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Cuvânt înainte / Foreword

It is with great pleasure that we introduce Issue 33/2025 of the Romanian Journal of International Law, which brings together a rich and thought-provoking selection of contributions addressing some of the most dynamic questions facing contemporary international law. The articles gathered in this issue reflect both the diversity of the field and the growing need to reassess established legal concepts in light of new realities, ranging from migration and minority protection to cyberspace, environmental degradation, and technological transformation.

The issue commences with a study on the protection of the rights of new minorities in the European and international context, examining the emergence of new minority groups of migratory origin and the legal frameworks available for safeguarding their rights. The following article turns to the relationship between economic, social and cultural rights and the environmental dimension of sustainable development, offering a critical assessment of the United Nations Committee on Economic, Social and Cultural Rights' General Comment No. 27 (2025) and its implications for the evolving understanding of States' obligations in the face of ecological limits and climate change. The digital sphere remains a central concern in this issue through an analysis of the extraterritorial application of human rights in cyberspace, with particular attention to the due diligence obligations incumbent upon States.

Questions of jurisdiction and accountability also feature prominently. One contribution revisits the extraterritorial application of the European Convention on Human Rights and the United Nations Convention against Torture in Transnistria, highlighting the challenges posed by contested control and the role of international mechanisms in addressing impunity in such spaces. Another article explores how diplomatic inviolabilities under the Vienna Convention on Diplomatic Relations may need to be reinterpreted in the age of new technologies, underscoring the pressure that digital threats and technological change place on the traditional architecture of diplomatic law.

Together, these contributions offer valuable perspectives on the capacity of international law to respond to novel actors, new technologies, and increasingly complex forms of vulnerability. We hope this issue will encourage further scholarly reflection and meaningful debate on the development of international legal norms in a rapidly changing world.

Professor Dr. Bogdan Aurescu

Judge of the International Court of Justice

La protection des droits des nouvelles minorités dans le contexte européen et international

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Résumé : *L'objectif de cet article est d'aborder la question des nouvelles minorités, et plus précisément les modalités de protection de leurs droits par rapport à la protection des droits des minorités nationales traditionnelles. La forte augmentation des migrations enregistrée au cours des dernières décennies a entraîné la formation et la consolidation, dans de nombreux États, de nouveaux groupes de minorités d'origine migratoire, pour lesquels on a commencé à utiliser de plus en plus le concept de « nouvelles minorités ». Après une introduction théorique dans laquelle j'aborde le contenu et l'évolution du terme de « nouvelle minorité », je présente certaines différences majeures entre les nouvelles et les anciennes minorités. L'article présente plusieurs réglementations juridiques, tant au niveau européen qu'international, qui font directement référence à la protection des nouvelles minorités, mais analyse également d'autres normes qui s'appliquent à toutes les minorités. Par ailleurs, on a tenté de mettre en évidence les moyens de garantir la protection des droits des nouvelles minorités dans plusieurs pays européens, ainsi que la position de l'UE et de la communauté internationale sur cette question.*

Mots-clés : *nouvelles minorités, minorités nationales, immigrants, protection des droits.*

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Les opinions exprimées dans cet article n'engagent que l'auteur et ne reflètent en aucun cas la position des institutions auxquelles elle appartient.

The Protection of the Rights of New Minorities in the European and International Context

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Abstract: *The aim of this article is to address the issue of new minorities, and more specifically, the ways in which their rights are protected in comparison to the protection of the rights of traditional national minorities. The sharp increase in migration over the past few decades has led to the formation and consolidation, in many states, of new minority groups of migrant origin, for which the concept of “new minorities” has increasingly come into use. Following a theoretical introduction in which I discuss the meaning and evolution of the term “new minority,” I present some key differences between new and traditional minorities. The article outlines several legal frameworks, both at the European and international levels, that directly address the protection of new minorities, while also analyzing other standards applicable to all minorities. Furthermore, we have highlighted the means of ensuring the protection of the rights of new minorities in several European countries, as well as the position of the EU and the international community on this issue.*

Keywords: *new minorities, national minorities, immigrants, protection of rights.*

Introduction

Au cours des dernières décennies, on a assisté à une intensification alarmante du phénomène migratoire, tant au niveau international qu'en Europe notamment, avec des implications importantes sur les plans social, politique, économique et démographique. Les récentes augmentations du nombre d'immigrants et de réfugiés enregistrées dans les pays européens ont suscité de vifs débats et des tensions politiques concernant la protection des droits et l'intégration de ces communautés de migrants dans les pays de destination. L'intensité du phénomène migratoire est mise en évidence par plusieurs données statistiques relatives à la proportion de migrants dans la population totale de l'Union européenne. Ainsi, selon les données d'EUROSTAT, 44,7 millions de personnes, soit 9,9 % des 449,3 millions de personnes résidant dans l'UE au 1er janvier 2024, étaient nées en dehors de l'UE. Par ailleurs, 17,9 millions de personnes, soit 4,0 % des 449,3 millions de personnes résidant dans l'UE, étaient nées dans d'autres pays de l'UE¹. Compte tenu du fait que la plus grande partie des immigrants provient de l'extérieur de l'Europe, on estime que « *la question de l'immigration extra-européenne est devenue centrale et occupe une place déterminante dans l'avenir de l'Europe* »². Dans ces conditions, où la proportion de personnes d'origine migratoire est devenue significative et ne cesse d'augmenter, on parle de plus en plus de l'émergence, aux côtés des minorités traditionnelles et historiques, de nouvelles collectivités pour lesquelles on utilise le terme de « *nouvelles minorités* ». Contrairement aux anciennes minorités (ou minorités nationales/historiques), dont la présence a été acceptée et dont la préservation de la langue, de la culture et de l'identité ne suscite plus de grandes controverses, dans le cas des nouvelles minorités, les problèmes sont plus complexes et plus difficiles à résoudre. Les instruments utilisés pour la protection des droits des minorités ne s'appliquent traditionnellement qu'aux anciennes minorités. La question se pose de savoir comment protéger les droits des nouvelles minorités.

Pour déterminer quels sont les droits communs ou distincts dont bénéficient ou devraient bénéficier les anciennes et les nouvelles minorités, il est nécessaire d'analyser les différences et les similitudes entre ces deux catégories de minorités. Les différents groupes de minorités, anciens

¹ EUROSTAT, Diversité de la population de l'UE par nationalité et pays de naissance, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_population_diversity_by_citizenship_and_country_of_birth

² Yona Cherki, *Intégration des étrangers et protection des minorités : étude comparée du droit international et du droit européen*, Droit. Université Panthéon-Sorbonne-Paris I, 2017, p. 8

(nationaux/historiques) ou nouveaux, présentent certaines caractéristiques communes, mais cela ne signifie pas pour autant qu'ils bénéficient des mêmes droits : certains ne disposent que d'un minimum de droits, tandis que d'autres jouissent de droits substantiels. Bien que de nombreux décideurs politiques ou acteurs économiques de divers États reconnaissent la contribution des nouvelles communautés de migrants à la satisfaction des besoins en main-d'œuvre, mais aussi, d'un point de vue démographique, à l'augmentation de la population et à l'amélioration de sa structure, d'autres considèrent toutefois qu'un nombre élevé d'immigrants et de réfugiés soulève de nombreux problèmes d'intégration, de différences culturelles et linguistiques, ainsi que de préservation de la cohésion et de l'unité sociales. C'est la raison pour laquelle de nombreux États européens ont commencé à rechercher des modèles et des politiques d'intégration des nouveaux groupes minoritaires ainsi que des solutions pour la protection de leurs droits. Après quelques précisions sur l'apparition et l'évolution du terme « *nouvelles minorités* », nous avons mis en évidence certaines différences significatives entre les anciennes minorités (minorités nationales/historiques) et les nouvelles minorités. L'article comprend une brève analyse de certaines réglementations juridiques qui visent directement des aspects relatifs aux nouvelles minorités, mais qui s'appliquent également de manière générale à toutes les catégories de minorités. Quelques exemples concernant l'état de la protection des droits des communautés de migrants dans certains pays européens sont également présentés.

1. Le concept des « nouvelles minorités »

Au cours des deux dernières décennies, des changements importants sont intervenus dans la taille et la structure des minorités, notamment en raison de l'intensification du phénomène migrationnel à l'échelle européenne et internationale. Dans de nombreux États, de nouvelles communautés se sont formées et développées, différentes par leur culture, leur langue, leur religion ou leurs idéaux par rapport aux minorités nationales traditionnelles déjà existantes. C'est pourquoi le terme de « *nouvelles minorités* », dont on parle de plus en plus et sur lequel les États, comme les organismes internationaux ont des opinions divergentes, fait l'objet d'un débat croissant.

La première organisation internationale à avoir mentionné *ce terme* est l'OSCE qui, en 2004, a abordé cette question à l'occasion de la Déclaration d'Édinbourg. Ainsi, au chapitre III, paragraphe 60, de ce document, il est reconnu que « *outre les minorités nationales « traditionnelles », il existe d'importantes « nouvelles » minorités dans plusieurs États participants de l'OSCE à la suite des migrations intervenues au cours des dernières*

décennies »³. Compte tenu de l'émergence de cette nouvelle catégorie de minorités, dont les problématiques diffèrent de celles des minorités nationales déjà reconnues, l'Assemblée parlementaire de l'OSCE a demandé au Haut-Commissaire pour les minorités nationales (HCNM) « *une étude comparative sur les politiques d'intégration des démocraties consolidées et d'analyser leurs effets sur la situation des nouvelles minorités* » (paragraphe 70 de la Déclaration)⁴. La réponse à la demande de l'Assemblée parlementaire de l'OSCE s'est concrétisée dans le rapport réalisé par le Migration Policy Group sur les politiques d'intégration dans les démocraties établies. Bien qu'aucune définition des nouvelles minorités n'ait été proposée, le rapport a conclu qu'il s'agit de « *groupes minoritaires établis dans le pays dont la présence est le résultat d'une immigration plus récente* ».⁵ La question des nouvelles minorités a été abordée par de nombreux auteurs, suscitant de nombreux débats et controverses dans la littérature spécialisée. Selon Roberta Medda-Windischer, « *les nouvelles minorités désignent des groupes composés d'individus ou de familles qui ont quitté les territoires où ils vivaient et ont émigré vers d'autres pays* »⁶. Les causes à l'origine de ces déplacements de groupes de personnes étaient de nature économique, politique, humanitaire, etc. L'auteure souligne que les nouvelles minorités sont composées d'immigrants et de réfugiés, mais aussi de leurs descendants, qui vivent dans des pays autres que leurs pays d'origine. Il ressort des propos de l'auteure que *les nouvelles minorités* comprennent non seulement la première génération d'immigrants et de réfugiés, mais aussi leurs descendants, c'est-à-dire les deuxième et troisième générations d'individus d'origine migratoire, dont beaucoup sont nés dans les pays d'immigration. Dans ces conditions, si l'on tient compte du fait que les communautés d'immigrants ou de réfugiés incluent généralement leurs enfants nés dans les pays d'accueil, on peut alors considérer que le terme de « nouvelle

³ Déclaration de l'Assemblée Parlementaire de l'OSCE et résolutions adoptées lors de la treizième session annuelle à Edinbourg, du 5 au 9 juillet 2004 <https://www.oscepa.org/en/documents/annual-sessions/2004-edinburgh/declaration-11/232-edinburgh-declaration-eng/file>

⁴ Nihal Eminoğlu, « *Nouvelle minorité* » : *Nouveau concept de la nouvelle Europe. Quelle articulation des normes en droit international pour la protection des nouvelles minorités ?*, Annales XLVIII, n° 65s, 2016, p. 16

⁵ Nihal Eminoğlu, p. 16

⁶ Roberta Medda-Windischer, *Minorités anciennes et nouvelles : gouvernance de la diversité et cohésion sociale du point de vue des droits des minorités*, Acta Univ. Sapientiae, Études européennes et régionales, 11 (2017), p. 27

minorité » fait référence à la « *minorité d'origine immigrée et non pas à celle de minorité issue de l'immigration* »⁷.

Will Kymlicka, un autre auteur qui s'intéresse à la question des minorités, utilise pour ces nouvelles minorités le terme de « *minorités ethniques* », précisant qu'elles « *sont constituées principalement de groupes d'immigrants qui quittent leur pays avec leur famille et, par conséquent, ne réclament généralement pas d'autonomie ni de droits d'auto-gouvernance, mais souhaitent néanmoins s'intégrer* »⁸. Il convient de souligner que la forte augmentation du nombre d'immigrants dans certains pays européens s'est produite avec l'accord des décideurs de ces États, qui reconnaissent la contribution importante des nouvelles minorités à la main-d'œuvre ainsi qu'à l'amélioration de la structure démographique et à la croissance de la population. À l'inverse, d'autres États considèrent que l'augmentation massive du nombre d'immigrants dans certains pays exerce une pression économique et politique sur les gouvernements pour l'intégration de ces groupes de personnes de cultures, de religions et de langues différentes, etc. Selon certains auteurs, « *l'intégration d'un grand nombre d'immigrants peut entraîner de sérieuses difficultés, non seulement d'un point de vue logistique et en termes de ressources, mais aussi en raison du manque d'acceptation sociale de la part de la majorité culturelle* »⁹.

2. Différences entre les minorités nationales et les nouvelles minorités

L'analyse du concept de « *nouvelles minorités* » ne peut être approfondie qu'en mettant en évidence les différences par rapport au concept de minorités nationales. Il est très important de classer les nouvelles communautés soit dans la catégorie des nouvelles minorités, soit dans celle des minorités nationales historiques, car de nombreux États mettent en place des systèmes de protection des droits différents selon les deux cas. Le terme de minorités nationales (traditionnelles, historiques) désigne « *les communautés dont les membres ont une langue, une culture ou une religion distinctes par rapport au reste de la population et qui sont devenues des minorités à la suite du redécoupage des frontières internationales, ayant vu la souveraineté de leurs*

⁷ Nihal Eminoğlu, p. 18

⁸ Will Kymlicka, *Multicultural Citizenship: A liberal theory of minorities rights*, Oxford University Press, New York, 2003, p. 102

⁹ Andrei Dragan, « *New Minorities* » in *the States Parties to the Framework Convention: The Importance of Self-Identification and Recognition*, Pécs Journal of International and European Law - 2018/I, p. 104

territoires passer d'un pays à un autre »¹⁰. Ainsi, l'une des principales caractéristiques des minorités nationales réside dans la durée longue de résidence sur le territoire de l'État concerné. D'autre part, les nouvelles minorités désignent des « groupes minoritaires établis dans le pays dont la présence est le résultat d'une immigration plus récente »¹¹. Une autre distinction entre ces deux groupes de minorités réside dans le fait que, généralement, les personnes appartenant aux minorités historiques bénéficient de la citoyenneté de l'État, tandis que les autres groupes de personnes, d'origine migratoire, ne la possèdent pas. À cet égard, même les États qui ne soutiennent pas l'existence de la citoyenneté ou de la nationalité comme condition nécessaire pour qu'une minorité bénéficie de la protection de ses droits par le biais d'instruments internationaux « considèrent généralement comme légitime que l'État puisse réserver un traitement plus favorable aux minorités nationales « de souche » (ou « historiques »), établies de longue date dans le pays, qu'aux minorités issues d'une immigration plus ou moins récente »¹². Troisièmement, les anciennes et les nouvelles minorités se distinguent également par la manière dont elles sont reconnues en tant que minorités dans les États concernés. Dans certains États européens, les minorités nationales ont été reconnues dans des textes juridiques, voire dans les constitutions. En revanche, les nouvelles communautés d'origine migratoire ne sont pas reconnues comme minorités nationales, elles sont privées de certains droits dont bénéficient les minorités traditionnelles « et sont protégées par le principe général de non-discrimination, mais ne disposent pas de droits spécifiques en tant que groupe »¹³. Il convient également d'inclure dans la liste des différences entre ces deux catégories de minorités, le fait qu'elles réagissent différemment par rapport à la population majoritaire. En règle générale, les communautés composées d'immigrants et de réfugiés acceptent que leur vie et celle de leurs enfants dépendent dans une large mesure de l'interaction avec les institutions gérées dans la langue de la majorité et s'efforcent autant que possible de s'intégrer le plus rapidement

¹⁰ Roberta Medda-Windischer, « *Minorités anciennes et nouvelles : gouvernance de la diversité et cohésion sociale du point de vue des droits des minorités* », Acta Univ. Sapientiae, Études européennes et régionales, 11 (2017), p. 26

¹¹ Nihal Eminoğlu, p. 16

¹² José Woehrling, *Les trois dimensions de la protection des minorités en droit constitutionnel comparé*, Rapport général présenté lors des Journées mexicaines de l'Association Henri Capitant à Mexico et Oaxaca du 18 au 25 mai 2002, p. 107

¹³ Katharina Crepaz, « *Old* » vs. « *new* » minorities – an identity-based approach to the distinction between autochthonous and immigrant minorities, Migration Letters, mai 2016, volume 13, n° 2, p. 204

possible dans la société, sans mettre particulièrement l'accent sur la préservation de leur identité. Au contraire, les minorités traditionnelles tentent, par diverses actions politiques et économiques, de résister à l'assimilation par la population majoritaire, dans le but de préserver leur langue et leur culture, ainsi que de maintenir et de développer leur identité.

On peut également parler de différences entre les minorités traditionnelles et les nouvelles minorités en ce qui concerne leur mode d'organisation et le soutien que l'État leur fournit, dans leurs démarches. En principe, les organisations et associations des communautés d'immigrés (les nouvelles minorités) ne sont pas interdites par les autorités étatiques, mais elles ne sont pas non plus promues ou soutenues de manière adéquate, contrairement aux organisations des minorités traditionnelles qui bénéficient de certains avantages consacrés dans des textes juridiques.

Bien qu'il existe de nombreuses différences entre les anciennes et les nouvelles minorités (..), elles partagent également certains points communs. Les deux catégories de minorités, à des degrés divers et par des moyens différents, s'efforcent de préserver leur identité, leur religion, leur langue et leur culture. L'existence de différences entre les deux catégories de minorités, mais aussi les politiques d'intégration différentes des États d'accueil, influencent le système de protection des droits des nouvelles communautés. Les modalités de protection des droits des nouvelles communautés suscitent de nombreux débats et controverses. Tout d'abord, la distinction entre les nouvelles minorités et les minorités traditionnelles soulève *« certains problèmes sur le plan moral et philosophique car les différences de traitement entre les deux catégories sont difficiles à justifier entièrement par le seul argument de l'antériorité des minorités historiques »*¹⁴. Deuxièmement, il n'est pas facile, ni confortable, pour un État de définir et de justifier la frontière entre ces deux catégories, à savoir après combien de générations une collectivité composée d'immigrants et de réfugiés pourrait être considérée comme une minorité nationale, historique. Ce ne sont là que quelques raisons, parmi tant d'autres, qui ont conduit certains auteurs à estimer qu'*« il faudrait éviter de faire une distinction stricte entre les « nouvelles » minorités et les « anciennes », en excluant les premières et en incluant les secondes, car cette distinction paraît relativement artificielle »*¹⁵. Cependant, l'auteur

¹⁴ José Woehrling, *Les trois dimensions de la protection des minorités en droit constitutionnel comparé*, Rapport général présenté lors des Journées mexicaines de l'Association Henri Capitant à Mexico et Oaxaca du 18 au 25 mai 2002. p.109

¹⁵ Asbjørn Eide cité par Yona Cherki, *Intégration des étrangers et protection des minorités : étude comparée du droit international et du droit européen*. Droit. Université Panthéon-Sorbonne-Paris I, 2017, p. 181

susmentionné¹⁶ estime que les minorités nationales devraient bénéficier de droits plus solides par rapport à ceux qui sont arrivés plus récemment dans les pays de destination, une solution adoptée par de nombreux États européens.

