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## XXI

## 1994

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# 1994

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# POLISH YEARBOOK OF INTERNATIONAL LAW

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# 1994




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# CSCE Contribution to the Establishment of the European Legal Order*

RENATA SZAFARZ

## 1. General Remarks

The All-European international law includes at present legal elements of the CSCE process, conventions adopted within the Council of Europe, treaties adopted under the auspices of UN Economic Commission for Europe as well as some other basically All-European treaties. This essay discusses the first of the aforementioned points.

"Final Act of the Conference on Security and Co-operation in Europe" signed in Helsinki on 1 August 1975 is the first and basic CSCE document.[1] It is not a treaty under public international law,[2] it is a political document.[3] However, as it will be proved below (sections 2 and 4), it is not deprived of certain essential legal significance.

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* This paper was written before the CSCE Budapest Summit 1994. According to the decisions of this Summit, CSCE has been known – as of January 1, 1995 – as the Organization on Security and Cooperation in Europe (OSCE).

[1] This document is cited by A.D. Rotfeld: "From Helsinki to Madrid, Conference on Security and Cooperation in Europe", Document 1973–1983, 110ff (1983), and A. Bloed (ed.): "From Helsinki to Vienna: Basic Documents of the Helsinki Process', 43ff (1990).

[2] This view is generally, almost unanimously, recognized in the doctrine. See, for example A.Ch. Kiss, M.F. Dominick: "The International Legal Significance of the Human Rights Provisions of the Helsinki Final Act", 13 *Vanderbild IIT'IL* 314 (1980); O. Schachter: "The Wtillight Existence of Nonbinding International Agreements", 71 *AJIL* 296ff (1977); and Non-Conventional Concerted Acts, in: M. Bedjaoui (ed.), "International Law: Achievements and Prospects", 265 (1991); M. Bowker, P. Williams: "Helsinki: Ten Years After. Helsinki and West European Security", 61 *Int. Aff* 613 (1985); J.A. Grigelionis: "K voprosu o pravovoy prirodie Zakluchitelnogo Acta Soveshchania po bezopasnosti i sotrudniechestvu v Europe" 1975, 171 (1977); H.S. Russell: "The Helsinki Declaration: Brbdingnag or Lilliput?", 70 *AJIL* 242, 247, 248 (1976); A. Bloed (ed.), "From Helsinki to Vienna"..., *op. cit.*, p. 11; P. van Dijk: "The Final Act of Helsinki – Basis for a Pan-European System?", 11 *NethYBIL* 109, 113 (1980); G. Rysiak: "Akt Końcowy KBWE a międzynarodowe Pakty Praw Człowieka", *Prz.Stos.Mnar* 1/77 (1979); J.F. Prevost: "Observations sur la nature juridique de l'Acte final de la Conference sur la securite et la cooperation en Europe", 21 *AFDI* 142 (1975); K. Blech: "Prinzipien-Erklärung der KSZE-Schlussaktee", 31 *AuA* 260–261 (1976); K. Skubiszewski: "Akt Końcowy KBWE w świetle prawa międzynarodowego", *Państwo i Prawo*, 12/4–5 (1976); G. Gilas: "Międzynarodowe normy polityczne", *Prz.Stos.Mnar.* 3/17 (1978); W. Poeggel: "Akt Końcowy KBWE a interpretacja zasady nienaruszalności granic w RFN", 20 *SM* 1/7 (1977); J. Symonides: "Deklaracja zasad stosunków międzypaństwowych KBWE", 28 *SM* 10/25 (1975); A.D. Rotfeld: "Europejski system bezpieczeństwa in *statu nascendi*", 98 (1990); J.E.S. Fawcett: "The Helsinki Act and International Law", 12 *RBDI* 6 (1977); H. Blix: "The Helsinki Declaration on Principles Guiding Relations Between States", 31 *REgiDI* 7 (1975); T. Buergenthal: "CSCE Human Dimension: The Birth of a System, Collected Courses of the Academy of European Law", vol. 1, Book 2, 200 (1992);

In general terms, the Helsinki Final Act contains following categories of provisions: principles, declarations of intention, recommendations and the programme of action.[4] Some norms, in particular principles, are closely connected with international law while other norms are of political and moral character. This shape of the CSCE Final Act was a result of the Federal Republic's of Germany not wishing to have a document which would resemble a peace treaty confirming the division of Germany. The Soviet Union, on the other hand, did not want the human right clauses to be included in the treaty.[5]

The CSCE Final Act was signed in Helsinki by high level representatives of 35 states. Those included all European states existing at that time except Albania, as well as the United States of America and Canada.

The CSCE based on the Helsinki Final Act constituted the second All-European forum with the UN Economic Commission for Europe being the first one. It developed, as it sometimes happens, as a result of contradictory expectations of both the democratic West and authoritarian East of Europe. The Western states considered the CSCE, above all, as a possible means for introducing democratic changes into the Eastern part of Europe, bearing in mind concerns regarding the human rights and their own security. On the other hand, the former European socialist states were mainly aiming at sealing the territorial status quo set up in the post-war Europe. Furthermore, both parts of Europe tried to intensify co-operation in various fields. In other words, those states aimed at strengthening the infrastructure of peaceful co-existence in Europe.

The CSCE process, which began in Helsinki in 1975, includes the follow-up meetings of the representatives of the states participating in the CSCE i.e. Belgrade – 1977, Madrid 1980–1983, Vienna 1986–1989, Helsinki 1992. Among other CSCE meetings[6] particular attention should be paid to the Paris summit, which was held between 19 and 21 November 1990, i.e. after the famous "Autumn of Nations", which swept through the Central and Eastern Europe in 1989. The Paris summit decisions, particularly the Charter of Paris for a New Europe, constituted a breakthrough for the whole CSCE process. First, the participating states' intention put forward in the aforementioned Charter was to transform Europe into a unified political, economic,

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The unclear concept of "a special legal act" was put forward in this context by J.F. P r e v o s t, *op. cit.*, p. 142; A.Ch. K i s s, M.F. D o m i n i c k, *op. cit.*, pp. 314–315 and G.V. I g n a t e n k o: "Zakluchitelny akt obshchevropeyskogo soveshchanya w Helsinki", *Pravovedene*, 99, 102 and 103 (1996).

The Final Act is considered to be a legally binding instrument by Y.P. B l i s h c h e n k o: "Zakluchitelny akt Soveshchanya po bezopasnosti i sotrudnichestvu v Evrope – dalneysheye razvitye mezhdunarodnogo prava", *Sovetskoe Gosudarstvo i Pravo*, 12/89–90 (1976).

[3] I do not use the *soft law* concept in this context, since, as was rightly pointed out by P.M. D u p u y, "soft law is a paradoxical term for defining an ambiguous phenomenon. Paradoxical because, from a general and classical point of view, it usually is considered that the rule of law is hard, i.e. compulsory, or simply does not exist. Ambiguous because the reality thus designed, considering as well its manifestations as its legal effects, is very often difficult to identify clearly" (in: A Hard Look at Soft Law, *PASIL* 381 (1988).

[4] As has been emphasized by K. S k u b i s z e w s k i the originality of this Final Act *consists in the establishment of an international programme of co-operation, op. cit.*, p. 4.

[5] See on this subject – J.-C. G a u t r o n: "Droit européen", 9 (1991).

[6] Approximately 30 multilateral CSCE meetings were held during the period 1975–1993. Most of them were meetings of experts in various fields.

social and legal area. Second, the Charter gave way to the process of CSCE institutionalisation: permanent organs with certain powers were established.[7] Due to this fact, one can now speak of the CSCE in terms of an international, intergovernmental organisation in *statu nascendi*.[8]

In principle, all follow-up meetings as well as meetings of experts have resulted in the adoption of certain political documents.[9] The set of documents created in this way makes the title of P. van Dijk's article: "The final Act of Helsinki – Basis for a Pan-European System?"[10] prophetic. Whenever the aforementioned documents refer to international law, "obligations" are highlighted. However, when the rules adopted within the CSCE process are referred to, the term "commitments" is applied. Sometimes "principles" are mentioned separately, i.e. ten principles contained in the Helsinki Final Act, which have become a decalogue of the whole CSCE process.

In the 1980s the Western states' expectations connected with the CSCE began do fulfil. The reason for change was the "human dimension of the CSCE" combined with the principle of non-interference in the domestic affairs of states; the latter principle has eliminated the so-called Brezhnev doctrine. As a result of those and other factors,[11] the famous "Autumn of Nations" in Europe took place, i.e. peaceful but revolutionary entry by the Central and East European states of the path of democracy, rule of law and the market economy. With account being taken of the various factors that have contributed to the aforementioned changes, the Charter of Paris for a New Europe states in the introduction that "the courage of men and women, the strength of the will of the peoples and the power of the ideas of the Helsinki Final Act have opened a new era of democracy, peace and unity in Europe".[12] Similarly according to the CSCE follow-up meeting document adopted in Helsinki in 1992, entitled "Challenges of Change", "The CSCE has been instrumental in promoting changes".[13] As a result Europe is gradually becoming a homogeneous region regarding its political and economic system. Furthermore, as it will be presented below (sections 2 and 3), the states participating in the CSCE process have committed themselves to acknowledging parliamentary democracy as the only legitimate form of government in Europe.

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[7] Namely, these are the following organs: CSCE Council of Ministers, Committee of Senior Officials, the CSCE Secretariat, Conflict Prevention Centre, Office for Free Elections (later transformed into the Office for Democratic Institutions and Human Rights). Subsequently other organs were set up, too.

[8] See R. S z a f a r z, "CSCE: an International Organization in *Statu Nascendi*?", in. A. B l o e d, W. d e J o n g e (eds.), "Legal Aspects of a New European Infrastructure", 15–21 (1992). CSCE will acquire the status of an international organization as soon as its organs and institutions have a legal foundation, i.e. a statute (*ibidem*, p. 21). In my opinion J. Menkes and A. Prystrom have described the CSCE as an international organization too soon. These authors consider the Paris Charter for a New Europe to be the CSCE statute (Instytucjonalizacja ochrony praw człowieka w systemie KBWE), 45 *SM* 7–12/43 (1992).

[9] The Geneva CSCE Meeting of Experts on Peaceful Settlement of Disputes (October 1992) was an exception in this respect. namely, during this Meeting a legal document, i.e. a convention, was also adopted (see below, section 4).

[10] P. v a n D i j k, *op. cit.*, pp. 97ff.

[11] Other essential factors were the following: the actions of "Solidarity" in Poland, as well as perestroyka, new thinking and glasnost in the Soviet Union after 1985.

[12] Charter of Paris for a New Europe, 20 *ILM* 193 (1991).

[13] Declaration and Decisions from Helsinki Summit, 31 *ILM* 1392 (1992).

Consequently, the idea of "peaceful coexistence" of states with different ideological, economic and political systems ceased to exist. Today, there is only one system as a standard and pattern.

The recent changes in Europe have also resulted in the number of CSCE participating states being extended. Following new CSCE members can be identified: Albania, all the states which have emerged after the breakup of both the former Soviet Union[14] and Yugoslavia (except Macedonia) as well as the Czech Republic and Slovakia – after the dismemberment of Czechoslovakia. In effect, a total of 53 states participate in the CSCE process at the moment.[15] The CSCE follow-up meeting document, signed in Helsinki in 1992, describes therefore the community of states participating in the CSCE process as a community, which comprises "free and democratic states from Vancouver to Vladivostok".[16] This area is also defined as the "CSCE region" further in the document, and the CSCE itself – as "a regional arrangement in the sense of Chapter VIII of the Charter of the United Nations".[17] Nevertheless, the CSCE still retains the phrase "in Europe" in its title as it is still mainly concerned with the All-European order. In the 1992 Helsinki document, quoted above, it is clearly declared that "the CSCE is a forum for dialogue, negotiation and co-operation, providing direction and giving impulse to the shaping of new Europe".[18]

Additionally, the conclusion of Convention on Conciliation and Arbitration within the CSCE (see section 4 below) constitutes another important result of the recent changes, which have occurred in Europe. It is the first treaty governed by public international law concluded in the framework of the CSCE process.

With regard to time that has passed as well as changes which have occurred in Europe, if one assesses the value of the Helsinki Final Act of 1975 it is evident that it was a certain *modus vivendi* adequate to the bipolar situation in Europe at that time. However, its effectiveness as well as the effectiveness of some further documents adopted within the CSCE turned out to be amazing and seemed to exceed all expectations. As A. Wasilkowski has commented: "it can be said, with some simplification, that the conduct of states participating in the CSCE is such as if they had forgotten that from a formal point of view their obligations are not contractual. They act as if they were obliged not only politically but also legally".[19]

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[14] Russia succeeded to the former Soviet Union, but other 14 post-Soviet states were separately admitted to the CSCE. The idea behind the admission to the CSCE of all Asian post-Soviet states was to prevent Islamic fundamentalism and Chinese influence in these states. These goals were to be achieved by the strengthening of the drive towards democracy and protection of human rights in the region. This reasoning and efforts were based on the conviction that the situation in Central Asia indirectly influenced Europe (through Russia). Security reasons were also considered.

[15] It is necessary to add that in 1992 the new Yugoslavia was suspended as a state participating in the CSCE (because of its involvement in the conflict in the Bosnia–Herzegovina area).

[16] Declaration and Decisions from Helsinki Summit, 31 *ILM* 1390 (1992).

[17] Ibidem, p. 1392.

[18] Ibidem.

[19] A. W a s i l k o w s k i: "Constitutional Rules concerning the Place of International Norms in Municipal Law and the Peaceful Settlement of Disputes in Europe", in: D. B a r d o n n e t (ed.): "The Peaceful Settlement of International Disputes in Europe: Future Prospects", Workshop 1990, 628 (1991). Similarly – see A. B l o e d (ed.): "From Helsinki to Vienna"..., *op. cit.*, 11; A.D. R o t f e l d: "Spotkanie Wiedeńskie KBWE a zarys nowego systemu bezpieczeństwa europejskiego", 42 *SM* (1989) and J.A. G r i g e l i o n i s, *op. cit.*, 171.

## 2. The Problem of the Legal Character of Principles Contained in the Helsinki Final Act of 1975

The "Declaration on Principles Guiding Relations between Participating States" is undoubtedly the most important part of the CSCE Final Act signed in Helsinki on 1 August 1975.[20] Clearly, since the Declaration itself is contained in a political document – the Final Act, from this point of view it also has political nature. Yet, strict and multiple ties of the respective principles listed in the Declaration with the general international law, constitute another issue to be looked into. This issue has been vividly discussed in the international law doctrine some time ago. As usual, it resulted in a wide range of opinions, including extreme ones, being expressed on the subject under consideration. The first of the extreme views is that the set of ten principles included in the Declaration constitutes a system of international law norms of the *jus cogens* type.[21] It is a wrong opinion since the regional particular principles cannot be a source of *jus cogens*. It is due to the fact that the concept of *juris cogentis* norms contains the requirement of the consent by the international community as w whole.[22] At most, it may be claimed that some principles included in the Declaration fall in line with the *juris cogentis* norms expressing them more or less precisely.[23]

The second extreme view argues that the principles contained in the Declaration are only of political character, i.e. they have the same political nature as the Helsinki Final Act.[24] For example, considering if the Helsinki Act principles could be regarded as an act of interpretation and application of international law, J. Gilas says: "This point of view cannot be accepted either. First, an array of principles – or their consequences – among those contained in the Helsinki Act, are new principles, which do not have sufficient background in the UN Charter and the General Assembly Declaration of 1970. Second, the UN Charter principles are considered to be *jus cogens* norms and therefore they cannot be altered other than only in the same mode in which they were developed, i.e. by the international community. Similarly, the development of a new *jus cogens* principle, requires the consent by the international community as a whole. Third, since the principles of friendly relations and co-operation of states based on international law have a universal character, it is thus not allowed for them to be modified, altered or interpreted with the binding effect for the international community – by a separate group of states, even if those were all the states from

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[20] Cited by A.D. R o t f e l d (ed.): "From Helsinki to Madrid"..., *op. cit.*, 113ff. The Declaration of Principles in quoted below as published in this book.

[21] The following authors support this view: W. P o e g g e l: Kwestia obowiązującego charakteru aktu końcowego KBWE przy szczególnym uwzględnieniu 10 zasad, *Prz.Stos.Mnar* 1/16 (1976); V.A. M a z o v: "Principy Helsinki – principy sotrudnichestva gosudarstv Europy", *SGP* 9/102 (1976); S.A. M a l i n i n: "Soveshchanye v Helsinki (1975 g.) i mezhdunarodnoe pravo", *Pravovedenye* 2/22 (1976).

[22] In this spirit – see also J. G i l a s, *op. cit.*, p. 19; and J. T y r a n o w s k i: "Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym", 155 (1990).

[23] In this sense I understand K. S k u b i s z e w s k i's opinion that "at least some principles are peremptory rules (*jus cogens*)", *op. cit.*, p. 13.

[24] This opinion has been expressed by H.S. R u s s e l l, *op. cit.*, 248; K. B l e c h, *op. cit.*, 260, and J. G i l a s, *op. cit.*, 18–19.

a particular geographical region".[25] One has to disagree with the above arguments. First, as it will be proved below, so-called "new principles" do not express entirely new norms of the international law. Second, to a certain extent it is always possible to supplement or develop even *jus cogens* norms and even by a limited number of states; only alteration or modification of those norms, which has a derogative effect, is excluded. Third, the CSCE participating states did not intend to "modify", "alter" or "interpret" the international law principles with the binding effect for all the states.

Apart from the extreme views presented above, which are in a sense of an exceptional character, in the doctrine one can encounter a variety of opinions indicating a wide range of ties between the Helsinki Declaration principles and international law. Above all, many authors point to the fact that the principles enshrined in the Declaration express principles of general international law.[26] At the same time, they rightly indicate that to a large extent obligatory character of principles contained in the Declaration arises out of other sources. For it is based on such foundations as – above all – the UN Charter and associated with it – Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (the UN General Assembly Resolution 2625 (XXV) of 24 October 1970), as well as other treaties and customary law. Therefore, some authors enhance the fact that the CSCE decalogue repeats and confirms the principles which are already in force on the aforementioned bases.[27] Additionally, some authors underline that the principles include both *de lege lata* and

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[25] J. G i l a s, *op. cit.*, 18.

[26] See, for example, K. S k u b i s z e w s k i, *op. cit.*, 11–12 and 13; G. C o h e n J o n a t h a n, J.-P. J a c q u é: "Obligations Assumed by the Helsinki Signatories", in: T. B u e r g e n t h a l (ed.): "Human Rights, International Law and the Helsinki Accord", 52 (1977); J.A. G r i g e l i o n i s, *op. cit.*, 11; L. H a n n i k a i n e n, "The Declaration of Principles Guiding Relations between States of the European Security Conference from the Viewpoint of International Law, Instant Research on Peace and Violence", 99, 10 (1976); P. v a n D i j k, *op. cit.*, 113 and 120; D. N i n è i ć, "Les implications générales juridiques et historiques de la Declaration d'Helsinki", 154 *RCADI* 65, 68 (1977); G. R y s i a k, *op. cit.*, 77; W. K m i t o w s k i: "Normy społeczności międzynarodowej", 43 *SM* 10/122 (1990); V. Y a r o s l a v t s e v: "Basis of European Security", *Int.Aff.* 5/18–19 (1976); A.D. R o t f e l d: "Republika Federalna Niemiec wobec KBWE i jej Aktu Końcowego", in: *Główne problemy prawne normalizacji stosunków PRL–RFN*, 72 (1979); J. S y m o n i d e s: "Deklaracja zasad"..., *op. cit.*, 25ff; B. R y c h ł o w s k i, J. S y m o n i d e s: "Bezpieczeństwo i współpraca europejska a koncepcja pokojowego współistnienia", 28 *SM* 9/10–11 (1975); J. M e n k e s, A. P r y s t r o m, *op. cit.*, s. 36. N.A. O u c h a k o v generally supports this view but makes an exception for inviolability of frontiers principle ("Le développement des principes fondamentaux du droit international dans l'Acte final sur la sécurité et la coopération en Europe", in: J. M a k a r c z y k (ed.): "Essays in International Law in Honour of Judge Manfred Lachs", 219, 232 (1984). According to T. B u e r g e n t h a l's opinion, this thesis refers to the following principles: refraining from the threat or use of force, sovereign equality, non-intervention in internal affairs and territorial integrity of States (*op. cit.*, 201).

[27] See, for example, A.Ch. K i s s, M.F. D o m i n i c k, *op. cit.*, pp. 305 and 306; D. N i n è i ć: "The Nature and Significance of the Final Act of the Conference on Security and Co-operation in Europe", *IRMP* 1–2/17 (1977); P. v a n D i j k, *op. cit.*, 113; A. M o v c h a n: "Problems of Boundaries and Security in the Helsinki Declaration", 154 *RCADI* 34 (1977); J.F. P r e v o s t, *op. cit.*, p. 146; R. B i e r z a n e k: "Bezpieczeństwo regionalne w systemie ONZ", 185 (1977; A.D. R o t f e l d: "Konferencja Bezpieczeństwa i Współpracy w Europie. Zagadnienia prawne", 31 *PiP* 1–2/89 (1976); B. S z c z e c h u r a: "Akt Końcowy KBWE a podstawy prawne bezpieczeństwa europejskiego", 35 *SM* 7/73 (1982); A.N. T a l a l a e v: "Helsinki: principy i realnost", 12 (1985).

*de lege ferenda* elements.[28] This opinion is not precise, nor is precise the view that progressive development of international law has been achieved in the decaloque.[29] For it was not the CSCE participating states' intention to develop international law, even as regards their mutual relations. All the principles' elements exceeding the actual international law should be treated as merely political elements.[30] Another issue is if and to what extent the later turn of events, in particular the later practice in the application of those principles, could have resulted in their acquiring of the status of regional/particular custom.

It is true however, that the Helsinki Declaration principles include both legal and political contents, with the former prevailing. As a whole, they were conceived in such a way as to satisfy specific European needs and requirements.

In general terms, putting legal principles into a political document like the Helsinki Final Act does not necessarily deprive those principles of their legal character; it is explicitly stated by some authors.[31] Also, containing some – relatively insignificant – new, political elements in the decalogue does not deny the legal character of the principles' main elements.

In the above context the opinion is expressed that putting legal principles in a political document leads to legal strengthening and "enrichment" of the actual character of those principles.[32]

In the subject's literature particular attention has been paid to relations between principles contained in the Helsinki Final Act Declaration and those formulated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of United Nations (the General Assembly Resolution 2625 (XXV), 24 October 1970).[33] First, authors quite commonly stress the fact that – from the formal point of view – the Helsinki Declaration covers a wider range as it contains ten principles while the UN Declaration of 1970 – only seven of them. Second, it is emphasized that the Helsinki Declaration does not confine itself to simply repeating the UN Declaration principles.[34] The UN Declaration of

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[28] For example, D. N i n è i □ "Les implications générales"..., 68–69.

[29] So, *inter alia*, A. M o v c h a n, *op. cit.*, 13; J. S y m o n i d e s: "Deklaracja zasad"..., *op. cit.*, 48; Y.P. B l i s h c h e n k o, *op. cit.*, 83; N.A. O u c h a k o v, *op. cit.*, 222.

[30] As J.E.S. F a w c e t t rightly points out *The undertakings in the Final Act do not ... as a matter of law, add to or modify the obligations of participating States under customary or conventional international law, op. cit.*, No. 1–2, p. 7. J. S y m o n i d e s is not correct when maintaining that also the precise "concretization" of the principles under consideration is (legally) binding, in "Deklaracja zasad"..., *op. cit.*, 12; A.Ch. K i s s, M.F. D o m i n i c k, *op. cit.*, 300; R. B i e r z a n e k, *op. cit.*, 184; H. B l i x, *op. cit.*, 8.

[32] For example, D. N i n è i ć has written: *the fact that a political commitment is assumed with regard to a legal obligation should make it more, not less, legally compelling* ("The Nature and Significance"..., 17). Also in this spirit but more cautiously – T. B u e r g e n t h a l, *op. cit.*, 201–202.

[33] This Declaration is cited by G. A r a n g i o-R u i z: "The UN Declaration on Friendly Relations and the System of the Sources of International Law", Annex I, at 318ff (1979). General remarks on this Declaration – see also R. R o s e n s t o c k: "The Declaration of Principles of International Law concerning Friendly Relations: a Survey", 65 *AJIL* 713 (1971).

[34] For example, A. C a s s e s e has written: *In fact, the Helsinki Declaration – while it does restate UN principles – in many respects goes further and also elaborates and refines those principles by adapting them to conditions obtaining in Europe*"(The Helsinki Declaration and Self-Determination, w: T. B u e r g e n t h a l (ed.): "Human Rights, International Law and the Helsinki Accord", 105 (1977).

1970, as such, includes legally binding principles[35] but it is not comprehensive enough.[36] For it does not comprise all possible principles implied by the UN Charter.

The Helsinki Declaration contains, from the formal point of view, still three more principles. Those are as follows: territorial integrity of states principle, inviolability of frontiers principle and human rights protection principle. Sometimes, in the literature the above principles are described as "specifically European".[37] However, this opinion is only partially right. Namely, it is right to the extent, to which it concerns the formulation of legal elements into separate principles. Nevertheless it is unsubstantiated when it suggests that in general international law, including the UN Charter, there are no norms referring to issues such as territorial integrity, respect for state frontiers or human rights protection. Yet, as it will be proved below, while commenting on particular principles, such norms already existed at the time of signing the Helsinki Final Act. They exist nowadays too.

Taking into account all that was said above, one can propose the following view regarding the legal character of principles formulated in the Helsinki Declaration: the Helsinki decalogue is undoubtedly based on general international law. In particular, the Helsinki Declaration principles contain numerous binding provisions for the CSCE participating states, as they reflect the general international law principles. Those are the principles arising out of the UN Charter provisions, the UN Declaration of 1970 and the customary law. In other words, the Helsinki Declaration decalogue refers to general international law norms, in principle, repeating, confirming and strengthening them. "In principle" – since its specific formulation is indeed original and, moreover, the CSCE decalogue also contains some new, strictly political elements. In any case, only those provisions of the Declaration, which had the same contents as general international law norms, were legally binding at the time of signing the CSCE Final Act of 1975.

It has to be emphasized that the Declaration of CSCE principles did not have a derogatory effect. One should remember about this particularly when claiming that in the CSCE catalogue international law principles have been interpreted and moreover – specified, developed or – to some extent – altered. The new, political elements of the CSCE principles only supplement international law principles, which are already in force (see below). However, it is still an open question if and to what extent those new political elements of the 1975 Helsinki principles have reached the All-European custom status by now.

Additionally, there is an indirect argument indicating that there are substantial ties between CSCE Declaration principles and general international law principles. This is included in the ending part of the Declaration: "The participating States, paying due

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[35] *Inter alia*, this was persuasively proven by J.J. S a l m o n: "Introduction to the Law of Friendly Relations between States", in: M. B e d j a o u i (ed.): "International Law", *op. cit.*, 421.

[36] For example, this is ascertained by R. R o s e n s t o c k, *op. cit.*, 735.

[37] So, for example, A.D. R o t f e l d: Europejski system bezpieczeństwa..., 86, and R. B i e r z a n e k, who has ascertained that *it is not accidental that specifically European principles concern respect for the territorial status quo and human rights, since in the history of Europe the drive to change state frontiers has led many times to wars, and the idea of human rights originated and developed in this part of the world, op. cit.*, 187.

regard to the principles above and, in particular, to the first sentence of the tenth Principle, "Fulfilment in good faith of obligations under international law", note that the present Declaration does not affect their rights and obligations, nor the corresponding treaties and other agreements and arrangements". This provision suggests that, at least theoretically, the principles formulated in the Declaration might affect "rights" and "obligations" of states as well as "treaties", "agreements" and "arrangements". Furthermore, attention should be paid to the fact that it was considered necessary to include such a provision only in one part of the CSCE Final Act, i.e. only in the Declaration of principles.[38] This distinction of the Declaration of principles is very significant in the context under consideration.

As regards the issue of CSCE decalogue's assessment, which was carried out in the doctrine of various states participating in the CSCE process, it has to be emphasized that as for the former socialist countries' doctrine, the fully legal character of all the Helsinki principles was underlined while in the western states' doctrine prevailed far reaching restraint and caution regarding legal elements of the CSCE principles. Apparently, it is only now that conditions for formulating more balanced and uniform opinions in this respect developed.

As a result, in Europe, and at present in the Euro–Atlantic–Central Asian region, which has become the CSCE region, the Helsinki decalogue supplements the UN Declaration principles of 1970. This leads to strengthening of the respective principles of international law in the aforementioned region. In any case, the Helsinki principles should be interpreted as not contradictory to the principles of general international law, which, in many cases, have the *jus cogens* character.

Furthermore, the Helsinki declaration of Principles of 1975 can be invoked as an evidence of recognising the customary norms of general international law by the respective states.[39]

The analysis of specific principles contained in the Helsinki Declaration leads to the following remarks:

**Principle I. Sovereign equality, respect for the rights inherent in sovereignty.**

The provisions of this principle's first and main paragraph are not in essence different from those, which can be found in the text of "The principle of sovereign equality of states", contained in the UN Declaration of 1970.[40] W.A. Mazov's opinion claiming that in the Helsinki text the principle of sovereign equality of states was "further developed"[41] can be referred to the second paragraph of this principle but only in a particular sense. Namely, this "development" does not entail addition of any new elements not included in the UN Declaration but is confined to specifying and

[38] This was also pointed out by. D. N i n è i ć: "The Nature and Significance"..., 17.

[39] See Case concerning *Military and Paramilitary Activities in and against Nicaragua*, (Merits), ICJ Reports 1986, at 100 and 107, para 204. In the legal writing an identical attitude is presented by I. B r o w n l i e: "Principles of Public International Law", 578 (1990).

[40] Similarly – see L. H a n n i k a i n e n, *op. cit.*, 95.

[41] V.A. M a z o v, *op. cit.*, 23.

enumerating of various possible elements included in the paragraph (b) of the UN principle. This paragraph states that "Each state enjoys the rights inherent in full sovereignty".[42] It is obvious that enjoying the rights inherent in full sovereignty means, *inter alia*, the possibility of conducting changes in state frontiers in accordance with international law, the right to belong or not to belong to international organisations, the right to become or not to become a party to international treaties, including alliances as well as the right to neutrality. Also, the obligation to respect each state's right to define and develop its relations with other states "in accordance with international law and in the spirit of the present Declaration", foreseen in the Helsinki principle, results indirectly but definitely from the UN Declaration's paragraph (b), quoted above. Since all the countries, due to their sovereignty, have the right to freely develop their international relations, the obligation to mutually respect all the respective decisions, actions etc. by all the states is an indispensable corollary to this right.

The mention of "the spirit of the present Declaration" included in the text of the Helsinki Declaration, constitutes an element, which exceeds the formula of the sovereign equality of states principle, set out in the UN Declaration.

**Principle II. Refraining from the threat or use of force**

The basic content of the principle is the same in both Declarations in question. Furthermore, in both declarations one can also find various additional elements constituting the development of this principle's consequences or enhancing various aspects within its scope. For example, the UN Declaration mentions the national liberation actions problem (indirectly), the issue of mercenaries, problems of a civil war and terrorism. On the other hand, the development of the aforementioned principle in the Helsinki Declaration includes the following three provisions:

– "No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle".

– "Accordingly, the participating states will refrain from any acts constituting a threat of force or direct of indirect use of force against another participating state".

– "Likewise they will refrain from any manifestation of force for the purpose of inducing another participating state to renounce the full exercise of its sovereign rights".

In my opinion the first of the quoted provisions constitutes an *expressis verbis* repetition of a content element, contained in the general formula. In principle, this concerns the second provision as well, with the mention of "indirect" use of force reaching further than it might have been presumed from the literally understood general formula. As far as the third provision is concerned, it should be admitted that to the extent, to which "the manifestation of force" does not pose a threat of force at the same time, it plainly exceeds the general formula and therefore the formula adopted in the UN Declaration too. It is undoubtedly a political element of this principle.

[42] Here and below I quote the UN Declaration of 1970 as published by G. A r a n g i o-R u i z, *op. cit.*, 318ff.

Additionally, inclusion of the aforementioned provisions into the Helsinki Declaration was the result of the Western states' strive to counter the so-called Brezhnev doctrine.[43]

**Principle III. Inviolability of frontiers**

The inviolability of frontiers principle is only included in the Helsinki Declaration. As far as the UN Declaration is concerned, the most important element of this principle is contained in the text of the refraining from the threat or use of force principle. It states explicitly that "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of any State...". Apart from this basic element, the emancipated Helsinki principle on inviolability of frontiers includes other elements too. It is, above all, the use of the word "assaulting" instead of the "use of force". This provides the European principle with a broader scope.

The second essential element of the principle under consideration is that "The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe". This "inviolability" incurs the impossibility of either "assaulting" the frontiers or issuing territorial claims. With regard to the above, in the second paragraph of the European principle the CSCE participating states committed themselves to "refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State".

Various opinions have been expressed as to the character of the Helsinki principle on inviolability of frontiers. N.A. Ouchakov denies it, as the only principle in the decalogue, any legal force.[44] Some authors, like S. Dabrowa[45] and A. Movchan,[46] point to this principle as an example of the progressive development of international law. The context of their deliberations indicates that they are primarily concerned with the emancipation of the inviolability of frontiers principle, carried out in Helsinki. However, it is a matter of form rather than substance.

L. Hannikainen places this principle among those, which, in his opinion, "do not bring much new into international law".[47] Furthermore, as J. Symonides has commented, "the inviolability of frontiers – recognition of the territorial status quo – was not only a postulate but a binding principle of international relations at the time of CSCE's convening, which was referred to in many inter-state statements and declarations and, above all, included in treaties concluded between both the Soviet Union and Poland and the Federal Republic of Germany".[48] G.V. Ignatenko and J. Tyranowski are devoted

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[43] See – on this subject – R. Sapienza: "The Prohibition of Resort to the Use of Force in the Final Act of the Conference on Security and Cooperation in Europe", in: A. Cassese (ed.): "The Current Legal Regulation of the Use of Force", 424 and 425 (1986).

[44] N.A. Ouchakov, *op. cit.*, 219 and 227.

[45] S. Dąbrowa: "Zasady nienaruszalności granic i integralności terytorialnej państw na KBWE", 28 *SM* 11/14 (1975)

[46] A. Movchan, *op. cit.*, 22.

[47] L. Hannikainen, *op. cit.*, 96.

[48] J. Symonides: "Prawo międzynarodowe a utrzymanie pokoju i bezpieczeństwa", 42 *PiP* 3/27 (1987). The attitude of the American negotiator of the CSCE Final Act, H.S. Russell, seems to be similar; he

proponents of the thesis acknowledging the legal force of the Helsinki inviolability of frontiers principle. The first author remarks categorically that "the legal strengthening of the inviolability of frontiers as a separate principle of international law is of particular significance".[49] Furthermore, according to J. Tyranowski, "The inviolability of frontiers principle is a binding principle of international law in the mutual relations between European states, the USA and Canada. This conclusion cannot be undermined by the fact that presumably not all the elements in the principle's legal content have been fully established or recognised to a sufficient degree".[50]

Summing up the above, I would like to emphasize that in 1975 at least one of the elements contained in the inviolability of frontiers principle, namely the duty to refrain from issuing the territorial claims, was neither as widely recognised by the international community of states nor by European states only, so as to claim that this principle wholly reflected the international law norms in force at that time. The provision in question should be considered a political element of the Principle III. The fact that the duty to refrain from issuing territorial claims has acquired a treaty basis in bilateral relations of some states (see so-called normalisation treaties concluded between the FRG and the USSR, Poland, Czechoslovakia and the GDR) is no obstacle to such an apprisal.

The issue of state frontiers recognition is another aspect of the Helsinki principle on the inviolability of frontiers. Namely, the former socialist states' doctrine in this respect was that the principle's formula meant the recognition of all the frontiers in Europe, i.e. the recognition of post-war status quo.[51] Opposed to this was the American Helsinki Final Act negotiator H.S. Russell, who said that the inviolability of frontiers principle "did nothing to recognise existing frontiers in Europe".[52]

In fact, the principle in question does not make use of the word "recognise" but of "regard". In my opinion, in case of the Helsinki inviolability of frontiers principle, in 1975 account could at most be taken of *de facto* frontiers recognition but not *de jure*.

Referring the inviolability of frontiers principle to the present situation in the CSCE region, one has to admit that apart from territorial changes, including frontier changes, being not in breach of this principle, there are clear cases of its violation. The provision ruling out issuing of any territorial claims is also being breached (particularly in both former Yugoslavia and the USSR).

**Principle IV. Territorial integrity of states**

Almost all elements of the Helsinki territorial integrity of states principle are contained in the UN Declaration of 1970, in the text of principles on non use of force,

has written that the principle under consideration "*does not depart materially from previous international arrangements on frontiers...*", *op. cit.*, 249.

[49] C.V. Ignatenko, *op. cit.*, 94.

[50] J. Tyranowski, *op. cit.*, 156.

[51] See, for example, J. Symonides: "Deklaracja zasad"..., *op. cit.*, p. 35; J. Tyranowski: "Zasada nienaruszalności granic w prawie międzynarodowym", 79–82 (1987); N.A. Ouchakov, *op. cit.*, 230.

[52] H.S. Russel, *op. cit.*, 249.

sovereign equality of states and equal rights and self-determination of peoples. The only new element in relation to the UN Declaration content is a provision excluding "other direct or indirect measures of force in contravention of international law". However, it should be emphasized that although this element exceeds the text of UN declaration itself, it does not exceed the international law in force. Consequently, one can reckon that the whole text of the Helsinki territorial integrity of states principle, referring several times to the UN Charter and international law, reflects norms of general international law in force.

The fact that in the CSCE Declaration text norms concerning territorial integrity of states were admitted the status of an autonomous principle is a matter of form rather than substance.[53] It is only in this sense that one can speak of "the progressive development of international law".[54]

**Principle V. Peaceful settlement of disputes**

All elements of the European principle on peaceful settlement of disputes are also included in the text of an analogous principle contained in the UN Declaration. L. Hannikainen is right when he states that "from the viewpoint of international law the text of the European Declaration does not contain any new aspects".[55]

**Principle VI. Non-intervention in internal affairs**

As J. Symonides has rightly commented, "the content of non-intervention in internal affairs principle agreed upon by the CSCE matches, in principle ..., formulae adopted in the UN Declaration of 1970".[56] The only element of the European principle's text not corresponding with its application in the UN Declaration is the phrase "regardless of their mutual relations" contained in the first paragraph of the principle. However it is only an enhancement or specification of an element contained in the general formula of the principle. The genesis of this provision is connected with the Western states' strive to counter the so-called Brezhnev doctrine.[57]

**Principle VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief**

While the former socialist states participating in the CSCE considered the inviolability of frontiers principle to be the "most important", in the opinion of the Western states it was just a protection of human rights principle that was viewed as

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[53] In this spirit also J. T y r a n o w s k i who has ascertained that the European principle concerning territorial integrity of States is a regional codification of elements of the general principle in this respect ("Zasada nienaruszalności granic"..., *op. cit.*, 77).

[54] See Y.P. B l i s h c h e n k o, *op. cit.*, 86.

[55] L. H a n n i k a i n e n, *op. cit.*, 97.

[56] J. S y m o n i d e s: "Daklaracja zasad"..., *op. cit.*, 41. Also in this sense – L. H a n n i k a i n e n, *op. cit.*, 97, and T. B u e r g e n t h a l, *op. cit.*, 174.

[57] This was acknowledged by T. B u e r g e n t h a l, *op. cit.*, 174.

having such a character.[58] This is precisely why, by means of mutual concessions, the respective provisions acquired the status of separate principles in the CSCE Helsinki Declaration. Thus, they acquired the status of basic principles – for the first time in the history of international relations.

As far as the UN Declaration is concerned, certain general norms concerning the protection of human rights and fundamental freedoms are included in the contents of the principle of cooperation of states as well as in the principle of equal rights and self-determination of peoples.

Various views have been expressed in literature on the precise content and character of the Helsinki human rights principle. H.S. Russell, the American negotiator of the CSCE Final Act, asserted that "some of the most innovative concepts contained in the Declaration"[59] had been reflected in Principle VII. Thus, the author seemed to indicate that basically this principle did not contain legal elements or contained only a few of them. G. Rysiak also believes that from this point of view Principle VII is the "weakest" among all the Helsinki Declaration principles. In his opinion "state practice in both bilateral and multilateral relations does not provide as strong basis for its acceptance as, for example, such practice in respect of Principles III and IV".[60] However, this author has admitted that "the justification for treating it as a binding principle of international law may result from its inclusion in the UN Charter and the General Assembly Declaration".[61] In this connection it should be emphasized that only the main elements of the European principle have been reflected in the UN Charter and the UN. Declaration.

On the other hand, certain authors have expressly stated that Principle VII "as a whole did not introduce new substantial elements in the field of human rights and fundamental freedoms".[62] Perhaps, it is with this idea in mind that T. Buergenthal has written that "Principle VII contains elements that merely reaffirm preexisting human rights obligations".[63] But it cannot be excluded that this author wanted in this way to express his conviction as to the legal character of the principle under consideration.

A.Ch. Kiss and M.F. Dominick are even closer to the affirmation of the legal character of Principle VII when they state that this Principle "may be considered as more than a simple restatement of existing and generally recognized principles".[64] Finally, L. Hannikainen seems to go the farthest by affirming that Principle VII "should be counted among the basic principles of international law".[65]

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[58] I have in mind the political appraisals by states, because from a formal point of view all principles of the Helsinki have the same status and the same "primary" significance. All these principles should also be interpreted as mutually interrelated.

[59] H.S. Russell, *op. cit.*, 268.

[60] G. Rysiak, *op. cit.*, 77.

[61] *Ibidem.*

[62] G. Rysiak, *op. cit.*, 75. Similarly – see J.E.S. Fawcett, *op. cit.*, 7 and J. Symonides: "Międzynarodowa ochrona praw człowieka", 147 (1977). The latter author has emphasized that: *In the field of human rights protection the Final Act does not surpass a level which has already been achieved in the UN system*" (*ibidem*).

[63] T. Buergenthal, *op. cit.*, 176.

[64] A.Ch. Kiss, M.F. Dominick, *op. cit.*, 305.

[65] L. Hannikainen, *op. cit.*, 97–98.

When interpreting Principle VII in the light of the doctrinal opinions quoted above, one may formulate the following conclusions. First, the main elements of this principle, reflected earlier in the UN Charter and the UN Declaration, were certainly legally binding in 1975. Second, as far as treaties are concerned, including the International Covenants of Human Rights of 1966, Principle VII only confirms that their provisions will be binding for the states parties. All references to the Universal Declaration of Human Rights of 1948 may assume a different character depending on whether the legal, or only the political character of this Declaration is recognized.[66] Finally, the following provisions included in Principle VII seem to be of an exclusively political character: paragraph 5, paragraphs 7 and 8 – partly, to the extent they refer to the fulfilment of obligations provided for in the political declarations.

As far as the general significance of Principle VII is concerned, one may mention the view that this principle (together with other principles of the decalogue) have played a greater role in the development of the human rights in Europe than the whole "Basket III" of the CSCE Final Act.

**Principle VIII. Equal rights and self-determination of peoples**

To some extent, the principle concerning equal rights and self-determination of peoples contained in the Helsinki decalogue is broader in scope than the analogous principle included in the UN Declaration of 1970. It refers to rights of peoples/nations, irrespective of whether or not they live in their own, independent and sovereign states.[67] In the UN Declaration the said principle is limited to the problem of liquidation of colonialism.[68]

To the extent in which the European principle applied to nations already living in their own independent states, it seemed in 1975 to have a political character. However, the "merging" of the customary international law principle concerning self-determination of peoples and the European principle, cannot be excluded.[69]

**Principle IX. Co-operation among States**

The principle concerning co-operation among states included in the CSCE decalogue goes further than the analogous principle contained in the UN Declaration.

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[66] As it was rightly underlined by L. H a n n i k a i n e n, there is a strong support among authors for the view that the Universal Declaration of Human Rights, as well as some other declarations have become part of customary law (*ibidem*, 98).

[67] See also A. C a s s e s e, *op. cit.*, 100.

[68] The following authors emphasize that the principle of self-determination developed in the UN system is limited to the liquidation of colonialism problem: J. S y m o n i d e s: "Deklaracja zasad"..., *op. cit.*, 44 and mentioned above A. C a s s e s e, *op. cit.*, 106. However, this second author also mentions views to the contrary.

[69] This perspective was indicated by A. C a s s e s e in the following way: *Of course, if the 35 signatories consistently modify their behaviour to comply with the Helsinki Declaration, then the customary law on self-determination and Principle VIII might tend to converge and even to amalgamate. This would, among other things, mean that Principle VIII would become legally binding, at least as to the 35 signatories, and this in turn would affect the entire scope of the customary and written law on self-determination, as it is applied to the entire international community* (*op. cit.*, 107).

Above all, it speaks of co-operation "in all fields". In particular, the specific CSCE fields are emphasized, such as, for example, confidence-building measures. The problem of environmental protection is also accentuated.

Moreover, most elements included in paragraphs 2, 3 and 4 of Principle IX are original.

The character of all these new elements of Principle IX is political.[70] This proves that States participating in the CSCE intended to develop co-operation which would significantly surpass the requirements of general international law (comp. the formula of an analogous principle in the UN Declaration of 1970).

**Principle X. Fulfilment in good faith of obligations under international law**

The Helsinki principle concerning the fulfilment in good faith of international legal obligations reflects the generally recognized and binding principle of the law of treaties – *pacta sunt servanda*. Its content is basically identical to the respective principle contained in the UN Declaration. It seems that the only political element of the Helsinki principle is the provision that the participating states "will furthermore pay due regard to and implement the provisions in the Final Act of the Conference on Security and Co-operation in Europe" (paragraph 2). Weaker words were used therein in respect of the CSCE Final Act than with reference to international law in general, and to treaties in particular.[71]

In the final provisions of the Helsinki Declaration it is expressly stated, inter alia, that "all the principles are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others".

This being so, all principles should be interpreted in their context.

All the general provisions included in the Helsinki Declaration that follow the principles themselves are of a political character.

The above review and analysis of the Helsinki decalogue confirms the thesis, already presented in this paper, that in the CSCE Declaration legal elements constitute an overwhelming majority.[72] Owing to this it is not groundless to assert that the Helsinki decalogue constitutes a part of the legal and political order in Europe and more broadly – in the CSCE region.

The greatest number of political elements are found in Principle X concerning co-operation among states. As indicated above, to a lesser extent such elements are present also in other principles.[73]

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[70] Having probably in mind these elements L. H a n n i k a i n e n has written that *the principle of cooperation has de lege ferenda aspects*, *op. cit.*, 99.

[71] This was also pointed out by L. H a n n i k a i n e n, *op. cit.*, 99 and J. S y m o n i d e s: "Deklaracja zasad"..., *op. cit.*, 47.

[72] "*Consequently* –as was written by T. B u e r g e n t h a l – *in order to interpret or understand the scope or nature of these obligations, reference has to be made to their meaning under international law*", *op. cit.*, 204.

[73] On the legal significance of these political elements, as well as on the possibility and chances of their transformation into legal elements – see below, section 5.

It may be concluded that the CSCE Declaration of Principles in its entirety is not contradictory to the UN Charter, the UN Declaration of Principles of 1970 and customary international law. Political elements of the CSCE principles have embraced fields which, so far, had not been regulated by international law.

J. Symonides is correct to state that "when applying and interpreting the CSCE principles one has to be absolutely guided by good faith and reasons of security and co-operation in Europe".[74] In case of doubt, an interpretation or action must be chosen that will promote these values more effectively. However, even such an approach could not eliminate differences in the interpretation of some provisions of the decalogue. This is due to the fact, noted by P. van Dijk, that compromise formulae sometimes reflect a different understanding of their implications. For example, while Western states understood some provisions contained in the non-intervention and self-determination principles as eliminating the so-called Brezhnev doctrine (see above), the former socialist states believed that the principle of fulfilment of obligations should also include the "socialist internationalism" principle, "which was bestowed with a legal character by the countries belonging to the socialist community".[75]

The future clearly showed that all compromises in connection with the Helsinki decalogue were well calculated by Western states in 1975. Nowadays, owing to the development of homogeneous systems within the states participating in the CSCE, the Declaration of Principles should be understood more uniformly.

In the main CSCE documents that followed, in particular in the final documents of the CSCE follow-up meetings and the Paris Charter for a New Europe there were included special provisions referring to the Helsinki decalogue. They accentuated and developed certain elements of some principles. For example, the document of the Vienna Follow-up Meeting of 19 January 1989, provides, *inter alia*, as follows:

"/1/ The participating States reaffirm their commitment to all ten principles of the Final Act's Declaration on Principles Guiding Relations between participating States and their determination to respect them and put them into practice. The participating States reaffirm that all these principles are of primary significance and, accordingly, will be equally and unreservedly applied, each of them being interpreted taking into account the others".[76]

This document also states the following:

"/3/ In this context, they confirm that they will respect each other's right freely to choose and develop their political, social, economic and cultural systems as well as their right to determine their laws, regulations, practices and policies...".[77]

It must be acknowledged that this last provision is like an overture to the famous "Autumn of Nations" which occurred in 1989 in Central and Eastern Europe.

As far as the Paris Charter for a New Europe is concerned, one may find the following provisions referring to the Helsinki decalogue: "The Ten Principles of the

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[74] J. S y m o n i d e s: "Deklaracja zasad"..., *op. cit.*, 48.

[75] *Ibidem*, 46. This view was exceptional in the Polish doctrine.

[76] Cited by A. B l o e d: "From Helsinki to Vienna"..., *op. cit.*, 184.

