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## INDIVIDUAL AND COLLECTIVE IDENTITY: FACTUAL GIVENS AND THEIR LEGAL REFLECTION IN INTERNATIONAL LAW. WORDS IN COMMEMORATION OF KRZYSZTOF SKUBISZEWSKI\*\*

### Abstract:

*States and individuals are the essential building blocks of international law. Normally, their identity seems to be solidly established. However, modern international law is widely permeated by the notion of freedom from natural or societal constraints. This notion, embodied for individuals in the concept of human rights, has enabled human beings to overcome most of the traditional ties of dependency and being subjected to dominant social powers. Beyond that, even the natural specificity of a human as determined by birth and gender is being widely challenged. The law has made far-going concessions to this pressure. The right to leave one's own country, including renouncing one's original nationality, epitomizes the struggle for individual freedom. On the other hand, States generally do not act as oppressive powers but provide comprehensive protection to their nationals. Stateless persons live in a status of precarious insecurity. All efforts should be supported which are aimed at doing away with statelessness or non-recognition as a human person through the refusal to issue identity documents.*

*Disputes about the collective identity of States also contain two different aspects. On the one hand, disintegrative tendencies manifest themselves through demands for separate statehood by minority groups. Such secession movements, as currently reflected above all in the Spanish province of Catalonia, have no basis in international law except for situations where a group suffers grave structural discrimination (remedial secession). As the common homeland of its citizens, every State also has the right to take care of its sociological identity. Many controversies focus on the distinction between citizens and aliens. This distinction is well rooted in domestic and international law. Changes in that regard cannot be made lightly. At the universal level,*

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*international law has not given birth to a right to be granted asylum. At the regional level, the European Union has put into force an extremely generous system that provides a right of asylum not only to persons persecuted individually, but also affords “subsidiary protection” to persons in danger of being harmed by military hostilities. It is open to doubt whether the EU institutions have the competence to assign quotas of refugees to individual Member States. The relevant judgment of the Court of Justice of the European Union of 6 September 2017 was hasty and avoided the core issue: the compatibility of such decisions with the guarantee of national identity established under Article 4(2) of the EU Treaty.*

**Keywords:** identity, individuals and peoples, determining factors, birth and family, gender, slavery, religious ties, freedom to leave any country, nationality, statelessness, official recognition as a person, self-determination, people and population, minorities and secession, refugees, EU citizenship, admission of refugees, competence of EU authorities to assign quotas of refugees to individual Member States

A. It is a great honour and pleasure for me to address this gathering in commemoration of Krzysztof Skubiszewski (hereinafter: KS), that great lawyer who earned a tremendous reputation not only for himself, but also for his country, Poland. KS died nine years ago, but his name is not forgotten. It is not my task to appraise his political achievements, although they are many and impressive. Poles themselves have to reflect on his legacy and how that legacy can be preserved and made to bear fruit in the best interests of the country. In many cases, looking back may help sharpen the views with respect to the challenges for the future and how to tackle them successfully. I confine myself to saying that a personality that exhibits all the qualities of a well-pondered perseverance, but at the same time a spirit of understanding and tolerance, can ideally serve as a figure of orientation and inspiration guiding political decisions, even in particularly rough waters. Fortunately, KS was able to put into practice these exceptional gifts as the Foreign Minister of his country during the difficult period of transition from 1989 to 1993.

Permit me to say just a few words about the scholarship of KS and his unchallenged recognition as one of the leading international lawyers of his time, of our time if I may say so. Only a few hints are necessary since Jerzy Makarczyk has given an ample account of KS’s academic career in the *Festschrift* (“Essays”), which KS received in 1996 on the occasion of his 70<sup>th</sup> birthday.<sup>1</sup> KS had the enviable opportunity to study and lecture abroad after having completed his studies at Poznan University, a rare privilege during the time of communist rule in Poland. A first stay in Nancy established ties with the French way of understanding and developing international law, which at that time – in

<sup>1</sup> J. Makarczyk, *Krzysztof Skubiszewski: His Professional and Public Activity*, in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century: Essays in Honour of Krzysztof Skubiszewski*, Kluwer Law International, The Hague: 1996, pp. 11-34. For more on the private life of KS, see P. Skubiszewski, *About my Brother*, 1 *Przegląd Zachodni* 321 (2017).

1957 – was still marked by a fairly traditional approach, and a year later he enjoyed the opportunity to become familiar with the intellectual climate of Harvard University in the United States, where he could witness a different spirit, closer to political realities. Thereafter, in 1960, KS completed his *Habilitation* at the University of Poznan. This should have opened up an academic career with full prospects for a successful future. But KS was not appreciated by the regime and could not count on favours from the academic establishment. As an independent spirit, he never bowed to the communist doctrines that also infiltrated the field of international law. The most remarkable sign of KS's proper way of thinking was the article he wrote in 1968 on "Use of Force, Collective Security, Law of War and Neutrality" for the Manual of Public International Law edited by the renowned Danish lawyer Max Sørensen, later judge of the European Court of Human Rights.<sup>2</sup> In that article, not a single word was lost about the specific communist doctrine of the principle of non-use of force, according to which recourse to force was permissible in order to help other brotherly nations in a spirit of friendly assistance to regain the path of genuine socialism. When the article was published that doctrine, later called Brezhnev doctrine, was not yet fully developed; it was formulated explicitly to justify the invasion of Czechoslovakia in August 1968. Nonetheless, signs foreboding that imperial doctrine of the Soviet Union were already in the air. In this context, KS developed his interpretation of the principle of non-use of force in the most traditional way, without creating any special opening for the eastern hegemon, so his opinion was referred to repeatedly in the subsequent decades by lawyers from all quarters as a standard comment on those key principles of the UN Charter.<sup>3</sup> It still reflects the state of the art today, although of course a modern treatment of *jus ad bellum* would have to take into account the doctrine of preemptive strikes that later arose from the US and British invasion of Iraq.

In the relationship between Poland and Germany, KS defended with great vigour the Polish viewpoint that the western border of Poland had already been determined by the 1945 Potsdam Agreement between the three main Allied Powers, the victors of World War II,<sup>4</sup> although that Agreement confined itself to referring to Polish administration of the German territories east of the Oder-Neiße line.<sup>5</sup> But he was absolutely right after the conclusion of the Warsaw Treaty of 7 December 1970 to maintain that a conclusive settlement had been reached through the definition of the western border of Poland in Article 1 of that Treaty,<sup>6</sup> notwithstanding the fact that German political leaders still

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<sup>2</sup> Macmillan, London: 1968, pp. 739-843.

<sup>3</sup> See M. Kowalski, *The Use of Armed Force: Contemporary Challenges in Light of Professor Skubiszewski's Legacy*, 18 International Community Law Review 109 (2016).

<sup>4</sup> Available at: [http://germanhistorydocs.ghi-dc.org/pdf/eng/Allied%20Policies%208\\_ENG.pdf](http://germanhistorydocs.ghi-dc.org/pdf/eng/Allied%20Policies%208_ENG.pdf) (accessed 30 June 2018).

<sup>5</sup> *La frontière polono-allemande en droit international*, 61 Revue générale de droit international public 242 (1957).

<sup>6</sup> K. Skubiszewski, *The Western Frontier of Poland and the Treaties with Federal Germany*, III Polish Yearbook of International Law 53 (1970), p. 65.

maintained that specific legal impediments stood in the way of such a settlement – which were eventually resolved formally through the treaties of 1990, the Treaty on the Final Settlement with Respect to Germany (12 September 1990)<sup>7</sup> and the German-Polish Border Treaty (14 November 1990)<sup>8</sup> that was signed by KS himself and by Hans-Dietrich Genscher on the German side. Fortunately, those two treaties put an end to all claims from both sides, including German territorial claims and Polish reparation claims. After that time, KS became a tireless promoter of relations of friendship and good neighbourliness between our countries, engaging himself consistently for the improvement of those relations.

