Inovatívne formy vzdelávania v transformujúcom sa univerzitnom vzdelávaní

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INTERNATIONAL PUBLIC LAW

Európska únia
Európsky sociálny fond

FACULTAS IURIDICA 1667 1998 UNIVERSITAS TYRNAVIENSIS

Operačný program VZDELÁVANIE

Operačný program: Vzdelávanie • Programové obdobie: 2007-2013 • Názov inštitúcie: Trnavská univerzita v Trnave, Právnická fakulta • Názov projektu: Inovatívne formy vzdelávania v transformujúcom sa univerzitnom vzdelávaní • ITMS projektu: 26110230028

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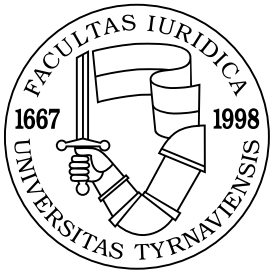
Selected Issues



International Public Law

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Published by:

ISBN: 978-80-8082-712-0

Authors:
The Right of Peoples to Self-determination, The State as a Subject of International Law, The Jurisdiction of Quasi-judicial Bodies of the United Nations, Case-law of the International Judicial and Quasi-judicial Bodies in the Area of Human Rights Related to the Roma Ethnicity – LANTAJOVÁ Dagmar
State Territory, Diplomatic Law – KUŠLITA Jozef
Law of Armed Conflict – LANTAJOVÁ Dagmar, VYSOCKÝ Marcel

Content

Introduction

You are holding a didactic material in the international public law – selected issues. Its ambition is not to cover all the areas of this legal area but with its content it responds to the current situation in the international relations regulated by the international public law.

In present we are witnessing creation of new states either being recognised by the members of international society (the South Sudan), or the members are not willing to accept the states *de iure* (Kosovo). Therefore, in the publication we are focusing on the problems of the right to self-determination of the nations, the creation of a state and state territory as well as the diplomatic law accompanying all the states during their existence.

The second part delivers the issues of the human rights. As the scope and provision of this part extends the possible range of the publication we have selected the topics related to the Slovak Republic and the jurisdiction of the quasi-judicial bodies which have already dealt with the individual complaints regarding the violation of the right. The Romany ethnics cannot be left aside; it is one of those issues Slovakia has been constantly searching the solution to. That is why the overview of the case-law of the quasi-judicial as well as the judicial organs is very useful.

Nevertheless, there is a problem of the armed conflicts. The topicality of them is very obvious to all of us even though we live in the 21st century and the world could have learnt the lesson from the two world wars in the past century. The reality is actually opposite. Nowadays, we are still experiencing the armed conflict, which are not exceptional occasions.

The publication was created within the project The International and the European Laws being a part of the university project „The Innovative Forms of Education in Transformation of the University Education", which is delivered within the Operational programme of Education in Trnavská University in Trnava.

I. The Right of Peoples to Self-determination

The term 'self-determination' can be characterised also as a free decision-making process of a certain subject about its destiny without being dependent on the will of another subject. In that case the right of a nation to self-determination expresses a free decision-making of the nation about its own destiny independently from other nations or states. Therefore the most effective way to achieve interests of the nation and the guarantee of its development is the use of political power, i.e. the power inside the state.

I. 1 The Right of Peoples to Self-determination untill the World War I

Development of national movement and a consequent creation of national states in the first half of the 17th century particularly encouraged the thought of a national state as a natural and the most important political organisation of the nation. Consequently, we can observe political foundations of modern concept of the right of peoples to self-determination in The **Declaration of Independence of the United States** from 4 July 1776, in which we can find the following wording: … 'that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.'[1] While some consider this wording the starting point of the right to self-determination, others claim that during those times it was not a concept of secession of an ethnic group from the existing state but a concept to establish a free and democratic government.[2] The right of peoples to self-determination was also elaborated by the leaders of The Great French Revolution. Their concept was of similar character but it was related to the prohibition to interfere in internal affairs from the third state (government that was created as a result of a revolution has to be protected against intervention of a

1 *The Max Planck encyclopaedia of public international law* 9. Vol. 9: [SA to TR] / edited under the direction of Rudiger Wolfrum ; published under the auspices of the Max Planck Institute for Comparative Public Law and. - [1st ed.]. - Oxford : Oxford University Press, 2012. - XXV, 1144 p. - ISBN 978-0-19-929168-7. p.114

2 *The Charter of the United Nations: a commentary.* Volume 1 / edited by Bruno Simma in collaboration with Hermann Mosler ... [et al.]; assistant editors Andreas Paulus and Eleni Chaitidou. - 2nd ed. – Oxford: Oxford University Press, 2002. - lxiv, 895, XXXIII p. - ISBN 978-0-19-924449-2 [Vol.1], ISBN 978-0-19-9253377-7 [Set], p. 50

foreign power) and because of this the **French Constitution** of 3 September 1791 (based on the Declaration of Rights of Man and of the Citizen – *Déclaration des droits de l'homme et du citoyen*) declared giving up conquering wars. In given period it was a well thought-through primary right of all the people to organise individual form of government for each state freely without any interference whatsoever from the third party.[3] *Despite this fact the first official and practical application of the right of peoples to self-determination in a form of its own state came in 1830 when the World Powers of Great Britain, France and Russia recognised Greece as an independent state fighting for independence against the Ottoman Empire.*[4]

The right of peoples to self-determination did not come to the fore until the 20th century and we witnessed its frequent application in practice, especially during decolonisation. V. I. Lenin expressed a thought in his **Decree on Peace** dated 1917 that if a nation concerned is unwillingly a part of another state, the nation must be given freedom to express a free will related to a form of state existence. This doctrine contained so called internal as well as external right to self-determination, *e.g.* the right to freely organise the nation's own state as well as the right to be independent from a foreign law (power).[5] This right to self-determination was supposed to be applied in the Soviet Doctrine in case of 'The Class-Struggle' only, in case of a rise of socialistic revolutions. W. Wilson in his '**The Fourteen Points Statement'** also formulated a principle of self-determination of nations which is not identical with Lenin's Doctrine. Wording of the right of peoples to self-determination can be found in the fifth point *(Free, honest and completely impartial adjustment of all colonial claims, based on the strict observance of the principle that in dealing with all such questions of sovereignty the interests of the population must have the same weight as the just demands of the government whose title is to be determined)* as well as in the tenth point *(Nations of Austria-Hungary, whose place among the nations we wish to ensure a secured, should be given the first opportunity to autonomous development)* which Wilson changed during the following few months and considered not only the autonomy of individual nations to be the foundation for peace in Central Europe within the Austrian-Hungarian Empire but a complete separation of these nations from the monarchy and their own new organisation in national states. Wilson's concept resulted in the establishment of democratic Eastern-European States.[6] He also talked about internal (the right to elect own form of government) as well as external right to self-determination (the right to choose sovereignty, government under which to live). Requirements resulting from the World War I led to the fact

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3 *Ibid*

4 KREJČÍ, O.: *Mezinárodní politika*, Ekopress, Praha, 2001, 2nd updated and extended edition, ISBN 80-86119-45-9, p 202

5 *The Charter of the United Nations: a commentary*. Volume 1, edited by Bruno Simma in collaboration with Hermann Mosler ... [et al.]; assistant editors Andreas Paulus and Eleni Chaitidou. - 2nd ed. - Oxford: Oxford University Press, 2002. - lxiv, 895, XXXIII p. - ISBN 978-0-19-924449-2 [Vol.1], ISBN 978-0-19-9253377-7 [Set], p. 50

6 LANTAJOVÁ, D.: *Medzinárodnoprávna úprava práva národov na sebaurčenie,* In: Slovenská ročenka medzinárodného práva 2008. - Bratislava: Slovenská spoločnosť pre medzinárodné právo pri Slovenskej akadémii vied, 2009. - ISBN 978-80-969540-5-6. pp. 87-98

that the meaning of an expression *'self-determination'* gained an ethnographic character of a 'principle of nationality'.[7]

I. 2 The Right of Peoples to Self-determination untill the World War II

The right to self-determination formulated this way was a part of **Paris Peace Treaties** and has become one of the principles of **The League of Nations**. The League of Nations formed foundations for the *mandatory territories system* (as a compromise between the application of the right of peoples to self-determination and interests of administrative powers) as well as the *system of protection of minorities under their supervision.* Example of this are Åland Islands which in 1921 gained status of demilitarised and neutral territory, they remained a part of Finland as a territory with extensive autonomy and authorities despite the majority of the population being Swedish and belonging to the Swedish Kingdom in the past (which they wanted to join again in 1921).[8] The issue was submitted to the League of Nations which decided in 1921 *that Finland will maintain sovereignty over the Islands but is obliged to adhere to autonomy for the entire population of the Islands.* The League of Nations argued the point that the lingual and religious minorities or other population groups cannot separate from the territory (state) to which they belong based purely on their own wish since it would destabilise the state and support a theory incompatible with the position of the state as a political and territorial unit. International Committee of Lawyers authorised by the Council of the League of Nations to produce an advisory opinion on Legal aspects related to the Åland Islands' case in which the Committee gave preference to the rule of territory integrity as opposed to a limited from of the right to self-determination – the right to separate (secession) in 1921.[9] The Islands belong to Finland with a particular form of autonomy (cultural, lingual, educational and postal, in transport, economy…).

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7 POMERANCE, M.: *Self-determination in Law and Practise, The New Doctrine in the United Nations*, The Hague, Martinus Nijhoff Publishers, 1982, ISBN 90-247-2594-1, p.1

8 The Åland Islands consists of more than 6 700 islands in the Eastern part of the Baltic Sea and between Sweden and Finland covering the territory of about 1 500 km^2 and a population of approximately 25.000 people who speak Swedish. The Islands belonged to the Kingdom of Sweden in the past but after the war in 1809 Sweden was forced to give up Finland together with the Islands in favour of Russia (The Åland Islands became a part of Finish autonomous Duchy of the Russian Empire), where during the Crimean War (1853-56) they were a strategic territory of Russia and after the war they became demilitarised territory (based on one-sided commitment of Russia which was later confirmed in conventions of years 1856, 1921, 1940 and 1947). After the declaration of Finland's Independence in 1918 The Åland Islands requested to become a part of Sweden again but Finland did not give permission and offered autonomy instead which the peoples of the Islands refused.

9 Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations Official Journal, Special Supplement No. 3, (October 1920), p. 18, 3 et 5

I. 3 The Charter of the United Nations

Principle of self-determination was consequently included in **The Atlantic Charter** of 1941 signed by F. D. Roosevelt on behalf of the United States and W. Churchill on behalf of Great Britain. The right to self-determination in this instrument is proclaimed as a general standard concerned with territorial changes which can be applied only with the consent of the population on given territory as well as the principle concerned with the free choice of rules in every sovereign state (principle No. 2 – territory changes have to be in accord with wishes of the nations concerned, principle No. 3 – all nations have the right to self-determination). Despite the wording of the Atlantic Charter, Churchill provided its restrictive interpretation at The House of Commons of the British Parliament stating that it shall not be applied in relation to the colonial territories.[10] The thoughts of The Atlantic Charter can be found in other documentation such as **The Declaration of the United Nations** of 1 January 1942 (accepted at the Arcadia Conference in Washington by 26 states and lay down foundations for later establishment of The United Nations), which confirmed Wilson's principle to self-determination. **The Moscow Declaration** in Point 4 Section on *The Mutual announcement of the four states* also determines that in the earliest possible time there is a need to create universal international organisation based on the principle of sovereign equality of all peaceful states, big or small with the goal to maintain international peace and security.[11] Representatives of the USA, Great Britain, Soviet Union and China discussed the idea of establishment of a universal organisation based on the principle of the right of peoples to self-determination in secret, informal as well as formal meetings during which they negotiated a few proposals about the future **Charter of the United Nations** consequently adopted in April 1945 at the San Francisco Conference. The Charter formulates principles of equality to self-determination of nations belonging to the third generation of human rights in **Article 1 Paragraph 2**, the basic goals of The United Nations ('to develop friendly relations between states based on the respect to principle of equality and self-determination of nations…'[12]). Adoption of **Article 55** of the Charter supports this idea, the commitment that the United Nations want to contribute to fulfilment of principles of equality and self-determination of nations by providing work beneficial for economic and social progress, and by approaching international problems with respect to human rights and basic principles of freedom. We ought to mention enactments of **Articles 73 and 74** concerned with non-self-governed territories where members of the organisation which have or will have responsibility for territory administration and have not yet obtained autonomy in full measure commit to act in accordance with the principle of protection and support of interest of population living on these territories and to respect principle of good neighbourhood. The following chapter XII of the Charter in **Article 76 Point b)** on trusteeship system of states determines that the fundamental role of the trusteeship system of states is to

[10] CASSESE, A.: *Self-determination of peoples: a legal reappraisal.* - reprint. - Cambridge: Cambridge University Press, 1995. - xviii, 375 p. - (Hersch Lauterpacht memorial lecture series, [12]). - ISBN 978-0-521-48187-8, ISBN 978-0-521-63752-7, p. 37

[11] Available on: http://avalon.law.yale.edu/wwii/moscow.asp /

[12] Published in Collection of Laws of the Slovak Republic under No. 30/1947 of Coll.

support political, economic, social and educational enhancement of the population of these territories and their gradual development towards autonomy or independence according to individual circumstances of each territory, its peoples and wishes. Thank to the fact the concept of self-determination was comprised in the Charter of the United Nations, it has become a binding principle of conventional international law.[13]

I. 4 Documents adopted by the United Nations

The first significant contribution to the right to self-determination which was established on the grounds of the United Nations was the adoption of two resolutions of the General Assembly of the United Nations (hereinafter 'UNGA') – **resolution No. 1514 (XV)** *(adoption of the Declaration on the granting of independence to colonial countries and peoples)* **and No. 1541 (XV)** *(adoption of Declaration which should guide Members in determining whether or not an obligation exists to transmit the information called under Article 73 of the Charter)*. Given law was granted to colonial and dependent nations.

The Declaration on the Granting of the Independence to Colonial Countries and Peoples – res. UNGA No. 1514 (XV) – adopted on 14 December 1960 claims in its Point No. 2 " that all the peoples have the right to self-determination based on the right to freely determine own political status as well as to apply economic, social and cultural development. The Declaration determines an obligation to terminate all military activities and repressive measurements against these dependent nations (but also against trusted or non-autonomous territories) and to allow them to fulfil their right to independence and integrity of their national territories which ought to be respected. At the same time, the declaration imposed to all the states to strictly adhere the stipulation of the Charter of the United Nations and the Universal Declaration of Human Rights on the principle of equality, non intervention to internal affairs of states and principle to respect sovereign right of nations and their territorial integrity.[14]

By **the resolution UNGA No. 1541** of 15 December 1960 **principles were adopted according to which all the member states of the United Nations responsible for the administration of non-autonomous territories are obliged to adhere,** *these are responsibilities of sending information about economic, social and educational conditions on given territories (in accordance with Article 73 Point e) of the United Nations Charter)*. In the sixth point, the Charter determined that non-autonomous territories can gain independence by establishment of a sovereign independent state or by free union with an independent state (which is ought to be implemented on free and voluntary decision of the peoples of given territory) or by integration with an independent state result of which ought to be equal status and equal rights and liberties of people of both territories without any difference and discrimination whatsoever (both

[13] *The Max Planck encyclopaedia of public international law* 9. Vol. 9: [SA to TR] / edited under the direction of Rudiger Wolfrum: published under the auspices of the Max Planck Institute for Comparative Public Law and. - [1st ed.]. - Oxford: Oxford University Press, 2012. - XXV, 1144 p. - ISBN 978-0-19-929168-7. p.115

[14] Official Records of the General Assembly, Fifteenth Session, Supplement No. 16, p. 66, U.N. Doc. A/4684 (1960)

nations ought to have equal representation and efficient participation at all levels in executive, legislative and judicial bodies).[15]

Two conventions were adopted within the United Nations six years later (New York, 19 December 1966): t**he International Covenant on Civil and Political Rights** (hereinafter 'Covenant') and the other one **the International Covenant on Economic, Social and Cultural Rights** (hereinafter 'Economic Covenant').[16] Both covenants set forth the right of peoples to self-determination as a subjective collective right in Article 1 but the right of all nations is not specified in further detail (nation based upon ethnocentric or civil principle).[17] Based on this right can the nations freely determine not only their political status but freely implement their economic, social and cultural development, they can freely handle their natural resources in accord with set targets; they cannot be deprived of their own tools for life existence. At the same time, the states responsible for the administration of non-autonomous and trusted territories ought to support and consequently respect the right of peoples of self-determination. Despite the fact that this right is a part of the Covenant, it is not possible to demand adherence for this right within the quasi-judicial control of Human Rights Committee (according to The Optional Protocol to the Covenant of 1966) since The Committee deals with the violation of individual rights set forth in the third Section of the Pact and therefore the procedure of individual complaints cannot be applied for the protection of collective rights.[18] The Covenant lists the right to minorities within the individual rights (Section III, Article 27 of the Pact), from which we can deduce that minorities do not have the right to self-determination as it is determined in Article 1 of the Covenant. They can appeal to Article 27 of the Covenant on cultural or administrative autonomy. When it comes to respecting regulations of the Covenant, all the contracting state parties are obliged to accept news procedure according to Article 40 of the Covenant and on facultative bases they can accept so called procedure on interstate complaints according to Articles 41 and 42 of the Pact. When it comes to the Economic Covenant, Article 1 talks about the right of all the peoples to self-determination which resulted in repeated emphasis on the existence of this right, in accordance with Article 16 the states, participating parties are obliged to report on respecting of articles of the Economic Covenant two years after entering into force (after that every 5 years) within report procedure. The Optional Protocol of the Economic Covenant was adopted in December 2008 based on which individuals will be able to submit individual complaints on violation of economic, social and cultural rights of the Committee for Economic, Social and Cultural Rights. Apart from individual communication, the Optional

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15 Official Records of the General Assembly, Fifteenth Session, Supplement No. 16, p.29, U.N. Doc. A/4684 (1960)

16 Published in Collection of Laws of the Slovak Republic under No. 120/1976 of Coll.

17 JANKUV, J.: *Medzinárodné a európske mechanizmy ochrany ľudských práv*, Bratislava, Iura edition, 2006, pp. 69-74 a
MALENOVSKÝ, J.: *Mezinárodní právo veřejné, všeobecná časť*, 3rd corrected and updated edition, Brno, MU Brno, Nakladatelství Doplněk, 2002, pp. 65-75

18 Communication No. 167/1984, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (views adopted on 26 March 1990 at the thirty-eight session, published on 10. May 1990), Report of the Human Rights Committee, Volume II, General Assembly, Official records: Forty-Fifth session, Supplement No. 40 (A/45/40)

Protocol creates a possibility to provide interstate communication and initiatives on investigating situations in the state by the Committee in case of serious suspicion on serious or systematic violation of economic, social and cultural rights. These competences of the Committee take place when the state explicitly recognises Article 10 and 11 of the Optional Protocol. The Protocol has not yet come into force.

The right of peoples to self-determination as worded in the above mentioned conventions later confirmed **The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations** (hereinafter 'Declaration on Principles of International Law'), adopted by **the resolution of UNGA No. 2625 (XXV)** of 24 October 1970.[19] Support of friendly relations and cooperation among states was repeatedly emphasised as well as the duty of accelerated termination of colonialism with emphasis on free demonstration of will of nations concerned, duty to respect human rights and fundamental freedoms and also confirmed forms of gaining independence (as a sovereign independent state or to freely attach it to another independent state or integrate with an independent state) in accordance with the Resolution of UNGA No. 1541 (XV) of 1960. Important fact is that the Declaration on Principles of International Law determines that it is impossible to use the form of interpretation which would give a right or support an action leading to separation or worsen territorial integrity of sovereign and independent states respecting and acting in accordance with the principle of equal rights of peoples to self-determination and whose governments consist of representatives of all nations belonging to their territory without discrimination of race, religion or skin colour.

At the same time it explicitly determined a duty of each state to avoid any activities whatsoever that might be targeted at partial or a complete violation of national unity and territorial integrity of any state or country.

I. 5 The Right of Peoples to Self-determination in Decisions by the International Court of Justice

International Court of Justice also dealt with the question of right of peoples to self-determination within its advisory opinion agenda (hereinafter 'ICJ'). The first case in which ICJ issued advisory opinion concerned with the right of peoples to self-determination was **The Namibia Case**;[20] ICJ noted that the principle to self-determination is applicable in relation to all non-autonomous territories as determined in The United

[19] Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 8, and U.N. Doc. A/8018 (1970)

[20] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

Nations Charter. The concept of trusteeship was confirmed and expanded to all the nations which have not until now gained full level of autonomy.[21]

The second case was **The Western Sahara Case,** [22] in which ICJ emphasised that the right of peoples to self-determination is a part of international custom as a source of international law but while applying it, subject that is sovereign has to be determined and has to dispose of sovereignty over the certain territory and consequently the right of peoples to self determination can be applied. ICJ responded to questions on this topic that there never existed relations of territorial sovereignty between Morocco and Western Sahara just like between Mauritania and Western Sahara and it was never demonstrated that Morocco exercised effective and exclusive state control on the Western Sahara territory although according to Morocco there existed some vassal relations but only among some Nomadic Tribes and Moroccan Sultan. Neither did these relations mean Moroccan territorial sovereignty nor did the territory occupied by these tribes become a part of Moroccan territory. [23] Western Sahara was *terra nullius* during Spanish colonisation due to the former tribes lead by tribal chiefs who were able to represent their own interests and therefore the population of Western Sahara has the right to self-determination. Spain, the administrating power is obliged to research true and freely expressed will of the peoples to self-determination. The tragedy is that the international community was not capable of securing the right of peoples to self-determination on the Western Sahara territory despite declarations of

[21] *South West Africa* (Namibia) was ruled under administration of Republic of South Africa (RSA) on the bases of trusteeship system of the United Nations, after the World War II RSA refused to transfer Namibia under the trusteeship system of the UN and wanted to attach Namibia to its own territory. ICJ first recognised in its judgment of 1950 that RSA is not obliged to make this transfer but is obliged to act in accord with the mandatory system of the League of Nations. General Assembly brought this mandatory to an end in 1966 for its violation from the side of RSA / resolution No. 2145 (XXI) of 27th October 1966 /. In the judgment of 1971 ICJ stated that RSA je obliged to bring occupation of Namibia to an end, member states of the UN are obliged to accept illegality of Namibia's occupation by RSA and to abstain from any action that might lead to accepting the right of RSA to sustain its presence in Namibia and non-member states are obliged to support all the activities of the UN in relation to Namibia.

[22] *Western Sahara*, Advisory Opinion: I.C.J. Reports 1975, p. 12

[23] Approximately from the 11th century Morocco was ruled by the Dynasty of Berbers (Almoravid Dynasty) which extended the territory of Morocco by the territory of Western Sahara but in the 15th century tribes from Yemen began to settle here, mixed with the local population and created a new Sahara nation whose followers claim that the Sahara nation were completely different from other nations living in neighbourhood. They had their own customs, migrated, had tribal hierarchy and kept cultural and religious connections with Morocco. These tribes maintained political as well as cultural independence the whole time. In the 19th century French and Spanish penetrate the territory. Spain declared Rio de Oro protectorate over the territory of Western Sahara in 1884 which is considered the beginning of colonisation. Spain was allocated the territory of Western Sahara on the bases of the Berlin Conference (1884-1885) when dividing Africa territory among the European supper powers. Spain gradually expanded its territories; in 1912 it defined borders of Western Sahara based on an agreement with France and suppressed rebellions. In 1934 it resulted in the establishment of the Spanish Sahara where Spain performed effective colonial administration lasting until 1976. In 1961 under the pressure from the international community Spain changes its status over Western Sahara from the 'colony' to a 'province' of Spain. Despite an effort from the international community Spain refused to carry out referendum giving a reason that the territories of Spanish provinces are not a subject of the right of peoples to self-determination.

ICJ and therefore this conflict has been reappearing on The United Nations' agenda for 35 years and is the second longest-lasting territorial conflict dealt by The United Nations.[24]

The third case, in which ICJ was dealing with the question of right of peoples to self-determination, was t**he case of Burkina Faso v. Republic of Mali**.[25] ICJ was provided an agreement between Upper Volta (Burkina Faso since 4 August1984) and Republic of Mali concerned with delimitation of common border in conflicting territories defined as a zone of the territory stretching from the sector Koro (Republic of Mali), Djibo (Upper Volta) up to the Belial region (and including). Each of the states proposed their own definition of borders. Both states claimed that the given borders were derived from the process of decolonisation and they also requested that the conflict be dealt with in accord with the principle existing when gaining national independence. The Court could not pay attention to the *uti possidetis juris* principle, application of which gives impetus for respecting abstraction of borders (this principle was applied in Spanish-Southern America for the first time). Borders among newly established states are not determined in accordance with this principle depending on ethic or lingual differences but copy administrative or similarly created or borders respected by previous power which secures stability of international borders. ICJ emphasised that this principle is a part of the general international law, which is logically connected with the process of gaining national independence.

The question of rights of people to self-determination was dealt with during **the conflict concerned with East Timor (Portugal v. Australia)** [26] where ICJ agreed with Portugal arguing the point that the right of peoples to self-determination as it had developed from the United Nations Charter as well as the practical experience of the United Nations is of *erga omnes* character and considered this argument as 'flawless'.[27]

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[24] LANTAJOVÁ, D.: *Prípadové štúdie z európskeho a medzinárodného práva*, 1st edition- Bratislava: Iura Edition, 2008. – p. 133: 1 CD. - ISBN 978-80-8078-231-3.

[25] *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554.

[26] *East Timor* (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90

[27] East Timor was a colony of Portugal, it shares a territory of the Island with Indonesia which together with Australia decided in 1974 that the best solution for security in the region after Portugal had given up this territory will be a fusion of East Timor with Indonesia,. In 1975 East Timor declared independence and was consequently occupied by Indonesia and became its 27th province. General Assembly as well as the Security Council of the UN (SC) reacted by presenting their resolutions / G.A. Res. No. 3485 (XXX) and S.C. Res. No. 384 (1975) / in which they called upon Indonesia and other states to accept territorial integrity of East Timor and allow its peoples to decide independently on their own future in accord with principles of self-determination. Despite these appeals Indonesia and Australia made an agreement 11 December 1989 (*de facto* accepting East Timor as a part of Indonesia in 1978 – ICJ Judge Skubiszewski argued the point in his *dissenting opinion* by res. SC of the UN No. 384 (1975) but also by so called Stimson's Doctrine on non-acceptance of international territorial changes which happened by applying force; Stimson's Doctrine applied *ex injuria jus non oritur* principle based on which the law cannot apply lawlessness) concerned with delimitation of continental shelf within so called 'Timor Gap' and created a collaboration zone between Indonesian province of East Timor and Northern Australia. Indonesia consequently adopted the law based on which the cooperation began to be practiced. Portugal considered this step a violation of international law mainly a violation of rights of East Timor to self-determination and a stable sovereignty over their natural resources as well as a violation of Portugal's right and administrative power in relation to East Timor; HARRIS, D. J. *Cases and materials on International Law*, 6th, ed., London: Sweet & Maxwell, 2004. p 1152

ICJ further noted that the principle of rights of people to self-determination is one of the fundamental principles of contemporary international law.

Advisory opinion in the case of construction of a wall in the occupied territory of Palestine by Israel is also important.[28] ICJ argued that the construction of a wall violates international law and the finishing of this Israeli fortification in West Bank (The Court thinks that this wall creates so called *fait accompli*, which could potentially become permanent) would be *de facto* equivalent to annexation of the Palestine territory (since it interferes with the territorial sovereignty of Palestine) and would represent a barrier for Palestine peoples to apply the right to self-determination. The wall will separate the territory on which Palestine peoples have the right to apply the right to self-determination and at the same time the wall represents violation of the principle about prohibition of gaining territory by force. ICJ reiterated that the right of peoples to self-determination is of *erga omnes* character.

Perhaps one of the most expected verdicts of ICJ was **the case concerned with unilateral declaration of Kosovo's independence of 17 February 2008** which, according to ICJ, was not a violation of international law. They argued their point by the fact that the international law does not contain such a prohibition (it does not contain active enactment limiting the declaration of independence). The Court argued there was a case in the past where after declaring independence (result of which was and sometimes was not an establishment of a new) the state from which the independence was declared started to dispute it (practical experience in the 18th, 19th and the beginning of the 20th centuries). Never did, according to ICJ, the practical experience of states during this period come to a conclusion that the declaration of independence is violation of international law. The right of peoples to self-determination underwent development in the second half of the 20th century to the extent that the law was created for independence of peoples of non-self-governing territories as well as for the peoples under foreign slavery, occupation and exploitation. Many new states were established thank to the existence of this right. Some participants of the trial of that case argued that a prohibition of the unilateral declaration of independence is indirectly or included in the principle of territorial integrity contained in. Article 2 Paragraph 4 of the United Nations Charter and determines that all member States in their international relations shall refrain in their international relations from threat by force or use of force against territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. ICJ dealt with the resolution of the Security Council of the United Nations No. 1244 (1999) which is legally binding on all Member States of the United Nations regardless of their involvement in given case. The statement of the Court that the subject and goal of this resolution was establishment of temporary administration of Kosovo and its stabilisation rather than the final solution, weakened its meaning. Serbia understood this resolution as a guarantee of its territorial integrity and sovereignty over Kosovo. It is therefore questionable whether this precedent did not create a problem for any state facing their own separatist tendencies. ICJ in this case came to the conclusion, that unilateral declaration of independence of Kosovo did not violate any applicable rule of international law, but did not deal with a question of consequences of such declaration whether

[28] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136

or not the result of which is an creation of a new state.[29] In order to conclude above mentiond we can mention that as of 1 June 2012 Kosovo was recognised by 91 states.[30]

[29] In accordance with *International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, I.C.J. Reports 2010, p 403

[30] For further details, see http://www.mfa-ks.net/?page=2,33 [used on 15 December 2012]

II. The State as a Subject of International Law

II. 1 The State as a Concept

A term '*State'* comes from the Latin word *status*, which can be translated as a status, a position, an attitude, as well as a system. The concept of a state in today's terms was established by Nicolo Machiavelli in his book *The Prince*, when in the first chapter named *The Different Forms of Government and the Various Ways in Which Power Is Produced*, wrote that *"all nations and governments, which the people were serfs of, are either the princedoms or the republics"*.[31] Max Weber, the founder of sociology, defines the state as *"a human community, which in a certain territory claimed for himself (even successfully), the monopoly of legitimate physical violence"*.[32]

The definition of a state is not provided only by the science itself, but also by the case-law of the judicial or the arbitration bodies. The European Conference Arbitration Commission on Yugoslavia established by the Declaration of 27 August 1991 declared in its Opinion No. 1 that *"the state is commonly defined as a community which consists of a territory and population subject to an organised political authority ... and such a state is characterised by sovereignty"*.[33]

The simplest definition of the State as a subject of international law declares that *"the state is a type of legal person recognised by international law"*.[34] Professor Brownlie adds that possession of a legal personality is not *per se* a sufficient sign of a state sovereignty and exercising legal capacity is rather a natural consequence than decisive proof of legal personality.[35] The state is performing its functions under the national law as well as under the international law.[36] In order to objective existence the state is obliged to meet certain constitutive elements. In the past these elements were only determined only by the theory of international law based on the international customs. As late as on 26 December 1933 at Montevideo there was the Convention on the Rights and Duties of the States adopted and defined the constituent elements.

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31 MACHIAVELLI, N.: *Úvahy o vládnutí a o vojenstve.* Praha: Argo, 2001, p. 19

32 WEBER, M.: *Politika ako povolanie.* Bratislava: SPEKTRUM, 1990, p. 10

33 Opinion No. 1 of the European Conference Arbitration Commission on Yugoslavia, Text of the Opinion: http://www.la.wayne.edu/polisci/dubrovnik/readings/badinter.pdf [used on 30 December 2009] Compare also SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708, p. 198

34 BROWNLIE, I.: *Principles of Public International Law.* Oxford: Oxford University Press, 2008, p.69

35 *Ibid.*

36 *Ibid.* p. 58

There is an interesting fact in regards of the convention - despite the Convention was concluded only between the states of the American continent, but eventually it has created the customary norm of the international public law.

Article 1 of the Montevideo Convention states that *"the State as a subject of international law should possess the following qualification assumptions* (which together form the primary features of the state):

1. *a permanent population,*
2. *a specified territory,*
3. *government,*
4. *capacity to enter relations with the other states".*[37]

States are original (primary) subjects of international law with full international legal personality. The has *the unique position* in international law as it is a representative of the sovereign power and it has the absolute normative capacity to create obligations under international law *(ius tractati),* capacity to establish and maintain diplomatic relations *(ius legationis),* capacity to create an international organisation, capacity to be a member of international organisations, capacity to ensure fulfilment of their legal obligations, capacity to bear the responsibility and capacity to enforce their claims against other states (subjects), capacity to claim rights at the courts *(ius standi).* The state is actually *the only* subject of international law of absolute international personality. Therefore, the states maintain their key position among the subjects of international law. The existing international law is therefore of inter-state character.

The state as a subject of international law is the first and the oldest subject of international law. The creation and end of the first state-like entities already occurred in deep antiquity. According to the latest archaeological research, as well as the ancient Egyptian historical records, the first units of that type occurred already during the 9th century B.C. The creation and end occurred in the history of the states very often, and the process has not ceased yet. For example, in 2006 there was a successful referendum held on the independence of the state of Montenegro, which broke away from Serbia, in 2011 the South Sudan was established and it became the youngest member of the UN. In 2008 Kosovo, Abkhazia and the South Ossetia declared their independence. The existence of these states is disputed.

Creation and dissolution of the states have significant legal implications, which are mainly *the establishment of international legal personality of the State, application of institute of recognition in international law and also the issue of the succession of the states in respect of international treaties, the state property, state archives and state debts.*

II. 2 The Emergence of International Legal Personality of the State

The emergence of international legal personality of the state is based on the fulfilment of four basic objective constituent elements of the states (as mentioned above) *the state territory, population, government (public power) capacity to enter into relations with other states (sovereignty or independence).*

[37] Convention on the Rights and Duties of States (Montevideo, 1933), Text of Convention: http://avalon.law.yale.edu/20th_century/intam03.asp [used on 30 December 2009]

State territory used to be considered the most important element of the state, as a condition of settlement and functionality of public authorities. International law does not set a minimum size required for the creation of a state. The fact that other states render make the legal claims on its territory, possibly, if the area is not well defined, is not to the detriment of statehood either.