[77] *Ibidem.*

Final Act will guide us towards this ambitious future, just as they have lighted our way towards better relations for the past fifteen years... To uphold and promote democracy, peace and unity in Europe, we solemnly pledge our full commitment to the Ten Principles of the Helsinki Final Act. We affirm the continuing validity of the Ten Principles and our determination to put them into practice. All the Principles apply equally and unreservedly, each of them being interpreted taking into account the others. They form the basis for our relations".[78]

In this context the following formula contained in the CSCE Helsinki Document of 1992 requires consideration:

"7. We reaffirm the validity of the guiding principles and common values of the Helsinki Final Act and the Charter of Paris, embodying responsibilities of States towards each other and of governments towards their people. These are the collective conscience of our community. We recognize our accountability to each other for complying with them. We underline the democratic rights of citizens to demand from their governments respect for these values and standards".[79]

First, it should be underlined that the Helsinki Document of 1992 does not pay much attention to the CSCE decalogue, namely it contains only one provision quoted above. In this respect, this document significantly differs from all earlier CSCE documents. Second, one should note that the above quoted provision only refers to "guiding" principles, and not "all ten principles" of the CSCE. Consequently, it is not clear whether it refers to the whole decalogue; previous CSCE documents were more specific in this respect. Third, it must be emphasized that the above formula speaks simultaneously of "guiding principles" and "common values" of both the "Final Act" and the "Paris Charter". The same treatment of these elements may signify two things. It could mean that the values referred to in the Paris Charter, i.e. parliamentarian democracy, rule of law and market economy, are on the way to being established as appropriate norms or principles. On the other hand, this may also mean that at least some principles included in the Final Act of 1975 are or will be considered as unsatisfactory in the present conditions.

In this context it is necessary to point out that the Helsinki Document of 1992 does not repeat the traditional formula, according to which all principles included in the CSCE decalogue will be equally and unreservedly applied. Furthermore, some opinions have been recently voiced on the process of differentiation of the significance of certain principles of the Helsinki Final Act. According to T. Buergenthal such is the case with the human rights and non-intervention principles,[80] as well as with their mutual relationship. In this author's view, the first of these principles, together with the

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[78] Charter of Paris for a New Europe, 30 *ILM* 193 and 196 (1991).

[79] Declaration and Decisions from Helsinki Summit, 31 *ILM* 1990 (1992).

[80] T. Buergenthal has written, *inter alia*: *Here the traditional domestic jurisdiction doctrine, which has tended to shield oppressive state practices and institutions from international scrutiny, has for all practical purposes lost its meaning and this notwith-standing the fact that non-intervention in the domestic affairs of a State is a basic CSCE principle. Once the rule of law, human rights and democratic pluralism are made the subject of international commitments, there is little left in terms of governmental institutions that is domestic*, *op. cit.*, 206–207.

commitments of the States participating in the CSCE concerning parliamentarian democracy, pluralism and rule of law viewed as the only state system admissible within the CSCE area, brought about an erosion of the principle concerning non-intervention in internal affairs of states. This development seems to be significant, especially because in the past, the original position of the human rights principle in the Helsinki decalogue has been diminished to the regret of some authors.[81] It even happened that this principle was treated as only "supplementary".[82] According to T. Buergenthal, at present "the CSCE approach permits the participating States to examine a State's human rights practice in its broader legal, political and constitutional context. The interrelationship that exists between the rule of law and respect for human rights can thus for the first time be openly addressed on the intergovernmental plane".[83]

A similar evolution is occurring in the mutual relationship of the provision of the Helsinki human rights principle which concerns minorities and self-determination of peoples/nations. According to T. Buergenthal it is probable that, in view of recent crisis-like situations within the CSCE area "the CSCE will focus more attention on minority rights and less on self-determination".[84]

Furthermore, it seems that the significance of the inviolability of frontiers principle has been weakened as a result of some recent cases of violation of this principle within the CSCE area. These violations sometimes remain unpunished. This development must be regretted. Therefore, it seems purposeful to postulate that the territorial integrity of States principle (Principle IV of the Helsinki decalogue) be supplemented. A provision could be added to the present text of this principle which would develop obligations/commitments as to the non-recognition of territorial changes brought about by the illegal use of force.

It also seems necessary to consider whether it would be appropriate to introduce changes to the text of Principle I of the Helsinki decalogue ("Sovereign equality, respect for the rights inherent in sovereignty"). This principle provides, *inter alia*, that states participating in the CSCE "will also respect each other's rights freely to choose and develop their political, social, economic and cultural systems...". However, the recent important CSCE documents, namely the Paris Charter for a New Europe and Helsinki Document of 1992 provide that state system based on parliamentarian democracy, political pluralism, rule of law and market economy is, and will be, the only system admissible within the CSCE area. Consequently, the provision included in Principle I requires substantial changes. It seems that these derogatory changes are possible, though from the formal point of view they could contradict the traditional[85] principle also included in the UN Declaration of 1970. However, it should be underlined that

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[81] So P. van Dijk, *op. cit.*, 114. This author's appraisal was based on the fact that the status of this principle was made equal to the status of the non-intervention principle.

[82] So J. Symonides, "Międzynarodowa ochrona"..., *op. cit.*, 150.

[83] T. Buergenthal, *op. cit.*, 207.

[84] *Ibidem*, 179.

[85] This old, traditional principle concerning the complete freedom of choice of the political system was connected with the concept of peaceful co-existence of states having different political, social and economic systems.

a democratic governance norm is also in *statu nascendi*, though not without difficulties,[86] in general international law. Regardless of the above, it is obvious that the whole norm-creating process is most advanced in Europe.[87]

The same derogatory change could also be introduced to the text of Principle VIII ("Equal rights and self-determination of peoples") in respect of the so-called domestic aspect of self-determination.

Another derogatory change can be proposed to the text of Principle VI ("Non-intervention in internal affairs") or Principle VII ("Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief"). Namely, a new provision could be added which would recognize humanitarian action intervention in case of mass violation of fundamental human rights.[88] Since there is a trend to accept such a norm in the general system this might be a justified departure from the respective principle contained in the UN Declaration of 1970. Various crises within the CSCE area, including the Yugoslav conflict, fully justify a serious consideration of this issue.

Generally, the principles contained in the CSCE Final Act of 1975, to the extent they reflect legal rules, are a foundation of the international law binding in Europe and more broadly – within the CSCE area. They are essentially norms of general international law, additionally strengthened by an European impulse. However, as was indicated above, this law seems to require certain changes.

## 3. The Problem of Particular Customary Norms of International Law in the CSCE Process

The general scheme of the emergence of customary norms in international law is as follows: state practice → standard → *usus* + *opinio juris* = custom. However, it is necessary to emphasize that "the moment of creation of any custom cannot be determined as exactly as the entry into force of a statute or treaty".[89]

In literature there is a general differentiation between generally binding customary norms of international law and particular/regional customary norms.[90] When

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[86] For example, on 18 December 1992 the UN General Assembly adopted a resolution concerning the Third Committee report on "Respect for the principles of national sovereignty and non-interference in the internal affairs of states in their electoral processes" (47/130). The preamble of this resolution expressly referred to the UN Declaration of 1970. In the main part of the resolution, the following provision was included: "5. Urges all States to respect the principle of non-interference in the internal affairs of States and the sovereign right of peoples to determine their political, economic and social system".

[87] On this subject, see T.M. F r a n c k: "The Emerging Right to Democratic Governance", 86 *AJIL* 46ff, in part. 66–69 (1993), as well as G.H. F o x: "The Right to Political Participation in International Law", 17 *Yale JIL* 570 (1992).

[88] An even further reaching postulate, namely, the sanctioning – under certain conditions – of an intervention in defence of democracy, has been put forward in the doctrine by M. H a l b e r s t a m: "The Copenhagen Document: Intervention in Support of Democracy", 34 *HarvardILJ* 163ff, in part. 174–175 (1993). It seems that in the light of present international law this postulate is reaching too far.

[89] R. B i e r z a n e k: "Studia nad społecznością międzynarodową", 33–34 (1991).

[90] Referring to the respective judgements of the PCIJ and the ICJ, K. W o l f k e stresses the following: *The fact that particular customary rules of international law exist is no longer controversial* ("Custom in

considering the possibility of the emergence of customary norms within the CSCE area, one has to point out that so far the States participating in the CSCE have used – in a consistent way – different terms depending on the type of norms in question. When referring to international legal norms the term "obligations" has been used while in the case of CSCE political norms the term "commitments" has always been used.[91] While in the case of "obligations" the term "responsibility" has been used as a correlate, in the case of "commitments" the term "accountability" has been applied. One cannot exclude the emergence in the future of certain European customary norms, or more precisely – customary norms of the CSCE area.[92] The degree of advancement of different corollaries of the first Helsinki Conference of 1975 encourages the consideration, in this context, of the human dimension of the CSCE, and above all of the minorities issue and requirements as to democracy, political pluralism, rule of law and market economy.

As it is well known, when the CSCE Final Act was being drafted, the field of human rights was an issue of confrontation between East and West. At that times the so-called socialist and bourgeois doctrines of human rights were advanced. Therefore, at the beginning of the CSCE process, the developments in the field of human rights were insignificant. The provisions of the so-called Basket III of the Helsinki Final Act have been significantly supplemented only recently. The following documents deserve special attention in this context: the concluding Document of the Vienna Follow-up Meeting of 19 January 1989,[93], Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990,[94] and the Helsinki Summit Document (Declaration and Decisions) of 10 July 1992.[96] During the Vienna Meeting a mechanism for the protection of human rights and the Conference on the Human Dimension of the CSCE were established.[97] In the framework of this Conference, three CSCE meetings were held: in Paris – June 1989, in Copenhagen – June 1990 and in Moscow – October 1991. Because of objections raised by Romania, the Paris Meeting ended with no significant result.[98] In turn, the Copenhagen Meeting

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Present International Law", 88 (1993). On the regional norms of international law – see also: L. C o n d o r e l l i, Custom, in: M. B e d j a o u i (ed.): "International Law"... *op. cit.*, 206ff (1991); R. B i e r z a n e k, "Studia nad społecznością"..., *op. cit.*, 35; W.R. S l o m a n s o n: "Fundamental Perspectives on International Law", 11 (1990).

[91] Quite apart from this sometimes *principles* were mentioned.

[92] With regard to the CSCE, G. C o h e n J o n a t h a n and J.-P. J a c q u é have written that "*he moral and political undertaking might be treated as pre-legal in character, op. cit.*, 53.

[93] Cited by A. B l o e d: "From Helsinki to Vienna"..., *op. cit.*, 181ff.

[94] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 *ILM* 1305 (1990). According to A. B l o e d, this document should be treated as "a European constitution in statu nascendi" ("Successful Meeting of the Conference on the Human Dimension of CSCE", 8 *NethQHR* 260 (1990).

[95] Charter of Paris for a New Europe, 30 *ILM* 193 (1991).

[96] Declaration and Decisions from Helsinki Summit, 31 *ILM* 1390 (1992).

[97] According to T. B u e r g e n t h a l *both substantively and institutionally, the Vienna concluding document can be said to have established the CSCE human rights system* (CSCE Human Dimension..., 185).

[98] On this subject see A. B l o e d: "Moscow Meeting"..., *op. cit.* 4.

was marked by a breakthrough caused by the "democratic revolution"[99] in Central and Eastern Europe. The meeting resulted in a uniform understanding of human rights and in well developed norms concerning fundamental human rights, democracy, rule of law, free elections and rights of minorities. The Copenhagen Document was the first CSCE document proclaiming a state system based on parliamentarian democracy and the rule of law as the only admissible system in Europe (within the CSCE area). The Paris Charter for a New Europe, the Document of Moscow Meeting and the Helsinki Summit Document of 1992 confirmed and further developed CSCE commitments. *Inter alia*, the Moscow Document encourages states participating in the CSCE not to recognize governments which have came to power through the use of force against legally elected state authorities. Thus, the institution of the democratic legitimacy of governments has been introduced into the CSCE process. Second, the Moscow Document expressly confirmed that problems of human rights protection did not remain exclusively within the domestic jurisdiction of states, and were not simple internal affairs of states. As such, those matters can be matters of international interest.[100] The Helsinki Summit Document of 1992 also referred to this problem. Its respective provisions read as follows:

"8. We emphasize that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned. The protection and promotion of human rights and fundamental freedoms and the strengthening of democratic institutions continue to be a vital basis for our comprehensive security".[101]

Various CSCE documents mentioned above provide for the following specific human rights and fundamental freedoms: the right to contact other people, right to get an access to information, rights to participate in the cultural exchange, right to freedom of religion, equal rights for men and women, right to protection against an arbitral arrest, right to protection against torture, right of a convicted person to appellation, right to due judicial process, right to free movement, rights during martial law, etc. However, all these provisions, as well as all the CSCE documents in which they are included, are not, as such, legally binding.[102] Today it is impossible to predict whether – as the result of the further developments in this field – only political commitments/standards will be strengthened or whether some particular customary norms will also emerge.[103] In this context, the conditions of recognition of post-Yugoslav

[99] The events of the breakthrough in Central and Eastern Europe in 1989/1990 were so described by T. Buergenthal, *op. cit.*, 189.

[100] On this subject see also: G.H. Fox, *op. cit.*, 570 and A. Bloed: "Moscow Meeting of the Conference"..., *op. cit.*, 4ff. The text of the Moscow Meeting Document – see *Helsinki Monitor* 66ff (1991) and 30 *ILM* 1671 (1991).

[101] Declaration and Decisions from Helsinki Summit, 31 *ILM* 1390 (1992).

[102] J. Menkes and A. Prystrom who have expressed a different opinion, are not right – *op. cit.*, 40 and 43.

[103] This last possibility is taken into consideration by A.Ch. Kiss, M.F. Dominick, *op. cit.*, 315; J. Symonides: "Collective Rights of Minorities in Europe", in: R. Lefeber, M. Fitzmaurice and E.W. Vierdag (eds.): "The Changing Political Structure of Europe. Aspects of International Law", 115 (1991); T. Buergenthal, *op. cit.*, 202.

and post-Soviet states were very significant. As is well known, European states and certain other states made their recognition of these new states dependent on the observance by them of: 1) human rights, 2) democratic institutions, 3) rights of minorities, 4) state territory and state frontiers. This is an element of custom-creating practice.

It seems that the custom-creating process is most advanced within the CSCE area in the field of promoting parliamentary democracy, political pluralism, free elections and rule of law as the only state system admissible in the area. When analyzing this process, it is purposeful to acquaint oneself with quotations from the respective CSCE documents. The most important provisions of the Copenhagen Meeting Document read as follows:

"The participating States express their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe. They therefore reaffirm their commitment to implement fully all provisions of the Final Act and of the other CSCE documents relating to the human dimension and undertake to build on the progress they have made.

...

(2) They are determined to support and advance those principles of justice which form the basis of the rule of law...

(3) They reaffirm that democracy is an inherent element of the rule of law. They recognize the importance of pluralism with regard to political organizations.

...

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.1.) – free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;

(5.2.) – a form of government that is representative in character in which the executive is accountable to the elected legislature or the electorate;

...

(6) The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral process. They recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, the democratic order freely established through the will of the people against the activities

of persons groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating State".[104]

At the same time, the Copenhagen Document provides for double limitations of the traditional principle concerning freedom of choice and development of political, social economic and cultural systems. Namely, according to this document, this freedom of choice/development should be exercised "in accordance with international human rights standards".[105] Moreover, all laws, regulations, practices and policies should be "brought into harmony with the provisions of the Declaration of Principles and other CSCE commitments".[106] The resulting conclusion is that the authors of the Copenhagen Meeting Document intended the principle concerning freedom of choice development of state systems to refer only to secondary matters, and not to the very essence of the system. As far as such essence is concerned, only parliamentarian democracy based on free elections comes into play.

The Paris Charter for a New Europe contains the following provisions concerning the discussed problem:

"We undertake to build, consolidate and strengthen democracy as the only system of government of our nations. In this endeavour, we will abide by the following:

Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an over-mighty State. Their observance and full exercise are the foundation of freedom, justice and peace.

Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.

Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law (...).[107]

In view of such categorical statements on the exclusiveness of the democratic system within the CSCE area it is surprising to find in the same document an equally categorical confirmation of the traditional principle concerning the full freedom of choice and development of state systems. Namely, the respective provisions of the Paris Charter read as follows:

"To uphold and promote democracy, peace and unity in Europe, we solemnly pledge our full commitment to the Ten Principles of the Helsinki Final Act. We affirm the continuing validity of the Ten Principles and our determination to put them into

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[104] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 *ILM* 1305 (1990).

[105] Ibidem. One of such human rights is at present precisely "democratic entitlement", i.e. the right to practise democracy, the right to participate in free elections, ets. in one's own state.

[106] *Ibidem.*

[107] Charter of Paris for a New Europe, 30 *ILM* 193–194 (1991).

practice. All the Principles apply equally and unreservedly, each of them being interpreted taking into account the others. They form the basis for our relations".[108]

It seems that there exists and internal contradiction in the provisions quoted above. The provision concerning the exclusiveness of the democratic system contradicts, for example, Principle I of the Helsinki decalogue, since it provides, *inter alia*, for a complete freedom of choice and development of the state political system.

The commitments of states participating in the CSCE in the field under consideration were further strengthened and confirmed in the Helsinki Summit Document of 1992. The respective provisions of this Document read as follows:

"6. We welcome the commitment of all participating States to our shared values. Respect for human rights and fundamental freedoms, including the rights of persons belonging to national minorities, democracy, the rule of law, economic liberty, social justice and environmental responsibility are our common aims. They are immutable. Adherence to our commitments provides the basis for participation and co-operation in the CSCE and a cornerstone for further development of our societies.

7. We reaffirm the validity of the guiding principles and common values of the Helsinki Final Act and the Charter of Paris, embodying responsibilities of States towards each other and of governments towards their people. These are the collective conscience of our community. We recognize our accountability to each other for complying with them. We underline the democratic rights of citizens to demand from their governments respect for these values and standards".[109]

When commenting on these provisions one should emphasize, above all, the "immutable" character of the following common values: democracy, the rule of law and economic liberty. Second, it is purposeful to notice that the "guiding principles" and "common values" of the "Helsinki Final Act" and the "Charter of Paris" have been placed on an equal footing. At the same time it is worthy to note that the provision in question refers only to the "guiding principles" and not to "all ten principles". Possibly, the authors of the Helsinki Summit Document were aware of the contradiction which exists between the promotion of democracy as the only system admissible within the CSCE area and the principle concerning the complete freedom of choice of political systems, proclaimed earlier in the Helsinki Final Act. On the other hand, it is probable that the word "guiding" simply refers to the same word used in the title of the Declaration on Principles contained in the Helsinki Final Act. If that is the case, the expression "guiding principles" would also mean "all ten principles" with the said contradiction persisting.

As a rule, the States participating in the CSCE conform in practice to their commitments to democracy. This is true at least with respect to European and North American states. However, some doubts may exist in the case of certain post-Soviet states.

In their efforts to practise democracy the States participating in the CSCE are assisted by the CSCE Office for Democratic Institutions and Human Rights (established

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[108] *Ibidem.*

[109] Declaration and Decisions from Helsinki Summit, 31 *ILM* 1390 (1992).

in Warsaw) and the Council of Europe. It should also be emphasized that one of the conditions advanced by the States participating in the CSCE to the recognition of the post-Yugoslav and post-Soviet states was that the latter states must practise democracy.

The facts and documents presented above indicate that within the CSCE region a particular customary norm of international law providing for every individual's right to democratic free elections in his or her own state[110] is in *statu nascendi*. While this norm seems also to be in *statu nascendi* in general international law and in some other regional systems,[111] it is most advanced in the CSCE area. Perhaps, we face a CSCE usus in this respect (because of the long-lasting practice in Western Europe, the USA and Canada). There are reasons to believe that the respective legal norms will be formed quicker in the CSCE region than in the universal system or some other regional systems.[112]

It should be noted in this context that according to the CSCE commitments, the participating States may make their relations with other participating States dependent, *inter alia*, on their progress in the human dimension field.[113] Nevertheless, it is unjustified to conclude that military intervention of the States participating in the CSCE is admissible in order to restore democracy in other participating States.[114]

Another human rights element which – within the CSCE area – seems to have at present the status of particular customary law in *statu nascendi* is the rules concerning minorities protection. This issue is of vital importance from the point of view of conflict prevention and was regulated at length in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 1990. The document includes, *inter alia*, the following provisions:

"(31) Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law.

The participating States will adopt, where necessary, special measures for the purposes of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.

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[110] As is persuasively indicated by T.M. F r a n c k, this right has its origin in the right to self-determination (which has external and internal aspects), as well as in the human right to freely express opinions (*op. cit.*, 90). As was further stated by this author *the rules, and the processes for realizing self-determination, freedom of expression and electoral rights, have much in common and evidently aim at achieving a coherent purpose: creating the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live and work* (*ibidem*, 79).

[111] On this subject see T.M. F r a n c k, *op. cit.*, 46, 47ff, and G.H. F o x, *op. cit.*, 539ff.

[112] This indirectly results also from T.M. F r a n c k's deliberations (*op. cit.*, 66–69) in the context of his reasoning as a whole.

[113] On this subject see T.M. F r a n c k, *op. cit.*, 84.

[114] A view to the contrary was expressed in doctrine by M. H a l b e r s t a m. The author's conclusion was as follows: *if (1) free elections are held, (2) the government so elected is barred from taking office or deposed by use of force, (3) another state or states intervene, restore the legitimate government and (4) withdraw, that is not – and should not be – a violation of international law*, *op. cit.*, 175. In turn, T.M. F r a n c k admits the possibility of military intervention in defence of democracy only on the basis of a UN Security Council decision adopted under Chapter VII of the UN Charter; this would mean the existence of a threat to the peace, *op. cit.*, 84.

(32) To belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice.

Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. In particular, they have the right;

(32.1.) – to use freely their mother tongue in private as well as in public;

(32.2.) – to establish and maintain their own educational, cultural and religious institutions, organizations, which can seek voluntary financial and other contributions as well as public assistance, in conformity with national legislation;

(32.3.) – to profess and practise their religion, including the acquisition, possession and use of religious materials, and to conduct religious educational activities in their mother tongue;

(32.4.) – to establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs;

(32.5.) – to disseminate, have access to and exchange information in their mother tongue;

(32.6.) – to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations.

Persons belonging to national minorities can exercise and enjoy their rights individually as well as in community with other members of their group. No disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights.

(33) The participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity. They will take the necessary measures that effect after due consultations, including contacts with organizations or associations of such minorities, in accordance with the decision-making procedures of each State.

Any such measures will be in conformity with the principles of equality and non-discrimination with respect to the other citizens of the participating State concerned.

(34) The participating States will endeavour to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation.

In the context of the teaching of history and culture in educational establishments, they will also take account of the history and culture of national minorities.

(35) The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.

The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned".[115]

These commitments have been confirmed and further developed in the Paris Charter for a New Europe[116] and in the Helsinki Summit Document of 1992. The latter document provides for the establishment of a new organ: the CSCE High Commissioner on National Minorities. It also regulates the Commissioner's competences in the field of "early warning" in case of tensions caused by minorities problems.[117] This is a part of the conflict prevention procedure in the framework of the CSCE.

The problem of minorities protection is regulated in CSCE documents, and rightly so, in connection with human rights, and not in the framework of the principle concerning self-determination of peoples/nations. Provisions contained in these documents, and in particular in the Copenhagen Document, constitute already an European or – more precisely – a CSCE standard. This European/CSCE standard has been expressly mentioned in bilateral European treaties. The Treaty between the Republic of Poland and the Federal Republic of Germany on Goodneighbourlines and Friendly Co-operation of 17 June 1991 (article 20, para. 2)[118] is one example in this respect. It was also precisely this standard that the European states, the USA and Canada had in mind when they conditioned the recognition of post-Yugoslav and post-Soviet states, *inter alia*, on the protection of minorities rights within these states. However, this practice did not prevent recent conflicts, including the Yugoslav conflict.

At present it is impossible to predict further stages in the formation of the respective particular customary norms within the CSCE area. In particular, it is not clear to what extent the whole process of formation of these norms may be complicated by the admission to the CSCE of the post-Soviet Asian states.

With respect to the relation between norms of the universal and particular/regional systems one can expect them to be complementary rather than subordinated to each other.[119]

## 4. Treaties concluded in the framework of the CSCE

So far, only one treaty has been concluded in the CSCE framework, i.e. Convention on Conciliation and Arbitration within the CSCE, signed in Stockholm on 15 December

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[115] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 *ILM* 1305 (1990).

[116] Charter of Paris for a New Europe, 30 *ILM* 199 (1991).

[117] Declaration and Decisions from Helsinki Summit, 31 *ILM* 1366ff (1992).

[118] *Dziennik Ustaw* (Official Journal) 1992, No. 14, item 56.

[119] Generally on this subject see S. Gonzales Galves who invokes the opinions of ICJ judges Alvarez and Read (The Future of Regionalism in an Asymmetrical International Society, in: R.St.J. Macdonald, D.H.. Johnston (eds.): "The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory", 666 (1986).

1992.[120] According to the mandate of the Helsinki Summit (1992), the text of this Convention was elaborated at the CSCE Meeting of Experts on Peaceful Settlement of Disputes, held in Geneva on 12–13 October 1992. The work of the CSCE Meeting of Experts was the result of work of the so-called Badinter group.[121] Foreign Ministers of the following twenty nine states signed the Convention in Stockholm: Albania, Germany, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Croatia, Finland, France, Greece, Hungary, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Moldova, Monaco, Norway, Poland, Portugal, Romania, The Russian Federation, San Marino, Sweden, Switzerland and Ukraine. Later the Convention was also signed by the representatives of Canada, Denmark, Iceland, The Slovak Republic and Slovenia. In accordance with the provisions contained in Article 33, para 3 of the Convention it entered into force on 5 December 1994, i.e. two months after the date of deposit of the twelfth instrument of ratification or accession. The following states are parties to the Convention under consideration: Germany, Cyprus, Croatia, Denmark, France, Italy, Liechtenstein, Monaco, Poland, Slovenia, Sweden and Switzerland. The instrument of ratification was deposited on behalf of the Republic of Poland on 9 December 1993.[122] The Government of Sweden is the depository of the Convention.

The Convention regulates two classical methods of peaceful settlement of disputes, namely, conciliation and arbitration. As provided by the Convention, conciliation is compulsory, while arbitration is, in principle, optional. However, states parties to the Convention may make declarations accepting the jurisdiction of the Arbitration Tribunals as compulsory. The Convention also provides for the establishment of the Court of Conciliation and Arbitration within the CSCE.

Several states, including Poland, have proposed that other treaties be concluded in the framework of the CSCE. For example, Poland has advanced the suggestion of concluding treaties concerning security within the CSCE area,[123] CSCE principles and the CSCE human dimension. So far, none of those proposals has been accepted.[124] Therefore, Poland which has a vital interest in European security problems, has presented a draft CSCE Code of Conduct in the Field of Security.[125] Of course, this is a political document.

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[120] For the text of the Convention see 32 *ILM* 557 (1993). On this Convention see R. S z a f a r z: "Konwencja o koncyliacji i arbitrażu w ramach KBWE", 48 *PiP* 5/58ff (1993).

[121] R. B a d i n t e r, the president of Conseil d'Etat organized an international group of experts whose purpose was to elaborate the draft convention on conciliation and arbitration in Europe.

[122] Information provided by the Polish Ministry of Foreign Affairs.

[123] See the proposal by the Polish Prime Minister, T. Mazowiecki, to establish the Council of European Co-operation (see *Rzeczpospolita* of 31 January 1990). The Polish proposal was similar to those of the President of France, F. Mitterrand, the President of Czechoslovakia, V. Havel and the Minister of Foreign Affairs of the FRG, H.-D. Genscher.

[124] However, the former Polish Minister of Foreign Affairs, K. Skubiszewski, has expressed some optimism in this respect. He has written, *inter alia*: *In the framework of the Conference on Security and Co-operation in Europe we are at present at the stage of combining various elements of co-operation into a unity; this is to prepare the next stage, i.e. collective security* ("The Position of Poland in Europe: Today and To-Morrow", *Gazeta Wyborcza* of 8–9 January 1994).

[125] Proposal by the Delegation of Poland: CSCE Code of Conduct in the Field of Security of 11 November 1992. This document was presented to the CSCE Forum for Security Co-operation.

Generally, it is not apparent that any significant number of treaties will be concluded in the framework of the CSCE. It is so in spite of the fact that the CSCE community of states is becoming more homogeneous as far as the political and economic system is concerned. This is caused above all by the CSCE tradition to adopt only political documents. Another reason is the admission of Central and Eastern European states to the Council of Europe within which many conventions have been concluded. The third reason is, perhaps, the admission of all post-Soviet Asian states to the CSCE. In such circumstances the further development of international legal obligations may prove to be difficult.

## 5. The Significance of the CSCE Political Agreements for the Legal Order of Europe

As is shown by the historical examples of the American Declaration of Independence and the UN Universal Declaration of Human Rights political documents may be very inspiring for subsequent legal acts.[126] Moreover, the political documents, like CSCE documents, may have certain direct legal significance.

According to R.R. Baxter, the following assertions concerning political or "soft" norms seem to be supportable:

"1. If some sort of written norm has been consented to by the states involved, the future course of discussion, negotiation and even agreement will not be the same as they would have been in the absence of the norm.

2. Once a matter has become the subject of such a norm, the matter can no longer be asserted to be one within the reserved domain or domestic jurisdiction of the State.[127] (...)

3. The norm will establish new standards of relevance for the negotiations between the parties. Certain arguments will be ruled out. (...)

4. The norm will establish the legal framework within which the dispute about its application may be resolved. It will establish presumptions, indicate the prevailing trend of opinion, provide a guiding principle which may have a certain inherent appeal for the parties, and channel negotiations and settlement into legal and orderly paths".[128]

Furthermore, if political commitments are parallel to legal obligations (as is the case with human rights) states seem to be obliged to interpret and apply treaties in the light of political agreements.[129] At the same time, the respective provisions of domestic law may, or even should be, interpreted and applied (also by courts) in the light of the CSCE commitments.[130] These commitments should also be taken into consideration in the legislative work of the states participating in the CSCE.[131] According to

[126] On this subject see T. Buergenthal, *op. cit.*, 205.

[127] Similar provisions were included in some CSCE documents, for example, in the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE and the Helsinki Summit Document of 1992.

[128] R.R. Baxter: International Law in "Her Infinite Variety", 29 *ICLQ* 565 with reference to 559 (1980).

[129] On this subject see T. Buergenthal, *op. cit.*, 209.

[130] *Ibidem*, 205.

[131] *Ibidem*.

T. Buergenthal, in this way political norms create "the foundation for a new pan-European public order".[132]

Many authors are of the opinion that at least some provisions contained in the CSCE documents have, or may have, a pre-legal character.[133]. However, A. Wasilkowski seems to go too far in asserting that "an attempt to prove that the Final Act has gradually become a treaty although it was not a treaty when signed, may be successful because the participating states consider it as a treaty in their practice".[134]

Multiple treaty references to the Helsinki Final Act and to other CSCE documents may have not only interpretative significance for the respective treaties.[135] For example, Article 5 of the Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Goodneighbourliness, Partnership and Co-operation of 9 November 1990, reads as follows: "Both Parties according to their abilities will support the security and co-operation process in Europe on the basis of the Helsinki Final Act of 1 August 1975, and in co-operation with all other participating States will further strengthen and develop it, namely through the establishment of permanent institutions and organs. The purpose of these efforts is the consolidation of peace, stability and security as well as the unification of Europe into one uniform area of law, democracy and co-operation in the fields of economy, culture and information".[136]

It seems that in connection with the above provision one may defend the view that the FRG and the USSR have incorporated the provisions of the Helsinki Final Act into their legal obligations.

Perhaps, a similar conclusion may be drawn from Article 20, para. 2, of the Treaty between the Republic of Poland and the Federal Republic of Germany on Goodneighbourliness and Friendly Co-operation of 17 June 1991. It reads as follows:

"2. The contracting Parties shall implement rights and obligations according to international standards concerning minorities and, in particular, in accordance with the United Nations Universal Declaration of Human Rights of 10 December 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966, the International Covenant on Civil and Political Rights of 16 December 1966, the CSCE Final Act of 1 August 1975, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990, as well as the Paris Charter for a New Europe of 21 November 1990.[137]

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[132] *Ibidem.*

[133] See on this subject, for example: G. Cohen Jonathan, J.-P. Jacqué..., *op. cit.*, 53; A. Bloed (ed.): "From Helsinki to Vienna"..., *op. cit.*, 11; A.Ch. Kiss, M.F. Dominick, *op. cit.*, 315; T. Buergenthal, *op. cit.*, 202; J. Symonides: "Collective Rights of Minorities"..., *op. cit.*, 115.

[134] A. Wasilkowski: "Comments on Arie Bloed's Theses", 18 *PolYBIL* 130 (1989–1990).

[135] Following treaties are examples: Treaty of Friendship and Co-operation between Spain and Portugal of 22 November 1977 (UNTS 1090, 30); Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Good Neighbourliness, Partnership and Co-operation, of 9 November 1990 30 *ILM* 505 (1991); Treaty between the Republic of Poland and the Federal Republic of Germany on Good Neighbourliness and Friendly Co-operation, of 17 June 1991 (Dz.U. 1992, No. 14, item 56); Treaty on the Final Settlement in Respect of Germany, of 12 September 1990, 29 *ILM* 1187 (1990).

[136] See above, note 135. Article 5, para 3 of the Polish–German Treaty is similar in content (*ibidem*).

[137] See above, note 135.

This provision leaves no doubt as to the intentions of Poland and the FRG to treat the CSCE standards concerning minorities as legal standards in their mutual relations. The respective provisions of the CSCE documents seem to have been indirectly incorporated to the Polish–German Treaty.

As regards the political elements included in the Helsinki decalogue, it seems that only some of them have a chance of becoming binding as particular customary norms or as parts of such norms. For example, this seems to be possible in case of the political elements contained in Principles III (Inviolability of frontiers) and VIII (Equal rights and self-determination).

As a side-note of these deliberations, it is purposeful to emphasize the generally large effectiveness of political accords negotiated in the framework of the CSCE. Sometimes it is even greater than in the case of some treaties.[138] However, today, the inability of the CSCE to prevent and later to resolve the Yugoslav conflict is a dark shadow in this otherwise rather bright picture. Unfortunately, the same is true of conflicts among several post-Soviet states.

## 6. General Appraisal and Future Prospects.

To sum up these deliberations one is inclined to conclude that the CSCE contribution to the international legal order of Europe is not very significant. CSCE achievements in this respect are the following: one convention, several particular customary norms in *statu nascendi* and the strengthening of general international law principles within the CSCE area. Further perspectives of the development of legal elements in the CSCE process depend, to a large extent, on the tempo and direction of the development of the CSCE, as such.

As it is well known, the CSCE process was instrumental in bringing about revolutionary changes in Central and Eastern Europe in 1989.[139] At that time optimists could have expected that in the new, unified and more homogeneous Europe the CSCE process would result in the acceptance of not only political documents, but also of many legal documents, i.e. treaties.

However, different factors have made this optimism unjustified. First, a tradition to adopt only political documents in the framework of the CSCE proved to be too strong (the convention concluded in the CSCE framework is an exception). Second, almost all Central and Eastern European states have become or are in the process of becoming members of the Council of Europe, as well as parties to its 155 conventions and agreements. Third, the United States is not inclined to expand its legal obligations in the field of European security. Fourth, among other factors hampering the fruitful development of the CSCE process are the Yugoslav conflict and the admission to the

[138] A.D. R o t f e l d has explained this fact as follows: *On the one hand the harmonization of interests and compromises achieved in the form of "package-deals", and on the other hand – mechanisms of continuity and verification of application of the adopted commitments, make the CSCE recommendations more effective in practice than some ratified treaties* ("Spotkanie wiedeńskie KBWE"..., 27).

[139] The Helsinki decalogue, including the human rights protection principle and principles indirectly eliminating the so-called Brezhnev doctrine, played a crucial role in this process.

CSCE of all post-Soviet Asian states, these states being very different from the point of view of legal culture and civilization.

If, in these circumstances, at least some Central and Eastern European states are admitted to the NATO and European Union, the significance of the CSCE process will be further diminished. Therefore, the following question may sometimes be encountered: Will the CSCE survive the year 2000?

If it is to survive and to be useful in the new circumstances in Europe, it will need a new impulse. It would be desirable if several conditions[140] and postulates were met. The first postulate concerns the Helsinki decalogue. As was proven above, some principles need a new shape (see above section 2 and 3). Moreover, Principle IX concerning "Co-operation among States" could be supplemented by an additional paragraph regulating the solidarity principle.

The second postulate is connected with the recognition of "symbiotic linkage among democracy, human rights and peace".[141] This means, *inter alia*, that when aiming at peace one has to guarantee democracy. The CSCE could contribute to the strengthening of democracy within its area by introducing the legal obligation to have all elections within the participating states monitored.[142]

The third postulate, based on the experience of the Yugoslav conflict, concerns supplementing the CSCE mechanism to be applied in time of crises. Perhaps, it would be purposeful to create an efficient mechanism of a regional humanitarian action/intervention in case of the necessity to restore respect for fundamental human rights within any state participating in the CSCE.

Finally, having the activity of the CSCE organs and institutions based on the legally binding statute would also be helpful.

The fulfilment of, at least, some of the mentioned above postulates will require the CSCE process to produce also legal documents (treaties).

At present, the CSCE seems to be at the cross-roads: either it will try to be an active actor on the European scene or it will be confined to remaining only a lobby for Central and Eastern European states in their attempts to join the Council of Europe, NATO and European Union.

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[140] For example, M.R. L u c a s has mentioned the following conditions: 1) "a qualitatively higher degree of synchronized progress in all CSCE baskets"; 2) "institutionalising all baskets and creating new structures within the CSCE framework"; 3) forging additional political administrative links between an upgraded CSCE and European institutions"; 4) "promoting a more active and multi-sided participation of the United States in the CSCE", in: The Conference on Security and Cooperation in Europe and the Post-Cold War Era, 144 (1990).

[141] So T.M. F r a n c k, *op. cit.*, 88–89. This author has also added that "States' nonagressiveness, however, depends fundamentally on domestic democracy" and has quoted the view that "in the past 150 years" no liberal democracies have ever fought against each other" (*ibidem*, 87).

[142] On this subject generally – see T.M. F r a n c k, *op. cit.*, 84.

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# La réforme du Conseil de sécurité des Nations Unies.

## Etat de la question de la représentation équitable au Conseil de sécurité et de l'augmentation du nombre de ses membres*

PAUL TAVERNIER

## Introduction

La réforme de l'ONU et du système onusien est un mythe au sens sorélien du terme, c'est-à-dire un "ensemble lié d'images motrices".[1] Les anniversaires qui jalonnent l'histoire de l'Organisation sont propices à l'éclosion de nombreux projets. Cela avait été le cas lors du 40ème anniversaire et cela se vérifie encore avec le 50ème anniversaire.[2] Le Secrétaire général des Nations Unies est lui-même très actif dans ce domaine puisqu'il a publié deux documents qui ont eu un grand retentissement, *l'Agenda pour la paix* en 1992[3] et *l'Agenda pour le Développement* en 1994.[4]

Beaucoup de ces rapports, documents ou projets concernent l'action des Nations Unies dans le domaine économique et social ou la restructuration du Secrétariat, mais la réforme du Conseil de sécurité a suscité depuis longtemps des réflexions et des initiatives. Dès 1945, à la conférence de San Francisco, plusieurs petits Etats avaient fortement critiqué le droit de veto reconnu dans la Charte (article 27, paragraphe 3) aux cinq membres permanents et dès la première session de l'Assemblée générale

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* Cette étude est une version développée d'une communication présentée lors du colloque de la Faculté de Droit de Besançon (France) sur "L'ONU 50 ans après. Bilan et perspectives" (Actes à paraître).

[1] Voir P. Tavernier: "Le processus de réforme des Nations Unies. Du rapport Bertrand (1985) au rapport du groupe des 18 (1986)", 92 *RGDIP* 305–334 (1988).

[2] Voir les travaux de la Fondation Dag Hammarskjöld (Uppsala, Suède) publiés par B. Urquart et E. Childers: *Une direction énergique pour le monde de demain: l'avenir des Nations Unies* (*Development Dialogue*, 1990:1–2), Towards a more effective United Nations (*Development Dialogue*, 1991:1–2) et Renewing United Nations System (*Development Dialogue*, 1994:1). Voir aussi les études du Centre Sud (South Center), Genève, sur "Le Sud et la réforme de l'ONU": *Enhancing the economic role of the United Nations* (1992), *Les Nations Unies à un carrefour critique. Le Sud doit agir sans tarder* (1993). Voir aussi, sur les propositions de réforme, D.D. Caron: "The Legitimacy of the Collective Authority of the Security Council", 87 *AJIL* 552–590 (1993), et M.C. Ortega Carcelen: "La reforma de la Carta de Naciones Unidas: algunas propuestas institucionales", 43 *REDI* 389–407 (1991).

[3] A/47/277-S/24111 du 17 juin 1992. Ce rapport a été examiné de manière approfondie par le Conseil de sécurité et a donné lieu à de nombreuses déclarations de son Président: voir P. Tavernier: L'Année des Nations Unies. Questions Juridiques, 38 *AFDI* 696-697, 712–713 (1992), 39 *AFDI* 696 (1993).

[4] A/48/935 du 6 mai 1994 et A/49/665 du 11 novembre 1994 (contenant les recommandations du Secrétaire général).

l'idée de modifier les règles de vote au Conseil de sécurité avait été avancée.[5] Les critiques du droit de veto ne cessèrent jamais. Toutefois, la réforme du droit de veto ne devait réapparaître à l'ordre du jour de l'ONU qu'à partir de 1969, dans le cadre des discussions au Comité spécial de la Charte des Nations Unies et du raffermissement du rôle de l'Organisation. Ces débats n'aboutirent pas, en raison de la force des "tabous" qui frappent tout projet de réforme aux Nations Unies: le texte de la Charte, malgré les dispositions des articles 108 et 109 relatives aux amendements et à la révision de la Charte est pratiquement "intouchable", sinon pour des réformes mineures: de plus, toute réforme radicale est exclue et toute modification exige des mesures transitoires et une mise en oeuvre progressive.[6] C'est ainsi que seules des modifications mineures furent adoptées en 1963, 1965 et 1971. La composition du Conseil économique et social fut élargie à deux reprises en 1963 et en 1971 et le nombre de ses membres fut porté de dix-huit à vingt-sept puis à cinquante-quatre. En revanche les projets destinés à transformer ce Conseil en organe plénier n'ont jamais été adoptés.

Les autres amendements concernent le Conseil de sécurité dont le nombre des membres est passé de onze à quinze, ce qui a entraîné la modification des articles 23 (composition) et 27 (vote), la majorité requise pour les décisions passant de sept à neuf voix. Ces réformes limitées furent complétées par l'amendement de 1965 relatif à l'article 109 qui se borne à appliquer la nouvelle majorité au Conseil de sécurité pour la décision relative à la convocation d'une conférence de révision, disposition qui avait été omise dans la réforme de 1963. L'objet de la réforme de 1963–1965 était de tenir compte de l'accroissement du nombre des Etats membres de l'ONU sans toucher au double privilège reconnu aux cinq vainqueurs du second conflit mondial: la permanence et le pouvoir de blocage des décisions autres que les décisions de procédure. En effet, tout amendement qui aurait mis en cause ce double privilège se serait heurté à l'exigence de l'unanimité des membres permanents pour toute modification de la Charte (articles 108 et 109).

La question de la réforme du Conseil de sécurité fut relancée en 1979 à la demande de l'Algérie, de l'Argentine, du Bangladesh, du Bouthan, du Guyana, de l'Inde, des Maldives, du Népal, du Nigeria, et de Sri Lanka[7] et l'Assemblée générale a décidé d'inscrire à son ordre du jour la "question de la représentation équitable au Conseil de sécurité et de l'augmentation du nombre de ses membres," malgré l'opposition de quatre des cinq membres permanents.[8] Cette situation explique sans doute pourquoi l'examen de la question fut constamment différé, d'année en année, de la trente-cinquième jusqu'à la quarante-sixième session de l'Assemblée générale[9]. Ce n'est que le 11 décembre 1992 (A/RES/47/62) que, l'Assemblée générale a adopté, sans

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[5] Voir P. Tavernier: "Commentaire de l'article 27" in: J.P. Cot et A. Pellet, *La Charte des Nations Unies. Commentaire article par article*, 495–514 (1991, 2e édition).

[6] Sur ces "tabous" voir notre étude précitée à la note n° 1, notamment pp. 324 et s.

[7] A/34/246.

[8] Voir P. Tavernier: L'Année des Nations Unies. Questions juridiques, 25 *AFDI* 464 (1979).

[9] Voir P. Tavernier: L'Année des Nations Unies. Questions juridiques, *AFDI* 26 (1980), 410; 27 (1981) 402; 29 (1983) 435; 38 (1992) 687–688.

vote, une résolution dans laquelle elle demande aux Etats de transmettre leurs observations au Secrétaire général et à celui-ci de lui présenter un rapport. Ayant examiné ces observations et ce rapport,[10] l'Assemblée a décidé en 1993 de "constituer un groupe de travail à composition non limitée pour examiner tous les aspects de la question de l'augmentation du nombre des membres du Conseil de sécurité ainsi que d'autres questions ayant trait au Conseil de sécurité."[11] Le groupe de travail a élaboré un rapport bref,[12] mais il n'a pu se mettre d'accord sur des recommandations concrètes. Un débat approfondi a eu lieu à l'Assemblée générale.[13]

Même si aucune décision définitive n'a pu être prise en ce qui concerne la réforme du Conseil de sécurité, 1992 a marqué un tournant dans la mesure où le principe de la réforme semble acquis, les membres permanents qui étaient hostiles à cette éventualité, c'est-à-dire les cinq, sauf la Chine, ayant levé leur opposition à toute réforme. Le tabou fondamental relatif au monopole des cinq paraît écarté, mais l'accord sur le contenu d'une réforme est loin d'être atteint, bien que de nombreuses idées aient été avancées et que les diverses options possibles se soient clarifiées.

De nombreuses raisons justifient une réforme du Conseil de Sécurité, notamment "l'augmentation considérable du nombre des membres de l'ONU, particulièrement des pays en développement, ainsi que ... l'évolution des relations internationales" (résolution 48/26). En effet lors de l'adoption de l'amendement élargissant le Conseil de sécurité, en 1963, l'ONU comptait 113 Etats membres, alors qu'elle en compte actuellement 185.[14] De plus la répartition de la puissance n'est plus la même dans les années 90 par rapport aux années d'après-guerre: l'Allemagne et le Japon sont devenus des grandes puissances et d'autres Etats, comme l'Inde, le Brésil ou le Mexique jouent un rôle important sur la scène internationale. En outre, la chute du mur de Berlin, la dislocation de l'URSS et la fin de la guerre froide ont eu des répercussions profondes sur les relations internationales. C'est dans ce contexte renouvelé que s'inscrivent les débats au sujet de la réforme du Conseil de sécurité. On en trouve l'écho dans les prises de position des Etats.

Les grandes puissances ont sûrement été sensibles à l'évolution de la situation internationale, mais en même temps leur propre évolution a permis de dépasser le tabou de la réforme du Conseil de sécurité. Désormais, la réforme qui était de l'ordre purement spéculatif, devient envisageable dans un avenir plus ou moins proche... Toutefois de nombreuses questions restent en suspens. Devra-t-on entreprendre une réforme globale du Conseil de sécurité ou peut-on se contenter d'une série de mesures moins ambitieuses, des "réformes à la carte" en quelque sorte? Peut-on se limiter à une réforme du Conseil de sécurité ou bien doit-on profiter du cinquantième anniversaire pour adopter une réforme de l'ONU dans son ensemble, voire du système

[10] A/48/264 et Add. 1 à 10.

[11] A/RES/48/26 du 3 décembre 1993, adoptée sans vote: P. T a v e r n i e r, L'Année des Nations Unies. Questions juridiques, 39 *AFDI* 688 (1993).

[12] A/48/47.

[13] A/49/PV.29–30, 13 et 14 octobre 1994.

[14] En 1945 l'ONU regroupait 51 Etats membres.

des Nations Unies, dans la perspective de l'établissement d'une "organisation de la troisième génération" selon l'expression de Maurice Bertrand?[15]

Toutes ces interrogations n'ont pas encore trouvé de réponses, mais parmi les nombreuses idées ou propositions qui sont avancées certaines exigent une modification formelle de la Charte, celles qui concernent l'élargissement du Conseil de sécurité et l'augmentation du nombre de ses membres. Au contraire, d'autres mesures préconisées concernent essentiellement les méthodes de travail du Conseil de sécurité et peuvent être adoptées sans toucher au texte de la Charte.

## I. L'élargissement du Conseil de sécurité

Toute augmentation du nombre des membres du Conseil de sécurité requiert l'accord des cinq membres permanents (articles 108 et 109 de la Charte). Même si les arrière-pensées des Etats qui avaient demandé l'inscription de la question à l'ordre du jour de l'Assemblée en 1979 étaient beaucoup plus radicales, on ne pouvait guère envisager plus qu'une simple augmentation du nombre des membres non permanents, le Conseil devant passer de 15 à 19 ou 21 membres. Même cette solution se heurtait à l'opposition des membres permanents (sauf la Chine). Caractéristique à cet égard est la position française: "modifier la composition du Conseil de sécurité reviendrait à changer l'équilibre existant entre les principales instances de l'ONU. Dans la mesure où le Conseil a été en tant que tel habilité par la Charte pour prendre des décisions obligatoires pour les Etats membres en matière de paix et de sécurité internationales ce serait une erreur de lui appliquer maintenant le principe de la répartition géographique."[16] L'évolution de la situation internationale a contraint les grandes puissances à reconsidérer leur position: elles se sont rendues compte qu'elles avaient sans doute inérêt à accepter certaines revendications, notamment du Japon ou de l'Allemagne, afin de mieux contrôler le processus de la réforme. La levée du tabou a permis d'entrouvrir la boîte de Pandore, mais l'accord sur le contenu de la réforme n'est pas encore en vue, voire prévisible, tant en ce qui concerne la composition même du nouveau Conseil de sécurité que le statut de ses membres.

### A. La composition du nouveau Conseil de sécurité

Le principe d'une augmentation du nombre des membres du Conseil de sécurité semble acquis depuis que les grandes puissances ne se sont plus opposées à la discussion de la question à l'Assemblée générale. En revanche, le désaccord est total non seulement sur les modalités d'un tel élargissement, mais aussi en ce qui concerne l'ampleur qu'il devrait revêtir. Les chiffres les plus divers ont été avancés, le Conseil de sécurité devant compter selon les uns une vingtaine de membres, d'autres proposant 25 environ et certains même une trentaine. Si l'on tenait compte de la proportion des membres du Conseil par rapport au nombre des Etats membres de l'ONU en 1945, soit 11/51 = 21%

[15] Rapport Bertrand de 1985: A/40/988 et JIU(REP/85/9. M. B e r t r a n d: *Refaire l'ONU. Un programme pour la paix*, (1986); *L'ONU* (1994).