I had the good fortune to meet KS first at a meeting of the Advisory Board of the Kiel Institute of International Law in 1989, when he had accepted forming part of that Board, and later in Strasbourg where he headed a Polish delegation to the Council of Europe. I happened to have some function to discharge with the Strasbourg institutions, and just by chance we met in a restaurant close to the Cathedral, where he kindly invited me to join him. We had an extensive and lively conversation which I still recall most vividly today. Some years later, I succeeded in convincing him to come to Berlin to give a lecture on the Iran – United States Claims Tribunal at Humboldt University.

**B.** Let me come now to the specific subject matter of today's lecture. It may seem strange to talk about individuals and States at the same time. It is a matter of common knowledge that the traditional actors in the field of international law are States. Up to the middle of the 20<sup>th</sup> century, international law was conceived of as a set of rules governing exclusively relations among States. Only slowly did international organizations make their way into the cobweb of those rules, a phenomenon that was eventually recognized through the opinion of the International Court of Justice in the *Bernadotte* case of 1949.<sup>9</sup> The individual's personality under international law emerged progressively as a consequence of the creation of the body of rules governing human rights. Originally, States and individuals were viewed as almost natural opponents, thus being fundamentally different as holders of rights and duties under international law.

## INTRODUCTION

Generally, no great attention is devoted to the specific identity of an individual or an entity classified as a State in general international law. Individuals are seen as an amorphous mass of people among whom, according to today's standards, the principles of equal rights and non-discrimination shall apply. Accordingly, the individual profile of a person, determined by natural or societal factors, is left out of consideration unless

<sup>7</sup> 29 International Legal Materials (1990), p. 1186.

<sup>8</sup> 31 International Legal Materials (1992), p. 1292.

<sup>9</sup> ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Rep. 1949, p. 174.

the law establishes special categories on legitimate grounds. General agreements exist, in particular, as to the need to afford extraordinary care to children, to handicapped persons, and to elderly people. Yet the interesting question arises whether the “starting conditions” of a person are unalterable and have to be simply accepted by them for their entire lifetime. In what relationship do the facts and the law stand towards one another? Can a person emancipate herself from the original design shaped by nature or the social environment and accede to a new identity? I venture to formulate a working hypothesis in this regard: In our time, one can observe a growing trend by individuals to break out of the cage nature or society has built around them.<sup>10</sup> Bowing to such individualistic pressures, national legislation as well as the relevant rules of international law have acquired some flexibility, although less than what many voices in political philosophy demand.

Similar questions arise with regard to States and peoples. In international law, States are the cornerstones of the entire normative system, the main addressees of international law. Its main rights and duties operate by way of reciprocity within that narrow group of actors. To that end, States should have a firm and unmistakable identity. One should know which entity is a State and which entity, on the other hand, cannot claim the specific privileges of that status. In theory, answers are not difficult to find. Every textbook points out that for a State to emerge and to exist there must be a territory, a population, and governmental structures in place.<sup>11</sup> In practice one rarely encounters any controversies about the element of territory. Disputes may arise with regard to the delimitation of the territory concerned, and the history of mankind is replete with narratives about wars and hostilities over territorial claims. Yet some territorial roots are indispensable. It is an inescapable truth that the exercise of public power can take place only on a specific parcel of land. On the other hand, the concept of a “people” is by no means as clear and requires more careful reflection. Who makes up the population of a country, the people entitled to make determinations on the destiny of the human community assembled within the territory of the State concerned? Does the “people” include everyone who lives within the territory, or does one take into account only those who have formally acquired the relevant citizenship? This is a determinative choice. If the right of political decision-making is granted to everyone present in the territory (the entire population), the original inhabitants might become overwhelmed and estranged in their own country. If, in contrast, political rights remain reserved to those enjoying full citizenship rights, non-naturalized immigrants may become a frustrated group of people endangering the stability of the polity. The choice is between a flexible concept

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<sup>10</sup> Yasuaki Onuma, *International Law in a Transcivilizational World*, Cambridge University Press, Cambridge: 2017, p. viii, writes: “[f]rom an overall ethical perspective, this privileged relationship in language [of English native speakers] must be overcome like the inequitable relations in sex, physical condition and other basically innate conditions.”

<sup>11</sup> Generally, reference is made in this connection to Article 1 of the Montevideo Convention on the Rights and Duties of States, 26 December 1933, available at: <http://bit.ly/2dRwh9G> (accessed 30 June 2018).

and a statist notion that prefers stability and continuity to constant change. Obviously, one does not have to go far in order to find concrete examples that lead to realities which governments find difficult to cope with. Globalization and the continually rising flows of refugees exert their impact on every community, including Europe, where statehood got its firm contours during the 19<sup>th</sup> and the 20<sup>th</sup> centuries.<sup>12</sup>

## 1. INDIVIDUAL IDENTITY

When focusing on *individual identity* and its evolution over time, two different aspects may be distinguished. On the one hand, one finds a whole panoply of instances where individuals seek to escape from, or overcome, their original identity by acquiring for themselves new opportunities (*emancipatory* aspects; section 1 below). Yet the opposite is also a significant feature of societal life. Individuals may be in search of a safe haven where they can lead their lives without any outside disturbance (*integration* aspects; section 2 below).

1) a) For everyone, life starts at birth. Nobody can choose the circumstances of their birth. A person may be born into a well-to-do or a poor or struggling family: this founding element of individual identity lies beyond any possibility of human control. It is certainly not incorrect to speak of a lottery that defies any requirements of justice and equity. Everyone has a father and a mother, but the prospects deriving from that origin are as diverse as humankind in its vast variety. Recognition of this state of affairs should prompt the responsible authorities to provide compensatory mechanisms, in particular by offering adequate health care and fair education opportunities.<sup>13</sup> Otherwise, the elementary human condition must be accepted by everyone. Beauty is a particular gift, it undeniably facilitates life – but its lack cannot be compensated for by the polity. Every individual must learn to live with her imperfections. The law cannot change or do away with this basic challenge.

b) Sex or gender is another one of the circumstances which every human being is confronted with outside his or her will. To be a male or a female person is attributable to biological factors which the persons themselves could not control. No one has any influence in respect of occurrences predating their birth. Whereas in former centuries such determinations by the forces of nature seemed to be unalterable, modern medicine has developed methods permitting individuals to change their sex, at least with regard to their external appearance. This quantum leap inevitably led to claims that such changes of gender identity must also be recognized in law. This issue appeared at an early date in the jurisprudence of the European Court of Human Rights. In two early judgments –

<sup>12</sup> See e.g. Ch. Ochoa, *The Individual and Customary International Law Formation*, 48 Virginia Journal of International Law 119 (2007-2008), p. 166; A.Y. Seita, *Globalization and the Convergence of Values*, 30 Cornell International Law Journal 429 (1997).

