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Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant

ANNA WYROZUMSKA

The Polish Constitutional Tribunal (CT) has recently rendered two judgments addressing i.a. the position and hierarchy of the EU law in the Polish legal system and the scope of the Tribunal's review over the EU acts, the judgments of 27 April 2005 (Case P 1/05 on the implementation of the European arrest warrant (EAW)), and the judgment of 11 May 2005 (Case K 18/04 on the compliance of the Accession Treaty of 2003 and Article 234 of the Treaty establishing the European Community with the Constitution of 1997). The significance of these judgments goes even further as the findings of the CT apply generally to international treaties. They are of essential importance to the application of both international and the EU law under the Constitution of 1997. The CT faced difficult issues, and also a "difficult" adversary in the second case. The applicants put forward numerous allegations, which were often inconsistent. The judgment of the CT is thus quite strongly dependent on the nature of these allegations.

Both judgments are quite rich in content and many of their aspects could be commented upon. We focus here on those statements of the Tribunal, which are essential for the application of international law in Poland.

1. Subsequent Review of Constitutionality

1.1. Material and Formal Review of a Treaty

In the judgment on the Accession Treaty, the Tribunal removed any doubts regarding the subsequent review of the constitutionality of the treaties which were concluded and are in force.[1] We call it subsequent review to differentiate it from the preventive control, i.e. the control which may be exercised before ratification and provided for in Article 133(2) of the Constitution.[2] The Tribunal dismissed the suggestions made

[1] Para 1.2 of the judgment.

[2] The President before ratifying an international agreement may refer it to the Constitutional Tribunal with a request to adjudicate upon its conformity with the Constitution.

here and there in the doctrine that the Accession Treaty as a part of the EU primary law is not subject to such control, and that a treaty confirmed by referendum (as the Accession Treaty) could not fall within such a review (as the highest embodiment of the nation's will), also due to formal reasons, as the control over the validity of the nationwide referendum lies with the Supreme Court.[3] The CT noted that although it is not authorised to make an intrinsic control (*kontrola samoistna*) of the constitutionality of the EU primary law, under the competence provided for in Article 188(1) of the Constitution it can control the Accession Treaty as a ratified international agreement.[4] This conclusion cannot be changed by the fact that the Accession Treaty has been ratified upon prior consent granted in a referendum. The power conferred on the CT to rule in matters concerning "the compliance of statutes and international agreements with the Constitution" does not differentiate the Tribunal's authority with regard to treaties concluded under the procedure of granting the consent for ratification.

As to the domestic law effects, we agree that there is no reason for precluding the control simply due to the fact that the treaty is the act of the EC primary law, since at the same time it is the act of national law. Moreover, the competence of the European Court of Justice is limited only to the interpretation of primary law and the Court in Strasburg assumes the responsibility of the Member State for any acts infringing the European Convention on Human Rights, as well as the acts of the EC primary law.

Another problem is whether the Constitutional Tribunal may examine the legality of primary law other than the Accession Treaty, e.g. the Treaty establishing the European Community (the Court was asked to review the constitutionality of Article 234 of the TEC). Pursuant to Article 1 of the Accession Treaty, Poland became the party to the founding Treaties and Article 2 of the Act of Accession confirms that from the date of accession Poland is bound by the provisions of these Treaties. Therefore, these other acts of primary law, may also be examined by the Constitutional Tribunal as the acts incorporated by the Accession Treaty (that is indirectly, "through" the Accession Treaty). But there is no clear statement in the judgment of the CT. Instead, the CT seemed to treat e.g. the TEC rather as an appendix to the Accession Treaty. Speaking on the nature of its competence, the CT noticed that the control mechanism

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[3] R. K w i e c i e ń: *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego* [The Position of International Agreements in the Legal Order of the Republic of Poland], Warszawa 2000, p. 188: "The argument for excluding the subsequent review of the CT with respect to the treaty referred to in Article 90 of the Constitution, is a specific nature of legal order, to which the aforementioned treaty shall contribute, when concluded – the legal order of the Community/European Union defined as supranational law." W. S o k o l e w i c z: "Ustawa ratyfikacyjna" [Ratification Act], in: M. K r u k: *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and Community Law in Internal Legal Order], Warszawa 1997, p. 125.

[4] Article 188 reads: "The Constitutional Tribunal shall adjudicate regarding the following matters:

1. the conformity of statutes and international agreements with the Constitution;

2. the conformity of a statute with ratified international agreements whose ratification required prior consent granted by statute;

3. the conformity of legal provisions issued by central State organs with the Constitution, ratified international agreements and statutes; [...]."

provided for in the Constitution is a clear proof of the supremacy of the Constitution on an internal plane:

"[...] the supremacy (*nadrzędność*) of the Constitution is confirmed by a constitutionally determined mechanism for the review of the constitutionality of the Accession Treaty and acts forming its integral components. This mechanism is based on the same principles on which the Constitutional Tribunal adjudicates on the compliance of ratified international agreements with the Constitution."

and further, quite surprisingly, the CT added:

"In this situation, however indirectly, also other primary law acts of the Communities and European Union which are the appendices to the Accession Treaty become the subject of the review."[5]

Later on, the CT reiterated that the scope of the review of constitutionality:

"can also include an international agreement itself, therein treaties concerning relations between RP and European Communities, and also – however only to the extent inherently connected with the application of the Accession Treaty and the Act concerning the conditions of accession forming an integral component thereof – Treaties constituting and modifying the Communities (European Union)."[6]

We will return to the issue of supremacy of the Constitution. Let us first concentrate on the finding that the TEC is an integral part of the Accession Treaty. The CT rightly held that primarily the content of a treaty is subject to constitutional review, even in the case of a treaty concluded under Article 90 of the Constitution, which includes a procedure reserved for treaties transferring the powers of the state's organs to an international organisation or international organ. This "content" however, seems understood too broadly by the CT – the Accession Treaty according to the CT, encompasses all its integral parts, which according to the CT are i.a. the Act of Accession, Final Act of the conference in Athens of 16 April 2003, and also the TEC and the TEU. The submission of the Final Act to the review is strongly emphasised in para 19 of the judgment and, as it can be seen, it results from the assumption of integrity accepted by the applicants:

"The representative of the applicants at the trial on 4 May 2005 confirmed the integrity of the Accession Treaty and Final Act in view of the indication of patterns of constitutionality review. In this situation, the Constitutional Tribunal, treating the Final Act as an integral element of the Accession Treaty, within its evaluation of the constitutionality of the provisions of the Accession Treaty, it encompasses also adequate provisions of the Final Act, making the review by applying particular review patterns of compliance with the Constitution, referred to by the applicants."

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[5] Para 7.

[6] Para 11.3.

It seems that the CT simplified the problem and misunderstood the role and the meaning of the Final Act. The TEC and the TEU do not form an integral part of the Accession Treaty. Neither are they appendices to the Treaty. The misunderstanding seems to result from the fact that the texts of the TEC and the TEU were placed in the Final Act to the Accession Treaty, and therefore the Final Act according to the Court also falls under the review. The Final Act to the Accession Treaty mainly serves to confirm the authenticity of the Accession Treaty, the Accession Act, protocols and appendices which are – in the legal meaning of this word – integral parts of the treaties, unilateral or common declarations made by other Member States acceding to the EU, old Member States and the institutions of the EC/EU, etc., and also the authenticity of the new authentic texts of the treaties forming the primary law, e.g. the TEC, the TEU in Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages.

Contrary to the Court, the Final Act itself is not an integral part of the Accession Treaty. The Final Act, in principle, is not legally binding although it can bring about legal effects,[7] and the same applies to the Final Act to the Accession Treaty. It is interesting that elsewhere the CT held that, it has no authority to examine acts which are not legally binding. The CT addressed this problem dealing with the claim of conflict between Article 6(2) of the TEC and Article 17 of the Charter of Fundamental Rights of the European Union, and Article 21(1) of the Polish Constitution on the protection of the proprietary rights. Referring to the Charter the Tribunal rightly pointed out that:

"Such a review is still *de lege lata* inadmissible. The Charter, in the form in which it was proclaimed in Nice, up till now is an agreement, the status of which is closer in nature to declaration rather than to an act of binding law. Therefore, its provisions are not of a legally binding character. Considering the legal aspect, they do not result in any specific rights on the part of individuals. They cannot invoke rights which are included in the Charter as the sole basis of claims."[8]

As a consequence, contrary to the CT primary assumption as it is noticed above, the Final Act, as an act which is not legally binding, cannot also be subject to the CT review.

The CT was further confronted with the issue of the control of constitutionality of what the applicants called (possibly incorrectly), the ECJ jurisprudence or line of judicial decisions, instead of customary law (or even *acquis communautaire*). The

[7] The document named the Final Act in the form known today comes from the Hague Conference of 1899. It was treated as an instrument which could be signed by all delegations participating in the negotiations without assuming any obligations; it was basically a form of report from the proceedings of the conference. All instruments accepted on the conference were attached to this report. This way the Final Act authenticates these documents. The Vienna Convention on the Law of Treaties of 1969 refers to the Final Act in Article 10(2), and confirms that signing the act can constitute the authentication of the text. The Final Act, as a document settling the authenticity of the agreement, can take effect referred to in Article 33 CLT.

[8] Para 18.8.

Tribunal seemed to prefer not to be engaged in the complex nature of the issues involved, and went on to state that:

"The scope of the review concerning the compliance of the Constitutional provisions mentioned in the applications include specific norms of the Accession Treaty and Act concerning the conditions of accession, and also the Final Act of the Conference in Athens. The Constitutional Tribunal cannot, however, subject to its direct review the constitutionality of the rulings of the Court of Justice of the European Communities. This applies both to individual judgments and to the "constant line of judicial decisions" of the European Court of Justice – drawn out from individual judgments, to which the applicants refer (especially in the application submitted on 19 April 2004). Regardless of the subjective elements in "drawing out" and "determining this line", which can inherently lead to quite diversified results, the evaluation of the jurisprudence of any judicial body of the European Communities clearly falls outside the cognition of the Constitutional Tribunal, strictly determined in Article 188 of the Constitution."[9]

Thus the Court has *inter alia* refused to examine the important argument on the unconstitutionality of the primacy of the EC law over Polish law. It seems that the Tribunal did not want to take any position with respect to the nature of the principle of primacy, any more than if it had the competence to examine the constitutionality of the customary law. This competence is not expressly provided in Article 188 of the Constitution, and from this point of view, this decision is accurate.

The judgment of the CT confirms not only the possibility of the material control of the constitutionality of the treaty concluded by Poland, but also, according to the Court, of "the process serving to introduce this agreement into the Polish legal order." The CT found the basis of this competence in Article 42 of the Act on the Constitutional Tribunal of 1997:

"While adjudicating on the compliance of a normative act or ratified international agreement with the Constitution, the Tribunal examines both the content of the act or agreement and its competence and observance of the procedure required by the law to issue an act or to conclude and ratify the agreement."

The Tribunal stated that the latter process include different procedures for granting the consent for ratification. In the case of treaties ratified with prior consent granted by statute the review applies to the ratification statute,[10] "not excluding the agreements mentioned in Article 90(1) and Article 91(3) of the Constitution." There is no doubt as far as the issue itself is concerned; the CT has already referred to it in its earlier judgments, however, the indication of Article 91(3) is surprising as it applies to secondary law acts of an international organisation.[11] As far as EC law is concerned,

[9] Para 9.1.

[10] Para 11.3.

[11] Article 91(3) reads: "If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws."

it is obvious that regulations, directives or decisions are not international agreements, whereas agreements concluded by EC are not concluded by Poland, so they cannot be subject to review referred to herein as there is no ratification statute in this case. Perhaps the CT meant agreements establishing international organisations (however, this raises a question: what is the significance of the above for the Accession Treaty, which certainly is not that kind of a treaty?).

Considering the procedure under Article 90(3) of the Constitution, it seems that the formal review in the opinion of the Tribunal, could apply only to the statute enacted in this procedure.[12] The Tribunal held that it does not have the competence to control referendum granting the consent for ratification of the agreement. Such a statement can be justifiable, as far as referendum is concerned (due to validity control exercised by the Supreme Court). However, the CT could control the Sejm's decision to hold a referendum (taken in the form of a resolution). It may be adopted e.g. contrary to the procedure provided by law or with the infringement of the competence of other state organs. On the grounds of literal interpretation of Article 188(3), it would be difficult to deny the Tribunal was right – the Sejm's resolution, although being an act of state central body, does not necessarily need to be treated as a normative act. However, if it is excluded from the CT's review, then it is not subject to any control and the provision of Article 42 of the Act on the Constitutional Tribunal of 1997 is limited to the review of the compliance of the ratification statute with the Constitution. This way the procedure for concluding a treaty, which is an important legislative process, becomes almost uncontrolled.[13]

1.2. Does the CT Review Apply to Secondary Law – i.e. Resolutions of International Organisations?

In para 18.5 of the judgment of 11 May 2005 concerning the conformity of Article 249 of the TEC with Article 31(3), Article 83[14] and Article 87 of the Constitution, the

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[12] Article 90 reads: "1. The Republic of Poland may, by virtue of international agreements, transfer (przekazać) to an international organisation or international institution the competence of organs of State authority in relation to certain matters.

2. A statute, granting consent for ratification of an international agreement referred to in para 1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies."

[13] See on infringements while concluding the Accession Treaty: A. Wyrozumska: "Charakter prawny traktatu o przystąpieniu do Unii Europejskiej z 2003 r." [Legal Nature of the Accession Treaty to the European Union], in: S. Biernat, S. Dudzik, M. Niedźwiedź: *Przystąpienie Polski do Unii Europejskiej, Traktat Akcesyjny i jego skutki* [Accession of Poland to the European Union, Accession Treaty and Its Effects], Zakamycze 2003, p. 34 ff.

[14] Article 83 reads: "Everyone shall observe the law of the Republic of Poland."

CT gave another important signal, namely, that its control may concern also secondary law.

Article 87 of the Constitution[15] does not enumerate the resolutions of international organisations, (e.g. the EC regulations or directives) among the sources of generally binding law. The applicants expressed their doubts "if they are a part of Polish law and if they are binding on Polish citizens," as they are legislated contrary to formal requirements of the Constitution. Moreover, they questioned whether the conditions permitting the limitations on the enjoyment of constitutional rights and freedoms referred to in Article 31(3) of the Constitution,[16] apply to the EC regulations or directives. The CT observed that:

"passing the requirements resulting from the content of Article 31 para 3 directly onto the area of Community legislation is unjustified. Each of these provisions concerns different legal systems which are autonomous to each other. This does not overrule the possibility of the evaluation of legal regulations, including Community regulations in the scope of their binding force on the territory of the Republic of Poland as components of the Polish legal system, among others, with regard to abiding with the rules resulting from Article 31(3) of the Constitution, including particularly the proportionality of limitations."

This statement suggests that regulations or directives could be examined by the CT as components of Polish law. The rationality of this statement with regard to Community law is highly doubtful. It is even obvious on the ground of the EC law that the ECJ has exclusive competence to interpret or review the legality of the EC secondary law. It is worth noting, that Article 31 of the Constitution enshrines an element of a rule of law – the principle on which also the European Union is founded. Thus the same act may be examined by the ECJ, and if jurisdiction was also exercised by the CT (even if the competence of the CT in this area is doubtful), then the two jurisdictions could conflict and it could be concluded from the CT's judgment, the conflict would be solved on the basis of the friendly (or sympathetic) attitude of one system towards the other (or rather the friendly attitude of Polish law towards the Community law). The CT alluded, for example, to the "requirement to respect and be favourably predisposed towards appropriately shaped regulations of international law binding upon the Republic of Poland"[17] (the CT derived it from Article 9 of the Constitution – "The Republic of Poland shall respect international law binding upon it") and further on the "constitutional principle of comity towards the process of European integration and co-operation between States". Nowadays, this approach to Community law may be seen as conservative. However, the CT seemed not to

[15] Article 87 reads: "The sources of the universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations."

[16] Article 31(3) reads: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

[17] Para 2.1.

exclude the primacy of the secondary law but emphasised that the primacy over the Constitution may not be automatic. The same mechanism applies to all other international agreements (namely to resolutions of organisations or organs created on the basis of these treaties), and in its general dimension it may have some value.

The CT clearly (and rightly) analysed regulations and directives as elements of the Polish law. They are the sources of generally binding Polish law although Article 87 enumerates only ratified treaties. The Tribunal explained that:

"The obligation to respect the law of the Republic of Poland, expressed in Article 83 of the Constitution, its scope includes these types of agreements (*ratified agreements* – note by A.W.). Therefore, there is no doubt, which was raised by the applicants, whether Community regulations being Community law acts are binding upon the Republic of Poland."[18]

Further on, the Tribunal noted:

"These regulations are issued on the grounds of an agreement constituting international organisations: European Communities (and European Union), and ratified by the Member States (i.e. also by the Republic of Poland). Article 91(3) of the Constitution expressly provides, that law enacted by such an organisation is applied directly and takes precedence in the case of a conflict with other statutes."[19]

We fully agree with the statements of the CT, however, regulations are not issued on the basis of the Accession Treaty but the TEC, which has not been ratified by Poland, but which is binding for it by virtue of the Accession Treaty. The first passage quoted above seems to show that the Tribunal assumed that an act derived from a ratified treaty is binding in the national law, because the treaty fulfils all requirements necessary to become binding. This thesis is significant for the application of treaties and resolutions of the international organisations or international organs constituted by these treaties. From this point, it is only one more step to hold that pursuant to Article 188 of the Constitution, the CT has the competence to review the constitutionality of resolutions of international organisations or organs established by a treaty via this treaty. Let us be reminded that Article 188 of the Constitution does not mention resolutions of international organisations. The question remains whether or not the CT will make that step in future. For the time being, in the judgment of 27 April 2005, which refers to the Framework Decision of 13 June 2002 on the European arrest warrant, the CT avoided the problem, focusing on the compliance of the law implementing this decision with the Constitution and not the Framework Decision itself. Still, consequently, the decision also – although only indirectly – appeared to be in conflict with the Constitution.

In this context, the judgments of the CT are a little bit inconsistent. The Tribunal confirmed that the EU is an international organisation, so it should treat acts adopted

[18] Para 18.5.
[19] *Ibid.*

under the Third Pillar as resolutions of international organisation.[20] Even if the Framework Decision is not a resolution of the international organisation (if the EU is not assumed to be an international organisation), then at least it is a resolution of a body constituted by virtue of an international agreement (the Framework Decision is an act of the EU Council). In order to describe the character of the Framework Decision, the Tribunal used the formula, which is in fact applied in the EU legal doctrine, but in a slightly different manner. The CT referred to the framework decision as an "intergovernmental obligation":

"Moreover, the framework decision, as a decision referring to the area of intergovernmental cooperation (Third Pillar) within the scope of co-operation of courts and police in criminal matters, is only an intergovernmental obligation. It is addressed mainly to the government of the RP. It does not possess necessary features of an international agreement, hence it cannot be treated as a source of law binding on the territory of the Republic of Poland, in the meaning of Article 87(1) of the Constitution."[21]

It is not clear to what extent this statement of the CT can be generally applied to resolutions of international organisations other than those enumerated in Article 91(3) of the Constitution and resolutions of the bodies constituted by ratified agreements. It appears that it refers to framework decisions due to their specific features set forth in Article 34(2b) of the TEU, i.e. the lack of direct effect, and the specific character of the decision concerning the EAW, as further on, the CT stated:

"The Constitutional Tribunal, having analysed the content of the above mentioned Framework Decision, have come to the conclusion, that given the generality of this Framework Decision and the solely directional nature of its disposition it is not subject to compliance review with clearly stated norm in Article 55(1) of the Constitution of the RP. Such a review may be applied to an act constituting the implementation of the directional disposition of the aforementioned Framework Decision."[22]

It could be concluded that a resolution "would be subject" to the CT's review, if it was not general and its disposition was not of directional nature (i.e. if it was self-executing).

The CT held that a provision of a treaty is subject to constitutionality review only if it is self-executing (as not self-executing the CT considered e.g. Article 308 of the TEC[23], Article 105 of the TEC[24]). Non self-executing norms are "not subject to review," because there is no direct conflict between the norm of the treaty and the Constitution. The CT does not limit this requirement to review to be performed through the constitutional complaint procedure.

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[20] Compare para 8.5 of the judgment of 11 May 2005.

[21] Para 18.9.

[22] *Ibid.*

[23] Para 18.6.

[24] Para 18.7.

It is worth noticing that the CT has the occasion to deal with the self-executing nature of the norms of a treaty in the judgment of 19 December 2002 (K33/02) on the compensation for the property left by the repatriates beyond the Bug River (*mienie zabużańskie*). The Tribunal accepted that the provisions of the so-called republican treaties (treaties with the Soviet Union or Soviet Union Republics – Belarus and Ukraine) were not self-executing as "substantial construction of these agreements and the scope of obligations accepted there, did not allow for claiming that they formed a legal basis for compensation claims of repatriates and their heirs." They required the reception into the internal legal system, as in the opinion of the Tribunal, the necessary condition of direct effect of a norm of agreement is:

> "determination of all normative elements in the treaty itself, on which the application of certain legal instrument depends. This attitude clearly finds confirmation in Article 91(1) of the Constitution, according to which one can talk about direct application of international agreement only if its application does not depend on adopting a statute."

Self-executing nature is a notion strictly connected with the application of the norm. Non self-executing provisions cannot be applied directly. However, it is not convincing that the lack of self-executing nature precludes the review of the provisions' constitutionality. In order to illustrate this problem with an example, let us assume that a constitution contains a provision forbidding the death penalty whereas a ratified treaty includes a provision which is not self-executing: "the state party shall take all necessary measures to introduce the death penalty into its national law." Why should the review of constitutionality of this provision (a clear and unconditional one, requiring implementation, however, so not complete) be precluded? Is it possible to conclude treaties which are in conflict with the Constitution? The opinions can differ on the matter, however, it seems that in some cases also non self-executing provisions may and should be subject to review.

In view of the above, one may have doubts concerning the correctness of a general limitation excluding non-self-executing provisions. Moreover, another question arises if it may be assumed that provisions conferring competence (this is the case of Article 308 and 105 of the TEC) are not self-executing. Probably it is the other way around. Considering the fact that the entity is endowed with competence, certainly this provision is self-executing (directly applicable). If so, then what is the meaning of "self-executing" in the current view of the CT? Unfortunately the CT offered no explanation, making only laconic statements instead. For example, with reference to Article 308 of the TEC, it found that this provision is not self-executing, because "its application requires issuing secondary law acts by the Community (Union) Council. When making such law, the Council must take univocal decision, therefore it cannot be accepted without the consent of the Republic of Poland." It seems that the CT mixes the areas of verification of the provision's nature and the concept of self-executing norm in this approach, as it does not apply to direct application of the norm, and does not denote clear, complete and unconditional norm which could be directly applicable.

It is possible that the CT understood "intergovernmental obligation" as a non ratified agreement (that is concluded in a simplified procedure), but actually that was the position of the applicants. As far as this type of agreement is concerned, the finding of the Tribunal would then suggest that if they are not the sources of the generally binding law (therefore, simplifying the problem to some extent, from the point of view of the Polish law, they are not self-executing agreements) they are not subject to the CT review. Such statement of the Tribunal seems even more questionable. Non-ratified treaties, despite the fact that they are not sources of the generally binding law, are the sources of obligations for state organs and can produce legal effects for other persons, e.g. by reference clause included in the statute. Moreover, Article 188 of the Constitution in para 1 (rather deliberately) empowers the CT to review the constitutionality of the statutes and any treaties with the Constitution; only in paras 2 and 3 is there reference to ratified treaties.

Now let us conceive that the same norms on the death penalty are included in a non-ratified treaty. A non-ratified treaty is encompassed by Article 9 of the Constitution. Hence, could the authority designated by law submit to the CT a legal question concerning the constitutionality of such an agreement? Who is supposed to examine, e.g. whether state organs infringe upon the rule of law by concluding an "unconstitutional agreement"? If this is not the CT, then it follows that non-ratified treaties receive the same status as informal agreements which are legally not binding. Another issue is that cases may be brought to the CT under different procedures and may refer to national law acts based on non self-executing acts of international law. It is hardly possible that the CT could avoid such a review (albeit an indirect one).

It is worth mentioning here, that the Belgian Constitutional Court (Cour d'Arbitrage) has recently faced the problem of review of compliance of the Framework Decision on the EAW with the Constitution. The Tribunal has not rejected the complaint because the Framework Decision on the EAW could not be applied directly (it is "non-self-executing"). The applicant brought the complaint to annul the law implementing the Framework Decision on the ground that the Framework Decision itself is not valid. Since Belgium has accepted the ECJ jurisdiction under Art. 35 TEU (Poland has not done it to date), the Court referred the question to the ECJ.[25] It seems that if Belgium had not accepted the jurisdiction of the ECJ, the Cour d'Arbitrage would not have rejected the complaint, and it would have settled the case by itself. Then it would also have to decide on the legality of the Framework Decision, perhaps as an act of Belgian law.

[25] The questions of the Tribunal concerned the conformity of the Framework Decision on the EAW with Article 34 of the TEC (the applicant argued that the matter – international cooperation in criminal matters – should have been regulated by convention instead of a framework decision) and the conformity of partial derogation of the dual criminality requirement for a list of 32 offences with the principle of non-discrimination and equality (according to the applicant, there is no reasonable justification for it). See note of the Belgian delegation: Council 11518/05 of 4.8.2005 r., COPEN 116, EUROJUST 42, EJN 38; judgment Cour d'Arbitrage 13.7.2005.

2. Supremacy of the Constitution over International/ Community Law

2.1. The Multi-Component Nature of the Polish Legal Order

The fundamental issue referred to in the judgment of 11 May 2005 is the problem of supremacy of the Constitution over international law binding upon Poland, including the TEC/the TEU. The Tribunal held that Article 8(1) of the Constitution clearly guarantees that the provisions of the Constitution have the status of the supreme law of Poland.[26] However, it noticed that:

"this regulation is accompanied by the requirement to respect and be favourably predisposed towards those provisions of international law which are properly shaped and binding upon the territory of the Republic of Poland. The legislature – by virtue of a conscious decision, to the supreme principles of the Constitution of the Republic of Poland and directly next to art 8(1), described by the applicants as a pattern of constitutional review – introduces the principle enshrined in Article 9. As stipulated in this provision "the Republic of Poland shall respect international law binding upon it"."[27]

The consequence thereof, in the opinion of the CT, is the multi-component nature of the national legal order, the "constitutional assumption, that on the territory of the Republic of Poland, next to provisions enacted by the national legislature, the regulations created outside the system of national (Polish) legislative bodies are binding." Community law is not totally external law, as the Tribunal rightly noticed, because national bodies also participate in the process of its creation, through the conclusion of international agreements or acceptance of acts in the Council. (It can be added that the same reasoning applies to each international agreement.) This further leads to the conclusion that:

"On the territory of Poland, the subsystems of legal regulations originating from different legislative centres are both binding. They should co-exist on the basis of mutually favourable interpretation and co-operative co-application. This circumstance, from another perspective, poses the problem of the potential collision of norms and the ultimate precedence of one of the separate subsystems."[28]

The general presumption that the nature of the law binding in Poland has multiple components is not undermined in this case, because this is not an episodic regulation, assumed only in connection with the accession to the EU. Hence, as one may believe, it is supposed to apply to the whole international law. As a general standpoint, this could be correct.

If so, then the next sentence in the judgment is misleading as it applies only to treaties concluded under the procedure provided for in Article 90 of the Constitution.

[26] Para 2.1.
[27] *Ibid.*
[28] Para 2.2.

Although it refers to Article 91 of the Constitution – which would suggest all ratified treaties – the special procedure introducing the concept of legal "subsystems" is provided for only in Article 90 of the Constitution, and only this procedure "shows the relationship", discussed hereunder:

"The Constitution, as a result of regulations included in Article 9, Article 87 and Article 90-91, accepts the multi-component structure of regulations binding upon the territory of the Republic of Poland and provides a special procedure for its introduction. This procedure shows its relationship with the procedure for changing the Constitution."[29]

Further on, the CT stressed the special stability of this structure, acknowledging that the multi-component structure of law took place by virtue of the Constitution and can only be revoked following the amendment procedure of the Constitution.

The vision of a multi-component legal system based on the supremacy of the Constitution in the judgment of 11 May 2005 is complemented by the holding in the prior judgment of the CT on the EAW. In that decision, the Tribunal held that Article 607t(1) of the Criminal Procedure Code implementing the Framework Decision on the EAW was contrary to Article 55(1) of the Constitution, which prohibits the extradition of a Polish citizen under the circumstances set forth therein. Since the immediate (on the day of promulgation of the judgment) elimination of the provision challenged in the case would result in an infringement of international obligations binding upon Poland, the CT decided to take advantage of the competence granted to it in Art. 190(3) of the Constitution[30] and maintained the questioned provision in force for 18 months.[31] The CT recognised it as an expression of:

"judicial moderation derived from the principle of the separation of powers and co-operation of state organs. In a situation in which the invalidation of the provision considered as unconstitutional could lead to an infringement of international obligations of the Republic of Poland, the institution of prolonging the period of its application comes to the fore within the field of the international obligations of the state. Taking advantage of it is a solution ensuring (until any conflicts in national legal order are removed) that Poland meets the accepted obligations."[32]

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[29] *Ibid.*

[30] Article 190(3) reads: "A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify a date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers."

[31] Para 5.4 of the judgment of 27 April 2005: "The effect of the deferral of the moment of cessation of the binding force of Article 607t § 1 of the Code of Criminal Procedure is such that over the period of 18 months after the publication of the judgment of the Constitutional Tribunal the respective provision should continue to be applied by the courts (unless it is earlier annulled or amended by the legislator), in spite of the fact that the presumption of its constitutionality has been refuted. Polish courts, therefore, cannot refuse to surrender Polish citizens indicted by European arrest warrants".

[32] Para 5.3 of the judgment of 27 April 2005.

Moreover, the CT views the institution of prorogation as a timely and valuable exception "to the principle of hierarchical conformity of the legal system and the principle of the Constitution supremacy, clearly admitted by the legislature. In fact, the Constitutional Tribunal decides *in concreto* about the occurrence of such exceptions having carefully balanced all the values, and also determines the date that particular provisions – which are subject to review – become invalid."[33]

Having regard to the supremacy of the Constitution clearly expressed in Article 8 and the rigid concept of a closed catalogue of generally binding sources of law and its hierarchical structure upon which the Constitution of 1997 is based, both judgments of the CT should be considered as a successful reconciliation of international obligations with the Constitution. Simplifying, the CT perceives these issues in the following way: the Constitution is the supreme law of the RP, but Article 9 and Article 190(3) of the same Constitution, in individual cases, allow for ensuring the performance of international obligations which are in conflict with the Constitution. However, one cannot speak of any general primacy over the Constitution:

"Each decision of this kind must imply the balancing of values: i.e. the harm caused as a foreseeable consequence of the prolonged application of unconstitutional provisions, in relation to the values protected by the deferral of the entry into force of the respective judgment. There is no doubt that the Constitutional Tribunal should be guided especially to take care in assuring the protection of constitutional rights and freedoms of individuals."[34]

Let us repeat that the statement of the CT concerns not only EU law but any other international obligation (especially since it does not refer to Community law but the act of the EU Third Pillar). As a general statement, it is significant and right. The confirmation of the precedence of the binding force and the application of the Constitution over any ratified treaty and also other sources of international law (with a possibility under certain conditions to fulfil international obligations remaining in conflict with the Constitution) are of fundamental importance for the application of international law in the Polish law. This mechanism may not necessarily be viewed as a satisfactory basis for the primacy of the EC law. However, it allows one to view Article 9 as a constitutional basis for this primacy.

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[33] *Ibid.*, para 5.1.

[34] *Ibid.*, para 5.1. The CT adds thereafter: "It should be noted, however, that the possibility for the Tribunal to prolong the period, over which the rights and freedoms are limited as a consequence of maintaining in force certain unconstitutional provisions, is not subject to such restrictive and unequivocally formulated conditions as the limitations regulated in Article 31 para 3 of the Constitution, which restrain the scope of action of the legislator in this regard. The Tribunal possesses more discretion here. Therefore, it is acknowledged that the deferral (of course only within time limits specified by the constitutional lawmaker) can be applied owing to values other than those specified in Article 31 para 3 (i.e. security and public order, protection of the environment, health and public morality, as well as freedoms and rights of other persons), and – when this becomes inevitable – even if it should lead to temporary maintenance in force of the regulations limiting constitutional freedoms and rights. A conclusion to the contrary would be unacceptable, as Article 190 para 3 does not rule out the possibility (as already mentioned earlier) of the prolongation by the Tribunal of the period of application even in the case of provisions infringing the limits set in Article 31 para 3 of the Constitution."

2.2. Treaties Transferring Competence of State Agencies – Primacy Only Over Statutes

The CT in the judgment of 11 May 2005 indicated that the Constitution is based on a closed catalogue of generally binding law. This catalogue includes ratified treaties (Article 87(1) of the Constitution), and there is no doubt that this category includes treaties ratified under Article 90. Pursuant to Article 91(2) of the Constitution, treaties ratified by the President of the RP with the prior consent of the Sejm and Senate granted by statute, have precedence over statutes if the terms of such a treaty cannot be reconciled with the provisions of statutes.

It should be emphasised that Article 91(2) concerns only treaties ratified upon the prior consent granted by statute. The provision does not cover treaties ratified under the procedure of a nationwide referendum under Article 90(2). The Tribunal does not seem to notice this problem, since it omitted any reference to the issue, treating in the same manner the whole category of treaties transferring competences "in certain matters" of the State organs. This is reflected in para 4.2. of the judgment:

> "The precedence of the application of international agreements provided for in Article 91(2) of the Constitution, ratified by virtue of a statutory authorisation or a nationwide referendum (according to Article 90(3), including agreements transferring competences "in certain matters" – over the statutory provisions which cannot be applied together [...]."

The Tribunal has not distinguished situations in which treaties are ratified in referendum procedure and *a priori* assumed that they enjoy the same status as treaties ratified according to the procedure provided for in Article 90(2).

The Tribunal has only distinguished between treaties transferring competence and other treaties ratified upon the prior consent granted by the statute, emphasising that their specificity is reflected in the ratification procedure "of clearly more stringent requirements" in comparison with the procedure required for other treaties ratified over prior consent granted by the statute. More stringent requirements mean: raising the majority required in both chambers from a simple majority to two-thirds majority vote both in the Sejm and in the Senate. As far as the other group of treaties is concerned "alternatively (by virtue of adequate resolution enacted by the Sejm by an absolute majority vote) the aforementioned requirements mean authorisation for ratification granted in a nationwide authorising referendum". This way, by equalising the authorising statute with the authorising referendum (the alternative character of the procedures seems to be decisive here), the CT overlooks this issue. Moreover, expressing its opinion on the nature of the Accession Treaty,[35] it clearly qualifies it as a treaty concluded with prior consent of the Sejm and the Senate (granted by the statute). Another comparison of both types of treaties ratified within the procedure provided for in Article 90 can be found in para 4.3. of the judgment, where the CT stated that in granting the consent for ratification under Article 90(2), the Sejm and the Senate act as organs representing the Nation – the sovereign. Whereas, regarding

[35] Para 5.2.

the other group of treaties "(i)ndirect reference to sovereign decision of the Nation is more intensive." Therefore these treaties have another feature in common.

Following this reasoning, one can agree with the aforementioned conclusion of the CT. However, it is not Article 91(2) that guarantees the precedence of treaties ratified upon the consent granted in referendum, because the constitutional legislator has clearly forgotten about this category of treaties, but the norm concluded from it, which logically must also apply to treaties accepted within a more stringent procedure, and having stronger democratic authorisation. However, it is a pity that given the silence of the Constitution and the clear wording of Article 9 of the Constitution, the CT did not use the special character of the treaty ratified with the consent granted in a referendum to accept its primacy of application towards all the domestic law. Instead, the CT found that the fact that Article 91(2) guaranteed the precedence:

> "of acts transferring competences in 'certain matters' – over the provisions of statutes that cannot be co-applied – does not directly lead to (in any scope) the acceptance of analogical precedence of these treaties over the provisions of the Constitution. The Constitution remains then – due to its special power – 'the supreme law of the Republic of Poland' with regard to all international treaties binding upon the Republic of Poland. This also applies to ratified international treaties transferring competence in 'certain matters.' By virtue of the legal power of the supremacy of the Constitution provided for in Article 8(1) it enjoys the precedence of binding force and application on the territory of the Republic of Poland."[36]

The above statement raises a question of whether this primacy conforms with the principle of primacy of the Community law over national law inherent in the Accession Treaty.

First, the concept assumed by the CT including the existence of two autonomous legal orders, i.e., of European law and of national (Polish) law gives rise to questions, as previously the CT has spoken about uniformity of the Polish legal order. According to the CT "(t)heir mutual interaction cannot be fully described using the traditional concepts of monism and dualism in the system: internal law – external law." Contrary to what the CT said, the Tribunal actually applied traditional concepts (dualism), whereas the enduring achievement of the Community law is the monistic approach. The EC/EU law forms a part of the national system (as one order). No norm of the national law, remaining in conflict with the Community norm, may be applied including the Constitutional norm (this however does not influence the validity of the norm as such). Further speculations of the CT are reminiscent of the line of thinking of the German FTK and the Danish Constitutional Court, and this is not surprising since the CT conceded that it takes into account their judgments. It is not by accident that these states are the ones which adopted dualistic approach. It is doubtful if the identical solution should be applied to Polish law which, in view of the Constitution of 1997, seems to be rather a monistic order (which results at least indirectly from Article 91, especially paras 2 and 3).

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[36] Para 4.2.

Without getting into a discussion on monism and dualism, it should be noticed that the CT rightly observed that considering the axiological unity and the fact that the European law is a result of a joint action of the Member States, conflicts with the Constitution will be rather rare. However, the possibility of "irremovable conflict" cannot be excluded:

"Such a conflict may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to a situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event, it is the Polish legislator who should decide on amending the Constitution, causing modifications within the Community provisions; or, ultimately decide on Poland's withdrawal from the European Union. This decision should be taken by the Nation as the sovereign, that is the Polish Nation or a state organ authorised by the Constitution to represent the Nation. The norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions. The Constitution in this context serves a guarantee function for the protection of rights and freedoms explicitly specified therein, and with respect to all entities in the scope of its application. The principle of interpreting national law in comity with the "European law", as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms nor can it be irreconcilable with the minimum guarantee functions realised by the Constitution. The CT does not then accept the possibility of questioning the validity of any constitutional norm simply by virtue of introducing Community provisions to the European law system which are in conflict with the Constitution."[37]

The supremacy of the Constitution is very strongly emphasised, which is, to some extent, a repetition of the thesis included in the FTK judgment.

However, if the norms of the Constitution concerning rights and freedoms of individuals determine the minimum and unsurpassable threshold, which can be neither lowered nor questioned as a result of introduction of Community provisions, and if in such cases the supremacy of the Constitution is manifested in the area of validity and application, the judgment of the CT of 27 April 2005 on the EAW becomes less clear. The Constitutional Tribunal held that the unconstitutional provision will nevertheless be effective for a further period of 18 months. The question therefore arises whether this judgment indicates that the "threshold is surpassable", even in the case of simple "intergovernmental obligation."

A similar problem was faced by Bundesverfassungsgericht. In the judgment of 18 July 2005,[38] the Tribunal acknowledged that the German statute implementing the EAW was in conflict with the constitution – encroaching upon "the freedom from extradition" (Article 16(2) of the Basic Law – Grundgesetz) in a disproportionate

[37] Para 6.4.

[38] 2 BvR 2236/04.

manner, because the legislator has not fully exercised the discretion provided by the Framework Decision on the European arrest warrant in a way ensuring that the implementation of the Framework Decision into national law shows the highest possible consideration for the fundamental right. Moreover, the statute infringed upon the guarantee of recourse to a court (Article 19(4) Grundgesetz) as there is no possibility of taking an appeal from the judicial decision that grants extradition. FTK pointed out that the extradition of a German citizen is not possible till a new statute is adopted. For the German Tribunal this threshold is "really" unsurpassable.

Still another question arises as to why the CT actually acknowledged the primacy of application of a national provision which implements an international obligation (although temporary and ensured individually by the CT) that is in conflict with the Constitution (with the provision concerning rights and freedoms of the person, determining a minimum and unsurpassable threshold) over the norm of the Constitution, when it does not want to accept the primacy of Community law (CT distinguishes Third Pillar EU acts). The answer of the CT is a strong emphasis of the Member States' sovereignty:

> "The principle of primacy of Community law over national law is strongly underlined by the jurisprudence of the Court of Justice of the European Communities. This state of affairs is being justified by the goals of the European integration and the necessity to create a common European legal framework. This principle undoubtedly reflects the pursuit to guarantee a uniform application and execution of European law. However, it is not only this principle which determines final decisions adopted by sovereign Member States in a hypothetical conflict between Community legal order and the provisions of a constitution. In the Polish legal system such decisions should always be adopted with reference to the content of Article 8(1) of the Constitution. Pursuant to Article 8(1) the Constitution remains the supreme law of the Republic of Poland."[39]

According to the CT, in the case of a conflict between the Constitution and the Community law, the Community law will not automatically prevail (even if the primacy means only the primacy of application of a norm). The primacy of application of the Community law elaborated by the ECJ may not negate the right of a "sovereign Polish constitutional legislator" to "take a decision concerning the manner of removing this conflict through a possible amendment of the Constitution itself."[40] The CT evidently sees its role as a protector of the supremacy of the Constitution. This clearly shows how difficult it is for national systems based on traditional concepts of sovereignty, independence, etc., to accept the "Community" nature of law. In fact, the judgment of the Polish CT does not diverge essentially from judgments concerning this issue delivered by the Constitutional Tribunals of other Member States.

However, the judgment of the CT of 11 May 2005 does not fully contradict the primacy of the EC law. It seems that it should be read in conjunction with the judg-

[39] Para 7.
[40] *Ibid.*

ment on the EAW, in which at least a few important statements on Article 9 of the Constitution can be found. Both judgments of the CT could be read to state that the supremacy of the Constitution encompasses the supremacy of Article 9 of the Constitution and that in the case of a conflict Article 190(3) of the Constitution may apply. Thus the Constitution itself allows for ensuring primacy of application of the Community norm over the Constitution in an individual specific case. Moreover, it seems that CT indicates the same "precedence" of any other international obligation. Considering the above, the conclusion emerges that the CT, although it tried to see a new quality in the Accession Treaty (a treaty different from other treaties in the traditional international law), in essence it has not attributed any individual feature to it, and it has even moved away from the "Community" nature of the legal order created by the TEC binding upon Poland.

In addition, the CT noticed that the Accession Treaty "in comparison with the traditional international agreements shows certain individual features." In the opinion of the Tribunal, traditional treaties show "predictability of future functioning at the time the agreement is concluded" whereas the European Union system is dynamic. "It provides for the possibility to change the content of law at the time of accession. It also stipulates for the possibility of evolution of the principles and scope of the Union operation. At the time of accession no one may speak with complete certainty of its further development."

This thesis is not convincing. The Accession Treaty does not show any specific feature in that respect, as at present the dynamics noted by the CT may be attributed to many international treaties binding upon Poland. Such dynamics cannot distinguish the Accession Treaty. For example, how "predictable" are the European Convention for the Protection of Human Rights or other treaties on the protection of human rights, the Statute establishing the International Criminal Court, or economic treaties establishing organs endowed with the competence to adopt decisions, which are binding on states parties or even the Charter of the United Nations? States always try to protect themselves against the "dynamics" of such treaties, and the best protection is ensured by a precise determination of obligations and competences of the created organs. In this respect, the CT rightly concluded that in the case of the Accession Treaty "the competences transferred by the Member States at the same time ensure the influence of these states on activities and decisions of the whole EU system. This is the essential guarantee of its correctness and approvability."[41]

3. The Transfer of Competences to an International Organisation or International Organ "in Certain Matters"

There are at least two issues attracting attention in the findings of the Tribunal on the transfer of competences "in certain matters" (*przekazanie kompetencji w niektórych sprawach*) referred to in Article 90 of the Constitution: the CT's understand-

[41] Para 5.1.

ing of the notion of transfer of powers and the scope of this transfer determined by Article 90 of the Constitution. The CT observed that the transfer of powers is not rare in international relations and it was practiced by Poland even before the effective date of the Constitution of 1997. The CT gave the example of the ECHR:

"It should be remembered that before the Constitution was passed on 2 April 1997, the Republic of Poland – by joining the Convention for the Protection of Human Rights and Fundamental Freedoms and by accepting the jurisdiction of the European Court of Human Rights – had expressed its consent for the transfer of certain powers, up till then remaining solely within the domain of national courts."[42]

Thus the Tribunal made the ECHR and the Accession Treaty equal. It could be the sign that the CT does not have enough understanding of the integration process and is not fully aware of the consequences of its finding. This finding encourages one to understand Article 90 of the Constitution as not only a European clause. Following the reasoning of the CT, the ECHR – if it was concluded today – would be subject to Article 90. Additional Protocols to the Convention accepted later would also be subject to Article 90. This seems dangerous for the Polish treaty practice.

In no way may the submission to control of an international judicial body be compared to the transfer of powers referred to in Article 90, and which is accomplished by the Accession Treaty. It is not convincing that Poland has transferred its competences to the Court in Strasburg, since the Polish courts are still empowered to adjudicate in cases concerning infringements of rights provided for in the Convention. Rather, the nature of the obligations under the ECHR is the consent for control of the compliance of the state organs with the ECHR by the international body. The competence of this body is incidental, involved only in cases of the allegation of breach of the obligation by the state party. Transferring a competence means the lack of it in a given field (i.e. a different entity exercises this competence), whereas ordinary treaties only limit discretion in the exercise of the competence, which the state still holds. In the doctrine, it is emphasised that the transfer of powers on one hand includes abandoning the competence by the state in a certain field in favour of a given international body, and on the other hand providing this organ with exclusive law-making competence in certain areas, making this law to be directly applicable in the state legal order and ensuring its precedence over other national norms. In order for the transfer of powers to be effective, all these requirements have to be fulfilled at the same time.[43] It should be noticed that in the case of the EC/EU the transfer of competences does not include all powers held by the EC or EU.

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[42] Para 8.1.

[43] See: J. K r a n z, A. W y r o z u m s k a: "Ratyfikacja Rzymskiego Statutu Międzynarodowego Trybunału Karnego a interpretacja Konstytucji z 1997 r.: Artykuł 90 – czy tylko klauzula europejska?" [Ratification of the Statute of Rome of the International Criminal Court of 1997: Article 90 or Only the European Clause?], *Studia Prawno-Europejskie*, vol. V, Łódź 2001, p. 17 ff; J. B a r c z: *Między konstytucją a ponadnarodowością. Opcja integracyjna konstytucji RFN* [Between the Constitution and Supranationality. The Integration Option of the German Constitution], Warszawa 1990, p. 127–133.

The CT did not go so far, as it did not determine the notion of the transfer of competences precisely and it is not clear if it distinguishes exclusive powers (generally speaking and simplifying the matter, i.e. the competences in the field in which the transfer of powers primarily takes place), shared powers, and others. The CT used a rather broad notion of the transfer of competences. According to the CT, the notion encompasses the whole sphere of the competence of the Community.

The CT referred to the transfer of powers also when it was dealing with the compliance of Article 234 of the TEC – on the ECJ preliminary rulings procedure – with the Constitution. The CT confirmed that all state organs, and also courts (including the Constitutional Tribunal) are bound by the treaty. The CT pointed out that:

„Article 234 of the TEC may be applied only if provisions of the Constitution or international agreements ratified by the Republic of Poland state that they oblige courts and Tribunals of the RP to apply acts (provisions) of the Community law. The scope of application of the Community law by the organs of the Republic of Poland including courts and tribunals is determined by the scope of transferred competences pursuant to constitutional provisions of Article 90(1) and 91(3)."[44]

At the same time, the Tribunal pointed to the division of powers between the ECJ and national courts. According to the CT, the ECJ makes decisions exclusively in matters concerning:

"the validity and interpretation of the Community law. The interpretation of Community law performed by the ECJ should fall within the scope of functions and competences transferred to the Communities by its Member States. It should also remain in correlation with the principle of subsidiarity in determining the operation of Community-Union institutions. Furthermore, this interpretation should be based upon the assumption of comity between the Community-Union institutions and the Member States. This assumption generates a duty for the ECJ to be favourably disposed towards the national legal systems and a duty for the Member States to show the highest standard of respect for Community norms."

However, it is also important that:

„The Member States maintain the right to assess whether in issuing particular legal provisions, the Community (Union) legislative bodies acted within the transferred competences and used their empowerment with respect to principles of subsidiarity and proportionality. Should the adoption of provisions infringe upon this framework, the principle of the primacy of Community law does not apply with respect to such provisions."

In the quoted excerpts, competences that are „transferred" simply stand for all competences of the EC/EU. Despite the lack of precision, the statements of the Tribunal – concerning the binding effect of the treaty towards all state organs and the determination of the scope of primacy for obligations resulting from treaties over

[44] Para 10.2.

national law via the scope of the treaty obligations – are general in nature and apply to all international agreements. The finding of the CT seems simple: the treaty does not enjoy the precedence in the domain, to which its provisions do not apply. However, the result of the further thinking of the CT, in reference to the EC law, is the rejection of the ECJ's exclusive competence to deal with the division of powers or subsidiarity.

As far as the other issue is concerned, i.e. the scope of transferred competence "in certain matters" under Article 90 of the Constitution, the CT explained that this notion should be interpreted as:

"a prohibition on the transfer of all competences of a given state organ, on the transfer of competences for all matters within a certain field and also as a prohibition on the transfer of competences determining the substantial scope of the activity of a given state organ. It is thus necessary not only to determine a field with precision, but also the scope of the transferred competences."[45]

The reasoning of the CT is in line with the judgments of the German Federal Constitutional Court[46] and the Danish Supreme Court[47] to which the Tribunal actually referred. However, it seems that the CT went even further and too far. The CT's understanding of the transfer of competences in certain matters can be easily used to block the ratification of a treaty as neither a precise determination (as it can be understood, in the treaty itself) of fields nor a precise determination of the scope of transferred competence is possible. It must be noted that the judgment of the Danish Supreme Court is different. The Danish Court was clear that a "precise" determination of either fields or the scope of competence is not possible:

"Constitutional limitation on transfer of powers 'in limits settled by law' (§ 20(1) of the Constitution) means both limitation in the fields in which the transfer takes place and also limitation of its scope. The cited formula means the requirement of positive delimitation of the transferred powers with reference to the fields, in which the competence is transferred, and also with reference to the substance of the transferred competence. The fields in which the transfer of the competence takes place can be described in general. In the determination of the scope of the transferred competence it is not necessary to be so precise as to eliminate all discrepancies in the interpretation. Transferred competence can also be determined by reference to the provisions of the TEC. In light of § 20 of the Constitution it is impermissible for the international organisation to determine its competence by itself."[48]

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[45] Para 4.1.

[46] Judgment of 12 October 1993, 2BvR 2134, 2159/92 Maastricht.

[47] Judgment of the Supreme Court of 6 April 1998, I 361/1997 Carlsen v. Denmark Prime Minister; See: *Sądy konstytucyjne państw Unii Europejskiej a prawo wspólnotowe* [Constitutional Courts of the European Union States and Community Law], publications of the CT, October 2003.

[48] *Ibid.*, thesis 2 of the judgment.

Similarly, the Federal Constitutional Court in the Maastricht Treaty case held:

"38 BL[49] (*i.e. Article 38 of the Basic Law* – explanation by A.W.) could be infringed if the legal norm – 'opening' the German legal order towards the direct effectiveness and application of the European Community law as supranational organisations – did not meet the requirement of being precise enough as far as the execution of sovereign powers transferred to these organisations or as far as the integration programme performed by them is concerned. Since the content of the treaty must still be negotiated with other states – the parties to this treaty, the requirements – resulting from the constitutional principle of parliamentary enactment of legislation, which apply to German statutes – cannot be referred to the issues of how well determined and how precise the treaty provisions are. The crucial point is that the membership of the Federal Republic of Germany and the obligations and rights resulting from this membership – including the ability of the Communities to produce direct and binding effects in internal relations – are described in the TEU in a manner predictable for the German legislator, and in the statute granting the consent for ratification they are regulated by him in a way sufficiently meeting the requirement of precision."[50]

Further on, the Constitutional Tribunal emphasised that the transfer of competences in "certain matters" should clearly remain "in compliance with the Constitution," and required that the transfer does not infringe "the core" of rights hence enabling, in accordance with the preamble to the Constitution, the sovereign and democratic determination of fate and future of the Republic of Poland.[51] One may, however, doubt whether there is any "core" of sovereignty and whether it is possible to determine it.

4. The EC/EU as International or Supranational Organisation

In the judgment of 11 May 2005 the Tribunal expressed its opinion also on the nature of the EC/EU.[52] It observed that the EU is now an international organisation, and that "according to international case law the legal personality is attributed to the European Communities. The personality of the European Union is not as yet fully determined in every aspect." Disregarding the fact that the CT has not drawn attention to any special judgments of international courts ("in the doctrine" would be more appropriate than "case law"), and not going into broader discussion, the ruling of the CT is justified; in rejecting the allegation of the applicants[53] and finding that the

[49] Considering Article 79(3) (the so called perpetual clause – *Ewigkeitsklausel*) in connection with Article 20 and Article 1 of the Basic Law, the changes in its content which may result in curtailment (*Berührung*) of the principles of democracy (including legitimisation via elections), federalism (including essential contribution of federal states in enactment of law), separation of powers and social state or (not mentioned by the Federal Constitutional Court in this context) the principles of inviolability of human dignity, protection of "inviolable and inalienable rights of an individual as the basis of every community, of peace and justice in the world" and the principle of fundamental rights binding directly upon public authorities.

[50] Quoted in: *Sądy konstytucyjne państw* ... [Constitutional Courts ...], *op.cit.*, thesis 6.

[51] Para 8.4.

[52] Para 8.5

[53] The allegations of the applicants concerned the transfer of competences to organisations not included in Article 90(1) by virtue of the challenged provisions of the Accession Treaty and the Act of Accession and the acceptance of the primacy of the law enacted by an organisation not included in Article 91(3) of the Constitution over the national law.

"constitutional criteria for organisations referred to in Article 90(1) and Article 91(3) of the Constitution, currently are fulfilled only by the Communities and the European Union."[54]

On the other hand, the CT clearly rejected the view that the EC/EU is a supranational organisation, assuming that an international organisation and a supranational organisation are disjunctive[55] notions. Even more so it seems that the CT based this conclusion on the etymological meaning of the notion "supranational", just as the applicants. In this approach, as one may think, supranational means "being above states."[56] The CT rejected the allegation that the European Union and the European Communities are supranational organisations, and the argument in favour of this finding includes the fact that the Accession Treaty is concluded between states, and these states having become a member still remain sovereign parties to the treaties establishing the European Communities and the Treaty on the European Union (they are the Masters of the treaties, hence the EC/EU is an organisation, which is not "above" the Member States):

"Moreover, these states, on their own and in accordance with their constitutions, ratify Treaties and hold the right for withdrawal from the Treaty following the procedures and requirements of the Vienna Convention on the Law of Treaties of 23 May 1969. No normative act against which an appeal has been submitted refers to the European Union as 'supranational organisation.'

There are two comments to be made here. The first concerns the application of the Vienna Convention. While it might be a minor issue, the participants of the proceedings before the Tribunal referred to it several times. Therefore, it must be noticed that the CT invoked the Vienna Convention without the required precision since it is not correct that the Member States "hold" the right to renounce the treaties following "the procedures and requirements of the Vienna Convention on the Law of Treaties." This is not true, as some Member States – France, Ireland and Malta – are not even parties to the Vienna Convention.[57] Therefore, the Vienna Convention may apply to relations between the parties to e.g. the Accession Treaty only as a pattern to be followed or an expression of customary law. A number of factors can be found in favour of the customary nature of various norms enshrined in the Vienna Convention. However, the prevailing opinion is that the provisions providing for the procedure of renouncing the treaty do not reflect customary law.

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[54] Para 8.5.

[55] *Ibid.*

[56] This notion can be understood in yet another way. If the nation is to be understood as an ethnic community made up of individuals which is not a legal body, then the organisation "above the nations" must be able to exert its power directly in relation to individuals, disregarding their appropriate authorities. Such an organisation has a significant feature: its acts are applied directly in relation to individuals, and without any intervention of a national legislator. Compare: F. Capotorti: "Supranational Organizations," in: R. Bernhardt: *Encyclopedia of Public International Law*, North Holland 2000, vol. 4, pp. 741–742.

[57] Portugal e.g. is a party to the Convention only since 2004.

The other comment concerns the notion of a supranational organisation. Contrary to the Court ruling, the notion of a supranational organisation is well established in international law (it was applied by German Federal Constitutional Court in the Maastricht Treaty case, quoted above). The CT is only right that a supranational organisation is not a legal but a descriptive term. It might be a pity that once again the CT ignored the doctrinal contribution of the Community law and international law, this time to describe the unique features of a "new" legal order.

5. Conclusion

In its judgments, the CT did not take into account any specific features of EC/EU law. The features actually identified by the CT do not determine the nature of the founding Treaties or the Community law (or the EU law) and they are common to many other treaties. The result is the CT did not treat the Accession Treaty and TEC or TEU differently. Its findings are general and they can be applied to all treaties. The CT approach towards EC/EU law is thus cautious, however, the CT did not entirely reject the application of the EU/EC law or any other treaty in the Polish legal order in the case of a conflict with the Constitution. In certain cases, it is possible and there is, according to the CT, a basis in the Constitution itself. However, it seems that the mechanism specified by the CT which could be applied in such cases may not satisfy the stringent requirement of primacy of application of the EC law. Thus, the solution proposed by the CT can be only provisional.

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Humanitarian Intervention: Threat to International Order, Moral Imperative, or Customary Norm *in statu nascendi*?[1]

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1.

In recent years, we have observed a worldwide debate on humanitarian intervention. This phenomenon is closely related to some international and very tragic events: Gulf War, Somalia, Rwanda, Bosnia, Haiti, Sierra Leone, Kosovo, East Timor, Afghanistan, Iraq, etc. The concept of humanitarian intervention has become an important moral, political and legal (quasi-legal?, illegal?) instrument in the international campaign for the protection of human rights. However, this institution is not only one of the most controversial issues in public international law, but has also some important philosophical aspects, of which this article should explore some. We can compare the legal, political and ethical aspects of humanitarian intervention with similar problems that accompany other legal institutions, political problems and philosophical topics: e.g. just or unjust war, universality or particularity of human rights, impunity or universal jurisdiction, legality or legitimacy, argument from justice or injustice and – last but not least – legal positivism or natural law on international level.

In the worldwide debate about human rights two trends were predominant in last years: the question of the universality of human rights and freedoms of an individual and the issue of legality and legitimation of humanitarian intervention.[2] From the point of view of both philosophy of law in general, and dogmatics of international law in particular, these issues are of distinct nature but, on the other hand, their common points cannot be ignored.[3] To make it simple, it can be said that advocates of universality of human rights tend to be *ex definitione* more in favour of humanitarian

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[1] The inspiration for this title was a review article of N. J. W h e e l e r: "Humanitarian intervention after Kosovo: emergent norm, moral duty or the coming anarchy?," *International Affairs* 77 (2001), pp. 113–128.

[2] P.R. B a e h r: "Controversies in the Current International Human Rights Debate," *Human Rights Working Papers* (2000), No 3, http://www.du.edu/humanrights/workingpapers/index.html.

[3] F.K. A b i e w: *The Evolution of the Doctrine of Humanitarian Intervention*, The Hague-Boston-London 1999, pp. 83–90. He draws attention to the connection between the universality of human rights and humanitarian intervention.

intervention than their opponents who stand for cultural pluralism. And conversely – protagonists of humanitarian intervention *ex definitione* seek arguments for its legality and legitimation on the basis of moral universality rather than on the grounds of relativism.

Heated debate over the issue of universality of human rights started in the world science in the 1980s and reached its culminating point in mid-1990s especially during Human Rights Conference in Vienna in 1993, and mainly in connection with the so-called Asian values. The issue of the human rights character has dominated over most present-day intellectual debates i.e. in political philosophy – between liberalism and communitarism, in law philosophy – between positivism and non-positivism, in ethics – between universality and relativism. These debates have included almost all eminent ethicists, philosophers, political analysts, lawyers and sociologists – R. Alexy, Ph. Alston, N. Chomsky, J. Donnely, F. Fukuyama, J. Galtung, A. Gutman, J. Habermas, R. Howard, O. Hoffe, S. Huntington, A. McIntyre, W. Kersting, M. Nussbaum, J. Rawls, R. Rorty, M. Sandel, A. Sen, Ch. Taylor or M. Waltzer, to name only a few of them, and only to give an example. It is characteristic that most of these authorities[4] have recently expressed their opinion also on humanitarian intervention, which confirms its relation with the issue of universality of human rights. The above-mentioned names bespeak, not only formally, that the problem is of great importance, and the way it is solved may have far-reaching practical consequences. There is one more characteristic of the exemplary enumeration – I have only mentioned thinkers representing the Western culture (or at least related with it), while the debate on the universality of human rights is an inter-civilisation debate and scientists from the Islamic world, Sub-Saharan Africa or Far East take active part in it. This fact makes the problem even more complex as there is no unanimity concerning the approach or even acceptance of universality of human rights on the intercultural level but also within seemingly homogenic Western thinking. According to J. Habermas, this intellectual debate is not only on inter-civilisation level but it is also the debate of "the West with itself."[5]

In the last few years this worldwide debate has lost its initial impetus[6] which was connected with the September 11 terrorist strikes and the declaration of war on terrorism. Subtle philosophical pondering on either universality or relativism of human

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[4] Compare for example: J. Donnely: "Genocide and Humanitarian Intervention," *Journal of Human Rights* 1 (2002), pp. 93–109; J. Habermas: "Bestialität und Humanität. Ein Krieg an der Grenze zwischen Recht und Moral," in: R. Merkel: *Der Kosovo-Krieg und das Völkerrecht*, Frankfurt am Main 2000, pp. 51–65; O. Hoffe: "Humanitare Intervention?," in: D.S. Lutz: *Der Kosovo-Krieg. Rechtliche und rechtsethische Aspekte*, Baden-Baden 1999/2000, pp. 233–236; W. Kersting: *Politik und Recht*, Weilerwist 2000, pp. 237–272; M. Waltzer: "The Argument about Humanitarian Intervention," *Dissent*, Winter 2002, pp. 29–37.

[5] J. Habermas: "Zur Legitimation durch Menschenrechte," in: H. Brunkhorst, P. Niesen: *Das Recht der Republik*, Frankfurt am Main 1999, p. 386.

[6] In spite of this, the issue of universality of human rights is in the focus of interest of science – of recent works on the subject especially extensive monograph of E. Brems: *Human Rights: Universality and Diversity*, The Hague-Boston-London 2001.

rights have been eclipsed by the question of legality and legitimation of humanitarian intervention undertaken with the aim of stopping massive human rights violations. In literature, the question of relation between the war on terrorism and humanitarian intervention is not unequivocal. On the one hand, there are attempts to draw a parallel between preventive war and humanitarian intervention on the grounds of the tradition of so-called just war; on the other, however, more and more often the question arises if the war on terrorism means the end of an era of "pure" humanitarian intervention as humanitarian motives are superseded with strategic national and international security targets (*vide*: Afghanistan, Iraq).[7]

Although the debate on humanitarian intervention started earlier than arguments about universality, it can be dated back to the 1970s[8] in connection with several armed attacks at that time (i.e. especially in Eastern Pakistan/Bangladesh), but in both cases it evolved into two different directions. After 1945, particularly after passing the Universal Human Rights Declaration in 1948, the universal character of basic rights and freedoms of individuals was accepted *a priori* and the debate in world literature of the 1980–1990s aimed at impairing, or at least relativing, the postulates of universality. In the case of the debate over humanitarian intervention we have quite a different situation. Regulation of Art. 2(7) of the UN Charter initially excluded, also to some extent *a priori*, the possibility of applying humanitarian intervention as a means of solving conflicts both international, and, all the more, internal. The only two exceptions concerning the threat or use of force in international relations are either cases of self-defence or actions which enjoyed UN Security Council authorisation according to procedure resulting from Chapter VII of the UN Charter in case of threat to world peace and security. UN Security Council authorisation following the procedure of declaration *Uniting for Peace* might be recognised as the third exception. These exceptions, however, did not initially assume the use of force with regard to humanitarian intervention in the present meaning of the institution, at least due to fairly wide interpretation of the so-called internal authority of state resulting from Article 2(7) of the UN Charter. International practice, however, went in other direction – in the 1960s and 1970s[9] cases of intervention in internal conflicts took place and they can be recognised as humanitarian interventions from today's perspective and standpoint, even if interveners referred to self-defence aspect rather

[7] Compare: G.R. L u c a s: "The Role of „International Community" in Just War Tradition – confronting the Challenges of Humanitarian Intervention and Preemptive War," *Journal of Military Ethics* 2 (2003), pp. 122–144 and S u n g - h a n K i m: "The End of Humanitarian Intervention?," *Orbis – A Journal of World Affairs* 47 (2003), pp. 721–736.

[8] Of the works of the time especially R.B. Lillich: *Humanitarian Intervention and the United Nations*, Charlottesville: University Press of Virginia 1973; some time later, the classic work was published as edited by the prominent representative of so-called English school of international relations H. B u l l: *Intervention in World Politics*, Clarendon Press, Oxford 1984.

[9] F.K. A b i e w, *op. cit.*, pp. 102–131; S. C h e s t e r m a n: *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press 2002, pp. 63–83; S. M u r p h y: *Humanitarian Intervention. The United Nations in an Evolving World Order*, University of Pennsylvania Press, Philadelphia 1996, pp. 83–115; N. W h e e l e r: *Saving Strangers. Humanitarian Intervention in International Society*, Oxford University Press 2002, pp. 55–136.

than to humanitarian reasons[10] (i.e. India's intervention in East Pakistan, or to some extent Tanzania's intervention in Uganda and Vietnam's in Cambodia). As the system of international protection of human rights has been evolving, the approach to the internal competence of state in the interpretation of the above-quoted rule of the UN Charter changed. The process intensified in the 1990s after the fall of the communist system and the end of Cold War,[11] and at the same time the humanitarian motive of intervention started appearing more often. From this point of view, NATO's intervention in Kosovo was a turning point – both legality and legitimation of this action have been the subject of debates until the present day.[12] The conclusion to the report of the International Commission on Kosovo is the best example for that. It reads: "The Commission acknowledges that the NATO's military intervention was illegal, though legitimate". And further it goes on to state: "The lesson from NATO's intervention in Kosovo shows that there is a need to bridge a gap between legality and legitimation".[13] The conflict between legality and legitimation is not a new question for lawyers and it has always been the main subject of philosophical and juridical debates. It was defined, in a very explicit way, by G. Radbruch in his conception of an antimony in three elements of the idea of law: security, purposefulness and justice.[14] Never before has it been so intense in theory and practice of international law as it is now because never before has the dogma of unlimited state sovereignty in international relations been questioned on the strength of the arguments ensuing from the system of international human rights protection. It obviously does not mean that the golden mean for solving a potential conflict between state sovereignty and international legal commitments concerning the protection of human rights has been found – merely, the importance of the problem has been recognised.[15] It has been apparent in the attitude to the issue of UN Secretary-General in recent years. In 1991, J.P. de Cuellar stated that "the rule of not interfering in states internal jurisdiction cannot

[10] An interesting attempt of considering the problem of the use of force in international relations from the point of view of self-defence was made recently by T.M. Franck. Within the accepted classification the author recognises, among others, also the cases of the so-called „purely humanitarian intervention" as for instance interventions in Bangladesh, Uganda, Cambodia, Central Africa, Iraq (1991), Sierra Leone and Kosovo – T.M. Franck: *Recourse to Force. State Action Against Threats and Armed Attacks*, Cambridge University Press 2002, pp. 135–173.

[11] F.K. Abiew, *op. cit.*, pp. 137–222; S. Chesterman, *op. cit.*, pp. 127–162; S. Murphy, *op. cit.*, pp. 145–281; N.J. Wheeler, *op. cit.*, pp. 139–284.

[12] Compare for example: G. Beestermoller (ed.): *Die Humanitäre Intervention – Imperativ der Menschenrechtsidee? Rechtsethische Reflexionen am Beispiel des Kosovo-Krieges*, Stuttgart 2003; J.L. Holzgrefe, R.O. Keohane (ed.): *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, Cambridge University Press 2003.

[13] The Independent International Commission on Kosovo, *The Kosovo Report. Conflict, International Response, Lessons Learned*, Oxford University Press 2000, pp. 4 and 10.

[14] The fact that the conception comes from Radbruch is not surprising as the problem of legality and legitimation was widely discussed in German legal science during the Weimar Republic – cf. more recent D. Dyzenhaus: *Legality and Legitimacy – Carl Schmitt, Hans Keisen, and Hermann Heller in Weimar*, Oxford University Press 1999 and A.J. Jacobson, B. Schlink (ed.): *Weimar. Jurisprudence of Crisis*, University of California Press 2000.

[15] Compare for example: G.M. Lyons, M. Mastanduno (ed.): *Beyond Westphalia? State Sovereignty and International Intervention*, The Johns Hopkins University Press, Baltimore London 1995.

be a protection barrier behind which human rights could be violated on a massive or systematic scale with impunity".[16] His successor, Boutros Ghali, in *Agenda for Peace* of 1992[17] stressed that states sovereignty and their territorial integrity is still the basis of international relations but at the same time he added: "The time of absolute and exclusive sovereignty has passed". The turning point in the process of recognising the issue was the speech of the present UN Secretary-General, Kofi Annan, of 20 September 1999 to UN General Assembly: "The state sovereignty is being re-defined by globalisation and international co-operation powers. It is widely understood that the state should serve its citizens and not vice versa".[18]

G. Radbruch mentioned above suggested that the potential conflict between legal security, purposefulness and justice should be solved *in favorem* the first one unless injustice of legal norm is to such an unbearable extent that the foul law should be replaced by the rule of justice itself. As a matter of fact, this can be applied to cases when procedural deficiency resulting from the definition in the UN Charter make the international community remain inactive witnessing massive human rights abuses or even genocide, war crimes and crimes against humanity. The problem of humanitarian intervention is the extreme normative exception, so it may be perceived as a conveyance of the so-called Radbruch formula into international relations.

