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# "Nowhere to Retreat": Defending National Identity by Means of International Law and Justice

*Abstract.* From the point of view of international law, approaches to protecting its national identity on the part of a state may include expanding or narrowing the scope of its international obligations or derogating from them. In order to clarify these approaches, the article examines the most high-profile cases considered in recent years by the European Court of Human Rights that involve issues of protecting historical memory and traditional values. The *case-study method* is used to demonstrate that the outcome of such cases is influenced not only by the content (*scope*) of the substantive law, but also by less obvious factors, such as historical and political contexts, as well as the procedural behaviour of the disputing party. In such cases, it is shown that the international court also pursues its own interests, which can be understood in terms of ensuring the enforceability of its own decisions rather than "diluting" the national identity of the state. By considering the implementation of acts of international justice on issues sensitive for a state not merely as a formally defined procedure, but also as a complex process of seeking mutually acceptable political solutions, the scope of opportunities for a state to defend its national identity is expanded. The effectiveness of protecting national identity is shown to be determined not by the principled position of the state in terms of the regularity or categorical nature of its objections, but rather by the effectiveness of its participation in international legal communication, including judicial proceedings.

*Keywords:* international justice; execution of international court decisions; national identity; historical memory; politics, European Court of Human Rights

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**Introduction.** Just over a hundred years ago, at the end of the "British period" of the evolution of international law (Grewe 2000: 429), it was not possible to discern in it transparent, formally defined procedures for the derogation of states from international obligations. In 1903, the German-Venezuela Mixed Claims Commission, in its decision on the *Fischbach & Friedericy Cases*, proceeded from the fact that international law is based exclusively on the voluntary fulfilment of obligations; accordingly, "any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations"[1].

Today, at a time when international law has moved away from purely voluntaristic principles (Dupuy 2020: 75-76), there is a clear shift in emphasis on the issue of derogation from international obligations. For example, when reflecting on the same question a century later, the WTO Dispute Settlement Body (DSB), stressed the need to resolve this issue *before* making a commitment. The DSB recalled that a state has the right not to take part in the negotiations on the drafting of a treaty, not to sign its final text, not to ratify it, or to ratify it with reservations[2].

In this context, issues of protecting national identity under conditions where threats to it are caused by the action of certain international legal norms should be reduced not to finding ways to retreat from obligations already assumed, but rather to the organisation of appropriate political and legal compliance that prevents the assumption of obligations that could result in threats to identity.

Meanwhile, it is possible that the political, economic and other benefits of accepting an international commitment may outweigh the risks such commitments may pose to national identity and other sovereign interests. In such a case, finding a balance between protecting national identity and observing international law becomes an important political and legal task for a state that intends to defend its subjectivity.

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[1] Germany-Venezuela Mixed Claims Commission. Fischbach and Friedricy Cases (1903). 10 RIAA 388 ff. Cited from: (Dumberry 2010: 786).

[2] *Dispute Settlement Body. European Communities – Measures Affecting the Approval and Marketing of Biotech Products*. Panel Report from 29 September 2006. P. 335, available at: https://worldtradelaw.net/document.php?id=reports/wtopanels/ec-biotech(panel).pdf&mode=download#page=145 (accessed May 20, 2025).

How to accomplish this task without violating the requirements of international law? Does its implementation depend on the state alone? How can a state maintain international legal communication while protecting its identity and other intrinsic sovereign interests? The present work sets out to define the main outlines of the answers to these questions based on recent resonant judicial practice in which issues of protecting national identity were addressed. Its most sensitive components, which are the subject of ongoing international judicial debates, consist in the interpretations of past events that are exceptionally significant for a particular society having determined its subjectivity (historical memory), as well as the values and traditions that are especially protected in a given society due to various circumstances that have arisen ("traditional values").

**Defending National Identity: Derogation and Discretion**. Once an international obligation has arisen, a state has only a very modest toolkit to limit its actions in areas that are particularly sensitive to it, including issues of national identity and distinctive values. Thus, it becomes advisable to examine it in more detail in order to establish what mechanisms allow the state to approach the fulfilment of its obligations more flexibly in a situation where there is nowhere to retreat – i.e., when it is impossible to protect its sovereign interests in other ways (while remaining, of course, within the framework of what is internationally permissible).