The *population* means all the individuals of both sexes living together in a given area as an organised community, and this community has a *settled, natural and permanent character*. The condition of settlement excludes the population of the nomadic tribes (such as the Tuaregs living on the territory of Algeria, Mali, Niger and Mauritania). Naturalness is meant in terms of coexistence of the population guaranteeing its biological reproduction. The criterion of permanence distinguishes between the actual people of the country who are bound to it by citizenship and the foreigners and statelessness. International law, as in relation to the territory of the state does not provide the minimum number of people.

Existence of the third element of the state - *government (public power)* means the fact that the state has the system of state bodies capable of providing such a minimum standard of local public administration and public policy on the relevant territory that can guarantee coexistence of the state with the other members of the international community. International law does not interfere into the changes of governments but the states have reserved the right to take an attitude to the government in the form of its recognition (recognition *de iure* or *de facto*).[38] Weakening the government effectiveness does not endanger the state as a subject of international law. In case the central administration is unable to perform public authority throughout the territory, it will be a dysfunctional state. There is a problem in such a case as international law does not comprehend any legal norms that could lead to combating dysfunctional states (Somalia, Sierra Leone, Liberia, etc.).

An important feature of the state public power is the sovereignty - underlying the forth state constitutive element - *competence to enter relations with other states*.

Capacity to enter relations with the other states basically involves existence of the sovereignty (independence) of the state. The state sovereignty actually means that the state or public authority is towards the certain territory and population the supreme exclusive power independent of any other sovereign state power. The state sovereignty is manifested *inter alia* by the unlimited capacity to dispose of its s state territory recognised by international law. Thus, the state may transfer a part of its territory to another sovereign state by cession - cession of territory (cession of Trans-Carpathian Ukraine by Czechoslovakia to USSR in 1945), or the state may waive territorial sovereignty on a part of its territory for some time (establishment of the military base).

II. 3 Methods of the Creation of State

Nowadays the issue of the creation of a state is closely linked to the issue of implementation *the right to self-determination*, as outlined in the previous chapter. Most of the states are currently created with reference to this right. Relationship between the

[38] DAVID, V., BUREŠ, P., FAIX, M., SLADKÝ, P., SVAČEK, O.: *Mezinárodní právo veřejné s kasuistikou,* 2nd edition - [Praha] : LEGES, 2011, pp. 159-160.

terms of state and nation is not adequately treated in international law. Relationship of the nation and the state depends on its understanding of politics, which can be either ethnocentric or political (territorial). *Ethnocentric understanding* is typical for Central and Eastern Europe and is based on consanguineous allegiance based on *ius sanguinis*. According to this approach the nations do not identify with the State. The nation is a principal and determining phenomenon, from which the state is derived on the basis of self-determination. According to this understanding (view) the nation is not the mainstay of the state *Political (territorial) understanding* is typical of Western Europe as well as Africa, America and Asia. It is a liberal approach. Under this conception the state is a principal and determining phenomenon, while the nation is a derived phenomenon - secondary to the state. The nation is the mainstay of the state. According to this concept the citizenship of the state's population is created on the basis of *ius soli*. Then the population of the state in a particular area creates a nation.

New states are created in several ways. In the past the states were established especially by so-called *the first original settlement* of unoccupied territory that was considered no man's land *(terra nullius).* This method of the state creation was not associated with exercising the right of people to self-determination, which was stabilised in international law already in the 20th century. Since stabilising the right of people to self-determination those in the 20th century the new states have mainly been based on the application of the law in the process of *decolonisation* (Africa, Asia, and South America).

However, the new states are created by *the fusion* of two or more states (reunification of Germany), *division* or *dissolution (dismembering)* of the state (former Czechoslovakia) or by *secession* from the state (several Federative Republics from the former Soviet Union and former Yugoslavia). In some cases, the process of the state dissolution is so complicated (Austria-Hungary) that includes separation as well as distribution of the state. Creating an independent state on the territory of the former colonies, which were not considered a part of the territory of the metropolitan powers, is regarded as a very specific method.[39]

II. 4 Types of States in the International Community

In the international legal relations there are mainly state entities with a *unitary character* in terms of their national law. These states are externally represented by one structure of state administration (the Slovak Republic). The countries composed under their own national law are also regarded as the unitary states. Although there are many degrees and level of public authorities (federation authorities, republican authorities) *in these states* (the Russian Federation, the Federal Republic of Germany), externally they are represented by only one type of state authority - federative authorities. International law considers such states as uniform in terms of their international legal personality. States in the form of a federation or a federative republic are thus of constitutional character. Another case is when the *states are composed of international legal character.* There are *confederations, unions, or communities of states.* It follows the particularities of their personality. For members of state *confederations* (Germany

[39] DAVID, V., BUREŠ, P., FAIX, M., SLADKÝ, P., SVAČEK, O.: *Mezinárodní právo veřejné s kasuistikou,* 2nd edition - [Prague] : LEGES, 2011, pp. 156-157.

in 1815-1856, the United States in 1778-1787, Switzerland in 1291-1798, the Czech and Slovak Federative Republic from 8 October 1992 to 31 December 1992, and in some point also the current integrated groupings of states such as the European Union and the Commonwealth of Independent States) apply to retain their international legal personality in full. They may be represented by their shared bodies may in certain areas but the final decision on legally binding acts of these organs is taken by their national parliaments. Therefore it can be concluded that the confederations, unions, or international state communities are international legal connection as they are usually made on the basis of an international treaty. In practice there are also *mixed types of statehood*, which are partly constitutional and partly international legal connection. They are so-called international federations, where their international relations are managed up to some extent by their member states or provinces (*e.g.* Quebec province in Canada, the Swiss cantons) to retain a reasonable degree of their international legal personality.

II. 5 Legal Consequences of the Creation of State

International law associates a number of legal consequences with the fact of the state establishmentcreation. Immediately after establishment the state becomes *a subject of international law*, but is eligible to apply only some manifestation of its international personality, including *their fundamental rights and duties* in particular. The fundamental rights and duties of states are: *the right to existence, the right to equality with other states, the right to self-defence, the duty to refrain from the threat and use of force, the obligation to settle their disputes by peaceful means as well as the full international legal capacity, capacity to bear the responsibility for the violations of international law*. State territory of the new state ceases to be *terra nullius* and therefore cannot be subject to the primary occupation. From the moment of its creation any armed attack by another State against the territory of the new state is considered the *aggression* forbidden by international law. The new state has *exclusive and full jurisdiction* within its territory, and it ought to be respected by other countries. According to the existing international regulations, the states have the right to so-called *jurisdictional immunities*. International customary regulation was codified in 2004 in the form *of the UN Convention on Jurisdictional Immunities of States and Their Property*. Under Article 1 the Convention covers the issue of the state immunity and its property in relation to the jurisdiction of the national courts in the other states. The creation of the new state does not automatically mean its full engagement in the international community life. It needs *to be recognised by other states*. The act of recognition by other states causes a gradual extension of the state rights and duties beyond the fundamental rights and duties. After being recognised the state may apply for the related legacy right - to establish diplomatic and consular relations with other states. After being recognised the state *can join international organisations and participate in their establishment*.

II. 6 Institute of Recognition in International Law

Institute of international legal recognition is very important for the functionality of the state and other entities. Recognition of the state has in the international legal practice the utmost importance. Institute of recognition can be defined as a *unilateral act of state* which explicitly or implicitly responds to the emergence of a new state, the government, the government in exile, insurgents, beligerents, and national liberation movements. Regulation of the institute of recognition has only a customary character. Recognition of any of the above mentioned entities does not affect its existence.

II. 7 Recognition of the State

The most common and most important type of recognition is *the recognition of the state*. Under international law the state objectively exists if all four elements of law are met. This statement is based on the international legal *principle of effectiveness* and basically means that other countries in the event of a creation new state limit themselves to checking and concluding whether the elements of the state are effectively met and they subsequently recognise or do not recognise the new state. This approach is based on so-called *declaratory theory* of recognition of the state subjectivity where recognition only declares the *status quo* and does not affect the creation or termination of international personality of the state. The opposite to this theory is so-call *constitutive theory* of recognising the state personality that existed in traditional international law in the past and meant that the state was considered only as a territorial unit recognised by all the existing states. At present the international community applies the principle of effectiveness and declaratory conception of the state recognition, however, it examines whether the new entity arose in violation of the fundamental principles of international law (respecting the principle the *rule of law*, adherence human rights and minority rights), as well as the values on which are in the interest of the international community as a whole (due to the emergence of aggression, annexation, or the needs of a particular extremist political group without connection to the right to self-determination). In regards of this the UN Security Council urged to disregard the declaration of independence of Southern Rhodesia in 1965 and in the Turkish Republic of Northern Cyprus in 1983. In relation to the Turkish Republic of Northern Cyprus it was also confirmed by the Committee of Ministers of the Council of Europe.[40] After the dissolution of the former Czechoslovakia, Yugoslavia and the Soviet Union, the similar policy was applied by the member states of the European Communities and they examined whether the new successor's states respected the human rights, the rights of minorities and the existing borders of state. On the other hand, the contemporary international law, in addition to the above-mentioned principles of efficiency, applies the *principle of legitimacy*, according to which a subject of international law is in some cases considered also an entity which does not meet the factual existence of all the elements of the state. The current experience of the states in the application of their

[40] ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo veřejné,* 1st edition, Prague: Eurolex Bohemia, 2003, pp.85-88

non-recognition particularly impedes their international political existence (Macedonia, the Turkish-Cyprus Republic, the Republic of Serbia, Chechnya, Tartastan, Kosovo, South Ossetia, and Abkhazia). Non-recognition of the state has therefore very significant legal consequences, the state cannot join the United Nations and other international organisations, cannot establish diplomatic, consular, economic, political, cultural and other relations with other states. In practice, this may cause a lot of problems associated with accepting their travel documents, judicial decisions, legal assistance, etc., which sometimes leads to its extinction under military or economic pressure from more powerful neighbours and the international community. Non-recognition of the state cannot deny its actual and real existence.

In case the state is *recognised*, there are relatively stable conditions generated for its existence. The existence of already recognised country (Cambodia, Lebanon, Afghanistan, and Iraq) is not affected by a temporary loss of the stable and effective government. The extinction of international personality of the state occurs only along with the actual extinction of the state (Austria-Hungary in 1918, Czechoslovakia in 1992) or as a result of the union of the states (Egypt and Syria in 1958, Tanganyika and Zanzibar in 1964). Recognition of the state is an act by which the existing state acknowledges the new state and its sovereignty and it is an equal subject of international law. At the same time the existing state reflects the will to have with the new state such legal relationships that exceed basic rights and duties. The first part of recognition is therefore declaratory and the second one has a constitutive character. Recognition of the state is retroactive from the moment of the creation of state. There are two types of the state recognition, which differ in their contents - recognition *de jure* and *de facto*. *De jure recognition is full, final and irrevocable*. It expresses willingness to act with the recognised state as a full subject of international law and establish with it usual relations in the international community. Its effects will end up when the recognised state demises. *De facto recognition is limited, temporary and reversible.* It has legal effects and creates relationships beyond the basic rights and duties of states. An example of *de facto* recognition is a treaty with a state without mentioning the recognition of its personality. *De facto* recognition is used by the states in cases when they are not convinced of its long duration, but there is a need to modify certain legal situation e.g. in relation to its subjects or the property of recognizing state. According to the form of the recognition act, the recognition can be expressed *de jure* and *de facto* explicitly or implicitly. *The explicit recognition* is every formal act by which the state directly states their willingness to recognise another state by a unilateral or a bilateral act. *The implicit recognition (implied)* is an official act of an indirect (implied) recognition by a recognising state, e.g. via recognition of the government or concluding a treaty with a new state. On the contrary, signing a multilateral agreement with an unrecognised state or common membership in some international organisation or joint participation in an international conference does not have such a nature. The latest experience in recognitions is represented by *Declaration on the Guidelines for the Recognition of New States* by the European Communities of 1991. The member states hereby refused to recognise the states established in a result of aggression and expressed their readiness to recognise the states created in a democratic way respecting the mandatory rules of international law.

II. 8 Extinction of the State and Its Legal Consequences

International legal practice also provides the situations when the states demise. The states can cease to exist primarily by *connecting* several states (Tanganyika and Zanzibar joined and created the State of Tanzania in 1964), *division* or *dissolution (dismembratio)* of one country (Czechoslovakia in 1992, Yugoslavia in 1992-1995). According to the nature of the state termination we also specify the method of succession. The state does not extinguish by the *separation (secession)* of the territory, and usually retains its previous international legal personality (Ethiopia after the separation of Eritrea in 1993). International law prohibits termination of the state by so-called *debelation* (complete military defeat of the state and destruction of the state power), in theoretical way, as a result of the loss of so-called material assumptions of the state as a territory or population due to natural forces. Extinction of the state is a historical fact and international law combines several legal consequences with it. The regulation of these issues is mostly customary. It is a question of the *state identity* (determining whether the personality of the new state is identical to the previous state or the new state entirely new subject of international law). The second legal issue is the question of *succession* to all or at least some of the rights and obligations of the defunct state to another state.[41] Codification of succession took place through two conventions - *the Vienna Convention on Succession of States in Respect of Treaties (1978)* and *the Vienna Convention on Succession of States in Respect of State Property, Archives and National Debt (1983).* Yet, only the first one entered into force.

II. 9 Succession to International Treaties

The aim of the succession is not only to ensure the stability and security of the existing contractual relations but also to facilitate the successor's entry into the contractual relations of the predecessor. Succession of the states in respect of international treaties is governed by *the Vienna Convention on Succession of States in Respect of Treaties (1978*[42]*)*. This Convention applies to the succession of the states in respect of the treaties *concluded in written form between the states*, but also the effects of succession of the states (the convention characterises it as the replacement of one state by another in responsibility for the international relations regarding the territory) in relation to the multilateral treaties, which are also the founding documents of international intergovernmental organisation, as well as in relation to each treaty accepted on its territory (Article 4). Another condition of the cumulative nature of applying the Convention is *to hold the succession of the states in accordance with international law and with the principles enshrined in the UN Charter.* In terms of time effect the Convention refers to the succession of the states *occurring after its entry into force, i.e. after 6 November 1996.* However, when expressing its consent to be bound by the Convention the state is allowed to make a statement of notifying the application of the provisions

[41] POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodní právo veřejné : zvláštní část*, 5th amended and extended edition - Prague: C.H. Beck, 2006. - xxii, (Law textbooks), p. 31.

[42] Published in Collection of Laws of the Slovak Republic under No. 33/2001 of Coll.

of the Convention also to its succession taken place before the entry into force of the Convention and in relation to a state which is party to the Convention and to adopt the statement (such statements as well as the subsequent adoption of the statement were made by the Slovak and the Czech Republics when depositing their ratification documents of the Convention[43]). The Convention also enables the provisional application of its provisions between the state and the successor that will express its consent to be bound by the statement and will claim this about such implementation in relation to its succession and a signatory or a contractual party, which accepted this declaration. The provisions of the Convention shall apply as from the date of that succession. The condition of the statement is the written notification to the depositary of the Convention, who shall inform the other contracting and signatory states. The –predecessor state and the –successor state conclude between themselves the agreement on the transfer of rights and obligations under in relation to the territory and as of the date of succession. The conclusion of such an agreement does not mean that the rights and obligations shall automatically become the rights and obligations of the successor state in relation to other states - as contracting parties to these treaties (Article 8). Neither the unilateral declaration done by the successor State guarantees shifting the rights and obligations from the predecessor to the successor or other parties to the treaties relating to the territory (Article 9). This declaration can be regarded as an offer to which the other party has the right to respond to both positive and negative ways. And the other party has the right to refuse an application of the treaties. In practice, there may be a treaty that directly establishes that the state successor will be considered as a party. It is therefore necessary that the state has expressed its explicit written consent of this fact. The successor state therefore becomes the party as of the date of succession, unless otherwise specified or agreed.

The Convention covers *three basic principles* in relation to the succession to the treaties the first of which is contained in Articles 11 and 12, stating that *the right of succession does not affect boundary treaties, i.e. that each state (and the successor state) shall respect national borders, border regimes and other territorial regimes that are established by the localised treaty, the predecessor state was bound by.* These regimes are automatically transferred from the predecessor state to the successor state. The issue of other local regimes was also addressed by the ICJ in Gabčíkovo-Nagymaros case since Hungarian party claimed that the treaty of 1977[44] expired on 31 December 1992 due to the fact Czechoslovakia ceased to exist. Hungary also did not admit that the treaty created by the border regime in accordance with Article 11 of the Convention or any other territorial regime within the meaning of Article 12 of the Convention. It also refused to claim that it is a localisation agreement. ICJ has decided, after selecting the contents of Article 12 of the Convention for the rule, which reflects customary international law, the treaty of 1977 must be regarded as the founding territorial regime under Article 12 of the Convention and therefore the treaty is in force even after the dissolution of the Czech and Slovak Federative Republic and it is binding on Slovakia as of 1 January

[43] For more information see http://treaties.un.org/

[44] Agreement between the Czechoslovak Socialistic Republic and the Peoples Republic of Hungary about building and operating the System of water works Gabčíkovo- Nagymaros (Budapest, 16 September1977), published in Collection of Laws of the Slovak Republic under No. 109/1978 of Coll.

1993.[45] There is an exception to this rule – regulation of the contractual obligations on military bases. The contrary view was presented in the publication by Potočný and Ondřej, who argue that succession does not apply to contractual commitments of the predecessor state for the grant to the establishment of foreign military bases on its territory[46]. However, International Law Commission, while preparing the draft articles of the Convention, discussed the issue, i.e. the specific provision of Article 12 Paragraph 3, but appeared to the Convention on the conference in Vienna. In discussions on other territorial regimes within the International Law Commission two particular cases related to military bases were raised, in both cases it should be a U.S. base in the West India and Morocco created under the treaty between the U.S. and the UK - actually France, i.e., at the time of the conclusion of the administrative powers of the colonial territory.[47] After gaining independence of both territories there were negotiations with the U.S. to recognise that the sovereign states should have the right to form their own alliances and to determine which military bases and under whose control permit they will be built on their land.[48] In its Article 13 the Convention states that any of its provision is without prejudice to the principle of international law, which confirms the permanent sovereignty of all the nations and the states over their natural wealth and resources.

If parts of the national territory or any territory the state is internationally liable (and is not a part of its territory) become a part of the territory of another state, the date of the succession ceases the validity of the agreements binding the predecessor state and the treaties of the successor state enter into force. Implementation of the treaties of the successor state related to the newly acquired territory, however, shall be consistent with the object and purpose of the treaty and cannot significantly change the conditions of their performance. It is expressing the principle of contractual limits mobility, reflecting the transition of sovereignty over a territory and the associated automatic change in the contractual scheme, the predecessor state's contractual regime into the successor state's regime as of the date of succession. This principle combines both the positive aspect (automatic application of the treaties of successor state) and the negative side (automatic termination of application of the treaties of predecessor state). In addition to the above-mentioned return to the territory of Alsace-Lorraine to France, this principle has also been used for incorporating the province of Newfoundland to Canada in 1949, or in 1952, when Eritrea was united as an autonomous region into federation with Ethiopia.

The second principle is related to a newly created independent state (which can also be formed from two or more areas within the meaning of Article 30 of the Convention, which at the time of succession were not the states)[49] within decolonisation

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45 *Gabčíkovo – Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7

46 POTOČNÝ M.; ONDŘEJ J. *Mezinárodní právo veřejné: zvláštní část*, 5th amended and extended edition, Prague: C.H. Beck, 2006. 511 p. ISBN 80-7179-536-4. p. 35.

47 The USA rented a military base on the territory of West India with an approval of Great Britain in 1941 and the military base in Morocco was established based on the agreement between the USA and France in 1950.

48 Yearbook of the International Law Commission, 1974, Vol. II, Part One, p. 203, Point 25.

49 An example of such establishment of a state is Nigeria combined from 4 territories (colony of Laos, two protectorates of Northern and Southern Nigeria and northern region of British territory of Cameron).

and is contained in Article 16 of the Convention. This principle is called *principle of tabula rasa* (clean table), which allows new independent states to freely decide on their succession to the predecessor state's treaties - the colonial powers. Exceptions to this are already mentioned localised treaties. In respect of multilateral treaties that are in force and that the predecessor state was a contractual party, the new independent states can announce their succession as notification, except where the implementation of the treaties (in relation to the state) would be incompatible with its object and purpose, or if being party of the treaty requires the consent of all parties. In case that depositary of the treaty is the UN Secretary-General, he immediately after gaining the independence approaches such a state by letter inviting state to confirm its bond by a given treaty. Then the result is notified to all contracting parties. A similar practice is also used by other depositaries of multilateral treaties. In relation to treaties that have not come to force yet a new state can succeed to the position of a contracting state (the state that has expressed its consent to be bound by the treaty and it has not come into force yet) as well as into the position of a contracting party (the state that has expressed its consent to be bound by the treaty and in relationship with the state it has already come into force). It can also succeed into the signature by the predecessor state and then make their own process of ratification, acceptance or approval of the treaty. Notification of succession should be made in writing, and ought to be signed by an authorised person (the Head of State, the Prime Minister or the Minister of Foreign Affairs, or the person duly empowered to do so by the competent authorities of the new state) and is given to the depositary of agreement, or the contracting parties or the states, if the treaty does not provide otherwise. The effects of the notification mainly arise from the date or succession or the date when the treaty entries into force. Regarding the bilateral treaties it is necessary to state that they are considered as valid between the new state and the other state if the two countries agree or if their conduct is deemed to have agreed to the implementation of the given treaty. Based on this it cannot be concluded that the treaty is valid also between the new independent state and the predecessor state. If the new independent state expresses it willingness to perform provisional application, the provisional application of treaty can be performed between the new state and every other state that agrees, or behaves in a manner of its obvious approval. In the case of treaty where the consent of state parties is required, the provisional application may start after such consent was expressed. In bilateral treaties it also applies that the provisional application is only possible with the consent of the other party, or if such consent results from its behaviour. Provisional application of multilateral and bilateral treaties can be terminated, if the new state notifies the intention not to become a party to a treaty, or by the notice of termination of the provisional application of the treaty within a reasonable time (i.e. the period of 12 months from the date of notification, unless the treaty provides otherwise, or otherwise agreed) by the new independent state or contracting state or when the time limit has expired.

The third principle is so-called *principle of limited continuity*, which relates to all the successors states except for the new independent states, which created within decolonisation process. Modification of this principle is found in Article 31, Paragraph 1 of the Convention, which provides that after the creation of the state, two or more states, and any treaty that is valid at the date of the succession in relation to the predeces-

sor state remains in force in relation to the successor state. Modification of this rule is possible only if the specific treaty parties agree otherwise, or unless the treaty shows that its application in relation to the successor state would be incompatible with its object and purpose, or the conditions for its application would substantially change. The specific treaty will remain in force in relation to the territory in which it was applied at the date of succession. In relation to the treaties that have not yet come into force the new state can succeed into the position of a contracting state as well as the position of a contracting party, just as in the second principle. Modification of this rule is possible in case its application in relation to the successor state would be incompatible with its object and purpose, or would substantially change the conditions of its application. The specific treaty will remain in force in relation to the territory in which it was applied at the date of succession. It is also possible to succeed into signing the treaty. If there is a succession because of secession a part of the state, regardless of whether the predecessor state continues to exist or not, every treaty in force in respect of the entire territory shall remain in force for the successor state. If the treaty applied only to that part of the predecessor state's territory, which has become territory of the successor, it remains valid only for the successor. An exception to this rule is possible in case the states agree otherwise, or the result of the treaty application in relation to the successor state would be incompatible with its object and purpose, or would substantially change the conditions of its implementation. At the same time if the predecessor state, being separated from its part, continues to exist, any treaty in force related to the state at the date of the succession remains in force. The exception is the situation when the treaty was subject to the area of secession only, then it remains in force only for the successor state. As in previous cases, it is possible the successor state can succeed to treaties that have not come into force yet, or they succeeded to signing the treaty. For these methods of the successor state there are the same conditions as the Convention provides for the succession after the union of two or more states, and are contained in Articles 36 and 37. The notification is required in written form, signed by the Head of State, the Prime Minister or the Minister of Foreign Affairs or a person empowered to do so. Notification shall be submitted to a depository of the treaty or to the contracting parties or states.

The actual succession in relation to *multilateral treaties* is carried through communication (notification) of the succession to the depositary of the treaty, which can contain the note of reservation to some provision of the treaty, as well as the intention to be bound only by a part of the treaty. A special situation occurs in case of the succession into *multilateral treaties establishing an international intergovernmental organisation*. The Vienna Convention also refers to the succession of this type. In addition, a prerequisite for validity of such notification of the succession into the treaty is adopting the successor state into that organisation. Succession in respect of *bilateral treaties* is negotiated on the bilateral basis and occurs only in case of mutual consent.[50]

[50] JANKUV, J., LANTAJOVÁ, D. a kol.: *Medzinárodné zmluvné právo a jeho interakcia s právnym poriadkom Slovenskej republiky***,** 1st edition, Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2011, 583 p.

II. 10 Succession in Respect of State Property, Archives and Debt

Customary rules in this area have been codified in *the Vienna Convention on Succession of States in Respect of State Property, Archives and Debt (1983).* This Convention, however, has not come into force yet. According to Article 1, this Convention applies to the effects of the state succession related to the state property, archives and debt. It is enshrined in Article 3 that these articles shall apply only to the effects of succession of the states occurring in conformity with international law and in particular with the principles of international law embodied in the Charter of the United Nations.

Succession regarding the *state property* is regulated in Part II of the Convention. According to international law the property of predecessor state is defined in Article 8 as property, rights and interests that pertained to that State at the date of succession of the states. Succession in relation to the *state archives* is stipulated by Part III of the Convention. The term of state archive is defined in Article 20, where the state archives of the predecessor state are all the documents and all other data of any kind produced or received by the predecessor state when exercising its functions, and all what belonged to the predecessor state at the date of the succession of the states in accordance with its national law and saved by the state or under its control as the state archives regardless its purpose. Succession in relation to *state debts* is set forth in Section IV of the Convention. *State debt* is defined in Article 33 of the Convention as any financial obligation if predecessor state towards another state, international organisation or any other subject of international law, which incurred in accordance with applicable international law. Therefore it does not include debts to individuals and legal entities, such as administrative debts (e.g. pensions) or acquired rights (e.g. lease contracts).

Succession of the states related to the state property, state archives and state debts is treated in details in the Convention in relation to the various ways of the dissolution of predecessor state and the creation of successor state. A very common approach, which appears in the Convention, is *the principle of territoriality* (related to the state property and state archives). Based on the principle, the state property is transferred to the new state on the territory where the state is located or to the territory the property is related to. By the spirit of this principle the state archives are transferred to the new state that owns the territory on which the state archives are located or the archives are related to. Important is *the principle of agreement* between the new states involved. It is used in cases when it is not possible to clearly identify who the state property, archives and debts belong to. In relation to movable state property the principle of *the division of movable property in fair share* is used. In relation to the state debt there are the following principles used: *the principle of equitable sharing of debt* and *the principle of equitable distribution of debt*. In relation to state debts by the state, which was based on decolonisation, the principle used points out that *no national debts are passed on this type of the state*.

III. State Territory

III. 1 State Territory

It is clear from the above mentioned definitions of the state that the element of territory appears in each of them since it used to be the most important element. Despite the importance of the state territory international law does not determine minimal area of the state territory and also accepts existence of so called 'mini states', e.g. San Marino etc. Any diminution of the state territory, even the considerable one does not have impact on the loss of the international personality of the given state. International law does not set forth any requirement of the exact specification of non-changeable borders and so the borders of the state as a subject of international law. It is satisfactory that it disposes of a particular territory which is not disputed. It is not a detriment if the state is in conflict with the neighbouring states as long as it is a question of delimitation or demarcation of their mutual borders.[51]

It was the actual requirement of a specific indisputable territory which was a reason why the state of Palestine did not come to existence despite its declaration in November 1988 at a conference in Algeria because Palestinian organisations headed by Jasir Arafat *de facto* did not have control over any indisputable territory.[52] Examples of disputable borders can be found around the world, e.g. Albania was accepted by many states before World War I despite its borders being disputable. Since its existence, Israel has faced many attacks from neighbouring Arabs neighbours whose intention has been its destruction or curtailment of its territory. On the other hand, if a state loses the ability to efficiently control its own territory, it does not necessarily mean the state ceases to exist. There is a concrete example of the constitutional and international law presumption of the existence of the Czechoslovak Republic during World War II despite the fact that the government of the Czechoslovak Republic temporarily did not control the state territory.[53]

As already mentioned, the most important subjects of the international public law are states based on sovereignty principle consisting of internal as well as external elements. Sovereignty itself characterised by the existence of rights and responsibilities is

[51] MALENOVSKÝ, J.: *Mezinárodní právo veřejné jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. Brno : Masarykova univerzita; Doplněk, 2008, 552 p., ISBN 978-807239-218-6, pp. 108-109

[52] *Ibid*., p. 199

[53] KLÍMA, K.: *Ústavní právo,* 3rd extended edition Plzeň: Publisher Aleš Čenek, 2006, 759 p., ISBN 80-7380-000-4, pp. 205 - 206

based on the actual existence of the state territory. It means that state as a legal entity or as public corporation would not be able to exist without the state territory.

Additional elements are certainly necessary for the creation of the state in accordance with a existing rule of the international law but we assume that the territory is the determining element since the majority of nations and state later had developed throughout close relations to the territory occupied.

III. 1.1 Definition of the State Territory

International law theory defines the state territory as *'that portion of land that falls, according to the international law, under its (state) sovereign power and is comprised of its inseparable entity.'*[54] This particular thesis was confirmed by the judge of the Permanent Court of Arbitration Max Huber in Island of Palmas Case (1928), when he stated, that *'sovereignty in relation to a portion of globe is the legal condition necessary for inclusion of such portion in the territory of any particularstate…Sovereignty in relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State. The development of a national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regards to its own state territory …'*.[55]

The state is a territory sovereign performing authority within its own territory; *i.e.* legislative, executive and judicial powers above all persons and matters basically.[56] To perform sovereign authority the state does not need consent of another state. State therefore can freely dispose of its own state territory.[57] The right to perform public authority within own territory is according to the international law theory regarded as a territory prerogative while territorial sovereignty is *'the right of the state to dispose of the state territory or its part with final effect and without involving any other power.'*[58]

III. 1.2 Element of State Territory

State territory can be defined as space which is defined horizontally by state borders and vertically which means that the state is sovereign above its own state territory and spaces located above and below.[59]

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[54] POTOČNÝ, M. - ONDŘEJ, J.: *Mezinárodní právo verejné, zvláštní část* 5th amended and extended edition Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 128

[55] *The Island of Palmas (or Miangas) case (1928)*, Permanent Court of Arbitration
SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708 p., ISBN 9780-521-72814-0, p. 489

[56] ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo verejné.* Praha: C.H.BECK, 2008, 840 p., ISBN 978-80-7179-728-9, p. 204

[57] *Case of the S.S. "Wimbledon" (1923,)* Permanent Court of International Justice

[58] SEIDL - HOHENVELDERN, I.: *Mezinárodní právo verejné,* 3rd edition. Praha: Aspi, 2006, 417 p., ISBN 80-7357-178-1, p. 198

[59] KLÍMA, K.: *Ústavní právo,* 3rd extended edition. Plzeň: Vydavatelství a nakladatelství Aleš Čenek, 2006, 759 p., ISBN 80-7380-000-4, p. 206

State territory as space in which it performs territorial sovereignty is three-dimensional and comprises the following elements:

1. land territory
2. waters
3. subsoil under the land territory
4. air space above the terrestrial part and waters
5. polar sectors

Ships registered in a specific state, aircrafts registered in a specific state, airspace objects belonging to a specific state, submarine cables and pipelines are not considered to be a state territory. These objects are according to the international law theory regarded as so called *territories fictifs*[60] or in case of ships or aircrafts they are regarded as floating or flying state territories.

III. 1.2.1 Land Territory

Land territory of the state territory comprises all the parts of the earth's surface located inside the state borders. It is legally irrelevant whether the state territory is or is not a geo-morphological unity. From a geographical perspective we can talk about so called enclaves or semi-enclaves. Difference between enclaves and semi-enclaves is that the semi-enclave disposes of the seaside while enclave is surrounded entirely by the territory of a different state. Islands, small islands, rocks and cliffs belong to the land territory of the state territory.[61]

III. 1.2.2 Waters

Waters are one of the elements of the state territory while in this context these are waters lying inside the land territory of the state territory or they are adjacent there to. The waters within the land territory of the state territory are denoted as internal waters or territorial waters.[62]

Internal waters according to the international law theory are considered domestic rivers, rivers creating a natural border among states, internationalised rivers, lakes, canals, channels, bays, gulfs and ports. In case of rivers the State is naturally the territory sovereign along its watercourse if the river is situated entirely within its state territory. In case of pluri-national rivers the State is a territory sovereign only for the part which

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60 POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodní právo verejné: zvláštní část* 5th amended and extended edition. Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 129
KLUČKA, J.: *Medzinárodné právo verejné.* Bratislava: Iura Edition, 2008, 684 p., ISBN 978-808078-219-1, p. 271
DAVID, V. - SLADKÝ, P. - ZBOŘIL, F.: *Mezinárodní právo verejné s kazuistikou,* 1st edition. Pribram: Publisher Leges, 2008, 392 p., ISBN 978-80-87212-08-0, p. 153

61 BROWNLIE, I.: *Principles of Public International Law.* Oxford: Oxford University Press, 2008, 784 p., ISBN 978-0-19-921770-0 (Pbk), p. 105

62 POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodní právo verejné: zvláštní část* 5th amended and extended edition. Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 129

falls under its sovereign power and which is separated from the state territory of a different sovereign.[63]

Internationalised river is the one that is a navigable one, which was by an international treaty declared an international river, has connection with the sea and flows through the state territory of two or more states or creates a natural state border among them. Such international river is accessible either to trade ships of all states or trade ships of coastal states.[64] In case of internationalised river the same regime applies as in case of the rivers which create a natural state border among States. In relation to what has been mentioned above, coastal state is a territory sovereign for the river part which is allocated to it by the international treaty based on which it has become an international river.[65] In case of pluri-national lakes the same principle applies. If they are national waters, the state as a territory sovereign determines the legal regime applicable on its state territory. This regime is determined by a principle of reciprocity with the surrounding states.