The war in Kosovo was itself a special case due to the character of military actions and not clear position of the UN Security Council, yet, at the same time, it became a pretext for attempts at reinterpretation of previously existing attitudes concerning both the question of the interdiction on the threat or use of force in international relations (Art. 2(4) of the UN Charter) and the principle of non-intervention in internal affairs of other state (Art. 2(7) of the UN Charter). It also worked as a stimulus to a reflection a on the role and future of the Security Council or even the whole system of United Nations.[19] As a result, since 1999 the number of scientific papers concerning humanitarian intervention has considerably risen and above all there are now more proponents of the institution, although they give various and different reasons

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[16] Quotation of K. A n n a n: "Peacekeeping, military Intervention, and National Sovereignty in Internal Armed Conflict," in: J. M o o r e (ed.): *Hard Choices. Moral Dilemmas in Humanitarian Intervention*, Rowman&Littlefield Publishers, Oxford 1998, p. 58.

[17] *Agenda for Peace. Preventive Diplomacy, Peacemaking and Peacekeeping*, point 17 – http://www.un.org./Docs/SG/agpeace.html.

[18] United Nations Press Release SG/SM/7136/GA/9596 – http://www.un.org./News/Press/docs/1999/19990920.sgsm7136.html.

[19] There have been proposals for reforms of the system made from the point of view of humanitarian intervention, including even the change of the UN Charter – compare for instance M. A y o o b: "Humanitarian Intervention and International Society," *Global Governance – a Review of Multilateralism and International Organization* 7 (2001); see also the debate of various authors on these proposals in *IJHR* 6 (2002), *Forum: Humanitarian Intervention*, p. 79 and especially M. A y o o b: *Humanitarian Intervention and State Sovereignty*, pp. 81–102 and N.J. W h e e l e r, *Decision-making Rules and Procedures for Humanitarian Intervention*, pp. 127–138). On the possibilities and limitations of structural and procedural reform of the UN Security council also in: T.G. W e i s s, "The Illusion of UN Security Council Reform," *The Washington Quarterly* 26 (2003), pp. 147–161.

for their approving attitude to the possibility of military intervention aiming at preventing or ending massive violations of human rights.[20]

The need for the new approach to legality and legitimation of humanitarian intervention was noticed in the mid-1990s of the twentieth century – for example O. Ramsbotham and T. Woodhouse in 1996 made an attempt of "reconceptualisation" of the institution comparing intervention in Uganda with conflicts in Iraq, Bosnia and Somalia.[21] It must be underlined that the quest for more rational than before strategy of solving conflicts between state sovereignty and norms of international human rights protection continues to the present day. In contemporary literature, opinions stressing the necessity for rethinking humanitarian intervention from ethical, political and legal points of view can be noticed more and more often. According to B.D. Lepard it is urgent to work out "the fresh attitude based on ethical foundations of international law".[22] To a certain extent, the Report of the International Commission on Intervention and State Sovereignty (ICISS), created under the aegis of the Canadian government, of 2000 may serve as an example of such attitude. The document explicitly points not only to the urgent need for legal-international definition of humanitarian intervention and conditions for its legality and legitimation and its operational efficacy but also places it on the background of strategies of contemporary international relations. It is very characteristic for the document that its authors suggest replacing the term "humanitarian intervention" with the notion of "responsibility to protect".[23] The problem is not only when, under which conditions and in what way to intervene, but also how to prevent humanitarian crises and how to maintain peace after a military conflict and rebuild democratic, stable social structures and economic infrastructure. The concept of responsibility to protect is threefold: the responsibility to prevent, the responsibility to react and the responsibility to rebuild.[24]

2.

In the abovementioned speech of the 20 September 1999, Kofi Annan suggested that the notion of humanitarian intervention should be understood extremely wide

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[20] In literature, it is clearly seen on the example of the war in Kosovo – extreme attitudes are represented: from the attempts of justification of legality of humanitarian intervention (see: M. Brenfors, M.M. Petersen, "The Legality of Unilateral Humanitarian Intervention – A Defence," *Nordic JIL* 69 (2000), pp. 449–499), to recognising NATO's action as crime against humanity (M. Cohn: "NATO Bombing of Kosovo: Humanitarian Intervention or Crime Against Humanity?," *International Journal for the Semiotics of Law* 15 (2002), pp. 79–106).

[21] O. Ramsbotham, T. Woodhouse: *Humanitarian Intervention in Contemporary Conflict. A reconceptualization*, Polity Press, Cambridge (Mass.) 1996.

[22] B.D. Lepard: *Rethinking Humanitarian Intervention*, Pennsylvania University Press 2002; compare also recently A. Orford: *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law*, Cambridge University Press 2003 – while Lepard approves of such redefined humanitarian intervention, Orford is rather critical in her opinion taking as the starting point intervention in East Timor.

[23] *Report of the International Commission on Intervention and State Sovereignty. The Responsibility to Protect*, Canada, December 2001.

[24] *Ibid.*, pp. 19–46.

and it should cover actions "from the most peaceful to the most forceful". In fact, if the character of such interventions is taken seriously, situations when non-military and "purely" humanitarian methods, such as supply of food, medicines, medical aid were applied, cannot be ignored. From this point of view, intervening subjects can be not only states, but also non-government organisations. We also cannot neglect the situations when the intervention is of military character but it is undertaken at the request of the country in question which is unable to solve its internal serious problems. And last but not least, theory and practice of international law distinguishes two situations: when intervention is aimed at the protection of its own citizens in other state territory, and when it is aimed at the protection of citizens other than its own. In this respect, there has been a reasonable evolution of the institution of humanitarian intervention. While in the nineteenth century practice[25] the former was prevailing, being a cover for colonial and religious motives, present-day interventionism, according to N.J. Wheeler, is aimed mainly at "saving strangers".[26] Throughout recent years, however, the cases of the first type intervention took place (to a certain extent American intervention in Grenada in 1983 or Panama in 1989 could be recognised as such) but in literature they are named as *intervention d'humanite* and they are distinguished from humanitarian intervention *sensu stricto*.[27]

From this standpoint, there is internal semantic inconsistency in the term "humanitarian intervention". If we say intervention – then not humanitarian but military and forced, and if humanitarian – then not intervention but aid. In the doctrine of international law we have a rather opposite trend as a certain paradigm has already been fixed and most authors limit their definitions only to actions of military and forced character, determined by humanitarian motives and aims of intervening state, group of states or international organisation without the permission of the state within whose territory an intervention takes place. There are also two main criteria of division of actions after 1945 which were classified as humanitarian interventions. The first is of chronological character and its turning point is the end of Cold War – in literature, there is a clear distinction between interventions which took place in the 1960s and 1970s (e.g. Congo, Dominican Republic, East Pakistan, Uganda, Cambodia) and those in the 1990s (e.g. Iraq, Somalia, former Yugoslavia Rwanda, Liberia, Haiti). As a result, this classification, though based on the formal time criterion, has very deep political dimension. The second criterion, from the point of view of international law is of much more serious character. In this case, interventions are divided into those which enjoyed UN Security Council authorisation *ex ante* (e.g. Iraq, Rwanda, Somalia) and those which were undertaken without such authorisation (e.g. Kosovo), even if it was tacit (e.g. Central Africa, Tanzania) or clear (e.g. Liberia) *ex post*

[25] On the subject of nineteenth century interventionalism see: W. G r e w e: *Epochen der Völkerrechtsgeschichte*, Baden-Baden 1984, pp. 573–583.

[26] N.J. W h e e l e r, *op. cit.*

[27] R. K o l b: "Note on Humanitarian Intervention," *International Review of the Red Cross* 849 (2003), p. 120.

factum.[28] This classification is, in turn, of formal-legal character and is based on the existence or the lack of a UN Security Council resolution, but it results in material-legal application and interpretation of the UN Charter. It needs to be said that both criteria – of the end of Cold War and of the UN authorisation – in spite of appearances, are closely tied with each other, as the demise of the communist system raised hopes for the end of paralysis of the Security Council in authorising humanitarian interventions.[29] Even if the 1990s, to a certain extent, disappointed these hopes,[30] still the authors of the above-mentioned ICISS Report are right when in conclusion they appeal for making an informal pact allowing superpowers to act *in dubio pro humanitate*, at least in cases of flagrant humanitarian crises which pose a threat to the world peace and security.[31]

It is clearly seen that the issue of humanitarian intervention cannot be treated *per non est*. It also cannot be considered in a selective and one-dimensional way – from the point of view of either ethics, politics or law.[32] It is a phenomenon whose understanding and solving requires taking all three perspectives into consideration.[33] Moreover, on each of these three planes very complicated theoretical and practical problems emerge, and consequently only a holistic approach[34] makes it possible to elaborate a position free of internal contradictions. The issue of humanitarian intervention can be considered only from the standpoint of extremely positivistic interpretation of the UN Charter, particularly Article 2(4) in connection with Article 2(7). In theory of law in general, and in theory of international law in particular, such a position in the past, especially in the context of the evolution of the theory of human rights, that in a sense *ex definitione* is a "non-positivistic" theory which does not have to mean "legal-natural" at the same time. Obviously, the other question is if this "non-positivism" gives us efficacious solution to all ethical, legal and political dilemmas connected with

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[28] Danish Institute of International Affairs: *Humanitarian Intervention. Legal and Political Aspects*, Copenhagen, DUPI 1999, pp. 57–95 – http://www.dupi.dk/fmp4.0/web/en1224.html.

[29] More on the topic see: R.-J. Dupuy (ed.): *The Development of the Role of the Security Council*, Martinus Nijhoff Publishers, Dordrecht-Boston-London 1993.

[30] On the other hand, it must be admitted that in the 1990s there was a considerable increase of Security Council engagement in realisation of the United Nations aims concerning human rights protection resulting from the UN Charter and especially in the context of humanitarian intervention – for more see: B.G. Ramacharan: *The Security Council and the Protection of Human Rights*, The Hague-London-New York 2002; L. Henkin, G.L. Neuman, D.F. Orentlicher, D.W. Leebron (ed.): *Human Rights*, New York 1999, pp. 707–737; Ph. Alston, H.J. Steiner: *International Human Rights in Context*, vol. 2, Oxford University Press 2000, pp. 648–694.

[31] *Report of the International Commission..., op. cit.*, pp. XIII and 75.

[32] Recently, the attention is drawn by authors of works in J.L. Holzgrefe, R.O. Keohane (ed.): *Humanitarian Intervention. Ethical, Legal and Political Dilemmas, op. cit.*

[33] It seems to be necessary to expand the debate to ethical discussion as previous attempts of solving the problem only on political or legal planes have not brought satisfying results – M.J. Smith: "Humanitarian Intervention: An Overview of the Ethical Issues," in: J.H. Rosenthal: *Ethics and International Affairs*, Georgetown University Press, Washington D.C. 1999, p. 279.

[34] In the context of relations between humanitarian intervention and the problem of universality of human rights it is characteristic that a holistic approach is often suggested regarding the latter – compare for example: A. Belden Fields: *Rethinking Human Rights for the New Millennium*, Palgrave MacMillan, New York, esp. pp. 73–99.

humanitarian intervention. The matter is, however, of a different nature. The present debate on humanitarian intervention reflects only a wider tendency in legal science, i.e. withdrawal from traditional legal "passivism" and turning to the position of legal "activism" which meets the present age requirements better. In international law, it means a withdrawal from traditional "statism" with states and only states being in the focus of interest, at the same time passing the subjectivity of individuals over.[35] A legal justification for humanitarian intervention or its absence must have ethical and political foundations. Without ethical legitimation humanitarian intervention may be perceived as a law of the stronger or a new form of colonialism. But also conversely. Without the political legitimation the debate may be reduced to the empty moralism.[36] Otherwise, it is difficult to explain why humanitarian interventions are in the present time selective and why they have not been undertaken in Chechnya or Tibet. The answer to this question is in fact rhetorical.

Humanitarian intervention is connected with the question of values which in normal conditions are not contradictory, but in extreme situations are in conflict with each other. These problems cannot be solved on the grounds of traditional positivism. The war in Kosovo is an example where the division line between different positions concerning the attitude of international law to morality is very clear.[37] The conflict between the value of state sovereignty and the value of international community responsibility for universal system of human rights protection is basic from the point of view of the causes of humanitarian intervention. The problem can be considered *a rebours*, however. It turns out then that from the standpoint of the course and results, humanitarian intervention may mean the conflict between the value of protection of human rights and the value of peace and interdiction on using force in international relations as the foundations of the present-day international community.[38] In any case, employing the abovementioned rhetoric of Radbruch formula transferred to international level, it can be said that in humanitarian intervention we deal with the conflict between security and order versus justice.[39] The problem concerns not only external forms and results of the institution but it is immanently embedded in its essence.

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[35] F. T e s o n: *A Philosophy of International Law*, Westview Press, Colorado 1998, esp. p. 39.

[36] It concerns also the issue of universality of human rights – R.A. F a l k: *Human Rights Horizons. The Pursuit of Justice in Globalizing World*, New York-London 2000, p. 4.

[37] From this point of view for example S. Schieder divides lawyers of international law into „legalists" who are in favour of restrictive interpretation of Article 2(4) of the UN Charter and „moralists" trying to reinterpret the Charter because of the special case of the war in Kosovo, and this moralism can be "minimalist" or "maximalist" depending on what changes are suggested – S. S c h i e d e r: "Pragmatism as a Path towards a Discursive and Open Theory of International Law," *EJIL* 13 (2002), p. 691. This division reflects, however, only the general trend of returning to ethics in contemporary international law and its science – see M. K o s k e n n i e m i: "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," *MLR* 65 (2002), pp. 159–175.

[38] The attention is drawn by N. K i r s c h: "Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo," *EJIL* 13 (2002), pp. 323–336.

[39] Danish Institute of International Affairs: *Humanitarian Intervention. Legal and Political Aspects, op. cit.*, pp. 14–17; see also: N.J. W h e e l e r, *op. cit.*, pp. 11–13.

3.

Taking all abovementioned proviso concerning the notion, types and ethical, political and legal implications of humanitarian intervention into account, it must be said that in contemporary literature of international law definitions of a narrow character are predominant. A typical example may be S.D. Murphy's suggestion: "Humanitarian intervention is the threat or use of force by a state or a group of states or an international organisation against the other state aiming at protecting its citizens from massive violations of internationally recognised human rights".[40] Similar definition can be found in the report of the Danish Institute of International Affairs of 1999: "For the need of the present report, humanitarian intervention is defined as a coercive action of states with the use of armed forces in other state without the permission of the state government, with or without UN Security Council authorisation aiming at averting or stopping massive human rights or international humanitarian law violations".[41] F.K. Abiew suggests that the term should be understood as "coercive measures applied by a state, a group of states, an international organisation or humanitarian agencies with the aim (or at least one of the main aims) to end massive human rights violations".[42]

Such terminological suggestions are plentiful as contemporary literature on humanitarian intervention is vast.[43] There are very general definitions as, for instance, I. Brownlie's who mentions the threat or use of force aiming at human rights protection.[44] Other authors, such as for example W.D. Verwey, limit the term only to military actions without the authorisation of competent UN organs.[45] It must be admitted that the latter approach has been gaining more and more proponents. It is assumed that at present the main issue is legality and legitimation of so-called unilateral intervention undertaken without UN Security Council authorisation, as so-called collective intervention with formal approval of UN organs is today unquestionable.[46] The review of all possible approaches, however, would be beyond the limits of this paper. I shall concentrate only on the attempt to reconstruct certain *loci communes* characteristic for the phenomenon of humanitarian intervention in present interna-

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[40] S. Murphy, *op. cit.*, p. 11.

[41] Danish Institute of International Affairs, *op. cit.*, p. 11.

[42] F.K. Abiew, *op. cit.*, p. 18.

[43] See the extensive bibliography in Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty: *The Responsibility to Protect*, Canada, December 2001, pp. 227–336.

[44] I. Brownlie: "Humanitarian Intervention," in: J.N. Moore (ed.): *Law and Civil War in the Modern World*, Baltimore, Johns Hopkins University Press 1974, p. 217 – quoted after F.K. Abiew, *op. cit.*, p. 18.

[45] W.D. Verwey: "Legality of Humanitarian Intervention after the Cold War," in: E. Ferris (ed.): *The Challenge to Intervene: A New Role of the United Nations?*, Life and Peace Institute, Uppsala 1992, p. 114 – quoted after F.K. Abiew, *op. cit.*, pp. 12–18.

[46] M. Brenfors, M.M. Petersen: *The Legality of Unilateral Humanitarian Intervention – A Defence*, *op. cit.*, p. 450 – and in fact similar M. Wellhausen: *Humanitäre Intervention. Probleme der Anerkennung des Rechtsinstituts unter besonderer Berücksichtigung des Kosovo-Konflikts*, Baden-Baden 2002, p. 47 and M. Ortega: *Military Intervention and the European Union*, Institute for Security Studies Western European Union, Paris 2001, Chaillot Paper No 45, pp. 5–17.

tional relations, as, despite some differences concerning details among individual authors, it is possible to establish a common core of the suggestions. It may be reduced to the following five elements.[47]

First, humanitarian intervention means the actual use of force. Some authors add also the threat of using force but it is not a universally accepted position. In fact, the question is if the mere threat of using force may be classified as the actual intervention or it is in the limits of widely understood diplomatic means. In the above-accepted meaning of the term, humanitarian intervention does not cover the action not accompanied by military force and which is confined exclusively to undertaking action with aims and methods purely humanitarian, especially if it is realised by non-government organisations (NGOs). In the last case, we should talk about humanitarian aid rather than humanitarian intervention. In the first, however, we deal with the use of force or, at least, as some claim with the threat of force.

Second, although non-government organisations play an important role during humanitarian intervention their role in relation to intervening subject has a subsidiary character. The subject may be an international organisation, a state, or a group of states.

Third, the cause of intervention are massive internationally recognised human rights violations in a state within whose borders intervention takes place. This is a quantity criterion as situation should reach a state defined as humanitarian disaster (widespread deprivations of internationally recognised human rights).

Fourth, the basic aim and motive of actions undertaken by intervening state is to halt such violations. It is extremely rarely, however, that interventions do not involve other political or economic interests of the intervening state. The point is that humanitarian cause should be the primary cause (primarily).

Fifth, in the case of humanitarian intervention the aim is to protect the nationals of a target state. It may happen, however, that among protected subjects are citizens of the intervening state.

4.

Such formulated definition implies conditions of permissibility of humanitarian intervention. In the literature of the subject, various criteria of applying humanitarian intervention are given. According to N.J. Wheeler,[48] permissibility conditions i.e. legality and legitimation of humanitarian intervention are given in four points: just cause which the author suggests calling supreme humanitarian emergency; last resort; requirement of proportionality; likelihood of positive humanitarian outcome. C.A. Coady[49] supplements the list with defining the right authority to undertake humanitarian intervention and authors of the abovementioned ICISS Report add the

[47] And also for instance: S. Murphy, *op. cit.*, pp. 12–18.

[48] N.J. Wheeler, *op. cit.*, p. 33.

[49] C.A.J. Coady: *The Ethics of Armed Humanitarian Intervention,* United States Institute of Peace, Washington 2002, pp. 24–31.

right intention to it.[50] In this way, we have five objective criteria (objective cause, exploration of other possible methods, proportionality of the applied measures, probability of efficiency, humanitarian intentions) and above them a subjective criterion (right authority if objective criteria are met). In connection with the latter there comes forward the widely argued in literature issue of right, or even moral (legal?) duty of humanitarian intervention.[51]

In this context, the most controversial question is, of course, about the subject authorised for humanitarian intervention if the substantial premise is met. If it is to be the subject authorised in this way or another by UN organs then what is the pretext for humanitarian intervention for, when the foundation could be the threat for world peace and security? If, in turn, it may be a subject acting without such authorisation and not in self-defence then how, on the grounds of the UN Charter, can legality of such military action be justified? And how does it relate to duties resulting from the system of international human rights protection and resulting in *erga omnes*? It can be argued, following the ICISS Report, that the best solution is to adhere to the model of collective security formulated in the UN Charter. But what if the system is paralysed, as it was in the past, by unfounded, from the moral point of view, use of veto by a permanent member of the Security Council? And also vice versa – who can guarantee that this bypassing the UN system due to the political paralysis of UN basic organs will be in practice not more than a form of *pax americana*? This objection is often raised with regard to actions of NATO in Kosovo and also to the war in Iraq, although the latter can hardly be recognised as an example of classic humanitarian intervention. The fact that Soviet interventions in Hungary, Czechoslovakia or Afghanistan were once considered as an indication of *pax sovietica* augments the ambivalence of the case.[52] On the other hand, however, military interventions of USSR in Hungary in 1956 or in Czechoslovakia in 1968 and NATO's action in Kosovo in 1999 can hardly be put on the same plane.

Such questions and doubts are innumerable. At the same time, it is difficult to predict in which direction international law will evolve in the future – will it return to restrictive interpretation of existing norms,[53] will it be changing of the UN Charter, establishing the new customary norm of law,[54] reinterpretation of the UN Charter or creating a parallel system "bypassing" its regulations,[55] treating each case *ad casum* in categories of extreme exception, sometimes even at cost of its legality?[56] Today,

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[50] *Report of the International Commission*, *op. cit.*, p. XII.

[51] C.A.J. Coady, *op. cit.*, p. 25.

[52] Ch. Gray: *International Law and the Use of Force,* Oxford University Press 2000, p. 62.

[53] *Ibid.*, *passim.*

[54] A. d'Amato: "There is No Norm of Intervention or Non-Intervention in International Law," *International Legal Theory* 7 (2001).

[55] J.L. Holzgrefe, R.O. Keohane, *op. cit.*, *passim.*

[56] B. Simma: "NATO, the UN and the Use of Force: Legal Aspects," *EJIL* 10 (1999), pp. 1–22; also commentary by A. Cassese: "Ex iniuria ius oritur; Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?," *ibid.*, pp. 23–20 and recently M. Byrnes, S. Chesterman: "Changing the Rules about the Rules? Unilateral Humanitarian Intervention and the Future of International Law," in: J.L. Holzgrefe, R.O. Keohane, *op. cit.*, pp. 177–203.

each of these solutions, may be excluding the latter, seems to be both controversial and doubtful when it concerns possibilities and chances of its practical realisation.

Defining objective rationale of humanitarian intervention seems to be easier, although it also has its theoretical and practical difficulties. Just cause refers to the theory of just war (*bellum justum*),[57] but at the same time it is distinct from it as it is limited to the problem of human rights protection against their massive violations. Of course, there raise difficulties concerning the "massive" criterion, but in this case such terms as genocide, crimes against humanity or war crimes, already defined in international law may be helpful. Obviously, not every case of human rights violation may lead to humanitarian intervention,[58] only those which result in humanitarian crisis on a disastrous scale.

Similar difficulties may accompany other substantial permissibility conditions of the discussed institution. It is best seen on the example of NATO's intervention in Kosovo. Even the proponents of the intervention admit that, on the one hand, the requirement of proportionality may be impaired as bombings were directed not only at military targets but they caused many casualties among civilians and destruction of both natural environment and economic infrastructure, and on the other hand, the principle of the last resort may be questioned as it is still not clear if all diplomatic means and procedures provided in the UN Charter had been explored. Doubts concerning other permissibility conditions of humanitarian intervention i.e. right intention and positive humanitarian outcome have been discussed earlier in the paper.

5.

As it was mentioned above, the issue of humanitarian intervention is very complex not only from the ethical and political but also (and possibly particularly) from the legal point of view. This cannot mean, however, that we should give up attempts to solve its various aspects also on juridical plane. According to the authors of the above-quoted report of Danish Institute of International Affairs,[59] there are four strategies towards the issue of humanitarian intervention based on the existing international law:[60]

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[57] M. Fixdal, D. Smith: "Humanitarian Intervention and Just War," *Mershon International Studies Review* 42 (1998), pp. 283–312 – for more see the classic M. Waltzer's work: *Just and Unjust Wars: A Moral Argument with Historical Illustrations,* 3rd edition, London 2000.

[58] For example, one of the most agitating problems for the public opinion has been female genital mutilation in some cultures. It is not, however, the reason for humanitarian military intervention but for activities of non-government organisations. A. Treueblood: "Female Genitalian Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory," *Denver JILP* 28 (2000), p. 464.

[59] Danish Institute of International Affairs, *op. cit.*, pp. 27 and 112.

[60] J.E. Rytter: "Humanitarian Intervention without Security Council: From San Francisco to Kosovo – and Beyond," *Nordic JIL* 70 (2001), pp. 144–151, points to three solutions: maintaining of the existing *status quo* and exact interpretation of the UN Charter; development of the new doctrine of humanitarian intervention without UN Security Council either of subsidiary or competitive character in relation to the present competence of this organ; adoption of *ad hoc* strategy recognising humanitarian intervention as an emergency exit justified either by necessity or by moral norms.

1. Maintaining the present political-legal *status quo* on the grounds of the UN Charter and recognition of permissibility of humanitarian intervention only on the base of the UN Security Council authorisation after the fulfilment of certain material-legal conditions (*the status quo strategy*);

2. Recognising humanitarian intervention as an "emergency exit" from international law when the UN Security Council does not react due to a blockade of the decision-making process (*the ad hoc strategy*);

3. Introduction of subsidiary law to humanitarian intervention in the treaty or customary course outside the system of the Security Council (*the exception strategy*);

4. Introduction of general law to humanitarian intervention in the treaty or customary course (*the general right strategy*).

It is seen *prima facie* that some of the abovementioned strategies may in practice be faced with difficulties in realisation. First of them, the *status quo* strategy, seems to be too conservative from the point of view of the creation of the new paradigm of sovereignty in international relations, not to mention duties *erga omnes* resulting from international human rights protection. The last, in turn, introducing the general right to humanitarian intervention would be, on the one hand "backwardness" of progress of international law and reversion to the *ius ad bellum* conception, on the other hand, it would pose a threat to international order and collective security. The future seems to be placed somewhere in between the strategies of "illegal extreme exception" and "subsidiary norm of international law".

This position is also acknowledged in recent works of some specialists of international law. It must be stressed that proponents of humanitarian intervention are faced with much more difficult task than their opponents critisisng the institution, particularly its functioning outside the UN system. For the latter it is enough to adduce UN Charter regulations, whereas the former have to refer to rather sublime, and at times even breakneck theoretic-legal constructions. A very interesting specification on humanitarian intervention proponents views has recently been compiled by A.Buchanan.[61] According to the author, theoretical justification of legality (illegality) and legitimation of humanitarian intervention can be considered from three basic angles. The first justification is based on reference to extralegal norms – even if humanitarian intervention is illegal because it is undertaken without UN Security Council authorisation, it is justified by moral necessity (Simple Moral Necessity Justification). Such approach is difficult to be accepted by lawyers, still it is consistent with the above-described strategy of defining humanitarian intervention as an, though illegal, but the only "emergency exit". Hence, some lawyers of international law, such as F.R. Teson,[62] seek not only legitimation but also legalisation of humanitarian intervention using moral principles and arguments. This position is defined

[61] A. B u c h a n a n: "Reforming the International Law of Humanitarian Intervention," in: J.L. H o l z g r e f e, R.O. K e o h a n e, *op. cit.*, pp. 130–173.

[62] F.R. T e s o n: "The Liberal Case for Humanitarian Intervention," in: *ibid.*, pp. 93–129; compare also of this author *Humanitarian Intervention. An Inquiry into Law and Morality*, 2nd edition, Transnational Publishers, Irvington-Hudson 1997.

by Buchanan with a seemingly shocking term "lawfulness illegality justification". It is the attempt to find a solution according to the rule of law in general. Even if intervention undertaken without UN Security Council authorisation violates norms (e.g. Article 2(4) of the UN Charter), it is justified by core values of international law, and the UN Charter in particular. From the standpoint of the theory of legal interpretation it is, to some extent, giving less importance to the textual interpretation and advancing to the level of systematic interpretation. It would mean that to the abovementioned strategies *de lege lata* and *de lege ferenda* should be added one more – strategy of systematic reinterpretation of the UN Charter. The third possible approach presented by A. Buchanan is shocking for lawyers. The author defines it as illegal legal reform. According to A. Buchanan, the existing system does not comply with the requirements and challenges of the present age. It concerns specially subjection permissibility of humanitarian intervention to a specific procedure of its authorisation by the UN Security Council. What does A. Buchanan suggest? In his opinion, in some cases it is necessary to break (sic!) the existing law in order to reform the legal system. To support his view, he points to two historic examples: illegal actions of British ships aiming at destroying the slave trade in the nineteenth century and the birth of the Nuremberg legal norms after 1945.[63]

6.

It is clear that humanitarian intervention is accompanied by complex ethical, political and legal problems both on practical and theoretical levels. The complexity of the matter has been long recognised in international law science. In 1895 T.J. Lawrence wrote: "in international law there are only few issues as complicated as those concerning legality of interventions".[64] In this connection, I believe, the debate on its legality and legitimation will continue in the future. This assumption is confirmed by events which took place in the recent years – in Sierra Leone, Liberia or East Timor directly, and in Afghanistan, Iran and international war on terrorism indirectly. To a certain extent, the fact that a very clear-sighted and reasonable ICISS Report was recognised as the official UN document seems to be consoling.[65] It makes further search for solving the problem of legality and legitimation of humanitarian intervention by compromise and in many aspects possible. First real proposals for multilateral convention in the matter have already been made.[66]

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[63] A. Buchanan, *op. cit.*, p. 136.

[64] T.J. Lawrence: *The Principles of International Law*, London 1895, p. 116 – quoted after S. Chesterman, *op. cit.* p. 1.

[65] There have already been first commentaries on the ICISS Report – see for example: "Forum: The International Commission on Intervention and State Sovereignty," *The International Journal of Human Rights* 7 (2003) (including papers of A. Roberts: "Intervention: One Step Forward in the Search for the Impossible;" D. Warner: "Responsibility to Protect and the Limits of Imagination;" R. Thakur: "Reply in Defence of the Responsibility to Protect").

[66] N.C. Crawford: *Argument and Change in World Politics, Ethics, Decolonization and Humanitarian Intervention*, Cambridge University Press 2002, pp. 431–434.

However, after the war in Iraq there arose the following question: "Is anyone interested in humanitarian intervention?".[67] I would like to vote for positive answer and to hope that this position is shared in contemporary literature on international relations, international law and legal philosophy.[68] T. Dunne, writing about new thinking on international society, remembered the following story from Albert Einstein's life : "'Professor Einstein, do you realise that this is the same exam paper that you set last year', said the examination officer. 'Ah', began the reply, 'the questions are the same, it's answer that have changed.'"[69] It fits very much to the moral, legal and political problems of humanitarian intervention as well.

[67] S.N. MacFarlane, C.J. Thieking, T.G. Weiss: "The responsibility to protect: is anyone interested in humanitarian intervention?," *Third World Quarterly* 25 (2004), pp. 977–992.

[68] See for example: "Roundtable: Humanitarian Intervention After 9/11," *International Relations* 19 (2005), pp. 211–250 (with voices of T.J. Farer, D. Archibugi, C. Brown, N.C. Crawford, T.G. Weiss and N.J. Wheeler).

[69] T. Dunne: "New thinking on international society," *British Journal of Politics and International Relations* 3 (2001), p. 223.

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International Responsibility of International Organisations – An Outline

WŁADYSŁAW CZAPLIŃSKI

Codification of international la w of state responsibility on one side, and events connected with the participation of NATO in a forcible resolving of conflicts in the former Yugoslavia posed a new legal problem before the international community: scope, basis and way of implementation of responsibility of international organisations under international law. Up to now, that issue has not been thoroughly discussed by international writing, except some monographs and articles. International Law Commission of the UN during its discussion on the responsibility of states proposed Draft Article 57, excluding the problem of responsibility of international organisations out of the scope of its activities. The UN General Assembly in its Resolution 56/83 of 12 December 2001 subsequently confirmed such approach. However, the ILC decided to include the responsibility of international organisations as a separate topic of its agenda. The work is still in its initial phase, although recently some fundamental questions were addressed (including the responsibility of the member states for the acts of the organisation). The present paper is not aimed as a detailed analysis of the problem, but rather points out the most crucial issues connected with this relatively new and vividly discussed issue.

International (governmental) organisations[1] should be responsible for their acts contrary to international law. The principles governing the responsibility of GO's in general correspond with those concerning the responsibility of states, although opinions can be heard that the former is stricter than the latter. This view is based on the special nature of an international legal personality of the organisations comparing to that of the states. We do not think, however, that the premises of the responsibility of international organisations differ radically from those of the responsibility of states, except the issues discussed below. The premises can be defined as follows: international legal personality of the organisation (including a presumed subjectivity connected with the recognition of a claim in the proceeding under international law), an attribution of a particular act to the organisation (certain doubts can arise with respect to acts *ultra vires*), and a violation of an international obligation binding upon that organisation.[2] As the organisations do not have *locus standi* before

[1] Possible responsibility of NGOs is not governed by public international law.

[2] Responsibility can be imposed for violations of the law governing the activity of the organisation concerned, but also for violations of general international law.

international courts, the dominating majority of claims are resolved on a diplomatic way. For instance, the UN concluded agreements with Congo and Belgium (on 27 November 1961 and 20 February 1965, respectively) in order to resolve disputes connected with damages caused by the ONUC during the Katanga secession war. We cannot, however, exclude other methods of peaceful settlement of disputes.[3]

The legal personality of international organisations implies the responsibility of that organisation, both contractual and delictual. The responsibility can be invoked by the member states of the organisation concerned, by the non-member states and other subjects of international law, and – finally – under specific circumstances, by individuals. International organisations accept their responsibility for acts of their officials, agencies, troops serving under their command, or even states empowered by them to act (so e.g. the responsibility of the UN for damages caused during peacekeeping operations or in the cases of maintaining or restoring of international peace and security).

Practice concerning a contractual responsibility (liability) of the international organisations towards individuals is equally widespread. It is of private legal nature, and it is usually governed by domestic law of the state where a contract concerned has been concluded. That is particularly true in the case of contracts concerning granting of certain services and/or operating an infrastructure to the organisation. In some situations, specific organisations (both universal and regional) elaborated a practice of subjecting of the contracts concluded to the legal system of selected state: UPU and WHO conclude their contracts in accordance with the Swiss law, while ICAO – under the law of Quebec. Finally, the choice of law can depend upon the technical characteristics of the contract. So IBRD and IMF subject loan contracts to the law of the state party to those contracts, to the law of the state in the territory of which a private bank concluding the contract with the organisations mentioned, or finally to the law of the state of New York. The proper law of the contract should be established either on the basis of a clear and manifest provision of the contract (that reflects the will of the parties), or in accordance with the conflict rules.

The delictual responsibility is also subjected – unless a specific legal regulation provides otherwise – to the law of the place where the delict has been committed. This is true i.a. with respect to the violations of international law that occurred during the UN peacekeeping operations. However, in certain situations the responsibility of international organisations can be based upon general principles of law. International legal writing did not precise all the premises of responsibility of international organisations. Usually, it is emphasised that contrary to the responsibility of states which is of objective nature, the responsibility of organisations is based on fault. The problem requires further detailed studies.

As the ILC completed its work on the codification of the international responsibility of states, it is desirable to discuss to what extent rules elaborated in that field

[3] It should be remembered that the legal personality and powers of the UN are unique, and neither scope nor methods of responsibility can be generalised.

can be applicable to the responsibility of international organisations. We should refer here to a solution adopted in the 1986 Vienna Convention on the Law of Treaties concluded between States and International Organisations, which followed *mutatis mutandis* the 1969 Convention on the Law of Treaties. Although the 1986 Convention never entered into force, it can be referred to as a codification of customary law. We shall discuss the current status of ILC codification works below.

Before analysing the issue of responsibility of international organisations under general international law, we would like to present specific provisions adopted by the statutes of certain international organisations, regulating the rules governing their responsibility for financial damages towards other subjects, mostly individuals. Art. 288 of the Treaty establishing the European Community provides for the delictual responsibility of the EC for acts of the organisation itself or acts committed by its officials or agents. The said provision does not precise enforcement rules but is limited to state that the responsibility can be claimed in accordance to general principles of law common for the legal systems of the member states. The ECJ proposed some important limitations of the responsibility of the EC, requiring that the infringement of law should be committed in the framework of official acts of the institutions, the incriminated acts being illegal and causing important material damage to the person concerned. Similarly, Art. 22 of the Annex III to the UN Convention on the Law of the Sea (1982) proclaims a delictual responsibility of the International Seabed Authority for violations of law committed in connection with its functions and activities. In fact, we must admit that similar provisions are relatively rare.

Nearly all international organisations accept claims by their officials against the organisation based on possible infringements of labour law. In the case of the UN and ILO, special administrative tribunals have been established to that aim. On the other hand, the proceedings against international organisations before domestic courts are more difficult, i.a. because of problems connected with the defining of the proper law of the claims. Possible forms of reparation correspond with those adopted in the cases of measures connected with the responsibility of states.

In several cases, the international organisation was able to avoid international responsibility by payments *ex gratia*. Finally, international practice knows also the cases of rejection of responsibility or of factual impossibility to meet financial claims because of bankruptcy (the case of International Tin Council being the most spectacular). However, that case was not decisive for the evaluation of state practice, as the House of Lords decided it on the basis of English law, and not public international law.

The most important open question is the existence and possible scope of responsibility of the member states for violations of international law committed by the international organisation. On the ground of a traditional concept of legal personality of international organisations, as formulated in the 1949 advisory opinion in the reparation for injuries suffered in the service of the UN,[4] member states are separate enti-

[4] ICJ Rep. 1949, p.174.

ties from the organisation. They cannot therefore be held responsible for the acts of the organisation. The conclusion is based upon a general principle of law stemming from the Roman law: *Si quid universitati debetur, singulis non debetur, nec quod debet universitas singuli debent.* The direct application of the principle was denied by international practice, in particular in the award in the *Westland Helicopter Ltd. v. AOI*,[5] but subsequently confirmed by the decisions of the Swiss courts in the appeal proceedings that reversed the award.[6] We should remember, however, that the issue was of contractual (private legal) nature, and not the responsibility under public international law. Doctrinal discussions deal also mostly with the liability of the member states for debts of the organisation. Three positions are represented. According to the first one, the responsibility of states for internationally wrongful acts belongs to fundamental principles of international law, and no state can escape such responsibility by establishing an international organisation. On the other hand, the responsibility of the international organisation under those circumstances is of subsidiary nature.[7] Other writers suggest that the member states cannot be responsible for the acts of the organisation because of their distinct legal personality, unless the founding treaty provides otherwise or some specific criteria for attribution can be found;[8] this view was modified by I. Pernice: according to him, the international organisations should be held responsible for the acts of their organs, while the member states would be liable for their own acts, even if acting upon the order or under control of the organisation.[9] Similarly, C.F. Amerasinghe stated that the principle of subsidiary responsibility of the member states for the acts of the international organisation did not exist under international law, at least not as a general principle of law in the meaning of Art. 38 of the Statute of the ICJ.[10] Finally, the last group of authors took the position that no general rule with that respect can be found, and any decision should be taken *in casu*, taking into account the particular circumstances and all the relevant international legal instruments, including the founding treaties of the organisation.[11]

Our position towards the opinions expressed by the writers is, however, not very favourable. The organisation itself bears full responsibility for activities of their

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[5] ILM 23(1984), pp.1071–1082.

[6] *Ibid.*, 28(1989), pp. 687–692. The main argument in the reasoning of the Federal Tribunal was that the entity signing the arbitration clause should be the only subject obligated to participate in the litigation and possibly to bear a liability.

[7] So G. Hoffmann: "Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden – Haftung aufgrund völkerrechtlicher und bundesrechtlicher Bestimmungen," *NJW* (1988), p. 585 ff.; C.T. Ebenroth, L. Fuhrmann: "Die zivilrechtliche Haftung internationaler Organisationen und ihrer Mitgliedstaaten," *JZ* (1989), p. 211; H.G. Schermers, N.M. Blokker: *International Institutional Law*, Boston-Leiden 2003, paras 1582 ff.

[8] M. Herdegen: *Internationales Wirtschaftsrecht*, München 2003.

[9] I. Pernice: "Die Haftung internationaler Organisationen und ihrer Mitgliedstaaten, dargestellt am "Fall" des internationalen Zinnrates," *AVR* 26 (1988), p. 406 ff.

[10] C.F. Amerasinghe: "Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent," *AJIL* 85 (1991), p. 259 ff.

[11] See in particular: I. Seidl-Hohenveldern: *International Economic Law*, 2nd edition, Dordrecht-Boston-London 1992, p. 182 ff.

organs and auxiliary bodies (on that basis NATO is responsible for the acts of KFOR). International organisations, however, often do not dispose of sufficient measures and abilities to fulfil their tasks and functions; the implementation of those tasks can be conferred to the member states or their agencies left at the disposal of the organisation concerned. According to the dominating opinion in the legal writing, there is no general obligation to overtake the responsibility by the states, because of the separate legal personality referred to above. The states can be held responsible exclusively if the founding treaty does not precise the scope of responsibility and claim procedures; as well as if the states do not effectively control *ultra vires* acts of the organisation concerned. The responsibility of member states is of an auxiliary nature, unless the states make the responsibility of the organisation impossible or excessively difficult. This opinion was formulated by international legal writing and does not find support in practice. Moreover, it weakens the position of international organisations.

On the other hand, some authors emphasise that the state of the seat could be held responsible for the acts of the organisation acting in its territory, and that the member states can be responsible if such responsibility can be attributed to them in accordance with the traditional rules of attribution of the delict to the state. A test of effective control would be decisive. We cannot exclude that those doctrinal opinions are connected with practical difficulties resulting from the implementation of the responsibility of international organisations and with fears that the violations of international law could remain unpunished.

The provision of Art. XXII of the 1972 Convention on the International Liability for Damage caused by Space Objects is exceptional. It empowers the damaged state to claim liability with the member states of the international organisation operating the spaceship if that organisation does not pay indemnity within the precised period. The regulation concerns, however, the liability for acts not forbidden under international law.

An important dispute arose in that context in connection with the air strikes by the NATO armed forces against Yugoslavia (operation *Allied Force* in spring 1999). Problems relating to the bombing of the TV broadcasting station and Chinese Embassy, both in Belgrade, are particularly acute. They result from the fact that neither a key legal instrument concerning the situation in Yugoslavia: UN Security Council Resolution 1244(1999) or any other act clearly empowered the NATO to use force.[12] Important questions include whether the NATO is bound by international legal rules in the field of humanitarian law, and what is customary law in that respect. Which activities of the NATO should give rise to international responsibility: possible illegal use of force without the authorisation of the Security Council, incorrect selection of targets of military attacks, particular decisions on the attack taken by the national commander to the pilots delegated to respective contingents? However, if we accept that NATO is not responsible for the military activities in Yugoslavia, that responsibility must be attributed to all the member states, as the decisions on the

[12] Opinions of learned authors differ on the point of the evaluation of the resolution.

bombings was taken by the statutory organs of the NATO unanimously. ICJ did not reject *a priori* claims brought by Yugoslavia against the NATO member states, except those against Spain and USA rejected because of the clear lack of jurisdiction. On 15 December 2004, the World Court decided that it lacks jurisdiction in cases brought by Serbia-Montenegro against the other NATO states; it took for granted that at the moment of bringing of the claims Serbia was neither member of the UN nor party to the ICJ Statute. Even if the decision is in line with the practice of UN political organs in the 1990s, it proves, however, certain inconsistency of the Court in the light of a refusal to restart the proceeding in the *Genocide Convention* case (judgments of 1993 and 1996).

The responsibility of states for acts taken in order to realise tasks conferred by the international organisation or to achieve goals precised by it constitutes a special case. The practice with that respect comprises in particular the proceedings initiated before the agencies established under the European Convention on Human Rights and Fundamental Freedoms. A consequent and constant practice of the Strasbourg agencies denied any responsibility of the EC for possible violations of the Convention, as the Community was formally not party thereto. Two most characteristic decisions were adopted by the Commission for Human Rights in the cases *CFDT v. EC and the Member States, jointly and separately*, and *Tête v. France*.[13] In the former case, the Commission excluded the responsibility on the basis mentioned above; it also stated that the Member States could not be held responsible for violations of the Convention, as they did not act within their jurisdiction within the meaning of Article 1 of the Convention. In the latter one, although the Commission was not very willing to declare its jurisdiction in the case, it stated nonetheless that no State party to the Convention can adhere to any other organisation in order to escape from the jurisdiction of the Strasbourg organs. Both decisions were subsequently confirmed by their later jurisprudence.

In its later decisions, the Strasbourg Commission and Court modified their position towards the scrutinising of acts of the Member States adopted in order to implement EC law. Also individuals modified their approach and started suing the EC member states for their acts undertaken in order to implement EC law. The European Court of Human Rights discussed the cases, although it was not eager to state the violation of the Convention (except some cases). In the first decision of that kind, *Melchers v. Germany* case,[14] the Commission emphasised that a transfer of powers by the State to another international subject is admissible, however, it cannot lead towards the diminishing of the degree of protection of individuals under the Convention. In the case referred to, the judicial protection granted by the Luxembourg Court would be sufficient. This decision was also confirmed in the subsequent jurisprudence, in particular in the cases of *Waite and Kennedy v. Germany*, and *Beer and Regan v. Germany*.[15]

[13] Cf. Applications: 8030/77, decision of the Commission of 10 July 1978, and 11123/84, decision of 9 December 1987.

[14] Application 13258/87, decision of 9 February 1990.

[15] Applications: 26083/94, and 28934/95, respectively, both judgments of 18 February 1999.

In *Cantoni*,[16] the Court decided to check the French legislation on the commerce of pharmaceuticals from the point of view of its conformity with the Convention, and declared that the powers of the Court cannot be limited by the specific origin of the legislation nor by the lack of the freedom of action by the State resulting from the membership in the EC and the obligations stemming thereof. In *Matthews v. UK*, the Court decided that the refusal by the UK to organise elections to the European Parliament violated Art. 3 of the Protocol No. 1 to the Convention. However, the Strasbourg Judges stressed that the act under control was of international legal nature rather than Community one, and it was not subjected to the control by the ECJ.

Finally, we would mention here a number of cases relating to preliminary questions in the context of the due and just process in the meaning of Article 6 of the Convention. In a series of decisions, both the Commission and subsequently the Court refused to declare the refusal to refer the preliminary questions to the ECJ did not amount to the violation of the European Convention, however, in each case the Court discussed the circumstances, taking into account in particular the possible arbitrary nature of the refusal. In all the cases the Court pointed to the specific decisions of domestic courts, especially to their adherence to the doctrines of *acte clair* and *acte éclairé*. It also stressed that the obligation to refer the preliminary question is not absolute.[17]

It is also perfectly known that the courts of Strasbourg and Luxembourg try to keep a mutual neutrality and to respect their powers, although the interpretation of the Convention by them is not always uniform. We do not intend, however, to discuss that issue in the present paper.

It is not surprising that the current works of the ILC follow the pattern elaborated in the jurisprudence of the Strasbourg Court. In fact, that is the only available practice concerning the issue. Draft Articles of the ILC on the responsibility of international organisations referred also to a practice of other organisations.

The present Draft Articles do not cover all the aspects of the most striking question of the scope of responsibility of the member states for the acts of the organisation. Chapter IV, as adopted in 2005, considered some aspects of the responsibility of states in connection with that of international organisations.[18] Art. 13 deals with the responsibility of the organisation for the acts committed by states (mostly member states, although we cannot exclude the responsibility relations with respect to non-members). The content of the disposition corresponds with Draft Art. 17 on the responsibility of states as adopted by the ILC and endorsed by the UNGA in the Resolution 56/83 of 12 December 2001. The international organisation shall be

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[16] Application 17862/91, judgment of 15 November 1996.

[17] See in particular: *Divagsa v. Spain* (application 20631/92, decision of 12 May 1993), *FS and NS v. France* (application 15669/89, decision of 28 June 1993), *Moosbrugger v. Austria* (application 44861/98, decision of 25 January 2000) *in re Bakker v. Austria* (application 43454/98, decision of 13 June 2002). *Pafitis v. Greece* (case 163/1996/782/983, judgment of 26 February 1998); *Canela Santiago v. Spain* (application 60350/00, decision of 4 October 2001), *Bosphorus v. Ireland* (application 45036/98, judgment of 30 June 2005).

[18] See: UN Doc. A/60/10, p.73 ff.

responsible for the acts of the states exercised under its direction or control if the organisation knows about the circumstances of the internationally wrongful act, and the act would be wrongful if committed by that organisation. The decisive criterion for attribution is the scope of discretion left to the states or international organisations acting. The larger discretion and freedom of action, the less probable the responsibility of the international organisation referred to. The commentary of the ILC refers also to definitions of "control" and "direction" formulated in the commentary to the Draft Articles on state responsibility. Control means domination over the commission of wrongful conduct, and not merely oversight, influence or concern; direction means an actual direction of an operative kind. Similar conditions as mentioned in Art. 13 have been formulated in Draft Art. 14 with respect to coercion. However, the most interesting from our perspective is Art. 15 concerning decisions, recommendations and authorisations addressed to member states and international organisations. The organisation should incur international responsibility if it adopts a decision binding a member State or an international organisation to commit an act that would be internationally wrongful if committed by the former organisation and would circumvent an international obligation of the former organisation. The responsibility will be incurred also if the organisation authorises the state to commit an internationally wrongful act or recommends such act, and the state commits the act in question in reliance on the authorisation or recommendation. These provisions do not preclude any question of state responsibility in connection with the activities of international organisations.

At the present stage, the evaluation of the draft articles 13–15 on the responsibility of the international organisations is premature. However, although the present author agrees with the position of the ILC towards Art. 13 and 15, he is of the opinion that mutual relations between the respective articles are unclear and require further clarification, preferably in the commentary by the ILC. In particular, the notion of coercion can be understood as encompassing the possible threat to use force, economic measures, but also mandatory rules of the organisation. It seems that the coercion implies the application of certain measures towards the third states, and the coercion towards the member states will be exceptional. We are also of the opinion that para 3 of Article 15 should be reformulated in order to draw a distinction between different situations depending of the possible scope of freedom of action of the states concerned. We imagine that the positions of the member states and the third states could be differentiated again. Finally, the relation between para 3 of Art. 15 and Art. 16 should be clarified.

If we are looking at the references by the Special Rapporteur and ILC to the international responsibility of the European Community/Union as formulated in the jurisprudence of the European Court of Justice are representative for the international responsibility. The cases refer mostly to the responsibility towards individuals (including *Dorsch Consult*, and *Royal Olympic Cruises Ltd a.o.*)[19] and not towards

[19] Cf. cases: T-184/95, ECR 1998-II, p.667, and T-201/99, ECR 2000, II-4005.

other subjects of international law. A specific nature of the EU law must also be emphasised. Even if from the point of view of law-making it can be classified as "external" in relation to domestic legal order of the state, it has certain specific features. The differences have been emphasised e.g. by the provisions of the Polish Constitution of 1997 and in the decision of the Polish Constitutional Court of 11 May 2005 in its judgment on the conformity of the Treaty of Accession to the EU with the Polish Constitution.[20] The same is correct with respect to the jurisprudence of the European Court of Human Rights, widely quoted by the Special Rapporteur (and presented above). Furthermore, the said provision of Art. 15 seems to apply also in relations between the organisation and its member states. It seems that this question should be left to the rules governing the organisation, including the possible proper rules of law enforcement, and not by general international law.

We also have some other doubts connected indirectly with the issues of the responsibility international organisations. As we have just mentioned, according to the ILC, the draft articles in general, and Art. 15 in particular, do not preclude any question of state responsibility in connection with the activities of international organisations. It is clear that this issue is governed by the general law on state responsibility, even if the 2001 draft does not address it directly. There is one important point only: whether the state could and should be held responsible for the acts of the organisation, the rules of which[21] oblige the member states to fulfil the orders of the organisation. The classical example would be the decisions of the UN Security Council enacted under Chapter VII of the Charter, which are binding not only upon the member states, but also upon the non-members (if any). There is a generally accepted opinion that the decisions of the UNSC are of political nature, and therefore they are not subjected to any form of control, including the judicial one. However, in this case – according to Article 103 of the Charter – the obligations under Art. 25 of the Charter prevail over international obligations under any other international agreement, including Articles on state responsibility (we leave aside the question of their entry into force). It is clear that the obligations under the Charter enjoy also priority over customary law. The problem of the responsibility of the member states for the implementation of the binding acts enacted by the institutions of the European Community was discussed several times by the Strasbourg Court. We agree with general conclusions adopted by the Court that the scope of responsibility of the member states for the acts of the organisation strictly depends upon the degree of freedom of actions by the states. The more liberal are the rules, the higher probability of the attribution of responsibility to the member states is.

Finally, the problem of the responsibility of the organisation for the acts *ultra vires* should be discussed. In that context, we must remember that an international

[20] Case K 18/04, para 2.2.

[21] According to Art. 4(4), "rules of the organisation" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organisation in accordance with those instruments; and established practice of the organisation.

personality of international organisations is of different nature than the one of the states. If the powers of the organisation are limited to those enumerated in its founding instruments, the acts *ultra vires* are either invalid or not existing. If the latter hypothesis is correct, the organisation cannot be held responsible for such acts.

We can conclude that the rules governing the international responsibility of international governmental organisations are unclear. Practice is limited as to the scope and not uniform. Under those circumstances, we are even unable to comment whether and to what extent the ILC draft (if completed) constitutes codification or progressive development of international law.

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The International Protection of the Intangible Cultural Heritage

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The safeguarding of the cultural heritage occupies a special position in the activities of the United Nations Educational, Scientific and Cultural Organization (UNESCO). This follows from the functions of the Organization defined in the UNESCO Constitution,[1] because under Article 1, para 2(c) it assures "the protection and conservation of the world's inheritance of books, works of art and monuments of history and science" and recommends to the nations concerned the necessary international conventions in this area. UNE SCO has so far drafted and adopted five conventions regarding the protection of cultural property and cultural heritage:[2] Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954,[3] Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property of 17 November 1970,[4] Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972,[5] Convention on the Protection of the Underwater Cultural Heritage of 2 November 2001[6] and the Convention for the Safeguarding of the Intangible Cultural Heritage of 17 October 2003.[7] Although between the Convention of 1972 and the next two treaties

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[1] The text of the UNESCO Constitution adopted on 16 November 1945, taking into account amendments introduced during successive sessions of the General Conference (the latest during the 31st session in 2001) in English, in: *Manual of General Conference 2002 edition*, UNESCO, Paris 2002. All major UNESCO documents can be accessed on the Organization's website: www.unesco.org.

[2] For more on the concept of cultural heritage and cultural property see: A. P r z y b o r o w s k a - - K l i m c z a k: "Les notions des "biens culturels" et du "partimoine culturel mondial" dans le droit international," *Polish Yearbook of International Law* 18 (1989–1990), pp. 47–72.

[3] Dz.U. [Polish Journal of Laws] 1957, No 46, item 212, Annex. Two additional Protocols for this Convention were adopted: one on 14 May 1954, the other – on 26 March 1999.

[4] Dz.U. 1974, No 20, item 106, Annex.

[5] Dz. U. 1976, No 32, item 190, Annex. Alongside the Convention, the Recommendation concerning Protection, at the National Level, of the Cultural and Natural Heritage was adopted.

[6] *Convention on the Protection of the Underwater Cultural Heritage*, Paris, 6 November 2001, vol. 1, Resolutions, UNESCO, Paris 2002, pp. 50–61. The process of preparation of this Convention and the description of its provisions was presented by J. S y m o n i d e s: "Międzynarodowa ochrona podwodnego dziedzictwa kulturowego," *Stosunki Międzynarodowe* 27 (2003), pp. 51–62. See also: T. S c o v a z z i: "La Convention sur la protection du patrimoine culturel subaquatique," *AFDI* 48 (2002), pp. 579–591.

[7] *Convention for the Safeguarding of the Intangible Cultural Heritage*, Paris, 17 October 2003, Records of the General Conference 32nd Session, Paris 29 September to 17 October 2003, vol. 1, Resolutions, UNESCO, Paris 2004, pp. 53–62.

there is an almost thirty-year time lapse, during that time other documents in this field were adopted, first of all recommendations and declarations. These also preceded the drafting of the last Convention, influencing the content of its provisions.[8] Of essential importance, reflected in the Introduction to the Convention of 2003, were three documents: Recommendation on the Safeguarding of Traditional Culture and Folklore of 15 November 1989,[9] UNESCO Universal Declaration on the Cultural Diversity of 2 November 2001,[10] and the Istanbul Declaration of 17 September 2002.[11]

The introduction to the Recommendation of 1989 emphasises that folklore constitutes part of the universal heritage of humanity and plays a significant role in bringing together different peoples and social groups, asserting their cultural identity. Its role in social, economic, cultural, and political life was felt in the past but it is also continued in the present. The traditional forms of culture are characterised by extreme fragility, and their aspects relating to oral traditions might easily be forgotten. The governments of the States should therefore act as quickly as possible for the safeguarding of folklore, taking first of all legislative measures and other steps in conformity with their practices and guidelines set forth in the Recommendation. They should also encourage the authorities, organisations and institutions concerned with folklore to participate in these projects.

The Recommendation also formulated the definition of folklore, stating that it comprises the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognised as reflecting the expectations of a community and its cultural and social identity. The folklore forms are, among others, language, literature, music, dance, games, mythology, rituals, social practices/customs, handicrafts, architecture and other arts.

The ways of the recommended actions to be taken by UNESCO Member States at the national level were also indicated. These include: identification of folklore (developing inventories, cataloguing and creating classification systems), folklore conservation (establishment of archives, museums, open-air ethnographic museums, training of specialist staff), preservation of folklore (teaching and study of folklore, guaranteeing the right of access to various forms of folklore, providing support for individuals cultivating traditions and holding items of folklore), dissemination of folklore (organising exhibitions, festivals, seminars and symposia, supporting publications, production of films, educational and information materials, the establishment

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[8] The description of the Convention draft was presented by L. L a n k a r a n i: "L'avant-projet de convention de L'UNESCO pour le sauvegarde du partimoine culturel immateriel. Évolution et interrogations," *AFDI* 48 (2002), pp. 624–631.

[9] *Recommendation on the Safeguarding of Traditional Culture and Folklore*, 15 November 1989, Records of the General Conference 25th Session, Paris, 17 October to 16 November 1989, vol. 1, Resolutions, pp. 238–243.

[10] *UNESCO Universal Declaration on the Cultural Diversity*, 2 November 2001, Records of the General Conference 32nd Session..., *op. cit.*, pp. 62–63.

[11] *Istanbul Declaration*, 17 September 2002, Final Communiqué, Third Round Table of Ministers of Culture, Istanbul, Turkey, 16–17 September 2002, the text in English can be accessed on the website: portal.unesco.org.

of documentation centres, libraries, museums, facilitation of meetings and exchanges between individuals, groups, and institutions concerned with folklore), as well as provision of legal protection, taking into account the "intellectual property" rights and the rights of individuals involved in activities concerned with folklore.

The last part of the Recommendation relates to international cooperation. This cooperation should be conducted between the States and international and regional associations, institutions and organisations in the field of science, dissemination and protection of folklore, *inter alia* through exchanges of information and publications, training of specialists, providing financial, scientific and technical assistance, promotion of international projects in the field of documentation of contemporary folklore, the organisation of meetings, study courses, and working groups. The States on whose territory research on folklore will be carried out should have the right to obtain the result of these studies. Moreover, the States should refrain from all acts likely to damage or diminish the value of folklore materials and take necessary measures to counteract natural dangers to which folklore is exposed and those deriving from armed conflicts and occupation of territories.

Of more general nature, in comparison with the provisions of the 1989 Recommendation, were the regulations of the 2001 Declaration. It emphasised that cultural diversity should be regarded as the common heritage of humanity and should be recognised and affirmed for the benefit of present and future generations. As a source of exchange, innovation and creativity it is as necessary for humankind as biodiversity is for nature (Article 1). Cultural diversity is a development factor and is closely connected with human rights (Articles 3 and 4). Cultural diversity in all its varied forms should be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, an inexhaustible source of creativity and inspiration for dialogue between cultures (Article 7).

The Declaration is supplemented by the Main Lines of an Action Plan for its implementation.[12] With regard to the intangible heritage, they indicated the need to safeguard the linguistic heritage of humanity and preserve its diversity. They also emphasised the special significance of traditional knowledge, in particular that of the indigenous peoples, particularly with regard to environmental protection and the management of natural resources.

Another document, which is an important link in the process of drafting the 2003 Convention, was the Istanbul Declaration adopted during the session of Third Round Table of Ministers of Culture held in Turkey on 16–17 September 2002. The session was organised in connection with the UN's proclamation of the year 2002 as the United Nations Year for Cultural Heritage,[13] the subject of the proceedings being "Intangible Cultural Heritage, a Mirror of Cultural Diversity".

The Declaration adopted as the final session communiqué read that the intangible heritage "constitutes a set of living and constantly recreated practices, knowledge

[12] *Main Lines of an Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity*, Records of the General Conference 32nd Session..., *op. cit.*, pp. 64–65.

[13] A/RES/56/8 – United Nations Year for Cultural Heritage, 2002; 21 November 2001.

and representations enabling individuals and communities, at all levels, to express their world conception through systems of values and ethical standards." It stressed at the same time that this heritage is especially threatened by disappearance or marginalisation, as a result *inter alia* of conflicts, intolerance, excessive merchandising, uncontrolled urbanisation or rural decay.

The Ministers of Culture called upon governments to promote the principles set out in the UNESCO Universal Declaration on Cultural Diversity and to undertake, within the framework of the policies of each State, research and documentation, and to establish legislations and appropriate mechanisms of protection of the intangible cultural heritage. They also emphasised the special role of UNESCO in fostering the development of new forms of international cooperation for the intangible heritage, and expressed support for the resolution adopted by the UNESCO General Conference in 2001 concerning the preparation of a convention on the safeguarding of this heritage.[14]

On 17 October 2003 during the UNESCO General Conference 32nd Session the Convention for the Safeguarding of the Intangible Cultural Heritage was adopted. The Convention is a fairly detailed document comprising the introduction and 40 Articles divided into nine chapters. The introduction refers both to the 1989 Recommendation and the 2001 and 2002 Declarations, and the documents concerned with the protection of human rights as well as to the 1972 UNESCO Convention. The adopted document emphasised the "deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage". Noting that no binding multilateral instrument has yet been created for the safeguarding of the intangible cultural heritage, it was recognised that it is necessary to enhance the efficacy of the existing documents by adopting international law provisions. In keeping with the message contained in the introduction, the international community should contribute, together with the States Parties to the Convention, to the safeguarding of the intangible heritage in a spirit of co-operation and mutual assistance. UNESCO programmes relating to the intangible heritage were recalled, in particular the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity, and it was stated that intangible cultural heritage is a factor bringing people closer together and enabling exchange of ideas and greater understanding among them.

Chapter I of the Convention – General Provisions – defines the purposes of the Convention and its relation to other international instruments, and also terminology. The purposes of the Convention are to safeguard the intangible cultural heritage; to ensure respect for the heritage of the communities, groups and individuals; to raise awareness of the importance of the intangible cultural heritage at the local, national and international level, and to provide for international co-operation and assistance. No provisions in this Convention may be interpreted as altering the status or dimin-

[14] 31C/Resolution – Preparation of a new international standard-setting instrument for the safeguarding of the intangible cultural heritage, 2 November 2001, Records of the General Conference 31st Session..., *op. cit.*, p. 67.

ishing the level of protection under the 1972 UNESCO Convention in relation to items with which the intangible heritage is associated. Interpretation may not likewise affect the rights and obligations of the States Parties deriving from any international instruments relating to intellectual property rights or to the use of biological and ecological resources.

Of crucial importance, both for the interpretation of the Convention provisions, and in the future for the process of implementation of it, is the determination of the referents of the term "intangible cultural heritage". Under the Convention definition this means the practices, representations, expressions, knowledge, skills as well as the instruments, objects, artefacts and cultural spaces associated therewith, which communities, groups, and, in some cases, also individuals recognise as part of their cultural heritage. The definition further stresses that the intangible heritage is transmitted from generation to generation, constantly recreated by communities and groups in their interaction with their environment, nature and history, and provides them with a sense of identity and continuity, thereby fostering respect for cultural diversity and human creativity. The Convention indicates that the intangible heritage is manifested *inter alia* in the following domains: oral traditions and expressions, including language as a vehicle of this heritage, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship.

Article 2 of the Convention stipulates that the term "safeguarding" of this heritage denotes measures ensuring its viability, including identification, documentation, research, preservation, promotion, enhancement, and transmission, particularly through formal and non-formal education, as well as the revitalisation of various aspects of such heritage.

In order to ensure the effective system of safeguarding, institutional solutions were adopted, based on the adaptation model of the bodies provided for earlier in the 1972 UNESCO Convention.[15] It envisages the establishment within the existing organisation, UNESCO, of a new intergovernmental body composed of representatives of States Parties and the use of the already operating bodies – the UNESCO Secretariat. Under Article 5 of the 2003 Convention an Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage was established, which is composed of 18 States Parties, elected during the General Assembly meeting of the States Parties.[16] States Members of the Committee will be elected for a term of four years, obeying the principles of equitable geographical representation, without being able to be elected for two consecutive terms, and with half of the Committee Members being renewed every two years. States Members should be represented in the Committee by persons who are qualified in the various areas of the intangible cultural heritage (Article 6).

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[15] Cf. A. Przyborowska-Klimczak: *Ochrona przyrody. Studium prawnomiędzynarodowe*, Lublin 2004, pp. 281–283.

[16] Once the number of the States Parties to the Convention reaches 50, the number of the members of the Committee will be increased to 24 (Article 5, para 2).

The main functions of the Committee are: to promote the objectives of the Convention and monitor its implementation, provide guidance on best practices and measures for the safeguarding of the intangible cultural heritage and make recommendations in this area, prepare plans for the use of the resources of Fund for Intangible Cultural Heritage and submit them to the General Assembly of States Parties for approval; seek means for increasing the Fund's resources, prepare and submit to the General Assembly operational directives for the implementation of the 2003 Convention, examine the reports submitted by States Parties and their requests for inscription on the lists of intangible cultural heritage and the granting of international assistance in accordance with the criteria established by the Committee and approved by the General Assembly (Article 7).

The Committee is responsible to the General Assembly of States Parties, to which it reports on its activities and decisions. The Committee adopts its own rules of procedure by a two-thirds majority of its members. It may establish, on a temporary basis, consultative bodies, assign them specific tasks, and invite to its meetings representatives of various bodies or private persons with recognised competence in the various fields of the intangible cultural heritage (Article 8). The Committee also proposes the accreditation with the General Assembly of non-governmental organisations concerned with the intangible cultural heritage (Article 9).

The second element of the institutional structure provided for in the Convention is the aforementioned General Assembly of the States Parties, which will hold ordinary sessions every two years. Extraordinary sessions of the Assembly may be convened at the request of the Intergovernmental Committee or of at least one-third of the States Parties. The General Assembly operates, in accordance with its adopted Rules of Procedure, as the body competent in matters covered by the Convention.[17]

The UNESCO Secretariat is the third body participating in the institutional structure of the Convention. It will prepare the documentation for the Committee and of the General Assembly and draft agenda of their meetings, and will ensure the implementation of their decisions (Article 10).

Like in the 1972 UNESCO Convention, the safeguarding of the intangible cultural heritage should be implemented at two levels: national and international.

In the area of safeguarding at the national level (Articles 11–15) the States Parties are obligated to take necessary measures to ensure the safeguarding of the intangible cultural heritage present in their territories, in particular to identify and define the various elements of such heritage. It is incumbent therefore on the States to draw up and regularly update inventories of the intangible cultural heritage and provide relevant information on the subject to the Committee. Other actions of the States Parties are also envisaged: adoption of appropriate policies promoting the function of the intangible cultural heritage and integrating the safeguarding of it into various programmes; designation of competent bodies for the safeguarding of such heritage in their territories, fostering scientific, technical, artistic and methodological studies on the intang-

[17] Article 4 para 1 refers to the General Assembly as "the sovereign body of the Convention.".

ible cultural heritage, in particular on such heritage in danger, adoption of appropriate legal, technical, administrative and financial measures in order to strengthen institutions concerned with training of staff for safeguarding purposes, facilitation of access to the intangible cultural heritage, and establishing documentation centres. As part of the safeguarding plan at the national level it is also necessary to start educational, training and information programmes, as well as disseminate awareness of dangers threatening heritage and emphasise the need for the safeguarding of the intangible heritage, and involve actively in such safeguarding activities the communities, groups, and individuals that create, maintain and transmit such heritage.

The safeguarding of the intangible cultural heritage assumes different forms of action. One of them, also modelled on the 1972 UNESCO Convention,[18] is the establishment, updating and publication of two lists: a Representative List of the Intangible Cultural Heritage of Humanity and a List of the Intangible Cultural Heritage in Need of Urgent Safeguarding. Requests for inscription on both Lists will be made by the States Parties concerned. These requests will be assessed according to the criteria drawn up by the Committee and approved the General Assembly. Decisions to inscribe a heritage item will be taken by the Committee (Articles 16 and 17).

Another form of safeguarding activities at the international level is the support for national and regional programmes, projects and initiatives for the safeguarding of the intangible heritage. Requests for such assistance, submitted by the States concerned, will be examined by the Committee, which decides whether such assistance will be granted. International assistance may also be granted for items of heritage inscribed on Convention lists.[19] The forms of assistance may be the following: studies concerning various aspects of safeguarding, the provision of experts for the States, training of the staff, setting of standards and elaboration of safeguarding measures, the creation of appropriate infrastructure, the supply of equipment and know-how, and financial assistance, including, inter alia, donations and low-interest loans (Article 21). The conditions, forms and scope of assistance will be regulated by means of an agreement between the Committee and the beneficiary State. This State should share the cost of the safeguarding measures for which international assistance is provided, and it will also be obligated to submit to the Committee reports on the use made of the assistance provided.