One such mechanism is derogation – i.e., a dereliction from an obligation when an emergency arises that calls into question the state's ability to fulfil it (Hafner-Burton et al. 2011: 676). There are special requirements for derogation: substantive and procedural. The first concerns the situation justifying the derogation: it must be extraordinary enough to exclude the physical possibility of fulfilling the obligation. Such situations include, for example, the loss of effective control by a state over a part of its territory. The second requirement requires that the competent international bodies be given a reasoned notice of the occurrence of such a situation. For example, in the European human rights regime, this procedure is enshrined in Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter referred to as the European Convention).

However, since the task of protecting national identity is a constant one for the state, it cannot be conditioned by the onset of a more or less emergency situation. Consequently, a more flexible parameterisation of legal regulation is required, which must nevertheless remain within the framework of what is internationally permissible. Meanwhile, the very fact of derogation and the context in which the state was forced to resort to it may be important when considering international disputes that raise issues concerning the protection of historical memory. To verify this, let us consider the resonant decision of the European Court of Human Rights (ECHR) in the case "*Borzykh v. Ukraine*"[3].

The applicant pointed out that Ukrainian legislation prohibits wearing the St. George ribbon in public places, as a result of which he was deprived of the opportunity to use it in accordance with his beliefs without the risk of being subjected to punishment (in addition to the fact that the applicant himself was an officer, his family took part in the Great Patriotic War and fought against Nazi Germany)[4]. To assess the admissibility of such a restriction of the right to freedom of expression, the ECHR examined the historical context, the origin of the St. George ribbon, its significance for the common historical memory of Ukraine and Russia as victorious countries in the Great Patriotic War, as well as its use today, including in other post-Soviet countries[5]. The court did not deny that the St. George ribbon is of extreme importance for post-Soviet states and the historical memory of their citizens. Indeed, given that the celebration of Victory Day is accompanied by the use of the St. George ribbon, there can be no doubt that it has become a symbol of national unity and, as a result, identity (at least for Russia). However, the ECHR noted that, since the St. George ribbon is associated with the Russian state in the current historical realities, against the backdrop of a significant deterioration in relations between Russia and Ukraine in 2014 and 2022, the authorities of the latter country have greater discretion to restrict the use of symbols associated with Russia[6].

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[3] BECHR. Borzykh v. Ukraine. Decision of 19 November 2024. Application no. 11575/24, *HUDOC*, available at: https://hudoc.echr.coe.int/eng?i=001-238740 (accessed May 20, 2025).

[4] Ibid. § 40.

[5] Ibid. § 4–11.

[6] Ibid. § 50–51.

It is possible that an additional basis for such a decision consists in the multiple derogations of Ukraine starting from 2015[7], since these were based on the same political events that are described in this decision (although the facts of the derogations are not mentioned in the decision). However, the first derogation in relation to Article 10 of the Convention was made by Ukraine only on 2 March 2022[8] – i.e., after the applicant had already filed a complaint in November 2017.

We believe that this is rather a manifestation of another mechanism, which more effectively allows for the accomplishment of the previously stated objective, thus enabling a more flexible and law-conforming approach to protecting national identity. Derogation is to a certain extent related to this mechanism; indeed, some commentators on the European Convention regard it as a special case thereof (Harris et al. 2018: 19). We are talking here about the well-known doctrine of the *margin of appreciation*) of states, whose effect in relation to issues of protecting historical memory can be seen in the example of another resonant decision of the ECHR in the case of "*Sinkova v. Ukraine*"[9].

The plaintiff in the case was a Ukrainian citizen who took part in a provocative "performance" near the Monument of Eternal Glory that was erected in honour of the fallen Soviet heroes of the Great Patriotic War. As part of the "performance", the applicant and two other participants fried eggs and sausages on the Eternal Flame at the Tomb of the Unknown Soldier, which "performance" was captured on video and distributed with a critical caption on the Internet[10]. As a result, the applicant was prosecuted for desecration of the Tomb of the Unknown Soldier and given a suspended sentence, which she later challenged in the ECHR citing a violation of freedom of expression.

