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"Struggle and Seek": In Search of the Right to National Identity in General International Law

Abstract. In the emerging context of a multipolar world order, providing for the protection of sovereignty and national identity from external threats becomes an urgent task. At the same time, destructive attitudes aimed at undermining national security and identity can be transmitted through international institutions. Such a situation necessitates the development of legal mechanisms by means of which states may protect their national identity. However, such mechanisms must also consider the possibility that exceptional situations may arise in which the protection of identity becomes impossible without refusing to fulfil one or another international obligation. The exceptional nature of the task consists not only in it forcing us to look for ways to deviate from the norms of international law, since, in the first place, it is necessary to ensure that states have the right to national identity and an appropriate means of protecting it. The present study opens a series of articles aimed at analysing the provisions of general international law that permit or limit the use by states of various mechanisms to protect their own national identity. Here, the aim is to provide a justification on the part of states to assert their national identity within the international legal order. In the present work, this issue is discussed in light of the principle of non-interference in internal affairs and the right of peoples to self-determination. Based on judicial practice, acts of the main organs of the UN and international legal doctrine, a conclusion is reached that the right of states to assert a national identity cannot be discovered in these principles. The reasons for this include the uncertainty of their positive legal content and the historical features of their origin, as well as the consequent impossibility of their broad interpretation. This does not mean, however, that states do not possess the sought-after right at all; on the contrary, the search for it can and should continue.

Keywords: national identity; international law; principle of non-interference in internal affairs; right of peoples to self-determination; International Court of Justice

Problem Statement. Globalisation processes continue to transform the contemporary world. Along with the positive transformations they have brought into socio-political life, many researchers also identify a threat to the national identity of modern societies and states. In the scientific discourse of those countries in which the topic of protecting national identity appears (for example, in Russia), national identity is understood as a system of the most important values shared by the majority of members of a particular society (Shabrov 2023: 18). Problems associated with national identity in the context of globalisation are also considered by Western scholars (Kennedy 2001: 18).

It should be borne in mind that national identity is not only a socio-cultural phenomenon, but also a legal one. In particular, it has implications for the international legal status of collective entities, in particular those defined as peoples or ethnic groups[1]. Thus, the International Court of Justice in its advisory opinion on the *Western Sahara Case*, which examined the claims of Mauritania and Morocco to this territory, assessed Mauritania's arguments that tribes living in Western Sahara (Chinguetti) during the period of Spanish rule represented an entire society united by a common language, way of life and culture[2], i.e. possessing a certain degree of identity. Taking this into account, the Court concluded that close legal relations arose between Morocco, Mauritania and these tribes, which lacked their own statehood[3]. In international legal doctrine, the ability of communities to enter into such relationships is a hallmark of international legal personality (Worster 2016: 210-211), although the Court did not recognise such personality for these tribes.

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[1] In this connection, the UN Declaration on the Rights of Indigenous Peoples of 2007 emphasises that indigenous peoples have the right to self-determination, which recognises the possibility to independently carry out their cultural development (Articles 3, 4).

[2] *International Court of Justice* (hereinafter – ICJ). *Western Sahara. Advisory Opinion of October 16, 1975.* § *132(b)*, available at: https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf (accessed October 10, 2024).

[3] Ibid., § 162.

Under what conditions is it appropriate to consider issues of national identity, including through the prism of international law? A tendency has emerged to view these phenomena as opposing: in a number of jurisdictions, international law is considered to be a threat to national identity; moreover, the latter can constitute a legal instrument that may prevent the implementation of an international legal act (typically a decision of an international court) that contradicts the principles and values of a particular society. In a given legal system, such values typically take the form of constitutional norms; thus, a refusal to implement an international legal act may be motivated by its incompatibility with constitutional stipulations. In this context, it is apposite to turn to the legal doctrines of Italy and Russia as states that apply the concept of national identity in such a way.

Thus, the Chairman of the Constitutional Court of the Russian Federation V.D. Zorkin points to a "national constitutional identity"[4] as consisting mainly in terms of the need to resolve contradictions between the national and international legal orders, thus supporting the possibility of Russia's refusal to implement individual decisions of international courts (Zorkin 2017: 1, 24). Professor F. Palombino of the University of Naples argues that a state's derogation from an international court's decision (counter-limits argument) is permissible, although not without observing strict conditions, such as the decision's contradiction with fundamental principles reflecting the uniqueness of the national legal order, or the international court's disregard for the interests of those individuals whose rights are protected by the national constitution (Palombino 2015: 528-529). Meanwhile, Professor P. Palchetti of the University of Milan ironically asks whether it makes sense in the era of European integration and globalisation to refer to the Italian or any other national school of international law as something distinct from other schools that risk soon becoming a relic of the past (Palchetti 2018: 15).