A factor that significantly influences the efficiency of the international safeguarding of the intangible cultural heritage is raising of funds for its implementation. In this area, also basing on the 1972 UNESCO Convention, an Intangible Cultural Heritage Fund was established, which would consist of resources acquired in accordance with the Financial Regulations of UNESCO. These resources consist of: contributions made by States Parties, funds appropriated for this purpose by the General Conference

[18] The World Heritage List contains 812 sites (properties): 628 cultural heritage properties, 160 – natural properties, and 24 mixed ones. The World Heritage in Danger List contains 34 properties. *The World Heritage Newsletter* 50 (2005), p. 2.

[19] Requests for assistance should indicate the envisaged safeguarding measures, forms of necessary intervention, and the assessment of cost. They may be jointly submitted by two or more States Parties. Some requests may be treated by the Committee as a matter of priority (Articles 21–22).

of UNESCO, contributions, gifts and bequests made by other States, organisations and programmes of the United Nations system, public or private bodies and individuals; interests on the resources of the Fund, revenues from collections and receipts from events organised for the benefit of the Fund, any other revenues provided for in the Fund's Regulations. Contributions should be paid by the States Parties, without prejudice to any voluntary contributions, every two years in the amount determined by the General Assembly, in the form of a uniform percentage applicable to all States. The contribution may not exceed 1% of the State Party's contribution to the regular budget of UNESCO. Each State may declare, at the time of the deposing of its instruments of ratification, acceptance, approval or accession to the Convention, that it will not be bound by the provisions relating to contributions. In this case, in order to enable the Committee to plan its operations, such State Party should pay regularly every two years a contribution as close as possible to the contribution it would have owed if it had been bound by the provisions concerning contributions. For similar reasons, the States Parties that wish to pay supplementary voluntary contributions to the Fund should inform the Committee as soon as possible about their intention. The States Parties should also lend their support to fund-raising campaigns organised for the benefit of the Fund under the auspices of UNESCO.

In order to maintain in the active condition the Convention system of the safeguarding of the intangible cultural heritage, the State Parties to the Convention are obligated to submit reports on the measures they have taken for the implementation of the provisions of this Convention, while it is incumbent on the Committee to prepare reports on its activities to be submitted to the General Assembly of States Parties and to the General Conference of UNESCO (Articles 29–30).

In reference to UNESCO's prior activity for the safeguarding of the intangible heritage associated with the programme of proclaiming the list of "Masterpieces of the Oral and Intangible Heritage of Humanity"[20] it was decided to incorporate the items on this list in the Representative List of the Intangible Cultural Heritage of Humanity, and after the entry into force of the Convention no further proclamation concerning the "Masterpieces..." list will be made.

The procedural provisions of the Convention, specified in the final clauses, stipulate that the Convention is subject to ratification, acceptance or approval, and the appropriate instruments confirming these acts will be deposited with the Director-General of UNESCO. The Convention is also open to accession by all non-Member States of UNESCO, invited by the General Conference of UNESCO, as well as by self-governing territories.[21]

The 2003 Convention will enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession,

[20] This programme has been described below.

[21] Article 33 para 3 specifies that this applies to territories which enjoy full internal self-government recognised as such by the UN but have not attained full independence in accordance with UN General Assembly resolution 1514 (XV), and which have competence over the matters governed by the Convention, including the competence to enter into treaties in respect of such matters.

with respect to those States that have deposited their appropriate instruments before that date.[22] With respect to any other States, the Convention will enter into force three months after the deposit by those States of appropriate instruments affirming their consent to be bound by this Convention.[23]

The Convention may be denounced by a State Party by notification in writing deposited with the Director General of UNESCO. The denunciation takes effect twelve months after the receipt of the instrument of denunciation. However, it does not affect the financial obligations of the State Party denouncing the Convention until the date on which the denunciation takes effect.

The final provisions also regulate the matters of proposing amendments to the Convention (Article 38). The Convention specifies that the original languages are six languages: English, Arabic, Chinese, French, Spanish and Russian, the texts in all these languages being equally authoritative. In conformity with Article 102 of the United Nations Charter, the Convention will be registered with the UN Secretariat at the request the Director-General of UNESCO.

In order to disseminate knowledge about the Convention and encourage States to express their consent to be bound by its provisions, special regional meetings are held with government representatives of States from particular regions of the world as well as meetings of experts concerning different aspects of the safeguarding of the intangible heritage.[24]

The entry into force of the 2003 Convention and then a greater number of States being bound by its provisions will cause that the safeguarding of the intangible cultural heritage will have a proper international law basis as well as the appropriate institutional framework and financial support provided by the Fund's resources. However, already within UNESCO four programmes in the field of the safeguarding of such heritage are underway, defined as: 1) Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity 2) Living Human Treasures System, 3) Endangered Languages, 4) Traditional Music of the World.[25]

The first programme was launched by UNESCO in 1998,[26] and its objective was to extend protection to all forms of popular and traditional expression such as languages, oral literature, music, dancing, games, myths, rituals, social practices, craftsmanship, and to protect cultural spaces: places where popular and traditional cultural activities take place in a concentrated manner (places associated with legends, sites where rituals are performed, marketplaces, festivals) or regularly (daily rituals, annual processions). The Proclamation of Masterpieces should raise awareness of

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[22] Within two years after the adoption of the Convention (by November 2005) 27 States deposited instruments of ratification, acceptance or approval. If this pace of the process of expression of consent to be bound by the Convention continues, it will come into force in 2006.

[23] Article 35 of the Convention contains the federal clause.

[24] Information on these meetings is available on the website: portal.unesco.org/culture/.

[25] Information on these programmes and documents adopted in connection with them can be accessed on the website: portal.unesco.org/culture/admin/.

[26] The initiative to start such a programme was proposed to the Director-General of UNESCO by the Executive Board during its 155th session in 1998.

their existence and recognise their importance as elements of the intangible cultural heritage. It is also expected to encourage States to establish inventories of such heritage and ensure legal and administrative protection of it, and foster the participation of governments, non-governmental organisations, local communities and various groups, institution and individuals in the preservation, promotion and safeguarding of this heritage.

Proclamations are prepared on the basis of candidatures submitted by the Member States and associated Members of UNESCO, by non-government organisations acting in consultation with national UNESCO committees and by other non-governmental organisations maintaining permanent contact with UNESCO. Elements of the intangible cultural heritage can be proposed for inclusion in the proclamation that meet the following criteria: 1) they have exceptional value as masterpieces of human creative genius, 2) have a well-documented, established position in the cultural traditions and history of a community concerned; 3) play a role as a means of affirming the identity of peoples and cultural communities, are important as a source of inspiration and exchange between cultures and as a factor bringing together people and communities, and they also currently play social and cultural roles in the life of a community; 4) they demonstrate perfection in the application of skills and technological abilities, 5) they affirm their value as a unique testimony to living cultural traditions; 6) they are at risk of disappearance due to a lack of resources for protection, processes of rapid changes, urbanisation or acculturation.[27]

Candidatures are submitted to the Director-General of UNESCO. Each State can submit one candidature every two years, joint candidatures by several States may also be proposed. Proposals may not be submitted without consultation with the communities or individuals concerned. Candidatures are evaluated by non-governmental organisations that maintain formal relations with UNESCO.[28]

The first Proclamation comprising 19 "masterpieces of the oral and intangible heritage of humanity" was held on 18 May 2001; the second proclaimed 28 masterpieces on 7 November 2003, and the third, in which 43 items of cultural spaces or forms of traditional and popular expressions were proclaimed by Director General of UNESCO, was held on 25 November 2005.[29]

The objective of the second programme "Living Human Treasures" is to provide protection to people who possess the outstanding knowledge and skills required for performing or creating specific elements of the intangible cultural heritage. They are selected by the States and treated as a testimony to living cultural traditions and to

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[27] Acculturation is a process of change of artefacts, social practices and beliefs as a result of contact of communities with different cultural traditions. This term also defines the result of such changes – for more see: *Encyclopaedia Britannica. Polish edition*, vol. 1, Poznań 1997, p. 220.

[28] They are: International Council for Traditional Music (ICTM), International Social Sciences Council (ISSC), International Council for Philosophy and Humanistic Studies (CIPSH/ICPHS), Permanent International Committee of Linguistics (CIPL), International Association of Legal Sciences (IALS), International Union of Anthropological and Ethnological Science (IUAES), International Theatre Institute (ITI), Union Internationale de la Marionette (UNIMA), International Council of Museums (ICOM).

[29] All lists of masterpieces are included on the UNESCO website.

the creative genius of groups, communities and individuals present in their territory.[30] The Republic of Korea (South Korea) proposed the establishment of this programme to the 142nd session of the UNESCO Executive Board in 1993, relating to its national programme conducted since 1964.[31]

The fundamental purpose of the programme is to preserve the knowledge and skills necessary for the enactment, performing or creation of cultural expressions that have high historical, artistic or cultural values. Besides public recognition, the programme should also ensure financial support for all kinds of projects. Appropriate conditions should be created under this programme for the perpetuation and development of the knowledge and skills of such individuals, the transmission of their knowledge and skills to younger generations, documenting and recording of the intangible cultural heritage, dissemination of their knowledge and skills through exhibitions and presentations.

A special role in UNESCO's activities in the field of safeguarding of the intangible cultural heritage is played by the programme dealing with the world's endangered languages. Language is regarded as an exceptional product of the human mind, the most adequate tool of communication, the way of reflecting views of the world and a vehicle of value systems, as well as a factor uniting groups and communities. At present, over 50% of the world's 6000 languages are seriously endangered.[32] The extinction of languages is not a new phenomenon: it is estimated that since languages diversified ca. 30 thousand of them have disappeared (only a few, e.g. Basque, Egyptian, Chinese, Hebrew, and Latin have lasted over two thousand years). However, the current speed of this phenomenon has reached an unprecedented level, with one language disappearing on average every two weeks.[33]

The issue of the protection of endangered languages was brought up at the UNESCO forum during the General Conference 30th session, where resolution was adopted on the implementation of a language policy in the world based on multilingualism.[34] It emphasised that language diversity is threatened by the globalisation of communication process and the accompanying tendency to use one language. This results in the

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[30] Guidelines for the Establishment of National "Living Human Treasures" Systems.

[31] The first such programme was created in Japan in 1950.

[32] See: R. B j e l j a c - B a b i c: "6,000 languages: an embattled heritage," *The UNESCO Courier*, April 2000, pp. 18–19.

[33] In the fall of 2004, the world media ran the news that in China the last woman, Yang Huanyi, died, who spoke the Nushu language used for over 400 years exclusively by women in order to express thoughts and feelings that they wished to hide before men. The women's only secret language in the world was born in the south of China and was transmitted to women before they got married. The Nushu language used modified Chinese characters, which denoted sounds rather than notions. A sound language – whistles – is used by shepherds on Gomera, one of the Canary Islands. Their language called *silbo gomero* is known to only a small number of people, and whistles denote whole sentences in it – see: O. S o b o l e w s k a: "Gwiżdżący mózg. Nie trzeba słów, by mówić" [The whistling brain. One does not need words to speak], *Gazeta Wyborcza*, 13 January 2005, p. 12.

[34] 30C/ Resolution 12 – Implementation of a language policy for the world based on the multilingualism, 17 November 1999, Records of the General Conference 30th Session, Paris, 26 October to 17 November 1999, vol. 1, Resolutions, Paris, UNESCO 2000, pp. 35–36.

marginalisation of other languages, and with languages spoken less often – in their disappearance.[35]

In order to thoroughly examine the situation of languages in the world today, an *ad hoc* expert group was established, which drew up a special report "Language Vitality and Endangerment."[36] On the basis of this report, Recommendations to UNESCO for Action Plans on the Safeguarding of Endangered Languages[37] were submitted. The report established nine criteria to be taken into account when determining the degree of endangerment of a language: 1) intergenerational language transmission, 2) absolute number of speakers, 3) proportion of speakers within the total population, 4) trends in existing language domains i.e. areas of language use, 5) response to new domains and media, 6) materials for language education and literacy, 7) governmental and institutional language attitudes and policies, including official status and use, 8) community members' attitudes towards their own language, 9) amount and quality of documentation. Recommended forms of action by the States include: studies on endangered languages, establishment of documentation of such languages, facilitation of access to and active use of those languages, fostering of programmes for the safeguarding of endangered languages. At the international level, an appropriate financial and administrative mechanism should be established to promote safeguarding activities, in which UNESCO would be a coordination centre for projects initialised by the States, for dissemination of information and collection of data on endangered languages (*inter alia* updating the UNESCO *Atlas of the World's Languages in Danger of Disappearing*), for support of regional centres dealing with the safeguarding of those languages.

The last of the four major programmes of UNESCO in the field of safeguarding of the intangible cultural heritage is devoted to the traditional music of the world. The objective of the programme is to preserve, revitalise and disseminate all kinds of music: popular, sacred, urban and rural, and festive or carnival music. This objective may be attained through presentation, recording and dissemination of such music, by organising festivals, meetings and symposia, and by releasing special collections of such music (e.g. the series: Listening to the World, Music and Musicians of the World, Anthology of Traditional Music, Traditional Music of Today).

The safeguarding of the intangible cultural heritage is a comparatively new field of UNESCO's activities. The starting of such safeguarding programmes means moving away from the comparatively narrow understanding of the notion of "cultural heritage" and extending it also to other products of the human mind that do not have

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[35] According to the figures presented on the forum of UNESCO: 96% of the world's 6,000 languages are spoken by 3% of the world's population, while 50% of languages are spoken in eight countries: Papua-New Guinea – 832, Indonesia – 731, Nigeria –515, India – 400, Mexico – 295, Cameroon – 286, Australia – 268, Brazil – 234.

[36] Language Vitality and Endangerment, UNESCO Intangible Cultural Heritage's *Ad Hoc* Expert Group on Endangered Languages, 13 March 2003.

[37] Recommendations to UNESCO for Action Plans on the Safeguarding of Endangered Languages, Paris, 13 March 2003.

a material form.[38] Legends, beliefs, rites, social practices/customs, performances, shows, languages and traditional craftsmanship constitute a special testimony to collective memory, a factor determining the cultural identity of various groups and communities. The preservation of cultural diversity in this field is an exceptional challenge to the international community. The awareness of the existing dangers to the elements of this heritage, which are fairly ephemeral, especially vulnerable and sometimes difficult to preserve, should encourage the States to find appropriate legal land administrative instruments in order to prevent an irretrievable loss of the most valuable elements of the world's intangible heritage. The 2006–2007 Culture Programme of UNESCO places safeguarding of the intangible heritage at the top of its list of priorities.

[38] See: L. P r e s s o u y r e: "The past is not just made of stone," *The UNESCO Courier*, December 2000, pp. 18–19.

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The Importance of Roman Law Tradition for the European Harmonisation of Private Law

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I.

The search for a compromise in the course of works over the preamble to the Constitutional Treaty of the European Union resulted, *inter alia*, in the departure from putting direct emphasis on connections between modern Europe and both humanist and cultural heritage of ancient Greece and Rome.[1] Nevertheless, the preamble version adopted by the Convention commences with referring to the definition of democracy formulated by a Greek historian Thucydides who lived in the second half of the 4th century B.C. The preamble refers in particular to cultural and humanist inheritance of Europe whose values are "still present".[2] These circumstances, in my opinion, give grounds for perceiving the preamble as a generalisation of theses declared in the doctrine that Roman law is one of the elements from which the cultural concept of Europe has originated[3] and that Roman law has played a fundamental role in the establishment of the civil law tradition characteristic of our continent.[4] Perceiving the Roman law tradition from this perspective induces us to return to the question, settled in different manners also in Poland,[5] whether and what kind of role it can play in the process of the harmonisation of civil law.

II.

The harmonisation of law, understood as approximation of legislations, is described with the usage of different theoretical divisions. In particular, complete har-

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[1] See, e.g.: D. P s z c z ó ł k o w s k a, R. S o ł t y k: "Konstytucja prawie jest" [Constitution almost completed], *Gazeta Wyborcza* of 12 June 2003, at 9.

[2] See: CONV 797/1/03 REV 1, p. 4.

[3] Compare: P. K o s c h a k e r: *Europa und das römische Recht*, München–Berlin 1953, p. 2; H. K u p i s z e w s k i: *Prawo rzymskie i współczesność* [Roman Law and Today], Warsaw 1988, p. 16.

[4] H.P. Glenn: *Legal Traditions of the World*, Oxford 2000, p. 135 ff.

[5] See: B. S i t e k: "Integracja Europy a prawo rzymskie" [European Integration and Roman Law], *PiP* (1996), No 12, p. 48 ff.; I. K a m i ń s k i: "Kontrowersje wokół pojęcia europejskiej kultury prawa prywatnego" [Controversies Around the Concept of the European Culture of Private Law], *PiP* 55 (2000), No 1, p. 36 ff.; M. K u r y ł o w i c z: *Prawo rzymskie. Historia – tradycja – współczesność* [Roman Law. History – Tradition – Today], Lublin 2003, p. 109 ff.

monisation whose purpose is the exhaustive regulation of a specific matter and partial harmonisation restricted only to certain aspects of the problem, are distinguished.[6] From the point of view of this division let us look at the approximation of civil law of the European Union Member States. The harmonisation of private law is directly referred to in the European Parliament resolutions of 26 May 1989,[7] 6 May 1994,[8] and 15 November 2001.[9] Resolutions have no direct legal effects but, by means of their propagation, express a specific political intention and vision of the development of private law.[10] The first above mentioned resolution indicates, as the most appropriate form of approximation of the Member States' private law, the unification of its most important branches.[11] Such a vision of complete unification of private law had no practical reaction whatsoever. Nevertheless, the European Parliament did not withdraw from the principle of approximation of private law of the Member States. It modified, however, its position so as to postulate, in the subsequent resolution of 1994, for the carrying out of partial harmonisation within a short period and more complete harmonisation within a longer period.[12] In both resolutions, the term of a "Common European Code of Private Law" occurs, covering entire branches of private law, significant for internal market functioning, from among which the law of obligations is put in the first place. Comparative study was indicated as the method of harmonisation. That postulate was followed up by the Parliament's call for establishing comparative and legal centres both in the Community and elsewhere.[13] The second half of the 1990s brought essential animation of theoretical discussion over the harmonisation of selected areas of private law. In 2000, the consolidated text of the Principles of European Contract Law was published, devised by the Commission on European Contract Law, i.e. the so-called Lando Commission.[14] The European Commission, in the Communication of 11 July 2001,[15] expressed its interest in gathering information on the required scope of activities in the field of private law and efficiency of *case by case* approach, i.e. partial harmonisation carried out by the implementation of directives. A joint communication of the Commission on European Contract Law and the Study Group on the European Civil Code of 24 August 2001 constituted response to these questions. That paper outlines weaknesses arising from the European legislation being restricted to small parts of private law. It is recommended that several phases be established in the course of which common principles of private law would

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[6] See: C. M i k: *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki* [European Community Law. Theory and Practice], vol. 1, Warsaw 2000, p. 594 ff.

[7] OJ 1989, C 158, p. 400.

[8] OJ 1994, C 205, p. 518.

[9] OJ 2001, C 255, p. 1.

[10] Cf.: J. G a l s t e r, C. M i k: *Podstawy europejskiego prawa wspólnotowego* [Fundamentals of European Community Law], Toruń 1995, p. 90 ff.

[11] Resolution of 26 May 1989 (b).

[12] Resolution of 6 May 1994 (2).

[13] Resolution of 6 May 1994 (3).

[14] O. L a n d o, H. B e a l e (eds.): *Principles of European Contract Law*, Part I and II, Hague 2000.

[15] COM (2001) 398.

be elaborated and introduced.[16] Such a vision of the harmonisation of private law is also presented in the last above-quoted European Parliament's resolution on this matter of November 2001. In the resolution's text, the term "European Civil Code" was omitted, but after critical statements that civilist directives were not optimal towards each other and from time to time caused problems in terms of their impact on legal systems of the Member States,[17] the postulate returned to introduce a broader European Civil Code enriched by a detailed plan of further harmonisation of private law by 2010. Furthermore, the Parliament repeated the thesis on the essential importance of comparative method for the process.[18] Based on the above outline, it can be said that the divergence as to the subjective scope of the harmonisation of private law between the European Parliament and research groups developing its postulates, and the practice, has been clearly visible within a dozen of years or so. The position stemming from the European Parliament's resolutions can be qualified as a postulate aiming at complete harmonisation, i.e. covering entire fields of private law and, in some statements, at the unification of these fields. The hitherto practice, however, concerning the European harmonisation of private law, which is basically based on the implementation of directives, is an example of partial harmonisation.

The European Parliament's position in the abovementioned dispute can be assessed from the point of view of the practice, competences of the Communities within the scope of private law, and as a postulate formulated with relation to private law while reflecting over the so-called Western legal tradition. The Commission on European Contract Law argued in the abovementioned communication that differences between national legislations resulted in increasing costs for entrepreneurs and consumers. The question of competences of the Communities within the scope of private law is disputable[19] but the opinion is also frequent that the authorisation of the Communities within the scope of private law codification is based on Article 95 of the Treaty establishing the European Community in the case it has as an objective the functioning of the internal market.[20] Further direction of these considerations is set out by looking from the perspective of the private law tradition. Such assessment of postulates included in the European Parliament's resolutions let us notice that they respond to minimum standards, specified by H. J. Berman, of private law appurtenance to the Western legal tradition. A call for the harmonisation of entire branches fulfils the postulate for relative autonomy of law expressed in its being treated as *corpus iuris*, i.e. a coherent system, developed on the continuation basis[21]. A strongly

[16] See: www.cbs.dk/departments/law/staff/ol/commision_on_ecl/Recent_Develompents.htm.

[17] Resolution of 15 November 2001 (2) and (3).

[18] Resolution of 15 November 2001 (16).

[19] See: E. Hondius: "Towards a European Civil Code. General Introduction," in: A. Hartkamp, M. Hesselink, E. Hondius, C. Jousrta, E. du Perron (eds.): *Towards a European Civil Code*, Hague-London-Boston 1998, p. 7 ff.

[20] See: Chr. Baldus: "Codification of Private Law in the European community: Legal Basis, Subsidiarity and Other Question," in: G. Barrett, L. Bernardeu (eds.): *Towards a European Civil Code. Reflections on the Codification of Civil Law in Europe*, Trier 2002, p. 91 ff.

[21] H.J. Berman: *Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej* [Law and Revolution. The Shaping of a Western Legal Tradition] (translated by S. Amsterdamski), Warsaw 1995, pp. 22 and 51.

stressed postulate for elaborating legal drafts, as a result of comparative research conducted by recognised experts, fulfils the standard of vesting experts with reflections on law and systematisation of legal institutions.

But it is complete harmonisation conducted through the intermediary of the implementation of directives that has recently brought significant changes in private law of the Member States of the European Union as well as countries aspiring for membership. Some of the directives, e.g. the one on unfair terms in consumer contracts, or the one on liability for defective products which touched classical, fundamental civilist figures, resulted in changes in civil codes. This induces us to ask a question whether the progress of partial harmonisation will be followed up by the rejection of hitherto legal tradition, i.e. the development of private law based on the continuation of concepts, principles, values, and even some systematic rules which, to a significant extent, derive from Roman legal texts.

III.

The concept of tradition referred to herein, in particular legal tradition, is quoted after H. P. Glen, as an indication of a factor resulting in "interlacing past with present",[22] i.e. causing that the development of law, despite bringing changes provoked by the practice, is based on the principle of continuation. It does not take place under the slogans of "cutting off" or a "new beginning". According to assessments which appeared with reference to changes introduced to civil law by means of the implementation of directives aiming at the protection of consumers, they have activated the process of "paradigm revaluation",[23] include examples in which "the assumption of breaking with hitherto tradition of the main European legal systems is manifested", and cause "civil earthquakes".[24] Thus, the question arises whether hitherto changes in civil law should be actually qualified as breaking with legal tradition which definitely started with Roman legal texts?

The directive of 25 May 1999 **on certain aspects of the sale of consumer goods and associated guarantees**[25] is indicated as the most important, "revolutionary" in the civil law of the Member States. In seeking an answer to the abovementioned question one should focus his attention on this directive. The literature contains statements referring to this act from the perspective of Roman law. Luigi Garofalo stated generally in 2000 that after the directive implementation in Italy claims for the refund or reduction of price deriving from Roman law would last "in a new context, with different [...] character, but maintaining unchanged antique core around which different changes took place throughout centuries".[26] Ch. Baldus, within the framework

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[22] H.P. G l e n n, *op. cit.*, p. 11.

[23] Cz. Ż u ł a w s k a: "Uwagi o 'europeizacji' prawa umów" [Reflections on the "Europeisation" of the Contract Law], *KPP* (2002), No 2, p. 231.

[24] *Ibid.*, p. 234.

[25] OJ 1999, L 171, p. 12.

[26] L. G a r o f a l o: *Studi sull'azione redibitoria*, Padova 2000, p. 186.

of the 1999 considerations over the changes that the directive implementation should bring into German law, came to much further conclusions. In his opinion, the solution adopted in the original version of § 462 of the German Civil Code (hereinafter referred to as: BGB) granting the purchaser the possibility of withdrawing from the contract or reducing price was a "cul-de-sac" both from historical and legal point of view as it consisted in copying the model adopted in an edict of *curule aediles* which already in antique Rome had been perceived as too narrow. Chr. Baldus was of the view that general definition of the state of things adopted by the directive, justifying the seller's liability and "flexible coordination of its legal effects" was "quite reasonable in terms of economics and corresponded with classical Roman legal thinking".[27] The abovementioned remarks attempting to settle changes introduced by the 99/44 directive in the private law tradition emerging from Roman law incline to look from this perspective also at fundamental arguments for the sake of the union legislator's breaking with this tradition. The first argument consists in a thesis that the directive admits several departures from the classical rule of *privatorum pactum non laedit iuri caeterorum*, i.e. that a contract does not bring about obligations or limitations for third parties.[28] It should be underlined, however, that departures from this rule were present already in antique Roman law.[29] It is pointed out that the directive eliminates, by introducing the concept of non-conformity with the contract, the concept of warranty deriving from Roman law. In the classical Roman law two models should be distinguished: the model of objective liability for specified physical defects according to the edict of *curule aediles*[30] and classical jurisprudence endeavours to accept general liability for hidden defects.[31] In jurists' considerations a view was of great importance that a thing sold or hired should be intact (*omnimodo integrum praestari debet*).[32] Such definition of a prerequisite of the seller's liability can be recognised as a simplified form of the criterion of conformity with the contract adopted in the directive. While stressing the critical importance of the directive, it is also stated that it replaces the typology of contracts shaped by Roman tradition with a functional criterion, as the fact that the performance is earmarked for consumption forejudges the directive application. According to this criterion, the directive in question does not distinguish between a sale contract, a contract to perform a specified task, and a contract of services.[33] Naturally, it is characteristic for a tradition deriving in particular

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[27] Chr. B a l d u s: *Binnenkonkurrenz kaufrechtlicher Sachmängelansprüche nach Europarecht. Zur Rolle des Richters bei der Koordienierung gesetzlicher Tatbestände*, Baden-Baden 1999, p. 64 ff.

[28] Cf.: Cz. Ż u ł a w s k a, *op. cit.*, p. 235.

[29] See: W. D a j c z a k: *Zwrot bona fides w rozstrzygnięciach dotyczących kontraktów u prawników rzymskich okresu klasycznego* [Bona Fides in Contract Settlements of Roman Lawyers of the Classical Period], Toruń 1998, p. 101 ff.; A. S o k a l a: *Lenocinium w prawie rzymskim* [Lenocinium in Roman Law], Toruń 1998, p. 43 ff.

[30] See: R. Z i m m e r m a n n: *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, p. 311.

[31] *Ibid.*, p. 320.

[32] D. 19,1,6,4.

[33] Cz. Ż u ł a w s k a, *op. cit.*, p. 235 ff.

from Roman law that the distinction between contract types is based on differences in the structure and kind of non-pecuniary performance. It is worth bringing attention to the fact that the following contracts: a contract to perform a specified task; rental contract, lease contract, and a contract of services treated as unity in edicts of Roman praetors, i.e. from the procedural point of view, were distinguished in the subsequent development of law. Functional similarity consisting in the fact of entrusting something to somebody (*locavit*)[34] forejudged this unity. Therefore, some similarity to legal thinking present in Roman law can be indicated with respect to each novelty of the 99/44 directive. The abovementioned observations do not deny the fact that the directive implementation has significantly changed the Member States' civil law. They do let defend the opinion that these changes should be perceived as resulting in the rejection of hitherto legal tradition.[35]

IV.

The thesis contested above according to which the harmonisation of private law conducted by means of directive implementation assumes breaking with hitherto legal tradition[36] is also contradicted by some practical statements. As an example, a decision of the Constitutional Court of the Federal Republic of Germany can be quoted, in which an opinion has been expressed that "the treaties of the Community should be understood also in the light of the European legal tradition and the culture of law",[37] or the fact of using, in the ECJ legislation, Latin rules and notions.[38] Such examples show that reference to common legal tradition can serve the harmonising interpretation of law. It provokes the question whether or not it is possible to use common legal tradition in creating norms approximating civil legislation. The conclusion can be drawn from hitherto establishments that from among the abovementioned harmonisation types, the European Parliament's postulates can favour harmonisation perceived as development based on continuation. The Parliament strongly emphasised in its resolutions the meaning of comparative law as a method of harmonisation. Thus, let us consider whether taking into account the relation between common legal tradition and comparative method as a method of harmonisation can serve the efficiency of this process. The utility of the history of law for comparative reflections was generally emphasised many times in the literature.[39] The thesis on the integration value of the

[34] O. L e n e l: *Das Edictum perpetuum*, Leipzig 1927, p. 299 ff.

[35] As for the importance of the Roman law tradition, for reflections on the Directive of 5 April 1993 on unfair terms in consumer contracts, see: W. D a j c z a k: "Doświadczenia prawa rzymskiego a pojęcie dobrej wiary w europejskiej dyrektywie o klauzulach niedozwolonych w umowach konsumenckich" [Roman Law Experience and the Concept of Good Faith in the European Directive on Unfair Terms in Consumer Contracts], *Zeszyty Prawnicze* (2001), No 1, p. 97 ff.

[36] Cz. Ż u ł a w s k a, *op. cit.*, p. 234.

[37] BverfG of 8 April 1987, BverfGE 75, p. 243 ff.

[38] See: R. K n ü t e l: "Ius commune und Römisches Recht vor Gerichten der Europäischen Union," *JuS* 36 (1996), p. 768 ff.

[39] In this manner, e.g. H. K ö t z: "Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?," *JZ* 1 (1992), p. 20 ff.

Roman law and canon law tradition is clearly associated at present, in my opinion, with R. Zimmermann. He speaks about the "re-Europeisation" of legal doctrine perceived as the restoration of unity similar to the one that existed within the medieval period of *ius commune*.[40] Definitely, taking into account the tradition, while reflecting upon private law, is not a banal proposal to return to the law of several hundred years ago. R. Zimmermann underlines that although the introduction of national codifications to the European continent in the 19th and 20th centuries brought certain dogmatic solutions, there are no grounds for treating the moment of national codifications coming into force as the point in which the presence is cut off from the past.[41] As a consequence, he suggests that they should be perceived as a kind of continuation in the development of private law. He particularly stresses that considering the influence of Roman law in England and experience concerning the so-called "mixed legal systems" in Scotland or South Africa can serve to break the stereotype related to total separateness of continental and Anglo-Saxon private law.[42] The substance of this approach is therefore based on the postulate for developing historical and comparative research, utilisation of Roman tradition aimed at stressing similarities between national solutions. It is supposed to strengthen the belief in the possibility of building up intellectual unity of European private law[43] and as a consequence, to serve its harmonisation in the future. Such attitude characterised by ascribing similarity presumption to comparative law may be contrasted with the attitude of those comparatists who postulate focusing attention on differences.[44] Experience shows that similarities between national solutions arising from the influence of Roman tradition can serve to unify law. From the Polish perspective, this is confirmed by the words of the main author of the unification of the law of obligations of 1934, i.e. R. Longchamps de Bérier. As one of the reasons for the codification of the law of obligations being relatively the easiest one, he indicated the fact that "this field of law in hitherto sector legislations showed relatively low number of fundamental differences, being based everywhere on the Roman law of obligations".[45] Recently, O. Lando, chairman of the Commission on European Contract Law, has stressed the importance of similarities between legal systems arising from the history for the Europeisation process of contract law.[46] It allows to accord

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[40] R. Zimmermann: "Roman Law and European Unity," in: A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron (eds.): *Towards a European Civil Code*, Hague-London-Boston 1998, p. 26 ff.

[41] See: R. Zimmermann: *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, Oxford 2001, p. 3 ff., p. 100 ff.; see also: rev. of W. Dajczak, *CPH* (2002), No 2, p. 323 ff.

[42] See: R. Zimmermann: "Historische Verbindungen zwischen civil law und common law," in: *Gemeinsames Privatrecht in der Europäischen Gemeinschaften*, Baden-Baden 1999, p. 103 ff.

[43] Compare: R. Zimmermann: *The Roman Law...*, p. 188.

[44] See: T. Giaro: "'Comparemus!'. Romanistica come fattore d'unificazione dei diritti europei," *Rivista critica del diritto privato* 19 (2001), p. 544.

[45] R. Longchamps de Bérier: *Polskie prawo cywilne. Zobowiązania* [Polish Civil Law. Obligations]. Lwów 1939, p. 3.

[46] O. Lando: "The Future Development of the Principles of European Contract Law and a European Civil Code," in: G. Barrett, L. Bernardeau (eds.): *Towards a European Civil Code. Reflections on the Codification of Civil Law in Europe*, Trier 2002, p. 40 ff.

with the view that the development of comparative analysis towards historical and comparative analysis can consequently favour the efficiency of private law harmonisation, provided it serves to stress similarities. The harmonisation process with the usage of comparative method will be the most difficult to carry out where essential differences occur. This brings about the question of whether the reference to Roman law tradition can facilitate harmonisation between essentially different solutions. An exhaustive answer to this question is obviously not possible. Nevertheless, an analysis of selected cases is feasible. As an example of this sort, the question of transferring the ownership of a movable can be chosen as a harmonising task included in the resolution of the European Parliament of 15 November 2001 on this matter.

V. 1.

Taking into consideration Roman tradition in the comparative analysis of the problem, which is differently solved in various codifications deriving from Roman tradition, invokes the question on the reason of their diversity in relation to Roman law received. Let us reflect then on the problem of transferring the ownership of a movable.[47] Solutions contained in the French, Austrian and German codes are quoted as three classic models of the transfer of ownership in the continental Europe.[48] Pursuant to Article 711 and 1138 of the French Civil Code (hereinafter referred to as: ccf), the conclusion of a contract itself, obliging to alienation, results in the transfer of ownership. Pursuant to § 424 and 426 of the Austrian Civil Code (hereinafter referred to as: ABGB), a contract obliging to the transfer of ownership of a movable basically induces this effect upon the delivery of the movable. Whereas, pursuant to § 929 BGB the transfer of ownership occurs based on two contracts: a contract obliging to alienation and a material contract resulting in alienation, effective in the event that the transfer of a thing is accompanied by an unanimous intent to transfer the ownership.

As a synthetic collection of fundamental principles of the transfer of ownership in the Roman law, constituting the subject of reception, the Emperor Diocletian's constitution is indicated stating that "the ownership of things is transferred by means of delivery and acquisitive prescription and not by naked contracts".[49] The abovementioned outline of models of the transfer of ownership shows that this is the ABGB solution that is consistent with the Roman tradition. Protocols of preparatory works over ABGB directly confirm that the model accepted in the code was based on the Roman law principle, i.e. *iura realia traditione demum transferuntur.*[50] The French

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[47] In these reflections I took advantage of abstracts of the results of research conducted within the framework of the project "Polnisches und deutsches Sachenrecht im 20. Jahrhundert – Romanistische Tradition, gemeinsame Erfahrungen, europäische Perspektive" supported by the Volkswagen Foundation in Hannover.

[48] See: W.J. K a t n e r: *Umowne nabycie własności ruchomości w prawie polskim* [Contractual Acquisition of Movables in Polish Law], Warsaw 1992, p. 8 ff.

[49] C.2,3,20: *Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur.*

[50] J. O f n e r: *Der Urentwurf und Beratungsprotokolle des Österreichischen Allgemeinen Bürgerlichen Gesetzbuches*, vol. 1, Nachdruck Glashütten im Taunus 1976, p. 277.

and German codes contain different solutions in comparison to Roman law and this has been shown by authors' attitude towards Roman law presented in the course of their drafting.

V. 2.

In the so-called third draft of the French Civil Code published in 1798 its Article 250 (534) still indicated actual delivery (*traditio*) as a manner of acquiring a movable.[51] It was only in the so-called *Commission du Gouvernement* draft of 1800 that a general norm appeared corresponding to the present Article 1138 of ccf., expressing the rule that the contract itself obliging to transfer the ownership would immediately result in alienation.[52] A discussion in the State Council illustrates arguments which caused the adoption of solutions compliant with this rule in the final text of the code. In the course of the discussion over an article constituting original Article 711 of ccf., M. Tronchet argued, answering the question of the consul Cambacérès "why actual delivery had not been recognised, in compliance with Roman law, as a manner of acquiring ownership", that the delivery was only a manner of performing an obligation, although he admitted that the question was susceptible as to movables (*susceptibles*). After the speech, the article's wording was accepted.[53] In the course of the discussion over an article constituting original Article 1138 of ccf., the transfer of ownership upon concluding a contract obliging to alienation was given grounds of the *res perit domino* rule. Such arguments show that they were based on a logical combination of two rules deriving from the Roman law tradition: the *periculum est emptoris* rule, in other words recognising the transfer of the risk of losing a thing upon the contract conclusion and the *res perit dominio* rule,[54] referred to in the course of discussion. The question of the transfer of ownership based on a sale contract itself was touched in a more extensive manner by J. Portalis in February 1804. Referring to early codification works, he stated that the works assumed by mistake, following the model of Roman jurisprudence, that an actual delivery led to the transfer of ownership. He explained, after this critical opinion, that "in accordance with principles of our French law it is enough to conclude a contract [to transfer the ownership] and these principles are more reasonable and favourable for the society".[55] Let us confront this statement with several important works of French jurisprudence of the end of the 17th century and of the 18th century. J. Domat in his work "Civil Law in its Natural Order" stated, while talking about a sale contract that the first effect of

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[51] Compare: F. R a n i e r i (ed.): *Projet du Code Civil de la Republique Romaine (1798). Paris, Bibl. Nat. – Nouv. Acq. Fr 21892*, Frankfurt am Main 1976, p. 79 ff.

[52] Compare: E. B u c h e r: "Die Eigentums-Translativwirkung von Schuldverträgen: Das „Wocher" und „Wohin" dieses Modells des Code civil," *ZEuP* (1998), p. 644 ff.

[53] P.A. F e n e t (ed.): *Recueil complet des travaux préparatoires du Code civil*, vol. 12, [reprint of the 1827 edition] Osnabrück 1968, p. 4 ff.

[54] So E. B u c h e r, *op. cit.*, p. 651 ff.

[55] V.F. P o r t a l i s: *Discours, rapports et travaux inédits sur le code civil, par J.-É.-M. Portalis*, Paris 1844, p. 235.

delivering a thing sold to the buyer would be his becoming the owner of the thing and invoked the above-quoted Diocletian's constitution.[56] Francois Bourjon, in a work dedicated to common law principles and Paris' couteme, declared to be a rule that coming into possession of a movable justified ownership, indicating in the grounds that this principle protects against confusion in trade.[57] Finally, R. Pothier, quoting the aforementioned Diocletian's definition, argued that the sale contract itself did not transfer ownership on the buyer. The transfer occurs as a result of actual delivery of the thing provided the price has been paid.[58] Such picture of sources, although restricted but concerning works of essential practical importance of that time provokes to consider the abovementioned statement by J. Portalis as at least not precise. Eugen Bucher has recently presented a strong opinion that the extension of the principle of consensualism was a novelty introduced in 1800 by the so-called commission of four, which had no grounds in national legal legacy and was inconsistent with earlier codification works.[59] In the light of other statements of J. Portalis concerning Roman law, there are no grounds for explaining the presented arguments as hostile towards Roman law.[60] Let us look at further course of Portalis' statement of February 1804. In my opinion, the explanation that "a contract is different from enforcement as a contract is an expression of the parties' will, whereas although enforcement implies a contract, this is not a contract [...] and would be absurd if somebody failed to perform a contract and avoided enforcement with this respect"[61] is the most important issue in this opinion. Based on these words, I think that doubts provoked by differentiation between *pactum* and *traditio* in the abovementioned Diocletian's constitution constituted grounds for Portalis's arguments. In the French legal writing, J. Domat expressly indicated that doubts could arise as how to combine the principle of a sale becoming effective (*la vente s'accomplit*) only be means of an agreement with the principle that the delivery only should transfer the ownership of a thing sold.[62] Portalis's arguments and earlier statements of M. Tronchet similar to these arguments in defending the draft Article 711 of ccf. proved that if the transfer of ownership took place based on a contract, the combination of a material effect with delivery must be understood as the recognition of *traditio* as a separate contract, and they did not want to support this kind of argumentation.

Based on the presented outline of the discussion which took place in the State Council, there appear two significant reasons for adopting the principle of consen-

[56] J. Domat: *Les loix civiles dans leur ordre naturel*, lib. I, tit. II, sect. II, art. 10.

[57] F. Bourjon: *Le droit commun et la coutume de Paris réduites en principes*, Paris 1770, Libre II, titre 1, chapitre 6, section 1, art. 1.

[58] R. Pothier: *Traité du contrat de vente*, vol. 1, Orleans 1772, item 318.

[59] E. Bucher, *op. cit.*, p. 650.

[60] Compare e.g.: V. F. Portalis: *op. cit.*, p. 241; generally in: W. Wołodkiewicz, M. Zabłocka: *Prawo rzymskie* [Roman Law], Warsaw 2001, p. 323.

[61] V. F. Portalis, *op. cit.*, p. 238.

[62] J. Domat, *op. cit.*, lib. I, tit. II, sect. II, art. 10. J. Domat, as a supporter of the transfer of ownership executed upon the delivery of a thing, argued that there was no contradiction between the concepts, and explained the relationship between the contract and its execution as two degrees of accomplishment (*deux degrés d'accomplissement*).

sualism: objection against actual treating the delivery of a thing as a contract and the combination of material effects with the *periculum est emptoris* principle.

V. 3.

The possibility of recognising *traditio* as a contract, perceived and rejected by Portalis, played an important role in pandectistic doctrine. Carl F. Savigny in his "System of Modern Roman Law" distinguished material contracts as a kind of private contracts. As the first example of this kind of contracts he indicated *traditio* underlining that is should be distinguished from a sale contract.[63] It meant the creation of a doctrinal basis for such a model according to which the ownership of things is transferred based on a contract for the alienation of a thing and its delivery, irrespective of the existence and regularity of obligation to transfer the ownership. Carl Savigny, in his "System", did not combine the abovementioned theory of an abstract material contract with any Roman legal text. In the works of the supporters of Savigny's theory direct reference to Roman sources appears, in the first place to the resolution of a Roman jurist Julian, preserved in the title of the Justinian's Digesta dedicated to acquiring ownership. The jurist's text concerned a case in which a person giving money acted in the conviction that he made a donation, and the recipient accepted the thing as a loan. Resolving that case the Roman lawyer recognised that the donation was not effective but in spite of that the ownership of money was transferred to the recipient.[64] A statement of H. Dernburg of 1857 can constitute an example of such arguments. H. Dernburg stated that Julian indicated unequivocally that in the Roman law it was enough for the transfer of ownership to deliver the thing when the parties' intention as to the transfer of ownership was unanimous.[65] The opinion that the transfer of ownership based on an abstract material contract had grounds in Roman law was favoured by pandectistic manuals.[66]

As a consequence, references to Roman law became an element of discussions over drafts of the German Civil Code, deriving mostly from pandectistic doctrine. We encounter the abovementioned Julian's text in vast reflections on the *traditio* nature included in a draft of material law of R. Johow of 1880 for the first commission. Based on that text, the draft's author argued for the sake of the separation of a contract obliging to transfer the ownership from a material contract. R. Johow noticed, more clearly than pandectistic authors quoted by him, the discrepancy between the theory of an abstract material contract justified by Julian's text, and a picture resulting from a broader analysis of Roman sources. He adopted, however, the position elabo-

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[63] F. C. Savigny: *System des heutigen Römischen Rechts*, vol. 3, Berlin 1840, pp. 312–313.

[64] D.41,1,36, differently Ulpian. D.12,1,18. This controversy was many times analysed by the doctrine.

[65] H. Dernburg: "Beitrag zur Lehre von der justa causa bei der Tradition," *AcP* 40 (1857), p. 1 ff.

[66] See e.g.: K. A. Vangerow: *Lehrbuch der Pandekten*, vol. 1, Marburg-Leipzig 1876, p. 573 ff.; B. Windscheid: *Lehrbuch des Pandekts*, vol. 1, Frankfurt Main 1882, p. 544, footnote 14.

rated by pandectistic authors as "decisive for common law".[67] R. Johow's proposal became a model for §§ 816, 817 and 851 of the first draft.[68] The separation of an obligation contract from a material one based on this reasoning was strongly criticised in the course of the works conducted in 1890 over the so-called second draft. Towards an objection that such separation was against the society's image,[69] the word "contract" referring to delivery was replaced with a term stating that the parties' intention as to the transfer of ownership "was unanimous" (*einig sind*) at the delivery of the thing. An opinion is dominant that this change was of purely editorial character.[70] In the course of discussion the commissioner, G. Planck, rejected further changes as detrimental to fundamentals of the draft's material law.[71] In the recitals of the draft, we again encounter references to Julian's text. The text was indicated as a basis for applying, in common law, the rule that *tradito* is a contract.[72] A model of the transfer of ownership was therefore shaped, based on an abstract material contract, expressed, as for movables, by § 929 of BGB.

V. 4.

In accordance with an opinion dominant at present in the doctrine, to transfer the ownership of a thing in Roman law of the Justinian period the cause (*causa*) of alienation was necessary, e.g. of a sale contract or actual delivery of the thing (*traditio*). The historical and comparative analysis conducted herein shows that the French and German models are connected owing to an idea which appeared in the course of preparatory works over the codes that the delivery of a thing could be understood in Roman law as a contract. The rejection of this opinion by J. Portalis can be perceived as one of the most important reasons for applying, in ccf., a principle that already a contract obliging to transfer the ownership resulted in alienation. In turn, the opinion justified by Roman law and accepted by pandectistic doctrine that *traditio* was a contract contributed to the adoption in BGB of the concept of transferring the ownership of a movable based on an abstract material contract and delivery of the thing. Recognition of *tradito* as a contract in Roman law rises serious doubts and has been strongly criticised starting from the end of the 19th century.[73] Detailed considerations concerning the abovementioned Julian's text deny its being evidence that the transfer

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[67] W. Schubert (ed.): *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfes eines Bürgerlichen Gesetzbuches (Nachdruck der als Manuskript vervielfältigten Ausgabe aus den Jahren 1876–1887)*, vol. III/1, Berlin 1982, p. 759 ff.

[68] *Ibid.*, vol. III/1, p. 236; H. H. Jakobs, W. Schubert (eds.): *Die Beratung des Bürgelichen Gesetzbuchs in systermatischer Zusammenstallung der unveröffentlichen Quellen*, vol. III/1, Berlin 1985, p. 241.

[69] H. H. Jakobs, W. Schubert, *op. cit.*, pp. 249 and 259.

[70] H. J. Wieling: *Sachenrecht*, Berlin-Heidelberg-New York 2001, p. 10, footnote 29.

[71] H. H. Jakobs, W. Schubert, *op. cit.*, vol. III/1, p. 259.

[72] *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuchs für das Deutsche Reich*, vol. 3, Berlin 1896, p. 7 footnote 1.

[73] See e.g.: M. Chlamtacz: *Die rechtliche Natur der Übereignungsart durch Traditio im römischen Recht*, Leipzig 1897; H. Hausmaninger, W. Selb: *Römisches Privatrecht*, Wien-Köln-Weimar 1994, p. 216 ff.

of ownership based on an abstract material contract was a Roman law principle.[74] Putting the result of the above comparative analysis into a few words, it can be said that the difficulty to grasp the legal nature of *traditio* in Roman law and, as a consequence arbitrary, therefore incidental declaring it to be a contract, was the reason for divergence between the described models of alienation. With reference to the French law, the combination, well-established in France, between the *periculum est emptoris* Roman rule and the *res perit domini* principle can be indicated as the second reason for adopting the principle of consensualism. However, such connection is not found in the Roman law, and can be assessed as an attempt to rationalise the accepted principle, deprived of any deeper reflection.[75]

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While undertaking the present research, I noticed the existence of a controversy as to the values of Roman tradition for the harmonisation of private law. The above considerations show that partial harmonisation carried out by the implementation of directives results in the formulation of a thesis on rejecting hitherto private law tradition. I questioned the accuracy of this thesis. In my opinion, this thesis stems from the fact that harmonisation restricted to selected problems of civil law only creates conditions for emphasising novelties. A postulate of the European Parliament, repeated many times within the last dozen of years or so, for undertaking harmonisation of complex fields of private law, based on comparative research, competes with partial harmonisation of private law, conducted in practice. In the event of adopting such scope and method of harmonisation there open visible opportunities of using the Roman law tradition as a factor serving to efficiently approximate civil law systems of the Member States. This process can be fostered both by the usage of Roman tradition with the view of emphasising similarities between national solutions, and showing, as presented above, based on the example of the transfer of ownership of a movable, that national differences can derive from wrong reasoning and usage of Roman law received in codification works. Both methods used in the historical and comparative analysis can weaken the defence of national differences. In other words, as the first legible value of Roman tradition for the harmonisation of private law there appears its usefulness for accepting a certain "point of departure", other than of national character. The multiplicity of national legal traditions and strong postulates for the instrumentalisation of private law[76] give grounds for accepting the fact

[74] See e.g.: J.G. F u c h s: *Iusta causa traditionis in der romanistischen Wissenschaft*, Basel 1952, p. 252; A. C a n n a t a: "D.41,1,36, una interpolazione occasionale," in: *Incontro con G. Pugliese*, Milano 1992, p. 74 ff.

[75] Compare: E. B u c h e r, p. 659, recognises, as the direct reason for introducing the principle of consensualism, faithfulness to the *periculum est emptoris* rule. At present, in Roman-related literature an attempt to connect these rules has been made by F. P e t e r s by way of introducing the concept of "economic owner of a thing" who will become its "legal owner" upon the delivery of the thing. Compare: F. P e t e r s: "Periculum est emptoris," in: *Iuris professio. Festgabe für Max Kaser*, Wien–Köln–Graz 1986, p. 232.

[76] See: E.J. W e i n r i b: *The Idea of Private Law*, Harvard 1995, p. 46 ff., p. 230.

that at present the Roman law cannot play the same role that it played, in building European solutions, in the 19th century.[77] It should not, however, be identified with the lack of values of Roman tradition for positive building up of a European solution. A conclusion can be drawn that if it serves to stress common features of national solutions, it will set out a principle, direction of a solution. Coming back to the models of the transfer of ownership of movables, I think that arbitrary nature shown based on this example concerning the approach to Roman law favours critical opinion on different national solutions, and as a consequence can lead to taking into account also Roman law experience as an element of seeking solutions on comparative law pathway. Thus, taking into account the Roman tradition in comparative research can cause that the tradition preserves, to a certain extent, its inspiring contribution to the development of private law. It may be feared that the development of considerations in a manner illustrated above by means of the transfer of ownership of movables will delay the determination of a solution by way of comparative analysis. This is not unlikely but the advantage of solutions elaborated in such manner can be the fact that they will not raise such strong objections of supporters of national legal traditions.[78] It can be also feared that a progress of the private law integration in Europe will result in time in losing by the Roman law tradition its position of a factor symbolising legal unity of Europe.[79] It cannot be excluded, however, that a more intense connection between private comparative law and research over Roman law can favour, in a longer perspective, the loss by Roman law of the position held thereby at present. If we juxtapose the opinion that certain autonomy of the development of law is one of the characteristics of the Western legal tradition and that it is treated as *corpus iuris*,[80] with threats for legal autonomy[81] emphasized recently by E. Weinrib, a legal philosopher, then the inclusion of comparative considerations serving to harmonise private law into the Roman law tradition can be perceived as an interesting vision of a development which can lead to the loss by Roman law of an autonomy within the present meaning, contributing, however, to the preservation of the autonomy of private law.

[77] Compare: R. Schulze: "Gemeineuropäisches Privatrecht und Rechtsgeschichte," in: P.-Chr. Müller-Graff: *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, Baden-Baden 1999, p. 138 ff. Differently: B. Sitek, p. 53.

[78] Compare: I.C. Kamiński, *op. cit.*, p. 48.

[79] Compare: M. Kuryłowicz, *op. cit.*, p. 112.

[80] H. Berman, *op. cit.*, pp. 22 and 51.

[81] E.J. Weinrib, *op. cit.*, p. 21.

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In Defence of the Idea of State Sovereignty in International Law

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A. Introduction

"The question of sovereignty and debates about it have always been at the centre of the system of public international law. Views about the nature and purposes of sovereignty and about its rightful place in international law have necessarily varied from time to time because changing times need different approaches" – says Sir Robert Jennings.[1] The concept of state sovereignty has long been criticised by many recognised scholars in international law (e.g. H. Kelsen, G. Scelle, and Ch. Rousseau). At present, the criticism of sovereignty has undoubtedly intensified. For example, Philip Allot maintains that "...the evolution of the reality of social organisation across the human world has made the idea of 'sovereignty' into an anachronism and an illusion, inappropriate as a theoretical explanation of the totalising structure of society."[2] It is emphasised that the concept of sovereignty has been mythologised, thus leading to the destruction of its identity, the idea of sovereignty being consequently regarded as "a catchword, a substitute for thinking and precision."[3] Sovereignty is challenged as the *raison d'être* of the democratic state,[4] it is dethroned in the context of the protection of human rights and the state's internal legitimacy,[5] and it is described as "organised hypocrisy".[6] In regard of the legal status of Member States in the European Communities and the European Union, a view is even advanced that there "simply

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[1] R. Jennings: "Sovereignty and International Law," in: G. Kreijen (ed.): *State, Sovereignty and International Governance*, Oxford University Press 2002 (reprinted 2004), p. 29.

[2] Ph. Allot: *The Health of Nations. Society and Law beyond the State*, Cambridge University Press 2002, p. 178.

[3] L. Henkin: "International Law: Politics, Values and Functions," *RCADI* 216 (1989), p. 24; *Idem*: "The Mythology of Sovereignty," in: R.S.J. Macdonald (ed.): *Essays in Honour of Wang Tieya*, Dordrecht 1994, p. 351; E. Lauterpacht: "Sovereignty – Myth or Reality," *International Affairs* 73 (1997), p. 137.

[4] D. Kostakopoulu: "Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?," *Oxford Journal of Legal Studies* 22 (2002), p. 147.

[5] See e.g.: W.M. Reisman: "Sovereignty and Human Rights in Contemporary International Law," *AJIL* 84 (1990), p. 866; F.R. Tesón: *A Philosophy of International Law*, Westview Press, Colorado-Oxford 1999, pp. 39–66.

[6] St. Krasner: *Sovereignty: Organised Hypocrisy*, Princeton University Press 1999.

is no nucleus of sovereignty that the Member States can invoke, as such, against the Community."[7] Critics of state sovereignty in international law share a conviction about its absolutist nature, which prevents the state from respecting legal obligations. As J.F. Wiliams once wrote: "What is sovereignty is not law; what is law is not sovereignty. All law is based on an abandonment of sovereignty..."[8] Authors of less radical views emphasise the changeable substance of the concept of sovereignty, thereby accentuating the need for a new approach to the idea of sovereignty in the present day.[9] With the progressing interdependence of states and increasing importance of human rights in the national and international legal orders, calls are often made to reform state sovereignty. Such a view has been professed for example by the latest UN Secretaries General.[10]

In the present study, I shall first seek to defend the thesis that state sovereignty continues to be the basic idea of the international legal order. Second, this idea still plays in my estimation the fundamental role in the legal protection of equality of states. Third, I intend to demonstrate that sovereignty has a constant nature but it is its functions that are variable for the functions of sovereignty are a derivative of the condition of international law. This is why in the days of modern absolutism or the time of deflation of norms of positive international law, in particular norms that prohibit the states from taking specific actions, sovereignty was equalled with lawlessness. Later, as a result of the development of the norms of universal international law, the nature of sovereignty did not change but its functions did because state functions started to be exercised in a different legal context. I object to the thesis that the development of international law is a process of restricting state sovereignty. A contrary thesis can rather be proposed, that is one may argue that the development of this law by reinforcing the protection of the state's legal existence, which process culminated in the principle of sovereign equality, led to the strengthening of sovereignty. The idea of sovereignty as an intellectual expression of the state's full competence to determine the forms in which state functions are performed constitutes, in my opinion, a guarantee of the equality of states and axiological pluralism of contemporary international law.

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[7] K. Lenaerts: "Constitutionalism and the Many Faces of Federalism," *American Journal of Comparative Law* 38 (1990), 205, p. 220.

[8] J.F. Wiliams: *Aspects of Modern International Law. An Essay*, London 1939, p. 29. Sovereignty was identified with absolutism e.g. by J. Maritain in his well-known criticism of the concept of sovereignty. See J. Maritain: "The Concept of Sovereignty," in: W.J. Stankiewicz (ed.): *In Defense of Sovereignty*, New-York-London-Toronto 1969, p. 41.

[9] Cf. N. Schrijver: "The Changing Nature of State Sovereignty," *BYIL* 70 (1999), p. 65; J.H. Jackson: "Sovereignty-Modern: A New Approach to an Outdated Concept," *AJIL* 97 (2003), p. 782; H. Schermes: "Different Aspects of Sovereignty," in: G. Kreijen: *supra*, n. 1, p. 185; R.O. Keohane: "Political Authority after Intervention: Gradations in Sovereignty," in: J.L. Holzgrefe, R.O. Keohane (eds.): *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas*, Cambridge University Press 2003, p. 275.

[10] See: B. Boutros-Ghali: "An Agenda for Peace," *ILM* 31 (1992), p. 956; K.A. Annan: *The Question of Intervention*, New York 1999.

B. The Nature of the Idea of State Sovereignty

There is a generic feedback between state sovereignty and the development of international law both at the level of ideas and of practice that implements them. Even the challengers to the idea of state sovereignty cannot disregard the fact of the operation of organised, independent political communities.[11] Without this fact, the development of the institutions of international law would not have been possible. It is state sovereignty as the ideological consequence of this fact that is the *spiritus movens* (or driving force), to which we owe the legal foundations of the contemporary international community. These foundations are certainly still imperfect because they are plagued by internal tensions and conflicts hardly known to state law, nevertheless they increasingly eliminate the shortcomings of the modern law of nations. State sovereignty should therefore be regarded as a regulative idea (in the Kantian sense of the word) of international law, i.e. the idea without which it would be impossible for the structure and institutions of this law to exist and to be explored.

An obvious circumstance is that sovereignty acquired the status of a fundamental, even constitutive feature of the state in twentieth-century international law. It is characteristic that with the steady growth in the number of states after the Word War II, states that are often unstable and politically backwards, more and more significance attached to sovereignty has been simultaneously observed in political and legal practice. Paradoxically, this happens despite prophecies that state sovereignty is on the wane in the present-day configuration of international relations. In some way, history has made a circle: sovereignty is attributed with the role of the advocate of the idea of equality protecting smaller states, which is the role it fulfilled at the start of its origin. This has resulted in almost complete elimination from the language of international law of the concept of the "dependent state" as self-contradictory. Not infrequently was it encountered in the diplomatic practice and legal literature as late as in the interwar decades.[12]

It is puzzling, however, that the concept of state sovereignty eludes a single generally accepted definition. Many authors speak of their "own" idea of state sovereignty. It is often associated with an intuitive rather than discursive meaning. This resembles to some extent the case of the definition of the state in contemporary international law. One supposedly knows what "State" is in this law, yet it is futile to seek a legal

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[11] Take, for example, the view of J.H.W. V e r z i j l, who, when opting for the removal of the concept of state sovereignty from legal language because of its ambiguity, wrote in his monumental work: "One of the major cruces in the theory and practice of the law of nations is the claim of States to sovereignty or 'sovereign independence.' No publication which pretends to deal with the major problems posed by international law can, therefore, possibly by-pass this central concept" (*International Law in Historical Perspective*, vol. I: *General Subjects*, Leyden 1968, p. 256).

[12] Sometimes the term "dependent state" is found in the contemporary interpretations of international law. See e.g.: I. B r o w n l i e: *Principles of Public International Law*, 6th ed., Oxford University Press 2003, pp. 72–74. However, the examples given there are only historically important in their vast majority, while those that have preserved their current relevance should rather be defined as the states voluntarily giving up some of their capacity to perform acts in law.

definition of it in a universally binding act.[13] Another source of controversy lies in the presumed normative sense of state sovereignty in international law. Can we at all speak of sovereignty as a legal norm? The answer to this question, contrary to appearances, is not obvious. A legal norm is, without doubt, "sovereign equality" as a principle of the UN Charter, constitutive acts of other international organisations and an element of a number of international agreements. It is from sovereign equality that the rights and duties of states follow. The sense of this principle, at least authentically interpreted at the UN founding conference, does not directly explain, however, what sovereignty is in its nature and whether sovereignty has any nature at all.[14] The principle of sovereign equality is a highly state-centric one and denotes the equality of all states in respect of sovereignty. The present problem can thus be formulated in the following way: in what way are all states equal?

Genetically, sovereignty remains combined with the fact of supreme authority in the state. It is itself not a fact, however. It is rather through its agency that specific actual states occur. It expresses at the level of ideas the ultimate character of authority in a politico-legal community. In relations between states, however, it emphasises something quite the opposite: the absence of suprastate authority in them.[15] We have therefore a thesis – the supreme authority in a certain community, and an anti-thesis – the absence of such authority in international relations. This opposition constitutes the identity of the concept of state sovereignty in international law.

When following the development of the concept and meaning of state sovereignty, one can arrive at a seemingly paradoxical conclusion. Namely, contrary to the frequently voiced statements that in modern and contemporary law the process of relativisation of state sovereignty supposedly occurred, that is the transition from the so-called absolute sovereignty to sovereignty subordinated to the supremacy of international law (incidentally, sovereignty was never outside the law), the development of this law proves that state sovereignty is being strengthened.[16] State sovereignty has always been subject to international law because from the very beginning it was its regulative idea. The problem of the so-called relativisation of sovereignty can be explained in a different way. The point is that in the days of only negligible legal regulation of international relations the lawlessness of states was not constrained by any legal straitjacket. And it was only in this sense that state sovereignty, espe-

[13] Which is why in its remarks on the 1949 "Draft Declaration of Rights and Duties of States" the International Law Commission stated that "the term 'State' is used in the sense commonly accepted in international practice" (*Yearbook of International Law Commission* [1949], p. 289).

[14] Some more recent studies concerning sovereignty render, in the spirit of postmodern philosophy, the essential question of what sovereignty is. See especially: J. Bartelson: *A Genealogy of Sovereignty*, Cambridge 1995, p. 1. The authoress maintains that the more sovereignty is being explained, the more it evades being explained (p. 17). Furthermore, she denies sovereignty the status of a being, consequently it is impossible to ascertain what it is but one can only name its functions (pp. 48–49).

[15] Cf. F.H. Hinsley: "The Concept of Sovereignty and the Relations between States," in: W.J. Stankiewicz (ed.), *supra*, n. 8, p. 275; G. Schwarzenberger: "The Forms of Sovereignty," in: W. J. Stankiewicz (ed.), *supra*, n. 8, p. 162.

[16] See: N. Schrijver (*supra*, n. 9, *passim*), who, on the example of evolution of several institutions of international law, shows the still fundamental role of sovereignty in this law.

cially that of great powers, was unlimited. As the number of provisions increased that regulated various aspects of activities of State, its freedom to take imperious actions was restricted, or at least these actions were no longer legally indifferent. This does not, however, justify the thesis about the restriction or diminishment of original state sovereignty. On the contrary, the development of international law is a process of strengthening the protection of state sovereignty, which culminates in the principle of sovereign equality being firmly established. The more there are legal norms that define the status of the state in international law, the better the significance of sovereignty manifests itself. In other words, without its normative background, sovereignty is devoid of significance in international law. What then is its norm? I object to treating sovereignty in this way. However, I concur with the view that recognises state sovereignty as the fundamental concept of international law, even though without a direct normative meaning.[17] This concept is very closely connected with the international community and international law. Many central principles and institutions of contemporary international law originate from the concept of state sovereignty, also many of them still continue to derive their justification from it.

Sovereignty has always been associated with the independence of central authority exercised in a specific territory. No wonder therefore that the concept of "independence" has often been regarded as synonymous with "sovereignty."[18] Independence is undoubtedly the foundation for state sovereignty. However, the nature of sovereignty does not seem to be exhausted only in this. Independence is merely a negative definition that indicates the absence of subordination to other entities. Sovereignty, on the other hand, is something more. Its nature is fulfilled in the state's full capacity to perform acts in law, within which the state exercises its functions. The complete and autonomous capacity to perform acts in law comprises both internal and external relations.[19] Its tangible manifestations include the making, application and enforcement of the law by state agencies, treaty-making powers, rights of legation and consulate, and *ius standii* in the field of international relations. The full use of these attributes proves that a given territorial entity enjoys sovereignty, thereby affirming its status as a state under international law even if it is actually politically subordinated to other subjects. The last case is illustrated by the situation of European states where the communist political system was established after the World War II. Their political vassalisation by the Soviet Union was no obstacle to recognising them

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[17] Cf. J. K r a n z: "Państwo i jego suwerenność," *Państwo i Prawo* (1996), No 7, pp. 4 and 23; *Idem*: "Réflexions sur la souveraineté," in: J. M a k a r c z y k (ed.): *Theory of International Law at the Threshold of the 21st Century*, The Hague 1996, p. 183.

[18] See e.g. the position of H.L.A. H a r t, who writes that the word "sovereign" eans nothing but "independent" and like the other, it points to something negative: a sovereign state is one that is not subject to some kind of control, while its sovereignty defines the area of activity, within which it is autonomous (*The Concept of Law*, 2nd ed., Oxford 1994, p. 223).

[19] That is why we can speak of the inner and outer sides of sovereignty. See e.g.: R. J e n n i n g s, *supra*, n. 1, pp. 35–38. In the Polish doctrine this is expressed by the definition (attributed to Ludwik E h r l i c h) of sovereignty as "self-ruling, autonomous rule" [samowładność] and "total rule" [całowładność]. See: L. E h r l i c h: *Prawo narodów*, Lwów 1927, p. 107, and successive editions of this handbook.

as sovereign subjects and developing mutual relations based on sovereign equality. A radical change in the political situation of these states at the turn of the 1980s – commonly referred to as "regaining of independence" – did not affect their international law status, owing to which they retained their identity and continuity under this law.

The absence of legal subordination of the authority exercising control over a specific territory justifies the state's autonomous capacity to perform acts in law. Therefore, independence of the territorial subject is a necessary condition for its sovereignty or full and exclusive capacity to exercise state functions. We could also say that independence constitutes the preliminary and most important condition for statehood, and sovereignty – its legal consequence.[20]

State sovereignty is expressed in having an autonomous legal order, i.e. one that is no part of a wider legal order nor does it find its ontic justification in it.[21] Which is why the state loses its sovereignty as a result of disintegration or unification processes insofar as they lead to the collapse of the previous legal order.

In this context, we should note the unfounded attribution of the property of sovereignty to the constituent parts of federal states. They are by nature subordinated to the state's central authority, while the *raison d'être* of their legal systems lies in the constitutional legislation of the federal state. It is the Constitution of the federal state that defines the extent of both internal independence of its constituents and, which happens comparatively rarely, the capacity to perform acts in law in international relations. The latter by no means proves their sovereignty. Although constituent parts that have some capacity to be represented in international relations are sometimes referred to as "constituent states" while constitutional provisions even call them "states", these concepts are not tantamount to the concept of state in international law. Constituent parts do not have sovereignty because, first, the scope of their independence is limited on behalf of the central authorities and other constituent parts, and second, their capacity to perform acts in law does not follow from international law, which makes such an effect consequent upon sovereignty, but from constitutional law. As a result, their mutual relations are regulated by constitutional law rather than by international law. Therefore, the principle of sovereign equality does not apply to them. The dependence of constituent parts on the central authorities discredits them as sovereign subjects. It is also incorrect to refer to them as subjects "with partial sovereignty" and to a composite state as a subject with "divisible sovereignty". Under international law, sovereignty is in principle indivisible. From this standpoint, the fact of admission to the United Nations (whose membership is reserved under

[20] Cf. J. C r a w f o r d: "The Criteria for Statehood in International Law," *BYIL* 48 (1976–1977) 93, pp. 139–140.

[21] This was once strongly emphasised by H. K e l s e n: *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tübingen 1920, *passim*, especially pp. 1–53 and by W. S u k i e n n i c k i: *La souveraineté des Etats en droit international moderne*, Paris 1927, pp. 24–25. Unlike these authors, however, I do not insist that the concept of state sovereignty can be retained only within monism, which advocates the supremacy of domestic law over international law.

the UN Charter for states only) of the Soviet Belarusian Republic and the Soviet Ukrainian Republic as parts of the Soviet Union should be viewed as an example of instrumental and opportunistic use of the Charter provisions by superpowers. The Soviet republics never had the status of states despite the fact that the amendment of 1 February 1944 to the Soviet Union's 1936 Constitution vested them with certain attributes enjoyed by states in international law.