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[7] Council of Europe. Note verbale JJ7979C from 10 June 2025, *Council of Europe Official Website*, available at: https://rm.coe.int/09000016804896cf (accessed May 21, 2025).

[8] Council of Europe. Note verbale JJ9325C corrigendum from 2 March 2022, *Council of Europe Official Website*, available at: https://rm.coe.int/1680a5b0b0 (accessed May 21, 2025).

[9] ECHR. Sinkova v. Ukraine. Judgement of 27 February 2018. Application no. 39496/11, *HUDOC*, available at: https://hudoc.echr.coe.int/eng?i=001-181210 (accessed May 21, 2025).

[10] Ibid. § 6–8.

The EHCR decision, which recognised that the applicant's rights had been violated, provoked strong criticism in Russian society. However, with regard to the most sensitive issues raised in the case, namely the protection of sacred symbols of Victory and the historical memory of the Great Patriotic War, the ECHR took a different position, finding no violation of Article 10 of the European Convention. The court took into account the special significance of the monuments and symbols that the applicant had insulted and noted that "[the Eternal Flame] on which the applicant fried eggs is part of a monument to the soldiers who gave their lives defending their country… The applicant had many appropriate opportunities to express her opinion… without insulting the memory of the fallen soldiers and the feelings of veterans"[11]. In this way, the ECHR recognised that a state that has established criminal liability for insulting the memory of defenders of the Fatherland has greater discretion in exercising its duty to guarantee the right to self-expression, allowing its limitation in situations where such severe damage to sacred historical memory could be inflicted.

**The devil is in the procedural details.** In the given examples, the protection of national identity through adjustments to the regulation of substantive rights themselves falls within the framework of the doctrine of discretion (margin of appreciation). However, since its application is legitimised by a judicial act, the grounds for its application must be proven in an adversarial process. The burden of proof of the existence of such grounds predictably lies with the respondent State, since this entity is, as the ECHR has pointed out, in a better position than the international court to judge the content of the requirements of public morality[12]. The State therefore becomes the main[13] source of information for the international court

[11] Ibid. § 110.

[12] ECHR. Handyside v. The United Kingdom. Judgment of 7 December 1976. Application no. 5493/72. § 48, *HUDOC*, available at: https://hudoc.echr.coe.int/eng?i=001-57499 (accessed May 22, 2025).

[13] In a number of cases, international courts draw information about national characteristics and traditions not only from the position of the respondent state (after all, we are talking about an interested party to the dispute). In order to verify the veracity of information coming from the state, international or non-governmental organisations, including those operating in that state, may be involved in the case, acting as *amici curiae*.

on the grounds for applying the doctrine of margin of appreciation to it. And if, for one reason or another, it does not take advantage of its procedural position, it may miss the opportunity to demonstrate the validity of its position in defence of national identity.

This can be seen in the example of the recent ECHR ruling in the case "*Kartyzhev and Others v. Russia*"[14]. One of the applicants in the case, Bryansk blogger Alena Chervyakova, was brought to administrative responsibility on the basis of Part 3 of Article 20.1 of the Code of Administrative Offenses of the Russian Federation for the publication of a video in which she performed a Latin American reggaeton dance on the site of the Mound of Immortality, a memorial complex to fallen Soviet soldiers of the Great Patriotic War. Disagreeing with the administrative fine and the courts' findings, Chervyakova filed a complaint with the ECHR regarding the violation of guarantees of freedom of expression.

The storyline is simple: the public performance of a joyful dance against the backdrop of a memorial site where the memory of the heroes and defenders of the Fatherland who laid down their lives on the altar of the Holy Victory is immortalised is considered offensive from the standpoint of Russian public morality. Such an act can be regarded as a blow to Russian national identity, an integral element of which is the memory of the Great Patriotic War associated with the historic feat, courage and sacrifice of the Soviet people. Although the ECHR's case law has every reason to restrict such forms of expression, in this case the Court still found a violation of Article 10 of the European Convention. With this decision, the Court brought down a barrage of predictable criticism on itself in Russia.