<sup>13</sup> The International Covenant on Economic, Social and Cultural Rights sets out the objectives to be achieved in that regard.

of 1986 and 1990 – the Court denied any violation of Article 8 of the European Convention on Human Rights (ECHR) by a government's refusal to recognize the new status of a person that had undergone surgery for the reassignment of sexual identity, holding that the typical sexual features of a human person remained essentially identical even though external changes in appearance had been brought about by way of a medical operation.<sup>14</sup> This rigid line of thinking was abandoned in 1992 in the decision of *B. v. France*<sup>15</sup> where the Court admitted that the refusal of public authorities officially to acknowledge the changed sexual identity of a person amounted to a breach of the right of privacy under Article 8 ECHR.<sup>16</sup> Since that time, it has become common ground that the right of a person to her or his chosen gender identity must be respected.<sup>17</sup> A whole series of decisions have concretized the specific consequences to be drawn from this principled shift of jurisprudence. Meanwhile, many European countries have enacted legislation that clarifies these consequences. As a documentary brochure issued by the Council of Europe shows, unanimity has not yet been reached as to the suitability of the concept of gender identity.<sup>18</sup> It seems, though, as if the primacy given to the individual's personal wishes is steadily winning ground. At the universal level, the Human Rights Committee has held that States are under an obligation to issue new birth certificates upon application by a transgender person.<sup>19</sup> While the majority of people in Europe continue to live in accordance with the gender assigned to them at birth, nevertheless for those whose physical characteristics as transsexuals are at the borderline between male and female, that jurisprudence has provided enormous relief.

c) Concerning societal rules and customs restricting an individual's freedom, *serfdom and slavery* constitute the most heinous examples. That no one should be held in such abject conditions of dependency on others was one of the primary demands of the revolutionary movements already in the 18<sup>th</sup> century. In his *Contrat Social* of 1762, Rousseau starts out with the critical words: "L'homme est né libre, et partout il est dans les fers." The French Déclaration des droits de l'homme et du citoyen of 1789 proclaimed in its first article: "Les hommes naissent et demeurent libres et égaux en droits."<sup>20</sup> Today, the prohibition of slavery and slavery-like conditions belongs to the centre-pieces of every codification of human rights. It is anchored in Article 4 of the Universal Declaration of Human Rights (UDHR), Article 8 of the International

<sup>14</sup> ECtHR, *Rees v. The United Kingdom* (App. No. 9532/81), 17 October 1986; ECtHR, *Cossey v. The United Kingdom* (App. No. 10843/84), 27 September 1990.

<sup>15</sup> ECtHR, *B. v. France* (App. No. 13343/87), 25 March 1992, para. 63.

<sup>16</sup> Confirmed extensively in ECtHR, *Christine Goodwin v. The United Kingdom* (App. No. 28597/95), 11 July 2002, paras. 91-93.

<sup>17</sup> See e.g. ECtHR, *Y.Y. v. Turkey* (App. No. 14793/08), 10 March 2015, para. 122.

<sup>18</sup> *Protecting Human Rights of Transgender Persons*, November 2015.

<sup>19</sup> Concluding observations on the third periodic report of Ireland, UN doc. CCPR/C/IRL/CO/3, 30 July 2008, pt. 8. In response to that recommendation, Ireland indeed enacted a statute to that effect in 2015: Gender Recognition Act 2015.

<sup>20</sup> The most recent reaffirmation of this basic principle is in the New York Declaration for Refugees and Migrants, UNGA Resolution 71/1, 19 September 2016, para. 13.

Covenant on Civil and Political Rights (ICCPR), Article 4 ECHR, and Article 5 of the Charter of Fundamental Rights of the European Union (Charter).<sup>21</sup> Interestingly enough, neither the Polish Constitution nor Germany's Basic Law have deemed it necessary to set forth an explicit ban on slavery, considering it self-evident that under the auspices of human dignity, freedom and equality of all citizens, slavery or similar status conditions, as a remnant of a distant past, are simply inconceivable in our time. It is well known, on the other hand, that notwithstanding the affirmation in the United States Declaration of Independence of 1776 that "all men are created equal" and that "liberty" constitutes an unalienable right, the Bill of Rights of 1789 refrained from setting forth explicitly a ban on slavery. A civil war was necessary to bring about at least the formal abolition of that status of total discrimination, which had been introduced by civil society and was supported and enforced by public institutions.

d) Other ties restricting the freedom of the individual were for hundreds of years enacted and enforced by religious denominations. In Europe, the Christian faith dominated civil society. Someone who had been dismissed from the community of believers fell into a precarious existence. Even secular leaders had to request the grace of the authorities of the Catholic church in order to stabilize the legitimacy of their power. The most famous example in point is provided by the pilgrimage of the German Emperor Henry IV to Italy ("Walk to Canossa", 1076-1077) to seek the revocation of his excommunication from the Pope. There is no need, nor space here, to refer in detail to the process of secularization that occurred in Europe from the 18th century onward. Many battles were fought in that regard. One of the main points of controversy was whether marriage was an ecclesiastical or a secular institution.<sup>22</sup> In any event, a key issue still ongoing today is whether a person is free to choose the religious denomination of her preference so that, where the burdens of belonging to her inherited religious community seem to become too onerous, she might escape the regime imposed upon her. The usual practice is that children follow the religious orientation of their parents. As is well-known, the Christian churches have introduced procedures ("confirmation") intended to manifest that a child has eventually established its religious membership of its own free will.

One of the main demands of the secularization movement was to recognize the right of the individual to leave their denomination if they so feel and decide. This negative religious freedom is today well-settled in the Western world and recognized by all Christian faiths. The Universal Declaration of Human Rights states in Article 18 that everyone "has the right to freedom of thought, conscience and religion", including the "freedom to change his religion or belief." The text of Article 18 of the International Covenant on Civil and Political Rights is markedly weaker. When defining the scope of freedom of religion, it confines itself to stating that it includes the "freedom to have or

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<sup>21</sup> The Slavery Convention of 25 September 1925 (amended in 1953), 212 UNTS 17, currently has only 99 States-parties.

<sup>22</sup> Exemplified in the famous novel *I promessi sposi* by Alessandro Manzoni in 1840.

to adopt a religion or belief of his choice.” Although it has rightly been argued that the guarantee of being able to “adopt” a religion must logically imply the right to change one’s religion,<sup>23</sup> most tenants of the Muslim faith do not share this construction of Article 18 ICCPR. According to wide sections of the Islamic clergy, the abandonment of the Islamic faith amounts not only to a religious sin (apostasy), but to a genuine criminal offence that may even be punishable by the death penalty.<sup>24</sup> In other words, children are supposed to remain within their family’s tradition and are prevented from acting in conformity with their personal convictions. Due to this schism between major world religions attempts to adopt, at the UN General Assembly, a declaration on religious freedom particularizing the wide and general terms of both Articles 18 have failed.<sup>25</sup>

Most Western countries, on the other hand, grant even minors the right to make determinations about their religious belonging from an age when the child is supposed to understand the significance of any decision in that regard. In Germany, the Statute on the religious education of children<sup>26</sup> provides that upon reaching age fourteen a minor is free to make the relevant choice independently of the authority of the parents. Two years earlier, i.e. at the age of twelve, the holders of parental authority are already denied the right to change the religious membership of a child against the child’s will. Thus, already at age twelve a child is considered capacitated to assert her own religious identity. The UN Convention on the Rights of the Child addresses the possible conflict between parental authority and the wishes of the child herself only in general terms,<sup>27</sup> apparently as a consequence of the divergent views as to the scope *ratione materiae* of religious freedom. No jurisprudence seems to have arisen within the Committee on the Rights of the Child under this provision.

e) The spirit of freedom has largely prevailed with respect to the demands of the State on the individual. The freedom to leave any country, including one’s own, is nowadays firmly established in international law. The UDHR so states (Article 13(2))

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<sup>23</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> ed.), N.P. Engel, Kehl: 2005, p. 415, comments on Article 18, margin note 15; K.J. Partsch, *Freedom of Conscience and Expression, and Political Freedom*, in: L. Henkin (ed.), *The International Bill of Rights*, Columbia University Press, New York: 1981, p. 211.

<sup>24</sup> See the report of the Iranian Human Rights Documentation Center, *Apostasy in the Islamic Republic of Iran*, 30 July 2014. See also the concluding observations of the Human Rights Committee on the second periodic report of Iran, UN doc. CCPR/C/IRN/CO/3, 29 November 2011, pt. 23 (on plans to formally codify the death penalty for apostasy in the Penal Code). For an overview, see [https://en.wikipedia.org/wiki/Apostasy\\_in\\_Islam](https://en.wikipedia.org/wiki/Apostasy_in_Islam) (accessed 30 June 2018).

<sup>25</sup> GA Resolution 36/55 on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 25 November 1981 does not mention the right to change one’s religion. Only a general reservation in Article 8 is intended to safeguard the rights under Article 18 UDHR and Article 18 ICCPR.