While they exist, states undergo various changes. These are most often minor changes but they also include ones that penetrate deep into the state's structure, sometimes calling its further existence into question. Presumption weighs in favour of preserving the state's identity and sovereignty in such situations. The relation between the state's identity and its sovereignty is very close because sovereignty should be viewed as the main criterion for state identity in international law. The state cannot thus be identical with an unsovereign political entity even when the two subjects have the same territory and population.[22] This is why the presumption of preservation of identity is abolished when circumstances occur that lead to the loss of sovereignty of the state and, consequently, to its collapse in the light of international law. International practice shows that third states usually adopt stances "for" rather than "against" with regard to the continuation of legal existence by a state undergoing serious changes. This is illustrated by Poland's situation in 1945. Even the establishment of conditions for the formation of Polish government which could enjoy general international recognition without the presence of legal Polish authorities was no obstacle to treating by third states with very few exceptions the post-Yalta Poland as a continuator of the Second Republic of Poland.[23] Therefore, the fact that Poland preserved her sovereignty was never challenged during the Word War II or during the period of her most acute political dependence on the Soviet Union. This situation, which after all also affected other Eastern European states as well as many states in Africa, Asia or Latin America demonstrates that a test of sovereignty in international law is rather formal-legal attributes, within which states exercise their functions, than the absence of political subordination. And it is the preservation or loss of them that determine the identity and continuity of states in international law.

The so-called relativisation of sovereignty that takes place as international law develops is often justified by the limitation of the competences of power of states.

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[22] On this relation see the already classic study by K. M a r e k: *Identity and Continuity of States in Public International Law*, 2nd ed., Genève 1968, pp. 186–189.

[23] See: J. C r a w f o r d: *The Creation of States in International Law*, Oxford 1979, pp. 409–412. Observe that serious changes in the government system in Poland at the end of the 1980s did not change her international legal status, because no problem then arose regarding the succession between the present form of Poland's government system and the Polish People's Republic. The actions of the latter thus co-determine the legal position of the present-day Polish State, which is fully confirmed by the treaty practice. This also applies to those agreements that were the expression of the lack of Poland's self-determination. Which is why the Third Republic [of Poland] as the continuation of the Polish People's Republic terminated, under the treaty law, for example the Agreement on the stationing of Soviet troops in Poland or the Warsaw Pact. See: L. A n t o n o w i c z: "Tożsamość państwa polskiego w prawie międzynarodowym," *Państwo i Prawo* 48 (1993), No 10, p. 3; R. K w i e c i e ń: "Tożsamość i ciągłość prawnomiędzynarodowa państwa polskiego," *Państwo i Prawo* 53 (1998), No 8, p. 13.

This view is in fact based on the interpretation of sovereignty in the spirit of Bodin and Hobbes: a sovereign is the holder of complete and exclusive power, not constrained by any obligations as being above the law it has made itself. However, in my opinion, it is incorrect to perceive sovereignty as the sum of competences of power.[24] It is a relative question whether the state is vested with specific exclusive competences and this depends every time on the government system of a state and its international obligations. The authority of an authoritarian state has more freedom of action than the authority of a democratic state. In the latter type of state, the authority remains under supervision and has – judicially enforceable – obligations towards the subjects under its jurisdiction. In the authoritarian state, however, there is a more limited extent of supervision of the state authority, nay, it is subject to no supervision in extreme cases. Does this mean that such a state is more sovereign than a democratic one? Certainly not, although the authority of an authoritarian state has without doubt more uncontrolled leeway of action. In the light of international law, both types of state are equally sovereign and thereby they enjoy equal protection of this right because of the principle of sovereign equality. The lack of a democratic form of government does not, on the other hand, adversely affect the position of authoritarian states because international law does not yet obligate the states to satisfy in internal relations the so-called "sovereignty of the nation" postulated by a number of constitutions. A universal norm has not yet developed, whose substance would be the right to democratic government despite some degree of change in recent years, which suggests there is an evolution going on in his direction.[25]

The legitimacy of treating sovereignty as a sum of state competences is also challenged by international obligations of states that bind them without their will. The coming into existence of a state as an international subject is determined by its acceptance of the basic norms of this law, which almost became a rule in Europe in the international practice of recognising new states in the 1990s.[26] New states entering the international community do not enjoy the benefits of the *tabula rasa* principle in the sense that they have a complete freedom of action. This does not mean, however, that already at the outset their sovereignty is restricted. The con-

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[24] On this matter I share the opinion of J. K r a n z: *Państwo....*, *supra*, n. 17, p. 10, pp. 16–18, pp. 23–24, who contends that there is no formal minimum of sovereignty in the form of predetermined or constant catalogue of state competences.

[25] See especially: T.M. F r a n c k: "The Emerging Right to Democratic Governance," *AJIL* 86 (1992), p. 46; J. C r a w f o r d: "Democracy and International Law," *BYIL* 64 (1993), p. 113. On the contemporary practice of recognising governments on the basis of the principle of democratic legitimacy see: S.D. M u r p h y: "Democratic Legitimacy and the Recognition of States and Governments," *ICLQ* 48 (1999), p. 545. However, doubts may arise regarding the view about the mutual exclusion of the principle of democratic state and sovereignty. Take for example the Warsaw Declaration "Towards a Community of Democracies" of 27 June 2000 (*Sprawy Międzynarodowe* 53 (2000), No 2, pp. 63–68), in which representatives of 107 states declared inter alia: "We will co-operate to consolidate and strengthen democratic institutions, with due respect for sovereignty and the principle of non-interference in internal affairs."

[26] See in this regard the stance of Member States of the European Communities: "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 XII 1991)," *ILM* 31 (1992), pp. 1485 and 1486.

verse seems to be true. Subordination of states to international law, manifested in the observance of its basic principles, constitutes the basic condition for the protection of state sovereignty. Following the reasoning of the Permanent Court of International Justice shown in the well-known decision on the *Wimbledon* case (1923), it should be stressed that international obligations not only do not restrict sovereignty, but the capacity to undertake them proves that it exists.[27] International obligations without doubt diminish the range of exclusive competences of states. They thereby direct the exercise of sovereignty because they create in specific fields the legal framework for the exercise of state functions in domestic and international relations. If we accept as accurate the view that sovereignty is diminished due to undertaken international obligations, we have to concur with the thesis that denies the existence of sovereign states. We could only speak of states with sovereignty restricted to a different extent, meaning that those with lower intensity of international contacts would be more sovereign. The cognitive value of such arguments, however, remains limited. First, it does not explain the *raison d'être* of the concept of "state sovereignty" in the acts of international law. According to this view, after all, there is no fully corresponding referent to state sovereignty if there are no states without international obligations. Second, this reasoning calls into question, apparently groundlessly, the reasonable sense of the principle of "sovereign equality" because the sovereignty of states restricted to a different extent does not allow us to speak of their equality in respect of sovereignty.

A frequent example of restriction on state sovereignty for the authors who see it as the sum of competences is the legal position of the European Union member states. Apart from the aforementioned disadvantages of this approach, we forget about the standpoint of those interested or the member states. An opportunity to express their stance was *inter alia* the situation arisen as a result of Denmark's problems with the ratification of the Maastricht Treaty. In the "Decision of the Heads of State or Governments concerning certain problems raised by Denmark on the Maastricht Treaty on European Union" of 11–12 December 1992 representatives of the member states declared that the Treaty of the European Union "involves independent and sovereign States having

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[27] *PCIJ* (1923), Series A, No 1: "The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of state sovereignty" (p. 25). See also the advisory opinion in the case of *Exchange of Greek and Turkish Populations* (*PCIJ*, Series B, No 14, p. 36) and the arbitration decision in the case of *Kronprins Gustaf Adolf* (*RIAA*, vol. 2, p. 1254). Worth noting is also the dissenting opinion of Judge D. A n z i l o t t i regarding the advisory opinion of PCIJ in the case of *Custom Regime between Germany and Austria* (*PCIJ* (1931), Series A/B, No 41) which emphasises that restrictions on the states' freedom of action, resulting from either customary or treaty law, do not restrict a state's independence unless they impose legal supremacy of one state over another (at p. 77). The thesis treating the capacity to make obligations as an attribute immanently attached to sovereignty can also be found in the US Supreme Court decisions. Judge Hughes, in the case of *Perry v. United States* ([1935] 294 US, 353) emphasised that "The power to make binding obligations is a competence attaching to sovereignty" (quoted after: H. L a u t e r p a c h t: *The Development of International Law by the International Court*, London 1958, p. 306).

freely decided, in accordance with the existing Treaties, to exercise in common some of the competences."[28] Despite their obligations related to the European Union membership, the states remain sovereign just as Denmark is sovereign, which refused at that time (1992) to take part in the next stage of building the Economic and Currency Union and in the common defence policy. The decisions of both sides were a proof of the competence to determine state competences. Within it, states have the right to show the ways of performing their functions, including the decisions on the joint exercise of these functions in specific domains. For as long as a state has the *competence of competence*, it enjoys the status of a sovereign subject of international law.

Originated in the German legal theory, the concept of the *competence of competence*[29] encountered criticism by some part of doctrine of international law. It was especially challenged by opponents of the so-called theory of the state's self-limitation, who argued that the state, while establishing its powers within its *competence of competence*, unfoundedly influences the competences of other states.[30] It does not appear, however, that the conception of the state's general capacity to shape its own competences, invoked to explain state sovereignty or even as its criterion, should constitute any source of anarchy in international law or a factor destructive for its theories. Although in its original wording, i.e. as an element of a broader theory of the state's self-limitation it causes certain theoretical-legal difficulties, the concept does not necessarily need to be associated with this theory. It has its existence independent of the theory of self-limitation. In particular, it will not be discredited by the charge of illegitimately defining the competences of other states, or, essentially, influencing their sovereignty. The state as a sovereign subject of international law comes under this law and it is bound to observe its principles, including due respect for the sovereignty of other states. Sovereignty does not so much arise from self-determination of the state – for it is not a fact unlike greater or smaller independence – as it is bestowed upon the state by international law shaped by the earlier concerted consciousness of states. It should therefore be assumed that the competence to determine one's own competence, vested in every sovereign subject, is subject to international law in the sense that it allows the state to operate freely in the domains that are not legally reserved for other states. One can thus assert that it is international law that separates the competences of individual states and spheres of operation of their legal orders. A different conclusion, that is the perception of the *competence of competence* as a capacity arising from the self-limitation by the state of its omnipotence leads – here we should concur with Kelsen and other critics of self-limitation theory – to negation of the sovereign character of other states and consequently, to the negation of international law itself.

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[28] A.G. Harryvan, J. van der Harst (eds.): *Documents on European Union*, London 1997, pp. 285–286.

[29] See especially: G. Jellinek: *Allgemeine Staatslehre*, 3rd ed., Berlin 1914, pp. 474–489.

[30] See: H. Kelsen: *Das Problem...*, *supra*, n. 21, pp. 187–190; W. Sukiennicki: *La souveraineté...*, *supra*, n. 21, pp. 168–216; G. Scelle: *Droit international public*, Paris 1944, pp. 78–79; Ch. Rousseau: "L'indépendance de l'Etat dans l'ordre international," *RCADI* 73 (1948), pp. 198–199.

International law entails the existence of certain domains subject to the discretionary power of the states and at the same time subject to special protection by international law. In the fact that there are matters reserved for domestic competence of the states one can seek a constitutive feature of international law or even the core of its structure. And although there is almost common consent in the doctrine that there is the so-called reserved domain in the law, yet this consent is at the same time accompanied by divergence of statements explaining the legal nature of such domain and its connections with sovereignty.

C. Sovereignty and Freedom of State Actions: the Issue of the So-called "Reserved Domain"

Modern acts of international law did not directly emphasise the significance of the reserved domain also referred to as domestic competence or jurisdiction of the state. Because of a small number of norms of international law, almost everything in the practice of states was regarded as the area of their unrestrained actions. However, parallel to the process aimed at extending protection over sovereignty itself, in treaty provisions there were more and more references to the existence of matters subject to the domestic jurisdiction of states. Therefore, the more the area of state lawlessness was restricted, the more international law and international practice accentuated the importance of the reserved domain. Provisions that exclude matters falling within the reserved domain from the supervision by international organisations and agencies have their origin in agreements instituting the duty to settle disputes under arbitration proceedings.[31] Today, the existence of the reserved domain is accentuated also by the most important agreements for the community of states. Art. 15(8) of the League of Nations Pact stipulated that if one party asserted and the Council found that a dispute concerned the matter which international law considered as being within the domestic jurisdiction of that party, the Council would note it in its report, without recommending any solution. Art. 39(2b) of the General Act on the Peaceful Settlement of International Disputes adopted in Geneva on 26 September 1928, permitted states-parties, as a result of objections they lodged, to exclude "disputes, which by international law are within the domestic jurisdiction of States" from procedures provided for in the Act. Finally, we know the wording of Art. 2(7) of the UN Charter: "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Charter VII." In turn, Art. I(3) of the UNESCO Constitution of 16 November 1945 stipulates that: "With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States members of this

[31] See: R.R. W i l s o n: "Reservation Clauses in Treaties of Obligatory Arbitration," *AJIL* 23 (1929), p. 69.

Organization, the Organization is prohibited from intervening in matters which are essentially within their domestic jurisdiction."

Of significance for the issue of the reserved domain are the declarations made under Art. 36(2) of the Statute of the international Court of Justice that recognise as compulsory *ipso facto*, in relation to any other state accepting the same obligation, the jurisdiction of the Hague Court. Out of the 66 declarations currently in force,[32] 25 of them directly exclude from the jurisdiction of the ICJ the disputes related to matters recognised as being within the reserved domain. At the same time, it is referred to in different ways in these declarations. This indicates divergences of interpretation between the states in regard of understanding the nature of the reserved domain. In the declarations, four ways can be distinguished that define disputes excluded from the ICJ jurisdiction because they are within the reserved domain. First, "disputes which by international law fall exclusively within the jurisdiction of a State" (Barbados, Gambia, Guinea, Yugoslavia, Cambodia, Canada, Kenya, Madagascar, Malta, Mauritius, Pakistan, Poland, Senegal, Hungary, or Ivory Coast). Second, "disputes which by international law, are essentially within the domestic jurisdiction of a State" (Botswana, Swaziland). Third, "disputes in matters which fall within the domestic jurisdiction of a State" (Cyprus, Honduras, India). And fourth, "disputes which a State considers essentially within its domestic jurisdiction" (Liberia, Malawi, Mexico, Nigeria, Sudan). Doubts about the nature of the reserved domain oscillate between the question whether it is determined by international law or whether defining it constitutes a power of states. It should be remembered that differences of opinion in this regard are found between the League of Nations Pact and the General Act on Pacific Settlement of Disputes on the one hand, and the UN Charter and UNESCO Constitution on the other. The Pact and the General Act refer to the matters which the international law considers as being exclusively within the jurisdiction of a state while the UN Charter and the UNESCO Constitution speak of "matters which are essentially within the domestic jurisdiction of any state". We are dealing therefore with an essential difference, i.e. the UN Charter and the Constitution disregard references to international law as the criterion for establishing the reserved domain. Which group of acts better renders the legal nature of the reserved domain? The reserved domain is beyond any doubt an institution recognised by international law. It should not, however, be identified with sovereignty unless, incorrectly I believe, we understand the latter as the sum of exclusive competences of a state. Following the divergences in defining the reserved domain that characterise the aforementioned wordings, there are also differences of opinion in the doctrine. Two conflicting views can be found here. On the one hand, one speaks of the power of states to define matters falling within their reserved domain,[33] while on the other hand, the fundamental

[32] See: www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm (29.12.2005).

[33] See e.g.: J. M a k o w s k i: "Wewnętrzna kompetencja państwa," *Zeszyty Naukowe Szkoły Głównej Służby Zagranicznej* (1956), No 2, 3, p. 10, pp. 17–18; N.A. O u c h a k o v: "La compétence interne des Etats et la non-intervention dans le droit international contemporain," *RCADI* 141 (1974), pp. 46–54.

importance of international law in this respect is emphasised.[34] The latter standpoint was expressed by the Permanent Court of International Justice in its advisory opinion in the case of nationality decrees issued in Tunis and Morocco (1921). The Hague Court stressed that the assignment of a particular matter to the domestic jurisdiction of a state is relative and depends on the degree of development of international relations. This is why domestic jurisdiction is narrowed down not only by universal international law but also by particular obligations undertaken by a state in relations to other states.[35] This position also follows from other decisions of the PCIJ as well as from ICJ decisions which indicate that the freedom of state actions is limited only in the areas where there are norms of international law that prohibit specific activities.[36] The reserved domain is defined here by international law in the sense that it is determined by the condition of international obligations of the states. This viewpoint is also strongly emphasised by the resolution of the Institute of International Law of 29 April 1954.[37] According to the Institute the "reserved domain" is the domain of state activities where the jurisdiction of the state is not bound by international law, that is the extent of this domain depends on international law and varies according to its development. This means that no state can unilaterally decide the issue whether in a particular case the subject of litigation falls within the exclusive jurisdiction of the state. This obviously challenges the legitimacy of the state's discretion in deciding about the extent of its exclusive competence. Genetically, the state without doubt influences its extent by undertaking international obligations. However, this is where the powers of states stop because it is in international law rather than in their individual wills that, to use Hart's terminology, the rule of recognition resides, which determines the reserved domain. This rule also excludes from the reserved domain cases that are the subject of international obligations arisen without the consent of states, which is especially illustrated by the situation of new states. It is difficult to accept, in the light of international law, that states have a unilateral power to determine their reserved domain. This would place the state above the law, thereby justifying not only the

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[34] See e.g.: W. Sukiennicki *supra*, n. 21, pp. 322–334; N. Politis: "La problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux," *RCADI* 6 (1925), pp. 43–59; G. Andrassy: "La souveraineté et la Société des Nations," *RCADI* 61 (1937), pp. 718–719; G. Scelle, *supra*, n. 30, pp. 83–85; Ch. Rousseau, *supra*, n. 30, pp. 237–241; H. Kelsen: *Peace through Law*, New York 1944, p. 33; L. Preuss: "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction," *RCADI* 74 (1949), pp. 559–568; J.L. Brierly: "Matters of Domestic Jurisdiction," in: *idem*: *The Basis of Obligation in International Law and other Papers*, Oxford 1958, p. 81; Ch. De Visscher: *Théories et realités en droit international public*, 3 éd., Paris 1960, pp. 285–287); A. Verdross, B. Simma: *Universelles Völkerrecht – Theorie und Praxis*, Berlin 1984, p. 164; J. Kranz, *supra*, n. 17, pp. 20–21; I. Brownlie, *supra*, n. 12, pp. 290–295; W. Czapliński, A. Wyrozumska: *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, 2nd ed., Warsaw 2004, pp. 253–256.

[35] *Tunis and Morocco Nationality Decries*, PCIJ (1921), Series B, No 4, pp. 23–26.

[36] Especially *Lotus* case, PCIJ (1927), Series A, No 10: "[...] international law leaves to States a wide measure of discretion which is only limited in certain cases by prohibitive rules" (pp. 18 and 19). See also: *The Anglo – Norwegian Fisheries* case, ICJ Reports 1951, pp. 124 and 143; *Military and Paramilitary Activities in and against Nicaragua* case, ICJ Reports 1986, p. 135; *Legality of the Threat or Use of Nuclear Weapons* (advisory opinion), ICJ Reports 1996, paras. 21–22, 52.

[37] *Annuaire de L'Institut de Droit International* 45 (1954), pp. 292–293, pp. 299–300.

mutual aid and hegemony of great powers in international relations, undermining not only the foundations of the international legal order but also actually discrediting the international legal capacity of states. The subjectivist point of departure, i.e. one that focuses on state lawlessness in the process of defining the reserved domain leads to nihilistic and anarchic consequences. The criterion for defining the range of matters falling within the reserved domain of a state should therefore be sought in an objective factor, which is the state's international obligations. In a contentious situation, one should therefore establish at the outset the existence or absence of international obligations of the state. In the absence of obligations, the state retains freedom of action because international law leaves a particular matter to its domestic jurisdiction. Presumption at any rate indicates that the matter falls within this jurisdiction.[38] It can be refuted by the proof showing the regulation of a given matter by international law provisions. The duty to provide such proof rests with the subject contending that a given matter does not fall within the exclusive competence of the state. When such proof is provided, the interested state loses the grounds to raise objections towards other states that the matter falls within its domestic jurisdiction. In other words it ceases to be the judge in its own case.[39]

The reserved domain of individual states has by nature different extents since it is difficult to assume that there are even two states with an identical status of their international obligations. It is therefore ill-considered, which must be emphasised once again, to define sovereignty as the sum of state competences[40]. Their extent varies, which by no means changes the nature of sovereignty. The state as a sovereign subject determines the forms of exercising its functions. International obligations may indicate the direction of exercising them, and with obligations *erga omnes* we can even speak of a lasting direction. It is difficult, nevertheless, to accept the view that sees restrictions on sovereignty in undertaking and fulfilling international obligations for one would have, on the other hand, to view the failure to meet obligations as a spectacular manifestation of sovereignty whereas it is simply an unlawful act. Sovereignty is not, at any rate, the opposite of the legal order. On the contrary, it is one of its constitutive elements and thereby it comes under protection in it. This is why there is only a negative connection between state sovereignty and the reserved domain, i.e. to encroach upon the reserved domain of a state is to unlawfully influence its sovereignty or infringe on it. Reference to the reserved domain is therefore justified insofar as it is not detrimental to the sovereignty and legally protected inter-

[38] One cannot at any rate presume restrictions on the exclusive jurisdiction of the state. See decisions listed *supra*, n. 36. See also: J. M a k o w s k i, *supra*, n. 33, p. 4.

[39] Therefore it is illegitimate, as some states frequently do in practice, to adopt positions based on the argument of the "reserved domain", invoked to refute accusations of not respecting international obligations relating to the domestic relations in a state. They were also rejected by the ICJ. See: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (advisory opinion), ICJ Reports 1950, pp. 70–71; *Interhandel*, ICJ Reports 1959, p. 25; *Right of Passage over Indian Territory* (*Goa* case), ICJ Reports 1960, p. 33.

[40] While H a r t, *supra*, n. 18, p. 299, rightly regards the exclusive competence [domestic jurisdiction] of a state as deriving from international law, he wrongly identifies it with sovereignty because he thereby accepts that it is in the nature of sovereignty to be limited.

ests of other states.[41] This explains is why an important function of international law is the demarcation of boundaries between the reserved domains of various states. It is in this sense that the nature of the reserved domain follows from international law.

Is there the minimum of matters that constitute the reserved domain? Are there really matters that, as the UN Charter puts it, "are essentially within the domestic jurisdiction of a State"? They are the matters whose nature prevents them from being excluded from the "self-rule or autonomous rule" of the state on account of the loss of legal identity by the state. The only such thing, in fact, is that which exhausts the nature of state sovereignty in international law or the complete and exclusive competence to define competences within which state functions are exercised. International law and other states cannot indicate the ways how these functions are to be performed or whether they are to be exercised at all. A decision to cease to exercise state functions, which leads to the collapse of the state, is therefore admissible provided it has a "centrifugal" or autonomous character. On the other hand, a decision to exercise in common some state functions should be treated as an expression rather than renouncement of sovereignty. This complexity of exercise of state functions at the time of progressing interrelation is already reflected and legitimised in constitutional legislation.[42] The "competence of competence" is by international law the inviolable reserved domain as safeguarding the state's identity. The elimination of it is tantamount to loss of sovereignty and thereby to the disappearance of states in international relations. Obviously, this would effectively mean the end of international law.

D. The Functions of Sovereignty

Criticism has already been levelled above against the view that announced the decline of state sovereignty or, in a milder form, its relativisation or fundamental re-evaluation. One often speaks of the difference between present-day sovereignty and Westphalian or "Versailles-Treaty" sovereignty. In other words, opinions persist about the variable nature of state sovereignty. Yet, I believe that things are different: sovereignty has a permanent nature at its core but as the international legal order develops, its role and functions performed change. If more meticulous attention was paid to the separation of the nature of sovereignty from its functions, this would certainly result in the increased number of voices emphasising relativisation of sovereignty.

The function of sovereignty is derivative of the binding force of regulations defining the status of a state in international relations. Sovereignty had therefore different functions while the foundations of international legal order were being shaped, dif-

[41] See the position of ICJ on *United States Diplomatic and Consular Staff in Teheran* case (ICJ Reports 1979, pp. 15–16). The ICJ ruled that the internal order (Islamic revolution) is the internal affair of Iran. If, however, it is detrimental to the legally protected domain of another state, it turns from an internal into international matter. See also *Barcelona Traction* case, ICJ Reports 1970, pp. 32–33.

[42] See e.g.: the French Constitution of 1958. Its Article 88(1) states: "La République participe aux Communautés européennes et l'Union européenne, constituées d'Etats qui ont choisi librement, en vertu des traits qui les ont instituées, d'exercer en commun certaines de leurs compétences" (F. Delpérée, M. Verdussen, K. Biver (eds.): *Recueil des Constitutions Européennes*, Bruxelles 1994, p. 249).

ferent ones while the hegemonial position of superpowers was legitimised, and still others when the principle of sovereign equality now prevails.

In its origin, sovereignty performed the functions of the advocate of political and legal emancipation of the states and of their equality. At the same time, an evaluative sense started to be attributed to it: being sovereign was equivalent to having the status of a full member of the international community. We must not forget, however, that the function of sovereignty at that time was also to legitimise actions that would not be justified in the light of present-day international law. Take for example the *ius ad bellum*, which essentially legalised the policy of force and spheres of influences in relations between states. It is thus difficult in modern times to see in sovereignty the function of safeguarding the inviolability of the legal status of states. Hence comes the conviction about the absolutist and anti-legal, in this sense, nature of sovereignty. However, it is not the nature of sovereignty but its the function, stemming from the absence of norms prohibiting violation of the legal existence of a state, that allowed states to establish a political and legal position at the expense of other actors in international relations.

Acceptance of *de facto* inequalities led to the legitimisation of hegemony in international relations, which was demonstrated by the legal accomplishments of the Vienna Congress, and then by the Holy Alliance and the Concert of Europe. This obviously defied the postulate of equality of states in regard of sovereignty.[43] The consequence of hegemony was the dictate of great powers in making international law, which in effect excluded an ideological and axiological pluralism of the community of states. As late as in the first half of the twentieth century we find references to "civilised nations" in international law documents.

Hegemony of great powers, however, was overcome by the increasingly widespread awareness of the need for the legal equality of all states. This process culminated without doubt in the establishment of the principle of sovereign equality in international law. Sovereign equality denotes the equality of states in respect of their sovereignty and thereby it is the fundamental international legal element of their protection.[44] In the light of this legal norm fundamental to contemporary international law, we can speak of the following functions of state sovereignty: 1) protection of pluralism in the community of states, manifested in the right to choose a political, social and economic system; 2) protection of the legal equality of states, including equality in enjoying the capacity to act in international law; 3) justification for autonomous decisions about the exercise by the state of its functions in domestic relations and in contacts with other states; 4) justification for the participation of each state in

[43] Therefore it is accurate to speak of unequal sovereigns at that time. So does recently G. S i m p s o n: *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order*, Cambridge 2004. Simpson argues legitimately that this condition characterised international relations especially in 1815–1839 (pp. 227–253).

[44] Cf. M.S. K o r o w i c z: "Some Present Aspects of Sovereignty in International Law," *RCADI* 102 (1961), pp. 34–35; J. K r a n z, *supra*, note 17, p. 19; B. K i n s b u r y: "Sovereignty and Inequality," *EJIL* 9 (1998), p. 599. In this context, we should quote the opinion of ICJ President of 1951: "Before this Court, there are no great or small states..." (ICJ Yearbook 1950–1951, p. 17).

developing universal international law; 5) justification for actions undertaken by the state in the domains not reserved by international law for its other subjects.

E. Conclusion: the Importance of the Idea of State Sovereignty

The aforementioned functions of sovereignty are disturbed from time to time with different intensity. This is the consequence of special rights of great powers in international law. Under such circumstances, tensions arise between egalitarianism and pluralism of the community of states and hegemonial aspirations of great powers.[45] They lead to the rise of actual situations – to name the recent intervention in Iraq (2003) – whose legal appraisal lies on a fine line between lawful restrictions on state sovereignty and infringements of it. One might say that the more the idea of sovereignty is challenged, the less importance is attached to the equality of states in international law and to the pluralism of values that constitute the identity of this law. The states are thereby divided into "equal and more equal than others." Consequently, the latter are given the opportunity to shape international relations not only through the law but also from a position of power.[46] Such a situation poses obvious threats to the international legal order, for it discredits the significance of fundamental norms of international law that safeguard the subjectivity of states, including the principle of non-intervention. The role of this principle comes down to civilising international relations through reconciling the actions of sovereign states. The International Court of Justice rightly emphasised that usurping the right to intervene is a manifestation of force, the use of which is in principle prohibited by international law, because by nature of actual relations, intervention will be used by the most powerful states. This challenges, in the Court's opinion, the principle of equality and "might easily lead to perverting the administration of international justice itself."[47] It also leads to the phenomenon of "false universalism", as M. Koskenniemi[48] terms it, which is the practice of invoking universal values to justify actions that protect one's own interests. The barrier to this phenomenon is created by the idea of sovereignty and the principle of sovereign equality of states. To challenge their legitimacy in international law is to accept inequalities in mutual legal relations of the states. For that reason, the idea of state sovereignty is worthy of permanent protection in international law and in its science.

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[45] G. Simpson's (*supra*, n. 43, *passim*) keystone thesis is that the international law system since 1815 has been characterised by permanent tension resulting from the confrontation of three factors: 1) legitimisation of the special position of great powers in international relations; 2) anti-pluralism of the international community leading to the marginalisation in this community of the so-called "outlaw states", thereby creating an enemy based on the opposition of us - them; 3) the significance of the principle of sovereign equality. This is without doubt an interesting and equally accurate ascertainment, although in my opinion Simpson attaches too much importance to anti-pluralism in international relations and attributes too little significance to the principle of sovereign equality.

[46] Cf. M. Koskenniemi: "International Law in Europe: between Tradition and Renewal," *EJIL* 16 (2005), 113, pp. 113–119.

[47] *Corfu Channel* case, ICJ Reports 1949, p. 35.

[48] M. Koskenniemi, *supra*, n. 46, p. 116.

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Granting Judicial Protection to the Guantanamo Detainees by the American Courts

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On 11 September 2001, a group of men who belonged to a terrorist organisation known as Al Qaeda carried out an armed attack upon the U.S. that resulted in substantial material damage and loss of life by some three thousand people, mostly civilians (exactly 3063 people), coming from 80 different countries. Leaders of Al Qaeda and a large part of its membership and facilities were located within the territory of Afghanistan; almost all that country was controlled by the Taliban, the de facto government of Afghanistan. The Taliban refused to stop giving sanctuary to Al Qaeda and gave away Osama bin Laden. As a result, on 7 October 2001, the U.S. and its allies attacked the armed forces of the Taliban and Al Qaeda invoking its right to self-defence. In consequence of the armed conflict, a considerable number of soldiers belonging to both entities were killed or captured. On 11 January 2002, the first group of 20 persons captured in Afghanistan arrived at the U.S. Camp X-Ray in Guantanamo Bay, Cuba. On that day, the U.S. Secretary of Defence Donald Rumsfeld announced that detainees in Guantanamo would be held as "unlawful combatants" and not as prisoners of war.[1] A week later, another group of detainees arrived and their number passed 600.[2] There were also persons not captured on the battlefield such as six Algerians caught in Bosnia and transferred to Guantanamo Bay under the U.S. custody by reason of their links with Al Qaeda.

So far, there have been several attempts undertaken in order to grant the detainees certain constitutional protection and rights resulting from the international humanitarian law (hereinafter IHL) and international human rights law. The plaintiffs had to fight a long battle over their rights which in some cases they won, however at a bitter price of often three years crossed of the life. Those cases pertain on the one hand to the foreigners detained at Guantanamo Bay and on the other to the American citizens considered "enemy combatants" and detained in the territory of the United States. Diverse judgments of the district and appeal courts, different, ever changing, indeed arbitral standards of treatment and qualification of the detainees by the American

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[1] Department of Defence (DoD) News Transcript, Secretary Donald Rumsfeld and Gen. Myers, 11 January 2002, available at: http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html.

[2] As on 22 September 2004, the number of detainees was approximately 549, according to a Department of Defence news release, available at: http://www.defenselink.mil/releases/2004/nr20040922-1310.html.

administration are the evidence of the hypocrisy of the authorities and of a lack of respect for the law and its arbitral interpretation according to particular needs. Even American citizens are treated differently – John Walker Lindh has been charged and convicted in criminal proceedings, Yaser Essam Hamdi has been deemed "enemy combatant", not charged and finally released, whereas Jose Padilla who was captured at the international airport and not at the battlefield is still in confinement. He has been indicted only recently in November 2005 after three years in detention. Some of the court judgments and their explanations are appalling; the terminology used by the judiciary as well as by the administration are equally appalling and in short they can be described as terminological mess. New terms are being invented and only after that definitions are added to them (for instance "enemy combatant"), terms which one will in vain look for in the IHL.

Referring to the term "enemy combatant" that appears in almost every judgment, it has no commonly fixed and permanent meaning. According to an interesting and correct view "[u]ntil now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international law or in the law of war. The term appears to have been appropriated from *ex parte* Quirin, the 1942 Nazi saboteurs case, in which the Supreme Court wrote that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."[3] This judgment had been passed before the Geneva Conventions were concluded, and invoking it just ignores decades of development of international law, as well as treaty law and customary law. Even the proponents of this term supporting President Bush and his administration probably without being aware of it admit that "enemy combatant" "[...] generally can be defined as anyone fighting for the other side in the context of an armed conflict" adding that "traditionally, an individual is considered to become an enemy combatant at the point he becomes subject to the authority of a state's armed force."[4] In other words – without going into details of the combatancy requirements – it may be stated that "enemy combatants" are combatants that after capture become prisoners of war. We deal here with the creation of new unnecessary and confusing terms because those terms which can be found in the Geneva Conventions namely those of combatants, prisoners of war and civilian person are sufficient and precise.

Undoubtedly, the American courts have a very responsible task to do but they should not hesitate to question and control executive's decisions which may violate basic human rights guaranteed in the international treaties, international customary law and the American Constitution. The need for a balance between the state security

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[3] G. Solis, quote for: American Bar Association. Task Force on Treatment of Enemy Combatants. Criminal Justice Section. Section of Individual Rights and Responsibilities. Report to the House of Delegates, p. 3; the report is available at: http://news.findlaw.com/hdocs/docs/aba/abatskforce103rpt.pdf

[4] D. B. Rivkin Jr, L.A. Casey, D.R. Bartram: *Enemy Combatant Determinations and Judicial Review*, p. 2; the article is available at: http://www.fed-soc.org/Laws%20of%20war/enemycomb.pdf

and the rights and freedoms of human beings appears expressly in the course of the armed conflict, yet after is has ended the state security does not seem to be so much endangered. Whereas the statements that during the armed conflict the detainees are not entitled to exercise procedural rights in full might be justified, it must be indicated that in every case the detainees have the right to guarantees enumerated in Art. 75 of Additional Protocol I to the Geneva Conventions. It should be emphasised that the international armed conflict between the United States and Afghanistan has ended and there is no longer any legal ground for holding the detainees in Guantanamo Bay without charging them.

Court Cases Concerning Foreign Detainees at Guantanamo Bay

1. *Coalition of the Clergy, Lawyers and Law Professors vs. Bush* (2002)

On 20 January 2002 the Coalition filed a Verified Petition for Writ of Habeas Corpus on behalf of "Persons Held Involuntarily at Guantanamo Naval Air Base, Cuba." In substance, the petition alleges that the captives held at Guantanamo (the "detainees") are in custody in violation of the Constitution or the laws or treaties of the United States, in that they: (1) have been deprived of their liberty without due process of law, (2) have not been informed of the nature and cause of the accusations against them and (3) have not been afforded the assistance of counsel. The petition also suggests that the detention violates the Third Geneva Convention.[5] The relief that petitioners seek is a writ or order to show cause (1) directing the respondents to "identify by full name and country of domicile and all other identifying information in their possession each person held by them within three days;" (2) directing respondents "to show the true cause(s) of the detention of each person;" and (3) directing respondents to produce the detainees at a hearing in this court.

On 21 February 2002 the District Court for the Central District of California ruled that the Petitioners did not have standing to assert claims on behalf of the detainees and even if petitioners did have standing, this court lacked jurisdiction to entertain those claims. No federal court would have jurisdiction over petitioners' claims, so there is no basis to transfer this matter to another federal district court. For those reasons the petition was dismissed. The Coalition made an appeal.

The Court of Appeal for the Ninth District confirmed the position of the Goverment of 18 November 2002) in regard to the Coalition's lack of standing to assert claims on behalf of the detainees but it stated that in the light of this lack the court of appeals vacated that part of the lower court decision finding that no court could adjudicate the claim as it found that there was no need to decide the question of jurisdiction. The judgment was based only on the Coalition's lack of standing in this particular case. The Court found that the petitioners lacked a "significant relationship" with the detainees. It applied the Whitmore test (*Whitmore vs. Arkansas* of 1990) which

[5] For more details see: *ILM* 42 (2003), p. 396 ff.

required the Coalition to show that the petitioner is unable to litigate his own cause due to lack of mental capacity, lack of access to court or other similar disability and the "next friend" who has filed the petition on the petitioner's behalf has some significant relationship with and is truly dedicated to the best interests of the petitioner.[6]

2. *Rasul vs. Bush* (2002), *Habib vs. Bush* (2002) and *Al Odah vs. USA* (2003)

In *Rasul vs. Bush*, the parents of three Guantanamo Bay detainees filed a petition seeking a writ of *habeas corpus* on behalf of their respective sons in the District Court for the District of Columbia: Shafiq Rasul and Asif Iqbal are British nationals and David Hicks is Australian. The facts allege that the detainees are not and never have been "enemy combatants" or "unlawful combatants". The petition challenges the Military Order of 13 November 2001 on the Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism (Military Order)[7] which authorised indefinite detention without due process of law as unconstitutional and a violation of international law.

The Government filed a motion to dismiss the petition and presented four reasons for the Court's lack of jurisdiction: 1) none of the detainees is being held pursuant to the 13 November Military Order but under the President's authority as Commander-in-Chief and under the laws and usages of war; 2) the detainees are aliens held abroad; accordingly on one of their claims is within the subject matter jurisdiction of the Court or any U.S. Court (it invoked *Johnson vs. Eisentrager* judgment of 1950); 3) the petitioners ask the Court to opine on the legality of the President's military operations and to release captured individuals whom the military has determined to be detained; and 4) even if the Court determined that it had jurisdiction, it would need to transfer the case because no custodian responsible for the detained petitioners is present within the District of Columbia.[8]

The District Court joined the *Rasul* case to *Al Odah vs. United States* filed before the District Court on 1 May 2002 on behalf of twelve Kuwaiti nationals detained at Guantanamo who also claimed not to be and never to have been combatants or belligerents against the U.S. The District Court dismissed both petitions by an order issued on 20 July 2002 relying on *Johnson vs. Eisentrager.* The dismissal in *Rasul and Al Odah* was joined to *Habib vs. Bush,* a *habeas corpus* petition brought by the wife of an Australian national detained at Guantanamo, and the three cases were appealed to the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit, in an opinion issued on 11 March 2003 affirmed the district court's dismissal of the petitions, again relying on *Johnson vs. Eisentrager,* to the effect that an alien abroad has no rights under the U.S. Constitution and consequently if the Constitution does not entitle the detainees to due process, they cannot invoke the jurisdiction of U.S. Courts to test the legality of their detention. The petitioners presented the argument that even though

[6] *Ibid.*, p. 393.
[7] Military Order is available at: http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html
[8] *Ibid.*, p. 394.

Guantanamo Bay is not a sovereign American territory still it is under the *de facto* sovereignty of the U.S. and in consequence U.S. courts can exercise jurisdiction over that territory. The Court dismissed that argument.

Interpretation of *Johnson vs. Eisentrager* varies slightly in every judicial reference. No court, so far, has preferred to follow the dissent of Justices Black and Douglas in that case. They stated that the issue in this case was "the power of courts to exercise *habeas corpus* jurisdiction on behalf of aliens, imprisoned in Germany, under sentences imposed by the executive through military tribunals". The Justices asked rhetorically: "The Court cannot, and despite its rhetoric on the point does not, deny that if they were imprisoned in the United States our courts would clearly have jurisdiction to hear their habeas corpus complaints. Does a prisoner's right to test legality of a sentence then depend on where the Government chooses to imprison him?"[9] If that is the case – and it seemed so in 1950 as well as in the case of Guantanamo – then the U.S. apply a very dangerous and disturbing rule. Many NGO's (e.g. Amnesty International), former federal judges, diplomats and American commissioned officers filed *amicus curiae* briefs in which they demanded the change in the decision of *Al Odah*. A very interesting document of that type was filed by the National Institute of Military Justice.[10] The authors of the brief indicated that under Art. 2 of the Uniform Code of Military Justice (UCMJ), which applies to members of the American armed forces and to prisoners of war as well, the Code is applicable to "persons within an area leased by or otherwise reserved or acquired for use of the United States which is under the control of the Secretary concerned and which is outside the United States."[11] Guantanamo Bay is such a territory. As a result, the detainees are entitled to the same procedural rights as members of the American armed forces. Subsequently, after having cited provisions from the Army Regulation 190-8 – implementing Art. 5 of GC III – *amicus curiae* states that "there is simply no provision in any law, domestic or international, that permits a country's commander in chief, or its chief executive, to issue a blanket pronouncement that all personnel falling into the power of the United States in a particular theatre of war are excluded from the protection of the GPW [Geneva Convention on the Treatment of Prisoners of War – A.Sz.]."[12]

3. *Gherebi vs. Bush* (2003)

In this case, a brother of one of the detainees filed a writ for *habeas corpus* on his behalf. The District Court – again relying on *Johnson vs. Eisentrager* – dismissed the motion justifying it with the lack of jurisdiction as Guantanamo Bay is outside of the U.S. sovereignty. The Court expressed its reluctance to reach such a decision

[9] Quote from: *ibid.*, p. 395.

[10] *Brief for the National Institute of Military Justice as Amicus Curiae in Support of Petitioners*, p. 3; the document is available at: http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/92/amicus-curiae_national_institute_of_military_justice.pdf.

[11] The Uniform Code of Military Justice is available at: http://www.army.mil/references/UCMJ/index.html#SUB%20CHAPTER%201.%20GENERAL%20PROVISIONS.

[12] *Brief for the National Institute of Military Justice...*, *op. cit.*, p. 9.

as the picture of the detainees being detained with no access to a legal counsel, no notification of the charges and no due process seemed to the Court disturbing. It also expressed hope that "a higher court w[ould] find a principled way" to provide the remedy of *habeas corpus*.[13]

On appeal, the Court of Appeals for the Ninth Circuit reversed the district court's holding and ruled that "It is evident that the United States exercises sole territorial jurisdiction over Guantanamo" (it invoked the 1903 Lease agreement between USA and Cuba and the 1934 Treaty continuing the agreement). It added that " by virtue of the United States' exercise of territorial jurisdiction over Guantanamo, *habeas* jurisdiction lies in the present case" and "at least for *habeas* purposes, Guantanamo is a part of the sovereign territory of the United States. [...] If "sovereignty" is "the supreme, absolute, and uncontrollable power by which any independent state is governed," "the power to do everything in a state without accountability," or "freedom from external control: autonomy, independence," it would appear that there is no stronger example of the United States' exercise of "supreme power".

This decision was subsequently suspended until the Supreme Court's ruling which was issued in June 2004.

Court Cases Concerning the American Nationals

In this place, there comes up the problem of defectors and deserters which for the reason of limited space will only be touched upon.[14] In Afghanistan, two Americans fighting for the Taliban (John Walker Lindh) and the Al Qaeda (Yaser Essam Hamdi) were captured. For the purposes of IHL they could be qualified as defectors but the situation looks differently in the internal context. Another American national Jose Padilla was arrested at the international airport in Chicago. Their cases will now be shortly presented.

One could ask a question whether Lindh or Hamdi are defectors. Or rather is it possible to prove the treason? In American practice, in order to establish that the crime of treason was committed four elements are necessary: in an overt act; two witnesses must testify to confirm the Government charges in regard to the overt act undertaken

[13] See: *Gherebi vs. Bush* (No 03-55785) – U.S. Court of Appeals for the Ninth Circuit judgment (with a short description of previous proceedings in Gherebi among others the District Court judgment) is available at: http://news.findlaw.com/hdocs/docs/terrorism/gherebibush121803opn.pdf.

[14] Most legal scholars supports the rule that the Detaining power is not obliged to grant POW status to its own nationals. Except for possible customary norm of international law and the views of the doctrine, also humanitarian aspects should be taken into account as they may cause changes in the application of the above rule. It may happen that a person who a long time before the outbreak of the conflict has indirectly renounced his/her nationality – the nationality of the Detaining power – without formal acknowledgment of this fact and then he or she found himself or herself in the hands of the Power of his/her nationality (e.g. when fighting for the opposite party). In such situations, the priority should be given to the material allegiance and not the formal nationality. As was rightly noticed by A. Rosas, it should be like that especially in cases when formal nationality would lead to adverse consequences for the prisoner of war. Such a solution would make it possible for the nationals of the Detaining power to retain its POW status in certain circumstances and would prevent their conviction for treason.

by the defendant, which comprises the treason; the defendant must have an intention of treason; and the overt act must give the aid and comfort to the enemy.[15] It would be rather difficult to prove treason in the case of the conflict in Afghanistan. Even in the case of Lindh who was captured on the battlefield. The charges (referred to below) he was charged with complying with the condition of "overt act" and treacherous character; the Government would probably not have any problems with proving the aid and comfort brought by such act to the enemy but the rest of the conditions would be difficult if not impossible to prove. Lindh himself denied having an intention of treason when he stated: "I did not go to fight against America, and [...] I went to Afghanistan because I believed it was my religious duty to assist my fellow Muslims militarily in their *jihad* against the Northern Alliance. [...] I saw the war between the Taliban and the Northern Alliance as a continuation of the war between the *mujahideen* and the Soviets."[16] Lindh's statement is naturally not conclusive but it cast a shadow of a doubt. Similar difficulties would be encountered in the case of Hamdi. For these reasons, it is senseless to consider the above cases in the internal legal context as the crime of treason. In accordance with what have been noted about the defectors and deserters who are captured by the armed forces of the Power of their nationality, the United States may grant them POW status (but is not under an obligation to do so – see footnote 14) or charge them with a crime in criminal proceedings. The first possibility has actually never been taken into account, especially that – against the law – the foreign detainees were denied POW status. In regard to the second possibility, the practice is also diversified and is just another evidence of the hypocrisy of the American administration, lack of solution and disrespect for the law.

1. John Walker Lindh

John Walker Lindh, called the American Taliban, is an American national. He was captured while fighting for the Taliban. After capture, he was detained for about a month in the Camp Rhino near Kabul, and next he was transferred the U.S. where he was indicted.[17]

As Lindh was charged in a criminal process he was entitled to all the procedural and constitutional rights accorded to every American national, including the right to

[15] Art. III, section 3, clause 1 of the American Constitution ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court"); available at: http://www.house.gov/Constitution/Constitution.html.

[16] Quote for: M. H. S p e r b e r: "John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces," *American Criminal Law Review* 40 (2003), p. 192.

[17] The Indictment is available at: http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.pdf. Lindh was charged with conspiracy to murder U.S. nationals, conspiracy to provide material support and resources to foreign terrorist organisations, providing material support to and resources to foreign terrorist organisations, conspiracy to contribute services to Al Qaeda, contributing services to Al Qaeda, conspiracy to supply services to the Taliban, supplying the services to the Taliban, using and carrying firearms and destructive devices during crimes of violence.

counsel and to be informed of the charges against him. At the beginning, the defence filed a motion for a bill of particulars concerning the details of the charges against Lindh as they were formulated in a very broad and ambiguous way which made the proper defence and preparation for it highly troublesome.[18] The defence demanded *inter alia* the identity of any civilian nationals of the U.S. and military personnel that the defendant allegedly conspired to kill; the date, time and place where the defendant allegedly joined such a conspiracy and the exact nature of material support that the defendant is alleged to have conspired to provide to the conspirators. The aim of this motion was to define more precisely the charges against the defendant and not only prosecute Lindh for the mere participation in a condemned group. The judge, however, dismissed the motion. Lindh also complained about his 55-day-long detention in the Camp Rhino in Afghanistan and so-called coercive interrogation techniques that were applied to him, and about the denial of legal counsel as well. The defendant claimed that his statements were given while he was unlawfully detained and consequently should not be admitted as evidence.

John Walker Lindh's case ended in a rather unexpected manner, namely with the plea agreement (15 July 2002).[19] For five months, the Government tried to find new evidence against Lindh without at the same time disclosing classified information. Lindh confessed to two charges: supplying the services to the Taliban and using and carrying firearms and destructive devices during crimes of violence. In return for that he was convicted to two consecutive ten years of imprisonment verdicts so twenty years in total and he committed himself to a full co-operation with the Government in the enquiry about Al Qaeda (4 October 2002). In this way, he avoided life imprisonment.[20] If the defendant fails in any way to fulfil completely all of the obligations under the plea agreement, the United States may prosecute the defendant to the full extent of the law. The defendant also agreed that the plea agreement puts to rest his claims of mistreatment by the United States military, and all claims of mistreatment are withdrawn. Despite the prosecution statements that the deal was "an important victory in the war against terrorism,"[21] it seems that when different incongruities in respect of the constitutional protection to which Lindh was entitled started to come up and with the increasing risk of disclosure of classified information,

[18] *Defence Motion for a Bill of Particulars, 15 March 2002* is available at: http://news.findlaw.com/hdocs/docs/lindh/uslindh31502mot4bop.pdf.

[19] The Plea Agreement is available at: http://www.usdoj.gov/ag/pleaagreement.htm.

[20] There was another men that was indicted in a criminal process – a French national Zacarias Moussaoui, deemed to be the Al Qaeda member, the twentieth terrorist supposed to take part in the terrorist attacks of 11 September. The Indictment of Moussaoui is available at: http://www.usdoj.gov/ag/moussaouiindictment.htm See also: D. E g g e n: "Judge in Moussaoui Case Blocks Release of September 11 Report," the article is available at: http://www.washingtonpost.com/wp-dyn/content/article/2005/04/29/AR2005042901435.html (last time visited 08.12.05) and http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/worldamericas/4524247.stm (last time visited 08.12.05). For more details of the proceedings against Moussaoui see: J. M a r i n e r: "A Fair Trial for Moussaoui," the article is available at: http://writ.news.findlaw.com/mariner/20030203.html (last time visited 08.12.05).

[21] See: "'I plead guilty' American Taliban Says;" the article is available at: http://archives.cnn.com/2002/LAW/07/15/walker.lindh.hearing/ (last time visited 08.12.05)

especially the necessity of the other detainees to testify, the Government decided to make a deal. One fragment of the plea agreement seems intriguing, namely that in which the Government agreed "to forego any right it has to treat the defendant as an unlawful enemy combatant based on the conduct alleged in the Indictment."[22] It suggests that despite the contrary statements, the Government thought that Lindh had some status under IHL.

2. Yaser Esam Hamdi

Yaser Esam Hamdi was captured in Afghanistan while fighting with the Taliban and then transported to Guantanamo Bay. A few months later, the American authorities discovered that Hamdi is an American national (born in Baton Rouge in Louisiana but spent most of his life in Saudi Arabia). After that discovery and its verification, Hamdi was transferred to the Naval Brig at Norfolk, Virginia in April 2002. He was considered an "enemy combatant". For months after being put in an isolation the Government did not issue any charges against Hamdi nor give any legal ground for the detention.

The treatment that Hamdi received is an evidence of arbitral attitude to the status of the detained American nationals fighting abroad with the Taliban. Lindh was convicted in criminal proceedings whereas Hamdi was deemed an "enemy combatant," held in isolation with no access to a lawyer; this comprised a violation of his rights – as an American national – resulting form V and VI Amendments to the Constitution (a right to a fair trial and to the legal counsel respectively). The President's Bush Military Order of 13 November does not apply to him as it applies only to non-citizens and therefore Hamdi should not be tried by the military commissions created by the Order. In consequence of qualifying Hamdi as an "enemy combatant," he should be tried by a court-martial fully in accord with UCMJ and GC III. But this may be a reason for criticism that American nationals are granted full treaty protection whereas the foreigners are granted only second category procedural rights (military commissions) and both groups were captured as "enemy combatants".

In the subject of granting judicial protection to Hamdi, U.S. courts twice ordered his right to a legal counsel to be exercised (in May and June 2002); however, in July 2002 the Court of Appeals for the Fourth Circuit reversed former decisions of the district courts because the district court "appointed counsel and ordered access to the detainee without adequately considering the implications of its actions [...]". The Appeals Court emphasised that "[o]ur Constitution's commitment of the conduct of war to the political branches of American government requires the court's respect at every step."[23] The case was remanded; the Court of Appeals also expressed its reluctance to "a sweeping proposition – namely that, with no meaningful judicial

[22] The Plea Agreement, *USA v. Lindh*, point 21.

[23] The judgment is available at: http://laws.lp.findlaw.com/scripts/printer_friendly.pl?page=4th/026895p.html.

review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[24]

On August 16 the District Court, which the case was remanded to, ordered the Government to produce evidence supporting Hamdi's qualification as an "enemy combatant". For that reason, additional controversies arose as the Justice Department refused to comply with the order. The Government made an appeal. In its opinion Hamdi's detention was necessary to intelligence gathering. Therefore, he should be detained as an "enemy combatant" according to the laws and customs of war. Pursuant to this demand, on 8 January 2003 the Court of Appeals for the Fourth Circuit ruled that there is no doubt that Hamdi was captured abroad fighting for the Taliban, and so being the facts he can be detained indefinitely as an "enemy combatant" with no access to a lawyer.[25] The sufficient basis for the detention was the sole qualification of Hamdi as an "enemy combatant" by the President acting in his power as Commander-in-Chief, and it cannot be challenged by the detainee nor anyone acting on his behalf. When confronted with the argument of lack of authorisation by the Congress to detain an American national (which is required in such cases), the Court stated that Joint Resolution of Congress of 18 September 2001 – *Authorisation for Use of Military Force* comprised such a required authorisation. It authorised the President to "use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on 11 September 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons."[26] The Court of Appeals also held in favour of the Government in the subject of the obligation to produce more evidence for qualifying Hamdi as an "enemy combatant". In the Court's opinion materials that the Government presented were sufficient.[27] The order to produce more information could lead to the disclosure of sensitive intelligence. Despite the statement that judicial review does not disappear during wartime, the Court added that the review of battlefield captures in overseas conflicts is a highly deferential one.[28] It pointed to the "well-established

[24] *Ibid.*

[25] The judgment in *Hamdi vs. Rumsfeld* (No 02-7338) is available at: http://pacer.ca4.uscourts.gov/opinion.pdf/027338.P.pdf, p. 16.

[26] *Joint Resolution, Authorization for Use of Military Force*; the resolution is available at: http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm.

[27] It was the so-called Mobbs Declaration (Special Advisor to the Under Secretary of Defence for Policy), according to which "Hamdi entered Afghanistan in July or August of 2001 and affiliated with a Taliban military unit. Hamdi received weapons training from the Taliban and remained with his military unit until his surrender to Northern Alliance forces in late 2001. At the time of his capture, Hamdi was in possession of an AK- 47 rifle. After his capture, Hamdi was transferred first from Konduz, Afghanistan to the prison in Mazar-e-Sharif, and then to a prison in Sheberghan, Afghanistan, where he was questioned by a United States interrogation team. This interrogation team determined that Hamdi met "the criteria for enemy combatants over whom the United States was taking control." Hamdi was then transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, a subsequent interview with Hamdi confirmed the details of his capture and his status as an enemy combatant;" see: *Hamdi vs. Rumsfeld* (No 02-7338), pp. 36–37.

[28] *Hamdi vs. Rumsfeld* (No 02-7338), p. 44.

power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, enemy belligerents, prisoners of war, and others charged with violating the laws of war." The Court added that "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect this deference [to the power of the military – A.Sz.] as well as 'a recognition that government has no more profound responsibility' than the protection of American citizens from further terrorist attacks."[29] Moreover the Court stated that the detainee's right to have his status verified in accordance with the GC III is not applicable to Hamdi as the GC III provisions are not self-executing, and as a result cannot be exercised by the individual and only by the State and the Government. The Court of Appeals mentioned also the principle of reciprocity which provides for the compliance with the Geneva Convention when prisoners of war are in captivity of both parties to the conflict. The United States itself, including its courts should remember this principle.

The whole judgment was based on a wrong assumption that international armed conflict still lasts and consequently captured combatants may be detained for the period of hostilities. The conflict has ended and as Hamdi rightly noticed "even if his detention was at one time lawful, it is no longer so because the relevant hostilities have reached an end."[30] The Court of Appeals wrongly considered the "war on terrorism" for such a conflict because as a matter of fact it is a metaphor such as "war against drugs", "war against poverty" or "war against famine". All of them will probably be conducted to the end of the world. Some elements of the so apprehended "war on terrorism" comprise armed conflicts – international or non-international in character. As such, they are regulated by IHL. International armed conflict was conducted in Afghanistan between October 2001 and June 2002 when the permanent Government with Hamid Karzai was elected. Moreover, if the court qualifies Hamid to be an "enemy combatant" then he is entitled to the POW status and all the rights (and obligations) connected with it. We have here a terminological mess – at the least. The U.S. administration but also U.S. courts use terms such as "enemy combatants" and "unlawful combatants" instead of using the well-established terms of "prisoners of war" and "civilian persons". As a matter of fact, an "unlawful combatant" is indeed a civilian person that illegally participates in combat. A combatant fighting for the enemy side is *ex definitione* an enemy combatant though the United States understand this term differently which only leads to unnecessary confusion.[31] If the U.S.

[29] *Ibid.*, p. 25.

[30] *Ibid.*, p. 42.

[31] In its later judgment in *Hamdi vs. Rumsfeld* (03-1027) of 2004, the Supreme Court stated that the term "enemy combatant" is a person that was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there". The judgment is available at: http://www.supremecourtus.gov/opinions/03pdf/03-6696.pdf, p. 8. Much later the definition of this term was included in the *Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal* of 7 July 2004, available at: http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. The Order states: "For purposes of this Order, the term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces".

does not want to grant Hamdi the POW status (which it is entitled to do as Hamdi is its national, however in this case the fact that he has spent most of his life in Saudi Arabia should be taken into account as an evidence of his material allegiance rather than formal nationality) it should charge and try him in a criminal proceedings where all the fair trial guarantees will be accorded to him. There is no third way.

Only as late as in December 2003 the Government decided to allow the access of a lawyer to Hamdi, yet under necessary security measures. On 2 February and 2 March 2004 Hamdi met his lawyer; the first meeting was observed by military observers and recorded as well, whereas the second one was not so monitored, which made it possible for the detainee to speak openly about the conditions of detention.[32]

3. Jose Padilla

The case of Jose Padilla differs significantly from those of Lindh or Hamdi, as Padilla was arrested at the international airport O'Hare in Chicago after he left the plane. It took place in May 2002 in exercise of the arrest warrant issued by the District Court for the District of New York as a result of its inquiry into September 11 terrorist attacks. At the beginning, Padilla was detained in NY as a material witness, then he was placed in the naval brig in Charleston, South Carolina. What is even more troubling is the fact that the U.S. Government (by the President's order of 9 May 2002) deemed Padilla an "enemy combatant" and refused to grant him a right to a legal counsel, to standing before the civil courts and it had not charged him for about three years. Even without giving more details, such a behaviour awakens resistance as Padilla has not been captured at the battlefield but at the airport when he was evidently and voluntarily leaving the plane. Even more, he is refused the right to a fair trial.[33]

The Secretary of Defence openly stated that the Government had no interest in charging or punishing Padilla and only wanted him for information purposes.[34] Similarly to Lindh and Hamdi, Padilla cannot be tried by military commissions as the Military Order of November 2001 has no jurisdiction over U.S. nationals. Jose Padilla should be released or charged and tried in a fair and just trial. There are

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[32] *United States of America. Appealing for justice: Supreme Court hears arguments against the detention of Yaser Esam Hamdi and Jose Padilla*, Amnesty International Report, available at: http://www.amnestyusa.org/waronterror/document.do?id=CD144801F480D1CA80256E9000421D34.

[33] For more about the facts of Padilla case see: the Court of Appeals for the Second Circuit judgment *Padilla vs. Rumsfeld* (No 03-2235); available at: http://news.findlaw.com/hdocs/docs/padilla/padrums121803opn.pdf; in Appendix A there is the determination by the President that Padilla is an "enemy combatant". In short, the determination states that: Padilla is closely associated with Al Qaeda; he engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States; he possesses intelligence, including intelligence about personnel and activities of Al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by Al Qaeda on the United States or its armed forces, other governmental personnel, or citizens; and he represents a continuing, present and grave danger to the national security of the United States.

[34] See: S.A. P i t t s - K i e f e r: "Jose Padilla: Enemy Combatant or Common Criminal?," *Villanova Law Review* 48 (2003), pp. 882–884 (footnote 26 in the article).

no ground for treating Padilla as an "enemy combatant"; he is a civilian person, an American national arrested on the U.S. territory and subject to the jurisdiction of the U.S. courts. Even though Padilla travelled to Afghanistan, there is no proof that he participated in Al Qaeda training camps or fought for the Taliban against the U.S. armed forces. For those reasons, Padilla's detention is illegal. He did not fight for the Taliban – contrary to Hamdi – so he cannot be deemed a combatant (including an "enemy combatant" according to the U.S. administration) but a suspected criminal (terrorist attacks). If there is sufficient evidence of his guilt, he should be convicted but – *a contrario* in lack of any – Padilla ought to be released.

On 11 February 2002 Padilla's lawyer filed a *habeas corpus* petition on behalf of her client. The petition argued that Padilla's detention is contrary to the U.S. Constitution; the President has no unlimited power to detain U.S. nationals without the right to a fair trial and to a verification of the legal grounds of such detention. In Padilla's opinion, the Congress resolution of 12 September 2001 *Authorisation for the Use of Military Force* did not give such a sweeping power. In December 2002, the District Court held that the above resolution authorised the President to detain Padilla but the latter is entitled to a legal counsel.[35] This part of the judgment, however, was not enforced until February 2004. Despite partly favourable decision, the Government made an appeal (pertaining to the part ordering the access of a lawyer). A lawyer visited Padilla only in March 2004; like in the case of Hamdi, the conversation was monitored.

In December 2003, the Court of Appeals for the Second Circuit ruled that the U.S. President lacks inherent constitutional authority as Commander-in- Chief to detain American citizens on American soil outside the zone of combat. The court also ordered Padilla's release from military custody within 30 days and his transfer under the control of civilian authorities when he should be tried with all the fair trial guarantees met.[36] The court also concluded that "Padilla's detention was not authorised by Congress, and absent such authorisation, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat."[37] Padilla's release was however suspended, because the Government made an appeal which was decided by the Supreme Court in June 2004.

Padilla's case is special and it comprises an exceptionally flagrant violation of American law as well as international human rights law. None of the possible justifications given by the administration is appropriate to justify detaining Padilla without charges and access to the court. One of such justifications might have been the need to prevent the disclosure of sensitive classified information. It seems probable that for similar reasons the plea agreement in Lindh case was made, as well as Hamdi

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[35] For a short description of the judgment of the District Court see: The Court of Appeals' decision in *Padilla vs. Rumsfeld* (No 03-2235), pp. 8–9.

[36] *Padilla vs. Rumsfeld* (No 03-2235), pp. 5 and 26, available at: http://news.findlaw.com/hdocs/docs/padilla/padrums121803opn.pdf.

[37] *Padilla vs. Rumsfeld* (No 03-2235), p. 4.

is refused court trial and is detained as an "enemy combatant", finally, hundreds of detainees are for similar reasons refused the POW status. It absolutely cannot be sufficient evidence to detain Padilla without charges. Another justification for Padilla's detention might have been the fact that the Government is not in a possession of information sufficient to convict Padilla as it might turn out that he would spend only few years in prison. And the Government obviously wants him to stay there for very long. But the lack of evidence is not a legal basis for detaining someone in a naval brig without access to a lawyer. One more justification for Padilla's detention which was openly invoked by Donald Rumsfeld is the extraction of information form Padilla, yet such a conduct is also illegal.[38]

The Supreme Court's Judgments (2004)

On 28 June 2004 the U.S. Supreme Court (SC) passed judgments in three important cases: *Rumsfeld vs. Padilla, Rasul vs. Bush* and *Hamdi vs. Rumsfeld.* They have been considered the victory of justice and of respect for human rights but after an exact analysis the enthusiasm is smaller. But still, the most significant of those three rulings seems to be *Rasul vs. Bush.*

Hamdi vs. Rumsfeld

In the case of *Hamdi vs. Rumsfeld*[39] the SC had to answer two questions – whether the executive has the right to detain nationals that it qualifies as "enemy combatants" without judicial control and without charges and how the detainee may challenge his qualification as an "enemy combatant".

Answering the first question, the SC stated that the Congress resolution *Authorisation for Use of Military Force* was the authorisation required to detain American nationals. The pertinent fragment of the ruling reads as follows: "[D]etention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorised the President to use". Hamdi indicated that the Congress has not authorised the indefinite detention to which he is now subject. The SC took that into account and stated that the Government's concept of "war on terror" as being of unconventional nature may indeed lead to Hamdi's detention for the rest of his life.[40] If it established that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorised by the *Authorisation for Use of Military*

[38] In this way: S.A. P i t t s - K i e f e r: "Jose Padilla...," *op. cit.*, pp. 907–908.

[39] *Hamdi vs. Rumsfeld* (No 03-6696) available at: http://www.supremecourtus.gov/opinions/03pdf/03-6696.pdf.

[40] *Hamdi vs. Rumsfeld* (No 03-6696), p.12.

Force.[41] Thus, the judgment implies that detention must come to an end when the hostilities end. In this place, it can be once again expressly emphasised that the international armed conflict between the United States and Afghanistan has ended and in consequence the detainees should be released whereas the war crime suspects should be charged and tried. It is intriguing and interesting that the SC found GC III to have significance to the detention of persons considered "enemy combatants" who were refused the POW status.

Turning to the second question, the SC held that a U.S. national detained as an "enemy combatant" should be given "a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker."[42] According to the judgment, a detainee "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions."[43] The proceedings that Hamdi participated in do not meet the fair trial requirements which he is entitled to pursuant to the U.S. Constitution. The SC did not rule on the complaint about the lack of access to a lawyer as when the case was pending Hamdi met his counsel.

Unfortunately, despite those welcomed passages of the judgment they have been depreciated by another troubling fragments that cause that this is not a full victory of human rights and freedoms and the defeat of the U.S. administration. The SC found that itself competent to control the conduct of the executive but made only very limited exercise of this entitlement. After stating that Hamdi has the right to a fair trial also in the course of war, the SC ruled that enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favour of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.[44] These additional qualifications actually undermine the previous statement on the right to a fair trial. It means acceptance to the Government's demand that for the determination of the detainee's status hearsay evidence will suffice. In the SC's opinion "[a] burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error."[45] Justice Scalia in his dissenting opinion rightly stated that the plurality "just as though writing a new Constitution comes up with an unheard of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than judge and jury.[46] Justice Souter in his opinion, partly dissenting and partly concurring, found that the

[41] *Ibid.*, p.14.
[42] *Ibid.*, p. 1.
[43] *Ibid.*, p. 26.
[44] *Ibid.*, p. 27.
[45] *Ibid.*, p. 27.
[46] *Ibid.*, Justice Scalia's dissenting opinion, p. 23.

Congress resolution did not authorise Hamdi's detention; he added that the executive was not entrusted with reaching a balance between liberty and security.[47] Justice Scalia found that military authorities cannot detain an individual without charging him with a crime.

It should be welcomed with satisfaction but also indignation that after more than three years of detention Yaser Esam Hamdi was released and came back to Saudi Arabia, to his family. The indignation is caused by the fact that for more than three years Hamdi was detained without charges and just before his release the Department of Defence announced that the U.S. security does not require further detention of Hamdi. Just that. No more details were disclosed as it might have endangered the security and operation of U.S. intelligence and armed forces.[48] After negotiations between Hamdi and federal prosecutors, the agreement was reached and as a result a motion to stay proceedings and subsequently the stipulation of dismissal of Hamdi (on 30 September 2004 at the latest) were issued. Pursuant to the agreement, Hamdi was released without charges and in return he renounced his American nationality, obliged to remain and reside in Saudi Arabia for a period of five years, never (!) to travel to Afghanistan, Pakistan, Iraq, Israel, Syria, the West Bank and Gaza Strip. He had to renounce terrorism and agreed not to engage in, assist in or conspire to commit any combatant activities against the U.S. and its citizens. He also waived any claim for any violation of America's, foreign and international law.[49]

Rumsfeld vs. Padilla

In the case of *Rumsfeld vs. Padilla*[50] the SC examined only the jurisdictional matters without touching upon the merits; it was a consequence of a lack of jurisdiction claim invoked by the Government. The Court had to decide which court had jurisdiction – the District Court for the Southern District of New York or for the District of South Carolina. It was dependent upon who the proper respondent was. The SC held that the District Court for the Southern District of New York lacked jurisdiction because the only proper respondent to Padilla's petition was his "immediate custodian" in the district of confinement – in this case the Commander of a Navy brig in Charleston, South Carolina (and not the Secretary of Defence Donald Rumsfeld) so the jurisdiction lies in the District Court for the district of South Carolina. As a consequence of the ruling, Padilla's legal counsel should have filed the *habeas corpus* petition in the District Court for the District of South Carolina, and not the Southern District of New York.

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[47] *Ibid.*, Justice Souter's opinion, p. 7.

[48] See: J. M a r k o n: "Hamdi Returned to Saudi Arabia," washingtonpost.com, available at: http://www.washingtonpost.com/wp-dyn/articles/A23958-2004Oct11.html (last time visited 10.12.05).