However, it appears that the true reasons for this decision lie not in the ECHR's deviation from its own established practice or in its political bias, but rather in the procedural details of the case.

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Thus, the ECHR took into account the position of non-governmental Russian organisations when deciding the case "*Bayev and others v. Russia*", which is considered further in this paper. See: ECHR. Bayev and others v. Russia. Judgment of 20 June 2017. Application no. 67667/09. § 58–60, *HUDOC*, available at: https://hudoc.echr.coe.int/fre?i=001-174422 (accessed May 22, 2025).

[14] ECHR. Kartyzhev and others v. Russia. Judgement of 15 May 2025. Application nos. 40763/19, *HUDOC*, available at: https://hudoc.echr.coe.int/tkp19/view.asp?i=001-243128 (accessed May 22, 2025).

*Firstly*, despite the painfulness of the issue raised in the case for Russia, it did not express its position on the case, even though the ECHR, in accordance with paragraph 2(b) of Rule 54 of the Rules, communicated Russia's complaint. At the time of communication, October 20, 2020, Russia was a party to the Convention. In its notification, the Court put to Russia specific eliciting questions that shed light on its position on the protection of national identity through restrictions on modes of expression that are deeply offensive to historical memory ("Was there a violation of Article 10 of the Convention?", "Is it consistent with the spirit of the Convention to provide increased protection to... public institutions by the insult law?" and "Were the fines justified by the gravity of the offence and the particular circumstances of the case?"[15]). Following Russia's withdrawal from the Convention, the ensuing silence could be explained in purely formal terms – i.e., the non-binding nature of ECHR decisions for Russia that entered into force after March 15, 2022, including the future decision on this case.

*Secondly*, it follows from the ruling in the case that the basis for awarding compensation to the applicant was a violation of not only Article 10, but also Article 6 of the Convention, which was not taken into account by critics of the decision in Russia[16]. As established by the ECHR (and not disputed), the violation of the right to an effective judicial remedy was manifested by the absence of a prosecutor during the court proceedings; the sole basis for initiating the case was a report from a third party (the Department of Culture of the Bryansk City Administration)[17], which effectively replaced the state prosecution to become the foundation of the accusation. Perhaps it was this circumstance that became decisive in the Court's decision.

The ECHR was thus forced to make a decision in the face of a deficit of critical information, which – in light of the distributed burden of proof – could only be obtained from Russia as the respondent State. Thus, it is possible that Russia's active involvement in this

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[15] ECHR. Kartyzhev and others v. Russia (Communicated Case). Statement of Facts. Questions to the Parties, *HUDOC*, available at: https://hudoc.echr.coe.int/eng?i=001-206179 (accessed May 22, 2025).

[16] ECHR. Kartyzhev and others v. Russia. Appendix no. 3.

[17] ECHR. Kartyzhev and others v. Russia (Communicated Case). Statement of Facts. § D (19).

case – one that raises issues sensitive to the country's history and, as a consequence, its identity – would have influenced the Court's findings of a violation of Article 10 of the Convention.

**National identity as a subject of political process.** When resolving a dispute that is sensitive for a state, the International Court often takes into account not only international-legal, but also political considerations. These may include factors such as the expected political reaction of the state to the decision taken, the expected volume of diplomatic efforts that will need to be deployed to ensure its implementation, the likelihood of the need for diplomatic pressure on the obligated state, the impact of the decision on the enforceability of other future decisions against the same state, etc. According to Linos-Alexandre Sicilianos, President of the ECHR from 2019–2020, the execution of the Court's decisions under the supervision of the Committee of Ministers of the Council of Europe (CM COE) requires political efforts and sometimes increased diplomatic pressure (Sicilianos, Kostopoulou 2020: 169, 173). Against this background, the words of London School of Economics Professor Spyros Economides, which were uttered in the context of international criminal justice, are highly redolent: "A court is a legal institution, but a highly politicised one, which will be viable and successful only thanks to the cooperation of states and a policy of consensus" (Economides 2003: 49).