<sup>26</sup> Originally of 15 July 1921, amended many times, current version available at: <https://www.gesetze-im-internet.de/kerzgj/BJNR009390921.html> (accessed 30 June 2018).

<sup>27</sup> Article 14(2): “States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”

and the ICCPR has followed suit (Article 12(2)). Obviously, in a strict sense the place of sojourn or residence does not belong to the constituent elements of the identity of a person, but it permeates the human condition profoundly. To be able to flee a country where any dissent is sanctioned by harsh measures of retaliation belongs to the most effective tools of personal liberation and emancipation. Indeed, the stubborn denial of citizens' claims to leave their country was a major factor contributing to the fall of the socialist regimes in Eastern Europe, epitomized by the tearing down of the Berlin wall. In Germany, those fleeing the dictatorship of the GDR had no difficulties in finding a country of reception: they were welcome in the FRG as German citizens, which was an exceptional situation since the right of exit is not automatically combined with a right of entry to another country.

On the other hand, the provisions just referred to do not mention at the same time a right to denounce one's link of citizenship. While mostly national legislation does not place any obstacles in the way of abandonment of one's nationality, nevertheless some countries deviate from this path. Under Iranian legislation, in particular, the renunciation of nationality requires an authorization by the Council of Ministers, which may be denied on discretionary political grounds.<sup>28</sup> The Iranian State thus wishes to maintain its control over the destiny of the person concerned. When an Iranian national has left her country and has lived for decades abroad, without any real contact with her juridical home country, such claim to maintain jurisdiction over her seems to lack any justification. Citizenship is built on an effective relationship embodied in actual facts. In any international proceeding, the applicant could argue with a high degree of persuasiveness that the Iranian State's assertion of jurisdiction lacks any foundation in law. In the jurisprudence of the Iran-U.S. Claims Court issues of dual nationality, where Iranians had lived for many decades in the United States, have played a prominent role, the Tribunal taking as determinative the "dominant and effective nationality."<sup>29</sup>

2) The second aspect in this discussion on individual identity is devoted to the attempts to establish firm links with a specific human group. Membership as a citizen in a national community is generally appreciated as a precious asset, usually acquired by birth. Once again one may allude to the idea of a lottery that creates winners and losers. In fact, it does matter which specific nationality is assigned to an individual. In the American literature, the difference between being born north or south of the Rio Grande is often referred to as a symbolic feature of being rich or poor.<sup>30</sup> An American citizen is a member of the most powerful nation of this globe. Latin Americans, on the other hand, know from their youth that their personal development is constrained by numerous encumbering elements resulting from the political destiny of their countries.

<sup>28</sup> See <http://www.mfa.gov.ir/index.aspx?siteid=3&pageid=24718> (accessed 30 June 2018).

<sup>29</sup> Iran-United States Claims Tribunal, Case A/18, 6 April 1984, 23 ILM 489 (1984), p. 501. KS did not participate in that proceeding.

<sup>30</sup> See e.g. O. Angeli, *Cosmopolitanism, Self-Determination and Territory: Justice with Borders*, Palgrave Macmillan, New York: 2015, p. 8. See also Ch.H. Wellman, P. Cole, *Debating the Ethics of Immigration: Is there a Right to Exclude?*, Oxford University Press, Oxford: 2011, pp. 13, 50.

No single person can fundamentally change this state of affairs. Switching to another nationality can never take place by virtue of an individual act of volition. To date, the distinction between nationals and aliens constitutes a divide closely related to the nature of the international community as a group of nations, each of which has developed its own identity with specific features.<sup>31</sup>

a) Since generally nationality is acquired based on the principle of *jus sanguinis*, children are rarely born as stateless persons, except in case where their parents lack a distinct nationality. Nationality is a status that each State confers according to its own political choices. However, that political discretion is not unlimited. Rules of international law enjoin States to confer their nationality or to abstain from granting their nationality to foreign citizens. Lastly, the rights and duties entailed by the nationality of a specific country are defined by international law insofar as they extend beyond national borders.

Nationality is a status that inserts individuals into the societal life of the people concerned. As citizens, they have to endure the unforeseeable movements which their nation is compelled by history to address. On the one hand, every citizen enjoys the protection of their country even when staying in foreign land beyond national borders. Diplomatic protection is in this regard the oldest and most venerable, but not always effective, mechanism to secure the elementary rights of those placed temporarily under the jurisdiction of a foreign State.<sup>32</sup> On the other hand, the nationals of a given country cannot avoid the burdens which they have to shoulder in solidarity with their nation. In the event of an armed conflict, they may become aliens against whom restrictive measures can be imposed, going as far as temporary internment. Additionally, their assets may be frozen or confiscated as enemy property. A nation is a community of destiny from which no one can easily escape. In the reciprocal relationship between Poland and Germany many illustrative examples can be found, well known to all of us and that need not be highlighted in the present context. It is enough to note that during World War II, more often than not elementary rules of humanitarian law were seriously breached. It is to be hoped that between our two nations recourse to those rules governing armed conflict will never be necessary again.

b) Although nationality thus combines features that constitute a blend of various positive and negative elements, it is clear that a person who is deprived of a nationality is in a precarious status, both legally and emotionally. Every human being needs a home, a place where they can live in safety and dignity, without having to fear for their life on a daily basis. Stateless persons, if they have been granted a right of abode in their country of sojourn, cannot, unless they are granted certain exceptional rights accepted

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<sup>31</sup> For voices of criticism see e.g. L. Bosniak, *Persons and Citizens in Constitutional Thought*, 8 International Journal of Constitutional Law 9 (2010), p. 17: “[e]xclusive state-centered conceptions of citizenship are unduly narrow or parochial in this age of intensive globalization”; G.M. Ferreira, M.P. Ferreira Snyman, *Migration in the Global Village: Cultural Rights, Citizenship and Self-determination*, 37 South African Yearbook of International Law 130 (2012), p. 133.

<sup>32</sup> See the ILC Draft articles on diplomatic protection, Yearbook of the ILC 2006 II/2, p. 24.

also outside that country, cross the borders to any other country. If they succeed in undertaking such a journey, they lack the protective authority of a home State while remaining on foreign territory. The 1954 Convention relating to the Status of Stateless Persons<sup>33</sup> provides for the granting of travel documents by the State of residence (Article 28), travel documents that have to be recognized by other Contracting States. However, the status of ratification of the 1954 Convention is lamentably low. Currently (as of October 2017), the Convention counts only 89 State-parties, less than half of the membership of the United Nations.

Accordingly, statelessness should be remedied to the extent possible. Although the Universal Declaration of Human Rights mentions the right of everyone to a nationality (Article 15), the International Covenant on Civil and Political Rights has abstained from converting this recommendation into a binding obligation. Article 24(3) provides no more than that every child has the right to acquire a nationality, leaving open the question of which State is obliged to grant its nationality to a child who otherwise would be stateless.<sup>34</sup> Unfortunately, the 1961 Convention on the Reduction of Statelessness<sup>35</sup> has refrained from stating unambiguously that any such child shall be granted the nationality of its birthplace – requiring instead that the mother must be a national of that country.<sup>36</sup> In 2014, UNHCR launched a 10-year global campaign to integrate every stateless person into the extant inter-State system through appropriate measures of naturalization, in order to satisfy that deep-seated psychic aspiration of every human being to belong firmly and indissolubly to a polity that provides protection against the major risks of life.<sup>37</sup>

c) At present, it is hard to contend that no State is allowed to deny its citizenship to persons who have spent their entire lifetime in the territory of that State. Yet such a right must be deemed to exist if such denial derives from patterns of systemic discrimination, where the persons concerned had never been granted any opportunity to demand conferral of citizenship. Currently, the case of the Rohingya in Myanmar constitutes the most flagrant case in point. Having lived for many generations as a Muslim minority within the confines of Myanmar, they were deliberately deprived of many amenities a State would normally have to dispense to its citizens. It is true that a people may take measures to preserve its identity.<sup>38</sup> Yet historical occurrences cannot be

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<sup>33</sup> Convention relating to the Status of Stateless Persons (entered into force 6 June 1960), 360 UNTS 117.

