed by the ECHR or to establish the absence of a violation,[35] which is one of the fundamental elements of the subsidiary nature of the system established by the ECHR.[36]

The exhaustion rule is not, however, absolute in nature,[37] but applies with a degree of flexibility and without excessive formalism.[38] In monitoring compliance with this rule, it is essential for the ECtHR to take account of the circumstances of each individual case.[39]

As far as Hungary is concerned, it is worth mentioning that according to the recent case-law of the ECtHR, all constitutional complaints under the Constitutional Court Act are effective remedies and therefore they are to be exhausted.[40] By derogation from the previous case-law[41], the ECtHR ruled

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[34] *Demopoulos and Others v. Turkey* [GC] (App. nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04) ECtHR (2010), para. 69; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 23.

[35] *Selmouni v. France* [GC] (App. no. 25803/94) ECtHR (1999), para. 74; *Micallef v. Malta* [GC] (App. no. 17056/06) ECtHR (2009), para. 55; *Ananyev ot Others v. Russia* (App. nos. 42525/07, 60800/08) ECtHR (2012), para. 93.

[36] *Selmouni v. France* [GC] (App. no. 25803/94) ECtHR (1999), para. 74; *Kudła v. Poland* [GC] (App. no. 30210/96) ECtHR (2000), para. 152; *Burden v. the United Kingdom* [GC] (App. no. 13378/05) ECtHR (2008), para. 42; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 24.

[37] *Kozacıoğlu v. Turkey* [GC] (App. no. 2334/03) ECtHR (2009), para. 40.

[38] *Fressoz and Roire v. France* [GC] (App. no. 29183/95) ECtHR (1999), para. 37; *Azinas v. Cyprus* [GC] (App. no. 56679/00) ECtHR (2004), para. 38; *Scoppola v. Italy (No. 2.)* [GC] (App. no. 10249/03) ECtHR (2009), para. 69; *Eberhard and M. v. Slovenia* (App. nos. 8673/05, 9733/05) ECtHR (2009), para. 104; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 25.

[39] *Kozacıoğlu v. Turkey* [GC] (App. no. 2334/03) ECtHR (2009), para. 40; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 25.

[40] P. Sonnevend & B. Bazánth, *35. cikk - Az elfogadhatóság feltételei* in P. Sonnevend & E. Bodnár (Eds.), Az Emberi Jogok Európai Egyezményének Kommentárja, HVG-ORAC, Budapest, 2021, p. 456.

[41] *Vén v. Hungary,* no. 21495/93, the decision of the European Commission of Human Rights of 30 June 1993. In its decision, the European Commission of Human Rights did not consider the constitutional complaint, which was available until the end of 2011, to be an effective domestic remedy, because it considered that under the rules in force at the time, the Constitutional Court did not have the power to annul or amend specific disciplinary measures taken against an individual by public officials.

in the *Mendrei case* that a direct constitutional complaint under section 26 (2) of the Constitutional Court Act is to be considered an effective domestic remedy. According to the ECtHR, where the harm suffered by the applicant can be remedied by the annulment of the relevant legislation by the Hungarian Constitutional Court, the direct constitutional complaint must be considered an effective domestic remedy within the meaning of Article 35 (1) ECHR and the application, which is made without exhausting domestic remedies, must be rejected pursuant to Article 35 (4) ECHR. [42]

According to the ECtHR's decision in the *Szalontay case*, a constitutional complaint under section 26 (1) and section 27 of the Constitutional Court Act is also considered an effective domestic remedy in terms of the admissibility criteria.[43] *"[I]t can be said that the use of an appropriate constitutional complaint is a necessary precondition for the submission of an application and for the ECtHR to proceed on the merits."*[44]

In proceedings before the ECtHR, the burden of proving that the applicant has not availed themselves of an effective and available domestic remedy lies with the respondent State government.[45] The burden of proof is on the applicant to show that the remedy was in fact exhausted, that the failure to exhaust was due to the remedy being inadequate or ineffective in light of the circumstances of the case, and that there were special circumstances that relieved the applicant from complying with the requirement.[46] A crucial consideration is that doubts about the effectiveness of a particular remedy do not excuse the applicant from seeking to pursue it,[47] as it is in their interest to seek redress before an appropriate tribunal.

The Hungarian government – in all likelihood also relying on the above-mentioned ECtHR case-law – ultimately held against the applicants with failure to exhaust constitutional remedies as an effective domestic remedy.[48] In opposition to the Hungarian Government's objections, the applicants correctly argued that their removal from the national minority register could not have remedied their prejudice and pointed out that a challenge to the decision of the election commission could necessarily be brought in relation to the counting of ballots and not to the application of a provision of law allegedly being in conflict with the Fundamental Law.

The ECtHR, accepting the applicants' arguments, correctly held that the decisive issue in the case was the alleged restriction on the right to vote of applicants registered as national minority voters arising from the legislation itself regulating national minority voting, not the fact that the applicants were registered as national minority voters or whether the electoral bodies had engaged in unlawful conduct or taken an unlawful decision. Accordingly, the ECtHR held that the remedies proposed by the Hungarian Government could not be regarded as a legal avenue which would have provided the applicants with the possibility of having the issue of the alleged violation of their voting rights examined.

The ECtHR also rightly accepted the applicants' evidence that the available domestic remedies were not adequate or effective in the circumstances of the case, and thus rejected the Hungarian

[42] *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), paras. 42-43.

[43] *Szalontay v. Hungary* (App. no. 71327/13) ECtHR (2019), para. 39.

[44] Sonnevend & Bazánth 2021, p. 456.

[45] *Mifsud v. France* [GC] (App. no. 57220/00) ECtHR (2002), para. 15; *McFarlane v. Ireland* [GC] (App. no. 31333/06) ECtHR (2010), para. 107.

[46] Sonnevend & Bazánth 2021, p. 457.

[47] *Domján v. Hungary* (App. no. 5433/17) ECtHR (2017), para. 33; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 26.

[48] Judgment, para. 28-29.

government's objections to the failure to exhaust domestic remedies.

In our view a direct constitutional complaint under section 26 (2) of the Constitutional Court Act is the only effective domestic remedy to address the issue of the alleged violation of the right to vote of applicants registered as national minority voters arising from the national minority voting legislation itself. According to the case-law of the ECtHR, the harm suffered by the applicants can presumably be remedied by reviewing and annulling the relevant law(s) by the Constitutional Court,[49] bearing also in mind that doubts about the effectiveness of the specific remedy do not exempt the applicant from attempting to seek legal redress.[50]

In the context of a direct constitutional complaint, however, it is worth pointing out the following.

Pursuant to section 26 (2) of the Constitutional Court Act, the procedure of the Hungarian Constitutional Court may be initiated exceptionally, on the one hand, if the violation of rights has occurred directly, without a judicial decision, due to the application or the effectuation of the provision of a law, which is contrary to the Fundamental Law and, on the other hand, if there is no legal remedy procedure to redress the injury, or the petitioner has already exhausted their options for legal remedies. It is essential to note that pursuant to paragraph (1) of section 30 of the Constitutional Court Act, a constitutional complaint under paragraph (2) of section 26 of the Constitutional Court Act may be submitted in writing within one hundred and eighty days of the entry into force of the law violating the Fundamental Law.