According to the contemporary international law theory bays are also considered national waters of the territory sovereign. Bays should fall under coastal waters since this is not the case of waters surrounded by land, but from a particular although a small part, these waters are connected to the sea which means saltwater system. In terms of bays the rule was constituted that they fall under a sovereign power of the coastal state on the assumption that the whole coastal part is under a sovereign power of one state and entry of this kind of bay is maximum of 24 nautical miles. This rule is not absolute; some exceptions apply in case of historical bays (e.g. Hudson Bay). In essence these exceptions are based on the premise that the historical bays have always been considered national waters of the coastal state regardless of the entry width to such bay. The significant thesis was confirmed by the Central American Court in 1917 declaring that *'it is a historical bay in case when its long-lasting possession together with a peaceful and undisturbed intention to govern (animus domini) and an acquiescence of other states is known. In case there is a route of a ship of an international significance, the coastal state has a duty to provide the ships of other states the right of innocent passage the same way as in its own territorial waters.'*[66]

Concerning the ports, these are considered a part of national waters of a coastal state so only the state as a territory sovereign determines rules by which to govern entry, exit but also operation of a concrete port. The state determines which ports will

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63 Concrete rules for determination of state borders on rivers, see p. 47 and the following.

64 POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodní právo verejné: zvláštní část* 5th amended and extended edition. Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 129

65 First document concerning with international river navigation was the Final Act of the Vienna Congress in 1815. Consequently, internationalisation of several rivers took place e.g. The Rhine (1814), Elbe River (1821, 1825), The Danube (1868) and others. Confirmation or consequent evidence of rules concerned with these rivers took place after World War I. In case of Danube individual international agreement was signed in 1948 in Belgrade. It is a Treaty about the navigation regime no. 241/1949 Series on the Danube. On the African continent Congo and The River Niger were internationalised at the Berlin Conference in 1885.
DAVID, V. - SLADKÝ, P. - ZBOŘIL, F.: *Mezinárodníprávo verejné s kazuistikou, 1st edition.* Příbram: Publisher Leges, 2008, 392 p., ISBN 978-80-87212-08-0, p. 166

66 *Ibid.*

be open for trade ship or closed e.g. military ports or ports for sabotage transportation which is usually reserved for domestic operators.[67]

Canals as well as artificially created water routes built for effective transportation are classified as internal waters. Such canals are usually built on the territory of one state (e.g. Panama) but there are exceptions (e.g. the Rhine – Main – Danube). Territorial sovereignty for canals is performed by the state where they are situated while this state determines rules of its utilisation in peace times and the war times. In case of canals just like with rivers there might occur a situation when they become internationalised. Kiel Canal situated between the North and Baltic seas is a concrete example of becoming internationalised in 1919 – 1936.

In terms of sea waters, the only part of the sea parts where the state performs its territorial sovereignty and which forms a part of its state territory, is the territorial sea.[68]

According to the United Nations Convention on the Law of the Sea (hereafter 'convention') the territorial sea can be defined as the part of the sea which is directly adjacent to the state territory of the coastal State or in the case of archipelago state it is the archipelago waters while the width of these coastal waters is determined by each state individually to the distance of 12 nautical miles from the baseline[69] In given area the coastal state performs territorial sovereignty since it also performs authority in this area. Territorial sovereignty of the state is limited by the right of innocent passage for ships while the conditions of peaceful transit are determined particularly by Article 19 of the convention. Anchoring or stopping a ship is possible by the *force majeure* or in case of distress, or if it is concerned with regular navigation, or if it is providing assistance to persons, aircrafts or ships in distress or need. Innocent passage shall not threaten peace, *ordre public* and security of the coastal state.[70] Ships transiting coasting waters, apart from military and state ships which are used for non-trade purposes, fall under jurisdiction of the coastal state with exception of criminal law and civil law jurisdiction. It has to be mentioned that during transit it is necessary to flow with raised flag.[71] They are obliged to adhere to customs, administrative, navigation and police national regulations. In terms of underwater vehicles these are obliged to navigate on the surface and float with a raised flag like ships.[72]

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67 ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo verejné.* Praha: C.H.BECK, 2008, 840 p., ISBN 978-80-7179-728-9, p. 228

68 Coastal sea or coastal waters are mutually identical terms while the term coastal sea is used in association with the law of the sea and the terms coastal waters in association with state territory.

69 Article 3 of the UN Convention on the Law of the Sea – Published in Collection of Laws of the Slovak Republic under No.242/1996 of Coll. 1 nautical mile is 1,852 km, which in the given case is a distance of 22,224 km.

70 *Ibid* Article 18 and 19.

71 *Ibid*. Article 27 and 28

72 *Ibid*. Article 21.

III. 1.2.3 Subsoil under the Land Territory

Subsoil under the land territory as a part of the state territory can be defined as space under terrestrial and water parts of the state territory which reaches to the notional earth's core. This space also falls under the state of a territory sovereign.

III. 1.2.4 Air Space

Air space is the space above the land territory as well as above internal and coastal waters of the state while the top border is a distance of 90 – 100 km from the earth's surface. This distance was determined on consensus of states since it is an approximate allocation of perigea, a point in orbit satellite orbiting the earth while the satellite in this point is closest to the earth. This point should at the same time create, according to a group of publicist of the international law, a border between air space and outer space.[73] According to Article 1 of Chicago Convention on International Civil Aviation *'every state has a complete and exclusive sovereignty over the air space above its territory.'*[74] This complete and exclusive sovereignty means that any use of air space whatsoever is possible only with a consent of a territory sovereign. Permission can be given for an individual flight or landing or for all flights and landings according to bilateral or multilateral conventions. Civil aircrafts flying over the air space of the state fall under the jurisdiction of the given territory sovereign while this jurisdiction is performed only when it comes to reality with consequence effecting terrestrial or water part of the state territory. In case of landing aircrafts fall under the jurisdiction of the state whose territory was used for landing. In case of national security and military necessity the state can or prohibit flights of aircrafts of other states above certain areas of its territory and exceptionally can temporarily limit or prohibit flights above the entire state territory.[75] Should they be state aircrafts e.g. police, customs or military aircrafts separate agreement or any other permission is required.[76]

III. 1.2.5 Polar Sectors

Polar sectors belong to the state territory of the countries bathed by the Arctic Ocean. Areas bathed by the Arctic Ocean and their subsoil have very important strategic meaning despite its inhospitality. The reason for it being strategic is an enormous amount of mineral resources under the Arctic Ocean and the Arctic territory. Apart from it this given area has and will have a significant geostrategic and geopolitical importance in association with global warming. Melting of large ice shelves may create

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[73] KLUČKA, J.: *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008, 511 p., ISBN 978-80-8078219-1, p. 280

[74] Article 1 of the Chicago Convention on International Civil Aviation - Published in Collection of Laws of the Slovak Republic under No.196/1995 of Coll.

[75] POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodní právo verejné, : zvláštní část* 5th amended and extended edition Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, pp. 143 - 146

[76] Article 3 of the Chicago Convention on International Civil Aviation

new naval journeys and consequently may create opportunities to easier access of mineral resources.

Polar sector can be defined as a triangle (or so called spherical triangle), tip of which is a North Pole, base is the northern border of the polar state and ordinates are meridians running through an end point, which means the westernmost and eastern-most point of the northern border. Polar states are Canada, USA, Denmark, Norway and the Russian Federation. Issues of these polar sectors are not as simple as they might appear. Theory of polar sectors is not applied in case of all states. In case of Denmark its territorial claims are based on possession of Greenland and the surrounding islands of the given area. Norway applied its territorial claims on exercise of the rights on the archipelago of Svalbard and the adjacent islands while these territorial claims are based on occupation, holding and long-term use of mineral resources. Moreover, the sovereignty of the Kingdom of Norway was recognised by eight states in 1920 despite protests of the Soviet Union.[77] Concerning the Russian Federation as a successor of the Soviet Union and Canada, their territorial claims are relatively controversial and are based on the statement about sector division of the Arctic area of the above mentioned polar sectors. Soviet Union applied certain territorial claims of this area and stated that these relatively immovable or immobile ice masses fall under its territorial sovereignty; in 1926 the following claim was made on *'over all territory, discovered or undiscovered, lying in the Arctic Ocean north of the coast of the Soviet Union to the North Pole, between meridian 32°4'35'' east of Greenwich and meridian 168°49'30'' west of Greenwich'*[78] These claims can be perceived as some political rhetoric since this arctic area is no territory in its proper sense but it is only the area consisting of great amount of ice. Donat Pharand, the professor make a distinction as to the following two categories in a process of gaining sovereignty above these masses of ice: so called great ice shelves and ice islands. Ice shelves can under certain circumstances be considered a territory since *'these huge ice-tongues are partly afloat, but their thickness and quasi-permanency render them much more like land than …'*[79] Ice islands can be analogically better compared with ships since they cannot be subsumed under the term island according to Article 121 of the United Nations Convention on the Law of the Sea.[80]

III. 1.3 Acquisition of State Territory

Similarly to the private law, the international law rules concerned with questions of acquisition state territory have also been constituted. Absence of a concrete central body or an authority as one of state prerequisite as subject to international law caused application of national law rules on acquisition of state territory. There rules with some

[77] Text of the Svalbard Archipelago Convention and the Protocol from 9 February 1920, Text of the Convention: http://www.aeco.no/MicrosoftWord-TheSvalbardTreaty.pdf.pdf [used on 31 December 2009]

[78] HARRIS, D. J.: *Cases and Materials on International Law.* London: Sweet & Maxwell, 2004, 1692 p., ISBN 978-0421781504, p. 234

[79] HARRIS, D. J.: *Cases and Materials on International Law.* London: Sweet & Maxwell, 2004, 1692 p., ISBN 978-0421781504, pp. 234-235

[80] *Ibid*. p. 235

exceptions and modalities caused by the fact that the national rules are usually precise and complemented by rich jurisdiction of national courts. Soil is according to general economic theory one of the basic production factors and so the only one of the basic sources of prosperity of every state while soil reflected economic and social status of the society in the past. Human society has undergone different level of evolution. Ancient and Medieval patrimonial theory considered state territories as exclusive property of monarch. Later, the state territory was later considered a public issue, *i.e. res publica* or *imperium*.[81] Soil and therefore a territory as well were the foundations of a feudal social establishment. Modern times and Present days have brought a change that the soil has become one of the goods and so it could become a subject of various private law operations result of which was constitution of precise rights and responsibilities of subjects of these private law relations.

Essence of transferring territorial sovereignty is a change of ownership based on a title. The title is concerned with facts as well as legal conditions based on which any specific territory can be considered a territory of a concrete state. This thesis was confirmed by the International Court of Justice in the case of territorial conflict between Burkina Faso and Mali, mentioning in the verdict that *'the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right.'*[82]

Rules of the international law concerned with acquisition of state territory are based on the rules of the Roman law concerned with ownership and possession. This close relation lies only in fundamental features since legal regulations from two thousand years ago cannot be absolutely applicable on international law situations of the present days.

Basic principle of acquisition ownership of the state territory is the Roman principle *nemo plus iuris ad alium transfere potest quam ipso habet.* Although it is the principle of private law, the arbiter Max Huber applied it in the above mentioned Las Palmas case during the international dispute when he refused declaration of the USA ownership title which was transferred by Spain according to the Paris Treaty since he came to a conclusion during his arbitrary decision that *'it is evident that Spain could not transfer more rights than she herself possessed.'*[83]

According to contemporary international law theory there are five legal methods of acquisition of territories and one illegal. Legal methods are:

1. primary occupation
2. accession and accretion
3. prescription
4. cession
5. adjudication

The only one illegal method of acquisition of territories is annexation / conquest based on debellation – the complete military defeat. Annexation as a way of acqui-

[81] PRUSÁK, J.: *Teória práva.* Bratislava: Vydavateľské oddelenie Právnickej fakulty Univerzity Komenského, 1998, 308 p., ISBN 80-7160-146-2, p. 58

[82] *Frontier Dispute, (Burkina Faso v. Republic of Mali),* Judgment, I.C.J. Reports 1986, p. 554
SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708 p., ISBN 9780-521-72814-0, p. 490

[83] *The Island of Palmas (or Miangas) case (1928)* Permanent Court of Arbitration,

sition state territory is prohibited since contemporary international law is based on a principle of territorial integrity, which is a principle of not interference in internal affairs, principle of inviolability of state borders but also prohibition of aggression.

Neither of the above mentioned method of acquisition of state territory can be understood as an exclusive of the one which would entirely explain the basis of acquisition of territory as such. It is necessary to perceive them in their whole complexity and mutual interconnection since in many cases they mutually influence each other and overlap.

III. 1.3.1 Primary Occupation

Primary occupation can be defined as an original method of acquisition of territory which had not been under territorial sovereignty of any state (so called *terra nullius*). This term was taken over from the Roman law. It is a result of reception of the Roman law into national laws. According to the Roman law theory, occupation *'was self-grasping of the thing into possession which was recognised as a method of acquisition of ownership due to the appropriation of this thing.'*[84] Foundation of occupation was a seizure of the thing (*adprehensio*), usually of the things belonging to no one (*res nullius)* or abandoned (*res derelictae)*[85]

Theoretical foundations of the Roman law became the foundations for discovery voyages for the European Monarchies particularly during medieval and modern time periods while this method of acquisition of territory could have been applied on territory which had not until then fallen under the authority of any territory sovereign. Populations of Africa, Asia, Australia and parts of America were considered uncivilised so their territory was considered *terra nullius* and it was possible to occupy them just like in case of territory which belonged to a specific sovereign in the past but such sovereign stopped applying its sovereignty over the given territory – it became a derelict territory *(territorium derelictum*[86]*).*

In order to acquire a territory by primary occupation, the following conditions had to cumulatively be fulfilled according to then valid international law.[87]

- It had to be the territory which did not fall under the authority of any territory sovereign
- Possession and consequent occupation of the territory had to be real
- Occupying State had to notify the fact of occupation to other states

Apart from the above mentioned conditions Anglo-American international law introduces additional two conditions. [88]

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84 REBRO, K., BLAHO, P.: *Rímske právo.* Bratislava, Iura Edition, 2003, 497 p., ISBN 80-89047-53-X, p. 262

85 *Ibid.*, pp. 262-263

86 KLUČKA, J.: *Medzinárodné právo verejné.* Bratislava: Iura Edition, 2008, 684 p., ISBN 978-808078-219-1, p. 273

87 DAVID, V. - SLADKÝ, P. - ZBOŘIL, F.: *Mezinárodní právo verejné s kazuistikou,* 1st. edition. Příbram: Publisher Leges, 2008, 392 p., ISBN 978-80-87212-08-0, p. 154

88 SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708 p., ISBN 978-0-521-72814-0, p. 500

- Occupation had to be performed by state or a group of individuals rather than an individual
- Occupation had to be performed for a purpose to acquire a territory

Nowadays, primary occupation as method of acquisition of territory is considered obsolete since contemporary level of science and technology allows discovery of new territories only theoretical. Every single territory belongs to a territory sovereign or an individual legal system is applied. Meaning of primary occupation lies in providing an evidence to demonstrate certain rights of the state to its own or a foreign territory.[89]

International judicial and arbitrary bodies have come across primary occupation cases during decision making processes a few times while their judgements or awards in such cases had an important not only political, but also a legal a interpretation importance.

III. 1.3.2 *Accession, Accretion*

Accession and accretion just like the primary occupation have their origin in the Roman law. Accession represented one of the original methods of acquisition of ownership. Its essence lay in connecting two things which from the materialistic perspective created one whole and this whole presented itself as one thing during the entire connection.[90]

Common feature for both methods of acquisition of territory is an addition. Under international law this method of acquisition of territory considered primary and also original since the state acquires a territory which by then had not been governed by any other territory sovereign. In case of accession the following situation may occur:

- Alluvial soils on the sea shore, lake or a river bank
- change of the channel of the frontier river *(alluvio),*
- Natural creation of a new island in coastal waters
- Natural separation of a part of a territory of one state and connection of this part to the territory of a different state *(avulsio).*[91]

Acquisition of territory based on the planning and artificial human activity is called accretion. We can mention a concrete example in Holland where artificial walls cause artificial dry out of soil.

In this context, it is appropriate to mention opinions of professors Čepelka and Šturma. Their opinions seem interesting since they as one of a few do not consider addition the original way of gaining territory. They claim that *'these phenomena or building arrangements occur within an existing state territory. Expansion of a new territory that can be considered original is e.g. an island created as a result of a volcanic activity* (insula in *mari nata).'*[92]

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89 PRUSÁK, J.: *Teória práva.* Bratislava: Vydavateľské oddelenie Právnickej fakulty Univerzity Komenského , 1998, 308 p., ISBN 80-7160-146-2, p. 61

90 REBRO, K., BLAHO, P.: *Rímske právo.* Bratislava, Iura Edition, 2003, 497 p., ISBN 80-89047-53-X, p. 265

91 POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodní právo verejné: zvláštní část 5*th amended and extended edition. Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 132

92 ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo verejné. Praha:* C.H.BECK, 2008, 840 p., ISBN 978-80-7179-728-9, p. 210

Some states sign treaties about immobile state borders because of accession cases. The Slovak Republic applied such practice in the Treaty with Poland about a mutual state border when in Article 3 Par. 1 set forth which places and sections of the mutual state border are mobile and therefore do not fall under influence of natural forces. [93] If states do not apply such practice, in case of state border changes can as a result of accession be signed an *ad hoc* international agreement about renewing the original state border. If significant changes of a state border occur as a result of accession, we call it a mobile state border and an international agreement should be signed.[94]

III. 1.3.3 *Prescription*

Prescription goes back to the Ancient Roman Law while this term was used to denote the method of acquisition of ownership *'based on possession lasting a time determined by law.'*[95] In order to gain ownership the following conditions of prescription had to be fulfilled.[96]

- possession
- Uninterrupted possession period which was a two-year period for real estate
- *iuris causabona fidae*
- Capacity of the thing to be subject of prescription

International law just like the Roman law defines prescription as a method of acquisition of territory based on a long-term exercise of territorial sovereignty over this territory if it was a territory of a different sovereign. [97] Definition of a professor Shaw is particularly interesting since he defines prescription as *'is a mode of establishing title to territory which is not terra nullius and which has been obtained either unlawfully or in circumstances wherein the legality of the acquisition cannot be demonstrated. It is the legitimisation of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign, and it reflects the need for stability felt with the international system by recognising that territory in the possession of a state for a long period of time and uncontested cannot be taken away from that state without serious consequences for the international order.'*[98]

Theorists of international law consider prescription as an original or derivational method of acquisition territory. Some consider prescription as an original way (e.g. Klučka, Seidl-Hohenveldern), and some as a derivative (secondary) way (e.g. Potočný, Ondrej, David). Some consider it an individual legal title of acquisition of territory since

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93 Article 3 Par.1 of the Treaty between the Slovak Republic and Poland about Mutual State Borders - Published in Collection of Laws of the Slovak Republic under No. 69/1996 of Coll.

94 Article 1 Paragraph 2 of the Treaty between The Czechoslovak Socialistic Republic and Austria about Mutual State Borders - Published in Collection of Laws of the Slovak Republic under No. 95/1975 of Coll.

95 REBRO, K., BLAHO, P.: *Rímske právo.* Bratislava, Iura Edition, 2003, 497 p., ISBN 80-89047-53-X, p. 270

96 *Ibid.*, pp. 271-274

97 DAVID, V. - SLADKÝ, P. - ZBORIL, F.: *Mezinárodníprávo verejné s kazuistikou, 1st edition.* Příbram: Publisher Leges, 2008, 392 p., ISBN 978-80-87212-08-0, p. 155

98 SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708 p., ISBN 9780-521-72814-0, p. 504

'general international law does not determine any prescription period of time period but international law theory contains various different time periods: immemorial possession, time period of 30 years until the time period of a century.'[99]

Compare to the Roman law does the international law science limit prescription for fulfilling two features; these are a territory possession and passage of time period although it is not specified and is significantly modified.

Essence of possession, like in case of primary occupation, is an effective performance. The difference is that in case of prescription it is reality existence of the already existing territory sovereign while this sovereign is consequently replaced.[100]

III. 1.3.4 *Cession*

Cession can be defined a derivative method of acquisition of territory according to the international agreement signed by states. In case of cession is territorial sovereignty passed from the existing territorial sovereign onto a new one in a moment set forth in the international agreement. Cessed territory is considered a part of state cessionary by the moment determined. Theoretically, the cession of whole territory is possible if one state merges with another. Some publicists of international law consider cession a transfer of territorial sovereignty based on an agreement signed between colonial powers and representatives of colonised native population. Such opinions are usually rare.[101]

Essence of a cession is an intention of a cessor to transfer territorial sovereignty onto a cessionary. The fact whether the actual territory was really passed on is legally less relevant. Concrete example can be a cession of Venice by Austria in favour of France in 1866 which consequently a few weeks later cessed Venice to Italy. The consequent cession by France to Italy was legal. On the other hand there was a legal cession of Iloilo by Philippines in favour of the USA based on ratification of the Paris Treaty of 1898 despite the fact that American military troops had occupied this town two months prior to the ratification act.[102]

Cessionary takes over from a cessor not only the rights but also obligations. Therefore it has to respect all the commitments of his predecessor. Cessor can not transfer more rights onto a cessionary than he himself possesses (see notes no. 79). The difference between the original acquisition of territory and a cession is that *'the cession of state territory does not demand effective state power on cessed territory by the state to which it is attached.'*[103] Professors Čepelka and Šturma consider a cession to be the only

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[99] ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo verejné.* Praha: C.H.BECK, 2008, 840 p., ISBN 978-80-7179-728-9, p. 209

[100] DIXON, M.: *Textbook on International Law.* Oxford: Oxford University Press, 2005, 380 p., ISBN 978-0-19-926072-0, p. 145

[101] SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708 p., ISBN 978-0-521-72814-0, p. 499

[102] SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708 p., ISBN 978-0-521-72814-0, p. 500

[103] KLUČKA, J.: *Medzinárodné právo verejné.* Bratislava: Iura Edition, 2008, 684 p., ISBN 978-80-8078 219-1, p. 276

legal method of aquisition of territory in modern international law.[104] International agreement based on which the cession is applied can be either bilateral or multilateral long while a reason for signing such agreement is legally irrelevant. The reason for it could be e.g. a sale of a part of state territory to another state (e.g. Alaska), exchange of a part of state territory among states (e.g. exchange of area ca. 452 ha after the dissolution of the Czechoslovak Federative Republic), transfer of state territory without compensation based on Peace Treaties (e.g. Alsace or Lorraine was returned to France after World War I) or a transfer of state territory based on other treaties (e.g. Ruthenia was transferred onto the Soviet Union after World War II).

III. 1.3.5 *Adjudication*

Similarly to the above mentioned methods of acquisition of state territory, adjudication has its roots in the Roman law where it represented a competence of the judge to adjudicate a certain thing to individual participants into Quirit ownership.[105]

Essence of adjudication according to the modern international law theory is a constitutive decision of international judicial or arbitrary body.

It is a derivative method of acquisition of state territory since competence of international body who in a particular dispute is a judge or an arbiter and therefore an authoritarian body, is based on an agreement of parties concerned out of which one party is always a current territory sovereign of the disputed territory. This agreement represents a commitment of parties concerned to fulfil a decision of a given body.[106] If this body comes to a declaratory decision only, adjudication would not be the method of acquisition of territory. This kind of decision would only declare already existing state of matter and it would not come to changes in territorial sovereignty.[107]

Concrete example of adjudication as a method of acquisition of territory in the history of The Czechoslovak Republic was a decision of the conference of ambassadors of 28 July 1920 regarding Cieszyn Silesia, Orava and Spiš regions based on which did the Czechoslovak Republic ceded 12 villages in Orava and 13 villages in Spiš to Poland.[108]

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104 ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo verejné*. Praha: C.H.BECK, 2008, ISBN 978-807179-728-9, p 211

105 REBRO, K., BLAHO, P.: *Rímske právo*. Bratislava, Iura Edition, 2003, 497 p., ISBN 80-89047-53-X, p. 134

106 POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodní právo verejné, zvláštní část* 5th amended and extended edition. Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 132

107 *Ibid*.

108 Government Decree on the Decision at the Conference of Ambassadors of 28 July 1920 - Published in Collection of Laws of the Slovak Republic under No. 20/1925 of Coll.,
Klučka, J.: *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008, 684 p, ISBN 978-80-8078219-1, p. 277,

III. 1.3.6 *Annexation*

Annexation can be defined as a method of acquisition of a part or the entire state territory based on military defeat (debellation) as the unilateral act of the winning state.[109]

It is the only illegal method of acquisition of state territory and therefore a legal title of such territory is null and void although until 1928 (– Kellogg – Briand Pact) or until 1945 (The United Nations Charter) was annexation a legal method according to the international law theory. This method of acquisition of territory belonged to the most popular practices. Illegality of such practices is nowadays based mainly on the above mentioned principle of territorial integrity.

In accordance with inter-temporary rules of the international law the territory acquired by annexation cannot be removed since it was gained legally back in 1928 or in 1945. Annexation itself is legally not a particular title of acquisition of territory according to the theory of international law but this legal title remains a title of the existing territory sovereign. Article 52 of the Vienna Convention on the Law of Treaties of 1969, set forth that *'a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.'*[110] In case of the state territory transfer by cession through use of force, such agreement is also invalid. Power as a legal way can nowadays be applied in case of self defence only.[111]

III. 1.4 Loss of State Territory

The existence of state is not only closely associated with issues of acquisition of state territory. Despite this fact, during the existence of international community loss of state territory can occur. Individual methods of acquisition of state territory mentioned above correlate with individual ways of loss of state territory. Primary occupation corresponds with abandonment or dereliction. Accession and accretion correspond with the loss of state territory by influence of natural forces e.g. flooding of part of state territory. In case of cession, prescription and adjudication it is always a loss of state territory of the existing state sovereign. Specific case of losing state territory is secession. Extinction of state as a whole takes place when successor states gain state territory in their favour.[112]

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[109] POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodníprávo verejné: zvláštní část* 5th amended and extended edition. Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 133

[110] Article 52 of the Vienna Convention on the Law of Treaties (1969) - Published in Collection of Laws of the Slovak Republic under No. 15/1988 of Coll.

[111] SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708 p., ISBN 978-0-521-72814-0, pp. 500 - 501

[112] POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodníprávo verejné, zvláštní část* 5th amended and extended edition. Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 83

III. 2 State Borders

State territory is a territory on which the state is a territory sovereign and therefore the state controls and performs its state power. This rule is not absolute since state borders do not have to necessarily overlap with the borders of territorial prerogative, e.g. cases of military bases in a foreign state etc.[113] States are not isolated units which develop independently but development of one state usually influences development of another. Institute for state borders deals with severance of borders of one state from another. Apart from this, institute serves as a department of state territory from space or spaces which do not fall under sovereign power of any state. These are areas *res communis* and *res omnius communis* (see note no. 33 under line).

III. 2.1 Definition

State borders can be defined as fictive vertical lines separating territory of one state from territory of another. The simplest definition of state borders is usually the most precise since it implies issues of separation of regular territorial sea, air space and subsoil under the land territory of neighbouring states.

III. 2.2 Types of State Borders

States as sovereign subject can agree on ways or determining terrestrial borders with their neighbouring states. International law divides terrestrial state borders into four categories:

1. orographic
2. geometric
3. combined
4. astronomic
5. azimuthal[114]

Orographic state borders are state borders led according to topographic relief and significant lines in a concrete terrain, e.g. mountain ridges, water flows. Some publicists categorise this group of state borders also into those determined according to road lines, railway lines but also pipeline system (e.g. gas and oil pipelines).[115]

Geometrical state borders are those state borders which do not copy natural relief in a specific place but connect two points of a state border. Such determination of a state border was applied during peace conferences when determining a state bor-

[113] SEIDL - HOHENVELDERN, I.: *Mezinárodníprávo verejné, 3rd edition.* Praha: Aspi, 2006, 417 p., ISBN 80-7357-178-1, p.208

[114] This type of a state border is rarely mentioned in the international law literature.
DAVID, V. - SLADKÝ, P. - ZBOŘIL, F.: *Mezinárodní právo verejné s kazuistikou, 1st edition.* Příbram: Publisher Leges, 2008, 392 p., ISBN 978-80-87212-08-0, p.158

[115] ŠMIHULA, D.: *Medzinárodné hranice na riekach*. In: *Právnik,* ISSN 0231-6625, 2000, Volume 140, No.8, pp.791-806,

der without listening to opinion of population concerned. Application of geometric border should be minimal since given borders do not respect interest of local population in many cases. In connection to the above mentioned it is necessary to mention that such application of border determination is mostly concerned with the local population, often in a negative way.[116]

Combined state borders are those which take advantage of both of the above mentioned principles. Only one of the above mentioned principles cannot be applied individually which is a natural consequence of reality. Concrete example is determination in mountains where the highest peaks connected with direct geometric lines are determined.[117]

Astronomic state borders are those which are determined on a basis of meridians and parallels. Such approach was applied mainly on American, African and Australian continents when representatives of states did not have enough information about real situation in places which had not been discovered.

Azimuthal state borders are also based on meridian and parallel division principle. The difference however is that *'the line of such border follows exactly determined azimuth which is general (does not cross parallel or meridian) and is differs from a geographic border by the length which is orderly in tenths and hundreds of kilometres. It is situated e.g. between Mauretania and Algeria.'*[118]

III. 2.3 Customary Rules for Determining Geographic Borders

Issues of determining geographic borders have a long history. Since the ancient times humankind have determined borders of tribes, kingdoms, monarchies, principalities etc. based particularly on specific geographic determinants which were in principle easily recognised. Foundations for determining borders were rivers, streams, rocks, cliffs or mountain ranges. International customary rules were constituted based on such practice and have lasted until now under an assumption that the neighbouring countries did not agree otherwise.

When it comes to mountain range, customary international law rules were constituted and determine that the bordering line runs along the mountain ranges of the highest peaks or flow of rivers and streams into individual states are the foundations for such division.

In case of bordering lakes it is the bordering line connecting two points which determine the state border. Underground borders of the states concerned touch the lake while this border line has the same distance from both banks. Customary determina-

[116] Concrete example of flagrant disrespect of interests of the local population was a division of the Slemence village after World War II when one village was divided based on the Transcarpathian Ukraine Treaty while after the division one new village Veľké Slemence was given to the Czechoslovak Republic and the other new village Mali Selmenci was given to the former Soviet Union. Division of gardens, lands or individual families which practically could not visit each other until 1989, although they were separated by a few tens of metres, were an absurdity. Some corrections were made in December 2005 when the border crossing for pedestrians opened.

[117] DAVID, V. - SLADKÝ, P. - ZBOŘIL, F.: *Mezinárodní právo verejné s kazuistikou, 1st edition.* Příbram: Vydavatelství Leges, 2008, 392 p., ISBN 978-80-87212-08-0, p.158

[118] *Ibid.*

tion of a state border in case of bordering river is not base on the same rules. It is important to distinguish whether the river concerned is a navigable or non-navigable.[119]

In case of navigable river the middle line of a navigable channel forms the state border. This international term is inaccurate from a perspective of water management since there is only one channel and not any others.[120] Channel can be defined as *'a strip which usually runs along the deepest areas of the river bed and is marked with buoys in the middle. Ships always pass by them on the left.'*[121] In case of unnavigable river a state border is formed by the middle of the river. If the given unnavigable bordering river contains more river arms, the middle line of the main arm of such river is considered a state border while this middle line copies all changes of the river flow.

III. 2.4 Delimitation, Demarcation

State borders are usually determined by an international agreement whether bilateral or multilateral. The actual process of determining borders comprises two stages – delimitation and demarcation.

Delimitation is the first stage of the process of determination of state borders. Allocation or attribution processes take place prior to delimitation during which division of a concrete territory takes place whether contractual or non-contractual. Essence of this principle is determination of concrete points of a state border by commission usually consisting of equal representation of parties concerned. Consequently, the actual delimitation takes place. It is a contractual determination of a border based on historical, ethnological, and topographic but also ownership data about the border area while the border line is marked on a map only approximately with a small scale. Such map usually forms an attachment of a concrete international convention concerned with determination and run of a state border.[122]

Delimitation process is followed by demarcation where exact and detailed determination of a state border takes place through a boundary commission with equal representation of parties involved. Essence of demarcation is determination of a concrete line of a state border based on results of delimitation process directly in a specific

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[119] Interesting but exceptional is a process of determination of a state border mentioned by Salman M.A. Salman according to which there are three ways to mark borders on rivers:
1. along the river in such a way that both bordering states lead their own border on their own river bank and therefore the river is a neutral zone or condominium (such principle is no longer applied nowadays) or along the bank of one state which allows sovereignty above the entire river bed to another state;
2. in the river flow, in the water along the river length or across its profile (border line is a direct connection of bordering ending points of the terrestrial border on both river banks);
3. river is a line from which agreed principle of measurement of real state border is applied
ŠMIHULA, D.: *Medzinárodné hranice na riekach*. In: *Právnik,* ISSN 0231-6625, 2000, Volume 140, No. 8, pp.791-806,

[120] *Ibid.*

[121] *Ibid.*

[122] POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodníprávo verejné, zvláštní část* 5th amended and extended edition. Praha: C.H.BECK, 2006, 511 p., ISBN 80-7179-536-4, p. 137
DAVID, V. - SLADKÝ, P. - ZBOŘIL, F.: *Mezinárodní právo verejné s kazuistikou*, 1st edition. Pribram: Nakladatestvíí Leges, 2008, 392 p., ISBN 978-80-87212-08-0, pp. 159 - 160

point through border signs e.g. pillars, stones and stone limits, marks etc. Concrete identification is usually placed on the above mentioned border signs. In connection with placement of such signs a demarcation protocol is elaborated. Detailed protocol concerned with placement of border signs is developed and a map of a mutual state border with a big scale which is usually a part of demarcation protocol.[123]

In some cases demarcation takes place as a consequence of various different realities e.g. primary demarcation has become disputable or unclear, placement of new border signs, difference in placing border signs etc. Demarcation process is in principle identical like in a process of demarcation. Concrete example of the Czechoslovak history was re-demarcation after World War II as a result of removal of border signs of the Czechoslovak Republic by military troops of the Nazi Germany.[124]

III. 2.5 *Uti Possidetis Principle*

In association with issues of acquisition of state territory there is a need to deal with one more principle. It is an *uti possidetis* principle which was applied for determining borders of former colonies after they gained independence but it was applied also in case of division of some European countries in 1990s.