3. Quelques dispositions juridiques relatives à la protection des droits des nouvelles minorités

L'émergence du concept de « nouvelles minorités » et l'augmentation marquée du nombre d'immigrants et de réfugiés, observée notamment au cours des deux dernières décennies, ont suscité de nombreux débats et controverses quant à la manière de protéger les droits de ces communautés. La question de la protection des droits des nouvelles minorités a constitué et constitue toujours une préoccupation constante tant pour les décideurs de nombreux pays que pour certaines institutions ou organisations européennes ou internationales. Ces actions se sont concrétisées par des réglementations visant, directement ou indirectement, à clarifier certains aspects relatifs aux droits des nouvelles minorités. Il convient de préciser d'emblée que, bien que la protection des droits des nouvelles minorités puisse généralement être assurée par des normes communes à toutes les minorités, comme les normes qui visent la protection des droits de l'homme, il existe également des situations où cela se fait par le biais de normes se rapportant exclusivement aux nouvelles collectivités. Nous aborderons ci-après quelques-unes d'entre elles.

Convention-cadre pour la protection des minorités nationales

Il convient de préciser que les instruments européens ou internationaux relatifs à la protection des droits des minorités ne sont pas explicites quant à l'inclusion ou l'exclusion des nouvelles minorités de la protection de leurs droits. Ainsi, certains articles ne peuvent être invoqués que par les communautés traditionnelles et historiques, tandis que d'autres clauses peuvent s'appliquer également aux nouvelles minorités. Considérée comme l'instrument européen le plus important dans le domaine de la protection des minorités, *la Convention-cadre*¹⁷ ne comprend que trois articles qui subordonnent les droits des minorités à l'existence de liens traditionnels (article 10.2, article 11.3, article 14.2). Il en résulte donc que, à l'exception des trois articles mentionnés ci-dessus, cet instrument pourrait s'appliquer en théorie aux nouvelles communautés de migrants ou de réfugiés. De plus,

¹⁶ Idem, p. 181

¹⁷ Convention-cadre pour la protection des minorités nationales, Conseil de l'Europe, Série des traités européens - n° 157, Strasbourg, 1er février 1995

selon le rapport explicatif¹⁸, le terme « *résidence traditionnelle* » ne fait pas nécessairement référence aux minorités historiques, mais « *uniquement à celles qui résident encore dans la même zone géographique* »¹⁹. On pourrait donc en conclure que les nouvelles minorités, issues de l'immigration, peuvent également bénéficier des dispositions des articles mentionnés ci-dessus. D'autre part, en dehors des trois articles mentionnés, toutes les autres dispositions de la *Convention-cadre* protègent tous les individus appartenant à « *des minorités nouvelles ou anciennes, tous les groupes reconnus ou non officiellement comme minorités, toutes les personnes possédant ou non la nationalité de l'État dans lequel elles résident* »²⁰.

La Charte européenne des langues régionales ou minoritaires constitue un instrument extrêmement important pour la protection des droits des minorités au niveau européen, en ce qui concerne les langues qu'elles parlent, mais elle n'est pas favorable aux nouvelles minorités, aux immigrants et aux réfugiés. Bien que la *Charte* n'établisse pas de liste des langues européennes correspondant à la notion de langues régionales ou minoritaires, elle précise toutefois à l'article 1er qu'il s'agit des « *langues pratiquées par des ressortissants de l'État qui sont différentes de la (des) langue(s) pratiquée(s) par le reste de la population de l'État, mais qui, bien que traditionnellement pratiquées sur le territoire de l'État, ne peuvent pas être rattachées à une aire géographique particulière de celui-ci* »²¹. Par ailleurs, l'article souligne clairement que son système de protection n'inclut ni les dialectes de la (des) langue(s) officielle(s) de l'État ni les langues des migrants. On constate que ce document européen exclut clairement de la protection les langues des nouvelles communautés de migrants.

La Recommandation 1201 du Conseil de l'Europe²² souligne sans réserve que « *la possession de la nationalité de l'État de résidence* » constitue une «

¹⁸ Rapport explicatif à la Convention-cadre pour la protection des minorités nationales, Conseil de l'Europe, Série des traités européens - n° 157, Strasbourg, 1er février 1995, paragraphe 66

¹⁹ Roberta Medda-Windischer, p. 33

²⁰ Idem, p. 33

²¹ Charte européenne des langues régionales ou minoritaires, Conseil de l'Europe, Série des traités européens - n° 148, Strasbourg, 5 janvier 1992, <https://rm.coe.int/168007c07e>

²² Recommandation 1201 relative à un protocole additionnel à la Convention européenne des droits de l'homme sur les droits des minorités nationales, Assemblée parlementaire du Conseil de l'Europe, 1993.

condition du statut de minorité »²³. Cette condition découle de la définition que la *Recommandation* propose à l'article 1er pour le terme de minorité, à savoir « *résident sur le territoire de cet État et en sont citoyens, et entretiennent des liens anciens, solides et durables avec cet État* ». Nous constatons donc que dans ce cas (*Recommandation 1201*), la position du Conseil de l'Europe est rigide, limitant l'accès à une protection adéquate des étrangers, des immigrants et d'autres catégories de personnes non-ressortissantes. Cette position est également soutenue dans la *Résolution 1985 (2014)*²⁴, qui, au point 3, « *rappelle par ailleurs la définition des minorités nationales énoncée dans sa Recommandation 1201 (1993)* ».

Pacte international relatif aux droits civils et politiques (PIDCP)

Considéré comme le premier traité international à portée mondiale faisant référence à la protection des droits des minorités, il pourrait concerner indirectement, du moins en théorie, les droits des nouvelles minorités. L'article 27 du Pacte précise que « *dans les États où il existe des minorités ethniques, religieuses ou linguistiques, les personnes appartenant à ces minorités ne peuvent être privées du droit d'avoir, en commun avec les autres membres de leur groupe, leur propre vie culturelle, de professer et de pratiquer leur propre religion, ou d'employer leur propre langue* »²⁵. L'analyse de l'article 27 permet de constater qu'il ne fait pas référence aux citoyens, mais aux personnes appartenant à des minorités ethniques, religieuses ou linguistiques. Cette interprétation est également étayée par les dispositions de l'article 26 du PIDCP qui précise que « *toutes les personnes sont égales devant la loi et ont droit, sans discrimination, à une protection égale de la loi* »²⁶. En conséquence, sont protégées, conformément à l'article 27 du Pacte, les personnes « *qui appartiennent à un groupe et qui partagent en commun une culture, une religion et/ou une langue* »²⁷. Bien que les deux articles mentionnés ci-dessus semblent indiquer que toutes les personnes appartenant à des minorités jouissent de certains droits, l'article 25 du Pacte établit toutefois une distinction claire entre les citoyens et les non-

²³ Yona Cherki. *Intégration des étrangers et protection des minorités : étude comparée du droit international et du droit européen*. Droit. Université Panthéon-Sorbonne-Paris I, 2017, p. 180

²⁴ Résolution 1985 (2014), La situation et les droits des minorités nationales en Europe, Assemblée parlementaire du Conseil de l'Europe,

²⁵ Le Pacte international relatif aux droits civils et politiques (PIDCP), adopté le 16 décembre 1966 par l'Assemblée générale des Nations unies dans sa résolution 2200 A (XXI), art. 27

²⁶ *Idem*, art. 26

²⁷ Nihal Eminoğlu, p. 22

citoyens. Selon cet article, seuls les citoyens peuvent jouir de certains droits : (a) de prendre part à la direction des affaires publiques, (b) de voter et d'être élu lors des élections... (c) d'accéder, dans des conditions générales d'égalité, aux fonctions publiques de son pays.

À cet égard, dans sa **Recommandation générale de 1994**, la Commission des droits de l'homme des Nations Unies a établi qu'il est important de « *ne pas exiger la citoyenneté comme condition nécessaire pour évaluer la détermination du statut des minorités et la protection des minorités* »²⁸. De plus, dans son *Observation n° 23 de 1994*, au paragraphe 5.2, la Commission des droits de l'homme des Nations Unies a interprété l'article 27 du *PIDCP* en soulignant que « *L'article 27 confère des droits aux personnes appartenant aux minorités qui existent dans l'État partie. Compte tenu de la nature et de la portée des droits énoncés dans cet article, il n'est pas justifié de déterminer le degré de permanence que suppose le terme « exister »* »²⁹. Par conséquent, selon la Commission, la citoyenneté et la nationalité ne peuvent constituer des critères permettant d'exclure certains groupes de personnes de la protection de leurs droits. Nous constatons donc qu'au niveau international, en matière de protection des droits des nouvelles minorités, l'approche est plus favorable à celles-ci que certaines réglementations appliquées au niveau régional européen.

4. L'approche nationale

En ce qui concerne **la situation dans différents pays européens**, la protection des droits des nouvelles minorités en vertu d'une législation spécifique aux minorités dépend, dans de nombreux cas, de l'octroi ou non du statut de minorité nationale. Les conditions requises pour l'octroi du statut de minorité nationale varient d'un pays à l'autre et il n'existe pas de procédures uniformes à cet effet. Dans de nombreux États européens, la règle consiste à n'accorder le statut de minorité nationale à certains groupes de personnes vivant sur leur territoire qu'à la condition qu'elles aient la nationalité de l'État concerné et qu'elles présentent des liens solides et durables tels que définis

²⁸ *Idem*

²⁹ Comité des droits de l'homme, Observation générale adoptée par le Comité conformément au paragraphe 4 de l'article 40 du Pacte international relatif aux droits civils et politiques.

dans *la Recommandation 1201*³⁰. Nous présenterons ci-après les conditions et les modalités d'octroi de ce statut dans le cas de quelques États européens.

Dans le cas *de la Roumanie*, on ne peut pas parler d'une procédure spéciale et explicite adoptée pour déclarer une communauté ethnique comme minorité nationale. En l'absence d'une procédure spéciale en Roumanie, la reconnaissance en tant que minorités nationales des nouveaux groupes ethniques composés d'immigrants ou de réfugiés repose sur les dispositions de plusieurs textes législatifs. La procédure d'octroi du statut de minorité nationale repose sur la définition figurant dans *la loi n° 208/2015*³¹, art. 56, al. 3 : « *On entend par minorité nationale l'ethnie représentée au Conseil des minorités nationales* ». Sans entrer dans les détails, les groupes ethniques, linguistiques ou religieux devraient suivre les étapes suivantes :

1. Création de l'association (organisation) des citoyens appartenant à des minorités ethniques³².
2. Reconnaissance du statut d'utilité publique de l'association (organisation) de citoyens appartenant à des minorités ethniques, par le Secrétariat général du gouvernement³³.
3. Obtention d'un siège au Parlement par la participation aux élections législatives.
4. Obtention du statut de membre au sein du Conseil des minorités nationales³⁴.

On estime qu'en Roumanie, « *le cadre juridique permettant l'affirmation et la promotion des éléments qui composent l'identité spécifique des minorités nationales constitue, dans la même mesure, la garantie de la promotion du*

³⁰ Yona Cherki. *Intégration des étrangers et protection des minorités : étude comparée du droit international et du droit européen*. Droit. Université Panthéon-Sorbonne-Paris I, 2017, p. 173

³¹ Loi n° 208/2015 relative à l'élection du Sénat et de la Chambre des députés, ainsi qu'à l'organisation et au fonctionnement de l'Autorité électorale permanente

³² Ordonnance du gouvernement n° 26 du 30 janvier 2000 relative aux associations et aux fondations

³³ Loi n° 246 du 18 juillet 2005 portant approbation de l'ordonnance du gouvernement n° 26/2000 relative aux associations et fondations, Journal officiel n° 656 du 25 juillet 2005

³⁴ Décision du gouvernement n° 589 du 21 juin 2001 relative à la création du Conseil des minorités nationales (Journal officiel n° 365 du 6 juillet 2001)

multiculturalisme, lui-même prémisses de la diversité culturelle et de l'interculturalisme »³⁵.

En **Hongrie**, où le terme de « *minorité nationale* »³⁶ a été remplacé par celui de « *nationalité* », outre les autres conditions nécessaires à la reconnaissance d'un groupe en tant que minorité nationale (13 minorités nationales sont reconnues), la *Loi sur les droits des nationalités* stipule à l'article 1 que « *une nationalité désigne tout groupe ethnique résidant en Hongrie depuis au moins un siècle...* »³⁷. Cette longue période de résidence sur le territoire hongrois éloigne considérablement les nouvelles minorités de l'obtention du statut de minorité nationale et, par conséquent, de la protection dont bénéficient les autres groupes ethniques reconnus comme minorités nationales.

Tout comme en Hongrie et dans le cas de **la Pologne**, les nouvelles minorités doivent remplir une condition plus difficile à satisfaire concernant la résidence de longue durée sur le territoire du pays. Ainsi, selon la *Loi sur les minorités nationales et ethniques, et sur la langue régionale*, « *une minorité nationale, au sens de la présente loi, est un groupe de citoyens polonais qui répond à toutes les conditions suivantes : [...] ses ancêtres ont occupé le territoire actuel de la République de Pologne depuis au moins cent ans* »³⁸. Il est clairement précisé que, dans ce cas, les nouvelles communautés devraient résider sur le territoire de la Pologne depuis au moins cent ans et acquérir la nationalité polonaise pour obtenir le statut de minorités nationales.

En **Estonie**, conformément à l'article 1er de la *Loi sur l'autonomie culturelle des minorités nationales*³⁹, « *sont considérés comme « minorité nationale » les citoyens estoniens qui résident sur le territoire de l'Estonie et qui entretiennent des liens de longue date, solides et durables avec l'Estonie* ». Ainsi, dans ce cas également, les groupes ethniques souhaitant obtenir le statut de minorité nationale doivent remplir au moins deux conditions, à savoir la possession de la nationalité et des liens solides et durables avec l'Estonie. C'est l'une des raisons pour lesquelles *le Comité consultatif de la*

³⁵ Aurescu Bogdan, Elena Lazăr, *Le droit international de la protection des minorités nationales*, Éditions Hamangiu, 2019, p. 214

³⁶ La loi sur les droits des minorités nationales et ethniques (loi LXXVIII de 1993)

³⁷ La loi CLXXIX de 2011 sur les droits des nationalités a été adoptée par le Parlement hongrois le 19 décembre 2011

³⁸ *Loi sur les minorités nationales et ethniques, et sur la langue régionale*, adoptée le 6 janvier 2005 par le Sejm (Parlement) et signée par le président le 24 janvier 2005

³⁹ *Loi sur l'autonomie culturelle des minorités nationales*, adoptée le 28 novembre 1993, Estonie

*Convention-cadre pour la protection des minorités nationales*⁴⁰ a recommandé à l'Estonie de s'efforcer de réduire le nombre de personnes sans citoyenneté en facilitant l'accès à la citoyenneté pour les résidents de longue durée.

Dans le cas **de la Serbie** également, *la loi sur la protection des droits et libertés des minorités nationales* fixe plusieurs conditions pour qu'une communauté obtienne le statut de minorité nationale, ce qui rend l'accès à ce statut assez difficile pour les nouvelles minorités. Ainsi, selon la loi, « *une minorité nationale consiste en tout groupe de citoyens de la République de Serbie, qui est suffisamment représentatif en nombre et..... il appartient à l'un des groupes de résidents, ayant des liens étroits et durables avec le territoire de la République de Serbie* »⁴¹.

Dans le cas **de la Suède**, *la loi sur les minorités nationales et les langues minoritaires* ne contient pas de définition des minorités nationales et ne précise pas non plus les conditions qu'un groupe ethnique doit remplir pour obtenir le statut de minorité. La loi stipule clairement et de manière restrictive qu'en Suède, « *les minorités nationales sont les Juifs, les Roms, les Samis, les Finlandais de Suède et les Tornédaliens, conformément aux obligations de la Suède en matière issues de la Convention-cadre pour la protection des minorités nationales (NE 2000:2) et de la Charte européenne des langues régionales ou minoritaires* »⁴². Ainsi, en dehors des cinq minorités traditionnelles, la loi n'offre pas aux nouveaux groupes ethniques la possibilité d'obtenir le statut de minorité nationale.

L'analyse des réglementations applicables aux nouvelles minorités présentées ci-dessus, de la manière dont la problématique de ces communautés est traitée dans plusieurs pays européens ainsi que des commentaires de la littérature spécialisée⁴³ permet de dégager trois options concernant la protection des droits de cette catégorie de minorités

1. le maintien de la séparation et de la distinction entre les minorités nationales et les nouvelles minorités, ce qui a comme conséquence l'exclusion

⁴⁰ Le Comité consultatif de la Convention-cadre pour la protection des minorités nationales adopte le 3 février 2022 son cinquième avis sur l'Estonie

⁴¹ Loi sur la protection des droits et libertés des minorités nationales, 2002, qui a été modifiée à plusieurs reprises par la suite. La version présentée ici est celle de 2018.

⁴² Loi n° 724 de 2009 sur les minorités nationales et les langues minoritaires, article 2

⁴³ János Fiala-Butora, *Allies or foes? Does the inclusion of new minorities undermine or strengthen the European system of minority protection?*, Hungarian Journal of Legal Studies 65 (2024) 4, p. 476

de ces dernières de la protection offerte par *la Convention-cadre* au niveau régional européen.

2. l'intégration des nouvelles minorités composées de migrants et de réfugiés dans le système européen actuel de protection des minorités, option déjà appliquée par certains États européens et également recommandée par certaines organisations internationales

3. la mise en place d'« un nouveau système de protection des droits des minorités qui englobe à la fois les minorités nationales, historiques et les nouvelles minorités »⁴⁴, dans le cadre duquel toutes les minorités bénéficieraient de certains droits universels, tandis que les minorités nationales devraient également bénéficier de certains droits supplémentaires.

Nous estimons que cette troisième option mériterait une plus grande attention dans l'hypothèse où elle parviendrait à établir un système d'application générale pour la protection des droits de toutes les catégories de minorités, tout en prévoyant effectivement une certaine spécificité/des droits spécifiques pour les minorités nationales/historiques.

Conclusions

L'analyse de la situation de la protection des droits des nouvelles minorités dans plusieurs pays européens, des conditions d'octroi par ces derniers du statut de minorités nationales, ainsi que de certains travaux doctrinaires spécialisés, nous permet de constater qu'il existe généralement une tendance à retarder leur accès au système de protection appliqué aux minorités nationales. Nous pouvons affirmer que, dans le contexte actuel d'une augmentation continue et marquée du phénomène migratoire, la question des nouvelles minorités qui se sont formées et développées dans de nombreux États doit devenir une préoccupation majeure pour les institutions et organismes internationaux compétents. Le présent article conclut qu'il existe un intérêt et un potentiel importants dans la promotion des droits des nouvelles minorités tant au niveau européen, qu'international, bien qu'aucun consensus n'ait encore été atteint quant à la méthode à utiliser. Aussi le rapporteur national sur la protection de minorités, monsieur Nicolas Levrat, souligne que même avec « *l'approche de l'UE en matière de lutte contre la discrimination, qui couvre tous les groupes minoritaires, y compris les migrants et leurs descendants, la Commission européenne devrait adopter un cadre plus complet pour les droits des minorités. Cela permettrait d'assurer une approche plus cohérente des questions relatives aux minorités dans*

⁴⁴ Idem, p. 478

l'ensemble de l'UE et de répondre aux besoins des minorités linguistiques, qui sont actuellement laissées de côté dans les stratégies et les politiques de l'UE »⁴⁵.

Nous estimons toutefois que, dans la reconstruction et la mise en œuvre d'un nouveau système de protection des droits incluant à la fois les anciennes (minorités nationales) et les nouvelles minorités, il faut tenir compte du fait que ces deux catégories présentent néanmoins des problèmes particuliers et des différences à bien des égards. C'est pourquoi nous estimons qu'il est difficile de trouver un système de protection unique et cohérente applicable à toutes les minorités, et que ce processus est généralement complexe, impliquant des débats sérieux et des compromis.