In accordance with the established case-law of the Hungarian Constitutional Court, the time limit begins to run on the day following the entry into force of the challenged legislation,[51] even if the petitioner becomes actually affected by the challenged legislation after that date. In accordance with the case-law of the Hungarian Constitutional Court, the time-limit is clearly to be calculated from the date of entry into force of the legislation, even if the application or effectuation of the legislation occurs after the time-limit.[52]

According to the consistent case-law of the Hungarian Constitutional Court, the time limit for filing a constitutional complaint under section 26 (2) of the Constitutional Court Act is an objective time limit,[53] which is a formal limitation of the Hungarian Constitutional Court's procedure.

The Election Act applicable in the examined case entered into force on 1 January 2012, and was first applied during the 2014 elections of Members of Parliament. It was the first time for the applicants as national minority voters to be confronted with the provisions of law causing their violation of their rights, but at that time they were obviously not in a position to submit a direct constitutional complaint – classified by the ECtHR as an effective domestic remedy – under section 26 (2) of the Constitutional Court Act.

The applicants' failure to exhaust domestic remedies cannot, however, be imputed to them with account to circumstances of the case because of the inadequacy of the remedy.

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[49] Cf. *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 42.

[50] Cf. *Domján v. Hungary* (App. no. 5433/17) ECtHR (2017), para. 33; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 26.

[51] Ruling No. 3264/2012. (X. 4.) of the Constitutional Court, Reasoning [2].

[52] B. Bitskey, J. Fröhlich & F. Gárdos-Orosz, *Az egyes alkotmányjogi panaszeljárások különös szabályai,* in B. Bitskey & B. Török (Eds.), Az alkotmányjogi panasz kézikönyve, HVG-ORAC, Budapest, 2015, pp. 178-180.

[53] Decision No. 3003/2018. (I. 10.) of the Constitutional Court, Reasoning [14].

4.2. Odd solutions of national minority suffrage – a "limping legal transaction"

The ECtHR found a violation of Article 3 of the First Additional Protocol to the ECHR, read alone and in taken conjunction with Article 14 of the Convention, in relation to the preferential quota system, the lack of free choice for national minority voters and the violation of the secrecy of the ballot. The issues we consider problematic in these three areas are set out below.

The preferential quota system was treated by the ECtHR as part of a system whereby national minority lists could only obtain the number of votes required to obtain a preferential mandate by the ballots of voters belonging to the national minority community concerned. This feature of the system, however, placed national minority lists in a position significantly different from party lists, which could obtain votes from the electorate as a whole. The ECtHR considered it essential to stress that the disadvantage on the side of the national minority lists in the electoral process was not based on the national minority communities' own decision to associate themselves with a numerically small interest group of the population, but on the legislator's decision to define the scope of the electorate voting for national minority lists and the conditions for voting for national minority lists. The ECtHR further accepted the applicants' argument that the number of national minority voters in Hungary was not high enough to reach the preferential quota even if all voters belonging to the national minority concerned had cast their ballots for the national minority list concerned. In the preferential quota system established by Hungary, the ECtHR considered that it had become more burdensome to collect the votes needed to obtain a preferential mandate than to obtain a mandate from a party list, and that this had a negative impact on the opportunities for voters of national minorities to participate in the elections on equal terms with other voters.[54]

In view of the population number of national minority communities living in Hungary, their activity at elections[55] as well as the rules for obtaining preferential seats, it is undisputed that only the Roma and the German national minorities had and have a real chance of obtaining preferential mandates.

We share the opinion of *Gábor Kurunczi*, who argues that *"the case where a national minority voter casts his or her vote in the knowledge that it is certain to be 'lost' is not subject to the same constitutional assessment as the case in which the vote is cast for a party list that subsequently does not reach the election threshold set in the Election Act"*. The difference lies in the fact that, even for parties setting a list, it is not impossible for them to gain support from an ever-widening scope of the electorate, whereas the number of voters belonging to national minority communities is fixed, it cannot be increased at will,[56] and their activity at the elections can only be increased during the election campaign, for a limited period of time.

In order to illustrate the chances of the national minority communities to obtain a preferential mandate in the preferential quota system existing at the time of the application, we consider it useful to provide the following information.

The number of votes necessary for reaching the varying preferential quota – depending on the number of votes cast for national minority lists and rate of participation at the elections in the country

[54] Judgment, paras. 55-58.

[55] See in details in G. Kurunczi, *Az egyre általánosabb választójog kihívásai. Az általános és egyenlő választójog elvének elemzése a magyar szabályozás tükrében,* Pázmány Press, Budapest, 2020, pp. 124-127. S. Móré, *Nemzetiségek a mai Magyarországon. Politikai képviseletük, érdekképviseletük és jogvédelmük,* Gondolat, Budapest, 2020, pp. 170-171., B. Dobos, *A nemzetiségi részvétel jellemzői az országgyűlési választásokon (2014-2018)*, Parlamenti Szemle, No. 2, 2021, pp. 64-78., B. Kiss, *A nemzetiségek országgyűlési jelenlétének választójogi kérdései és részvételének jellemzői a 2022. évi országgyűlési választásokon I.*, Közjogi Szemle, 2022/2, pp. 60-74.

[56] Kurunczi 2021, p. 129.

– was 22,022 votes in 2014, 23,831 in 2018 and 23,074 in 2022. A look at the number of valid votes cast on national minority lists by voters belonging to national minority communities shows that the preferential quota was reached for the first time in 2018 and again in 2022, following successful voter mobilisation, only by the German national minority list set by the National-level Self-government of the Germans in Hungary, with 26,477 and 24,630 votes respectively.

In 2014, the total number of votes for national minority lists (19,543 votes) would not have resulted in a preferential mandate. In 2018, apart from the number of votes cast for the German national list, the number of votes for all other national minority lists (11,055 votes) was only less than 50% of the preferential quota, and in 2022, in the absence of a Roma national minority list, the number of votes cast for national minority lists was just over 25% of the number of votes needed to obtain a preferential mandate (6,005 votes) (Table 1).

National minority	2014	2018	2022
Bulgarian	74	104	157
Greek	102	159	232
Croatian	1,212	1,743	1,760
Polish	99	210	281
German	11,415	26,477	24,630
Armenian	110	159	163
Roma	4,048	5,703	–
Romanian	362	428	526
Ruthenian	463	539	645
Serbian	236	296	418
Slovakian	995	1,245	1,208
Slovenian	134	199	219
Ukrainian	293	270	396

Table 1: Number of valid national minority list votes cast in the parliamentary elections, 2014-2022[57]

Against this background, we consider the ECtHR's reasoning on the preferential quota system to be correct.

The question arises as to whether a stronger preference than the current one can be granted in Hungary in order to obtain preferential mandates by way of national minority lists.

In examining this question, it should be emphasised that the principle of equality of suffrage implies the requirement that votes should preferably be of equal weight in the election of each representative (effective equality, substantive requirement).[58]

The principle of equal suffrage is not included in the ECHR text, but has been derived from the

[57] www.valasztas.hu (22 February 2023).