When considering international disputes concerning national identity, the following competing interests clash. On the one hand, the respondent State is interested in protecting its identity in various ways, depending on the sensitivity of the issue being raised, up to and including a complete refusal to comply with the decision of an international court that questions or revises these values. On the other hand, since any court is clearly interested in the execution of its decision, its portfolio contains as few unexecuted acts as possible. The existence of such acts suggests that their recipients do not take them seriously, which creates an impression either of the poor quality of justice dispensed by such a court, or of off-putting judicial activism that unnecessarily provokes states into protest.

From this perspective, the implementation of an international court decision affecting issues of national identity is transformed from a banal legal procedure into a creative search for mutually acceptable political solutions, often at the initiative of the interna-

tional court itself. Let us consider this process using two specific cases as examples.

The most resonant of these was the case "*Bayev and Others v. Russia*". The case concerned a situation in which participants in public events aimed at defending non-traditional sexual relations and raising awareness about the rights of sexual minorities (recognised as an extremist organisation by a decision of the Supreme Court of the Russian Federation dated 30 November 2023) were subjected to administrative penalties for their promotion of such relations among minors under Article 6.21 of the Russian Code of Administrative Offences. The ECHR decision, which found Article 10 of the Convention had been violated, became controversial in Russia due to being at odds with traditional ideas about sexual relations.

Here it is significant that the subject of the ECHR's consideration was not so much the nature of the demonstrations held by the applicants[18], but rather the Russian legislation on administrative offences itself. Thus, the ECHR expressed the following opinions regarding the quality ("conventionality") of national legislation:

– the legal norms under consideration [Article 6.21 of the Code of Administrative Offenses of the Russian Federation] "do not serve to advance the legitimate aim of the protection of morals"[19];

– The Court emphasised the "vagueness of the terminology used in the legislation at hand, allowing for extensive interpretation of the relevant provisions"[20];

– "inferiority of same-sex relationships compared with opposite-sex relationships" is determined by legislation, and not by specific law enforcement decisions[21].

The main conclusion of the ECHR was that Russia had gone beyond the scope of its discretion under Article 10 of the Convention precisely as a result of the "adoption of general measures" – i.e., legislation prohibiting the promotion of non-traditional sexual relations. At the same time, contrary to the position of the majority of critics, the ECHR took Russia's position into account when awarding

[18] In this part, the ECHR concluded that, when conducting their demonstrations, the applicants did not seek to interact with minors and did not invade their personal space. See: ECHR. Bayev and others v. Russia. § 80.

[19] ECHR. Bayev and others v. Russia. § 83.

[20] Ibid.

[21] Ibid. § 90–91.

remedies to the applicants, which is presented in detail in the present case[22]. The court understood that Russia would not revise this legislation, including for fundamental reasons of protecting traditional values, and that it would not implement it in the event of a decision to the contrary. The ECHR also took into account that this legislation was the subject of an assessment by the Constitutional Court of Russia, which recognised it as constitutional[23], thus emphasising the principled nature of Russia's position. Considering, finally, that there were no grounds for applying the pilot procedure under Rule 61 of the ECHR Rules, the Court refrained from ordering Russia to take measures to adjust its legislation and limited itself to awarding monetary compensation. In doing so, the Court attempted to find a balance between the conflicting interests mentioned above rather than seeking to force Russia to take measures that it would sabotage by refusing to engage in political dialogue, thereby sacrificing its national identity.

An even more striking example is the case "*Fedotova and Others v. Russia*", which was based on the refusal of Russian civil registry offices to register same-sex marriages, citing family law. The case was examined by the Chamber[24] and the Grand Chamber of the ECHR[25]. both times, a violation of the applicants' right to respect for their family life was found (Article 8 of the Convention).