⁴⁵<https://www.ohchr.org/en/press-releases/2026/01/eu-must-end-double-standards-minority-protection-un-expert>

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Economic, Social and Cultural Rights and the Environmental Dimension of Sustainable Development: A Critical Assessment of the United Nations Committee on Economic, Social and Cultural Rights 's General Comment no. 27 (2025)

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Abstract: *The General Comment no. 27 (2025) on economic, social and cultural rights and the environmental dimension of sustainable development is the last general comment adopted by the United Nations Committee on Economic, Social and Cultural Rights (the Committee), in September 2025, after a consistent work that lasted almost 6 years. It highlights the adverse impacts of environmental degradation on economic, social and cultural rights and clarifies the obligations of State parties to the International Covenant on Economic, Social and Cultural Rights (the Covenant), with respect to the environmental dimension of sustainable development. The general comment seeks to provide guidance to states with regard to the fulfilment of their obligations under the Covenant, in light of the current realities related to climate change and environmental degradation, namely in a manner that respects ecological limits and the finite character of natural resources. At the same time, the general comment is following a wider trend that it is currently present in the work of several international organizations, namely that of clarifying states international obligations in the context of environmental degradation and climate change.*

While making a short overview of the document, the present paper aims at looking at it with a critical eye with a view to responding to two main questions, namely: 1. How did the United Nations Committee on Economic, Social and Cultural Rights approached economic growth, sustainable development, environment and the progressive realization of economic, social and cultural rights before the adoption of GC no. 27 (2025)? and 2. Is

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GC 27 (2025) proposing a different approach, including a different economic model? And, if yes, what would this new approach entail.

Consequently, the paper is proposing an short overview of the Committee 's approach to economic growth, sustainable development, environment and the progressive realization of economic, social and cultural rights rights, before the adoption of GC no. 27 (2025) (Section I), followed by a short presentation and evaluation of CG no. 27 (2025), including with regard to the Committee 's stance on a new economic model that would be able to reconcile the realization of economic, social and cultural rights with planet 's ecological limits (Section II). This paper will conclude with identification of the main takeaways and of future perspectives on the topic.

Key-words: *ESC rights, sustainable development, environment, economic growth, doughnut economics, ecological limits, future generations.*

Introduction

Adopted in 1966 and entered into force in 1976, the *International Covenant on Economic, Social and Cultural Rights*¹ currently stands for one of the main human rights treaties adopted by the United Nations, being so far ratified/accepted by 173 States parties.

Economic, social and cultural rights are central to everyone 's day to day lives as these rights relate to food, water, housing, standard of living, health, education, employment or culture, to name just a few examples. Protection and fulfilment of these rights are not only conducive to the enhancement of the lived experience of everyone but also need to be seen as entitlements of individuals to enjoy "a life with dignity" and this stands at the core of the values that are enshrined in the 1948 *Universal Declaration of Human Rights*². Or, as pointed out by the Human Rights Committee³ in its recent general comment on the right to life⁴, "a contemporary understanding of the right to life must engage with the myriad social, economic and environmental threats to life experienced by millions of people across the globe" and "States

¹ Further referred to as *ICESCR*.

² Further referred to as *UDHR*.

³ Further abbreviated as *CCPR*.

⁴ *CCPR, G.C. no. 36 (2019) on the right to life (article 6 of the ICCPR)*, *CCPR/C/GC/36*, 3rd of September 2019, para. 26.

parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”. This approach implies that the right to life has economic and social dimensions – which are also relevant from the perspective of economic, social and cultural rights – and that the implications for the right to life of environmental degradation and climate change as well as of unsustainable development are nowadays undeniable.

The implementation of the *ICESCR*⁵ is monitored by the United Nations Committee on Economic, Social and Cultural Rights⁶, which was established as a subsidiary body of the ECOSOC in 1985 following the adoption of *ECOSOC Decision 1985/17 of 28th of May 1985*. Thus, as of 1985, the Committee is composed out of 18 independent experts, elected by the ECOSOC, following, among others, the criteria of the equitable geographical distribution. The experts act in their personal capacity, work by consensus and their main task is to monitor the implementation of the Covenant by the States parties through the reporting procedure referred to in art. 16 of the Covenant.

The Covenant makes no reference to environment or to a right to clean, healthy and sustainable environment, nor to sustainable development as such. Nevertheless, the relationship between human rights and international environmental law was present, in the last decades, in the work of human rights treaty bodies, including CESCR with the argument that many of the economic, social and cultural rights enshrined in the *ICESCR* also involve an environmental component. This human rights-based approach to the environment became critical to address due to the multiple and interconnected environmental crisis and of the imperative to act with a view to preserve the ESC rights not only for the present but also for the future generations. Moreover, there were also attempts to look at ESC rights from an international environmental law perspective⁷.

⁵ Initially, the ECOSOC has set up a Sessional Working Group on the Implementation of the *ICESCR* through the adoption of the ECOSOC Decision 1978/10 on the 3rd of May 1978. This Sessional Working Group was later, in 1985, renamed CESCR.

⁶ Further referred to as CESCR or the Committee.

⁷Stephanie Chuffart, Jorge E. Vinuales, *From the other shore: Economic, Social and Cultural Rights from an International Environmental Law Perspective* in Eibe Reidel, Gilles Giacca, Christophe Golay, *Economic, Social and Cultural Rights in International Law. Contemporary Issues and Challenges*, Oxford University Press, 2014, pp. 286-307.

Following the principles that were enshrined in the *Vienna Declaration and Plan of Action*⁸, in 1993, on the universality, indivisibility inter-dependence and inter-relatedness of all human rights, the *ICESCR* become one of the two pillars of international human rights law. This approach also led to an emphasis on the justiciability of ESCR rights and to the adoption, in 2010, of an Optional Protocol to the *ICESCR*⁹. The Protocol has 31 States parties, has entered into force in 2013 and enables the CESCR to consider individual communications (article 1-9), inter-state communication (article 10) and also use the inquiry procedure (article 11). The latter two possibilities being provided for following the separate acceptance of articles 10 and 11 of the *OP-ICESCR*.

While exercising its monitoring functions under art. 16-18 of the Covenant, the Committee adopts concluding observations¹⁰. From the procedural point of view the adoption of COBs follows several steps. Thus, the monitoring starts with the submission of a written report by the State party, followed by the adoption of a list of issues¹¹, the State party replies to the LOIs and, finally, a constructive dialogue held, in person, in Geneva.

Apart from its monitoring function the CESCR also adopts statements – on problems/issues of general interest – and general comments¹². The general comments are adopted as a result of the substantive work undertaken the Committee on matters that are relevant for the implementation of the Covenant and serve as interpretative tools/instruments that provide guidance to States parties with respect to their obligations under the *ICESCR*.

*General Comment no. 27 (2025) on ESC rights and the environmental dimension of sustainable development*¹³ it is the last GC adopted by the CESCR. The GC was adopted in September 2025 after a consistent work that

⁸ At the UN World Conference on Human Rights, Vienna, 12th of July 1993, the *Vienna Declaration and Plan of Action* the Conference concluded that: “the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis”.

⁹ Further referred to as *OP-ICESCR*.

¹⁰ Further referred to as COBs.

¹¹ Further referred to as LOIs.

¹² To date, CESCR has adopted 27 general comments. The latter being the one which is analysed in this paper. The next GC would be on the implementation of ESC in the context of armed conflict.

¹³ CESCR, *GC no. 27 (2025) on ESC rights and the environmental dimension of sustainable development*, E/C.12/GC/27, 26th of September 2025. Further referred to as *GC no. 27 (2025)* or the *GC*.

has lasted almost 6 years. The process of adoption was widely consultative, with CESCR holding a series of regional, thematic and group focused consultations (including regional consultations with children). Within CESCR, several substantive and conceptual debates have influenced both the general orientation of the document, as well as its final language. As indicated in the title, the general comment focuses on the ESC rights and the environmental dimension of sustainable development while at the same time acknowledging the link and interdependence between the economic, social and environmental dimensions of sustainable development.

The general comment highlights the adverse impacts of environmental degradation on economic, social and cultural rights and clarifies the obligations of State parties to the ICESCR (the Covenant), with respect to the environmental dimension of sustainable development. It seeks to provide guidance to states with regard to the fulfilment of their obligations under the Covenant, in light of the current realities related to climate change and environmental degradation, namely in a manner that respects ecological limits and the finite character of natural resources (para. 4 of GC no. 27). At the same time, the GC is also following a more general trend with regard to the work of international organizations and/or bodies¹⁴, namely that of clarifying states international obligations in the context of environmental degradation and climate change.

While making a short overview of the document, the present paper aims at looking at it with a critical eye with a view to responding to two main questions, namely: 1. How did CESCR approached economic growth, sustainable development, environment and the progressive realization of ESC rights before the adoption of GC no. 27 (2025) ? and 2. Is GC 27 (2025) proposing a different approach, including a new economic model? And, if yes, what would this new approach entail.

Consequently, the paper is proposing an short overview of CESCR's approach to economic growth, sustainable development, environment and the progressive realization of ESC rights, before the adoption of GC no. 27 (2025)

¹⁴ UNGA, A/RES/76/300; HRC, A/HRC/RES/48/13. In 2022, the United Nations General Assembly (UNGA) recognized that unsustainable development and climate change “constitute one of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights”. Both the UNGA and the Human Rights Council have recognized the clean, healthy and sustainable environment as a human right which is interconnected with the rights enshrined in the two main human rights covenants, that constitute nowadays the core of the human rights protection. They both acknowledge that such approach requires the full implementation of multilateral environmental agreements under the principles of both human rights and international environmental law.

(Section I), followed by a short presentation and evaluation of CG no. 27 (2025), including with regard to CESCR's stance on a new economic model that would be able to reconcile the realization of ESC rights with planet's ecological limits (Section II). This paper will conclude, with identification of main takeaways and future perspectives on the topic.

1. CESCR's approach to economic growth, sustainable development, environment and the progressive realization of ESC rights, before the adoption of GC no. 27 (2025)

Although ICESCR is not an economic, nor an environmental treaty but a human rights treaty, it is nevertheless connected with economics, sustainable development and environment, through the cross-cutting provision enshrined in article 2 (1)¹⁵, in particular. Thus, the maximum available resources that a state is expected to mobilize, under the Covenant, with a view to achieve progressively the realization of ESC rights, are undoubtedly directly connected with economics. Thus, the existence, availability, allocation and use of these resources are linked with the economic resources and the fiscal policies of a state and by way of their concrete amount and use are able to influence the fulfilment of the international obligations of that state under the *ICESCR*.

As regards the environment, while the existence and availability of some natural resources is clearly linked with the maximum available resources provision, namely, article 2 (1), at the same time the realization of some of the rights enshrined in the Covenant, like for example, the right to an adequate standard of living (article 11 of the Covenant), could also be influenced by environmental aspects and would request the adoption, by the state concerned, of adaptation measures. In this regard, in the last 10 years, in its

¹⁵ Article 2 of the ICESCR states: "1. Each State Party to the present Covenant undertakes to take steps, *individually and through international assistance and cooperation*, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively the full realization of the rights* recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the *rights* enunciated in the present covenant *will be exercised without discrimination of any kind* as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals". See for a detailed interpretation of article 2 of the *ICESCR*, Olivier de Schutter, *Article 2*, in Emmanuel Decaux, Olivier de Schutter, *Le pacte international relatif aux droits économiques, sociaux et culturels. Commentaire article par article*, Edition Economica, Paris, 2019, pp. 111-159.

LOIs and COBs, CESCR has raised/addressed climate change mitigation issues under article 2 (1) while climate change adaptation measures were generally raised/addressed under article 11 of the Covenant.

a. Economic growth and sustainable development are also not mentioned in the treaty itself but, indirectly, these concepts are, again, connected with the provisions of article 2 of the Covenant on international cooperation and progressive realization of rights, as well as with the minimum core obligations.

Needless to mention that, the links of the *ICESCR* with economics were also not easy to manage in the post WWII ideological debate regarding the different economic systems embraced by States parties or with respect to their views on the different legal nature of CP and ESC rights, respectively. Moreover, the issue of sustainable development and its connection to human rights, has also raised the question of whether human rights, in general, are means or ends of sustainable development, or both. In the view of CESCR one of the two principles that are relevant with respect to development cooperation activities is that “development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights”¹⁶.

As shown in its thematic work, CESCR has navigated, sometimes skillfully, these ideological controversies with a view to fulfil its mandate, namely that of monitoring with a view to protect ESC rights.

Thus, in 1990, in its *GC no. 3 (1990) - The nature of State parties ‘obligations (art. 2 para.1)’*¹⁷, CESCR has explicitly affirmed *ICESCR* ‘s neutrality vis-à-vis any economic and political system and noted the relevance of other human rights and of the right to development: “The Committee notes that ‘the undertaking to take steps (...) by all appropriate means including particularly the adoption of legislative measures’ neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question (...). Thus, *in terms of political and economic systems the Covenant is neutral* and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the

¹⁶ CESCR, GC no. 2 (1990) – *International technical assistance measures (article 22 of the ICESCR)*, E/1990/23, para. 7.

¹⁷ CESCR, *GC no. 3 (1990) – The nature of State parties ‘obligations (art. 2 para.1 of the Covenant)*, E/1991/23, para. 8.

Committee reaffirms *that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems*, provided that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. *The committee notes the relevance in this regard of other human rights as well as the right to development*".

Nevertheless, this statement of neutrality was often interpreted as being a self-restraint approach and of being, in fact, an indirect validation of unlimited economic growth as an *ipso facto* element for the realization of ESC rights, as well as of the GDP as being the exclusive indicator of evaluating this growth.

The above-mentioned evaluation is confirmed by the approach taken by the CESCR with respect to sustainable development and economic growth in some of its general comments and statements adopted between 2000 and 2009. This approach was also reflected in the practice of the Committee.

One of the earliest references of CESCR to sustainable development is the *Statement to the Third Ministerial Conference of the World Trade Organization* in 2000¹⁸. In this statement, the CESCR recognizes the advantages of the international trading system envisioned in the Preamble of the Marrakesh Agreement, noting its objectives of "higher standards of living, *steady growth* of real income, full employment and economic growth patterns compatible with sustainable development".

In 2002, in its *Statement to the Commission on Sustainable Development – relationship between sustainable development and human rights*¹⁹ CESCR has stated that: "international commitments to human rights and on sustainable development should be considered in the light of their important points of convergence, and of the legally binding nature of human rights obligations". Thus, the Committee has recognized, in general terms, the important relationship between sustainable development and human rights and stated that *any sustainable development related obligations must be understood from the perspective of binding human rights treaties*. Following the same line, CESCR has stressed the need to place human rights at the center

¹⁸ CESCR, *Statement of the CESCR to the Third Ministerial Conference of the World Trade Organization* (2000), para. 1.

¹⁹ CESCR, *Statement of CESCR to the Commission on Sustainable Development* acting as Preparatory Committee for the World Summit on Sustainable Development, May-June 2002, para. 2 and 4.

of efforts to achieve sustainable development and that *the core of sustainable development is the realization of human rights*.

With respect to the link between sustainable development and the environmental issues, in the same statement, the CESCR noted that “a failure to prevent human rights and environmental harm by extractive industries affects sustainable development and also constitutes a breach of treaty obligations under the Covenant” (para. 3).

Moreover, in 2005, in the *GC no. 18 (2005) on the right to work (art. 6 of the ICESCR)*²⁰, CESCR *connected economic growth with ESC rights’ realization*. In this context, by referencing the *ILO Convention no. 122 concerning the Employment Policy* (1964), CESCR has explicitly affirmed that the aim of States parties’ employment policy should be *economic growth and development and that economic growth is linked with the obligation to progressively realize (to fulfil) the right to work*: “(...) This obligation include *inter alia* the obligation to recognize the right to work in national legal systems and adopt a national policy on the right to work as well as a detailed plan for its realization. The right to work requires formulation and implementation by States parties of an employment policy with a view to *stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment*”.

In 2009, CESCR has departed, slightly, from this vision, when it adopted the *GC no. 20 (2009) on Non-discrimination in economic, social and cultural rights (art. 2 para. 2 of the ICESCR)*²¹ and later, in 2012, confirmed this shift in its *Statement in the context of the Rio+20 Conference on “the green economy in the context of sustainable development and poverty eradication”* (2012)²².

Thus, in its *GC no. 20 (2009)* CESCR states that: “*Economic growth has not, in itself, led to sustainable development and individuals and groups of individuals continue to face socio-economic inequality often because of entrenched historical and contemporary forms of discrimination*” (para. 1). Moreover, “(...) Economic policies, such as budgetary allocations and

²⁰ CESCR, *GC no. 18 (2005) on the right to work (art. 6 of the ICESCR)*, E/C.12/GC/18, 6th of February 2006, para. 26 (the obligation to fulfil the right to work).

²¹ CESCR, *GC no. 20 (2009) on Non-discrimination in Economic, Social and Cultural Rights (art. 2 para. 2 of the ICESCR)*, E/C.12/GC/20, 2nd of July 2009.

²² CESCR, *Statement in the context of the Rio+20 Conference on “the green economy in the context of sustainable development and poverty eradication”* (2012).

measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights, without discrimination” (para. 38).

Consequently, the main takeaways from this document are that sustainable development is more than economic growth, it must include equality and non-discrimination and that non-discrimination is an immediate and cross-cutting obligation in the Covenant (para. 7).

At the same time, with the *Statement of CESCR in the context of the Rio+20 Conference on “the green economy in the context of sustainable development and poverty eradication”* the CESCR has come very close to a definition of sustainable development: “(...) In this regard, while recognizing the concept of green economy as highlighted in the zero draft, the Committee emphasizes *the need to integrate the green economy into the broader concept of sustainable development* which encompasses social development, together with economic growth and environmental protection, and thus has close linkages with economic, social and cultural rights” (para. 3); “many of the provisions of the ICESCR link with the environment and sustainable development, and the Committee in its dialogue with States Parties, has regularly stressed the interlinkages of specific economic, social and cultural rights, as well as the right to development, with the sustainability of environmental protection and development efforts” (para. 5).

The elements of the definition of sustainable development provided by CESCR are in line with the widely recognized definition of sustainable development as enshrined in documents such as the *Brundtland Report* (1987)²³, the *Rio Declaration on Environment and Development* (1992)²⁴, the *Copenhagen Declaration on Social Development* (1995)²⁵ and the

²³ See for details the *Report of the World Commission on Environment and Development: Our Common Future* (1987), A/42/427, para. 27 where sustainable development is defined as development that “meet the needs of the present without compromising the ability of future generations to meet their own needs”; “sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspiration for a better life”.

²⁴ June 1992, A/CONF151/26, principle 3: “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”.

²⁵ 14th of March 1995, A/CONF166/2, article 6: “Economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people”.

Transforming our World: the 2030 Agenda for Sustainable Development (2015)²⁶.

The main takeaways from this document would be that, in this statement, CESCR conceptually emphasizes the inclusion of green economy within the concept of sustainable development, the affirmation that sustainable development encompasses social development, economic growth and environmental protection and, the fact that, while *noting* that: “sustainable development encompasses social development, economic growth and environmental protection and thus has close linkages with economic, social and cultural rights” (para. 3), CESCR calls upon the participants of that conference to ensure that: “the new concept of green economy (which does not specifically incorporate social development) is intrinsically linked with the comprehensive concept of sustainable development” (para. 8).

In 2016, in the context of the 50th anniversary of the ICCPR and ICESCR, in the *Joint Statement the International Covenants on Human Rights: 50 Years On*²⁷, adopted by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, both human rights treaty bodies stressed the importance of the two covenants for the achievement of the Sustainable Development Goals and the implementation of the 2030 Agenda (para. 8 of the Statement).

In 2019, CESCR started to pave its way, to what later would become GC no. 27 (2025), with the adoption of the *Statement on the Pledge to leave no one behind: the International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development* (2019)²⁸. In this statement, the Committee has emphasized the importance of ensuring that rights are fulfilled through methods that are sustainable so as to ensure that the rights are secured for both present and future generations (para. 12, e). Moreover, in the view of the Committee “the Covenant is also ideally suited for the implementation of Sustainable Development Goal 16, which is to promote peaceful and inclusive societies for sustainable development, provide that access to justice for all and built effective, accountable and inclusive institutions for at all levels.

²⁶ UNGA, A/RES/70/1, preamble, *Transforming our World: the 2030 Agenda for Sustainable Development*, 21st of October 2015.

²⁷ CESCR, *Joint Statement the International Covenants on Human Rights: 50 Years On* (2016).

²⁸ CESCR, *Statement on the Pledge to leave no one behind: the International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development*, (2019).

With regard to its practice (both COBs and LOIs), the issue of economic growth and sustainable development, CESCR' approach was not systematic.