[58] Decision No. 809/B/1998. of the Constitutional Court, ABH 2000, 783, 784.

ECtHR practice. However, the ECtHR, in its practice under Article 3 of the First Additional Protocol to the ECHR, does not require effective equality of the right to vote in relation to equality of the right to vote.

The principle of equal suffrage is not included in the ECHR's text, but has been derived by the ECtHR in its case-law. However, in its case-law elaborated on the basis of Article 3 of the First Additional Protocol to the ECHR, the ECtHR does not require effective equality of suffrage in relation to the equality of suffrage.[59]

The Hungarian Constitutional Court has stated in connection with the preferable equal weighting of votes: "*The equality of suffrage does not and cannot mean the completely equal exercise of the political will expressed at the time of the election. Although the Constitution proclaims the equality of suffrage, the indirect expression of the political will of the citizens through their representatives naturally results in disproportionality*".[60] It is apparent from the case-law cited that the Hungarian Constitutional Court has excluded effective equality of suffrage from the scope of the equality of suffrage,[61] holding that no absolute effect can be attributed to the equal weight of votes.[62] In the view of the Hungarian Constitutional Court, "*representation is a necessary condition for the [national minorities] to fulfil their role as state-constituent factors*".[63] As the Constitutional Court had already emphasised in its Decision No. 1040/B/1999, the Parliament may adopt rules more favourable than the general ones in order to provide for the representation of national minorities in Parliament.[64] In addition, in a decision on preferences related to suffrage, it also pointed out that "*there is a wide range of legislative measures aimed at eliminating inequality of opportunities, and the legislator has the discretion to choose between the various regulatory methods, while respecting the provisions of the Constitution*".[65]

The European Commission of Human Rights, however, considered a derogation from the equality of suffrage to be acceptable in order to protect national minorities.[66] In the context of suffrage preferences, the Venice Commission also stated that special rules offering to national minorities preferential access to seats in Parliament are not contrary to the principle of equality of suffrage.[67]

The Hungarian Constitutional Court – also in the light of the Venice Commission's recommendation referred to above – stressed that "*the legislator may derogate from maximum compliance with the constitutional requirements deriving from the equality of suffrage in respect of the weighting of votes only if there are sufficient constitutional grounds for doing so. The more significant the deviation (...) the stronger the constitutional justification is required to justify the deviation (...) A*

[59] E. Bodnár, *A választójog alapjogi tartalma és korlátai,* HVG-ORAC, Budapest, 2014, p. 111., E. Bodnár, *3. cikk Szabad választáshoz való jog,* in P. Sonnevend & E. Bodnár (Eds.), Az Emberi Jogok Európai Egyezményének Kommentárja, HVG-ORAC, Budapest, 2021, pp. 632-633.

[60] Decision No. 3/1991. (II. 7.) of the Constitutional Court, ABH 1991, 15, 17-18. and Decision 26/2014. (VII. 23.) of the Constitutional Court, Reasoning [36].

[61] Cs. Erdős, *3/1991. (II. 7.) AB határozat – parlamenti küszöb,* in F. Gárdos-Orosz & K. Zakariás (Eds.), Az alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990-2020. I. Társadalomtudományi Kutatóközpont – HVG-ORAC, Budapest, 2021, pp. 89., 97., 102.

[62] Decision No. 3141/2014. (V. 9.) of the Constitutional Court, Reasoning [29].

[63] Decision No. 35/1992. (VI.10.) of the Constitutional Court, ABH 1992, 204, 205.

[64] Cf. Decision No. 1040/B/1999. of the Constitutional Court, ABH 2001, 1098, 1101.

[65] Decision No. 809/B/1998. of the Constitutional Court, ABH 2000, 783, 785.

[66] *Lindsay and Others v. The United Kingdom,* no. 8364/78, the decision of the European Commission of Human Rights of 8 March 1979.

[67] CDL-AD (2002) 23 Code of Good Practice in Electoral Matter. Guidelines and Explanatory Report. Guidelines on Elections. I.2.4.b).

sufficient justification may be the taking into account of the [national minorities'] proportion in the population." [68]

The views expressed in the Hungarian literature present a very varied picture on the preferential quota system in force and the granting of a stronger preference than the current one.[69] The ECtHR's finding is undoubtedly correct in that the quota system does not create a real opportunity for eleven national minority communities to obtain seats, as this would require even a greater distortion of the effective equality of votes than the existing rules – but no related obligation to this end is set forth in the ECtHR's judgement.

On the other substantive issue of suffrage, the ECtHR found a violation of the right to free choice in the context of the fact that, as a consequence of registering as a national minority voter, national minority voters could only vote for the whole of their national minority list or abstain from voting for the list. Minority voters could not choose between party lists, nor did they have any influence on the order in which the candidates on the national minority list were elected.[70] The ECtHR expressed doubts as to whether a system in which voters can only vote for a specific closed list and which requires voters to give up their party affiliation in order to be represented as a national minority adequately ensures the free expression of the people's views in the election of the legislature, as provided for in Article 3 of the First Additional Protocol to the ECHR.[71]

The ECtHR did not base the infringement of the right to free choice primarily on the absence of party list voting, but on the fact that the regulation chosen by the legislature, which entrusts national-level minority self-governments with the exclusive competence and responsibility for drawing up national minority lists,[72] does not allow for the expression of political and ideological diversity within the national minority community and, in the absence of such diversity, for the national minority voters to cast their votes in order to promote political ideas and political action programmes or to associate themselves with others for political purposes through their votes.[73]

We agree with Péter Kállai, who argues that the current Hungarian legislation presupposes that "*a given [national minority] – and its national-level self-government – represents a single, common position, therefore there is no political competition within them, and they can be forced to agree on the issue of setting up a list*".[74] This solution is undoubtedly harmful because it eliminates the possibility of competition within a given national minority, which cannot be treated as a politically homogeneous entity.[75]

The question arises whether the ECtHR judgement under consideration includes an obligation to introduce plural voting in Hungary. Although the ECtHR undoubtedly warns that the legislation imposes an obligation to renounce party affiliation and refers to the opinion of the Venice Com-

[68] Decision No. 22/2005. (VII. 17.) of the Constitutional Court, ABH 2005, 246, 252. and Decision No. 26/2014. (VII. 23.) of the Constitutional Court, Reasoning [36].

[69] See in summary: Kiss 2022, p. 67.

[70] Judgment, para. 61.

[71] Judgment, para. 66.

[72] Section 9 (1) of the Election Act and section 117/A (1) of the National Minorities Act.

[73] Judgment, para. 65.

[74] P. Kállai, *Az alkotmányos patriotizmustól a nemzeti és etnikai kisebbségek parlamenti képviseletéig,* Fundamentum No. 4, 2012, p. 50.