[49] The Agreement and the stipulation of dismissal are available at: http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html (last time visited 11.12.05).

[50] The judgment in *Rumsfeld vs. Padilla* (No 03-1027) is available at: http://www.supremecourtus.gov/opinions/03pdf/03-1027.pdf.

Padilla has to go through the whole proceedings from the beginning, this time filing the petition in the District Court for the District of South Carolina. If he is not charged it is probable that he will be released.[51] In February 2005, the District Court for the District of South Carolina held that Padilla must be released or charged. But as a result of an appeal made by the Government on 9 September 2005 the Court of Appeals for the Fourth Circuit reversed this decision and held that the President of the United States possesses the authority to detain militarily a U.S. citizen who is closely associated with Al Qaeda, an entity with which the United States is at war pursuant to the *Authorisation for Use of Military Force* Joint Resolution enacted by Congress.[52] The Appeals Court argued that as the SC ruled that the President was authorised to detain Hamdi so it was as well authorised to detain Padilla. In the Court's opinion Padilla is an "enemy combatant" and it sees no obstacle in the fact that Padilla was arrested at the airport far from the battlefield. Hamdi was captured – as was already mentioned – at the battlefield. The Court of Appeals' justification bewilders especially when the Court for instance states that there is no difference "between an enemy combatant captured abroad and detained in the United States, such as Hamdi, and an enemy combatant who escaped capture abroad but was ultimately captured domestically and detained in the United States, such as Padilla."[53] Instead of speaking about the international armed conflict in Afghanistan, the Court uses the metaphorical term of "the war on terrorism". In this context, it found that Padilla poses a threat to the U.S. security and the aim of his detention is to prevent him from returning to the battlefield. But Padilla did not fight with the Taliban so it is difficult to speak about his return to the battlefield and this is not the case; Padilla may be a danger for the United States but from the inside – what matters is not the fact that Padilla is a combatant fighting for the Taliban but whether he is a terrorist associated with Al Qaeda.[54]

Padilla is still in detention and it is probable that his case will be decided by the Supreme Court this time on the merits.

Rasul vs. Bush

In the case of *Rasul vs. Bush*[55] the petitioners were two Australians (Mamdouh Habib and David Hicks) and twelve Kuwaitis captured abroad in the course of armed hostilities between the U.S. and the Taliban. When the case was still pending, two of the petitioners namely British citizens Shafiq Rasul and Asif Iqbal were released from

[51] See some interesting remarks by R. A. L e v y: "What the Supreme Court Really Said about Jose Padilla;" the article is available: http://www.cato.org/dailys/08-09-04-2.html (last time visited 11.12.05).

[52] The judgment in *Padilla vs. Hanft* (No 05-6396) is available at: http://pacer.ca4.uscourts.gov/opinion.pdf/056396.P.pdf, p. 6.

[53] *Padilla vs. Hanft* (No 05-6396), p. 12. On the Court of Appeals' judgment see: J. M a r i n e r: "The Unjust Detention of Jose Padilla;" the article is available at: http://writ.news.findlaw.com/mariner/20050914.html (last visited 11.12.05).

[54] For more on the subject see: J. M a r i n e r, *ibid.*

[55] The judgment in *Rasul vs. Bush* (No 03-334) available at: http://www.supremecourtus.gov/opinions/03pdf/03-334.pdf.

Guantanamo and transferred under the British authorities' control which released them shortly after their arrival in the U.K. This is just another proof of the American hypocrisy as the U.S. authorities negotiated the release of nationals of its ally, the nationals that not so long ago it termed terrorists; it is also a proof of the shaky grounds for the indictment as the judicial bodies of the U.K. released the detainees without any charges. They did not find any danger on their side.

The SC had to answer the following question: do the U.S. courts have a right to judicial review of the legality of detention of aliens captured abroad in connection to armed hostilities and incarcerated at the Naval Base at Guantanamo Bay, Cuba?

The SC rules that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. The District Court has jurisdiction to hear petitioners' *habeas* challenges under 28 U.S.C. § 2241, which authorises district courts, "within their respective jurisdictions," to entertain *habeas* applications by persons claiming to be held "in custody in violation of the [...] laws [...] of the United States," §§ 2241(a), (c)(3). Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[56] According to the defendants, this provision is not applicable outside the U.S. territory but the Court found that as §2241 makes no difference between U.S. nationals and foreigners detained by the U.S. authorities (the provision reads generally on persons and not the U.S. nationals) so there is no reason to think that it was the intention of Congress to limit the applicability of the provision dependent on the nationality of a detainee. Moreover, pursuant to 1903 U.S.-Cuba Lease Agreement "the United States recognises the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States [...] the United States shall exercise complete jurisdiction and control over and within said areas. In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the [...] naval station of Guantanamo."[57] Invoking the "ultimate sovereignty" of Cuba by the U.S. is for the latter a very comfortable and easy excuse for its own conduct. The SC rightly found that the jurisdiction of U.S. Courts extends to the Guantanamo detainees and in this way it prevented the negative consequences that the Government's decision to place the detainees allegedly outside the jurisdiction of any U.S. Court in a so-called "legal black hole"[58] might cause for them. The SC also emphasised that *habeas corpus* is deeply rooted in "the genius of our common law"[59] and it appeared in the English law a few centuries ago. It may be

[56] *Ibid., Syllabus*, p. 2.

[57] *Ibid.*, p. 3.

[58] The term "legal black hole" was invented by J. S t e y n: "Guantanamo Bay: Legal Black Hole," *International and Comparative Law Quarterly* (2004), No 53. On the Cuban sovereignty over Guantanamo see: J. M a r i n e r: *A Guantanamo-Size Hole in the Constitution*, available at: http://writ.news.findlaw.com/mariner/20031201.html (last visited 11.12.05).

[59] *Rasul vs. Bush, op. cit.*, p. 5.

suspended only in cases of "rebellion or invasion the public safety may require it."[60] In the case of *Rasul* there is no such danger to the national security.

The SC dismissed the thesis on the deciding character of *Johnson vs. Eisentrager.* It pointed to several distinctions between that case and the present. The petitioners in the present case are not the nationals of a party at war with the U.S. and they denied having participated in or planned any acts of aggression against the U.S.; they were not charged with any crime and for more than two years were detained on a territory under the complete jurisdiction and control of the U.S.

Concluding, in *Rasul vs. Bush* the Supreme Court held that the U.S. courts have jurisdiction to verify the legality of Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, the SC reversed the judgment of the Court of Appeals and remanded for the District Court to consider in the first instance the merits of petitioners' claims.[61] This decision was probably the most revolutionary of the present SC's trilogy. According to one of the judges – Justice Scalia writing in his dissenting opinion – *Rasul vs. Bush* decision overruled *Johnson vs. Eisentrager.* Unfortunately, it does not mean that the detainees are finally guaranteed some substantial rights but only a procedural right to challenge the legality of their detention. That question was left for the district courts to decide. It must be noticed – with sorrow though – that the SC did not take a stand on qualifying someone as a an "enemy combatant" and detaining him in the context of the III Geneva Convention. The SC should have expressly stated that such conduct is contrary to the GC III.

Cases Decided after the Supreme Court's Judgments

1. *Hamdan vs. Rumsfeld* (2004)

Salim Ahmed Hamdan was captured in Afghanistan in the end of 2001. In July 2003 – pursuant to his Military Order the President designated Hamdan for the trial by military commissions. It was justified by the allegation that he was a member of Al Qaeda or otherwise involved in terrorist activities against the U.S. In December 2003, Hamdan was placed in Camp Echo – a part of the Guantanamo Camp for the detainees awaiting trial by military commissions. In this camp, the petitioner was kept in isolation. In February 2004, Hamdan's lawyer filed a demand for charges and speedy trial. On 6 April 2004 in the United States District Court for the Western District of Washington, Hamdan's counsel filed the petition for *habeas corpus*. He complained about the nature and length of pre-trial detention of Hamdan contrary to the GC III, including common Art. 3 and about the legality of Hamdan's trial for alleged war crimes by the military commissions created by special orders of the President and Secretary of Defence instead of courts-martial pursuant to the Uniform Code of

[60] *Ibid.*, p. 5.
[61] *Ibid.*, p. 17.

Military Justice.[62] The petition challenges the order establishing the military commission as a violation of the separation of powers doctrine and as purporting to invest the military commission with authority that exceeds the law of war; it challenges the creation of the military commission as a violation of the equal protection guarantees of the Fifth Amendment and argues that the Military Order does not, on its face, apply to Hamdan.[63] The Government moved to dismiss. In the meantime – on 9 July 2004 – Hamdan was formally charged with conspiracy to commit the following offences: attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent and terrorism. Following the Supreme Court's decision on 28 June 2004, that federal district courts have jurisdiction of *habeas* petitions filed by Guantanamo Bay detainees, the case was transferred to the District Court of the District of Columbia, as having jurisdiction over such cases.[64] The District Court for the District of Columbia held that no proper determination has been made that Hamdan is an offender triable by military tribunal under the law of war and that the procedures of the military commission are fatally contrary to or inconsistent with those of the Uniform Code of Military Justice. On this basis, the Court granted the petitioners' motion.

The major premise of the government's argument that the President has untrammelled power to establish military tribunals is that his authority emanates from Article II of the Constitution and is inherent in his role as Commander-in-Chief.[65] But the President may establish military commissions only for offenders or offences triable by military tribunal under the law of war.[66] As Justice Robertson correctly stated, it was not determined that Hamdan is an offender triable under the law of war. Then the Court examined whether the violation of the GC III and its common Art. 3 occurred. It ruled that "the law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt." It pointed to Art. 102 of GC III which reads as follows: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power [...]. "The military commission is not such a court. Its procedures are not such procedures. The Government's position is that Hamdan is not entitled to the protections of the Third Geneva Convention at all, and certainly not to POW status, and that in any

[62] The UCMJ is available at: http://www.military-network.com/main_ucmj/main_ucmj.htm.

[63] For the factual background of the case before the District Court for the Western District of Washington see: the judgment of the District Court for the District of Columbia in *Hamdan vs. Rumsfeld*, available at: http://news.findlaw.com/hdocs/docs/tribunals/hamdanrums110804opn.pdf, p. 4.

[64] *Ibid.*, pp. 3–4.

[65] Article II states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment". The U.S. Constitution is available at: http://www.house.gov/Constitution/Constitution.html.

[66] *Hamdan vs. Rumsfeld, op. cit.*, p. 8.

event the protections of the Third Geneva Convention are not enforceable by way of *habeas corpus*. The Court rejected those arguments.[67]

It found that Hamdan was captured in the course of international armed conflict between the U.S. and Afghanistan and not – as the Government maintains – in a separate conflict with Al Qaeda, and in consequence Hamdan is entitled to the protection of GC III. In the Court's opinion, the conflict in Afghanistan was an international armed conflict in which Taliban and Al Qaeda joined forces against U.S. and its Afghan allies; the Geneva Conventions are "triggered by the place of the conflict, and not by what particular faction a fighter is associated with."[68] The Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there – whether as a prisoner of war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3. In reply to that the government argues that, even if the GC III might theoretically apply to anyone captured in the Afghanistan theatre, members of Al Qaeda such as Hamdan are not entitled to POW status because they do not satisfy the test established by Article 4(2) of the GC III.[69] In October 2004, the Combatant Status Review Tribunal (CSRT) qualified Hamdan as an "enemy combatant" being a member of Al Qaeda. In regard to this argument, the District Court invoked Art. 5 of GC III and Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees[70] comprising its implementation and confirmation. Pursuant to the Army Regulation 190-8 if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated in Article 4 of GC III such persons shall enjoy the protection of the Geneva Convention until such time as their status has been determined by a competent tribunal. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.[71] The District Court found however that the CSRT was not such a "competent tribunal" as it was not established to address detainees' status under the Geneva Conventions but to comply with the Supreme Court's decision in Hamdi to decide "whether the detainee is properly detained as an enemy combatant" for purposes of continued detention.[72]

The Government also argued that the qualification by the CSRT that Hamdan was an Al Qaeda member is determinative to the of Hamdan's POW status, since the President has already determined that detained Al Qaeda members are not pris-

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[67] *Ibid.*, p. 14.

[68] *Ibid.*, p. 15.

[69] *Ibid.*, p. 16.

[70] The Army Regulation 190-8 is available at: http://usmilitary.about.com/gi/dynamic/offsitehtm?site=http://www.usapa.army.mil/pdffiles/r190%5F8.pdf.

[71] Chapter 1, Tribunals 1–6.

[72] *Hamdan vs. Rumsfeld*, p. 18; see also: *Memorandum From Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 3* (7 July 2003), available at: http://www.defenselink.mil/news/Jul2004/d20040707review.pdf

oners of war under the Geneva Conventions (on 7 February 2002). In relation to that the Court rightly noticed that, the President is not a "tribunal". It added that the Government must convene a competent tribunal and until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner of war.[73]

In regard to the government's next argument, that Common Article 3 does not apply because it was meant to cover local and not international conflicts, is was also rejected. The Court invoked the International Court of Justice's judgment in the Nicaragua case of 1986 where the ICJ has stated it plainly: "There is no doubt that, in the event of international armed conflicts [...] (the rules articulated in Common Article 3) [...] constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts."[74]

Finally, the District Court had to define the nature of the GC III's norms – whether they are self-executing or not. The Government maintained that Hamdan's rights under the Geneva Conventions, if any, and whatever they are, are not enforceable by this Court – that, in effect, Hamdan has failed to state a claim upon which relief can be granted – because the GC III is not "self-executing" and does not give rise to a private cause of action. The Court rejected this argument and stated that treaties made under the authority of the United States are the supreme law of the land (U.S. Constitution art. VI, cl. 2). United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are "non-self-executing." In this place, the Court indicated that A treaty is "non-self-executing" if it manifests an intention that it not become effective as domestic law without enactment of implementing legislation or if implementing legislation is constitutionally required.[75] The Geneva Conventions, of course, are all about prescribing rules by which the rights of individuals may be determined. Only a few provisions require implementing legislation. Articles 5 and 102, which are dispositive of Hamdan's case were not among them. What requires implementing legislation are Articles 129 and 130, providing for additional criminal penalties to be imposed upon those who engaged in "grave" violations of the Conventions, none of which is involved here. In conclusion, the District Court stated that "[b]ecause the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty."[76]

[73] *Hamdan vs. Rumsfeld, op. cit.*, p. 18.
[74] *Ibid.*, p. 21.
[75] *Ibid.*, p. 23.
[76] *Ibid.*, pp. 25–26.

Probably the most important part of the judgment was the one pertaining to the military commissions where the Court decided that the procedures of the military commissions are contrary to UCMJ. This inconsistency is mostly evident in the structure of the reviewing authority after trial which is the executive (the President or the Secretary of Defence or a person designated by them) and in the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him. There is however a great many other differences.[77] The latter one is "such a dramatic deviation from the confrontation clause [that] could not be countenanced in any American court" (thus it violates a right to defence). In conclusion, the Court ruled that unless and until the military commission's rule permitting Hamdan's exclusion from commission sessions and the withholding of evidence from him is amended so that it is consistent with and not contrary to UCMJ Article 39, Hamdan's trial before the military commission would be unlawful.[78]

On 15 July 2005 the Court of Appeals for the Columbia Circuit overruled the above presented decision in *Hamdan*.[79] It held that military commissions are not illegal and the President has the power – given by the Congress in *Authorisation for Use of Military Force* – to create such commissions. The Appeals Court also found that military commissions are "competent tribunal" pursuant to Art. 5 of GC III. Additionally, the Court ruled that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court. The Court reached a completely illogical conclusion on common Art. 3, namely that Art. 3 is not applicable to Hamdan as he was captured in the course of war in Afghanistan and this war is a part of war against Al Qaeda which in turn is a part of broader "war on terrorism". The last one, however, is international in nature whereas Art. 3 applies only to non-international conflicts. In this place, all that can be done is to point to the correct decision of the District Court calling Art. 3 "a minimum yardstick" applicable also to international armed conflicts.

In November 2005, the Supreme Court agreed to examine the legality of the military commissions to try those charged with terrorism (as a result of an appeal made by Hamdan). The SC will hear the arguments of the parties probably in February 2006.[80]

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[77] See: *ibid.*, pp. 28–29. For more on military commissions read: "Military Commission Proceedings Violate International Law," available at: http://www.humanrightsfirst.org/media/2004_alerts/0817.htm (last time visited 11.12.05).

[78] *Hamdan vs. Rumsfeld, op. cit.*, p. 44.

[79] The judgment in *Hamdan vs. Rumsfeld* (No 04-5393) passed by the Court of Appeals is available at: http://caselaw.lp.findlaw.com/data2/circs/dc/045393a.pdf.

[80] See: "Supreme Court to hear Guantanamo detainee's case," http://www.post-gazette.com/pg/05312/602518.stm and "Five Guantanamo detainees charged," http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/4416682.stm (last time visited 11.12.05).

In re Guantanamo Detainees (2005) and *Khalid vs. Bush* (2005)

Shortly after the judgment in Hamdan vs. Rumsfeld was passed, two more cases were decided by the federal judges, both of which deserve some attention; they are two opposite decisions. In *in re Guantanamo Detainees*[81] of 31 January 2005 judge Green examined the eleven coordinated *habeas corpus* cases filed by the Guantanamo detainees. Similarly to judge Robertson in *Hamdan vs. Rumsfeld*, she decided in favour of the detainees applying IHL which she deemed self-executing. Judge Green stated that the detainees are entitled to the protection emanating from the Fifth Amendment (a right to a fair trial) as Guantanamo Bay amounts to the U.S. sovereign territory. Fair trial guarantees were not provided by the CSRT's and its procedures.[82]

In the other case of 19 January 2005 – *Khalid vs. Bush*[83] judge Leon decided in favour of the Government, thus taking a complete opposite stand. He stated that in the present circumstances he "finds no viable legal theory under which it could issue the writ they each seek."[84] This statement stands in a sharp contrast with what the Supreme Court found in *Rasul vs. Bush* where it was concluded that the districts courts are competent to decide the cases on the merits. The District Court also stated that "the Petitioners are asking this Court to do something no federal court has done before: evaluate the legality of Executive's capture and detention of non-resident aliens, outside the United States, during a time of armed conflict."[85] It relied on *Johnson vs. Eisentrager* just like it were forgetting the SC's judgment in *Rasul vs. Bush*. Moreover, the District Court expressly stated that "[n]othing in *Rasul* alters the holing articulated in *Eisentrager*."[86] It is indeed difficult to understand how the court reached such a conclusion. It also ruled that the President's war power must include the power to capture and detain the enemies and as an argument for this thesis it invoked the SC's decision in *Hamdi vs. Rumsfeld*.[87] There is, however, no consequence in relying on one of the SC's judgments while at the same time ignoring the other. The District Court invoked *Hamdi vs. Rumsfeld* but it ignored *Rasul vs. Bush*. Such an attitude is not appropriate.

As a conclusion, we would like to quote a significant passage from Art. 75 of Additional Protocol I which is declaratory of customary international law and which is binding on every state including the United States: "3. Any person arrested, detained

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[81] The judgment is available at: http://www.dcd.uscourts.gov/opinions/2005/Green/2002-CV 299~8: 57: 59~3-2-2005-a.pdf.

[82] The judgment is very critical on the CSRT – among others, it indicates that the detainees are not allowed access to the evidence being the basis for the CSRT's decisions; the right to legal counsel is illusory; it is possible that evidence is obtained through torture or so-called coercive interrogation techniques; finally the definition of an "enemy combatant" is too broad.

[83] The judgment in *Khalid vs. Bush* (No 1:04-1142) is available at: http://www.dcd.uscourts.gov/opinions/2005/Leon/2004-CV-1142~7:40:40~3-2-2005-a.pdf.

[84] *Ibid.*, p. 8.

[85] *Ibid.*, p. 6.

[86] *Ibid.*, p. 18.

[87] *Ibid.*, p. 11.

or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist. 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised."[88]

[88] Protocols Additional to the Geneva Conventions of 12 August 1949, ICRC, Geneva, 1996.

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The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights

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The development of international institutions entrusted with competence to entertain disputes in different branches of international law has reached an unparalleled stage. Never before in the history of international relations there has been so many judicial and quasi-judicial organs set up with view of interpreting and applying norms of international law. This phenomenon tends to be labelled as a "proliferation" of international courts, though it was rightfully observed that it is not the most fortunate term one could think of in this regard.[1] Nevertheless, it seems that the existence of different *fora* of international adjudication constitutes an inevitable consequence of evolving complexity of international relations. Moreover, the choice between various methods of resolution of a dispute has become much broader than ever before.[2]

The proliferation of international courts and tribunals has been an object of continuing interest among legal scholars since – at least – a decade. Certainly, the International Court of Justice ceased to be the only permanent international judicial body much earlier,[3] however, the real bloom of new institutions came with the advent of the 1990s.[4] Some eminent jurists expressed fears that the diverging case-law would

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[1] See: H. Thirlway: "The proliferation of international judicial organs: institutional and substantive questions: The International Court of Justice and other international courts," in: N.M. Blokker, H.G. Schermers: *Proliferation of international organisations: legal issues*, The Hague (etc.) 2001, p. 251 ff. The author notes that it would be more arguable to use the term "proliferation" if the new international courts had been set up through separation from pre-existing judicial bodies. One could also add that the term has been frequently associated with "proliferation of nuclear weapons".

[2] Cf. V. Lowe: "Overlapping Jurisdiction in International Tribunals," *Australian Yearbook of International Law* 20 (1999), pp. 191–204; Y. Shany: *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press 2003.

[3] Following the set up of the ICJ as a successor to the Permanent Court of International Justice, the next international courts have been established in the 1950s – the European Court of Human Rights under Article 19 of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 (European Treaty Series No 5) and the Court of the European Coal and Steel Community under Article 31–45 of the Treaty Establishing the ECSC of 1951. The latter Court has been transformed into the Court of Justice of the European Communities in 1957.

[4] That includes *inter alia* the two *ad hoc* International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR), the International Tribunal for the Law of the Sea (ITLOS), the Court of the European Economic Area (EFTA), the Court of Justice of the Common Market of Eastern and Southern Africa (COMESA). For further reference see the website of the *Project on International Courts and Tribunals (PICT)* – http://www.pict-pcti.org – a joint undertaking by the *Center on International Cooperation* at the New York University and the *Centre for International Courts and Tribunals* at University College, London.

destroy the uniformity of international law,[5] but some were more reassuring and saw no reason to worry.[6] The fact remains that the existing international courts and tribunals can hardly be perceived as parts of a coherent "system". With no institutional or hierarchical links, the judicial and quasi-judicial bodies resemble scattered pieces of puzzles rather than orderly planned "international judiciary". This is not a surprise to international lawyers, nor it is for international courts, as reflected in a thought-provoking *passus* from a judgment of the ICTY:

> *International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).*[7]

So far, so good. But is the uniformity of international law really in danger? Can we presume that the risk of conflicting jurisprudence or double standards prevails over benefits of proliferation, such as enhanced possibilities of peaceful resolution of conflicts? There can be no straightforward answer to these questions and it is not this author's intention to assess the pros and cons of the proliferation of international courts. Instead, We propose to take a closer look on two important international jurisdictions in order to establish the role of precedent in their judicial practice.

One could *prima facie* believe that since there are no institutional links between various *fora* of international litigation, we should not expect that the same judicial decision on a given issue would be applied across every international jurisdiction. However, it would be a misunderstanding to say that international courts and tribunals are exercising their functions with no regard to jurisprudence other than their own. They obviously *take* notice of external case-law, which might influence their decisions to a large extent. But can we prove the existence of some "jurisprudential links" among international judicial bodies which amount to a doctrine of precedent *de facto*? I shall focus on this question below, trying to outline the ICJ's and ECtHR's attitude towards the use of external precedents.

I shall also comment on these bodies' approach to its own jurisprudence. It is intriguing to note that although the doctrine of *stare decisis (et non movere quieta)* is unknown in international courts, most of them have apparently developed a regular practice of using previous decisions or judgments *as* persuasive precedents. This phenomenon deserves some attention and we shall briefly elaborate on the internal application of precedents in a given international body before coming to the external sphere.

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[5] G. Guillaume: "The Future of International Judicial Institutions," *International and Comparative Law Quarterly* 44 (1995), p. 862 ff.

[6] See: J.I. Charney: "Is International Law Threatened by Multiple International Tribunals?," *Recueil des Courses* 271 (1998), pp. 347–374; M. Koskenniemi, P. Leino: "Fragmentation of International Law? Postmodern Anxieties," *Leiden Journal of International Law* 15 (2002), pp. 553–579.

[7] *Prosecutor v. Dusko Tadić*, ICTY judgment of 2 October 1995 (decision on the defence motion for interlocutory appeal on jurisdiction), § 11.

Undoubtedly, the proposed field of inquiry is quite vast – this is also one of the reasons for constraining this essay to the two indicated jurisdictions. Needless to say, a more comprehensive analysis should include other international judicial bodies and it is this author's objective to take that challenge in the near future. For now – as I mentioned above – we shall elaborate on the doctrine of precedent in the ICJ – the oldest and arguably the most influential body of international adjudication, as well as in the ECtHR – the most experienced regional court in the field of human rights protection. My comments will also indirectly concern other jurisdictions where some influence of the ICJ or ECtHR could be ascertained.

It is important to stress that for lawyers brought up in continental legal traditions it may be difficult to accept the use of the term "precedent" for judicial decisions which do not have binding force according to principles adopted in common law jurisdictions. In fact, the notion of "precedent" in some civil law countries might be used more often by journalists or publicists rather than the lawyers themselves. However, the clear-cut division for common law countries with strictly applied principle of *stare decisis* and civil law countries rejecting the judicial decisions as a source of persuasive authority belongs now to the past.[8] The doctrine of precedent need not be equated with the doctrine of *stare decisis.* Therefore I do not find any convincing reasons for evading the term "precedent" in relation to the international case-law, as long as we agree on the broad scope of the term, involving judgments which are not necessarily considered a direct source of law.

International Court of Justice

In his outstanding monograph on the application of precedents in the ICJ Judge M. Shahabuddeen noted:

[T]he fact that the doctrine of binding precedent does not apply means that decisions of the Court are not binding precedents; it does not mean that they are not "precedents". The term occurs in the jurisprudence of the Court; it occurs also in the pleadings of counsel and in the writings of publicists.[9]

The author argues elsewhere that the Article 59 of the Statue of the ICJ,[10] commonly regarded as a prohibition to apply the doctrine of *stare decisis,* does not concern the issue of precedential value of the Court's decisions.[11] Article 59 of the Statute serves a different purpose, and notably defines the scope of binding force attached to

[8] Cf. examples provided in: D.N. MacCormick, R.S. Summers" *Interpreting Precedents. A Comparative Study,* Darmouth 1997, *passim.* See also: L. Morawski: *Główne problemy współczesnej filozofii prawa* [Main Problems of Contemporary Philosophy of Law], Warszawa 1999, p. 211 ff.

[9] M. Shahabuddeen: *Precedent in the World Court,* Cambridge University Press 1996, p. 2.

[10] Article 59 of the ICJ Statute stipulates: *The decision of the Court has no binding force except between the parties and in respect of that particular case.*

[11] *Ibid.*, p. 63 ff..

the Court's judgments. Thus, we should not infer from the text of Article 38(1)(d) of the Statute[12] that the Court may not use its own precedents.

J. Charney in his Hague Lecture also subscribes to this view by pointing out that:

> *Although a strict common law doctrine of stare decisis is not used, the ICJ and other standing courts of international law increasingly rely on reasoning found in prior cases. Thus, there is precedent in international law. Even though this precedent is not of a binding character, it is highly persuasive.*[13]

The examples of referring to previous judgments in the case-law of the ICJ are numerous; in fact a randomly selected Court's decision would contain a referral to earlier cases, usually cited in brackets. The very fact that the ICJ invokes its earlier case-law signifies that the Court found it appropriate to link the decision in the case at hand with a rule expressed in a previous judgment. It might also happen that the Court wishes to distinguish a case from one already considered.[14] Still, when the Court invokes a previous case or cases, is it enough to establish that it applied or followed a precedent? It seems that the doctrine of precedent in the ICJ is not reflected simply by referring to particular cases. The degree of influence or persuasiveness of a given precedent may differ; besides it might be sometimes problematic to assess the degree of that influence if the reasoning provides us with no hints in this regard. Be it as it may, the very referral or citation of a previous case is not equivalent to the application of the precedent, though might be the first step towards this direction.

It could be argued that the practice of referring to previous decisions and following precedents is inherent to the judicial application of law, so it comes as a matter of course. Indeed, self-referring is not surprising in case of international courts, nor it is in case of legal scholars. Nevertheless, the most important is the real value that the Court attaches to the practice of citing earlier decisions. The ICJ seemingly not only cites, but also follows the *rationes decidendi*[15] established in its case-law. That practice has been common and frequent as early as in times of the ICJ's predecessor, the Permanent Court of International Justice.[16] Following precedents has thus become a part and parcel of the Court's legal tradition, notwithstanding the debate on whether or not the judicial decisions are the product of law-making.[17]

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[12] According to Article 38(1)(d) of the Statute, *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply [...] subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

[13] J.I. Charney, *op. cit.*, p. 129.

[14] See: M. Shahabuddeen, *op. cit.*, p. 128–151.

[15] On the concepts of *rationes decidendi* see: N. MacCormick: "Why Cases Have Rationes and What These Are," in: L. Goldstein (ed.): *Precedent in Law*, Oxford University Press 1991, pp. 155–182.

[16] See: M. Shahabuddeen, *op. cit.*, p. 16–22.

[17] Cf. the analysis of different opinions in this regard by V. Röben: "Le précédent dans la jurisprudence de la Cour internationale," *German Yearbook of International Law* 32 (1990), pp. 382–407.

Legal certainty and stability of law are usually provided as explanations to the practice of applying precedents. Probably the most plausible reasons for the ICJ's practice in this regard were adduced by Sir Hersch Laurterpacht in his classic work of 1958:

The Court follows its own decisions for the same reasons for which all courts – whether bound by the doctrine of precedent or not – do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of essence of the orderly administration of justice; and (a minor and not invariably accurate considerations) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.[18]

N. Miller was exploring the instances of resorting to external precedents in the case-law of international judicial bodies, including the International Court of Justice,[19] though – despite the promising title – he refrained from elaborating on the term "precedent" itself. Instead the author chose to use the "relatively unencumbered phrase 'to refer'".[20] Indeed, the notion of "precedent" may be misleading if we do not try to define its meaning in a given system of law. But even assuming that the term is ambiguous, we must draw a clear distinction between "referring to a case" and "following precedent". The former does not always result in the latter, yet it depends on the judicial reasoning adopted in a particular case.

The ICJ has taken a rather reluctant approach towards referring to external precedents. Few examples of contrary practice should rather be considered an exception from the rule.[21] Apparently the ICJ does not find it necessary to invoke the authority of other bodies' case-law on a regular basis. On the one hand this approach seems understandable – a distinguished judicial body with over eighty years' experience in international adjudication (if we agree on considering the PCIJ and ICJ as the same World Court) might not be interested in searching for back-up within relatively younger fellow courts – but on the other hand, this reluctance could be explained by conservatism if not judicial isolationism.

Apart from judicial policy developed by the ICJ, it is also a matter of opportunity. So far the ICJ had never a chance to entertain a dispute on the basis of – say – the

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[18] H. Lauterpacht: *The Development of International Law by the International Court*, London 1958, p. 14.

[19] N. Miller: "An International Jurisprudence? The Operation of «Precedent» Across International Tribunals," *Leiden Journal of International Law* 15 (2002), pp. 483–526.

[20] *Ibid.*, p. 489. The author noted that *precedent is a loaded term. [...] To the extent that it is understood to refer to other practices, the term is ambiguous; it means different things in different legal systems and can have multiple meanings even with the same system, depending on the context in which it is used* – see: N. Miller, *op. cit.*, pp. 488–489.

[21] The comparative research by N. Miller shows that the ICJ has referred three times to external judicial decisions – twice to the judgment of the Central American Court of Justice of 9 March 1917 and once to the 1977 Anglo-French Arbitral Tribunal – see: N. Miller, *op. cit.*, p. 500.

European or Inter-American Convention on Human Rights. The existence of inter-state complaint procedures at the regional human rights courts presumably excludes such proceedings at the ICJ. However, the relatively recent Advisory Opinion of the ICJ concerning *legal consequences of the construction of a wall in the occupied Palestinian territory*[22] brought an interesting turn in the Court's policy towards authority of external case-law. The Court's considerations on the application of the International Covenant of Civil and Political Rights on the occupied territories include a direct reference to the case-law of the Human Rights Committee.[23] The ICJ has also invoked the Committee's *General Comment No 27* concerning the limitation clause in the context of the freedom of movement.[24] The mode of referring to the HCR case-law indicates that ICJ attached a considerable weight to the Committee's decisions, even though it is not a judicial body *sensu stricto*.[25]

Whether or not the ICJ is likely to show similar openness towards external case-law in its future decisions remains to be seen, however, the Advisory Opinion of 2004 should be perceived as a positive message from the Bench. It means that the ICJ is ready to participate in the inter-judicial (or "transjudicial"[26]) dialogue and shows readiness to benefit from external authorities – as long as they provide valuable support in the process of judicial reasoning. It should be hoped that the ICJ has abandoned the path of isolationism and the policy which in case of the US Supreme Court was classified – and reasonably criticised – as "legal exceptionalism".[27]

We shall leave aside the issue of how the ICJ case-law influences other international jurisdiction, though it would not be an exaggeration to say that the Court's case-law is usually a key point of reference if a general issue or principle of international law happens to be examined by other international court.[28] Of course, divergent views may by expressed on the same issue by the ICJ and other international judicial body,[29]

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[22] The Opinion of 9 June 2004, available at the ICJ's website: www.icj-cij.org

[23] Cf. § 109 of the Opinion: *The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. [...] The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, López Burgos v. Uruguay; case No. 56/79, Lilian Celiberti de Casariego v. Uruguay). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, Montero v. Uruguay).*

[24] The ICJ has agreed with the Human Rights Committee with regard to the restrictions provided for under Article 12, paragraph 3, of the ICCPR – see § 136 of the Advisory Opinion.

[25] See: T. Burgenthal: "The U.N. Human Rights Committee," *Max Planck Yearbook of United Nations Law* 5 (2001), pp. 341–398.

[26] See on that point: A.-M. Slaughter: "A Global Community of Courts," *Harvard International Law Journal* 44 (2003), pp. 191–219.

[27] Cf. C. Booth, M. du Plessis: "Home Alone? – The US Supreme Court and International and Transnational Judicial Learning," *European Human Right Law Review* 10 (2005), pp. 127–147.

[28] See D.W. Prager: "The Benefits of Proliferation," p. 283 ff.

[29] See on the "desirability of keeping differences to minimum": M. Shahabuddeen: "Consistency in Holdings by International Tribunals," in: N. Ando et al. (eds.) *Liber Amicorum Judge Shigeru Oda*, The Hague 2002, pp. 633–650. Judge Shahabuddeen elaborates *inter alia* on the internal precedent in the practice of the ICTY. That issue has been also discussed by C. Harris: "Precedent in the Practice of the ICTY," in: R. May et al. (eds.), *Procedure and Evidence in Honour of Gabrielle Kirk McDonald,* The Hague 2002,

but this should be perceived as a natural consequence of the decentralised structure of international judiciary. Occasional differences of opinions between international courts do not rule out the existence of some inter-systemic precedents, provided we are ready to consider that each international judicial body operates in an autonomous, self-contained system. Without going into too much detail, we could find examples of ICJ precedents which represent a universally recognised standard confirmed in the jurisprudence of other international courts, just to mention the Court's case-law on the binding character of provisional measures.[30]

European Court of Human Rights

The European Court of Human Rights (ECtHR) could be regarded as the busiest international judicial body in the first years of the XXI century.[31] The development of the system of human rights protection within the Council of Europe, as well as the ECtHR's case-law, allows to consider that Court as the European "Constitutional Court" in the field of human rights and freedoms.

The practice of invoking its own case-law is common with the ECtHR to the degree comparable – if not greater – to the ICJ. There are no legal obstacles to applying previous precedents in the Court's practice; Article 46(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[32] which concerns the binding force of the Court's judgments and delimits the scope of that force, should not be construed as having any influence on the precedential impact of the ECtHR judicial decisions.

Following precedents in the Court's case-law has been widespread both before and after entry into force of the Protocol No 11 which set up a full-time ECtHR.[33] Although the "new" Court could be perceived as a "new quality", there can be no doubt that it is the successor of the Court established originally by the ECHR. Thus, there is no artificial division between the "old" and the "new" case-law, which is

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pp. 341–356, as well as in a broader context by X. T r a c o l: "The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals," *Leiden Journal of International Law* 17 (2004), pp. 67–102.

[30] See the ICJ judgments in cases: *LaGrand (Germany v. United States of America)* of 27 June 2001 and *Avena and Other Mexican Nationals (Mexico v. United States of America)* of 31 March 2004. The binding character of provisional measures has been also recognized in the case-law of the Inter-American Court of Human Rights – see references in the ECtHR judgment of 5 February 2005 – *Mamatkulov and Askarov v. Turkey* – confirming that principle also with regard to the system of the European Convention on Human Rights (§ 53).

[31] Sometimes referred to as a victim of its own success, the ECtHR is permanently overburdened despite the fact that it delivers nearly a thousand judgments yearly. Some improvement is anticipated when the Protocol No 14 to the ECHR enters into force, which should happen in late 2006 or 2007, but this will not resolve the present difficulties. Therefore another reform of the ECHR system is being considered within the Council of Europe by the *Group of Wise Persons* and the effects of that exercise are expected in May 2006.

[32] Article (46)1 of the ECHR stipulates: *The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*

[33] The Protocol No 11 to the ECHR came into force on 1 November 1998, replacing the European Commission of Human Rights and the "old" Court with the "new", permanent judicial body.

a very sound policy, but could have not been anticipated with absolute certainty when the Protocol No 11 came into force.[34]

Exploring the "precedent value" of the ECtHR decisions in 1980s, F. Sundberg distinguished between *internal* and *external* precedent value.[35] The author explained that under the head "internal value" he meant *the normative effects of judgments in subsequent cases before a Convention organ*, whereas "external value" concerns the same effects before domestic authorities of the states-parties to the ECHR.[36] Indeed, the Court's judgments may have impact both within the internal sphere of adjudication ("internal precedent") as well as externally, but I would not constrain the outer persuasiveness of the Court's judgments to the domestic legal orders. In my view we can distinguish specific "external precedents", i.e. judgments which overwhelmingly influenced other international jurisdictions and contributed to the development of a certain common denominator among international courts. Therefore I would rather opt for recognising two directions of external influence of the Court's judgments – a vertical and a horizontal one. The former concerns the impact of the Court's case-law on domestic legal orders,[37] whereas the latter – a from of precedential influence on other international judicial bodies.[38]

Another issue is whether the precedential influence has a *normative effect.* This brings us closer to the debate on the normative value of international judgments and their classification among the recognised sources of international law. As we know, judicial decisions are usually considered an indirect source of international norms or – to use the language of the ICJ Statute – the "subsidiary means for the determination of rules of law".[39] However, it is also acknowledged that the international courts sometimes tend to develop international law in a creative way, balancing between judicial activism and self-restraint.[40] In any event, it seems that the normative effect of the ECtHR's – or other international court's – case-law should not be taken for granted but not excluded, either. This applies both within the internal, as well as external field of precedential influence, including the ECtHR's impact on domestic legal systems, where an indirect normative effect can sometimes be observed.[41]

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[34] See: V. Berger: "La nouvelle Cour europeénne des droits de l'homme – d'une jurisprudence à l'autre?," in: *Mélanges en hommage à Louis Edmund Pettiti*, Bruxelles 1999, pp. 129–144.

[35] F.G.E. Sundberg: "The European experience of human rights proceedings: the precedent value of the European Court's decisions," *Akron Law Review* 20 (1986–1987), p. 629–647.

[36] F.G.E. Sundberg, *op. cit.*, p. 629.

[37] Sometimes even in states not being members of the Council of Europe – see: J.F. Flauss (ed.): *L'influence de la la Convention européenne des droits de l'homme sur les Etats tiers*, Brussels 2002, *passim.*

[38] Cf. G. Cohen-Jonathan, J.F. Flauss (eds.): *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme,* Brussels 2005.

[39] Article 38(1)(d) of the Statute.

[40] Cf. for instance H. Thirlway: "Judicial Activism in the International Court of Justice Tribunals," in: N. Ando et al. (eds.): *Liber Amicorum Judge Shigeru Oda*, The Hague 2002, pp. 75–105. In the context of the ECtHR see: A. Mowbray: "The Creativity of the European Court of Human Rights," *Human Rights Law Review* 5 (2005), pp. 57–79.

[41] On the effects of the Court's case-law on the domestic legal order see E. Lambert: *Les effets des arrêts de la Cour européenne des droits de l'homme,* Bruxelles 1999, *passim.* Cf. also J.-P. Costa: "Some Aspects of the Influence of the European Convention on Human Rights on Domestic Law," in: G. Canivet et al. (eds.): *Comparative Law Before the Courts*, London 2004, pp. 85–89.

The ECtHR underlined in 1990 that it is not bound by its previous decisions – in the *Cossey v. United Kingdom* judgment the Court noted:

[The Court] usually follows and applies its own precedents, such as course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.

It remains perfectly clear that the doctrine of *stare decisis* does not apply in the ECHR system, and it follows that the doctrine of binding precedent *(precedent de iure)* must be rejected. However, the Court deliberately develops its case-law along the doctrine of non-binding precedent, being guided by convincing reasons, such as the principle of legal safety and orderly development of case-law.[42] J.G. Merrills pointed out that the Court not only cites but also applies and follows precedents in the grounds of its judgments.[43] According to L. Wildhaber, the President of the ECtHR, *to follow precedent normally is not only plainly compatible with the independence and impartiality of a tribunal, but expresses sound judicial policy.*[44]

The doctrine of persuasive precedent developed by the ECtHR does not mean that previous decisions are the only *rationes* taken into account in the process of judicial reasoning. It goes without saying that important influence in that process should be attached to the principles of ECHR interpretation, general principles of international law, core values of the democratic society or – last but not least – comparative legal standards.[45] Nonetheless, the judgments which form the basis of what used to be called "constant jurisprudence" might be regarded as persuasive precedents followed voluntarily by the Court.

In her excellent study on the effects of the Court's judgments, E. Lambert prefers to consider the Court's practices as *techniques de l'auto-référence* rather than instances of applying the doctrine of non-binding precedent.[46] It could be argued that a "self-reference" understood as a voluntary application of a *ratio decidendi* included in a previous judgment to the judicial reasoning in a case at hand is – to this author's

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[42] See the *Jane Smith v. United Kingdom* judgment of 27 September 2001, § 77.

[43] J.G. Merrills: *The Development of International Law by the European Court of Human Rights*, Manchester 1993, p. 12 ff.

[44] L. Wildhaber: "Precedent in the European Court of Human Rights," in: P. Mahoney et al. (ed.): *Protection des droits de l'homme: la perspective européenne. Mélanges à memoire de Rolv Ryssdal*, Köln-Berlin-Bonn-München 2000, p. 1529.

[45] Cf. J.G. Merills, *op. cit.*, p. 35. See also: L. Wildhaber: "The Role of Comparative Law in the Case-Law of the European Court of Human Rights," in: J. Brö hmer et al. (eds.): *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress*, Köln 2005, pp. 1101–1107, as well as: P. Mahoney: "The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law," in: G. Canivet et al. (eds.): *Comparative Law...*, *op. cit.*, pp. 135–150.

[46] E. Lambert: *Les effets des arrêts de la Cour européenne des droits de l'homme*, Bruxelles 1999, p. 397 ff..

understanding – equivalent with a "precedent *de facto*" or a "non-binding-but-persuasive precedent". But leaving aside the questions of terminology, it is worth to note that E. Lambert differentiates between referrals to methods and techniques of the ECHR interpretation and referrals invoking *rationes* established in earlier decisions.[47] Indeed, among the Court's judgments we could distinguish interpretative precedents setting out the rules on the Convention's temporal or territorial application, and general rules such as principle of effectiveness or margin of appreciation.

Despite the fact that applying precedents by the ECtHR could be regarded as a non-written rule, the "precedent reasoning" might of course also imply a distinguishing or overruling. The examples are quite numerous, but we will deal briefly with three of them. The first case illustrates a failed attempt to distinguish it from a previous "constant case-law". In the *Kopecky v. Slovakia* judgment the Chamber of the Court initially decided to distinguish the case from earlier precedents concerning the "legitimate expectations" in the context of the right to peaceful enjoyment of possessions enshrined in Article 1 of Protocol No 1.[48] More specifically, in some previous cases the Court ruled that where the applicants had been excluded from the scope of persons entitled to a restitution of property due to non-fulfilment of statutory requirements, their complaints under the Convention should be regarded non-applicable. In the *Kopecky* case the Chamber composed of seven judges distinguished it from previous cases and by four votes to three decided that there has been a violation of Article 1 of Protocol No 1. The Slovakian Government successfully applied for a referral of this case to the Grand Chamber under Article 43 of the Convention. As a result the Grand Chamber issued a final judgment which overruled the previous one and thus the Court returned to the principles expressed in earlier cases.

An example of overruling the "constant jurisprudence" might be found in the *Christine Goodwin v. United Kingdom* case[49], which concerned the allegations under Article 8 of the Convention (right to respect of private and family life) due to a non-recognition of the change of sex underwent by the applicant. The Court noted that it has previously examined complaints against United Kingdom concerning this issue and has consequently applied the precedent expressed in the *Rees* case.[50] In the *Christine Goodwin* case the Court decided to assess the factual and legal background in the light of present conditions, analyzing the medical and social implications. In turn the Court came to conclusion that in the 21st century the transsexuals' right to personal development cannot be longer a controversial issue. The Grand Chamber

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[47] E. L a m b e r t, *op. cit.*, p. 408 ff.

[48] The previous line of case-law was expressed in the following decisions: *Malhous v. Czech Republic (appl. No 33071/96, Grand Chamber decision of 13.12.2000), Gratzinger and Gratzingerova v. Czech Republic (appl. No 39794/98, Grand Chamber decision of 10.07.2002), Brezny & Brezny v. Slovakia (appl. No 23131/93, European Commission on Human Rights decision of 4.03.1993).*

[49] ECtHR judgment of 11.07.2002.

[50] *Rees v. United Kingdom* judgment of 17.10.1990 and the later cases against United Kingdom concerning post-operative transsexuals: *Cossey (27.09.1990), X., Y. and Z (22.04.1997), Sheffield and Horsham (30.07.1998).*

has overruled the *Rees* precedent and unanimously found a violation of Article 8 and 12 in the case at hand.

The last example of overruling concerns the *Kudła v. Poland* case. In the judgment of 26 October 2000 the Court has reversed its case-law as regards the relation between Articles 6(1) (the right to fair hearing) and 13 (the right to effective remedy) of the Convention. The Court ruled that there was no absorption of the safeguards of Article 13 by those of Article 6(1) where the alleged violation concerned the right to trial within a reasonable time. Therefore the Court found it necessary to examine separately the applicant's complaint under Article 13. One of the most significant reasons for overruling the established case-law was the growing frequency of violations of the reasonable time requirement laid down in Article 6(1). The Court has underlined "the important danger" that exists for the rule of law within the national legal orders of the State Parties when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy.[51] In effect of that judgment Poland has adopted an Act introducing a special remedy against unreasonable length of proceedings.[52]

The above examples show that the ECtHR is ready to distinguish or overrule precedents if need be. The concern for the consistent development of the Court's case-law is expressed *inter alia* by the Rule 72 of the Rules of the Court which concerns the relinquishment of jurisdiction to the Grand Chamber. The said Rule provides in its first paragraph:

In accordance with Article 30 of the Convention, where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered a judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case has objected in accordance with paragraph 2 of the Rule. Reasons need not be given for the decision to relinquish.

Although the relinquishment of jurisdiction is a possibility and not a duty of a Chamber, it is understandable that such a decision should be taken whenever the consistency of the Court's case-law so requires. It could be argued that decisions overruling previous precedents should be in principle adopted by the Grand Chamber composed of seventeen judges.

Let us have a look now at the Court's attitude towards external precedents, i.e. authorities coming from other international jurisdictions. According to the research done by N. Miller and already referred to above, the ECtHR seems to be somewhat

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[51] See § 148 of the *Kudła* judgment.

[52] The Act of 17 June 2004 on a complaint against violation of a party's right to have a case examined without undue delay in judicial proceedings *[ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postepowaniu sądowym bez nieuzasadnionej zwłoki]* – Journal of Laws (Dz. U.) 2004 No 179, item 1843. It is evident that the *Kudła* judgment had an indirect normative effect in the Polish legal order, as the adopted legislation should be considered as a fulfilment of a general measure indicated by the Court.

shy or unenthusiastic as regards external authorities, with only several references to the case-law of the International Court of Justice, Court of Justice of the European Communities and single instances of invoking cases from the Inter-American Court of Human Rights and the International Criminal Court for the Former Yugoslavia.[53] Several new examples should be added, which occurred in the period following the N. Miller's research publication in 2002 – the Court's recourse to external authorities in the *Mamatkulov and Askarov v. Turkey* judgments of 6 February 2003 and 4 February 2005,[54] *M.C. v. Bulgaria* of 4 December 2003,[55] as well as in the *Ilascu v. Molodva and Russia* judgment of 8.07.2004.[56]

The assumption that the ECtHR is unwilling to invoke international precedents would be jumping to conclusions. We should have regard to the fact that not every case examined by the Court provides it with an adequate opportunity to refer external authorities. On the contrary, the ECtHR as a specialised and treaty-based court can deal with issues of general importance in public international law insofar as they emerge from the individual or, much rarely, interstate applications. Such opportunities are not frequent indeed, though the first years of the "new" Court following the entry into force of Protocol No 11, brought some fresh air in this regard.[57]

Having in mind the fact that the ECtHR is the oldest and most experienced human rights court in the world, it is not surprising that its Court's case-law seems to "shine" and influence other international judicial bodies. But certainly there are limits to this influence. We should remember that the ECtHR was set up by the ECHR as a regional judicial body and is supposed to apply European standards and values laid down by the Convention and its Protocols. The European system of human rights protection does not include legal provisions exclusively; it encompasses also the virtues common to the Council of Europe member states. Thus the external persuasiveness of the Court's judgments depends to the large extent on whether the other international judicial bodies are willing to open up to the human rights standards applied on the European continent.

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[53] N. M i l l e r, *op. cit.*, p. 503.

[54] The judgments – of the Chamber and Grand Chamber respectively – concerned the issue of the states' legal obligation to comply with the provisional measures requested by the Court. The ECtHR referred to the ICJ and other case-law to back up its reasoning.

[55] The Court invoked *inter alia* the case law of the ICTY concerning sexual crimes and the related notions of terms "coercion, force, or threat of force".

[56] The international law background of the *Ilascu* case concerned mostly the issues of jurisdiction, but the Court also took this opportunity to note – invoking the *Cairo* case heard by the General Claims Commission in 1929 – that – *A state may also be held responsible even where its agents are acting ultra vires or contrary to instructions. Under the Convention a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected* (see § 319 of the judgment). The jurisdictional aspects of this and earlier cases are discussed by R. W i l d e: "The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?," *European Human Rights Law Review* 10 (2005), pp. 115–124.

[57] See: G. C o h e n - J o n a t h a n: "Rapport introductive general," in: *Droit international, droits de l'homme et jurisdictions internationals. Actes de la table ronde du 10 juillet 2003 organisée par l'Institut international des droits de l'homme*, Bruxelles 2004, p. 29 ff..

The ECtHR case-law seems to be favourably received in the jurisprudence of the Inter-American Court of Human Rights[58] and to some extent also in international criminal jurisdictions.[59] The existence of Strasbourg precedents in the case-law of the Court of Justice of the European Communities is scarce,[60] although it could be expected that the future will bring some new developments in this regard, especially if the reinforcement – or constitutionalisation – of fundamental rights within the EU would be pursued. Needless to say, the accession of the EU to the ECHR, which might not be a close perspective, but will happen one day – will be preceded by a discussion on the jurisprudential relations between both Courts. In such scenario, the precedential influence of the ECtHR judgments should be more visible.

Conclusion

Is there a doctrine of precedent in international law? My answer would be affirmative, though subject to several reservations. We cannot ignore the fact that the term "precedent" carries a strong connotation with the common law world and the traditional doctrine of *stare decisis*. However, it is undisputed that precedents also refer to judgments devoid of any law-making effect. Persuasive precedents are reality both in common law as well as civil law jurisdictions.[61] Even though these precedents are not strictly binding, they are being distinguished because of the degree of their influence on subsequent judicial decisions. A judgment does not become a precedent *per se* – it must be recognised in the successive case-law.

Precedents allow for an orderly development of a legal system. They are supposed to influence the judge and assist him or her in the process of judicial reasoning. Applying wise and convincing precedents reflects the court's prudence and strengthens the stability of case-law. Why should we then consider such approach to the use of precedents as not relevant to judicial application of international law? Despite the fundamental differences between the municipal and international law, the process of applying legal norms by a domestic or international court has a lot in common.

Do we need a doctrine of precedent in international law? Having regard to the decentralised character of international judiciary, as well as the phenomenon described as the "proliferation" of international courts and tribunals, every attempt to bring the scattered pieces of puzzles together appears to be of some use. I am referring now

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[58] Cf. A.A. Cançado Trindade: "Approximations and Convergences in the Case-Law of the European and Inter-American Court of Human Rights," in: G. Cohen-Jonathan, J.F. Flauss (eds.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Brussels 2005, pp. 101–138.

[59] Cf. A. Cassese: "La prise en compte de la jurisprudence de Strasbourg par les jurisdictions pénales internationales," in: G. Cohen-Jonathan, J.F. Flauss (eds.): *Le rayonnement...*, pp. 29–82.

[60] See: N. Miller, *op. cit.*, pp. 501–502. Cf. also: O. de Schutter: "L'influence de la Cour européenne des droits de l'homme sur la Cour de justice de Communautés européennes," in: G. Cohen-Jonathan, J.F. Flauss (eds.): *Le rayonnement...*, pp. 189–242.

[61] Cf. R. Bronaugh: "Persuasive Precedent," in: L. Goldstein (ed.): *Precedent in Law*, Oxford University Press 1991, pp. 217–247.

to the "inter-systemic" precedents – judgments expressing a universally recognised principle of international law; an acknowledged common denominator. Perhaps it is not easy to imagine that all international courts speak with one voice on a given issue, but nevertheless – the closer are the links between the jurisprudence of international courts, the better for the uniformity of international law. As I noted above, a mutual – or multilateral – respect for ICJ or ECtHR's case-law in several important areas of international law has been developing. It might be called an "international judicial dialogue", though I would prefer to perceive it as an evolving doctrine of international precedent.

Apart from the "inter-judicial" sphere, the doctrine of precedent seems alive and kicking within internal sphere of international jurisdictions. It is perfectly understandable that international courts are following their own steps and respect the established case-law, with a possibility of distinguishing or overruling if need be. The practice of the ICJ and the ECtHR includes plentiful examples of applying the doctrine of persuasive precedents, which could also be called "precedents *de facto*". Of course, the use of precedents in every international jurisdiction might be subject to subtle modalities, but the essence is the same – to follow the *rationes* expressing the recognised and respected principles of international law.

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1944 "Republican Agreements" and the Compensation for "Property Left Beyond the Bug River" – Reaching a Definite Settlement After 60 Years?

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1. Introduction

In the beginni ng of the 21st Century, there still remain unsolved legal problems that have resulted from the Second World War. For more that 60 years, Polish legislative, executive as well as judicial bodies have been engaged in a troublesome and complex set of issues related to compensation for the property abandoned by people repatriated from the eastern provinces of pre-war Poland which included large areas of today's Belarus, Lithuania and Ukraine.

Putting into effect the decisions taken by the Allies at the end of the War, later confirmed at Yalta and Potsdam Conferences, the borders of Poland were shifted from the East to the West. With some minor exceptions, the new eastern border reflected the so-called Curzon line and was delimited along the Bug River. Polish population of former Polish territories was repatriated to Poland on the basis of the so-called Republican Agreements. It is estimated that from 1944 to 1953, some 1,200,000 to 1,700,000 people were evacuated. The repatriates later should have received compensation for the property they had to leave. The compensation was to be arranged by the Polish State which had undertaken such obligation in accordance with the Agreements.

How is it possible that for some 60 years the state was not able to provide a final and definitive settlement of compensation claims and legal issues that are related to them? Were they really so complicated? Or perhaps there was some negligence on the part of the state, and especially of its executive organs? Is it a coincidence that the issues were more attentively looked into when they reached the control bodies of the European Convention on Human Rights? We need to be aware that state activities for those 60 years were not very intensive. It does not mean that Polish organs were not acting at all; quite to the contrary, there was a number of decrees and statutes that addressed the content, form and procedure of compensation. The primary problem was that, at some point, the enacted legislation failed to be effective any longer, and for many years the situation remained unchanged. This resulted mainly from the lack of effective control mechanisms over the action (or inaction) of state bodies, and

especially, the lack of remedies for individuals to effectively question state conduct and claim the compensation.

The article discusses some legal issues related to the compensation for the property left in the former Polish territories, so called "territories beyond the Bug River" (*ziemie zabużańskie*), also known as "Borderlands" (*Kresy* or *Kresy Wschodnie*).[1] First of all, it thoroughly analyses the 1944 Republican Agreements which have been the starting point for compensatory claims. Further, it looks into the implementation of the compensation by the domestic legislation and practice and next, it mentions the proceedings before the Strasbourg Court.

2. The Republican Agreements of 1944

The notion "Republican Agreements" covers three agreements signed by Poland with, respectively, Belarusian and Ukrainian (on 9 September 1944) as well as Lithuanian Soviet Republics (on 22 September 1944). They all three were entitled: *The Agreement between the Polish Committee of National Liberation and the Government of the Ukrainian* (Belarusian, Lithuanian respectively – author's note) *Soviet Socialist Republic concerning the evacuation of Polish citizens from the territory of Ukrainian* (Belarusian, Lithuanian respectively) *SSR and of the Ukrainian* (Belarusian, Lithuanian respectively) *population from the territory of Poland.*[2] All three Agreements entered into force on the day of signature. It is perhaps interesting to note that while Polish borders were ultimately decided upon at 1945 Conferences (Yalta and Potsdam), the 1944 Agreements had already sanctioned the new territorial shape of post-war Poland and allowed the Soviet Union to employ the *fait acompli* tactics.

The Republican Agreements provided for repatriation ("evacuation" is the term used by the agreements) of populations. Despite their wording, as if the repatriation was mutual, it was in fact principally one-way process from the East to the West. Although the Agreements stipulated that *"evacuation is voluntary and therefore no coercion may be applied either directly or indirectly"*,[3] it was illusory to rely on that under the political and military circumstances of that time. The repatriated could take personal belongings with them (clothes, shoes, food, household equipment and livestock) but only limited amount of money and no furniture, cars, motor-cycles, gold, platinum, or gemstones in unworked forms, etc.[4] Furthermore, what is the key issues

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[1] This article is partially based on the author's previous short commentary: "Sprawa „mienia zabużańskiego" przed Europejskim Trybunałem Praw Człowieka" [The issue of "the property left beyond the Bug River" before the European Court of Human Rights], *Problemy współczesnego prawa międzynarodowego, europejskiego i porównawczego* (2003), vol. I, p. 162.

[2] *Układ pomiędzy Polskim Komitetem Wyzwolenia Narodowego a Rządem Ukraińskiej Socjalistycznej Republiki Rad dotyczący ewakuacji obywateli polskich z terytorium U.S.R.R. i ludności ukraińskiej z terytorium Polski.*

[3] Art. 1 alinea 3, 1944 Agreements (quoted after the Polish-Ukrainian Agreement. Similar provisions appear also in the two other agreements).

[4] See: Art. 3.4, 1944 Agreements.

of this article, each of the 1944 Agreements included a provision on giving back the repatriates the value of the property they had abandoned: "The value of movable property left on evacuation as well as of immovable property shall be returned to the evacuated [...] in accordance with the laws binding in the Polish State and respectively in the Ukrainian (a.o.) Soviet Socialist Republic."[5]

There is a number of legal issues related to the process of concluding the Republican Agreements and their subsequent operation. Were they concluded by competent authorities? Was the procedure accurate? Did they require ratification? Were they ratified? Can they be directly effective in the domestic legal order? Can they constitute a sufficient legal basis for compensatory actions? This whole set of questions is under discussion below. Why analysing them, we need to keep in mind that, in accordance with the dualistic concept of the relations between international and domestic law, international agreements need to be incorporated into domestic law so as to bear legal consequences in it.

4. Competence to Conclude 1944 Agreements

The Republican Agreements were concluded in September 1944 by Poland and the three Soviet Republics directly, and not by the USSR alone or the USSR acting in conjunction with its republics.[6] Poland was represented by the Polish Committee of National Liberation (*Polski Komitet Wyzwolenia Narodowego, PKWN*) and the Republics – by their respective governments. A question may be raised if they were adequate and sufficiently empowered bodies to conclude the Agreements, and in particular, was the PKWN competent to sign them?

At that time, the War was not over yet, the 1944 Warsaw Uprising was continued, the internationally recognised Polish government was the one exiled in London.[7] The State National Council (*Krajowa Rada Narodowa, KRN*) as the new regime in Poland soon rejected the 1935 Constitution and declared to follow instead the March Constitution of 1921.[8] According to the 1921 Constitution, treaty-making power was vested in the President.[9] There is some ambiguity on who should be considered to act as the President of Poland at the time when the Republican Agreements were concluded. Władysław Raczkiewicz was the Polish President exiled in London, still nominated in accordance with the 1935 "April" Constitution, whereas the new

[5] Art. 3.6, 1944 Agreements.

[6] Soviet Constitution of 1936 provided for limited rights for the Republics that formed part of USSR to act on international plane.

[7] The Polish Government in exile was recognised until mid-1945 when the Interim Government of National Unity (*Tymczasowy Rząd Jedności Narodowej*) was created on 28 June 1945 and this government soon became internationally recognised. The United States and the United Kingdom withdrew their recognition of the Government in Exile on 6 July 1945.

[8] Act of State National Council of 21 July 1944 on the establishment of the Polish Committee of National Liberation [*Ustawa z dnia 21 lipca 1944 r. o utworzeniu Polskiego Komitetu Wyzwolenia Narodowego*], Dz.U. (Polish Journal of Laws) 1944, No 1, item 1.

[9] Art. 49 Constitution.

administration of Poland, the KRN, vested the presidential prerogatives (those of 1921 Constitution) in the Chairman of the State National Council. It did so however only on 20 September 1944.[10]

Hence, there are justified doubts whether a newly established (on 21 July 1944) Polish Committee of National Liberation, a puppet government sponsored by the Soviet Union, can be recognised as a legitimate representative of Polish state at that time, and a body competent to conclude international agreements on behalf of Poland. To conclude these Agreements meant to involve international responsibility and in effect also domestic responsibility of Poland to provide repatriates with compensation for the property they left in the former Polish territories.

Could PKWN exercise the presidential prerogatives on 9 September 1944? This may be arguable. In addition, we have to remember the political context in which the PKWN was created as well as the ongoing war activities and the formation of new Polish administration under strict Soviet influence and control. All these circumstance highly contribute to the doubts whether PKWN was a competent and authorised body to conclude the Agreements in accordance with both international and domestic laws. From the more academic point of view, in 1944 and subsequent years it was probably much easier to provide a negative answer to that issue and maintain that PKWN was not competent to commit Poland on international level in September 1944, since it was not yet an effective and recognised government, not to forget its obvious immanent non-sovereign nature. For practical reasons, however, such an answer is not really of much relevance today. What is more, for political reasons such an answer was not imaginable at that time. What matters today, is the lapse of time and the fact that no Polish government ever contested the authority of PKWN to conclude the Agreements, neither the governments of Polish People's Republic, nor the democratic governments after the political transformation of 1989/1990. Therefore, the rule of estoppel should be applied to this situation. If there are circumstances that make it probable to invalidate an international treaty, they should be brought up and invoked in proper time. Otherwise, the binding force of no international treaty would ever be certain. It can therefore be held that, according to the rules of customary international law, later incorporated to the 1969 Vienna Convention on the Law of Treaties, Poland lost the opportunity to invoke a possible lack of competence on the part of PKWN as a ground for invalidating the 1944 Agreements.[11]

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[10] Act of State National Council of 11 September 1944 on the competency of the Chairman of the State National Council [*Ustawa z dnia 11 września 1944 r. o kompetencji Przewodniczącego Krajowej Rady Narodowej*], Dz.U. 1944, No 5, item 23. The Journal was published on 20 September 1944 and according to Art. 5 of the Act, it entered into force on the day of its publication. KRN was created on the night of New Year's Eve 1943 on the initiative of Josef Stalin and the Polish Communist Party (*Polska Partia Robotnicza*) that was created in the Soviet Union several months before (in January 1942).

[11] Compare: Art. 45(b) of the 1969 Vienna Convention on the Law of Treaties.

5. Should the Agreements be Ratified?

In order to become a source of domestic law, an international agreement is expected to be ratified and promulgated. We can consider these to be minimal requirements before an international treaty becomes operational in the domestic legal order. It is clearly laid down in the 1997 Polish Constitution (Art. 87.1 and 91.1) but it was also needed when the 1952 Constitution or the 1921 "March" Constitution were in force. These are, however, additional requirements imposed on an international agreement from the viewpoint of domestic legal order. They are imposed with the purpose of putting an agreement into operation in national law. Public international law itself does not call for an obligatory ratification or publication of every international agreement. To the contrary, nowadays, it is even presumed that, if an agreement does not specify the mode in which parties shall express to be bound by it, it is believed that the simplified mode shall be sufficient, that is to say, to sign a treaty is enough.[12]

In the case of the 1944 Agreements, there should be no doubts which way was the appropriate way to conclude them. The parties had explicitly chosen the simplified mode, as the Agreements provide: "The Agreement enters into force on the day of signature."[13] There was no need to ratify them; the ratification was neither expected nor required. It was not forbidden, though. Nevertheless, such an act would be superfluous from the perspective of international law.

Would the act of ratification have any added value from the perspective of domestic law? If we imagined that the Agreements had been ratified, would it change the situation? It can be argued that it would not. The answer may be negative because the situation would probably not be different. With regard to awarding compensation for the repatriates, the 1944 Agreements refer to domestic law in that the provisions of the Agreements cannot be regarded as "self-executing norms". Consequently, this suffices not to consider them as direct and adequate legal basis for compensatory claims of the evacuated people. Since the Agreements require existence of appropriate internal law of the State, they cannot be "self-executed" and cannot be directly applicable themselves. The act of ratification would not change much here, because the Agreements are quite clear about their effect. What in fact the Republican Agreements did was to pronounce the principle of compensation and to refer to domestic legislation for all modalities of the compensation (e.g. scope of compensation, its procedure, remedies, etc.).

From the above remarks, it may appear that the ratification (and subsequent publication) does change much. Probably the only good argument in favour of ratification could be the one that the 1944 Agreements speak of "returning the value" and do not limit compensation to certain percentage of the original value or to certain amount of money. Hence, this may of importance if the Agreements formed part of Polish domestic law. In such a situation, it could be argued that they supersede the

[12] See: S.E. N a h l i k: *Kodeks prawa traktatów*, Warszawa 1976, p. 134; M. F r a n k o w s k a: *Prawo traktatów*, Warszawa 1997, p. 90; A. A u s t, *Modern Treaty Law and Practice*, Cambridge 2000, p. 76.

[13] See e.g.: Art. 22 Polish-Ukrainian Agreement.

limitations imposed on compensation by domestic legislation, and particularly, that they dispose of the criteria of maximum percentage or maximum amount. There are, however, two remarks that should be made in this context. Firstly, this is true that the Agreements did not provide any limitations to the compensation but it is as well true that they did not prohibit to impose ones. They simply remain silent about it. It may well be argued that it is more intuitive and more compliant with textual interpretation to accept the positive, favourable understanding – should the parties to 1944 Agreements wish to limit the compensations, they would have included this in the Agreements in an express way. Then again, this understanding can be contested, if we consider the compensatory provision of the Agreements as a general principle only and assume that the modalities were deliberately and intentionally left to be set by the domestic law. In the latter case, even if ratification (and publication) took place and the Agreements became part of domestic law, it would be for the domestic legislation to determine the way in which the compensation should be implemented. Secondly, we need to bear in mind, it is only the 1997 Constitution that for the first time clearly provided that some international agreements may take precedence over statutes (acts of Parliament). Previous Polish Constitutions that are of relevance here, did not resolve this possible conflict between international agreements and national statutes. The 1997 Constitution provides for the precedence of international agreements when they have been ratified with the previous consent of the Parliament.[14] This way or the other, it is not the case for 1944 Agreements. To conclude, regardless of when the ratification took place, if at all, there would be no automatic precedence of 1944 Agreements over statutes and other legislation that determined the compensation for the property left beyond the Bug River, even if the Agreements were promulgated in the Official Journal of Poland.

6. Were the Agreements Ratified?

There is certain divergence of opinions among lawyers, the judiciary and the government as to whether 1944 Agreements were in fact ratified. It seemed to be an important issue as it backed certain hope for those who have long awaited the compensation and maintained that Agreements did provide sufficient basis for compensation. The 1997 Constitution stipulates that "After promulgation thereof in the Journal of Laws of the Republic of Poland, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly [...]."[15] It immediately continues, however, "[...] unless its application depends on the enactment of a statute."[16] The Constitution extends this provision to international agreements that were concluded before it entered into force.[17] Therefore, had we concluded, which is highly arguable, that the referral to domestic law does not, under certain circum-

[14] Art. 91.2 Constitution.
[15] Art. 91.1. Constitution.
[16] *Ibid.*

stances, make it impossible to invoke the Agreements as legal basis for compensation, we still would need to prove that the Agreements were ratified and promulgated.