Thus, sometimes CESCR favoured the approach of unlimited economic growth (measured by reference to GDP/economic indicators only) as indispensable for the realization of ESC rights in relation with States from the Global North, while with respect to states from Global South and some less affluent states from Global North it stated that economic growth is important *ipso facto* but it did not link it with the progressive realization of ESC rights.

In other cases, such as that of the COBs with regard to Solomon Islands (1999) CESCR has recommended "sustainable economic growth", in the COBs on Republic of Moldova (2017) CESCR recommend the "promotion of sustainable consumption and production patterns (para. 69)" and with respect to Angola (2016) the recommendation was "to create a sustainable economy resilient to shocks".

Another interesting aspect is mentioned in the COBs of France (2016) in which CESCR has expressed concern that "due diligence requirements related to sustainable development do not provide full protection to ESC rights" (para. 7). Or the one of Tunisia (1999) where the CESCR has addressed the social component of development and commanded the State party for its success in the promotion of sustainable human development: "as evidenced by the reduction in the number of persons living below the national poverty line, the increase in life expectancy, the decrease in illiteracy and the decrease in infant mortality, as indicated by the overall human development index" (para. 5).

To sum up, before the adoption of GC no. 27 (2025), CESCRs usage, in practice, of the terms "sustainable" and "sustainability" was not necessarily connected with sustainable development concept but more with the idea that the ESC rights need to be realized for both present and future generations, namely by having in mind the human rights principle of sustainability²⁹ as well as its relationship with the principle of non-discrimination, non-retrogression and progressive realization³⁰.

²⁹ For more details, see also Human Rights Council, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation*, Catarina Albuquerque, A/HRC/24/44, 12th of July 2013.

³⁰ CESCR, *GC no. 12 (1999)*, para. 7; CESCR, *GC no. 15 (2003)*, para. 11 and 12; CESCR, *GC no. 19 (2008) on the right to social security (article 9 of the ICESCR)*, E/C.12/GC/19, 4th of February 2008, para. 11.

Nevertheless, in the thematic work, the CESCR understanding of sustainable development, included the following aspects: 1. sustainable development is a concept that may impose limitations on standards of living, growth of real income, full employment and economic growth; 2. commitments related to sustainable development can, and should, be framed as human rights obligations where they overlap with human rights; 3. human rights, including the principles of equality and non-discrimination are at the core of sustainable development; 4. sustainable development encompasses social development, economic growth and environmental protection, and the notion of green economy; 5. sustainable development has important links to ESC rights and the right to development; 6. sustainable development necessitates good governance and sound institutions (indivisibility and interdependence of all human rights); 7. international cooperation under article 2(1) needs to be interpreted to include cooperation required for sustainable development.

b. As regards the *climate change* and *environmental issues*, apart from some references included in the documents that were already mentioned above, there are less references to these topics in CESCR 's general comments and statements.

One of the most explicit GC with respect to the right to a healthy environment is *GC no. 14 (2000) on the right to the highest attainable standard of health (article 12 of the ICESCR)*³¹: “The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a *healthy life*, and extend to *the underlying determinants of health*, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and *a healthy environment*”. Moreover, article 12.2 (b) the right to healthy natural and workplace environments comprises, inter alia, “the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health”.

This GC identifies States Parties specific legal obligations with respect to the right to health and environment, namely: the obligation of states to refrain from unlawfully polluting the air, water and soil e.g. through industrial waste from State owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health (negative obligation to respect); the obligation of states to adopt measures against environmental and occupational hazards and against

³¹ CESCR, *GC no. 14 (2000) on the right to the highest attainable standard of health (article 12 of the ICESCR)*, E/C.12/2000/4, 11th of August 2000, para. 4.

any other threat as demonstrated by epidemiological data and the obligation of states to formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline (obligations to fulfil/facilitate).

In light of the above, the following actions would be considered as violations of the right to health: the suspension of legislation or the adoption of laws and policies that interfere with the enjoyment of any of the components of the right to health (violation of the obligation to respect); the failure of the state to enact or enforce laws to prevent pollution of water, air and soil by the extractive and manufacturing industries (violation of the obligation to protect).

In *GC no. 15 (2002) the right to water (arts. 11 and 12 of the ICESCR)*³², the Committee has stated, with regard to the right to water, the *principle of intergenerational equity*, one of the most important principles of environmental protection: “Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for *present and future generations*”.

Moreover, “States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient water for present and future generations. Such strategies and programmes may include: a. reducing depletion of water resources through unsustainable extraction, diversion and damming; b. reducing and eliminating contamination of watersheds and water-related ecosystems by substances such as radiation, harmful chemicals and human excreta; c. monitoring water reserves; d. ensuring that proposed developments do not interfere with access to adequate water; e. assessing the impacts of actions that may impinge upon water availability and natural eco-systems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity” (para. 27).

With regard to the violations of the right to water in the context of environment, para. 44, a (iii), identifies as a violation of the obligation to respect, pollution and diminution of water resources affecting human health, while para. 44, b (i) identifies as a violation of the obligation to protect the right to water, the failure to enact or enforce laws to prevent the contamination and inequitable extraction of water.

³² CESCR, *GC no. 15 (2002) the right to water (arts. 11 and 12 of the ICESCR)*, E/C.12/2002/11, 20th of January 2003, para.11.

In *GC no. 12 (1999) the right to adequate food (article 11 of the ICESCR)*³³ the Committee acknowledged that the right to adequate food requires appropriate economic, environmental and social policies, at both national and international level, and that the core content of the right to adequate food implies: “the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, *free from adverse substances*, and acceptable within a given culture” and “the *accessibility of such food in ways that are sustainable* and that do not interfere with the enjoyment of other human rights”.

In the *Statement in the context of the Rio+20 Conference on “the green economy in the context of sustainable development and poverty eradication”* (2012) CESCR has emphasise, *inter alia*, the obligation of States parties to avoid adverse environmental effects on the right to food of its population (art. 11, para. 1 a), and, in particular, the need to fully assess the impacts of newly developed green technologies in the area of energy and in relation to access to food and water; it emphasises the adverse implications for the right to food of cases of land grabbing and overexploitation of fisheries which not only have detrimental effects on environmental sustainability but also gravely affect the livelihood of present and future generations; the need to conserve the natural habitat and the sustainable use of natural resources as elements of the enjoyment of the right to health (art. 12) and, in particular, access to safe and potable water and the prevention of water degradation and pollution that affect the right to health (para. 6).

Another reference to environment is the one on the determinants of the right to health, in para. 6, namely: “the need to conserve the natural habitat and sustainable use of natural resources as elements of the enjoyment of the right to health (article 12) and, in particular, access to safe and potable water and the prevention of water degradation and pollution that affects the right to health”.

In 2018, the *Statement on Climate change and the International Covenant on Economic, Social and Cultural*³⁴, the CESCR stated that: “the impacts of climate change on a range of rights guaranteed under the *ICESCR* have been amply documented” and that “complying with human rights obligations in the context of climate change is a duty of both State and non-State actors. This requires (...) fulfilling human rights by *adopting policies that can channel*

³³ CESCR, *GC no. 12 (1999) the right to adequate food (article 11 of the ICESCR)*, E/C.12/1999/5, 12th of May 1999, para. 4, 8.

³⁴ CESCR, *Statement on Climate change and the International Covenant on Economic, Social and Cultural* (2018), E/C.12/2018/1, 8th of October 2018, para. 10.

models of production and consumption towards a more environmentally sustainable pathway". Consequently, "a failure to prevent foreseeable harm to human rights caused by climate change or a failure to mobilize the maximum available resources in the efforts to do so, could constitute a breach of this obligation" (para. 6).

Moreover, "under the Covenant States parties are required to respect, protect and fulfil all human rights and for all", "they owe such duties not only to their own populations, but also to populations outside their territory" (para. 5).

Consequently, "the Committee will continue to review the impacts of climate change on economic, social and cultural rights and provide guidance to states on how they can discharge their duties under the Covenant in the *mitigation of climate change and adaptation* to its unavoidable effects".

In 2020, in the *GC no. 25 (2020) on the right to science*³⁵ although there is only one reference to climate change, the right to enjoy the benefits of scientific knowledge and of its applications is, nevertheless, relevant to climate change and to measures taken to address it. Thus, by establishing that States parties have a core obligation to "adopt mechanisms aimed at aligning government policies and programs to the best available, generally accepted scientific evidence" and to "promote accurate scientific information and refrain from disinformation, disparagement or deliberately misinforming of the public, so as to erode citizen understanding and respect for science and scientific research" this GC makes an important contribution also in the area of scientifically proven data related to climate change and measures to mitigate and adapt to it. Moreover, the same GC also stressed the need to "ensure that people have access to basic education and skills necessary for the comprehension and application of scientific knowledge" and to "promote accurate scientific information" including on climate change.

In the history of the CESCR reporting procedure, the first COBs that made reference to climate change obligations date back to 2008. At that time CESCR has recommended to Ukraine "to adopt legislation on climate protection giving effect to the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*". Ever since, the climate change topic was present in the work of the Committee and the COBs adopted reflect this stance. CESCR recommendations started to be focused on four main areas related to climate change, namely: mitigation, adaptation, procedural rights and international cooperation.

³⁵ CESCR, *GC no. 25 (2020) on the right to science (2020)*, E/C.12/GC/25, 30th of April 2025.

Consequently, environment-related concerns have started to emerge in CESCR's practice and, in terms of substance, referred to: pollution, harm from extractive industries, diminished environmental protection, lack of environmental and human rights impact assessments³⁶, consultation with indigenous people³⁷, mobilisation of resources through increased fees for foreign investors exploiting natural resources³⁸, investigations of threats, violence and harassment against environmental human rights defenders³⁹.

On State parties *mitigation policies*, which were addressed by CESCR in a significantly greater proportion than the others, this resulted in recommendations such as: to set national climate change targets with time bound benchmarks (Russian Federation, 2017); to increase efforts to reduce greenhouse gas emissions (Germany, 2018; Swiss Confederation, 2019); to take measures to reverse the current trend of increasing absolute emissions of greenhouse gases and pursue alternatively renewable energy (Australia, 2017); to ensure compliance with commitments made under the Paris Agreement in relation with the exploitation of fossil fuels (Argentina, 2018).

On *adaptation* to climate change, CESCR has produced recommendations such as: to address the impact of climate change on indigenous people more effectively while fully engaging indigenous people in related policy and program (Canada, 2016); to reduce the vulnerability of communities by increasing their preparedness and fostering prevention measures (Mauritius, 2019).

On *procedural rights*, the focus was on the participation of civil society in climate policy making. Thus, the CESCR adopted recommendations such as: to put in place effective mechanisms to ensure meaningful participation of Maori in all decision-making processes affecting their rights and ensure that its climate change policies are developed and implemented through their effective participation (New Zealand, 2018); to ensure that the national and regional strategies and action plans on climate change and disaster response and risk reduction are formulated with the meaningful participation of affected communities and civil society (Bangladesh, 2018).

As regards the COBs on *international cooperation*, all of them are linked with the UN *Framework Convention on Climate Change* (UNFCCC), adopted in

³⁶ E/C.12/NZL/CO/4, para. 9; E/C.12/KAZ/CO/2, para. 17 (e).

³⁷ E/C.12/MEX/CO/4, para. 10; E/C.12/PHI/CO/5-6, para. 14.

³⁸ E/C.12/SEN/CO/3, para. 11.

³⁹ E/C.12/ARG/CO/4, para.17; E/C.12/ZAF/CO/1, paras. 12-13; E/C.12/ECU/CO/4, para. 13-14.

1992, and vary accordingly, following the principle of shared by differentiated responsibilities. Thus, in the recommendations addressed to developing states CESCR advised these countries to seek international support and assistance in order to mobilize the financial and technological support, while in those addressed to developed states the focus was on reminding them of their international responsibilities to provide climate change finance to the Green Climate Fund, over and above the current ODA.

In the last 8 years, climate change and environmental issues are addressed in a more systematic way – under article 2 (1), where the Committee raise issues related to climate change mitigation and, under art. 11 – the right to an adequate standard of living – in which context the Committee is raising issues related to climate change adaptation. Moreover, the LOIs include explicit standard questions⁴⁰ on these two aspects of climate change and states commitments under the *Kyoto Protocol* (1997) and the *Paris Agreement* (2015) serve as interpretative benchmarks.

2. Is GC 27 (2025) proposing a different approach, including a new economic model?

In September 2025, CESCR has adopted, after an almost 6 years process, its *GC no. 27 (2025) on ESC rights and the environmental dimension of sustainable development*. The aim of this section is to briefly present this document and to evaluate whether what the CESCR is proposing is a different approach to economic growth, sustainable development and environmental issues. The section is also meant to reply, in case of a positive answer to the first question, whether this approach is compatible, or not, with any of the already existing economic models? And alternatively, is there is need for a new economic model to be imagined, in order for the provisions of this document to be implemented, and, if this is the case, how this model will look like?

⁴⁰ For example, between 2020-2021, CESCR has requested in the LOIs prepared for countries such as Norway, Azerbaijan, Italy, Canada, France, Latvia, Kuwait, Belgium, Guatemala, PRC, Cambodia, Qatar, Chad, Guatemala etc. that the respective country provides information on measures taken to implement national climate targets; information on the mitigation policies in view of the delay in reducing its carbon dioxide emissions; information on the State Party contributions to the Green Climate Fund and/or ODA; . As regards the COBs, CESCR has included specific references to emission reductions targets – Norway (2020), Belgium (2020) and Latvia (2021) – and encouraged states to increase the ambition of their targets

The structure of the *GC 27 (2025)* is complex but accessible as the document sets clear from the very beginning the context, the scope and methods of interpretation (*Sections I and II*), followed by one general section on the obligations of States parties under the ICESCR in the context of environmental degradation, namely: general obligations/to respect, protect and fulfil, progressive realization, maximum available resources; core obligations; international obligations/extraterritorial obligations, international assistance and cooperation; obligation of equality and non-discrimination, equal rights of men and women (*Section III*), then the document makes an analysis of the States parties obligations in relation to specific rights (*Section IV*). The last part of the document deals with individuals and groups in a particularly vulnerable situation (*Section V*) as well as with remedies and accountability (*Section VI*).

There are several key messages that one can identify by reading the provisions of the document namely that: 1. a clean, healthy and sustainable environment is both an essential precondition for the enjoyment of ESC rights, because nature is indispensable for human existence and well-being, as well as an autonomous human right; 2. the interconnected environmental challenges of our time increase the risk of reaching irreversible biophysical tipping points that threatens fundamental ecological systems and processes that sustain life; 3. the planetary environmental threats are driven by unsustainable level of production and consumption shaped by enduring relations of domination over both nature and people, deeply rooted in colonial era resource extraction; 4. at the current rate of resource exploitation, pollution and environmental destruction without regard for the earth environmental limits it is impossible to equally realize ESC rights for all; 5. there are multiple interlinkages between the economic, social and environmental dimensions of sustainable development and for this purpose State parties need guidance on how they should discharge their obligations to respect, protect and fulfil ESC rights, while at the same time respecting the ecological limits and the finite character of natural resources.

With regard to the principles of interpretation, although the ICESCR makes no reference to environment or environment protection, nor to sustainable development, the right to a clean and healthy environment is implicit in the provisions of the Covenant and, as already acknowledged, sustainable development requires a balanced and integrated approach across its economic, social and environmental dimensions. Thus, the ICESCR is a living document that need to be interpreted in the light of the current realities with a view to ensure respect for the principle of effectiveness of human rights.

Moreover, protecting the environment is indispensable for the realization of ESC rights of present and future generations. Thus, ensuring the progressive realization of ESC rights requires an intergenerational perspective with a view not to compromise the rights of the future generations.

Moreover, when clarifying the obligations of States Parties, international environmental law must be taken into account in accordance with art. 31 (3) c of the Vienna Convention on the Law of Treaties. The framework offered by the *ICESCR* should be further informed and interpretation guided by: the right to clean, healthy and sustainable environment, the right to development, intergenerational equity, common but differentiated responsibilities and respective capabilities and precaution (para. 9 of GC no. 27(2025)). Moreover, the full realization of ESC rights demands a just transition towards sustainable economy that centres human rights and the wellbeing of the planet.

The above-mentioned principles would also influence the way in which the obligations of States Parties under the *ICESCR*, with respect to the fulfilment of ESC rights. Thus, the obligations to respect, protect and fulfil, the progressive realization, the maximum available resources, the core obligations, the extraterritorial obligations, international assistance and cooperation, the obligation of equality and non-discrimination, the equal rights of men and women and the obligations to respect, protect and fulfil ESC rights would need to be read in a different key of interpretation and that would correspond, basically, to questions such as: is development exclusively about unlimited growth? And, more importantly, is infinite growth on a finite planet possible?

In the view of CESCR, in the current context, respecting, protecting and fulfilling the Covenant rights requires addressing the root causes of the interconnected crises of climate change, biodiversity loss and pollution. These are driven by unsustainable patterns of consumption and production and an economic model based on unlimited growth.

Consequently, a transition to an economy that centres on human rights and well-being of the planet is imperative with a view to ensure the equal enjoyment of human rights within the Earth's ecological limits (para. 15).

State parties are bound to implement both mitigation and adaptation measures to protect the Covenant rights from the effects of climate change and to provide reparation for the adverse impacts of climate change. These measures must reflect the highest possible ambition to meet the global temperature goal, aiming to avoid the worst climate-related harms and uphold human rights and sustainable development (para. 16 and 17).

Traditionally, CESCR is addressing mitigation policies under article 2 (1), while adaptation measures are discussed under article 11 on the right to an adequate standard of living. Thus, in the introductory part of the GC, the Committee has only indicated some examples of possible mitigation measures, while in *Section IV – Obligations of States parties with respect to specific rights*, when article 11 is discussed, CESCR has clarified States parties' obligations with respect to climate change adaptation and has indicated some examples of climate change adaptation measures that could be envisaged.

In the view of the Committee, to *mitigate* climate change, States parties must take all available measures based on the best scientific evidence, to reduce greenhouse emissions in line with the goal of limiting global warming to the *Paris Agreement* temperature goal; they should phase down the expansion of fossil fuels infrastructure, phase out inefficient fossil fuels subsidies that do not address energy poverty of just transitions; they should promote renewable energy; they should phase down unabated coal power; and they should transition away from fossil fuels in energy systems. Developed states should take the lead in mitigation efforts and provide financial and technological assistance to developing states to enable them to meet these requirements.

With respect to *adaptation* measures, the main principle is that, although the right to an adequate standard of living requires States parties to ensure that everyone have access to the goods and services necessary for an adequate standard of living, including adequate food, water, sanitation, clothing, housing, electricity, transport and communications, the reference in article 11 of the Covenant to the "continuous improvement of living conditions" must be understood in light of the planet's environmental limits. States parties should promote transitions in areas such as food, water, housing, transport systems to ensure sustainability and resilience to environmental change. Thus, States parties must promote a transformation of food systems consistent with human rights obligations, ensuring the long-term viability of production and distribution; States parties are required to develop and reform the agrarian systems in "such a way as to achieve the most efficient development and utilization of natural resources" and efficiency must be understood to include long-term preservation of natural resources for the present and future generations; current agricultural policies and subsidies that support unsustainable use of land and deplete natural resources must be transformed to enable food systems that ensure an adequate standard of living for present and future generations; States parties should adopt strategies to ensure the right to water for present and future generations; States parties must take measures to ensure that housing is resilient to climate impacts, including insulation, efficient heating and cooling but at the same time these measures

should not undermine the right to adequate housing especially for residents of informal settlements and persons in disadvantaged or marginalized situations, by increasing housing costs, energy poverty or homelessness, or reinforcing pre-existing inequalities etc.

As regards, *progressive realization* (article 2 (1)) this entails the prohibition of retrogression but, at the same time, the full realization of the Covenant rights must occur within the planet 's ecological limits. Consequently, measures taken by states with a view to addressing excessive levels of consumption and production should not be considered retrogressive but retrogression would be present, and impermissible, when a State party takes measures with the aim of weakening environmental regulations; when is sustaining or promoting consumption patterns that cause significant environmental harm, thereby undermining the equitable realization of rights over time; when is reducing access to water and sanitation; as well as when it fails to consider the long-time impacts of environmental degradation such as climate change, biodiversity loss and pollution on future generations.