[75] For details on the composition of the national-level minority self-governments, the characteristics of setting up the 2022 national minority lists and the competing positions in the assemblies of national-level minority self-governments, see B. Kiss, *A nemzetiségek országgyűlési jelenlétének választójogi kérdései és részvételének jellemzői a 2022. évi országgyűlési választásokon II.,* Közjogi Szemle, 2022/3, pp. 75-93.

mission among the relevant documents of the Council of Europe, which considers that a solution which would ensure a minimum representation of national minorities by giving persons belonging to national minorities the right to vote both for the general and on the national minority list is conceivable,[76] it does not lay down any clear obligation for Hungary in relation to plural voting.

Although the requirement of equality of suffrage is not explicitly provided for in Article 3 of the First Additional Protocol to the ECHR, in its case-law the ECtHR has identified the realisation of the "one man, one vote principle" as an appropriate guarantee of equality, in addition to effective equality of votes.[77]

In its consistent case-law, the Hungarian Constitutional Court considers the principle of equality of suffrage to be a special rule of equality compared to Article XV (2) of the Fundamental Law prohibiting discrimination.[78] The principle of equality of suffrage requires suffrage to be of equal value in respect of the voters (numerical equality, formal requirement).[79] "*Equal value of suffrage means that all voters have the same number of votes and that each vote is worth the same number when the ballot is counted. In this respect, [equality of suffrage] excludes plural suffrage, which would give beneficiary groups of voters more or differently valued votes in elections. In the Constitutional Court's view, this requirement is absolute: the "one man, one vote" principle stemming from the Constitution cannot be restricted for any reason whatsoever in this respect*".[80]

When drafting the regulation excluding the possibility of voting for party lists along with voting for the national minority lists, the legislator, as the Hungarian government also referred to in the proceedings before the ECtHR, certainly had in mind the Hungarian Constitutional Court's case-law, which could probably lead to the conclusion that "*a legislative solution according to which voters may vote for more than one list at the same time would violate the principle of equality of suffrage in Hungary*".[81] We agree with the views expressed in the literature that the exclusion of double-list voting is clearly based on the principle of equality of suffrage[82] and was introduced in the regulation order to enforce the numerical equality of votes.[83]

From a purely formal point of view, we also have to agree with the argument that, in the election of Members of Parliament, equality of suffrage should also apply to voters of national minorities, during the casting of their votes and the counting of ballots.[84]

In our view, the only way to create the possibility of plural voting in Hungary – in order to ensure acquiring preferential mandates – would be to amend the Fundamental Law. It should also be borne in mind that the equality of suffrage can only be interpreted and must be complied with when voters participate in the election of the same body or person,[85] consequently, if only national minority spokespersons could participate in the work of the Parliament and there was no possibility of obtaining preferential seats, in our opinion there would be no constitutional obstacle to the statutory institutionalisation of plural voting.

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[76] CDL-AD (2002) 23 Code of Good Pratctice in Electoral Matter. Guidelines and Explanatory Report. 23.

[77] Bodnár 2014, p. 111., Bodnár 2021, pp. 632-633.

[78] Decision No. 22/2005. (VII. 17.) of the Constitutional Court, ABH 2005, 246, 248.

[79] Decision No. 809/B/1998. of the Constitutional Court, ABH 2000, 783, 784.

[80] Decision No. 22/2005. (VI. 17.) of the Constitutional Court, ABH 2005, 246, 249-250.

[81] Móré 2020, p. 172.

[82] Kurunczi 2020, p. 107.

[83] Kállai 2012, p. 51.

[84] Cf. Decision No. 809/B/1998. of the Constitutional Court, ABH 2000, 783, 785.

[85] Bodnár 2014, p. 107.

In connection with the third essential question of electoral law, the ECtHR saw a violation of the secrecy of the voting in the fact that those present at the polling station at the relevant time, in particular the members of the election commission, would become aware that the voter registered as a national minority voter was casting his/her vote for the national minority list. The voter could also be linked to his/her vote during the counting of the ballot, especially in polling districts where the number of registered national minority voters is low. As a consequence, national minority voters were not considered by the ECtHR to have the right to complete secrecy.[86]

The ECtHR's findings regarding the breach of the secrecy of the voting are beyond doubt correct. It can be argued, however, that the identification of national minority voters by the election commission is indispensable for the exercise of suffrage,[87] which necessarily infringes the secrecy of the vote cast by the national minority voter. However, this objection can easily be refuted.

It is not disputed that the active electoral registration system established by Hungary for participation in the election of Members of Parliament, which makes the exercise of the right to vote on a national minority list conditional on the initiative of the voter belonging to the national minority concerned and their registration on the electoral roll, is a suitable means of identifying national minority voters, with account to the fact that that registration on the roll is based on a declaration of the free will of the person concerned. In its case-law, the Hungarian Constitutional Court has also pointed out that the restriction of the right to self-determination in relation to declaring affiliation with a national minority may be constitutionally based on making the exercise of suffrage subject to prior registration.[88] A request for registration on the roll based on one's free will does not result in a restriction of the essential content of the fundamental right to freely assume one's self-identity.[89]

However, it is worth pointing out that the ECtHR judgement does not call into question the need to identify national minority voters. The ECtHR finds that the right to secrecy of the ballot is infringed if, in addition to the legitimate aim of identifying national minority voters, the content of the vote of a minority voter necessarily becomes known to the members of the election commission and potentially to other voters present at the polling station, as a result of the specific features of the preferential quota system.

In our view, a voter's request – based on their free discretion – to be entered on the national minority register cannot in any way be interpreted as an acceptance that the content of their vote will be disclosed in public.

The ECtHR's findings on the secrecy of the voting are also compatible with the case-law of the Hungarian Constitutional Court, according to which "*[the] requirement of secrecy of the voting means that the content of the votes cast by individual voters may not be disclosed under any circumstances. This constitutional principle imposes on the State the requirement that it must lay down rules for the voting process and the counting and aggregation of ballots and must ensure that the conditions for voting are such as to guarantee that others cannot have access to or find out the content of the votes cast by the voters.*"[90]

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[86] Judgment, para. 70.

[87] Section 175 (1) and section 176 (1), (3) of the Election Procedure Act.

[88] Cf. the position of the Constitutional Court on the establishment of national minority self-governments. Decision No. 45/2005. (XII. 14.) of the Constitutional Court, ABH 2005, 569, 576-577. and Decision No. 41/2012. (XII. 6.) of the Constitutional Court, Reasoning [52].

[89] J. Tóth, *41/2012. (XII. 6.) AB határozat – nemzetiségi önkormányzatok létrehozása,* in F. Gárdos-Orosz & K. Zakariás (Eds.), Az alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990-2020. II., Társadalomtudományi Kutatóközpont – HVG-ORAC, Budapest, 2021, p. 99.

[90] Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 453.

"*In the [Hungarian Constitutional Court's] view, enforcing the secrecy of the voting is an absolute requirement for elections. The secrecy of voting must be guaranteed by the State in all circumstances. The secrecy of voting is infringed if, during the counting of ballots, the content of the votes cast by the voter can be reconstructed and the counting committee can ascertain what the voter has voted on.*"[91]

In agreement with the ECtHR's findings, it is essential to point out a further circumstance that seriously undermines the principle of secrecy of the vote.