After the research carried out in the Polish State Archives (*Archiwum Akt Nowych*), attorneys-at-law who represented "the Bug River people" announced that at least two of the Agreements (the ones with Belarus and Ukraine) had been ratified. This opinion was shared by the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) in its judgments delivered in May 2003[18] and later confirmed by the judgments of the Supreme Court.[19] The Courts referred to the minutes of the State National Council that could have been regarded as the parliament at that time. In August 1944, the KRN reserved by itself and for itself the competence to ratify international agreements.[20] The minutes of KRN session of 9 September 1944, which is the very day when the Belarusian and Ukrainian Agreements were signed, suggests that KRN did ratify the two Agreements on that day. The minutes read as follows: "The KRN ratifying the agreements with the Government of Ukrainian SSR and the Government of the Belarusian SSR on mutual evacuation of population calls the PKWN to conclude similar agreement with the Lithuanian SSR as soon as possible".[21] Nonetheless, no genuine document of ratification has been found so far and it remains unclear whether it was not issued at all or whether it was lost. In reference to the third Republican Agreement, the one with Lithuania, there is, however, no similar document or even a note that would shed light on its ratification. We can of course presume that it would be reasonable to ratify also the third Agreement once the two previous were ratified, nevertheless, there is no "hard proof" of this ratification taking place.

7. Should the Agreements Be Published?

The 1944 Republican Agreements have not been promulgated so far. The issue whether they should be published or not caused some confusion within the Polish judiciary. The promulgation was requested by those who were entitled to compensation with the purpose to make the Agreements directly incorporated into domestic law. The Polish Prime Minister was not inclined to satisfy such requests. Consequently, he had to face complaints on inaction brought before the Supreme Administrative Court. The first complaints proved to be unsuccessful for formal reasons, since the Court indicated that the Prime Minister shall act on the motion of the Minister of Foreign Affairs, and therefore, the complaints were misaddressed.[22] Subsequent com-

[17] Cf. Art. 241.1 Constitution

[18] Judgment of 22 May 2003 (file No II SAB 420/02) and judgment of 29 May 2003 (file No II SAB 419/02). Later, in a judgment of 16 September 2004, the Supreme Administrative Court withheld its opinion as it held itself non-competent to determine the questions of ratification and implementation of 1944 Agreements.

[19] Judgment of the Supreme Court of 21 October 2003 (file No I CK 323/02), the opinion of the Supreme Court was not very strong, accepted this opinion "as more justified".

[20] Act of State National Council of 15 August 1944 on the interim mode of issuing decrees [*Ustawa z dnia 15 sierpnia 1944 r. o tymczasowym trybie wydawania dekretów z mocą ustawy*], Dz.U. 1944, No 1, item 3. The Act entered into force on the very same day (day of publication).

[21] Quoted after the judgment of the Supreme Court of 21 October 2003 (file No I CK 323/02).

[22] Judgments of 22 and 29 May 2003, see: *supra*, n. 18.

plaints on inaction, this time against the Minister of Foreign Affairs, were admitted by the Supreme Administrative Court which ordered the Minister to examine the request for publication and issue an administrative decision.[23] The standpoint of the Supreme Administrative Court complied with the judgment of the Supreme Court delivered a few days before. The Court confirmed that the non-implementation of the obligation to issue or publish a normative act may lead to a constitutional delict.[24] It added, however, that this does not automatically involve liability of the state and does *per se* entitle the individual to bring a compensation claim against the state, since not only the wrongfulness and damage but also the causal link between those two must be proven. Rejection to publish the Agreement could cause damage only if the Agreements were considered as direct legal basis for the claims.

The issue of review of ministerial decision not taking any action in order to publish the Agreement was further continued, as the Minister of Foreign Affairs soon contested the Supreme Administrative Court's judgment by lodging a cassation complaint with it. It argued that the acts or actions related to the publication of an international agreement do not have individual character and are not related to an individual person, therefore do not come under the scope of scrutiny by the administrative court. The Minister also relied on the assumption that the Republican Agreement did not concern rights and obligation of an individual in the direct way, since it provided that the compensation should be enforced to the extent and according to the modalities laid down by domestic legislation.

It is interesting to note that the Minister invoked also an argument that promulgation of international agreements comes within the scope of the activities of the legislative branch and is not subjected to judicial review of an administrative court. If the court ordered the Minister to take action in this sphere, it would infringe upon the principle of separation of powers. At first, the Supreme Administrative Court rejected this argument as it held that once publication is done by an administrative organ, its only a technical act and not the one within the scope of legislative powers. Moreover, it brings an important legal effect in that the agreement becomes a legal source in domestic law and, in principle, it may be applied directly.[25] While considering the cassation complaint and having a chance to re-think its reasoning, the Supreme Administrative Court came to a contrary conclusion and recognised itself as not competent to rule on the publication of an international agreement. In the end, the Court shared most of Minister's position and quashed its previous judgment.[26]

8. Are 1944 Agreements Still in Force?

The argument that the Republican Agreements were terminated was brought up by the Polish Government in certain court proceedings, including the ones before

[23] Two judgments of 12 December 2003 (files Nos. II SAB 219/03 and II SAB 221/03).
[24] Judgment of 21 September 2003 (file No I CK 323/02).
[25] Judgment of 12 December 2003 (file No II SAB 219/03).
[26] Decision of 16 September 2004 (file No OSK 247/04).

the European Court of Human Rights. It relied on the 1952 Agreement concluded between Poland and the Soviet Union and the three Soviet Republics that were parties to 1944 Agreements.[27] The 1952 Agreement stipulated that all claims, i.a. related to repatriation, are definitively settled.[28] Hence, the government drew a conclusion that Republican Agreements were fully implemented and due to their full implementation they should be terminated. It is true that according to international law, an international agreement once fully implemented may be considered terminated as its object is satisfied and purpose accomplished. There are, however, two comments that should be made. Firstly, the position presented by the Government assumes unjustifiably too extensive consequences of the 1952 Agreement. Even if an agreement was considered terminated following its implementation, it still continues to provide a legal basis for the legal situation it created. Thus, the termination of the Agreements shall not quash the principle of compensation itself. What is of importance here is that the 1944 Agreements created an obligation to compensate. Unless the compensation process is completed, the Agreements cannot be terminated in this respect. It follows that the 1952 Agreement did not resulted in termination of the previous agreements. It merely stated that mutual claims are settled while it did not touch upon the rest of the normative content of the 1944 Agreements. Secondly, the 1952 Agreement settles the issues on the international level only, in other words, it has impact solely on mutual relations between its state-parties. This differentiates the nature and the content of the 1952 Agreement in comparison to the 1944 Republican Agreements. The 1944 ones, while establishing the principle of compensation for the property abandoned in Borderlands, do not only have importance for individual persons but also are of legal relevance to them, even if they cannot serve as direct and adequate legal basis for individual claims. In consequence, we come to the conclusion that the 1944 Agreement have not been terminated yet and they cannot terminate until compensation is completed.

9. Implementation by Polish Domestic Law of the Right to Be Compensated

The Republican Agreements entered into force immediately after their signature in 1944, which was followed by massive exodus of Polish citizens living so far in

[27] Full title reads as follows: The Agreement between the Government of the Republic of Poland, on the one hand, and the Government of the Union of Soviet Socialist Republics, the Government of the Ukrainian Soviet Socialist Republic, the Government of the Belarusian Soviet Socialist Republic and the Government of the Lithuanian Soviet Socialist Republic, on the other hand, on mutual settlement of accounts resulting from the evacuation of population and the delimitation of Polish-Soviet state border [*Umowa między Rządem Rzeczypospolitej Polskiej, z jednej strony i Rządem Związku Socjalistycznych Republik Radzieckich, Rządem Ukraińskiej Socjalistycznej Republiki Radzieckiej, Rządem Białoruskiej Socjalistycznej Republiki Radzieckiej i Rządem Litewskiej Socjalistycznej Republiki Radzieckiej, z drugiej strony, o wzajemnych rozliczeniach, wynikłych w związku z ewakuacją ludności i delimitacją polsko-radzieckiej granicy państwowej*]. The Agreement was signed on 21 July 1952 in Moscow and entered into force on the day of signature.

[28] Art. 4 and 5 of the 1952 Agreement.

the Polish eastern provinces. Therefore, the compensation that was envisaged by the Agreements had to be put into operation as soon as possible. From the very beginning, it became evident that the compensation would take the form of compensation in kind and not in cash. Obviously, this was justified as Poland was facing the enormous war damage and was not at all able to finance the pecuniary compensations.

(a) compensation in kind and its gradual illusiveness

In fact, as early as in 1946 the Polish domestic legislation provided the evacuated people with specific compensation mechanism. They were entitled to take part in competitive bids (auctions), buy land from the state or obtain a right for perpetual usufruct of the land (*prawo użytkowania wieczystego*) and deduct the value of the property they left on evacuation from the price of the land they bought or from the fee for perpetual usufruct they obtained. It needs to be recognised that most of the entitled repatriates used these opportunities in 40-ies and 50-ies, and thus most of the entitlements were enforced. Nonetheless, not all of them and in the course of time, it was more and more difficult to obtain compensation. This situation was caused by the following factors. Firstly, the area of land that could be assigned for compensatory purposes was gradually decreasing. Secondly, the national legislation, step by step, introduced restrictions on the categories of land that could be obtained by those entitled to compensation. After the political transformation of 1989–1990, a significant portion of state-owned land was communalised. Although the self-government that overtook the land was still obliged to respect the entitlements but, in reality, self-governmental bodies were not very eager to dispose of land in favour of the repatriates (or their heirs). The auctions were less and less frequently organised and the chances to enforce the entitlements were lower and lower. In addition, subsequent legislation excluded from the entitlements the land administered by the Agency of Agricultural Property (*Agencja Własności Rolnej Skarbu Państwa*), as well as the estate administered by the Agency of Military Property (*Agencja Mienia Wojskowego*). At the end of 1990s it was estimated that still around 80,000 to 90,000 people have not yet received their compensation.

(b) full or partial compensation?

The 1944 Agreements did not limit the compensation either with respect to any threshold amount or to any percentage of the original value. They simply stipulated: "the value [...] shall be returned to the evacuated on the basis of insurance valuations" and "in accordance with the law binding in the Polish State [...]."[29] The limitations were, however, introduced by domestic legislation. During the war, the whole population of Poland suffered from war atrocities and damage. It was widely accepted that the principle of solidarity should be employed, otherwise, a full compensation for the repatriates *vis à vis* no or less significant compensation for the rest of population,

[29] Art. 3.6, 1944 Agreements.

would be unjust and in fact might lead to unjustified difference in treatment. This position was adopted i.a. by the Polish Constitutional Court in its judgment issued in December 2002. It held that partial compensation, limited in time or of special nature would not be contrary to the principle of justice (fairness).[30]

(c) recent developments

Until late 2003, the compensation for the property left in the Borderlands was regulated in a number of statutes by the "*a propos*" method. The legislation was not focused on the enforcement of entitlements to compensation but dealt with some other subject-matters (e.g. agricultural reform, non-agricultural property, land administration and expropriation, privatisation of state-owned enterprises, etc.) and the compensation appeared only as a side issue. In fact, the first attempt to enact a complete piece of legislation dealing with the compensation in question was the 2003 Act on offsetting the value of the property.[31] The 2003 Act was heavily criticised for introducing harsh and non-proportional limitations on compensation. They included a fixed ceiling of 15 percent of the original value of the abandoned property and in any case the compensation could not be higher that PLN 50 000 (some EUR 12 500). It is easy to notice that in cases of many repatriates (or their heirs) this could lead to recognise only a very small fraction of their claims. In addition, the 2003 Act introduced further limitations: a requirement of permanent residence in Poland on the day of entry into force of the Act, or exclusion of those, who previously received partial compensation (again, regardless of how much they had received). All these restrictions were held by the Constitutional Court to be in breach of the Constitution after a group of parliamentarians challenged the 2003 Act.[32]

Following the Constitutional Court's judgment, a new Act on the implementation of the rights to compensation was passed in July 2005.[33] The 2005 Act sets the compensation ceiling at 20 percent but does not fix the maximum amount nor does it contain other restrictions held to be unconstitutional. The Act introduces a deadline of 31 December 2008 for lodging requests for confirmation of the right to compensation.[34] The right cannot be sold[35] but can be inherited. Furthermore, the Act

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[30] Judgment of 19 December 2002 (file No K 33/02).

[31] Act of 12 December 2003 on offsetting the value of the property left beyond the current borders of Polish State against the price of State property or against the fee for the right of perpetual use [*Ustawa z dnia 12 grudnia 2003 r. o zaliczaniu na poczet ceny sprzedaży albo opłat z tytułu użytkowania wieczystego nieruchomości Skarbu Państwa wartości nieruchomości pozostawionych poza obecnymi granicami państwa polskiego*], Dz.U. 2004, No 6, item 39. The Act entered into force on 30 January 2004.

[32] Judgment of 15 December 2004 (file No K 2/04).

[33] Act of 8 July 2005 on the implementation of the right to compensation for property left beyond the current borders of the Republic of Poland [*Ustawa z dnia 8 lipca 2005 r. o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej*], Dz.U. 2005, No 169, item 1418. The Act entered into force on 7 October 2005.

[34] Art. 5.1, 2005 Act.

[35] Art. 4, 2005 Act.

introduces compensation in cash (pecuniary benefits) to be realised by a newly created "Compensation Fund".[36]

10. Proceedings Before the ECHR

There is a number of individual complaints lodged with the European Court (and earlier with the European Commission) of Human Rights which are related to the "property beyond the Bug River" and the lack of compensation for its value. They all were brought as "last resort" after Poland failed to enforce the entitlements to compensation. The complaints are based on Art. 1 Protocol No. 1 to the ECHR (protection of property). Some of them additionally allege the violation of Art. 13 ECHR (right to an effective remedy). The pilot case that was first decided by the Court is the case of *Broniowski versus Poland*.[37] It took the Strasbourg system altogether 9 years to bring the case to a final resolution.

The case was brought before the European Commission on Human Rights in 1996. After Protocol No. 11 to European Convention had entered into force (1 November 1998), the case was transferred to the (new) European Court of Human Rights and assigned to a 7-judges chamber. In March 2002, the chamber relinquished the jurisdiction over the case in favour of the Court's Grand Chamber composed of 17 judges.[38] The Grand Chamber declared the application admissible in December 2002 and followed 18 months later with a judgment on the merits in which it found Poland to be in violation of Art. 1 Protocol No. 1. It did not immediately awarded just satisfaction to the complainant, since it wished to give last chance to the state to try to settle the issues on its own. In the end, the government reached a friendly settlement with the applicant who was satisfied with PLN 237,000.[39]

11. Conclusion

It took more than 60 years to come to a resolution of the problem of compensation for the property that was due to repatriated Polish citizens. Hopefully, this resolution will soon be final and definitive. With all likelihood, it could have been resolved a couple of decades ago, sparing much frustration to a number of people, if only it received appropriate attention of decision-makers who should not pretend that the problem did not exist. We can speculate that it could still take more time if the Strasbourg control machinery did not intervene and did not convey a direct and clear message that this situation will no longer be tolerated.

There may be another conclusion, a bitter one, to be made. It is awkward that Poland, during the Second World War, probably the most experienced and most devastated population and state, had to bear alone the very high costs of the situation

[36] Art. 13.1 point 2 and Art. 16, 2005 Act.

[37] Application No 31443/96.

[38] A Court's chamber may do so on the basis of Art. 30 ECHR.

[39] Originally, Mr Broniowski valuated his compensation for more than PLN 2.5 million.

to which it was brought without its will and had to pay for the decisions that were taken beyond it. Not only it has rested with Poland to provide compensation to own population repatriated "voluntarily" from Polish pre-war territories that were taken by another state. Poland had to pay to the Soviet Union 76,000,000 roubles as a result of "settlement of mutual accounts" in relation to repatriation and delimitation of their border.[40] It lost a large area of its territory, its citizens were "evacuated" and upon this they lost most of their property, and Poland have had to pay the bill.

[40] Art. 2, 1952 Agreement on mutual settlement of accounts, see: *supra*, n. 27.

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Theoretical Assumptions Concerning the Protection of Foreign Investments in the Light of Bilateral International Agreements

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I. Preliminary Remarks

The purpose of this paper is to outline the issues related to the protection of investment activity under bilateral international contracts on supporting and mutual protection of investments, and as the source of protection – a factor stimulating trade exchange development.

In connection with the dynamic growth of international trade exchange,[1] there arises the necessity of working out proper regulations concerning these issues. Conducting investments by an economic entity outside its country of origin – irrespective of whether we are dealing with the place of residence or registered office – requires appropriate mutual agreements.

At present, bilateral contracts concluded between capital exporters and importers are the main instrument ensuring the protection of foreign investments under international law.[2] The parties enter into those treaties with the view of creating favourable conditions for mutual investments.[3] This arises from the fact that an attempt to regulate these issues based on traditional diplomatic protection or on acquired rights has brought other than expected results.[4] Conflicting interests of capital exporters and importers cast a particular shadow on this issue. The conflict became even more

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[1] This phenomenon can be observed in particular through sudden growth of indirect investments or private sector investments, also in developing countries (despite earlier protectionist development strategy of Third World countries), although it was relatively higher in richer countries; compare: UNCTAD 2001, *World Investment Report*, United Nations Conference on Trade and Development, New York.

[2] P. K r y c z k o: "Instrumenty zapewniające ochronę interesów inwestorów zagranicznych w Polsce" [Instruments Ensuring the Protection of Foreign Investors' Interests in Poland], *Państwo i Prawo* (1994), No 5, p. 36.

[3] Compare: Cz. P i l a r s k a: "Uregulowania prawne dotyczące działalności bezpośrednich inwestorów zagranicznych w Polsce" [Legal Regulations Concerning the Activities of Direct Foreign Investors in Poland], *Zeszyty Naukowe Akademii Ekonomicznej w Krakowie* (2003), No 594, pp. 21–30.

[4] Contracts concerning the protection of foreign investments and their functions in contemporary international relations have little to do with diplomatic protection based on the common law exercised over own nationals and their property. This was emphasised by the International Court of Justice in Barcelona Traction Case stating that this kind of activity is completely different from diplomatic protection; compare: *ICJ Rep.* 1970, p. 47.

prominent as attempts were made to elaborate multilateral contracts in this scope, the two opposed sides being separated by the border line between the rich North and the poor South. It is enough to say that gaining foreign investments, in particular related to modern technologies, is a must for developing countries. Nevertheless, they bear the risk of becoming victims of pillage economy run by foreign investors, in particular trans-national corporations, which can even lead to own market destruction.[5] From the point of view of highly industrialised states, the opportunity to invest abroad results in improvement of their economic standing. However, these states in turn risk nationalisation of their investments. That is why a bilateral contract gives better chances of working out a compromise between the interests of capital exporters and importers. Flexibility of the contracting parties based on own capacities makes the execution of provisions of such contracts feasible.[6]

In order to analyse the abovementioned relationship between states, one should discuss firstly the manner of treating foreigners, and secondly the manner of treating foreign investments within territorial jurisdiction of a given state. Therefore, initially the concept of a "foreigner" and then the concept of a "foreign person" should be defined, taking into account also international trade exchange.

The legislator adopted quite an extensive definition of a foreigner, stating that this term includes every person other than of Polish citizenship.[7] Among the few exceptions, the nationals of European Union Member States together with their families have been excluded from the act regime.[8] Also nationals of the states belonging to the European Economic Area but non-Member States of the European Union enjoying the freedom of movement are subject to the exclusion.[9]

The concept of a "foreigner" *ex definitione* assumes a physical person and is convergent, to a certain extent, with a "foreign person". The latter term, if used with reference to a physical person, assumes that such person is not a Polish national, and that he resides abroad.[10] Apart from physical persons, foreign persons mean also col-

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[5] Also developing countries themselves are to be blamed, as owing to unsatisfactory efficiency of the relevant institutions, they are still among the most corrupt countries in the world. What is comforting is the fact that foreign investors, taking into account the higher costs of operation, connected with the necessity of "sponsoring" local notables, avoid countries with a high level of corruption; compare: A.Z. K a m i ń s k i, B. K a m i ń s k i: *Korupcja rządów. Państwa postkomunistyczne wobec globalizacji* [Corruption of Governments. Post-Communist States Towards Globalisation], Warszawa 2004, p. 189 ff.

[6] Compare: R. B i e r z a n e k: "Prawnomiędzynarodowa ochrona inwestycji zagranicznych" [Protection of Foreign Investments under International Law], *Sprawy Międzynarodowe* 43 (1990), No. 9, p. 68.

[7] Dz.U. [Polish Journal of Laws] of 2003, No 128, item 1175, as amended.

[8] *Ibid.*, Article 3(2).

[9] These nationals take advantage of the free movement of persons and their families based on contracts concluded with the European Union. The matter in question is governed by the Act on the rules and conditions of the entry and stay of nationals of the European Union Member States and members of their families within the territory of the Republic of Poland (Dz.U. of 2002, No 141, item 1180, and Dz.U. of 2003, No 128, item 1175). Generally speaking, a state establishing rules and conditions for admitting aliens to its territory takes into account also international obligations incurred referred to as aliens regime (Compare: J. J a c y s z y n, S. K r z e ś, E. M a r s z a ł k o w s k a - K r z e ś: *Działalność gospodarcza osoby zagranicznej w Polsce* [Economic Activity of a Foreign Person in Poland], Warsaw 2002, p. 20).

[10] Dz.U. of 2004, No 173, item 1807, as amended, Article 5(2)(a).

lective entities having their registered office abroad. Both legal entities[11] and organisational units other than having legal personality are included in this group.[12]

The possible forms of conducting economic activity by a given entity are in each case determined depending on the exact meaning of the term "foreign investor" which comprises two standards. The first one makes it possible for foreign investors to undertake and perform economic activity within the territory of the Republic of Poland according to the same rules as apply to Polish nationals.[13] The second one, save as provided otherwise in the concluded international agreements,[14] restricts the forms of conducting economic activity by foreign persons to limited partnerships, limited joint-stock partnerships, limited liability companies, and joint stock companies.[15]

II. The Concepts of Treating Foreigners

The manner of treating foreigners, in particular with reference to the protection of foreign investments, is envisaged by bilateral contracts, the provisions whereof are reflected in acts of the law. With reference to the above, J. Menkes indicates certain regularities allowing to develop the following *quasi* models:[16]

– French treaties,[17] whereby the parties agree to admit and encourage investors of the other party to undertake investments, based on own legislation and provisions of the agreement;

– American treaties,[18] whereby the parties oblige themselves to admit the establishment and acquisition of investment projects on favourable conditions, allowing at the same time for the introduction of additional formalities connected with the investment process, provided that such formalities are not contradictory to the provisions of the contract.

In the conclusions, the author points out that despite different departure points we deal with likewise practices.[19] These practices should consist in protecting a foreigner's rights after he is admitted to the territory. A host nation, pursuant to the territorial sovereignty principle, is entitled to make decisions within the scope of all

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[11] *Ibid.*, (b).

[12] *Ibid.*, (c).

[13] Pursuant to Article 13(1) it is limited to foreign persons from Member States of the European Union and Member States of the European Free Trade Association (EFTA), and foreigners specified in Article 13(2).

[14] Taking into consideration provisions arising from adopted international contracts can be perceived as *lex specialis*.

[15] This norm includes not only the right to undertake and conduct economic activity, but also to join the aforementioned partnerships and companies and to take up or acquire their shares or stock by remaining foreign persons, other than mentioned in the quoted Article 13(1) and (2).

[16] See: J. M e n k e s : "Prawnomiędzynarodowa ochrona własności inwestycji zagranicznych" [Protection of Foreign Investment Property under International Law], *Sprawy Międzynarodowe* 53 (2000), No 4, p. 71.

[17] *Ibid.*, As an example the author indicates agreements concluded by France with China, Israel and Pakistan.

[18] *Ibid.*, As an example the author mentions the agreements concluded between the United States and Egypt.

[19] J. M e n k e s , *op. cit.*, p. 71.

actions connected with investing or transferring foreign resources to its own area. Furthermore, the state can amend its legislation, changing the scope of rights and duties of a foreign investor, which could impair the latter's position. Certain norms of common law and diplomatic protection are usually recalled in this context, in accordance with which the admitting state should not entrap a foreigner whom it undertook to protect upon his admittance.[20] However, for the time being it is emphasised that diplomatic protection of nationals and their property significantly differs from the protection of foreign investments.[21]

While writing about rules for treating foreign investments within a state's territorial jurisdiction, one cannot but refer to the dispute in the field of public international law between the supporters of the so-called national treatment standard and the supporters of the so-called minimum national standard.

Foreigners treated according to the national treatment standard cannot demand to be treated in a more favourable manner than nationals of the state where they invest. Thus, their investments cannot be privileged in relation to domestic investors, even with reference to expropriation or other similar measures. In this case, awarding indemnity to foreigners requires that such indemnity be awarded also to own nationals. Nationalisation carried out in the Soviet Union and its satellite countries is a good example of failing to apply this rule. In these countries, foreigners' claims arising from nationalisation were, to a bigger or smaller extent, taken into account, but claims of own nationals were ignored.

Supporters of treating foreigners according to the minimum international standard invoke this standard or even the moral standards of civilised states. According to this concept, the treatment of own nationals is not taken into consideration when establishing the manners of treating nationals of other states. The point of reference is constituted by the minimum international standards which are slowly becoming synonymous with human rights.[22]

As regards the protection of foreign investments, it is difficult to unambiguously decide which of the abovementioned concepts should be applied in its "pure" form. Each of them has some favourable aspects, but they also involve elements which would be detrimental to entities dealing in international trade. Without entering into too much detail, we can distinguish three standards of treating foreign investments: the standard of the highest privilege, national treatment, and *fair and equitable* standard.[23] J. Menkes brings down the difference between these concepts to competences of the admitting state related to authorisations.[24] While adopting the standards of the highest privilege or national treatment, the foreign investor's authorisations are

[20] E. Vattel: *Le droit des gens ou les principes de la loi naturelle*, Neufchâtel 1773, vol. I, Chap. VIII, § 104.

[21] Compare: R. Bierzanek, *ibid.*, p. 60.

[22] Compare: T. Gadkowski, J. Tyranowski: *Ochrona inwestycji zagranicznych w Polsce. Zbiór umów międzynarodowych* [Protection of Foreign Investments in Poland. Collection of International Treaties], Warszawa-Poznań 1993, p. 6.

[23] Compare: J. Menkes, *ibid.*, p. 72.

[24] *Ibid.*

specified; this in turn influences his position towards other entities of the admitting state. Therefore, the state, by means of a contract, imposes on itself an obligation that it shall e.g. treat investments of investors of the other party, conducted within its territory in compliance with the binding legislation applicable to investment project development and usage, in a manner not less favourable than investments of its own investors. The publication of these provisions in the official journal is followed by their enforcement within the state's jurisdiction. If the national clause is applied, a foreign investor has the right to be treated by state authorities in a manner excluding discrimination. As a consequence, the position of domestic entities is not privileged towards the foreign investor. As regards the *fair and equitable* standard, it is disputable whether it is based on the minimum international standard, or whether its substance is assessed on a case by case basis. Consequently, with the view of ensuring legal certainty, reference to the highest privilege or national treatment is applied in investment treaties much more often.

III. Rules for the Treatment of Foreign Investments in Bilateral Contracts

Passing to bilateral agreements, despite their multiplicity and diversity certain common features can be identified, such as investment protection only in capital importing countries, or applying the reciprocity rule. In the latter case, one cannot but think that in a bilateral contract – where a highly developed country is one party to the contract and a developing country is the other one – such principle remains a strictly theoretical assumption. Apart from the fact that usually only poor countries need capital, the possibility that they will invest in highly industrialised countries seems to be only hypothetical. Without entering into details, some similarities are visible also in contracts on the protection of foreign investments, to which Poland is a party.[25] The following groups of provisions can be distinguished:

a) general provisions,
b) principles of treatment of foreign investments,
c) expropriation, nationalisation and indemnity,
d) transfer of investments and revenues,
e) settlement of disputes.

General provisions. Basically, all contracts start with a concise preamble indicating as the purpose of concluding the contract the development of economic cooperation and the creation of favourable conditions for investments conducted by investors of the other party. The treaty concluded with the United States on 21 March 1990 is an exception [the name itself is different in comparison to agreements with other states as the term "agreement" is normally used]. It says about fair and equitable

[25] Taking into account the legal status as of December 2003, Poland is a party to 59 bilateral contracts on supporting and protecting foreign investments. This figure covers member states published in the Polish Official Journal.

investment treatment, which is characteristic of all bilateral agreements in this scope concluded by the United States. The purpose of the agreement is to ensure stability of investment conditions and maximum effectiveness of using economic resources. This purpose is accomplished by applying two principles: of sovereign equality and mutual benefit. Furthermore, the treaty includes the supposition that the development of commercial and economic ties can result in amelioration of employees' situation and increase respect for their fundamental rights. This particular preamble ends with the statement that having a free and open market with operating private businesses is the best way to improve the living standards of both countries' inhabitants. This opinion is supported by recognising Poland's pursuit towards reducing the role of state-owned enterprises and privatising the economy.

As it is difficult to find a commonly accepted definition of investment, the majority of contracts define the investments to which protection applies. In the contract concluded on 19 May 1987 with Belgium and Luxembourg, the concept of investment is defined in Article 1 Paragraph 1. ***Investment*** means all assets as well as all direct and indirect contributions to all companies or mixed enterprises operating in any sector of the economy. In particular, the definition includes the following: movables and immovables as well as all rights in property;[26] stock and other kinds of shares in enterprises;[27] receivables and rights to benefits of economic value;[28] copyrights, trademarks, patents, technical processes, trade names and all other industrial property rights and goodwill.[29] Furthermore, the parties acknowledge that a change in the legal form in which property and capital have been invested does not change its character in the quality of an investment. Definitions of investment are significantly different from one another. They often contain a clause according to which a change in the form of investing assets does not deprive them of the investment character.

The second concept, defined as frequently as the *investment* concept, is that of an investor. Referring to the abovementioned contract, pursuant to Article 1 Paragraph 2, in order to become an ***investor*** in the meaning of the contract it is necessary to fulfil one of two prerequisites. Namely, every physical person being a national of Poland, Belgium, or Luxembourg,[30] or every legal person established in accordance with the law of any contracting party and having its head office [registered office] within its territory is an investor.[31]

What is more, other contracts define concepts such as e.g.: *revenues, expropriation, territory, non-discrimination, national treatment, treatment based on the principle of the highest privilege, commercial activity, control, national of a party* or even *marine zones*.

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[26] Dz.U. of 2001, No 15, item 153, Article 1(1)(a).
[27] *Ibid.*, Article (1)(b).
[28] *Ibid.*, Article (1)(c).
[29] *Ibid.*, Article (1)(d).
[30] *Ibid.*, Article 1(2)(a).
[31] *Ibid.*, Article 1(2)(b).

General provisions can also include regulations connected with supporting and admitting investments. Referring, for example, to the abovementioned convention with Belgium and Luxembourg, pursuant to Article 2 Paragraph 1 thereof, the requirement to support an investment and admit it to a state's territory, in accordance with the law of such state, burdens the admitting state. However, this requirement is not unrestricted. Firstly, in compliance with the time clause used, the contract applies to investments conducted starting from 1 July 1986.[32] Secondly, with regard to fiscal conventions, in particular on the prevention of double taxation, this treaty does not exclude privileges granted by the parties to third states.[33]

The aforementioned agreement, in the light of Article 10, is binding for the period of ten years. Despite some exceptions, this is basically a standard term for currently concluded contracts. An evolution in comparison to earlier agreements concluded even for the period of fifty years is clearly visible.

Principles of treatment of foreign investments. By analysing the contents of international contracts one may reconstruct the basic ideas, in other words: the principles of investment protection. In the first place, we can mention the principle of fair and equitable treatment of investment conducted by investors of the other party.[34] The application of this principle imposes the obligation to exclude all unjustified or discriminatory measures used towards the investor.

The second principle is the application of the highest privilege clause.[35] This means that the protection of investments of contracting parties cannot be in any way inferior to the protection enjoyed by the most privileged countries, save for measures necessary for public interest. Therefore, the national clause has not been included, either as an individual clause or a clause co-existing with the abovementioned one.

There is an exception to applying the abovementioned principles. They do not cover privileges that a party could have granted to investors from a third state, due to the party's participation in or being a member of an economic union, customs union, common market, free trade zone, regional economic organisation of international character or organisation of mutual economic assistance.[36] Furthermore, Article 7 contains the clause of more favourable treatment. It guarantees to investors of the other party the right to be treated in a more favourable way than envisaged by the contract. Pursuant to this clause, these investors can choose the manner in which they want to be treated at their discretion.

Expropriation, nationalisation and indemnity. Provisions included in this group are of accessory and supporting character in relation to investment treaties. As a matter of fact, they are the main reason for which a state exporting capital, providing its nationals investing abroad with guarantees protecting them from strictly defined non-commercial risks, binds itself with an international legal instrument.

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[32] *Ibid.*, Article 2(2).
[33] *Ibid.*, Article 2(3).
[34] *Ibid.*, Article 3(1).
[35] *Ibid.*, Article 3(2).
[36] *Ibid.*, Article 3(3).

Overrunning the scope of internal protection is deemed more favourable for foreign investors owing to the stability of provisions concerning the matter; in particular as it aims at making actions deteriorating the investor's position more difficult.[37]

The possibility of taking advantage of expropriation or other similar measures is envisaged by Article 4 Paragraph 1 of the abovementioned contract. In order to be conform to the agreement, these actions must fulfil certain prerequisites. Expropriation and nationalisation may therefore be applied only due to public interest and in compliance with legal regulations. A negative prerequisite is that the abovementioned measures cannot be applied should they be of discriminatory character. In order for such actions to be legal, it is also indispensable that appropriate compensation be paid to the investor. In the latter case, it should be paid in convertible currencies and easily transferred out. Indemnity is also due to an investor incurring losses in special situations such as war or other armed conflicts, martial law, disturbances or riots taking place within the territory of the other party.[38] In this case, the indemnity is based on the most favored nation clause.

Transfer of investments and revenues. Difficulties in balances of payments of many capital importers and attempts to cure this state of things by means of limiting the transfer of receivables connected with foreign investments enforced the elaboration of certain regulations in this scope. Namely, the principle of free transfer of receivables has been introduced.[39] It should be pointed out that many contracts contain detailed definitions of the components of the investor's capital and revenues covered by the right to transfer. The principle mentioned above evolves towards free and complete transfer of gains and capitals, which means the possibility for a foreign entity to transfer out receivables in an unlimited amount, without a separate foreign exchange authorisation.[40]

Article 5 of the contract in question, concluded with Belgium and Luxembourg, contains provisions concerning the transfer of investments and revenues. In particular, the contract guarantees the free transfer of: capital or supplementary amounts necessary to maintain or increase investments;[41] amounts necessary to repay loans;[42] licence charges or other fees;[43] profits, dividends, interest or other current income;[44] amounts received, including possible profit on account of total or partial investment liquidation;[45] indemnity due for expropriation or other similar measure as well as

[37] Compare: R. B i e r z a n e k, *op. cit.*, pp. 68–69.

[38] Dz.U. of 2001, No 15, item 153, Article 4(2).

[39] Compare: B. P o p o w s k a: "Instrumenty ochrony prawnej inwestycji zagranicznych na przykładzie stosunków RFN-Polska" [Instruments of Legal Protection of Foreign Investments based on the Example of the Relationship between the Federal Republic of Germany and Poland], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* (1991), vol. 4, p. 51.

[40] Compare: B. P o p o w s k a: *Podmioty zagraniczne w polskim prawie gospodarczym* [Foreign Entities in the Polish Business Law], Poznań 1999, pp. 218–221.

[41] *Supra*, n. 38, Article 5(1)(a).

[42] *Ibid.*, Article 5(1)(b).

[43] *Ibid.*, Article 5(1)(c).

[44] *Ibid.*, Article 5(1)(d).

[45] *Ibid.*, Article 5(1)(e).

particular situations[46]. The terms for transfers, such as currency[47] and rate, have been set out further in the aforementioned Article[48].

Settlement of disputes. In general, there are two procedures for the settlement of disputes arising from the application of inter-state contracts on the protection of investments.

The first procedure consists in direct negotiations. Such a provision is contained in the abovementioned contract. Article 9 Paragraph 1 states that each dispute between a party to the contract and a foreign investor with reference to expropriation, nationalisation or any other measure of similar nature related to an investment project, will be a subject of a written notification attached to a detailed *aide-memoire* and addressed to the host nation.[49] The parties determined the time limit for this procedure as six months starting from the written notification.

The second procedure applied while settling disputes arising from the application of inter-state contracts on the protection of investments, in particular if the procedure described above has failed to bring expected results, is arbitration.[50] In the contract in question, in accordance with the investor's choice, the following bodies are proper for recognising the matter: Arbitration Institute of the Stockholm Chamber of Commerce; International Centre for Settlement of Investment Disputes (ICSID);[51] *ad hoc* Arbitration Tribunal.[52]

Without entering into details, it should be said that disputes between an investor and the host nation are more and more frequently settled with the use of procedures included in the International Centre for Settlement of Investment Disputes Washington Convention. Naturally, the condition *sine qua non* is the inclusion, in a bilateral agreement, of the clause referring to provisions of the convention. Furthermore, while using this instrument, an individual or a company has the capacity to act directly at the international forum.

IV. Conclusions

International bilateral contracts on supporting and mutual protection of investments are the main instrument strengthening the position of both foreign investors and host nations while enforcing claims. Although it cannot be concluded that obli-

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[46] *Ibid.*, Article 5(1)(f).

[47] *Ibid.*, Article 5(2).

[48] *Ibid.*, Article 5(3).

[49] *Ibid.*, Article 9(1).

[50] *Ibid.*, Article 9(2).

[51] *Ibid.*, Article 9(2)(b); ICSID has been established within the framework of the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States", submitted for signature in Washington on 18 March 1965. This instrument is available if a state-party to an international contract on the protection of investments is at the same time a party to the abovementioned convention.

[52] *Ibid.*, Article 9(2)(c); Such Tribunal is to be established in accordance with the principles of the United Nations Conference on International Trade Law or United Nations European Economic Commission, whose competent person to appoint an arbitrator or arbitrators shall be, at the investor's choice, UN Secretary General or President of the International Court of Justice.

gations provided for in investment contracts are being transformed into obligations under international law, they can still constitute a title for exercising diplomatic protection over an injured investor. The latter principle together with the principle of acquired rights stems from the reciprocity principle and general custom. It is worth mentioning that capital export and import exceed the scope of diplomatic protection. Thus, using international agreements as instruments increasing the trade security seems well-founded.

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Author's Rights to Scientific Publications in International Agreements

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I. Introduction

In recent years, more and more authors of scientific works have decided to publish the results of their research in international periodicals. The period of almost a year elapsing between the termination of work on a scientific study and the moment of its publication causes that many researchers decide to make their results available in electronic networks (most of all on the Internet). Works published in this way are accessible to millions of recipients at once. The simplicity of reproduction of digitally recorded works causes that authors to a larger extent than ever before are exposed to violations of their rights by unauthorised entities, both in their country where the publication was made available and abroad.

Treaty regulations and appropriate resolutions of international organisations provide protection of scientific works in relations between states. The most significant norms of this kind with reference to particular form of scientific work, i.e. as scientific publication, are discussed in the present article. The discussion of these regulations is preceded by a synthetic presentation of the most important knowledge and notions necessary for fixing proper range of legal protection of authors provided by international law. We also attempt to define and classify scientific publications.

II. General Information

A. Notion of Copyright

Copyrights or, as they are called in countries of the civil law tradition, **author's rights** (*droit d'auteur*) are a component of a group of norms that protect non-material interests. These norms build up the system of intellectual property law and are of autonomous character comparing to rights referring to material objects, which are results of human creativity.[1] It is assumed objectively that copyright is a group of norms regulating social relations connected with creating, using and protecting

[1] Apart from copyright and related rights, there are also industrial property rights included in the group of intellectual property rights, i.e. trademarks, patents, industrial designs, geographical indications and topographies of semiconductor products. In some countries, norms protecting secret information (so-called know-how), and even norms of competition law are also included here.

works. Subjectively, copyright can be defined as all the rights destined to protect authors' personal and financial interests, resulting from the fact of having created a given work.

Furthermore, according to the legal writing there are rights relating to copyright, called **neighbouring rights** (*droit voisins*, *verwandte Schutzrechte*).[2] In civil law countries neighbouring rights function in a strict relation with copyright, but they constitute a separate group of powers. However, there is usually no such difference in the countries of common law, where neighbouring rights are treated as rights included in economic right.[3] Consequently, the notion of neighbouring rights is not identical in particular legislations and it is impossible to define it on a universal plane.[4]

In spite of the abovementioned differences referring to the scope of definition of copyright and neighbouring rights, they are included in the category of absolute rights which are protected against any infringements by unauthorised subjects. Moreover, economic rights included in these rights can be object of legal relations (also inheritance).

B. Notion of a Scientific Publication

In order to define essential features of a scientific publication, we have to precise what can be classified as such a product, and what conditions must be met to include a particular study into the said category.

Although the majority of international regulations use the term of scientific work, none of them directly defines the notion of a scientific work and the specific form of making the results of research process accessible.

According to the definition proposed by R. Markiewicz, scientific works are non-material products of intellectual work which are directed to reproduce or to project aspects of the real world. Within the framework of such a wide definition he distinguishes: a) works as defined by copyright, b) objects of exclusive rights, such as inventions and practical models, c) research results.[5] Works as defined by the copyright are works which are the result of a scientific cognitive process oriented at presenting the objectively existing reality.[6] As it is widely emphasised, these works can be recorded by words but also by other means such as: photography, artistic project, sound recording or even a film of scientific character.[7]

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[2] For the first time the concept appeared in the Austrian Act of 1936 dealing with the right of authors to literary and artistic works, and protection of related rights.

[3] J.A.L. Sterling: *World Copyright Law*, London 2003, p. 4.

[4] M. Czajkowska-Dąbrowska, in: J. Barta (ed.): *System prawa prywatnego, Prawo autorskie*, Warszawa 2003, p. 294.

[5] R. Markiewicz: "Ochrona prac naukowych," *ZNUJ PWiOWI* (1990), No 55, p. 166.

[6] J. Barta, M. Czajkowska-Dąbrowska, Z. Ćwiąkalski, R. Markiewicz, E. Traple: *Komentarz do ustawy o prawie autorskim i prawach pokrewnych,* Warszawa 1995, p. 129.

[7] J. Barta, R. Markiewicz: "Utwory naukowe. Komentarz do prawa autorskiego," *Rzeczpospolita*, 18 October 1994; A. Szewc: "Dzieła naukowe i ich status w prawie autorskim," *Państwo i Prawo* (1997), No 10, p. 27.

But can any such work be regarded as "scientific publication"? The guidelines elaborated by the American *Council of Biology Editors* can be assumed as the point of reference for defining the features which scientific publication should have. According to the contents of these assumptions, **a primary scientific publication** is understood as the first presentation of an original research process which allows the recipients to learn of the details of research methodology, research results and evaluation conclusions carried out by the author (verification whether conclusions resulting from the work find support in the results of research).[8] Moreover, without regard to the form of publication, it is assumed that it must be available without limitations for the whole scientific community on a permanent carrier regularly indexed by any of the commonly known secondary sources of scientific information (such as, for example, *Index Medicus, Science Citation Index*, etc.). It is also assumed that only such a presentation of research process that was subjected to earlier evaluation by other scientists, can be regarded as a scientific publication.[9] It means that reviewed papers only can have the status of a scientific publication.

On the basis of the criteria mentioned above it can be easily noticed that only a part of the wide scope of scientific works can be considered scientific publications. According to accepted assumptions, this notion will not include scientific films but also survey articles, reviews, or publications in daily newspapers. Due to the lack of unlimited access and regular indexation of the carrier by secondary sources of scientific information, speeches presented at conferences and unpublished doctoral dissertations cannot be regarded as scientific publications. In the last case, a given dissertation has the status of a scientific publication at the moment it is published in its primary or modified version in the form of a monograph.

The exclusion of reports or abstracts from speeches presented at scientific conferences from the notion of scientific publications is disputable. It quite often happens that original conceptions and research results are presented at conferences in a concise way, and subsequently they are published in collected papers which include materials from a given seminar or conference. These elaborations are frequently made available to academic institutions, libraries and individuals on the same terms as other books and magazines. In this way, the condition of unlimited access is met. Furthermore, conference materials are frequently published in publication series indexed by secondary sources of scientific information (as scientific booklets of an academic institution which organises the conference). This point seems to fulfil the next requirement of regarding a given report or speech as a scientific publication.

In the case of conference materials, an objection can be raised that presentations are too superficial as far as a relation between the research results and the author's conclusions based on them is concerned. This argument can be justified in the case of analytic and experimental branches of science where it is crucial to present the whole information on which the conclusions are based. But in the case of the humanities such detailed

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[8] Council of Biology Editors: *Proposed definition of a primary publication*, Washington 1968.

[9] R.A. D a y: *How to Write and Publish a Scientific Paper*, Philadelphia 1983, p. 3.

presentation of research methodology and all aspects of researched phenomenon is not a necessary condition to classify a given work as a scientific publication.

C. Object of a Copyright

Non-material goods – works, which can be legally distinguished, are objects of copyright. Any expressed manifestation of human activity of creative and individual character is regarded as a work from the perspective of civil law. In common law, the dominant view is that the object of copyright does not have to be the author's individual work, it suffices if the work is original and unique. This opinion is justified by the fact that in many fields there are numerous experiments that include the element of coincidence in the creative process, which finally influences the final shape of the work.[10]

In both systems of law, intellectual contribution is the basic factor conditioning the creation of work as a result of man's creativity. So the scientific publication must include individualised results of creative work of the author (or co-authors). According to other opinions, this creative element does not have to be identical with the contents of scientific work, as due to the nature of research carried out, the researcher only describes, explains, organises and indicates the relations among objectively existing phenomena.[11] The subject of research, facts fixed in the course of research, and the scientific establishments are not covered by copyright due to lack of the feature of personal output.[12] But the individual character can be found in the contents of reasoning and scientific theories, the choice of facts or in the formal (textual) layer of work. It is enough that only one element of the work has creative character to regard it as object of copyright. Such distinctive elements include, for example, the choice of arguments in conclusions presented in a given publication or constructive plan of a given work.

Finding out if another person was able to get acquainted with the work or its part in the form of manuscript or word processor file is decisive for copyright. The fact that the work is published later (it is multiplied and made accessible to the public, also in the electronic form) does not have any importance for copyright. Such a publication accompanied often by charts, graphs or photographic documentation, can be regarded as a qualified form of a recording of activity results of the author's scientific work.

Copyright does not cover technical methods applied in creating a given work. Also ideas that can be granted an exlusive status only in connection and form of expression are not covered by the legal protection. Ideas can be protected on the basis of regulations referring to counteraction of unfair competition or protection of

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[10] A. Karpowicz: *Autor – Wydawca. Poradnik prawa autorskiego,* Warszawa 1999, p. 15; See: J. Błeszyński, M. Staszków: *Prawo autorskie i wynalazcze,* Warszawa 1983, p. 45; A. Latman: *Howell's Copyright Can,* Washington 1962, p. 1.

[11] M. Późniak-Niedzielska, in: J. Barta (ed.): *System prawa prywatnego...*, *op. cit.*, p. 11.

[12] J. Barta, R. Markiewicz, *ibid.*, p. 23; R. Markiewicz: *Ochrona...*, *op. cit.*, p. 21.

confidential information.[13] The scientific work can be regarded as immaterial legal good, as it exists independently from the material subject on which it was recorded (*corpus mechanicum*).

D. Copyright Subject

As a principle, the natural person – **author,** whose intellectual activity resulted in creation of a work, is the subject of copyright. It must be noted that in some countries the author is distinguished from the creator, also a legal person. This is the case of an American construction of a work made for hire. It is assumed that if it was stipulated in a written agreement, in the case of works created in the framework of a labour contract or specially commissioned, the primary subject to copyright is the employer or that one who commissioned a piece of work, and he/she is treated as author of a work.[14] In the system of *droit d'auteur* it is assumed that the right of authorship is vested in the natural person, as a work can be created only as a result of human intellectual activity.[15]

A group of people who can become subject of copyright in derivative way (for example on the grounds of contract or inheritance) must be distinguished from subjects primarily entitled to copyright, that is authors. This is the case of transferable proprietary rights that in civil and common law countries are *ab initio* vested in persons or institutions who employ the author. For example, in the case of a scientific publication, the publisher of the work or the scientific institution entitled to proprietary rights to publish the scientific work of the employee who created the work as a result of employment contract with the institution can become derivative subject of copyright.[16]

The result of intended common activity of a bigger number of authors where each of them has a separate contribution of creative work can also be a piece of work. The consequence of such creation is a **work of joint authorship**. In that situation all the authors are subjects of copyright. So co-authors are such persons who had creative contribution in the work. Persons who organised the author's work, financed the project or whose co-operation was of auxiliary character cannot be regarded as co-authors. But proprietary copyright can be transferred for the benefit of them (for example: the right to reproduce a work or put it into circulation).

Collective work is another distinguished example of work created by many people. Comments to a given legal act that consists of several parts, is an example of collective work. The right to the specific parts of the collective work, having a separate

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[13] P. Goldstein: *International Copyright: Principles, Law, and Practice*, Oxford University Press 2001, p. vii; E. Traple: *Dzieło zależne jako podmiot prawa autorskiego*, Warszawa 1979, pp. 41–42.

[14] See: K. Grzybczyk: "Work made for hire w porównaniu z konstrukcjami prawa polskiego," *Rejent* (1997), No 4, pp. 101–107.

[15] J. Sobczak: *Prawo autorskie i prawa pokrewne*, Poznań 2000, p. 81.

[16] For example, art. 14(1) of the Polish Act on Copyright Law and Neighbouring Rights.

significance, is vested in individual authors (most often final author's rights result from the agreement concluded with the publisher).

III. Copyright Protection in the Berne Convention

A. General Remarks

Granting the rights according to the principle of reciprocity was the earliest form of copyright protection. Numerous bilateral agreements were the next stage in the evolution of copyright protection on the international scale (the first of them were concluded by the member States of the German Confederation in 1827–1829). However, unified grounds of protection can only be achieved by elaboration of multilateral international convention. The first agreement of this kind was initiated by the International Literary and Artistic Association (*l'Association Littéraire et Artistique Internationale* – **ALAI**). This association was founded in 1879 and it was initiated by *Société des Gens de Lettres de France*, and its foundation was patronised by Victor Hugo. The proposal of ALAI to create an international organisation to protect copyright among its members was well received and led to the **Berne Convention for the Protection of Literary and Artistic Works** in 1886, called the Berne Convention.

In following years, it was amended many times. It led to creation of seven editions of Convention's text. Poland is bound by the most recent one, i.e. the Paris Act of 1971.[17] Parties of the Berne Convention set up the **International Union for the Protection of Literary and Artistic Works**. Although Swiss law granted it the status of a legal person on January 1, 1893, its nature causes controversies in literature.[18] But the dominant opinion is that the Berne Union as an association of 160 states, set up on the basis of multilateral agreement, is an independent entity of international law.[19] The autonomous character of the Union (its existence does not depend on the membership of a specific state), and its aim – the international protection of authors' rights to their literary and artistic works, makes such interpretation dominating.

B. Rules and Aims of the Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works is regarded as the most important international agreement regulating issues of copyright protection. Its basic aim is not the legal regulation of works' status in relations in a given state, but legal protection of foreign authors' works in a given country.

The agreement was based on three rules:

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[17] The document of Polish accession is published in the Polish Journal of Laws (Dziennik Ustaw) of 1994, No 104, items 506 and 507; the official translation of Paris Act into Polish was published in annex to the Journal of Laws of 1990, No 82, item 474.

[18] W. Nordemann, K. Vinck, P.W. Hertin: *International Copyright and Neighboring Rights Law. Commentary with Special Emphasis on the European Community*, Weinheim 1990, p. 37.

[19] S. Ricketson: *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, London 1987, pp. 145–146.

– rule of **national treatment**, according to which authors in countries different than the country of origin of a work (it is usually the state of work's publication or the state the national of which the author is) take advantage of the rights that are or will be granted to their nationals. This rule means that foreign works are given the same protection as domestic works.

– rule of **automatic protection**, as no formalities are required to protect the work according to the Convention.

– rule of **independence of protection**, as protection granted on the basis of the Berne Convention does not depend on the fact that a given work was granted protection in the state where it was published or the state the national of which the author is.

C. Scope of Protection

All scientific works, notwithstanding the way or form of expression, fall within the scope of the Berne Convention. This applies to:

1) works of authors who are nationals of the Berne Union, without regard to the place and the fact of the publication of a work,

2) works of authors who are not nationals of the state-signatory of the Convention if they were published for the first time in one of these states or simultaneously with publication in the state that does not belong to the Convention.

Authors who are not nationals of Union countries, but who have place of permanent residence there, are subjected to the same protection as nationals of a State belonging to the Union. Furthermore, a scientific work published in two or more states within thirty days after its first publication is regarded by the Convention as published simultaneously in these countries (although it is difficult to imagine that the same scientific publication appeared in such a short period of time in another foreign journal, even after the permission of its original publisher).[20]

The Berne Convention provides protection most of all to the **author** of a given work, and it is assumed that it refers also to the author's legal successors (as it was mentioned, in the case of a scientific publication – its publisher may be such legal successor). But the protection of personal goods and chattels belongs only to the author. The Convention regards persons whose names are placed on the work in the generally accepted way as authors of a work.[21]

D. Economic Rights

Differences in the level of protection granted in individual states, according to the assimilation rule, are eliminated by vesting authors with basic copyrights *ex iure conventionis*. They provide the minimal level of rights in the States-parties of the Convention, as authors can refer to them irrespective of the fact whether a given country where they seek protection grants them such rights. The Convention does not

[20] Art. 3.

[21] Art. 15.

limit claims of wider protection if they result from legislation of the state-party to the Union.[22] The most essential rights referring to scientific publications are the right of translation of the work and the right to decide about its reproduction.

a) Right of Translation – Article 8

According to the norm of Article 8 of the Berne Convention, authors of literary and artistic works enjoy the exclusive right of making and of authorising the translation of their works throughout the term of protection of their rights in the original works. Since the entry of the Paris Act into force, the right of translation was significantly limited, and these limits result from the possibility of substituting for the exclusive right of translation a system of non-exclusive and non-transferable licences in developing countries.

Licence for translation of a work and its publication in a language the work was not previously published can be granted to any natural or legal person coming from the interested developing country.[23] The licence is granted by the competent authority of this country. The condition the licence is granted upon is that the work would not be published in a language of general use within **3 years** from its first publication.[24] The licence can be granted only when obtaining permission of the owner of the right to translation is not possible. Specific requirements must be fulfilled, i.e. the respect of authorship of the work, integrality of its text and providing the author with the possibility of withdrawal from circulation. It is possible also when all editions of the translation published in a given language are out of print.

Granting the licence requires the fulfilment of many specific conditions. The name of the author should be indicated on all the copies of translation, as well as the original title. The copies should also bear a notice in the appropriate language stating that they are available for distribution only in the country or territory to which the said licence applies.

Compulsory licence can be granted exclusively for the purpose of teaching, or research. It cannot be granted when the author withdrew all the copies of his work from circulation. The scope of licence is limited exclusively to the territory of the country-signatory of the Berne Convention. This also means that copies of the work published on the grounds of licence are not subject to exportation.

b) Right of Reproduction – Article 9

Subjects of property rights to works protected by the Convention enjoy **the exclusive right of authorising the reproduction** of these works, in any manner or form.[25]

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[22] Art. 19.

[23] The state is regarded as developing according to the practice of General Assembly of United Nations, having fulfill of a number of procedural requirements, among which submission of notification to Director General of UNESCO is most important.

[24] This term can be shortened to one year in the case of translations into a language, which is not commonly used in one or more developed states.

[25] Art. 9.

The right has a wide scope, including all the existing methods of copying works, also reprography, sound or visual recording, recording works on magnetic carriers or microfilms, as well as analogical ways of reproduction which will appear in the future.[26] Therefore, according to the Berne Convention, also a digital copy of work not used widely in the moment it came into force is also a reproduction of the work.

Legislators of the Union states have reserved the possibility of limitation of the exclusive right of work's reproduction by issuing general a permission for the reproduction of works (published and unpublished) provided three prerequisites (so-called three-step test) are jointly fulfilled. Firstly, permitted reproduction can only take place in exceptional cases clearly provided by law of a given state. Secondly, reproduction of such works is permitted provided that such reproduction is not in conflict with normal exploitation of a work. Thirdly, reproduction of such works is permitted provided that it does not unreasonably prejudice the legitimate interests of the author.[27] Any activity colliding with a commonly accepted way of exploitation of a given work is regarded as being in conflict with "normal exploitation of the work".

The possibility of **quotation** of scientific work, which is legally made accessible to recipients, as well as its exploitation to **illustrate the teaching** provided it conforms to accepted customs and justified by its aim, is the conventional limitation of the right of reproduction resulting from Article 10. In both cases **reference to original source** is necessary.

Furthermore, a similar compulsory licence as in the case of the right of translation which is granted in a developing country is applied. The basic condition is the lapse of time from the first publication of a given edition of the work. As a principle, it amounts to five years, and in the case of a work from natural or technological sciences, it is shortened to three years.

c) Term of Protection – Article 7

According to the Berne Convention, the term of legal protection of the author is governed by the legislation of the state where protection is claimed (national treatment). But if the legislation of a given country does not stipulate otherwise, the period cannot be longer that the time fixed in the state of origin of the work. This rule, called also the rule of comparison of terms or the **rule of shorter term**, constitutes a crucial exception from the Convention's rule of national treatment for the benefit of material reciprocity.[28]

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[26] *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, Geneva 1978, p. 54.

[27] Art. 9(2).

[28] This norm became subject of considerations of the Court of Justice of the European Communities in the statement dealing with *Land Hessen v. Ricordi & Co* of 6 June 2002 (C-360/00). Tribunal proposed an interpretation of this norm, according to which domestic courts should not apply rules of shorter term in relations among Union states due to its contradiction to the rule of non-discrimination included in article 12 of EU Treaty (see: A. M a l a n: "The Future of the Berne Convention in Intra-Community Relations," *Revue Internationale du Droit d'Auteur* 200 (2004), p. 108).

As a consequence, the Berne Convention treats natural persons as authors, the minimal period of rights' protection is fixed for the period of author's life and 50 years *post mortem auctoris* (Union's countries can grant longer protection than resulting from the above rules).[29] In the case of co-authors, the period after the death of the last author is taken into consideration.

E. Moral Rights – Article 6bis

The following regulations were introduced in the limited scope into the Berne Convention during the diplomatic conference. They refer to the protection of moral rights – **the right to claim authorship of the work** (*droit de paternité*) and **the right to object to any distortion, mutilation or other modification of the said work** (*droit au respect*), and they remain in force after the death of the author at least till the time when economic rights expire. Furthermore, on a clear request of common law countries, unwilling to protect moral rights of authors, an entry was introduced into the Convention. It said that countries which do not provide protection of moral rights after the author's death are able to stipulate that one or both of these rights are not in force after the occurrence takes place. This entry unquestionably weakens the protection of author's immaterial rights.

IV. Copyright Protection in the Universal Copyright Convention

A. General Remarks

Although the Berne Convention is regarded as the most important legal act regulating issues of international copyright, it has not become the universal convention at once. It was caused by adaptation of the Convention's aims to the interests of developed countries, as well as the lack of adaptation of its provisions to copyright protection in common law countries, which emphasise its economic aspect.[30] But other systems, based on Roman and German legal tradition, place the protection of moral right to the work, which is the product of the author's intellect, on the first position. The contrary approach is presented by common law where copyright protection depends on the fulfilment of several formal conditions, such as the deposit and registration of a copy of work and indication of a proper note on such a copy. Furthermore, there are distinct differences between both concepts concerning the time of copyright protection.

The existence of such two separate concepts of copyright led to the need to create a uniform worldwide protection system that would also take into account the demands of developing countries. As a result, on **6 September 1952 Universal Copyright Convention (UCC)** was signed in Geneva. After it had come into force, it turned out

[29] In the Polish Copyright Act a longer term of 70 years was accepted.

[30] J.M. Cavendish: *A Handbook of Copyright in British Publishing Practice*, London 1974, p. 3; D. Bainbridge: *Cases and Materials in Intellectual Property Law*, London 1999, p. 2.

that its norms cannot be accepted by many of the mentioned developing countries. For this reason, as well as because of wide progress of technology and the necessity to update legal regulations, UCC's text was revised during Paris Conference in 1971. Paris Revision of the Convention is binding also upon Poland.

B. Scope of Protection

Article I of UCC obliges all countries which are parties of the Convention to take all the necessary measures to provide for an adequate and effective protection of rights of authors and other copyright holders in scientific works. The notion of **"publication"**, as defined in Article VI is crucial for a more precise definition of the scope of protection resulting from UCC. According to the accepted definition in this regulation, publication means the reproduction in tangible form and general distribution to the public of copies of a work from which it can be read or otherwise visually perceived. So all works of authors originating from countries-signatories of this agreement or works published on their territory for the first time, despite the author's origin, take advantage of Convention's protection. The works are subject of protection on the territory of other countries, and protection is the same as granted by a given legislation to its nationals' works published for the first time in its territory. The strong point in the Convention is the scope of protection which is widened and includes works produced by stateless authors or refugees (persons living on the territory of the country-signatory of UCC). The weak point of the regulation is that it omits the limitation of protection included in article 6(2) and (3) of the Berne Convention stipulating that the protection is vested in authors-nationals of a country not belonging to the Convention only based on the place of the first publication.[31]

C. Formal Requirements

Many States (like US or Spain) condition the protection of works depending on the fulfilment of such formalities as deposit, registration, notice, notarial certificate or payment of fees. Therefore, there are norms included in the UCC that allow avoiding the necessity of fulfilling of different formal requirements as the condition for protection.

The formal requirements existing in a given state are regarded as satisfied in relation to every work protected by the UCC when the following conditions are met:

- the work was published for the first time outside the territory of the State concerned,
- the author is not a national of that State,
- since the time of the first publication all the copies of the work published with the authorisation of the author or other copyright owner bear the symbol © accompanied by the name of the copyright owner and the year of first publication.

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[31] G. Ć m i k i e w i c z: "Konwencja powszechna o prawie autorskim," *ZNUJ PWiOWI* 13 (1977), p. 55.

As far as legal copyright note is concerned, it is assumed that the symbol © originating from the English word "copyright" should be treated as a sign and it cannot be substituted by any written notice, in contrast to the word from which it originates.[32] Placing the mentioned note does not release of satisfaction of any kinds of procedural requirements, connected with court's proceedings where protection of the Convention takes place (like the requirement of legal representation in legal proceedings at law in the country where protection is sought).[33]

It must be noted here that the formal requirements for protection mentioned above, with the exception of procedural requirements connected with court's proceedings, do not refer to works which are not published (which are not scientific publications). The unpublished work is protected without regard to fulfilment or of given formalities.[34]

E. Term of Protection

The term of the protection of the work in the UCC is fixed according to the rules of national treatment and of shorter term. However, the wording of accepted universal rule of shorter term differs slightly from the wording accepted in the Berne Convention, as its contents is formulated as the right and not the obligation to shorten the protection term.[35]

In Article IV, there are two terms indicating a minimum protection period that can refer to scientific publications:

1) not less than the life-time of the author and twenty-five years after his or her death (as a basic term),

2) period of 25 years from the date of the first publication when legislation of a given state applied this way of calculation for certain categories of works.

None of the contracting states is obliged to protect the scientific study longer than the period fixed for a given type of work in domestic law of the state of first publication. If it happens that the work is published for the first time in a state which is not party of the Convention, the work is regarded as being published for the first time in the state of nationality of the author.

When a domestic legislation stipulates two or more successive terms of protection, the Convention assumes their aggregation. In the case of simultaneous publication in two or more contracting states, the work shall be treated as first published in the state which grants the shortest term.[36]

The protection under Universal Copyright Convention is not retroactive.[37]

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[32] *Ibid.*, p. 56.

[33] Art. III(3).

[34] Art. III(4).

[35] A. B o g s c h: *The Law of Copyright Under The Universal Convention*, Leyden–New York 1972, p. 52.

[36] Art. IV.

[37] Art. VII.

F. Economic Rights

UCC focuses on ensuring author's economic interests, and not on the protection of moral rights. It grants the authors, among others, the exclusive right to authorise reproduction of work by any means as well as the exclusive right of making, publishing and authorising the making and publication of translation of works. This exclusive right can be limited by a domestic law with regard to translations of written works and publication of these translations in every national language in which the work has not been published yet. In this way the UCC, like the Berne Convention, established the institution of non-transferable compulsory licence for the translation of a written work.

The conditions of granting of the licence were formulated in a similar way as in the corresponding norms of the Berne Convention, with the exception of defining the term that must elapse from the date of the first publication of the work. In the Universal Convention, licence for translation amounts, as a rule, to 7 years.[38] The term can be shortened to 3 years in the course of domestic legislation in a state regarded as a developing one, and in the case of translations into a language that is not commonly used in developed states, the term can be a shortened even to one year.[39]

G. Universal Convention vs. Berne Convention

As a separate international agreement, the UCC does not affect any provisions of the Berne Convention relating to the protection of literary and artistic works. To avoid situations, when states would abandon the Berne Convention for the benefit of the Universal Convention, fixing a lower protection level (which would constitute a serious threat to developed states' interests), works originating from the state that withdraws from the Berne Convention after 1 January 1951 will not be protected under the Universal Convention in states belonging to it. Furthermore, in relations between the Berne Union states, as far as protection of works originating from one of member states of the Union is concerned, priority was given to provisions of the Berne Convention assuming that the Universal Convention will not be applied to such works.

V. TRIPS and WIPO Copyright Treaty

The conventions discussed above do not exhaust the full catalogue of international agreements regulating the issues. The essential legal acts connected with this problem also include the **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**, which is annexed to the agreement establishing the World Trade Organization (WTO). It covers the territory of states which are members of this organisation (148 members on 1 February 2005, including Poland).[40]

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[38] Art. V(2).

[39] Art. V bis, V ter.

[40] 30 countries regarded by UN as the least developed, like Bangladesh, Chad, Nigeria, are the exception.

As far as author's rights are concerned, this agreement establishes a new type of object of copyright, unknown to the Berne Convention, the so-called **compilations of data** (for example, data used in statistical analysis). These goods are also protected when they contain materials (elements) which do not have features of a work.[41]

TRIPS formulates the **rule of minimum of protection** which imposes the duty to introduce protection on at least the same level as stipulated by the agreement by a given state, being a party of the agreement.[42] Furthermore, its protection is subject to the **national treatment** and the **most-favoured-nation treatment**.[43] The latter one is a general clause, not included in other multilateral international agreements referring to copyrights. But it does not have an absolute character. Moreover, in TRIPS, apart from substantive norms, there are provisions referring to the enforcement of intellectual property rights as well as dispute prevention and settlement.

WIPO Copyright Treaty (WCT) is the latest international agreement regulating the discussed issues. The Treaty has been concluded concluded under the auspices of the World Intellectual Property Organization.[44] The organisation adapts problems of protection of copyrights to requirements resulting from the development of modern digital technologies and, accepting most of its provisions, it supplements the protection granted by the Berne Convention. The Treaty was accepted during the diplomatic conference in Geneva on 20 December 1996 and came into force on 6 March 2002.

WCT covers all types of works, strengthens protection referring to software and databases, and includes general recommendations to provide procedures for the enforcement of copyright. It also establishes new kinds of author's rights. As far as scientific publications are taken into consideration, the most important of them is the **right of communication to the public** of the works, by wire or wireless means, including making available to the public works in such a way that members of the public may access these works from a place and at a time individually chosen by them (eg. on-demand services). Such a wide perspective of this right reflects the tendency that aims at simplifying norms of international copyright to provide effectiveness with regard to ways of exploitation of works unknown at present.

According to the abovementioned right, the very fact of making accessible someone's work without permission, for example on the Internet, can constitute an infringement of copyright. If a given material is placed (recorded) on a widely accessible server (computer), on web sites or presented on an Internet discussion forum, it can be assumed that all conditions to make the work accessible are met. Sending a work by e-mail between two users of the Internet is not regarded as making it accessible due to the lack in public character of such an activity.[45]

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[41] J. Barta, R. Markiewicz: *Prawo autorskie w Światowej Organizacji Handlu (WTO)*, Kraków 1996, p. 36.

[42] Art. 1(1).

[43] Art. 3 and 4.

[44] Together with WIPO Performances and Phonograms Treaty these agreements are called "Internet treaties".

[45] J. Barta, R. Markiewicz, in: *System Prawa Prywatnego. Prawo autorskie*, *op. cit.*, p. 737.

In the case of a publication of an original research work on the Internet, according to earlier adopted assumptions, it will be regarded as a scientific publication equivalent to a printed publication only when it appears on a generally accessible Internet site, regularly indexed by one of the recognised secondary sources of scientific information. Unfortunately, up till today there are only a few such services, and they are mostly in English.

VI. European Community Law

When discussing norms of international agreements connected with copyright, it must be emphasised that European Union's legislative authorities are very active in harmonising and raising the level of legal protection in this regard. Eight Directives were adopted between 1991 and 2004 that harmonised rights and exceptions and certain other features of substantive copyright law. So far, **Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society enlarges** seem to be the most important.[46] Basing on solutions included in WCT, it extends the notion of the right of reproduction that embraces direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. It also refers to reproductions connected with the exploitation of works accessible in the computer network. An exception to this rule is precised in article 5(1) of the Directive that exempts the temporary acts of reproduction that are transient or incidental and an integral and essential part of a technological process enabling an exploitation of a work.

The Council Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights[47] is another instrument that has a significant meaning for the protection of authors (also of scientific publications). It orders to extend the term of protection to 70 years after the author's death, independently of the fact when it was made available to the public. It must be added that when a work is published in volumes, parts, instalments, issues or episodes, and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.

The Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights[48] is the most recent European regulation referring indirectly to the discussed problem. It aims at counteraction against infringements of intellectual property rights by imposing on EU states a number of restrictive requirements (e.g. the obligation to provide judicial authorities with a possibility of freezing bank accounts of a person who is charged with infringement), as well as unification of the regulations referring to enforcement of rights in individual Member States.[49] The deadline for implementation of the directive is 30 April 2006.

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[46] OJ L 167, 22.6.2001, p. 10.

[47] OJ L 290, 24.11.1993, p. 9.

[48] OJ L 195, 2.6.2004, p. 16.

[49] M. B a r c z e w s k i: "Nowa dyrektywa dotycząca dochodzenia praw własności intelektualnej," *Jurysta* (2004), No 5, pp. 21–23.

In the course of works on this Directive, the chapter concerning penal sanctions was removed. Due to this fact, in July 2005 the European Commission adopted the proposal for a **Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights,** as well as the proposal for a Council Framework Decision to strengthen the criminal law framework to combat intellectual property offences.[50] These projects obligate to impose criminal sanctions for intentional infringements of these rights on a commercial scale and unify the types of punishment provided in these cases (they include penalty of imprisonment, fines, destruction of goods). What is important, according to the contents of this project, attempting, aiding or abetting and inciting such infringements are treated as criminal offences.

VII. Summary

On the basis of an analysis of the mentioned norms of international agreements, it can be noted that although some of them distinguish the category of scientific works as a separate object of protection, with respect to their qualified form (such as scientific publications) the distinction is only of terminological nature. In the international scale, the contents of copyright protection of scientific publications seems to be identical with the protection granted for the literary work. The Paris Act of the Berne Convention is the most important legal act regulating the issues of international protection of this kind of works. It widely regulates the problems connected with the protection of the most important rights vested in authors, most of all economic rights. It is also a point of reference to later agreements, which raise the level of protection of copyright, also supplementing norms of the Berne Convention. These norms constitute jointly a sufficiently high level of protection, also with regard to works available in digital technology.

All the discussed agreements have had a direct impact on the shape of legal solutions adapted in domestic legislations of states-parties of the agreements. For example, under the influence of conventional and EU regulations, the Polish Act on Copyright and Related Rights determined the term of duration of economic rights of the author.

In future, due to dynamic development of digital technologies, the necessity of more detailed deepening of mechanisms connected with the protection of copyright to the works seems to be obvious. This necessity refers in particular to the improvement of judicial procedures in the implementation of international regulations in individual countries. Joint initiatives of the World Organization of Intellectual Property and authorities of the European Union can play a significant role in widening the scope of this protection, as these organisations try to keep up with the needs of subjects of copyright and initiate strengthening of the protection of authors in member states.

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[50] COM(2005)276.

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Polish Transitional Periods Relating to Four Freedoms – Temporary Derogations*

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Introduction

The Republic of Poland became a Member of the European Union (EU) on 1 May 2004, together with nine other countries. This fact implies vast and complex changes in legal and economic functioning of the country. The scope of this paper is of course much more modest. It is focused on one of the basic ideas of Community law – namely the four freedoms issue, and more specifically – on the temporary derogations for Poland from the general provisions on those freedoms. The main problems examined in this paper are: the nature of such derogations, the way of interpreting them and their scope. Therefore, this paper will first briefly present the outline of Polish integration with the EU, in order to explain why the explicit derogations are in fact quite limited in their scope. Then, the notions of immediate obligation and immediate application will be distinguished and analysed. Finally, the derogations to the four freedoms provisions will be examined and assessed.

1. The Way to Polish Membership in EU

On 19 May 1990, Poland submitted an official application to start negotiations concerning an association of the Republic of Poland with the European Communities. It led to an Association Agreement[1] (hereafter: Europe Agreement) signed on 16 December 1991 by Poland, the European Communities and their Member States. It entered into force on 1 February 1994.[2] Since the submission of the EU membership application in April 1994 Europe Agreement was perceived as a basis for the adjustment of Polish legal order and economic reality to future accession. On the basis of

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[1] Association Agreement between Poland, European Communities and their Member States entered into force on 1 February 1994, OJ L 348/1, of 31.12.1993. Cf also: A. N o w a k - F a r: "Droga Polski do Unii Europejskiej," in: J. B a r c z (ed.): *Prawo Unii Europejskiej. Zagadnienia systemowe*, Warszawa 2003, pp. 481–499.

[2] From 16 December 1991 to 31 January 1994 an Interim Agreement on Commerce and Commercial Issues was applied, OJ L 17/69, of 16.12.1991.

this Agreement, a free trade zone between Poland and European Communities was created, leading to a gradual elimination of customs and of other restrictions in free trade of goods (Art. 7, Art. 25 of Europe Agreement). Within ten years, practically all existing custom duties were eliminated. Europe Agreement did not introduce the free movement of workers, it only prohibited the discrimination of Polish nationals already employed in Member States[3] and *vice versa* (Art. 37, Art. 52[4] of Europe Agreement). It guaranteed however the freedom of establishment[5] (for self-employed persons – art. 44, 48) and provision of services (gradual liberalisation – Art. 55). *Standstill* clause for the free movement of capitals and payments meant that Poland was able to retain those restrictions that existed on the 1 February 1994. Art. 68 of Europe Agreement imposed on Poland a general obligation to align its legislation to *acquis communautaire* (best endeavour clause). All those provisions caused that during the ten years preceding Polish accession, the ideas stemming from Community law were gradually established in the Polish legal order. In the meantime, a new Constitution of 1997, containing some "European" provisions was adopted, setting the possibility for the accession to the EU.[6] On the 8 April 1994, Poland had applied for membership, which after nine years resulted in signing the Treaty concerning the Accession of ten new Member States to the European Union[7] (hereafter: Accession Treaty) accompanied by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (hereafter: Act of Accession). The Act of Accession is accompanied by eighteen annexes, out of which the XII contains a list of derogations concerning Poland (hereafter: Annex XII). The enlisted documents seen together would be further referred as Accession Treaty *sensu largo*.[8]

2. Immediate Binding Force *versus* Immediate Application

The rule of immediate binding force of *acquis communautaire* applies both to the so-called primary law, as well as secondary law. Some adaptations necessary in both

[3] Cf case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer*, [2002] ECR I-01049.

[4] Possibility to employ "key personnel" in branches of enterprises from Member States.

[5] Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, [2001] ECR I-08615; case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk*, [2001] ECR I-06369.

[6] The Constitution of the Republic of Poland as adopted by the National Assembly on 2 April 1997, particularly its Art. 90.1: *The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters* and its Art. 91.3: *If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.*

[7] OJ L 236, vol. 46, of 23.09.2003.

[8] J. Barcz, A. Michoński: *Polska w Unii Europejskiej. Wybór dokumentów. Traktat Akcesyjny*, Warszawa 2003, p. 26.

types of legal acts were introduced by the set of documents constituting Accession Treaty *sensu largo*. The changes concerning primary law were introduced by a new Treaty, as well as the necessary modifications of acts adopted by the institutions – as it is stated in Articles 20 and 21 of the Act of Accession. The acts of the institutions are more specifically amended by Annex II to the Act of Accession. It has already been stated in the doctrine as well as in the primary law itself that this type of amendment does not change the character of the previously existing secondary law legislation.[9] It is still the secondary law legislation that had been subject to amendments stemming from primary law.

Article 2 of the Act of Accession states that: *From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession* ***shall be binding*** *on the new Member States and* ***shall apply*** *in those States* ***under the conditions*** *laid down in those Treaties and in this Act.*

It stems from this provision that the new Member States are bound by both primary and secondary legislation that was in force before the accession. There is, however, a clear division between an obligatory effect of those provisions – which is unquestionably immediate – and the application of those provisions – which might be subject to conditions negotiated and concluded within the Accession Treaty *sensu largo*. That application might be "postponed" in time either because of the provisions introduced by previous Member States, or because of provisions on which the newcomers insisted. All of those "intertemporary" solutions are set for a certain period of time, counted from the 1 May 2004. But it must always be seen as an exception – thus restrictively interpreted – from the rule of immediate binding force and application of Community law.

Apart from Art. 2, Art. 10 of Act of Accession clearly provides the possibility for derogations: *The application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act*. On the basis of this provision, it seems that derogations concern only the application, not the binding force of Community measures. Article 54 of the Act of Accession adds: *The new Member States shall put into effect the measures necessary for them to comply,* ***from the date of accession****, with the provisions of directives and decisions within the meaning of Article 249 of the EC Treaty and of Article 161 of the Euratom Treaty, unless another time-limit is provided for in the Annexes referred to in Article 24 or in any other provisions of this Act or its Annexes*. The Act of Accession distinguishes clearly between binding effect and application, allowing the postponement of immediate application in the defined circumstances.

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[9] L.S. K a l e d a: *Przejęcie prawa wspólnotowego przez nowe państwa członkowskie. Zagadnienia przejściowe i międzyczasowe*, Warszawa 2003, p. 45; cf also cited there: J.P. P u i s s o c h e t: *L'élargissement des Communautés européennes: Présentation et commentaire du Traité et des Actes relatifs à l'adhésion du Royaume-Uni, du Danemark et de l'Irlande*, Paris 1974, pp. 199–200. S. L. K a l e d a: "Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine?," *ELJ* (2004), No 1, pp. 102–122.

Derogations must be clearly provided in the Treaty and they allow a suspension from application for some period of time. From 1 May 2004 new Member States are therefore bound by all the provisions included within *acquis communautaire*. But not all of the provisions are immediately applicable from that very date. The major examples of such postponed application might be:

1) provisions setting the full application on a fixed later date, like most of the provisions in Annex XII, that will be discussed further.

2) provisions making the full application of some provisions of *acquis communautaire* to a certain new Member State depending on a later decision of the Council, like some of the provisions of *Schengen acquis* (Art. 3.2 Accession Treaty).[10]

3) provisions conditioning the possibility of application (or non-application) on the fulfilment of some further provisions, like Art. 37 on preventive measures.[11]

Article 24 of the Act of Accession provides that the measures listed in Annexes V to XIV shall apply in respect of new Member States under the conditions laid down in those Annexes. Annex XII concerns transitional measures agreed for Poland. All those derogations are a result of complex negotiations and stem from political decisions. But there is a need to signal as well the possibility of "accidental derogations" not planned by neither Member States nor Community institutions, due to the late translation or publication of Community law in new Member States.

3. Problem of Late Translation or Publication – "Accidental Derogations"?

The binding effect of Accession Treaty provisions does not raise any doubts. The secondary legislation not covered by express derogations should also be binding and applied immediately. But the practical applicability in new Member States depends also on the appearance in the Official Journal of the European Union in the language of the Member State concerned. This is mainly problematic when an act that has not been published imposes an obligation on an individual, as this would endanger the principle of legal certainty, recognised broadly also by the Community legal order.[12]

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[10] Art. 3.2: *Those provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon in or otherwise related to it not referred to in paragraph 1 (of the same article), while binding on the new Member States from the date of accession, shall only apply in a new Member State pursuant to a Council decision to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all the parts of the acquis concerned have been met in that new Member State and after consulting European Parliament.*

[11] Article 37.1: *If, until the end of a period of up to three years after accession, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a new Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market.*

[12] Cf case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise*, [2002] ECR I-06325, par. 44; case 316/86 *Krücken*, [1988] ECR 2213, par. 22; joint cases C-31/91 to C-44/91 *Lageder e.a.* [1993] ECR I-1761, par. 33; C-381/97 *Belgocodex*, [1998] ECR I-8153, par. 26; C-396/98 *Schlossstrasse*, [2000] ECR I-4279, par. 44.

This type of situation has already appeared after previous accessions but the European Court of Justice did not often have a chance to assess it. The main reference remains the case 160/84 *Kavallas v. Commission,* concerning Greek fishermen's obligation to pay higher custom duties that were not yet published in a Greek version of the regulation in the Official Journal. The European Court of Justice admitted that the Commission was bound to pay back the custom duties received from Greek enterprises. This judicial decision was, however, taken under Art. 230 TCE and never confirmed in preliminary proceedings. On the contrary, usually the linguistic problems of enterprises were not seen by the ECJ as a clash against the principle of legal certainty, as clearly indicated by the case T-107/94 *Kik v. Council*[13] or C-108/01 *Prosciutto di Parma.*[14]

In the national jurisprudence of new Member States, one clear example of not imposing the obligations on individuals because they were not able to know those obligations in their language, is given by N. Jääskinen.[15] In the Finish case *Iitti*[16] the fact that a special issue of Official Journal in Finish language appeared only some months after the Finland accession, was enough to release from criminal charges some Finish enterprises accused of breaching Community custom rules.

To this respect, Art. 58 of the Act of Accession provides that: *the texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession,* ***be authentic*** *under the same conditions as the texts drawn up in the present eleven languages.* ***They shall be published in the Official Journal of the European Union*** *if the texts in the present languages were so published.* It should be underlined that no clear date is indicated and as practise reveals that date **was not the 1 May 2004.** Special Edition of the Official Journal was bound to be published gradually between the aforementioned date (1 May) and mid 2005. However, at the time of writing this article (1 September 2005) this total publication in Polish language was not accomplished fully. On the other hand, it seems that Art. 2 of Act of Accession imposes the full binding effect and full application (if no express derogation is given) to all texts, regardless of whether they were or were not published. This would go along the general rule of public international law – *pacta sunt servanda.* However, the internal legal orders of Member States usually recognise the principle of certainty of law – and Community being a Community of law should recognise it too.

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[13] Case T-107/94 *Christina Kik v Council of the European Union and Commission of the European Communities,* [1995] ECR II-01717.

[14] Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd,* [2003] ECR I-05121; *cf.* S. Enchelmaier, *Case C-469/00, Ravil S.a.r.l. v. Bellon Import S.a.r.l. and Biraghi SpA,* [2003] ECR I-5053 (Full Court); *Case C-108/01, Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v. Asda Stores Ltd. and Hygrade Foods Ltd., Judgments of 20 May 2003,* [2003] ECR I-5121 (Full Court), *CMLRev.* 41 (2004), pp. 825–838.

[15] N. J ä ä s k i n e n: "The application of Community Law in Finland 1995-98," *CMLRev.* 36 (1999), p. 419.

[16] *The State of Finland,* represented by the *District Customs House of Lappeenranta v. Peltola, Iitin käräjäoikeus,* 12 March 1997, (R 97/44), quoted by N. J ä ä s k i n e n, p. 418.

As stated, it could be mainly problematic when an act that has not been published in the Polish language **imposes an obligation on an individual**. It seems that the applicability should be excluded, as otherwise it would breach the principle of legitimate expectations and certainty of law. The best way of solving the indicated doubts – whether an individual should be bound by such provisions or not – would be to pose a preliminary question to the European Court of Justice under Art. 234 TCE. In the case of a positive answer (that the provision should be applicable regardless of publication/translation), another issue that would demand explanation is the question of liability – would the person bound by a text not available in his or her language be able to claim damages for harmful consequences of such a situation. As there is no clear declaration on who is responsible for the timely publication, there would be a clear danger of *deni de justice* – similar to the cases like *Cato.*[17] This judgment reveals the clear tendency on the part of Community to refuse any compensation in situations of "shared" responsibility – which would clearly be the case for translations that are done first at a national level and then are accepted by the European Commission and published in the Official Journal of the EU.

4. Interpretation and Application of Temporary Derogations

Any derogations from Community law should be interpreted restrictively. As the European Court of Justice stated in a series of judgments on previous Accession Treaties, "a derogation from the Treaty rules (...) must (...) be interpreted restrictively"[18] and „(...) the derogations permitted by the Act of Accession from the rules laid down by the Treaty must be interpreted in such a way as to facilitate achievement of the objectives of the Treaty and application in full of its rules."[19] Therefore, any derogation from the rules on free movement should be interpreted in the narrowest possible way.

Temporary derogations cannot be extended by the Member States. As clearly stated in the case C-140/97 *Rechberger* – it is not for the national law to decide on the scope of the application of Community law, thus also on the scope of its inapplication.[20] This jurisprudence indicates that the previously mentioned hypothesis of "accidental derogations" due to lack of translation would probably not be accepted by the ECJ. The provisions of Community law apply *ab initio* and *in toto* to new Member States, derogations being allowed only in so far as they are expressly laid down by transitional provisions.[21]

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[17] Case C-55/90 *James Joseph Cato v Commission of the European Communities*, [1992] ECR I-02533.

[18] Case C-233/97 *KappAhl Oy*, [1998] ECR I-8069, par. 15, *mutatis mutandis*: case 258/81 *Metallurgiki Halyps v. Commission*, [1982] ECR 4261, par. 8.

[19] Case C-233/97 *KappAhl Oy*, [1998] ECR I-8069, par. 18; joined cases 194/85 and 241/85 *Commission v. Greece*, [1988] ECR 1037, par. 20.

[20] Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v. Republik Österreich*, [1999] ECR I-3499, par. 51–52.

[21] Case C-233/97 *KappAhl Oy*, [1998] ECR I-8069, par. 18; case 77/82 *Peskeloglou v. Bundesanstalt für Arbeit*, [1983] ECR 1085, par. 12.

5. Polish Temporary Derogations from General Rules on Free Movement

The commentary on derogations provided either for or "against" the Republic of Poland is split into two parts – firstly, the part concerning the movement of means of production (goods and capitals), secondly, the part concerning the free movement of persons (workers and service providers).

5.1. Temporary Derogations Concerning the Free Movement of Goods and Capitals

The provisions of Annex XII concerning the free movement of means of production (goods and capitals) are generally favourable for Poland – they allow it to keep some solutions until indicated dates. But this favourable solution has its price. For the free movement of goods, the other Member States (including the other new Member States) are able to stop Polish products covered by the derogation so they do not circulate freely in the internal market.

5.1.1. Free Movement of Goods

The solutions concerning the movement of some goods originating from Poland were created in order to keep on the Polish market some products that did/do not fulfil certain conditions stemming from the EC law.

The first derogation provided in Annex XII is the one concerning medical devices. Three directives[22] will not be fully applicable to Polish medical devices possessing certificates for such products that entered into force before 1 October 2002. Such certificates – even though they do not respect the requirements set by the aforementioned directives – shall remain valid until their expiry or until 31 December 2005, whichever is the earlier. However, such medical devices can circulate freely only within Poland, as other Member States are not obliged to recognise such certificates. They can also prevent the introduction on their markets of Polish medical devices as long as they are not in conformity with the directives.

The second set of derogations concerns pharmaceutical products. Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products[23] and directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use will not be fully applicable to Polish

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[22] Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices, (OJ L 189, 20.7.1990, p. 17 as last amended by the Council Directive 93/68/EEC of 22.7.1993, OJ L 220, 30.8.1993, p. 1); Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, (OJ L 169, 12.7.1993, p. 1 as last amended by the Directive 2001/104/EC of the European Parliament and of the Council of 7.12.2001, OJ L 6, 10.1.2002, p. 50); Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices (OJ L 331, 7.12.1998, p. 1).

[23] OJ L 311, 28.11.2001, p. 1.

pharmaceutical products.[24] The marketing authorisations for the pharmaceutical products on the list (in Appendix A to the Annex XII) issued under Polish law prior to the date of accession, remain valid until they are renewed in compliance with the *acquis* and in accordance with the timeframe set out in the abovementioned list, or until 31 December 2008, whichever is the earlier. Appendix A to the Annex XII lists 15085 medical products covered by the derogation. Therefore again, the derogation consists of allowance for lower standards (or in fact, different administrative procedures) that those provided in the secondary Community law. However, the other Member States can decide if they admit such Polish pharmaceutical products, thus limiting the free movement of goods. In addition, Annex XII clearly states that marketing authorisations covered by this derogation do not benefit from mutual recognition in the other Member States. The Polish pharmaceutical products thus do not enjoy the presumption of safety, quality and efficacy like products from other Member States do.

In the provisions concerning agriculture, Poland was also granted some derogations, but the products covered by those derogations cannot circulate within the internal market. Those solutions permit Polish farmers to avoid an abrupt transition from previous conditions of production to the new ones – but slower farmers risk to lose the possibility to exporting their products. The derogations in agriculture concern *inter alia* milk with certain amount of fat – it can only be produced for five years after the Accession and it can be only marketed in Poland or be sold to third countries. As to the raw milk and raw milk products – certain farms in Poland are allowed to keep the way they produce those products but only for the Polish market. The same solution was retained for certain farms producing meat.

The derogations for free movement of goods are said to be favourable for Poland. They are, however, excluding the possibility for the Polish products to circulate freely in EU. Therefore, most of the Polish producers actually do not profit from them, preferring to apply the stricter Community law solutions in order to be able to sell their products to other Member States with no limitations.

5.1.2. Free Movement of Capital

The reasons for limitations in the free movement of capital were different than those provided for some goods. They were mainly political, negotiated in order to calm some fears existing in the Polish society that the Western capital would buy out Polish land. Therefore, the derogation periods for rural land are particularly long and were considered a success of the Polish diplomacy, even though they are in fact rather symbolic.

In the Act of Accession, Poland was allowed to control the acquisition of secondary residences and agricultural land and forest. Still, the nationals of the Member States or legal persons formed in accordance with the laws of another Member State cannot be treated less favourably in respect of the acquisition of land than they were treated at

[24] OJ L 311, 28.11.2001, p. 67.

the date of signature of the Accession Treaty. This means that Poland is not allowed to introduce any further restrictions apart from those that existed in April 2003.

The full application of Art. 56 TCE is limited for five years from the date of accession. During this period, the rules regarding the acquisition of secondary residences laid down in the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners[25] are still applied (requirement of permission from Ministry of Interior). However, the situations that took place before the accession are treated differently as the nationals of the Member States and nationals of the States which are parties to the European Economic Area Agreement and who have been legally resident in Poland for four years continuously shall not, as regards the acquisition of secondary residences, be subject to the requirements set in the Act of 1920.

As far as the acquisition of agricultural land and forests is concerned, Poland may maintain in force for twelve years from the date of accession the rules laid down in the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners. Again, the foreigners that resided in Poland before 1 May 2004 are treated favourably. Nationals of another Member State or of a State which is a party to the European Economic Area Agreement who want to establish themselves as self-employed farmers and who have been legally resident and leasing land in Poland as a natural or legal person for at least three years continuously, are not subject to those provisions as regards the purchase of agricultural land and forests from the date of accession. Still, this period extends to seven years for the following eight voivodships (out of sixteen in total): Warmińsko-Mazurskie, Pomorskie, Kujawsko-Pomorskie, Zachodniopomorskie, Lubuskie, Dolnośląskie, Opolskie and Wielkopolskie. All those regions were considered for historical reasons as being particularly attractive for German investors.

Apart from those provisions, all the Treaty rules and secondary law on the free movement of goods and capitals should be applied immediately and in total to Polish products and capital means.

5.2. Temporary Derogations Concerning the Free Movement of Persons

Traditionally, the free movement of persons within European Communities was perceived only from an economic point of view and was guaranteed for working force or service providers.[26] Since the introduction of the citizenship of the European Union by the Maastricht Treaty and the inclusion of *acquis Schengen* into EU law by the Amsterdam Treaty, there are two aspects of the free movement of persons – economic and non-economic.

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[25] Dz.U. [Polish Jounal of Laws] 1996, No 54, item. 245, as amended.

[26] A. Castro Oliveira: "Workers and Other Persons: Step by Step from Movement to Citizenship – Case law 1995–2001," *CMLRev* 39 (2002), p. 77.

5.2.1. The Non-Economic Movement of Persons

The non-economic movement of persons is strictly linked with the *Schengen acquis*. That *acquis* is not fully applicable in new Member States. As Art. 3.1 of the Act of Accession provides only that the acts listed in Annex I to this Act[27] and the acts adopted before the accession "shall be **binding on and applicable in the new Member States from the date of accession**". All other acts of Schengen acquis are, accordingly to Art. 3.2 of the Act of Accession, binding on the new Member States from the date of accession, but they "**shall only apply in a new Member State pursuant to a Council decision** to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the acquis concerned have been met in that new Member State and after consulting the European Parliament".

Therefore the major part of the *Schengen acquis* not included in Annex I to the Act of Accession will only apply after the Council decision. It seems that the Council decisions will concern individual new Member States. This introduces the possibility of differentiation between new Member States.

5.2.2. Economic Movement of Persons

General assessment of the Treaty of Accession indicates that the derogations concerning economic movement of persons are in favour of the "old" Member States, the new Member States (including Poland) may however apply the principle of reciprocity. The only derogations favourable for Poland concern some aspects of free movement of services.

5.2.2.1. Free movement of Workers and Service Providers
– Protection Measures for the Old Member States

The derogations from the full application of Art. 39 TCE and Art. 49.1 TCE were insisted on by the previous Member States. The solutions adopted are examples of pure protectionism and reveal a fear to be flooded by the cheap working force. Poland, being the biggest new Member State, had for obvious reasons raised probably the biggest anxieties in ancient Member States.

Annex XII provides for ancient Member States (not for the other new Member States) the following solutions: as far as Art. 39 and par. 1 of Art. 49 TCE and Art. 1 to 6 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community[28] are concerned, the fifteen old Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals until the end of the two-

[27] OJ L 234, vol. 46, p. 50, of 23.09.2003

[28] OJ L 257, 19.10.1968, p. 2 as amended by the Council Regulation (EEC) No 2434/92 of 27.7.1992, OJ L 245, 26.8.1992, p. 1.

year period following the date of accession.[29] The old Member States may continue to apply such measures until the end of the five-year period following the date of the accession. A Member State maintaining national measures or measures resulting from bilateral agreements at the end of the five-year period may, in the case of serious disturbances of its labour market or threat thereof and after notifying the Commission, continue to apply these measures until the end of the seven-year period following the date of accession. It means that the working force from Poland might be excluded for the total period of seven years following the accession, should an ancient Member State so decide. Only three old Member States did not use the provisions provided by Annex XII and opened their labour markets for Polish working force immediately after the accession: United Kingdom, Ireland and Sweden.

Whenever national measures, or those resulting from bilateral agreements, are applied by the old Member States by virtue of the transitional provisions laid down in Annex XII, Poland may maintain in force equivalent measures with regard to the nationals of the Member State or States in question. This particular reciprocity rule was used by the Republic of Poland towards all twelve Member States that maintain the limitations for Polish working force. It should be rather perceived as a political gesture then any serious hindrance for the flow of workers from old Member States to Poland.

The Annex XII provides as well the solutions for situations existing before the accession of Poland to EU. Polish nationals that legally worked in an ancient Member State at the date of accession and were admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures. Similarly, Polish nationals admitted to the labour market of an old Member State following the accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.

Two old Member States – the Federal Republic of Germany and the Republic of Austria insisted on specific derogations for the free movement of some services.[30] In order to address serious disturbances or the threat thereof in specific sensitive service sectors on their labour markets, Germany and Austria may, after notifying the Commission, derogate from the first paragraph of Article 49 of the EC Treaty with a view to limit, in the context of the provision of services by companies established in

[29] Before the end of the two-year period following the date of accession, the Council shall review the functioning of the transitional provisions laid down in paragraph 2, on the basis of a report from the Commission. On completion of this review, and no later than at the end of the two-year period following the date of accession, the present Member States shall notify the Commission whether they will continue applying national measures or measures resulting from bilateral agreements, or whether they will apply Articles 1 to 6 of Regulation (EEC) No 1612/68 henceforth. In the absence of such notification, Articles 1 to 6 of Regulation (EEC) No 1612/68 shall apply.

[30] For Germany: 1) Construction, including related branches; 2) Industrial cleaning; 3) Activities of interior decorators. For Austria: 1) Horticultural service activities; 2) Cutting, shaping and finishing of stone; 3) Manufacture of metal structures and parts of structures; 4) Construction, including related branches; 5) Security activities; 6) Industrial cleaning; 7) Home nursing; 8) Social work and activities without accommodations.

Poland, the temporary movement of workers whose right to take up work in Germany and Austria is subject to national measures. The application of this solution shall not result in conditions for the temporary movement of workers in the context of the transnational provision of services between Germany or Austria and Poland which are more restrictive than those prevailing on the date of signature of the Treaty of Accession (standstill clause). No other old Member State adopted similar solutions. It seems that the two States wanted to avoid the possibility of situation that occurred in the judgment *Rush Portuguesa*,[31] in which the ECJ stated that the provider of services can bring its own working force with him. In this case concerning a Portuguese building enterprise, transitional periods limiting the entry of Portuguese working force on labour markets of the old Member States concerned only the free movement of workers, not services.

The derogations adopted in this field constitute a serious hindrance for the free movement of workers and service providers until up to seven years from the accession to the European Union.

5.2.2.2. Services – Solution Favourable for Poland

Annex XII contains also some derogations favourable for the Republic of Poland, allowing it to maintain for some time the national law provisions that are not in compliance with EC secondary legislation. Until 31 December 2007, the minimum level of compensation required by Art. 4.1 of Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes should not apply.[32] Other Member States retain the right to prevent a branch of a Polish investment firm established on their territories from operating unless and until such a branch has joined an officially recognised investor-compensation scheme within the territory of the Member State concerned in order to cover the difference between the Polish level of compensation and the minimum level referred to in abovementioned article.

Similarly, until 31 December 2007 an initial capital requirement laid down in paragraph 2 of Art. 5 of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions[33] shall not apply until 31 December 2007 to the co-operative credit institutions already established in Poland at the date of accession. Poland should only ensure that its initial capital requirement for these co-operative credit institutions is not less than EUR 300 000 until 31 December 2005, and not less than EUR 500 000 from 1 January 2006 until 31 December 2007. During the transitional period, pursuant to Article 5(4), the own funds of these undertakings may not fall below the highest level reached with effect from the date of accession.

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[31] Case C-113/89 *Rush Portuguesa Ld[a] v Office national d'immigration*, [1990] ECR I-01417.

[32] OJ L 84, 26.3.1997, p. 22. Poland shall ensure that its investor-compensation scheme provides for cover of not less than EUR 7,000 until 31 December 2004, of not less than EUR 11,000 from 1 January 2005 until 31 December 2005, of not less than EUR 15,000 from 1 January 2006 until 31 December 2006 and of not less than EUR 19,000 from 1 January 2007 until 31 December 2007.

[33] OJ L 126, 26.5.2000, p. 1.

Finally, until 31 December of 2005 Poland may apply a weight limit of 350 grams for reserving services to universal service providers, which constitute a derogation from Art. 7.1 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service.[34]

But for those very punctual solutions, the whole set of Community rules on provisions of services apply fully to the Polish service providers.

6. Conclusions

The subject of temporary derogations from general internal market rules seems straightforward at the first sight. Only explicit derogations are allowed, those existing should be interpreted strictly and the Member States applying the derogations are still bound by the derogated provisions – thus they cannot undertake actions that would exclude further effective application for the future once the derogation period is over (otherwise, it would raise to a *culpa in contrahendo*, against Art. 18 of the Convention on the Law of the Treaties).

However, the closer examination of the issue of temporary derogations brings several reflections. First, from the political point of view it is interesting to notice that only old Member States are allowed to keep the real protective measures as far as labour markets are concerned. It is clearly illustrated by the solutions adapted for the flow of working force. The old Member States can freely decide to exclude the free movement of workers from Poland up to seven years after the date of the Accession. The Treaty provides the possibility of reciprocal limitations introduced by new Member States – but from the practical point of view their importance is hardly noticeable. Therefore, the old Member States can efficiently protect their labour markets and the fact that the vast majority of them – twelve out of fifteen – have used this possibility towards Polish workers, is a clear indication of distrust and fear against the new, often cheaper and less requiring labour force from new Member States. On the other hand, a different sort of distrust is illustrated by the solutions concerning the possibility of acquisition of land in new Member States. The long transition period as to the agricultural land and forests in Poland reveals – in crude terms – a fear of "being bought out by wealthier neighbours". Those solutions can help to ease the shock of immediate melting of markets and are a handy tool for politicians to indicate their "victories" in negotiations even if this "battle language" should no longer apply.

Second, apart from the express derogations, there is an issue of "accidental derogations" appearing in the case of non-translation of texts to be applied in new Member States. This problem is not purely theoretical and hopefully will find a solution in future ECJ's rulings. The principle of certainty of law would be an argument for the non-application of provisions not translated into official languages of the new States

[34] OJ L 15, 21.1.1998, p. 14 as amended by the Directive 2002/39/EC of the European Parliament and of the Council of 10.6.2002, OJ L 176, 5.7.2002, p. 21.

if the non-translated provisions impose obligations on individuals. This type of situation could be compared to the case of non-transposition of directives which in such circumstances cannot impose obligations on individuals. If, however, it is admitted that such provisions are to be applied, this raises the problem of liability for the lack of translation. The damages suffered by an individual in such circumstances could be claimed both from a Member State and the Community. In fact, the translation is first done at the national level, then accepted by the European Commission which results in a shared responsibility. This hypothesis is actually not very favourable for individuals, as it might lead to double litigation finishing with deny of justice if none of the plaintiffs is found responsible.

Finally, for some derogations there is a clear division of the European Union into two blocks – of the old Member States and of the new Member States. Whereas for the derogations in free movement of goods there is no such distinction (derogations can be applied towards all countries), the possibility of limiting the flow of working force is reserved for the old Member States and the introduction of such measures between any two of the new Member States is not possible. It can be argued that such division between the old and the new countries is unavoidable but it naturally creates two categories of Member States, with different scopes of rights. The positive aspect is the fact that this division is naturally temporal and it will disappear once the transition periods are over.

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Execution of European Arrest Warrants in the Polish Judicial Practice After the Judgment of the Constitutional Tribunal of 27 April 2005

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The Republic of Poland implemented the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States by the Law on the amendment of Penal Code, Code of Penal Procedure and Misdemeanour Code of 18 March 2004[1] and applies the Law from 1 May 2004 to all requests sent or received from that date. However, the implemented provisions reduced the substantive scope as regards both the minimum thresholds for sentences and certain categories of offence, for which they have reintroduced a check on double criminality.[2] They also restricted the possibility of surrender of Polish citizens and residents.

Two provisions of the Code of Criminal Procedure (CCP) differentiate the application of an EAW in respect of Polish citizens on the basis of whether an EAW was issued for the purpose of executing a previously imposed custodial sentence (or detention order), or rather for the purpose of prosecuting the person for a criminal offence. Article 607s § 1 CCP governs the first situation and states that an EAW may not be executed against a Polish citizen in the absence of their consent to the surrender. In the case of the lack of consent to being surrendered expressed by the Polish national or by a person exercising his/her asylum right in the Republic of Poland, the refusal to surrender is obligatory; in the case of domicile or permanent residence in the Republic of Poland of the person referred to in the EAW refusal is optional. In the case of refusal pursuant to the abovementioned grounds, the Polish court decides to execute the sentence or the measure ordered by the judicial authority of the state of issuance of the EAW (Article 607s § 3-5 CCP).

Article 607t § 1 CCP concerns another situation: "Where a European arrest warrant has been issued for the purposes of prosecuting a person holding Polish citizen-

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[1] Dz.U. [Polish Journal of Laws] 2004, No 69, item 626.

[2] Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2005) 63 final.

ship or enjoying the right of asylum in the Republic of Poland, the surrender of such a person may only take place upon the condition that such person will be returned to the territory of the Republic of Poland following the valid finalisation of proceedings in the State where the warrant was issued".

The Polish Constitutional Tribunal in its judgment of 27 April 2005[3] ruled that Article 607t § 1 of the Code of Penal Procedure, insofar as it permits the surrendering of a Polish citizen to another Member State of the European Union on the basis of the European Arrest Warrant, does not conform to Article 55(1) of the Constitution. As a rule, a Constitutional Tribunal judgment declaring the unconstitutionality of the challenged provision leads to the loss of binding force of that provision from the moment of the judgment's publication in the Journal of Laws. However, the Tribunal decided to delay the date of the challenged provision's loss of binding force for 18 months, which is permitted by Article 190(3) of the Constitution. Accordingly, the Tribunal's judgment shall have only future effects (meaning that the unconstitutional provision will continue to possess binding force in the interim period) and, furthermore, may not constitute the grounds for challenging final judicial decisions hitherto delivered.

Consequently, during the period of 18 months following the publication of the present judgment, courts should apply this provision, provided that the legislator does not earlier invalidate or amend this provision. Whilst this provision remains in force, Polish courts may not refuse to apply it for the reason that it fails to conform to Article 55(1) of the Constitution.

However, the everyday practice of the courts after 27 April 2005 is diverse.

There are different schemes of deciding about the execution of EAW in cases concerning the surrender of Polish citizens. The survey conducted in the Polish courts concerning their practice in executing the EAW requests (altogether 33 cases reported) after 27 April 2005 resulted in establishing five possible schemes.

I. Cases Decided on the Basis of Article 607s § 3-5 CCP

1. The court refuses to execute the EAW and carries out the penalty in Poland (1 case).

In the only reported case the requested person did not consent to surrender. Article 607s § 1 CCP states that an EAW may not be executed against a Polish citizen in the absence of their consent to the surrender and in such a case the carrying out of the penalty takes place in Poland.

II. Cases Decided on the Basis of Article 607t § 1 CCP

1. Court decides that the surrender of the requested person may only take place upon the condition that such person will be returned to the territory of the

[3] Judgment of the Polish Constitutional Tribunal concerning European Arrest Warrant of 27 April 2005, No P 1/05.

Republic of Poland following the valid finalisation of proceedings in the State where the warrant was issued (in 14 cases).

This is the most common scheme followed by the courts. This method stands in accordance with Article 607t § 1 CCP. Courts follow the thesis of the Constitutional Tribunal's judgment and apply the provision notwithstanding its declared unconstitutionality. In doing so, they also comply with Article 4(6) of the Framework Decision of 13 June 2002, which states that if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is national or a resident of the executing Member State and that state undertakes to execute the sentence or detention order in accordance with its domestic law, the executing judicial authority may refuse to execute the EAW. Also Article 5(3) allows for subjecting execution of the EAW to the condition that the surrendered person, after being heard, is returned to the executing state in order to serve there the custodial sentence or detention order passed against him in the issuing state.

Whilst taking the decision courts examine conditions of surrender as set by Article 607k – 607z CCP, which introduces the Framework Decision, *inter alia*: if the judicial organ issuing the EAW was competent, and if offences give rise to surrender pursuant to an EAW, according to Article 2(2) of the Framework Decision. They also check if there are grounds for mandatory or optional non-execution of the EAW, as set by Article 3 and Article 4 of the Framework Decision (implemented in Articles 607p and 607r CCP), e.g. the requested person is being prosecuted in Poland for the same acts as that on which the EAW is based. In order to guarantee the proper progress of the procedure of surrender, courts administer the provisional arrest. Some of the courts explicitly mention the Constitutional Tribunal's judgment, stating that it does not constitute a valid ground for a refusal to surrender a Polish citizen to a Member State and Polish courts may not refuse to apply it for the reason that it fails to conform to Article 55(1) of the Constitution. Last but not least, the courts stress the importance of complying with the commitments arising under international treaties and the European Union *acquis*, as well as the binding force of Article 9 of the Polish Constitution: "The Republic of Poland shall respect international law binding upon it".

2. The court refuses to execute the EAW (in 7 cases).

The survey showed that Polish courts adopt various grounds of non-execution of an EAW, listed as obligatory or optional in the Framework Decision. Obligatory grounds for refusal are listed in Article 607p CCP,[4] which implements the relevant provisions of the Framework Decision. Consequently, the court is obliged to refuse the execution of an EAW if:

1) the offence referred to in the EAW, in the case of jurisdiction of Polish courts, is subject to remission by virtue of amnesty;

[4] Translation of the relevant CCP provisions after: Working Party on Cooperation in Criminal Matters (Experts on the European arrest warrant). Implementation of the Framework Decision on the European arrest warrant in Poland – Practical information for the attention of the judicial authorities of the other Member States of the European Union, Brussels, 11 May 2004, 9402/04.

2) there was a valid and final judgement against the requested person passed in another state, relating to the same acts, and in the case of conviction for the same acts, the requested person is serving or has served the sentence, or the sentence may not be executed pursuant to the law of the state of issuance of the sentence;

3) there is a valid and final decision on the surrender of the person to another Member State of the European Union;

4) the person referred to in the EAW, on account of his/her age is not, according to the Polish law, subject to criminal liability for the acts that served grounds for issuing the EAW.

Optional grounds for refusal are codified in Article 607r § 1 CCP:

1) the offence that served grounds for issuing the EAW, other than those referred to in Article 2(2) of the Framework Decision, is not an offence according to the Polish law. Article 607r § 2 CCP states that the provision does not apply if such an act does not constitute an offence only because of the lack or different type of regulation of taxes, duties, customs and exchange in Polish law;

2) there is a pending criminal proceeding in the Republic of Poland against the prosecuted person, in connection with the offence that served grounds for the EAW. Additionally, according to the CCP the execution of the decision on surrender is postponed in case there is a criminal proceeding against the prosecuted person carried on in the Republic of Poland in connection with the act other than the one referred to in the EAW or in case the prosecuted person is to serve the sentence of imprisonment in the Republic of Poland in connection with such an act. The execution of the decision is postponed until the proceeding is concluded or the penalty is executed (Article 607o CCP);

3) in connection with the act that served grounds for issuing the EAW, there was a valid and final judgement issued against the prosecuted person, concerning the refusal to institute the proceedings, the discontinuance of the proceedings, or other judgement concluding the proceedings in the case;

4) according to the Polish law, the period of limitation for the prosecution or for the execution of the sentence has expired and the offences concerned were subject to the jurisdiction of Polish courts;

5) the EAW concerns the offences which, according to the Polish law, have been committed wholly or partially in the territory of the Republic of Poland, as well as in Polish ships or aircrafts;

6) for a prohibited act referred to in the EAW, in the state of issuance of the EAW it is possible to pass a sentence of life imprisonment or another measure involving the deprivation of liberty without the possibility of applying for its reduction.

Among the seven cases of negative response to EAW requests, four were based on officially authorised grounds, as listed in the legal provisions. In three of them courts refused the surrender on the ground that there was a pending criminal proceeding in the Republic of Poland against the requested persons, in connection with the offence that served grounds for the EAW. In one case, surrender was not carried out also on the ground that the EAW concerned the offences, which, according to the

Polish law, had been committed wholly, or partially, in the territory of the Republic of Poland, as well as in Polish ships or aircrafts. Another case was not admissible on the grounds that the period of limitation for the prosecution had expired and the offences concerned were subject to the jurisdiction of Polish courts.

The most remarkable fact emerging from the survey was that in three cases considered courts decided to refuse the execution of EAWs and surrender of Polish nationals on grounds of its unconstitutionality. The decisions were based on the judgment of the Constitutional Tribunal. The courts noted that both Member States involved in the procedure of surrender in the particular cases – Poland and Germany – decided that in this aspect the Framework Decision is contrary to their Constitutions. It is worth to mention, that although Poland delayed the date of stating binding unconstitutionality of surrender of Polish nationals, the German Constitutional Tribunal did not. Therefore, German courts refuse to execute EAWs concerning German nationals. All the requests of Polish judicial authorities concerning persons of German nationality, in some cases of double – both Polish and German – nationality have been rejected. Consequently, the courts came to a conclusion that it is reasonable to refuse executing EAWs coming from Germany, on the grounds of reciprocity. Polish provisions do not provide for refusal on grounds of lack of reciprocity. The justification for eliminating such grounds was a confidence in full reciprocity of commitments taken by the Member States of the European Union. Rationally – as assumes one of the courts – one would suppose that all the Member States would take necessary steps in order to implement the provisions providing for procedures of surrender pursuant to an EAW. However, Germany does not comply with the commitments under the European Union law. Such a situation leads to a conclusion that Germany is the only Member State "entitled to" refuse execution of EAWs, whereas Poland – bound by the same commitments as Germany rejected – is the Member State "obliged" to obey the requests. That would mean that the citizens of Germany enjoy broader rights than the citizens of Poland. The Regional Court deciding the case of execution of the EAW cannot accept such an inequity of rights. In conclusion they stated, that the surrender of a Polish nationals to Germany would constitute a breach of international law and Article 55(1) of the Polish Constitution, and refused the surrender.

3. The court decides to apply the pre-custodial measure in the form of provisional arrest (2 cases).

Firstly, it is necessary to issue an arrest warrant in accordance with the Polish law. Then, the executing court takes a decision on whether the requested person is to be surrendered. Pending taking that decision the person remains in custody. After hearing of the requested person or obtaining his or her consent to surrender, the executing courts decide whether to execute the EAW.

4. Court decides to execute the warrant without any additional conditions (5 cases).

In five cases, the courts examined solely if there have been any grounds for obligatory or optional non-execution of the EAW. Since there have been no obstacles,

which would make surrender impossible, they decided to execute the EAWs. They did not use the possibility to impose the condition that such person will be returned to the territory of the Republic of Poland following the valid finalisation of proceedings in the State where the warrant was issued.

Appeals (4 cases)

In three cases, the decision to execute the EAW and to surrender the requested person was upheld. In most cases the requested person appealed on the grounds of unconstitutionality of the surrender of a Polish citizen procedure. The courts refused to recognise such an argument, as the judgment of the Constitutional Tribunal stating unconstitutionality of these provisions has no binding legal force yet. The only quashed decision was nullified on the grounds that the executed EAW did not meet the requirement of giving a description of the circumstances in which offence was committed, including the time, place and degree of participation in the offence by the requested person, as required by Article 8(e) of the Framework Decision and Article 607z(1). The court of the first instance should have required additional information from the issuing organ but neglected the duty, which renders its decision to execute the EAW challengeable. Consequently, the practice of the appeal courts follows the same scheme as complied with by the courts of the first instance.

Conclusion

Despite the judgment of the Constitutional Tribunal, the European arrest warrant is now operational in most of the cases. However, some courts, for the reason that it fails to conform to Article 55(1) of the Constitution, refuse to apply the provision allowing for the surrender of Polish citizens to Member States, which does not allow for the surrender of its citizens, on grounds of reciprocity. They base on the Tribunal's judgment, insisting that it does constitute a valid ground for the refusal to surrender of a Polish citizen to a Member State, notwithstanding the 18 months of delay in the binding force of the judgment. Nevertheless, such cases remain in the minority. Taken as a whole, the surrender procedure simplifies the investigation and prosecuting of perpetrators and is an effective tool of the cooperation in the criminal matters between the Republic of Poland and other EU Member States.

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Jurisdiction of Administrative Courts in the Community Matters

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After over a year our presence in the European Union the time has come to ask whether the national judge has really become a Community judge and to what extent the Community law is present in the jurisdiction of administrative courts. We still have to wait for typical appeals examining the legal backgrounds on the day following 1 May 2004, but we can already say that the necessity to apply the Community law is fully accepted.

At the opening of the following deliberation it should be stated that of the most importance should be that the Community law does not cause any fear in national judges. The co-existence of the national legal order with the Community one has been strongly underlined. In the European Union, there is even a tendency to integrate the national and the Community legal systems into one common legal order. It is needless to say the process itself is slow, and more importantly – it concerns only some fields of law.

Preliminary Remarks

Before the accession of Poland to the European Union it was underlined that after 1 May 2004 the national judge would become a Community judge. This date was supposed to cause additional obligations such as correct, but first of all effective application of the Community law. It was underlined that the Community law takes advantage of the supremacy principle and should be applied directly in appropriate cases.

The necessity of respecting the supremacy principle of the Community law, ensuring the appropriate protection of individuals' rights deriving from the Community law, or the assessment of transposition of the directives – all these are new tasks for judges from the new Members States and these may cause significant changes in the way of examining cases by courts.

The principle of supremacy of the Community law, adjudication in the scope of the conformity of national rules with the Community law, or ensuring the direct application of the Community law pose a challenge for the national judges, which demands additionally very good knowledge of the Community law and judgements of the European Court of Justice (ECJ). Especially the extensive case-law of prec-

edential nature requires in every case very precise analysis of interpretation presented by the Court of Justice. It is not an easy task, as it requires both enormous knowledge and determination. As it is widely known, the body of rulings of the Court of Justice has been translated into Polish to a very small extent. The complexity of cases and the specific language used by the ECJ forces us to compare different language versions available to determine the content of the provisions of the Community law. However, this task requires at least a general knowledge of foreign languages.

The crucial matter in judicial practice is how to define whether the case is a "Community one" or of purely national character. When the dispute concerns only national subjects or when it lacks any Community elements (e.g. cross-border transaction), less experienced lawyers may come across difficulties with finding a link with the Community law. It is worth mentioning that even in the fields which seem to be unregulated at the Community level, there are still some Community law issues. It is not only about Community legal acts *sensu stricto* or the judgements of the Court of Justice. Special attention should be paid to respecting the general principles of the EU law.

The approach to the application of the Community law by Polish administrative courts in matters where the Community law is applied directly should be judged positively. At present, this kind of judgement can be made only *in camera*, because of the fact that the administrative court examines the correctness of an administrative decision on the basis of regulations applicable on the date of issuing the decision. Based on this fact, we can assume that the application of legal rules contained in the regulations (the instrument of unification of legislation of Members States) will be made with full understanding of the Community matters and the meaning of the regulations provisions. The accessibility of the Community acts in Polish is not a problem anymore, but still the quality of translations leaves much to be desired.

The issue concerning the application of provisions of the Community directives should be judged individually. It may be observed that in those fields where the directives only determine the aim of each legal regulation judges check the wording of the directive and compare it with the Polish acts of law. A directive is itself an instrument of law harmonisation between Member States. It differs from a regulation, which aims to uniform the law of Member States. Therefore, the difficulties in the assessment of the quality and the scope of transposition into Polish legal acts must be taken into account.

The references to the judgements of the ECJ or to the primary / secondary law may be found more often in the judgements of the Supreme Administrative Courts, as well as the "Community element", which was present in the judgements even before the accession. In the judgement of 12 February 2001 (case no. V SA 305/00), the Supreme Administrative Court (hereinafter: "the NSA") indicated clearly the necessity of interpretation "towards the integration" and underlined that the obligation of harmonisation of the Polish law with the Community law "does not depend only on adjusting the wording of law, but on the harmonisation of legal behaviour standards, which also involves the practice of application and interpretation of law." Reference

to the Community law was made in the matters concerning labour law, equal rights for men and women, competition law, customs law, banking law, tax law, trade marks and personal data protection.

The scope of reference to the Community law was and still is different – from general quoting of each Community legal rule to a detailed analysis of particular legal norm with the precise reference to the case-law of the Court of Justice. The fact that the Community law had not been an element of the Polish legal order in the pre-accession period caused that the ways of referring were different and the fact itself of referring to the Community law was rather rare.

After 1 May 2004, Polish administrative courts refer to the Community law more often in the justification to the judgements, which should be assessed positively. The reference to the Community law should be preceded in each case by a careful analysis of factual background. The additional argument of relevant Community law solution must correspond to the needs of the case.

However, the link between the Community law and the case in which a judgement is issued is not often clearly seen. Even though some fields are not regulated directly by the Community law, EU provisions can still have some influence on deciding the case. The general principles of the Community law, which enter *de facto* each field of life regulated by law, should be taken into consideration. The principles of the Community law cover the legal orders of all Member States. It happens very often that the Community principles are similar to the general principles of the national legal order. The assessment whether the current national case-law is in line with the judgements of the Court of Justice will be the key element to guarantee the proper level of protection. It might be expected that in many cases apparently identical principles derived from the Community legal order or those existing in national legal order will differ in the scope of premises of their application or in the level of protection. The identification whether in a given case the general principle of the Community law should be applied or converged with the national one will be decisive for the proper judgement. It is particularly vital in these fields of law which are not harmonised at the Community level. The proper application of the Community legal principles will demand from the judge a very good knowledge of aims, functions and criteria of application of each principle. It must be taken into account that the principles of EC law are not one uniform category. They can be divided into two groups – the ones that are recognised by the legal order of democratic countries (the legal certainty and protection of trust, proportionality, equality, transparency) and those that are fundamental rights of human beings. Special attention should be paid to the non-discrimination principle. Each Member State is obliged to treat citizens and goods from other Member States in the same manner as they treat their own citizens (the principle of national treatment). Every sign of unequal treatment in the same situation without objective justification should be immediately identified by the Polish judge – in particular in those cases where it seems that the Community law is not applicable.

We might hear that the prepared overview of judgements is made too early because of the fact that in administrative courts there are yet not many claims concerning the

breach of law by decisions of administrative bodies issued after 1 May 2004. Because of this, we are aware that only now in the judicial practice of the administrative courts the cases with the Community element will appear. On the basis of an analysis of the body of rulings of the Court of Justice it seems that the administrative courts are bodies which most often make use of the preliminary ruling procedure. We assume that the same might happen in our case. The Voivodeship Administrative Court in Warsaw (the court of first instance, hereinafter: "the WSA") has already referred a preliminary question to the ECJ. This first question should encourage other courts to make a reference to Luxembourg in all cases where they have justified doubts concerning the interpretation or the validity of the Community legal acts.

Chosen Judgements of the Polish Administrative Courts with the Community Element

In the period preceding the Polish membership to European Union the Community element in the jurisdiction of administrative courts covered two main issues: the assessment of application of the Community law (especially the provisions of Association Agreement) to the cases which happened before the accession and the issues concerning the preliminary ruling procedure (Art. 234 EC Treaty).

It is worth mentioning that from the date of accession the parties claim more often the inconsistency of Polish legal rules with the Community ones and they indicate the obligation of the Court of last instance to make a reference to the ECJ.

The most important judgements concerning the specific issues of preliminary questions and intertemporal rules of the Community law application were issued in the fields of taxation and customs. The chosen judgements of administrative courts will be divided because of the case-matter (taxation, customs and other fields in the jurisdiction of administrative courts).

Tax Law

In its judgement of 31 May 2004, in the case no. 101/04, which concerned the right to deduct input VAT with regard to non-taxable transactions, the NSA, when deciding the compliance of the Polish provisions of the law on value added tax and excise duty with EU law, cited the relevant ECJ judgements and relied upon the fundamental principles of the common VAT scheme.

It is important to state that one of the judges made a *votum separatum*, finding it inadmissible to put an obligation upon the taxpayer, not provided for in the national provisions, solely by referring to the wording of the EU directives and the ECJ judgements.

The judgement of the court must be regarded as a correct one. One must not forget that it was delivered in the point of time when the scope of applicable provisions of EC law and the ECJ judgements was the most difficult to define.

It is hard to state clearly whether the court is obliged to apply the *acquis* in the cases where the final administrative decision was delivered before 1 May 2004 and the judicial review of that decisions takes place after that date.

On the one hand, it must be welcomed that Polish administrative courts take into account the fundamental principles of common VAT scheme when applying Polish VAT provisions. On the other hand though, it must be pointed that the court's decision, which is based solely on the arguments derived from the Community legislation may lead to the unjustified application of those provisions, which causes, as the *votum separatum* author suggests, putting upon the taxpayer the obligations not required by national provisions. The correct weighing of the influence of ECJ judgements and the Community legislation on the assessment of national provisions which are applied in "purely internal" cases seems to be of greatest importance during the first period of the Polish membership in the EU.

The NSA in the judgement of 7 June 2004 (case no. FSK 87/04) pointed out that the provisions of the common VAT system and the Polish VAT system are identical as far as it concerns the taxpayer's right to deduct input VAT. Moreover, the court referred to the common principle derived from the First VAT Directive, that VAT tax places the burden on the final consumer.

Similarly, in the NSA judgement of 5 May 2004 (case no. FSK 2/04), the court cited the relevant ECJ judgements which concerned the fundamental character of the taxpayer's right to deduct the input tax, as a guarantee of neutrality of the value added tax.

In the judgement of 15 October 2004, case no. FSK 617/04, the NSA gave its statement on possible reference to the principles of the common VAT system when assessing the compliance of Polish legal acts in cases where factual background is dated before the date of accession.

In the referred case, the claimant raised the argument that the interpretation of the provisions of Polish legislation (namely, Act on the tax on Civil Law transactions, and the Tax Statute) should take into account the standards of the EC law on the tax on raising the capital set in the secondary legislation and the ECJ judgements.

The NSA clearly stated that such an assessment is not permitted, because of intertemporal reasons. Furthermore, it ruled that: „The obligation of harmonisation of the Polish law in the pre-accession period required that the binding Polish law provisions had to be adjusted to the European standards by way of interpretation. Such an action would be justified if there were no doubts as to the application of a provision of Polish law, but not in the situation, as it happens in the examined case, when the grammatical interpretation allows to read its meaning correctly. In such a case, even if there has been a difference between the provision of Polish law and the Community provision, it must be acknowledged that the rational legislator, after the Association Agreement has been signed, intentionally delayed the adoption of some of the Community measures and it actually was entitled to do so."

Similarly, in the judgement of 22 December 2004 (case no. FSK 860/04), the NSA pointed out that the suggested need of harmonisation of the Polish VAT provi-

sions and the interpretation of them in compliance with the Community law, raised in an appeal by the claimant, can be of use only as it concerns the provisions of the Association Agreement, due to intertemporal reasons. It was one of the many cases where the NSA pointed out the difference between the approximation of national law and the obligation to ensure full compliance with the EU law (see also the judgement of the NSA of 22 December 2004, case no. FSK 868/04).

The case concerning the refusal of decision delivery stating the excessive amount of the personal earnings tax was a good opportunity for the Court to give a statement on the party's request to refer for a preliminary ruling to the ECJ (the NSA judgement of 21 October 2004, case no. FSK 571/04). The party's motion was dismissed mainly on the basis that the proposed preliminary question fell outside the jurisdiction of the ECJ. Nonetheless, the justification to the decision of the Court contained important thoughts concerning the correct way of dealing with the party's motion of referring for a preliminary ruling. The court reminded the purpose of the procedure provided for in Art. 234 of the EC Treaty and emphasised that the right to refer a preliminary question could be exercised only by the court or tribunal. However, that in fact does not exclude the possibility of a party's motion persuading a national court to refer to the ECJ. The NSA ruled that the appropriate procedure of deciding upon the claimant's motion as well as the form in which a preliminary question should be referred to the ECJ, is governed by the national procedural rules (the Polish Law on proceeding before the administrative courts).

The NSA ruled that the decision on the party's motion to refer the question to the ECJ should be delivered in the form of a court's decision. Due to the fact that the Polish Law on proceeding before the administrative courts does not contain any specific provisions governing the procedure of referring a preliminary question to the ECJ, provisions of Art. 106 § 2 of the Law should be regarded as the legal basis of a party's motion for a reference to ECJ.

When the court decides to refer to the ECJ, either *ex officio* or having examined the party's motion, such a reference should be based on the provision of Art. 234 of the EC Treaty. Finding the party's arguments unjustified, the court rejected the motion in the form of a court's decision based on Art. 162 of the Law on proceeding before the administrative courts. The court emphasised that such decisions do not need a separate sentence, they are not subject to appeal and do not need written justification. However, regarding the provisions of the last indent of Art. 234 of EC Treaty, the NSA when dismissing the party's motion is obliged to state reasons of such a dismissal. The NSA cited the relevant ECJ judgements regarding the sufficient *vacatio legis*, and pointed out that the Community principle of non-retroactivity may be restricted only in exceptional cases. Retroactive application of the provisions of EU Treaty is not permissible in the case when the relevant facts arose before the date of Poland's accession to the EU.

The judgement in the abovementioned case deserves approval. Particularly, the NSA correctly emphasised the court's obligation to give reasons of dismissal of the

party's motion to refer a question to the ECJ. It guarantees the appropriate protection of the party's rights derived from the Community legislation.

The obligation to give reasons for the dismissal of the reference to the ECJ firstly – ensures that the party is informed about the motives which led the court to a particular decision, and secondly – the NSA is obliged to state why it assumes that the obligation provided for in Art. 234, third sentence of the EC Treaty, is not binding in a case brought before it.

The lack of national provisions governing the procedure of referring preliminary questions to the ECJ by administrative courts, together with the doubts as to the application *mutatis mutandis* of Art. 125 of the Law on proceeding before the administrative courts, shows that this matter should be clarified by legislative action.

Recently, administrative courts began to deal with the cases of excise duty on second-hand vehicles. Doubts as to the conformity of the Polish Law on excise duty with the EC law, brought in the media and commented by the doctrine, caused that the first decisions of administrative courts in that matter were impatiently awaited.

The judicial practice of Polish courts shows currently that there exist different approaches to the question of the conformity of Polish excise duty provisions with the EC law.

In the judgement of the WSA Olsztyn of 23 February 2005 (case no. I SA/Ol 16/05), the court repealed the decision of the customs office dismissing the party's motion to declare the overpaid amount of excise duty. However, the reason for that was not the statement of non-compliance of the national law with the EC legislation, but the fact that the administrative body did not fulfil the obligations required by the national provisions on administrative procedure. As the WSA stated: „the argumentation raised by the taxpayer in the justification of his motion and in the appeal against the decision of the customs body of first instance, was in fact passed over. The customs bodies while justifying their decisions, referred merely to the constitutional rules, not taking into account the heart of a dispute, which is the obligation of administrative bodies to apply the Community law. When settling a dispute, the customs office may not refer tritely to national provisions and justify its decision by stating that they are not competent to decide on the violation of the principles of the Polish Constitution. The administrative body must take into account the relevant Community legislation as well as the ECJ judgements." Moreover, the WSA pointed out that: "the assessment made by the customs office must be reflected in the justification of its decision. In the present case, where the party raised several objections as to the compliance of relevant national provisions with the EC law, the administrative body cannot just make a general statement that the party's arguments are unjustified, referring to the obligation to apply the binding national law and the lack of competence to decide on the unconstitutionality of the relevant excise duty provisions."

The WSA Lublin did not have any doubts that the Polish law on excise duty on second-hand vehicles complies with the EC law. As it stated in its judgement of 11 February 2005 (case no. III SA/Lu 728/04): „The Community law does not restrict the right to levy an excise duty on the acquisition of second-hand vehicles from the

territory of other Member States, provided that similar domestic products are not treated in more favourable way." According to the WSA, the chosen criterion of levying the excise duty on second-hand vehicles – the occurrence of first registration of the vehicle on the territory of Poland – guarantees that there is no difference in the treatment of a vehicle which was not previously registered in Poland and is a subject of national transaction and a vehicle which was imported or was a subject of inter-Community acquisition. That led the court to the statement that there was no infringement of Art. 90 of EC Treaty (see also the case of the WSA Lublin of 11 February 2005, case no. III SA/Lu 690/04).

But in another judgement of 25 May 2005 (case no. I SA/Lu 77/05) the WSA Lublin changed its former position and decided that the Polish legislation on excise duty on second-hand vehicles is contrary to the principle of non-discrimination.

In the justification to the judgement, the WSA emphasised the obligation of Polish courts to ensure the effectiveness and direct effect of the EC law and referred in detail to the party's arguments as to the violation of fundamental principles of the Community, that is the free circulation of goods (Art. 25), the prohibition of quantitative restrictions on imports and measures having equivalent effect (Art. 28) and the principle of non-discrimination in tax matters (Art. 90), citing various relevant ECJ judgements. The court took into consideration the objection raised by the party as to the violation of Art. 90 EC Treaty, but dismissed the party's claim with regard to the provisions of Art. 25 and 28 of the EC Treaty.

The WSA stated that the provisions of Art. 80 para. 1 of the Law on excise duty read together with paragraph 7 of the Regulation on excise duty rates are not in accordance with the principle provided for in Art. 90 of the EC Treaty, as interpreted by the ECJ. Furthermore, the court emphasised the binding force of the ECJ judgements and the administrative authorities' obligation to apply them effectively.

The existence of the abovementioned doubts concerning the conformity of the Polish provisions on excise duty with EC law was surely one of the main reasons which led the WSA Warsaw to refer to the ECJ for a preliminary ruling on the interpretation of Art. 25, 28 and 90 of the EC Treaty. The WSA sought an answer whether the EU Law precludes national legislation on excise duty on second-hand vehicles (decision of the WSA Warsaw of 22 June 2005 in the case no. III SA/WA 679/04).

Cases concerning excise duty were definitely the first ones where the need to confront the Community legislation with the national law is clearly seen. Those cases concern the factual backgrounds occurring after 1 May 2004, which causes the obligation of the courts to take into account *acquis communataire,* in such a way that its effectiveness and priority is ensured. The judgements delivered so far show that Polish courts are not afraid of deciding of the incompatibility of Polish provisions with the EC Law. It must be noted, that the WSA Olsztyn gave proper justification to abovementioned judgement. It was correctly pointed out that the lack of justification to the decision of administrative body concerning the objections of the party as to the European law has to be regarded as a violation of the principle of convincing the parties – one of the fundamental principles of administrative procedure. It is hard

to acknowledge that the objections connected with the Community provisions are treated as a "second-category" objections, which somehow only "support" the objections as to the national law. The national legal order and the Community one are both parts of Member State's legal system and their significance cannot be differed, especially by giving less importance to the Community law. The sentence must be also approved with regard to the arguments of the Court concerning the reply to the party's claim. Administrative body's arguments of "not being entitled to confront national provisions of law with the Community law" or referring to the obligation of applying the national law binding at the relevant time show that they are unaware of the obligations set upon them by the Community law. The judgement of the WSA Warsaw of 27 April 2005 (case no. III SA/WA 163/05) is also worth mentioning in that regard. The court pointed out that the arguments of the administrative court given in its reply to the appeal are in contrary to the EC law. The reference of the administrative authority to the "lack of competence to confront the national law with the European legal order" is clearly against the Community principles. Administrative authorities must be aware of the obligations set upon them by the Community law, and those new, additional obligations must be exercised in the event of incompatibility of national law with the EC Law. However, the current activities of the administrative bodies show that the state of EC law knowledge is not satisfactory, which makes the abovementioned judgements even more important.

The decision of the WSA Warsaw to refer a question to the ECJ must also be warmly welcomed. There are still doubts whether such a reference was necessary or the court could rather decide by itself. However, the existing divergences in approaches and the different effects of the incompatibility with the specific provisions of the Treaty justify the need to seek ECJ guidance. Moreover, such a decision shows that Polish judges are aware of their right to seek assistance of the ECJ if in any doubt on the interpretation of the Community law.

Customs Law

In the field of customs law, the judgement of the NSA of 12 February 2001 (case no. V SA 305/00) can be seen as the very first one, in which a Polish court directly dealt with the Community law. It emphasised the need to interpret the Polish law "towards the integration" and showed the influence of the Community legal order on deciding the cases before the accession of Poland to the EU. The NSA also pointed out the necessity of harmonisation of national law with the EC law by way of judicial interpretation.

In a number of cases in the field of customs law, the parties claimed the violation of the Community law by the decisions of customs offices being made contrary to provisions of Art. 68 and 69 of the Association Agreement. Mostly, the factual background in those cases arose in the period before the date of accession.

In its judgement of 28 July 2004 (case no. GSK 310/04), in reply to a party's motion to refer a question to the ECJ as to the interpretation of Art. 68 and 69 of the

Association Agreement, the NSA decided: "The wording of Art. 234 of the EC Treaty clearly shows that if the court of a Member State is faced with a question, the resolution of which is necessary to deliver a decision, that court may refer a preliminary question to the ECJ. If such a question is raised in the proceeding before the court whose decisions are not subject to appeal, then this court is obliged to refer to the ECJ. The question may be referred to the ECJ only if the issue concerns the interpretation or validity of the Community acts, is directly connected to the case brought before the court and it is doubtful for the court. Otherwise, the obligation of the courts of the last instance to refer the question proposed by the party to the ECJ, would in fact transfer the decision-making process from the national court to the ECJ and that is not the role of the Tribunal." In the referred case, the NSA stated that the objections raised by the party did not meet the criteria set in Art. 234 of EC Treaty, which allowed for finding the motion inadmissible (see also the judgement of 10 August 2004, case no. GSK 320/04).

In its judgement of 24 June 2004 (case no. GSK 686/04), the NSA clearly stated that it was not entitled to apply the Community law in all cases when the relevant facts occurred before the accession of Poland to the EU.

The NSA pointed out, that the reference to binding tariff information, based on the Commission regulation and the argumentation, that the Community regulations have priority over national law, can be claimed by the party as an infringement of the rules of procedure. The intertemporal issues made the party's appeal inadmissible.

he NSA, in its judgement of 25 May 2004 (GSK 53/04), found once more the objection of infringement of Art. 68 and 69 of the Association Agreement unjustified (see also the judgement of the NSA of 2 June 2004, case no. GSK 633/04).

In the judgement of 2 June 2004 (case no. GSK 611/04), the NSA found the party's claim concerning the infringement of Art. 68 and 69 of the Association Agreement unjustified. The court stated that: "the provisions of the Customs Code are based on the provisions of the 1994 Agreement on the application of Art. VII of GATT, which were incorporated in the Customs Code."

In the judgement of 13 June 2004 (case no. GSK 302/04), the NSA stated that: "In the examined case, the event (delivery of the customs declaration), which was the reason of the administrative and judicial procedure, as well as the decisions of the customs authorities and the judgement of the NSA were delivered before 1 May 2004. From that date Poland, as a Member State of the European Union, is bound by the provisions of the EC Treaty. Regarding that the reference to the provisions of Art. 28 of the EC Treaty is unjustified, because it cannot be applied in the examined case." The NSA also found unjustified the application of Art. 10 para. 4 of the EU Treaty. Moreover, with regard to the definition of the "approximation of law" provided in Art. 68 of the Association Agreement the NSA ruled that: "The necessity of approximation of law emphasised in the abovementioned provisions is addressed mainly to the national legislator. However, the authorities which are to apply that law in the pre-accession period (the administrative bodies and courts) should interpret the national law as close to the meaning of the Community law as possible. Such an interpretation

is definitely possible and desired, however that does not mean that in the pre-accession period, the Community provisions were to be applied directly. The provisions of the Association Agreement, which is an international agreement, do not contain any restrictions as to the relevant decision-making on the basis of national law. However, they do contain an obligation to approximate the national law with the Community legal order. The application of the provisions which bind the Member State from the date of accession – *inter alia* the provisions of the Community Customs Code – to the facts and legal relations which occurred before that date, could be considered only if the activities of the public authorities of the associated State were found contrary to the provisions of the Association Agreement or one of the fundamental principles of the Community law (e.g. the non-discrimination principle, the principle of free movement of goods). Such an infringement did not occur in the referred case (see also the judgement of the NSA of 7 February 2005 (case no. GSK 1472/04).