The *maximum available resources* (article 2 (1)) would also need to be read in a different way and the international obligations of States parties adjusted accordingly.

Firstly, States parties must mobilize and allocate the maximum available resources for the progressive realization of the Covenant rights in a manner compatible with the ecological limits and the objectives of sustainable development.

Secondly, States parties should enhance resource availability through: combating tax evasion, tax avoidance and corruption, strengthening progressive tax systems, while avoiding undue burdens on disadvantaged individuals and groups; fiscal policies should be sustainable, support a just transition to low-carb economies and protect low-income households from increased costs during this transition and address economic and structural inequalities including with respect to access to land, natural resources and scientific research.

Thirdly, with respect to the natural resources CESCR has adopted the ecosystem approach, namely the obligation to manage in a sustainable way the resources, for present and future generations, including through incentives for sustainable practices and investment in climate adaptation.

The GC also identifies the *core obligations* of States parties in the context of environmental degradation and the transition to sustainable economies. Thus, states have a core obligation to ensure, at the minimum, essential levels of each right recognized in the Covenant including in situations of conflict,

emergency and natural disasters. This includes: access to essential healthcare, basic shelter and housing, safe and sufficient water and sanitation, adequate and safe food, and education that meets the minimum standards; moreover, access to essential public services and basic income security, occupational safety etc.

In light of the Committees assessment, States parties have a core obligation to safeguard environmental conditions necessary for realizing essential levels of Covenant rights in the short, medium and long term. This includes: protecting sources of water for domestic use, reducing pollutants and preserving critical ecosystems such as forests and wetlands; to prevent and, where not possible, to mitigate environmental harm that threatens the realization of the essential levels of the Covenant rights.

The above-mentioned obligations also extend beyond the borders of the state concerned, thus the GC also makes reference to the existence of *extraterritorial obligations* and ground them in the customary international law rule, namely the obligation to prevent significant environmental harm to other States⁴¹. States parties also have an extraterritorial obligation to prevent the activities of business enterprises under their jurisdiction from causing environmental harm that affects the enjoyment of Covenant rights in other countries and to this end, States parties are expected to adopt appropriate regulatory and policy measures to ensure that business entities domiciled in their territory or under their jurisdiction respect human rights, including by conducting human rights and environmental due diligence throughout their operations and value chain.

In the last part of Section III, CESCR addresses the issue of *international assistance and cooperation*. Thus, with a view to protect ESC rights, States parties must take steps, individually and through international assistance and cooperation to mitigate and adapt to climate change, and to address biodiversity loss and environmental degradation in line with the objectives of sustainable development. The main principles here are that States parties should consider historical contribution to environmental degradation, different capabilities, and the specific needs of the developing countries and that just transition must reduce, not reinforce, inequalities within and between countries.

In light of the environmental dimension of sustainable development, the obligation of *equality and non-discrimination* (article 2 (2)) requires States to address structural and systemic discrimination and inequality. Moreover,

⁴¹ ICJ, *Advisory Opinion on the obligations of States with respect to climate change* (2025), para. 272.

States must take into account the rights of the future generations to equal enjoyment of all human rights, and refrain from acts and omissions likely to result in or perpetuate discrimination against them.

Finally, on the *equal rights of men and women* (art. 3) the CESCR departs from the idea that environmental crises exacerbate existing gender inequalities particularly in access to land, natural resources, essential services, including healthcare, food, water, sanitation and waste management, consequently, in addressing environmental crises and fulfilling their obligation to ensure substantive equality, States parties must guarantee women's access to, control over, and secure tenure of land and other means necessary for food security and livelihoods; to reduce and redistribute unpaid care and support work by ensuring accessible, rights-based care and support systems and to integrate a gender-responsive and whole-of-government approach into all sustainable development policies, especially those related to disaster use.

Section IV of the CG discusses the *obligations of States parties with relation to specific rights* and focuses on the right to self-determination (article 1); the right to just and favourable conditions of work (article 7); the right to form and join trade unions (article 8); the right to social security (article 9); the right to an adequate standard of living (article 11); the right to the highest attainable standard of physical and mental health (article 12), the right to education (articles 13 and 14) and the right to take part in cultural life and to enjoy the benefits of scientific knowledge and its applications (article 15).

Section V addresses the issue of individuals and groups in a particularly vulnerable situation namely: children, indigenous peoples, peasants, pastoralists, fishers, and other people living in rural areas, persons displaced in the context of climate change.

Finally, in Section VI the Committee addresses the issue of remedies and accountability.

The key takeaways from this document would thus be that: a clean, healthy and sustainable environment is a precondition for the equal realization of ESC rights but also autonomous human right; we can no longer continue business as usual because we are in danger of not having the material support for our actions, the planet; environmental law principles are important for the current interpretation of the international human rights law, in light of the living document and effectiveness principles; allocating the maximum available resources does not mean that these resources are unlimited but there are ecological limits which correspond to the planetary boundaries; with regard to natural resources – ecosystem approach – resources must be managed

sustainably for present and future generations; the full realization of the Covenant rights must occur within the planet's ecological limits; measures addressing excessive levels of consumption and production should not be considered retrogressive and efficiency must be understood to include sustainability.

However, the question that still remains is whether any of the already existing economic models are equipped to sustain and implement this vision? Or, is there a need to think in terms of a new economic model? And, if yes, what that model would entail?

After reading GC no. 27 (2025), one could question CESCR's stance on neutrality with respect to existing economic models, because the theoretical model that seems to be endorsed by this GC share close ties with the very interesting proposal that comes from the British professor and economist Kate Raworth⁴².

In her book *Doughnut Economics*, professor Raworth puts forward a new economic model as a response to one of the most complex existing questions, namely: how could the needs of human beings and societies continue to be satisfied, within the existing planetary resources?

Thus, the model that professor Raworth envisages has the shape of an American doughnut, where the doughnut itself is a safe and equitable space for the sustainable development of humanity, because it takes into account an economic development that is in line with the environmental protection and social equity; the empty hole, inside the doughnut is the space where the complex needs of human beings (civil, political, economic, social and cultural) are not satisfied; while the exterior of the doughnut would mean the satisfaction of these complex human being needs above what it is possible within the current planetary boundaries.

Consequently, the economic model envisaged by professor Raworth states that, with a view to preserve our planet, human societies should move away from the unlimited and exclusive economic growth towards a more comprehensive approach which places at the basis of sustainable development not only economic growth but also the equitable human development in harmony with environmental protection. The book sets out an optimistic vision of humanity's common future: a global economy that creates a thriving balance thanks to its distributive and regenerative design.

⁴² See for details, Kate Raworth, *Doughnut Economics. Seven Ways to Think Like a 21st Century Economist*, Penguin Books, 2022.

Along the same lines, one could also mention the human rights economy approach⁴³.

However, it remains to be seen, how such models could be translated into practice and how they would be able to function and produce the expected results in the already existent world and its complex challenges. Moreover, another aspect that remains to be assessed in the future is how CESCR would be able to test this approach in practice and convince States parties of its advantages.

⁴³ Proposed by the OHCHR. One hallmark of the human rights economy is the high priority accorded to respecting, protecting, fulfilling and enforcing ESC rights. The primary role of the economy is to protect and fulfil the rights and wellbeing of people, ensure environmental protection and sustainable use of natural resources, and secure a fair and equitable world, free from want and fear.

Conclusions

To conclude, through the adoption of GC no. 27 (2025) the CESCR is proposing a new interpretation of the general cross-cutting obligation to use its maximum available resources with a view to progressively realize the rights enshrined in the *ICESCR*. This approach represents the materialization of the fact that human rights treaties are living instruments that need to be interpreted in light of the existing realities with a view to render effective the protection of the respective rights. Thus, the existence, today, of different world settings and conditions that the ones existing in 1966, would require an adaptation of the interpretation of States parties' obligations with a view to respond to existing challenges, including the ones related with the multiple planetary environmental crisis⁴⁴. Realizing the Covenant rights in the context of the planetary environmental crisis requires a renewed interpretation of State's obligations, including the general ones in article 2 (1) of the Covenant. Moreover, approaching the environmental limits of our planet also influences the policy, options and measures required to implement all ESC rights. However, the theoretical framework that has been propose would need to be tested in practice – with 173 heterogeneous States parties – and the time would it say whether this GC was able to make a difference/a change or it remained just one, among others, sterile intellectual exercise.

With respect to the doughnut economics model, although this model has received some criticism with regard to its pragmatism and the lack of practical implementation tools, some of the positive examples of its application, at the local level⁴⁵, could be valuable and deserve careful evaluation in the future.

⁴⁴ As summarized in the *Stockholm 50+ Report: Unlocking a Better Future*, 2022: "Humanity has been facing multiple interlinked environmental, social, economic and health challenges – the climate change crisis, pollution, bio-diversity loss and the extinction of species, deforestation, land degradation, increased incidents and environmental disasters, widening gaps between rich and poor, backlash to woman 's rights, lack of decent jobs and new emerging zoonotic diseases".

⁴⁵ This model was tested and seemed feasible, in Amsterdam, in respect to the housing crisis, pollution and water consumption.

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Extraterritorial Application of Human Rights in Cyberspace. Due Diligence Obligations.

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Abstract: *The extension of a State’s jurisdiction beyond its territory generates consequences with respect to the content of the obligations under international human rights law. This article aims to examine the criteria that can be transposed to cyberspace for the purpose of establishing extraterritorial jurisdiction, and, from the perspective of the obligations of States, it will analyze both the primary obligations of the State- including due diligence obligations- and the subsidiary obligations of the foreign State in ensuring the protection of persons and their property.*

Key-words: *extraterritorial application of human rights, extraterritorial jurisdiction, due diligence obligations, State's responsibility.*

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The opinions expressed in this paper are solely the author’s and do not engage any of the institutions she belongs to.

Introduction

The rapid expansion of cyberspace has posed unprecedented challenges to traditional concepts of State jurisdiction under international law. Unlike physical territory, cyberspace is inherently borderless and accessible to both State and non-State actors¹. Traditional mechanisms of state control- such as customs offices and physical checkpoints- are increasingly obsolete against extraterritorial data streams delivered directly to individual users².

1. The conditions of extraterritoriality of human rights

In examining whether a State may be bound to respect the fundamental rights of natural or legal persons beyond its national borders, it must be taken into account the concepts of extraterritoriality and extraterritorial jurisdiction³.

The former pertains primarily to substantive law and refers to a State's capacity to apply legal norms in order to ensure the protection of persons and their property outside its territory⁴. The latter, by contrast, concerns the jurisdictional competence of a State's national judicial authorities to exercise authority over persons and activities situated beyond its territorial boundaries⁵.

The State's possibility to project jurisdiction outside the territory is considered to be subordinated to other States⁶. As the Permanent Court of International

¹ Carmen Moldovan, *Is Cybersovereignty the Future of Cyberspace*, in *Analele Științifice ale Universității „Alexandru Ioan Cuza” din Iași*, Tomul LXVII, Supliment 2, Științe Juridice, 2021, pp.274-275.

² Daniel Rosenberg, *Seizing the Means of Disruption: International Jurisdiction and Human Rights in the Expanding Frontier of Cyberspace*, in *New York University Journal of International Law and Politics*, vol.55, 2023, p. 126.

³ Bogdan Aurescu, Ion Galea, Elena Lazar, Ioana Oltean, *Scurta culegere de jurisprudenta*, ed. Hamangiu, 2018, p.205

⁴ Menno T. Kamminga, *Extraterritoriality*, in *Max Planck Encyclopedia of Public International Law*, 2020, para. 1.

⁵ Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lesson for the Business and Human Rights Sphere from Six Regulatory Areas*, in *Corporate Social Responsibility Initiative*, Working Paper No. 59, 2010, pp.13-15,

⁶ Vassilis P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, in *Michigan Journal of International Law*, vol.36, issue 1, 2014, p.129.

Justice stated in *Lotus Case*⁷, States are prohibited from exercising governmental authority, including jurisdiction, on the territory of a foreign State. At the same time, within their own territory, States may exercise jurisdiction over persons and property presenting an extraterritoriality element, insofar as no general prohibition under international law prevents the exercise of jurisdiction on their own territory⁸.

In analyzing the development of extraterritoriality it is important the European Court of Human Rights jurisprudence. Initially the sole criterion for the application of human rights was determined geographically by the territory of the State party to the Convention, as jurisdiction constitutes an aspect of state sovereignty, taking into account the State's capacity to exercise administrative, legislative and judicial functions⁹. In *Banković and Others v. Belgium and Others (Judgement)*¹⁰, the Court examines the meaning and scope of state jurisdiction, maintaining that the jurisdiction of states is territorial- nearly completely overlooking its previous decisions, which had gradually extended the reach of the human rights obligations¹¹- and considers that extraterritorial jurisdiction is limited by the sovereignty of other states. The key criterion was the place where the wrongful acts were committed or whether a particular case could be situated in an exceptional context permitting a derogation from the rule of territoriality¹².

Subsequently, a criterion identified by the Court as foundational to extraterritoriality is the degree of power and control exercised by the authorities of the State Party beyond its own territory. In this regard, the Court

⁷ Permanent Court of International Justice, *France v. Turkey (The Case of S.S.Lotus)*, Judgement No.9, 7 September 1927, paras. 45-46.

⁸ Armin von Bogdandy, Markus Rau, *Lotus, The*, in Max Plank Encyclopedias of International Law, 2006, paras. 9-10.

⁹ Ian Brownlie, *Principles of Public International Law*, 7th edition, Oxford University Press, 2008, p.299.

¹⁰ European Court of Human Rights, *Banković and others v. Belgium and others*, Application No.52207/99, Judgement, 12 December 2001, paras.59-61.

¹¹ Conall Mallory, *A second coming of extraterritorial jurisdiction at the European Court of Human Rights?*, in QIL, vol.82, 2021, p.32.

¹² Lord Dyson, *The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, but is it a Sound One?*, speech delivered at Essex University, 2014, p.19, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf>, accessed 26 January 2026.

held in *Loizidou v. Turkey (Preliminary Objections)*¹³ that the responsibility of States Parties may be engaged through the attribution of wrongful acts committed by their authorities, whether within or outside the State's territory, so long as the consequences occur beyond the territorial boundaries of the State.

The effective control exercised implied that Turkey assumed authority over the administrative and political activity of northern Cyprus, resulting in the inability of the Cypriot authorities to perform governmental functions in the ordinary manner. Similarly, in *Cyprus v Turkey*¹⁴ case, the attribution of the wrongful acts to the author State was, once again, founded on the actions of authorities exercising effective control over a territory situated outside the State's own territory, expressly referring to *Loizidou v. Turkey (Judgement)*¹⁵.

The engagement of state responsibility is examined from the perspective of the essential criterion of control exercised by Turkish authorities over northern Cyprus through Turkish military funding. In this regard, Turkey's jurisdiction is not limited exclusively to acts committed by the regular Turkish army, but also extends to wrongful acts of the local authorities in the northern territory of Cyprus that depend on Turkish support.

By rendering its judgment in *Al-Skeini and Others v. The United Kingdom*¹⁶, in establishing jurisdiction, the Court recognizes the status of the United Kingdom, together with the United States, as occupying powers over the territory of Iraq from 1 May 2003 until the establishment of the provisional government, whereby the United Kingdom exercised functions involving State authority that would ordinarily have been performed by the legitimate sovereign government. By virtue of the governmental power effectively exercised, the United Kingdom acted with a degree of effective control over persons who died as a result of security military operations, a fact which gave rise to the attribution of jurisdiction to the United Kingdom¹⁷.

¹³ European Court of Human Rights, *Loizidou v Turkey*, Application No.15318/89, Judgement on Preliminary Objections, 23 March 1995.

¹⁴ European Court on Human Rights, *Cyprus v Turkey*, Application No. 25781/94, 10 May 2001, paras. 75-78.

¹⁵ European Court of Human Rights, *Loizidou v Turkey*, Application No.15318/89, Judgement, 18 December 1996, paras.52-56.

¹⁶ European Court of Human Rights, *Al-Skeini and others v. The United Kingdom*, Application No.55721/07, Judgement, 7 July 2011, paras.138-140.

¹⁷ Barbara Miltner, *Revising Extraterritoriality after Al-Skeini: The ECHR and Its Lessons*, in *Michigan Journal of International Law*, vol.33, 2012, p.698.

The link to the sovereign authority is considered to be the activities of public powers that may generate a functional jurisdiction, as manifested in legislative or executive acts¹⁸. Extraterritoriality needs to imply effective and overall control, meaning that the State's exercise of power is based on a claim to legitimate authority, rather than being a result of mere coercion¹⁹. Following the aforementioned judgment, the Court developed the personal model as a form of extraterritoriality, meaning that a State exercises effective control through its agents, whereby the use of force outside its own territory triggers the extraterritorial application of human rights obligations²⁰.

With regard to extraterritoriality, two major consequences emerge²¹: first, the obligation of the State concerned to extend its protective measures beyond its own territory, as a primary obligation; and second, the corresponding and subsidiary obligation of the State or non-State actor on whose territory the individual is present to recognise and safeguard the rights of that individual, insofar as it exercises a degree of control over a source of danger affecting that person. The second category of obligation is regarded as subsidiary in nature, because the foreign State is not required, on the basis of extraterritoriality, to diminish the rights of its own nationals²² in favour of foreign individuals, nor may it permit an excessive exercise of jurisdiction by foreign authorities within its territory. Correlatively, due to the universality

¹⁸ Mariagiulia Giuffrè, *A functional-impact model of jurisdiction: Extraterritoriality before of the European Court of Human Rights*, in QIL Zoom-in, vol.82, 2021, p.65, https://www.qil-qdi.org/wp-content/uploads/2022/01/04_ECtHR-Jurisdiction_GIUFFRE_FIN.pdf, accessed 03.02.2026.

¹⁹ Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, in Leiden Journal of International Law, vol.25, 2012, pp.872-874.

²⁰ Yves Haeck, Clara Burbano-Herrera, Hannah Ghulam Farag, *Extraterritorial obligations in the European human rights system*, in The Routledge Handbook on Extraterritorial Human Rights Obligations, Routledge, 2022, pp. 129-130.

²¹ Human Rights Council, *International solidarity and the extraterritorial application of human rights: prospects and challenges*, Report of the Independent Expert on human rights and international solidarity, 19 April 2022, pp. 3-4.

²² Sarah Joseph, *Blame it on the WTO? A Human Rights Critique*, in Oxford University Press, 2011, p.260, <https://www.econstor.eu/bitstream/10419/118676/1/454396.pdf>, accessed 03.02.2026.

character of human rights²³, the persons concerned to be able to assert fundamental rights against these two categories of states²⁴.

2. Recognition of Extraterritorial Jurisdiction in Cyberspace. Due Diligence Obligations

The difficulties implied by extraterritoriality in the application of human rights in cyberspace arise from the absence of clearly defined jurisdiction. The spatial application of law is difficult to sustain in cyberspace, because the individual's conduct may fall under multiple jurisdictions depending on the destination of data flows²⁵. Furthermore, it must be acknowledged that there may be a discrepancy between the geographic place of access and the individual's physical location²⁶.

The fact that States do not exercise sovereignty exclusively gives rise to the consequence that cyberspace cannot be placed under their control²⁷, which creates obstacles in establishing the jurisdiction. As a commonly recognized practice, it is universally acknowledged that States are permitted to access data and information that are publicly available within their territory but are in fact hosted on cyber infrastructure located within the territory of a foreign State, a situation in which extraterritorial jurisdiction applies²⁸.

As a general rule and in accordance with the principle of territoriality, States exercise sovereign prerogatives over cyber infrastructure, persons, and activities located within their territory. However, the sovereign prerogatives of States are maintained even in cases where the actual location of the cyber infrastructure- whether of a public or private nature- is established outside the State's territory²⁹.

²³ Samantha Besson, *The Extraterritoriality ...*, *loc.cit.*, p.859.

²⁴ Samantha Besson, *Due Diligence and Extraterritorial Human Rights Obligations- Mind the Gap!*, in *ESIL Reflections*, vol.9, issue 1, 2020, p.2.