<sup>34</sup> See in this regard Human Rights Committee, General Comment No. 17 (1989), paras. 7, 8.

<sup>35</sup> Convention on the Reduction of Statelessness (entered into force 13 December 1975) 989 UNTS 175. The circle of State-parties is even more restricted than in the case of the 1954 Convention, comprising only 70 States.

<sup>36</sup> This provision is understandable only on the basis of the traditional concept that nationality is transferred only by the father.

<sup>37</sup> See K.A. Belton, *Ending Statelessness Through Belonging: A Transformation Agenda?*, 30 Ethics and International Affairs 419 (2016); *id.*, *Heeding the Clarion Call in the Americas: The Quest to End Statelessness*, 31 Ethics and International Affairs 19 (2017).

<sup>38</sup> This issue will be taken up in greater detail in the following pages.

rolled backward. The presence of the Rohingya in Myanmar for hundreds of years<sup>39</sup> is a fact of life that cannot be talked away and must be accommodated in accordance with today's principles of equality and non-discrimination.

Lastly, a perspective of naturalization should be open to stateless persons in their countries of residence.<sup>40</sup> The 1954 Convention relating to the Status of Stateless Persons calls upon States, in soft terms, to "facilitate" their assimilation and naturalization (Article 32). This proposition should be viewed as a directive being part and parcel of general international law. To exclude a meritorious human being for decades from the full enjoyment of political rights seems to amount to an infringement of human dignity.

d) Similar considerations apply to situations where a State is remiss in officially registering all new-born children at the moment of birth. To be sure, a person whose name is not inscribed into the civil registry is not deprived of her physical existence. In legal terms, for all intents and purposes, however, she is a true nobody. She is prevented from obtaining any identity documents, she is factually and legally denied the right to vote, and she will never be able to travel outside her country. Such degradation of a human being amounts to a clear violation of Article 6 UDHR, Article 16 ICCPR (and Article 7 of the (1989) Convention on the Rights of the Child), according to which "everyone has the right to recognition everywhere as a person before the law."<sup>41</sup>

e) On the reverse side of the coin, States are placed under the commitment not to sever arbitrarily the links of nationality with their citizens. Pursuant to unchallenged human rights standards, everyone has the right to stay in their country.<sup>42</sup> In cases of State succession, the successor State is under an obligation to assign its nationality to all those who had the nationality of the predecessor State and lived permanently in the area concerned.<sup>43</sup> The punishment of exile, widely practiced in ancient Greece, has no legitimate place under the auspices of freedom and equality. It is a debatable issue, though, whether a State may provide in its legislation that a convicted person may choose between imprisonment and exile. Given the natural right of citizens to lead their life within their national territory, practices of arbitrary expulsion can never find any justification. Mass expulsions may entail international responsibility towards those States compelled to admit the victims on their territories.<sup>44</sup> The harshest form of mass

<sup>39</sup> We have currently no other authoritative source than the relevant article on the Rohingya people in Wikipedia, [https://en.wikipedia.org/wiki/Rohingya\\_people](https://en.wikipedia.org/wiki/Rohingya_people) (accessed 30 June 2018).

<sup>40</sup> See Angeli, *supra* note 30, pp. 92-93.

<sup>41</sup> Article 20 of the American Convention on Human Rights establishes a right to a nationality. For the inferences to draw from that provision for the registration of new-borns, see Inter-American Court of Human Rights, *Caso de personas Dominicanas y Haitianas Expulsadas v. República Dominicana*, Judgment C 282, 28 August 2014, paras. 253-271.

<sup>42</sup> Article 13(2) UDHR, Article 12(4) ICCPR.

<sup>43</sup> See Article 1 of the 1999 Draft Articles of the ILC on Nationality of Natural Persons in Relation to the Succession of States, text annexed to GA Resolution 55/153, 12 December 2000.

<sup>44</sup> See W. Czapliński, *La responsabilité des états pour les flux de réfugiés provoqués par eux*, 40 *Annuaire français de droit international* 156 (1995); Ch. Tomuschat, *State Responsibility and the Country of Origin*, in: V. Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, Nijhoff, The Hague: 1996, pp. 59-79.

expulsion, ethnic cleansing, has been elevated to the rank of an international crime that is dealt with under the Rome Statute of the ICC (in particular Article 7(d)) and is classified among the core crimes that come within the purview of the Responsibility to Protect (GA Resolution 60/1, 16 September 2005, para. 138). We have all learned from the experiences of World War II and its consequences.

3) Let me give a short summary of my line of reasoning. Generally, human rights have made deep inroads into situations which only decades ago seemed to be firmly and indissolubly established. Even genetic predeterminations have had to cede in law under the pressures of claims for freedom by individuals desirous of taking their fate into their own hands. The right to gender identity has emerged in Western culture but has not yet received world-wide recognition. In a similar fashion, the power of States to decide exclusively on their relationship with their citizens has been significantly eroded. It would necessitate another inquiry to assess to what extent the increasing emphasis on individual human rights has negatively affected the social institutions that are destined to discharge essential functions in the interests of the majority of the population.<sup>45</sup>

## 2. COLLECTIVE IDENTITY

Let me now come to the second part of my exposition, the impact of occurrences at the international level on the identity of States and their peoples. Here again two opposed aspects must be dealt with. On one hand, the focus will be on disintegrative tendencies originating from the inside. Subsequently, the legitimacy of efforts to preserve national unity and cohesiveness against immigration flows from outside will be analysed.

1) It was already noted that the identity of a State is defined by territory, population and governmental power. The fundamental rules of non-recourse to force and non-intervention protect that identity. Even without such foreign interventions, however, the human foundations of a State may be subject to changes through the constant movement of people across borders.

Is the traditional delimitation of a “people” – that a “people” consists of the sum total of all those who are formally, according to their documents of identity, citizens of the country concerned – still the appropriate yardstick? In a legal sense, no objections can be raised against this configuration. Yet one must be allowed to put forth the question whether, in an epoch in which mobility has arisen to one of the supreme values of our societies and when national boundaries have almost disappeared in law and in practice, a broader definition of “people” should be adopted, including all those who have obtained a right of permanent residence. Should not the right of political

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<sup>45</sup> Thus, the assertion of individual rights may destroy schools as social institutions designed to serve the community as a whole. An example of this can be seen in the judgment of the ECtHR in *Lautsi v. Italy* (App. No. 30814/06), 18 March 2011. For more on its general aspects, see K.-H. Ladeur, *Bitte weniger Rechte!*, Frankfurter Allgemeine Zeitung, 8.12.2016, p. 8.

self-determination accrue to everyone present on the territory? Such an enlargement of the *ratione personae* scope of the right of self-determination is being discussed in terms of political philosophy. The Spanish (Basque) thinker Daniel Innerarity, among others, contends that in Europe only a common *pouvoir constituant* corresponds to the new realities of our time.<sup>46</sup>

All those who advocate the extension of political decision-making to foreigners on the national soil have to a great extent lost contact with the living architecture of a continent still divided into national communities different in terms of history, habits and languages. The governing constitutional rules, as they are defined both in general international law and in the Treaty of Lisbon, reflect the political wisdom of the international community at both the universal and regional levels and have not brushed aside these traditional boundaries. Europe wishes to live in harmony, but also in its established diversity.