In the NSA judgement of 4 February 2005 (case no. GSK 1402/04), the court found the party's motion for the reference to the ECJ unjustified. The NSA ruled: "The objections raised by the party cannot be regarded as an issue defined in Art. 234 of the EC Treaty. That makes the party's claim unjustified, because the referred matter in the proceeding before the Council of Association does not concern the issue which is directly connected with the referred case. Therefore, the decision of the Council of Association is not necessary to deliver the judgement. In that regard, the legal effects of the decision of the Association Council are of no importance" (see also the NSA judgement of 13 January 2004, case no. GSK 1179/04 and the NSA judgement of 30 August 2004, case no. GSK 815/04).

Deciding the case no. I GSK 168/05 (judgement of 6 May 2005) the NSA presented an extensive argumentation on the dismissal of the party's motion for the reference to the ECJ and on the other objections concerning the non-application of the EC law. The NSA reminded the purpose of the preliminary ruling procedure and emphasised the necessity to consider it's applicability in the light of intertemporal rules. The court pointed out that it must be decided first whether the referred case is "purely national" or a "European" one. The justification to this judgement contains an extensive analysis of the party's proposal of questions to the ECJ. The analysis covered the admissibility and advisability, together with the argumentation of the court with respect to the dismissal of the party's motion. The judgements of the ECJ, which the party was referring to, were also examined in detail. The NSA also showed its opinion on the retroactive application of the secondary Community law, and emphasised once more that the application of EC law to the facts which arose before the accession is justified only in exceptional situations.

Others

Besides the judgements of administrative courts presented above it is worth emphasising that the Community elements have also occurred in other NSA judgements, even in these fields which are not so strongly harmonised with the Community

law as indirect taxes or customs. It is also the reason why these kind of references are not so widely justified by ECJ case law and relevant Community provisions. The relevant references were made in the data protection cases (e.g. case no. OSK 829/04 or case no. I OPS 2/05) and trade marks cases (e.g. case no. GSK 864/04)

Conclusions

As it might be seen from the presented judgements with the Community element, in most of the cases administrative courts have not accepted the parties' claims concerning inconsistency of Polish legal provisions with the Community ones. So far practise has not shown any unwillingness of judges to apply the Community law. The accepted solution results mainly from the character of the Polish administrative procedure.

The claims were rejected mainly because of intertemporal rules. In a number of cases, the party's arguments were based on ECJ judgements, which were not to be applied in the examined case.

The judgements presented contain the fundamental procedural solutions concerning reference for the preliminary ruling to ECJ and the aims and the scope of Art. 234 EC Treaty, which is of enormous importance for further judicial and legal practice.

The adjudications in the scope of intertemporal issues of the Community law or the statements concerning the obligations of administrative bodies have to be assessed positively. The fact that justification of the courts according to the claims in the scope of the Community law can be found more often in the judgements, also deserves approval. The administrative courts on their own tend to quote the relevant ECJ judgements.

The first preliminary question referred to ECJ shows that the Polish courts are aware of the possibilities (and in the case of the NSA – the obligation) of making use of the procedure determined in Art. 234 of the EC Treaty. It also allows to expect, that this instrument will be used more often in the future.

We are of the opinion, that further judicial practice will be even more interesting, because of the possible revision of the administrative decisions based on directly applicable Community legal provisions.

BOOK REVIEWS

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A. OTT, K. INGLIS (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process*, T.M.C. Asser Press, The Hague, 2002, 1116 pp.

The objective of this impressive book is to provide a comprehensive and structured guide to the enlargement process for academics, practitioners and students. To this end, the editors have undertaken a massive challenge of covering a large variety of legal fields, with contributions from fifty-two authors.

The book is divided into three parts. Part I provides an outline of the legal, political and historical background to the EU enlargements. It explores the structures of the EU/EC and the pillar system, the participation of the EC, Member States and candidate countries in the international organisations, previous enlargements, and devotes a section on the Stabilisation and Association Agreements and Partnership and Co-operation Agreements. Part II fills an important gap in the literature by providing the first comprehensive account of the position of international agreements in the national legal orders of the individual candidate countries (most of which have now joined the EU), with a special focus on the implications of the Europe Agreements. The contributions in this part also offer insights into relevant national case-law and constitutional issues pertaining to EU accession. Part III, which forms about two-thirds of the book, explores in detail the specific fields addressed in the Europe Agreements and other Association Agreements, such as the free movement of goods, agriculture, fisheries, persons, services, capital, competition, approximation of laws, environment, economic and monetary policy, taxation, justice and home affairs, and social policy. The chapters in this part start with an overview of the evolution of, and the state of play in, the particular field of EU law. Although such overviews inevitably remain somewhat superficial, they provide a sufficient basis for then exploring the approximation process in the candidate countries. These include issues arising from the Europe Agreements, the EU's pre-accession instruments as well as national policy documents. A number of the chapters conclude with a case-study, examining the experiences of an individual candidate country. For instance, Ryszard Cholewinski provides an in-depth account of the adoption of the *acquis* in the field of Justice and Home Affairs, an area which has been a "moving target" due to fast legislative changes. His general part is followed by a case-study on the Czech experience. Rainer Arnold and Kirstyn Inglis explore the approximation in the rather costly field of environmental law, posing the question whether new Member States might in the future resist the introduction of Community environmental legislation on the grounds of cost-benefit ratio or disproportionate advantages. By way of another example, Adam Lazowski explores the approximation clauses in the Europe Agreements, offering valuable insights into the rich debate on the legal aspects of approximation in the Polish legal literature.

The book could have perhaps included a broader analysis of the social and economic issues pertaining to the approximation process, and an assessment of what lessons might have been learnt for future enlargements. However, this would admittedly have gone beyond the rationale of the volume – to serve as a "handbook", especially as it is already rather long, with more than a thousand pages. Another unavoidable weakness of the book lies in the fact that some of its parts have become outdated after the completion of the accession process. For instance, the Accession Agreements have ceased to exist for the ten countries that have joined the EU, and the national constitutional landscapes have undergone changes following the EU-amendments that have been introduced into the constitutions. Nevertheless, the book remains a very useful source of reference, in particular for those dealing with future enlargements.

The editorial work for the book has been of an excellent standard, bringing the numerous and diverse contributions together in a way which gives the book a unified and coherent feel, with the chapters being written consistently in a clear and accessible manner. Contributions from well-established authorities (e.g. Marise Cremona, Steve Peers, Rainer Arnold, Vilenas Vadapalas, Andrew Evans, Elspeth Guild, etc.) have been successfully combined with those from younger experts (e.g. Adam Lazowski, Annemarie ter Heegde, Erik Evtimov, Roman Petrov, etc.). Unlike many other books on the topic, a substantial number of contributors come from the candidate/accession countries, which allows for a deeper insight into the views of these countries and of the practical challenges faced by them.

Overall, the book provides a very valuable contribution to the research on EU enlargement. Its main strength lies in the systematic and comprehensive coverage of the topic, by virtue of which it complements well the existing literature that has mainly focussed on selected aspects of enlargement.

Anneli Albi

ULRICH MAGNUS (ed.), ***Global Trade Law. International Business Law of the United Nations and UNIDROIT Collection of UNCITRAL's and UNIDROIT's Conventions, Model Acts, Guides and Principles***, Sellier, European Law Publishers, München, 2004, 535 pp.

The collection gathered by professor Ulrich Magnus contains texts of hard and soft law formulated by two major sources of international trade law codification: United Nations Commission on International Trade Law (UNCITRAL) and International Institute for the Unification of Private Law (UNIDROIT) issued until 2004. The texts indicate a tendency for harmonisation of global trade law, that very often is only a 'soft' harmonisation. Thus they encompass conventions, model acts, principles and some guides thereto in the field of international business law. For the Conventions the state of ratifications is recorded. The instruments are put into nine chapters.

The opening general chapter contains the UNCITRAL Model Law on Electronic Commerce of 1996, its Guide of Enactment, the UNCITRAL Model Law on Electronic Signature of 2001 and UNIDROIT Principles of International Commercial Contracts of 2004.

Then, the Chapter on sales follows with two United Nations Conventions: on Contracts for the International Sale of Goods of 1980 and on the Limitation Period in the International Sale of Goods. The third chapter covers the issue of services, containing the UNCITRAL Model Law on Procurement of Goods and Construction of 1993, the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) and its Guide to Enactment. Further, the transport instruments are included, thus the United Nations Convention on the Carriage of Goods by Sea of 1978, United Nations Convention of the Liability of Operators of Transport Terminals in International Trade of 1991, and CMI/UNCITRAL Draft instrument on the carriage of goods by sea of 2003. The acts concerning the payment and security issues are enlisted in chapter five: United Nations Convention on International Bill of Exchange and International Promissory Notes of 1988, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit of 1995, the United Nations Convention on the Assignment of Receivables in International Trade of 2001, the UNCITRAL Model Law on International Credit Transfers of 1992 and UNIDROIT Draft Convention on substantive rules regarding securities held with an intermediary of 2004. Other commercial contracts include UNIDROIT Convention on International Financial Leasing of 1988 and the UNIDROIT Convention on International Factoring of 1988. The property rights cover the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects of 1995 and the UNIDROIT Convention on International Interests in Mobile Equipment. Then the arbitration acts encompass the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the UNCITRAL Model Law on International Commercial Arbitration of 1985, UNCITRAL Arbitration Rules and UNCITRAL Conciliation Rules. The final text is the UNCITRAL Model Law on Cross-Border Insolvency of 1997.

The main value of the book consists in gathering together this huge collection of texts relevant for practitioners and scholars working in the field of international business law.

Krystyna Kowalik-Bańczyk

DIETER BLUMENWITZ, GILBERT H. GORNIG, DIETRICH MURSWIEK (eds.), ***Die Europäische Union als Wertegemeinschaft***, Duncker&Humblot, Berlin 2005, 312 pp.

The book concerning the common values of the European Union gathers the papers presented during the 22nd Conference of the Study Group for Politics and International Law, that was held in March 2003, in Königswinter, Germany. The title of the collection could suggest it would examine the values respected in the European Union. However, the perspective undertaken in the book is different: its main aim is to examine if the new (at the time of conference still "candidate") Member States share the same values as the old EU Members. The editors declare that they wish to find and define fundamental common values of the "new" Europe. Therefore, they treat different subjects, that can be divided into two broad groups. First, there is a group of essays concerning the general European question of values, like: Christian origins of European identity, the possibility of creating a common Constitution for

Europe, the Charter of Fundamental Rights as a common catalogue of values respected by all Member States and finally the impact of Social Charter. Then the second part, concerning only a few of the new Member States, presents more a historic and, it seems, specifically German point of view on the preparedness of the Czech Republic, Poland and Hungary for participation in the European Union. This is followed by an essay on the readiness of Romania for accession to the EU and the paper on legal status of Kaliningrad region. The last issue does not really fit into the scope of interest signaled by the editors, which, however, does not influence its informative value.

The first paper, by Professor Anton Rauscher, presents the Christian roots of the European unification (pp. 19–27). The author first sets the landscape just after the second world war and the necessity of co-operation between the Western European countries. He presupposes that for this co-operation a certain alignment of respected values must have been in place. Therefore, he tries to indicate the main sources of those values. First of them is the Greek philosophy, with its respect for man and search of explication of God powers. The second source is the Roman heritage, based on the legal order and the idea of justice, that both guaranteed the possibility of living in peace. The third source is, according to Rauscher, the Christianity. He underlines that Europe was the first continent that accepted and adopted the teachings of Jesus Christ and that this fact influences the European values until the present times. This is the reason for the respect of human beings (the man is a picture of God) and the idea of equality of different people, whatever their social status or sex (people are all children of the same God). Thus, the Christianity, in its very different forms, rejoins all Europeans.

The following essay by Professor Hubert Isak explains if the European Union as it stood in 2003 had already its constitution (pp. 28–48). First, the author discusses the question of the aim of such a constitution and if it was necessary to create a new one. He is persuaded that the movement to create a constitution was the result of the spillover effect, known in the whole European process and that is was necessary from the point of view of EU citizens. He underlines that non-state actors can possess documents of constitutional character. Isak then analyses the particular aspects of creating the constitution of EU and describes in more detail the work of the Convent on particular provisions of the draft Constitutional Treaty. The author ends his essay with the optimistic statement that the time is ripe for the European constitution, which, as we know today, was not true.

The paper of Thilo Rensmann (pp. 49–72) analyses the fundamental values in the process of European constitutionalisation. He makes an analogy to the German history, comparing the slow introduction of values into German constitution that took place in two phases – first in 1919 and then in 1949, where at the second phase the values took an eminent place in the German legal order. This process was not welcomed by all German authors and similarly, the broad introduction of fundamental values proposed by the Charter of Fundamental Rights and the draft of European Constitution was seen by some as an overdoing, risking to introduce "a tyranny of values" (p. 51). Then Rensmann analyses if the provisions provided in the draft constitutional treaty would mean that the Union would became a community of values, but he states that the result is different – it creates only the *Wertverbundenheit* and *Wertgebundenheit*, not the *Wertegemeinschaft*. The community of values is already in place and the Constitutional treaty would not, according to the author, change much as far as scope and quality are concerned. But he sees the drafting of Constitution by Convent as an effort to persuade the public to believe that the Union is a community of values – it is visible in the preamble and in the normative part of the Treaty. He criticises the pathos of some provisions, indicating that it should not undermine the precision of legal expressions.

The Charter of the European Union as an expression of the fundamental European values constitutes the subject of Thomas Schmitz' paper (pp. 73–97). The author first presents the question of protection of fundamental rights before the Charter, the development of the Charter and its legal character. He underlines that the Charter does not contribute any new legal competence for the European Union, it is only a catalogue of fundamental rights respected in and by the European Union. He is of the opinion that the Charter cannot be invoked by the individuals before the European Court of Justice, not even as a source of inspiration (p. 78). The content of the Charter is however important – not only because there is a final concrete list of fundamental rights that European Union recognises, but also because it often sets the scope of those rights in a particular way, excluding certain solutions (i.e. narrow scope of social rights). The author thus regrets that the inclusion into the draft Constitutional Treaty was not followed by some modifications of the content of the Charter.

Alexis von Komorowski in his essay on "The Contribution of the European Social Charter to the European community of values" (pp. 99–157) first argues that there is nos common model of welfare state within European Union (p. 101). But the process of globalisation of economy forces the EU to adopt the common set of social rights, as the national level of protection would not be enough. He then turns to the major legal document developed on the European level – the European Social Charter of 1965 created under auspices of the Council of Europe. Von Komorowski compares the Charter with the European Convention of Human Rights, indicating the reasons for much smaller and less spectacular success of the former (if any success at all). Then he analyses the legal character of the Charter, if its rights are binding on the states that are parties to it and if it is directly applicable. He also indicates that the Charter is influencing other self-contained regimes – giving an example of European Court of Human Rights that has started to control the infringements of Social Charter (p. 152). Within the EU, the Charter is referred to in the preamble of the Treaty on European Union as well as in the article 136 of the Treaty on European Community. Its influence is also visible in the part of the Charter of Fundamental Rights concerning the principle of solidarity. The author concluded thus that the rights guaranteed in the Charter belong to the fundamental rights protected by the European Union (despite the *à la carte* principle in acceptance of the Charter by EU member states).

Further, the book contains four essays concerning the problem of the so-called *Vertriebenen* (expelled): Germans that had to leave Hungary, Czechoslovakia or Poland after the Second World War. Their placement in the book concerning European Union values is not directly explained but it can be presumed that the values common for EU that are to be exposed are: respect for property rights and – more plausibly – prohibition of mass expulsion and the prohibition of discrimination founded on nationality. The papers give the information that during the Potsdam conference the governments of Great Britain, United States and Soviet Union agreed that the German population that remain in Poland, Czechoslovakia or Hungary should be transferred back to Germany (p. 171, p. 216), still they attribute the responsibility to the Central European countries enlisted.

The series is opened by Dieter Radau essay on "The Right to Homeland and the European Union" (pp. 159–168). The author argues that the right to homeland belongs to the set of rights included as the so-called Copenhagen criteria. Their respect is necessary in order to let a candidate country effectively become a member state of European Union. In order to define the right to homeland, Radau first refers to the Stuttgart Charter of German expelled (*Charta der deutschen Heimatverbriebenen*), then presents the provision on protection of minorities in the Constitution of Hungary (1993), then gives his own definition of homeland (p. 160) and con-

cludes by citing articles 4 and 8 of the resolution of UN Commission on Discrimination of 22nd August 1997. Then, he examines whether the art. 6 of the Treaty on European Union covers the right to homeland and states that it is not protected by this provision. He argues, however, that the ratification of the Charter of Fundamental Rights, the right to homeland would become such a right on the basis of article 19(1) that prohibits collective expulsions.

The second of those papers, by Dieter Blumenwitz, entitled „The Beneš Decrees. A Stocktaking in the Light of the Czech Negotiations for the European Union," criticises the Czech position presented in 2002 that those decrees, expropriating Germans in 1945, were still in force and respected by the Czech Republic. He particularly examines Decree no 115, that excludes any possibility of prosecuting crimes committed during the expulsion and bars any civil claims. Blumenwitz is of the opinion that Czech Republic should be held liable for reparations because expropriations were based on the act of injustice. Christoph Pan and Beate Sibylle Pfeil in their paper "The Beneš-Decrees and their Legal Effects on the German Minority in the Czech Republic" (pp. 183–196) expose similar artuments. So does Siegrid Krülle in her essay concerning similar problem in Poland: "The Expulsion and Expropriation of Germans by Poland. On the Present Juridical Situation under Consideration of the Accession of Poland to the European Union" (pp. 201–249). She presents – as it seems – a fairly personal opinion on the responsibility and compensation issues, claiming that despite the clear declaration of Kanzler Schröder of August 2004, the restitution of property should take place. In the meantime, the author clearly states that during the accession negotiations (p. 238) the questions raised in her paper were not discussed (as not covered by Community or Union competence).

The relatively short paper by Jànos Wolfart presents the question of rehabilitation and compensation of the Hungarian Germans (pp. 251–255). First, the author presents a brief summary of the fate of Hungarian Germans during the years 1944–1953. In 1990, the Hungarian Parliament recognised in its resolution that the deportations that started in 1944 and the resulting emigration of Hungarian Germans constituted an unfair process. Due to this document, two bills on compensation were issued, but the author judges them as insufficient.

Next, Monica Vlad discusses the legal questions of European integration in the case of Romania (pp. 257–269). She opens her text with somehow pessimistic quotation of Emil Cioran *Cahiers,* indicating that the specific and tragic history of this region influenced and shaped people's perception of the world as a cynical place. She sincerely states that should the Romania be not accepted into European Union, there is no other alternative scenario, no other direction invented by the political powers. She describes in realistic and fairly critical manner the Romanian reality as a financial oligarchy living in symbiosis with state bureaucracy (p. 259). She indicates three major problems blocking any further economic development of the country: the already mentioned bureaucracy, the instability of the legal system and the corruption. Thus, the author judges that even 2007 as a date for accession is unrealistic as the country would not be prepared (mainly in people's attitude) to be a member of the EU (p. 261). Further, she describes works on the formulation of the provisions of the new Constitution that are introduced in order to align the Romanian legal order with *acquis communautaire.* She enlists the areas of law that would need further improvement in order to harmonise them with the European standards.

The last paper in the collection is the one by Oxana Vitvitskaya, entitled "The Legal Status of the Kaliningrad Region" (pp. 271–289). It discusses first the recent history of this region, then its status within the Russian Federation and finally the influence of eastern enlargement on the situation of this city.

The collection of essays gives a specific overview of German opinions on the meaning of the European Union as the community of values. Whereas some opinions are clearly predicable (like the one on the Charter of Fundamental Rights), other are a bit striking for lecturers from the new Member States. They can, however, pave the way to the greater mutual understanding and are thus to be welcomed, even if not agreed with.

Krystyna Kowalik-Bańczyk

DIETER MAHNCKE, ALICIA AMBOS, CHRISTOPHER REYNOLDS (eds.), ***European Foreign Policy. From Rhetoric to Reality?***, College of Europe Studies, P.I.E.-Peter Lang, Brussels 2004, 381 pp.

The study undertaken by the College of Europe aims at presenting a comprehensive overview of both the past and the future of the second pillar of European Union (EU), with the main focus on "making" of the Common Foreign and Security Policy (CFSP). Fifteen authors, both academics and practitioners, provide valuable guidance for those interested in this ever growing field of European Union activity.

The book is divided into two parts. The first one is of a more general character, presenting the theoretical basis for creating common foreign policy, its institutional structure and history. The second part contains ten case studies, aiming at presenting the foreign policy "in action", indicating very different experiences, achievements or sometimes mismatches within EU policies.

After the general introduction written by the editors, the book is opened with an essay by Dieter Mahncke, concerning "The Need for a Common Foreign Policy" (pp. 27–42). After explaining the notion of CFSP as being in "tandem with national foreign policies" (p. 28), the author enlists the aims and instruments of this policy, the relationship between foreign and security policy, as well as the actors participating in it. He is confronting the idea of "spill-over", used to spread European activities in various fields, with the actual will of member states to lead a shared common foreign policy. In conclusions, he indicates various motives for the CFSP, among those the will to increase the EU role on international level, will to create a counterbalance for the United States of America and to promote European interests. He does seem to be persuaded that there is a genuine and continuing need for stronger CFSP.

The second chapter by Christopher Reynolds (pp. 43–59) presents differences among national foreign policies of member states. The author examines whether a certain convergence among them is conceivable and if it takes place. Finally, he analyses how the enlargement of the European Union might influence the existing differences and convergences. Reynolds sees the trend towards the centralisation of foreign and security policy making in Brussels as an ongoing but irreversible process.

Wolfgang Wessels examines in chapter three the conditions that must be fulfilled so that a common policy could appear (pp. 61–96). The author reviews different schools of thought on the EU role in international politics and tries to indicate the possible model for functional CFSP and ESDP.

Inge Govaere presents in chapter four (pp. 97–115) the legal aspects of external relations of the European Union. She indicates that this aspect of analysis is often neglected in academic writings, whereas it could easily explain the unpromising results of Common Foreign and Security Policy. Govaere underlines that big expectations put on the European Union as global actor are not followed by corresponding and enabling legal provisions in the Treaty on European Union. This might be one of the main reasons for the disappointment in second pillar. She also draws the attention to the fact that the provisions of draft Constitutional Treaty in fact retained the separated second pillar and did not enhance the institutional and operational ability of action of the EU in this field. The solution of appointing a Common Foreign Minister is criticised by the author as not solving the problems connected to intergovernmental nature of the second pillar (and possibly shifting this method to other external relations) and endangering the institutional balance between the Commission and the Council.

Further, the history of European foreign policy follows in chapter five written by Roberto Francia and Miguel Angel Medina Abellán (pp. 117–164). It describes the way to the present state of the common policy, focusing mainly on the issue of coherence, explaining several reforms of the system introduced during its functioning. The authors conclude by stating that the process of creating a genuine Common Foreign and Security Policy is an "unfinished" story that most probably will remain open.

At the end of the first part, Alicia Ambos in chapter six (pp. 165–192) completes the general picture of the second pillar with the presentation of institutional framework of both Common Foreign and Security Policy and Security and Defence Policy. She touches the question of relationship with NATO as well as the problem of the lack of democratic control over this field of activity.

The second part of the study provides ten examples (called case studies) of European performance on international scene. They present a useful picture of advantages and shortcomings of common European actions in the second pillar. They concern respectively: transatlantic relations, Iraq, Kosovo, Macedonia, Mediterranean region, Middle East, Great Lakes, Russia, Asia and Latin America. Thus virtually the whole world is covered, and so are the major "sore points" in the world politics.

The first case study by Dieter Mahncke concerns transatlantic relations (pp. 195–208). The author focuses on two questions only: first, if EU is a single actor in its relations with the United States, and second – if it is perceived as a single actor by the United States (US). Both questions are in fact answered negatively by Mahncke. He argues that there is a variety of policies in different member states. There is no coherent and single policy of the European Union towards United States. This is a result of the fact that the US are too important for particular member states to pass the lines into EU hands only and the states do not wish to renounce the power to influence their relationships with America by themselves. The United States do not look at European Union as a single actor as far as foreign policy is concerned (whereas in fields like trade, finance or development they do).

Peter Van Ham comments on the issue of European reaction on 11th of September 2001 in the Iraq context (pp. 209–226). He indicates that what he calls "renationalisation" of policies in Iraq hinders an effective development of EU policy in this field (p. 213). The main lacking elements for effective European presence in Iraq are – according to Van Ham – the leadership and the vision. The 2003 Security Strategy might be a first step towards an "Americanisation" of the European Common Foreign and Security Policy (p. 226) being a panacea for this differentiation of opinions.

In the next study, Miguel Angel Medina Abellán examines the EU policy towards Russia (pp. 227–239), looking first at trade and technical help issues and then at the security questions. He underlines the problem of specific ambitions of this previously dominant power that feels a slight marginalisation of its role. Even though there is a mutual need of co-operation, it remains, as the author calls it – "token act" – with still uncertain contours, due to the lack of clear-cut plan of co-operation from the EU side and Russian failure to keep its contractual commitments (p. 238).

Armin Michael Mayer and Christine Stockhammer present – as they call it – the "success story" of European action in Kosovo (pp. 241–254). They focus on the European Union as a civilian power able to bring substantial changes in the Kosovo region. Next, still in the Balkans, Kathrin Ahlbrecht examines the European policy towards Macedonia (pp. 255–275). She looks at the actions undertaken both during and after the crisis in 2001, indicating that some important conclusions must be drawn from this lesson of first EU military mission, if the EU wants to undertake such actions effectively in the future. She is fairly optimistic that the European Union has proved in the *Concordia* mission that it is able to manage the crisis in Balkans effectively, while managing the internal crisis within its structure (connected to the Iraq issue in 2003). She also underlines that it was a clear case of efficient NATO-EU co--operation.

The focus turns from Balkans to Mediterranean region in the next two essays. Chapter twelve by Miguel Angel Medina Abellán (pp. 277–291) analyses two initiatives undertaken in this region: the Partnership programme and Common Strategy. It is followed by Alicia Ambos' and Ines von Behr's analysis of the Middle East Peace Process (pp. 293–315), focussing on the relations and parallel actions of the EU and its particular member states. They even use the term "Brusselisation" to indicate that the role of EU is growing in member states policies towards Middle East problem, resulting in the enhanced coordination.

Then, Anja Fiedler in chapter fourteen presents the only paper concerning EU approach towards Africa (pp. 317–334). She examines the Union's performance in the last decade in the Great Lake Region, beginning with the failure during the Rwanda genocide in 1994 and the EU coherent intervention in Congo in 2003.

Radhia Oudjani presents in chapter fifteen the broad issue of EU-Asia Relations (pp. 335–355). The relations commented cover North and Southeast Asia. The author tries to determine the question whether the EU has a successful policy towards Asia and examines if EU is able to act as one actor in this continent. Both questions must be answered as negative. The role of the member states remains vital, their policies are too divergent to reconcile therefore no common strategy is in place. The European declarations on values do not match the reality in European – Asian relations and the Asian partners themselves prefer to lead contacts with particular member states and not with European Union as such.

The case studies are closed by chapter sixteen concerning the foreign policy towards Latin America, written by Alejandro Ribó Labastida (pp. 357–370). The term Latin America encompasses all the Hispanic countries of South America. The author first presents the history of European-Latin American relations, from the "void" before the eighties until the "blossoming" in the nineties. He underlines that the main EU focus is on developing consistent trade relations with this region, the questions of spreading stability and enhancing democratic standards staying in the background. Labastida underlines that the best EU action is to foster regional integration processes so that the groups of countries follow the EU model. He is highly critical towards the European policy in agricultural relations with Latin America, indicating that it contravenes the claimed European values and should be abandoned as quickly as possible in order to help the region develop.

The whole study ends with the conclusions by the editors who try to draw conclusions on the main weaknesses and the main suggestions how to improve EU's performance in the second pillar. They underline the constant widening of the scope of European interests, followed by the deepening of coherence (by institution building and coordination of policies). Still this doubled process cannot be perceived as fully effective. The weaknesses are: lack of coherence, lack of single European voice (both institutionally and nationally), gap between expectations and declarations on one side and capabilities on the other. But they underline the hope connected with typically European feature: capability of learning from crisis and defeats. They indicate that the process of "policy learning" and "institutional learning" is in full swing. The EU had experienced how to avoid mistakes committed in the nineties in Balkans and Africa, and more recently in transatlantic relations. The process of deepening is unavoidable due to the fact that the European Union is a global actor that has to take responsibility for at least some of the world's affairs. The authors admit that the actor is not fully formed – citing Roy Ginsberg's expression that European Union is "more than a dwarf and less than a superpower" (p. 374), but this diagnosis indicates that it can "make a difference" at the international scene, which on the whole is already optimistic.

Krystyna Kowalik-Bańczyk

JOËL MOLINIER (ed.), ***Les principes fondateurs de l'Union européenne***, Presses Universitaires de France, Paris 2005, 280 pp.

The aim of this study undertaken by a group of French academics led by Professor Joël Molinier is to present a comprehensive overview of seven "founding" principles of the European Union: freedom, democracy, respect of human rights and fundamental freedoms, human dignity, equality and solidarity. The authors try to explain why those principles were gradually introduced into the Community legal order and what is and could be their role for both individuals and member states. The novelty of the book consists of looking at those seven principles as the founding ones, indispensable for the legitimate functioning of the European Union in the eyes of its citizens.

The book is divided into three parts. The first one explains the situation of founding principles within EU legal system. The second identifies the sources of inspiration for formulating those principles. The third reveals the characteristics of all seven principles as they stand now in the primary law and the provisions of the Charter of Fundamental Rights. The study is closed with an epilogue on the activity of the Convent working on the Constitutional Treaty in the field of fundamental values issue.

The authors begin by distinguishing several notions used in EU texts: – values, rights and principles, then more specifically: the founding principles and the general principles of law. The usual distinction goes that the values are of moral nature, whereas the principles possess a legal and political meaning (so in the Statute of the Council of Europe). The same distinction would at the first sight be made within the EU legal order but the authors underline that the division is blurred because of inconsequences in the use of those notions in the Charter of

Fundamental Rights (p. 17). In some cases, they are used as if they were synonyms (Art. 3 of the Preamble of Charter of Fundamental Rights), in other the distinction set in the Council of Europe *acquis* prevails. The difference between principles and rights is more complex. The main dissimilarity consists in the possibility of judicial control in the case of non-respect. The rights (i.e. Art. 6 para. 2 TEU) are guarded by the European Court of Justice, whereas the principles are only a source of inspiration. The authors seem to consider the analysed principles as those protected by the Court and enjoying direct effect – thus belonging to the category of "rights" rather than "principles" despite the notion used in the European texts (p. 24). Then, the differences between the founding principles and the general principles of law are presented: the first expression is used in the Treaty on European Union. This fact reveals that the seven principles are at the basis of the Union as such, whereas the general principles of law are more rules of legal technique (p. 26), being the rules of protection for individuals in relation with public authorities (p. 29) and belonging to the unwritten primary law (p. 32).

After defining the nature of founding principles, the authors try to trace the origins of the list of principles. They indicate that they were first mentioned in the seventies, after the first enlargement of the Communities. Then they reappeared in the programs of creating the European Union, and were finally included in the Treaty on EU. The functions of those principles are interestingly presented: the first function is to legitimate the European political power. The second (linked with the first in our opinion) is to constitutionalise the European Union. The authors underline that they give a new basis for powers of the national constitutional courts, calling it a "supraconstitutionalité externe" (p. 58). This idea might be contested bearing in mind the doctrine of the primacy of Community law. The authors seem to suggest that the national constitutional courts might control the alignment of EU actions with the founding principles and in the case of divergence refuse to accept the EU decisions. The third function would be to create a greater coherence in the functioning of the Union (p. 62). Next, the external dimension of those principles is examined. An interesting overview including some of those principles in the agreements concluded by the Community (the authors use the expression "Union" throughout the whole text) is given. A tendency for "export" of some of the values in the agreements on co-operation and development might be observed, though a certain lack of consequence and coherence is underlined (a certain "géometrie variable" is at place, p. 81).

The second part of the study concerns the "identification of founding principles" and it analyses all the other sources of inspiration different than the primary law. Thus, it first turns to national constitutions of the member states, covering all twenty four existing constitutions (but for the United Kingdom). That solution might be surprising as the meaning of founding principles was formulated long before the last enlargement of the EU. On the other hand, it might mean that the authors are of the opinion that the inclusion of new states might change the scope and interpretation of the founding principles, even if not radically. The second source is quite naturally the European Convention of Human Rights and Fundamental Freedoms, the third the declaratory Community acts and finally the doctrine of European law. The analysis of the national constitutions must have been preceeded by choosing criteria for selecting the principles. They are twofold: the basic principles mentioned in the preambles and first articles of the constitutions, and the principles that lie at the basis of functioning of a state. Twenty two constitutions possess such catalogues (Denmark and Belgium do not have any explicit mention of those). Within this group three categories of principles are to be found: structural ones (defining the state), values to be followed and rights to be protected and guaranteed by

the state. The authors conclude that two types of national constitutions might be distinguished after this analysis: those where the stress is put on the functioning of state institutions and those that focus on the protection of citizens. None of those models prevail in setting the scope of the founding values of the European Union.

As to the European Convention on Human Rights, the authors underline that this act was not a major inspiration in creating the Charter of Fundamental Rights of the European Union (p. 95), but they explain it by the fact that the Convention is already "appropriated" by the Community law thus being its part (p. 96). Therefore there was no need to repeat its provisions in the Charter. Then the authors present the process of this appropriation of the Convention by the Community legal order. First being a source of inspiration (p. 96), it gradually turned to be an integrated part of this legal system, thought its formal status as a source of law for the EU is still problematic. The authors underline that the Convention is a material source of rights within EU (based on Art. 6.1 and 6.2 TEU, Art. 46 TEU, Art. 220 TEC, Art. 49 TEU, Art. 309 TEC), which was clearly confirmed by the provisions of the Amsterdam Treaty. Further, the authors indicate similarities and differences in applying certain methods by the European Court of Justice and the European Court of Human Rights, giving an example of using general principles of law.

The analysis of the inspirations for founding principles in the declaratory acts is opened by an explanation of what those acts are. They encompass the whole so-called *soft law* that "contaminate" the *hard law* by influencing its development and further interpretation (p. 117). By presenting different non-binding acts in which the founding principles were mentioned (though not necessarily under this name), the authors try to present a certain evolution of ideas that finally led to the inclusion of those principles into binding provisions. The authors declare that four types of documents: resolutions of the European Parliament, declarations of the European Council, interinstitutional declarations and conclusions of the presidency of the Council would be analysed but in fact they mainly look at the resolutions of the Parliament. They notice a certain interdependence of the founding principles and conclude that they are indivisible (p. 120).

As to the identification of founding principles by the doctrine – the authors analyse (it has to be underlined) only the French language literature. That analysis led them to distinguish two groups of thoughs – first encompassing the authors who do not distinguish between founding principles and the general principles of law, and the second covering those who separate the general principles of law from other principles that they treat as a different group of European principles (those authors are called *avant-gardiste,* p. 132). None of the authors from the second group speak of the "founding" principles of the European Union as such.

The third part of the study presents the founding principles as they stand in the Treaty on the European Union and in the Charter of Fundamental Rights. The presentation is opened with the principle of freedom that was included from the beginning in the founding treaties (preamble of the Rome Treaty, Art. 2), then also in the Charter of Fundamental Rights and the draft of the European Constitution. Initially, it was mainly perceived as a freedom of movement, being a subjective right for individuals within the Community. The Single European Act broadened this strictly economic meaning to a political one. Since the reformulation of Art. 6 of TEU in Amsterdam, this principle becomes the founding principle of the European Union. The European Court of Justice does not refer to the principle of freedom as such, it always refers either to a certain type of freedom (i.e. free movement of persons) or to the principle of freedom of a particular nature, like the freedoms inspired by ECHR, i.e. freedom of expression (p. 151).

The principle of democracy implicitly existed according to the authors since the beginning of existence of the Communities, as only the democratic states might have participated in this form of integration. But as the authors underline, for a long time the democratic features of the Community institutions were not reflected. Only the direct elections to the European Parliament started the trend to democratise the institutional scheme. The Maastricht Treaty introduced several solutions in order to democratise and – the authors note this paradox – only then were the critics claiming democratic deficit to be heard. The democratic character of the candidate country is since Amsterdam a *conditio sine qua non* of admission to the EU, and the breach of this principle may be subject to the sanctions added in Art. 7 and Art. 309 TEC. The respect for democracy is also conditioning development of international relations of the Community with some third countries. The authors underline that there is no hint in Art. 6 as to the scope of the principle of democracy. The Charter of Fundamental Rights does not mention it at all, though they speculate that the Chapter on citizenship contain some rights connected with this principle (right to the good administration, right to vote, p. 171). In the jurisprudence of the ECJ, two distinguished references are to be seen – one to the democratic society and the other to the principle of society. According to the authors, the scope of principle of democracy is narrower than that attributed to the notion of democratic society (p. 173). It implies the democratic representation of the people by the parliamentary assembly. This is confirmed in the ECJ's jurisprudence where the notion of principle of democracy appears each time when the Court is protecting the prerogatives of European Parliament (p. 173). An extension of the scope might be seen in the idea of introducing a good governance, promoted by the Commission (p. 175) and in promoting a participatory democracy, particularly when the Parliament is not included in the legislative process (i.e. T-135/96 *UAPME v. Council,* ECR [1998], p. II-2335). Since the Amsterdam Treaty, it also seems to encompass the idea of transparency and access to documents of institutions but the authors note that the link between transparency and democracy is not consistently raised by the Community courts (p. 179). Although it cannot be said that the principle of democracy is a-judicial (*a-juridique*), it is still a principle with mainly political functions (p. 182). Its central purpose is to create a model of society on which the European construction is based.

The next principle examined is the principle of respect for human rights and fundamental freedoms. The analysis begins with the well known information that the initial Communities were not vested with any powers to deal with this questions but gradually the rights were recognised in the jurisprudence of ECJ, as the economic freedoms could not have existed without the protection of fundamental rights (this notion and the notion of human rights are used interchangeably in the text). The authors underline that the initial formulation of Art. 6 TEU implied a passive conception of human rights (those rights imposed themselves on the Union), whereas the Treaty of Amsterdam introduced an "active" conception of human rights, stating that the Union "is founded" on them (p. 189). It acquired a protective status, as the respect for human rights is not only verified before accession to the EU, it can also be politically controlled under Art. 7 TEU. Additionally, Art. 13 TEC introduced a general clause of non-discrimination, the ECJ gained some degree of control over this respect as far as European institutions are concerned (Art. 46(a) and (d) TEU) and there is a communautarisation of migration policies in title IV of TEC. The authors conclude that the respect of human rights is no longer limited to an economic context (p. 202). This has several consequences – the Union has to reconsider the principle of equality and apply it in an undifferentiated manner (what is called *approche unitaire*, p. 203). It has to respect the human rights with no temporal limits and it has to treat them as a interdependent set of rules, of which none can be privileged or

neglected (the authors mean mainly the possible deny of social rights). Each of the rights has to be interpreted in the light of the others.

The principle of the rule of law (*Etat de droit)* is examined in three contexts. First, the multiple references to this principle are analysed. Then, its scope is set as encompassing the earlier analysed rule of democracy and respect of human rights. Thus its content is not clear and the use of this notion usually reserved for the state might create some confusion. The idea of "Community of law" as a corresponding notion is widely used by the ECJ in order to justify some of the protective measures undertaken by it but the coherence with the "*Etat de droit*" as it is defined in the national laws is persisting because it can also be seen as an autonomous concept, issued for the new legal order created by the CE and not the consequence of being the set of countries respecting this rule (p. 222). Thus it can be seen as a structural rule, organising the relations between legal rules, institutions, legal orders and member states of the Community.

The shortest analysis is focused on the principle of human dignity. It does not appear explicitly in the legal texts (only the general notion of human rights appears), it is only included in the Charter of Fundamental Rights (Art. 1). The authors underline that it is mainly referred to by the Advocates General, and it is in the light of their opinions *un principe à contenu variable* (p. 228). The same expression is used to describe the principle of equality. It usually describes an equality in front of the law (*égalité formelle, constitutionelle*). According to the authors, the Court of Justice does not distinguish the principle of equality from the principle of non-discrimination (p. 238).

The last examined principle is solidarity. Similarly to human dignity and equality, it does not figure in the Article 6.1 TEU. It only appears in the preamble of the Charter of Fundamental Rights. It is the "youngest" of the principles at stake in the study. The authors underline that there might be a confusion if the solidarity constitutes a principle or rather a policy (p. 257, 259). The place contributed to the solidarity in the Charter indicates that it is a principle. However, its content reveals – according to the authors – that it is a policy. This results from inadequacy of the title "Solidarity" with the rights enlisted therein (p. 261).

The study makes the point of proving the distinguishable character of founding principles. Even though the book was written with the implicit assumption that the Constitutional Treaty would be adopted in the near future, its analytical value of the principles contained in the founding treaties and the Charter of Fundamental Rights remains useful for all those interested in the functioning and development of the European Union.

Krystyna Kowalik-Bańczyk

SEYED ALI SADAT-AKHAVI, ***Methods of Resolving Conflicts Between Treaties***, Martinus Nijhoff Publishers, Leiden–Boston 2003.

International law addresses many different types of conflicts. These include conflicts between conventional norms and customs, as well as conflicts in the interpretation of treaties and whether certain components of such treaties are binding or non-binding, or whether various international treaties conflict with one another. The book focuses primarily on conflicts

between treaties, the resolution of such conflicts and the difficulties connected with the resolution of such conflicts.

The first part of the book focusses on the concept of conflicts, types of conflicts and the method of establishing the existence of a conflict. The author first describes the role of interpretation in ascertaining the existence of the conflict, and second, if the conflict cannot be resolved through interpretation, then test of reconciliation is considered (i.e. "two norms shall be considered as reconcilable if there is at least one way of complying with all their requirements," p. 43).

The second part describes the methods of resolving conflicts under conventional law by interpreting the Vienna Convention on the Law on Treaties of 1969. The author focusses on the effects of the concept of *Jus cogens* and their role in resolving conflicts. Sadat-Akhavi also focuses particularly on Article 103 of the United Nations Charter that established the hierarchical order between the obligations of UN Member States and established conflict-resolving clauses, which can be useful tools in resolving existing conflicts between the parties of the treaty. The author also analyses whether there are any norms of customary law that can help resolve conflicts between treaties; and examines in this context other sources of international law – namely general principles of law and decisions of international tribunals, although what we later find in the "conclusions" of the work: "the rules for resolving conflicts should be mainly sought in conventional law" (p. 249).

In the last portion of the text, the author focusses on the process of resolving conflicts and outlines steps that should be taken to resolve conflicts between teaties, first by ascertaining that the conflict has indeed appeared and whether there are any conflict resolving-clauses between the parties, through ascertaining the willingness of the parties to resolve the conflicts, and finally, the principle of "priority of the later treaty over the earlier one". Sadat-Akhavi also examines exceptions to this rule concerning certain types of treaties, for example, the principle of "more favourable provisions" in human rights treaties or the principle of "maximum effectiveness" in the context of private law issues.

Overall, this work explains the great practical and theoretical importance of methods for resolving conflicts between treaties. We can call this book fundamental in this field, providing a detailed analysis with hundreds of examples. This book, not only fills a gap in this area of international public law, but is a perfect source for academics in the field of international law and students who are new to treaty law and treaty interpretation.

Karolina Wierczyńska

DOMINIC McGOLDRICK, ***From '9-11' to the Iraq War 2003, International Law in an Age of Complexity***, Hart Publishing, Oxford and Portland, Oregon 2004.

The cover of the book depicts a photograph of New York after the attack on the Twin Towers of the World Trade Centre, which were the symbol of democracy, capitalism and freedom. This is symbolic, as the book is focused on the two wars that were started by the United States after this attack: the War Against Terrorism [Afghanistan] and the Iraq War in

2003. The author analyses the issues and events that led to the Iraq War; presents the reaction of international organisations such as the European Union, NATO, as well as governments, especially the approach of the United States. McGoldrick describes how these events have raised challenges for international law and international relationships, as they were the turning points in the history of international law.

The first chapter presents the evolution of international law and international relationships introducing the theory of global complexity to help us understand the problems described in the book.

In the second chapter, the author presents the link between the two wars, discussing whether the wars changed the international legal system.

The following chapter presents the problem of applying human rights law during conflicts, such as the status of "illegal combatants" imprisoned at Guantanamo Bay, or Military Tribunals established (by the US) to try the accused with no right to appeal.

The next two chapters focus on the moral, legal and political aspects of the war on Iraq, by analysing the Security Council resolutions issued in the "Iraq case" and the problems connected with the interpretations of those resolutions, as they are interpreted in a way preferred by the US and Great Britain. The author poses such questions as "who can interpret Security Council resolutions and should such interpretations be made by consensus or by majority?" He also presents the US approach to international law and its legal system.

In the sixth chapter entitled "Winning the Peace: An Iraq for the Iraqis" (which is quite symbolic), the author presents the post-war situation in Iraq; the question of human rights, economic reconstruction and international aid. The bulk of the chapter describes the question of accountability for the past, such as the establishment of the special tribunal to try those accused of the gravest crimes, such as genocide or crimes against humanity.

In the last chapter, McGoldrick concludes that the problems presented in the book consider alternative visions of the world order, and finally puts several questions which should be answered soon: what is the future of the UN, what will be the long-term effects of the war on terrorism and what are the ramifications of the Iraq war on the international legal order, is the structure of the Security Council relevant given the challenges of the new century? Although these questions are not new, they have appeared many times before, as in the case or Rwanda or Kosovo, but this is maybe the first time in history when we have been presented with a proposal to reform the old world order or to accept a new one. McGoldrick does not give any answers, but sums up his opinions with the sentence: "if the world did change, then perhaps legal changes inevitably follow" (p. 196).

Ongoing discussions about reforming the United Nations (especially the Security Council), the UN Charter system, the questions of international security and so on, make this book very timely. Overall, it can be treated as a brief summary of the events after "9-11" highlighting the aspects of international public law, showing its links to morality and policy. It can be used by teachers, students or by people merely interested in questions of terrorism and the global response to terrorism.

The book includes primary sources, which make it easy to read, but in the age of the internet it seems to be old-fashioned, unnecessary custom, as all the documents, especially the Security Council resolutions (40 pages in the book!) can be easily found on the UN website.

Karolina Wierczyńska

ENZO CANNIZZARO AND PAOLO PALCHETTI (eds.), ***Customary International Law on the Use of Force, A Methodological Approach***, Martinus Nijhoff Publishers, Leiden–Boston 2005.

This book, as described in the acknowledgements section, is the result of a workshop under the same title that was organised in the summer of 2004 and which closely followed the events of the Iraq War of 2003 and its immediate aftermath. Issues related to the use of force, humanitarian crises and terrorism are currently of great interest in furthering the theory of customary law as it relates to the use of force and its ever-evolving dimensions. The work is a methodological analysis of the state of law given this new reality. The list of people who contributed to this research project is quite long, so rather than mention them all, I will only focus on the problems raised and presented in this debate.

The book, edited by Enzo Cannizzaro and Paolo Palchetti (both of whom are experts in legal issues relating to the use of force), includes a foreword by Bruno Simma plus three distinct chapters. Each of these chapters consists of several articles focusing on the different problems directly connected with the subjects of the chapters.

The first chapter raises the issue of the role of states in ascertaining customary international law as it relates to the use of force. It includes articles concerning the main issues connected with customary law such as the question of *opinio juris*; the universality of customary norms, or its breaches, and the effects of breaches of norms (whether it is possible that a breach of norm can thus create a new law). One of the authors discusses the establishment of new customary rules by analysing several conflicts that were the impulse to form the new rules (for example rules relating to European Colonialism or to territorial conquest). In this context, there is also a discussion about consistency and uniformity, or the lack thereof, with respect to rules regarding the use of force and the distinction between them in international law.

The second chapter focuses on the role of non-state actors in determining customary international law on the use of force. The non-state actors specified in the chapter make a strange collection, as they include political organs of the UN and the ICJ, as well as NGOs and other international organisations. We also find comments of public opinion and a report of the International Law Commission. It is not that they have nothing in common with the question of customary law and the use of force, but the titles of the articles and their logical connection with one another is not wholly accurate or logical (this is my only formal complaint about the work).

The third chapter presents the problem of the use of force and the protection of the fundamental values of the international community, describing "the balancing-of-values approach," which on the one hand highlights the necessity of protecting human rights and on the other, the importance of a state's territorial sovereignty. The chapter also focuses on the core values of international law, namely protecting human rights and the prohibition of the use of force. Conclusions that are based on the state practice are disappointing as "the present system, based on sovereignty, still leaves a protected space for states to commit gross violations of human rights within their jurisdiction" (p. 292).

Overall, the book includes debates and discussions of different expert views and visions, thus allowing the reader to look comprehensively at the problem of the use of force. It is

undoubtedly a useful source of knowledge. Additionally, the book makes a great contribution to legal analysis and the theory of law and the use of force.

Karolina Wierczyńska

ADEMOLA ABASS, ***Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter***, Hart Publishing, Oxford and Portland, Oregon 2004.

This text was published in response to the lack of original comprehensive studies focused on the problem of collective security and regional organisations. In short, when the Iron Curtain collapsed, international organisations started playing a greater role in the maintenance of international stability and security, and this phenomenon is a major new development in modern history. The author further defines the term of regionalism and analyses the provisions of the United Nations Charter as it relates to collective security, especially after the Cold War.

Chapter VIII of the United Nations Charter allows for "the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security" as long as they are consistent with the "Purposes and Principles of the UN". This chapter was established in order to regulate the formal relationships between the United Nations and regional organisations, as well as establishing a framework for a decentralised system of enforcement. According to Art. 53 of the Charter, "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council". Such a provision was made in order to limit the scope of the regional organisations and to prevent them from operating too expeditiously. However, as the author shows using the examples of ECOWAS in Liberia and NATO in Kosovo, the provisions of the Charter do not limit the acts of regional organisations, as the idea of collective security, as established in the UN Charter, is now obsolete and old-fashioned. This partly explains why the organisations act far beyond the provisions of the Charter. The author analyses in this context art. 2(4) and 103 of the Charter and whether those provisions, as originally directed to the member states, can be adequately used in relationships between the UN and regional organisations. He also questions whether acting beyond the provisions of the Charter violates the Charter in situations when it is being made during "consensual military intervention" (when the act is based on consensus).

The author concludes that in today's world, when Chapter VIII of the Charter has become obsolete for regulating the relationships between the UN and regional organisations, there is a great need to redefine or at least further develop the provisions of the Charter in order to make it correspond to the existing reality. Essentially, regional organisations should co-operate with the UN in the area of collective security on the basis of the UN Charter, and in order to make this co-operation full and effective and within a proper legal framework, the constitutions of the organisations themselves and the UN Charter itself should be redrafted to clearly delineate the duties and obligations of both.

Generally speaking, the text raises a number of important legal questions, in addition to analysing the problems of collective security relating to the provisions of the UN Charter. The author also examines a great number of contemporary comprehensive practices and provides a brief summary of the history of collective security, taking into account both the end of the Cold War and the origins of the term "collective security".

The book is generally well written and successfully conveys the meaning of several complex issues, although the structure of the book is not particularly logical. For example, the issue of collective security, which is, judging by the title, the most important topic, is first raised in the middle of the book.

Besides this drawback, I find the text to be a useful guide for readers focusing on the problems of collective security.

Karolina Wierczyńska

N. WALKER (ed.), ***Europe's Area of Freedom, Security and Justice***, Oxford University Press, Oxford 2004, 289 pp.

This book contains the papers for the Academy of European Law in Fiesole of 2002 (it is important to note that they were updated in 2003). It is divided into three parts and consists of six contributions altogether. It also contains comprehensive tables of cases, legislation and other instruments, as well as a very detailed index.

The first part consists of only one contribution, by Neil Walker. The essay has both introductory and theoretic character and, as the author points out, the subsequent contributions should be read in the light of it. On the other hand, the chapter provides an analysis of the Area of Freedom, Security and Justice (AFSJ) in the light of constitutional developments of the 2003 intergovernmental conference. In this context, one of the questions put is: what the position of AFSJ is and should be within the European law seen as a whole.

Part two consists of three contributions and focuses on border controls, asylum and immigration. Kay Hailbronner discusses the issue of asylum. First, he gives us basic facts and statistics on the number of asylum applications filed in the Member States and then he informs the readers of the aims and problems of the common European asylum policy. He also makes an in-depth study on the substantive asylum law (identifying persons in need of protection, definition of a refugee, subsidiary protection *inter alia*), the asylum procedure and the return policy. In the conclusions, he points out a special role that lucid and transparent EU return policy should play in future AFSJ. Ferruccio Pastore's essay deals with the European entry control system. The author presents a detailed and meticulous study of its formation, structure and perspectives of development, leading to the establishment of the integrated external border management. Also, the content and limits of the Community competence in this field are analysed. Pescatore rightly stresses the importance of the integration of national agencies which could enable the creation of effective European control structures. A significant part of the essay is devoted to questions relating to 2004 enlargement. Steve Peers provides a very detailed analysis of family reunion in the European law. It is worth mentioning that his paper is not limited only to rules governing the family reunion of third-country nationals – the reunion

of family members of the EU nationals and of the third-country nationals under association agreements are also covered in his essay. The author concludes that, as for the first group, although these rules were criticised at the beginning, the situation changed with the adoption of the 2003 Directive.

The third part deals with police and judicial cooperation in criminal matters and is composed of two contributions. The aim of Christine van den Wyngaert's paper is to compare Eurojust and the European Public Prosecutor, that is to say – the institution which has existed for a comparatively short time on the one hand, and the institution which has been formally established only in the Constitutional Treaty, on the other. The author raises a very interesting question whether these two institutions should be complementary or rather combined in a single agency. And the last essay, by Cyrille Fijnaut, gives us a detailed review of the police co-operation within the AFSJ. One of the important issues analysed in her article is the branching of the police co-operation towards the first (the establishment of OLAF is a good example) and second pillars of the EU.

All in all, this book is still of a great interest to everyone interested in the AFSJ, although, as has been mentioned at the beginning, the essays were completed in early 2003. It constitutes a source of reliable information and a starting point for further studies.

Katarzyna Strąk

C. TOMUSCHAT, J.-M. THOUVENIN (eds.), ***The Fundamental Rules of the International Legal Order***, Martinus Nijhoff Publishers, Leiden–Boston 2006.

The presented book is a result of the meeting of *Société française pour le droit international* and the *Deutsche Gesellschaft für Völkerrecht* with special guests from Poland. The workshop took place in October 2004 and was focussed on the question of the fundamental rules of international law, namely *Jus Cogens* and obligations *Erga Omnes*. The variety of the authors and problems raised in the book is such that this article allows for focussing only on a few of them.

In the book, which seems to be fundamental not only because of its title, many of the raised issues, (from the introduction to the subject made by Paul Tavernier, who presents the problems of the identification of the basic rules and the authority that should define them, to the piece by Stefan Kadelbach, who makes the distinction between the *erga omnes* obligations, the peremptory norms, and the universal criminal law from the historical perspective), are connected with the peremptory norms and *erga omnes* obligations.

Another problem discussed in the book, the universal jurisdiction, is currently a very important legal topic. Andreas Zimmermann advocates that it should be possible to use the theory of universal jurisdiction in all the fields of international crimes, while Michael Cosnard takes a more cautious approach. This debate reflects a current discussion in the doctrine of international law, commenced by the invocation of the universal jurisdiction in *Eichmann Case* by Israeli Court on one hand, and on the other, the case of Yerodia Abdulaye Ndombasi (known as: *Kongo v. Belgium case*, or *Arrest Warrant case*) before

the International Court of Justice, which actually was not a step forward on the issue of the universal jurisdiction.

Another author, Władysław Czapliński sets out the origins of *jus cogens* and its regulation through the Vienna Convention on the law of treaties, highlighting a number of problems which appeared during the preparatory works for the Convention. Criticising the insufficiency in the definition of the peremptory norms, the author discusses problems connected with the establishment of the possible catalogue of *jus cogens*; the problem of who can invoke a violation of *jus cogens* and the question of the relationship between possible reservations to the treaties and *jus cogens*.

Going further through the book, Stefan Talmon's article attracts attention, describing the practice of *non-recognition* (the obligation not to recognise as lawful) in situations of illegal use of force or other serious breaches of *jus cogens*. The author presents several problems connected with *non-recognition*, namely, when such obligation should appear, whether the United Nations should be informed in the first place that serious breach occurred, and finally, what the timeframes of the obligation should be.

The *non-recognition* obligation is also presented as the minimum sanction for the breach of the legal order (this view is reviewed by Théodore Christakis), although, as the author admits, several other authors representing the doctrine continue to doubt the existence of such obligation.

In addition, the book also presents issues related to the right of third states to take countermeasures; the question of the immunities from jurisdiction; the status of prisoners of war as an example of *jus cogens*, and finally universal jurisdiction in civil matters.

The book is a thorough and close to perfect presentation of the opinions of the doctrine from both sides of the Rhine (and not only). Moreover, it is also a great source of knowledge as it consequently develops the question of the fundamental rules of international law and particularly the international legal order, presenting new trends and also conservative approaches to the issue. I find the debate presented in the book rather impressive and interesting.

Karolina Wierczyńska

P. EDEN, TH. O'DONNELL (eds), ***September 11, 2001. A Turning Point in International and Domestic Law?***, Transnational Publishers, Ardsley, NY 2005, 856 pp.

The events of September 11, 2001, gave rise to numerous analyses concerning the influence of terrorist acts upon political, economic, social and legal relations in the contemporary world. From the perspective of public international law, it became clear that a new chapter in the law governing the use of force was open. The UN Charter was drafted in 1945 as a reaction to a traditional international war waged between two or more States. Notions like aggression, use of force, armed attack, self-defence, etc. corresponded with a conflict of a State acting against another State. All the rules had to be reread and reinterpreted from the perspective of a new kind of armed conflict: a group of civilians attacked targets in a powerful State.

The volume edited by Therese O'Donnell and Paul Eden, both readers in international law at the Universities of Strathclyde and Sussex, respectively, contains papers presented at the conference at Sussex in March 2003. All the presentations were divided into seven parts relating consecutively to different aspects of the consequences of the attempt of September 11: influence upon international law, legitimacy of the use of force, concept of terrorism and responses to global terrorism, position and role of military tribunals and corresponding bodies towards international human rights law, responses of European States, Japan, and under domestic law of the UK and US, in particular in the domain of asylum and refugee law, and finally reporting on the state of international law after the events of September 11. Presentations were elaborated by leading British and international experts.

It is interesting that most of the authors expressed critical opinions about the developments in international relations after September 11. Serious doubts were presented as far as the intervention in Afghanistan was concerned; it is hard not to agree that the attacks against Afghanistan did not met a requirement according to which countermeasures (and other measures taken by the State concerned) can be used exclusively against the State responsible for violations of international law. Moreover, the abolishing of the Taliban regime does not suffice to legitimise the war. On the other hand, it was agreed – although with certain reluctance – that the US and UK accepted the intervention in Afghanistan based upon the self-defence without problems, even if the UN Security Council got some difficulties with the interpretation of the action under the Charter (cf. S. Kapferer, p. 33–34). We agree that the lack of a clear position of the SC is not very satisfying, we also share a critical opinion as to an evaluation of the US conduct towards prisoners detained at Guantanamo. The final conclusion of the first chapter of the book (shared by Ph. Sands in his comments) is clear: any reaction to terrorism activities must conform to international law; while the rejection of international law by the US was fully conscious and broke all fundamental principles of international order. It cannot therefore be justified.

Another important analysis was presented by Ch. Gray, perhaps the most illustrious specialist in the field of *ius ad bellum* under contemporary international law. Her discussion of possible justification of the intervention in Iraq deserves attention. She stated *inter alia* that the Resolutions 1368 and 1373 of the UNSC indicate that the Council was eager to reformulate the principles on the use of force under the Charter in order to adapt the interpretation of that instrument to the current needs of international law. Unfortunately, the intervention of the "Coalition of the willings" under the US direction made the modification of the traditional position of the SC impossible. On the other hand, the US tended to justify the intervention in Iraq by the doctrine of pre-emptive self-defence elaborated by President G.W. Bush and the team of his advisers. This attempt was never fully accepted by the UN and the European allies; it is also interesting that the US did not accept the justification of attacks by Russia against Georgia based upon the new understanding of the right to self-defence. We agree with the position that even if it would be possible to refer to self-defence as the basis of the intervention in Afghanistan, the same stance should be excluded as far as the evaluation of the attack against Iraq was concerned.

We do not intend to describe here the whole book edited by Eden and O'Donnell – however, one element is clear: British authors are much less favourable towards the Second War in the Gulf than the UK Government. This position is manifest from the first to the very last page of this valuable book.

Władysław Czapliński

M. FITZMAURICE, D. SAROOSHI (eds.), ***Issues of State Responsibility before International Judicial Institutions***, The Clifford Chance Lectures, vol. VII, Hart Publishing, 2004, 236 pp.

The codification of law on state responsibility aroused again the interest of writers and scholars in that domain of international law. In 2004, several academic institutions in London organised a joint seminar on international responsibility. Presentations by the most eminent scholars shown a panorama of contemporary practice in that field from the perspective of international judicial institutions, including the International Court of Justice, human rights agencies, but also from the point of view of recent developments relating to general issues of state responsibility in the relations between international law and domestic law. As usual, it is impossible to present here all the papers, so we shall limit the review to the most important and interesting ones. Judge Rosalyn Higgins, having reviewed the practice of the ICJ, made a surprising statement that the World Court usually makes a common statement about illegality of certain action and about state responsibility in this respect. Even more interesting is another observation: that the responsibility has never been stated in the cases relating to territorial issues. On the other hand, issues of responsibility should be discussed if the violation of obligations is raised as a central element of claims. However, even in those cases the statement on illegality allowed the Court to omit further consequences in the field of state responsibility for international delicts. I. Brownlie in his short sketch on the practice of the ICJ in the most important cases involving state responsibility: *Chorzów Factory*, *Corfu Channel*, *Nicaragua* and *Tehran Hostages*, analysed the most frequent misunderstandings resulting from the reading of the judgments. He concentrated upon issues of constitutive elements of state responsibility, including the relationship between the attribution of illegal acts and personal conduct (he clearly emphasised that the practice of the ICJ fully supported the concept of objective responsibility), and the relationship between the law on state responsibility and other areas of international law. M. Mendelson discussed the issues concerning the responsibility for the non-observance of provisional measures imposed by the ICJ, an extremely interesting question if we take into account recent developments. However, the conclusion is not optimistic: there is no sanction for the violation of those measures. An interesting study by Ch. Greenwood on the responsibility for the decisions of domestic courts constitutes an important input to the discussion led under European Union law on the responsibility for violations of law by judicial authorities. In particular, it is surprising that the notion of a denial of justice, perfectly known in the international legal writing, was rarely invoked in the practice of international courts. It is also interesting that the states should introduce an effective and just judicial system in order to guarantee the procedural rights of individuals. However, the scope of state responsibility for judicial acts is relatively limited, and local remedies have to be exhausted. M. Craven devoted his reflection to the analysis of the relationship between Art. 42 and 48 of the Draft on State Responsibility. In particular, he discussed the right to apply remedies in cases of violations of human rights. The question is crucial, as it touches the rights of different categories of states to take countermeasures against the perpetrator. We agree with the author that the interests of indirectly injured states while applying countermeasures are rather of non-legal nature (moral, political, etc.), but they constitute the only effective and efficient way of securing compliance by the states with human rights obligations. However, we would welcome any analysis of relationship between the two provisions of the Draft on State Responsibility with Art. 60 of

the Vienna Convention on the Law of Treaties, as in most cases countermeasures are applied by the other parties of the multilateral treaty violated by the perpetrator. Finally, B. Conforti discussed the case-law of the Strasbourg Court concerning the state responsibility for a breach of positive obligations (obligations to act); after a short analysis, he concluded that in the context of those obligations the issue of causality in the law of state responsibility for violations of the European Convention on Human Rights should be reviewed, and perhaps the distinction between primary and secondary rules of international law should be abolished. In our opinion, the discussion is interesting but perhaps it is useful to consider whether the application of the European Convention on Human Rights is not governed by specific rules, and the Convention constitutes therefore a self-contained regime under international law.

Summing up, we stress that the book under review is far from constituting a systematic lecture of the law of state responsibility as seen by the international courts, but rather contains an exciting substantive material for further reflection on the application and evaluation of law of international responsibility by the judiciary. It should be recommended to postgraduate and doctoral students possessing certain knowledge of the international judicial practice, and in particular familiar with the cases referred to in the particular papers.

Władysław Czapliński

A. ZIMMERMANN, R. HOFMANN (eds.), ***Unity and Diversity in International Law,*** Duncker & Humblot, Berlin 2006, 496 pp.

The book contains papers presented during an international colloquium organised under the auspices of the Institute of International Law at the University of Kiel, on the occasion of the 90th anniversary of the establishing of the Institute. The seminar concerned the development of international law and its impact upon the unity and diversity of international norms. Introductory papers to specific subjects were presented by the present and former collaborators of the Institute, and they were subsequently commented by eminent scholars connected with the Institute by different ties. Speakers elaborated questionnaires dealing with the following aspects of international law connected with the areas covered by the research of the Institute: law of the sea, special fields of international law (economic/ environmental/ humanitarian/ human rights), sources of law (treaties and customary law), non-state actors in international relations, application of international law in domestic orders, settlement of disputes, and law of state responsibility.

A number of interesting statements and analyses were presented during the seminar. The exhaustive presentation of all of them would not be possible within the framework of this Yearbook. We would like to concentrate upon some important issues. In the field of the law of the sea, D. König discussed a role of non-governmental organisations, showing their increasing participation in the development of law- and decision-making process within different international organisations (like the IMO). She also analysed specific questions of sources of the law of the sea, showing that currently no norm in that field could be granted a peremptory status, although some provisions of the UNCLoS can possible be regarded as having an *erga*

omnes effect. She also remarked that customary law, traditionally playing an important role in the field, gradually loses its importance because of the development of codification of international law. The final part of the presentation corresponds with another paper by B. Rudolf, discussing the dispute settlement procedures. The multiplication (or proliferation) of international courts certainly leads to discrepancies between judicial decisions taken by particular bodies. However, we are of the opinion that those inconsistencies are often exaggerated. In fact, the Tribunal of the Law of the Sea, like all other courts, refers to general international law including the law of state responsibility. Even if the decisions are different on some points, that is owed to specific subject-matters. The same scheme of presentation was adopted with respect to other special fields of international law referred to above. M. Heymann devoted her study to the issues of unity and diversity with respect to the law of treaties. In her opinion, all the specialised domains of international law are governed by the same substantive rules of the law of treaties, although there are some specific features: economic law is regulated mostly by bilateral agreements, that are rare in environmental law and law of the sea, and nearly non-existing in humanitarian and human rights law. Similar specificities can be observed as far as the conclusion of treaties is concerned. Human rights law usually develops in the framework of international organisations, while humanitarian law has been codified by international conferences. Environmental law, law of the sea and economic law at a multilateral level, are codified under the auspices of the United Nations. The international legal instruments regulating the two former domains show a tendency towards having certain effect with respect to third parties. However, the analysis shows clearly (and conclusions by the author confirm the stance) that no self-contained treaty regime has been elaborated, and specific features of international agreements regulating different subject matters do not amount to destruction of the unity of international law. That position was shared by commentators, M. Kohen and A. Pellet, as well as by the present author. A. Seibert-Fohr remarked that there is a trend to modify an approach to international customary law, emphasising the importance of practice in the law-making process. Such an approach can be recognised in the practice of certain judicial institutions including the Inter-American Commission for Human Rights and ICTY. However, that new approach has not yet been confirmed by the ICJ, and it is difficult to foresee whether the Hague judges would be willing to depart from the firmly established jurisprudence requiring for the last 80 years the co-existence of two elements: state practice and *opinio iuris*. We are not convinced whether the notion of "elementary considerations of humanity" really replaces the state practice in the reasoning of the ICJ. There is one more interesting remark by A Seibert-Fohr: the idea of fundamental values was extended from *ius cogens* to customary human rights and humanitarian law. We disagree, however, with the conclusion by a commentator, V. Gowlland-Debbas, that the differentiation of customary law leads to the establishing of a new hierarchy of norms in international law. In particular we share her scepticism as to the new approach to *jus cogens*-making process. Furthermore, we would like to refer to two more presentations. S. Wittich discussed the role of domestic application of international law in the preservation of unity or development of diversity of international law. We do not think that different ways of applying the same norms can really constitute a factor of differentiation. The same could be stated about the application of domestic law by different courts, as it seems to be a natural consequence of a multitude of law-enforcing agencies. The same conclusion was presented by a commentator Z. Kędzia, who stated that different methods of interpretation and application of domestic law are characteristic in particular in the field of international human rights, that is to be enforced principally by domestic courts. Finally, Ch.J. Tams presented the issue of state responsibility. It was extremely important, as the preservation of a unique regime of

responsibility was present from the very beginning of the codification works. He emphasised that in different specific fields of international law the breach-based orientation is replaced by an approach aimed at the prevention of violations. The author also remarks that even if specific international treaties establish special responsibility regimes, those particular solutions do not cover remedies/effects of the violations. They cover: cessation of violation of international law, reparation (in the form of restitution, compensation and satisfaction), and the guarantee of compliance with international law in the future. We agree that, although some diversities can be found, essential elements of the system of state responsibility remain unchanged comparing to the ILC Draft Articles on State Responsibility.

We regret that the lack of space does not allow us to present a more detailed analysis of the valuable contribution of the Kiel Institute of International Law and its guests to the study on a contemporary structure of international legal order.

Władysław Czapliński

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