²⁵ Wanshu Cong, *A Critical Assessment on the Extraterritorial Application of Human Rights Treaties to Transnational Cyber Surveillance*, in *Canadian Journal of Law and Technology*, vol.15, no.1, 2017, p.57.

²⁶ Ido Kilovaty, *An Extraterritorial Human Right to Cybersecurity*, *Notre Dame Journal of International & Comparative Law*, vol.10, issue 1, p.47.

²⁷ Carmen Moldovan, *supra cit.*

²⁸ Daniel Rosenberg, *loc.cit.*, p. 136.

²⁹ Michael N. Schmitt, *Tallin Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, 2017, p.13-14.

Based on the boundless nature of cyberspace, the concept of territory has been redefined as consisting of two components- objective territoriality (according to which States exercise jurisdiction even when cyber operations are carried out outside their territory, but the consequences occur within their borders), and subjective territoriality (where cyber acts are committed within a State's territory, but the consequences occur outside it)³⁰.

Acts capable of generating extraterritorial effects may be classified into two principal categories. The first category consists of acts adopted or carried out within a State's own territory which, by their nature or intended scope, produce effects on individuals or entities located outside that territory. The second category includes acts performed by a State outside its territorial boundaries which likewise have consequences for persons or activities situated beyond the State's territory. In both cases, the defining feature of extraterritorial action lies in the cross-border impact of state conduct and in the extension of state authority beyond the traditional confines of territorial jurisdiction³¹.

For establishing the connection between a state and foreign territory or persons present on foreign territory, the reference criterion in invoking extraterritorial jurisdiction lies in the effective power and control exercised by the state over the foreign territory or over persons located outside its national territory³². As previously indicated, the conditions established by the case law of the European Court of Human Rights are equally applicable and have been transposed to the cyberspace context.

A distinct discussion, which is particularly relevant in the context of cyberspace, concerns the due diligence obligations established under

³⁰ Tsvetelina van Benthem, Joanna Kulesza, Ye Liu, Nanxiang Sun, *Jurisdiction in Cyberspace*, Sino-European Expert Working Group on the Application of International Law in Cyberspace, Research Group Report, 2024, p.10, https://www.gcsp.ch/sites/default/files/2024-12/EWG-IL_Partnered_Jurisdiction_2024-11%3Bdigital.pdf, accessed 26 January 2026.

³¹ Michael N. Schmitt, *op.cit.*, p.184.

³² Human Rights Committee, *General Comment No.31: The nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted at the 80th Session, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para.10, <https://digitallibrary.un.org/record/533996?v=pdf>, accessed 26 January 2026.

Principle 14 of the Maastricht Principles³³. Within the category of State duties are included the obligation to prevent any cyber act committed on their territory, to take all necessary measures to ensure the implementation of a cyber security system, as well as the obligation to act with a view to bringing to an end any ongoing cyber operations³⁴. Accordingly, the duty to ensure respect encompasses legislative, administrative, judicial, and other measures necessary to guarantee that human rights are protected against both direct and indirect infringements committed by third parties³⁵.

Furthermore, under customary international law, States can be held responsible for conduct that aids or facilitates violations of international law by other actors³⁶. In discharging this obligation, States may be required to adopt legislative and regulatory measures aimed at preventing and sanctioning wrongful conduct and expression, including activities undertaken in cyberspace, that infringe upon protected rights. Such measures may include the criminalization of certain forms of online behavior where they meet the requisite thresholds of seriousness and intent under international law, as exemplified by the prohibition of direct and public incitement to genocide³⁷.

In order to demonstrate the peremptory character and the *erga omnes* effects of fundamental human rights, beyond the reaffirmation of the prohibition of acts of genocide as a *jus cogens* rule, the application submitted by the State of The Gambia³⁸ is relevant both from the perspective of a State's standing in the proceedings (even where it has not been directly harmed by the wrongful

³³ Sandy Liebenberg (Chair), *Maastricht Principles on The Human Rights of Future Generations*, adopted on 3 February 2023, <https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf>, accessed 26 January 2026.

³⁴ Matthias C. Kettmann, Anna Sophia Tiedeke, *Cybersecurity and extraterritorial obligations of states*, in *The Routledge Handbook on Extraterritorial Human Rights Obligations*, Routledge, 2022, p.410.

³⁵ Michael N. Schmitt, *op.cit.*, pp.196-198.

³⁶ Lorand Bartels, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, in *EJIL*, vol.25, 2014, p.1080.

³⁷ *Ibidem*.

³⁸ International Court of Justice, *Application instituting Proceedings and Request for Provisional Measures (The Gambia v. Myanmar)*, filed in the Registry of the Court on 11 November 2019.

acts³⁹) and from the perspective of the responsibility of the author State for failing to fulfil its obligation to prevent and punish acts of genocide⁴⁰.

In support of the factual situation, The Gambia based its submissions on the conclusions of the international commission of independent experts established by the United Nations Human Rights Council for the purpose of conducting an investigation aimed at determining the existence of internationally wrongful acts⁴¹.

The link with cyberspace is established by acts of incitement to hatred against persons of Rohingya ethnicity and muslims, as well as by dehumanizing portrayals that contributed to the large-scale formation of a negative perception of these racial groups as threats to the state. Facebook constituted the primary source through which the population obtained information⁴², with the result that messages were transmitted and disseminated rapidly within a very short period of time⁴³ and the statements made by State officials were directed against individuals belonging to distinct religious and ethnic groups, employing inflammatory language that characterized their presence as a threat to national security and called for their removal from within the state⁴⁴.

From the perspective of the international responsibility of the author State, two categories of obligations have been found to have been breached. On one hand, Myanmar failed to adopt the necessary measures, within its domestic legal order, to prevent gross violations of international human rights law and

³⁹ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of Provisional Measures, 23 January 2020, p.18.

⁴⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, entry into force on 12 January 1951 in accordance with article XIII.

⁴¹ United Nations General Assembly, *Resolution adopted by the Human Rights Council on 24 March 2017*, A/HRC/RES/34/32, 2017, <https://docs.un.org/en/a/hrc/res/34/22>, accessed 26 January 2026.

⁴² Carmen Moldovan, *Freedom of Expression in Cyberspace: The Good and the Bad, in Recent Debates in Cyberspace and Artificial Intelligence Law*, ADJURIS- Editura Academică Internațională, 2023, p.31.

⁴³ United Nations General Assembly, Report of detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, p.323, <https://documents.un.org/doc/undoc/gen/g18/277/04/pdf/g1827704.pdf?OpenElement>, accessed 26 January 2026.

⁴⁴ *Idem*, pp.331-335.

international humanitarian law (which falls within the scope of the failure to comply with the aforementioned due diligence obligations). On the other hand, the wrongful acts in question constitute acts of genocide, in respect of which the State has not demonstrated any intention to initiate judicial proceedings aimed at holding accountable the individuals found responsible for the acts committed, thereby breaching its obligation to punish such forms of wrongful conduct⁴⁵.

Conclusions

In light of the operational mechanisms of cyber infrastructure, reality confirms that State jurisdiction extends beyond physical territory, for which reason the legal regime of extraterritoriality ensures the coherence of the international protection system, preventing situations in which accountability is rendered impossible due to geographic fragmentation or non-participation in normative instruments.

States are unequivocally under an obligation to prevent and punish wrongful acts that violate the sphere of protection of persons. From this perspective, it is beyond doubt that the category of due diligence obligations constitutes a set of duties that States are required to transpose into the online environment, irrespective of whether the wrongful acts are committed by the administrative authorities of the State concerned or by third parties- whether State or non-State actors.

⁴⁵ United Nations General Assembly, Report of the independent international fact-finding mission on Myanmar, 8 August 2019, pp.15-17, <https://docs.un.org/en/a/hrc/42/50>, accessed 26 January 2026.

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Extraterritorial Jurisdiction under the European Convention on Human Rights and the United Nations Convention against Torture – the Case of Transnistria

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Abstract: *This research examines the extraterritorial application of the European Convention on Human Rights (ECHR) and the UN Convention Against Torture (UNCAT) in Transnistria, a region where questions of jurisdiction remain highly contested. Although officially part of the Republic of Moldova, the State's obligation to prevent, investigate, and punish acts of torture is constrained by its loss of de facto control over this territory. The analysis compares the approaches of the European Court of Human Rights (ECtHR) and the Committee against Torture in interpreting jurisdiction beyond national borders. The findings show that both mechanisms contribute positively to combating impunity and extending human rights protection to population in this territory. While the ECtHR has adopted a pragmatic approach assigning shared obligations to the Republic of Moldova and Russia, the Committee against Torture remains more cautious. The study concludes that international human rights law is evolving toward recognizing accountability based on control and influence rather than strict territoriality, urging both bodies to strengthen their engagement in these grey zones of international law.*

Key-words: *extraterritorial jurisdiction, Transnistria, human rights, torture, effective control.*

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Introduction

Transnistria declared independence in August 1991 and has since operated as a self-proclaimed state. However, to date, no member of the United Nations recognizes its sovereignty. Internationally, Transnistria is regarded as a *de jure* part of the Republic of Moldova. However, the Moldovan government exercises no effective control over the territory, as Russian troops are located in the region without Moldova's consent.¹

In this context, the application of legal instruments tends to be sporadic and inconsistent. While *de facto* authorities perform many state-like functions, their actions remain largely beyond effective oversight or accountability. As a result, these quasi-state entities frequently become breeding grounds for human rights violations and widespread impunity.

Furthermore, both Republic of Moldova and the Russian Federation, the two states involved in the conflict, demonstrate a pronounced reluctance to acknowledge or assume responsibility for actions occurring within their jurisdiction. Consequently, issues of jurisdiction are frequently invoked as a means to contest or evade the attribution of responsibility.

Within this framework, the present paper seeks to examine the legal implications stemming from the refusal of the states concerned to assume jurisdiction over the territory. To address these issues, the first part of the study will analyze how the European Court of Human Rights has established the jurisdiction in its case-law. The second part will then consider the concept of jurisdiction as articulated under the United Nations Convention against Torture, with a view to assessing the extent to which both regimes converge or diverge in their respective approaches to extraterritorial responsibility.

1. The case-law of the European Court of Human Rights concerning jurisdiction over Transnistria

Traditionally, the ECtHR has interpreted the notion of "jurisdiction" under the ECHR through the primarily territorial understanding of jurisdiction in international law². Consequently, instances of extraterritorial jurisdiction have been viewed as exceptional, demanding specific justification, such as

¹ Júlia Miklasová, *Status of Transnistria Under International Law*, in KE Gray (ed.), *Global Encyclopedia of Territorial Rights*, Springer, 2022, p. 1, ssrn.com/abstract=4910810.

² Bogdan Aurescu, Ion Galea, Elena Lazar, Ioana Oltean, *Scurta culegere de jurisprudenta*, ed. Hamangiu, 2018, p. 204

effective control over territory or individuals, rather than being regarded as a routine extension of a State's obligations when acting beyond its borders.³ For example, in *Banković*, the Court declared itself satisfied that “from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial”.⁴

While the case-law of the ECtHR concerning jurisdiction over Transnistria is not new, as the Court's first judgment on the matter dates from 2004, some developments can be seen in the Court's approach to this subject.

The first case in which the Court delivered a judgment on this subject was the case of *Ilaşcu and Others v. Moldova and Russia*⁵. The Court addressed the issue of jurisdiction concerning Moldova that had lost effective control over Transnistria within its internationally recognized territory, as well as the exercise of extraterritorial jurisdiction by Russia over the same territory. The applicants alleged that they have been convicted by an illegally established tribunal, in violation of Article 6 of the Convention and that their conditions of detention breached Article 3 and 8 of the Convention.

The Court reaffirmed what it has already recognized in the *Loizidou* case⁶, that “in exceptional circumstances, the acts of Contracting States performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.”⁷ The Court held that, consistent with relevant principles of international law, a State's responsibility may be engaged where, as a result of military action, it exercises overall effective control over an area situated beyond its national territory.⁸

³ Petra Stojnić, *Gentlemen at home, hoodlums elsewhere: The Extraterritorial Application of the European Convention on Human Rights*, in *The Oxford University Undergraduate Law Journal*, Issue X, 2021, pp. 137-170, p. 163, www.law.ox.ac.uk/sites/default/files/migrated/public_law_5.pdf.

⁴ *Banković and Others v. Belgium and Others (dec.) [GC]*, no. 52207/99, § 59, ECHR 2001-XII.

⁵ *Ilaşcu and Others v. Moldova and Russia [GC]*, no. 48787/99, ECHR 2004-VII.

⁶ *Loizidou v. Turkey (merits)*, 18 December 1996, Reports of Judgments and Decisions 1996-VI.

⁷ *Ilaşcu and Others v. Moldova and Russia [GC]*, no. 48787/99, § 314, ECHR 2004-VII.

⁸ Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, in *Leiden Journal of International Law* (2012), 25, pp. 857-884, p. 869, <https://core.ac.uk/download/pdf/20660691.pdf>.

Turning to the jurisdiction of each of the two respondent States, it is instructive first to consider the arguments put forward by both States regarding their alleged lack of jurisdiction over Transnistria.

The Moldovan Government contended that it did not have jurisdiction over Transnistria, as it lacked *de facto* control over the region. *De facto* regimes, while situated within a State's internationally recognized borders, operate beyond the effective authority of that State, which is therefore unable to guarantee the full enjoyment of rights to the population living there. On this basis, Moldova argued that the application was incompatible *ratione personae*, since the alleged violations could not be attributed to it, given that it was not responsible for the actions of the Transnistrian authorities. Nevertheless, Moldova maintained that it had fulfilled its positive obligations by taking measures aimed at restoring effective control over the territory and, in particular, at safeguarding the rights of the applicants.

Similarly, the Russian Federation contested its jurisdiction over Transnistria, arguing that since the territory is an integral part of Moldova, only the Moldovan Government could be held responsible for the alleged violations.

The Court held that both States may be found to exercise jurisdiction over Transnistria.⁹ It held that Moldova exercised jurisdiction on the basis of its sovereign title over the region – its jurisdiction being limited to certain positive obligations, which encompassed two distinct dimensions: (i) the adoption of measures aimed at re-establishing its authority over Transnistrian territory, as an expression of its jurisdiction; and (ii) the implementation of measures to ensure respect for the individual applicants' rights.¹⁰ Given that, from the outset of the hostilities in and around Transnistria in 1991–1992, Moldova had undertaken all measures reasonably within its power to restore effective control over the breakaway region, the Court found the first aspect of its positive obligations to have been satisfied.¹¹ With regard to the second aspect, however, the Court concluded that Moldova had failed to comply with its obligation to secure respect for the applicants' rights, as it did not take all measures arguably available to it during negotiations with the Transnistrian and Russian authorities to bring an end to the violations suffered by the

⁹ Linda Hamid, *Ilaşcu: from contested precedent to well-established case-law*, strasbourgobservers.com/2019/10/31/ilascu-from-contested-precedent-to-well-established-case-law/.

¹⁰ *Ilaşcu and Others v. Moldova and Russia [GC]*, no. 48787/99, §§ 339-340, ECHR 2004-VII.

¹¹ *Ilaşcu and Others v. Moldova and Russia [GC]*, no. 48787/99, §§ 341-345, ECHR 2004-VII.

applicants. Russia, on the other hand, exercised jurisdiction on the basis of its “effective authority or, at the very least [its] decisive influence” over the territory.¹²

In his partly dissenting opinion, Judge Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Panțîru, while in agreement with the conclusion of the majority of the Court that the responsibility of Russia was engaged, he was unable to share the view of the majority that the responsibility of Moldova was similarly engaged. In his words, he found it difficult to accept that the Republic of Moldova was responsible “merely because of a failure on its part to establish that it had made sufficient efforts on the legal or diplomatic plane to guarantee those rights”¹³.

Judge Kovler went even further in his dissenting opinion and proposed that the application be declared inadmissible *ratione loci* and *ratione personae* with respect to Russia, while recognizing jurisdiction solely in relation to Moldova. He further suggested that, given Moldova’s lack of de facto control over Transnistria, the Court could have characterized the situation as a “legal vacuum” or “lawless area”, thereby rendering the provisions of the Convention inapplicable.¹⁴ Although such an approach might have simplified the Court’s task in adjudicating cases arising from contested territories, it would have been ineffective in securing the rights of detainees and residents within these regions. Excluding these territories from the protection of the Convention would mean accepting the dire conditions prevailing in detention facilities administered by de facto authorities, contrary to the principle of the universality and indivisibility of human rights.¹⁵

Still, the majority’s approach has been the subject of considerable criticism in academic literature. The first aspect of Moldova’s positive obligations has been viewed as reflecting a predominantly political, rather than judicial, character, while the second aspect has been criticized on the grounds that, for the purpose of establishing jurisdiction, the decisive criterion should be a

¹² *Ilașcu and Others v. Moldova and Russia [GC]*, no. 48787/99, § 392, ECHR 2004-VII.

¹³ *Ilașcu and Others v. Moldova and Russia [GC]*, no. 48787/99, ECHR 2004-VII, Partly dissenting opinion of Judge Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Panțîru, § 8.

¹⁴ *Ilașcu and Others v. Moldova and Russia [GC]*, no. 48787/99, ECHR 2004-VII, Dissenting opinion of Judge Kovler.

¹⁵ Lidia Carchilan, *The extraterritorial application of the European Convention on Human Rights and the United Nations Convention against Torture in frozen conflict regions as a tool of ensuring the prohibition of torture — the cases of Transnistria and Abkhazia*, p. 61, lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8984503&fileOId=8984504.

State's actual capacity to act, rather than its sovereign title over the territory in question.¹⁶

In subsequent cases, Moldova has not raised any objections of incompatibility *ratione personae* and *ratione loci*, thus accepting what the Court has previously ruled in *Ilaşcu and Others v. Moldova and Russia*. Russia, however, continued to raise these objections.

In *Mozer*, which was decided by the Grand Chamber, the Court took into consideration, in addition to factual findings from previous cases such as *Ilaşcu* or *Catan*¹⁷, various developments in the relations between Russia and Transnistria contemporary to the facts of the case to support its finding “that Russia continues to exercise effective control and a decisive influence over the Moldavian Republic of Transdniestria (“MRT”) authorities.”¹⁸

In *Lypovchenko and Halabudenco v. the Republic of Moldova and Russia*, the Court, sitting as a Chamber, maintained its approach that Russia exercised jurisdiction over the territory of Transnistria, noting the “ongoing military presence of the Russian Federation in Transnistria, contrary to the will of the Moldovan Government, the renewed calls for the withdrawal of its troops, and the economic and political support of the Russian Federation for the “MRT” regime – which was not disputed by the Russian Federation”.¹⁹ This judgment is the Court's most recent judgment concerning acts committed by the “MRT”.

Except the *Ilaşcu* case, in the above-mentioned cases, the Court found that Moldova respected its positive obligations and therefore its conduct was not in breach of the Convention. In *Ilaşcu*, however, Moldova was found to have failed to adequately address the applicants' situation in the course of its negotiations with the Transnistrian and Russian authorities.

A different approach was taken by the Court in the *Pocasovschi and Mihaila v. the Republic of Moldova and Russia* case, in which the Court found that Moldova was responsible for the disconnection of utilities from a penitentiary

¹⁶ Linda Hamid, *Ilaşcu: from contested precedent to well-established case-law*, <https://strasbourgobservers.com/2019/10/31/ilascu-from-contested-precedent-to-well-established-case-law/>.

¹⁷ *Catan and Others v. the Republic of Moldova and Russia [GC]*, nos. 43370/04 and 2 others, ECHR 2012 (extracts).

¹⁸ *Mozer v. the Republic of Moldova and Russia [GC]*, no. 11138/10, § 110, 23 February 2016.

¹⁹ *Lypovchenko and Halabudenco v. the Republic of Moldova and Russia*, nos. 40926/16 and 73942/17, § 87, 20 February 2024.

in Transnistria.²⁰ The Court observed that, even though the Moldovan Government did not exercise control over the local authorities who had disconnected the utilities, the Moldovan authorities nonetheless retained full control over the prison and the individuals detained therein and could therefore have taken appropriate measures to remedy the violation. Consequently, Moldova was held responsible for its failure to act promptly to address the situation.