The main problem with any mechanisms for resolving discrepancies between national and international law with reference to the protection of national (constitutional) identity is that they are gen-

[4] V.D. Zorkin uses the concepts of "national identity" and "constitutional identity" as contextual synonyms: he believes that "constitutional values" are "common-good values" that constitute the identity of the people and the state when enshrined in the corresponding constitution (Zorkin 2017: 1, 8).

erally discussed and applied without first answering the key question of whether the state (state-forming society) has a principled right to a national identity. If we can imagine a right that is not provided with a means of protection (*nudum jus*), then there is no means of protection in the absence of the protected right.

The present work therefore sets out to address the methodologically important question of whether a state has the right to national identity under general international law and, if so, whether it allows a state to refuse to implement an international legal act in exceptional cases when it is impossible to protect national identity by other means and without prejudice to the binding nature of international legal provisions. Since the comprehensive consideration of such a complex issue should form the subject of more than one study, this work will focus on the search for this right in the context of two imperatives of international law: the principle of non-interference in the internal affairs of states and the right of peoples to self-determination.

In order to analyse the content of these two principles as a means of determining whether the right of states to national identity can be derived from them, we will make two important preliminary observations.

Firstly, international law invariably proceeds from its own paramountcy. Thus, back in 1932, the Permanent Court of International Justice in its advisory opinion on the *case concerning the treatment of Polish citizens and other persons of Polish origin in the territory of Danzig* indicated that the content of national laws is for international law merely a question of fact, and that a state does not have the right to refer to the provisions of its legislation, including constitutional legislation, to justify its non-compliance with international legal norms[5]. In the 21st century, this thesis was confirmed by the UN International Law Commission in their commentary on the current Draft Articles on the Responsibility of States for Internationally Wrongful Acts[6].

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[5] *Permanent Court of International Justice. Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory. Advisory Opinion of 4 February 1932.* § *61-62,* available at: https://www.worldcourts.com/pcij/eng/decisions/1932.02.04_danzig.htm (accessed October 10, 2024).

[6] *International Law Commission. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. Adopted by the International*

Secondly, international law, like any legal system, does not exclude deviations from its own provisions (the use of force in self-defence, permitted by Article 51 of the UN Charter; derogation in international human rights law; non-application of a number of international legal guarantees to an aggressor state (Dörr, Schmalenbach 2018: 1381-1383), etc.[7]). That is, it would be premature to assert that a state does not have the right to exclude for itself the effect of international obligations it has already assumed, always and in all cases, even if it is a matter of protecting national identity.

National Identity and the Principle of Non-Interference in the Internal Affairs of States. Since national identity is generally determined through a system of values, it should be considered a product of the unique cultural development of a society. International legal acts recognise the right to such development precisely in the context of the principle of non-interference in the internal affairs of states.

As based on the UN system, this principle has historically been formulated exclusively in modern international law as a negative obligation on the part of states not to take actions aimed at interfering in each other's internal affairs. Such formulations are used in the UN Charter (paragraph 7 of Article 2), bilateral agreements (for example, the Indian–Chinese Agreement on the Five Principles of Peaceful Coexistence of 1954) and acts of international conferences (the Bandung Principles of 1955).

The cultural aspect of this principle was emphasised by the UN General Assembly in the Declaration on Principles of International

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Law Commission at its fifty-third session, in 2001. pp. 37–38, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed October 10, 2024).

[7] This, however, does not change the fact that each of the given examples of permissible deviation from the norms of international law has clear limits determined by international law itself. Thus, it is considered that self-defense, as implemented in accordance with Article 51 of the UN Charter, is permitted only in response to an armed attack (O'Meara 2022: 322-323), and derogation within the framework of the European human rights mechanism is possible only subject to compliance with the appropriate procedure in the form of notification of this to the Secretary General of the Council of Europe (para. 3 of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950).

Law of 1970. The Declaration proposes to classify any threats (armed or unarmed) against the cultural foundations of the state as a violation of the principle of non-interference in internal affairs, along with "the use of force aimed at depriving peoples of their national identity"[8]. Moreover, for the first time the Declaration introduced a positive legal element into the content of this principle, namely the right of states to choose a cultural system without outside interference.

Meanwhile, it seems that even such a direct indication of the existence of relevant rights among states is not sufficient to conclude that states have the right to national identity in accordance with general international law, much less to derogate from its provisions in order to protect it. Predictably enough, the text of the 1970 Declaration does not speak about the latter. Moreover, it should be considered that the Declaration itself is an act of soft law.