2) It cannot be denied, though, that demands for more political autonomy have sprung up even in Europe. Let me first address the instances where an ethnic or linguistic minority wishes to break away from the State to which it belongs in law. Kosovo and Catalonia are currently the most prominent examples of such demands,<sup>47</sup> and the Kurds living in four different countries in the Middle-East see themselves as victims of a conspiracy that was initiated when the Ottoman Empire collapsed at the end of World War I. The right of self-determination is indeed a right which the relevant instruments of the United Nations recognize as inherent to “all people.”<sup>48</sup>

Many authors have undertaken research into what constitutes a “people” as a collective holder of that right. The usual criteria have already been mentioned. A common history, common ethnic features, and a common language are generally identified as constituent characteristics of a people. Authors embracing these criteria,<sup>49</sup> however, tend to forget that the right of self-determination is a creation of the United Nations and has

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<sup>46</sup> D. Innerarity, *Transnational Self-Determination. Resetting Self-Government in the Age of Interdependence*, 53 *Journal of Common Market Studies* 1061 (2015), p. 1069. See also E. Hirsch Ballin, *EU Enlargement with Reversed Priorities: Law, Economics and Basic Values in the Process of Turkish Accession to the European Union*, 13 *Tilburg Foreign Law Review* 31 (2006), pp. 34-35.

<sup>47</sup> Kosovo is clearly ahead of Catalonia. It declared its independence on 17 February 2008 and has hitherto been recognized as an independent State by 115 other States. Catalonia, on the other hand, has made only a few steps on the road to independence which parts of the population of Catalonia wish to attain. By a judgment of 28 June 2010, available at: [https://boe.es/diario\\_boe/txt.php?id=BOE-A-2010-11409](https://boe.es/diario_boe/txt.php?id=BOE-A-2010-11409) (accessed 30 June 2018), the Spanish Constitutional Court declared unconstitutional large parts of a revised version of Catalonia's Autonomy Statute, the main reason being (pt. 7) that the Catalans were characterized as a nation in the Preamble of that text. As of October 2017, the conflict between the central institutions of the Spanish State and the regional Catalanian institutions has reached new climax points.

<sup>48</sup> UNGA Resolution 1514 (XV), 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples; Resolution 2625 (XXV), 24 October 1970, Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nation, Principle 5.

<sup>49</sup> See e.g. F. Mégret, *The Right to Self-Determination*, in: F.R. Tesón (ed.), *The Theory of Self-Determination*, Cambridge University Press, Cambridge: 2016, pp. 54-59.



3) The opposite question is whether a State is compelled to open up to foreigners knocking at its doors. Undeniably, the immigration of aliens changes the composition of a population and leads to changes in social structures and mentalities, in both the short- and long-terms. It is for this reason that sovereign States have established mechanisms of immigration control by virtue of regulations that differ widely in their degree of strictness. The right to decide on who may enter the national territory is one of the inherent attributes of every sovereign State.<sup>55</sup> Open borders are a rare exception.

a) Only within the European Union has a more generous system been introduced, based on mutual confidence and reciprocity. Freedom of movement across borders is institutionally guaranteed. Every citizen of each of the 28 EU Member States has the right to take up residence in any other State of the Union, becoming liable to expulsion only if grave criminal offences have been committed by her.<sup>56</sup> Otherwise, according to the principle of national treatment, European citizens enjoy equality of treatment in almost all spheres of life. The European Convention on Human Rights provides additional guarantees to ensure equality and non-discrimination.<sup>57</sup>

The liberal regime of the European Union constitutes a stark exception from the standards applied almost anywhere else in the world. But it has not led to a complete blurring of the distinction between national citizens and those EU citizens of other countries who have followed the incentives for immigration. To date, European citizens settled down in another Member State of the Union remain to a great extent excluded from the political processes in their country of residence. According to Article 20 of the Treaty on the Functioning of the European Union, they are granted: “the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence”, but they are not integrated into the political structures at higher levels, so they have no voice in national parliamentary elections. In legal terms, this denial of full political rights cannot be put into question. The International Covenant on Civil and Political Rights, today the yardstick in such matters, grants rights of political participation only to the citizens – not to the inhabitants – of the country concerned (Article 25).

b) The international system established for assistance to refugees has not derogated from this basic ground rule. When the UDHR was drafted, no agreement could be reached on the recognition of an individual right to asylum, meaning a right to be admitted in a host country. Article 14 states in well-pondered weak terms that everyone

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<sup>55</sup> See the New York Declaration for Refugees and Migrants, GA Resolution 71/1, 19 September 2016, pt. 42: “We recall ... that each State has a sovereign right to determine whom to admit to its territory.” Institut de droit international, *Resolution on Mass Migration*, 9 September 2017, Preamble, para. 4: “Recognising the legitimate right of States to control their borders and to exercise their sovereignty over entry and residence on their territory.”

<sup>56</sup> Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004], OJ L 158/77, Article 27.

<sup>57</sup> For more details, see Ch. Tomuschat, *Gleichheit in der Europäischen Union*, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 327 (2008).

has the right to seek and to enjoy in other countries asylum from persecution. Obviously, no one can be denied the right to apply for asylum in another country – but deliberately no right to the fulfilment of such wishes was added to complete the concept of asylum in substantive terms.<sup>58</sup> Nor did the 1951 Geneva Convention relating to the Status of Refugees<sup>59</sup> fill in this lacuna, being essentially designed to lay down rules for the treatment of those who have been recognized as victims suffering from political persecution. In practice, however, the principle of non-refoulement set out in Article 33, according to which no one may be expelled or returned to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” has taken on the function of “asylum light”, in that persons being entitled to invoke Article 33 may provisionally remain in the country where they have found refuge, for periods of time that eventually may extend to many years. Later efforts within the United Nations to introduce a general right of territorial asylum have failed. In 1967, agreement could only be reached on the proposition that taking care for refugees was incumbent as a collective responsibility on the entire international community.<sup>60</sup> The United Nations High Commissioner for Refugees is actively engaged in discharging this monumental task at the global level.

Intensive debates among authors in the field of political philosophy are sometimes far removed from living realities. Many authors overvalue the aspirations of individuals seeking to fully exploit their potentialities. One such ill-considered utterance stems from British scholar Kieran Oberman, who sees immigration restrictions as obstacles arbitrarily curtailing individual freedom and preventing people from going where they want to go.<sup>61</sup> The Oxford philosopher David Miller is the major voice cautioning against such boundless optimism, pointing out in his writings that every immigrant puts a demand on the resources of the host country and will contribute to altering the structure of that country.<sup>62</sup> It is amazing that the majority of authors who have taken a stance on this issue avoid appraising the inherent merits and wisdom of the legal rules that have been laid down in positive international law.

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<sup>58</sup> Re-emphasized in the New York Declaration for Refugees and Migrants, *supra* note 55, pt. 67: “We reaffirm respect for the institution of asylum and the right to seek asylum.”

<sup>59</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137.

<sup>60</sup> GA Resolution 2312 (XXII), 14 December 1967: Declaration on Territorial Asylum.

<sup>61</sup> K. Oberman, *Immigration as a Human Right*, in: S. Fine, L. Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership*, Oxford University Press, Oxford: 2016, pp. 32-36; *id.*, *Immigration as a Human Right*, Oxford University Press, Oxford: 2016; Ch. Kukathas, *The Case for Open Immigration*, in: A.I. Cohen, Ch.H. Wellman (eds.), *Contemporary Debates on Applied Ethics*, Blackwell Publishing, Malden, MA, Oxford: 2005, pp. 207-220. Kukathas, however, acknowledges that the modern welfare State constitutes one of the greatest obstacles to open borders.