Thus, the Court has ruled that Russia's influence over Transnistria is decisive. Consequently, Russia exercises jurisdiction over this territory. Turning to Moldova's jurisdiction, the Court's approach is to examine whether the Republic of Moldova was in a position to bring the violation to an end. Therefore, Moldova's jurisdiction cannot be regarded as merely formal or altogether absent.

2. Extraterritorial Jurisdiction under the United Nations Convention against Torture

After examining the implications of extraterritorial jurisdiction under the ECHR, this analysis will turn to the concept of extraterritoriality within the framework of the United Nations Convention Against Torture (UNCAT)²¹. This comparison is particularly important, as international human rights mechanisms, while not formally bound by one another's jurisprudence, frequently take into account the findings and interpretations developed by other bodies. In doing so, they may indirectly shape each other's approaches to complex and contested issues, including the scope of states' obligations beyond their territorial borders. This comparison is particularly relevant since the majority of cases before the ECtHR concerned allegations on the detention conditions in prisons in the territory of Transnistria.

Under Article 2 of the UNCAT, a State is obligated to take effective legislative, administrative, judicial, and other measures to prevent acts of torture "in any territory under its jurisdiction". To monitor the implementation of the UNCAT by its States Parties, the Committee against Torture was established under Article 18 of the Convention. The Committee reviews the implementation of the Convention by each State party through reports submitted to it and during meetings with national delegations (Article

²⁰ *Pocasovschi and Mihaila v. the Republic of Moldova and Russia*, no. 1089/09, 29 May 2018.

²¹ UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Treaty series, vol. 1465.

19); conduct confidential inquiries in cooperation with the State party when circumstances indicate the possibility of systematic torture being practiced (Article 20) and consider communications (or complaints) from States parties and from individuals, in States parties which have accepted the procedure (Articles 21 and 22).

Although the formulation from Article 2 (“in any territory under its jurisdiction”) appears to emphasize territorial jurisdiction rather than personal jurisdiction, the Committee against Torture in its General Comment No. 2 on the Implementation of Article 2 by States parties stated that, given the non-derogable nature of the prohibition of torture, the Convention applies to any territory or facility and protects any person, citizen or non-citizen alike, subject to the *de jure* or *de facto* control of a State party.²²

The Republic of Moldova ratified the UNCAT on 31 May 1995 and entered into force on 28 December 1995 and the Optional Protocol of the UNCAT on 24 July 2006.²³ Since its ratification Moldova has been subjected to review four times, under the procedure provided in Article 19 of the Convention.

Article 19 of UNCAT provides that the States Parties shall submit to the Committee reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter, the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request. Following their submission, the reports of the State party will be considered by the Committee against Torture as a priority at one of its following sessions, and a delegation from the State party will be invited to participate and respond to questions from the Committee.

The second report concerning the Republic of Moldova is relevant for the situation in Transnistria. The Moldovan Government stated that it lacked the capacity to ensure the application of either international or national law within the territory of Transnistria, emphasizing the central authorities’ inability to exercise full jurisdiction over the region. The Government further noted that efforts to resolve the conflict were being pursued through diplomatic means. It drew attention to the fact that the absence of effective jurisdiction over Transnistria had already been addressed by the ECtHR in *Ilaşcu and Others*

²² United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2 on the Implementation of Article 2 by States parties, CAT/C/GC/2, 24 January 2008.

²³ indicators.ohchr.org/.

v. Moldova and Russia. The report also highlighted that the Transnistrian authorities had taken various measures to prevent the Moldovan central authorities from managing penitentiary institutions located within the region. According to the Government, this issue was “much more complicated at the institutional level,” as the Transnistrian penitentiary administration was reluctant to cooperate and consistently refused any form of coordination with the penitentiary system of the Republic of Moldova.²⁴ The Committee against Torture, while taking note of Moldova’s position, concluded that the “State party has an ongoing obligation to ensure that acts of torture and other forms of ill-treatment are prohibited in all parts of its territory”.²⁵ In other words, the lack of effective control over the territory of Transnistria is not a legitimate excuse to not ensure the UNCAT’s application on this territory.

For the third report, the Republic of Moldova was requested, among other things, to indicate the measures taken to ensure full respect for the UNCAT in the Transnistrian region. Notably, this request was left unanswered. The report merely referred to the Committee’s question without providing any substantive information or explanation for the omission. It is particularly striking that, while Moldova addressed the other inquiries on the Committee’s list in detail, it failed to supply any information regarding measures adopted to ensure compliance with the Convention in Transnistria.²⁶ In the Concluding Observations on the third periodic report, the Committee against Torture took note of the “State party’s lack of ability to exercise effective control in the territory of Transnistria, which impedes the application of the Convention in this region”.²⁷

²⁴ Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 2nd periodic reports of States parties due in 2004: addendum: Moldova*, CAT/C/MDA/2, 2007, par. 109.

²⁵ Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture, Republic of Moldova*, CAT/C/MDA/CO/2, 2010, par. 4.

²⁶ Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 3rd periodic report of States parties due in 2013, Republic of Moldova*, CAT/C/MDA/3, 2013.

²⁷ Committee against Torture, *Concluding Observations on the third periodic report of Republic of Moldova*, CAT/C/MDA/CO/3, 2017, par. 6.

On the List of issues prior to submission of the fourth periodic report of the Republic of Moldova, there is no reference to the situation in Transnistria.²⁸ Similarly, the report submitted in 2022 contains no reference to the Moldova's implementation of the UNCAT within the territory of Transnistria.²⁹

Until the publication of the fourth report on this matter, we could have concluded that the Committee is not inclined to relieve Moldova of its obligations under the UNCAT regarding Transnistria, despite its lack of effective control over this territory. The Committee's observations showed that it is unconvinced that Moldova was doing everything within its power to ensure the prohibition of torture in the region.

However, the fourth periodic report of the Republic of Moldova makes no reference to the situation in Transnistria, leaving many questions unresolved. It would have been valuable to see the Committee provide concrete recommendations or to address the possible activation of Russia's positive obligations in this context. As the Committee's concluding observations on this report have not yet been published, there remains a possibility that it will offer guidance on this matter. Nevertheless, such an outcome appears unlikely, given that neither the list of issues nor the State report itself contained any information concerning Transnistria.

With regard to the recommendations made by the Committee against Torture to Russia on the implementation of the UNCAT within the territory of Transnistria, in its Concluding observations from 2018, the Committee recommended "that the State party, through its participation in the "5+2 talks", encourage the adoption of effective measures to promote the prevention and prohibition of torture and ill-treatment, taking into account the jurisdictional vacuum in the Transnistrian region."³⁰ Despite this, the reports submitted by the Russian Federation make no reference to the situation in Transnistria as an issue of concern. Judging from this position, the prospect of Russia reporting on the region under the framework of the UNCAT appears illusory, as Russia consistently refuses to acknowledge that it exercises

²⁸ Committee against Torture, *List of issues prior to submission of the fourth periodic report of the Republic of Moldova*, CAT/C/MDA/QPR/4, 2021.

²⁹ Committee against Torture, *Fourth periodic report submitted by the Republic of Moldova under article 19 of the Convention pursuant to the simplified reporting procedure, due in 2021*, CAT/C/MDA/4, 2022.

³⁰ Committee against Torture, *Concluding observations on the sixth periodic report of the Russian Federation*, CAT/C/RUS/CO/6, 2018, par. 51.

jurisdiction or effective control over the region and has repeatedly denied such control in proceedings before the ECtHR.

So far, no confidential inquiry was conducted by the Committee in the Republic of Moldova or Russia, under Article 20 of the UNCAT. This shows that there are no well-founded indications that torture is being systematically practiced in these States.

Conclusion

In carrying out this analysis, two international bodies, the European Court of Human Rights and the Committee against Torture, were examined in relation to how they interpret and safeguard their respective treaties, the European Convention on Human Rights and the UN Convention Against Torture, particularly concerning questions of extraterritorial jurisdiction. While both mechanisms share the common objective of ensuring the universal protection of fundamental rights, their approaches diverge significantly.

The ECtHR, as a judicial body with binding authority, has developed a pragmatic doctrine of extraterritorial jurisdiction that allocates obligations to both the Republic of Moldova and Russia over the territory of Transnistria. Despite the criticism which was expressed in the dissenting opinion and in the literature, this approach which imposes obligations on both states may represent the most balanced and effective strategy. It acknowledges the political dimension of the conflict by maintaining pressure on Moldova to pursue a peaceful settlement and to reassert control over the region, while simultaneously engaging Russia's jurisdiction and responsibility for the ongoing human rights violations in Transnistria, violations that, in reality, would not persist without Russia's continuous support.³¹

By contrast, the Committee against Torture has taken a more restrained position, acknowledging that Moldova lacks *de facto* effective control over Transnistria, which limits its ability to comply fully with its obligations under the UNCAT. A logical next step for the Committee would be to develop region-specific recommendations aimed at fostering incremental changes at the local level and encouraging cooperation between the *de facto authorities* and the Republic of Moldova.

³¹ Lidia Carchilan, *The extraterritorial application of the European Convention on Human Rights and the United Nations Convention against Torture in frozen conflict regions as a tool of ensuring the prohibition of torture — the cases of Transnistria and Abkhazia*, p. 63, lub.lu.se/luur/download?func=downloadFile&recordOID=8984503&fileOID=8984504.

Ultimately, the comparison between the ECtHR and the Committee against Torture underscores a broader tension within international human rights law: the balance between respecting State sovereignty and ensuring that individuals are not left unprotected due to political or territorial complexities. The Transnistrian example reveals that maintaining accountability through overlapping positive obligations remains essential to uphold the universality and non-derogability of fundamental human rights, even beyond a State's territorial borders.

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Reinterpreting the Diplomatic Inviolabilities in the Vienna Convention on Diplomatic Relations in the Era of New Technologies*

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Abstract: *This article examines the challenges regarding the diplomatic inviolabilities contained in the Vienna Convention on Diplomatic Relations (1961) in the current high-tech era. As new technologies begin to reshape international relations, the diplomatic activity must adapt to new challenges. In recent years, there have been numerous incidents targeting diplomatic activity. Little by little, the Vienna Convention, the cornerstone of diplomatic law, is no longer capable of insuring the protection of this activity. Despite the efforts of scholars, notably the experts involved in the creation of the Tallinn Manual 2.0, “modern” diplomatic inviolabilities remain an unregulated branch of international law. This study aims to highlight the need for a stronger response from the international community regarding this aspect. By addressing this issue, this article contributes to the ongoing discussions regarding the adaptation of traditional institutions of international law to cyberspace and its specificities.*

Keywords: *diplomatic inviolabilities, cyberspace, electronic archives, cyber diplomacy.*

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The opinions expressed in this paper are solely the author’s and do not engage the institutions she belongs to.

Introduction

International relations are increasingly influenced by emerging technologies. The development of cyberspace and the progressive use of Artificial Intelligence in warfare are just some of the subjects that captivated the general public in the last years. In such an effervescent world, the diplomatic activity finds itself exposed to new and complex threats¹.

In recent years, numerous incidents related to cyber operations have highlighted how vulnerable diplomats truly are. It was suggested that the Vienna Convention, once the bedrock of diplomatic law, is struggling to provide protection in today's digital environment².

Despite recent contributions of legal scholars, the concept of "modern" diplomatic inviolability remains largely unaddressed in international law. This article aims to highlight the need for an "updated" response from the international community regarding this issue.

Diplomatic inviolability refers to the principle that diplomatic agents, the premises where they conduct their activity and their means of accomplishing their missions are protected from interferences of host States. This concept is central to the stability of international relations.

Caught in the middle of a rapidly changing world, one cannot help but wonder: can the institution of diplomatic inviolability survive in the digital era without fundamentally rethinking the current international legal norms of the Vienna Convention on Diplomatic Relations? In the following pages, the author will try to analyze this issue.

1. Traditional Diplomatic Law

Diplomatic law represents the "field of international law concerning the practice of diplomacy and the rights and obligations of state representatives on the territory of other States"³. At the core of diplomatic law stands the

¹ Lazăr Elena, *Jurisdiction et cybercriminalité*, Revue TIC, Innovation et droit international, Ed. Pedone, 2017

² Jovan Kurbalija, *Is it time for a review of the Vienna Convention on Diplomatic Relations?*, 16th april 2012, www.diplomacy.edu/blog/it-time-review-vienna-convention-diplomatic-relations/, read on 10th January 2025.

³ *Diplomatic Law* (LII / Legal Information Institute), www.law.cornell.edu/wex/diplomatic_law, read on 10th January 2025.

institution of diplomatic inviolability.⁴ In Ancient Greece and in the Roman Empire, envoys enjoyed protection and were considered essential for maintaining good relations with other States⁵. Messengers were crucial for harmony between kingdoms⁶ and, consequently, enjoyed special treatment, as a form of respect towards the sending State itself.

With the Treaty of Westphalia (1648), the concept of *State* was established. States were recognized as sovereign, independent in relation to other States and enjoying supremacy on the national scene. Rulers agreed to respect internationally-recognized borders and to treat other States as equal subject on the international scene. Subsequently, the representatives of these States were also granted a special form of recognition, in respect for the functions they had to accomplish.

By the end of the seventeenth century, there was already a well-established practice of granting immunity to representatives of States⁷, rules that can be considered the foundation of diplomatic law today. For example, in 1758, Vattel, in his work *Le Droit des gens*, was already offering clear overview of the existent rules of diplomatic immunity at the time⁸. State practice remained constant for the next two hundred years⁹. In 1815, after the downfall of Napoleon Bonaparte, at the Congress of Vienna, the first international instrument to codify aspects of diplomatic law was adopted¹⁰. These rules

⁴ On the related issue of immunity of state officials and its interactions with other obligations, such as the obligations to extradite and prosecute, see Filip Andrei Lariu, Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute – Part I: The Principle of *aut Dedere aut Judicare*”, RJIL, 27/2022, “Part II: Immunities and the Existence of a Conflict of Norms”, RJIL, No. 28/2022 and “Part III: The Effects of Immunities on the Obligation to Extradite or Prosecute”, RJIL, No. 29/2023.

⁵ Felipe López-Valencia, *Diplomatic Shield: The Historical Origin and Dynamics of Diplomatic Immunity in Public International Law*, 4th October 2023, dip.uexternado.edu.co/uncategorized/diplomatic-shield-the-historical-origin-and-dynamics-of-diplomatic-immunity-in-public-international-law .

⁶ K.A.A.N. Thilakarathna Akalanka, *The Evolution Of The Vienna Convention On Diplomatic Relations And Consular*, www.academia.edu/The_Evolution_Of_The_Vienna_Convention_On_Diplomatic_Relations_And_Consular.

⁷ Eileen Denza, *Commentary on the Vienna Convention Diplomatic Relations. A commentary* (2016), Oxford University Press, p. 1.

⁸ *Ibidem*.

⁹ Commentary on Vienna Convention (n 1).

¹⁰ *Vienna Convention on Diplomatic Relations* United Nations, Audiovisual Library of International Law, 18 April 1961, legal.un.org/avl/ha/vcdr/vcdr.html.

regarded the classes of heads of diplomatic missions and their order of precedence. Finally, in 1961, the customary law was finally comprised in one treaty, the Vienna Convention on Diplomatic Relations. Two years later, the Vienna Convention on Consular Relation followed.

The Vienna Convention on Diplomatic Relations is considered to be one of the most successful treaties ever created¹¹. The International Court of Justice (ICJ), the main judicial organ of the United Nations, ruled that this Convention enjoys so much success because it is “accepted through the world by nations of all creeds, cultures and political complexions”.¹² Its importance cannot be denied. In the following pages, the author will make a brief analysis of the articles regarding diplomatic inviolability, which stand at the heart of the Convention.

1.1. Inviolability of the Diplomatic Missions

Article 22, paragraph 1 of the Vienna Convention refers to the premises of the mission, the *physical* space where most of the diplomatic activities are being exercised. At first glance, it may seem that the provision only protects the actual building of the diplomatic mission. However, the term *premises* has a broader sense. It refers to buildings, parts of buildings, pieces of land that are necessary for the activity of the mission and the official residence of the Head of mission.¹³ These entities constitute *premises* in the sense of the Convention irrespective of their ownership.¹⁴ They could belong to the sending State, to the receiving State or can simply be rented from privates, for the exercise of diplomatic purposes. What matters is the diplomatic activity conducted within, which will determine their special status in international law.

The premises of the mission are protected from any law-enforcement operation conducted by the authorities of the receiving State that can hinder the activity of the mission.¹⁵ Exceptionally, the receiving State’s authorities can enter the premises if the Head of Mission allows it. Some scholars have

¹¹ Behrens P, *Diplomatic Law in a New Millennium, In the praise of a self-contained regime. Why the Vienna Convention on Diplomatic Relations remains important today*, Oxford University Press 2017, p. 23.

¹² Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran); [1981] ICJ, Order, 12 V 81.

¹³ Vienna Convention (n 2).

¹⁴ Vienna Convention (n 3).

¹⁵ Vienna Convention (n 4).

even suggested that private individuals are under the same obligation to refrain from hindering the activity of the mission.¹⁶

Article 22 was envisaged to cover objects that have a physical existence: buildings, pieces of land, residences of the members of the diplomatic corps. For *traditional* diplomatic law, sovereignty and jurisdiction maintain a strict link to territoriality.¹⁷ One can easily observe that the provisions of the Vienna Convention were imagined in a world that was still “Westphalian”. However, with the development of the new technologies, territoriality begins to lose its importance. In fact, the majority of the diplomatic activity can be conducted from afar, without the necessity of physically being on the territory of one’s State. After the COVID 19 pandemic, for example, the number of virtual videoconferences has increased, limiting the number of face-to-face meetings between diplomats. Naturally, this phenomenon had an important influence on the diplomatic activity.

1.2. Inviolability of Archives and Documents

Article 24 stipulates that “the archives and documents of the mission shall be inviolable at any time and wherever they may be”¹⁸. But what exactly constitutes a *document* or a diplomatic *archive*? The preparatory work of the Convention confirms that the term must be broadly interpreted.¹⁹ The provision was never intended to solely cover physical documents (confidential papers, notes from ambassadors, orders from the central administration of the sending State etc.) that can be found within the premises of the diplomatic mission. That is why there is no exhaustive list provided by the Convention. However, the Vienna Convention on Consular Relations does offer such a list for the term *consular archive*: “all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping”.²⁰ In practice, this definition has been applied by analogy to diplomatic relations²¹. The reason behind this practice is that diplomatic relations are much more extended than consular ones, so the term *archives* should also be interpreted at least to this

¹⁶ Paul Behrens, *Diplomatic law in a new millennium...*, p. 173.

¹⁷ Ibidem.

¹⁸ Article 24 of the Vienna Convention on Diplomatic Relations.

¹⁹ Eileen Denza (n 4).

²⁰ Vienna Convention on Consular Relations, article 1(1)(k).

²¹ Eileen Denza (n 5).

extent.²² Foreign policy objectives cannot be fulfilled without diplomatic activity, which encompasses a wide range of actions. While safeguarding national interest, State's representatives must also find ways to promote mutual interests. This aim requires coordinated responses and strategies, which require more action than in the case of consular relations.

Article 24 permits a wide interpretation and it is perfectly adaptable to today's new forms of communications. In the light of this provision, new types of *documents* and *archives* could benefit from protection. Some aspects are particularly interesting in this regard. Virtual embassies, social media platforms of the missions, smartphone apps, digital task forces, big data used for diplomatic purposes²³ could fall under this provision, therefore being inviolable.

1.3. Inviolability of the Diplomatic Personnel

Article 29 of the Vienna Convention on Diplomatic Relations stipulates that “the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.²⁴” This rule is the oldest rule in diplomatic law²⁵.

When interpreting article 29, the inviolability of the diplomatic personnel is understood as an interdiction to charge, arrest the diplomat or search through his/her personal belongings.²⁶ In the light of new technologies, there are new actions that may violate this provision. Surveillance of the activity of diplomats or data theft can be covered by this provision. Considering how diplomacy evolved over the years from its traditional form to a more “visible” diplomacy²⁷, in which the diplomat addresses not only States, but also individuals and other multiple stakeholders, these concerns are becoming more and more acute for the diplomatic corps around the world.²⁸ Visibility brings the diplomat closer to its goals, but sometimes visibility can also mean vulnerability. Cyberspace is the perfect example.