In examining the voting procedure, it is clear from a combined reading of section 178 (1) and section 257 (1a) of the Election Procedure Act that the election commission, on the basis of the electoral roll of the relevant polling district, shall hand over to the voter – registered as a national minority voter with effect also for the election of Members of Parliament – a ballot paper for voting in the individual constituency and a ballot paper for the list of the voter's national minority, as well as an envelope for the ballot papers. Section 182 (1) of the Election Procedure Act provides that after filling in the ballot paper the voter may place the ballot paper in an envelope and shall throw it in the ballot box.

Due to the population number of national minority communities living in Hungary and the diaspora nature of their geographical location, the number of voters registered in the national minority register in individual polling districts may be very low, in some cases only one voter may cast his/her vote for a national minority list. In this context, it is important to highlight that in the 2022 general election of Members of Parliament, only one voter was listed as a national minority voter in the electoral rolls of slightly more than 15% of the polling districts in Hungary.[92] It is also worth pointing out that if a single national minority voter attends the polling district and places the ballot papers, after filling them out, in the envelope handed over to him or her by the election commission, this circumstance may give the election commission the opportunity to reconstruct the content of the vote cast on the individual constituency ballot paper by the voter who can be easily identified on the basis of his or her national minority list ballot paper.

In our opinion, while the envelope is one of the guarantees of the secrecy of the vote when voting for candidates for single-member constituencies and party lists,[93] the use of the envelope in relation to national minority voters may result in the identification of the content of their vote and the violation of the principle of secrecy of the voting.

According to the case-law of the Hungarian Constitutional Court, in special circumstances, such as, in our view, the voting of national minority voters, "*the secrecy of the voting requires enhanced guarantees*".[94] "*In the [Hungarian Constitutional Court's] view, the disclosure of the vote cast by the voter in such cases results in a breach of the secrecy of the vote.*"[95] A regulation in which the low number of votes makes the content of the votes known is contrary to the Fundamental Law. In the absence or infringement of these requirements, the panel found an unconstitutionality by omission due to the failure to adopt guarantee provisions to ensure the secrecy of the voting in foreign diplomatic representations.[96]

[91] Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 455.

[92] www.valasztas.hu (22 February 2023).

[93] Á. Cserny & A. Cserny, *Választójogi és népszavazási kommentárok,* Wolters Kluwer, Budapest, 2017, p. 317.

[94] Cf. Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 455.

[95] Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 455.

[96] Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 456.

In the light of the foregoing, in our view, the secrecy of the voting is not guaranteed even in the case where a small number of voters or a single national minority voter cast their votes in the polling district and put the ballot papers in an envelope. In this case, the rules governing the voting procedure create the possibility for the election commission to reconstruct during the counting of the ballots the content of the vote cast by the voter on the ballot paper for the individual constituency.[97] Based on the above, in our opinion, the rules of the Election Procedure Act on the national minority list voting do not fully guarantee the secrecy of the vote, which may result in further violation of the suffrage of voters belonging to a national minority.

4.3. The right to free elections and the prohibition of discrimination

The ECtHR unanimously found a violation of the right to free elections and the prohibition of discrimination in the Hungarian legislation, based on Article 3 of the First Additional Protocol to the ECHR and Article 14 of the ECHR.

Although, in their concurring opinions, judges *Marko Bošnjak* and *Davor Derenčinović* supported the relevant finding on Article 14 ECHR, on the grounds that making a distinction between the situation of national minority voters (lack of choice, violation of the secrecy of the ballot) and that of the electorate as a whole was not justified. However, in their view, the judgement does not contain an application and analysis of the general principles of Article 14 ECHR to the facts of the case, which makes it difficult to understand how the fundamental safeguards against discrimination were applied in the case in the context of the elections.

We agree in part with the judges who have expressed the concurring opinion, and we consider that a detailed explanation of the reasoning behind Article 14 ECHR could indeed have contributed to the further development of the ECtHR's case-law. However, the absence of a detailed reasoning does not render the examined ECtHR judgement unfounded.

In view of this, we consider it important to draw attention to the case-law of the ECtHR in relation to Article 14 ECHR. Article 14 ECHR is applicable in the context of the rights and freedoms set out in the ECHR, namely Articles 2 to 13. The scope of application of Article 14 ECHR covers the provisions of the First, Fourth, Sixth, Seventh and Thirteenth Additional Protocols in relation to the contracting States which have ratified them. The prohibition of discrimination is an integral part of the human rights that the ECHR is designed to protect. A prerequisite for the applicability of Article 14 ECHR is that the life situation giving rise to the alleged discrimination complained of must fall within the regulatory scope of one of the rights set out in the ECHR. The non-discrimination provision is therefore not applicable on its own, but only in a subsidiary, complementary manner.[98]

It is also a consequence of the subsidiary nature of Article 14 ECHR that in most cases the ECtHR will not examine the discriminatory element in the facts of the case if it has already found a violation of another right or rights that the ECHR is supposed to protect, mainly on the grounds that the discriminatory element does not give rise to a new, appreciable violation of rights in the context of the situation at issue.[99]

Although the ECtHR judgement analysed in this paper does not indeed contain an explicit rea-

[97] Cf. Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 455.

[98] E. Szalayné Sándor, *14. cikk Megkülönböztetés tilalma,* in P. Sonnevend & E. Bodnár (Eds.), Az Emberi Jogok Európai Egyezményének Kommentárja, HVG-ORAC, Budapest, 2021, pp. 337-338.

[99] Szalayné Sándor 2021, p. 338.

soning regarding the violation of Article 14 ECHR, it does, however, set out in detail the general principles relating to Article 14 ECHR and the specific principles relating to the assessment of discrimination on grounds of racial or ethnic origin, and repeatedly points to the different situation of national minority voters and the electorate as a whole.[100]

In our view, moreover, if the ECtHR had conducted an examination under Article 14 ECHR, it would certainly have strengthened the applicants' position.

In the case-law of the ECtHR, discrimination within the meaning of Article 14 ECHR means treating persons in a similar situation differently without objective and reasonable justification.[101] The ECtHR also includes within the scope of Article 14 ECHR the cases in which persons who are in fact in different situations are treated in the same way rather than differently.[102]

The absence of an objective and reasonable justification means that the discrimination in the case does not serve a legitimate aim or that there is no reasonable proportionality between the means used and the aim pursued.[103] The extent of the Member States' discretion in this respect depends on the circumstances, nature and context of the case.[104] According to ECtHR case-law, where the basis for differential treatment is affiliation with a national minority, the concept of objective and reasonable justification must be interpreted as narrowly as possible.[105]

There is no doubt that there is a clear and foreseeable difference between most members of the thirteen national minority communities living in Hungary as a group in a similar situation. Eleven out of the thirteen communities cannot reach the preferential threshold because of the verifiably low number of voting age members of the national minorities, and the discrimination in their respect is based on objective facts and it is inexcusable (Table 1).

4.4. The Framework Convention for the Protection of National Minorities as an aid of interpretation

We agree with the ECtHR's reasoning that the parties to the Framework Convention for the Protection of National Minorities have a wide margin of appreciation as to how to approach the objective set out in Article 15 of the Framework Convention, namely the promotion of the effective participation in public affairs of persons belonging to national minorities.