[16] A/BUR/35/SR. 1 du 17 septembre 1980.

environ, le Conseil de sécurité pourrait aujourd'hui être élargi jusqu'à 39 ou 40 membres. Un tel élargissement qui serait admissible au regard de l'impératif de représentativité et de démocratie, souvent avancé pour justifier la réforme, se heurterait en revanche à l'impératif d'efficacité auquel doit répondre l'action du Conseil du fait des fonctions qui lui sont dévolues dans la Charte. Il est d'ailleurs significatif qu'il n'y ait pas eu de propositions en ce sens et beaucoup de délégations se sont prononcées en faveur d'une augmentation modérée et limitée qui ne bouleverserait pas la situation actuelle.

Toutefois de nombreux Etats ont attiré l'attention sur l'article 24 de la Charte qui reconnaît que le Conseil agit au nom des membres de l'ONU mais aussi que le mandat ainsi confié par tous les Etats appartenant à l'Organisation implique que la composition de l'ONU soit mieux reflétée dans celle du Conseil. L'Inde a fait remarquer que "le rapport entre le nombre des membres représentés au Conseil de sécurité et le nombre de membres siégeant à l'Assemblée générale a diminué, passant de 1 pour 4,6 en 1945 à 1 pour 12 aujourd'hui".[17] Les petits ou moyens Etats ont notamment fait part de leur très faible espoir de siéger un jour au Conseil de sécurité parmi les membres non permanents. Ainsi l'Ukraine a indiqué que les Etats du groupe d'Europe orientale disposent depuis 1963 d'un siège permanent et d'un siège non permanent: ces chiffres sont restés inchangés alors que le groupe passait de 10 à 20 Etats. Il en résulte que "chaque Etat du groupe a une chance d'être élu au Conseil en moyenne une fois tous les 38 ans."[18] Même si l'on adoptait certaines réformes proposées, la situation des petits Etats resterait peu favorable. Le représentant de Saint-Marin a fait remarquer que la proposition italienne réservait 10 sièges seulement aux 125 petits Etats: "si nous options pour un mandat de deux ans, elle nous garantirait le bénéfice de nos droits équitables approximativement tous les 22 ans!"[19]

Outre cette question concernant la rotation dans la représentation des petits Etats, les débats ont porté essentiellement sur le maintien des deux catégories de membres, permanents ou non permanents, ou sur l'introduction d'une troisième catégorie. Parmi ceux qui souhaitent le maintien de la distinction établie par la Charte entre les membres permanents et les membres non permanents, certains considèrent que la catégorie des membres permanents devrait être gelée et devenir une catégorie en voie d'extinction, alors que d'autres, plus nombreux considèrent qu'elle devrait être à l'avenir en expansion. Les chiffres avancés pour les membres supplémentaires sont variés, souvent deux, parfois cinq ou six.[20] Le plus souvent les projets ne prévoient pas de toucher à la situation des cinq membres permanents actuels, mais il arrive qu'une redistribution complète des sièges soit prévue[21] ou envisagée dans l'avenir, la réforme à adopter étant susceptible d'un réexamen périodique. Dans cette optique on peut envisager

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[17] A/48/264, p. 51, réponse de l'Inde du 29 juin 1993.

[18] A/49/PV. 31, p. 7.

[19] A/49/PV. 31, p. 10.

[20] Voir les interventions de Cuba, de la Croatie ou de l'Equateur: A/49/PV. 31, pp. 20, 22, 24. Voir aussi les réponses des Etats au Secrétaire général: Inde, Maurice et Nigeria (A/48/264, pp. 51, 65 et 72), Egypte (A/48/264, Add. 2, pp. 4–5).

[21] Voir par exemple la réponse de Belize (14 septembre 1995): A/48/264/Add. 3.

d'accorder un siège unique à l'Union européenne comme le fait remarquer l'Italie: "le jour où l'Union européenne acquerra une identité politique forte et originale, se posera la question de savoir quelle place il convient de lui accorder au sein du Conseil de sécurité."[22]

Parmi les noms des Etats qui pourraient se voir attribuer la qualité de membres permanents du Conseil de sécurité, les plus souvent cités sont l'Allemagne et le Japon. Ces deux Etats se sont déclarés prêts à assumer cette responsabilité et ils sont appuyés par de nombreux gouvernements: Etats-Unis, France, Pays-Bas, mais aussi Roumanie, Jordanie, Ghana, Pérou ou Kazakhstan...[23] Toutefois d'autres noms ont été cités pour siéger à titre de membres permanents: l'Inde estime qu'elle "répond à tous les critères pour siéger en tant que membre permanent du Conseil de sécurité."[24] Elle insiste sur l'importance du critère de la population en tant qu'élément de démocratie et de puissance.[25] L'Italie, pour sa part, s'estime également en droit de figurer au nombre des nouveaux membres permanents "car elle compte parmi les Etats qui ont apporté la contribution la plus élevée au budget de l'Organisation des Nations Unies ainsi qu'aux opérations de maintien de la paix décidées par le Conseil de sécurité.[26]

C'est donc la question des critères requis pour siéger au Conseil de sécurité et plus précisément pour devenir membre permanent qui est ainsi évoquée. La plupart des Etats néanmoins pensent qu'il n'est pas nécessaire de réviser les critères prévus à l'article 23 § 1 de la Charte, même si certains suggèrent d'interdire à un Etat de siéger au Conseil s'il ne remplissait pas ses obligations financières, ce qui pourrait embarrasser certains des actuels membres permanents.

Par ailleurs, les Etats ont assez fréquemment envisagé d'abandonner la dichotomie actuelle entre membres permanents et non permanents afin de mieux refléter la réalité des relations internationales contemporaines. Il s'agirait d'introduire une troisième catégorie de membres, qui serait inteermédiaire entre les deux précédentes. Plusieurs solutions ont été envisagées. On a proposé tout d'abord de dissocier la permanence et la jouissance du droit de veto, les nouveaux membres permanents ne devant pas bénéficier du droit de veto.[27] La France avait tout d'abord envisagé une solution de ce type au profit de l'Allemagne et du Japon avant de se rallier à l'octroi du statut actuel pour ces deux Etats.

On a également suggéré la création d'une catégorie d'Etats membres semi-permanents, en invoquant le précédent de la Société des Nations, précédent malheureux

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[22] A/48/264, pp. 56–57.

[23] Toutefois la République populaire démocratique de Corée s'oppose à la candidature du Japon en tant que membre permanent: A/49/PV. 32 du 14 octobre 1994, A/49/602 du 31 octobre 1994 et A/49/662-S/1994/1274 du 10 novembre 1994. Elle accuse le Japon de vouloir "acheter" son siège auprès des nations asiatiques par une "diplomatie de l'argent", alors que le contentieux né du passé n'est toujours pas réglé. Voir la réponse du Japon: A/49/551 du 19 octobre 1994.

[24] A/49/PV.29, p. 22.

[25] A/48/264, p. 52; dans le même sens, voir la réponse du Nigeria, A/48/264, p. 71.

[26] A/48/264, p. 57.

[27] En ce sens les réponses de l'Espagne, de Fidji, de Maurice et de la Nouvelle-Zélande: A/48/264, pp. 39, 43, 66 et 74; mais aussi de l'Indonésie et de Samoa: A/48/264/Add.1, pp. 7 et 17. En revanche, le Guatemala s'oppose à une telle solution: A/48/264, p. 50.

selon certains. Cette semi-permanence pourrait être aménagée selon des modalités diverses, soit par extension de la durée du mandat, actuellement limité à deux ans, soit en supprimant l'interdiction de réélection immédiate figurant à l'article 23, § 2 in fine de la Charte.[28]

Le création d'une troisième catégorie de membres a été proposée non seulement pour permettre à certains Etats de siéger plus fréquemment au Conseil, en raison du rôle important qu'ils jouent sur la scène internationale et à l'ONU, mais aussi pour assurer une meilleure répartition régionale des sièges. De nombreuses délégations ont souligné le déséquilibre existant très favorable à l'Europe en général et à l'Europe occidentale en particulier, alors que l'Afrique ne dispose d'aucun siège permanent. Si la répartition actuelle, issue du second conflit mondial était admissible à l'époque de la guerre froide, elle ne se justifie plus alors même que celle-ci est maintenant terminée. Au contraire, le rôle de plus en plus grand reconnu aux accords régionaux dans le cadre du chapitre VIII devrait se refléter dans la composition du Conseil de sécurité. Plusieurs suggestions ont été avancées en ce sens.[29]

On ne s'étonnera pas de ce foisonnement des propositions, caractéristique d'une phase peu avancée des négociations. Tous ces projets supposent des amendements à l'article 23 de la Charte qui fixe la composition du Conseil de sécurité, mais en filigrane apparaît souvent la question du statut à réserver aux membres du nouveau Conseil et notamment au sort qui doit être fait au fameux droit de veto consacré à l'article 27, § 3.

### B. Le statut des membres du nouveau Conseil de sécurité et le droit de veto

Le ralliement de tous les membres permanents à l'idée d'une réforme et d'un élargissement de la composition du Conseil de sécurité a réveillé les vieilles discussions à propos du droit de veto. Certaines grandes puissances avaient cru pouvoir échapper à ces débats en accordant à plusieurs Etats le statut de membre permanent, sans leur concéder le droit de veto qui est attaché à cette qualité depuis 1945. Les cinq membres permanents essaieront sans doute d'éviter la prolifération en ce domaine comme ils l'ont fait en matière nucléaire, mais là aussi leur monopole est de plus en plus difficile à conserver, voire à justifier.

Les débats n'ont pas fait apparaître beaucoup d'éléments nouveaux par rapport à ceux qui avaient eu lieu antérieurement, notamment dans le cadre du Comité spécial de la Charte des Nations Unies et du raffermissement du rôle de l'Organisation. Ils ont été centrés autour de deux grands axes: l'existence du droit de veto et son usage.

En ce qui concerne l'existence même du droit de veto, trois types de positions ont été prises: soit la suppression (immédiate ou à terme) de ce droit, soit le statu quo, c'est-à-dire le maintien de ce privilège au seul profit des cinq membres permanents, soit l'extension du droit de veto aux nouveaux membres permanents, étant entendu

[28] En ce sens, intervention de la Nouvelle-Zélande qui prévoit certaines précautions à prendre: A/49/PV.31, p. 12. Actuellement plusieurs pays comme le Japon, le Brésil, l'Argentine, l'Inde ou le Pakistan ont siégé assez fréquemment au Conseil de sécurité, mais pas pour des périodes consécutives.

[29] Réponses de l'Egypte: A/48/264/Add.2; de Belize: A/48/264/Add.3.

que l'octroi du veto à tel ou tel Etat ou catégorie d'Etats pourrait être revu de temps à autre, afin de vérifier que les critères d'attribution sont toujours respectés et que la situation internationale n'a pas changé. Plusieurs Etats se sont prononcés en faveur de la suppression du veto, en faisant valoir notamment que, du fait de la fin de la guerre froide et du climat qui règne depuis plusieurs années au Conseil de sécurité, celui-ci n'est pratiquement plus utilisé.[30] Toutefois il serait erroné d'en tirer la conclusion que le veto est tombé en désuétude, comme l'a montré le veto russe exercé en 1993 à propos du financement de la Force des Nations Unies à Chypre.[31] De plus, il ne faut jamais oublier que le veto joue aussi un rôle de dissuasion et qu'il est souvent utilisé officieusement au stade de la négociation des textes.

Par ailleurs, les Etats se sont à nouveau engagés dans une voie qui avait été déjà largement explorée lors des débats antérieurs, celle de la réglementation de l'usage du veto afin de limiter le recours à celui-ci ou d'en atténuer les conséquences. L'Egypte, qui avait joué un rôle considérable dans ce domaine, a repris ses suggestions[32] et quelques idées plus ou moins neuves ont été avancées. Certains ont proposé de limiter le droit de veto aux questions traitées dans le cadre du chapitre VII de la Charte.[33] D'autres ont suggéré d'exiger un double veto pour bloquer la décision du Conseil de sécurité[34] ou bien de donner au Conseil de sécurité, ou même à l'Assemblée générale, le droit de renverser le veto opposé par un seul membre permanent.[35]

On est donc devant un ensemble de propositions très diverses et on se trouve probablement encore assez loin d'un accord sur quelques-unes d'entre elles. Dans l'esprit de leurs promoteurs ces propositions amélioreraient le fonctionnement du Conseil de sécurité en le rendant plus démocratique. Elles exigent de toutes façons un amendement formel de la Charte alors que d'autres propositions de réforme touchant aux méthodes de travail du Conseil de sécurité peuvent être adoptées sans modification du texte de la Charte.

## II. La rénovation des méthodes de travail du Conseil de sécurité

L'élargissement de la composition du Conseil de sécurité et surtout sa démocratisation par un réaménagement du statut des membres permanents sont de vieilles revendications, longtemps bloquées par le tabou de la réforme de la Charte. En revanche, la nécessité de rénover les méthodes de travail appliquées par le Conseil de sécurité est apparue plus récemment dans la mesure où les transformations profondes de la société internationale intevenues dans les années 90, avec la fin de la guerre froide et

[30] Voir les réponses de la Malaisie, de la Nouvelle-Zélande, de la Yougoslavie: A/48/264, pp. 63, 74 et 95; de la Libye et du Soudan: A/48/264/Add.1, pp. 10 et 19; du Yémen: A/48/264/Add.2; de la Tanzanie au nom du Groupe des Etats d'Afrique de l'ONU: A/48/264/Add.5; voir aussi l'intervention du Honduras au nom des Etats d'Amérique centrale: A/49/PV.31, p. 15.

[31] Voir P. Tavernier: L'Année des Nations Unies. Questions juridiques, 39 *AFDI* 689 (1993).

[32] Intervention de M. Elaraby: A/49/PV.29, p. 21, 13 octobre 1994.

[33] Réponses de Fidji: A/48/264, p. 43; du Ghana: A/48/264/Add.3. Intervention de Kazakhstan: A/49/PV.31, p. 9; et de Singapour: A/64/264/Add.7. Intervention de la Croatie: A/49/PV.31, p. 29.

[34] Réponse de la Malaisia: A/48/266, p. 63; du la Mongolie: A/48/264/Add.3.

[35] Réponse de l'Ukraine: A/48/264/Add.2, p. 8 et intervention de l'Ukraine: A/49/PV.31, p. 8.

de l'antagonisme est-ouest, ont eu des répercussions considérables sur le mode d'intervention du Conseil de sécurité. Le volume des affaires traitées par le Conseil a augmenté dans des proportions jamais atteintes jusqu'ici, même s'il en "sous-trait" un certain nombre aux Organisations régionales, voire aux Etats. En outre le Conseil de sécurité, longtemps paralysé par la rivalité idéologique entre Etats socialistes et Etats capitalistes, a retrouvé une capacité d'agir qu'on ne lui connaissait pas et par là même une nouvelle jeunesse. Beaucoup d'observateurs ou de diplomates s'en réjouissent et parlent d'un retour à la Charte, ce qui est tout à fait inexact. En revanche, il est certain que le Conseil a dû adapter ses procédures de décision à la nouvelle situation. Il a multipié les consultations officieuses au nom des impératifs de rapidité et d'efficacité, mais il a parfois oublié d'associer dans ces consultations, les autres Etats ou les autres organes de l'ONU qui ont pourtant leur mot à dire.

Certains ont proposé une refonte totale du règlement intérieur du Conseil qui fonctionne depuis près de cinquante ans sur la base d'un règlement provisoire. Il conviendrait par conséquent d'adopter un règlement définitif. Cette opinion n'est certes pas sans valeur, mais ce qui nous paraît plus important, c'est le contenu des réformes proposées. Les débats qui ont eu lieu à ce sujet ont fait ressortir deux impératifs, celui de la transparence des travaux du Conseil de sécurité qui n'est pas assurée actuellement, ainsi que celui d'une certaine participation des Etats intéressés aux décisions pour faciliter l'application ultérieure de celle-ci.

### A. Les réunions officieuses

La pratique des consultations informelles et des réunions officieuses au Conseil de sécurité est fort ancienne,[36] mais ce qui apparaît nouveau, c'est l'ampleur prise par ce phénomène[37] et la dévaluation corrélative des séances officielles. Ces dernières sont demeurées souvent des séances purement fomelles, limitées à quelques minutes et destinées uniquement à enregistrer le résultat des séances officieuses: le procès-verbal, seul document diffusé publiquement, se réduit à quelques lignes. Dès lors l'opacité est complète et on ne sait plus comment le Conseil de sécurité est parvenu à sa décision, ce qui ne permet pas d'en éclairer le contenu et de mieux saisir les tenants et les aboutissants de la situation. De nombreux Etats ont dénoncé cette évolution dans les réponses qu'ils ont transmises au Secrétaire général ainsi que dans leurs interventions à l'Assemblée générale. Pour la Colombie, "il ne faut pas que, comme c'est le cas à présent, toutes les questions importantes soient examinées à huis clos... Le Conseil doit discuter de ces questions ouvertement. La transparence ne saurait limiter l'efficacité du Conseil."[38]

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[36] M.-C. S m o u t s: "Réflexions sur les méthodes de travail du Conseil de sécurité", 28 *AFDI* 601–612, not. 611 (1982).

[37] Le diagramme reproduit dans le rapport du Secrétaire général pour 1994, intitulé "Pour la paix et le développement", est tout à fait caractéristique à cet égard et montre bien que le nombre des séances officielles et celui des consultations plénières (officieuses) étaient à peu près identiques jusqu'en 1990 et que l'écart est apparu et s'est creusé de manière spectaculaire à partir de cette date: A/49/1, p. 13.

[38] A/49/PV.30, p. 2.

Certes une transparence totale relève de l'utopie, mais la fréquence des observations des Etats à ce sujet révèle qu'il s'agit d'un problème réel. C'est pourquoi certains ont proposé de limiter le nombre des séances officieuses.[39] D'autres ont suggéré d'assurer une publicité réduite des réunions officieuses sous la forme d'un résumé des débats ou de communiqués de presse, voire par l'intermédiaire d'un porte-parole du Secrétariat ou d'un rapporteur.[40] On a également proposé la publication des amendements aux résolutions examinées en séances officiueuses.[41] Il s'agit de mesures limitées, qui ne devraient pas être trop difficiles à mettre en oeuvre et qui peuvent s'inscrire dans le cadre de certaines mesures déjà prises par le Conseil de sécurité pour assurer une plus grande transparence de ses travaux, comme ce fut le cas pour les déclarations présidentielles.[42]

Mais il ne suffit pas de rendre les réunions officieuses moins opaques, il faut aussi restaurer le débat public. La France a insisté sur ce point: "le débat public s'est trouvé ... réduit à une succession de discours rituels prononcés alors que la décision à prendre était déjà arrêtée. Sans renoncer aux avantages des consultations informelles, nous pensons que l'heure est venue d'enrichir la réflexion des membres en leur permettant de dialoguer avec tous les Etats de l'Organisation, en séance publique, avant qu'une postition ait été arrêtée, au moins sur les questions importantes."[43] Le gouvernement français a développé ses idées dans un "Aide-mémoire sur les méthodes de travail du Conseil de sécurité."[44] La clé du problème se trouverait dans l'article 48 du règlement intérieur provisoire selon lequel les séances publiques sont la règle: "A moins qu'il n'en décide autrement, le Conseil de sécurité siège en public." Pour le gouvernement français: "La ligne de partage devrait se situer entre l'information, la consultation et les échanges de vues de portée générale qui devraient demeurer en principe publics et la négociation, la préparation de détail d'une décision à prendre, qui relèvent normalement d'autres procédures."

Dans cette optique, la France se prononce contre la diffusion du contenu de la discussion en séance informelle et contre l'établissement de procès-verbaux de ces séances, car "on aboutirait à la négation même de leur objet" et "si les séances informelles recevaient une large publicité, elles ne seraient qu'une forme dégradée des réunions publiques."[45] Les séances officieuses doivent demeurer une simple

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[39] En ce sens, voir les réponses de la Nouvelle-Zélande et de la Turquie: A/48/264, pp. 75 et 92.

[40] Interventions des Philippines et du Brésil: A/49/PV.29, pp. 18 et 25; du Mexique: A/49/PV.30, p. 30.

[41] Intervention de Saint-Marin: A/49/PV.31, p. 11.

[42] P. T a v e r n i e r: Les déclarations du Président du Conseil de sécurité, 39 *AFDI* 86–104 (1993). Certaines de ces déclarations contiennent une sorte de résumé des discussions intervenues lors des séances officieuses et des prises de positions des Etats.

[43] A/49/PV.30, p. 19.

[44] A/49/667-S/1994/1279 du 16 novembre 1994. Les propositions françaises sont approuvées par le Brésil: A/49/759-S/1994/1384 du 6 décembre 1994. Le Conseil de sécurité, à la suite de l'initiative française, a adopté le 16 décembre 1994 une déclaration présidentielle (S/PRST/1994/81) sur ses méthodes de travail et ses pratiques.

[45] Les réunions informelles doivent être distinguées des réunions privées, prévues dans le règlement intérieur du Conseil et qui donnent lieu à procès-verbal, celui-ci pouvant être consulté par les Etats membres, à certaines conditions (articles 51 et 56 du règlement intérieur). De plus, il arrive parfois que le Conseil de sécurité décide de rendre public le procès-verbal d'une réunion privée, ce qui permet de mesurer la différence de ton de ces deux

commodité pratique. En revanche, la France propose de rétablir un meilleur équilibre entre séances officielles et consultations informelles. Non seulement elle annonce qu'elle usera de son droit de demander la réunion du Conseil en séance publique, mais elle avance plusieurs suggestions concrètes. Au lieu de réunir le Conseil pour une séance publique alors que les décisions sont déjà prises, elle estime que deux sortes de réunions officielles pourraient être organisées, soit, des "débats d'orientation ouverts à tous les membres de l'Organisation au moment où le Conseil s'apprête à entamer l'examen d'une question importante", soit des "échanges de vues publics entre membres du Conseil de sécurité" qui remplaceraient les tours de table qui ont lieu en séance informelle. Cela permettrait "de redonner vie au débat public en le privant du caractère stérile dont il souffre aujourd'hui et qui est intimement lié à la fonction explétive et marginale dans laquelle il est actuellement relégué". En effet, pour la France, "le Conseil doit travailler, au moins pour une part significative de son action, en pleine lumière et sous les yeux de l'ensemble des délégations."

On ne peut qu'applaudir à cette apologie – un peu tardive – de la transparence et de la publicité des débats qui est à la base de l'exigence démocratique. Mais cette exigence va plus loin que la simple transparence car les Etats ont trop souvent le sentiment de ne pas participer à l'élaboration des décisions du Conseil qui apparaît alors comme un directoire fort peu démocratique.[46] Certains Etats membres non permanents du Conseil ont parfois exprimé leur mauvaise humeur à ce sujet,[47] mais cela est encore plus perceptible parmi les Etats qui ne font pas partie du Conseil de sécurité.

### B. Les relations avec les Etats non membres du Conseil de sécurité

Les inconvénients résultant de la non-participation de certains Etats aux travaux du Conseil de sécurité ont souvent été soulignés, notamment s'il s'agit d'Etats parties à un différend. L'Equateur et Chypre ont mis l'accent sur les conséquences fâcheuses qui découlent à cet égard des consultations officieuses: il conviendrait donc d'assurer une participation d'Etats non membres à ces consultations, ce qui n'est pas le cas actuellement.[48]

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types de réunions. Pour un exemple, à propos du Sahara occidental voir P. T a v e r n i e r, L'Année des Nations Unies. Questions juridiques, 21 *AFDI* 571 note 138 (1975).

[46] Le Centre Sud (*Les Nations Unies à un carrefour critique*, août 1993, p. 39) met en garde contre les dangers d'un "directoire nommé par lui-même," autrement dit autodésigné. Au contraire une partie de la doctine se félicite de l'évolution actuelle: voir, par exemple M. T o r r e l l i: "Le Conseil de sécurité: un directoire mondial?", *Le Trimestre du Monde*, 27–40 (1992).

[47] Voir, en ce sens, l'intervention de l'Italie lors de l'adoption de la résolution 598 qui devait mettre fin à la guerre entre l'Irak et l'Iran: S/PV.2750; P. T a v e r n i e r, L'Année des Nations Unies. Questions juridiques, 33 *AFDI* 414 (1987); P. T a v e r n i e r: "Le caractère obligatoire de la résolution 598 (1987) du Conseil de sécurité relative à la guerre du Golfe", 1 *JEDI* 278–285 (1990); P. T a v e r n i e r, "La résolution 598 du 20 juillet 1987 et le rôle du Conseil de sécurité dans la guerre entre l'Irak et l'Iran, *ARES*, 209–223 (1988). G. K e l l e r décrit très bien le processus de négociation au Conseil de sécurité et le "système des groupes informels": "La France et le Conseil de Sécurité", *Le Trimestre du Monde*, 4e trim., pp. 41–51 et notamment pp. 44–47 (1992).

[48] Réponse de l'Argentine et de l'Equateur: A/48/264, p. 32 et 37 et intervention de Chypre: A/49/PV.31, p. 19.

De nombreuses propositions ont été faites pour institutionnaliser cette participation des Etats non membres sous la forme d'organes subsidiaires qui seraient créés sur la base de l'article 29 de la Charte.[49] Cela devrait concerner en premier lieu les Etats qui fournissent des contingents et contribuent aux opérations de maintien de la paix.[50] On a d'ailleurs fait remarquer que l'article 44 de la Charte prévoit que le Conseil de sécurité doit convier un Etat non représenté au Conseil, qui fournit des forces armées, à participer aux décisions touchant l'emploi de ces contingents.

Mais, comme l'a indiqué la Croatie, il ne suffit pas de consulter les pays fournisseurs de contingents, il faut également prendre l'avis des pays d'accueil, ceux qui reçoivent des forces de maintien de la paix des Nations sur leur territoire "car ce sont ceux qui sont le plus affectés par les décisions du Conseil."[51] Par ailleurs, des consultations plus étroites devraient être établies, de l'avis de nombreux Etats, avec les pays touchés par les sanctions décidées par le Conseil de sécurité.[52]

L'élargissement des consultations à des Etats non membres du Conseil n'est pas incompatible avec des consultations au contraire plus restreintes au sein de cet organe. Ainsi la Finlande suggère la création de "chambres" du Conseil, en application de l'article 29 de la Charte, qui permettrait l'examen, à titre préliminaire, de certaines questions.[53] Cependant ce type de proposition reste assez isolé. En revanche de nombreux Etats ont insisté sur la nécessité d'assurer une meilleure information et une participation accrue des Etats non membres aux travaux du Conseil de sécurité en organisant de façon plus satisfaisante les rapports du Conseil avec les organes de l'ONU à composition plus large: l'Assemblée générale, qui représente tous les Etats, mais aussi le Conseil économique et social. Le Pakistan, par exemple, souligne le rôle préventif que pourrait jouer le Conseil économique et social en attirant l'attention du Conseil de sécurité sur les "agitations et conflits en puissance."[54] Il suggère également des réunions régulières entre les Présidents du Conseil de sécurité et de l'Assemblée générale pour coordonner les travaux des deux organes,[55] voire la création, sur la base de l'article 22 de la Charte, d'un organe subsidiaire de l'Assemblée générale chargé d'examiner et de discuter les questions de paix et de sécurité internationales.

La plupart des propositions portent sur l'amélioration des relations entre le Conseil et l'Assemblée, notamment par une meilleure présentation du rapport annuel du Conseil

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[49] En ce sens, réponse des Etats-Unis, des Pays-Bas: A/48/265, pp. 41 et 83; de la Suède: A/48/264/Add.1, p. 21.

[50] Réponses de la Finlande: A/48/264, p. 45; de l'Autriche: A/48/264/Add.3. Interventions de la Malaisie, des Philippines, de l'Egypte et du Brésil: A/49/PV.29, pp. 10, 18, 20 et 25; de l'Autriche: A/49/PV.30, p. 7 et de la Nouvelle-Zélande: A/49/PV.31, p. 13. Ce pays a d'ailleurs fait circuler, avec l'Argentine, un projet de résolution à ce sujet. Le Conseil de sécurité a, pour sa part, adopté le 4 novembre 1994 une déclaration présidentielle (S/PRST/1994/62) sur la consultation avec les pays contributeurs de troupes.

[51] Intervention de la Croatie: A/49/PV.31, p. 23.

[52] Interventions du Brésil: A/49/PV.29, p. 25 et de la Croatie: A/49/PV.31, p. 23.

[53] Réponse de la Finlande: A/49/264, p. 45.

[54] Intervention du Pakistan: A/49/PV.31, p. 3.

[55] Saint-Marin suggère d'organiser régulièrement des réunions d'information entre le Président du Conseil de sécurité et les Présidents des groupes régionaux, de manière à tenir le Président de l'Assemblée générale au courant des travaux du Conseil: A/49/PV.31, p. 11. Dans le même sens, intervention de Malte: A/49/PV.31, p. 16.

à l'Assemblée qui est actuellement beaucoup trop factuel, mais aussi grâce à l'organisation d'un véritable débat à l'Assemblée au sujet de ce rapport, ce qui n'est pas le cas, malgré certaines mesures prises récemment en ce sens. De plus, la fréquence des rapports du Conseil à l'Assemblée pourrait être accrue et devenir trimestrielle.[56]

C'est dire que les propositions ne manquent pas. On peut, néanmoins, légitimement s'interroger sur le sort qui leur sera réservé en fin de compte.

## Conclusion: Quelles sont les chances de la réforme du Conseil de sécurité?

La réforme des Nations Unies, et plus particulièrement celle du Conseil de sécurité, apparaît, à bien des égards, comme un "serpent de mer", un "monstre du Loch Ness" qui resurgit périodiquement. Pourtant la situation semble avoir évolué à partir de 1992 lorsque les gandes puissances ne se sont plus opposées à la discussion de la question à l'Assemblée générale. Le rapport du groupe de travail, dont le caractère laconique est le signe de l'absence d'accord général sur les problèmes soulevés par la réforme, souligne néanmoins que le principe même de l'élargissement du Conseil est désormais acquis. Comme le fait remarquer justement le Brésil, "la question n'est plus de savoir s'il doit être élargi, mais de combien de membres et dans combien de temps."[57] Certes toute réforme, du moins toute réforme modifiant la composition du Conseil, exige l'accord des cinq membres permanents, mais aussi des deux tiers des membres de l'Organisation.[58] M. Elaraby l'a rappelé au nom de l'Egypte: "la majorité des deux tiers ... n'approuvera pas quelque chose qui soit contraire à ses intérêts vitaux."[59] Dans ces conditions, la réforme apparaît inéluctable.

En effet le moment paraît tout à fait opportun, après la fin de la guerre froide et le renouveau spectaculaire du Conseil de sécurité, qui est de plus en plus sollicité, mais qui n'est plus paralysé par la menace permanente du veto. De surcroît le cinquantième anniversaire de l'Organisation offre une occasion unique pour réaliser enfin cette réforme réclamée depuis longtemps par de nombreux pays, notamment dans le Tiers-Monde.

Pourtant, il n'est pas certain du tout que la réforme du Conseil de sécurité soit adoptée en 1995.[60] L'Assemblée générale a terminé ses débats sur la question de la représentation équitable au Conseil de sécurité et de l'augmentation du nombre de ses membres et questions connexes (point 33 de l'ordre du jour), sans prendre de décision formelle. Toutefois le Président de l'Assemblée a estimé qu'elle souhaitait que le

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[56] Réponse du Paraguay: A/48/264, p. 81.

[57] A/49/PV.29, p. 23.

[58] La majorité des deux tiers est requise aussi bien au moment de l'adoption que de la ratification des amendements (article 108 et 109 de la Charte).

[59] A/49/PV.29,, p. 21.

[60] Le Secrétaire général, M. Boutros Boutros-Ghali, s'est montré fort pessimiste à cet égard devant la presse parisienne au mois de janvier 1995: *Bulletin du Centre d'information des Nations Unies*, Paris, nº 14, février 1995, p. 63.

groupe de travail poursuive l'examen de tous les aspects de la question.[61] Les avis semblent divergents en ce qui concerne l'urgence de la réforme: pour les uns on ne saurait la différer, alors que pour les autres il ne faut pas trop se presser car il convient de peser soigneusement les solutions qu'on désire adopter. La Belgique, pays du bon sens et de la mesure, met en garde contre les dangers d'une "véritable révolution, qui par la mise en avant d'objectifs difficilement atteignables, dépasserait la réalité."[62] Il est vrai, comme la sagesse populaire nous l'enseigne, que "qui trop embrasse, mal étreint" ... Doit-on pour autant choisir l' "option douce", comme le suggèrent déjà certains, c'est-à-dire renoncer à la réforme de la Charte pour se contenter de "réformettes" susceptibles d'être adoptées sans toucher aux "Tables de la loi"? Le risque est grand de tomber dans ce piège familier des Nations Unies.

Ce serait évidemment très regrettable car il existe des possibilités réelles bien que relativeament étroites, d'aboutir à un consensus. En effet, les Etats et groupes d'Etats ont, semble-t-il, tous intérêt à un accord: les cinq membres permanents ont compris qu'ils ne pouvaient pas s'opposer indéfiniment aux justes revendications des petits et moyens pays et qu'il était sans doute opportun de "jeter du lest" en acceptant un élargissement limité du Conseil de sécurité, y compris en accueillant parmi eux, avec droit de veto, l'Allemagne et le Japon; quant aux autres Etats ils seraient avisés de saisir l'opportunité qui leur est ainsi offerte de briser un tabou qui paraissait impossible à contourner. Ainsi les voies d'un compromis semblent entrouvertes et M. Insanally, représentant de la Guyana et président du groupe de travail, en a esquissé les contours: "nous ne pensons pas qu'on puisse tomber rapidement d'accord sur l'idée de membres permanents supplémentaires à moins d'accepter en même temps un nombre approprié de membres non permanents qui satisfasse à l'exigence d'une représentation équilibrée et équitable de tous les Etats, développés et en développement, au Conseil."[63]

Les Etats auraient tort de ne pas suivre la voie qui leur est tracée, mais encore faudrait-il qu'ils abandonnent la phase, indispensable, du libre échange des idées, pour aborder sérieusement celle d'une véritable négociation qui n'était pas encore ouverte au début de l'année 1995. Il leur reste encore quelques mois pour adopter la réforme du Conseil de Sécurité avant la fin de la 50ème session de l'Assemblée générale.

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[61] A/49/PV.32 du 14 octobre 1995. L'Assemblée n'a pas adopté une décision en bonne et due forme comme le lui avait recommandé le groupe de travail. En revanche, le point 33 a été maintenu à l'ordre du jour de l'Assemblée et son examen pourra donc être repris en 1995: décision 49/474 du 23 décembre 1994.

[62] A/49/PV.31, p. 5

[63] A/49/PV.30, p. 12.

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# The Resolutions of the Security Council of the United Nations Aimed at Maintenance or Restoration of International Peace and Security and the Polish Legal Order. The Practice of Implementation and Its Prospects

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**1.** The activities of the Security Council in the 1990s and the adoption by it of several resolutions and decisions on the basis of the provisions of the Chapter VII of the United Nations Charter make us consider the problem of the implementation of their provisions. Such an implementation requires complex activities on both international and domestic planes. Such a series of resolutions imposing sanctions and restrictions on states threatening the maintenance of international peace and security was the fulfillment of the dreams of specialists of the international law.[1] It should be seen as a result of an astonishing uniformity of the activities of the international community, including the permanent members of the Security Council, and their unanimity as to the means to be applied for the resoration of peace.[2] Still for lawyers responsible for the implementation of all those resolutions by individual states, the "eruption" of activity of the Security Council was a nightmare.[3] The legislations of the states turned not out to be prepared to a systematic implementation of UN resolutions. As the resolutions were to be implemented in a short time, it was necessary to determine soon, what way of implementation was prescribed by the domestic law of a given state. It was understood that timely and effective carrying out of resolutions imposing embargo on states breaching peace (blocade of its trade, payments and any other financial operations within the jurisdiction of a given UN Member State, communication with its territory) will influence directly the effectiveness of measures aimed at restoration of peace.[4]

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[1] The Gulf War: The Law of International Sanctions, *PASIL* 182 (1991).

[2] See e.g. S. S u r: La resolution 687 (3 avril 1991) du Conseil de Securité dans l'affaire du Golfe: Problemes de retablissement et de garantie de la paix, 27 *AFDI* 25–97 (1991); R. L a v a l l e: The Law of the United Nations and the Use of Force under the relevant Security Council Resolutions of 1990 and 1991, to resolve the Persian Gulf Crises, 23 *NethYBIL* 3–62 (1992); H. F r e u d e n s c h u s s: Between Unilateralism and Collective Security: Authorisation of the Use of Force by the the UN Security Council, 5 *EJIL* 492–531 (1994).

[3] *PASIL* – 1991, [Carver], at 182.

[4] Remarks as to the XX-century economical sanctions and conditions of their effectiveness in: Eliott, PASIL 1991, p. 170–175.

In the present article we will deal with the Polish practice of implementation of Security Council resolutions imposing economic sanctions. We will present and assess the system of transformation of the provisions of resolutions into the Polish domestic legal order. We will also refer to proposals of the enactment of a special regulation with respect to this problem, and to characteristics that it would have to possess.

**2.** In Poland it is the Government (the Council of Ministers) that is responsible for the implementation of UN resolutions.

In response to the UN Security Council resolutions issued in the 1990s with respect to Iraq, Libya, Serbia and Montenegro, the Polish government took the following steps:

2.1. In implementation of the earliest resolutions imposing economical sanctions on Iraq (Resolution 661 of 6 August 1990), the government adopted two acts: a resolution and a regulation.[5] The resolution of the Government was oficially adopted in order to discharge the UN SC Resolution 661 and to precise the group of subjects obliged to take concrete measures in discharge of the UN resolution. This group included: ministers, directors of central offices and of territorial units of administration (wojewoda). All these organs were obliged to take within the scope of their duties all possible activities aimed at carrying out of the UN Resolution. The act did not name these activities in detail. The supervision of the implementation of the government resolution was to be effected by the Minister for the Economical Cooperation with the Foreign Countries acting in agreement with the Minister of Foreign Affairs. The resolution entered into force on the day of its adoption. It was intended as an act authorising a broad group of organs to executive acts. It was in the other act (the regulation) that concrete, substantive powers were transferred. It must be pointed that although the UN Resolution was invoked as a reason of the adoption of the regulation, the legal basis thereof was a norm of domestic legal order, namely an article of the Act of Parliament from of 28 December 1989 "The Customs Law". The regulation contained exclusively the prohibitions of trade in goods.[6] No other provisions of the UN Resolution were implemented. The regulation was also adopted on 13 August 1990, it went into force on this day with the retrospective effect of 7 August 1990.

After some time another government resolution was adopted (1 August 1991). According to its introductory part, the intention of the government in the adoption of this document was the implementation of the UN SC Resolution 687 of 3 April 1991. An earlier government regulation prohibiting temporarily trade in goods with Iraq was invoked as the basis of the act. The resolution itself regulated cooperation of the Minister

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[5] Dz.U. (Official Journal) 1990, No. 57, Item 339; amendments in: Dz. U. 1991, No. 33, Item 137; Dz.U. 1991, No. 71, Item 309; Dz.U. 1991 No. 121, Item 533; Dz.U. 1993, No. 56, Item 255.

[6] Neither the resolution nor the regulation evidence the transformation into the Polish legal order of the following prohibitions from parts 3 and 4 of Resolution No. 661: prohibition of any transshipments of goods originating in Iraq or in Kuwait after the date of the adoption of the UN resolution ( by a given country and with respect to its territory), prohibition of financial transfers for such transshipments, prohibition of transshipments with the participation of Polish citizens or Polish ships, prohibition of any access to funds or any other financial resources for Iraq, its trade, industrial and public utility institutions, as well as of carrying out or transfer of such funds or resources.

of Foreign Affairs with the special Committee of the Security Council (Sanctions Committee) coordinating the carrying out of the sanctions by the Member States of the UN.

2.2. Completely different solutions (as compared to the first of the aforementioned government resolutions) were chosen in another government resolution, adopted on 5 May 1992 in implementation of the sanctions imposed on Libya on 30 March 1992. Firstly, the resolution refers to the UN SC Resolution 748 as to a reason for its adoption, but not as to a legal basis. The latter is to be found in the Polish legal order, namely in the provisions of the act of the Parliament "Air Law".[8] Secondly, the resolution obliges the respective ministers to introduce sanctions and restrictions. Other organs of administartion are not the addressees of the resolution. Thirdly, unlike in the "Iraqi" resolution, all substantive rules are transposed from the UN resolution to the Polish one. They form groups of duties for which respective ministers are responsible. The coordination of their activities is to be provided by the Minister of Foreign Affairs. Also this resolution had a retroactive effect since 15 April 1992. No regulation was adopted in this case.

2.3. Resolutions adopted in implementation of the measures taken with respect to Serbia and Montenegro resemble the "Libyan" one. The most important difference is that both of them (of 2 June 1992 and 24 June 1993) refer exclusively to the UN SC Resolutions (Resolution 757 of 30 May 1992 and Resolution 820 of 18 April 1993 respectively) and do not mention any domestic legal basis. As regards the detailed solutions, similarities dominate. Also in this case only ministers are authorised to take action in implementation of the resolutions. To delimit the scope of action of several ministers, the clauses of the UN resolutions are cited (with references to the paragraphs). Still, the resolutions are accompanied by governmental regulations. The first of them, of 22 June 1992 prohibits trade in goods with the Federal Republic of Yugoslavia (Serbia and Montenegro).[9] The second one, of 18 August 1993 regulates temporary restrictions of trade in goods with the territories of the Croatian Republic being under the protection of the United Nations and the territories of the Republic of Bosnia and Hercegovina being under the control of Bosnian Serbs.[10] Both regulations refer to the intent of implementation of UN Resolutions and are based on the Polish Customs Act. The provisions on both regulations regulate exclusively restrictions of trade.

**3.** A few general conclusions can be made with respect to the practice of implementation of UN SC resolutions. We can divide them in two groups. The first one would adopt the outside perspective of observation, the other one – the perspective of an insider.

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[7] See: M. K o s k e n n i e m i: Le Comité des Sanctions, 37 *AFDI* 199–137 (1991).

[8] It must be noted that Resolution 784, except suspending air transport with Libya and other restrictions connected with this, introduced several restrictions of a different kind, namely: prohibition of trade in arms and other military objects, obligation of withdrawing military advisers employed in Libya, of limiting the number of diplomatic staff in missions in Libya, of denial of entry or deportation of Libyan citizens, that had been denied entry or deported from other states because of their engagement in terrorist activities.

[9] Dz.U. 1992, No. 54, Item 255.

[10] Dz.U. 1993, No. 78, Item 367.

The first group of conclusions is the following:

– by adopting the aforementioned acts the Council of Ministers demonstrated its readiness and willingness to carry out the decisions of the Security Council (Art. 25 of the Charter) and took the action aimed to carry them out directly and in accordance with the Polish law (Art. 48 of the UN Charter),

– the Council of Ministers treats UN resolutions as norms comparable to non-self-executing treaty obligations,[11] their effects depending upon a complete transformation into the domestic law.

The second group of conclusions comprises the following:

– the problem of implementation of resolutions of the organs of international organizations is not regulated by any act of the Parliament (including the constitution),

– the Council of Ministers initiates the process of implementation of UN SC resolutions,[12] determining organs (at the ministerial level) responsible for this, for this end a form of so called autonomous resolutions, that is resolutions based on constitutional rules regulating the functions of the government,[13] is used,

– sanctions are transformed into the domestic legal order in form of a regulation based on an act of the Parliament regulating subjects similar to those of UN resolutions in question or on any other executive act to an autonomous resolution of the government (e.g., a ministerial order),

– such a regulation determines also the scope of restrictions and limitations,

– the formal guarantee of the implementation of UN resolutions is to be found in the aforementioned governmental resolutions together with regulations or other executive acts to governmental resolutions.

**4.** Taking into consideration the characteristics of the Polish practice, we can try to evaluate it. We will consider the effectiveness of the process of implementation of UN resolutions. In our opinion the factors to be considered comprise: the degree to which the connection with respective UN Charter obligations is demonstrated in the process of implementation of resolutions, the integrity of the requirements of resolutions after their implementation, the division of the executive functions in the administration, the time of the initiation of the process and the accessibility of both UN resolutions and implementing acts.

Consequently we will discuss:

a) the means of implementation of UN resolutions,

b) the way and correctness of transformation of resolutions into the Polish legal system, as well as the accessibility of resolutions and implementing acts,

c) the division of functions and coordination of their exercise,

d) the speed of the implementation.

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[11] V. G o w l a n d-D e b b a s: Security Council Enforcement Action and Issues of State Responsibility, 43 *ICLQ* 85 (1994).

[12] Except the Libyan case.

[13] Now the basis is to be found in Art. 54 (2) of the Constitution Act of 17 October 1992 which reads as follows: "The Council of Ministers adopts resolutions within the scope of its constitutional rights".

4.1. The consideration of the first of the aforementioned problems makes us discuss the degree to which the fact of the fulfillment of international obligations is demonstrated in the process of implementation. One can ask why Polish resolutions and regulations do not invoke the United Nations Charter among the legal bases thereof. The question is fully justified, as we can presume the transformation of the UN Charter into an act of Parliament. Namely, at the time of its ratification the rules of the 1921 constitution (so called March constitution) were said to be binding in the Polish legal order. The implementation of their requirements with respect to the competences in the international relations was sufficient for the conclusion of effective agreements.[15] If the effects of transformation of the Charter are not to be questioned, the legal bases of governmental resolutions should comprise Art. 25 and 48 of the Charter. Both of them, and additionally Art. 41 of the Charter, would form (together with domestic acts) legal basis of regulations. Such references (together with the statement of intent of implementation of resolutions) would improve the prestige of the UN resolutions with in the Polish legal system. The present practice in this respect is insufficient, as references to the titles and numbers of UN resolutions can be regarded as a source of information only for a narrow number of people of the utmost experience in this respect, what cannot be said even about all the ministers, leaving aside other addressees.

To answer, why the Council of Ministers does not refer to the articles of the UN Charter, we must turn back to the events connected with the ratification of the latter and the requirements of the effective act of transformation.

The governmental statement of 8 July1946 informs that on 24 October 1945 the Polish document of ratification of the United Nations Charter – signed on 16 October

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[14] The constitutional regime of the years 1944- 1947 was based on the Act of 11 September 1944 about the organization of the national councils (Dz.U. 1944, No. 5, Item 22) and the Act of the same day about the competences of the President of the National Council of the Country (Dz.U. 1944, No. 5, Item 23). Art. 1 of the former act read: "Till the election of the permanent political representation of the nation according to the Constitution from 17 March 1921, the national councils will be temporary legislative and self-governmental (regional) organs on territories of the Polish Republic liberated from the occupation". Art. 2.1. read: "The hierarchical structure of the national councils is the following: a) the National Council of the Country, b) national councils in województwa (regions) (...)". Art 26 provided that: "The National Council of the Country: (...) gives its consent for trade and customs agreements and agreements imposing on the state permanent financial burdens." Art. 3 of the latter act read: "The President of the National Council of the Country acting as a substitute of the President (...) e) concludes agreements with other states".

[15] Art. 49 of the Consitution was at stake. According to Art. 49(1): "The President concludes agreements with other states and informs the Parliament about them". Art. 49(2) read: "Trade and customs agreements, agreements imposing permanent financial burdens upon the State or containing provisions binding on citizens, agreements changing borders and alliances require the consent of the Parliament. (Dz.U.RP 1921, No. 44, Item 267). For a detailed examination and evaluation of the transformation procedure under the 1921 Constitution see: P.D a r a n o w s k i: "Miejsce traktatów w porządku prawnym PRL" Acta Universitatis Lodziensis, 41 Folia Iuridica, 1989, p. 6–16.See also: *Metropolitan Chapter in Poznań* v. State Treasury, 47 *ILR*, p. 24.

[16] As to the existence of such a possibility we can infer from the Governmental Resolution No. 16 of 29 March 1994 as to the additional requirements for the procedure connected with governmental projects of legal acts necessitated by a duty of their conformity with the law of the European Union. Monitor Polski 1994, No. 23 Item 188. Art. 68 of the Europe Agreement (Dz.U. 1994, No. 11, Item 38) is invoked as the legal basis of the resolution. This very act was transformed into the Polish legal order according to the Constitution from 1952, as amended on 7 April 1989 (Dz.U. 1989, No. 19, Item 101). See also note 22 below).

1945 – was deposited by the US Department of State.[17] So, the President of the National Council of the Country ratified the Charter within 8 days after its signature and on the eighth day the document of ratification was deposited with the depositary.[18] Thereafter, on 31 December 1945 the National Council of the Country adopted an act (being on the level of an act of Parliament) about the ratification of the Charter of the United Nations signed in San Francisco on 26 June 1945 and of the Agreement establishing the Preparatory Commission of the United Nations.

The Charter was published in the Official Journal of 6 March, 1947.[19]

It must be pointed that in Poland the mechanism of transformation was based on the transposition of international agreements into acts of Parliament. This procedure concerned only agreements that could not be ratified by the President without the prior consent of the Parliament. So, the consent of the Parliament was to be given before the ratification (with respect to a future act). The consent was given in a form of an act of the Parliament. Only after the ratification itself, both the agreement and the ratification act of Parliament were to be published in the Official Journal (Dziennik Ustaw). The moment of transformation of the agreement into Polish legal order was determined by the act of publication of both documents (the time from which the agreement, or formally the act of Parliament, became a part of the Polish law). It must be pointed out here that the Charter belonged to acts requiring for its ratification a prior consent of the Parliament. Namely, it imposed an obligation of paying financial contributions for the Organization, in consequence qualifying as an agreement "imposing permanent financial burdens on the State".

In the light of the aforementioned historical events we can formulate the following conclusions:

1. The Charter was not transformed into the Polish legal order. It was due to the breach of the procedural rules. Namely, the consent of the Parliament (then – the National Council of the Country) was not given prior to the ratification.

2. The consent given by the National Council of the Country after the ratification (effected by the President of the Council contrary to the domestic rules regulating competences for the conclusion of international agreements[20] in a way evident for the other parties) can be interpreted as a convalidation of the agreement and an act expressing the readiness of Poland to implement the Charter.[21]

3. In consequence, the Charter is an act remaining outside the Polish legal system. The mere publication of the Charter is not sufficient for transformation.