Essence of this principle is a rule that the state borders of newly established states copy administrative borders of states from times when they used to be colonies of European powers or copy borders of individual federative republics from times of federation. This principle was first applied during decolonisation of Latin America when the first countries as former Spanish colonies declared the independence and later during the conflict of these countries with Brazil (in 1811 Paraguay declared the independence, in 1816 Chile and in 1816 Argentina[125]). This institute was later applied on the African continent while this principle was confirmed by the resolution of the Organisation of African Unity of 1964 which declared that colonial borders existing in times of declaration of independence represent reality and all member states are committed to respect these borders. Declaration process in Africa confirmed this principle e.g. in case of former Belgian Congo or Sudan.[126] In case of Europe this principle was applied during the dissolution of Soviet Union or Socialistic Federative Republic of Yugoslavia. In case of Czechoslovak Federative Republic in 1992 such principle was also applied which was then incorporated into the Treaty between The Slovak Republic and The Czech Republic about general determination of mutual state borders. Article 1 states that *'state borders between the Slovak Republic and the Czech Republic are identical with the current administrative borders of both republics.'*[127]

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123 *Ibid.*

124 KLUČKA, J.: *Medzinárodné právo verejné.* Bratislava: Iura Edition, 2008, 684 p., ISBN 978-808078-219-1, p. 269

125 http://www.mzv.sk/LDM/CONTRACTMZV.NSF [used on 27 December 2009]

126 SHAW, M. N.: *International Law.* Cambridge: Cambridge University Press, 2008, 1708 p., ISBN 978-0-521-72814-0, p. 526

127 Article 1 of the Treaty between the Slovak Republic and the Czech Republic on General Determination of Mutual State Borders – Published in Collection of Laws of the Slovak Republic under No. 194/1993 of Coll.

IV. Diplomatic Law

Diplomatic Law represents an integral part but at the same time a partial issue of Public International Law for which complexity is a typical feature. Legal definition for this area does not exist at present. Majority of publicists do not even try to find exact definition for this term but try to achieve clear and explicit explanation for the term diplomacy as a focal point. Individual definitions of the term vary in relation to the professional profile of authors. For example, Ian Brownlie defines diplomacy as *„...all means by which states establish or maintain mutual relations, communicate with each other, or carry out political or legal transaction, in each case through their authorised agents."*[128] It migt besaid that diplomacy represents one of the channels for mutual interaction between states and their relations regardless of their character. Taking into consideration this definition of the term diplomacy, diplomatic law can be defined as a set of rules governing individual legal aspects of diplomacy as the most significant communication tool between the subjects of international community, particularly the states.

Multilateral treaties and international custom are sources of diplomatic law predominantly. Taking into consideration a catalogue of sources of international law provided by the Statute of International Court of Justice, judgement of the International Court of Justice in the case of Diplomatic and Consular Staff of 24th May 1980 can also be considered a source of diplomatic law. When it comes to conventional sources, Vienna Convention on Diplomatic Relations done in Vienna on 18th April 1961 at the United Nations Diplomatic Relations Conference, as a result of codification activity of the International Law Commission played a cardinal role. The Convention entered into force on 24th April 1964 together in accordance with Article 51. The Czechoslovak Socialistic Republic accessed the Convention on 25th April 1964.[129] There are 187 contracting parties Significance of The Vienna Convention can be seen in two aspects. Firstly, complex codification of international custom in the area of diplomatic law was achieved. Secondly, the Vienna Convention put down foundations for other multilateral conventions partially or completely related to the diplomatic relations sector, mainly the following international conventions:

1. the Vienna Convention on Consular Relations, entered into force 24th April 1963, [130]
2. the Convention on Special Missions, entered into force 8th December 1969,[131]

[128] BROWNLIE, I.: *Public International Law.* 7th Edition. Oxford University Press 2008, p. 349

[129] Published in Collection of Laws of the Slovak Republic under No. 157/1964 of Coll.

[130] Published in Collection of Laws of the Slovak Republic under No. 32/1969 of Coll.

[131] Published in Collection of Laws of the Slovak Republic under No. 40/1987 of Coll.

3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, entered into force 14th December 1973[132]
4. The Vienna Convention on Representation of States and their relations with International Organisations of a Universal Character, entered into force 14th March 1975.

When it comes to the international custom, it plays a marginal role in present diplomatic law since the majority of international diplomatic law rules were codified by the Vienna Convention on Diplomatic Relations. Relation between the international custom and the Vienna Convention are based explicitly on subsidiary principle, in the Preamble of the Vienna Convention it is stated that *„...the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention. "*[133]

IV. 1 History

The history of diplomacy dates back to the end of the 4th and the beginning of the 3rd millennium B.C. when ancient states, Egypt, states in Mesopotamia, India, China in order to arrange contacts amongst each other as well as the neighbouring countries began signing agreements particularly concerned with peace, alliance, military and business.[134] Probably, the very first documents historically supporting the existence of diplomacy are laws of the ancient Indian monarch – Manu laws. Art of diplomacy based on Mana laws was focused on protection against wars and maintenance of peace. Later, in the 2nd millennium B.C. laws concerned with envoys sent to the surrounding countries were adopted. Ancient China did not lag behind either in the area of diplomacy. According to Confucius it was a task of an envoy to represent his monarch in a dignified manner and successfully negotiate in his name.[135] Characteristic feature was a careful adherence of rules of comity and religion. Apart from these, envoys performing diplomatic activities were protected by inviolability. Additional roots of diplomacy understood in modern terms can be tracked down in Ancient Greece, later in Roman Empire. Ancient Greek city states - *polis* scattered across the Mediterranean region began to create certain code of conduct for their envoys, who were elected in people's assembly. In Sparta office of *efories* coordinated foreign but also military politics, whilst national assembly - *apella* elected their envoys for individual city states. In Ancient Athens it was the Council – *bulé* as the highest governing and administrative body responsible for signing treaties with other states and accepting foreign envoys.

[132] Published in Collection of Laws of the Slovak Republic under No. 131/1978 of Coll.

[133] Preamble of the Vienna Convention on Diplomatic Relations Published in Collection of Laws of the Slovak Republic under No. 157/1964 of Coll.

[134] HAMILTON, K., LANGHORNE,R.: *The Practice of Diplomacy – its Evolution, Theory and Administration*, Padstow, Cornwall, T.J. Press, Ltd., 1995, p. 35

[135] MAZUREK, J.: *Diplomatický a spoločenský protokol - história, vývoj a súčasnosť.* Koprint, Banská Bystrica 2006, p. 6

Over the time a function *proxenia* was developed in order to provide help for nationals of other city states as well as to protect their interests.[136]

The era of existence and growth of the Ancient Roman Empire was a period when mainly civil law was developed. Development of international law and diplomacy was minimal. Since the creation of the Roman Empire until the fall of the Western Roman Empire different bodies were responsible for foreign affairs depending on the system of government. King – *res*, national assemblies – *comitta*, senate – *senatus* or caesar – *princeps* were responsible for foreign affairs over the period of development. During principate the department called *Ab epistulis* was established within caesar office administration. Its function was to deal with foreign messages.[137] Establishment of such department can be considered to be one of the first attempts to institute a body dealing with administration of foreign affairs.

After the fall of the Western Roman Empire it was mainly Byzantine empire which influenced development of diplomacy. It was more-less successfully trying to follow in footsteps of the Ancient Rome in order to eliminate and pacify bellicose of tribes mainly during Nations Great Migration in the early Middle Ages. Foundations for Byzantine diplomacy were grandiose and complex ceremonies, recorded in the Book of ceremonies from the first half of the 10th century. Foreign affairs were administered by the first minister - *magister officiorium*.[138]

The Pope was the most significant element in Western but partially in Central Europe, since Popes gained their rights through politics to crown emperors thank to dominance of Christianity. Furthermore, they were provided with privileged rank amongst all monarchs. This adherence of such a kind of custom can be compared with a rank of nuncios in some states. During the High Middle Ages some Northern-Italian city states such as Genoa, Milan or Florence began to enforce themselves. *„Milan established its first formal diplomatic mission in 1455 in Genoa. "*[139] Individuals with certain status were appointed as envoys since their status guaranteed respect and decent reception. This is how a writer Dante Alighieri or a philosopher, politician and diplomat Nicolo Machiavelli both became diplomatic envoys. At the same time, diplomatic law begins to develop during this period, its content, as we understand it today, contains all privileges, immunities, personal inviolability, extraterritoriality etc. Diplomatic corps begins to develop. In the 17th century diplomacy gained on importance in the area of foreign affairs. It is noticeable during the reign of Cardinal Richelieu, who reinforced international position of France at the expense of Spain, Holland and Sweden. Additionally, assumption adopted by signing the Peace of Westphalia in 1648 about the equality of all states and their diplomatic representation were fully institutionalised in other countries as well.[140]

After Napoleon's defeat until the break out of the World War I – period so called the European Concert is considered the Golden Time of Diplomacy. Historical sources

136 ŽELEZKOVOVÁ, G., BLAHO, P., ČARVAGA, V.: *Všeobecné dejiny štátu a práva*. 5th edition, Bratislava: Universita Komenského, 1999, pp. 21 – 33

137 REBRO, K., BLAHO, P.: *Rímske právo*. Bratislava: IURA EDITION, 2003, p. 34

138 BYSTRICKÝ, Ľ.: *Základy diplomacie*. Vydavateľstvo Michala Vaška, Prešov 2006, p. 14

139 *Ibid*, p. 16

140 HAMILTON, K., LANGHORNE, R.: *The Practice of Diplomacy - its Evolution, Theory and Administration*, Padstow, Cornwall, T.J. Press Ltd., 1995, p. 35

show that almost 100 years past without a significant conflict between powers. This success was achieved thank to informal meetings and summit of the highest representatives of the world super powers or maybe because from the end of the 18th century diplomacy was gradually professionalised.[141] End of the World War II and a consequent Peace Conference in Paris marked additional significant milestone of diplomacy – establishment of multilateral diplomacy in its true sense.

IV. 2 Legacy Law

Every sovereign state disposes of *ius legationis*, which means the right to send and receive diplomatic agents. This law is implemented through the consensus of states concerned while this kind of consensus can be expressed also informally. Fundamental condition for establishing diplomatic relations is about mutual recognition of the states concerned not only *de facto*, but mainly *de iure*, in an appropriate form, e.g. through declaration, decision of the highest state bodies, exchange of official correspondence, sending official delegation or an exchange of diplomatic notes. No sovereign state can be compelled to establish diplomatic relations. At the same time there is a valid assumption that an agreement to establish diplomatic relations also includes establishment of consular relations.[142] The Vienna Convention in relation to functions of a diplomatic mission provides a demonstrative catalogue of functions which can be considered a minimal standard of activities of a diplomatic mission. This includes:

1. Representing the sending State in the receiving State;
2. Protecting interests of the sending State and its nationals in the receiving State within the limits permitted by the international law;
3. Negotiating with the Government of the receiving State;
4. Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
5. Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.[143]

IV. 3 Diplomatic Mission

Establishment of diplomatic relations between states and foundations of permanent diplomatic missions is realised by mutual consent. The consent usually contains conditions of a type of diplomatic mission agreed between states, rank of the 'head of the mission' and a number of other members of the diplomatic staff while the Convention indirectly determines that the number of members of mission has to be kept within limits, circumstances and conditions of the receiving State and the needs of the mission concerned.[144] Consequently, the role of the sending state is to acquire *agrément*

[141] *Ibid*.

[142] See art. 2 (2) of the Vienna Convention on Consular Relations

[143] Art. 3 par. 1 of the Vienna Convention on Diplomatic Relations

[144] Art. 11 the Vienna Convention on Diplomatic Relations

for the head of the mission as well as material and technical equipment of premises required for effective functioning of the mission, residential premises for the ambassador, accommodation for other members of the diplomatic staff of the mission, means of transport and communication.[145]

IV. 4 *Agrément*

Prior to the leave of the head of the diplomatic mission to fulfil his duty, the sending state is obliged to obtain an approval for this person. Such approval is called *agrément.*

This agreement requires that the head of the mission either of rank of ambassador or envoy, but some states apply for the approval for other members of the mission particularly In the case of military, naval or air attachés.[146] Some states make a reservation related to the consent of acceptance with all members of the diplomatic staff as a consequence of international custom from the past.[147]

The receiving State has the right to express or not to express consent with the designated head of the mission. The process of gaining *agrément* is a discreet matter of a diplomatic character performed through the Ministry of Foreign Affairs in association with the head of the mission or a person appointed to perform this function. As long as the receiving state does not provide the *agrément*, the designated head of the mission is not made public. Premature public announcement of the designated head of the state by the sending state is a serious misdemeanour. The receiving state can consider it an impermissible pressure that incompatible with principle to respect sovereignty of the other state and may lead to a premature failure to gain agreement.[148]

If the receiving state refuses to grant *agrément* according to Article 4 (2) of the Convention it is not obliged to give reasons for doing so. Information of granting of *agrément* is performed diplomatically by means of an diplomatic note.

IV. 5 Credentials, Documents on Withdrawal

The Ministry of Foreign Affairs issues *Lettres de créance* – credentials signed by the Head of State in the case that the receiving state has granted agreement for a designated head of mission ranked as ambassador or envoy. This document confirms that

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145 GARDINER, R. K.: *International Law: 1st Edition*. Pearson Education Limited, Harlow 2003, p. 348.
Some countries reserved a right of an approval of the Minister of Foreign Affairs to gain premises for establishment of a diplomatic mission or consular office such as Great Britain, which in 1987 adopted Diplomatic and Consular Premises Act SHAW, M.N.: *International Law.* 5th Edition. Cambridge University Press, Cambridge, p. 674

146 Diplomatický protokol Ministerstva zahraničných vecí SR: *Diplomatická prax*. MZV SR, Bratislava 1996, p. 35

147 Judgement of the British Court in the case *R. v. Lambeth Justices, ex. p. Yusufu* concluded that failing to fulfil responsibility of the sending state to inform the receiving state about an arrival of a member of the diplomatic mission results in loosing the right to enjoy privileges and immunities of this person.
BROWNLIE, I.: *Public International Law. 6th Edition.* Oxford University Press 2003, p. 346

148 BYSTRICKÝ, Ľ.: *Základy diplomacie*. Vydavatelství Michal Vašek, Prešov 2006, p. 30

the person can operate as a diplomatic representative and a confirmation of the head of state to act as the head of the mission. The head of the mission in a lower function is issued *Lettre d'introduction, Lettre de cabinet* – Cabinet Member document, which, compare to the Credentials is signed by the Minister of Foreign Affairs of the sending state and is addressed to the Minister of Foreign Affairs of the receiving state.[149]

Credentials together with Documents on Withdrawal of the previous head of the diplomatic mission are passed on from designated individual to the head of State during invitation audience. Details of this audience are set forth by protocol of the receiving State. Until the audience has taken place all meetings, residence and visits of the future head of the mission are considered private. As soon as the head of the mission transmit the credentials, he begins to fulfil his function and becomes a member of a diplomatic corps. Formalities, form and content of credentials and Documents on Withdrawal are determined individually by each state.

IV. 6 Privileges and Immunities of the Diplomatic Mission

The Vienna Convention grants privileges and immunities to the diplomatic mission in order to guarantee its effective functioning while privileges have positive character compare to the immunities which are negative. Here is the list of privileges and immunities[150]:

- The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.
- The premises of the mission shall be inviolable; the agents of the receiving state may not enter them, except with the consent of the head of the mission. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
- The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.
- The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
- The archives and documents of the mission shall be inviolable at any time and wherever they may be.
- The receiving state shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the government and other missions and consulates of the sending state, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and

[149] Diplomatický protokol Ministerstva zahraničných vecí SR: *Diplomatická prax.* MZV SR, Bratislava 1996, p. 37

[150] Vienna Convention on Diplomatic Relations

messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving state.
- The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
- The diplomatic bag shall not be opened or detained.
- The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.
- The mission has the right to grant political asylum.

IV. 7 The Staff of the Diplomatic Mission

The Vienna Convention in Article 1 divides the staff of the mission into three categories, the diplomatic staff of the mission, the administrative and technical staff and the service staff. It also mentions a "private servant" a person who is in the domestic service of a member of the mission and who is not an employee of the sending State.[151]

Individual categories vary according to the range of privileges and immunities.

IV. 7.1 Diplomatic Staff – Head of the Diplomatic Mission

Leading member of the diplomatic mission is the head of the mission also called a titular. The Vienna Convention operates with a title head of the mission who is the person appointed by the sending state to perform duties connected with this function. Titular represents the sending state in the receiving State which results in a very complicated selection and nomination process following written and unwritten rules of diplomacy. Candidates are usually professional diplomats, individuals who work in diplomatic services of the sending state and who acted as diplomats abroad in a lower function. It is very common that the states appoint someone from an economic, political, cultural or academic-scientific sphere.

The head of the mission can be accredited for a number of states. This has to be clearly communicated by the sending state to all the receiving states. According to the Vienna Convention *agrément* request has to contain that the titular is accredited to function as the head of the mission for other states and to inform where he will reside during his stay. Under exceptional and serious circumstances the receiving state can reject this kind of agreement...[152]

Vienna Congress 1814-1815 after the defeat of Napoleon Bonaparte marked not only new geopolitical structure of the world but also codification of custom and practice in the sphere of diplomacy. This codification was realised in a form of the Vienna Reglement (1815) supplemented by Protocol of Aachen of 1818 which divided the heads of missions into four categories:

1. Classes of ambassadors, nuncios or the papal legates;
2. Classes of envoys and papal internuncios;

[151] Art. 1 (h) of the Vienna Convention on Diplomatic Relations

[152] Art. 5 of the Vienna Convention on Diplomatic Relations

3. Classes of chargés d'affaires
4. Class of ministers residents

Classification of the heads of diplomatic missions according to the Vienna Reglement was incorporated in a modified version by the International Law Commission into the Vienna Convention despite the fact that the fourth class was no longer used during the 20th century. By the end of the World War I it was only the world super powers which sent and received ambassadors. Embassies were established between the world super powers, between middle and small states the diplomatic mission headed by envoys only. Spain and Turkey were exceptions and were not considered super powers during this period. Embassies in these two states remained based on political reasons and international courtesy.[153] In order to balance the equality amongst the states this practice ceased to exist and other states could start appointing ambassadors. Article 14 Paragraph 1 of the Vienna Convention divides the heads of missions into three categories:

1. Class: ambassadors and nuncios accredited to Heads of State, and other heads of the mission of equivalent rank;
2. Class: envoys, ministers and internuncios accredited to Heads of State;
3. Class: chargés d'affaires accredited to Ministers of Foreign Affairs;

According to Article 14 Paragraph 2 there shall be no differentiation between heads of the mission by reason of their class except their precedence and etiquette.[154] Titles Extraordinary and Plenipotentiary are currently used for ambassadors. These practice developed historically. Apart from permanent – plenipotentiary diplomatic representatives the heads of states initially sent abroad extraordinary envoys with a special mission. These missions were mainly concerned with events such as ceremonies, crowning, weddings of monarchs or funerals. These envoys had a higher protocol rank than diplomatic representatives residing in the sending State which caused various misunderstandings, arguments etc. To avoid them, all responsibilities related to the representation of the head of state and country were carried out by one extraordinary and plenipotentiary ambassador.[155] *High Commisioner* and a high representative so called *Haut Représentant* are specific titles for heads of mission used by Commonwealth states or states of former French colonial system..[156] The first class of the Vienna Convention mentions nuncio as the head of the mission. The Holy See, as a subject *sui generis* of the international law, is used to refer to the head of its diplomatic representation – nunciature, the term nuncio. Other states may use all other titles based on the international custom. This practice has historical background since the Pope was the most important element of international relations in the past whether it was in a function of an arbiter or agreement depository between states. The Vienna Convention does not distinguish between *chargé d'affairs ad interim* and *chargé d'affairs en pied* despite the fact these title are different. *Charge d'affairs ad interim* acts as vice head of the mission in case of a vacant position of the head of mission or if the

[153] Diplomatický protokol Ministerstva zahraničných vecí SR: Diplomatická prax. MZV SR, Bratislava 1996, p. 14

[154] Art. 14 (2) of the Vienna Convention on Diplomatic Relations

[155] BYSTRICKÝ, Ľ.: *Základy diplomacie*. Vydavatelství Michal Vašek, Prešov 2006, p. 39

[156] *Ibid*. p. 38

titular cannot perform his responsibility or if the new head of mission for any reasons have not yet been nominated (e.g. credentials have not been transmitted). *Charge d'affair ad interim* does not a right related to the status, privileges and immunities that are disposed of the head of the mission.[157] *Chargé d'affairs en pied (en titre),* appointed by the Ministry of Foreign Affairs is a permanent head of the mission in the receiving state having the agreement with the sending state about this particular class for various, mainly political reasons.

Exceptional situation is when there is no member of the diplomatic staff present in the receiving state. In such case the sending state may appoint for a period of time and with a consent of the receiving state any of the members of the administrative and technical staff as*chargé d'affairs courantes* to perform regular administrative tasks.[158] If the two states get into conflict and one of the states feels offended and there is a risk of a long-term damage of good relations, the offended state calls off and invites its head of mission to return to his home country to hold the consultation while *chargé d'affair ad interim* becomes a temporary head of the mission. *Chargé d'affair ad interim* is a diplomatic agent of the mission who is listed on the diplomatic register right behind the head of mission.

Demonstrative absence of the head of mission usually does not exceed a few days or weeks and is a sign for the other state to begin intensive diplomatic negotiations in order to solve the problem to satisfaction of the states involved. It is not uncommon that the other state reacts similarly and calls off its titular for consultations. Consultations prove to be effective preventive measures of diplomacy. At the same time this tool has to be used with the highest possible consideration and caution.[159]

IV. 7.2 Diplomatic Staff – Other Diplomatic Staff

Except the head of the mission there are other members of the diplomatic staff having a diplomatic rank.[160] The sending state usually determines the size and ranks of the diplomatic staff while as mentioned before, the receiving state may demand limited number of members based on circumstances and conditions of the receiving state and the needs of the actual mission. The receiving state has the right to reject diplomatic agents of some rank.[161] Diplomatic ranks have a steady, internationally recognised scale which is applied by individual states according to their individual needs.[162] Based on this experience and convention there are following ranks:

1. Counsellors of the embassy;
2. Secretaries (first, second and third secretary);
3. Attachés.

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157 Diplomatický protokol Ministerstva zahraničných vecí SR: *Diplomatická prax*. MZV SR, Bratislava 1996, p. 17

158 BYSTRICKÝ, Ľ.: *Základy diplomacie*. Publisher Michal Vašek, Prešov 2006, p. 40

159 *Ibid*. p. 35

160 Art. 1 (d) of the Vienna Convention on Diplomatic Relations

161 Art. 11 (1.2) of the Vienna Convention on Diplomatic Relations

162 BYSTRICKÝ, Ľ.: *Základy diplomacie*. Vydavatelství Michal Vašek, Prešov 2006, p. 39

The head of the mission and other diplomatic agents are listed in a diplomatic register which is issued in relevant languages by the Diplomatic Protocol of the Ministry of Foreign Affairs of the receiving state. Head of mission determines rating of individual diplomatic agents of the mission according to their ranks and makes sure the head of the mission is followed by the diplomatic agent which takes over titular's responsibilities in his absence. Other diplomatic agents including the head of the mission, accredited in other states at the same time will be listed in a diplomatic register of each state by providing their permanent residence. Apart from their diplomatic agents many states send their business, military or cultural attachés on the diplomatic mission. These are sent by various ministries (Ministry of Defence of the Slovak Republic sends the military attaché and Ministry of Interior of the Slovak Republic sends police attaché). The fact that each ministry sends their attaché on a mission does not mean they are not subordinated to the heads of the mission[163]. Priests and interpreters are members of the diplomatic staff in some mainly in Asian countries. This practice undergoes evolution and it is becoming more common that they form administrative or technical staff.[164].

IV. 7.3 Administrative and Technical Staff

Administrative and technical Staff together with other diplomatic staff guarantee a smooth running of the mission. The Vienna Convention defines this staff as members of the mission who are employed in administrative and technical services of the mission.[165]

Economic officer, assistants, secretaries, interpreters, typists, an expert on ciphers and codes, a driver etc. belong to this category. Other experts, delegates and non-diplomatic employees of the business department, cultural, press and similar departments of representative offices which can be citizens of the receiving state also fall into this category.

IV. 7.4 Service Staff

The Vienna convention lists a category recorded as "Service Staff" who are members employed in domestic services of the mission. Residence and office administrators, caretakers, gardeners, chefs etc., who do not fall into the category of the administrative and technical staff, belong to this category. It is common for the members of this category that they are employed equally by the sending state and, just like in the case of administrative and technical staff can be citizens of the receiving state.[166]

163 *Ibid.*

164 *Ibid.*

165 Art. 1 (f) of the Vienna Convention on Diplomatic Relations

166 *Ibid.*

IV. 7.5 Private Servants

Private servants are employed in domestic services by a member of the mission who pays them salary. They are not employees of the sending state and fall into an individual category.[167]

IV. 8 Privileges and Immunities of Staff of the Mission

Similarly to the diplomatic mission the Vienna Convention grants certain privileges and immunities to the staff as well but the range of individual privileges and immunities varies with relation to their classification while their task is to provide members an opportunity to perform their duties in the receiving state. [168]

The Vienna Convention provides the widest range of privileges and immunities to the diplomatic staff and their family members which the Convention does not specify, but it states, that the family members of the diplomatic representative who are a part of his household also enjoy privileges and immunities in case they are not citizens of the receiving State.[169]

As a result, we can state that the definition of the term is vague and it is not clear whether the term family should be interpreted extensively or restrictively. It is up to the receiving state to interpret this term. Privileges and immunities of the diplomatic representative begin as soon as he enters the territory of the receiving state or by notifying the Ministry of Foreign Affairs of the receiving state should he already be on the territory of the receiving state. Diplomatic agent and his family members enjoy privileges and immunities guaranteed by the Vienna Convention when they cross borders of the third state or during the stay in the third state while proceeding to take up or return to his post or when returning to the sending state.[170] These privileges and immunities cease to be applied when the diplomatic agent leaves the receiving state or when the allocated time has passed from the moment the agent is declared as *persona non grata*.[171] In case of death of a member of the staff of the mission, the members of his family shall continue to enjoy privileges and immunities they are entitled to but only until the expiry of a reasonable period in which they had to leave the territory of receiving state.[172] Range of privileges and immunities of the administrative, technical and service staff is considerably more limited than of diplomatic staff and is related to the time they exercise their function.

Privileges and immunities of the member of the mission are following:

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167 Art. 1 (h) of the Vienna Convention on Diplomatic Relations

168 BYSTRICKÝ, Ľ.: *Základy diplomacie*. Vydavatelství Michal Vašek, Prešov 2006, p. 44

169 Art. 37 (1) of the Vienna Convention on Diplomatic Relations

170 Diplomatický protokol Ministerstva zahraničných vecí SR: *Diplomatická prax*. MZV SR, Bratislava 1996, p. 23

171 Art. 39 (2) of the Vienna Convention on Diplomatic Relations

172 Art. 39 (3) of the Vienna Convention on Diplomatic Relations

- Head of mission shall have the right to use the flag and emblem of the sending state on the premises of the mission, including the residence of the head of the mission, and on his means of transport.
- head of mission shall be exempt from all the national, regional or local dues and taxes except those for services rendered;
- All members of the mission shall dispose to freedom of movement and travel in the territory of the sending state except those where access is restricted for state security reasons;
- Member of diplomatic staff shall be inviolable; he shall not be liable to any form of arrest or detention;
- The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission;
- A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state; he shall also enjoy immunity from its civil and administrative jurisdiction;
- A diplomatic agent is not obliged to give evidence as a witness;
- No measures of execution may be taken in respect of a diplomatic agent; a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional municipal,[173]
- The diplomatic agent shall be exempt from all personal services, from all public service of any kind whatsoever, and from military obligations;
- The receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for personal needs of the diplomatic agent and the members of his family;
- The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that the domestic law is breached; such inspection shall be conducted only in the presence of the diplomatic agent or of his authorised representative.
- Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall enjoy the privileges and immunities except that the immunity from civil and administrative jurisdiction of the receiving state and shall not extend to acts performed outside the course of their duties.
- Members of the service staff of the mission who are not nationals of or permanently resident in the receiving state shall enjoy immunity in respect of acts performed in the course of their duties,
- Member of the service staff shall be exempt from dues and taxes on the emoluments they receive by reason of their employment.
- Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving state, be exempt from dues and taxes on the emoluments they receive by reason of their employment.

It is necessary to add that if the diplomatic agent enjoys privileges and immunities from jurisdiction of the receiving state it does not mean that he also enjoys privileges

[173] See exceptions in Art. 34 of the Vienna Convention on Diplomatic Relations

and immunities from jurisdiction of the sending state. Waiver of immunity from jurisdiction for diplomatic agents or members of the administrative, technical and service staff can be exercised by the sending state while it has to be explicit.[174]

IV. 9 *Persona Non Grata* (Unacceptable Person)

The receiving state may at any time without having to explain its decision notify the sending state that the head of the mission or any other member of the diplomatic staff is *persona non grata*.[175] In any such case, based on this announcement the status of the diplomatic agent in the sending state is terminated. The sending state shall recall this diplomatic agent from the mission.

The reasons for recall can vary, e.g. the diplomat committed a serious crime or performed any other activity incompatible with status of diplomatic agent (particularly espionage). The receiving state takes countermeasures against the sending state in case the sending state dismissed a diplomatic agent of the receiving state in the past and considered it unjustified.

The term *persona non grata* is used in connection with a diplomatic agent while the term unacceptable person indicates a person who belongs to the administrative, technical or service staff. *Persona non grata* or an unacceptable person is obliged to leave the territory of the receiving state within a reasonable time. If the person does not leave, the receiving state may reject to consider a person concerned to be a member of a diplomatic mission.

IV. 10 Interruption of Diplomatic Relations

Interruption of diplomatic relations is a result of serious political disputes between states. The history of the 20th century provides many such cases, e.g. interruption of diplomatic relations among Cuba and the USA after the Caribbean Crisis, interruption of diplomatic relations between the USA and Iran after 1979 etc. [176] In such cases the sending state usually requests a befriended state that its mission, represent interests of the state whose mission was closed due to the interruption.[177]

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174 Art. 32 (1,2) of the Vienna Convention on Diplomatic Relations

175 Art. 9 (1) of the Vienna Convention on Diplomatic Relations

176 The example can be found in the history of the Czechoslovak Socialistic Republic, e.g. after the outbreak of Sixday War the official diplomatic relations between the Czechoslovak Socialistic Republic and Israel were interrupted on 10 June 1967, the relations were restored on 9 February 1990
ČEJKA, M.: *Izrael a Palestina: Minulost, současnost a smerovaní blízkovýchodního konfliktu*. Centrum pre strategické štúdie 2005, pp. 264 - 266

177 After interrupting diplomatic relations between the USA and Cuba during the Caribbean crisis in 1962 Cuba requested the Czechoslovak Socialistic Republic to represent their interests in the USA, Diplomatický protokol Ministerstva zahraničných vecí SR: *Diplomatická prax*. MZV SR, Bratislava 1996, p. 14

IV. 11 Diplomatic Protocol

As mentioned earlier, a Diplomatic protocol or related department of the Ministry of Foreign Affairs of every receiving state keeps a list of diplomatic corps. List of diplomatic corps in a form of an official instrument is an official document while the Ministry of Foreign Affairs regularly modifies it in relevant languages based on diplomatic notes. These are sent by head of mission of individual diplomatic missions at the departure and arrival of every member of the diplomatic staff of the mission while the head of mission is responsible for the correct ranking of his diplomats.

This authorised list contains the name of the state, correct address of its diplomatic mission; an address of titular's residence or addresses of private premises of other members of the mission, opening hours, and telephone and fax contact details of the mission. Data also contain a full name, diplomatic rank and official function of the head of the mission and other diplomats. The name of wife or husband of the head of mission is also listed in the list of diplomatic corps accredited in the Slovak Republic.

All persons listed in the list of diplomatic corps shall enjoy privileges and immunities in the territory of the Slovak Republic according to the Vienna Convention and the list of diplomatic corps represents an elementary tool for ranking of diplomatic agents at various social events.

IV. 12 Diplomatic Corps, *Doyen* of the Diplomatic Corps

Diplomatic corps (*Corps diplomatique* in French - CD) comprises diplomatic agents accredited for the Slovak Republic. In a narrower sense, these are heads of all diplomatic missions regardless of their class only. In a wider sense, diplomatic corps comprises diplomatic members of all missions who enjoy diplomatic privileges and immunities.

Taking into consideration an extensive definition of the diplomatic corps, it also comprises husbands, wives and adult sons and daughters of diplomatic agents.

Function of the diplomatic corps is mainly ceremonial, so it is concerned with events such as congratulations, condolences etc. Besides, the doyen of the diplomatic corps may act to protect diplomatic privileges and immunities of members of diplomatic corps in the receiving state in case they are breached by the state bodies of the receiving state.

Doyen is the head of the diplomatic corps – a diplomatic agent of the highest rank and the first one according to the local diplomatic order – the principle of so called *seniority,* which derives from the date of transmission of the letter of credentials.[178] This rule does not apply in the countries with Christian tradition where according to the international custom and according to Paragraph 3 Article 16 of the Vienna Convention doyen is automatically an Apostolic Nuncio – representative of the Holy See regardless of the principle of seniority. Doyen is a post of honour, not a rank. Doyen acts on behalf of the diplomatic corps but only after consulting its members and plays a role of a mediator in the case of dispute between the diplomatic corps and the Ministry of Foreign Affairs of the receiving state. Doyen sometimes deals with disputes amongst

[178] BYSTRICKÝ, Ľ.: *Základy diplomacie*. Vydavateľstvo Michala Vaška, Prešov 2006, p. 41

members of the diplomatic corps. In case of a state where doyen is not automatically a representative of the Holy See, a wife or a husband of a doyen may have certain protocol responsibilities.