Here too, the ECHR presumed to assess the quality of Russian law. The Court linked the violation of the Convention precisely to the defectiveness of the law, which does not provide for any form of legalisation of same-sex relations[26]. However, in making its decision, the ECHR faced the same competition of political interests as in the case of Bayev and Others v. Russia: the court was aware that it was raising an issue that was extremely sensitive for Russia due to the traditional views on same-sex relations that prevail in the coun-

[22] Ibid. § 45–50.

[23] Ibid. § 20, 22, 25.

[24] ECHR. Fedotova and others v. Russia. Judgement of 13 July 2021. Application no. 40792/10, *HUDOC*, available at: https://hudoc.echr.coe.int/fre?i=001-211016 (accessed May 22, 2025).

[25] ECHR. Fedotova and others v. Russia (Grand Chamber). Judgement of 17 January 2023. Application no. 40792/10, *HUDOC*, available at: https://hudoc.echr.coe.int/fre?i=001-222750 (accessed May 22, 2025).

[26] Ibid. § 224; ECHR. Fedotova and others v. Russia. § 56.

try. The Chamber even acknowledged that the enshrinement in the Russian Constitution from 2020 of the concept of marriage as a union between a man and a woman may be aimed at achieving the legitimate goal of strengthening marital institutions[27]. As a result, both the Chamber and the Grand Chamber limited themselves to merely finding a violation of Article 8 of the Convention, refraining in this case even from awarding compensation to the applicants. Contrary to the opinion of some critics of this decision, the ECHR did not formulate instructions to Russia on measures of a general nature, including the legalisation of non-traditional forms of relations.

In this way, the ECHR tried to make a politically balanced decision. On the one hand, it did not require any active actions from Russia: neither general nor individual, i.e., nothing that even in the slightest degree forces the state to transgress its identity. On the other hand, the decision is purely declaratory in nature and, in principle, does not require any implementation, which deprives the respondent state of any legal means to overcome it within the national legal system.

It is equally important to maintain a balance of political interests at the stage of implementing a decision. To this end, the international court may be more lenient towards measures taken by a state to implement a decision that conflicts with certain aspects of its identity. An example is the ECHR ruling in the case of "*Ünal Tekeli v. Turkey*"[28], in which the absence in Turkish legislation of the option for a woman to retain her maiden name upon marriage was recognised as a violation of the right to respect for private life. As can be seen, the ECHR in this case also linked the violation of conventional rights with defects in legislation – Article 187 of the Turkish Civil Code, which required a woman to use either her husband's surname or a double surname when entering into marriage[29]. Although the Court did not order Turkey to amend its legislation, it

[27] ECHR. Fedotova and others v. Russia. § 54.

[28] ECHR. Ünal Tekeli v. Turkey. Judgement of 16 November 2004. Application no. 29865/96, available at: https://hudoc.echr.coe.int/eng?i=001-67482 (дата обращения: 23.05.2025).

[29] Türk Medenî Kanunu. 4721 sayılı, *Lexpera*, available at: https://www.lexpera.com.tr/mevzuat/kanunlar/turk-medeni-kanunu-4721 (дата обращения: 25.05.2025).

is clear that the remedy for the violation of the Convention – based on the root causes of the violation – would require such an amendment.

Despite the fact that the decision was made back in 2004, it remained unimplemented for almost twenty years, until the Constitutional Court of Turkey in 2023 disqualified Article 187 of the Civil Code of Turkey, including with reference to the position of the ECHR[30]. At the same time, such prolonged inaction by the Turkish side did not receive any censure from the Committee of Ministers of the Council of Europe, which supervises the execution of ECHR judgments. Only in the same year 2023, the Committee of Ministers was satisfied with a reference to the clearly belated decision of the Turkish Constitutional Court, indicating that "the fact that the case remains under consideration by the Committee does not mean that the respondent State is ignoring the court decision"[31]. The reasons for this lie not only in legal nuances (the execution of the judgment was not subject to a temporal limitation, the operative part of the decision did not contain any indication that Turkish legislation needed to be amended, there is currently a heavy workload on the Committee of Ministers of the Council of Europe, etc.), but also in political factors: the question of which surname a married woman should bear is particularly sensitive for Turkish society and, given its traditions, is rooted in the country's unique family values.