4. Any attempt to demonstrate direct effect of the Charter in the Polish legal order would be contrary to the Polish tradition of transformation of international agreements that is a deep-rooted element of the Polish constitutional tradition.[22]

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[17] Dz.U. 1947, No. 23, Item 91.

[18] Cf. the UN Charter. Art. 110 (2).

[19] Dz.U. 1947, No. 23, Item 90.

[20] See Vienna Convention on the Law of Treaties, Art. 46.

[21] See: Vienna Convention on the Law of Treaties, Art. 45.

[22] As an example we can invoke the resolution of the Supreme Court (adopted by the Court composed of 7 judges) of 12 June 1992 concerning the constitutional practice under 32 g (1) and (2) of the 1952 Constitution

4.2. The government has No. doubt that for the effect of UN resolutions in the Polish law the adoption of implementing acts is necessary. The process of transformation of non-self-executing norms of UN resolutions has the following characteristics:

a. it can be effected without delay, in the form of regulations based on appropriate acts of Parliament,

b. it can be effected by a competent Minister (several Ministers), in the form of regulations or ordonnances based on acts of Parliament or in the form of acts based on autonomous resolutions of the government,

c. it can be partly effected by a competent Minister (or several Ministers) in the form of regulations or ordonnances based on acts of Parliament, the additional duty being the consideration of necessity of adopting new, more detailed rules forming the legal basis of other measures to be taken,

d. it can be effected after changes in the legislation.

In practice it means:

**ad. a.** The process of immediate transformation covered only a part of the provisions of the resolutions. They restricted trade in goods with given countries. The legal basis was to be found in the provisions of the customs law (precisely: Art. 4 (5)(1) and Art. 9 of the Customs Act.

We can verify the adequacy of references to these articles as the basis of restrictions on trade. According to Art. 4 (5)(1) the Council of Ministers determines in the form of a regulation the height of customs duties. Art. 9 provides that the government can introduce (in the form of regulations) restrictions on trade with other countries if this is required by the trade policy, an economic or a national interest of the State.The Government rightly refers to the latter clause. It is admissible to bind the protection of a "national interest of the State" with the obligations emerging for Poland in consequence of the ratification of the Charter. The references to "requirements of trade policy" or "economical interest of the State" would be unjustified, as the implementation of resolutions imposing sanctions usually results in financial losses of both states and their market operators (e.g. companies).[23]

One can wonder why Art. 3 of Customs Act was not invoked. According to it, "everybody is allowed to participate in the activities of international trade on equal rights, save as otherwise provided by the law or international agreements". It must be reminded that the Polish doctrine has presented a view that at the present level of the

amended on 7 April 1989. Art. 32 g read: "1. The President ratifies and renounces international treaties. 2. The ratification of treaties resulting in substantial financial burdens for the country or treaties requiring changes in legislation is possible only with a prior consent of the Parliament." As we can see, it was a copy of the solutions from the 1921 Constitution.The resolution of the Court referred directly to the pre-war practice and pointed at the transformation effect of the ratification effected by the President with participation of the Parliament and the publication of ratified treaties in the Official Journal. Under the rule of the Constitution from 1952 (1989) the Convention on the Rights of a Child – ratified and publicated – was, in the opinion of the Court, " (...) put on a par with acts of Parliament and could be applied as such an act, with all consequences there of (underlined by P.D.). See: 179 *OSNCP* No. 2, at 65 (1992). The view of the Supreme Court with respect to the transformation effect is shared by the Polish Ombudsman. See: Biuletyn Rzecznika Praw Obywatelskich No. 3, at 57–60 (1994).

[23] See: B. Grelon, C.E. Gudin: Contrats et crise du Golfe, 118 *Clunet* 633–677 (1991).

development of international law resolutions of international organizations belong to treaty law *sensu largo*.[24] The adoption of such an assumption and understanding this article as a reference to the Charter and UN resolutions would make this article very useful for the process of implementation of UN resolutions.

The regulations of the Council of Ministers contain very shortly formulated, simple prohibitions or temporary limitations of trade in goods other than humanitarian aid.[25] This makes us notice that:

– the prohibitions of trade seem to constitute also the blocade of payments accompanying such trade,

– provisions formulated in the aforementioned way do not seem to transform into the Polish law detailed prohibitions to be found in some UN resolutions (e.g. as regards trade in arms).[26] The government should not limit itself to general prohibitions, but should add appropriate specific prohibitions concerning some categories of goods.

– in fact, more complex provisions are copies of the respective clauses of UN resolutions.

**ad. b.** There is a variety of functions attributed to several ministers. They comprise: prohibition of exports of specific categories of goods (arms, munition, parts of airplanes)[27] – the Minister for the Economic Cooperation with Foreign Countries, the Minister of National Defence, the Minister of Transport and Maritime Management; prohibition of transport of different kinds (air and water transport, the obligation of seizure of means of transport breaching the blocade)[28] – the Minister of Transport and Maritime Management, the Minister of Justice (acting as General Prosecutor), the Minister of Home Affairs, the Minister for the Economic Cooperation with Foreign Countries; the suspension of the right of entry for several categories of nationals of the incriminated state[29] – the Minister of Home Affairs. It must be borne in mind that the general prohibition of trade in goods introduced immediately by the government is of the utmost importance, the significance of the prohibitions of ministers being smaller.

The resolutions of the government do not prescribe the form, in which ministerial acts are to be adopted.[30] We can only read that ministers "will take necassary steps", "necessary measures", "will order" something and so on. It is for the minister to decide

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[24] R. S o n n e n f e l d: Uchwały Rady Bezpieczeństwa ONZ, at 26, 30–31 (1979).

[25] The bans on exports and imports introduced by the resolutions did not refer to "medical goods and products and food sent for humanitarian reasons".

[26] For example para. 5 of the "Libyan" UN Resolution required all states to prohibit the provision of Libya by their citizens or from their territory with weapons and all respective materials, including sales and transfer of weapons and munition, military vehicles and equipment for para-military police and spare parts to them and any types of equipment necessary for the aforementioned objects, as well as the conclusion of license agreements for the production or the service of such objects.

[27] See: para. 2(2) and 3(2) of the "Libyan" Resolution (No. 46/92).

[28] See: para. 2(1) of the "Libyan" Resolution (No. 46/92) and para. 3(1) and (2) and para. 5 of the "Serbian" Resolution (54/93).

[29] For example: Libyan citizens denied entry or deported from other states because of their involvment in terrorist activities (para. 6(1) of the "Libyan" Resolution (46/92)).

[30] See para. 2(1) of the "Libyan" resolution (46/92) obligating the Minister for Transport and Maritime Management to issue orders prohibiting the issuance of permissions for planes to take off.

not only on the form of an act but also upon its formal legal basis (the act of Parliament or the autonomous resolution of the government).

**ad. c.** Paragraph 4 of the governmental resolution dealing with Serbia obliged the Minister of Justice to initiate criminal proceedings against persons infringing prohibitions and orders of the UN resolutions. The proceedings were to be conducted in accordance with the provisions of the law in force. Still, the Minister was authorised to present the Council of Ministers proposals in changes of criminal law. The choice of an authorisation instead of an obligation in this respect was due to the opinion of the government as to the possibility of punishing the aforementioned persons according to the existing provisions. Actually, the proceedings were intended to be brought potentially both against public officials responsible for the effectiveness of the implementation of the UN resolutions and private persons engaged in prohibited transactions.

As regards the first category, Art. 246 of the Criminal Code is suitable for the penalisation of the acts in question. According to the first paragraph of this article: "A public official who, by exceeding his competences or not fulfilling his duties, has acted against any public or private goods, will be imprisoned for time from 6 months to 5 years".[31]

Still, the activities of private persons are not incriminated by the Criminal Code.

Consequently, we can wonder whether the Commission for the Reform of the Criminal Law (headed by the Minister of Justice himself) has considered any new solutions with regard to persons infringing sanctions of the Security Council. It is not to be seen in the draft project of the Criminal Code.[32] Especially, no. mention of the subject can be found in the "special" part of the code in the chapter dealing with "Crimes against peace, mankind and war crimes".

**ad. d.** Paragraph 2 of the aforementioned government resolution of 24 June 1993 (the "Serbian resolution") obliges the Minister of Finance acting in agreement with the Chairman of the Central Bank to propose changes in the acts regulating banking and foreign currency movements in order to implement Art. 21 of the resolution, dealing with the blocade of the assets of the aggressor state.[33] To be precise, the respective clause of the resolution provided the freezing of all Serbian funds being on the territories of the UN Member States in order to make them impossible for use by their disponents (the state authorities of Serbia and Montenegro, enterprises from those states and any other persons controlled directly or indirectly by such authorities, enterprises, etc.). The clause specifies the activities of a crucial importance for the effectiveness of the economical sanctions.[34] There is no. doubt that by authorizing the Minister of Finance to initiate the amending of a few legal acts the Council of Ministers displayed its

[31] See: W. W o l t e r: Nauka o przestępstwie, 334 (1993).

[32] Komisja ds. Reformy Prawa Karnego, Projekt Kodeksu Karnego, (the Draft of the Polish Criminal Code) 49 *PiP* No. 2 Suppl. (1994); Komisja ds. Reformy Prawa Karnego, Uzasadnienie do Projektu Kodeksu Karnego (the reasons of the draft of the Criminal; Code), 49 *PiP* No. 3 Suppl. (1994).

[33] Despite a clear provision of para. 4 of the Resolution 661, the Polish government did not deal with the obligation of freezing the financial assets of Iraq in Polish banks.

[34] See: *PASIL* – 1991, [Carver] at 181–183.

willingness of creating pro futuro a stable legal basis for the blocade of payments with states incriminated by the Security Council of the United Nations. The act Foreign Exchange Act of 2 December 1994 was influenced by the aforementioned governmental resolution. According to Art. 28 of this act: "Banks should follow resolutions of the Council of Ministers adopted in implementation of resolutions of the Security Council of the United Nations prohibiting or limiting the freedom of payments with respect to a given country".

To close our discussion about the way and correcness of transformation of the provisions of UN resolutions into the Polish legal system, we should mention the question of the public accessibility of both international and domestic (implementing) norms. It must be noticed that the only proof of the transformation is to be found in the governmental regulations published in the Official Journal. Still, the regulations transform exclusively a part of the provisions of the resolutions in question, namely those relating to restrictions on trade in goods. As to the transformation of the others, effected by ministers on the basis of resolutions of the Council of Ministers, it would be very difficult to evaluate their correctness. Neither the Official Journal, nor the Official Journal "Monitor Polski" mention the fact of the adoption of ministerial acts implementing UN resolutions.

This element of the Polish practice must be criticised. From the point of view of the effectiveness of sanctions, each element thereof should be attributed the same significance. Consequently, if the restrictions on trade in goods deserve mentioning in the Official Journal, also the transformation of the rest of the provisions should be mentioned in it. As to the publication of ministerial acts, "Monitor Polski" is the best place for it. It would be justified by the very fact that sanctions affect rights and duties of citizens (e.g. restrictions of trade, transport and so on) and should be known by them.

4.3. The division of functions and the coordination of their fulfillment provided for in the governmental resolutions adopted with respect to Libya and Serbia is much better than too idealistic solutions of the "Iraqi" resolution. It was very rational to abstain from imposing any duties on the territorial organs of administration and to limit itself to impose new obligations on particular ministers. This will ensure much greater effectiveness of the implementation of resolutions.

4.4. Not only correct, but also timely transformation of the provisions of resolutions is a condition of the effectiveness of economic santions.[36]

The "Iraqi" regulation came into force on the day of its adoption with the effect from the very day of the adoption of the respective UN SC resolution. The retroactive effect of the regulation was the best proof of the intent of the Polish government to take action as quickly as possible. It was not the case with the other resolutions. The "Serbian" regulation was adopted on 22 June 1992 in implementation of the Security Council resolution of 30 May 1992 (the governmental resolution was adopted on

[35] Dz. U. 1994, No. 136, Item 703.

[36] See: *PASIL* – 1991, [Schlitter] at 178.

2 June 1992). It entered into force on 15 July 1992, i.e. with a delay. The second "Serbian" regulation of 18 August 1993 adopted in implementation of the Security Council resolution 820 of 18 April 1993 went into force on the day of its publication (25 August 1993), i.e. more than 4 months after the date of the adoption of the UN resolution.

4.5. The positive and negative conclusions of our analysis can be formulated in the following way:

1. If economic sanctions are to be understood as an impuls inspirated by the government and bringing about a threat or an actual withdrawal from normal forms of trade and financial relations,[37] it can be said that the Polish government confronted with the necessity of implementing UN resolutions, utterly tries to find an inspiration in the Polish law. It chooses as legal bases acts of Parliament regulating matters similar to those of the UN resolutions or, if this occurs impossible, tries to pass such acts. In consequence, the Polish legislation is now prepared for an effective blocade of trade and financial relations with incriminated states. We may guess that also in future the government will refer to old (Customs Act) and amended acts (Foreign Exchange Act) as legal bases for measures implementing UN resolutions.

2. The transformation of provisions imposing restrictions on trade in goods can be seen as satisfactory. Still it may be recommended to the government not to limit itself to general clauses but also to supplement them with specific provisions as to specific categories of goods (e.g. arms). It must be emphasized that at the time of the transformation of the Polish legal system not all provisions of the UN resolutions were implemented. Namely, the provisions requiring a blocade of the financial assets of incriminated states in Polish banks were not implemented.

3. The hitherto practice of the Council of Ministers results in the perception of the implementing process of UN resolutions as an extraordinary process, taking place rarely and devoid of social significance. This perception is somehow supported by the lack in the Polish law of any rule formulating the obligation (not only of public organs, but also of private persons) to follow the provisions of the UN SC resolutions. This situation is petrified by the routine of adopting autonomous resolutions of the Council of Ministers, initiating the very process of implementation. That is why the activities of the government can be seen as an action.

4. The hitherto practice does not take into consideration the need of public accessibility of implementing acts. The process of implementation of UN resolutions takes place in cabinets. The best proof thereof is the lack of publication of governmental resolutions and implementing acts other than regulations in the "Monitor Polski".

5. The references to resolutions of the Security Council as a basis for the adoption of a given act is devoid of any informative value for the addressees. The latter cannot guess the importance of the resolutions. As they are not publicated in the Official Journal, it is impossible to know their texts or to use them as a source of interpretation.

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[37] See: *PASIL* – 1991 [Kimberly Ann Elliott], at 170.

The latter would be necessary for persons applying domestic acts adopted in implementation of UN resolutions.

6. In the light of the remarks 3–5 it is no longer surprising that the Polish Criminal Code does not contain any provision ensuring the implementation of UN resolutions by persons other than public organs.

7. Several reservations may be formulated with respect to the speed of implementation of trade restrictions in relations with Balkan countries.

**5.** Critical remarks dominate in the above evaluation. It makes us formulate a few proposals of changes. They are made on the assumption that the role of the United Nations in the contemporary world merits such an implementation of the resolutions of the Security Council aimed at maintenance or restoration of peace that is effected with the full conviction of acting for peace.

I think that the fulfillment of obligations arising from the adoption by the Security Council of resolutions aimed at maintenance or restoration of peace and security should be regulated by a special act of Parliament.It would deal with the following questions:

1. Such an act should express the readiness of Poland to implement resolutions of the Security Council imposing non-military sanctions and should determine expressis verbis that it relates to resolutions based on Art. 39 and 41 of the Charter.

2. The act would impose an obligation of the implementation of resolutions by all organs of control and administration and by all private persons within the Polish jurisdiction.

3. The act should order immediate publication of the Security Council resolutions in the Official Journal.

4. The publication would imply transformation of resolutions into the Polish legal order, the position of these norms in this system should be determined in such a way that they would have priority in case of conflict with any other act of Parliament, save the Constitution itself.

5. The publication would result in the transformation of a resolution into an act of Parliament, or would amount to an introduction into the Polish legal system connected with a direct effect of resolutions.

6. In favour of the first of the two possibilities from the preceding paragraph we can invoke the usefulness of the rule empowering the Government or ministers to adopt regulations specifying provisions of resolutions.

7. The act should oblige the government to determine the division of functions necessary for the implementation of resolutions; the government would order the Minister of Foreign Affairs or (partly) other minister to coordinate the implementation measures in internal and external relations.

8. A special clause should be inserted according to which the debate about the costs of the implementation of a given resolution may be initiated with the possibility of excluding the effectiveness of resolutions contrary to the interests of the State. As the act would serve the implementation of the Charter – an act for which the consent of the supreme organs was required, the abstension from implementation should be effected by the President with the consent of the Parliament.

9. The act should contain a provision of criminal law penalizing breaches of resolutions by public organs and private persons. For such crimes a punishment by imprisonment should be provided, but also a high pecuniary penalty, as trade with states subject to an embargo is very profitable.

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# The Time Factor in the Creation of Rules of Customary International Law

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## Introduction

The aim of this study is to assess the role of duration – the time element – in the formation of rules of customary international law (custom). Perhaps the essential problem with the time element is to decide whether indeed it even constitutes a necessary element in the formation of rules of custom. There are probably only two possibilities. The first is that duration is itself a required element in the formation of a rule of custom, along with the generality of the practice. The alternative is that duration cannot be treated separately from practice – that it is essentially concomitant with practice. The point here is that, since a widespread practice is regarded as necessary in establishing a rule of general custom, a certain amount of time will have to elapse in order for that practice to become sufficiently widespread and furthermore to be acknowledged as such. Seen from this perspective, there is no separate time element as such; rather, it is merely the case that sufficient practice will require time in order to become established, but the actual amount of time is not definite. The standard English language textbook on international law has this to say about the matter:

> Provided the consistency and generality of a practice are proved, no particular duration is required: the passage of time will of course be a part of the evidence of generality and consistency. A long (and, much less, an immemorial) practice is not necessary... The International court does not emphasize the time element as such in its practice.[1]

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[1] I. B r o w n l i e: *Principles of Public International Law,* (4th ed., 1990), at 5. The latest edition of *Oppenheim* is not dissimilar in its assessment: "As usages have a tendency to become custom, the question presents itself: at what stage does a usage turn into a custom? This question is one of fact, not of theory. All that theory can say is this: Wherever and as soon as a line of international conduct frequently adopted by states is considered by states generally legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law." R.Y. J e n n i n g s and A. W a t t s (eds.): *Oppenheim's International Law* (9th ed., 1992), Vol. 1, at 30.

This analysis seeks to clarify the position – is there a separate time element or not? If there is, how long is it? It has to be said that much of the evidence would appear to confirm Professor Brownlie's view. However, it seems that the time factor may indeed still have a role to play.

Considerations of the nature of custom have not exactly been ubiquitous in the case law of the ICJ, nor in that of the PCIJ for that matter. Moreover, even when the subject has come up, the time element has tended to be glossed over or given a relatively short treatment. This may be because the Courts have formed the view that the matter was uncontroversial generally, because they considered it uncontroversial in the particular case, or because they did not consider that there was a time element as such.

Some analyses of the time element have mentioned the so-called traditional view (without necessarily approving it) that, for a usage to acquire legal effect, it must have been carried on since time immemorial,[2] though the exact measure of "time immemorial" is of its nature imprecise. This explains Brownlie's reference to the term. The validity of that notion has been exposed by D'Amato as not corresponding to reality, at least in the context of national legal systems, which required various but rather specific time frames for the development of a custom.[3] The phrase is commonly derived from the dissenting opinion of Judge Negulesco in the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*:

> The teachings of publicists and of international practice agree in recognizing the necessity of immemorial usage consisting both of an uninterrupted recurrence of accomplished facts in the sphere of international relations and of ideas of justice common to the participating States and based upon the mutual conviction that the recurrence of these facts is the result of a compulsory rule.[4]

In fact, it seems to have been his most telling contribution to the jurisprudence of international law that he made a statement against which writers and courts have, ever since, reacted negatively.[5]

The notion of custom was discussed extensively in the *Lotus Case*[6] but even there the Court, in discussing State practice at length with regard to the formation of a rule of custom, did not specify any particular time element. In fact, this did not seem to be an issue; its deliberations were confined to an assessment of the extent of State practice without reference to the time it had been carried out.

The first major treatment of custom by the ICJ was in the *Asylum Case*.[7] While the Court's ruling, and some of the dissenting judgments, did address the need for practice,

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[2] See, for example, E. Jiménez de Aréchaga: *General Course in Public International Law*, 159 *RCADI* 25 (1978); M. Akehurst: Custom as a Source of International Law, 47 *BYBIL* 15 (1974–75); K. Skubiszewski: *Elements of Custom and the Hague Court*, 31 *ZaöRV* 834 (1971).

[3] A. D'Amato: *The Concept of Custom in International Law* (1971), at 56–57.

[4] Advisory Opinion No.14, 1927 PCIJ Reports Series B, in M.O. Hudson,:*World Court Reports*, Vol. II, at 209.

[5] As Professor Skubiszewski put it in 1971, "Judge Negulesco has remained isolated in his view." Note 2, *supra*, at 834. Twenty years on the position remains the same.

[6] France v Turkey, *PCIJ Publ.*, Series A, No.10 (1927), 28.

[7] Colombia v Peru, *ICJ Reports* 1950, 266.

there was again little reference to duration as such. However, it is possible to discern an indirect acknowledgment of the need for time in the famous reference to a "constant and uniform usage practised by the States in question".[8] While most of the Court's discussion was with regard to the uniformity of the practice, the mention of a "constant" usage does indicate that there would have to be *uninterrupted* practice. No specific time frame was elaborated in general terms, but it is submitted that a constant practice would require some time to become evident. The actual amount of time would, however, be dependent on the amount of accompanying practice. The fact that the Court failed to designate a particular time, in a case which turned on the existence of a rule of customary international law, indicates that it did not regard it as crucial. In his Dissenting Opinion, Judge Azevedo actually stressed the element of uniformity of the practice rather than its constant exercise. It is difficult to separate the notions of "constant" and "uniform" entirely: if a practice is not uniform, or consistent, it may be maintained that it is also not constant. Yet, the Court clearly considered that there were two aspects of the practice – that it could be constant without necessarily being uniform, and *vice versa*. Thus, a practice may be one without being the other and, in such cases, may be insufficient to establish a rule of custom. Judge Caicedo Castilla, in another Dissenting Opinion, did refer to the time element. In asserting that there was in Latin America a customary rule with regard to the granting of diplomatic asylum, he stated that "...the custom has been continuous since it arose as early as the middle of last century... we are dealing with a custom one century old...".[9] Of course, the custom could not have existed since it arose, since when it first arose it was by definition not a custom but rather a new action, unless the statement means that, since the custom was acknowledged to have come into existence, which would have taken a certain amount of time, it had *since then* been continuous. This raises one factor which does count in favour of a time element, even if it is variable according to each case – even if it only takes a moment for a new rule to develop,[10] that moment is still a period of time. However, this does not take us very far in deciding whether a time element is *necessary*, or merely *coincidental*, in the formation of custom.

Further indirect reference to the time element was made by Judge Alvarez in his Individual Opinion in the *Anglo-Norwegian Fisheries Case*. He made the point that "customs tend to disappear as the result of the rapid changes of modern international life; and a new case strongly stated may be sufficient to render obsolete an ancient custom".[11] Although many rules of custom may come to be superseded by treaties, it is also the case that they may be replaced by other, new customary rules. The implication here is that such rules may develop very fast in modern international life, which, if anything, is changing even faster than it did in 1951. Judge Alvarez' statement was a recognition that custom could be created rapidly.

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[8] At 276.

[9] At 370.

[10] It was suggested by Brierly that this had occured with regard to the principle of sovereignty over airspace at the moment World War I broke out: 1950 I *YBILC* 5.

[11] UK v Norway, *ICJ Reports* 1951, 148.

The next reference by the Court to the time element did not have much impact on the debate. In the *Right of Passage Case*, it found that a rule of custom had been established with regard to a practice which had been going on for more than one and one quarter centuries.[12] The upshot was that India was obliged to recognise that Portugal had a right of passage over Indian territory in order to gain access to Portuguese enclaves. The Court reached this decision after careful scrutiny of the actions of Portugal and the UK, then India, with regard to this matter, for the period of over 125 years mentioned above. It is unwise to read too much into this finding; clearly, the longer the practice had actually been taking place, the easier it would have been to find that there was a rule of custom. In other words, the very length of the practice claimed to give rise to a rule of custom was such as to make any issue of time uncontroversial. This is confirmed in the Dissenting Opinion of Judge Armand-Ugon, who argued that:

> [t]he continual repetition of an act over a long period does not weaken this usage; on the contrary, it strengthens it; a relationship develops between the act and the will of the States which have authorized it. The recurrence of these acts over so long a period engenders, both in the State which performs them and in the State which suffers them, a belief in the respect due to this long-established practice...[13]

As the Court did not offer any views on the issue beyond dealing with the immediate problem, the matter was not taken any further forward by the case. A more interesting, though perhaps less authoritative, comment had been made in an earlier phase of the case. In a Dissenting Opinion, Judge Chagla remarked that:

> [i]f for a considerable period of time Portugal has been exercising this right, then the right may be upheld by international law. But in order that local custom be established, it is not sufficient for Portugal merely to state that for a long period she maintained communications between Daman and the enclaves. She must go further and establish that the transit facilities that she had were enjoyed by her as a matter of right and not as a matter of grace or concession on the part of the Indian Government.[14]

This statement indicates that the alleged custom must have been in existence for a "considerable" period. While Judge Chagla did not specify how long the practice had to have been going on before it would be deemed sufficiently lengthy, clearly 125 years qualified. The point worth noting is that Judge Chagla seemed to predicate any legal effect of the custom on the time factor – had it not been for the lengthy duration of the practice no legal right would have been established. That is not to say that duration was the only essential factor; rather, while not in itself sufficient it was nevertheless a conditio sine qua non for the establishment of a rule. It should however be stressed that this statement was part of a dissenting judgment; the majority opinion did not go as far as Judge Chagla.

[12] Portugal v India, *ICJ Reports* 1960, 40.

[13] *Ibid*, at 82.

[14] *Right of Passage Case (Preliminary Objections), ICJ Reports* 1957, 125, 176–177.

Therefore, by the beginning of the 1960's it was still quite maintainable, at least on the basis of the jurisprudence of the ICJ, that a practice would have to have been followed for a considerable period of time before it could crystallize into a rule of custom. However, a more precise statement of the required duration would be problematic: while the Court had addressed the issue to some extent it had confined itself to findings with regard to particular alleged rules of custom, rather than risking a more prescriptive analysis. This changed with the *North Sea Continental Shelf Cases*.[15] In those cases Denmark and The Netherlands argued that the continental shelf areas between them and the Federal Republic of Germany should be divided according to the equidistance principle, which they submitted was a rule of customary international law binding upon the FRG. It was their contention that, even if there had not been such a rule in existence in 1958, when the Geneva Convention on the Continental Shelf was adopted, such a rule had since come into effect, because of the combined impact of the Convention and subsequent State practice, in less than ten years.[16] They argued that the FRG, while not a party to the 1958 Convention, was bound by the recently emerged rule of customary international law that continental shelves should be divided between adjacent States on the basis of equidistance. Thus, in contrast to the *Right of Passage Case*, where a custom of over 125 years was in point, the Court was obliged to assess the status of an alleged rule of customary international law which, at the time of hearing, had existed for a maximum of about ten years, even less if one were to assess it in light of the date when the dispute arose. The Court made two statements which are crucial to an analysis of the time factor. In discussing when a treaty rule may acquire customary status, it said:

> ...it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.[17]

Admittedly, the Court did not say what it meant by a "considerable" period of time – but the period which had elapsed in this case was a maximum of ten years. Even so, there was a clear acknowledgment that it was possible for a rule of custom to emerge relatively quickly, through the impetus of a treaty (which would constitute the necessary practice), so long as those States particularly affected by the alleged rule were party to the relevant instrument. In fact, this passage may be read as indicating that the time element is not in itself crucial but rather concomitant with the State practice element – the continuous and uniform usage. Clear stress is placed by the Court on the need for a widespread practice, particularly amongst States most affected by the rule. One is given the impression that the more extensive the practice the less time would be required. This is confirmed by the following:

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[15] ICJ Reports 1969, 3.
[16] *Ibid.*, at 43 (para. 74).
[17] *Ibid.*, at 42 (para. 73).

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked...[18]

Again here, the time element appears to be secondary; the implication is that a specific amount of time as such is not required, as long as the practice is sufficient. This is tantamount to denying the time element altogether – it is no longer, if it ever was, essential that the practice have been in existence for a certain minimum time. If this was indeed what the Court intended, the result is that the practice need only have subsisted long enough to have become extensive and uniform. However, it is interesting that the Court said that the passage of a short period of time is not *necessarily* a bar to the formation of custom. The obvious inference to be drawn from this statement is that in fact it is desirable that the duration of the practice should have been reasonably lengthy. Nevertheless, it has to be accepted that the effect of this part of the ruling is that custom may emerge very quickly if the relevant practice is sufficiently extensive and consistent.

The dissenting opinions were perhaps more ambivalent with regard to the time factor. Judge Tanaka argued that "the duration of time required for the generation of customary law cannot be mathematically and uniformly decided".[19] However, he also said the same of the amount of State practice required. Clearly, there will be no custom without some State practice. The belief that one could not specify a particular amount of time should not obscure Judge Tanaka's apparent endorsement of a time factor. Nevertheless, it is arguable that the statement, treating the length of time as variable, may be read the other way, so that the time factor is again a requirement only in as much as it allows sufficient State practice to occur. Indeed, Judge Tanaka went on to argue that the importance of the time factor had been minimised by the increased tempo of international affairs, which allowed the "acceleration of the formation of customary international law. What required a hundred years in former days now may require less than ten years".[20] Yet, even this statement, in asserting the decreasing relevance of the time factor, serves to confirm its residual if limited role: if previously one hundred years had been required in order to allow the accumulation of sufficient State practice to establish a rule, and in 1969 only ten years were necessary, it remains the case that some time must pass.[21]

It is thus arguable that the decade from 1960 to 1970 saw a significant change in the attitude of the ICJ. While in the earlier cases it had certainly not come out in favour

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[18] Note 16, *supra*.

[19] At 175.

[20] At 177.

[21] See the Dissenting Opinion of Judge M. S ø r e n s e n at 243: "In its previous jurisprudence, however, the Court does not seem to have laid down strict requirements as to the duration of the usage or practice which may be accepted as law."

of a distinct lengthy period during which State practice was to be assessed, it had nevertheless maintained that a considerable period of time, whatever was actually meant by that notion, should have elapsed. The *North Sea Continental Shelf Cases* established clearly that a briefer period of time might be sufficient provided that there was sufficient State practice.

The Court had to deal with a dispute involving custom again in the *Fisheries Jurisdiction Cases in 1974*. On two occasions mention was made of problems relating to the ascertaining of alleged newly emerged rules of customary international law, yet in both cases the issue was dealt with in terms of State practice. No reference was made of whether sufficient time had passed. What is interesting here is that attention was focused on the lack of consistent practice. In his individual declaration, Judge Nagendra Singh noted that:

> [t]he rules of customary maritime law relating to the limit of fisheries jurisdiction have still been evolving and confronted by a widely divergent and, discordant State practice, have not so far crystallized.[22]

Similarly, in a joint separate opinion, Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda declined to find a customary rule establishing an obligatory maximum fishery limit of twelve miles for coastal States, on the basis that there was lacking an international usage "sufficiently widespread and uniform".[23] Admittedly, if there was insufficient State practice, one might maintain that it was simply unnecessary to consider the time element, and thus no adverse inference should be drawn from the failure to refer to the time factor. However, it is surely relevant that the attention of the judges was focused on the State practice: none of them attempted to argue that there was no custom because insufficient time had elapsed. Having said that, the clearest defence yet of the time factor appeared in the same case, in the Separate Opinion of Judge De Castro, who appears to have been on a frolic of his own when he argued:

> [i]t is time which ripens a practice and transforms it into a custom... The Court has recognized the possibility of some relaxation of the requirement of a considerable length of time, but only on condition that [there has been extensive and virtually uniform relevant State practice].[24]

This was a very bold statement and, it is suggested, very much out of step with the rest of the Court. Judge De Castro seems to have taken the view that a considerable period of time remained necessary, but for the limited exception permitted since the *North Sea Continental Shelf Cases* as a result of very widespread practice. This statement is more in tune with that of Judge Negulesco in the *European Commission of the Danube Case* than with the mainstream of opinion in the mid-seventies. Indeed, in the second *Fisheries Jurisdiction Case*, the Court considered that two new rules of

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[22] UK. v. Iceland, ICJ Reports 1974, 39.

[23] *Ibid.*, at 45.

[24] *Ibid.*, at 90.

customary international law, concerning the notions of fisheries zones and preferential fishing rights in adjacent waters for coastal States, had evolved since the second law of the sea conference in 1960, a maximum of fourteen years.[25]

After this references to the time factor became somewhat infrequent. In his Separate Opinion in the *Western Sahara Case* (Advisory Opinion), Judge Dillard, in assessing the legal effect of General Assembly Resolutions, remarked that

> "the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law."[26]

Again, there is no reference here to a specified period of time; the phrase may be construed as requiring a minimum period but no indication of that minimum is offered. The impression once more is that the amount of time required is simply that which allows sufficient State practice to occur.[27]

While the Court seems to have accepted that custom may now develop very rapidly, especially where there is a major multilateral treaty which allows for consensus, it has confined itself to assessing the claims made for particular rules in each case, rather than committing itself to specific times. The role of treaties in developing custom was expressly acknowledged and considered in the *Continental Shelf Case* between Libya and Malta.[28] Just as The Netherlands argued (unsuccessfully) for the impact of the 1958 Geneva Convention on the Continental Shelf in helping to establish rapidly new rules of customary international law, so the 1982 Law of the Sea Convention, which was not to enter into force even until 1994, was the object of a similar debate between the protagonists in 1985. The Court acknowledged[29] that it had to take account of the role of such treaties in developing customary law, but in doing so stressed that the role of such treaties was more in the way of recording and refining rules of custom; the crucial way to assess the existence of a rule was through actual practice. The role of treaties was seen here as to some extent secondary in assessing State practice. However, to the extent that treaties were relevant, they obviously could contribute towards the speedy development of a rule, particularly if a widespread consensus was achieved. This was alluded to by Judge Sette-Camara in his Separate Opinion, though not with great approval: "In spite of all the speculations backing the theory of instantaneous formation of customary international law by the procedure of consensus...".[30]

If indeed there is such a thing as instant custom (this will be discussed below), any notion of duration becomes meaningless as far as a minimum requirement is concerned.

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[25] FRG v Iceland, ICJ Reports 1974, 192, para. 44.

[26] ICJ Reports 1975, at 121.

[27] Similarly, in the *Gulf of Maine Case*, the Court indicated that, in seeking rules of custom, the appropriate technique was "by induction based on the analysis of a sufficiently extensive and convincing practice..." ICJ Reports 1984, 299, para. 111.

[28] ICJ Reports 1985, 29–30, para. 27.

[29] *Ibid.*

[30] At 69.

The Court has been relatively circumspect in recent times as far as custom is concerned. If assessing the position in the mid-1980's, one would have been forced to conclude that there is indeed, in the view of the Court, no real element of duration required for the formation of custom. The emphasis has been very much on the requirement of State practice, with duration being incidental. It is arguable, however, that the *Nicaragua Case*,[31] while not contradicting that position, has added to it. First of all, with regard to pre-existing (as opposed to new) rules of custom, the Court made it clear that, contrary to the contention of the USA, when the same rule exists both in custom and in a treaty, the mere fact of its existence in a treaty will not normally affect the customary rule, which endures[32]. In other words, a rule of custom does not cease to exist merely because some States have entered into a treaty covering the same ground. This of course is pertinent to the notion of duration with regard to preexisting custom, but it does not tell us anything about the time factor in the formation of new rules.

The Court did make one interesting statement about the nature of custom, at para.184. In ascertaining exactly what rule, if any, exists, said the Court, it must "satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice." Indeed, general practice was regarded as playing an "essential role". Again there is no comment on duration as such, only on practice. The implication may be that the time factor is not in itself a must. And yet, if one considers the statement of the Court further, it is arguable that it is not only duration which is concomitant (to practice); the practice itself is concomitant to establishing the rule, which is ultimately dependent on the existence of *opinio juris* alone.[33] If that be indeed the case, then duration is actually no more or less important than practice; each serves to help establish the *opinio juris*. It is true that the Court referred to the "essential role" played by general practice. It is difficult to discount such an affirmation. But what exactly did the Court affirm? The practice does indeed have to exist – "the shared view of the Parties as to the content of what they regard as the rule is not enough", according to the Court. But the practice does not *make* the law; it *confirms* it. The practice has an evidentiary function. It is suggested that this passage of the Court's judgment treats practice as an essential but secondary element in the formation of custom, relevant to the emergence of a new custom. Surely, once a rule of custom is established, the element of practice is no longer necessary – the rule after all exists; it is only in the face of some dispute – for instance the alleged development of a contrary or varying rule, or the assertion that the rule has fallen into desuetude – that the practice would again become relevant in order to confirm or deny that there was a rule.

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[31] Nicaragua v USA, *ICJ Reports* 1986, 14.

[32] At 93–96, paras. 174–179.

[33] A similar view has been expressed by B. C h e n g: "It may be permissible to ... say that the role of usage in the establishment of rules of international customary law is purely evidentiary: it provides evidence on the one hand of the contents of the rule in question and on the other hand of then *opinio juris* of the States concerned. Not only is it unnecessary that the usage should be prolonged, but there need also be no usage at all in the sense of repeated practice, provided that the *opinio juris* of the States concerned can be clearly established. Consequently, international customary law has in reality only one constitutive element, the *opinio juris*". See United Nations Resolutions on Outer Space: "Instant" International Customary Law? 5 *IndJIL* 36 (1965)..

The Court's jurisprudence, thus, far indicates that the formation of a new rule of custom requires practice. That practice should be constant and uniform; yet we know that it does not have to be adopted by all States all the time; the element of practice is variable. Similarly we know that the Court has not required that a specific period of time has elapsed before accepting the establishment of a new rule; yet even instant custom, as Judge Jennings might have said, requires at least an instant to come into effect.[34] The logic of this is that there is a time element in the formation of custom, just as there is a practice element, because there can be no practice without some time for that practice to take place. The fact that the Court has not specified a time should not be given undue significance. It means simply that the Court does not consider there to be a set time, just as the amount of practice required will vary. However, by requiring practice the Court must also require time; the actual amount will vary according to the needs of the particular rule.

## The International Law Commission

The ILC has also given some consideration to the formation of customary international law. Reference has already been made to the well-known comment of Brierly, that the principle of sovereignty over airspace was established at the moment World War I broke out.[35] Brierly was supported by el-Khoury, who argued that the Nürnberg principles were another example of instant custom.[36] Nevertheless, the Working Paper prepared by the Special Rapporteur, Hudson, did include a time element as one of four aspects of custom:

> (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice *over a considerable period of time* (emphasis added); (c) conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other States.

Regardless of the possible validity of Hudson's view at the time, the requirement of a *considerable* period of time, as has been shown, has not actually been stressed by the Court; the more time that has elapsed the better, in that it will increase the likelihood of a rule of custom being found to exist, but that seems to be as far as the Court has been prepared to go.

## Analysis of the Time Element in the Literature

Much of the literature on customary international law has rightly concerned itself with discussions of how the ICJ has defined the notion of custom and how it has

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[34] "Even "instant" custom, if there be such a thing, can hardly be simultaneous with the instrument from which it develops."Dissenting Opinion, *Nicaragua Case*, note 31, *supra*, at 531.

[35] See note 10, *supra*.

[36] *Ibid.*

looked at the formation of custom. However, it is arguable that analyses have been, at least in some cases, more sympathetic towards the time element than has the Court.

Professor Higgins, while not addressing directly the time element, has made the point that international law may be seen as a process, in which no custom is ever "safe" in as much as its continued existence cannot be assured.[37] If a new custom is emerging to replace an older one, perhaps in contradiction to it, it may require substantially more time to acquire binding effect than customs which emerge to fill apparent *lacunae*. In any case that process cannot take place without some time to allow it to happen. The length of time required may indeed vary depending on the custom:

> [n]ew norms require both practice and *opinio juris* before they can be said to represent customary international law. And so it is with the gradual death of existing norms and their replacement by others.[38]

If a putative rule of custom is in competition with an existing one, then, unless there is an overwhelming shift in practice from the old to the new, a considerable amount of time may indeed be necessary. O'Connell displayed a similar insight in his reference to "the formulation and modification of customary international law ...being an evolutionary matter."[39]

There is probably no currently active writer on international law who would take the view that, in principle, a particular period of time *must* elapse before a rule of custom may come into effect. Even when the ICJ has dealt with the duration of State practice, it has either looked at the time which had elapsed in the particular circumstances of the case, or else it had recourse to some variation on the constant and uniform usage. It has not attempted to lay down a minimum period. Some writers have gone further and have already dismissed the time element from the custom equation. Thus Baxter as long ago as 1970 felt able to say, in the aftermath of the *North Sea Continental Shelf Cases*:

> The time factor as a separate element in the proof of custom now seems irrelevant. The new customary rule will be established as soon as it acquires the necessary degree of acceptance.[40]

In fact, Baxter was perhaps not quite as dismissive as he might at first appear. Certainly he discounted the relevance of the time factor as a *separate element* in the proof of custom, but that is not necessarily to maintain that he discounted it entirely. The next sentence confirms this: the rule is established "as soon as" it has the required degree of acceptance; in other words, after a certain amount of time has elapsed to allow for the occurrence of sufficiently uniform and extensive State practice to suggest

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[37] R. H i g g i n s: International Law and the Avoidance, Containment and Resolution of Disputes. General Course on Public International Law 230 *RCADI* 44–45 (1991). See also B. C h e n g: Custom: The Future of General State Practice In a Divided World, in: McDonald and Johnston (eds), *The Structure and Process of International Law*, 513, esp. at 550–551 (1993).

[38] R. H i g g i n s, *ibid*, at 48.

[39] D.P. O'C o n n e l l: *International Law*, Volume One (2nd ed., 1970), at 19.

[40] R. B a x t e r: Treaties and Custom 129 *RCADI* 67 (1970).

the existence of *opinio juris*. A similar view was taken by Tunkin, who asserted that, while time may be important in the formation of a custom, it would not "in itself create a presumption in favor of the existence of a customary norm of international law".[41] The essence of this remark is that the mere fact that a particular period of time has passed cannot in itself establish the existence of a rule; thus, the time element has factual relevance for Tunkin, being necessary to allow sufficient State practice to take place that *opinio juris* may be inferred.

The crucial aspect of the time factor is clear, not only from the jurisprudence of the ICJ but also from the expressed views of writers on the subject: that is its flexibility. Briggs asserted more than forty years ago that:

> ...international law contains no rules as to how many times or for how long a time this practice must have been repeated. To require that the practice necessarily must be "ancient", has no basis in positive international law.[42]

The implication is that the practice must go on for as long as it takes for *opinio juris* to emerge. Yet, it could be argued that the same qualification applies to the practice itself: the extensiveness of the practice required before the emergence of a new rule of custom may vary greatly indeed, but that has never prevented the ICJ or commentators from asserting the crucial nature of practice in the formation of custom. It is suggested that the considerations applying to State practice apply, *mutatis mutandis*, to duration: to establish a new rule of custom, there will be required as much practice as it takes for as long as it takes. This is extremely vague but no more so than some of the ICJ's *dicta* about the need for extensive State practice. It is acknowledged that the Court has spoken of the need for, for instance, "a very widespread and representative participation...including that of States whose interests were specially affected".[43] This is certainly quite specific in a general sort of way. However, given the static nature of the community of States and the relative certainty that numbers will not change very rapidly (the collapse of the USSR and Yugoslavia not withstanding) it is therefore possible to assess with reasonable accuracy when there actually is a widespread and representative participation with regard to a custom. The same exercise will be much more problematic with duration, but that does not obviate the need to decide if the practice has subsisted long enough. Moreover, it is submitted that one can distinguish the type of situation envisaged by the ICJ in the *North Sea Continental Shelf Cases*, because there was a specific problem there concerning the possible customary status of alleged rules which clearly had their origin in treaty rather than "normal" State practice. In other words, duration really is as necessary, and as variable, as State practice in the formation of custom. That being the case, any definition of how custom is formed should acknowledge this state of affairs. To borrow from Manfred Lachs,[44] in

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[41] G. Tunkin: *Theory of International Law*, at 114–115 (1974).

[42] B. Briggs: The Nature of Customary International Law 47 *AJIL* 666 (1953) (footnote omitted).

[43] *North Sea Continental Shelf Cases*, note 15, *supra*, at 42, para.73.

[44] M. Lachs: The Threshold in Law-Making, in: Bernhardt, Geck, Jaenicke, Steinberger (eds): *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler*, at 493 (1983).

arriving at a new rule of custom, a threshold has to be crossed, from simply behaving in a certain way to behaving in that way because international law permits or prohibits something. The crucial matter is whether or not the custom has been created, and we find this in the *opinio juris* of States; the evidence of the *opinio juris*, though, is found in State practice over a certain period of time – the time which elapses until the threshold is crossed.

The link between time and practice has been explored frequently. Mosler has made the point that less time may be required for the development of a new custom because of the much greater frequency of international contacts and, consequently, practice.[45] Thus, sufficient practice for a rule of custom may occur in a shorter time span than was previously typical. Essentially this is just a contemporary adjustment of the practice-duration balance; nowadays less time is required for the same amount of practice. The acceptance by the ICJ of more quickly maturing practice has been taken as support for the notion that "duration is not an end in itself but only a means of demonstrating the generality and uniformity of a given State practice".[46] Duration is indeed not an end in itself; but neither is State practice. They both serve the function of facilitating the recogniton of an emerging rule of custom.

More recently, a number of writers have acknowledged the role that duration has to play in the formation of custom. Bernhardt has even written of "the time element" as an important aspect of the process, although he does accept that the time span for the formation of a rule may be significantly shorter than previously: "[t]he shorter the period of the relevant practice, the more important is a widespread *opinio juris*".[47]. With respect, one has to question this view. The implication of Bernhardt's assertion is that a lengthy practice may compensate for a less widespread *opinio juris*. If there is not a widespread *opinio juris*, then it is debatable whether even an extremely lengthy period of practice will suffice to establish the rule. It would have been more in keeping with the trend of the (admittedly few) utterances of the ICJ on this matter had Bernhardt argued for practice which is more extensive where it is postulated that a new rule of custom has emerged after a relatively short time span.

Henkin has also paid his respects to the "traditionally" long practice required for custom[48] but has also accepted that new rules may emerge rapidly. One aspect of this more rapid emergence which Henkin highlights is the notion of custom being used deliberately as a means to establishing new rules, rather than emerging, as it were like

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[45] H. M o s l e r: The International Society as a Legal Community *RCADI* 129 (1974). See also A k e h u r s t, note 2, *supra*, at 15: "Time is less important now than it used to be, because improvements in communications enable the actions and reactions of States to be known all over the world more quickly than in the past."; and J i m é n e z de A r é c h a g a, note 2, *supra*, at 25: "Today, the simultaneous appearance of similar problems between various States, the immediate knowledge of the attitudes taken by other governments, the pooling of information at plenipotentiary conferences and the whole process of codification, all account for the present acceleration of the development of customary law." A similar point is made by W. G ó r a l c z y k: *Prawo międzynarodowe publiczne w zarysie* (4th ed, 1989), at 100.

[46] E. J i m é n e z de A r é c h a g a, *ibid.*

[47] R. B e r n h a r d t: Custom and Treaty and the Law of the Sea 205 *RCADI* 266 (1987).

[48] L. H e n k i n: General Course on Public International Law 216 *RCADI* 58 (1989).

a Pope, as if it were the most natural thing in the world. This phenomenon he designates *purposive* customary law; arguing that it

> reflects a desire by large numbers of States to change old law or generate new law in a system that has no legislature, without the slow, cumbersome, difficult, expensive process of making law by multilateral treaty, and without having to face political obstacles to concluding formal agreements...[49]

This argument is remarkable in that it suggests as positive characteristics of custom precisely the type of features which in the past might have been claimed for treaties. Of course, Professor Henkin was writing in the aftermath of the debacle over the United Nations Law of the Sea Convention, which only received sufficient ratifications to enter into force in late 1994, although many of its provisions have already become accepted as custom in any case. If one follows Henkin's proposition the implication is that custom may be formed even more rapidly because of the very strong will which may be held by a significant number of States.

The conclusions of writers on the subject seem to have been relatively consistent. Most would say that some time must elapse for the formation of a rule of custom. However, the more widespread the practice the less time may actually be required; moreover, given the ever-increasing frequency and ease of communication between States there is a greater likelihood that custom may indeed emerge rapidly. This is correct as far as it goes but it is suggested that in fact duration may be as significant as practice in establishing a rule of custom. It is true that no formal length of time is required to elapse for a new rule to be established. Nevertheless, some amount of time simply must pass for sufficient practice to take place, although that time may in reality be very short indeed. The ICJ has not stressed the time element because it has not been necessary; the requisite State practice cannot occur in a chronological vacuum. It is suggested that the role of practice is to provide evidence of an emerging rule; the time factor cannot be ignored in this calculation and may be regarded as the necessary but perhaps neglected element in the analysis of custom.

## Instant Custom

The discussion thus far has noted that only a relatively short period of time may be required for a new custom to emerge, but has not yet dealt with the phenomenon known as instant custom – rules of customary international law which come onto being over a very short period of time, perhaps even, as the term indicates, instantly. Judge Lachs, in his Dissenting Opinion in the *North Sea Continental Shelf Cases*, said:

> With regard to the time factor, the formation of law by state practice has in the past frequently been associated with the passage of a long period of time. There is no doubt that in some cases

[49] *Ibid*, at 58–59.

this may be justified. However, the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do.[50]

In similar vein Judge Sørensen remarked that it was possible to recognize the "rapid" emergence of a new custom based on recent State practice.[51] The notion was discussed, famously, by Bin Cheng in 1965.[52] In that article he discussed the possible creation of instant custom with regard to the uses of outer space. He took the view that the custom had only one constitutive element – *opinio juris* – and that State practice was purely evidentiary. Because States are simultaneously the principal subjects of international law and the principal law makers, they can give very rapid consent to new rules which will subsequently bind them – hence the possibility of instant custom.[53] A similar view was expressed by Arangio-Ruiz:

> In so far as custom in general is concerned, it is perfectly conceivable that a customary rule of international law come into being by virtue of the fact that with regard to some question to which the general attention of States happens to be called at some stage of development of international society, an *opinio juris* of adequate *intensity* may come into being, in itself sufficient to constitute a customary rule or determining the formation thereof.[54]

On the other hand, Mosler has argued that continuity over a certain period of time is an "inherent feature" of custom. He went on to argue that because of this need for a certain level of practice, "[r]ecent attempts to extend customary law so as to include rules which have arisen quite suddenly in the international community are therefore bound to fail".[55] Mosler did however acknowledge that the time required for a new custom to emerge may be much shorter.