IV. 13 Diplomatic Courier

Diplomatic courier is a person authorised by the state authorities to deliver diplomatic bag. Apart from a passport which does not have to be a diplomatic one, a courier is equipped with an official document indication his position – courier letter with a dispatch note – *bordereau* summarising a number of package constituting a diplomatic bag. Seal of the delivery is determined by an internal security norms of an individual state. Subject of the delivery can only be used for official purposes of the mission and diplomatic documents. According to Article 27 Paragraph 5 of the Vienna Convention, a diplomatic courier shall enjoy inviolability during the performance of his function and shall not be liable in any form of arrest or detention. The states of transit are obliged to provide the same inviolability and protection for a diplomatic courier.[179] The state may designate an *ad hoc* diplomatic courier (Article 27 Paragraph 6 of the Vienna Convention). Such a diplomatic courier shall enjoy immunities of a regular courier but only by the time his mission is completed – he delivers diplomatic post to the consignee. These couriers are usually employees of central state authorities, particularly the Ministry of Foreign Affairs performing duty during their business trips.

The Vienna Convention enables diplomatic bag to be entrusted to a captain of a civil aircraft. Similarly to the *ad hoc* diplomatic courier, the captain of the aircraft is obliged to be equipped with an official document determining a number of packages constituting bag but according to the international law he cannot be considered a diplomatic courier.

IV. 14 Diplomatic Communication and Correspondence

Communication among a diplomatic mission or diplomatic agents and bodies and offices of the receiving state is made through the Ministry of Foreign Affairs of the receiving state. The communication takes place either in a verbal or a written form while the written form is denoted as diplomatic correspondence.[180]

Foundations of diplomatic correspondence date back to the 13th century in the Republic of Venice in which by law, diplomatic representatives of the Italian city states had to provide periodic reports from the place of their mission.[181]

Nowadays diplomatic correspondence is packed in special bags or other baggage marked as *colis diplomatique* (in French) or *diplomatic pouch*. The sack has to be beeswax-sealed by the state emblem while the courier carrying such a post has to be equipped with the courier letter and a dispatch note - *bordereau.* The most common

[179] Diplomatický protokol Ministerstva zahraničných vecí SR: Diplomatická prax. MZV SR, Bratislava 1996, p. 31

[180] BYSTRICKÝ, Ľ.: *Základy diplomacie*. Vydavateľstvo Michala Vaška, Prešov 2006, p. 47

[181] *Ibid.*

type of official communication among the Ministry of Foreign Affairs and a diplomatic mission or missions is a diplomatic note. Theory of diplomatic practice distinguishes between diplomatic notes according to a form for a formal note, verbal note, collective note, identical note and circular note. Apart from this, in diplomatic practice we can come across with a memorandum, *aidé-memoie*, *bout de papier* a *non-paper*.

Apart from the types mentioned above, there are personal letters, legacies of heads of states, announcements and declarations which are considered diplomatic correspondence. Typical feature of an announcement or a declaration is an official publication and not a delivery of it to an addressee as a way for him to get familiar with their content.[182]

IV. 15 Diplomatic Protocol

Diplomatic protocol is a term that has multiple meanings in diplomacy. It is either an unit of the Ministry of Foreign Affairs but also an unwritten code of conduct on courtesy and good manners that diplomatic agents obliged to respect and apply among each other but also in contact with the bodies of the receiving state.

The Ministry of Foreign and European Affairs of the Slovak Republic established a Department Diplomatic Protocol which is subordinate to the Minister of Foreign and European Affairs of the Slovak Republic directly. The tasks of department are determined by bye-law of the Ministry of Foreign and European Affairs of the Slovak Republic.

Diplomatic protocol in its true sense represents a set of international standards generally accepted based on custom and courtesy. Representatives of various states, diplomatic relations with such representatives, relations among diplomats themselves are guided by these standards. Such code of conduct is applied during ceremonies, mainly in their form and organisation, rank of individual diplomatic agents, dress code, seating plan or the type of food served.

It might be said that this code of conduct is a result of a long-term development of etiquette at monarchal courts and even up till today diplomatic protocol of individual states differs despite certain common general features. One of the strictest protocols today is a diplomatic protocol applied in the Holy See and monarchies.[183]

IV. 16 Consular Functions of the Mission

Consular department is usually established within the mission which function is to provide and procure practical matters for the citizens of the sending state as well as for the citizens of other states e.g. the receiving State.

Legal framework of the consular services is set forth in The Vienna Convention on Consular Relations. It entered into force 24. April 1963 and regulates types of consular

[182] Diplomatický protokol Ministerstva zahraničných vecí SR: *Diplomatická prax*. MZV SR, Bratislava 1996, p. 149

[183] BYSTRICKÝ, Ľ.: *Základy diplomacie*. Vydavateľstvo Michala Vaška, Prešov 2006, p. 41

representation, administration of consular functions, classes of heads of consular offices, privileges and immunities etc.

Article 5 of The Vienna Convention on Consular Relations determines consular functions:

- to protect interests of the sending state and its state nationals, both individual and bodies corporate within the limits permitted by international law;
- to further the development of economic, cultural and scientific relations between the sending and receiving states and otherwise promoting friendly relations among them in accordance with provisions of The Vienna Convention;
- to ascertain conditions and development in the commercial economic, cultural and scientific life of the receiving state by all lawful means and to report this information to the government of the sending state and the persons concerned;
- to issue passports and travel documents for citizens of the sending state and visas or appropriate documents to persons wishing to travel to the sending state;
- to provide help and assistance both individual and bodies corporate of the sending state,;
- to act as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature which do not fit in contrary in the laws and regulations of the receiving state;
- to protect interests of nationals, both individual and bodies corporate, of the state representatives of the sending state in cases of succession *mortis causa in* the territory of the sending state in accordance with laws and regulations of the receiving state;
- to safeguard, within the limits imposed by the laws and regulations of the receiving state, the interests of minors and other persons lacking full capacity who are national of the sending state, particularly where any guardian nor trusteeship is required with respect to such persons;
- subject to the practices and procedures obtaining in the receiving state, to represent or to arrange appropriate representation for nationals ort he sending state before the tribunals and other authorities of the receiving state, for the purpose of obtaining, in accordance with the law and regulation of the receiving state, provisional measure for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interest subject;;
- To transmit judicial and extrajudicial documents or executing letter rogatory or commissions to take evidence for the court of the sending state in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving state;
- to extend assistance to vessels and aircrafts, to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving state, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the

seamen insofar as this may be authorised by the laws and regulations of the sending state;

- to perform any other functions entrusted to a consular post by the sending state which are not prohibited by laws and regulations of the receiving state or which no objection is taken by the receiving state or which are referred to in the international agreements in force between the sending state and the receiving state.

V. The Jurisdiction of Quasi-judicial Bodies of the United Nations

Several conventions on the protection of human rights were adopted at the United Nations. Since analysis of the substantive provisions of particular conventions would exceed the range of this textbook, we have focused primarily on procedural provisions which are not part of the standard textbooks on human rights.

Within the universal UN's system of human rights protection there is a system of so called treaty-based bodies, which, in their nature, are quasi-judicial bodies. Currently, there are nine treaty bodies (in accordance with applicable agreements) as follows: Human Rights Committee[184] (hereinafter "CCPR"), the Committee on Economic, Social and Cultural Rights[185] ("CESCR"), the Committee on the Elimination of Racial Discrimination[186] (hereinafter as "CERD"), the Committee on the Elimination of Discrimination against Women[187] (hereinafter "CEDAW"), the Committee against Torture[188] (hereinafter referred to as "CAT"), the Committee on the Rights of the Child[189] (the "CRC"), the Committee on Migrant Workers[190] (hereinafter "CMW"), the Committee on the Rights

[184] Established in accordance with Article 28 of the International Covenant on Civil and Political Rights (New York, December 19, 1966) - Published in Collection of Laws of the Slovak Republic under No. 120/1976 of Coll., valid for the Slovak Republic based on the succession to the rights and obligations of the former Czechoslovakia

[185] Established by the Economic and Social Council of the United Nations in accordance with its Resolution No. 17/1985

[186] Established in accordance with Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (New York, December 21, 1965) - Published in Collection of Laws of the Slovak Republic under No. 95/1974 of Coll., valid for the Slovak Republic valid based on the succession to the rights and obligations of the former Czechoslovakia

[187] Established in accordance with Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) - Published in Collection of Laws of the Slovak Republic under No. 62/1987 of Coll., valid for the Slovak Republic based on the succession to the rights and obligations of the former Czechoslovakia

[188] Established in accordance with Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) Published in Collection of Laws of the Slovak Republic under No. 143/1988 of Coll., valid for the SR based on the succession to the rights and obligations of the former Czechoslovakia

[189] Established in accordance with Article 43 of the Convention on the Rights of the Child (New York, 20 November 1989) - Published in Collection of Laws of the Slovak Republic under no. 104/1991 of Coll., valid for the SR based on the succession to the rights and obligations of the former Czechoslovakia

[190] Established in accordance with Article 72 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990), the Slovak Republic has not signed the Convention yet

of Persons with Disabilities[191] (the "CRPD") and the Committee on Enforced Disappearances[192] (hereinafter "CED").

V. 1 The Jurisdiction of Human Rights Committee - CCPR

Obligatory jurisdiction of the CCPR, which consists of 18 members, is given by Article 40 of the International Covenant on Civil and Political Rights, which provides for the obligation of party to the Covenant to report on the implementation of the Covenant, the legislative measures adopted in the context of the implementation as well as the progress made in the implementation of the rights in the territory of relevant State. The first report must be prepared and submitted within one year after the entry into force of the present Covenant for the State; other reports whenever CCPR requires them. The Slovak Republic submitted its first report only on 9th January 1996, second report was submitted on 30th July 2002 and the third report on 25th June 2009[193]. CCPR has a facultative jurisdiction in regards with the procedure for inter-state complaints, according to Articles 41 and 42 of the Covenant, where party concerned may at any time declare that it recognises the competence of CCPR to receive and consider a communication of any state that the other state does not fulfil its obligations in accordance with the provisions of Covenant. In accordance with Article 1 of the Optional Protocol to the Covenant[194] it also has facultative jurisdiction in regards to the consider communication from individuals subject complaining on a violation of any of the rights specified in the Covenant by the state. CCPR shall consider the notice acceptable if it meets the conditions set forth in Optional Protocol and the Committee's Rules of Procedure[195] (violation must relate directly and personally to the complainant, a person under the jurisdiction of the state, /therefore the so called *actio popularis* cannot be applied/, the communication must be in written form and must not be anonymous and at the same time be the subject of action by another international body, the complainant has exhausted all available domestic remedies, the right to submit a communication cannot be misused by its submission, the content of the notice must be compatible with the provisions of Covenant while observing jurisdiction *ratione materiae*, *ratione temporis*, *ratione loci a ratione personae* /where the fulfilment of the requirements of active and passive legitimation of complainant is comprehended/ and the complainant can only

[191] Established in accordance with Article 34 of the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), the Slovak Republic it entered into force on 26 May 2010

[192] In accordance with Article 26 of the International Convention for the Protection of All Persons from Enforced Disappearance (New York, December 20, 2006), which Slovakia signed 26th September 2007

[193] UN Doc. CCPR/C/81/Add.9 English, CCPR/C/SVK/2003/2 English, CCPR/C/SVK/3

[194] Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966) - Published in Collection of Laws of the Slovak Republic under No. 169/1991 of Coll., valid for the SR based on the succession to the rights and obligations of the former Czechoslovakia

[195] UN Doc. CCPR/C/3/Rev. 6, 24. April 2001, Rules of procedure of the Human Rights Committee

object the violation of rights referred to in Articles 3 to 27 of the Pact.[196] CCPR's procedure is confidential and written; its decision is final and no remedy thereon exists. CCPR's decision, the opinion, is not binding for the state in accordance with Article 5, Paragraph 4 of Optional Protocol, but Article 2, Paragraph 3 of the Pact states that each state shall ensure an effective protection for any person whose rights or freedoms are violated as recognised by the Pact. Despite the non-binding character of the CCPR's decisions, these are respected and the imposed measures are implemented by the states. CCPR's findings regarding measures implemented by the states are published annually in the annual report.

Due to the fact that Czechoslovakia joined both the Covenant and the Optional Protocol, the Slovak Republic announced its succession to the rights and obligations of the former Czechoslovakia, including reservations and declarations[197] by a note addressed to the Secretary-General of the United Nations (hereinafter "UN Secretary General"). CCPR received a total of 5 individual complaints relating to the violation of the obligations of the Slovak Republic, but only in one case a violation of individual rights by the Slovak Republic was found (case *Matyus vs. SR*) [198] and others were declared inadmissible by CCPR due to the absence of *ratione personae* and *ratione materiae*.

V. 2 The Jurisdiction of Committee on Economic, Social and Cultural Rights - CESCR

The control mechanism is stipulated in the provisions of Articles 16 to 25 of the Pact, marginally in the resolution of the Economic and Social Council (hereinafter referred to as "ECOSOC") no. 17/1985 of 28th May 1985 and the Optional Protocol to the Covenant. Its basis lies primarily in the obligatory jurisdiction of the UN Secretary General in the reporting procedure (first report on the measures taken and progress made in the implementation of the rights of the Covenant must be submitted to him within one year after the entry into force of the Convention for the State in accordance with Article 17 of the Convention); he then forwards the report to ECOSOC for consideration. UN Secretary General forwards copies of the reports also to specialised agencies; if they are relevant in relation to the substantive issues and the state is also their member. Specialised agencies as specified in Article 18 may submit their reports of progress to ECOSOC, if they are in compliance with those provisions of the Covenant which are the subject of their work. In accordance with Article 21, ECOSOC may submit reports of states and specialised agencies from time to time to the General Assembly (the "General Assembly") on the measures and progress in the protection of the Covenant.

196 The committee narrowed its jurisdiction in its opinion on the complaint of Bernard Ominayaka, the Chief of the Lubicon Lake, versus Canada, UN. Doc. CCPR/C/38/D/167/1984, count 32.1

197 Note from Slovak Republic was received by UN Secretary General on 28 May 1993

198 LANTAJOVÁ, D.: *Aktuálna judikatúra kvázi súdnych orgánov Organizácie spojených národov v oblasti ľudských práv vo vzťahu k Slovenskej republike*, *In: Medzinárodné právo v slovenskom kontexte: liber amicorum Ján Azud: zborník z konferencie pri príležitosti životného jubilea 80 rokov prof. JUDr. Jána Azuda, DrSc,* Bratislava, Slovenská spoločnosť pre medzinárodné právo pri Slovenskej akadémii vied, 2009, pp. 123-133

The Slovak Republic submitted its first report on 28th February 2001 and a second report on 25th June 2009[199].

CESCR, composed of 18 independent experts, established by ECOSOC in 1985 in accordance with Resolution 17/1985 as a subsidiary body eventually gained the status of an international quasi-judicial body, which clearly results from the adoption of the Optional Protocol to the Covenant.[200] Until the adoption of the Optional Protocol and its entry into force[201] CESCR is the main authority in the interpretation of the covenant, issues the so-called concluding remarks and comments on each report. After the Optional Protocol enters into force, in accordance with its Article 1, CESCR is also competent to receive individual communication from individuals or groups of individuals who are subject to the jurisdiction of a contracting state and who claim to be victims of a violation of any provision of the Covenant. Details regarding the admissibility as well as the procedure after the notice to CESCR are stated in Articles 2 to 9 of the Optional Protocol: the need for the submission within 1 year after the negotiation within national remedies was terminated; the issue happened after the entry into force of the Optional Protocol or it happened before the entry, but it lingers; prohibition of substantive assessment of the communication by other investigative or conciliation body and prohibition of anonymity of complainant; compatibility with the Covenant, the need for copies in writing; the possibility of asking the state to adopt precautionary measures to prevent further violations; sending all notices to the affected state, which shall express its attitude within six months; possibility to conclude an amicable settlement between the parties in cooperation with CESCR, its non-public sessions for judgement of notices, where it deals with the adequacy of the steps taken by the state taken in accordance with Part II of the Covenant; possibility for the state to comment on the decision of CESCR within 6 months. In accordance with Article 10 of the Optional Protocol shall CESCR also be relevant to the so called interstate communication, which means that it shall be able to receive and judge notices from the contracting states that other contracting state does not fulfil the provisions of the Covenant. In accordance with Article 11 of the Optional Protocol CESCR may be relevant to the inquiry procedure, including visit *in situ.* All three powers of CESCR have the nature of facultative jurisdiction.

V. 3 The Jurisdiction of Committee on the Elimination of Racial Discrimination - CERD

CERD, composed of 18 independent members, is another quasi-judicial body of the UN, which jurisdiction was accepted by both the Slovak Republic and the Czech Republic.

The control mechanism of CERD, as well as that of CCPR, consists of 3 procedures, two of them obligatory – *reporting procedure in accordance with Article 9 of the Conven-*

[199] UN Doc. E/1990/5/Add/49 English, E/C.12/SVK/2

[200] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (New York, 10 December 2008), SR signed this protocol on 24 September 2009,

[201] In accordance with Article 18, it shall enter into force within 30 days after the date of deposit of the tenth instrument of ratification or instrument of accession with the UN Secretary General

tion under which states submit their reports to the implementation of the Convention (the first report on the legislative, judicial, administrative or other measures made in the performance of the provisions of the Convention shall be submitted by states within one year after the entry into force for the state concerned, and thereafter every two years, or whenever CERD requires it; CERD presents its report on its activities to the UNGA annually by the UN Secretary General, where it may suggest or do general recommendations based on these reports – the Slovak Republic gave first, second and third report on 20th August 1999, the fourth and fifth on 28th October 2003 and the sixth to the eighth report were to be submitted by 28th May 2008, but it has not done been done yet)[202] *and procedure for inter-state complaints in accordance with Article 11 of the Convention* (if a contracting state assumes that another contracting state of the Convention breaches its obligations contained in this Convention, it may send a communication to CERD, which then sends its communication to the relevant contracting state and requests to comment it within three months or to inform about how the matter is settled; if the matter is not settled within six months, either state may refer the matter back to CERD, which shall pursue it only after all domestic remedies were exhausted; in accordance with Article 12 shall establish an *ad hoc* conciliation commission whose task is to present a final report on all factual issues in dispute with recommendations to CERD; states in dispute after being informed of the given report shall within three months express their statement on the adoption of the recommendations contained in the report) *and facultative procedure for individual complaints in accordance to Article 14 of the Convention.* Since it was introduced, procedure for individual communication has been used mainly by foreigners, but currently it is used by citizens belonging to national, ethnic and racial minorities who want to assert their rights. CERD Proceedings are almost identical to CCPR Proceedings with a few differences. CERD does not deal with anonymous reports, but the identity of the complainant shall be notified to the state only with the complainant's consent, communication may be made by a group of persons, it has to be submitted to CERD within 6 months after all available domestic remedies were exhausted, but the communication may be submitted even in case that the matter is the subject of proceedings of different international bodies, or the matter is already resolved.[203]

CERD's decision is not binding for the state in accordance with Article 14 of the Convention, but even here, the wording of Article 2 of the Convention has to be taken into account, where obligations of a state are established as not to exercise racial discrimination by its authorities not to support it, not to defend and ban and remove it by all appropriate means. The Slovak Republic accepted this CERD's jurisdiction by a declaration done in accordance with Article 14 Paragraph 1 of the Convention valid from 17th March 1995. In relation to the Slovak Republic, 3 notices were received, in 2 cases CERD found a violation of the Convention[204] and in one case after such receipt of

[202] UN Doc. CERD/C/328/Add.1; CERD/C/419/Add.2

[203] UN Doc. CERD/C/35/Rev.3, 1 January 1989, Rules of Procedure of the Committee on the Elimination of Racial Discrimination

[204] UN Doc. CERD/C/57/D/13/1998 (*Anna Koptová vs. SR*) a UN Doc. CERD/C/66/D/31/2003 (*Ľ.R vs. SR*),

notice CERD observed that the Slovak Republic fulfilled its obligations as the contracting state in relation to the struggle against racial discrimination[205].

V. 4 The Jurisdiction of the Committee on the Elimination of Discrimination against Women - CEDAW

CEDAW has 23 members and a competence in the *obligatory reporting procedures in accordance with Article 18 of the Convention* (the obligation of a contracting state to submit, within one year of the entry into force of this Convention for the relevant state a report on the legislative, judicial, administrative and other measures taken for the purposes of the provisions of this Convention; other reports must be provided at least every four years or whenever requested by the CEDAW – the Slovak Republic gave the first report of 29th April 1996 and the second, third and fourth report only on 11th May 2007[206] and *facultative procedures*, *i.e.* the possibility for the individuals to submit communication in accordance with Article 1 of the Optional Protocol [207] and procedure of the in accordance with Articles 8 and 9 of the Optional Protocol, including *in situ* visits.

CEDAW's proceedings in relation to individual communication are again almost identical to the CCPR's proceedings with two differences: the communication may be submitted by individuals and groups and they cannot be a subject of negotiations of other authority while the same applies to the time prior to the notice to committee[208]. CEDAW has essentially the same standpoint in relation to the Czech Republic and the Slovak Republic, Slovakia has accepted the jurisdiction by its declaration which entered into force on 17th February 2001; the notice of violation of the provisions of the relevant conventions has not yet been communicated on their part.[209]

Articles 8 and 9 allow CEDAW to authorise its members in case of receiving reliable information on non-compliance by any contracting state to investigate the situation if necessary, and with the consent of the contracting state to visit its territory. Consequently, these members must prepare a report of their findings, together with comments and recommendations. The state has six months to submit its position to CEDAW. CEDAW received information relating to violation of the provisions of the Con-

205 UN Doc. CERD/C/59/D/11/1998 (*Miroslav Lacko vs. SR*),

206 UN Doc. CEDAW/C/SVK/1; CEDAW/C/SVK/1/Add.1; CEDAW/C/SVK/4

207 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (New York, October 6, 1999) - Published in Collection of Laws of the Slovak Republic under No. 343/2001 of Coll.

208 UN Doc. A/56/38, Annex I, Rules of Procedure of the Committee on the Elimination of Discrimination against Women

209 CEDAW has negotiated 24 individual notices so far and in only 4 cases found a violation of obligations of States, but there are still 8 notices pending.

vention by the Slovak Republic, but did not continue proceedings in accordance with Article 8 Paragraph 2 of the Optional Protocol.[210]

V. 5 The Jurisdiction of the Committee against Torture - CAT

CAT is composed of 10 members, whose role is monitoring compliance with the rights set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Equally as with other contracting bodies, CAT contains several procedures, too: *obligatory jurisdiction in the reporting procedure in accordance with Article 19 of the Convention* (contracting state shall submit its first report within one year from the date of entry into force for it, then every four years, the committee may make general comments to the report and submits them to the relevant state and the state may express their attitude, CAT may include its findings in its annual report, which is presented annually to the General Assembly – the Slovak Republic presented its first report on 4th May 2000 and the subsequent on 1st February 2007, the third report is due by the end of 2013[211]; *facultative procedures for inter-state complaints in accordance with Article 21* (such state must then submit their position within three months after it has been requested by CAT, if the matter is not settled within six months, either state may refer the matter back to CAT, which shall pursue it only after all domestic remedies were exhausted, CAT then prepares a report, which shall also include the attitudes of the states in case the matter is not settled) and individual complaints in accordance with Article 22 of the Convention (the difference, in comparison with CCPR's proceedings, is that the notice cannot be a subject of negotiations of other authority while the same applies to the time prior to the notice to CAT[212] - the Slovak Republic accepted given jurisdiction by its declaration of 17th March 1995 – and investigation, including *in situ* visits in accordance with Article 20 of the Convention (if CAT finds out that any party systematically exercises torture in its territory, CAT may authorise its members to investigate the situation, which may be accompanied by a visit to the territory of the State. CAT then prepares a report and submits it to the relevant state - despite the fact that Czechoslovakia made an objection to the provision, the Slovak Republic withdrew it). Another *facultative jurisdiction* is a system of regular visits to the detection facilities introduced by the Optional Protocol to the Convention against Torture and

[210] On 21 September 2004 an international NGO submitted a notice on systematic violation of Article 12 (*elimination of discrimination against women in health care, the care of women in relation motherhood*) of Slovak Convention in accordance with Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against women to CEDAW in relation to the alleged sterilisation of Roma women. Following the opinion the Government of the SR was informed by the Secretariat of CEDAW on 1 August 2005 about the appreciation for its legislative action (adoption of a new law on health care) and about not pursuing the investigation in accordance with Article 8 of the Optional Protocol. (*Cf.* Second and third periodic report from SR to the Convention on the Elimination of All Forms of Discrimination against Women /for the period 1998 to 2006 /, source: http://www.foreign.gov.sk/App/WCM/main.nsf?Open

[211] UN Doc. CAT/C/24/Add.6 a CAT/C/SVK/2

[212] UN Doc. CAT/C/3/Rev.4, 9 August 2002, Rules of Procedure of the Committee against Torture

Other Cruel, Inhuman or Degrading Treatment or Punishment[213]. Performance of the provisions stipulated by the Optional Protocol (visits to detection facilities, submission of recommendations in relation to the protection of persons deprived of their liberty against torture and other similar treatment, the function of counsellor in relation to the national preventive mechanism) is managed by the Subcommittee on Prevention of Torture and other Cruel, Inhuman or degrading treatment and punishment, which consists of 25 members (already ratified by 50 states).

V. 6 The Jurisdiction of the Committee on the Rights of the Child - CRC

CRC, composed of 18 members, independent experts of high moral character, is currently the only committee that does not have any valid provisions or provisions at the stage of approval, which would allow the 3 standard procedures, as is the case with other contracting bodies. CRC only has the obligatory jurisdiction with relation to the reporting procedure enshrined directly (as provided for in Article 44 of the Convention, and which is identical with the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Article 12, as well as the Optional Protocol to Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, Article 8[214]), which lays down the obligation for contracting states to provide the first report on the measures taken to implement the Convention (as well as the Optional Protocols) within two years after entry into force for the state concerned, other reports are required to be submitted by states every five years. The Slovak Republic submitted its first report on 6h April 1998, another on 18th September 2001[215] and the third, fourth and fifth report is to be presented in June 2013.

The third Option Protocol on procedure of announcement to the Treaty was approved by the UN General Meeting by its Resolution No. 66/138 of 19 December 2011. In fact, the approval was initiated by the Slovak Republic, which became the leader of the preparatory process at the same time[216]. As implied from the name of the Protocol, unlike the first two substantive option protocols it has procedural character and this way it creates a mechanism of individual announcements responding to abuse of the rights of children given in the agreement as well as in the two option protocols. The

213 (New York, 18 December 2002), Slovak Republic did not even sign this protocol, but in the Czech Republic it came into force on 9 August 2006 in accordance with its Article 28, Paragraph 2.

214 Both (New York, 25 May 2000) - Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography - Published in Collection of Laws of the Slovak Republic under No. 424/2004 of Coll. and the Optional Protocol on the Involvement of Children in Armed Conflicts - Published in Collection of Laws of the Slovak Republic under No. 256/2009 of Coll;

215 UN Doc. CRC/C/11/Add.17 and CRC/C/SVK/2, or in the relation to the Optional Protocol on the Involvement of Children in Armed Conflicts 2 November 2009 (CRC/C/OPAC/SVK/1) and to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 30 October 2009 (CRC/C/OPSC/SVK/1)

216 The Slovak Republic was even the first state to sign the actual Option Protocol on 28 February 2012 in Geneva (the Prime Minister Iveta Radičová), up to 15 January 2013 the Protocol has not come into force yet.

receiver of an individual communication will be exactly CRC, which can address recommendations to a related state. Yet the state is obliged to inform about the measures taken to remedy the existing situation. It is the procedure already found in the other eight so-called *„treaty bodies"*. The Protocol also establishes a facultative mechanism of international communication concerning any violation of the agreement provisions as well as its two option protocols. Another procedure a state can explicitly refuse at signing, ratification or accession is investigation procedure. The protocol also includes guarantees, the role of which is to adhere the principle of confidential information as well as the best interest of child.

V. 7 The Jurisdiction of the Committee on Migrant Workers - CMW

Issues of the application of the Convention are solved by the provisions of the part VII of the Convention, where Article 72 establishes CMW, which was composed of 10 members when it entered into force; now there are 14 members (after the accession or ratification of the 41. contracting state) with high moral standing, impartial and with recognised competence in the field of Convention. Obligatory reporting jurisdiction in regards to the implementation of the rights contained in the Convention by the contracting parties, stipulated by Article 73, consists of the submission of a report on the legislative, judicial and other administrative measures taken to implement the Convention within one year after the entry into force for a particular state, and consequently every five years thereafter, or whenever required by CMW. In addition to the obligatory reporting procedure, CMW is also competent to discuss individual communication in accordance with Article 77 of the Convention. This facultative jurisdiction has so far been recognised by only two States (the declaration in accordance with Article 77 Paragraph 8) i.e. Guatemala and Mexico, which implies that CMW has not negotiated any individual complaints yet. At the same time, states may at any time declare that they recognise CMW's facultative jurisdiction in procedures for inter-state communication in accordance with Article 76 (such jurisdiction is only recognised by the declaration of Mexico).

When negotiating individual notices, CMW should first determine the admissibility of the communication (it cannot be anonymous, the right to submit individual communication cannot be violated, it cannot be in conflict of the Convention and discussed by other bodies) and consequently asks the relevant state to submit a written statement to the notice within 6 months of the receipt. The subsequent negotiated opinion of CMW shall be announced to the state and to the individual complainant.

V. 8 The Jurisdiction of the Committee on the Rights of Persons with Disabilities - CRPD

CRPD is established in accordance with Article 34 and after ratification by 60 States it consists of 18 independent members. Members are experts in the field of human rights, with high ethical standards and are elected so as to retain an equitable geographical distribution, principal legal systems, as well as balanced gender representa-

tion and participation of experts with disabilities. CRPD has obligatory jurisdiction of the reporting procedures, while each contracting party shall submit its first report on the implementation of the Convention within two years of the entry into force of this Convention for that state, and subsequently every four years or whenever CRPD requests it. CRPD prepares its proposals and recommendations to the report and sends them to the relevant state, which may respond back to CRPD with any information it decided to send. CRPD presents a report on its activities every two years to the General Assembly and to ECOSOC and may make suggestions and general recommendations based on the examination of reports and information received from states which are contracting parties to the Convention. CRPD, in accordance with Article 1 of the Optional Protocol to the Convention, has an obligatory power to be submitted by individual communication presented by persons or groups of persons concerning a state, contracting party to the Convention and to the Optional Protocol. Anonymous reports are inadmissible, as well as obviously unfounded or not sufficiently substantiated communication and communication constituting an abuse of the right to submit a communication, if they are related to matters that have already been judged by CRPD, if all available domestic remedies have not been exhausted, or the events happened prior to the entry into force for that contracting party, with the exception for where the facts are still persisting after that date. CRPD shall inform the contracting party on receipt of communication and awaits its explanation in writing within 6 months of receipt. However, CRPD may ask the state after receipt of the communication, but before its decision, to take provisional measures to prevent possible harm to the victim or victims of the alleged violation of the obligations. CRPD evaluates communication in closed session and its proposals or recommendations sends to the contracting state and to the proposer. CRPD has not dealt with any individual communication so far because its first meeting was only held in Geneva on 23rd to 27th February 2009. In accordance with Article 6, CRPD also has a facultative jurisdiction (based on statements in accordance with Article 8 of the Optional Protocol) in the investigation procedures including *in situ* visits. Findings of its investigation with the proposals and recommendations shall be sent to the contracting state, which is supposed to send its response within 6 months of receipt. CRPD may ask the relevant contracting party to include details in its report conducted under Article 35 of the Convention details regarding any measures taken in response to an inquiry conducted under Article 6 of this Protocol.

V. 9 The Jurisdiction of the Committee on Enforced Disappearances - CED

CED is composed of 10 independent experts whose role is not only the monitoring of compliance with the provisions of the Convention, but also cooperation with other relevant bodies and agencies as well as other treaty bodies. CED has the obligatory jurisdiction in relation to reporting procedure in accordance with Article 29 of the Convention, in which the contracting state shall submit the first report on the measures taken for the implementation of the Convention within two years of the entry into force for the state concerned. The report from UN Secretary General is then submitted to the other party and CED prepares its observations and recommendations, which

are then sent to the contracting state. In accordance with Article 31, CED has the facultative jurisdiction in regards to the procedures for individual communication, which may be submitted by those individuals who consider themselves victims of a violation of obligations under the provisions of the Convention valid for the contracting state. Anonymous communications are inadmissible and the same applies to the notices that violate the right to submit communications or to the communications that are incompatible with the provisions of the Convention and to the situation where all domestic remedies have not been exhausted yet. The condition for admissibility consists of the fact that the case was not presented to another international proceeding. CED sends the report to the relevant state and requests it to provide its observations and comments within certain period. CED may ask the contracting state after receipt of the communication to take the necessary provisional measures in order to prevent possible irremediable harm to the victims of the alleged violence. After the communication has been evaluated by CED, CED's opinions are sent to the contracting state and to the author of the notice. Another facultative jurisdiction of CED is the procedure of inter-state communication, *i.e.* the possibility to receive and evaluate communications from states about another state not fulfilling its obligations under the Convention. Any contracting state may make a statement, which accepts this CED's jurisdiction in accordance with Article 32 of the Convention. Article 33 allows CED for visits *in situ* carried by its members, in case CED finds out that one of the contracting states seriously breaches the provisions of the Convention and provided that the state agrees. CED, after making its findings, announces its conclusions and recommendations to the state concerned. Different procedure in accordance with Article 30 of the Convention is the application for search of the disappeared person, which can be submitted by the relatives of the disappeared person, by their attorneys, by other authorised person, or by a person who has a legitimate claim. When CED finds the request justified, compatible with the provisions of the Convention and does not constitute an abuse of the right to submit such request, when it was submitted by the competent authority of the contracting party and the case has not been dealt with by other international bodies, it asks the relevant contracting state to provide an information concerning a wanted person. CED can send recommendations and requests to the relevant contracting state asking to take all the necessary measures, including the provisional measures, in order to find out about the temporary residence of the disappeared person and in order to protect such person; the state shall inform CED about the measures taken. CED shall also inform the person who made the request for urgent action. CED shall work with relevant parties until the destiny of the person sought has been resolved.

V. 10 Practice of the Slovak Republic

The Slovak Republic succeeded to the rights and obligations of Czechoslovakia as of the date of its establishment and continued in the field of human rights in gradual adoption of other international treaties and through them in acceptation of control mechanisms that create these international treaties. The Slovak Republic is one member of the 80 percent of UN member states that in the period after World War II have ratified or acceded to four or more international human rights treaties, it has accepted

the obligatory jurisdiction of almost all treaty bodies so far as well as probably the most effective facultative jurisdiction of half of these authorities regarding procedures for individual notices. SR also became a member of the newly formed Human Rights Council and has been active in encouraging the adoption of new international treaties.