Indeed, the Court in its judgment in the *case concerning military activities in and against Nicaragua* recognised, including with reference to the Declaration, that the prohibition of interference in the internal affairs of a state implies the inadmissibility of interference in the choice of a cultural system[9]. However, the Court here also stipulates – obviously preventing a broad interpretation of its findings – that since Nicaragua's request concerns acts of armed intervention, the Court will in this case examine only such acts for compliance with the principle of non-intervention[10]. Moreover, the Court pointed out that not every interference is unlawful, but only one characterised by a certain degree of coercion[11]. Subsequently, the Court also appealed to the principle of non-

[8] *UN General Assembly. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970. Adopted at the 25th Session of UN General Assembly, on 24 October 1970. A/RES/2625(XXV)*, available at: https://treaties.un.org/doc/source/docs/A_RES_2625-Eng.pdf (accessed October 10, 2024).

[9] ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Judgment of 27 June 1986.* § *204*, available at: https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (accessed October 10, 2024).

[10] Ibid.

[11] Ibid., § 205.

intervention only in situations involving the use of force[12], i.e., under conditions of unequivocal coercion. It is characteristic that for a long time the Court did not invoke this principle in other contexts, including cultural.

Moreover, states themselves demonstrate a lack of readiness for a broad interpretation of the principle of non-intervention. This is demonstrated, for example, by objections to the application of the principle of non-intervention in the classification of interstate cyber-attacks. In particular, Russia takes a rather categorical position in pointing out the inadmissibility of a "simple extrapolation" of the norms of international law to cyberspace, including the principle of non-interference[13]. The United States, while acknowledging that cyber-attacks may violate this principle, stipulates that "the principle of non-intervention is considered a relatively narrow norm of customary international law"[14].

Finally, it is important to note that arguments in favour of national identity are typically advanced in the context of non-implementation of decisions of international human rights bodies. At the same time, it is widely acknowledged that human rights and their protection cannot be purely an internal matter of the state, but are a subject of international concern (Slater, Nardin 1986: 88). In this connection, the question of the admissibility of humanitarian intervention, as representing a legalised form of interference in the affairs of the state, becomes particularly salient (Rodley 1989: 332).

Thus, the right of the state to national identity does not clearly follow from the principle of non-interference – both be-

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[12] ICJ. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). Judgment of 19 December 2005.* § *164*, available at: https://www.icj-cij.org/sites/default/files/case-related/116/116-20051219-JUD-01-00-EN.pdf (accessed October 9, 2024).

[13] *UN General Assembly. Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behavior in Cyberspace in the Context of International Security established pursuant to General Assembly resolution. Adopted at the 76th Session UN General Assembly, on 13 July 2021. A/76/136. p. 81*, available at: https://front.un-arm.org/wp-content/uploads/2021/08/A-76-136-EN.pdf (accessed October 9, 2024).

[14] Ibid., pp. 139-140.

cause of its negative nature and because of the difficulty of its broad interpretation.

National Identity and the Right of Peoples to Self-Determination. At first glance, there are prerequisites for the right to national identity to be derived from the right of peoples to self-determination. These rights are set out in the Declaration on Principles of International Law of 1970, according to which all peoples have the right to pursue their cultural development freely and without outside interference. Moreover, such prerequisites were formulated by the International Court of Justice in its advisory opinion on *case concerning the Legal Consequences of Israeli Policies and Practices in the Occupied Palestinian Territory, including East Jerusalem*, in which the right of peoples to their independent cultural development is noted to be a key element of the right to self-determination[15].

It appears that the content of the right to self-determination can be formulated more precisely than that of the principle of non-interference, including for the purposes of protecting national identity. Unlike the principle of non-intervention, the right of peoples to self-determination has a higher legal status, since, from the point of view of the UN International Law Commission, it is a norm of *jus cogens*[16].

Historically, the right of peoples to self-determination arose as a product of the dismantling of the colonial system. The above formulations of the Declaration on Principles of International Law of 1970 are literally identical to the provisions of the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960[17], in which they first appeared. This historical context can

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[15] ICJ. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Advisory Opinion of 19 July 2024.* § *241*, available at:: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf (accessed October 10, 2024).

[16] *International Law Commission. Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries. Adopted by the International Law Commission at its seventy-third session, in 2022. p. 16*, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf (accessed October 10, 2024).