It is suggested that custom may indeed develop "instantly". If practice is only the evidence to which we look in assessing the existence of a rule, there is no reason why sufficient practice may not occur very quickly, thus giving rise to an inference that a new rule of custom has been created. "The heart of the matter", as Akehurst put it, "is probably that the requirement of time is very much bound up with the requirement of repetition."[56] The number of acts needed to get the rule established may of course vary, depending on several factors, such as whether a gap in the law is being filled or a contrary rule of custom being overturned; the extent to which States most affected by the new rule actually follow it may also be very significant. In the end, Akehurst seems to have adopted a posture very similar to that of Cheng: "...the supposed requirement of time, like the supposed requirement of repetition, can usually be

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[50] Note 15, supra, at 230.
[51] *Ibid*, at 244.
[52] Note 33, *supra*.
[53] Note 33, *supra*, at 37.
[54] G. A r a n g i o-R u i z: Normative Role of the General Assembly of the UN, 137 *RCADI* 483 (1972).
[55] Note 45, *supra*.
[56] Note 2, *supra*.

dispensed with if there are no precedents which can be cited against the alleged rule of customary law".[57]

The notion of "instant" custom has provoked varying reactions ranging from enthusiastic support to treating it almost as if it were a highly infectious disease. Those who would denigrate the time element in the formation of custom ought to support the notion of instant custom, since that takes the emphasis on practice to its logical conclusion by predicating the birth of a new rule of custom on the existence of a sufficient amount of practice regardless of the minimum time which has elapsed. It is suggested that "instant" custom is merely one manifestation of a development already observed and approved by the ICJ and several of its judges in Dissenting or Separate Opinions, viz. that as a result of developments in technology and inter-state communication, coupled with increased State practice, customary rules may develop much faster than was previously feasible. While it may not be a frequent occurrence, there is no logical reason why new rules cannot indeed develop almost instantly. Duration, it should be remembered, is not an element of custom; it is an element in the formation of custom. Once the emerging rule has crystallized into one of international law the time span becomes irrelevant. The duration may be very short if accompanied by sufficiently extensive State practice.

## Further Considerations: New States and Persistent Objectors

There are certain situations in which it may be contended that rules of custom do indeed apply instantly. The discussion thus far has been concerned with the formation of rules of custom amongst existing States. But when a new State comes into existence, a frequent occurrence in the immediate post-communist period, an issue may arise as to the extent to which these new States are bound by international law. With regard to treaties, the position is that new States are not automatically bound by the treaty commitments of the predecessor State.[58] But this is not so with custom; new States are regarded as accepting the general international law in force when they themselves come into being.[59] Thus, it is arguable that, in a sense, the corpus of customary international law applies "instantly" to new States. Of course, the reason that it can apply instantly is that it already exists. The law has not necessarily evolved rapidly; rather, it has descended upon the new State at the moment of its birth – an example perhaps of instant *application* of custom rather than instant formation. Of course, if a new State objects to the application of a particular rule of custom it may say so but it will nevertheless remain bound. However, if that new State then adopts a contrary practice (which may at first be unlawful), it may actually begin the process that will

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[57] *Ibid.*

[58] "...as a matter of general principle a new state, *ex hypothesi* a non-party, cannot be bound by a treaty [of the predecessor]", I. B r o w n l i e, note 1, *supra*, at 668. The only definite exception would be with regard to boundary treaties: R. P i o t r o w i c z: The Polish-German Frontier in International Law: The Final Solution, 63 *BYBIL* 411 (1992).

[59] A. D'A m a t o, note 3, *supra*, at 191–193.

lead ultimately to the creation of a new rule of custom which may either supersede or coexist with the older rule.

The position of persistent objectors is analogous. It is well-established that a State which objects consistently and persistently to a practice which is developing into a rule of custom may avoid being bound by that rule once it acquires the status of custom.[60] In such a situation the objecting State is entitled to act as if the custom does not exist, although other States will be bound as usual. If, however, a State withdraws its objection to that rule, there is no reason why it cannot apply to that State forthwith. Again, the rule may not have developed very rapidly but its effect for the former dissenting State will be instantaneous from the moment that the objection is withdrawn.

## Conclusions

Very clearly, there is no specific time requirement for the formation of customary international law. The ICJ has on several occasions discussed duration and has not once asserted such a requirement. Furthermore, it is now widely accepted that custom may emerge very rapidly indeed given the increased quantity of inter-State contacts and the greater ease with which such contacts may be achieved. It is moreover suggested by some that custom may come about "instantly". One of the reasons for this is that a sufficiently widespread practice may occur so fast that *opinio juris* can be discerned after a very brief period of time. The element of practice, like the time factor, has an evidentiary function; once the custom is established the amount of practice is irrelevant unless the continued existence of the custom is questioned or it is threatened by a conflicting rule of custom. In this sense duration is just as important as practice – a balance has to be struck between the two. This analysis would appear to be confirmed by the statement of the ICJ in the *Nicaragua Case* at para.184, that "[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice".

[60] *Fisheries Case*, note 11, *supra*. An interesting related issue, beyond the scope of this study, is whether a successor State of a persistent objector State may benefit from that objection or not.

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# Aspects de processus de la responsabilité internationale

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## Introduction

Les questions soulevées par la mise en jeu de la responsabilité internationale de l'Etat se retrouvent dans deux domaines: l'application du droit international et le règlement des différends internationaux. Comme l'écrivait M. Virally:

"Il s'agit en effet de déterminer et d'organiser les réactions à une éventuelle violation du droit – et elles peuvent être très variées – mais aussi d'établir un systeme de constatation de ces violations (qui peut fonctionner en relation avec le règlement des différends) et, éventuellement, de prévention."[1]

Notre but est évidemment beaucoup plus limité: nous nous bornerons à l'examen des modalités principales du processus de la mise en oeuvre de la responsabilité de l'Etat. Resteront en dehors de notre étude la procédure juridictionnelle, arbitrale, celle des organisations internationales ou des institutions visant à la protection des droits de l'homme.

Le sujet qui nous intéresse ici, soit la mise en oeuvre de la responsabilité internationale de l'Etat fait l'objet des travaux de la Commission du droit international des Nations Unies dans le cadre de son Projet d'articles sur la responsabilité des Etats.[2]

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[1] M. V i r a l l y: Panorama du droit international contemporain. Cours général de droit international public. 183 *RCADI* 208 (1983).

[2] Déjà en 1986, l'ancien Rapporteur spécial, le Prof. W.Riphagen avait abordé dans son septième rapport l'étude de la troisième partie du Projet d'articles, intitulée "La mise en oeuvre de la responsabilité internationale et le règlement des différends". L'article premier impose à l'Etat réclamant l'obligation de notifier sa prétention et les raisons de sa réclamation. L'avant-projet prévoit la mise en place d'une procédure de conciliation obligatoire, qui pourrait être déclenchée par l'une des parties. On a aussi prévu la juridiction obligatoire de la Cour internationale de Justice, qui pourra être saisie par requête d'une quelconque des parties: ceci chaque fois que sera alléguée une violation des normes de jus cogens, qu'il s'agisse d'un différend relatif à la commission d'un crime international ou que les contre-mesures prises soient considérées comme non-conformes aux règles de jus cogens. Toutefois, la Commission n'a pas encore examiné ces textes. Voir – *ACDI* 1986, vol. II, 1-ère partie,

## 1. Types du contentieux de la responsabilité internationale

Par l'étude des différents types de contentieux de la responsabilité des Etats on cherche à savoir quels sont les différentes raisons de l'invocation de la responsabilité internationale; autrement dit, ce que l'on vise à obtenir d'un Etat lorsqu'on invoque sa responsabilité internationale. On parle ici du contentieux *lato sensu*, c'est-à-dire, non seulement du contentieux dans le cadre juridictionnel, mais aussi dans le cadre des négociations et même du recours aux contre-mesures.

"Certes pendant longtemps le droit international n'a connu que deux types de contentieux: le contentieux de l'interprétation, nécessairement important dans un systéme de droit, où une grande partie des règles juridiques a sa source dans un traité, au sens parfois incertain – et le contentieux de la pleine juridiction, qui occupe une place encore plus large avec la foule des actions en responsabilité soumises au juge, en cas de délit international" – écrivait L.Delbez qui retenait en outre l'émergence en droit international de deux nouveaux types de contentieux: "le contentieux en annulation, qui est la règle devant les juridictions récentes, que sont la Cour de justice de communautés européennes ou le Tribunal administratif des Nations Unies – et le contentieux de la répression, jailli de la conscience universelle après la dernière guerre, lorsqu'ont été créées des juridictions répressives que sont le Tribunal de Nuremberg et celui de l'Extrême-Orient."[3]

La distinction entre les divers types de contentieux est moins précise en droit international qu'en droit interne: ceci à cause de l'absence de juridiction obligatoire, ainsi que de l'égalité souveraine des sujets de ces rapports. En outre, chaque fait internationalement illicite peut donner lieu, d'une part, à l'obligation de réparer (lato sensu), et d'autre part, au droit de recourir aux contre-mesures. Enfin, le droit international n'a pas élaboré de distinction entre délit civil et infraction pénale, et, par conséquent – entre responsabilité civile et responsabilité pénale, ainsi qu'entre procès civil et procès pénal. Cependant, l'émergence de règles de jus cogens, ayant le caractère des "lois objectives" en droit international a donné naissance aux rapports erga omnes. Les sujets de tels rapports ont un intérêt juridique à demander l'observation de ces règles. La reconnaissance d'intérêts sociaux impérieux, tels que la paix, la libre détermination des peuples, la dignité de l'être humain et le respect de l'environnement naturel, à la protection desquels tout Etat a un intérêt juridique, a changé la nature du contentieux international. Autrement dit, à côté du contentieux subjectif qui exige la protection d'un intérêt individuel et subjectif du réclamant, émerge un contentieux objectif destiné au respect de légalite supérieure, constituée par les normes "d'importance essentielle pour la sauvegarde d'intérêts fondamentaux de la communauté internationale" (en employant les termes de l'article 19 du Projet d'articles de la CDI).

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p. 1–20. En 1992 le Rapporteur spécial, le Prof. G. Arangio-Ruiz a examiné la protestation (ou l'intimation, la sommation ou la demande de cessation ou réparation) comme la condition préalable au déclenchement des contre-mesures. G. A r a n g i o-R u i z: Quatrième rapport sur la responsabilité des Etats; A/CN. 4/444, p. 6–19.

[3] L. D e l b e z: Les principes généraux du contentieux international. 151–152 (1962).

L'état actuel du développement du contentieux international permet de distinguer, à côté du contentieux subjectif caractèrisé par le contentieux de la réparation et de la légalité, le contentieux de la légitimité.

L'objet de l'invocation de la responsabilité internationale dans le contentieux de la réparation est clair – on cherche l'indemnisation du dommage matériel. Comme le note Ch. Dominicé, "la réparation proprement dite est donc bien toujours au coeur des actions en responsabilité mais cela ne doit pas dissimuler le problème particulier que le fait illicite persistant fait surgir."[4] Dans ce dernier cas il s'agit du retour à la légalité.

Le contentieux de la légalité "a seulement pour objet de constater et de dénoncer la violation du droit par une conduite donnée."[5] Il a pour caractère surtout la demande d'une décision déclaratoire constatant un manquement à une obligation internationale. Notamment, dans la Mémoire présentée devant le Tribunal Arbitral constitué selon l'accord entre la France et la Nouvelle-Zélande du 9 juillet 1986 concernant l'affaire *Rainbow Warrior* la Nouvelle-Zelande demandait de lui accorder:

"(a) Une déclaration selon laquelle la République française:

(i) a violé ses obligations envers la Nouvelle-Zélande en manquant d'obtenir de bonne foi le consentement de la Nouvelle-Zélande à l'évacuation de l'île de Hao du Commandant Mafart et du Capitaine Prieur;

(ii) a violé ses obligations envers la Nouvelle-Zélande en évacuant le Commandant Mafart et le Capitaine Prieur de l'île de Hao; (...)

(b) Une ordonnance enjoignant la République française de renvoyer sans délai le Commandant Mafart et du Capitaine Prieur sur l'île de Hao pour le reste de leur période de trois ans conformément aux dispositions du Premier Acccord."[6]

On peut toutefois noter une tendance récente dans le contentieux de la légalité à voir surgir des demandes d'interdiction d'un certain comportement; il s'agit donc de la fonction préventive de l'action de la responsabilité. Un tel exemple est donné par la requête de l'Australie dans l'affaire des *Essais nucléaires*:

"Le Gouvernement australien prie la Cour de dire et juger que (...) la poursuite des essais atmosphériques d'armes nucléaires dans l'océan Pacifique Sud n'est pas compatible avec les règles applicables du droit international et ordonner à la République française de ne plus faire de tels essais."[7]

Dans l'affaire *Nicaragua*, la demande de la prohibition de certains actes formait une partie importante du contentieux.[8]

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[4] Ch. D o m i n i c é: Observations sur les droits de l'Etat victime d'un fait internationalement illicite, Droit international 2. Cours et travaux de l'IHEI de Paris. (1982).

[5] P.-M. D u p u y: Le fait générateur de la responsabilité internationale des Etats, 188 *RCADI* 91 (1984).

[6] Sentence arbitrale du 30 avril 1990 *Nouvelle-Zélande c. France*. 94 *RGDIP* (1990).

[7] *CIJ Recueil* 1974, 256.

[8] Dans la requête, le Nicaragua "prie la Cour de dire et juger: (...) Que, vu ces violations des obligations juridiques susvisées, les Etats-Unis ont le devoir exprès de mettre fin et de renoncer immédiatement: à toute utilisation de la force...; à toutes violations de la souveraineté, de l'intégrité territoriale ou de l'indépendance politique du Nicaragua... ." CIJ Recueil 1986, 18–19.

"The contentieux objectif presupposes first of all that the rule invoked primarily serves to protect the public interest of international society, and such rules are still scarce in international law. Moreover, the optional character of the Court's jurisdiction entails that the Court only has jurisdiction to perform such an "objective" review when the title of jurisdiction concerned leaves sufficient scope for it; and such instances are scarcer still."[9]

A ce jour, une seule affaire de recours objectif a eu lieu, il s'agit de l'affaire du Sud-Ouest africain dont le recours a été rejeté. Cependant, il ressort de la pratique suivi par la Cour qu'elle accepte la possibilité de tels recours. Par exemple, dans l'avis consultatif sur les réserves à la Convention pour la prévention et la répression du crime de génocide (1951) la Cour a constaté:

"Dans une telle convention, les Etats contractants n'ont pas d'intérêts propres; ils ont seulement, tous et chacun, un intérêt commun, celui de préserver les fins supérieures qui sont la raison d'être de la convention."[10]

Dans la fameuse affaire Barcelona Traction, la Cour a recconnu l'existence d'obligations pour tous les Etats envers la communauté internationale dans son ensemble, ainsi qu'un intérêt pour agir pour tout Etat qui invoque la protection des droits correspondant à de telles obligations.[11] Enfin, l'avis consultatif sur *les conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie* constata l'obligation pour tous les Etats de reconnaître l'illégalité et l'invalidité de la présence sud-africaine en Namibie.[12]

"La jurisprudence de la CIJ a contribué substantiellement à l'émergence d'un "contentieux de la légalité"– concluait L.-A. Sicilianos.[13]

Le recours objectif est plus développé dans certains autres domaines de droit international contemporain. Chaque Etat membre de l'ONU peut recourir devant l'Assemblée Générale et le Conseil de sécurité dans les cas où la paix et la sécurité internationales sont menacées. En outre, le recours d'un Etat devant le Comité des droits de l'homme ainsi que devant la Cour européenne des droits de l'homme n'exige pas un intérêt individuel et subjectif, parce qu'il ne se limite pas à la protection des droits de ses propres ressortissants. On peut remarquer la même tendance dans le contentieux communautaire:

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[9] P. v a n D i j k: Judicial review of governmental action and the requirement of an interest to sue. 487 (1980).

[10] *CIJ Recueil* 1951, 23.

[11] *CIJ Recueil* 1970, 32.

[12] *CIJ Recueil* 1971, 52,56.

[13] L.-A. S i c i l i a n o s: Les réactions décentralisées à l'illicite. Des contre-mesures à la légitime défense. 150 (1990). (L'auteur emploie ici le terme "légalité" pour désigner le contentieux de la légalité que nous préférons désigner sous le terme du contentieux de la légitimité). Sur la différence entre ces types du contentieux international voir – P.-M. D u p u y: Le fait générateur..., op. cit., 91, 98–105.

"The proceedings belonging most clearly to the contentieux objectif are those instituted by the Community Institutions and by the Member States...."[14]

## 2. Engagement de la responsabilité internationale

Selon le principe général posé à l'article premier de la première partie du Projet d'articles de la CDI, "tout fait internationalement illicite d'un Etat engage sa responsabilité internationale". Par le terme de responsabilité internationale la Commision du droit international désigne "l'ensemble des relations juridiques nouvelles auxquelles, dans les différentes hypothèses, un fait internationalement illicite d'un Etat peut donner naissance".[15]

Le fait illicite joue le rôle de fait générateur des rapports de la responsabilité internationale. Il engage l'obligation de l'Etat coupable de rétablir l'Etat lésé dans son droit et de réparer le préjudice causé; ainsi que le droit de l'Etat ou les Etats lésés (et, le cas échéant, des organisations internationales) d'imposer des sanctions. Toutefois, le fait internationalement illicite ne reste qu'un simple fait juridique. La naissance des droits et des obligations en soi ne signifie pas que ces droits seront exercés et les obligations exécutées. Il faut encore qu'un des titulaires des droits violés introduise l'action nécessaire pour mettre en oeuvre la responsabilité internationale de l'Etat coupable. Comme l'écrit Ch. Rousseau, la responsabilité internationale "est mise en oeuvre par les Etats intéressés selon procédures du droit international (action diplomatique, action arbitrale et action judiciaire internationale)."[16]

## 3. Epuisement des recours internes dans la mise en oeuvre de la responsabilité internationale de l'Etat

L'engagement de la responsabilité internationale de l'Etat pour les dommages causés aux étrangers (le domaine de la protection diplomatique) est soumis à une condition préalable – l'épuisement des recours internes. Selon l'art. 22 du Projet des articles de la CDI "Epuisement des recours internes":

"Lorsqu'un comportement d'un Etat a créé une situation non conforme au résultat requis de lui par une obligation internationale concernant le traitement à réserver à des particuliers étrangers, personnes physiques ou morales, mais qu'il ressort de l'obligation que ce résultat ou un résultat équivalent peut néanmoins être acquis par un comportement ultérieur de l'Etat, il n'y a violation de l'obligation que si les particuliers intéressés ont épuisé les recours internes efficaces leur étant disponibles sans obtenir le traitement prévu par l'obligation ou, au cas où cela n'était pas possible, un traitement équivalent."

Prenant en considération les modalités actuelles de la protection des droits de l'homme, il serait très difficile de considérer que la responsabilité pour certaines

[14] P. van Dijk: op. cit., 486.
[15] *ACDI* 1970, t.II, 382.
[16] Ch.V. Rousseau: Droit international public. T.V. Les rapports conflictuels. 9 (1983).

violations des droits de l'homme serait engagée seulement au moment de l'épuisement des recours internes par la victime.

"Si de graves sévices allant jusqu'à la torture sont infligés à un étranger, il n'est guère acceptable que la violation de l'obligation ne se produise qu'au moment où les dommages-intérêts réclamés par la victime lui sont refusés de façon définitive", – soutient G. Perrin.[17] Donc, il serait plus correct de considérer que la violation des droits des particuliers est accomplie au moment de la perpétration du fait initial.

L'arrêt récent de la CIJ dans l'affaire de *l'Elettronica Sicula S.p.A. (ELSI)* du 20 juillet 1989 décrit comme suit la règle de l'épuisement des recours internes:

"...pour qu'une demande internationale soit recevable, il suffit qu'on ait soumis la substance de la demande aux juridictions compétentes et qu'on ait persévéré aussi loin que le permettent les lois et les procédures locales, et sans succès."[18]

Pour la Cour c'est une question de recevabilité de la requête, la question processuelle, tout à fait différente de la question du fond qui porte sur l'existence de la violation du droit international.

"Dans une affaire ou les juridictions internes ont été vraiment beaucoup sollicitées, il n'est jamais facile de décider si les recours internes ont été réellement "épuisés". Mais, en l'espèce, l'Italie n'a pas rèussi à convaincre la Chambre qu'il restait manifestement quelque recours que Raytheon et Machelett auraient dû former et épuiser, indépendamment de l'ELSI et du syndic de faillite."[19]

Les Etats peuvent convenir dans un traité, soit que la règle de l'épuisement des recours internes ne s'appliquera pas aux demandes fondées sur de prétendues violations de ce traité, soit confirmer qu'elle s'appliquera. C'est la première solution qui figure, par exemple, dans la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats de 1965. D'après cette Convention, l'investisseur étranger peut recourir au Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI) sans avoir épuisé les recours internes. L'art. 26 de la Convention stipule:

"Le consentement des parties à l'arbitrage dans le cadre de la présente Convention est, sauf stipulation contraire, considéré comme impliquant renonciation à l'exercise de tout autre recours."[20]

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[17] G. P e r r i n: La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le Projet d'articles de la Commision du droit international. Festschrift für Rudolf Bindschedler. 290 (1980).

[18] *CIJ Recueil* 1989, 46.

[19] *CIJ Recueil* 1989, 47–48.

[20] Il faut ajouter, que cette règle est liée à la renonciation à la protection diplomatique dans l'art. 27 de Convention: "Aucun Etat contractant n'accorde la protection diplomatique ou ne formule de revendication internationale au sujet d'un différend que l'un de ses ressortissants et un autre Etat contractant ont consenti à soumettre ou ont soumis à l'arbitrage dans le cadre de la présente Convention, sauf si l'autre Etat contractant ne se conforme par à la sentence rendue à l'occasion du différend."

Comme l'écrit J.-P. Laviec, "l'Etat partie à un différend ne peut pas exiger que les recours internes soient épuisés, et l'investisseur ne peut pas saisir une autre juridiction."[21]

Dans le domaine de la protection des droits de l'homme, l'épuisement des recours internes est exigé expressis verbis (sauf les cas de violation systématique, ayant caractère d'une pratique établie). [22] Selon l'art. 41, alinéa 1c du Pacte international relatif aux droits civils et politiques:

"Le Comité ne peut connaître d'une affaire qui lui est soumise qu'aprés s'être assuré que tous les recours internes disponibles ont été utilisés et épuisés, conformément aux principes de droit international."

Des règles analogues concernant la saisine de la Commission européenne des droits de l'homme, ainsi que celle de la Commision interaméricaine sont inscrites dans l'art.26 de la Convention européenne et dans l'art.46 de la Convention interaméricaine.

"Toutefois, il n'y a pas là, à notre avis, de quoi prouver que les Etats seraient disposés aujourd'hui, eu égard au développement progressif du droit international, à renoncer au principe de l'épuisement des recours internes ou à en réduire fortement la portée,"– conclut R. Ago.[23]

## 4. Protestation

La protestation ou tout autre acte exprimant la volonté de l'Etat[24] de s'opposer à l'atteinte de ses droits est indispensable pour que le processus de la mise en oeuvre de la responsabilité internationale soit engagé. Le premier effet de la protestation se manifeste dans la réaffirmation de l'existence du droit subjectif violé, et, par conséquent, dans la volonté de le préserver; le second, selon contenu de la protestation, dans l'exercice par l'Etat lésé de ses droits à la réparation, à la restitution ou à la satisfaction.

"As a matter of principle, the first reaction in the event of an internationally wrongful act has to be a demand for resumption of perfomance of the obligation breached and/or for any other measure of reparation that is called for as the case may be,"– écrit B.Simma.[25]

Par oppposition au silence de la victime, la protestation s'exprime par une réaction active contre la violation du droit international et les conséquences que cela entraîne. Le plus souvent donc on définit la protestation comme une objection à la violation:

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[21] J.-P. L a v i e c: Protection et promotion des investissements. Etude de droit international économique. 272–273 (1985).

[22] Malgré que, comme nous l'avons déjà noté, on peut considérer que la violation grave des droits de l'homme est accomplie au moment de la perpétration du fait initial.

[23] R. A g o: Sixième rapport sur la responsabilité des Etats, ACDI 1977, vol II, 1-ère partie, 46.

[24] Selon le Rapporteur spécial G. Arangio-Ruiz il s'agit aussi de l'intimation, la sommation ou de la demande de cesser le fait illicite et de réparer le dommage (A/CN.4/444, p.6). L'ancien rapporteur spécial W. Riphagen parlait de la notification (ACDI 1986, vol.II, 1-ère partie, p.4).

[25] B. S i m m a: Bilateralism and community interest in the law of State responsibility. In: Y. D i n s t e i n (ed.): International law in the time of perplexity. Essays in honour of Shabtai Rosenne. 833 (1989).

"A protest is a formal communication from one subject of international law to another objecting to conduct or to claim by the latter as being contrary to or unfounded in international law."[26]

La protestation peut prendre diverses formes de la communication interétatique: par exemple celle de la note diplomatique ou de la déclaration orale.[27] On peut dire aussi que les actes concluants, l'introduction d'une affaire devant la juridiction internationale, l'appel au Conseil de sécurité, le recours aux contre-mesures, etc. peuvent être considérés comme une protestation contre la violation du droit subjectif du réclamant. Ce qui est important – c'est la volonté elle-même de l'Etat victime de s'opposer à la violation de ses droits.

Parfois le contenu de la protestation exige la forme écrite de cet acte unilatéral.[28] Pourtant la déclaration orale est la forme la plus urgente de la protestation. Si la situation exige, "dans des cas exceptionnels, parce que graves et urgents, l'ambassadeur doit généralement formuler sans délai une protestation. Celle-ci prendra plus souvent la forme d'une déclaration orale."[29] Un attentat contre une ambassade peut constituer un exemple d'une telle situation d'urgence.[30]

La protestation préparée en la forme écrite peut prendre la forme de la déclaration orale. Il est admis dans la pratique diplomatique qu'en cas de rejet par le chef de la mission diplomatique d'une note, celle-ci peut lui être présentée oralement devant témoins au Ministère des affaires étrangères.

La protestation se compose en principe de deux parties: la première présente l'exposé des faits et l'opposition de l'Etat protestant aux actes commis, la deuxième formule les demandes. Au vu de la diversité des hypothèses, on demande de cesser la violation, de rétablir la situation, d'indemniser des dommages subis, de punir les coupables, d'assurer la non-répétition de telles violations, ou d'ouvrir l'enquête. Le droit de demander la réparation, ainsi que celui de recourir aux contre-mesures peuvent être réservés. En général, le contenu de la protestation dépend du caractère du fait internationalement illicite (la violation pertinente ou "instantanée", la présence du

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[26] W. K a r l: Protest. – in: Encyclopedia of Public International Law. Instalment 9 (1986) 320.

[27] "A diplomatic protest is a communication; in itself, it is purely verbal. The communications which implement foreign policy vary widely in both form and content. They are oral and written; they are notes, notes verbales, aide-memoires, and manifestations; they are inquires, representations, reservations of rights, protests, and ultimatums. External style makes no difference; a protest may be written or oral, and may take any accepted form of diplomatic correspondence." J.C. M c K e n n a: Diplomatic protest in foreign policy: analysis and case studies. 13 (1962).

[28] Par exemple, selon les articles 65 et 67 de la Convention de Vienne sur le droit des traités, la protestation comportant la notification de la suspension ou l'extinction du traité doit être faite par écrit.

[29] F. M o u s s a: Manuel de pratique diplomatique. L'ambassade. 164 (1972).

[30] "It is in any case wise diplomacy for an official request to be addressed immediately after the attack to the host government on behalf of the victim government to assure effective protection both for the official representation of the victim country, and for its local community. The right to claim compensation should also at once be reasserted. This kind of diplomatic action can and indeed should be taken without delay (i.e. without waiting for instructions) by the mission affected." Satow's guide to diplomatic practice. Fifth edition, 193, 197 (1979).

dommage etc.) ainsi que du choix de l'Etat lésé de prèsenter telle ou telle demande légitime.[31]

Enfin, les exigences émises lors de la protestation doivent être proportionnelles à la violation. Comme l'a soutenu le Juge Padilla Nervo dans l'affaire des *Pêcheries* (1973):

"Les professeurs, juristes et diplomates qui sont au fait des relations internationales et de la politique étrangère savent bien que certaines "notes" remises par le gouvernement d'une grande puissance au gouvernement d'une petite nation peuvent avoir le même objet et le même effet que l'utilisation ou la menace de la force."[32]

Le rejet de la protestation ne signifie pas nécessairement le rejet des demandes de l'Etat lésé.

"Les raisons qui justifient – ou qui sont avancées pour motiver – le rejet d'un document sont nombreuses. Les plus courantes sont les suivantes: emploi de termes réputés non diplomatiques (inadmissibles, offensants ou diffamatoires); protestations considérées comme injustifiées: accusations mensongères; intervention sérieuse dans les affaires intérieures de l'Etat; et évidemment ton d'ultimatum."[33]

L'Etat lésé n'est plus le seul sujet de droit international capable de présenter des réclamations internationales, y compris d'émettre des protestations. Déjà dans son avis consultatif sur *la réparation des dommages subis au service des Nations Unies* en 1949, la Cour internationale de Justice a conclu "que les membres ont conféré à l'Organisation qualité pour présenter les réclamations internationales que nécessiterait l'exercice de ses fonctions", c'est-à-dire "la capacité de recourir aux méthodes habituelles reconnues par le droit international pour l'établissement, la présentation et le règlement de réclamations. Parmi ces méthodes on peut mentionner la protestation... ."[34]

La protestation de l'Etat lésé ne peut être plus considérée comme le seul moyen d'engager le processus de mise en oeuvre de la responsabilité internationale de l'Etat coupable. Si, en reprenant les mots de l'arrêt de la Cour internationale de Justice dans l'affaire *Barcelona Traction*, il s'agit des "obligations des Etats envers la communauté internationale dans son ensemble", des obligations qui "concernent tous les Etats",[35] n'importe quel Etat peut entreprende une action pour protéger les droits dérivés de telles obligations. Ainsi, d'après la résolution de l'Institut de droit international "La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats"(1990):

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[31] "Restitution should apply to any kind of wrongful act. (...) the ultimate choice between a claim for pecuniary compensation and a total or partial claim should be left to the injured State, as well as the view that the injured State's right of choice should not be unlimited," – estimait le délégué du Nigeria dans le Sixième comité. A/C. 6/43/SR.32, p.16.

[32] *CIJ Recueil* 1973, 47.

[33] F. M o u s s a: op. cit., 139–140.

[34] *CIJ Recueil* 1949, 177, 180.

[35] *CIJ Recueil* 1970, 32.

"Les démarches diplomatiques, de même que l'expression purement verbale de préoccupation ou de désapprobation au sujet des violations des droits de l'homme, sont licites en toute circonstance".[36]

"When international law has in fact been violated, not only the victim is entitled to protest, but whoever has a legal interest in the preservation of the law. This applies, in particular to the parties to collective treaties or with respect to obligations erga omnes, which are the concern of all States (Jus cogens). At least this is so in the absence of centralized supervisory organs. While normally there is only a right to protest, a pertinent duty may follow from the victim's obligation to preserve its own rights. Since neutral States are under such an obligation, they have a duty to protest against violations of their neutrality"

– reléve l'"Encyclopedia of public international law."[37]

## 5. Prescription et effets juridiques de la protestation

L'effet le plus direct de la protestation est d'éviter que le silence de la victime soit invoqué pour prouver l'abandon du droit violé. Par une protestation, l'Etat empêche que l'état des choses ne soit légalisé par l'acceptation tacite de la situation telle qu'elle est, et prévient les objections soulevées par l'Etat responsable de la renonciation aux droits (l'acquiescement) ou même de prescription.[38]

Si on peut admettre l'existence d'un acquiescement en cas d'absence de protestations de la part de l'Etat lésé, la prescription en droit international général semble inacceptable sans que le terme exact soit prévu par le traité. Les Etats sont plus disposés à protéger leurs droits et intérêts en dépit de l'écoulement du temps qu'ils ne le sont à reconnaître l'extinction des droits violés à cause de l'expiration du terme, auquel ils n'ont pas consenti à l'avance. Bien que les tribunaux internationaux invoquent parfois la prescription, ils ne l'appliquent pas dans les cas d'espèce sans qu'elle soit prévue par les dispositions conventionnelles liant les parties au contentieux.[39] Comme le soulignait Sir Gerald Fitzmaurice:

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[36] *AIDI* 1990, p. 342.

[37] W. K a r l: op. cit., 321–322.

[38] "Protests in some shape or form, or equivalent action is necessary in order to stop the acquisition of a prescriptive right."– Sir G. F i t z m a u r i c e: The law and procedure of the International Court of Justice. 172 (1986).

[39] "It is generally admitted that the principle of extinctive prescription applies to the right to bring an action before international tribunal.(...) There is no doubt that there is no rule of international law which lays down a time limit with regard to prescription , except in the case of special agreements to that effect", revèle la sentence *Ambatielos* (1956). (Répertoire de la jurisprudence arbitrale internationale (ci-après: *RJAI*), t.III, 1608).

„The Tribunal recognizes that extinctive prescription is an established principle of public international law which has been applied by international tribunals . (...) Given the commercial nature of the transactions at issue, however, the Tribunal does not consider it appropriate to apply the principle of extinctive prescription as a matter of public international law", constatait le Tribunal irano-americain de réclamations dans l'affaire *Iran Airlines Company v. The Goverment of the United States of America* (1987).(Ibid., p. 1618). "S'agissant d'actions portées devant une instance internationale, il n'est pas permis à l'interprèter du Traité (de Paix avec l'Italie de 1947) d'y introduire des termes de caducité non prévus par celui-ci, ou d'étendre un terme de caducité prévu pour un groupe d'actions à un autre groupe, d'autant moins si à cet autre groupe appartiennent des actions susceptibles de naître seulement après la fin de ce terme", indique la sentence arbitrale dans *l'affaire de la Société Nationale des Chemins de Fer Français* (1953). (Ibid., p. 1608)

"The admission of another State's claim or right, or the abandonment of a State's own position, will not lightly be implied."[40]

Il est clair que la renonciation à des droits ne se présume pas, de même que l'absence de protestations en soi n'entraîne pas l'acquiescement. Néanmoins, le silence de l'Etat victime qui a adopté une attitude purement passive face à l'atteinte à ses droits peut signifier une telle renonciation, un acquiescement au comportement de l'Etat coupable.[41]

Comme toutes manifestations de la volonté de l'Etat, l'acquiescement peut être exprimé tacitement, explicitement ou même implicitement, mais à la condition d'être clairement établi. Il faut aussi qu'il ne soit pas entaché de "vices", tels l'erreur, le dol, la corruption ou la violence.

La protestation tardive ne peut servir de preuve à la réaffirmation des droits lésés. Pour être effective, la protestation doit s'accompagner d'un comportement clairement explicite de non-reconnaissance des faits accomplis. Elle ne peut être isolée. Comme l'a soutenu le Juge Levi Carneiro dans l'affaire *Minquiers et Ecrehos*, tandis que le Gouvernement britannique "agissait, continuait d'exercer sa souveraineté, le Gouvernement français se contentait de protester "sur le papier". Ne pouvait-il pas faire autre chose? Il pouvait et devait, si je ne me trompe, proposer l'arbitrage. D'autant plus qu'il y avait entre les deux Etats le traité du 14 octobre 1903, qui soumettait à la décision de la Cour permanente d'Arbitrage tous les differends de nature juridique ou sur l'interprétation d'un traité."[42]

## 6. Négociation dans la mise en oeuvre de la responsabilité internationale de l'Etat

La réclamation internationale, comme le constatait la Cour internationale de Justice dans l'affaire de *la réparation des dommages subis au service des Nations Unies*, "est traitée par voie des négociations, et, en l'état actuel du droit concernant la juridiction internationale, ne peut être déférée à un tribunal international que du consentement des Etats en cause."[43] Néanmoins, le droit international n'oblige pas les Etats lorsqu'ils mettent en oeuvre la responsabilité internationale à préférer la négociation à toute

[40] Sir G. Fitzmaurice: op. cit., 174.

[41] Comme, par exemple, en a conclu la Cour Internationale de Justice dans l'affaire du Temple de Preah Vihear, la Thaïlande a adopté une attitude entièrement passive devant la violation prétendue de sa souveraineté territoriale, et "il est clair que les circonstances étaient de nature à appeler dans un délai raisonnable une réaction de la part des autorités siamoises, au cas où celles-ci auraient voulu contester la carte ou auraient eu de graves questions à soulever à son égard. Or, elles n'ont réagi ni à l'époque ni pendant de nombreuses années et l'on doit, de ce fait, conclure à leur acquiescement. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*" *CIJ Recueil* 1962, 23.

[42] *CIJ Recueil* 1962, 106, 107. Pour un exemple contraire, voir l'affaire *Ambatielos* (1956): "The diplomatic correspondence produced by the parties shows that the Greek Government intervened from 1925 onwards in order to exercise its diplomatic protection on behalf of Mr. Ambatielos, and that, since then, it has made repeated representations at intervals which cannot be regarded as abnormal in the particular of the case." *RIAA*, vol III, 1608.

[43] *CIJ Recueil* 1949, 177–178.

autre voie de règlement des différends; ceci car, selon la Cour, "la responsabilité d'un Etat (...) pourrait être engagée dans les différentes manières."[44] Toutefois, la négociation joue un rôle important dans la mise en oeuvre de la responsabilité internationale de l'Etat.

Il est évident que le droit international général n'impose pas aux Etats l'obligation de négocier. Les Etats gardent une certaine liberté de choix des moyens du règlement des différends.

"Although it would seem a natural result of diplomatic courtesy and friendly relations in international intercourse not to refuse to enter into such negotiations, this still does not constitute a legal obligation," indique la sentence arbitrale dans l'affaire de *l'assujettissement à l'impôt des employés d'Euratom* (1967).[45]

P. Reuter a conclu à propos de l'obligation de négocier en droit international général par ces mots:

"La conclusion qui s'impose est qu'il n'y a pas une obligation uniforme de négocier, mais que selon les circonstances il y a une obligation plus ou moins consistante, plus ou moins riche de devoirs."[46]

Ainsi, le devoir de négocier est lié à l'ouverture même des négociations. La déclaration de Manille sur le règlement pacifique des différends internationaux adoptée par l'Assemblée générale le 15 novembre 1982 stipule à ce sujet:

"Lorsqu'ils choisissent de recourir à des négociations directes, les Etats devraient mener des négociations qui aient un sens, de manière à parvenir rapidement à un règlement acceptable pour les Parties."

En ouvrant des négociations, les Etats s'engagent à négocier. En conséquence, la rupture injustifiée des négociations, des délais anormaux, le mépris des procédures prévues, le refus systématique de prendre en considération les propositions ou les intérêts adverses costituent autant de violations de cet engagement.

Si les parties ont conclu un *pactum de negotiando* (l'engagement conventionnel de négocier en vue de conclure l'accord) "il incombe de parvenir communément par concessions mutuelles à un accord sur lequel elles se sont engagées à négocier", constatait le Tribunal d'Arbitrage de l'Accord sur les dettes extérieures allemandes dans l'affaire no. 5 entre la Grèce et RFA (1972).[47]

Une autre hypothèse de l'existence de l'obligation de négocier est liée à la saisine de la juridiction internationale. Selon L. Cavaré:

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[44] *CIJ Recueil* 1949, 185.

[45] *RSA*, vol. XVIII, 511.

[46] P. R e u t e r: De l'obligation de négocier (dans): Il processo internazionale. Studi in onore di Gaetano Morelli. 715 (1975).

[47] Vol. III, 16.

"L'action en responsabilité ne peut être formée devant une juridiction internationale que si l'objet du litige a d'abord été porté sur le terrain diplomatique. (...) C'est seulement en cas d'échec de l'action diplomatique que l'action en responsabilité peut être formée. L'action diplomatique préalable, en effet, est de droit; l'action juridictionnelle en responsabilité n'est que subsidiaire."[48]

Toutefois, l'analyse de la jurisprudence de la CIJ permet de conclure que l'obligation de négocier comme condition de la saisine de la Cour n'existe que si les parties ont conçu un *pactum de negotiando*, c'est-à-dire un accord stipulant qu'une partie peut saisir la Cour si le différend n'est pas réglé par la voie de négociations.[49] Dans ce cas, comme l'écrit D.J.Scheffer:

"Most of these conventions require of two conditions before the dispute may be brought to the Court: first, the compulsory clause typically requires that the dispute "cannot be settled by negotiation" or "is not settled by negotiation", and second, the parties must not have agreed on another mode of settlement."[50]

Dans plusieurs affaires portées à elle durant ces dix dernières années, la CIJ a retenu cette obligation de négocier comme une condition d'admissibilité de recours.[51] Ainsi, dans l'affaire du *personnel diplomatique* la Cour a indiqué:

"Lorsque les Etats – Unis ont déposé leur requête du 29 novembre 1979, leurs tentatives de négociations avec l'Iran au sujet de l'invasion de leur ambassade et de la détention de leurs ressortissants en otages avaient abouti à une impasse, le Gouvernement de l'Iran ayant refusé toute discussion. Il existait donc à cette date non seulement un différend mais, sans aucun doute, "un différend ... qui ne (pouvait) pas être réglé d'une manière satisfaisante par la voie diplomatique" au sens de l'article XXI, paragraphe 2, du traité de 1955; (...)."[52]

Si on ne peut pas conclure à l'existence de l'obligation de négocier en droit international général, à moins que les parties l'aient stipulé d'avance dans un *pactum de negotiando*, il semble qu'une telle obligation existe dans les rapports de responsabilité internationale. L'Etat coupable d'un fait internationalement illicite est obligé de rétablir la situation préexistante et de réparer le dommage causé. Cette obligation fait partie des relations juridiques nouvelles qui, selon la définition de la Commission du droit

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[48] L. C a v a r é: Le droit international public positif. T. II. 291–292 (1951).

[49] De même façon, si les parties au litige ne sont pas convenues d'épuiser la procédure de négociations, avant de saisir l'arbitrage international, elles ne sont pas obligées de négocier. Selon la sentence arbitrale dans l'affaire *Texaco* (1975): "il est très généralement d'usage d'épuiser les possibilités de règlement amiable avant d'engager une procédure contentieuse. Mais elles ne faisaient pas en droit strict une obligation aux parties de recourir à des pourparlers amiables avant d'entamer la procédure arbitrale." *RJAI*, t. III, 1390.

[50] D.J. S c h e f f e r: Non-judicial State Remedies and the Jurisdiction of the International Court of Justice. 27 Stanford *JIL* 98 (1990).

[51] Les affaires du *personnel diplomatique et consulaire à Teheran.* (*CIJ Recueil* 1980, 26), des *activités militaires et paramilitaires* (*CIJ Recueil* 1984, 427–429), de *Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'accord du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies*, avis consultatif, *CIJ Recueil* 1988, 33–34 (*CIJ Recueil* 1988, 33, 34).

[52] *CIJ Recueil* 1980, 27.

international, "peuvent naître en droit international du fait illicite d'un Etat, (...) qu'elles soient centrées autour de l'obligation pour l'Etat coupable de rétablir l'Etat lésé dans son droit et de réparer le préjudice causé, ou bien aussi autour de la faculté pour l'Etat lésé lui même ou pour d'autres sujets d'infliger à l'Etat coupable une sanction admise par le droit international."[53] Pour que l'obligation de rétablir l'Etat lésé dans son droit soit exécutée, et en l'absense de clause compromisoire régissant les rapports conflictuels, l'obligation de l'Etat coupable de négocier avec l'Etat lésé représente le seul moyen réel de la mise en oeuvre des obligations de l'Etat auteur du fait internationalement illicite. En employant la terminologie du Prof. P. Reuter, il s'agit des "obligations de négocier liées". Ce n'est pas le cas de la négociation *ex nihilo*, quand les Etats "jouissent l'un à l'égard de l'autre d'une liberté totale, ils ne sont liés, antérieurement à l'ouverture des négociations, par rien sinon par la promesse toute abstraite de négocier". Par contre, ici les parties aux négociations sur la responsabilité internationale sont liées par le fait internationalement illicite. "Dans un cas de ce genre l'obligation de négocier s'entend de l'obligation de négocier dans un cadre déterminé; si un des Etats en présence veut unilatéralement sortir de ce cadre, il viole l'obligation de négocier: l'obligation de négocier abstraite est enrichie ici de toutes les obligations découlant de la situation dans laquelle se trouvent les parties au moment de l'ouverture des négociations. Cette constatation est aussi simple que fondamentale."[54] Bien sûr, dans le cadre de la responsabilité, cette obligation est assumée tout d'abord par l'Etat auteur d'un fait internationalement illicite. Il doit négocier en vue de conclure soit un accord régissant toutes les questions de la responsabilité, soit un accord permettant la conciliation, la procédure arbitrale ou judiciaire, etc. Donc son obligation de négocier est une obligation de résultat: il doit négocier dans l'intention de parvenir à un tel accord avec l'Etat lésé. Une fois que la négociation est proposée par l'Etat lésé, l'obligation de négocier en vue de conclure un tel accord est à la charge de l'Etat responsable.

Quelle est la portée d'une telle obligation? Comme l'écrit P. Reuter, "une telle obligation subsiste tant qu'il existe raisonnablement des chances d'aboutir, car une obligation cesse d'exister quand elle a perdu sa cause; cette réponse réduirait les cas d'obligation permanente de négocier."[55] Si l'Etat responsable a négocié dans l'esprit de bonne foi en vu de parvenir à un accord sur le rétablissement du droit violé de l'Etat victime, ou de réparation du dommage causé ou, au moins, sur la soumission de l'affaire à des tiers, mais que ces négociations ont échoué à cause de la position intransigeante de l'Etat lésé, l'obligation cesse alors d'exister.

"Une négociation ne suppose pas toujours et nécessairement une série plus au moins longue de lettres et de dépêches; ce peut être assez qu'une conversation ait été entamée; cette conversation a pu être très courte; tel est le cas si elle a rencontré un point mort, si elle s'est heurtée finalement à un non possumus ou à un non volumus péremptoire de l'une des parties et qu'ainsi il est

[53] *ACDI* 1970, vol. II, 328.
[54] P. R e u t e r: De l'obligation..., op. cit., 720–721.
[55] *Ibid.*, 726–727.

apparu avec évidence que le différend n'est pas susceptible d'être réglé par une négociation diplomatique, "– a répété la CIJ à la suite des conclusions de la C.P.J.I. dans l'affaire *Mavrommatis* (1924) lorsqu'elle a donné un avis consultatif precité sur *l'accord relatif au siège* (1988).[56]

## 7. Date critique dans le contentieux de la responsabilité internationale et déclenchement des contre-mesures

Après que l'Etat lésé ait présenté la protestation, puis ait tenté de s'entendre avec l'adversaire sur le rétablissement de ses droits violés, et, enfin, qu'il ait vu ses tentatives échouer à cause du refus de l'Etat coupable, survient la date critique du contentieux de la responsabilité internationale.[57] Comme le soulignait Sir Gerald Fitzmaurice dans sa plaidoirie dans l'affaire Minquiers et Ecrehous:

"Most disputes are preceded by a period, which may be short or sometimes may be very long, according to the circumstances, in which there are diplomatic exchanges, protests, negotiatios perhaps. Now, I suggest that this preliminary period does not give rise to a critical date – nor would it be equitable that it should – because the Parties have not taken up any final position. But, if the differences are not resolved, these eventually comes a moment when it can be said that a concrete issue in definite form has arisen. The Parties are no longer negotiating, or protesting, or attempting to persuade one another. They have taken up position, and are standing on their respective rights ... ."[58]

Le plus souvent la date critique naît déjà, "se cristallise" pendant les négociations.

"In effect, as the Court has indicated earlier, when referring to the concept of the critical date as articulated by Sir Gerald Fitzmaurice, and as accepted by the Parties, it is not enough, in order to establish a critical date, that the Parties to a dispute have formulated their claims; there must also have been at least a minimum of negotiations between them which will have permitted a consolidation of the matters in dispute."[59]

Dans l'affaire des *Essais nucléaires* la date critique est caractérisée par la "cristallisation" des positions définitives:

"... dans la correspondence diplomatique et dans les entretiens qui se sont déroulés pendant l'année en cours, le Gouvernement français n'a pas accepté de mettre fin aux expérimentations

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[56] Cf. CPJI, serie A, no. 2, 13).

[57] On peut trouver une telle date critique dans l'Acte américain du 7 juillet 1798 annulant les traités entre les Etats-Unis et la France: "Whereas the treaties concluded between the United States and France have been repeatedly violated on the part of the French government; and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustement of all complaints between the two nations have been repelled with indignity ... ." J.B. Moore: A Digest of international law. Vol. V, 356 (1906).

[58] Sir G. Fitzmaurice: op. cit., 264.

[59] La sentence rendue par la Cour d'arbitrage dans l'affaire de *la délimitation entre les Emirats de Dubai et de Charjah* (1981). *RJAI*, t. III, 460.

nucléaires en atmosphère dans le Pacifique ni de renseigner l'Australie sur les dates des expériences projetées, l'importance et le rendement escompté des explosions; et que, dans une déclaration faite devant le Parlement français le 2 mai 1973, le Gouvernement français a indiqué que, malgré les protestations de l'Australie et d'autres pays, il n'envisageait ni d'annuler ni de modifier le programme d'experimentation nucléaire initialement prévu."[60]

L'échec des négociations sur la mise en oeuvre de la responsabilité internationale à cause de la position prise par l'Etat qui a commis un fait illicite peut entraîner deux conséquences principales: premièrement, s'il existe une clause compromisoire sur l'épuisement des moyens diplomatiques de règlement avant de recourir à l'arbitrage ou à la procédure judiciaire, l'Etat victime a la faculté de recourir à ces moyens; deuxièmement, cet Etat se voit reconnaître le droit de recourir aux contre-mesures qui sont légitimes "après sommation restée infructueuse".[61] Cette deuxième conséquence se justifie par l'épuisement par l'Etat lésé de l'obligation de tenter un règlement à l'amiable avant de prendre des contre-mesures.[62]

## 8. Accord sur la responsabilité internationale

Selon H. Kelsen "un Etat ne peut se tenir pour obligé de réparer un dommage que s'il reconnaît avoir commis un acte illicite. En d'autres termes les Etats en cause doivent se mettre d'accord sur ce point."[63]

L'obligation de réparer prend néanmoins naissance déjà au moment de l'accomplissement d'un fait illicite. Ce n'est qu'au stade de l'exécution qu'elle peut faire l'objet d'un accord négocié. Certes, l'accord entre l'Etat lésé et l'Etat responsable donne certain choix de solutions: il peut aboutir au règlement total ou partiel des réclamations entre les deux Etats, ou à la renonciation aux prétentions, ou encore à la soumission de l'affaire à un tiers, etc.