VI. Case-law of the International Judicial and Quasi-judicial Bodies in the Area of Human Rights Related to the Roma Ethnicity

The issue of the rights of the Roma is very timely, high attention is paid not only at the national but also at the international level. Particularly in Central and Eastern Europe after the fall of the Iron Curtain, the socio-economic changes in society negatively affected this ethnic group the most. What contributed was not only an increase in unemployment and poverty in society, but particularly disintegration of a social network, reduction in spending on health and education, which caused a rapid fall of living standard.[217] The educational level of the members of this ethnic group is usually very low, not only in the young generation but also in the elderly. This also raises social aversion toward the Roma as a whole, which some of the Roma find hard to bear since there are not good relations among them.[218] Negative perceptions of the majority of the population in relation to the Roma ethnic group can be observed in their ability to navigate the social system not only in their own state, despite the above-mentioned low education level of most Roma. Another negatively perceived area is crime committed by the Roma. Although no statistics exist on the Roma criminality, which is of course correct and in accordance with law and the international obligations of the Slovak Republic, it is generally known that the proportion of the Roma, especially for non-violent crime (particularly theft) is considerable. Even on this basis, we currently encounter not only positive reactions of any way to solve the problem of Romas. Nowadays for the Roma minority the synonymous term 'citizens incapable of integration' was adopted. However, despite the above-mentioned negative information can be no doubt of the need for continued protection of this minority in accordance with one of the basal principles of the protection of minorities and the principle of granting specific rights of minorities (the principle of positive discrimination), which correspond with their different status in states.

Romas come from the area between the north-western India and the Iranian plateau, the first reports on their arrival in Europe go back to the 14th century and now they live in almost every member state of the Council of Europe, estimated number living in Europe is eight to ten million. In some countries of Central and Eastern Europe they represent more than 5% of the population. Despite these statistics the Roma are not considered as the nation, most were subjected to per-

[217] ŠUPÍNOVÁ, M. *Reprodukčné zdravie ako problém sociálne slabých a vylúčených skupín.* Banská Bystrica : Fakulta zdravotníctva SZU; Technická Univerzita vo Zvolene, 2011, p. 7.

[218] ŠIŠKOVÁ, T. ed: *Výchova k toleranci a proti rasismu,* collection, 1st Edition, Prague, Portál, 1998. p.208

secution and denial during their 'European history' and maybe thank to the consequences of these historical events they are currently living on the fringes of society in their home countries and their integration into public life is very complicated. An example from history may be the status of this ethnic group on the territory of former Czechoslovakia. During the Austro - Hungarian Empire, as well as in period 1918 - 1939, the status of minorities and their rights were narrowed down to the issue of the use of their own language in dealings with authorities and the issue of minority education, where children of minority members were able to learn in their mother tongue. However, it was not the case with the Roma minority. These two questions had partial relevance since the main issue highlighted was a different way of life. The state addressed mainly with the issue of crime of this minority but also had a desire to restrict their migration (e.g. general rules of home law or law No. 117/1927 Series and of Wondering Gypsies). Later, during the period of communism, the way of life of the Roma and their crime were considered negative affecting the live of the entire society and therefore this state regime attempted to transform their way of life and the integration of the Roma into majority of society (e.g. the concept of universal social and cultural integration of the Roma - the resolution of the federal government of Czechoslovakia No. 231/1972).[219] It should also be noted that the Roma in Czechoslovakia until the adoption of the Charter of Fundamental Rights and Freedoms in 1991, did not have the status of a national minority or of an ethnic group. After the adoption of the **Charter of Fundamental Rights and Freedoms** Romas could the freely declare their allegiance to their ethnicity in the census in 1991. The Government of the Slovak Republic by its resolution No. 153 of 9 April 1991 recognised the status of ethnic minority for the Roma citizens.[220] Even after the independence The Slovak Republic has not found a solution for solving the Roma issue and it is therefore possible to ask the following question; If the members of this ethnic group had the same characteristics, knowledge, skills or abilities as members of the majority nation, would they have the same chance to prove themselves? Would not, in majority of the cases, members of this ethnic group have to face discrimination? And the possible answers to these questions are the reason why we have decided to refer to the case-law of international judicial and quasi-judicial authorities and what they consider a breach of racial discrimination against the Roma minority in general (as they refer to cases concerning the violation of rights not only in one state), and can thus help public authorities to more easily identify possible discrimination in social relations because the fundamental and initial principle of human rights is equality in their enforcement and protection. Without this principle would assessment of violation of human rights be unfair.[221]

A non-governmental organisation **'European Roma Rights Centre'** is very active in the sphere of protection of the Roma rights, which not only monitors but also helps in the protection of their rights. Not only does the Centre warn individual states about violation of the Roma human rights on their territory, but also works closely with the

[219] PETRÁŠ, R., PETRŮV, H., SCHEU, H., Ch. (eds.): *Menšiny a právo v České republike*, Auditorium, Prague 2009, 512 p., pp. 82 and 131.

[220] *Ibid.* p.380

[221] SVÁK, J.: *Ochrana ľudských práv (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práv),* 2nd amended edition - Žilina : Poradca podnikateľa, 2006. - 1116 p. - (EUROKÓDEX). - ISBN 80-88931-51-7., p. 973

Council of Europe and the Economic and Social Council of the United Nations as well as the so-called '*treaty-based bodies'* (observer status), to which it regularly sends messages about the state of human rights violation of members of the Roma ethnic group. Often it plays a role of an 'attorney' for this ethnic group individual before judicial and quasi-judicial authorities in the proceeding on violation of their rights. And last but not least, it is also an important educational institution in the field of human rights.

The issue of rights of the Roma is also dealt with by many international organisations within their activities, e.g. the General Assembly of the United Nations, in addition to the conventional documents that will be discussed below, in December 1992, adopted the **UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**, which represents an ambitious attempt to integrate the protection of minorities in the universal concept of human rights and therefore to correct a certain deficiency associated with the Universal Declaration of Human Rights of 1948.[222] Also in the framework of the Commission on Human Rights adopted resolution 1992/65, entitled Protection of the Roma (Gypsies), which draws attention to the poor living conditions of the Roma. Also, the Committee on the Elimination of Racial Discrimination in 2000 adopted *General Recommendation No. XXVII: Discrimination against the Roma*, which urges states to take measures to protect the Roma community against racial violence as well as to improve their living conditions.[223] It must be said that no binding contractual document has been adopted yet that would at the universal level be dealing with the protection of the rights of the Roma.

Organisation for Security and Cooperation in Europe (OSCE) is active in monitoring and protecting the rights of the Roma and it regularly negotiates reports on the rights of the Roma in their states. Relevant legal document which also contains a minor dimension is the CSCE Final Act of 1975. Subsequently, other documents relating to the issues of minority rights were adopted, such as *The final document of the CSCE meeting in Vienna* of 1989, *Document of the Copenhagen Meeting of the CSCE* 1990, CSCE *Charter of Paris for a New Europe* of 1990, *Document of Meetings of Experts on National Minorities in Geneva* in 1991 and *the Declaration of the Summit of the CSCE and the Helsinki decision*s of 10 July 1992.[224] In the early 1990s the OSCE predecessor (Conference on Security and Cooperation in Europe) decided to pay special attention to the rights of the Roma and Sinti. During the following several meetings the decision was made to create an action plan to improve their situation. After long consultations at the Council of Ministers in Maastricht in 2003 an Action Plan was adopted to improve the situation of the Roma and Sinti within the OSCE by the Decision 3/03. The Action Plan is a comprehensive document that the 56 participating states undertake to take steps concerning the Roma and Sinti to secure their share of the public and political life, to eliminate discrimination against them, it also provides recommendations and possible measures to be taken to address their problems.

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222 **PETRÁŠ, R., PETRŮV, H., SCHEU, H., Ch. (eds.):** *Menšiny a právo v České republike***, Auditorium, Prague 2009, 512 p., p. 277.**

223 http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/11f3d6d130ab8e09c125694a0054932b?Opendocument, [used on 11 January 2013]

224 JANKUV, J.: *Medzinárodnoprávna ochrana práv príslušníkov menšín*; 1st edition. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2009. 316 p. ISBN 978-80-7380-210-3, pp. 160-168.

The Council of Europe (CoE) does not lag in action on the rights of the Roma either. It adopted various contractual documents governing the protection of human rights and freedoms in general (European Convention of 1950) as well as the protection of minority rights (the European Charter for Regional or Minority Languages of 1992, and the Framework Convention for the Protection of National Minorities of 1995). In addition to these documents, it deals with the issue of the Roma rights within subsequent work of their own authorities. The Parliamentary Assembly of the CoE adopted on 26 February 2010 *The report relating to the situation of the Roma in Europe and relevant activities of the Council of Europe*,[225] which referred to the discrimination of members of this ethnic group in the field of education, housing, employment and health care in the member states as well as CoE informed of their plans and strategies on the given issues. The result of the negotiations on the situation of the Roma was the adoption of Resolution 1740 (2010) and Recommendation 1924 (2010) on the situation of the Roma in Europe and relevant activities of the CoE. At the end of 2010 further report was discussed on the situation of the Roma /Resolution 1760 (2010)/[226] and in June 2012 the report on the migration of the Roma /Recommendation 2003 (2012)/.[227] CoE also raised the issue of discrimination against the Roma children.[228] **The European Commission against Racism and Intolerance** (ECRI) was created within the CoE in 1993 during the first Summit of Heads of States and Governments of the member states of the Council of Europe. Independent statute of the ECRI was adopted in 2002, thus it became an independent mechanism for monitoring human rights specializing on issues of racism and intolerance, whose task is to tackle racism, xenophobia, anti-Semitism, intolerance as well as discrimination and prejudice arising from differences of race, colour, language, religion, nationality or ethnic origin. In February 2011, an ***Ad hoc* Committee of Experts on the Roma issues (CAHROM)** was created, which reports directly to the Committee of Ministers, whose main task is to analyze and evaluate the implementation of national policies on the Roma issues and to exchange experiences of individual states in the field.

The issue of protection of the rights of the Roma can be found in the **European Union** (EU) legislation which contains the rules on the prohibition of discrimination on any ground. The European Union has for many years, within the fight against discrimination, focused only on the area of prevention of discrimination on grounds of nationality and gender. Recently, however, the EU focused attention on other possible grounds of discrimination such as racial or ethnic origin, religion or belief, disability, age or sexual orientation, resulting from Articles 10 and 19 of the consolidated version of the Treaty on the Functioning of the European Union. The Council may, with approval of the European Parliament, adopt measures to combat discrimination based, apart from others, on ethnic origin within special legislative procedures. Also, the Charter of Fundamental Rights of the European Union provides for equality of all before the law (Article 20), prohibition of discrimination on any grounds (Article 21) as well as respect for cultural, religious and linguistic diversity (Article 22). In the field of

[225] Doc. 12174 The situation of the Roma in Europe and relevant activities of the Council of Europe

[226] Doc. 12386 Recent rise in national security discourse in Europe: case of the Roma

[227] Doc. 12950 the Roma migrants in Europe

[228] Doc. 12913 Ending discrimination against the Roma children

non-discrimination on grounds of racial or ethnic origin the Council adopted Directive 2000/43/EC (20 June 2000), implementing the principle of equal treatment of persons irrespective of racial or ethnic origin (its analysis is discussed below). The fact that the EU pays an adequate attention to the Roma issue can be seen in the activities of the other bodies of the EU. The European Commission prepared and adopted in April 2011 The EU Framework for National Roma Integration Strategies up to 2020, which responds to the challenges associated with social integration of the Roma communities at the European level, since the primary responsibility for the integration of the Roma population appertains to the EU member states and their national or local or regional authorities. It is a policies whose solution fall under the authority of the member states, in particular the access to quality education (each Roma child should complete primary education), labour market (to reduce the gap in unemployment of the Roma and non-Roma), to housing, to basic services (the Roma access to running water and electricity) and health care (improved health status of the Roma population, reduce infant mortality). The aim of this strategy is therefore to reduce disparities between the Roma and the rest of the population in given areas. To achieve this goal Structural Funds will be accessible in 2014 - 2020.[229] In November 2008, the Council Framework Decision 2008/913/JHA was adopted on combating certain forms and expressions of racism and xenophobia by means of criminal law.

Next, we will address the analysis of the **case-law of quasi-judicial authorities within the procedure of individual communications of racial discrimination, particularly of Roma and the case-law of the European Court for Human Rights on the rights of the Roma ethnic group related to a breach of Article 14 (discrimination on grounds of the Roma ethnicity**) in conjunction with other factual violations of the European Convention on Human Rights and Fundamental Freedoms and its Protocol No. 12. Given that the case-law of the European Court of Justice does not yet have a decision on discrimination on grounds of the Roma ethnic group, the case concerning discrimination in hiring based on race or ethnic origin will be analyzed. Analysis of this case-law can not only arrive at a conclusion which rights with respect to members of the Roma ethnic group are most violated, but also what the behaviour against those persons is or is not in accordance with international obligations of the states.

VI. 1 Universal System of the Human Rights Protection and its Quasi-judicial Bodies

The first contractual document governing the protection of national minorities at the universal level and is very important in relation to the protection of the rights of the Roma ethnic group is the **International Convention on the Elimination of All Forms of Racial Discrimination** (hereinafter 'the Convention'). The States Parties to the present Convention declare that *'they condemn all propaganda and all organisations which are based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and*

[229] In January 2012 (resolution No. 1/2012) the Government strategy for the integration of the Roma by 2020 was approved by the Slovak Republic.

discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such (Article 4).

The Convention in its Article 1 defines racial discrimination as *'any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life.'*

The Convention, as we have previously mentioned, created a quasi-judicial body of the UN - CERD, whose jurisdiction was also recognised by the Slovak Republic, and its control mechanism consists of three procedures, two obligatory - reporting in accordance with Article 9 of the Convention and interstate communications procedures in accordance with Article 11 Of the Convention and of an optional individual communications procedures in accordance with Article 14 of the Convention.[230]

Individual communication procedure is used by foreigners as well as citizens of states belonging to national, ethnic and racial minorities. This is evidenced by the case-law of the Committee not only in relation to Slovakia, where all three notices were filed by ethnic groups and claimed a violation of their rights by the state, but according to statistics available on the Committee's website of 14 March 2011, the Committee dealt with 45 notifications, of which 17 were declared unacceptable, in 10 violation of the Convention was found, in 14 the Committee found that such a violation did not occur and 4 notices were in a process of negotiation (of which notification against Russia was declared unacceptable on 19 September 2011 and one of the notifications against Denmark was on 5 April 2012 declared partly unacceptable (Article 3) and at the same time it was stated that Article 2 and 6 were violated, but Article 4 was not).[231] The countries to which notices were targeted are Denmark (20), Australia (8), The Netherlands, Norway, Slovakia and Sweden (3), France (2), Germany, Russia and Serbia (1). The applicants submitting these complaints were members of the Roma ethnic group only in 5 cases, in 3 cases against Slovakia, in one case against Serbia and Russia.

As we have already mentioned above, the Committee received three communications in which the applicants complained of violation of rights under the Convention by the Slovak authorities.

The first notification *(Miroslav Lacko v. Slovakia)*[232] was a case of a Slovak citizen of the Roma ethnic group, who alleged a violation of Article 2 *(prohibition of racial discrimination by state authorities, prohibition of sponsor, defend and support of racial discrimination),* Article 3 *(a conviction, the prohibition and elimination of racial segregation and apartheid),* Article 4 *(commitment of the state to declare a criminal dissemination of ideas of racial superiority or hatred, incitement to such acts as well as providing support to racist activities),* Article 5 *(prohibition and elimination of all racial discrimination and safeguard the right of everyone to equality before the law without discriminatory distinction)* and Article 6 *(obligation of the State to ensure the protection of all persons against acts of racial discrimination and compensation)* of the Convention that he was not served at a restaurant in Košice at the railway station. After he entered with other persons into the res-

[230] More about CERD see unit VI. The Jurisdiction of Quasi-judicial Authorities of the United Nations.

[231] UN Doc. CERD/C/80/D/46/2009

[232] UN Doc. CERD/C/59/D/11/1998

taurant the waitress told him that the owner commanded not to serve the Roma. The owner justified that his facility was destroyed by the Roma in the past. The applicant complained that neither he nor his companions destroyed his facility. Then he listened to the claim that only the decent Roma will be served. The applicant initiated criminal proceedings which resulted in the verdict, in which the court found the behaviour of the owner of the restaurant to be illegal, found him guilty and levied him a fine of 5000, - SKK (Slovak crown) or imprisonment for 3 months. The Committee declared this communication to be acceptable and after examining the case concluded that the verdict of finding the restaurant owner guilty and a penalty charge were in accordance with obligations of the state in the fight against racial discrimination. Based on this opinion, the Committee did not find violation of the provisions of the Convention by the state, but advised the Slovak Republic to supplement its legislation on law guaranteeing freedom of access to public places *(access to all places and for use of all services for the public),* in accordance with the provisions of Article 5, Point f) of the Convention.

Second successful notification from a perspective of an applicant submitting a complaint *(Anna Koptová v. Slovakia)*[233], was the case of the Roma activists, who represented seven Roma families from villages Rovné and Zbudské Dlhé. In 1981 they found work in the agricultural cooperative in the village of Krasny Brod, parts Ňagov and Rokytovce and they gained permanent residency here in accordance with the law. In 1989, the cooperative terminated employment with their families and they were forced to leave their homes based in the cooperative facilities and demolished after their departure. These families were trying to get accommodation in the district of Medzilaborce over the following few years but none of them allowed location of their own caravan (rent of which was ensured by the Social Security Administration in Medzilaborce) in the locations of these villages. In 1997, the families settled in the village Čabiny, whose inhabitants, however, disagreed with this action and therefore the mayor agreed with mayors of Čabalovce and Ňagov on accommodation of these families in the locations of their villages. The mayor of Rokytovce was not present at this meeting and the municipal council approved on 8 June 1997 Resolution No. 21, which expressly prohibited the Roma families to settle in the locations and at the same time declared that they are not the original inhabitants of this village and after separation of Rokytovce from Krásny Brod they are not entitled to reside in the village. A similar resolution No. 22 with unlimited duration was adopted on 16 July 1997 by the representatives of the village Ňagov, which prohibits the entry and presence of the Roma people in the locations of the village. Concerned citizens therefore asked to investigate the legality of both resolutions of the Prosecutor General of the Slovak Republic also turned to the Constitutional Court of the Slovak Republic, which rejected their submission. After the notification was submitted in 1998 to the Committee objecting the violation of the rights contained in Articles 2, 3, 4, 5 and 6 of the Convention, highlighting the violation of the right to freedom of movement and residence within the borders of the state, the special session on 8 April 1999 brought together representatives of community councils of Ňagov and Rokytovce and attended by District Attorney they cancelled disputable resolution within the interlocutory. The Committee declared communication to be acceptable and after obtaining all the circumstances of the case issued an

[233] UN Doc. CERD/C/57/D/13/1998

opinion, in which stated violation of the right to freedom of movement and residence within the borders of the state *(Article 5, Points d) i) of the Convention)* during the period of dispute resolutions (June 1997 - April 1999) by the Slovak Republic on the ground of wording of the resolutions, which clearly indicated that not only the affected Roma families have been denied residence and movement in given villages, but other Roma too. It was also from the part of the committee advised to Slovakia to take necessary measures to ensure complete elimination of practices limiting freedom of movement and residence of the Roma under its jurisdiction.

The final notification of the Committee *(Ľ.R. and others v. Slovak Republic)*[234] concerned discriminatory acts of the Dobšiná City Council, which first approved construction of low standard housing by adopting a resolution (as identified in the complaint, the complainants) for the Roma inhabitants of the city and ordered the mayor the task to prepare a project to secure funding from a government fund set up specifically to improve housing conditions of the Roma in a contracting state, as about 1,800 Roma live in an unsuitable housing of the city. Then the people of the town created a five-member petition committee that prepared the petition, signed by 2,762 (the Roma as well) population of the city (out of 4963) with the text: 'I disagree with the construction of low-cost housing for the citizens of the Gypsy ethnicity in Dobšiná city because there is a risk of inflow of the Gypsy ethnic group from the neighbourhood, even from other districts and regions.' The petition was presented to the city Council 30 July 2002 which unanimously approved cancelling the original order through a second resolution explicitly referring to the petition. The complainants requested to investigate the contents of the petition and the prosecution of the authors and approached the District Attorney in Rožňava who rejected the application on grounds of lack of authority for such procedure. The complainants submitted a complaint to the Constitutional Court with a request to cancel the second resolution of the city council and to review the legality of the petition as Articles 12 and 33 of the Constitution, the Law on the Right to Petition and the Framework Convention for the Protection of National Minorities were violated.[235] Given that the submission was not complete (though the Constitutional Court twice asked complainants to complete their application); the Constitutional Court subsequently dismissed the complaint as manifestly unjustifiable. The notification addressed to the Committee argued that *Articles 2, 4, 5 and 6 of the Convention* were violated. The Committee after examining the notification concluded that Slovakia violated Article 2, Paragraph 1, Point a) *(prohibition of racial discrimination and the duty of all public authorities and institutions to act in conformity with this commitment),* Article 5, Point d) iii) *(prohibition of racial discrimination and a guarantee of the right of everyone to citizenship)* and Article 6 of the Convention *(right to ask the courts for a fair and reasonable compensation for the damage suffered as a result of racial discrimination)* and is required to provide to the complainants an efficient remedy in accordance with Article 6 of the Convention and to ensure that similar breaches in the future did not occur. In particular, Slovakia should take measures to ensure the position of the complainant prior to the adoption of the second resolution of the city council. On 9 June 2005, The Slovak Republic informed the Committee that the city

234 UN. Doc. CERD/C/66/D/31/2003

235 (Strasburg, 1 February 1995) - Published in Collection of Laws of the Slovak Republic under No. 160/1998 of Coll.

council in Dobšiná cancelled two resolutions relating to the given case, taking into account the opinion of the Committee, and reached the agreement in relation to the implementation of low-cost housing in a given area and will pay particular attention to the housing problems of the Roma community. Criminal proceedings against five members of the Petitions Committee were also initiated in accordance with § 198 and the Criminal Law.[236]

Another state against which an individual communication was directed in 2003 is **Serbia and Montenegro** *(Dragan Durmic v. Serbia and Montenegro)*.[237] Complainant Dragan Durmic, a citizen of Serbia and Montenegro, but of the Roma nationality, who was represented in the proceedings by the European Roma Rights Centre, alleged a violation of Article 2, Paragraph 1, Point d) *(the prohibition and elimination of racial discrimination applied by anyone)*, Article 5, Point f) *(the right of access to all places and to use all the services to the general public),* Article 3 *(racial segregation),* Article 4, Point c) *(prohibition on public authorities and institutions to promote or incite racial discrimination)* and Article 6 *(obligation of the state to ensure the protection of all persons against acts of racial discrimination and damages)* of the Convention. In 2000 a number of "tests" were made on the territory of Serbia, resulting data of which should have served as information whether or not the Roma minority is discriminated in respect of the right of access to public places as the number of complaints about denial of such access to the Roma was increasing. On 18 February 2000, two Roma (one of which was a complainant) and three persons of non-Roma origin decided to visit a discotheque in Belgrade. All five were smartly dressed, behaving decently and were not under the influence of alcohol. The only distinguishing feature was therefore the colour of their skin. While two members of the Roma had been denied access on grounds that it is a private party and without invitation admission is impossible, the other three were allowed entry without invitation. On 21 July 2000 from the part of the Humanitarian Law Centre on behalf of the complainant a complaint was filed to the Public Prosecutor's Office in Belgrade because of an offense under Article 60 of the Criminal Law of Serbia, referring to a breach of Article 5, Point f) of the Convention. They had not received a response for seven months and therefore asked the prosecution again to act. In October 2001, was the Humanitarian Law Centre informed by the prosecutor that the owner of the disco on the given evening held a private party, which in its response to the Committee was confirmed by the Ministry of the Interior (which also reported that the disco owner is unable to identify members of the security services who were in charge on the given evening because of frequent rotation of personnel). In January 2002, the complainant turned to the Federal Constitutional Court with a petition, which, however, did not act in the matter the following 15 months. The complainant also stated that the use of "testing" as techniques to gather evidence about discrimination had been permitted since 1950 by the U.S. courts and also the committee acknowledged this possibility[238] and also stated that he had used all available domestic remedies for cure since the former Republic of Yugoslavia (predecessor of Serbia and Montenegro) in its Declaration of 27 June 2001 stated that the Federal Constitutional Court is the fi-

[236] UN Doc. CERD, A/60/18 (2005)

[237] UN Doc. CERD/C/68/D/29/2003

[238] *Lacko v. Slovakia*, Case No. 11/1998, Opinion of 9 August 2001, *B.J. v. Denmark*, Case No. 17/1999, Opinion of 17 March 2000 and *M.B. v. Denmark*, Case No. 20/2000, Opinion 13 March 2002.

nal judicial authority that can negotiate redress of the issue of discrimination, but only if no another solution is possible to use. This principle remained retained in the new constitution of Serbia and Montenegro of 4 February 2003. However, until the filing of his individual communication the complainant did not live to see the second hearing of his complaint neither by the Federal Constitutional Court of the former Republic of Yugoslavia nor its successor, the Constitutional Court of Serbia and Montenegro. Nevertheless, the Committee recognised the communication admissible in terms of exhaustion of domestic remedies, given that Article 14, Paragraph 7, Point a) of the Convention allows to deal with the communication, although not all domestic remedies were exhausted, because the correction procedure is prolonged without justification (the complainant submitted his complaint to the Constitutional Court on 30 January 2002 and to the date of the issued opinion to this notification by the Committee – 6 March 2006 – The Constitutional Court failed to set a hearing in the given matter). The Committee ultimately decided that there was a breach of Article 6 of the Convention, despite the fact that Serbia and Montenegro did not investigate the given incident and therefore could not talk at the same time about the violation of substantive law (Article 5, Point f). Case-law of the Committee acknowledges this possibility.[239]

In the case of ***A.S. v. Russian Federation***[240], the complainant, a Russian citizen of the Roma ethnic group born in Pskov region, but currently living in St. Petersburg, complained that the Russian Federation violated the provisions of Articles 4, 5 and 6 of the Convention. On 16 July 2008, in the town of Opoška in Psovsky region she found a flyer on an electric post with the text, which was insulting members of the Roma ("black bastards") and in an indiscriminate way it drove them out of the area. She filed a complaint to the prosecutor of the Pskov region with the commencement of criminal proceedings for breach of Article 282 *(incitement to hatred or enmity, degrading of human dignity)* and Article 280 *(call for public support for extremist activities)* of the Criminal Law of the Russian Federation. They later found two other flyers with similar content and displayed Nazi swastika. This office, however, based on the finding that the author of these flyers was the third person who was in a dispute with the persons listed on that flyer, did not start prosecution for the above mentioned violation of Articles 282 and 280 of the Criminal Law for lack of evidence, but found breaking the law, because of other crimes and slander, insult, which could be investigated only if the complaint was submitted by the damaged person. This decision was subsequently re-examined five times, but each time it was completed with the same decision not to initiate criminal proceedings, as the competent authorities referred to the authors' assertion flyers who claimed that the purpose was only to frighten two people mentioned on the flyer therefore the flyer content had not been directed against anyone. The court to which the complainant had been approached did not rectify remedy with the reason of fruitless expiration day period of appeal against the first decision of the prosecutor. Subsequently, the court dealt with the reference to the fourth decision of the prosecutor, but decided on a lack of standing of the complainant given the fact that the applicant is not a resident of the city Opoška but Vlesno village, where the flyers were not distributed. Consequently, the communication was addressed by

[239] *Habassi v. Denmark,* Opinion No. 10/1997, adopted on 17 March 1999 and *Kashif Ahmad v. Denmark,* Opinion No. 16/1999, adopted on 13 March 2000.

[240] UN Doc. CERD/C/79/D/45/2009

the Committee, which basically accepted the decision of the Russian authorities and decided on non-admissibility of the notification *ratione personae* with reasoning coming from settled jurisprudence of the Committee, which determines that a breach of provisions of the Convention must be of individual concern to the complainant (must therefore be direct victims of violations of the Convention) and can not investigate disputes without the general nature of the identified victims *(actio popularis).* However, the Committee reminded the state authorities about the obligation to begin investigating such violations of the Convention (encouraging racial hatred and discrimination), *ex offo*, regardless of the violation of national legislation.

Similar arrangement of individual communications was received within the **International Covenant on Civil and Political Rights**, or its Optional Protocol (New York, 16 December 1966, published in the Collection of Laws under No. 169/1991 Coll. Series) and more specifically in Article 1, which allows receiving and considering such communication from citizens of contracting states of the Covenant and the Protocol. Substantive provision on the protection of minorities is found in Article 27[241], which states that in those states where ethnic, religious or linguistic minorities exist, they shall not be denied the right of their members to enjoy their own culture, to profess and practice their own religion or to use their own language together with other members of their group. Despite the negatively worded provision compared with other positively and clearly worded provisions, this one is by now the only legally binding standard governing the protection of the rights of national minorities at the universal level.[242] CCPR has still not received a communication which after an investigation would allege a violation of the rights of the Roma ethnic group because of ethnicity.

CEDAW was founded on the bases of the **Convention on the Elimination of All Forms of Discrimination against Women.** CEDAW has responsibilities within the reporting procedure in accordance with Article 18 of the Convention, and individuals may submit communications in accordance with Article 1 and the Optional Protocol.[243] Proceedings before this Committee are almost identical with the proceedings before the UN Committee on the Elimination of Racial Discrimination.[244] The Committee dealt with the causes, of which the complainants were members of the Roma ethnic group. It dealt with the case, which concerned the Slovak Republic and sterilisation of the Roma women.

On 21 September 2004 an international NGO submitted a communication on systematic violation of Article 12 (*elimination of discrimination against women in health care, the care of women in relation motherhood*) of the Convention in accordance with Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against women to CEDAW by the Slovak Republic in relation to the al-

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241 WELLER, M. (ed.). *Universal Minority Rights, a Commentary on the Jurisprudence of International Courts and Treaty Bodies.* Oxford: Oxford University Press, 2007, pp. 10-11

242 **PETRÁŠ, R., PETRŮV, H., SCHEU, H., Ch. (eds.):** *Menšiny a právo v České republike***, Auditorium, Prague 2009, 512 p., p.270.**

243 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 6 October 1999) - Published in Collection of Laws of the Slovak Republic under No. 343/2001 of Coll;

244 UN Doc. A/56/38, Annex I, Rules of Procedure of the Committee on the Elimination of Discrimination against Women

leged sterilisation of the Roma women. Following the opinion the Government of the Slovak Republic was informed by the Secretariat of CEDAW on 1 August 2005 about the awards for its legislative action (adoption of a new law on health care) and about not pursuing the investigation in accordance with Article 8 of the Optional Protocol.[245]

Another case where the complainant was a member of the Roma ethnic group where the reason for a communication was also the complainant's sterilisation is the case ***A.S. v. Hungary.***[246] Despite the fact, that the forced sterilisation of the member of the Roma ethnicity had been made by hospital personnel before the Optional Protocol to the Convention for Hungary came into force, which allows an individual notification, CEDAW did not consider this communication inadmissible *ratione temporis* because it is a fact of continuous nature and recognised violation of Article 10, Point h) of the Convention. The complainant is the mother of three children, and in 2000 she was pregnant again, her pregnancy was terminated by the cesarean section, by which a dead embryo was pulled out from her body. Before the operation she had been asked by the hospital staff to sign consent to a cesarean, transfusion and anaesthesia. In the agreement with the cesarean she signed the consent to sterilisation, but she did not know it, because it was difficult to read a hand-written text, which used Latin terms whose meaning was not clear. Among other things, hence her signature confirmed that she is aware of the death of the embryo and does not want to be pregnant and give birth again and at the same time applied for sterilisation. Before leaving the hospital, she asked the doctor when will be able to get pregnant again and within this conversation she understood the meaning of the word 'sterilisation', to which she would not have given her consent because of her Catholic faith and her role in the Roma family. The complainant approached the action to the Court of First Instance, which dismissed her motion. The Court of Second Instance stated that the hospital staff acted negligently because they did not explain to the patient the importance of the signed statements and the risks and consequences of actions they were about to perform. However, given that the complainant has no sustained damage and a causal relationship had not been proved with hospital procedure, the Court of Appeal dismissed the appeal. The Committee found a violation of Article 12 of the Convention *(right to health care especially during pregnancy and puerperium)* and Article 16, Paragraph 1, Point e) *(right to freely decide on the number of children and time of their birth and to have access to information to ensure the applicability of this right)*

The last Committee addressing the issue of violation of the rights of the Roma ethnic group is **CAT**.[247] The case ***Hajrizi Dzemajl et al. v. Yugoslavia***[248] is concerned with the violation of rights of 65 people, all young citizens of Yugoslavia of the Roma origin

[245] Second and third periodic report from SR to the Convention on the Elimination of All Forms of Discrimination against Women /for the period 1998 to 2006/ the source: http://www.foreign.gov.sk/App/WCM/main.nsf?Open*);*

[246] UN Doc. CEDAW/C/36/D/4/2004

[247] Established in accordance with Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) - Published in Collection of Laws of the Slovak Republic under No. 143/1988 of Coll. Valid for the Slovak Republic based on the succession to the rights and obligations of the former Czechoslovakia, (hereinafter the "Convention against Torture")

[248] UN Doc. CAT/C/29/D/161/2000

from the village Danilovgrad, who were arrested in April based on a report that two young Romas raped a girl, a member of an ethnic minority in Montenegro. The same day, members of the same ethnic group as the girl, assembled in front of the police station and demanded that the Roma were expelled from the village and their houses set on fire. Later, the two young Roma, out of the group of arrested, confessed and the others were released. They were also warned by the police to leave Danilovgrad immediately after the release together with their families as they face lynching by non-Roma neighbours. Similar warnings had been raised by the other inhabitants of the Roma settlement Bozova Glavica, most of whom left the village. Only a few men and women remained in the village to guard their property and livestock. Then a group of several hundred members of the Roma ethnic group rushed into the village and began to demolish the settlement, including burning buildings. Police despite their presence parked the car at a safe distance and very mildly tried to persuade the strikers to end their action. The entire Roma settlement was destroyed and the police, although it did nothing to prevent this situation, however was able to take measures to protect others from the devastation of surrounding buildings, which belonged to non-Roma population. During the investigation, it was proven that not only some residents of Danilovgrad, not members of the Roma ethnic group, but also some police officers were present at the destruction of the Roma settlement. Police opened a criminal investigation in accordance with national law. Then they began a tangle of events which resulted in the authorities participating in legal proceedings which stopped the investigation of the incident. Later 71 victims applied for compensation not only for the complete destruction of their property, but also for non-pecuniary damage consisting of compensation for distress, pain, violation of their honour, reputation, freedom of movement and the right to choose their own place of residence. After submitting the proposal, however, for more than five years nothing happened in given proceedings. Eight Roma (complainants) were fired by their employer for their absence at work due to fear about their lives for more than five consecutive working days. Competent Court of First Instance did not grant their request for a change of the decision on this appeal, the Court of Appeal ordered a retrial, but the action was long again without a final decision. Complainants were driven from their homes which together with their property were completely destroyed and therefore were forced to stay in the capital of Montenegro, with the support of the local Roma, but in poverty and provisional conditions. Complainants in their communication to CAT claimed violation of Article 2, Paragraph 1 (state obligation to prevent torture) in conjunction with Article 1 (definition of torture), Article 16, Paragraph 1 (obligation of the state to prevent a public official in his behaviour other than torture, but cruel, inhuman or degrading) and Article 12 (duty to investigate torture), 13 (right to have re-investigate complaints from a person who have been subjected to torture), 14 (right of a torture victim to redress a fair and adequate compensation), either individually or in conjunction with Article 16 of the Convention against Torture. Although the state objected on grounds of inadmissibility of the communication procedure in accordance with national legislation, as well as non-exhaustion of all available remedies, CAT decided on the admissibility of the notification and decided on a violation of Article 16, Paragraph 1 and Article 12 and 13 of the Convention Against Torture and called on the contracting party to conduct a proper investigation of the facts, which occurred 15 April 1995 as well as to prosecute

and punish those responsible for these acts and to provide adequate compensation to the complainant. At the same time the state is obliged to inform CAT of the action taken within the following 90 days.