However, the ECtHR's argument that the ECHR and the First Additional Protocol to the ECHR, even interpreted in the light of the Framework Convention, do not oblige the contracting parties to grant national minority communities or their members preferential, national minority-based suffrage cannot be accepted. Although Article 15 of the Framework Convention does not speak ex-

[100] Judgment, 55, 58, 71 to 73.

[101] *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009). para. 41.

[102] *Thlimmenos v. Greece* [GC] (App. no. 34369/97) ECtHR (2000), para. 44; *Pretty v. The United Kingdom* (App. no. 2346/02) ECtHR (2002), para. 88; *Milanović v. Serbia* (App. no. 44614/07) ECtHR (2007), para. 97.

[103] *D.H. and Others v. the Czech Republic* [GC] (App. no. 57325/00) ECtHR (2007), para. 196; *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009) para. 41; *Cernea v. Romania* (App. no. 43609/10) ECtHR (2018), para. 33; Judgment, para. 49.

[104] *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009). para. 41; *Cernea v. Romania* (App. no. 43609/10) ECtHR (2018), para. 33.

[105] *D.H. and Others v. the Czech Republic* [GC] (App. no. 57325/00) ECtHR (2007), para. 196; *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009). para. 43; Judgment, para. 50.

pressly about the establishment of parliamentary representation, but it does expect the contracting parties to create the conditions necessary for participation in cultural, social, economic life and public affairs. Furthermore, Article 1 of the Framework Convention establishes the link between the rights enshrined in the Framework Convention and human rights, i.e. the ECHR. The Framework Convention, as a source of law increasingly invoked by the ECtHR, expects in the English text of Article 15 the possibility of *effective* participation, in contrast to the Hungarian text, which omits the adjective *effective*.

To explore the content of Article 15 of the Framework Convention for the Protection of National Minorities, the interpretation provided by the Advisory Committee of the Framework Convention for the Protection of National Minorities can be consulted in the first place.

According to Article 15 of the Framework Convention, effective participation means ensuring that the participation of national minorities has a meaningful influence on the decisions taken and that, as far as possible, the decisions are taken jointly. The participation of national minorities in matters directly affecting them can be considered as a minimum objective. It is therefore an essential requirement that persons belonging to national minorities should also have a voice in matters which do not affect them exclusively but which affect them as members of society as a whole.[106] Effective participation in decision-making can be achieved, among other things, through representation (of interests) in legislative bodies, typically by granting preferences under electoral law.[107] However, it is also clear that, in addition to direct representation of national minorities in Parliament, there are many other means of achieving effective participation in public affairs.[108] With this in mind, parliamentary representation should not be seen as the exclusive means of implementing Article 15 of the Framework Convention.

In our view, the omission of the adjective *effective* from the Hungarian translation of Article 15 of the Framework Convention for the Protection of National Minorities is not only a matter of semantics, but goes beyond the ECtHR's assertion that there is no international obligation on the contracting parties to create the conditions for effective, non-discriminatory participation in parliamentary decision-making.

Both the majority decision[109] and the concurring opinion[110] argue that neither the ECHR, nor the First Additional Protocol to the ECHR, nor the relevant international legal norms require different treatment, positive discrimination in the establishment of parliamentary representation of national minorities. In its submission, the Hungarian Government argued[111] that Hungary had sought to eliminate or reduce the de facto inequalities in political representation in domestic law[112] by introducing positive discrimination through the preferential quota system.[113]

Noteworthy is the case-law of the ECtHR in cases where a State Party generally provides a broader or higher level of protection in relation to a human right to be protected than is otherwise required

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[106] T. H. Malloy, *Commentary of Article 15 of the Framework Convention for the Protection of National Minorities,* in R. Hofman, T. H. Malloy & D. Rein (Eds.), The Framework Convention for the Protection of National Minorities. A Commentary Brill-Nijhoff, Leiden-Boston, 2018, pp. 269-270.

[107] Malloy 2018, pp. 278-282.

[108] Cf. Malloy 2018, pp. 278-287.

[109] Judgment, 54, 73.

[110] Judgment, Concurring opinion, 6.

[111] Judgment, para. 39.

[112] Judgment, para. 73.

[113] Judgment, Concurring opinion, para. 6.

by the ECHR or its Additional Protocols. The ECtHR also requires respect for non-discrimination in relation to such additional rights.[114] The ECtHR's established case-law and recurring approach to the concept of additional rights providing higher protection than that required by the ECHR or its Additional Protocols requires States to conduct themselves in such cases in a manner consistent with the principle of non-discrimination based on Article 14 ECHR.[115]

The ECtHR confirms the case-law referred to by stating that, in relation to the additional rights granted by the Hungarian legislature to national minorities, it is natural that the measure should strengthen the participation of national minorities in parliamentary elections on equal terms with others, rather than perpetuating the exclusion of national minority representatives from political decision-making at national level.[116]

4.5. The scope of discretion – is there or is there not an international obligation?

In the ECtHR's view, if the legislator decides to establish a system aimed at eliminating or reducing the de facto inequalities in political representation, it is natural that the measure should strengthen the participation of national minorities in parliamentary elections on equal terms with others, rather than perpetuating the exclusion of national minority representatives from political decision-making at national level.[117]

The provisions of the Fundamental Law and the legislation in force since 2012 have allowed the interests of national minority communities living in Hungary to be represented in the work of Parliament since 2014. After more than 20 years of the regime change, these provisions were adopted to fulfil internal legal obligations on the one hand,[118] and recommendations made by international fora[119] and neighbouring states[120] on the other.

We agree with the judges who drafted the concurring opinion that indeed the current preferential quota system in the form of a parliamentary mandate does not guarantee political representation for all national minority communities, but the need for participation in public affairs is to some extent

[114] Szalayné Sándor 2021, p. 340.

[115] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium,* nos. 1474/62, 1677/62, 1769/63, 1994/63, 2126/64, para. 9, the decision of the European Commission of Human Rights of 23 July 1968.

[116] Judgment, para. 73.

[117] Judgment, para. 73.

[118] For the Constitutional Court decisions establishing a constitutional omission in connection with the lack of parliamentary representation of national minorities, see Decision No. 35/1992. (VI. 10.) of the Constitutional Court, ABH 1992, 204. and Decision No. 24/1994. (V. 6.) of the Constitutional Court, ABH 1994, 377.

[119] ACFC: First Opinion on Hungary, adopted on 22 September 2000, 48., Resolution ResCMN(2001)4 on the implementation of the Framework Convention for the Protection of National Minorities by Hungary, adopted by the Committee of Ministers on 21 November 2001, 1.

ACFC: Second Opinion on Hungary, adopted on 9 December 2004, 18, 109 to 112, 134 to 135., Resolution ResCMN(2005)10 on the implementation of the Framework Convention for the Protection of National Minorities by Hungary, adopted by the Committee of Ministers on 14 December 2005, 1.b), 2.