Ainsi, l'Echange de lettres entre le Gouvernement français et le Gouvernement néo-zélandais du 9 juillet 1986 concernant l'affaire *Rainbow Warrior* prévoit le règlement total des réclamations:

"Le Premier Ministre français adressera au Premier Ministre néo-zélandais ses excuses formelles et sans réserve pour l'attentat commis en méconnaissance du droit international par les agents des services français à Auckland le 10 juillet 1985 contre le Rainbow Warrior.

En outre, le Gouvernement français versera au Gouvernement néo-zélandais la somme de sept millions de dollars des Etats-Unis en réparation de l'ensemble des préjudices subis par la Nouvelle – Zélande.

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[60] *CIJ Recueil*, 1973, 104.

[61] La sentence arbitrale dans l'affaire de *Naulilaa* (1928). - *RSA*, vol. II, 1025.

[62] Comme l'écrit L.-A. S i c i l i a n o s: "L'obligation de tenter un règlement à l'amiable n'est, enfin, pas aussi vague qu'on le croit à première vue. L'examen de la pratique révèle que les Etats qui s'estiment lésés émettent généralement des protestations écrites ou verbales en présentant et en motivant leurs griefs, en invitant l'Etat présumé auteur à revenir sur son comportement licite et en lui faisant comprendre qu'une attitude récalcitrante pourrait entraîner des conséquences négatives." L.-A. S i c i l i a n o s: op. cit., 202.

[63] H. K e l s e n: Théorie du droit international public. 84 *RCADI* 30 (1953).

Le Gouvernement néo-zélandais transférera le commandant Alain Mafart et le capitaine Dominique Prieur aux autorités militaires françaises. Immédiatement après, le commandant Mafart et le capitaine Prieur seront transférés sur une installation militaire française de l'île de Hao, pour une période minimale de 3 ans."[64]

Les accords d'indemnisation pour les dommages causés aux ressortissants d'un Etat se résument souvent par l'attribution d'une indemnité globale forfaitaire ("lump sum agreements"). Par exemple, l'Echange de notes du 1er décembre 1966 constituant un accord entre le Royaume-Uni et l'Indonésie concernant les pertes subies par le Gouvernement du Roayaume-Uni et par ses ressortissants par suite des troubles en Indonésie en septembre 1963 indique:

"Le Gouvernement indonésien se charge de régler: (...)

c) Les réclamations déjà transmises au Gouvernement indonésien par l'Ambassade de sa Majesté à Djakarta ainsi que d'autres réclamations de ressortissants du Royaume-Uni au titre de pertes ou de dommages subis, directement ou indirectement, au cours ou à la suite des émeutes et des désordres qui ont eu lieu en Indonésie entre le 10 et le 30 septembre 1963, à concurrence d'un maximum de 335 000 livres sterling."[65]

Une autre solution possible est celle d'accord, le compromis, demandant à la CIJ ou au tribunal arbitral de statuer sur la responsabilité de l'Etat. Ainsi, le compromis entre le Royaume-Uni et l'Albanie dans l'affaire du *détroit de Corfou* du 25 mars 1948 soumettait à la Cour les questions suivantes:

"1) L'Albanie est-elle responsable, selon le droit international, des explosions qui ont eu lieu le 22 octobre 1946 dans les eaux albanaises, et des dommages et pertes humaines qui en seraient suivis, et y a-t-il le cas de réparations à donner?

2) Le Royaume-Uni a-t-il violé, selon le droit international, la souveraineté de la République populaire d'Albanie par les actions de la marine de guerre britannique dans les eaux albanaises le 22 octobre 1946 et les 12 et 13 novembre 1946 et y a-t-il lieu à donner la satisfaction?"[66]

L'accord peut aboutir à l'indemnisation *ex gratia*. Le payement des dommages à titre gratieux n'implique pas, selon la partie accordant la compensation, qu'il reconnaît avoir commis un fait illicite, qu'il admet sa responsabilité internationale.[67]

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[64] *RSA*, vol. XIX, 216–218.

[65] 606 *RTNU* 129, 131.

[66] *CIJ Recueil* 1949, 6. La liberté des Etats de conclure un compromis par lequel la Cour est saisie n'est pas illimitée car les parties doivent respecter le Statut. Ainsi, dans l'affaire des *Zones franches*, la Cour permanente de Justice internationale considérait "qu'il serait incompatible avec son Statut et avec sa position en tant que Cour de Justice, de rendre un arrêt dont la validité serait subordonnée à l'approbation ultérieure des parties". C.P.J.I., série A/B, no. 46, p. 163. Par contre, il existe une plus grande liberté des parties en matière de compromis arbitral. Le compromis d'arbitrage entre la France et les Etats-Unis dans l'affaire des services aériens (1978) demandant au Tribunal arbitral de statuer sur la question de la légalité des contre-mesures prises par les Etats-Unis stipulait que "en ce qui concerne cette question, le Tribunal rendra (...) un avis consultatif qui ne sera pas obligatoire." - *RSA*, vol. XIX, 459.

[67] Ainsi, l'Accord sur le règlement du différend concernant la compensation pour la mort de Letelier et Moffitt du 11 mars 1990 entre les Etats-Unis et Chili stipule: "3. The United States has sought compensation from Chile on behalf of the families of Letelier and Moffitt, on the ground that the United States considers the

Il semble que le régime de nullité prévu à l'art. 53 de la Convention de Vienne sur le droit des traités est pleinement applicable aux accords sur la responsabilité pour violation des règles de *jus cogens*. L'accord entre l'Etat directement lésé et l'Etat responsable ne peut justifier la violation de règles de *jus cogens*. Il ne peut concerner que la réparation du dommage subi. Une autre limite à la validité de l'accord sur la responsabilité de l'Etat concerne les traités multilatéraux. Dans les rapports en cadre du traité multilatéral "objectif" (les traités dans le domaine des droits de l'homme, du désarmement, etc.), dont la violation concerne chaque partie du traité, un tel accord est dépourvu de valeur juridique. La seule exception valable à cette règle est l'accord qui porte exclusivement sur l'indemnisation du dommage. D'autre part, si le traité multilatéral est "divisible" dans le sens que sa violation ne concerne que deux Etats en cause (par exemple la violation des immunités consulaires par l'Etat de résidence), l'accord bilatéral sur la responsabilité de l'Etat partie au traité est legitimé.

State of Chile is legally responsible under international law for the deaths of Orlando Letelier and Ronni Moffitt and the personal injuries to Michel Moffitt. Without admitting liability, the Government of Chile, in order to facilitate the normalization of relations, is willing to make an *ex gratia* payment (...). 4. (...) the amount of *ex gratia* payment should be equal that which would be due if liability were established, and should be determined by the Commission (...). 6. Upon receipt of the *ex gratia* payment (...), the Government of the United States will regard as satisfied the claim (...)." 30 *ILM* 421–424 (1992).

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# Restitution and Revindication of Art Treasures Spoiled or Displaced During or in Result of War

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## I.

Each nation has a right to cultural heritage – comprising art treasures collected during several centuries and reflecting historical development of particular nation and its civilization. There is no doubt as to that statement as long as we do not consider the complexity and the abundance of sources of art treasures forming cultural heritage. It is even very difficult to define the latter notion, as there is no universal pattern thereof. It is also impossible to point at any group of characteristics to be possessed by the cultural heritage of a given state.[1] Actually, to be recognized as an art treasure a given object must express any social values, must serve the transmission of tradition or ideals or must produce some associations. All these values, patterns of behaviour, the very attitude to art and to the functions of its products undergo significant changes. Objects that were underestimated yesterday, may be appreciated today to be forgotten tomorrow. Even the beauty of art treasures – recognized as one of the values since the time immemorial – has not always been defined in the same way. The relative character of the notion of beauty can be demonstrated by the abundance of styles, tendencies and fashions in the Art. And what about the other values: historical, scientific, patriotic? The historical events connected with art treasures are not always the ones that we are ready to boast, but also such that we would like to forget as quickly as possible. The development of science results in the shrinking number of persons interested in the start-up period of a given discipline, the means used in research of that time and even in the recorded results of such a research. Still, the patriotism is connected with the notion of nation that was developed not earlier than two hundred years ago. Also several voices advocating integration based on ideology or the European unification try to discredit patriotism, calling it "nationalism", "xenofoby", "chauvinism", "national megalomany" and so on. Still, even taking the national element as a point of departure we would conclude that there is no uniformity of art treasures also in this respect. The

[1] "Culture" – is a term used in sociology and defined in different ways. "Good of Culture" emerged for the first time in the Reichskulturkammergesetz from 22 September1933 (RGBl. I. 661 and 797) (*Kulturgut*). Definitions referring to values in most of the provisions, were inserted into the French act which 31 December 1913 of is still in force after several amendments.

cultural heritage comprises historical monuments of local and foreign origin, produced on the historical territory of a given nation, appropriated legally by different persons – enlighted or simply rich – in order to decorate their houses, temples, royal residences and collections, which gave the beginning of public museums.[2] Still, the legality of such appropriation may be questioned, if for example their objects had been obtained during excavations or simply found in the countries, before their populations could feel their own identity and create independent states.

A separate mention must be made with respect to art treasures and craftsmen's products that were stolen, seized (*ius spolii*), illegally transferred abroad, and to territorial changes. In the past royal residences, temples and later also museums, libraries and archives were plundered by invaders for different reasons (religious, political or material) underlying several military conflicts.[3] The spoiled art treasures not only commemorated the military victories, that would be forgotten in lack of any objects of this kind, but also were a considerable source of material wealth. Public museums of several countries of undoubtedly high cultural level are in possession of objects, the appropriation of and the title to which is very controversial.

This problem has its dimension in the sphere of the public law.[4] Several nations that have acquired their independence only recently, demand restitution of art treasures that were taken from their territories, also in effect of legally conducted excavations. Complications connected with the title to art treasures[5] make the full revindication not only impossible, but also not desired. It would mean namely not only technical difficulties but also the closing of cultural borders, a complete lack of exchange in this field, the breach of historical relationships between nations and in result a complete petrification of the universal culture. That is why some political systems used sentiments based on theories of racial or ideological superiority to make people believe in the right to decide what elements of cultural heritage of other nations could be protected (after the seizure, of course) and which should be destroyed in the name of a leading ideology.[6]

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[2] Louvre was nationalized by a decree of 17 July 1793; the British Museum based on collection endowed by Sir Hans Sloan in 1753 was established by an act of Parliament of that year; Ashmolean Museum in Oxford originated from the private collection of Lord Ashmole. Also the last Polish king – Stanisław August Poniatowski intended to follow the latter examples, but his collection, kept in the Royal Castle and in the Łazienki Palace, was spoiled by the Russians.

[3] The best examples are the acts of seizure committed by Sweden during the Thirty-Year War (1618–1648) and the war with Poland (1655–1657) (known as "the Swedish Deluge") and by France during the wars conducted by Napoleon (1792–1813). In both cases the acts of seizure were effected by specialists, on quasi-contract basis. See: C. G o u l d: "Trophy of Conquest" (1965).

[4] From a rich literature on the subject we recommend: St. N a h l i k: "Grabież dzieł sztuki. Rodowód zbrodni międzynarodowej", (1958) and by the same author: "Protection internationale des biens culturels en cas de conflit armé." 120 *RCADI* 61–163 (1967); P.J. O'K e e f e / L. P r o t t: "Law and Cultural Heritage", (1989); J. T o m a n: "La protection des biens culturels en cas de conflit arme", (1994).

[5] A specially complicated case is connected with "the golden treasure of King Priam" discovered on the Turkish territory, belonging to the cultural heritage of the ancient Greece, endowed to the Museum in Berlin, seized by the Soviet Union in execution of ius spolii and now kept in the Puschkin Museum in Moscow.

[6] Such activities were as a rule conducted by the Germans with respect to Jews and nations of the Eastern Europe and by the Soviet Russia with respect to Poles during the war from the years 1919–1921 and after the aggression from 1939.

This is in no case a new phenomenon. Art treasures (although not called as such) were spoiled or destroyed i.a. in the war of Tiglat-Pilesar II (VIII century before Christ), in the war on Peloponez having so many elements of a total war (431–404 B.C.), in the Punic wars (264–146 B.C.), in the wars conducted by Sweden in the XVII century, by Napoleon and in the conflict between Prussia and France. Here it must be reminded that it was only in the XIX century that the idea of the protection of art treasures was formulated.[7] The protection of some elements of cultural heritage because of their value and in the social interest, required not only an obligation of keeping them in a good state, but also their appreciation and popularisation as art treasures, historical monuments, objects for research and, what was the most important, as objects identifying and integrating nations with respect to their culture. The logical consequence thereof were attempts of codification of rules protecting art treasures during armed conflicts.

The priority in this respect should be given to "Instructions for the Governance of the Armies of the United States in the Field", the draft of which was written by Francis Lieber and published in 1863. It was the first document formally prohibiting seizure and destruction of art treasures, scientific collections, resources of libraries and archives by the fighting parties.[8] However, this act was not a treaty. Nor was it the Declaration of Brussels from 1874 according to which: "the property of municipalities, and that of institutions devoted to religion, charity, education, art and sciences cannot be seized. All destruction or willful damage to the institutions of this character, historic monuments, archives, works of art or science is formally forbidden, save when urgently demanded by military necessity".[9] These rules were later included in the provisions of the First Hague Conference (1899) and in the Fourth Hague Convention on the Laws and Customs of War on Land (1907).[10] We should also remind the initiative of Nicholas K. Roerich, which resulted in the Treaty of Washington from 15 April 1933. The Roerich Covenant after having been accepted by the Panamerican Conference was accepted by the United Kingdom, France and also Italy, Japan and Poland. It is worth

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[7] Lex Doria Pamfilii from 2 April,1802 about the protection of historical monuments in the Papal State and edict of Bartholomeo Pacco from 7 April 1820; the circulars of the Prussian authorities from 6 April 1819 and 15 December 1823 prohibiting destruction of historical monuments; the French act from 1830 about the Inspection générale des monuments historiques and analogical Bavarian Generalinspektion established on January 1835; the Greek act on historical monuments protection from 22 May 1834.

[8] "34. As a general rule, the property belonging to churches, to hospitals or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of fine arts, or of a scientific character – such property is not to be considered public property (...)

36. (...) In no case shall they be sold, or given away (...) nor shall they ever be privately appropriated or wantonly destroyed or injured." see: Q. W r i g h t: "Francis Lieber's Code for Land Warfare." (1971).

[9] Oxford Manual 1880. The Laws of War on Land. Art.53.

[10] The 1899 Hague Convention, Art. 27: "In sieges and bombardment, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments.(...) Art. 28. The pillage of a town or place, even when taken by assault, is prohibited. (...) Art. 56 (...) All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden and should be made the subject of legal proceedings. "International Law Concerning the Conduct of Hostilities."Coll. of Hague Conventions. Int. Committee of Red Cross. (1989) p. 25 and 30.

noting that also the Chancellor of the Third Reich said in 1939 that because of humanitarian reasons he accepted the abstention from bombing of any non-military targets in all cases. It did not influence the later practice of the Luftwaffe, which destroyed open towns and cities, the result being the destruction of historical monuments of the Polish capital and subsequently intentional destruction of cathedrals in Birmingham, Canterbury, Exeter, Norwich and York. The price to be paid by the Germans was the destruction of Lübeck, Dresden, Bremen, Nürnberg and tens of other historical towns.

In consequence of conquests and occupation art treasures of all countries being in fight with Germany were devastated and seized. Several collections were scattered. The Polish culture was specially injured. It was the consequence of the activities of both signatories of the so – called Ribbentrop–Molotow agreement from 23 August 1939 on the territories annexed by the Soviet Union, of very carefully prepared and realized German activities in the so called General Government (German-occupied Poland)[12], military activities on the Polish territories in the second phase of the war and a broad interpretation of *ius spolii* (right of seizure) by the winners. The losses reaching an appaling number of 90% of the resources of the Polish museums, the complete destruction of hundreds of historical temples, intentional burning down of libraries and archives[13] and seizure of historical objects from private collections can be attributed to protective measures (Schutzmassnahmen) effected by special groups of action (Einsatzkommandos) in the framework of action SS-Ahnenerbe, to the activities of German government mandatories for the protection of art treasures and historical monuments and to blantant thefts.The aim of these measures was not secret. It was namely the total destruction of the Polish nation and its culture in all forms.[14] The same aim could be attributed to the second of the occupants of the eastern Polish territories, which conducted a planned destruction of historical and sacral buildings, residences, museums, art galleries and collections – both public and private.[15]

It must be said that the German activities from the time of war and occupation proved the inadequacy of the hitherto declarations and agreements to a total war. It was nothing more than illusion to believe that civilized nations would respect art treasures of other nations, especially if they were stored in special, properly signed buildings or underground shelters and stores. Such an exceptional cumulation of bad

[11] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments. (Roerich Pact), Washington, 15 April 1935, see note 10, at 31–32..

[12] See: R. F u c h s: "Działalność das Ahnenerbe w zakresie grabieży dzieł polskiej kultury narodowej." in: Cz. P i l i c h o w s k i, Ed. "Zbrodnie i ich sprawcy" (1989); A. M ę ż y ń s k i: "Kommando Paulsen", (1994); J. P r u s z y ń s k i: "Ochrona zabytków w Polsce", (1989), p. 110–124.

[13] B. B i e ń k o w s k a and others: "Straty bibliotek w czasie II wojny światowej.Wstępny raport o stanie wiedzy.", Warsaw 1994. From 36500 public, school and scientific libraries existing before the second World War most of them suffered losses of 55–90% of the pre-war state of possession.

[14] "(...) this country must be germanized (...) All traces of the Polish character must be destroyed within a few years"; A. F o e r s t e r (see: "Polskie Siły Zbrojne" part III p.10 -11).

[15] The basic source: E. C h w a l e w i k: "Zbiory Polskie. Archiwa, biblioteki, gabinety, galerje, muzea i inne zbiory pamiątek przeszłości w Ojczyźnie i na obczyźnie", (1926-27), unfortunately the parts I and II contain no pictures. None of the private and public collections mentioned in this publication was kept in its integrity.

faith based on discriminatory legal acts of the occupants which authorised grabbing and destruction of art treasures can not be qualified as a by-product of militaty activities or even the execution of the right of seizure. It was the first time that the destruction of cultural heritage was an autonomous reprisal as such, a means of destruction of nations and their history evidenced by art treasures. The qualification of these activities as an "international crime"[16] cannot be changed by the very fact that the Second World War resulted also in substantial losses of art treasures of the participants of Hitler coalition and the temporary followers of Germany. Nowadays, 50 years after the end of the Second World War, despite the existence of new instruments that are in the opinion of their authors capable of preventing such events in the future[17] there is still a problem of restitution and revindication of art treasures, displaced during the war and the occupation, to be solved. A uniform solution on the basis of an international agreement seems to be impossible, as there were different ways of appropriation of the objects in question, different reasons thereof and possibility of autonomous deciding in matters regulated by the great powers.

The regulation of restitutional obligations usually followed directly the end of a given war and took place in peace treaties[18] making it possible to a limited extent to search art treasures that had been appropriated during or even before the war.[19] Still such elements as the total character of the Second World War, several territorial changes and migrations, resulting partly from military activities and partly from the Potsdam Agreement, and the division of Europe into spheres of control resulted in the difficulties that would be encountered by any attempts of regulating restitution and revindication of art treasures. Here it must be put very strongly that there can be no comparison of the situation of art treasures obtained by Poland on the treaty basis and the situation of the treasures seized by Germany and the Soviet Russia in result of their aggression and occupation of the Polish territories. The two situations are completely different, what will be proved below.

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[16] The title of the work of Prof. Nahlik and the proposal of supplementing the 1954 Hague Convention by declaring spoiling of art treasures as *crimen lesae humanitatis and delictum Juris gentium* subject to a universal repression.

[17] See: W. K o w a l s k i: "Liquidation of the Effects of World War II in the Area of Culture", (1994); P.J. B o y l a n: "Review of the Convention for the Protection of Cultural Property in Event of Armed Conflict", (1993), J. T o m a n: *op.cit.*.

[18] Art. 231 and 245–247 of the Treaty of Versailles; Art. 191–193 of the Treaty of Saint Germain en Laye and Art. XI paras 1–15 of the Treaty of Riga.

[19] The Treaty of Riga concluded in 1921 after the war between Poland and the Soviet Union provided for the return of art treasures seized by Russia since 1772 (the first partition of Poland) and during several national insurrections. The revindication action conducted by a special commission resulted in an actual return of a part of known and still existing art treasures. M. M o r e l o w s k i: "Muzealne rewindykacje delegacji polskiej w Moskwie", 48 *Przeglqd Współczesny*, 131–143 (1926).

## II.

Several international meetings of specialists organised to discuss the problems of the restitution of art treasures do not induce anybody to optimism.[20] The specialized administrative agencies of different countries[21] try to determine objects to be restituted and to prove the rights of their respective countries to these objects. If it is possible, they attempt to point at the present place of storage of these art treasures. Still, they are less inclined to consider why the objects in question found can be in the other countries. There are several possible ways of the latter, to remind breaches of the law of armed conflicts, restitution in kind, general restitutions for the losses resulting from the war, and also territorial changes. The borders agreed at the Potsdam Conference were not delimited immediately. As it was also agreed that the Soviet Union would satisfy its restitutional claims by carrying out appropriate objects from its occupational zone and the German property being abroad, the present western and northern territories of Poland were treated by the Soviet administration as an enemy territory. At the same time Poland after having suffered immense losses was even not allowed to get any compensation. Poland was namely to be compensated within the framework of the pool acquired by the Soviet Union, the amount of compensation being left to the discretion of the latter. At the same time the displacement of the German population, the repatriation of Poles from the former Polish Eastern territories (that were settled on the place of displaced Germans) and the activities of the Soviet Army "seizure committees" coincided. The Germans were allowed to take a luggage not exceeding the physical possibilities of repatriants. The property of Poles from the eastern territories had already been destroyed in result of the war, but at the same time the conditions of the displacement of the Germans could not be compared with the atrocities of the displacements organised by Germans with regard to the inhabitants of the Zamość region and the whole population of Warsaw after the insurrection of 1944.

It would be a misunderstanding to treat all art treasures left on the territories from which the Germans were displaced as a part of the German cultural heritage. Except objects serving as interior decorations or equipment of historical monuments of these territories, two other categories of goods were to be found there. The first one comprised art treasures carried out from the occupied Polish territories. Such objects are according to both Polish and international law a belonging and property of the Polish state, Polish public institutions and private persons. The second group would contain

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[20] International Meeting "Cultural Treasures Moved Because of War. A Cultural Legacy of the Second World War – Documentation and Research of Losses", Bremen, December 1994; "The Spoils of War. World War II and Its Aftermath: the Loss, Reappearance and Recovery of Cultural Property", New York, January 1995 – neither of these two perfectly organised conferences attended by eminent specialists managed to influence the position of the politicians to the problem of restitution.

[21] In most of the European countries there are special departments dealing with the restitution of art treasures. In Poland it is the Bureau of the Governmental Plenipotentary for the Polish Cultural Heritage in the Ministry for Culture and Arts (Biuro Pełnomocnika Rządu do spraw Polskiego Dziedzictwa Kulturalnego za Granicą w Ministerstwie Kultury i Sztuki). In the Federal Republic of Germany – Koordinierungsstelle der Länder für die Rückfürung von Kulturgüter by the Senator for the Cultural Matters. In Russia it is the Department for Restitution of the Ministry of Culture. The similar organisation are created in all the countries involved.

collections of German museums and libraries evacuated by the Germans because of the allied air bombings.

As it has already been mentioned, the German activities including seizure (Übernahme) and securing (Sicherstellung) of Polish art treasures preceded not only the very aggression of 1939 but also direct preparations thereof. Namely, it was already at the beginning of the 1930s that the Ost Institut prepared materials devoted to Polish culture, in such a way as to present them in a negative light.[22] The same rules were adopted in the publication "Schriften für Politik und Auslandskunde",[23] which endeavoured to show, with the aid of citations taken out of context, a civilization and ethnic inferiority of Poles and an allegedly temporary character of the Polish state.[24] At the same time German historians of art from Berlin, Heidelberg, Königsberg and Breslau – entertained in Poland several times – prepared the documentation of Polish art treasures, the seizure of which they effected during the occupation, already in uniforms of SS or SD.[25] Due to the preservation of the acts of the Science and Research Community "Ancestors' Heritage" (SS Forschungs- und Lehrgemeinschaft "Das Ahnenerbe") controlled by Heinrich Himmler, we can trace the grabbing of Polish art treasures committed since October 1939 by the Kommando of Paulsen (Untersturmführer of SS, former a professor of prehistory). The so – called "protective measures" (Schutzmassnahmen) adopted in September 1939 provided a penetration of museums and seats of public organs in Bydgoszcz, Lvov, Poznań, Toruń, Warsaw and Wilna aimed at protecting German art treasures in Poland.[26] Dozens of museums, several hundreds of temples and private collections were seized (in fact grabbed) on the basis of the regulations issued by the occupants.[27] These activities were conducted

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[22] See: T. K u ł a k o w s k i: "Hitlerowska polityka eksterminacji kulturalnej", (1955); K. J o n c a: "Założenia hitlerowskiej polityki kulturalnej", in: "Inter arma non silent musae. Wojna i kultura 1939–1945", 239–247 (1982).

[23] K.C. v. L o e s c h: "Der Polnische Volkscharakter", (1940); H. L u d a t: "Polenstellung in Ostmitteleuropa", (1939); E.W u n d e r l i c h: "Das moderne Polen", (1938); J. A h l e r s: "Polen", (1935).

[24] "Because of a complete collapse of the former form of government in Poland, the Government of the Reich and the Government of the USSR find it necessary to put an end to the unacceptable political and economical conditions that now exist on these territories. They feel themselves obliged to restore peace and order on these territories, that are a natural sphere of interest of both states." (Paragraph 4 of a secret instruction of Ribbentrop for the German ambassador in the USSR, a draft text of a common statement). "The ruling spheres of Poland boasted a lot the "permanent" character of their state and the "power" of their army. However a short attack of the German army and later the Red Army brought about such a situation that nothing remained of this monstrous bastard of the Versailles Treaty" (fragment of an expose byMolotow from the session of the Supreme Council of the USSR held on 31 October 1939) – quoted after: W. S u k i e n n i c k i: "Biała księga", at 67 and 133 (1964).

[25] See: A. M ę ż y ń s k i: *op.cit.* at 12–15.

[26] There are also: a letter by E. Petersen from Landesamt in Wrocław to the Secretary General of the "Ahnenerbe" – W. Sievers – containing a list of archeological museums and the names of their emplayees, and reports by A. Six – the director of section II RSHA – concerning the "securing" of art treasures in Poland. See: A. M ę ż y ń s k i: *op. cit.* at 42–60.

[27] Verordnung über die Beschlagnahme von Kunstgegenständen im GG vom 16 November 1939 (VBlGG p. 209): "The whole public cultural property becomes the property of the Reich. This relates to objects being so far the property of the state, as well as private objects indicated by the plenipotentary appointed by the General Governer". The full collection of legal acts of the time to be found in "Das Recht des Generalgouvernements", edited by A. Weh, Cracow 1940.

with changing intensity during all five years of the occupation and took the point of cumulation in the act of grabbing the collection of the National Museum and burning down of the underground stores of the Library of the Krasiński family in Warsaw. The latter event meant destruction of more than 300.000 of the most valuable monuments of the Polish literature manuscriptsand printed rarities.

In exceptionally difficult conditions and despite the death punishment provided for such acts as "crimes against the German reconstuction" Polish historians of art collected and recorded the information about the losses of the Polish culture and even about the points of destination of the spoiled Polish art treasures. It facilitated the searches undertaken already in 1945 by the Bureau for the Revindication and Compensation of the Ministry of Culture and Arts.[28] The revindication activities took place first of all in the present western and north-western territories of Poland. After the creation of the office of delegates for the restitution of cultural goods by the Polish Mission in Berlin such activities were undertaken in the American and the British zones and to a smaller extent in the French one. Almost no activities were taken in the Soviet zone. Owing to the aid of the American Monuments, Fine Arts and Archives Officers, Poland recovered immediately after the end of the war: treasuries of the cathedrals from Gniezno and Poznań, the famous altar of Wit Stwosz from Cracow (St Mary's altar), parts of the collections of the National Museum and of the Cabinet of Drawings of the Warsaw University Library, beautiful Arras tapestries from Wawel, townscapes of Canaletto, and archival documents.

One cannot be astonished that the Polish specialists finding objects from German public collections found themselves allowed and even obliged to secure them in this world of chaos, military presence of the Soviet Union and its "seizure committees". The Allied Control Council prepared at this time an instruction about restitution in kind for goods, the natural restitution of which was impossible,[29] the losses of the Polish culture were known by these persons, who were exclusively the workers of museums, possessing scientific degrees and titles.[30] The base of their activities was to be found indirectly in the Potsdam agreement and directly in the Polish provisions, which provided the appropriation by Polish State or Polish public institutions of the so called "post-German, left and abandoned property".[31] In exercising sovereignty over these territories that became a part of Poland to some extent in recognition of historical reasons, but also as compensation for the eastern territories that were invaded in accordance with the agreement between Germany and the Soviet Union from 1939, Poland was not only allowed but also obliged to make decisions with respect to that

[28] Established by a resolution of the Council of Ministers and comprising such specialists as: Wacław Borowy, Józef Grycz, Witold Suchodolski, Stanisław Lorentz and Stanisław Nahlik. The first revindication missions took place in the Lower Silesia already in 1945. See: St. L o r e n t z, ed. "Walka o dobra kultury" (1970); K. S r o c z y ń s k a: "Rewindykacja dzieł sztuki" in: "Materiały do zagadnień muzealnictwa i konserwatorstwa polskiego", (1968); J. P r u s z y ń s k i: *op.cit.* at 130–147.

[29] More on the subject in: W. K o w a l s k i: "Restytucja dzieł sztuki" (1993).

[30] Director of the National Museum in Warsaw – St. Lorentz, specialists from the Faculty of Architecture of the Polish High Technical School in Warsaw, from the Archive of Old Acts and from the Warsaw University.

[31] Decree from 2 March 1945 on left and abandoned property (Dz.U. Nr 4, Item 45); Decree from 8 March 1946 on left and post-German property (Dz.U. Nr 13, Item 87).

property. The legal qualification was not very precise. "Left property" was the one left by the owners or their successors in result of the war. "Abandoned property" meant property that had not been taken over by organs of administration till the moment of the adoption of the decrees. "Post-German property" comprised the property of the Third Reich and its citizens, with the exception of persons of Polish nationality or of any other nationality persecuted by Germany, and also the property of persons who had collaborated with Germany or had deserted to Germany. The special category was invented for persons sentenced in a legally valid way for war crimes.

As regards art treasures they could have been divided into five groups:

– objects connected with the territory in a permanent way, which should have remained in situ as pertinentia (though sometimes they did not),

– objects deposited by the German authorities in stores and churches,

– objects that found themselves on the newly Polish territories during the retreat of the German forces,

– objects appropriated by the Soviet Army in exercise of the right of seizure (*ius spolii*),

– objects secured and carried out by special troops of the Soviet Army as compensation.

This is of course an ex-post systematisation. In the first period all such objects were treated simply as the property of Germans and the cruelty of the German army, police, administration and civil persons with respect to Poles did not make anybody care specially for such property. It must be added that the Potsdam Agreement resulted in a repatriation (though word "depatriation" would be more suitable) of Poles that had not been earlier deported or exterminated by the Soviet authorities. Also this displacement was effected in conditions much worse than these of the displacement of Germans. The population from Wołyń or the region of Wilna did not feel any connection with the territories on which it had to live after the war. If we also take into consideration the fact that the changes of the political system in Poland in 1944–1948[32] were a mere attempt to copy the Soviet model of government with its ideological intollerance for the national culture[33] and under a permanent control of the Soviet special and secret services then it will be easy to understand that accusing Poland of cultural losses of Silesia, Masuria or Pomerania proves only the lack of historical knowledge or of good faith.

The complexity of situation of several collections can be illustrated by the example of the so called treasure from Grüssau (art treasures from Berlin). The resources of the Royal Library (after 1919 called "Prussian State Library") containing exceptionally rich collection of musical requisits, several manuscripts and cimelia, were brought by the Germans to a few stores in order to avoid the effects of the bombings of Allied forces. A substantial part thereof found its place in the castle Fürstenstein (now: Książ) and in the cloister and the churches of Grüssau (now: Krzeszów).[34] The Polish

[32] See: N. D a v i e s: "Heart of Europe. Short History of Poland", (1984), Chapter 1.1.

[33] See: W.I. L e n i n: "Critical Remarks on the National Question".

[34] The so called treasure from Grüssau comprises only three from 29 parts hidden in cloisters and castles of Saxonia and Silesia. Except musical manuscripts it contained collections of oriental objects, judaica and famous

revindication missions encountered about one thousand cases of this deposit and decided to send it to the Jagiellonian Library in Cracow. The law in force required such elements of the post-German property of a clear provenience to be sent to a Polish scientific library. The Jagiellon Library was the most capable to store the objects like these. The authorities of the German Democratic Republic ignored the circumstances in which the objects had found their way to Cracow and demanded their return as a presumed successor of the rights of the Deutsche Staatsbibliothek in Berlin to the Prussian Library.[35] The requests were repeated in the years 1957–1977 though the Polish searchings of the spoiled art treasures had been discontinued in result of the creation of the GDR and the very mentioning them in scientific publications was prohibited.The political considerations resulted in 1965 in the transmission by Poland of about one hundred thousand bibliographic positions – among them several magasins. In 1977 when the treaty on friendship and cooperation was signed, the first secretary of the Polish United Workers' Party presented the leader of the German communist party (SED) several precious manuscripts of Beethoven, Bach and Mozart in exchange for the promise of a similar act. The latter has never taken place. In the light of the Polish law such donation was really very doubtful, putting aside the political circumstances of the time.It is also very controversial that the resources kept in the Jagiellon Library are neither popularized, nor are there any attempts to determine their status, as if the politicians were not sure of the Polish rights to them.

Nowadays – after the German unification and the signature of the Treaty on Good Neighbourlines and Friendly Cooperation between Poland and Germany[36] the problem of the Prussian Library returns in several press enunciations and diplomatic disputes. The German party uses in this context phrases of "return" (Rückgabe) of the objects, of "illegally kept German cultural heritage" and even its seizure![37]

The character of the collection comprising musical manuscripts, incunabula, old prints and also objects from the Eastern Asia and the XIX-th century press gives the solution of this problem the character of precedent.

First of all the owner of the collection must be determined. In a diplomatic note of the Ministry of Foreign Affairs of the German Democratic Republic of 9 December, 1981 we can find a demand of "return to the lawful owners in the GDR". Such claims were renewed several times, what let us believe that the German party had been familiar with neither with the reasons for which the library in question got the possession of all these objects nor with the respective provisions of the Potsdam Conference, according to which Poland had become the owner of them.

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"*libri picturati*". It is suspected that the parts of the collection hidden in the castles in Legnica and Gauernitz were burnt down by the Soviets.

[35] The symbols on the cases (PSB – Preussische Staatsbibliothek) and call numbers did not give rise to any doubt. There is also no question of treating them as belongings of the territory. according to the international law. On the other hand there is no doubt as to the application to them of the treaty provisions, which gave Poland the ownership of the objects in question. For a different opinion see: S. T u r n e r: "Internationaler Kulturschutz und deutsche Frage", (ed. W. Fiedler), 1991, p. 164–165 and 177–180.

[36] Treaty of 17 June 1991. Polish–German Treaties. Bonn 1991.

[37] See: note 34. The objects are secured, catalogued and made accessible for the public.

"The collection in question became the property of Poland in result of the administration effected by Poland on the former German territories. This administration was effected on the basis of respective solutions of the four great powers having the highest authority on the German territories.(...) Any claims according to which any other subject than Poland itself or Polish institutions is the owner of the collection is devoid of legal bases and contrary to moral obligations that were entered into by Germany in result of the endangering of the existence of the Polish nation and the systematic destruction of its cultural heritage.(...) The collection in question did not and does not avail itself of the protection afforded by Art. 56 of the Hague Regulations[38] as they referred neither to the occupation of Germany in 1945, nor to the Polish administration on the former German territories."- wrote Krzysztof Skubiszewski and Marian Wojciechowski.[39]

The notion of a moral obligation was not an unequivocal term, one should have spoken of the moral duty resulting from the atrocities of the German occupation authorities. We should cite the words of the memorial "The War Losses "from 1945: "The aim of Germany in 1939 was not only to cancel the Polish state but also to decimate the Polish nation. (...) This required fight with the Polish culture which was conducted all the time in a planned and constant way."[40] It is proved[41] that grabbing and destruction of Polish libraries was an organized action. If at the very beginning only the most valuable old prints, incunabula and drawings[42] were seized and "harmful or anti-German"[43] publications simply destroyed, after the supression of the Warsaw insurrection the total destruction of the underground stores of the Krasiński Library took place. The most valuable items from the National Library and the University Library were burnt down by the special "Verbrennungkommando". The losses comprised 80.000 old prints,[44] several thousand incunabula and more than 50.000 manuscripts, musical manuscripts, copperplates and xylographs. The value of these items was much bigger than all objects obtained on the basis of the Potsdam Agreement.

But even if the moral duty may be realised more or less under the condition of the primacy of moral rules over policy, there is still a legal aspect of the problem.

Chapter III of the Polish decree from 8 March 1946 provided for a special procedure of return of property, the place of storage of which was known. In the case of the

[38] See note 10. Such a formulation is also to be found in the IV Hague Convention from 18 October 1907, though it is difficult to determine whether it was a "seizure" (saisie, Beschlagnahme) within the meaning of this convention.

[39] Experts' report from 8 April 1987.

[40] The Archive of the New Acts: item 387/17, text from 1945.

[41] B. B i e ń k o w s k a: "Straty bibliotek..." at 29–36; "Walka o dobra kultury", Vol. I, p.179–444.

[42] Included in the catalogue of the exhibition "Sichergestellte Kunstwerke in der Generalgouvernement", published in Berlin in 1940.

[43] On the "Liste der deutschfündlichen, schaedlichen und unerwueschten polnischen Schrifeitums" edited by the Propaganda Department of the General Governorship we can read the names of Adam Mickiewicz – the most famous of the Polish poets, the Noblist – Henryk Sienkiewicz, Bolesław Prus, and ...Ksawery Pruszyński.

[44] Among them a few hundred medieval parchment codexes, 50.000 volumes of manuscripts, 80.000 old prints, more than 10.000 maps, 100.000 geographical illustrations, the objects from the Library of Załuski, the Rapperswil Library, the musical collection of the Phonographic Institute, the exact quantification of which is impossible, as the stock-books were also destroyed by the fire.

Prussian Library the arguments about keeping in secret the fact of its existence for tens of years are not convincing. The transports of hundreds of cases with items from this library to the castle in Fürstenstein and the cloister in Grüssau were effected by stages and documented by the Germans. The civil claims, that could have been executed, are no longer enforceable in result of extinctive prescription.[46] In result no arguments as to the German ownership of the items in question can be accepted.

Consequently, it must be noticed that the very way of speaking about "return" of the German cultural heritage ignores both facts and law.

Still, the solution of this dilemma would have other aspects. As it has already been put: each nation has right to cultural heritage and the transferance of it to a nation which has worked it out, may be also a subject of a moral duty. But what should be done with the score of the hymn by Haydn – the melody that was the anthem of the Austrian Empire and later – with the text written by Herman von Fallersleben – the Prussian anthem:" Deutschland, Deutschland über alles". Are the authorities of Austria also entitled to it?[47] Should the items from the eastern Asia be divided in such a way, that Chinese treasures are sent to China, Korean ones to Korea (and which of them) and Hebraic ones to Israel? Should the so called "*libri picturati*" from the collection of prince John Maurice de Nassau be transmitted to the Netherlands or maybe to Brasil, as they present Brasilian fauna and flora? What is more interesting, such solutions have been proposed by the officials of the Polish Ministry of Foreign Affairs. Still, they cannot be treated as a proof of the knowledge of the subject.

The Polish-German Treaty on the Good Neighbourlines and the Friendly Cooperation delimits precisely the scope of activities of the parties in the sphere of cultural matters. According to it:

"The Parties will foster a m u t u a l disclosure and return of cultural and historical goods, which were lost, illegally carried out or which found themselves illegally on the territory of the other party". In the light of the aforementioned facts the collection of the Prussian Library cannot be qualified as goods lost, illegally carried out. It cannot be also proved that their remaining in Poland is illegal as such.

In the years 1992–1995 several meetings took place in Bonn, Warsaw and Berlin, their aim being the clarification and solution of matters that could be solved. The exchange of diplomatic notes and of information resulted in the return to Poland of the collection of golden coins and decorations from Poznań, kept in the Fund of the Prussian Heritage. It can be believed that the existence of specialized governmental agencies dealing with the documentation of the war losses[48] will help find several art treasures lost during or in result of the war, but any automatic mechanism of their return or

[45] The revindication in a court procedure of the lost property was possible till the end of 1947 (this period was prolonged by one year) and the prescription periods were at this time generally applied – namely 5 years for movables and 10 years for immovables. See: J. P r u s z y ń s k i: "Prawa do dóbr kultury na Ziemiach Zachodnich i Północnych", 48 *PiP* 10 (1993).

[46] The UNIDROIT project provides the prescription periods of a few tens of years, what is expected to give rise to complications due to domestic regulations of several Europeans countries.

[47] The manuscript of the first Polish anthem – a song "Bogurodzica" (Mother of God) – since the XVII-th century is to be found in Sweden.

[48] See above, note 21.

holding must be the result of negotiations, which will depend on the readiness of Germany to compensate Poland for the cultural losses effected by the Third Reich. It must be remembered that despite all political and social changes, the Federal Republic of Germany is the successor of the latter.

## III.

The Polish aspect of the restitution of cultural goods makes us consider the problem of the cultural heritage of the former eastern Polish territories – incorporated into the Soviet Union and now forming the territory of Belarus, Ukraine and Lithuania.[49] Though the political decision of the four Great Powers, influenced by the Soviet Union and J.V. Stalin personally, was that the territories, that had formed part of the Polish Kingdom and the Grand Duchy of Lithuania for several ages, became a part of the Soviet Union, Poland being compensated on the West, it did not determine the character of the cultural heritage of these territories. The Potsdam Agreement simply sanctioned the state of affairs resulting from the secret agreement from 23 August 1939 (so-called Ribbentrop-Molotow agreement). This agreement provided the total appropriation of the Polish movable and immovable property, without any compensation and with no possibility of vindication.[50] This property, comprising several public museums belonging to the Polish municipalities, churches (or religious movements) and cultural associations, hundreds of residences (palaces and mansion-houses)[51] with rich art collections, several libraries and archives, was devastated or intentionally destroyed for the same reasons as those of Germans. Such activities were accompanied by the extermination of Poles in form of deportations,[52] mass executions[53] and sending to camps of compulsory work for several years. As for the last 40 years the very metioning of the subject was prohibited, leaving alone any searchings, because of the relation of subordination to the Soviet Union, it is only from the catalogues and Soviet publications that we can infer the fact of destruction of the majority of these art treasures.[54]

[49] The border line from the Potsdam agreement coincides with the one from "Ribbentrop–Molotov agreement" (demarcation line) and the border of the territories occupied by Russia in the XVIII and XIX century.

[50] According to the warnings published in Lvov after the entry of the Red Army, the punishment of long-time imprisonment in a camp was provided for people keeping old arms, art treasures and precious objects.

[51] The first more detailed, though incomplete documentation is to be found in: R. A f t a n a z y: "Materiały do dziejów rezydencji", volumes I–XII (with maps and illustrations), (1986–1993).

[52] Called usually "dislocation" or "evacuation". More than 1,5 million people (according to incomplete data) were deported. There were special lists comprising all officers, policemen, public administration, teachers, members of political and youth organizations, landlords, merchants and also workers of the railways and forests.Most of these people died in camps or during transports. See: M. C z a p s k a: "Polacy w ZSRR 1939–1942", (1963).

[53] Except the world-famous crime in Katyń, we find new places of massive executions – Mednoe, Charkov, Lvov, Kiev – in which more than 24 thousand Polish officers, policemen and members of the border forces were killed. See: J.K. Z a w o d n y: "Death in the Forest. The Story of the Katyń Forest Massacre", (1971); L. F i t z g i b b o n: "Crime without Parallel", (1971).

[54] The 4-volume catalogue: "Pamjatniki gradostroitelstwa i architektury Ukrainskoj SSR" (The Architectural Monuments of the Ukrainian Socialist Soviet Republic) edited by Y. A s e e v, (1983–85) does not refer to any of the residences mentioned by R. A f t a n a z y *op. cit.* It does not mention any Roman catholic churches. See: S. L i t a k: "Struktura terytorialna kościoła łacińskiego w Polsce w 1772". (1979).

A report prepared in 1945 and never published stated:

"Revindication of the Polish cultural goods from the eastern regions is an integral part of the solution of the problem of borders with the Soviet Union republics. (...) As the Polish population from these territories gets the right and possibility of unification with its own nation and of settlement in the central Poland or on the newly recovered, prehistorical Polish territories,[55] also the Polish cultural goods – evidencing their long relationships with the Polish nation and forming part of the common cultural heritage should accompany them."[56] The Polish cultural claims referred first of all to items kept in Lvov, inhabited by a Polish majority[57] and very rich in cultural goods. Despite the statement of the vice-premier of the Ukrainian Socialist Soviet Republic confirming "the right of Poles to the items created by them and being for a longer time in their possession, what qualified such items as part of the Polish cultural heritage" and also to documents connected with eminent persons of the Polish history, the facts were less optimistic. Only a part of the rich collection of the National Institution of the Ossoliński – that had been created and endowed to the Polish nation by the founder – were returned to Poland. It was not the case with the Library of the Polish University of John Casimirus (Jan Kazimierz), with the Baworowski Library and the Polish Academy of Sciences (PAU) – in this the endowment of the Dzieduszycki Library, as well as the collection of the Historical Museum of Lvov. The notion "return" is fully justified in this context. Poland neither ceased its existence,[58] nor was in state of war with the Soviet Union what would justify any form of *ius spolii*. We cannot treat seriously the propaganda phrases that the Polish heritage in Lithuania, Volhyn and Belarus was the effect of an "exploitation of the people by the Polish lords". The mutual relations were not of the kind to be found in colonies or occupied territories. What is more, Poland had been the sovereign of these territories before their nations were formed. The argument of Russia that the losses suffered by it justify its rights to all the property of the incorporated territories may not be invoked with respect to Poland. Poland was not in state of war with Russia but was attacked by the latter, nor was Poland responsible for the losses

[55] In repatriation agreements with the Lithuanian SSR and the Belorussian SSR from 9 September 1944 and with the Ukrainian SSR from 22 September 1944 a term "evacuated" is used. See: "Dokumenty i materiały do historii stosunków polsko–radzieckich ", Vol. VIII, at 221ff (1974); W. K o w a l s k i: "Liquidation..." at 84–88.

[56] The mentioned agreements expressly prohibited "carrying out of art treasures and of ancient objects with the exception of these – belonging to the family of an evacuated person".

[57] A draft project of an agreement dealing with the "cultural repatriation" (such an agreement was not signed) provided that: "Art. 2: The Government of the USSR agrees to return Poland historic monuments, artistic and scientific objects and objects from libraries and archives that are on the territory in question and form part of the Polish cultural heritage, not being more strictly connected with the cultural heritage of the Ukrainian, Belorussion and Lithuanian nations. Especially, the Government of the USSR obliges itself to return: 1) the works of the Polish artists and scholars, 2) objects connected with Polish kings, military commanders, statesmen, public officers, activists in the social, scientific and artistic fields, 3) military objects connected in the most strict way with the Polish army and with the sovereignty effected by Poland on the territories in question, 4) the collections of Poles in their totality (...), 5) all objects belonging to the Catholic Church, 6) the monuments of Poles, as objects devoid of interest on the part of the aforementioned nations, 7) national Polish foundations destined by their foundators for the dissemination of the Polish culture, 8) - 10) libraries and archives.

[58] Cf. study L. A n t o n o w i c z: "Tożsamość państwa polskiego w prawie międzynarodowym", 48 *PiP* 10/8–9 (1993); L. G e l b e r g: *Powstanie Polski Ludowej, Problemy prawa międzynarodowego* (1970), at 124..

of the Soviet Union. As the property of Poland is not an enemy one, it cannot be used for the satisfaction of compensation claims.

The long-lasting coexistence on the former eastern Polish territories of different populations produced objects that should be treated as a unifying element instead of the object of disputes.[59] Still, it does not derogate the norms of public international and civil law. Let us cite a contract between Bolesław Orzechowicz and the municipality of Lvov, according to which the latter obtained an extremely rich collection of Polish and western paintings, of weapons, miniatures and artistic products of craftsmen. The collection, placed in the Historical Museum, was to remain in integrity and for all ages. However, an additional clause was inserted which read: "If Lvov in effect of political or social events, no longer has its Polish character, i.e. if it loses its Polish nationality, the donation (...) is to become a property of the National Museum in Cracow, and if the latter is too difficult to be effected, of the Polish state."[60] Though the collection was scattered in result of the Soviet (1939–1941) and German occupation, it does not influence the Polish rights to the existing elements thereof.