<sup>62</sup> D. Miller, *Immigration: The Case for Limits*, in: Cohen & Wellman, *supra* note 61, pp. 193-206; *id.*, *Strangers in Our Midst: The Political Philosophy of Immigration*, Harvard University Press, Cambridge, MA: 2016, pp. 49-56; *id.*, *Is there a Human Right to Migrate?*, in: Fine & Ypi, *supra* note 61, pp. 11-27.

c) The treaties on the European Community/European Union contain, since the Treaty of Amsterdam of 2 October 1997,<sup>63</sup> a title on freedom, security and justice. All affairs related to the free movement of persons: controls on external borders; asylum; immigration; and safeguarding the rights of third-country nationals were at that time “communitised.” The regime established on that occasion was later transferred to the 2001 Treaty of Nice<sup>64</sup> and has found its current version in the 2009 Treaty of Lisbon, where the relevant subchapter carries the title “Policies on border checks, asylum, and immigration” (Articles 77 to 80). It is certainly not inappropriate to ask the question whether all the governments involved were fully aware of the consequences entailed by that decision to confer broad and extensive powers on the European institutions. Apparently, it was considered that the concept of freedom of movement within the territory of the entire EU required a uniform border regime that could only be established by common rules under the jurisdiction of the Union. At the same time, it should not go unnoticed that the most decisive determinations on the establishment of a common space of free movement were taken at a time when the former socialist States had not yet acceded to the EU. Their admission was completed only on 1 May 2004. Accordingly, they had no voice at all when the core principles of today’s immigration regime were determined. On the occasion of the negotiations on the Treaty of Lisbon, they were unable to bring about a re-orientation of the earlier decisions, which seemed to display all the features of liberal progressiveness.

The final shape of the immigration regime was moulded on the basis of those powers, again in a spirit of great openness. In 2011 a Directive was enacted that transposed into EU law not only the classic concept of asylum – which presupposes a person being individually threatened – as an individual right but extended the traditional scope of asylum by the addition of a right to “subsidiary protection.”<sup>65</sup> The peculiar feature of this right is that a person invoking it is relieved of the burden of proving her status as an individualized victim or potential victim. An accurate definition is given in the Qualification Directive (Article 2(f)):

Person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm ...

Thus, the scope *ratione personae* of entitlement to protection was considerably enlarged, much beyond the traditional understanding of asylum. While this enlargement

<sup>63</sup> Entered into force on 1 May 1999.

<sup>64</sup> Of 26 February 2001, entered in force on 1 February 2003.

<sup>65</sup> Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, [2011] OJ L 337/9.

may be called a noble gesture of human solidarity, it stands to reason that it carries with it heavy potential risks and burdens.<sup>66</sup>

When in 2015 the entire system of refugee management collapsed under the influx of hundreds of thousands of persons desirous to leave the theatres of hostility in Syria and Iraq, and when Germany opened its borders, animated by a spirit of human compassion, the question of where and by whom shelter should be provided for the immigrants became automatically an issue for the entire European Union. Germany undertook extraordinary efforts to accommodate the needs of all those who eventually arrived on its soil. But the German Government was not willing to shoulder that burden alone. The issue was taken to the Council of Ministers which, on 14 September 2015, took a first decision by consensus on the basis of Article 78(3) TFEU<sup>67</sup> to relocate 40,000 persons seeking international protection from Italy (24,000) and from Greece (16,000).<sup>68</sup> A few days later, the Council adopted a second decision on provisional measures for relocation with a view to alleviating, once again, the plight of Greece and Italy. It provided that 120,000 persons in need of international protection shall be relocated from those two countries, first of all a contingent of 15,600 persons from Italy, and additionally a contingent of 50,400 persons from Greece.<sup>69</sup> This time the vote was taken by a qualified majority. The Czech Republic, Hungary, Romania and the Slovak Republic, all of which were to shoulder some part of the burden, voted against the proposal, while Finland abstained. Applications requesting that this decision should be annulled were introduced in the European Court of Justice (ECJ) by the Slovak Republic and Hungary; Poland intervened in support of the applicants' submissions.

d) The Preamble to the ECJ's highly controversial judgment of 6 September 2017 contains a lengthy enumeration of the considerations explaining the factual background and discussing the scope of the powers invoked to adopt it. In the proceedings in Luxembourg, Advocate-General Bot meticulously considered all the arguments of the applicants, dismissing them one by one.<sup>70</sup> His line of reasoning was almost entirely endorsed by the Court itself, which also rejected all the allegations that the decision was not in conformity with its legal basis.<sup>71</sup> In particular, the conclusions of a meeting of the European Council of 25/26 June 2015 that a distribution scheme should be set up by consensus were dismissed as irrelevant.<sup>72</sup> Within the European Union, normally

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<sup>66</sup> See the call for a general review of the border regime of free movement in the EU by political scientist H.-P. Schwarz, *Die neue Völkerwanderung nach Europa. Über den Verlust politischer Kontrolle und moralischer Gewissheiten*, Deutsche Verlags-Anstalt, München: 2017.

<sup>67</sup> "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

<sup>68</sup> Decision (EU) 2015/1523, OJL 239/146.

<sup>69</sup> Decision (EU) 2015/1601, OJL 248/80.

<sup>70</sup> Opinion in cases C-643/15 and C-647/15, 26 July 2017.

<sup>71</sup> Judgment in cases C-643/15 and C-647/15, 6 September 2017.

<sup>72</sup> *Ibidem*, paras. 143-150.

a dispute comes to an end after a judgment from the ECJ in Luxembourg. This time however, things are different. As far as my information goes, the four States that had voted against the adoption of the relocation decision have all declared that they were not inclined to respect the pronouncement by the European judges.<sup>73</sup>

I cannot go into the details of this ongoing dispute, which of course will have many sequels. Obviously, the Commission, which is the guardian of legality, may not remain passive when a State openly disobeys an order of the highest judicial organ of the EU. Yet supervising the execution of the judgment of 6 September 2017 does not belong to daily routine. The case has technical aspects and additionally raises a number of issues of principle. In this regard, an observer may note with some amazement that while Advocate-General Bot and the Court examined every tiny detail in an almost pedantic manner, they shied away from addressing the truly crucial aspect of the scope of their powers. Decisions on who may enter the territory of a country touch upon the very core of national sovereignty. It should be recalled that pursuant to Article 4(2) TEU, the EU shall respect the national identities of Member States, “inherent in their fundamental structures, political and constitutional.” Obviously the assignment of migrants to a State considerably affects its societal structure, even under the legal regime of freedom of movement, which is one of the cornerstones of the European Union. It is true that all the Member States of the EU have acquired a multicultural profile through the flows of immigration from their European neighbours. However, the common European space is based on a certain commonality of traditions, customs, and habits among its inhabitants, so that the traditional policy of open doors within the EU was generally accepted not only by governments, but also by the societies of the 28 Member States. By contrast, the massive arrival of migrants constitutes a true challenge to the fundamental requirement of peacefully living together in society.<sup>74</sup>

National identity is not only reflected in the constitutional architecture.<sup>75</sup> Peoples are more than just the sum total of all those who hold the same passport. A people is a community of persons who have a common history and have developed a sense of solidarity, being prepared to share collectively the burdens to which the continuous flow of events exposes them on a daily basis. Such feelings of commonality, of belonging together, of mutual responsibility and trust, expressed in terms such as Heimatliebe, amour de la patrie or patriotism, and manifesting themselves also in the mundane affairs of everyday life,<sup>76</sup> should not be ridiculed or denounced as an expression of

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<sup>73</sup> In an interview with the German Newspaper Die Welt, Hungarian Justice Minister László Trócsányi said that in his opinion the ruling of the European Court of Justice had undermined the structure of the European institutions, available at: <http://www.politico.eu/article/europe-refugees-hungarian-justice-minister-ecj-decision-very-worrying-for-the-future/> institutions (accessed 30 June 2018).

<sup>74</sup> See ECtHR, *S.A.S. v. France* (App. No. 43835/11), 1 July 2014, paras. 141-142, 157.

<sup>75</sup> This is the jurisprudence of the German Federal Constitutional Court; see Ch. Tomuschat, *The Defence of National Identity by the German Constitutional Court*, in: A. Saiz Arnaiz, C. Alcobarro Livina (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge: 2013, pp. 205 et seq.