**Conclusion.** As can be seen, the process of protecting national identity by states in the international legal plane can proceed according to two scenarios.

The first scenario involves a unilateral refusal by a state to fulfil its international obligations to implement the judicial decisions resulting therefrom, even if this means literally violating international law. In this case, the state, in abrogating from its international obligations, does not raise the question of "to where" it will have to retreat. Such a scenario can be chosen intentionally if the state

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[30] Anayasa Mahkemesinin 2 Şubat 2023 kararı. Tarihli ve E: 2022/155, K: 2023/38, *Lexpera*, available at: https://www.lexpera.com.tr/Appendix/publication_tr/rg801y2023n32174p6_483908533_1.pdf (accessed May 25, 2025).

[31] Supervision of The Execution of Judgments and Decisions of The European Court of Human Rights. 17th Annual Report of the Committee of Ministers , *The Council of Europe*, 2024. P. 13.

intends to signal to the international community the principled nature and sensitivity of the issues raised (including in view of their connection with issues of identity).

Meanwhile, when the state operates with arguments about national identity, it is worth considering that the state and civil society's ideas about its content may not coincide. Moreover, the citizens of that country, based on their own feelings of community and professed values, may be bearers of an identity different from that which the state intends to protect (for example, when civil society rejects the values imposed by the state based on its utilitarian interests). In such cases, national identity turns from a substantive argument into a formal one that is aimed at the artificial creation of a "space" for the state to retreat from its obligations. Be that as it may, this scenario is conceivable in an exceptionally favourable political and legal context, which objectively allows the state to dictate to the relevant international court, in the words of V.D. Zorkin, its "limits of compliance" (Zorkin 2024: 29) (the passivity of the international court in ordering general measures for the state, the irregularity of supervision over the execution of its decisions, concessions in it, etc.).

According to the second scenario, issues of protecting national identity are resolved in the process of international legal communication, i.e. they are the subject of lengthy diplomatic efforts, competition in an international court, and even political bargaining, including in the execution of acts of international justice. This scenario is more intuitive for the following reasons.

Firstly, as a rule, an international court does not limit a state in its choice of methods for executing its decision. This is the nature of sovereignty and subsidiarity of international justice, which, as Paolo Carozza notes, "recognise… the responsibility of national [authorities] to ensure human rights and regard international intervention [only] as… a complementary or auxiliary mechanism" (Carozza 2003: 67). As a result, the state is given the opportunity to choose the "lesser of two evils": a method of execution that will meet the requirements of protecting national identity or, at any rate, will cause it less damage.

Secondly, international law encourages active international communication. It is no coincidence, for example, that the UN International Law Commission points out that a state's objection

to an emerging international custom (*persistent objector doctrine*) must not only be brought to the attention of all states involved, but also consistently defended in the international arena,[32] which is only possible under conditions of continuous international legal communication. Otherwise, the state will not be considered to have objected to a norm that is undesirable to it, which threatens the national values that it sought to protect through this objection. The intuitiveness of this approach is confirmed by ancient Roman lawyers, who said that "laws help those who are awake, not those who are asleep" (Latin: *vigilantibus, non dormientibus, jura subveniunt*).

In this context, the difference between genuine law and momentary political interests lies precisely in the observance of due procedure: "even in the event of a disagreement of interests and desires" and "even a decision 'tainted' by value preferences... will ultimately still be recognised, even without approval, if it... took place in a legal procedure" (Aranovsky, Knyazev 2016: 71, 121). The same applies to international law: if a state intends to "protect" itself from the application to it of any international legal norms (for example, by preventing the emergence of a custom or consensus that contradicts internal traditional values) or standards (for example, by using its discretion), this is possible only within the framework of the international legal regime that enshrines these norms or standards, namely through constant, open and timely communication, including in the procedures established by this regime, not excluding judicial ones. If we recognise the protection of national identity as an important sovereign interest of the state – a boundary beyond which there is no retreat – then we must also recognise that sovereignty, being an international legal attribute, can and must be protected only by means of international law.

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