The comparison of the cases of the Prussian Library and the donation of Orzechowicz displayes the differences of the two situations. No wonder that there can be no analogies between the two situations, leaving alone any discussion about the dependence of restitutional measures in relations with the two neighbour states. Still one more question must be posed. It concerns the Polish art treasures spoiled by the Germans and later found and seized by the Soviet administration. They partly returned directly[61] or indirectly.[62] It is reasonable to believe that some items still exist and their return should take place.

During a conference organized recently in New York the discussions tended to concentrate on the problem of cultural losses much more than on the question of revindication of spoiled art treasures.

Art treasures, instead of uniting different nations, are still an argument in political games. Maybe the adoption of UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, that is believed to take place soon, will change the legal status of goods that were an object of theft. It is not expected however, in the light of the positions of various states, to be given a retroactive effect. It means that war restitutions require a separate international regulation, except bilateral agreements depending on

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[59] I referred to this problem in a referate presented in Czernihov in 1994 "Zabytki kultury – wspólne dziedzictwo czy przedmiot sporu?"(Historical Monuments – a common heritage or an object of disputes), being convinced that despite all the destructions from the last 50 years, there are still many objects which should be returned to Poland, as e.g. the whole of the Ossolineum collection, the existing parts of other libraries, the whole donations of Orzechowicz and Władysław Łoziński.

[60] Cited after K. B a d e c k i: "Zbiory Bolesława Orzechowicza. Katalog." (1922).

[61] Except the part of the Ossolineum collection and the monuments of king John III Sobieski and Alexander Fredro, the USSR returned to Poland till 1956 ca. 12.000 paintings and parts of the collections from the castle in Goluchów, the castle in Kórnik and the Museum of the Polish Army.

[62] A case deserving a few remarks is connected with the regalia of the Polish kings from the Wettin dynasty. They were seized by the Germans in 1942 and then taken over by the Soviets in 1945 and despite their origin transmitted on 27 November 1958 to ... the GDR. Now the regalia of August III and the Queen Maria Josepha are in Poland.

good faith of the parties.[63] Too little attention is still paid to the rules of cooperation and reciprocity in disclosure, conservation, making public and describing of art treasures that have become the property of other states or simply are in their possession. If we are to build a united Europe, which borders are to be opened for the cultural cooperation to the extent impossible till recently, we must put aside antagonisms and compensate for the war losses just now. This problem should not be left for solution in the undetermined future.

[63] Despite a rich literature of the subject, the question has not been explained yet. The statement of the Russian Minister of Culture from the New York conference does not let believe in any return, due to the losses of the Soviet Union. Still, the Germans claim that the return of the Prussian library should be effected independently of any losses suffered by Poland. The problem is still to be solved. The treaty between Germany and Russia on Good Neighbourhood, Partnership and Cooperation from 13 September 1990 provides: "mutual return of spoiled or illegally seized art treasures to their owners or their successors". The interpretation of term "illegally" is of crucial importance in the light of the occupation of Germany resulting directly from the war and the capitulation.

[64] See: S. G r e w e: *Ein Besatzungsstatut für Deutschland.*, (1948).

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# State Sovereignty as a Guarantee of an Individual's Human Rights – Selected Aspects[1]

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*"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates his duty he establishes a precedent that will reach to himself."*[2]

This article aims to consider the issue of the responsibility of a state toward an individual innocent of any crime within its competent jurisdiction, but who is wanted by another state.[3] Normally state sovereignty is thought of as an impediment to the protection of human rights; criticism of a state's record on human rights abuses is dismissed as an interference in the internal affairs of that state. However, if a victim or potential victim manages to gain entry to another state then he may be able to rely on that latter state's assertion of its sovereignty to safeguard himself. To what extent must a state protect someone within its borders against the demands of another state? The law relating to human rights, aliens, extradition and refugees is pertinent to this study, although the constraints of space may leave some of the more technical questions unbroached.

The issue concerns the individual within one state's borders who is wanted by another state for some reason. Where the person is sought in relation to a crime within the jurisdictional competence of the requesting state, then international criminal law provides through the mechanisms and procedures of extradition law the lawful means to carry out his surrender whilst guaranteeing his human rights. However, states have used a variety of alternative means of rendition where extradition was either impossible or extremely difficult. These alternatives, such as abduction or collusive deportation, lack the safeguards that are included in extradition law for the protection of the individual. In addition to the above, the law relating to refugees may be pertinent if the individual has a well-founded fear of persecution in the requesting state, even if he might also have violated that state's laws.

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[1] The law is stated as at 1 January 1995. Due to constraints of space, no attempt is made here to consider the Schengen Agreement or the Third Pillar of the Treaty of European Union both of which impinge upon territorial sovereignty.

[2] From the Complete Writings of Thomas Paine, vol. 2, at 588 – P. F o n e r, (ed.), 1945. Cited in *United States v Alvarez-Machain*, [1992] U.S. LEXIS 3697 at 56: and see *infra* n113.

[3] In this chapter, the state where the individual seeks protection will be known as the asylum state, while the state that has an interest in him will be known as the requesting state.

## 1. Extradition[4]

It is one of the emerging norms of international human rights law that those guilty of serious crimes should be punished therefor.[5] Indeed, it would be odd if human rights law were to inhibit the effectiveness of international criminal law by which states assist each other in the interests of law enforcement.[6] Human rights ought necessarily to have as a corollary human responsibilities.[7] Thus, extradition is not going to be directly prohibited under human rights conventions. However, it ought to be noted at the outset that extradition law is deemed to be the method of rendition designed to return a fugitive offender in compliance with human rights norms.

Given that the individual in the asylum state is wanted by the requesting state in relation to an offence which the latter state is competent to prosecute, then his surrender should only be granted if the asylum state is satisfied that various safeguards have been met. The individual is innocent of any crime within the asylum state and is, at least in part, under its protection. These safeguards are both internal and external to extradition law, but their operation requires a delicate balancing exercise by the courts to protect the human rights of the fugitive and of the victims of his crime.

One line of protection that is usually forgotten and dismissed as part of the procedural formalities of the extradition process is the principle of double criminality.[8] Nevertheless, double criminality does in one way provide a level of assurance for the fugitive. The principle operates by permitting extradition only where either the elements of the offence under the requesting state's law or the conduct constituting the offence[9] would be deemed a crime in the asylum state. As such, it means that an individual should not be extradited where the asylum state does not treat his behaviour as criminal.[10] Furthermore, another element of extradition procedure that can act to protect the fugitive is the requirement that the requesting state prove a prima facie[11] case. Traditionally, common law states imposed this requirement while civil law states treated it as showing a lack of trust in their criminal justice systems. Given that common law states made the same demand when dealing with requests between themselves, though, the criticism was ill-founded. There are problems with the operation of the requirement,

[4] To talk of the law of extradition as if it were some uniform code operated in an identical manner by all states is a generalisation. Each state has its own domestic legislation and series of international agreements. Nevertheless, because of the interdependent nature of the extradition process and its inherent reciprocity, similar practice between states is observed and the same types of provision are considered by the various domestic courts.

[5] See, for example, Articles 4 and 5, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 *ILM* 1027 & 24 *ILM* 535 (1984).

[6] Vogler, The Scope of Extradition in the Light of the European Convention on Human Rights, at 663 *et seq.* of Matscher & Petzold, *Protecting Human Rights: The European Dimension* (1988).

[7] Bailey: *Human Rights and Responsbilities in Britain and Ireland: a Christian Perspective*, (1988).

[8] Bassiouni: *International Extradition and World Public Order*, at 314–29, (1974); Shearer: *Extradition in International Law*, at 134–49 (1971); and Gilbert: *Aspects of Extradition Law*, at 38–54 (1991).

[9] The *in concreto* and *in abstracto* approaches, respectively.

[10] For example, in some states adultery is a criminal offence while in others it is an offence to leave the state without permission of the relevant authorities.

[11] In the United States the equivalent level of proof is known as probable cause.

but these are more to do with the rules on the admissibility of evidence in the courts of the asylum state, which evidence has been collected in the requesting state. The requirement that a state produce prima facie proof of the case against the fugitive before surrender, however, ought to guarantee that the request is not malicious or a subterfuge and ought to ensure that, if extradited, the fugitive is not detained on remand for years before trial while evidence is collected.

In addition, though, extradition law is permeated with special defences designed to protect the alleged fugitive criminal from being surrendered. For instance, where the fugitive would face the death penalty for his crime if surrendered, but the equivalent offence does not bear such a penalty in the asylum state, then the latter has the discretion to refuse surrender unless guarantees are given concerning the sentence the fugitive will receive. The typical clause to be found in treaties is set out in Article 11 of the European Extradition Convention, 1957.[12]

"If the offence for which extradition is requested is punishable by the death penalty under the law of the requesting Party, and if in respect of such offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out."

Moreover, there is a trend to treat this defence as part of customary international law. In the late 1970's, cases in the Netherlands and in Italy[13] held that the principle of not extraditing someone to face the death penalty could only arise where it was provided for by treaty. However, the French Conseil d'Etat in Fidan[14] in 1987 considered that it would be contrary to French ordre public to extradite in those circumstances, having regard to the Sixth Protocol of the European Convention Human Rights[15] which recommends the abolition of capital punishment. The European Convention on Human Rights and Fundamental Freedoms[16] itself allows for the death penalty in Article 2, but in the Soering Case,[17] de Meyer J was prepared to hold that despite the wording of the Convention, it would be a violation of the fugitive's human rights to surrender him if he might be executed by the requesting state for his crime. Soering is authority that the Death Row phenomenon, whereby convicts can spend years in gaol pending execution, may amount to a violation of Article 3's prohibition on inhuman and degrading treatment. Given that Article 17 of the Organisation on Security and Co-operation in Europe's Copenhagen Document of 1990[18] exhorted states to abolish the

[12] *ETS* 24; 359 *UNTS* 273.

[13] See *Viaux-Peccate v The State of the Netherlands*, District Court of the Hague, 74 *ILR* 456 at 457 (1978), and *Re Cuillier, Ciamborrani and Vallon*, Constitutional Court of Italy, 78 *ILR* 93 (1979).

[14] Errera, [1987] *PUB.LAW* 286.

[15] Concerning the Abolition of the Death Penalty, 5 *EHRR* 167 (1983).

[16] *ETS 5* (1950); hereinafter ECHR.

[17] Series A, Vol. 161, at 41.

[18] Conference on the Human Dimension of the Organisation on Security and Co-operation in Europe, Copenhagen, 1990, 11 *HRLJ* 232 (1990). Buergenthal, *A New Public Order for Europe*, 11 *HRLJ* 217 (1990). (The former Conference on Security and Co-operation in Europe became the Organisation on Security and Co-operation in Europe on 1 January 1995; hereinafter, OSCE).

death penalty, it seems appropriate to prohibit extradition where the requesting state will not agree to guarantee, rather than give mere assurances as at present, to prosecute for a non-capital crime.

Extradition law also provides an exemption for those persons, accused or convicted, requested in relation to military offences.[19] The nature of the defence is to protect the freedom of conscience of the fugitive. Thus, it only extends to those military crimes that are not also common crimes.[20] Article 4 of the French extradition law of 10 March 1927 spells out the distinction clearly.[21]

> *"... que l'extradition est applicable aux infractions «commises par les militaires, marins et assimilés, lorsqu»elles sont punies par la loi française comme infractions de droit commun' ... L'immunité concerne les infractions de la caract, re purement militaire, c'est-à-dire celles qui sont prévues par le code de justice militaire."*

While desertion would be within the exemption, theft and assault, for example, and especially war crimes would not. Once again, the OSCE Copenhagen Document 1990[22] reaffirmed the right of persons to refuse to do military service, revealing the interplay of human rights and international criminal law.

States may also have the duty to refuse extradition where the request is made in bad faith. This obligation is express in the Commonwealth Scheme for the Rendition of Fugitive Offenders.[23] Unfortunately, one of the very few cases to have considered the scope of this protection has probably limited its potential to the point where it is irrelevant as a guarantee of the fugitive's rights. In *Re Osman*[24] the fugitive alleged that the request by Hong Kong was to avoid Malaysia, another Commonwealth state, having to apply for his surrender because of the domestic political implications.[25] However, the Divisional Court held that once it was admitted that Hong Kong had competent jurisdiction to prosecute, then a claim of *mala fides* would fail. Given that in any extradition case the requesting state must first satisfy the asylum state that it is competent to prosecute, it is difficult to envisage any circumstance where a claim of bad faith would succeed, especially since states refuse to disclose diplomatic communications on the ground of public policy.

Bad faith applications can also be dealt with, though, as part of the political offence exemption. More often than not, if a state is trying to obtain the return of a fugitive for duplicitous reasons, that request will be politically motivated. However, before considering the politically motivated request, it is necessary to examine the political

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[19] Even British law has come to accept this exception since 1989 – see s6(1)b) Extradition Act 1989.

[20] *Cf. In re Banegas*, Supreme Federal Court of Brazil, 15 *ILR* 300 (1948), where the defence was applied to a member of the Bolivian armed forces who had put down a coup, killing military personnel and civilians.

[21] See also, Article 4 of the European Extradition Convention, 1957: *supra*, note 12.

[22] *Supra n* 18.

[23] April 1990, LMM(90). See Article 10(3)(b).

[24] Unreported, QBD, CO/252/90, MWC, 20 JUN'90.

[25] N.B. The Hong Kong authorities had investigated the case several years earlier and had decided not to prosecute.

offence exemption itself as the principal guarantor of a fugitive's human rights in extradition law.[26]

The political offence exemption is said to date from the 1830s, with the Franco-Belgian extradition treaty of 1834.[27] Its origin is rooted in the political upheavals taking place throughout Europe in the nineteenth century as the old autocratic empires gave way to liberal democracies. Hiding behind the defence that they did not wish to interfere in the internal struggles of other states, governments would rely on the exemption to protect the adversaries of the government of the requesting state. Of course, by providing succour to the revolutionaries, states did take sides in the affairs of other states.[28] In reality, the exemption provided a guarantee of freedom of thought and political opinion, although whether that is still its essence is open to debate. In the late twentieth century, the main issue surrounding the political offence exemption is how to narrow its scope so as to exclude «terrorism», while preserving its role in the protection of the fugitive's human rights. This difficult balancing exercise will involve a whole range of value-judgements by the judiciary and executive of the asylum state, from considering whether the motivation behind the offence was political, to the nature of the relations between it and the requesting state. Furthermore, it imposes "the common and popular ideals and values of one nation state upon another".[29] Nevertheless, any consideration of how far a person's human rights are protected by state sovereignty must necessarily examine the ambit of the political offence exemption. On the one hand, by excluding terrorists and war criminals from its reach, it enforces human rights by providing no refuge for violators: on the other hand, though, it may safeguard the liberty and physical integrity of persons trying to bring about change from a regime that ignores the human rights of its citizens.

There are three types of recognised political offence: pure political offences, *délits complexes* and *délits connexes*. The first category covers those crimes that only affect the state, such as treason, sedition and *lèse majesté*. *Délits complexes* are the classic political offence, in that the crime for which the fugitive is requested is a common one, for instance murder, but it will have occurred in the context of a political disturbance. It is in this situation that the delicate balance between protecting human rights and enforcing international criminal law has to be achieved. The final type, *délits connexes*, deals with offences which in and of themselves are not political, but which are so closely intertwined with a political offence that the fugitive ought to receive protection. The link with the ultimate political goal of the dissident group may, in fact, be extremely tenuous and, therefore, according the status of a political offender on the fugitive should only be done after the most careful consideration. Given that there are these three types of political offence, when should states refuse the extradition of a fugitive

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[26] See, for example, the works cited *supra* n8, plus W i j n g a e r t: *The Political Offence Exemption to Extradition*, (1980), and S t e i n: *Die Auslieferungsausnahme bei politischen Delikten*, (1983).

[27] 22 B.F.S.P. 223.

[28] W i j n g a e r t, *supra* n26, cites the 1978 example of President Mobutu of Zaire criticising Belgium for granting asylum to some of his adversaries – p. 204, n1071.

[29] B a s s i o u n i: *Ideologically Motivated Offences and the Political Offence Exception in Extradition – A Proposed Juridical Standard for an Unruly Problem*, 19 *De Paul L.Rev.* 217 at 245 (1969).

on the grounds that his offence is of a political character?[30] Traditionally, there are five approaches, each associated with a particular state's practice.

Taking the United Kingdom's understanding first, the so-called incidence test has developed from the seminal case of *In re Castioni*.[31] Castioni was requested for murder after a failed coup in the Swiss canton of Ticino. His own supporters pointed out that there had been no need for the homicide. Nevertheless, the Divisional Court found that the offence had been part of and was in furtherance of a political disturbance and, therefore, that it was political in character. Apart from creating a special case for those fleeing totalitarian regimes during the Cold War,[32] the *Castioni* definition has remained the basis of the United Kingdom's approach to the political offence exemption. Subsequent case law has added various requirements, such as that, the fugitive should be a part of an organised group pressing for change or attempting to overthrow the incumbent government[33] and that the offence must be political *vis-à-vis* the requesting state.[34]

"The crime must be incidental to and form part of a political upheaval, committed by the fugitive offender as part of an organised political party contending for power with the established government .... The individual has to be at odds with the state."[35]

Furthermore, the act must not be too remote from the ultimate goal of the fugitive's parent organisation.

"I would accept ... that the relevant state of mind is not restricted to the intent necessary to constitute the offence with which he is charged, for in the case of none of the extradition crimes can this properly be described as political. The relevant mental element must involve some less immediate object which the accused sought to achieve by doing the physical act. It is unnecessary for the purposes of the present appeal, and would, in my view, be unwise, to attempt to define how remote that object might be. If the accused robbed a bank to obtain funds to support a political party, the object would ... clearly be too remote to constitute a political offence. But

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[30] Practically everyone agrees that mere political motivation is insufficient.

"Which of the two elements is more grave? Is it the political or the common? What constitutes the greatest peril to society, and consequently the greatest interest to repression, the political or the non-political element? If the political right and interest are the more conspicuous, the offence is political. Otherwise it is not political."

Ortolan, *Elements de droit penal*, vol. 1, p. 311 (1875), cited in Defensor-Santiago: *Political Offences in International Law*, (1977).

Although Walsh J in *Finucane v McMahon*, [1990] IR 165, seemed to suggest that motive alone might suffice, Viscount Radcliffe in *Schtraks*, *infra* n34, at 591, Sweet DJ in the Canadian case of *Re State of Wisconsin and Armstrong*, 10 CCC (2d) 271 (1973), the U.S. Court of Appeals in *Escobedo v U.S.*, 623 F.2d 1098 at 1104 (1980), and German courts in the *Baader-Meinhof Group Terrorist Case*, 74 *ILR* 493 (1977), and the *Yugoslav Terrorism Case (No. 2)*, 74 *ILR* 515 (1978), have all held that more was required. See also, Wijngaert and Stein, both *supra* n26.

[31] [1981] 1 QB 149.

[32] *R v Governor of Brixton Prison, ex parte Kolczyński*, [1955] 1 QB 540.

[33] *Schtraks v Government of Israel*, [1964] AC 556.

[34] *Cheng v Governor of Pentonville Prison*, [1973] AC 931.

[35] *R v Governor of Pentonville Prison, ex parte Kakis*, 122 *SOL.JO.*96 (1978), *per* Lord Widgery CJ.

if the accused had killed a dictator in the hope of changing the government of the country, his object would be sufficiently immediate to justify the epithet «political».»[36]

In conclusion with respect to the United Kingdom approach, the offence must further the group's ultimate goal and it must not be too remote therefrom, but there are no guidelines as to how to assess effectiveness and proximity.[37]

The United States approach[38] is also based, in name at least, on *Castioni*.[39] Nevertheless, the U.S. understanding has diverged from that applied in British courts. The U.S. approach has concentrated on the existence of a political disturbance as the *sine qua non* of a political offence. If no disturbance existed at the time of the offence, then no other factors could colour it into a crime of a political character.[40] The corollary is that once such a disturbance has been found to exist, then almost any crime that is part thereof is treated as a political offence. In *Ezeta*,[41] the fugitive had robbed a bank to pay the troops carrying out the ultimately failed coup. Such an offence would be deemed too remote under the United Kingdom interpretation.[42] Moreover, as the focus of the political offence exemption has increasingly become the issue of whether terrorist crimes should be automatically excluded from its ambit, decisions by U.S. courts have grown more and more anomalous, since a background of terrorism in the requesting state will often provide the necessary political disturbance.[43] However, occasionally the courts have imposed a proximity test,[44] although there does seem to be an attitude, also, that it is not for judges to lay down how the fugitive's organisation carries out its campaign.[45] Thus, case law in the United States is in something of a state of flux as it tries to adapt its interpretation of the exemption to meet the problems of the late twentieth century – the human right of the fugitive to express his political opinions cannot be allowed to violate in too gross a manner the human rights of those affected by his crimes.[46]

The French approach has become assimilated to that used by the Swiss courts[47] and, therefore, the two will be considered together. The predominance test, as it is

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[36] Lord Diplock in *Cheng*, *supra* n35, at 945. See also, *Watin v Minist,re Public Fédéral*, 72 *ILR* 614 (Swiss Fed. Trib., 1964): *Folkerts v Public Prosecutor*, 74 *ILR* 498 (Dutch Supreme Court, 1978): and *Prevato v Governor Metropolitan Remand Centre*, (1986), 64 *ALR* 37, (Australian Federal Court).

[37] Terrorists, however, do not fare well before United Kingdom courts – see *Ferrandi v Governor of Brixton Prison*, unreported, 22 JUN '81; *Re Kexel & Tillman's Application for Habeas Corpus*, unreported, 10 *APR* '84.

[38] See Garcia-Mora: *The Nature of Political Offences: A Knotty Problem of Extradition Law*, 48 *VA.L REV.*1226 (1962).

[39] *Supra* n31. See *In re Ezeta*, 62 F.972 (1894).

[40] *Eg. Sindona v Grant*, 619 F.2d 167 (1980).

[41] *Supra* n39.

[42] See Lord Diplock in *Cheng*, *supra* n36.

[43] *In re Doherty*, 599 F.Supp 270 (1984).

[44] *Eain v Wilkes*, 641 F.2d 504 (1981).

[45] See *Quinn v Robinson*, 783 F.2d 776 (1986). The cynic might point out that *Eain*, *supra* n44, concerned a Palestinian accused of a terrorist crime and requested by Israel, while all the cases where the political offence exemption has been successfully pleaded in the last fifteen years involved members of Irish republican groups.

[46] Traditionally only states violate human rights, but several recent UNGA Resolutions on terrorism have referred to the violation of human rights – *eg* UNGA Res.48/122 (1993).

[47] The classic French analysis of the test was laid down in *Re Giovanni Gatti*, [1947] Ann.Dig.145 (Case No.70), but it would only have included pure political offenders.

known, balances the political and common elements of the crime for which the fugitive is requested. As well as incorporating a requirement that the offence be proximate to the ultimate goal, in line with the United Kingdom approach,[48] the predominance test demands that the means used be proportionate to that ultimate goal. If the crime is violent, then the common element will outweigh the political in all but the most extreme cases. Two cases concerning homicide[49] and members of the FLN serve to highlight the important principles involved. In *Ktir v Ministère Public Fédéral*[50] the fugitive had killed another member of the FLN who was allegedly betraying the movement.

"Although ... he acted for political, not personal reasons, it does not, however, follow that the act had a predominantly political character. For this to be the case it is necessary that the murder be the sole means of safeguarding the more important interests of the FLN and of attaining the political aim of that organization."

*Ktir* should be contrasted with *Watin*,[51] where the fugitive had attempted to kill General De Gaulle as part of the FLN's campaign. The Swiss Federal Tribunal held that since De Gaulle embodied the political system of the state, the fugitive might well have thought that his removal would effect a change in that very system – thus, Watin's surrender was refused.

The predominance test has been adopted by courts in other jurisdictions to decide whether alleged terrorists ought to be protected by the exemption. The French *Conseil d'Etat* in *Galdeano, Ramirez & Beiztegui*[52] held that the fugitives' crimes were so grave as to deprive them of a political character. The Irish Supreme Court in *McGlinchey v Wren*[53] took a similar line.

"Modern terrorist violence ... is often the antithesis of what could be regarded as political."

While the protection of the fugitive is dependent on the exercise of discretion by a judge, the Swiss predominance test does seem to pose the appropriate questions in deciding whether a state should refuse extradition in order to guarantee the fugitive's human rights; the more heinous the crime, the less likely it is to be regarded as an acceptable manifestation of the fugitive's political opinions.

An additional element has been interpolated into the analysis of the political offence exemption by the Irish courts. On top of proximity and proportionality,[54] Irish courts

[48] See *In re Nappi*, 19 *ILR*.375 at 376 (1952).

"[The] political character of an offence is predominant only if the offence is in direct relation to the end sought. In order that such a relation may exist, this offence must be a really efficacious method of achieving the end, or constitute an integral part of acts leading thereto, or represent an incident in a general political movement in which the parties have recourse to such methods."

[49] *In re Pavan*, [1927–28] *Ann.Dig*.347 at 349.

"Homicide, assassination and murder, is one of the most heinous crimes. It can only be justified where *no other method* exists of protecting the final rights of humanity."

[50] 34 *ILR* 143 at 144 (1961).

[51] *Supra n*36.

[52] Case note by Errera, [1985] *PUB.LAW* 328.

[53] [1982] *IR* 154 at 159, *per* O'Higgins CJ.

[54] See *McGlinchey v Wren*, *supra n*53, *Shannon v Fanning*, [1984] IR 548 and *Ellis v O'Dea*, [1991] *ILRM* 346 (H.C. & S.C.)

impose a requirement of constitutionality. Its effect was to deem non-political those crimes which were carried out on behalf of an organisation whose ultimate goal threatened the Irish state as much as it sought to end the continued presence of British rule in Northern Ireland. Thus, in *Quinn v Wren*,[55] it was held that since the Irish National Liberation Army wished to impose by force of arms a thirty-two county workers' republic contrary to the Irish Constitution, the fugitive's crime could not be political. In terms of strict logic, there is no reason why an offence that threatens the asylum state should not still be political *vis ... vis* the requesting state, and the constitutionality principle is far from settled in Irish extradition jurisprudence,[56] but at one level it does provide a practical control on the excessive use of the exemption. It may seem that the principle is fairly limited in its application beyond the particular Anglo-Irish milieu, but it reflects the view that the political offence exemption was created in the nineteenth century to protect revolutionaries trying to overthrow the old autocratic empires in order to create liberal-democracies. As such, whenever a fugitive has used means or has adopted values that contradict the fundamental principles of liberal-democracies, then he should not gain the protection of the exemption. An unreported French case[57] decided by the *Cour d'Appel* at Douai allowed the extradition of a fugitive to Italy because an offence would not be deemed political where the object of the accused was to destroy the democratic order and overthrow the economic and social order of a liberal-democratic country which was a party to the European Convention on Human Rights. Given that the aim of this chapter is to define the limits of the protection owed to a person innocent of any crime in the asylum state, then the fact that the requesting state observes accepted human rights norms should have an influence on whether the fugitive's particular crimes qualify as falling within the political offence exemption.

Apart from developing these various approaches, states have taken concerted action to ensure that the exemption is only applied to those who do not violate certain agreed minimum standards. The most usual way of achieving this objective has been for states to exclude certain offences, typically violent ones, from the scope of the exemption. The European Convention on the Suppression of Terrorism[58] is a good example; it excludes absolutely those offences listed in Article 1, such as crimes established by the Hague Convention for the Suppression of the Unlawful Seizure of Aircraft,[59] while giving states a discretion in Article 2 to exclude other crimes such as murder. Similar provisions can be found in the Model American Convention on the Prevention and Punishment of Certain Serious Forms of Violence Jeopardizing

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"[The] offences set forth in the two warrants ... cannot be regarded as political offences ... as they contemplate and involve indiscriminate violence and can be correctly characterised as terrorism."

55 [1985] *ILRM* 410.

56 Compare the following cases:- *Russell v Fanning*, [1988] *ILRM* 333; *Finucane v McMahon*, *supra* n31; *Sloan v Culligan*, [1991] *ILRM* 641 (H.C.) – upheld on appeal to the Supreme Court.

57 *J.C.P. Douai*, 1985 II 20353, 29 Nov'83.

58 *ETS* 90 (1977); hereinafter ECST.

59 16 Dec '70, 10 *ILM* 133 (1971).

Fundamental Rights and Freedoms[60] and various U.S. bills[61] and treaties.[62] Given that sufficient states implement the international agreements in their domestic legislation, then these measures can have some effect in combatting the problem of those who violate human rights being granted protection via the political offence exemption.[63] However, in their blanket exclusion of certain offences, there is the possibility that a fugitive might be extradited where it is not appropriate. Indeed, if the Swiss approach to the scope of the exemption were to be applied correctly, there is no occasion where a fugitive would receive protection who would not having regard to these exclusionary treaties and statutes. Thus, while such agreements allow states to publicly proclaim their intention to limit the exemption, their effect might not be as profound as might have originally been anticipated.

Beyond the political offence exemption *per se*,[64] extradition law has provided safeguards for those persons who have not committed an offence of a political character in the traditional sense, but whose request is tinged with political overtones. Such fugitives should also be able to rely on the sovereign status of the asylum state to guarantee their human rights. The Cold War case of *Kolczynski*[65] illustrates the point. The fugitives were on a Polish fishing trawler when they wrested control of it from the captain and sailed into an English harbour claiming asylum. During the struggle a series of offences against the person had been committed and a request was received from the Polish authorities for the surrender of the fugitives. The Divisional Court held that no extradition should be granted because the crimes were committed as part of an attempt to escape a police-state – there had been no political disturbance, nor any attempt to replace the Polish government, but the court was of the opinion that the request had been made in order to punish the fugitives for having fled the country. The Swiss Federal Tribunal reached a similar result in relation to the hijacking of a Yugoslav plane in the case of *In re Kavic, Bjelanovic and Arsenijevic*.[66]

Nevertheless, there are limits to the scope of this category of political offences which have rejected extradition "if only for reasons of humanity".[67] In the *Sindona* case,[68] the accused was requested for financial crimes in Italy with no political overtones whatsoever. However, he alleged that his extradition was being sought in order that he might be questioned about high-level corruption in Italian government circles. The

[60] Drafted by the Standing Committee on World Order Under Law of the American Bar Association, see Lillich: *Model American Convention*, 77 *AJIL* 662 (1983). It is interesting to note the way the long title of the Convention brings out the idea that no protection should be available to those persons violating "Fundamental Rights and Freedoms".

[61] See, for example, Senate Bill S220 (1983).

[62] See, for example, Anglo-U.S. Supplementary Treaty 1986. The Supplementary Treaty in its final form is to be found in Cm.294, UKTS 6 (1988) and, with comments, in Appendix 1 to the U.S. Senate EXEC.REPT 99–17, accompanying TR.DOC.99–8. It was ratified on 23 December 1986.

[63] See, for example, *Ellis v O'Dea*, *supra* n54.

[64] And the discussion above barely scrapes the surface of this complex issue – see Gilbert, Ch.6, *supra* n8.

[65] *Supra* n32.

[66] 19 *ILR* 371 (1952).

[67] Kolczynski, *supra* n32, at 551 *per* Goddard LCJ.

[68] 619 F.2d 167 (1980).

U.S. agreed to his surrender, refusing to inquire into the motives of the requesting state.[69] In the British case of *Budlong*[70] the fugitives were wanted for burglary by the U.S. authorities – the burglary, though, concerned an attempt by the fugitives to gain access to secret files kept on them by the F.B.I. as members of the Church of Scientology. The Divisional Court allowed their surrender, also refusing to inquire into the political undercurrents in the case. Finally, the Swiss Federal Tribunal in *T v Swiss Federal Prosecutor*[71] rejected claims that the German government was requesting his extradition because he was shipping cobalt to Eastern Europe, something that was then forbidden in the F.R.G. for political reasons.[72] However, the French *Conseil d'Etat* in *Astudillo-Calleja*[73] refused to grant extradition for some thefts, because it viewed the Spanish government's underlying motive as political.[74]

Connected with the last idea of when a person accused of a crime should not be returned to face trial, many international agreements[75] now contain a clause allowing the asylum state to refuse extradition if the fugitive would be persecuted or punished on account of his race, religion, nationality or political opinion.[76] This humanitarian provision emphasises the accepted realisation that the system of international criminal law ought to protect fundamental human rights. Moreover, other commentators[77] have suggested that the question to be answered before surrender is granted is whether the fugitive would receive a fair trial in the requesting state. Procedurally, the establishment of an international criminal court,[78] or a regional one,[79] may also improve the fugitive's chances of a fair trial, as might trial in the asylum state under the *aut dedere, aut judicare* principle.[80] In conclusion, though, it is evident that extradition law is increasingly trying to achieve the delicate balance between, on the one hand, enforcing human responsibilities through the workings of international criminal law and, on the other, of protecting the human rights of the fugitive. Its success depends upon the sovereignty of the asylum state.

External to extradition law, regional human rights agreements also impinge on the extradition process. Using the highly developed case law of the European Convention on Human Rights[81] to illustrate the issues, fugitives might seek to stay extradition by reference to measures prohibiting torture, inhuman and degrading treatment,[82] or ones

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[69] See also, *In the matter of the Extradition of Locatelli*, 468 F.Supp 568 at 574–5 (1979).

[70] *R v Pentonville Prison Governor, ex parte Budlong & Kember*, [1980] 1 *WLR* 1110.

[71] 72 *ILR* 632 (1966).

[72] See also, *Korosi*, [1925–26] *Ann.Dig.*309.

[73] See [1977] Dalloz (J) 695 at 699 *per* M. Genevois: *Commissaire du Gouvernement*:- "*Le but politique est sous-jacent ... la demande d'extradition*".

[74] *Cf. Urchain Cirizar*, [1992] 1 *AJDA* 82.

[75] *Eg.* Article 5 ECST, *supra n*58.

[76] *Folkerts v State Secretary of Justice*, 74 *ILR* 472 at 474 (Dutch Council of State, 1978).

[77] See Wijngaert, *supra n*26, at 203.

[78] International Law Commission Draft Statute for an International Criminal Tribunal, 33 *ILM* 253 (1994). See also Ferencz: *An International Criminal Court* (2 Vols.) (1980).

[79] See the European Parliament's adoption of the Zagari Report, May 1989.

[80] See the *Universal Jurisdiction (Austria) Case*, 28 *ILR* 341 (1958).

[81] *Supra, n*16.

[82] Article 3 ECHR. See also, Article 3 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; 23 *ILM* 1027 (1984) and 24 *ILM* 535 (1985).

guaranteeing a fair trial[83] or a right to family life. A series of cases dating back to *Amekrane v United Kingdom*[84] lay down that it is a breach of the asylum state's obligations under Article 3 to return a person to a country where he might face torture, inhuman and degrading treatment,[85] although there may be a different approach depending upon whether the request is made by another ECHR member state, another "stable democracy" or some third state.[86] The leading overall authority is now the *Soering Case*,[87] where the fugitive was requested by the U.S.A. from the United Kingdom for capital murder. As indicated above,[88] de Meyer J held that sending someone back to face the death penalty violated Article 2, the right to life: however, the rest of the Court held that the case fell to be decided under Article 3, on the ground that excessive time spent on Death Row while appeals were heard might amount to inhuman and degrading treatment. Accepting that the risk of violation was only potential until his trial in Virginia, the Court went on to state that furthermore,

"inherent in the whole of the Convention was a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's human rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe-havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases ....

Nevertheless, the European Court of Human Rights went on to find in favour of Soering.

"In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, *where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country*. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the requesting country, whether under general international law, under the Convention or

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"No State Party shall expel, return (*refouler*), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

[83] Article 6 *ECHR*.

[84] App.5961/72, 16 *YB.ECHR* 356 (1973). See also *Altun v Federal Republic of Germany*, (1983), 5 *EHRR* 611; *App.10292/83 v Spain*, (1984), 6 *EHRR* 146; *App.10479/83 v United Kingdom*, (1984), 6 *EHRR* 373, (the *Kirkwood* case).

[85] *Amekrane* was a friendly settlement so it laid down no binding precedents, but it put an end to the argument that a claim based on rights violated outside member states of the ECHR would automatically be manifestly ill-founded.

[86] See *App.9012/80, X v Switzerland*, 24 D+R 205 (1980).

[87] *Supra* n17. See also, *Kindler v Canada*, UN HRC'ttee, 14 *HRLJ* 307 (1993).

[88] See text at *supra* n17.

otherwise. In so far as any liability under the Convention is or may be incurred, it is the liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[89]

*Soering* builds on the already well-established, if previously untested, principles relating to extradition and Article 3. The Court has decided that in future the asylum state must have regard to potential violations of ECHR guarantees by the authorities in the requesting state, regardless of whether the latter is a party to the ECHR.

The jurisprudence of the ECHR organs with regard to Articles 2 and 3 would appear to be the following:-

1) If the requesting state is a party to the ECHR then, *prima facie*, extradition should not be prohibited.[90]

2) If the requesting state is not a member of the Council of Europe, but is another "Western democracy", then refusal of extradition should be rare, although that practice may be changing.[91]

3) With regard to any other state, much would seem to depend on whether there was an obligation to extradite under some international agreement, such as a bilateral treaty. If an extradition treaty has been concluded, then the fugitive should be protected by the safeguards therein. If no treaty exists, then the requesting state could well have to guarantee Convention rights to the applicant before extradition would be granted.[92]

The European Court and Commission of Human Rights have not dealt as fully with the other Convention rights. In relation to the right to a fair trial, the Commission in *App.8299/78, X & Y v Ireland*[93] and the Court in *Soering*[94] have both held *obiter* that in appropriate circumstances a potential violation of Article 6 in the requesting state might indicate that extradition should not be granted.

"The right to a fair trial in criminal proceedings, ..., holds a prominent place in a democratic society .... The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a *flagrant* denial of a fair trial in the requesting country."[95]

Whilst often pleaded by applicants, the Commission has always held that the right to a family life should always be subservient to the duty to enforce criminal laws.

**Summary:-** In conclusion, extradition is designed to allow the proper return of a fugitive criminal to face trial or to serve a sentence. Such a mechanism is an essential part of the system of dealing with individuals within international law. However, the

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[89] *Supra n*17, at paras.89 and 91.

[90] *Altun, supra n*84.

[91] Compare *App.10292/83 v Spain* and *Kirkwood*, both *supra n*84, with *Soering, supra n*17.

[92] *App.9012/80, X v Switzerland*, 24 D+R 205 (in English at 213).

[93] 24 *YB.ECHR* 132 at 174 (1981).

[94] *Supra n*17.

[95] *Soering, supra n*17, at para.113.

[96] Resolution of 24 June 1960, 15 U.N.S.C.O.R. SPECIAL SUPP. (Jan-Dec 1960) Doc.S/4349. The Eichmann trial is to be found at 36 *ILR*.5 (1961). See also, *The Savarkar Case*, Scott, Hague Court Reports p.275 (1911), and *The Lawler Incident*, cited in MCNAIR's *International Law Opinions*, vol.1, p.78 (1956).

other aspect of the individual in international law that must complement the extradition laws is the protection of human rights. Extradition law has internal safeguards and is subject to external constraints that seek to ensure that having found refuge in the asylum state, the fugitive is only to be returned to the requesting state if those protections on his fundamental rights are satisfied. The sovereignty of the asylum state means that his position is to be investigated before being returned.

## 2. Alternative Methods of Rendition

While extradition takes primacy as the preferred method of rendition for fugitive offenders, alternative means have been used where extradition was impossible or even where it might have proved ineffective. The lawfulness of such other means is questionable and it brings to the fore from the outset the issue of whether abduction or collusive deportation breach state sovereignty and/or the fugitive's human rights.

With respect to abduction, where a state authorises or permits its agents to forcibly take an individual from another state, then the latter state's sovereignty is undoubtedly breached. The fact that when Adolf Eichmann was abducted from Argentina to Israel the United Nations Security Council had to intervene in the subsequent international dispute,[96] indicates the manifest illegality[97] of this type of action. Regardless, though, of the position in international law, common law and civil law states have traditionally held that despite the means used to bring the fugitive before the courts, his trial for the relevant offences is justified. Not only have the fugitive's rights been infringed by the method of return, even if it is only to the extent that the safeguards of extradition have not been available, but the state, of which the courts are a part, has been seen to condone a violation of international law:

The United States has, with a few brief interruptions, followed the traditional approach and continues to do so.

In civil law states the following view has been taken in the past – once before the court, the fugitive is subject to its jurisdiction regardless of the means used to achieve that end;[98] however, a 1991 South African case, discussed below, suggests a change of approach.

English courts have, until recently, generally[99] ignored the breach of international law and have said that the fugitive's rights can be satisfied through a civil action against the kidnappers and that it is for the state whose sovereignty has been violated to seek the extradition of those responsible.[100] The fugitive was always prosecuted,

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[97] See S h e a r e r, *supra* n8.

[98] See *Geldof v Meulemeister and Steffen*, 31 *ILR* 385 (Belg. Cr de Cass.); *Re Argoud*, 45 *ILR* 90 (Fr. Cr de Cass.); *Barbie*, 78 *ILR* 125 (Fr. Cr de Cass.).

[99] *Cf. R v Garrett, ex parte Sharf*, (1917), 86 *LJ(KB)* 894 at 898; aff'd [1917] 2 KB 99 – where Viscount Reading CJ held *obiter* that an "arrest" on the high seas would raise some interesting questions.

[100] See *Ex parte Susannah Scott*, 109 ER 166 (1829); *R v O/C Depot Battalion, RASC, Colchester, ex parte Elliott*, [1949] 1 All ER 373. See also from other common law jurisdictions, *Miyanda v The Attorney-General*, (1992) 88 *ILR*.263 (Zambian S.Ct); *Re Hartnett and The Queen*, (1973), 14 CCC(2d) 169 (Ont.HCJ). NB It may be that in some cases the state where the fugitive was residing will assist with the kidnap – *Bennett, infra* n128.

apart from one case where the court held that it ought to divest itself of jurisdiction because extradition had been possible in the circumstances.[101] However, a later case cast serious doubt on the correctness of this decision.[102] This position represented the law until 1994.

The *Ker-Frisbie*[103] doctrine, as it was known, laid down that if the fugitive was before a competent U.S. court then the means used to obtain his presence were irrelevant – a civil action might lie against the kidnappers and the violated state could seek their extradition,[104] but it was no defence to the instant prosecution. However, inroads were made over the years into the absolute nature of this stance. In 1974 the Court of Appeals for the Second Circuit decided the case of *United States v Toscanino.*[105] The accused alleged that United States Drug Enforcement Agency officials had arranged for him to be kidnapped from Uruguay and for him then to be tortured in Brazil before being drugged and placed on a «plane to the U.S.A. The Court held that if those facts were true,[106] then on the basis of the breaches of U.S. Constitution and because the U.S. had violated two treaties to which it and Uruguay were party, then its jurisdiction ought to be vitiated. However, it rejected the argument that because there was an extant U.S.-Uruguayan extradition treaty that no prosecution ought to have taken place. The Court of Appeals, though recognised that the abduction violated Uruguayan sovereignty contrary to the U.N. Charter and the Charter of the Organisation of American States and that, as such, no prosecution should have occurred. Subsequently, however, *Toscanino* was consistently distinguished and rejected.[107] Nevertheless, other cases have taken a different route to respond to the violation of sovereignty and to protect the accused's fundamental rights. In *Jaffe v Smith,*[108] the court acknowledged, *obiter,* that an accused might be able to allege at his subsequent trial a violation of an applicable extradition treaty if he could prove governmental involvement; it is pertinent that the Canadian Government protested at Jaffe's abduction. This view initially received judicial endorsement in the related cases of *United States of America v Humberto Alvarez-Machain*[109] and *United States of America v Rene Martin Verdugo-Urquidez*[110] as well. Both Machain and Verdugo had been abducted from Mexico in relation to an investigation into the torture and murder of a U.S. DEA official and had been brought

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[101] *R v Bow Street Magistrates, ex parte Mackeson,* (1981), 75 Cr.App.R 24. See also the New Zealand decision of *R v Hartley,* [1978] 2 *NZLR* 199.

[102] *R v Plymouth Magistrates Court et al., ex parte Driver,* [1985] 2 All ER 681 – see especially the judgment of Stephen Brown LJ at 690-1.

[103] *Ker v Illinois,* 119 US 436 (1886): *Frisbie v Collins,* 342 US 519 (1952).

[104] See *Kear v Hilton,* 699 F.2d 181 (1983).

[105] 500 F.2d 267 (1974).

[106] The District Court to which the case was remanded rejected Toscanino's allegations about his treatment – 398 F.Supp 916 (1975).

[107] See *U.S., ex rel.Lujan v Gengler,* 510 F.2d 62 (1975); *U.S. v Lira,* 515 F.2d 68 (1975); *U.S. v Herrera,* 504 F.2d 859 (1974); *Matta-Ballesteros v Henman,* 895 F.2d 255, 896 F.2d 255 (1990).

[108] 825 F.2d 304 at 307–8 (1987); see also Buser, *The Jaffe Case and the Use of International Kidnapping as an Alternative to Extradition,* 14 *GaJICL* 357 (1984).

[109] 946 F.2d 1466 (1991). See also, 745 F.Supp.599 (1990).

[110] 939 F.2d 1341 (1991).

to the U.S.A. There was an extradition treaty in force between the U.S. and Mexico.[111] The Court of Appeals for the Ninth Circuit held that if the Mexican Government had protested about the kidnapping of each man, then jurisdiction was vitiated and the appropriate reparation was repatriation of the two accuseds to Mexico. An accused might successfully plead a breach of an international extradition agreement where the violated state made a protest. Such a stance by the Court of Appeals reflected the fact that state sovereignty has been breached by the taking of a person from within a state where he has committed no offence and the proper remedy was to restore the *status quo ante*, incidentally correcting the infringement of abductee's human rights – it also recognises that extradition is the accepted method of international rendition and that the use of an alternative where extradition is available ignores the procedural guarantees it provides. However, the U.S. Supreme Court in June 1992 reversed the Court of Appeals' decisions in *Machain* and *Verdugo*[112] by a six to three majority,[113] Rehnquist CJ giving the prevailing judgment of the Court. The Supreme Court held that the decision in *Ker* governed the jurisdiction of trial courts – if the accused is before the court, then the means by which his presence was acquired is irrelevant to the standing of those proceedings. It is almost as if extradition laws and treaties are a subset of the *Ker* rule. The majority's reasoning, however, lacks persuasiveness. Rehnquist CJ starts by rejecting any claim that the U.S.-Mexican treaty expressly prohibits forcible abduction, as though two states negotiating an international agreement would make provision for the possible violation by one of the parties of the territorial sovereignty of the other, contrary to customary international law and antithetic to the very instrument under discussion. The judgment even refers to the 1906 *Martinez* incident,[114] ignoring the fact that both *Ker* and *Martinez* were cases of private individuals abducting fugitives rather than federal agents as in *Machain*.[115] Furthermore, the majority went on to reject the idea that customary international law might give rise to an implied provision in the extradition treaty vitiating jurisdiction where the fugitive had been kidnapped by state officials from another sovereign state.

> "In a broad sense, most international agreements have the common purpose of safeguarding the sovereignty of signatory nations, in that they seek to further peaceful relations between nations. This, however, does not mean that the violation of any principle of international law constitutes a violation of this particular treaty."[116]

In fact, the Supreme Court ducked the issue and held that the return of a fugitive who had been abducted and where the violated state protested, as Mexico had done,

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[111] Given that both men were Mexican nationals, though, there was no real possibility that Mexico would extradite them to the U.S.A. if a request had been made.

[112] *Supra nn*109 and 110.

[113] *United States v Alvarez-Machain*, No.91–712, [1992] U.S. LEXIS 3679; 112 S.Ct 2188, 119 L.Ed 2d 441. By the time the proofs were sent, the correct cite for this case was 504 US 655 (1995) – I am grateful to the editors for letting me add this reference at such a late stage.

[114] *Supra n*113, at 19.

[115] See dissent at 46 and n.30 of the judgment at 51; *supra n*113.

[116] *Supra n*113, at n.14 of the judgment at 24.

was a matter not for the courts, but rather the Executive which had instigated and perpetrated the breach of international law in the first place.

The dissent of Stevens J[117] in *Machain*[118] is instructive. It adopts the common-sense position that where two states have concluded an international agreement for the return of fugitive offenders, then no such person should return to face trial by the unilateral action of one party. An extradition treaty must be exclusive, otherwise the inter-state procedural and the fugitive's human rights guarantees are "little more than verbiage".[119] Stevens J went on to show that it was the accepted view of leading international law commentators that if the violated state protested, then the proceedings to prosecute the abductee ought not to take place.[120] The crimes with which Machain was charged were serious and deserving of punishment, but it did not justify U.S. officials snatching him from Mexico.

"It is ironic that the United States has attempted to justify its unilateral action based on the kidnaping, torture, and murder of a federal agent by authorizing the kidnaping of respondent, for which the American law enforcement agents who participated have now been charged by Mexico. This goes to my earlier point that extradition treaties promote harmonious relations by providing for the orderly surrender of a person by one State to another, and without such treaties, resort to force often followed."[121]

One immediate consequence of the *Machain* decision was that Mexico withdrew its co-operation with the U.S. to counter drug trafficking until the U.S. agreed to revise the relevant legal instruments.[122] However, it is the dissent by Brandeis J in *Olmstead v United States*[123] that best generally describes why human rights are better protected if, *inter alia*, extradition treaties are utilised rather than kidnap.

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

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[117] Joined by Blackmun and O'Connor JJ.

[118] *Supra n*113, at 27.

[119] *Supra n*113, at 31.

[120] See Lauterpacht: *Oppenheeim's Inteernational Law*, vol. 1, at 295 (8th ed.; 1955): Henkin: *A Decent Respect to the Opinions of Mankind*, 25 *John Marshall LJ* 215 at 231 (1992): American Law Institute, *Restatement of the Law of Foreign Relations of the United States* §432 and Comment c. (3d, 1986).

[121] *Supra n*113, at n.12 at 34.

[122] See The Guardian p.8, 17 June'92, and p.11, 19 June'92. Ironically, on remand before the trial court in California, the case against Machain failed for lack of evidence.

[123] 277 US 438 at 485 (1928), cited in *Machain, supra n*113, at n.33 at 54.