VI. 2 European System of Human Rights Protection

The basic document for the protection of minorities (hence the Roma) is the ***European Convention on Human Rights and Fundamental Freedoms*** of 1950 (hereinafter "European Convention"),[249] in particular its Article 14, which refers to the prohibition of discrimination on any ground such as race, sex, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, gender or other status *("13 reasons of prohibited different treatment").* In conjunction with Article 1 of the European Convention can be said that the rights and freedoms set in this Convention any contracting state is obliged to secure for everyone within its jurisdiction without discrimination. The European Convention thus does not provide direct protection of minority rights, the protection of minorities is possible on the basis of anti-discrimination clause provided for in Article 14 of the European Convention. The term "(un) discrimination" is sufficiently addressed in the judicature of the European Commission of Human Rights and also the European Court. It shows that despite the fact that they can not rely on a violation of Article 14 itself, it is an important complement to other substantive provisions of the European Convention and its protocols. Individuals, who are in similar situations, are protected from any discrimination just because of a provision of this article. Discriminatory measure of the state, which may otherwise not be contrary to the provisions of the European Convention and its Protocols may be in conflict with that Article just in combination with Article 14. We can say that this Article is an integral part of any provision of the European Convention and its Protocols, which guarantees a specific right or freedom. In practice, this means that at first the violation of a particular right or freedom protected by other provisions of the European Convention must be proved, and only then Article 14 is applied, it is examined whether there has been a violation of given provision also a discrimination of a complainant. Thus, Article 14 does not prohibit discrimination in general, but only in context with the application of the rights and freedoms of the European Convention and its protocols, therefore if any provision of the European Convention or its protocols do not guarantee (even if only implicitly) the right or freedom, the infringement of which an individual objects to, Article 14 does not have its own sphere of activity and thus its own independent existence. Apparent autonomy of Article 14 comes from its provision, but it can be applied only in the context of the rights and freedoms of the European Convention and its Protocols (judgment in the case of Abdulaziz, Cabales and Balkandali of 1985, Series A-94.[250] The Court in its decision, in the case of ***Willis v. the United Kingdom*** (application No. 36042/97, 11.06.2002) ruled that *discrimination involves the differential treatment of persons who are in a comparable situation, and that*

[249] Published in Collection of Laws of the Slovak Republic under No. 209/1992 of Coll. (Protocol No. 11 published separately in Collection of Laws of the Slovak Republic under No. 102/1999 of Coll.)

[250] ČAPEK, J.: *Evropská úmluva o ochraně lidských práv,* komentář s judikaturou. 1. část: Úmluva, 1st Edition, Prague, Linde, 2010. 887 p., pp. 621-2

the differential treatment is made without an objective and reasonable grounds. At the same time, the Court states, that Article 14 allows in relation to certain groups, a different treatment but only in the event that such treatment would be balanced 'factual inequality'. Under certain circumstances, it may indeed result in the violation of this Article just because there is no objective and reasonable justification for a different treatment and it did not come to an adjustment of inequality /***Thlimmenos v. Greece*** (application No. 34369/97, 06.04.2000)/. The Court also acknowledges that the policy or general measure that has disproportionately negative impact on a particular group may be considered discrimination, although it is not directed specifically against this group /***Hugh Jordan v. United Kingdom*** (24746/94, 04.05.2001)/. Result from the above mentioned is, that for the bodies of the Council of Europe, the existence of different treatment during the violation of the prohibition of discrimination and an objective *("13 reasons of prohibited different treatment")* and reasonable justification for such treatment are important *(which occurs when there is no legitimate target of a different treatment and a reasonable relationship between the means employed and the aims pursued)*. The most common violation of prohibition of discrimination is therefore of a prohibited different treatment, is the membership of a national minority. Discrimination can occur not only in assessing violation of the prohibition of discrimination, so we talk *material-legal aspect*, but also in a process of determining whether or not the violation of the prohibition of discrimination took place, *i.e. procedural-legal aspect*.

A new approach to non-discrimination comes along with **Protocol No. 12**, which prohibits all forms of discrimination to the European Convention and which entered into force on 1 April 2005.[251] Article 1, Paragraph 1, of the Protocol No. 12 determines that the enjoyment of all rights provided by law shall be secured without discrimination on any ground ("*13 reasons of prohibited different treatment")* and Paragraph 2 determines that any public authority can not discriminate based on any ground, especially on those set out in Paragraph 1. When Article 14 of the European Protocol and the provisions of the Protocol No. 12 are compared it is clear that, whilst Article 14 has no independent nature and should be applied at all times in connection with another law of the given Convention, Protocol No. 12 allows direct protection without requiring further connection with another law of the European Convention.[252] Prohibition of discrimination is also linked with the principle of equality, content of which is a requirement towards public authorities and bearers of human rights to be treated equally in equal circumstances and unequal situations unequally. While the principle of equal treatment in equal situations automatically results from the provisions of the Convention, the second principle is the result of decision-making practice of the bodies of the Council of Europe, *e.g*. the decision on the ***Thlimmenos v. Greece*** (application No. 34369/97, 06 April 2000), which states that discrimination may occur when states without an objective and reasonable justification do not treat persons

[251] Protocol No. 12 signed by the Slovak Republic on 14 November 2000 and has not until now ratified (09 November 2012), the source: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=11/11/2012&CL=ENG [used on 15 December 2012]

[252] JANKUV, J.: *Medzinárodnoprávna ochrana práv príslušníkov menšín;* 1st Edition. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2009. 316 p. ISBN 978-80-7380-210-3, pp. 116-117

differently whose situations are significantly different.[253] At the same time the Court in its decision in the case of ***Zarb Adami v. Malta*** (application No. 17209/02, 20 September 2006) stated that differential treatment may be contrary to Article 14 if it is not regulated by a normative regulation and therefore cause or source of discrimination may thus be a "practice" or "factual situation". At the same time, in relation to the burden the Court established that if the complainant proves the existence of differential treatment, the government must prove its merits /***Timishev v. Russia*** (application No. 55762/00, 55974/00, 13 December 2005)/. The Court in its judgment in the case of ***Nachova and others v. Bulgaria*** (application No. 43577/98 and 43579/98, 06 July 2005) stated *inter alia* that discrimination based on ethnic origin of a specific person is a form of racial discrimination, which is particularly despicable and as such, requires, due to the potentially dangerous consequences extreme awareness of a clear response from competent authorities. This is how the bodies of the Council of Europe decided on the number of complaints which objected to the violation of the prohibition of discrimination as a consequence of belonging to the Roma ethnic group, but not in all cases did the court acknowledge the complainants' argument. Violation of any rights or freedoms guaranteed by the European Convention was often stated, but not of non-discrimination. There are a few cases in which a violation of Article 14 was acknowledged (or Protocol No. 12):

The case ***Moldovan and Others v. Romania*** (application No. 41138/98 and 64320/01, 12 July 2005). Members of the Roma ethnic group complained that after an argument with another three Roma villagers, during which a son of a villager was killed, the Roma fled to a neighbouring house, and then an angry crowd (in which there were also members of the local police) set the house on fire, one Roma burned inside, as the crowd prevented him to leave the building and the other two Roma were beaten to death by the crowd. The following day 13 Roma houses were completely destroyed and several of them were damaged (the crowd was apparently challenged by the police). Then the inhabitants of these houses were forced to leave their residence and live in very poor conditions, which resulted in the deterioration of their health. The Court found a violation of Article 3 (prohibition of torture) and 8 (right to respect for private and family life) and Article 14 in conjunction with Article 6 (right to a fair trial) and 8. The Court noted that attacks on complainants were induced by their belonging to the Roma ethnic group, which was the reason for the length and outcome of the national proceedings. This case is related to the following case ***Lacatus and others v. Romania*** (application No. 12694/04, 13 November 2012). A member of the Roma minority, a companion of the Roma killed during the events of 20 September 1993, and her two daughters complained about the violation of Article 3, 6, 8 and 14 in conjunction with Article 6 and 8 of the European Convention on grounds that they had been discriminated on the basis of their ethnicity and their rights had been violated by judicial and other authorities. The reason for the complaints was the proceedings of the authorities in relations to the incident, which happened in 1993. Investigation and the trial followed that was unreasonably long, and during this period the applicants were forced to live away from home in cramped and very poor conditions. The European

[253] SVÁK, J.: *Ochrana ľudských práv (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práv*), 2nd amended edition. Žilina: Poradca podnikateľa, 2006. - 1116 p. (EUROKÓDEX). ISBN 80-88931-51-7., p.973

Court confirmed a violation of Article 3, 6, 8 and Article 14 in conjunction with Article 6 and 8 of the European Convention. The Court issued a similar verdict in the case of ***Paraskeva Todorova v. Bulgaria*** (application No. 37193/07, 25 March 2010), where the complainant, member of the Roma minority argued that a court composed of a professional judge and two lay judges decided on her punishment of imprisonment for three years for fraud and rejected the conditional sentence, as they believe that the minorities do not consider probation to be punishment. Here, too, The Court found a violation of Article 14 in conjunction with Article 6, Paragraph 1 of the European Convention.

The cases ***D.H. and others v. Czech Republic*** (application No. 57325/00, 13 November 2007) and ***Sampanis and others v. Greece*** (application No. 32526/05, 05 June 2008) cases concerning placement of the Roma children in special schools *(schools for children with learning disabilities or requiring special care)* in case of the Czech Republic or in preparatory classes located outside the main school building in Greece. The Court in these cases had consistently decided that such conduct committed by states was a violation of Article 14 of the European Convention in conjunction with Article 2 of the Protocol No. 1 (right to education). The opposite view was however in the case of ***Oršuš and others v. Croatia*** (application No. 15766/03, 16 March 2010), where complainants objected to the inclusion of their children to the "Roma-only classes." Here the Court stated by contrast that the practice of including the Roma children in the "Roma-only classes" based on the entry exam (and subsequent demonstration of lack of knowledge of the Croatian language at the appropriate level) occurred only in four primary schools in a particular region (which had a high proportion of the Roma ethnicity) and therefore can not be regarded as a general policy of the state. Placement of the Roma children in separate classes is thus seen as a positive measure designed to help these children to acquire knowledge to enable them to be integrated into regular education.

The case ***Munoz Diaz v. Spain*** (application No. 49151/07, 08 March 2010). In this case, the Court found a violation of Article 14 in conjunction with Article 1 of the Additional Protocol (protection of property) that after the death of her husband (whom she marry by rites of the Roma minority) the complainant was denied a widow's pension provision by public authorities on the grounds that she did not enter into marriage in the form of civil marriage.

The case ***Sejdic and Finci v. Bosnia and Herzegovina*** (application No. 27996/06, 34836/06, 22 December 2009). The verdict in this case is the decision of discrimination of complainants in the electoral law, as under the law they did not have the right to stand for election to the House of Peoples of Bosnia and Herzegovina, because of lack of the "constitutive" nation (as they claimed to be of Jewish or the Roma origin and not Bosnians, Croats and Serbs) based on the Constitution of Bosnia and Herzegovina which acknowledges the right to stand for election only for "constituent" peoples (Article 4 of the Constitution). The Court had concluded that it was a violation of Article 14 in conjunction with Article 3 of the Additional Protocol (right to free elections) and Article 1 of Protocol No. 12 (general prohibition of discrimination). The case ***Fedorčenko and Lozenko v. Ukraine*** (application No. 387/03, 20 September 2012), the case of the burnt house whose inhabitants were members of the Roma minority. On 28 October 2001, a complainant left his house and met face to face with the

police officer and two other people, who attacked him, beat him and forced into the house, which was subsequently set on fire. Other family members of the complainant were in the house, two of whom were burnt in the house and the other three died in hospital as a result of burns. One of the victims was selling drugs in the house. Ukrainian authorities joined the investigation to the murder of two members of the family of the complainant as well as the arson of his house. During the investigation, prosecution of the member of the police and of another accused person was suspended in the end (due to his death). The Court found that there had been a violation of Article 14 in conjunction with Article 2 of the European Convention (right to life) in relation to the procedural part, as in the case of racially motivated crime there is an explicit obligation to investigate the offense and the Ukrainian authorities failed to conduct effective investigations into this incident. The same violation of the European Convention was stated by the Court in the case of ***Angelova and Iliev v. Bulgaria*** (application No. 55523/00, 26 July 2007). In this case, 28-year-old Roma was killed who died as a consequence of an attack by seven teenagers, one of which stabbed him several times. Apart from one of the attackers, all others were minors. The investigation was completed and the file was forwarded to the prosecutor, who did not work with the case the following four years, as a result of which limitation period in relation to some of the accused expired. In the case of ***Nachova and other v. Bulgaria*** (application No. 43577/98 and 43579/98, 06 July 2005), the Court also found a violation of Article 14 in conjunction with Article 2 of the European Convention that the state authorities did not examine possible racist motives of the events that led to the death of members of the Roma ethnic minority, Mr. Angelov and Petkov, who were murdered by a military police officer who was trying to arrest them. Investigative authorities believe that the police officer acted in accordance with military regulations and the court refused to punish him accordingly. The Court emphasised that any evidence of racist verbal statements of police officers in the event of use of force against members of minority or ethnic group is important to assess whether or not it was illegal, racially motivated use of force. Also in the case of ***Yotova v. Bulgaria*** (application No. 43606/04, 23 October 2012) there was an attack on a member of the Roma ethnic group, which left lasting effects after the injury and who complained that the authorities not only failed to meet its obligation to effectively investigate the attempted murder of her but made no attempt to investigate whether it was racially and ethnically motivated crime. Here, too, the court acknowledged the violation of Article 14 in conjunction with Article 2 of the European Convention.

The case ***Cobzaru v. Romania*** (application No. 48254/99, 26 October 2007). The complainant, the local Roma leader's son, forcibly opened an apartment of his girlfriend in presence of another person, because he suspected that she tried to commit suicide (as she tried it in the past). The apartment was empty, and after leaving the place he met a brother-in-law of his girlfriend and three other people, all of them were armed with knives and tried to attack him. But he escaped, and then consequently learned that the police are looking for him because of the complaint of his girlfriend's brother-in-law, and so he himself went to the police with an idea to clarifying the matter. There several police officers beat him and forced him to sign a statement that he was beaten by his girlfriend's brother-in-law. And they also said that his father's position in a given situation is not at all in his favour. The Court acknowledged the

breach of Article 14 in conjunction with Article 3 (prohibition of torture) in the process plane and Article 13 (right to an effective remedy) that the authorities failed to investigate possible racist motives of behaviour by police officers in their mistreatment of the complainant combined with their attitude during the investigation. The Court found the same violation of the European Convention in the case ***Petropoulou-Tsakiris v. Greece*** (application No. 44803/04, 06 March 2008). Similar judgements (violation of Article 14 in conjunction with Article 3 of the European Convention) were issued in the case ***Stoika v. Romania*** (application No. 42722/02, 04 June 2008), in which the Roma citizens were harmed by the police officers as well as in the case ***Šečić v. Croatia*** (application No. 40116/02, 31 August 2007), where the complainant was attacked and brutally beaten during the attack and bullies shouted racist insults. The violation of Article 14 in conjunction with Article 3 of the European Convention (failure to investigate possible racist motives events) occurred in the case of ***Bekos and Koutropoulos v. Greece*** (application No. 15250/02, 13 March 2006), where as in the previous cases, the complainants reported health harm by the police officers.

VI. 3 Protection of Minority Rights in the European Union

The European Union has for many years focused within the fight against discrimination only on the area of prevention of discrimination on grounds of nationality and gender. Recently, however, the EU has focused attention on other possible grounds of discrimination such as racial or ethnic origin, religion or belief, disability, age or sexual orientation, as is clear from Article 10 of the consolidated version of the Treaty on the Functioning of the European Union. In the field of prohibition of discrimination on grounds of racial or ethnic origin within **the Council Directive 2000/43/EC (20 June 2000)** was adopted, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The directive defines *direct discrimination* as a situation in which one person on grounds of race or ethnic origin is treated in a comparable situation less favourably than another person and *indirect discrimination* as a situation where as a result of an apparently neutral provision, criterion or practice would be a person of a particular race or ethnicity put in a less favourable situation compared with others. An exception is the situation in which a stated provision, criterion or practice would be justified by a legitimate aim and the means to achieve it are appropriate and necessary. Given the above, as well as the objective of this contribution it should be noted that the Court of Justice of the European Union (hereinafter "EU Court") still has not decided on a case involving those of the Roma ethnic group. However, the proceedings have not been terminated in the case ***Komisia za zashtita ot diskriminatsia – Valeri Hariev Belov v. ChEZ Elektro Balgaria AD, ChEZ Raspredelnenie Balgaria AD and Darzhavna Komisia po energiyno i vodno regulirane (Case C-394/1),*** which is at the same time the first case before the Court of the EU, alleging violation of the rights of the Roma on grounds of the Roma ethnicity. The reason for initiating the dispute is practice existing in two urban areas of the Bulgarian town of Montana, where mostly members of the Roma ethnic group live, and where companies responsible for the supply and distribution of electricity (they operate under the supervision of the State Commission for Regulation in energy and water management) place elec-

tric meters on power poles at 7 meters, while in other parts of the city they place them at a maximum of 1.7 meters and were thus accessible for the consumers. The supply company in its general terms committed to allow indirect visual inspection of meters located at 7 meters on the written request of the customer within 3 by porting a special vehicle with an elevator, but so far none of the customers concerned took advantage of this offer. The company also offers an option to install control electrometers in homes of customers for a fee. The complainant Mr Belov states that by this procedure he is discriminated against because of ethnic discrimination and other persons of the Roma origin residing in given two neighbourhoods are also exposed to discrimination. The decision of this case for the EU Court means that for the first time it will address the issue of indirect discrimination on grounds of ethnic origin, and thus will be able to improve its judicature dedicated to anti-discrimination directives. The EU Court has already adjudicated the dispute over direct discrimination on grounds of racial or ethnic origin and that is a dispute ***(C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn Company NV (2008) - verdict of the Second Chamber of 10/07/2008)*** in which the company Feryn in Belgium applied a discriminatory recruitment policy. The complainant in this case was the Centre for Equal Opportunities and Fight against Racism, who claimed that the company director publicly announced that they recruit additional installers of doors, but they can not be immigrants (Moroccans), because their clients refuse to allow them access to their homes during execution of work. The director therefore said that he must meet the requirements of their customers; otherwise they would have to close down the company, *i.e.* terminate their business. He argued that if he wants to achieve profit as other businesses, he has to meet customer needs otherwise they will not buy their product. Belgian court dismissed the complaint on the grounds that there was no evidence or assumption that the person applying for the position would not have been recruited on the basis of their ethnicity. The Court of the Upper Instance, therefore turned to the Court of Justice of the EU in the appeal with a few questions, whether the public statements made by the employer could be considered direct discrimination during the recruitment process in accordance with Directive 2000/43/EC. The Court of Justice of the EU held that the direct discrimination based on racial or ethnic grounds within the meaning of the given directive it is not necessary to reject a particular person who applied for a job. Public declaration of a potential employer is sufficient to discourage certain category of employees to apply for this job, which constitutes direct discrimination in access to employment within the meaning of the given directive (Article 2, Paragraph 2, Point a) of Directive 2000/43/ES). It also confirmed that it is irrelevant whether there is an identifiable complaint, therefore a particular person who has been directly affected by discriminatory action by the employer. It also found that the public statement of the employer, that he will not accept a person of a particular racial or ethnic origin, is sufficient to create a presumption that there is a discriminatory recruitment policy in accordance with Article 8, Paragraph 1 of Council Directive 2000/42/ES and therefore the employer must prove the breach of the principle of equal treatment (applying burden of proof). The EU Court of Justice also ruled, however, in the case ***C-391/09 - Malgožata Runevič-Vardyn and Lukasz Wardyn v. Vilniaus miesto savivaldybės Administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos Komisija, Vilniaus miesto savivaldybės administracijos Teisės departa-***

mento Civilinės metrikacijos skyrius (verdict of the Second Chamber of 12 May 2011), where the assessment was made of the above directive in relation to the rules of writing names and surnames of persons. The EU Court, however, decided that the national legislation adaptation, which states that the surnames and names of persons can in the documents of civil status of this state be rewritten only in a form that complies with the rules of writing in the official state language, refers to a situation that does not belong to scope of Council Directive 2000/43/ES of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Proposal to the EU Court was made by a citizen of Lithuania and her husband, a citizen of Poland, and was directed against the Lithuanian city of Vilnius based on the refusal of the registry office to change the names and surnames of applicants in the main proceedings, as described in the documents of civil status, which this authority issued). As it can be checked based on the above mentioned cases, the EU court has often dealt with cases of discrimination and expressed very important interpretative rules which the member states must comply.

VII. Law of Armed Conflict

Law of armed conflict (*ius in bello*) is a newer name for the Law of War. This is the sector of Public International Law, which governs International Humanitarian Law and the issue of initiation and termination of hostilities, the effects of armed conflicts on international treaties, diplomatic relations, status and assets of enemy aliens and the institute of neutrality, etc.[254]

Origin and formation of rules of conduct of armed conflict were not homogeneous and mainly based on international practices and customs. They were written in the form of an international multilateral treaty at the turn of the 19th and 20th centuries and revised and supplemented later after World War II. The basis for current legislation form four Geneva Conventions of 1949 (Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field[255], Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea[256], Geneva Convention III relative to the Treatment of Prisoners of War[257] and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War[258]) and the two Additional Protocols of 1977 (Additional Protocol I relating to the Protection of Victims of International Armed Conflict[259] and Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts[260]), supplementing those conventions.

The rules of the law of armed conflict must be respected in all circumstances, regardless of the legality of the conflict. Compliance with the rules of *ius in bello* is not subject to answer the question whether the armed conflict is in accordance with the

254 MALENOVSKÝ, J. *Mezinárodní právo, Obecná část*. 5th edition, Brno: Doplněk, 2008. p. 404.

255 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field - Published in Collection of Laws of the Slovak Republic under No. 65/1954 of Coll.

256 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea - Published in Collection of Laws of the Slovak Republic under No. 65/1954 of Coll.

257 Geneva Convention Relative to the Treatment of Prisoners of War - Published in Collection of Laws of the Slovak Republic under No. 65/1954 of Coll.

258 Geneva Convention Relative to the Protection of Civilian Persons in Time of War - Published in Collection of Laws of the Slovak Republic under No. 65/1954 of Coll.

259 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) - Published in Collection of Laws of the Slovak Republic under No. 168/1991 of Coll.

260 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) - Published in Collection of Laws of the Slovak Republic under No. 168/1991 of Coll.

law of the state to begin war (*ius ad bellum*). In other words, parties to a conflict are obliged to follow the rules of armed conflict, even if they believe that counterparty breached the rules of *ius ad bellum*, *i.e.* was not authorised to use armed force.

VII. 1 Beginning of Armed Conflict and Legal Consequences of Conduct of Hostilities

In the past, the war began with formal declaration of war, or with an announcement. Thus, in practice of international community, various forms of declaration of war were created. The Hague Convention of 1907 on the Opening of Hostilities set the condition of hostility to either prior announcement or to the ultimatum with conditional declaration of war.[261] „Formal" beginning of fighting was not very respected in practice[262], thus *de iure* an armed conflict is now also the situation when war was not declared, but armed clashes between the parties began. It is not crucial for the assessment of the legal nature of armed conflict how an armed violence is named or labelled.[263] In other words, an armed conflict occurs on the basis of objective fact of the existence of armed violence, regardless of the subjective assessment of the situation by the states.

The emergence of the war means interruption of peaceful relations and specific rules of the law of armed conflict are applied. This does not affect the application of general legal principles, such as principle of sovereign equality of states, the principle of humanity, *pacta sunt servanda* principle, international responsibility and coercion that apply for any situation.[264]

The emergence of armed conflict usually means an interruption of diplomatic and consular relations.[265] The diplomatic premises of embassy, its property and archives are subject to international legal protection during the conflict. Those under diplomatic immunity who find themselves in enemy territory shall be granted secure and

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[261] e.g. an emergence of hostilities between Austria-Hungary and Serbia on July 28th, 1914, preceded by the Austro-Hungarian ultimatum imposing fulfilment of the conditions associated with the investigation of the assassination of Franz Ferdinand d´Este in Sarajevo or declaration of war on Germany by Britain and France in connection with the German invasion of Poland.

[262] e.g. when Japan attacked China (1937), or USA (1941), Italy invaded Ethiopia (1935) and Albania (1939), Nazi Germany during World War II. began the war against Poland, USSR, Denmark, Norway, Belgium and even Čepelka and Šturma state that "in 140 wars that occurred in the years 1700 to 1907, there were merely 10 cases of a formal declaration of hostilities."
ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. p. 739

[263] e.g. in 1956 was an attack on Egypt characterised by the British government as an "armed conflict". Neither the British nor the Egyptian government invoked the state of "war". 1981 was again marked by the Israeli armed attacks against the Iraqi nuclear reactor. Israel justified that this was an attack against the territorial integrity or political independence of Iraq. The official justification for the attack was that it was aimed to prevent Iraq from building the facilities for nuclear weapons and use them against Israel.

[264] POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: zvláštní část*. 5th amended and extended edition. Praha: C.H. Beck, 2006. p. 438

[265] In exceptional situations, however, these relations may not be interrupted, e.g. as was done in connection with the Iraqi aggression against Iran (1980), when they were interrupted only after seven years.

decent opportunity to leave the territory of a foreign state.[266] In practice the principle of reciprocity is in this case often applied, *i.e.* state releases diplomatic and consular representatives of the parties in the conflict only after being assured of the safe departure of the delegates.

The protection of the interests of a hostile state may be exercised only by neutral power. During World War II this activity was carried out mainly by Switzerland. This practice had in the past relied solely on a well-established tradition, contractually set forth in the Vienna Convention on Diplomatic Relations (1961), which provides for an obligation to " respect and protect the premises of the mission, together with its property and archives " and for the sending state the right to entrust the protection of its interests (including the diplomatic premises, its property and archives), as well as the protection of the interests of its citizens to the third country.[267]

Similarly, citizens of a hostile state (so-called enemy aliens) who are in the territory of the belligerent party should be, if it is not against the security interests of the state, within a reasonable time allowed to leave the territory.[268] Although the Geneva Convention relative to the Protection of Civilians assigns them a status of protected persons, in case of not leaving the territory they risk the internment.[269] In such case enemy aliens gain similar status as prisoners of war.

The emergence of a state of war has an impact on the validity and the application of international treaties. Since the Vienna Convention on the Law of Treaties (1969) does not provide legal effects of hostilities on international treaties[270] "a room for disunity of perception of which international treaties are cancelled by the state of war and which are not occurs."[271] While in traditional international law international treaties were losing their validities and multilateral their effectiveness as a result of hostilities, nowadays the opposite approach applies. With regards to bilateral treaties, contracts covering various fields of peaceful relations (political, economic, etc.) cease to be valid. Existing international treaties are concluded

1. for the emergence of war,
2. international treaties for permanent relations (*i.e.* assignment of rights to the territory, delimitation of borders) and
3. international treaties between parties in the state of war.

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266 Article 44 of the Vienna Convention on Diplomatic Relations (1961),

267 Article 45 of the Vienna Convention on Diplomatic Relations (1961),, A similar regulation is contained in the Vienna Convention on Consular Relations (1963) in Article 27.

268 Geneva Convention IV on the Protection of Civilian Persons in Time of War, Published in Collection of Laws of the Slovak Republic under No. 65/1954 of Coll., Article 35

269 During World War I, Great Britain after sinking of the British passenger and mail steamer Lusithania by Germany acceded to the internment of German and Austro-Hungarian citizens. The justification for it was the concern with the lives of such persons in connection with the crowd gathered after the incident broke out throughout the country.
ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. p. 746

270 Article 73 of the Vienna Convention on the Law of Treaties provides only that "the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

271 ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. p. 742

Generally, multilateral collective agreements remain in force. If their performance relies on the existence of peaceful relations between states, their validity is suspended at the state of war.[272] If there is no general rule governing the effects of hostilities on treaties, "the decisive criterion for their validity and (or) the effectiveness during the armed conflict is the intention of the parties, the nature and content of the international treaties."[273]

VII. 2 Basic Principles of the Law of Armed Conflict

The principles of the Law of Armed Conflict lead to connecting the contradictions between the desire to win the fight at any cost and the need to respect the rules of protection of victims of armed conflicts. Even though "it is to be feared, that in practice this contradiction is solved without compromising warfare, but at the expense of humanity,"[274] these principles constitute the backbone for regulation of armed conflicts.

It is obvious that "the aim of war is to forcibly break the enemy's armed resistance."[275] An effort to break resistance is based on the principle of military necessity, which is limited by the principle of legal regulation of war. Law of armed conflict determines an obligation for the parties to the conflict to use only such kind and amount of force that is necessary for the military defeat of the enemy in the shortest possible time and with the least possible losses. The principle of legal regulation of war was first enshrined in the Lieber Code of 1863. Later, in the Regulations concerning the Laws and Customs of War on Land, provisions are found restricting the right to choose the means by which the enemy can be damaged. Its steadfastness in International Law is confirmed by Article 35 of Additional Protocol I, which provides a rule to forbid prevailing of the military effectiveness over the legal regulation of war even during the extraordinary threat to any of the warring parties.[276] Misuse of the interpretation of the concept of these principles was the most noticeably violated by the doctrine of total war.[277]

The need to respect the rules of humanitarian law brings us to the fundamental principle of humanity. G. Mencer regards the principle of humanity as a pillar and general principle which should dominate the entire law of armed conflict, both contrac-

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272 ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. pp. 742 – 745,
KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008.pp. 453 – 455,
POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: zvláštní část*. 5th amended and extended edition Praha: C.H. Beck, 2006.pp. 438 - 439

273 KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. p. 454.

274 SEIDL-HOHENVELDERN, I. S. *Mezinárodní právo veřejné*, Praha: ASPI, 2006. p. 347

275 *Ibid*, p. 433

276 KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. p. 447

277 In particular, German authors were of the opinion that the principle of military necessity prevails over the principle of legal regulation of war.
ONDŘEJ, J., STURMA, P., BÍLKOVÁ, V., JÍLEK, D. a kol. *Mezinárodní humanitární právo*. Praha: C.H. Beck, 2010. pp. 204 - 206

tual as well as customary. This principle must be respected by all states. [278] The real principle of humanity is manifested "in commitments of belligerents parties not to use for instance such perfidious (treacherous) munitions imitating objects of daily consumption, means which would be causing excessive injury or unnecessary suffering or excessive damage (napalm and land mines)"[279] and so on. Most textbooks and scientific studies discuss the principle of humanity in connection with the so-called Martens clause.[280] This clause, in cases that are not treated by applicable international law (*i.e.*, contractual or customary norms) assumes the use of "existing practice among civilised nations, the laws of humanity and the requirements of the public conscience."[281] *Martens clause* became part of Article 1, Paragraph 2 of the Additional Protocol I and the preamble of Additional Protocol II in 1977.

While the number of civilian casualties in World War I was around 5% in the World War II it was already 52%, in the Korean War already 84% and in the Vietnam War even about 90%.[282] The need to distinguish combatant and those not participating in combat is one of the most important principles of international humanitarian law. "The highest principle of all warfare is that war violence is fundamentally directed only against combatants"[283]. Here we are approaching the principle of distinction. The very title of Article 48 of Additional Protocol I - "Basic rule" reveals the importance of this principle, which is confirmed by the ICJ.[284] This article sets out the obligation of the parties to the conflict to always "distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives"[285]

The traditional participant in war is a state that allocates personnel and equipment to participate in the war. The allocated personnel and material then constitutes the traditional armed forces. International law then logically recognises the status of combatant for members of these traditional, government forces.[286] Article 1 of the Ground War Provision (1899) stated that the armed forces of a warring party are not only comprised of military, but also of militia and volunteer corps, if they meet the following conditions:

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278 MENCER, G.: *Nové mezinárodní humanitární právo (vybrané problémy)*. Praha: Academia, 1983. p. 122

279 KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. p. 447

280 On the Hague Peace Conference in 1899 a Russian diplomat, Fyodor Fyodorovich Martens, successfully introduced a clause in the preamble of the Hague Convention (II) with regards to the laws and customs of war, land management, which has been preserved almost verbatim in its revised version, which was adopted as the Hague Convention (IV) at the peace Conference in 1907.