[17] *UN General Assembly. Declaration on the Granting of Independence to Colonial Countries and Peoples 1960. Adopted at the 15th Session of UN General Assembly, on 14 December 1960*, available at: https://www.refworld.org/legal/resolution/unga/1960/en/7290 (accessed October 9, 2024).

also be seen in the practice of the International Court of Justice, which even in 2024 recognises the right to self-determination as a peremptory norm of international law only in cases of foreign occupation[18]. Analysing the Court's earlier decisions, however, it must be acknowledged that judicial practice on this issue is irregular and unstable. Thus, if in its advisory opinion on the *case concerning the legal consequences of the construction of a wall in the occupied Palestinian territories*, the Court touched upon the issue of the content of the right to self-determination, at least in part[19], later, for example, in the opinion on the case concerning the *conformity with international law of the declaration of independence of Kosovo*, the Court completely disregarded it[20]. As for national identity, there is no consensus in the doctrine of international law regarding which factors are decisive for the realisation of the right to self-determination, i.e., subjective (including those related to identity) or objective (for example, territorial). Accordingly, the right to self-determination – given its burden of historical context – cannot provide a sufficient basis for the emergence of the right of states to national identity in the sense in which it is considered in this study.

Conclusion. The Supreme Court of Canada in its *Reference Re Secession of Quebec* indicated the need for a strict distinction between the right of a people to act and their specific powers to do so[21]. Perhaps this is precisely why the question was raised about whether states have the right to national identity. The answer to this question must be obtained before examining the specific powers of a state – in particular its power to derogate from its individual obligations as a last resort in the protection of identity.

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[18] ICJ. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*. Advisory Opinion of 19 July 2024. § 233.

[19] ICJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion of 9 July 2004. § 88.

[20] ICJ. *Accordance with international law of the unilateral declaration of independence in respect of Kosovo. Advisory Opinion of 22 July 2010.* § *82-83*, available at: https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf (accessed October 7, 2024).

[21] *Supreme Court of Canada. Reference re Secession of Quebec. Judgement of 20 August 1998. 2 SCR 217.* § *106*, available at: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1643/index.do (accessed October 7, 2024).

The findings of this study do not prejudge the answer to these questions, but merely indicate the need to consider them in a broader international legal context. If it turns out to be problematic to discern the right to national identity in the context of the considered principles (including because their content must be judged by the advisory acts of the courts, which *stricto sensu* do not have binding force), such a right can be discerned in the context of other principles, which will be the task of further research. In particular, Sir M. Wood and M. Jamnejad believe that the answer lies in the law enforcement concept of the margin of appreciation of states in resolving issues that are particularly sensitive for them (Jamnejad, Wood 2009: 377)[22], including in light of the values adopted in that state that constitute its social identity.

References

Dörr O., Schmalenbach K. (eds.) 2018. *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed., Berlin, Springer–Verlag, 1535 p.

Jamnejad M., Wood M. 2009. The Principle of Non-intervention, *Leiden Journal of International Law*, vol. 22, no. 2, pp. 345–381.

Kennedy P. 2001. Introduction: Globalization and the Crisis of National Identities, *P. Kennedy, C.J. Danks (esd.). Globalization and National Identities. Crisis or Opportunity?* Basingstoke, Palgrave, pp. 1–28.

O'Meara C. 2022. Reconceptualising the Right of Self-Defence Against 'Imminent' Armed Attacks, *Journal on the Use of Force and International Law*, no. 1, pp. 278–323, doi 10.1080/20531702.2022.2097618

Palchetti P. 2018. International Law and National Perspective in a Time of Globalization: The Persistence of a National Identity in Italian Scholarship of International Law, *KFG Working Paper Series*, no. 20, pp. 3–15.

Palombino F.M. 2015. Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, no. 75, pp. 503–529.

[22] These same authors do not exclude that violations of the principle of non-interference may include, for example, individual cases of illegal television broadcasting and propaganda on the territory of another state (Jamnejad, Wood 2009: 374). As is known, modern telecommunication technologies can very actively influence public opinion and consequent attitudes towards the values accepted in society; consequently, such activities are of particular importance in the context of national identity.

Rodley N.S. 1989. Human Rights and Humanitarian Intervention: The Case Law of the World Court, *The International and Comparative Law Quarterly*, vol. 38, iss. 2, pp. 321–333, doi 10.1093/iclqaj/38.2.321

Shabrov O.F. 2023. National-State Identity in the Context of Global Confrontation: The Problem of the Stability of Social Systems, *Sotsial'no-politicheskie Nauki*, vol. 13, no. 4, pp. 16–26, doi 10.33693/2223-0092-2023-13-4-16-26 (in Russ.).

Slater J., Nardin T. 1986. Nonintervention and Human Rights, *The Journal of Politics*, vol. 48, no. 1, pp. 86–96, doi 10.2307/2130926

Worster W.T. 2016. Relative International Legal Personality of Non-State Actors, *Brooklyn Journal of International Law*, vol. 42, no. 1, pp. 207–273, doi 10.2139/ssrn.2682444

Zorkin V.D. 2017. Justice Constitutional Identity of Russia: Doctrine and Practice, *Journal of Constitutional Justice*, no. 4, pp. 1–40. (in Russ.).