²² Ibidem.

²³ Corneliu Bjola, Ilan Manor, *The rise of hybrid diplomacy: from digital adaptation to digital adoption*, *International Affairs* 98: 2, 2022, p. 2.

²⁴ Article 29 of the Vienna Convention on Diplomatic Relations.

²⁵ Eileen Denza (n 6).

²⁶ Vienna Convention on Diplomatic Relations.

²⁷ Paul Behrens, *Diplomatic law in a new millennium...*, p. 33.

²⁸ Ibidem.

After briefly presenting the main provisions of the Vienna Convention, we will now analyze the new challenges regarding diplomatic inviolabilities.

2. Diplomatic Law and the Challenges of New Technologies

In the context of the evolution of cyber warfare techniques, scholars have started to envisage how certain branches of international law may be adapted to cyberspace. NATO's Cooperative Cyber Defence Centre of Excellence has created the Tallinn Manual, an outstanding initiative that aims to clarify numerous "cyber issues". In the following pages, the author will focus on the second version of the manual, in order to analyze the latest developments of diplomatic inviolabilities.

2.1. Establishing New Conditions for the Diplomatic Mission's Inviolability

Rule 39 of the Tallinn Manual stipulates the inviolability of the diplomatic premises in which cyber infrastructure is located²⁹. Starting from the definition of the term "premises" contained in article 1, letter (i) of the Vienna Convention³⁰, the experts have added a new condition regarding the protection of diplomatic missions in the context of cyber operations: that the critical infrastructure must be located *inside* the premises of the mission.³¹ *A contrario*, a cyber infrastructure that can be found outside of the premises does not benefit from the inviolability of the mission. Moreover, only the critical infrastructure that is used for the activity of the mission is being protected under this provision³².

It is interesting that the experts have decided to link the application of the inviolability rule to the actual location of the infrastructure. By imposing this condition, they have limited the scope of the provision.

Scholars have wondered if portable objects, used in the diplomatic activity, outside of the premises of the diplomatic mission, could be protected by the

²⁹ Schmitt MN, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press 2018, rule 39.

³⁰ Article 1, letter (i) of the Vienna Convention on Diplomatic Relations stipulates that the "premises" are the buildings, parts of buildings and land ancillary used for the purpose of the mission, including the residence of the head the mission.

³¹ Tallinn Manual 2.0 (n 1).

³² Tallinn Manual 2.0 (n 3).

inviolability of the diplomatic mission³³. Article 22, paragraph 3 of the Vienna Convention on Diplomatic Relations stipulates that: “The premises of the mission, their furnishing and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.”³⁴ Gadgets such as phones, laptops or other portable devices could be connected to the ICT infrastructure of the Ministry of Foreign Affairs (MFA). Because of the fact that the diplomat can access sensitive information by using these devices, some scholars have asked themselves if these objects should also enjoy inviolability, as movable goods “linked” to the premises³⁵.

The opinions of the experts varied. Some scholars believed that inviolability extends to these gadgets as well. They claimed that a different interpretation contravenes the main goal of the provision.³⁶ Therefore, any cyber operation conducted against these objects outside of the diplomatic premises would violate the rule³⁷. This interpretation was also upheld by the systemic interpretation that the Vienna Convention on Diplomatic Relations provides that the movable property of diplomats remains inviolable. Other experts were more reticent to this interpretation. They emphasized that these movable goods are only immune to search, requisition, attachment, execution³⁸. Therefore, when it comes to cyber operations, they should only be protected in the exceptional cases mentioned above³⁹. A few experts argued that this type of property should enjoy no protection whatsoever⁴⁰.

Rule 40 of the Tallinn manual, named *Duty to protect cyber infrastructure*, stipulates that “A receiving State must take all appropriate steps to protect cyber infrastructure on the premises of a sending State’s diplomatic mission or consular post against intrusion or damage”⁴¹. Once again, the emphasis is put on the physical presence of cyber infrastructure on the premises of the diplomatic mission or the consular post. Therefore, the receiving State’s main

³³ Tallinn Manual 2.0 (n 4).

³⁴ Vienna Convention on Diplomatic Relations, article 22, paragraph 3.

³⁵ Ibidem.

³⁶ Tallinn Manual 2.0 (n 5).

³⁷ Ibidem.

³⁸ Tallinn Manual 2.0 (n 6).

³⁹ Tallinn Manual 2.0 (n 7).

⁴⁰ Tallinn Manual 2.0 (n 8).

⁴¹ Tallin Manual 2.0 (n 10).

obligation is to make sure that this infrastructure is not harmed, in any way, by any type of unwanted activity. This is a *special duty* of the receiving State, one specific to cyberspace. Apart from ensuring the protection of the premises of the mission itself, States must now protect a specific immobile good within the premises of the mission, which is the cyber infrastructure. The experts have highlighted the fact that, the moment the authorities of the receiving State (the legal subject that holds this obligation) are aware of the fact that the infrastructure of the mission is being targeted by malicious activity, they have the obligation to protect it.⁴² The obligation is not one of result, as the receiving State must *engage in all reasonable effort* to terminate the malicious attack against the mission⁴³. Therefore, the obligation is one of best efforts. If the situation demands it, the receiving State even has the obligation to notify the authorities of the sending State to inform them about the threat and the steps that need to be taken further⁴⁴.

In order to be able to effectively tell if the receiving State fulfilled this obligation, some conditions may be considered. Tallinn Manual 2.0 mentions the *magnitude of the threat posed to the premises, the extent to which the receiving State was aware of the threat* and, last but not least, *the capabilities of the receiving State* (including its own cyber infrastructure) to detect such threats.⁴⁵ As it can be observed, this is a case-by-case analysis in order to assess whether or not the receiving State respected its obligations. What is certain is that the standard for States that have a well-established cyber infrastructure will be different from those that are less experienced regarding cyberspace. The former will have to be very convincing in demonstrating why they did not react to the threat or why they took a specific measure, whereas for the latter the standard of proof will be less restrictive. Unfortunately, this may raise numerous difficulties in practice. A case-by-case analysis must be conducted regarding every specific incident.

Because of the difference in States' technological development, some scholars wondered if a receiving State can demand the assistance of other States, third-parties, in order to effectively defend the cyber infrastructure within a diplomatic mission.⁴⁶ Once again, there was no consensus on the matter. The term *appropriate steps* does not imply, for the majority of the

⁴² Tallinn Manual 2.0 (n 11).

⁴³ Tallinn Manual 2.0 (n 12).

⁴⁴ Tallinn Manual 2.0 (n 13).

⁴⁵ Tallinn Manual 2.0 (n 14).

⁴⁶ Ibid.

experts, that a receiving State must request help from another State. Therefore, the rule limits the action of the State to what it alone can do⁴⁷. Other experts believed the contrary. As the obligation is one of best efforts, one State can seek assistance from States that have a more developed cyber infrastructure⁴⁸.

When it comes to preventive actions, the experts concluded that the receiving State has no obligation to take preventive measures to protect the premises of the diplomatic mission.⁴⁹ This opinion was supported by State practice.⁵⁰ In traditional diplomatic law, the receiving State is under no obligation to offer protection to the premises in the absence of an imminent risk.⁵¹ Only if there is a real, quantifiable risk regarding the premises, there is an obligation to take action.⁵²

The receiving State is, however, under the obligation to make sure that the activity of the mission is not, in any way, hindered.⁵³ It is unclear how far the receiving State should go in order to comply with this provision. If social media users write threatening comments on the Facebook page of a foreign embassy, it was concluded that this act, in itself, does not necessitate an answer from the receiving State, as it cannot constitute a serious disturbance of the mission's activity.⁵⁴ Therefore, a higher level of disturbance must be attained in order to apply this provision. If, in traditional diplomatic law, attacks on embassies, protests and attempts to trespass their perimeter constitute acts that demand an according response from the receiving State, in cyberspace, DDoS, ransoms or attacks that disturb the activity of embassies may be actions that demand a strong and equally-proportionate response from the receiving State's authorities. This is a case-by-case analysis to conclude that the degree is high enough to necessitate action.

There have been numerous attacks against embassies in recent years. Some perpetrators have specialized themselves into exploiting the vulnerabilities of the diplomatic activity conducted in cyberspace. The Golden Jackal is one

⁴⁷ Tallinn Manual 2.0 (n 15).

⁴⁸ Tallinn Manual 2.0 (n 16).

⁴⁹ Tallinn Manual 2.0 (n 17).

⁵⁰ Tallin Manual 2.0 (n 18).

⁵¹ Tallin Manual 2.0 (n 19).

⁵² Tallin Manual 2.0 (n 20).

⁵³ Tallinn Manual 2.0 (n 21).

⁵⁴ Tallinn Manual 2.0 (n 23).

threat actor known for its attacks against embassies and governmental organizations. Its goal is to steal confidential data from high-profile systems.⁵⁵ They do not target systems that are connected to the internet.⁵⁶ Reports show that there were three main types of malware used in the case of the South Asian embassy attacked: the GoldenDealer, GoldenHowl and GoldenRobo⁵⁷. GoldenDealer consisted of executables that were introduced in the systems via compromised USB drives⁵⁸. GoldenHowl was creating a modular backdoor, which helped stealing files, creating tasks and SSH tunneling.⁵⁹ GoldenRobo was the exfiltration tool.⁶⁰ Moreover, two more types of malware, the GoldenMailer and GoldenDrive, were used to steal data via email and Google Drive⁶¹.

Another example occurred in 2024 and it involved Russian-sponsored actors who were targeting French diplomatic entities. The hostile actions were disclosed by the ANSSI (Autorité nationale de la sécurité des systèmes d'information), the French Cybersecurity Agency. The culprit was the group known as Midnight Blizzard.⁶² ANSSI has shown in its report that numerous diplomatic entities were targeted, from embassies of Western countries to Ministries of Foreign Affairs⁶³, alongside public institutions, such as the French Ministry of Culture and the National Agency for the Territorial Cohesion⁶⁴. The former were targeted with emails containing a file named "Strategic Review"⁶⁵. In the case of the embassies, the attacks constituted in

⁵⁵ *Cyberattacks On Embassies, Threat Actor Using ChatGPT To Write Malware, and MMS Vulnerabilities*, community.f5.com/kb/security-insights/cyberattacks-on-embassies-threat-actor-using-chatgpt-to-write-malware-and-mms-vu/335426.

⁵⁶ Ibidem.

⁵⁷ *Cyberattacks On Embassies* (n 3).

⁵⁸ *Cyberattacks On Embassies* (n 4).

⁵⁹ *Cyberattacks On Embassies* (n 5).

⁶⁰ *Cyberattacks On Embassies* (n 6).

⁶¹ *Cyberattacks On Embassies* (n 10).

⁶² Wajahat Raja, *Russia APT Targets Storm- 0156 Server For Attack Campaigns*, (TuxCare) tuxcare.com/blog/alert-french-diplomats-targeted-by-russian-cyber-attacks/, 20th december 2024.

⁶³ Ibidem.

⁶⁴ *Russia APT Targets Storm* (n 1).

⁶⁵ ANSSI, *Malicious activities linked to the Nobelium intrusion set*, advisory, 19th of June 2024, page 1.

phishing email sent to public organizations⁶⁶. The emails were sent from the addresses of foreign institutions and individuals that were also victims of the same viruses⁶⁷. This created the perfect trap and raised no concern of the targeted institutions. For example, the French embassy in Kyiv received an email called “Diplomatic car for sale”, which contained the virus⁶⁸. As ANSSI stated, this particular attack was unsuccessful⁶⁹. However, the threat remains.

Another operation was designed against the Ministry of Foreign Affairs of France. The perpetrators were trying to install a tool named Cobalt Strike that was supposed to enable the remote control over the compromised infrastructure⁷⁰. However, this attack was also deemed unsuccessful. ANSSI also shows how the private accounts of diplomats can be hacked in order to trick other embassies and diplomatic structures to believe in the veracity of a certain attack. In March 2022, ANSSI documented that a European embassy in South Africa received an email announcing them that the French embassy was closing due to the threat of a terrorist attack⁷¹. The email was sent from a compromised account that belonged to a diplomat.

In fact, any informatics system can constitute a threat if not protected. Gadgets such as mobile phones, laptops and tablets can become a target for hackers. Smart TVs, smart vacuum cleaners or smart fridges can also become targets. The operating systems of airplanes, cars, trains are not safe either.⁷² Cyberattacks against these means of transportation can happen anywhere in the world, with minimum effort, through attacks that can be remotely conducted.⁷³

⁶⁶ thehackernews.com/2024/06/french-diplomatic-entities-targeted-in.html, 20th June 2024.

⁶⁷ Ibidem.

⁶⁸ ANSSI (n 1).

⁶⁹ ANSSI (n 2).

⁷⁰ ANSSI, *Malicious activities linked to the Nobelium intrusion set*, advisory, 19th of June 2024, page 2.

⁷¹ Ibidem.

⁷² Lev Topor, *Cyber sovereignty. International Security, Mass Communication, and the Future of the Internet*, Springer, 2024, page 84.

⁷³ Lev Topor (n 1).

2.2. Data Inviolability: the New Electronic Archives, Documents and Correspondence

This provision protects what can be resumed in one word: information. Naturally, information is of outmost importance in traditional diplomatic law, a view that the Tallinn Manual 2.0 shares.

Rule 41 of the Manual protects the inviolability of electronic archives, documents and correspondence⁷⁴. The main objective of this provision is to ensure the confidentiality of the information, a *sine qua non* condition to properly fulfill one's diplomatic duties.⁷⁵

The Manual highlights that this obligation can only belong to States, therefore private entities are excluded from the scope of this provision.⁷⁶ Establishing responsibility of such private entities can only be done by attributing their acts to a State.⁷⁷

The term *archive* has a broad meaning: it contains external hard drives, flash drives, USBs⁷⁸. *Documents* may include treaties and political documents, but also *notes verbales*, negotiation drafts etc.⁷⁹ Both of the notions require a wide interpretation. The same approach must be followed for *official correspondence*.

One particular question divided experts and fueled a fascinating debate: is diplomatic material in electronic form inviolable if it finds itself outside of the receiving State's territory?⁸⁰ Some experts believed that data could be protected by the inviolability of the mission.⁸¹ It can be observed that the two types of inviolabilities are complementary. Some experts adopted the view that such information, outside the premises, enjoys "absolute" inviolability⁸², the inviolability extending to third parties as well. Some even pointed out that this is a correct solution, considering how easy States can nowadays

⁷⁴ Tallinn Manual 2.0, rule 41.

⁷⁵ Tallinn Manual 2.0, page 219.

⁷⁶ Tallinn Manual 2.0, page 219.

⁷⁷ Tallinn Manual 2.0, page 219.

⁷⁸ Tallinn Manual 2.0, page 220.

⁷⁹ Ibidem.

⁸⁰ Ibidem.

⁸¹ Ibidem.

⁸² Ibidem.

access data outside their territory.⁸³To illustrate how electronic archives, documents and correspondence can be compromised, a practical example may be useful.

Canada is one of the States that suspected a foreign interference in their national elections from 2019 to 2021, which led to an intricate investigation.⁸⁴ The *Foreign Interference Commission* had the mandate to “examine and assess the interference by China, Russia and other foreign States or non-state actors, including any potential impacts”.⁸⁵ Moreover, it was mandated to analyze the flow of information between Canadian officials, in order to clearly identify the security breaches that caused the leakage of information.⁸⁶

The Commission issued its report in January 2025. The verifications have identified a group of “malicious cyber actors”, named APT 31 (“Advanced Persistent Threat 31”), acting under the direction of the Ministry of State Security of the People’s Republic of China (PRC).⁸⁷ At the time, APT 31 was targeting Canadian politicians, as they were part of a broader group, the Inter-Parliamentary Alliance on China (“IPAC”), whose members shared “the common value that China is a threat” to the security of their countries.⁸⁸

APT 31 sent spear phishing emails, imbedded with tracking links, to IPAC members.⁸⁹ Although the virus in itself was not able to compromise the device or the account of the victim, it was able to steal the user’s IP address and, consequently, lay the foundation of a series of subsequent cyber operation against the IPAC members.⁹⁰ The malicious links were sent both on the parliamentary and personal email addresses.⁹¹ In this way, APT 31 was able to keep track of the entire activity of the parliamentarians.

This example can be illustrative for the threats diplomats may face.

⁸³ Ibidem.

⁸⁴ Site of the *Foreign Interference Commission*, <https://foreigninterferencecommission.ca/>.

⁸⁵ Ibidem.

⁸⁶ Ibidem.

⁸⁷ Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions, *The Government’s Capacity to Detect, Deter and Counter Foreign Interference (Facts and Analysis 2/2)*, Volume 4, Chapters 14-18, Chapter 15, section 15.4, page 72.

⁸⁸ Ibidem.

⁸⁹ Ibidem.

⁹⁰ Ibidem.

⁹¹ Ibidem.

In their article *The Estonian Data Embassy and the Applicability of the Vienna Convention: An Exploratory Analysis*, the authors Nick Robinson, Laura Kask, Robert Krimmer question whether the Vienna Convention is able to protect the data and the information systems that are crucial parts of the diplomatic activity, by extending the protection conferred by the inviolability of the diplomatic mission to the data that is being stored in the clouds of a certain public administration⁹². Should the international community create new provisions in order to ensure the protection of data and information systems?

After the infamous cyberattack that occurred in Estonia in 2007, Estonian authorities decided to protect their data in one of the most interesting and innovative ways: creating a virtual embassy. It is a data center located in Luxembourg, “a digital continuity of Estonia as a state”.⁹³ The project emerged in 2015, when negotiations were initiated between Estonian representatives and Luxembourg’s authorities⁹⁴. A bilateral agreement was signed in 2017.⁹⁵

The Estonian embassy raises some interesting debates regarding its true legal nature. The virtual embassy functions on a dedicated server, a part of an already existing government-operated data center of the Estonian government⁹⁶. Certainly, the explanatory memorandum between Estonia and Luxembourg labels it as an “embassy”. However, this denomination may be challenging when applying the provisions of the Vienna Convention on Diplomatic Relations. In order to establish embassies, sending States must receive recognition from the receiving States⁹⁷. Moreover, these embassies need to be registered accordingly⁹⁸. Another difficulty lies in the fact that the data center does not have actual personnel that represents the Estonian state⁹⁹. If there are no diplomats, why should does premises enjoy special status in

⁹² Robinson N, Kask L and Krimmer R, *The Estonian Data Embassy and the Applicability of the Vienna Convention*, Proceedings of the 12th International Conference on Theory and Practice of Electronic Governance (2019), doi.org/10.1145/3326365.3326417.

⁹³ Estonia Data Embassy Fact Sheet, found on the site of the Data Embassy.

⁹⁴ Ibidem.

⁹⁵ Fact Sheet (n 1).

⁹⁶ Robinson N, Kask L and Krimmer R, *The Estonian Data Embassy and the Applicability of the Vienna Convention...*

⁹⁷ Ibid.

⁹⁸ The Estonian Data Embassy (n 1).

⁹⁹ The Estonian Data Embassy (n 2).

international law? These are important questions that have not been given an appropriate answer so far.

Conclusion

The Vienna Convention has constituted the cornerstone of diplomatic relations for decades. Despite its popularity and success in the international community, this convention couldn't have foreseen the new challenges that threaten to completely change international relations.

In the context of the growing importance of cyberspace, the experts that contributed to the Tallinn Manual 2.0 have established an important precedence for the development of the diplomatic inviolabilities. New conditions were added to the traditional provisions of the Convention, a sign to show that traditional diplomatic law doesn't cover these aspects in a sufficient matter. But are these steps enough? Should the international community solely rely on the general rules established by the Convention? If the answer is no, what exactly should these provisions contain, in order to navigate the intricate sphere of cyberspace?

The answers to these questions are far from simple, especially in a polarized world like the one we live in. However, one thing is certain: the subject of diplomatic inviolability in the tech era is crucial for the entirety of the diplomatic community and it will be necessary to address it in the following years. The need for a coordinated response is stringent. Such an important aspect cannot be addressed individually, but multilaterally, together with all the stakeholders involved in the development of cyberspace.

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