<sup>76</sup> See B. Schlink, *Alltagskultur als Leitkultur*, Frankfurter Allgemeine Zeitung, 28.09.2017, p. 6.

right-wing extremism or racism.<sup>77</sup> Most human beings need firm foundations in their lives.<sup>78</sup> If through their governments they manifest such desires they deserve respect and their views belong to the concert of voices that in a democratic society can be uttered legitimately, although of course they may be challenged by others who have embraced a more “modern” understanding of the national community. The *pouvoir constituant* is still in the hands of currently 28 “peoples”, who may hold diverging views on issues of national existence and identity. EU institutions are well-advised to perceive these boundary lines at the right time. Obviously, however, any distinctions that might be introduced must not degenerate into crass discriminatory patterns.

It is true that the profile of societies is not immutable. They are ineluctably subject to the influences from their societal environment in the international community. Yet it should never be considered illegitimate to defend the existing state of affairs under the slogan: We want to remain what we are. Peoples themselves have the right to decide what way to take toward the future.<sup>79</sup>

The Member States of the EU have unanimously agreed to conduct a policy that takes care of the plight of those compelled to flee their countries of origin. They do not wish to seclude themselves in a “Fortress Europe.” Article 18 of the Charter of Fundamental Rights explicitly embraces the Geneva Convention on Refugees; the Lisbon treaty implements that promise appropriately; and the relevant acts of secondary legislation, in an extremely generous spirit, go much beyond what is required under general international law. However, those general acts were invariably adopted by unanimity. And eventually, according to the usual scheme of distribution of powers between the Union and its Member States, decisions on the admission of persons needing international protection are to be taken by the host State concerned, which constitutes an essential ultimate safeguard for maintaining national sovereignty. Given this framework, it is by no means clear that Article 78(3) TFEU provides a power to assign quotas of persons applying for international protection to specific States. Significantly, four of the younger Member States had voiced their disagreement with the draft proposal, expressing their disapproval with a policy of forced immigration susceptible of endangering national self-determination, in any event in the long run.<sup>80</sup>

Both Advocate General Bot and the Court relied decisively on the principle of solidarity, enunciated in Article 80 TFEU. However, solidarity among the Member States

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<sup>77</sup> Margin number 305 of the judgment of 6 September 2017, *supra* note 71, does not do justice to this issue.

<sup>78</sup> German Federal President Steinmeier said in his speech of 3 October 2017, commemorating German reunification 27 years ago: “Wer sich nach Heimat sehnt, der ist nicht von gestern. Im Gegenteil: je schneller die Welt sich um uns dreht, desto größer wird die Sehnsucht nach Heimat“, available at: <http://www.bundespraesident.de/SharedDocs/Reden/DE/Frank-Walter-Steinmeier/Reden/2017/10/171003-TdDE-Rede-Mainz.html> (accessed 30 June 2018): “Whoever has a longing for *Heimat* does not belong to yesterday. On the contrary, the faster the world turns around us, the greater becomes the longing for *Heimat*.”

<sup>79</sup> For more on the concept of “German Leitkultur” see Schlink, *supra* note 76, p. 6.

<sup>80</sup> Poland did not oppose the controversial decision.

can take many different forms and need not be implemented through the allocation of contingents of migrants to the Member States who accepted the Chapter on border checks, asylum and immigration. A better mode of reconciliation between Article 4(2) TEU and Articles 77 to 80 TFEU should have been sought. In fact, the right of self-determination, a principle having the character of *jus cogens* that lies at the foundations of a national community, must be taken into account when construing the provisions of the European treaties. The EU is still comprised of States with different nations, each of which has a specific identity that has not been merged into one single European citizenship. Efforts to advance on the path toward an “ever closer union” require the utmost caution and must be carried out pursuant to the principle of unanimity. Circumventing this principle by recourse to Article 78(3) TFEU, contrary to the agreement reached beforehand to proceed by consensus, was an inconsiderate step to take. A democratic decision of the European Parliament, as embodied in the general regulations on the distribution of migrants, would have required more respect.

Can one say without any hesitation that the judgment of the European Court of 6 September 2017 is wrong?<sup>81</sup> As has been shown, many indicia point in that direction. In any event, however, the Court must be blamed for having circumvented the essential issue of national identity and self-determination. Its strict adherence to the letter of the law, to the detailed provisions of the TFEU, may be called an act of blind obedience to positive law, understood in a narrow sense. Even if the final outcome should be considered correct, the Judgment of 6 September 2017 is not persuasive because in its legal reasoning the Court has eschewed addressing the heart of the matter.<sup>82</sup>

e) One must deplore, in these circumstances, that the judges of the Luxembourg Court are prevented from disclosing their personal views. From the very outset of its activity, the rule applied has been that individual opinions are not admissible.<sup>83</sup> That rule was aimed at protecting the unity of the Court and the independence of its judges. Initially, fears were prevalent that the judges might be supervised by their governments, or that judges might be tempted to please those governments by writing individual opinions in support of national positions. Such fears seem to have been overcome long ago. At the present stage, one must rather regret that the backdrop of a judgment continues to be impenetrable. Judgments of the Luxembourg Court present themselves as pronouncements without any cracks and fissures, stable and unshakeable from bottom to top. One may assume – and hope – that the discussion among the judges was much richer in substance than what the text of the judgment reveals. It is well-known, from the experience of the United States in particular, that individual, and

<sup>81</sup> In this sense M. Nettesheim, *Das Fehlurteil zu Flüchtlingsquoten*, Frankfurter Allgemeine Zeitung, 14.09.2017, p. 8; *id.*, *Das EU-Recht in der Krise – ein schwieriges Verhältnis*, Verfassungsblog, 15.09.2017, available at: <http://verfassungsblog.de/das-eu-recht-in-der-krise-ein-schwieriges-verhaeltnis/> (accessed 30 June 2018); for the contrary view see J. Bast, *ibidem*.

<sup>82</sup> This criticism must also be addressed to A. von Bonin, *Die Rechtsstaatsunion in Gefahr?*, 28 Europäische Zeitschrift für Wirtschaftsrecht 785 (2017).

<sup>83</sup> Currently Article 35 of the Statute of the Court of Justice of the European Union.

not only dissenting, opinions of judges may open up new and constructive avenues for the future.

As the British Brexit has shown, the EU is not as firmly grounded as it may seem at first glance. The democratic forces in the Member States have not been totally amalgamated in a European spirit, and are watching carefully whether the EU institutions follow faithfully the path not only of compliance with the integration treaties, but also of full respect for national sovereignty. The aftermath of the Judgment of 6 September 2017 has already become a test of strength between the four dissenting Member States and the Luxembourg Court (which the Brussels institutions of course must support). It is by no means sure who will eventually come out as the winner of that battle. We must all hope that the Court's decision will not develop into an explosive charge that, after Brexit, threatens once again the cohesion of the EU.

## CONCLUSIONS

It would be hazardous to draw too many inferences from the considerations set out above. Indeed, individual and collective identities markedly differ from one another by their very nature. However, one central idea may perhaps have become clear in my presentation. Nations, as associations of human beings, are essentially determined by the ties that relate them to their societal foundations. A polity functioning under the rule of law is a valuable social good that should be immune from challenges arising from whims and fancies of sudden origin. Individuals also find themselves enmeshed in crucial relationships of social dependency, notwithstanding the process of emancipation which they have experienced during the last century. They have achieved a high degree of real freedom by being able to shed numerous burdensome constraints that linked them to traditional environments. Human rights in particular, as well as the processes of international globalization, have contributed to the progressive mitigation and at the same time the erosion of State power. But human rights alone do not provide all the guarantees that everyone needs to live in dignity and peace. The lofty promises of democracy, equality, and rule of law must be secured by effective public institutions. Freedom and authority must go hand in hand. Real enjoyment of human rights is possible only within a well-secured space, which only public authorities can build and maintain.