ACFC: Third Opinion on Hungary, adopted on 18 March 2010, 19, 30, 136–139., Resolution CM/ResCMN(2011)13 on the implementation of the Framework Convention for the Protection of National Minorities by Hungary, adopted by the Committee of Ministers on 6 July 2011, 1.b), 2.

[120] For details on the recommendations made by the joint minority committees to Hungary in the context of the establishment of parliamentary representation of national minorities, see B. Kiss, *A nemzeti kisebbségek parlamenti képviseletének kérdése a kétoldalú szomszédsági kapcsolatokban,* Jogi Tanulmányok, Vol. 23, 2022, 35-49.

created by the presence of national minority spokespersons in the work of the Parliament.[121]

The judgement raises the question of the extent to which the ECtHR took Hungary's discretion into account and the extent to which it paid regard to its political development.

Indeed, the ECtHR judgement under examination and the concurring opinion attached to it refer in several places to the wide scope of discretion of the States in election matters,[122] and the judgement also emphasises that any election law must be assessed in the light of the political development of the country concerned,[123] a consideration which must be even more strongly applied when a State, in this case Hungary, is seeking to introduce a more equitable system of representation. The wide discretion of the States is limited by the need to ensure that the free expression of the people's views in the election of the legislature is guaranteed in the representative system established.[124]

The ECtHR judgement analysed (as well as the concurring opinion) refer in several places to the wide discretion of states in election matters, and the judgement also emphasises that any election law must be assessed in the light of the political development of the country concerned, a consideration that must be even more strongly applied when a state, in this case Hungary, is trying to introduce a more equitable system of representation. The wide discretion of the states is limited by the need to ensure that the free expression of the people's views in the election of the legislature is guaranteed in the representative system established.

In our view, having regard also to the case-law of the ECtHR cited above, the ECtHR could not have refrained from finding a violation of Article 3 of the First Additional Protocol to the ECHR, read alone and in taken conjunction with Article 14 of the Convention, even if it had taken greater account of Hungary's scope of discretion and the specific features of its political development.

5. Lessons from the judgement – instead of a conclusion

In relation to the effective participation of national minorities in public life, the European Commission of Human Rights has already pointed out that the ECHR does not oblige States to provide for positive discrimination in favour of national minorities.[125] The ECtHR held in the *Partei Die Friesen Case*, also cited in the judgement under examination, that the ECHR and the First Additional Protocol to the ECHR, even interpreted in the light of the Framework Convention for the Protection of National Minorities, do not require different treatment in favour of national minority parties in the context of effective participation in public life,[126] and that the absence of positive discrimination does not result in a violation of Article 3 of the First Additional Protocol to the ECHR read alone and taken in conjunction with Article 14 of the Convention.[127]

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[121] Judgment, Concurring opinion, para. 7.

[122] Judgment, para. 44, 54.; Judgment, Concurring opinion, para. 3, 5, 7.

[123] *Py v. France* (App. no. 66289/01) ECtHR (2005), para. 46; *Yumak and Sadak v. Turkey* [GC] (App. no. 10226/03) ECtHR (2008), para. 111.

[124] *Mathieu-Mohin and Clerfayt v. Belgium* (App. no. 113) ECtHR (1987), para. 54, *Podkolzina v. Latvia* (App. no. 46726/99) ECtHR (2002), para. 33.

[125] *Magnago and Südtiroler Volkspartei v. Italy,* no. 25035/94, the decision of the European Commission of Human Rights of 15 April 1996; *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016), para. 42.

[126] *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016), para. 43.; Judgment, para. 54.

[127] *Magnago and Südtiroler Volkspartei v. Italy,* no. 25035/94, the decision of the European Commission of Human Rights of 15 April 1996; *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016), para. 44.

In its case-law, the ECtHR – due to discriminatory treatment on racial or ethnic grounds – has established in numerous cases violations of Article 14 of the ECHR, in addition to the violation of Article 3 of the First Additional Protocol to the ECHR, the right to free elections.[128]

In the context of State measures to enhance the effective participation of national minorities in public life, the ECtHR has stated in principle that election laws should clearly specify the procedure to be followed in the allocation of seats to organisations representing national minorities. The unpredictability of election laws and the lack of adequate guarantees violate the essence of the rights set out in Article 3 of the First Additional Protocol to the ECHR.[129]

In connection with the significance of the ECtHR's judgement, it is however essential to emphasise that the ECtHR has not yet carried out such an abstract examination of the legislation of the Member States ensuring the effective participation of national minorities in public life, and thus – in its own assessment as well – has deviated significantly from its previous case-law.[130]

With regard to the international impact of the ECtHR judgement in Bakirdzi and E.C. v. Hungary, it is undisputed that its binding force relates to the individual case in both personal and material terms, but it also has a character that goes beyond the specific case, since the provisions of the ECHR are interpreted and given concrete content by the case-law of the ECtHR. There is no reason to believe that the judgement of the ECtHR cannot have an impact on States not party to the proceedings. Although the body of law of the ECHR is not formally precedent law, the interpretation of the law given by the ECtHR necessarily becomes part of the content of the individual rights. It is indeed impossible to separate the text of the ECHR from the case-law interpreting it, as they together give rise to the legal obligations to be complied with by the Member States. The reason for this is that the ECtHR, although not formally bound by it, follows its previous case-law and develops it only where justified, usually by extending the rights. In view of this, it can be assumed that "*upon a relevant request, acts of public authority of a Member State contrary to the case-law of the ECtHR will be found by the ECtHR to be contrary to the Convention*".[131]

The ECtHR judgement analysed here is therefore found to have established a standard for the ECtHR's assessment of State measures introduced to enhance the effective participation of national minorities in public life.

It is also worth taking into account the possible impact of the ECtHR judgement on the decision of the Hungarian Constitutional Court in a possible future review of constitutionality by the Constitutional Court.

In its case-law, the Hungarian Constitutional Court has argued that for certain fundamental rights, the Fundamental Law formulates the substantive content of the fundamental right in the same way as an international treaty. In these cases, the level of protection of fundamental rights provided by the Hungarian Constitutional Court may in no way be lower than the level of international protec-

[128] *Aziz v. Cypirus* (App. no. 69949/00) ECtHR (2004) (the exclusion of Cypriot citizens of Turkish origin from exercising their right to free elections, in contract with those of Greek origin); *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009) (the exclusion of citizens of Bosnia and Herzegovina of Roma and Jewish origin from the right to stand as a candidate for higher public office); *Zornić v. Bosnia-Herzegovina* (App. no. 3681/06) ECtHR (2014) (the exclusion from the right to stand as a candidate in elections to the House of Representatives of citizens of Bosnia and Herzegovina who do not claim to belong to the three constituent ethnic groups).

[129] *Grosaru v. Romania* (App. no. 78039/01) ECtHR (2010), para. 49, 57.

[130] Judgment, para. 53. Judgment, Concurring opinion, para. 4.