281 Compare Convention on the Laws and Customs of Land War (Hague Convention IV) from 1907, Preamble, Paragraph 8, Additional Protocol II, Preamble, Paragraph 4 Additional Protocol I, Art. 1, Paragraph 2

282 KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. p. 441

283 SEIDL-HOHENVELDERN, I. S. *Mezinárodní právo veřejné,* Praha: ASPI, 2006. p. 355

284 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I. C. J. Reports 1996, p. 66 (Paragraph 78 – 79)

285 Additional Protocol I of the Protection of Victims of International Armed Conflicts Published in Collection of Laws of the Slovak Republic under No. 168/1991 of Coll., Article 48

286 DETTER, I. *The law of War*. 2nd. edition. Cambridge: Cambridge University Press, 2000. p. 131

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognisable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war[287]

The same four conditions were taken by the third Geneva Convention (1949). Additional Protocol I then responded to the specifics of guerrilla warfare and required that guerrilla, in order to maintain the status of the combatants, publicly wore a military weapon during any meeting or during the time when they can be seen preparing for battle before attack.[288] Combatant status does apply to spies (Article 46 of Additional Protocol I), mercenaries (Article 47 of Additional Protocol I), deserters and traitors. The civilian population is not entitle to participate in the fighting and does not have the combatant status, except where civilians living on unoccupied territory rise against the approaching enemy and spontaneously seize weapons (*leveé en masse*) while they carry weapons publicly and respect the laws and customs of war.

Special legal regime then applies to parliamentarians, *i.e.* persons empowered to negotiate with the counterparty. The parliamentarians are untouchable during their mission and cannot be attacked. They wear the white flag as their hallmark.

The principle of distinction applies also to the distinction between civilian and military objects. Article 51, Paragraph 4, Point. a) of Additional Protocol I require that each attack is aimed at specific military objects, while the attack is therein understood as any act of violence directed against the enemy, both offensive and defensive in nature (Article 49, Paragraph 1). In connection with the aforementioned provisions it is very important to clarify the very concept of a military facility. Article 52, Paragraph 2 of Protocol I states that the military object must cumulatively meet two criteria:

1. the nature, location, purpose or use represents an effective contribution to military action;
2. total or partial reduction, capture or neutralisation of such an object must, under the circumstances, provide an obvious military advantage.

Each object that does not meet the required criteria is considered a civilian object. International Committee of the Red Cross tried to narrow the wide-ranging definition by calculation of concrete objects. It turned out, however, that this approach is impractical in view of the specifics of combat operations. Practical experience thus led to the choice of general definition.[289]

In the context of military facilities, one can distinguish two categories. The first consists of the objects for which it is possible to assume the status of a military object, *i.e.* they meet the inclusion criteria inherently. We can include here for example enemy combatants, weapons, ammunition, military equipment and war material of any purpose.[290] The second category of military objects comprises objects that need to be

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287 GEISBACHEROVÁ, D. *Vojenské humanitné právo*. Bratislava: Ministerstvo obrany SR, 1998. p. 17.

288 Additional Protocol I of the Protection of Victims of International Armed Conflicts, Article 44

289 KALSHOVEN, F., ZEGVELD, L. : *Constraints of the Waging of War.* [online]. 3rd ed. Geneva: International Committee of the Red Cross, 2001. p. 101.. Available on the Internet: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0793/$File/ICRC_002_0793.PDF [used on 23 November 2009]

290 Experience, however, shows a different interpretation of this destination. During the NATO air offensive against Yugoslavia in 1999, the Yugoslav Army military installations were attacked including those that directly did not exert any combat action. *Ibid*, p. 100

considered with regards to the particular circumstances prevailing on the battlefield (e.g. civilian object becomes military in case the house is occupied and a firing place is set in it).[291] According to Protocol I, the ones who are planning an attack or are in charge of it must do „do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives."[292]

The principle of proportionality, as opposed to the principle of distinction is not explicitly enshrined in any international convention, even though it is known for a long time, and it refers to the ICJ.[293] The concept of proportionality is based on the proportionality between the losses among the civilian population and civilian objects on the one hand and the anticipated military advantage for the attacker on the other.[294] In other words, attacks that are likely to outweigh the concrete military advantage by damage caused are prohibited. It should be, however, noted that the losses among the civilian population and civilian objects, not exceeding military advantage does not make the attack proportional.[295] A typical manifestation of non-proportionality is the use of nuclear weapons, which are referred to as "blind weapons of mass destruction."[296]

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[291] *Ibid*, p. 101; The media discussed vividly situations such as when the Yugoslav television station was hit during the war about the Kosovo (April 23rd, 1999), which was justified by saying that the Serbian media tend to incite racial hatred, to mobilise Serbs and thus they support the campaign of Slobodan Milosevic. It seems that in this case, the principle of distinction was violated. In such situations, it is necessary to consider possible mistake, i.e. misidentification of the object. As an example one can mention the Chinese embassy in Belgrade which was hit (8th May, 1999). NATO then declared that this was due to faulty information of intelligence service. http://zpravy.idnes.cz/zahranicni.asp?r=zahranicni&c=990508_101141_zahranicni_jpl. [online]. [used on 5 January 2010].

[292] Additional Protocol I, Article 57, Paragraph 2, letter. a, (i)

[293] „Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July1996, Paragraph 30

[294] MENCER, G. *Nové mezinárodní humanitární právo (vybrané problémy).* Praha: Academia, 1983. p. 72

[295] For example, in the Gulf War U.S. tank hit the Palestine Hotel in the centre of Baghdad, where foreign journalists were staying. Three journalists died and three were wounded. Americans were justifying the attack saying that there were Iraqi snipers who started firing from the hotel on the first place. Given the means (fire from tanks), in this case was a breach of the principle of proportionality.

[296] KLUČKA, J. *Medzinárodné právo verejné.* Bratislava: Iura Edition, 2008. p. 446

VII. 3 Prohibited Methods and Means of Warfare

VII. 3.1 Prohibited Methods of Warfare

Although it has "long been acknowledged that the belligerent parties are not allowed to use any means and any ways to damage the enemy,"[297] the first of more thorough procedures for keeping the rules of war have only appeared in the Middle Ages. Since then these methods have gone through rather complicated development.[298] On the basis of Article 22 of Regulations concerning the Laws and Customs of War on Land, or based on Article. 35, Paragraph 1 of the Additional Protocol I, it can now be said that belligerent parties do not have an unlimited right to choose methods and means of warfare.

Principles of distinction and proportionality (see above), can serve us to logically derive several methods of prohibited conduct of armed conflict. Prohibition of intentional attacks on the civilian population is one of them. In order to talk about intentional attacks, the offender has to cause death or harm to the health of civilians intentionally. If the civilians were hit by mistake, or in an attack on military installations, this is not considered as a prohibited conduct of armed conflict.

Hitting civilians in this case will represent so-called associated damage. The same rules apply in the case of civilian objects (Article 51, Paragraph 1 of Protocol I). It applies, of course, on the presumption that an object must be considered a civilian object in case of any doubt (Article 52, Paragraph 3). These rules thus "serve not only to protect homes and schools, but also to protect the so-called mixed objects, i.e. factory, installation and equipment used for either civilian or a military production."[299]

Other prohibited methods of armed conflict are indiscriminate attacks (of defensive or offensive nature). Paragraph 4 of Article 51 of Protocol I exhaustively describes three types of indiscriminate attacks. Indiscriminate are therefore:

a) "those which are not directed at a specific military objective;
b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[300],

In other words:

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297 POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: zvláštní čás*t. 5th amended and extended edition. Praha: C.H. Beck, 2006. p. 444

298 OETER, S. *Methods and Means of Combat*. In FLECK, D. (ed.). *The Handbook of International Humanitarian Law*. 2nd ed. Oxford: Oxford University Press, 2008. pp. 119 – 123;
ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. pp. 760 - 766

299 POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: : zvláštní část*. 5th amended and extended edition Praha: C.H. Beck, 2006. p. 447

300 Additional Protocol I of the Protection of Victims of International Armed Conflicts Published in Collection of Laws of the Slovak Republic under No. 168/1991 of Coll., Article 51, Paragraph 4

1. object must be objectively identified as military,
2. the attack must be directed against such identified target,
3. such means and methods must be used, which presuppose the intervention of a military target with a certain degree of probability.

Paragraph 5 of Article 51 then also prohibits so-called carpet bombing and attacks which may expectedly cause so-called collateral damages that would exceed the anticipated concrete and direct military advantage (principle of proportionality). Protocol I marked launching indiscriminate attacks as serious violation (Article 85, Paragraph 3, letter. b) and the Rome Statute of the International Criminal Court considers it a war crime (Article 8, Paragraph 2, letter. b).[301]

Regulations concerning the Laws and Customs of War on Land (1907) forbade killing or injuring persons excluded from warfare (Article 23, Point. c). Protocol I developed this rule. Article 41, Paragraph 1 stipulated that a person who is recognised or under certain circumstances should be recognised as a person excluded from warfare[302] cannot be the object of an attack. Protocol I, herein, refers to a serious violation of the Rome Statute of the ICC on war crime in case of failure to keep these provisions.

Prohibited method of warfare is also a starvation of civilians (Article 54, Paragraph 1 AP I). Belligerent party cannot attack, damage or remove objects that are necessary for the survival of the civilian population. Such objects are food stocks, livestock, water supply facilities, agricultural land, etc.

Protocol I determined the prohibited methods of warfare also as killing, injuring or capturing of enemy by using perfidity (Article 37). Perfidity (treachery) generally means breach of words, of confidence, or dishonesty, deliberate deception. Acting perfidiously thus means to act in such a manner that deliberately creates counterparty's trust in humanitarian law, but the intent of it is to betray that trust.[303] This general definition was later amended in Article 37 by the exhaustive list of treacherous proceedings: a) to pretend an intend to negotiate under the flag of parliamentarians or to pretend surrendering; b) to pretend incapacity because of injury or disease; c) to pretend civilian status or the status of non-combatant; d) to pretend the status of protected persons using labels, marks or uniforms of the United Nations or of neutral or other states which are not parties to the conflict.

It is necessary to distinguish perfidiousness and war trap, though. Whereas both are the cases of warfare methods to confuse the other side, perfidiousness is banned, while ruses of war are allowed. Article 37 states that ruses of war are such acts, „which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to

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301 FUCHS, J. *Válečné zločiny jako zločiny podle mezinárodního práva.* Vyškov: Vysoká vojenská škola pozemního vojska, 2002. pp. 103 - 107

302 A person that is excluded from warfare must meet two conditions - does not make any hostile acts and does not attempt to escape. In addition to these conditions, such person must meet one of three alternative conditions: a) is in the power of the other party, b) clearly expressed the intention to surrender c) fell into a coma or is otherwise excluded due to injury or disease.

303 PILLOUD, C. et all. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949: of 8 June 1977 to the Geneva Conventions of 12 August 1949.* Geneva: Martinus Nijhoff Publishers, 1987. pp. 434 – 435.

protection under that law". Protocol further states the examples of war trap - the use of camouflage, decoys, mock operations and misinformation.

VII. 3.2 Prohibited Means of Warfare

General principles of this legislation are included in Article 23 of the Regulations concerning the Laws and Customs of War on Land (1907) and Article 35, Paragraph 2 and 3 of the Additional Protocol I (1977). Regulations concerning the Laws and Customs of War on Land sets the ban to use weapons, projectiles and materials that are capable of causing unnecessary suffering and Additional Protocol I prohibits weapons capable of causing superfluous injury or unnecessary suffering, as well as weapons harmful to the environment, which was confirmed by the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977.[304]

International Court of Justice in 1996 issued an advisory opinion in the matter of the legality of the threat of nuclear weapons and their use. Three principles governing the legality of the use of weapons were set out in it: 1) the principle of distinction prohibits the use of weapons that are not able to distinguish between military and civilian targets; 2) it is prohibited to use weapons that cause unnecessary suffering of combatants, and 3) from the right of neutrality the prohibition against the use of weapons whose effects cannot be limited to the territory of warring parties can be inferred.[305] International Court of Justice thus enlarged the list of basic rules from 1977 by two others – the prohibition against the weapons without distinguishing effect and against the weapons without territory limited effect.

VII. 3.2.1 Weapons of Mass Destruction

Weapons from the perspective of the law of armed conflict can be divided into weapons of mass destruction and conventional weapons. The main assumption for determining the weapon is its mass destructive attack. These weapons are not used with the intention of hitting a particular soldier or unit, but of hitting a significant part of the population in a given area, which may be a city, region or the entire state.[306] Weapons of mass destruction are chemical, biological (or bacteriological) and nuclear weapons.[307]

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304 KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. p. 473, 474

305 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, I. C. J. Reports 1996, p. 66 Paragraph 78, 89

306 DETTER, I. *The law of War*. 2nd edition Cambridge: Cambridge University Press, 2000.p. 235

307 POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: zvláštní část*. 5th amended and extended edition. Praha: C.H. Beck, 2006.;
ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008;
KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008;
DETTER, I. *The law of War*. 2nd edition. Cambridge: Cambridge University Press, 2000.

VII. 3.2.1.1 Chemical and Bacteriological Weapons

Regulations concerning the Laws and Customs of War on Land (1899) forbade the use of poison and poisoned weapons (Article 23 a). Despite, chemical weapons, with substantially harmful effect were used in the World War II.[308] This was reflected in the peace treaties concluded with defeated powers, where the production of asphyxiating, poisonous or other gases was prohibited, arguing that their use is prohibited in the war.[309] Careful monitoring of the prohibition of chemical and bacteriological weapons is also important for the relatively easy availability of manufacturing resources and low-cost production of these weapons, which has often been abused by less developed countries.[310] Nowadays, a big threat of their abuse exists in case of terrorist attacks.

In 1925 the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was adopted.[311] In the second half of the 20th century several conventions governing chemical weapons were adopted; to mention just one: the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993).[312]

Bacteriological or biological weapons were for a long time connected with chemical weapons. What unites them is their impact on living matter. Until the World War II they were dealt with at the international level.[313] An important step was the adoption of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction[314] in 1972, which is considered the first real disarmament treaty.[315]

VII. 3.2.1.2 Nuclear Weapons

Infamous termination of the World War II, when the U.S. dropped nuclear bombs on Japanese territory, logically brought the debate on the use of nuclear weapons and their conformity with international law. It is paradoxical that they have the greatest effect of all weapons of mass destruction, but the question of their use is of the most complex and least transparent. Contrary to the fact that, especially during the

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308 "In the years 1915 - 1918 caused the death of 91 thousands persons, 1.2 million people were contaminated." In Čepelka, Č., Šturma, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. p. 728

309 POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné*: *zvláštní část*. 5th amended and extended edition. Praha: C.H. Beck, 2006. p. 74

310 e.g. Chemical weapons were used by Iraqi government against Kurds in the mid-nineties.

311 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, Geneva Gas Protocol (Published in Collection of Laws of the Slovak Republic under No. 173/1938 of Coll..)

312 Published in Collection of Laws of the Slovak Republic under No. 276/1997 of Coll.

313 DETTER, I. *The law of War.* 2nd. edition Cambridge: Cambridge University Press, 2000. p. 251

314 Published in Collection of Laws of the Slovak Republic under No.. 96/1975 of Coll.

315 DETTER, I. *The law of War.* 2nd. edition. Cambridge: Cambridge University Press, 2000. p. 260; ČEPELKA, Č., ŠTURMA, P. Mezinárodní právo veřejné. Praha: C.H. Beck, 2008. p. 728

Cold War, states led by the USA and the USSR adopted several disarmament obligations,[316] nuclear powers (such as China and France) were due to the strategic importance of these weapons unwilling to give up their full use. In 1961 the General Assembly adopted the Declaration on the Prohibition of the Use of Nuclear Weapons and Thermonuclear Weapons (A/RES/1653 (XVI)), which established that each state using such weapons violates the UN Charter and commits the crime against humanity and human civilisation.[317] Although, the problem is that General Assembly resolutions are not legally binding documents, and thus the resolution has more political than legal significance. It is therefore important to note that no international humanitarian law convention expressly forbids the use of nuclear weapons. Another problem then lies in the creation of possible international custom, because since the end of the World War II, no country has restored the use of nuclear weapons.[318]

In 1994, at the request of the UN General Assembly its opinion on the subject is expressed by International Court of Justice.[319] In 1996 the International Court of Justice issued an advisory opinion in which it stated that there is no universal prohibition of the threat or use of nuclear weapons contained in the international treaties or international custom.[320] The International Court of Justice then went on to examine whether their use is in accordance with the principles and rules of the Law of Armed conflict. International Court of Justice concluded that humanitarian principles are applied to all forms of war, and all equipment and weapons that were used. According to the advisory opinion the use of nuclear weapons is generally illegal in the rules of international law of armed conflict, and, in particular, the principles and rules of international humanitarian law. However, the International Court of Justice also noted that in the present international law it cannot state with certainty whether the use of such weapons is legal or illegal in "an extreme circumstance of self-defence, in which the very

316 POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné*: *zvláštní část*, 5th amended and extended edition - Praha: C.H. Beck, 2006. p. 390 – 409; ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. pp. 721 - 727

317 KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: IURA EDITION, 2008. p. 475

318 DETTER, I. *The law of War*. 2nd. edition Cambridge: Cambridge University Press, 2000. p. 242

319 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I. C. J. Reports 1996, p. 66

320 "With regards to the customary prohibition of their use, the International Court of Justice stated that the international community is deeply divided in the opinion on its sheer existence and particularly on whether the period of 50 years during which such weapons were not used, should be regarded as an expression of *opinio iuris* of states or only as for the time when, the conditions of their use were not fulfilled." Cit. In KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. p. 475

survival of a state would be at stake".[321] The question of the legality of use of nuclear weapons thus remains unclear.

VII. 3.2.2 Conventional Weapons

The prohibition of certain conventional weapons have come from St. Petersburg Declaration of 1868, which prohibited the use of any bullets weighing less than 400 g, which are explosive, flammable or fulminating.

Hague Conference of 1899, then prohibit the use of bullets, which are usually referred to by its place of manufacture as „*dum-dum*". These are the bullets which, in the human body, easily extend or flatten.[322] The Hague Conference of 1907 marked a shift especially in maritime war. At that time the opinion emerged that naval mines constitute a threat for free maritime navigation and it is therefore necessary to modify their use.[323] The Convention relative to the Laying of Automatic Submarine Contact Mines was adopted in 1907. This Convention aims primarily to protect freedom of navigation and prohibits indiscriminate use of landmines, even though it does not use such term. Since no further amendment (indiscriminate use of mines) has been accepted since then, the Convention remains the exclusive legislation on this issue.[324] Its importance was confirmed by ICJ.[325]

Under the influence of the International Committee of the Red Cross, the General Assembly asked the Secretary-General to review the rules limiting the use of conventional weapons and report back in 1972. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was held in 1974 and based on the results of this conference the General Assembly then convened an international conference on conventional weapons.[326] Then the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects was adopted in 1980.[327] The convention itself is only a framework, thus five additional protocols were later adopted.

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321 D. „A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons". E. „However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;" *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, I. C. J. Reports 1996, p. 66 Paragraph 105, D. and E.

322 ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. p. 730

323 DETTER, I. *The law of War.* 2nd. edition. Cambridge: Cambridge University Press, 2000. p. 229

324 POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné*: *zvláštní část*, 5th amended and extended edition Praha: C.H. Beck, 2006. p. 450

325 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. 1986, Paragraph. 215

326 DETTER, I. *The law of War.* 2nd. edition Cambridge: Cambridge University Press, 2000. p. 214 - 215

327 Published in Collection of Laws of the Slovak Republic under No. 456/2004 of Coll.

Protocol I prohibits the use of weapons whose main effect is to cause injury by small fragments which cannot be detected in the human body by X-rays.[328] The prohibition, although, does not apply to anti-tank mines, for example, covered in the bodies to avoid easy detection by a metal detector, or, another example, cluster bombs injuring by steel arrows.[329]

It is estimated that in 1999 there were more than 110 million anti-personnel landmines situated in 63 countries, which kill or injure at least 26 000 people a year, with 90% of them civilians, including many children.[330] Protocol II regulates the use of land mines, booby traps and other devices, which are sometimes collectively referred to as "treacherous" weapons.[331] This Protocol, however, in accordance with Art. 1 shall apply only to land mines and does not apply to laying mines at sea or inland waters.[332] The protocol inconsistently addresses the issue of mine disposals after the conflict. It "only" determines that states are to strive to reach such an agreement that would lead to remove mines from minefields. The Protocol II was amended and clarified in 1996 by Addendum, which includes new provisions. One of the important provisions is Article 10, which governing the obligation of contractual parties to clean, remove, destroy and keep all the minefields promptly after active hostilities.[333]

Protocol III banned and restricted the use of incendiary weapons, because incendiary weapons may have indiscriminate effects and may cause painful permanent injury. The protocol contains a relatively broad definition of incendiary weapons. However, it does not contain any explicit prohibition of napalm, incendiary warfare agents, which was in this case applied mainly through aviation and caused enormous suffering and loss of lives.

In 1995, the Convention of 1980 was amended with Protocol IV on Blinding Laser Weapons.[334] Blinding Laser Weapon is such laser weapon whose sole means of combat or one of the means of combat is to cause permanent blindness to an unprotected eye, *i.e.* eye or eyes unprotected by wearing glasses or contact lenses (Article 1). Blinding the enemy temporary, however, is not forbidden. This was taken as an advantage by the British Navy during the Falklands War (1982), when they glared the windows on the enemy's aeroplane cockpit.[335]

The last amendment was the Protocol V on Explosive Remnants of War in 2003.[336] It is a response to the issue of the large amount of unexploded munitions remain-

328 ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. s. 731

329 DETTER, I. *The law of War*. 2nd. edition. Cambridge: Cambridge University Press, 2000. s. 217

330 *Ibid*. p. 227

331 *Ibid*.

332 ONDŘEJ, J. *Zákaz některých druhů konvenčních zbraní v ozbrojených konfliktech*. In Právnik, 2001, Volume CXL, No. 6, p. 610

333 ONDŘEJ, J., ŠTURMA, P., BÍLKOVÁ, V., JÍLEK, D. a kol. *Mezinárodní humanitární právo*. Praha: C.H. Beck, 2010. p. 307.

334 Published in Collection of Laws of the Slovak Republic under No. 458/2004 of Coll.

335 CARHAN, B., ROBERTSON, M. *The Protocol on „Blinding Laser Weapons", a New Direction for International Humanitarian Law*. In American Journal of International Law, vol. 90, No. 3, 1996, p. 489. In ONDŘEJ, J. *Zákaz některých druhů konvenčních zbraní v ozbrojených konfliktech*. In Právnik, 2001, volume CXL, No. 6, p. 614

336 Fifth Protocol on Explosive Remnants of War

ing on the battlefield. It is therefore primarily targeted at post-conflict measures and obliges contractual parties to remove explosive remnants of war on its territory. However, these (and other) obligations are stipulated by a vague wording "where feasible", which creates room for a misuse.[337]

VII. 4 Cessation of Hostilities and the End of Hostilities

Armed conflicts are characterised by varying levels of intensity, which is often associated with cessation of the fighting (ceasefire). Even though in practice, time and substantive fusion of cessation of hostilities and the end of hostilities occurs, conceptually and legally, it is necessary to separate these two terms.

VII. 4.1 Legal Forms of Ceasefire

Ceasefire is characterised by temporariness and it occurs mostly by consensus of the parties. In legal terms, however, it does not mean the end of hostilities.[338] In addition to natural causes of the end of hostilities, we find other ways to break the conflict in practice, such as the form of discontinuation of fighting, a ceasefire agreement or an agreement to surrender.

Discontinuation of fighting (*Waffenruhe, suspension d´armes*), also known as a ceasefire or peace weapons, is the freezing of fighting of local importance for a relatively short time. Most often it happens by the agreement of commanders of frontpart (without any further authorisation) in order to assist the wounded, collect the dead, and evacuate the population.[339]

Declaration of truce (ceasefire agreement) by the mutual agreement of the parties in conflict means the fights are interrupted on the specific area or on the whole area of fighting. Agreement on a local ceasefire ends fighting only in certain areas or for certain types of forces (e.g., air forces or navy). General ceasefire, on the contrary, means cessation of fights on the whole territory, for the relatively long time, often indefinite. The ceasefire agreement does not affect the completion of armaments and ammunition, building fortifications and preparing for a new attack. General ceasefire agreements are agreed either by Special Representatives of governments, or by military commanders, while implied agreement cannot be excluded.[340] Ceasefire arrangement usually heralds the end of hostilities (e.g. before the end of World War I and World War

[337] OETER, S. *Methods and Means of Combat*. In FLECK, D. (ed.). *The Handbook of International Humanitarian Law*. 2nd ed. Oxford: Oxford University Press, 2008. p. 153

[338] POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: zvláštní část*. 5th amended and extended edition. Praha: C.H. Beck, 2006. p. 472

[339] KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. pp. 493-494; POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: zvláštní část*. 5th amended and extended edition. Praha: C.H. Beck, 2006. p. 472;
ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. p. 797

[340] ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. p. 800

II), but sometimes it may mean the actual end of the war itself.[341] Serious violation of the ceasefire agreement entitles the other party to its termination and continuation of hostilities.

Agreement to surrender is signed on the condition of surrendering and putting down weapons on one side. All weaponry becomes war booty of the other side and combatants of defeated power acquire the status of prisoners of war. Unlike general truce, logically, there is no possibility to renew hostilities as the defeated powers gave their weapons away. The practice of warfare concludes conditional (party sets certain conditions) and unconditional surrender (defeated party is forced to accept the conditions set by the winner; such conditions must be set within the limits of International Law). An example of the unconditional surrender is that of Germany and Japan's surrender in the World War II.[342]

Literature also sometimes mentions the word quasi-capitulation. The examples of such contracts can be the agreements with Italy and other European Axis satellites (Romania, Finland, Bulgaria and Hungary) concluded during World War II. Although they externally act like a traditional ceasefire agreement, its content is closer to the institute of unconditional surrender.

VII. 4.2 Legal Forms of the End of Hostilities

Only after the end of hostilities tacitly, by unilateral declaration or conclusion of the peace treaty, the rules of law of peace begin to apply. In other words, if fighting was ceased just by a general ceasefire, or by surrender (although there is no possibility of renewed fighting), a state of war persists.[343]

In the past the external manifestation on which it was possible to clearly identify the status of the end of the war was so-called debellation, *i.e.* the military destruction of statehood (e.g. Boer war years of 1899-1902). In practice of the international law, particularly in the 18th century we can find the tacit termination of hostilities.[344] Fearing legal uncertainty of implicit termination of hostilities, the institute of unilateral declaration of the end of hostilities was implemented after World War I and defeated states usually tacitly accepted it. The declaration contained the necessary conditions for the establishment of peaceful relations. Thus the state of war ended after World War I between the USA and Germany, or between Germany and China. After World War II, as a result of the division of Germany, states of so-called United Nations, including Czechoslovakia joined in to follow suit in 1955.[345]

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341 e.g. conflict between North and South Korea was ended by the signing of the ceasefire agreement without receiving a subsequent peace treaty.

342 POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné*: *zvláštní část*, 5th amended and extended edition. Praha: C.H. Beck, 2006. p. 473

343 *Ibid.* p. 474

344 *Ibid*

345 KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. p. 497

In modern international law the institute of peace treaty was established as a result of the end of military operations.[346] The peace treaty or agreement[347] may take the form of a general or separate contract, generally it is negotiated by officials of state pursuant to its constitution and it is completed by ratification. If the contract does not state otherwise the crucial condition for the signing is current status. In other words, the winning state retains the spoils of war and the conquered territory corresponding to the status at the time of termination of the war. By signing of the peace treaty suspended contracts are renewed (except those that have been withdrawn and there is a restoration of diplomatic and consular relations.[348]

VII. 5 International Humanitarian Law

International Humanitarian Law is a special issue within the law of armed conflict, which regulates situations of armed conflict. The concept of international humanitarian law has become naturalised after World War II on the initiative of representatives of the International Committee of the Red Cross, particularly by Jean Pictet. Originally, this term was meant to include rules that protect generally human beings during the armed conflict. It is a narrow concept that is currently being replaced with medium or broad conception.

Most of the doctrine inclines to medium conception which subsumes the concept of international humanitarian law as "a set of international rules of contractual and customary origin, whose specific task is to solve humanitarian problems directly arising from the armed conflict, whether international or non-international, for humanitarian reasons, to limit the rights of parties to conflict to use means and methods of warfare and to protect persons and objects that are or could be affected by the conflict." [349] The main mission of humanitarian law is to respect humanitarian principles and humanity in conflict situations and limiting the means and methods of warfare.

The broad conception includes international human rights law into the international humanitarian law. "Humanitarian Law" (*droit humain*) should then ensure a "respect for and full development of the individual."[350]

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346 Sometimes the function of cessation or end of hostility was only fulfilled by the peace treaty. *E.g.* in the first Russo-Finnish War (1939-1940).

347 The term peace agreement has become natural mainly in the area of civil wars.
ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. pp. 808 - 809

348 KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2008. p. 496;
POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: zvláštní část*. 5th amended and extended edition. Praha: C.H. Beck, 2006. p. 475;
ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. Praha: C.H. Beck, 2008. pp. 801 - 804

349 BÍLKOVÁ, V. *Úprava vnitrostátních ozbrojených konfliktů v mezinárodním humanitárním právu*. Praha: Univerzita Karlova v Praze, 2007. p. 15.

350 *Ibid*, p. 16.

VII. 5.1 Law of Geneva, Hague Law and New York Law

International humanitarian law can among other classification be divided into three sectors, the Law of Geneva, Hague Law and New York Law. Such a division is named after the place of adoption of main documents and the regulation area that is being conducted.

Geneva Law, sometimes also called the "Red Cross Law" is committed to protecting persons excluded from warfare and persons not participating in the warfare, *i.e.* wounded, wrecked, sick, prisoners of war and civilians. Geneva Law can be understood as international humanitarian law in the true sense.

Hague Law defines the permitted means and methods of warfare and the rights and obligations of the parties to the conflict in the implementation of military operations. Historically and ideologically it is based on the so-called Lieber Code[351] form 1863, bringing together several sources generated in a variety of periods, of which the most important are conventions adopted during the two world peace conferences at Hague, which took place in 1899 and in 1907.

The professionals associate the Geneva and Hague Law with the third sector of New York Law. It mainly introduces the implementation, control and sanction mechanisms, *i.e.* secondary norms, which should ensure the application, compliance and punishment of violations of standards of both older sectors. It has been developed in the 60's and the 70's of the 20th century under the influence of the United Nations, which began to be actively involved in issues of armed conflict, especially with regards to human rights during armed conflict. A very important relationship between the law of armed conflict and human rights law has been thus developed.[352]

VII. 5.2 International Humanitarian Law and Human Rights Law

International humanitarian law is not to be confused with International human rights law (IHRL). International humanitarian law and IHRL have many identical elements: both are based on the irrevocability of fundamental rights, enshrine the principle of non-discrimination and protect human and his dignity.[353] On a particular level, for example, simultaneously provide safeguards against torture and other cruel, inhu-

[351] Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863 - http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a25aa5871a04919bc12563cd002d65c5?OpenDocument [used on 11 December 2008]. Unlike the first Geneva Convention, the code did not have the character of contract because it was meant only for Union soldiers fighting in the American Civil War.

[352] KALSHOVEN, F., ZEGVELD, L. *Constraints of the Waging of War.* 3rd ed. Geneva: International Committee of the Red Cross, 2001. pp. 29 – 32.

[353] JANKUV, J. *Medzinárodné a európske mechanizmy ochrany ľudských práv.* Bratislava: Iura Edition, 2006. p. 313

man or degrading treatment or punishment[354] and guarantee the right to a fair trial.[355] On the other hand, there are also significant differences between them. Human rights law governs the relationship of the individual and the state; it is valid in time of armed conflict and peace and has a plurality of national, regional and universal sources. International humanitarian law defines the relationship between the warring parties, it is used almost exclusively in times of armed conflict and the written sources are largely the result of the codification process inspired by the International Committee of the Red Cross. Human rights law permits derogation or limitation of rights under certain conditions, while the rules of humanitarian law do neither allow derogation nor limitation.[356]

The difference between the International humanitarian law and IHRL can also be found in the subject and scope of protection. While International humanitarian law protects only the lives of individuals not participating in the warfare and for example, killing a combatant during wartime actions is considered legal, human rights law guarantees the right to life to all. Differences between international humanitarian law and human rights law are not random. They arise from the different nature and objectives of the two systems, and their inclusion into one area of public international law as a result of the aforementioned does not seem very appropriate. International humanitarian law can draw on ideas of human rights and to take some of its elements, it can be similar in some partial sources, but on no account should it merge. It has a specific mission (ensuring the protection of victims of armed conflicts and to limiting the ways and means of warfare for this purpose), which is being implemented with the use of specific tools and principles.

VII. 5.3 International Humanitarian Law and Law of International Disarmament

International humanitarian law cannot be linked with the law of international disarmament or with international arms control. The law of disarmament is a traditional law. It does not regulate the behaviour in the armed conflict, but rather requires the state's commitment to reduce weaponry potential and prohibits a disposal of certain means at all. Currently, some theorists begin to consider the international law of disarmament a separate sector of international law or a part of another separate sector of international law - the law of international security.[357]

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354 Compare Article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7 of the International Covenant on Civil and Political Rights - the law of human rights and par. 1, point. a) Common Article 3 of the Geneva Conventions and Article 75, Paragraph. 2, letter. a) Additional Protocol I - in humanitarian law.

355 Compare Article 6 of the European Convention and Article 14 of the Covenant - the Law of Human Rights and Article. 1, point. d) Common Article 3 of the Geneva Conventions and Article 75, Paragraph 3 to 4 of the Additional Protocol I - in international humanitarian law.

356 GASSER, H., P. *International humanitarian law. An introduction*. Berne/Stuttgard/Vienna: Henry Dunant Institute, 1993. p. 28

357 POTOČNÝ, M., ONDŘEJ, J. *Mezinárodní právo veřejné: zvláštní část*, 5th amended and extended edition. Praha: C.H. Beck, 2006.

The rules of humanitarian law are based on the requirements of humanity and consequently not subject to reciprocity. In contrast, in the arms control reciprocity plays a key role.[358]

[358] GASSER, H., P. *International humanitarian law. An introduction*. Berne/Stuttgard/Vienna: Henry Dunant Institute, 1993. p. 19

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