[131] E. Bodnár, *46. cikk Az ítéletek kötelező ereje és végrehajtása,* in P. Sonnevend & E. Bodnár (Eds.), Az Emberi Jogok Európai Egyezményének Kommentárja, HVG-ORAC, Budapest, 2021, p. 533.

tion, typically as elaborated by the ECtHR.[132] As a consequence of the principle of *pacta sunt servanda*,[133] the Hungarian Constitutional Court must follow the case-law of the ECtHR and the level of fundamental rights protection set out therein, even if this would not necessarily follow from its own previous "precedent decisions".[134] Furthermore, the Hungarian Constitutional Court has stated in principle that in interpreting the provisions of the Fundamental Law, it also takes into account the case-law of the ECtHR.[135]

The ECHR can not only contribute to the interpretation of the provisions of the Fundamental Law, but is itself a constitutional standard, insofar as the legislation under the Fundamental Law should not be contrary to it, otherwise the rule of consistency enshrined in Article Q (2) of the Fundamental Law is violated.[136]

With respect to examining the conflict of a provision of domestic law with an international treaty – by excluding the competence of the ECtHR to examine the abstract legislation of the Member States[137] –, the Hungarian Constitutional Court reserves to itself the exclusive right to carry out such a review[138] subject, of course, to the restriction that it cannot rule on a conflict with the ECHR without taking into account the case-law of the ECtHR.[139]

The case-law of the Hungarian Constitutional Court regarding the examination of the conflict of laws with an international treaty also provides examples of the Hungarian Constitutional Court building its decision directly upon a judgement of the ECtHR.[140] The Hungarian Constitutional Court formulates its decision on the basis of a specific ECtHR judgement if the defendant in the case before the ECtHR is Hungary, if the ECtHR in its decision assesses an alleged violation of a convention arising from the application of a provision of Hungarian law, or if the Hungarian Constitutional Court has to rule on the constitutionality or the conflict with an international treaty of the same provision of Hungarian law. The exceptional, mandatory consideration of the ECtHR judgement is justified by the fact that it reveals the infringement of a convention by a provision of Hungarian law. [141] In its case-law, the Hungarian Constitutional Court has also pointed out that, by virtue of Article Q of the Fundamental Law, it must refrain from assessing a legal solution declared by the ECtHR to be contrary to the Convention as compatible with the ECHR.[142]

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[132] Decision No. 61/2011. (VII. 13.) of the Constitutional Court, ABH 2011, 290, 321. Reinforced in Decision No. 32/2012. (VII. 4.) of the Constitutional Court, Reasoning [41]; Decision No. 7/2013. (III. 1.) of the Constitutional Court, Reasoning [30]; Decision No. 8/2013. (III. 1.) of the Constitutional Court, Reasoning [48]; Decision No. 22/2013. (VII. 19.) of the Constitutional Court, Reasoning [16]; Decision No. 13/2014. (IV. 18.) of the Constitutional Court, Reasoning [33]; Decision No. 30/2015. (X. 15.) of the Constitutional Court, Reasoning [35]; Decision No. 15/2016. (IX. 21.) of the Constitutional Court, Reasoning [42]; Decision No. 21/2018. (XI. 14.) of the Constitutional Court, Reasoning [63]-[64].

[133] Fundamental Law, Article Q para.graphs (2) to (3).

[134] Decision No. 61/2011. (VII. 13.) of the Constitutional Court, ABH 2011, 290, 321. Reinforced in Decision No. 21/2018. (XI. 14.) of the Constitutional Court, Reasoning [63].

[135] Ruling No. 3215/2016. (X. 26.) of the Constitutional Court, Reasoning [7].

[136] L. Blutman, *Törésvonalak az Alkotmánybíróságon: Mit lehet kezdeni a nemzetközi joggal? (Breakpoints at the Constitutional Court: what to do with international law?),* Közjogi Szemle, 2019/3, p. 4.

[137] See in *Nikolova v. Bulgaria* [GC] (App. no. 31195/96) ECtHR (1999), para. 60.

[138] Decision No. 32/2014. (XI. 3.) of the Constitutional Court, Reasoning [52] and Decision No. 21/2018. (XI. 14.) of the Constitutional Court, Reasoning [15].

[139] Ruling No. 3215/2016. (X. 26.) of the Constitutional Court, Reasoning [7].

[140] On taking account of specific rulings from the Constitutional Court's case-law relating to international treaties, see Decision No. 6/2014. (II. 26.) of the Constitutional Court, Reasoning [24]; Decision No. 23/2015. (VII. 7.) of the Constitutional Court, Reasoning [36]; Decision No. 10/2020. (V. 28.) of the Constitutional Court, Reasoning [22].

[141] Blutman 2019, p. 5.

[142] Decision No. 166/2011. (XII. 20.) of the Constitutional Court, ABH 2011, 545, 557. and Decision No. 32/2014. (XI.

In our view, the ECtHR judgement under examination must necessarily be taken into account in a potential review by the Constitutional Court – either in a question of examining the conformity of relevant legislation with the Fundamental Law or in the case of a conflict with an international treaty –, since it is binding on Hungary and, on the basis of it, the relevant laws are in conflict with the ECHR.[143]

The implementation of the ECtHR judgement is an obligation for Hungary under both international law and domestic law. Obligation under international law to implement the ECtHR judgement is created by Article 46 (1) of the ECHR and the underlying principle of *pacta sunt servanda*.[144] In the Hungarian legal system, Article Q (2) of the Fundamental Law creates an obligation under domestic law by regulating that "*In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law*".

The ECtHR did not prescribe how the judgement should be implemented, nor did it impose any specific obligation on Hungary. Hungary is therefore free to choose, under the control of the Committee of Ministers of the Council of Europe,[145] the method of implementing the judgement, provided that it is in accordance with the judgement of the ECtHR.[146]

However, in the context of the implementation of the ECtHR judgement by the Member States, it should be stressed that the aggrieved party is obliged to take general measures in its domestic legal system to eliminate the violation and to remedy its consequences.[147] This also means that, on the basis of the ECtHR judgement, the legislation in breach of the convention must be amended or repealed.[148]

In the process of implementation by the Member State, when amending the relevant legislation, it is essential to obtain the opinions of the communities concerned and to become acquainted with their position. However, one should not forget that the position of national minority communities is not necessarily unified about their participation in the work of the Parliament, the way in which they are represented there, and the effectiveness of their representation. In this context, the opinion of the Parliament's Committee on the National Minorities in Hungary might as well differ from the position of the national-level national minority self-governments.

3.) of the Constitutional Court, Reasoning [52].

143 Cf. Blutman 2019, p. 5.

144 *Verein gegen Tierfabriken v. Switzerland (no. 2)* [GC] (App. no. 32772/02) ECtHR (2009), para. 61.

145 Article 46 (2) ECHR.

146 *Scozzari and Giunta v. Italy* [GC] (App. nos. 39221/98, 41963/98) ECtHR (2000), para. 249; *Verein gegen Tierfabriken v. Switzerland (no. 2)* [GC] (App. no. 32772/02) ECtHR (2009), para. 88.

147 Cf. *Verein gegen Tierfabriken v. Switzerland (no. 2)* [GC] (App. no. 32772/02) ECtHR (2009), para. 85.

148 Bodnár 2021, pp. 539-540.

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