In one sense, the majority's decision in *Machain* may hasten the demise of state-sponsored kidnaps of alleged international criminals, for it has brought to the fore this attempt to authorise the "manifestly illegal".[124]

The South African approach to illegal rendition had followed the English common law and held that the means used to effect the fugitive's return were no bar to the jurisdiction of the courts.[125] However, in *The State v Ebrahim*,[126] the Supreme Court, relying on Roman Law, Roman-Dutch Law of the 16th–18th centuries and *Toscanino*,[127] heldthat under both legal systems illegal rendition had rendered the courts incompetent and that *Toscanino* reflected the proper rule.

In *Bennett v Horseferry Road Magistrates' Court*,[128] the accused's claim was that he had been kidnapped in South Africa and, as a result of collusion between the South African authorities and the English police, forcibly returned to England without recourse to lawful extradition procedures.[129] The House of Lords held that the English High Court has authority to inquire as to the means adopted to bring the fugitive before it – disregard of extradition procedures, however, is a prerequisite to the court staying the prosecution as an abuse of process and ordering the fugitive's release.

> "If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law."[130]

Not only does abduction breach international law according to the House of Lords, it is a violation of the human rights of the fugitive, sufficient to vitiate the jurisdiction of the courts in such circumstances.[131] The fact that the fugitive was under the sovereign protection of the asylum state, therefore, provides certain basic guarantees which ought to be respected by all other states according to English law.

A more difficult case is presented by the use of collusive deportation as an alternative to extradition. The problem is that no violation of state sovereignty will have occurred. Both states will have agreed to use deportation to return the fugitive. Furthermore, where extradition is impossible, it may be that it is legitimate to deport an individual to

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[124] The U.S. Department of Justice held that *Machain* should not be seen as a green light for international kidnapping of fugitives. Moreover, the Inter-American Juridical Committee gave a legal opinion holding that the kidnap was a serious violation of public international law – 32 *ILM* 277 (1993).

[125] *Abrahams v Minister of Justice*, [1963] S.Afr.L Rep.542; *The State v Heymann and Dinzaka*, [1966] S.Afr.L Rep.599.

[126] 31 *ILM* 888 (1992)

[127] *Supra n*105.

[128] [1994] 1 AC 42, [1993] 3 All ER 138.

[129] *R v Commissioner for the Police of the Metropolis, ex parte Bennett*, QBD, 1 November 1994, unreported, per Rose LJ.

[130] *Bennett, supra n*128, at 61H and 150, respectively.

[131] The limit on *Bennett, supra n*128, is that it prevents the trial, but not the issuing of a warrant for the fugitive's arrest once back in the United Kingdom – *R v Commissioner of Police for the Metropolis, ex parte Bennett, supra n*129.

a state where he may face trial. The issue is whether it is sufficient a violation of the fugitive's human rights to deport him[132] to face trial where extradition is possible that the court should divest itself of jurisdiction. Earlier cases seemed to take the position that it was the prerogative of the state to admit and permit to remain any non-national, subject to the obligation not to return a qualifying refugee to a state where he might be persecuted, and that, therefore, the courts would not look behind a valid deportation order unless the individual could show *mala fides* on the part of the authorities.[133] Sometimes, however, the actions of the deporting government so offended public opinion that the practice was not repeated.[134] Subsequent decisions, though, have revealed an increasing willingness to question the use of deportation where extradition is available.[135] The Superior Administrative Court of Münster in the *Residence Prohibition Order case (No.2)*[136] refused to order the fugitive's expulsion because he would not be guaranteed the rights inherent in extradition. The Federal Court of Australia also dealt with the issue in *Schlieske*.[137] Extradition to the F.R.G. having twice failed, the Australian government sought to deport Schlieske. While accepting that it was permissible to deport a person who would face criminal charges in the country to which he was being sent, the court went on to hold that deportation for the sole purpose of bringing a person to justice in a foreign state was outside the purposes of the relevant statute: disguised extradition was not permissible.

"The relevant principle is that the power to deport a prohibited non-citizen, while wide and unqualified by any statutory provision, must be exercised for the purposes of the Migration Act, that is to say, in aid of the sovereign right of this country to determine who shall be permitted to enter it and who should be excluded therefrom ... [It] is plainly extraneous to the decision to deport a person, and to deport that person to a particular country, that the person is wanted by the government of that country upon criminal charges. It is not one of the purposes of the Migration Act to aid foreign powers to bring fugitives to justice. There is a distinct head of constitutional authority – namely the external affairs power – and a distinct mechanism – the extradition legislation – under which that object may be pursued."

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[132] Exclusion of the fugitive before he enters the asylum state raises separate questions since in theory until he enters the state it owes him no duties, though see discussion of the principle of *non-refoulement* in §3. below.

[133] See *Sitaram v Superintendent Rangoon Central Jail*, 28 *ILR* 313 (1957); *R v Brixton Prison Governor, ex parte Soblen*, [1962] 3 All ER 641; *Wallace v The State of Netherlands*, [1963] *Ned.Jur.* No.509, cited in S h e a r e r, *supra n*8, at 82; *State of Japan v Mitsuyo Kono and Takao Kono*, 59 *ILR* 472 (1971). The U.S. Attorney-General designated the United Kingdom as the country to which Joseph Doherty should be deported in June 1988 because he was wanted there to serve a sentence for murder. However, the Court of Appeals overturned the designation because it had been influenced by foreign policy considerations – *Doherty v U.S. Dep't of Justice, I.N.S.*, 908 F.2d 1108 at 1121 (1990); reversed on other grounds by the U.S. Supreme Court in *I.N.S. v Doherty*, 502 US 314 (1992).

[134] With respect to the *Soblen* case, *supra n*133, both the Israeli and the United Kingdom governments lost face. See the Israeli Ministerial Report, 2 *ILM* 419 (1963), and the comments in the House of Commons by Paget MP, 28 Nov'62, 662 H.C.DEB.445–46, cited in Thornberry, *Dr Soblen and the Alien Law of the United Kingdom*, 12 *ICLQ* 465, *n*91 (1963). The echoes of *Soblen* meant that the United Kingdom government used extradition in the case of *Cheng*, *supra n*34.

[135] Some of the following material is taken from the author's work on extradition – *op.cit.*, *supra n*8, at 200–202.

[136] 61 *ILR* 433 (1968).

[137] *Schlieske v Minister for Immigration and Ethnic Affairs*, (1988), 84 *ALR* 719 at 729.

The Austrian Law on Extradition and Mutual Assistance in Criminal Matters goes so far as to prohibit the use of deportation as an alternative to extradition.[138] The most forthright judicial statement against disguised extradition, however, is to be found, not in the decision of some municipal court, but in the decision of the European Court of Human Rights in *Bozano v France*.[139] The Italian government's extradition request for Bozano had been rejected by the French courts on the ground of *ordre public*; such a finding was binding on the French government. However, since extradition was impossible, the French authorities agreed to deport him to Switzerland from where his extradition to Italy would present no problem. Having been sent to Italy by these means, he appealed to the European Court of Human Rights, partly on the basis that his rights under Article 5(1)(f) had been violated. The Court held that actions to deport must be lawful having regard to domestic law if Article 5(1)(f) is to be satisfied.[140] Moreover, the arbitrariness of deportation, lacking as it does, the safeguards and proper procedures of extradition, also renders it contrary to the European Convention on Human Rights. Finally, the Court held that disguised extradition, *per se*, was unlawful under Article 5(1)(f), because it meant that the fugitive was not detained "with a view to deportation".[141] Thus, within the Council of Europe it now seems to be the case that if the fugitive is deported for the sole purpose of effecting a *de facto* extradition, then such deportation will violate Article 5(1)(f). The Court has effectively held that *de facto* extradition is not a lawful use of the powers of deportation. It remains to be seen whether the governments of the member states will, in practice, abide by this ruling.

**Summary:** So far it has been seen that there are no universally applied controls on *de facto* extraditions, whether in the asylum state or on return to the requesting state. As an alternative to extradition, abduction must be rejected,[142] but it is very unlikely that states will ever completely cease to use deportation, despite *Bozano*. Opinion seems to be divided as to whether deportation is something that should be officially rejected or whether a regulated system of expulsion, providing quasi-extradition safeguards, should be imposed.

As Bassiouni has noted, the law enforcement authorities will flout the law to obtain jurisdiction in some instances.

> "This creates, of course, serious problems for the integrity of the legal process, even though it may be a manifestation of the frustration of law enforcement authorities with their inability to make the extradition system work with the speed and satisfaction they desire."[143]

Indeed, the number of instances may be increasing.[144]

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[138] See M u r p h y: *Punishing International Terrorists*, at 88 (1985).

[139] Series A, No.111, 9 *EHRR* 297 (1986).

[140] *Supra n*139, paras.53–58.

[141] *Supra n*139, at para.60.

[142] Pregent, *Presidential Authority to Displace Customary International Law*, 129 *MLR* 77 (1990). *Cf.* Liput, *Legal Issues Surrounding the Capture, Trial and Conviction of Manuel Noriega*, [1992]:12 *NY State Bar Jl* 22.

[143] B a s s i o u n i: *International Extradition: United States Law and Practice*, vol. V, §§ 3–5, cited in MURPHY, *supra n*139, 72.

[144] M u r p h y, *supra n*138, at 93.

Thus, extradition on its own is insufficient and inadequate for the enforcement of international criminal law. As was argued by Judge Schermers, dissenting in the Commission's the decision in *Bozano*,[145] the extradition process may sometimes be too formal. Among states recognising the same standards of justice, it may be that the aim should be to ensure that the fugitive is returned to face trial or serve his sentence, even if the traditional extradition procedures are not followed. Rather than react with indignation as successive fugitives are subjected to informal rendition procedures, it would be better to develop rules of practice for returning fugitives by means other than extradition. They should only be available *in extremis* and never where the extradition merely means reasonable delay, not escape for the fugitive. To back up this procedure, the fugitive should be able to use any inappropriate use of this less formal system as a defence at the trial. Any other method of rendition not sanctioned by these new rules would automatically divest the court of jurisdiction. Evans and Murphy suggested the following approach in 1978.

"A multilateral convention should establish a common standard regarding the use of exclusion and expulsion for purposes of international rendition with procedural safeguards for the interests of the offender as well as those of the states involved."[146]

However, two points should be noted. First, the very popularity of other methods of rendition is due to their current informality. If a multilateral convention were to regularise informal rendition, these new, less protective procedures might well be seen as an acceptable replacement for the system of extradition laws, and yet they might be circumvented themselves because they would have lost their most appealing feature, their informality. Secondly, Gordon[147] has produced evidence that deportation and expulsion are not that much more speedy or effective than extradition, anyway, countering the popular belief to the contrary;[148] however, conclusive proof one way or the other is difficult to obtain.

In conclusion, changes must be made in the field of informal rendition, but the direction of the changes is unclear. Further, there is an inertia among states to regulate an informal system designed to expedite state interests at the expense of the fugitive's human rights.

## 3. Refugees[149]

The foregoing part of this study has considered the situation where human rights considerations have prevented the return of an individual, accused or convicted of a crime, to a state which is competent to prosecute or to impose and carry out a sentence.

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[145] *Supra n*139, at 326–27.

[146] Evans & Murphy: *Legal Aspects of International Terrorism*, at 508–9 (1978).

[147] See Evans: *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, [1980] *PASIL* 274 at 284–86.

[148] Evans, *supra n*147.

[149] In a work looking at the "legal" assault on human rights, the treatment of refugees by western industrialised states requires separate consideration to bring out the full extent of the breaches of the spirit and intendment of

This final section will look at the situation where international criminal law properly denies protection where it would ordinarily be granted. A refugee, to meet the requirements of international law, must cross an international boundary[150] – the protection offered is vested in and is dependent upon the sovereignty of the asylum state. Refugee status is the classic example of state boundaries as a guarantee of human rights. However, in the same way that international criminal law should be seen as a necessary adjunct to the effective implementation of human rights, human rights protection should not be offered to those who have violated the common standards of humanity – whether the exceptions in the 1951 Convention[151] go further than is necessary is beyond the scope of this short study.[152]

A refugee is an individual who is outside the country of his nationality and who is unwilling or unable to return there

"... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[153]

Given that he qualifies as a refugee, then under Article 33(1) he has the right of *non-refoulement* if he can prove that his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. It is obvious that a person in such a position ought to be accorded all protection: state boundaries guarantee his human rights. However, refugee status and the right of *non-refoulement* can be withheld from applicants with respect to whom there are serious grounds for believing that they have committed war crimes, serious non-political offences or that they have been guilty of acts contrary to the purposes of the United Nations.[154] Article 33(2) allows a state to *refoule* an Article 1 refugee to a state where his life or freedom would be threatened if there are reasonable grounds for believing that he represents a danger to the asylum state. In *Doherty*,[155] the U.S. Supreme Court ducked the issue, but Scalia J, in his dissenting judgment,[156] was prepared to find that

"[irrespective] of foreign policy concerns and regardless of whether Doherty's crimes were «political», it was within the Attorney-General's discretion to conclude that Doherty is a sufficiently unsavory character not to be granted asylum in this country."

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the 1951 Convention Relating to the Status of Refugees (*infra* n150). Reference should be made to Goodwin-Gill: *The Refugee in International Law*, 1983; Martin: The New Asylum Seekers (1988); Martin: *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 *U.Penn L Rev.*1247 (1990); Hathaway: *The New Asylum Seekers*, (1991).

150 Article 1 of the Convention Relating to the Status of Refugees 1951, 189 *UNTS* 150, and the 1967 Protocol thereto, 606 *UNTS* 267, speaks of a refugee as someone "outside" the country of his nationality.

151 *Supra* n150.

152 For detailed consideration, see Hathaway and Goodwin-Gill, *supra* n149.

153 Article 1, *supra* n150.

154 Article 1F, *supra* n150.

155 *Supra* n133.

156 In which he was joined by Stevens and Souter JJ.

The case of *Georg K v Ministry of the Interior*[157] involved an Italian national who had previously been convicted by an Austrian court of carrying out a bombing campaign in the South Tyrol in order to reintegrate that region into Austria; his application to the Austrian Administrative Court for asylum was rejected under Article 1F(c) because his activities had affected the relations between Austria and Italy and were, thus, contrary to the United Nations Charter. *Georg K* needs to be contrasted, though, with the case of *Antonin L v F.R.G.*[158] where Czech hijackers were allowed to seek asylum after they had served their sentence – the motive for the hijack had been to escape the then repressive regime in Czechoslovakia. Moreover, the French *Conseil d'Etat* in *Berechiartua-Echarri*[159] held that a qualifying refugee should never be extradited to a country where he might face persecution, even when requested for a non-political offence.

In conclusion, refugee status and *non-refoulement* must never prevent the proper prosecution of crimes, but that ought to be set into the framework of human rights protection. There is a delicate balance to be achieved and it is for the asylum state to make the appropriate decision having regard to international criminal law and the international norms of human rights law. Once within the borders of the asylum state, the individual should receive full protection from persecution, but that does not entail that it should ignore his previous conduct – the integrity of the international system of protection has to be upheld and it will be compromised if serious non-political crimes are overlooked.

## 4. Conclusion

The 1990s have seen remarkable changes in Europe. The Iron Curtain no longer exists as a barrier to the effective monitoring of human rights implementation. The argument that human rights are an internal affair no longer holds water. That should mean that state borders will not be used as an excuse for not respecting human rights. However, those same borders can be used to ensure respect for human rights as well, as this article has sought to show. Refugee law has always recognised this, but extradition law and judicial rejection of inappropriate alternative forms of rendition bring to the fore the responsibility of states to guarantee human rights to all people within their borders.

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[157] 71 *ILR* 284.

[158] 80 *ILR* 673 (1979).

[159] N#.85.234, 1 Apr'88 – to be published in *Recueil Lebon*.

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# Comparative Study of Internal Legal Regulations of Council of Europe Member States Concerning the Protection of National Minorities

## (With special attention to the relevant legal regulation of the Slovak Republic)

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## Preliminary Note

The main purpose of this study is to give a comparative overview of the internal legal regulations of the Council of Europe states (first of all) dealing with the protection of minorities. It should be pointed out however that special attention will be given to the relevant Slovak legal regulation of this issue. One of the results of such comparative analysis will be the identification of the place and position of Slovak legal norms (both constitutional and other) within the framework of similar legal regulations of other European and non-European countries. This study is based (as regards its comparative aspect) upon replies to the questionnaire on the rights of minorities formulated by the European Commission for Democracy through Law[1] and also follows the structure "Report on the replies to the questionnaire on the rights of minorities".[2] It takes into consideration the replies of the following countries: Albania, Austria, Belgium, Canada, Croatia, Denmark, Finland, Germany, Greece, Hungary, Italy, Kyrgystan, Liechtenstein, Luxembourg, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, and Turkey. Nevertheless the main purpose of this paper is not an exhaustive study of comparative law in the matter of protection of minorities, but identification of the prevailing trends in internal legal regulation of this matter in various states (1) and evaluation of the appropriate Slovak legal regulation (ad 2). If (on the basis of this approach) some "gaps" in Slovak legal regulation of minorities will be registered, this study tries to identify them (ad 3).

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[1] Doc. CLD-PV/93/14, Addendum 1, 3 March 1993.

[2] Draft prepared by the secretariat of Venice Commission-Doc.CDL-MIN (93)11 Rev of 28 April 1994.

## I. Introduction

The importance of the question of minorities is today beyond dispute. The currency of the issue is reflected on the international as well on the national level. In most of states, and especially in the countries of Central and Eastern Europe, legislation relating to the rights of minorities has undergone important modifications in the past few years (including that of the Slovak Republic). It must nevertheless be kept in mind that every minority presents its own particular characteristics. That is why there is no standard means of resolving the multitude of concrete problems which each "case" throws up in a specific national context. Models which might be directly "exportable" from one national context to another do not exist today. Comparative analysis of the internal legal orders of the mentioned states fully confirms such a conclusion. On the other hand it is a fact that analysis of domestic legal regulations concerning minorities (either on the constitutional or other basis) enables determination of a basic standard (maybe minimum standard) of rights and freedoms belonging to minorities quaranting of which each state considers necessary for maintenance and further development of its "own" minority.

## II. Definition of the Concept of "Minority"

There is no generally accepted definition of minority neither on the international law level nor on the national level. Some elements thereof have certainly been identified as the standard if not universal classification of minorities into three groups: ethnic minorities, religious minorities and linguistic minorities. This characterisation is adopted also in Article 27 of the International Covenant on Civil and Political Rights. However no generally accepted definition of minorities has been formulated to date and opinions of the legal doctrine concerning the usefulness of such definition are still very different. As regards municipal legal orders of the mentioned states, they have generally accepted the concept of a minority but on the other hand the terms employed to describe it (whether in the Constitutions or in the legislation) differ. The legislation of most of the states employ only the term "minority" combined in different cases with one or several terms of qualification, for example "linguistic", "ethnic", "religious", or "cultural". Some states: Albania, Switzerland, Hungary, Kyrgystan and Poland use the term "national minorities", and another group of states does not speak directly about minorities but of "ethnic groups" (Austria), "ethnic communities" (Slovenia). Finally, in some states (Luxembourg, Liechtenstein, Denmark) no specific term is adopted at all because they do not directly regulate the treatment of minorities in specific terms on their territory, or because they refer by name to the groups which enjoy particular protection.

The term "minority" is registered in two constitutional acts of the Slovak Republic. The Constitution of the Slovak Republic,[3] in its Articles 33 and 34, employs the term

[3] No. 460/1992.
[4] No. 23/1991.

"national minority and ethnic group". The Charter of Fundamental Rights and Freedoms[4] in Articles 24 and 25 uses the terms: "national and ethnic minority". The terminology of the Slovak constitutional acts therefore correspond to the terminology of those states which in their national legal order employ the term "national minority" and ethnic group (minority). (see above).

## III. Definition of a Minority in Constitutions and in the Laws

### a. In Constitutions

Several states use the term "minority" in their Constitutions without ever defining it. This is the case with Albania, Belgium, Croatia, Finland, Hungary, Italy, Poland, Slovakia, Slovenia, Sweden, and Switzerland. There is therefore no definition of minorities in the constitutions of the listed states. On the other hand it is a fact that the constitutions of these states differ according to more or less detailed descriptions of the rights granted to national minorities or to persons belonging to them. Clearly, if these rights which are conceded to minorities are to be applied, those entitled to them must be identified. They must therefore fulfil conditions in order to enjoy them and it is in these conditions that the elements of definition are to be found. This as a general rule depands upon the possession of the nationality and/or residence on the territory of the state. In countries listed above the only minorities protected are those whose members possess the nationality of the state in question.

The constitution of the Slovak Republic does not contain an exact definition neither of national minority nor of ethnic group, but the subjects of minority rights are defined as Slovak nationals (Article 33 and 34 of the Slovak Constitution). As regards the rights granted to persons belonging to national minorities, the above mentioned articles of the Slovak constitution list the rights to promote their cultural heritage, the right to receive and disseminate information in their mother tongues, to form associations, create and maintain educational and cultural institutions, the right to be educated in a minority language, the right to use a minority language in official communications and the right to participate in decision-making in matters affecting the national minorities or ethnic groups. Following this approach the Constitution of the Slovak Republic indirectly defines the notion of minority. It can therefore be stated that in the meaning of the Slovak constitution, national minorities or their members are those groups and persons whose characteristics are the subject of the rights granted them by the Constitution of the Slovak Republic. The national minority and ethnic group and their members are thus defined by the content of their constitutional rights.

### b. Domestic Legal Provisions

In several states the term "minority", or some similar term, is to be found in legislation, either in laws specifically concerning minorities (Austria, Finland, Greece, Hungary, Italy, Portugal, and Switzerland) or in other laws.

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[5] No. 428/1990.

[6] No. 191/1994.

In the Slovak Republic the term national minority can be found in the Law about official language (Article 6(2)),[5] and in Article 1(1) of the Law concerning the marking of the names of villages in the language of national minorities.[6] The relevant domestic legal regulation of Slovak Republic similarly as the laws of prevailing number of states do not define the term "national minority" or "ethnic group" as well.

Strictly speaking there are only two definitions of minorities that are to be found in the legislation of mentioned states, and namely Austria (Article 1 of the 1976 Law on Ethnic Groups) and Hungary (Article 1 of the Law No. LXXVII of 1993 on the rights of national and ethnic minorities). Mention should nonetheless be made of the cases of two other countries: Finland and Denmark, which, while not really defining the notion "minority", do specify the characteristics that certain categories of persons must present if they are to obtain special protection. Each definition of minority however implies the existence of certain criteria for determining the persons belonging to the national minority. There are objective criteria usually jointly with subjective criteria. It is useful to note that objective criteria are common for all states regardless of minority definition. In this connection should be mentioned that among them can be identified for example nationality or citizenship of the state, residence on the territory of the state, a lasting presence, the fact of constituting or being part of numerical minority of the population etc. As regards the subjective criteria, it can be noted the ability of the person to speak a language other than that of the majority of population (Hungary), can be noted or having a parent or grandparent who is a member of minority (Finland).

The constitution of the Slovak Republic and relevent legal regulation using the notion "national minority" and "ethnic group" define any criteria for determination of persons belonging to minority besides the Slovak nationality of their members.

## IV. The Free Choice of Belonging to a Minority

The legislations of the mentioned states all tend in the same direction: in each of them membership of a minority is the result (in principle) of personal choice. Each is free to decide either to declare himself a member of a minority or, on the contrary, not to be part one. Conversely the choice itself may well not exist in which case the authorities will intervene to determine themselves whether or not their citizens belong to a minority. States do not unilaterally impose on their nationals the quality of a member of a minority; nor do they prohibit renunciation of membership of a minority group.

This general rule is fully respected by the relevant provisions of the Slovak Constitution. Under Article 12(3), individual membership of the minority group always depends on the free decision of every person. This provision moreover expressly prohibits any influence on this decision and all kinds of pressure oriented to the denationalisation of individuals. This means that any pressure on any individual concerning membership of a national minority is expresly exclared by the Slovak Convention.

Another general rule can be identified from the legislation of concerned states stating that free choice of belonging to minority does not in general have consequences for the acquisition or loss of nationality, or for the excercise of political rights.

Membership of a minority has no influence on the acquisition or the loss of the nationality of the Slovak Republic. Law No. 40/1993 concerning Slovak nationality has established no relevant relation between the association of a person to a specific national minority or ethnic group and the acquisition or loss of Slovak nationality. As regards the impact of minority membership on the practical application of political rights, Article 12(4) of the Slovak Constitution states: "No person shall be prevented from excercising his or her fundamental rights and freedoms". The Slovak Constitution allows the restriction of the practical application of some political rights if the relevant constitutional requirements are met. It is useful to stress that membership of a national minority does not serve as a constitutional basis for restriction of any of the recognised political rights granted by the Constitution.

## V. The Recognition of Minorities by the State

In some countries the Constitutions or laws require the formal recognition of minorities by the state organs as a necessary precondition for them to be able to benefit from all or some of the rights. This is the case in Italy, Belgium, Croatia and Hungary. In these countries fulfilling the above mentioned subjective and objective criteria is no longer sufficient; a positive act of recognition on the part of the state is additionally required. In other countries the Constitutions or the laws expressly allow the state to recognise minorities without however requiring it do so (Albania). It is useful to note that both obligatory or non-obligatory recognition of minorities may have the result of creating discrimination among minorities according to whether or not they are recognised by the state because certain minorities (recognised by state) can enjoy privileges not granted to others (not recognised by the state). This potential danger arises obviously for those countries where either the Constitutions or the laws require the recognition of minorities by the state as a necessary pre-condition for the granting of any kind of special protection. In most of the listed states (Greece, Poland, Denmark, Finland, Portugal, Kyrgystan, Slovenia, Germany, and Switzerland) neither constitutions nor laws envisage formal recognition of minorities.

As regards the Slovak Republic neither the Slovak Constitution nor other laws require and therefore do not determine, any procedure of recognition of minority by the Slovak Republic through formal-legal acts. The existence of national minorities of ethnic groups, and the scope of practical application of the rights granted to their members do not therefore depend on the official recognition of such minorities or ethnic groups by the public authorities of Slovak Republic.

## VI. Protection of Minorities by the Granting of Rights-Fundamental Rights and the Principle of Equality

Fundamental rights, whether recognized in the Constitutions or in the European Convention on Human Rights are designed to protect every person. They also make it possible to provide, to same extent, protection of the members of minorities, notably through principles of equality and non-discrimination. The national legal orders all of the mentioned states (including Slovak Republic) recognise the principles of equality and/or non discrimination. The question of minorities is treated in some cases explicitly when they expressly forbid any discrimination on the grounds of belonging to a minority (Albania, Austria, Croatia, Slovak Republic). There are even two provisions of the Constitution dealing with these principles. Article 12(2) reads: "Fundamental rights shall be guaranteed in the Slovak Republic to every person regardless of ... association to a minority or an ethnic group. Article 33 states: "Membership of any national minority or ethnic group may not be used to the detriment of any individual". The Constitution therefore expressly excludes any discrimination against persons based on their membership of national minority or ethnic groups.

For the sake of completness it is useful to make a brief characteristic of two other kinds of legal regulation of this principle. The constitutions of some states deal with the principle of equality and/or non discrimination more indirectly when they simply prohibit any discrimination on the grounds of nationality, race, language or religion without expressly referring to the membership of a minority or ethnic group (Canada, Germany, Hungary, Italy, Kyrgystan, Poland, Portugal, Turkey). But often the constitutional provisions containing the principle of equality make no mention of this question (Denmark, Finland, Liechtenstein, Luxembourg, Greece, Sweden, Switzerland). It should also be remembered that most states are bound by the European Convention on Human Rights which provides expressly in Article 14 that the enjoyment of the rights and freedoms set forth in the Convention must be guaranteed without discrimination on any ground, including language, religion, national origin or association with a national minority. However the mere application of the principle of non-discrimination in a lot of cases is not sufficient to protect minorities (minority members) sufficiently or to take account of their specific interests. It is even possible that strict application of the principle of non-discrimination would paradoxically result in discrimination aqaist certain minorities. Most states therefore opted for specific positive measures to be taken in favour of certain categories of individuals (positive discrimination). The measures of positive discrimination can be identified in the Constitutions of states and these are oriented either to the national minority or ethnic group (as a distinct entity) or both to the national minority and their members as well (combination of individual and collective approach of the positive discrimination measures). These kinds of approaches can be identified in the constitutions of the following states: Albania, Austria, Canada, Croatia, Greece, Hungary, Italy, Norway, Slovenia.

With regard to the Slovak Constitution, according to the individual approach to minority rights, measures of positive discrimination are granted to the persons belonging to a national minority or ethnic group. Article 34 of the Constitution guarantees the specific rights for persons belonging to national minorities or ethnic groups, namely to use their own language in public and private life, to be educated in a minority language, to participate in decision making in matters concerning national minorities or ethnic groups, to form minority associations, to maintain their own educational and cultural institution, to receive and disseminate information. The details of practical application of these rights are regulated by the relevant laws of the Slovak Republic and they will be analysed later.

## VII. Linguistic Rights

The countries where either national, ethnic or linguistic minorities use their own language (different from the language of the majority) adopt legal norm regulating the practical use of this language. Apart from Liechtenstein, Luxembourg and Portugal which have no linguistic minorities, almost all states regulate this question in their domestic laws (except in the cases of Greece, Poland and Turkey where the right of minorities to use their own language is regulated by international treaties).

Article 6(1) of the Slovak Constitution states that Slovak is the official language on the territory of the Slovak Republic. The Constitution, in Article 34(2)(6), guarantees to persons belonging to a national minority or ethnic group the right to use their own language in official communications. This constitutional right is "inter alia" specified in article 6(2) of the Law on the official language of the Slovak Republic quoted above. This provision states that practical application of this right is guaranteed in official communications with state organs or self-administration organs of those towns and villages where a national minority represents at least 20% of the "local population" in the actual town or village. Moreover, Article 6(4) of the law states that its provisions do not adversely effect on any other language rights granted to persons belonging to national minorities on the basis of other laws of the Slovak Republic. The Slovak Constitution, in Article 47(4), guarantees for everybody who does not know the Slovak language (including members of national minorities) the right to have an interpreter in legal and administrative proceedings. Article 2(14) of the Penal Procedure Act[7], Article 18 of the Civil Procedure Act[8], and Article 23 of the Constitutional Court Procedure Act[9], guarantee using the language of person(s) belonging to national minorities in judicial proceedings before penal courts, civil courts and constitutional courts. Practical application of these rights, however, is not "geographically" limited only to the ethnicly mixed regions of Slovakia. It is guaranteed before any court of the Slovak Republic regardless of its seat.

[7] No. 158/1992.
[8] No. 501/1992.
[9] No. 38/1993.

More detailed legal regulation of this matter can be found for example in legislation of Belgium, Switzerland, Canada, Italy, Finland, Austria and Germany.

## VIII. Rights in the Educational Field

In this field there are two principal issues concerning minorities: the question of education in the language or languages of minorities, and the teaching of this (these) languages. The first issue concerns ethnic and linguistic minorities and is therefore connected with the question of using a minority language. As regards education in the language of minorities or ethnic groups, either Constitutions or laws of most of the states confirm the rights of persons belonging to national minorities or ethnic groups to be educated in their own language, at least at primary and secondary schools. This right can be found in relevant legal regulations of Albania, Austria, Canada, Croatia, Finland, Greece, Hungary, Italy, Kyrgystan, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland, and Turkey.

Article 34(2)(a) of the Slovak Constitution guarantees the right to be educated in their own language for persons belonging to national minorities or ethnic groups, as well as the right to establish their own educational institutions (Article 34(1)). These provisions of the constitution represent lex specialis a relation to Article 42, which states: "Every person shall have the right to education". Article 34 precised that this generally recognised fundamental right can be exercised (as regards the members of a national minority or ethnic group) in the language of the national minority or ethnic group. This constitutional right is confirmed by article 3(1) of the Law on primary and secondary schools[10] and guarantees the right to be educated in the language of a national minority in primary and secondary schools in the Slovak Republic (figures for the various kinds of schools using the languages of national minorities are in the supplement of this study).

As regards the right to establish their own educational institutions, Article 42(3) of the Slovak Constitution states that establishment of education in schools other than state shall be possible only under the conditions provided by law. Such schools may collect school fees. Today it is possible to establish two types of non-state schools namely private schools[11] and church schools.[12] It is important to note that the legal regulation left the choice of language of instruction completely free (do not prescribe concrete teaching language).

For the sake of completness it is useful to note that similar legal regulations concerning the creation of private schools can be found in the legislation of Denmark, Poland, Slovenia, Sweden, and Germany.

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[10] No. 29/1984 Collection of Laws.

[11] Regulation of the Ministry of Education No. 11/1991.

[12] Regulation of the Ministry of Education No. 536/1990.

## IX. Cultural Rights of Persons Associating to National Minorities or Ethnic Groups

It is generally accepted that the members of minorities have the right to preserve and to develop their own culture. Generally speaking states allow minorities or persons belonging to minorities access to communication means such as television or radio. In addition members of minorities may also have recourse to the theatre and the press and have the right to form associations to develop their cultural identity. As regards radio and television most states (Luxembourg, Austria, Finland, Hungary, Italy, Portugal, Slovakia, Sweden, and Switzerland) allow national minorities and ethnic groups the right to use national television channels or radio stations for specified amount of time in order to produce programmes for the members of their minority in their own language.

Article 34(1) of the Slovak Constitution guarantees for members of minorities the right to receive and distribute information in their own language. Law No. 270/1993 on the Slovak radio, Article 6(d), states that Slovak radio ensures (by means of radio broadcasting in the language of national minorities) the implementation of interests of national minorities and ethnic groups living on the territory of the Slovak Republic and contributes to the development of their culture. The same provision can be found in Law No. 271/1993 on Slovak television as regards television for minorities (Article 3(3)) of afore the mentioned law). Law No. 268/1993 concerning radio broadcasting and television programmes, Article 9(2)(c), obliges both Slovak Radio and Slovak Television to produce, and enable production of, programmes the purpose of which is to preserve and develop cultural identity of national minorities and ethnic groups of the Slovak Republic. As regards theatre activity of national minority members, Law, No. 36/1978 (in the wording of the Law No. 115/1989) on theatre activity, Article 31(f), obliges the Ministry of Culture to take care of the interests of national minorities and ethnic groups in the sphere of theatre culture and to create the conditions for the satisfaction of these interests.[13]

## X. Freedom of Association

In general freedom of association is recognised either by the Constitutions or by laws of all the mentioned states, but express references to minorities are not always to be found. In most states the general principle which applies to all nationals of the state is interpreted so as to extend to persons belonging to a minority (Germany, Romania, Luxembourg, Switzerland, Slovakia). No state denies this freedom to persons belonging to a minority and some of them (Switzerland, Finland, Slovakia) grant this right to "everyone" regardless of nationality. Evidently this freedom is subject to certain restrictions. These restrictions are generally justified by reference to the safeguard of constitutional interests such as national security, public safety, the defence of public order, the prevention of crime, the protection of public health or morals or the protection

[13] More detailed informations are contained in the supplement of this paper.

of the rights of others (Denmark, Germany, Slovenia, Slovakia). Association rights for persons belonging to national minority or ethnic group are generally guaranteed by Article 29(1) of the Constitution: "Everyone has the right to associate freely with other persons in unions, societies and other associations." This right is expressly confirmed (for persons belonging to national minority or ethnic groups) by Article 34(1) of the Slovak Constitution. Restriction on the practical application of this right can be found in Article 29(3) of the Constitution of Slovak Republic stating that: "The excercise of the right of association may be limited only in cases provided by law where in a democratic society it is necessary to protect national security and public order, prevent crime and to protect the rights and freedoms of other person." Law No. 83/1990 on associations of citizens precised that the creation of such associations: "the objective of which is to deny or to limit personal, political and other rights of citizens because of their nationality ... race ... religion, to initiate hatred and intolerance based upon these reasons, to support violence or to break the Constitution and law in other way" (Article 4(a) is not permitted.

## XI. The Right to Form Political Parties

In general, states have not adopted specific rules on political parties representing minority rights. They must fulfil the same conditions as other political parties. As regards political parties as political representant of minority interests two solutions are possible: either the interests of minorities are defended by the political parties that they have formed to this end and which are composed only by representatives of the minorities, or the interests of minorities are defended by the traditional political parties which include in their lists some representatives of the minorities.

Article 29(2) of the Slovak Constitution grants to nationals of the Slovak Republic the right to form political parties and political movements, and associate therein. The details of concrete application of this right are laid down in the Law No. 424/1990 on political parties. The criteria of Slovak nationality fully enables the formation of political parties also for persons belonging to national minorities or ethnic groups. Current political practice of the Slovak Republic confirm that national minorities or ethnic groups prefer to form their own political parties (Hungarian minority, Roma minority).

## XII. Representation of Minorities in State Institutions

It is rare for states to establish a special structure in order to bring about the participation of minorities in the life of political and state institutions. The cases of Belgium and Switzerland are exceptions to this rule. Other states have also adopted concrete measures but they often consist of the creation of bodies for the management of problems relating to national minorities. These bodies are generally confined to a consultative power (Romania, Finland, Hungary, Slovakia). In the Slovak Republic there are no special measures enabling the participation of national minorities or ethnic groups either in political life (election) or in various state institutions. There exists,

however, the Government Council for Minorities Affairs and the Round-Table of National Minorities (as a non-permanent organ of the President of the Slovak Republic) as consultative bodies of executive organs able to initiate and recommend legislative or other measures in favour of national minorities of ethnic groups living in the Slovak Republic.

## XIII. The Duties of Minorities Within States

Most states grant specific rights to persons belonging to minorities. It is not a general practice, however, for them to impose on such persons special duties beyond the general obligation to respect the laws in force and in particular a duty of loyalty. In such cases this duty is imposed upon all citizens independently of whether or not they belong to a minority.

As regards the Slovak Republic, Article 34(3) of the Constitution states (especially for minority members) that: "The exercise of rights guaranteed by this constitution to citizens belonging to national minorities or ethnic groups may not threaten the sovereignty and territorial integrity of the Slovak Republic or discriminate against other citizens". This provision is formulated generally and has no real impact on the scope and practical application of rights guaranteed to members of national minorities or ethnic groups by the Constitution of the Slovak Republic.

## XIV. Protection Mechanism-Remedies Available to Minorities

In general the states provide for persons belonging to minorities or ethnic groups the same administrative and judicial remedies which are available to the population at large. Exceptions to this rule can be found in the legislation of Italy, Belgium, Austria, Hungary, Poland, providing a special kinds of protection exclusively for minority members.

In the Slovak Republic persons belonging to national minorities or ethnic groups have at their disposal the same administrative and judicial means as the rest of the population. Any special extraordinary means of protection provided to minority members are not available in the legal order of the Slovak Republic.

## XV. Criminal Legislation Against Racial Hatred and Genocide

The penal laws of many states provide for offences of incitement to racial hatred and to violence against minority groups such as ethnic and racial minorities. The special protection extends both to the groups themselves and to the individuals comprising them.

The minorities in the Slovak Republic are protected by the penal law as well. Penal Law No. 140/1961 (full wording No. 392/1992) provides Article 198 for an offence of slandering of a national minority, its language, race or its beliefs, Article 198(a) provides for the offence of incitement to national or racial hattred, and Article 259 prohibits genocide toward any national, ethnic, racial or religious group.

## XVI. Legal Regulation of Specific Minority Rights Resulting from Membership of the Slovak Republic in the Council of Europe

The report of the Parliamentary Assembly on the application by the Slovak Republic for membership of the Council of Europe (doc. 6864 – June 1993) states, inter alia, that Parliamentary Assembly "takes note in particular of the Slovak authorities commitment to adopt legislation granting to every person belonging to a minority the right to use his/her name and first names in his/her mother tongue and, in the regions in which a substantial number of a national minority are settled, the right for the persons belonging to this minority to display in their language local names, signs, inscriptions and other similar information in accordance with the principles contained in Recommendation 1201 (1993)".

The first requirement was met by Law No. 300/1993 on names and first names enabling the persons belonging to national minorities or ethnic groups to use their names and first names in the language of the national minority or ethnic group.

Law No. 191/1994 on the marking of local names of villages in the languages of national minorities determines (according to Article 1(1)) the local names of villages in the language of national minorities provided that the number of their members represent at least 20% of the local population. Article 3(1) even allows change of names by a "local referendum" of persons living in the village. The supplement of this law provides a total number of 587 Slovak villages whose names are (since 1 November 1994) marked in the languages of the Hungarian, German or Ukrainian/Ruthenian minority. This total number represents *in concreto* 489 names marked in the language of the Hungarian minority (83,31%), 96 names marked in the language of the Ukrainian/ Ruthenian minority (16,35%) and 2 names marked in the language of the German minority (0,34%).

## Final Remark

A comparative analysis of the Council of Europe member states' internal legal regulations concerning the protection of minorities confirms that the relevant legal regulation of this issue in the Slovak Republic is fully compatible with similar legal regulations of the listed states. Prevailing trends in this kind of internal legal regulation are recognised and respected by relevant Slovak legal norms (both constitutional and others). That is why this study did not reveal any "vacuum iuris". It is a fact that legal regulations of some states are more detailed than in others and some states provide for their national minorities or their members rights and freedoms which are not available for the minorities of other states. This kind of legal regulation can serve as a "source of potential legislative inspiration" also for another countries. The common basis of relevant legal regulation of this issue is however represented by a "basic standard" of these rights and freedoms granted to national minorities and/or their members in all states. The requirements of this standard are today met by the relevant legal regulations of the Slovak Republic.

# The Situation of Regional or Minority Languages in the Slovak Republic (some aspects)

In accordance with the definition of regional or minority languages of the European Charter for Regional or Minority Languages, the main minority languages spoken in Slovakia are Hungarian, Ukrainian languages and Ruthenian, which does not exist in a codified form. German and Polish are two regional or minority languages which are spoken less frequently, as well as Romany and Czech which are categorized as "non-territorial" minority languages.

## 1. National (Ethnic) Structure of the Slovak Republic and Geographical Localization of the Regional Minority Languages

According to the 1991 census, the ethnic group population in the Slovak Republic is as follows:

| Ethnic group | Population | Percentage of the total number of the population |
|---|---|---|
| Slovak | 4.511.679 | 85,6 |
| Hungarian | 566.741 | 10,7 |
| Romany | 80.627 | 1,5 |
| Czech | 53.422 | 1,0 |
| Ruthenian | 16.937 | 0,3 |
| Ukrainian | 13.847 | 0,2 |
| German | 5.629 | 0,1 |
| Moravian | 3.888 | 0,07 |
| Polish | 2.969 | 0,05 |
| Other | — | — |
| Total | 5.268.935 | 100,0 |

Hungarian, the most widespread regional language, is spoken in 13 Slovak-Hungarian ethnically mixed districts in southern and south-eastern Slovakia. The speakers of this language represent (including the cities of Bratislava and Košice) 25.3% of all inhabitants of that area.

| District | Nationality | | | |
|---|---|---|---|---|
| | Slovak Population | % | Hungarian Population | % |
| Bratislava | 402.343 | 91,5 | 19.505 | |
| Bratislava-country | 132.279 | 91,1 | 10 494 | 7,2 |
| Dunajská Streda | 12.388 | 11,3 | 95.394 | 87,2 |
| Galanta | 79.596 | 55,5 | 61.735 | 43,1 |
| Košice | 212.633 | 90,5 | 10.128 | 4,3 |
| Košice-country | 67.664 | 77,2 | 16.299 | 16,4 |
| Komárno | 28.232 | 25,8 | 78.929 | 72,3 |
| Levice | 80.235 | 66,5 | 38.155 | 31,6 |
| Nové Zámky | 87.008 | 56,8 | 63.930 | 41,7 |
| Lučenec | 70.784 | 73,8 | 22.792 | 23,8 |
| Velký Krtíš | 31.472 | 67,2 | 14.447 | 39,6 |
| Rožňava | 59.298 | 68,8 | 22.416 | 26,0 |
| Trebišov | 67.845 | 57,1 | 46.748 | 39,3 |
| Rimavská Sobota | 49.339 | 49,9 | 46.000 | 46,5 |
| Nitra | 193.370 | 91,5 | 14.244 | 6,7 |
| Total | 1.583.436 | 71,5 | 561.216 | 25,3 |

Ukrainian and Ruthenian (in the form of local dialects) are spoken in 6 Slovak-Ukrainian/Ruthenian ethnically mixed districts in north-eastern Slovakia. The speakers of these languages represent altogether 4.3% of inhabitants of this region.

| District | Nationality | | | | | |
|---|---|---|---|---|---|---|
| | Slovak Population | % | Ruthenian Population | % | Ukrainian Population | % |
| Bardejov | 72.056 | 91,2 | 1.918 | 2,4 | 1.407 | 1,8 |
| Humenné | 96.958 | 86,5 | 7.945 | 7,0 | 4.628 | 4,2 |
| Prešov | 188.640 | 94,2 | 886 | 0,4 | 1.406 | 0,7 |
| Stará Lubovňa | 42.339 | 91,1 | 1.095 | 2,3 | 661 | 1,4 |
| Svidník | 37.411 | 84,6 | 3.532 | 7,9 | 1.952 | 4,4 |
| Vranov n. Toplou | 69.539 | 94,8 | 307 | 0,4 | 184 | 1,25 |
| Total | 506.943 | 91,3 | 15.683 | 2,8 | 10.238 | 1,5 |

### 2. Minority Legislation

Slovak is the official language of the Slovak Republic. The protection of national minority rights regarding the utilization of their language in all sectors of private and civic life is guaranteed by Article 34 of the Slovak Constitution. Article 34 guarantees minority rights to:

– disseminate and receive information in the mother tongue,
– education in the mother tongue,
– utilize the mother tongue in official matters.

At a subordinate legislative level the rights of national minorities regarding utilization of the mother tongue are guaranteed by the following laws:

– The 1990 Official Language Act enables utilization of a minority language in official matters in any region with at least a 20% national minority population. This includes 500 small towns and villages in the Slovak-Hungarian ethnically mixed area;

– 1993 Name and Surname Act enables persons belonging to a national minority group to utilize their national minority names and surnames;

– Civil Court Proceedings (§ 18) and Criminal Court Proceedings (§ 2, s. 14), the rules of which enable the participants in court to use their native language.

### 3. Current Situation in the Area of Regional and Minority Language Utilization

*3.1. Education*

The school system of nationalities in the SR includes all educational levels in minority languages (Hungarian and Ukrainian), starting from kindergartens up to university level, depending on specific characteristics of a concrete national minority (situation of ethnic and national awareness, level of linguistic evolution, population, etc.).

There are three types of national schools in Slovakia:

– uni-lingual national schools and classes with the language of a particular minority being the only educational and instructional one (which includes Hungarian schools only);

– bi-lingual national schools and classes where certain subjects are taught in a mother tongue (e.g. music, elementary tuition on mother country, history), and others, especially mathematics and natural sciences, are taught in the Slovak language (this is the case in Ukrainian, Romany and German schools and classes);

– schools (classes) with tuition of the national language as a subject. At these schools the minority language is taught as one of the subjects and Slovak is an instructional language (applied especially for Ukrainian and in the first period after their beginning in 1993, also German schools).

Hungarian language

– According to empirical research conducted in 1990 on average 76% of Hungarian minority population speaks Hungarian on a daily basis (in private life 83%, at work 75% and in public 70%).

– In 1992/93 school year there were 284 independent kindergartens with Hungarian instructional language and 129 mixed ones, i.e. with both Slovak and Hungarian classes. Total number of classes with Hungarian as the language of instruction in that school year was 646 and they were attended by 12 182 children representing 77% of the total 16 838 children of Hungarian minority in kindergartens in the Slovak Republic.

– There are 13 independent high schools with Hungarian as the language of instruction and 8 mixed ones with both Slovak and Hungarian classes. In 1992/93 school year the classes with Hungarian as the language of instruction were attended by 4 454 students, i.e. 81% of the total 5 450 students of Hungarian minority in high schools in the Slovak Republic.

– There are 6 independent secondary professional schools with Hungarian as the language of instruction and Hungarian classes can also be found in other 19 schools. During 1992/93 school year Hungarian classes at secondary professional schools were attended by 4 951 students representing 77% of the total 6 411 students of Hungarian minority in secondary professional schools in the Slovak Republic.

– In 1992/93 school year there were 9 independent apprentice schools with Hungarian as the language of instruction and 24 schools with a bilingual Slovak-Hungarian tuition. The classes with Hungarian as the language of instruction are attended approximately by 41% apprentices of a total number of Hungarian minority apprentices in the Slovak Republic.

– In addition to the Department of Hungarian Languages and Literature at the Philosophical Faculty of Comenius University (which conducts a scientific research of Hungarian language as well), there is a Hungarian Department at the Pedagogical University in Nitra (previously Pedagogical Faculty) which prepares teachers for schools with Hungarian as the language of instruction.

Consideration is being given to the establishment of an independent faculty of national cultures for training of teachers at national schools and experts for cultural and educational institutions.

Ukrainian and Ruthenian Languages

There is a certain hybrid character of Ruthenian – Ukrainian nationality due to an insufficient development of Ruthenian national awareness, owing in particular to unfavourable historical circumstances. The fact is that persons belonging to this nationality consider themselves mostly as a separate ethnic group feeling no, or only very few, ties to Ukrainian national history and culture.

For instance, according to empirical research only 10–11% of respondents wish to reinforce instruction in Ukrainian language. After a communist coup d'état in 1948 the Ruthenian population was exposed to a forced Ukrainization which represented also a framework for building a Ukrainian school system and cultural institutions. A considerable part of the Ruthenian population responded to this pressure by its inclination to the Slovak nationality and by sending their children to Slovak schools. In the last census a major proportion of the so-called Ruthenian-Ukrainian nationals has declared themselves to be of Ruthenian nationality, which is documented in the table above.

Thus Ruthenian nationality stands at the beginning of its constitution: it does not have a codified language – a Ruthenian national school system with Ruthenian as the language of instructions does not exist yet. Hopefully, it is a problem of a near future.

We shall further deal with Ukrainian national school system with literary Ukrainian as an instructional language:

– In 1992/93 school year there were 48 kindergartens with Ukrainian as the language of instruction and with Ukrainian language tuition, 65 classes were attended by 1 145 children of Ukrainian (and also Slovak) nationality.

– In 1992/93 school year there were 15 Ukrainian elementary schools along with those with Ukrainian language tuition, i.e. 80 classes and 1 232 pupils of both Ukrainian and Slovak nationalities.

– There is one independent high school with Ukrainian as the language of instruction and 2 high schools have classes with Ukrainian instructional language or Ukrainian language tuition. During the school year 1992/1993 these schools and classes were attended by 259 students.

– The Ukrainian minority population does not have any independent secondary professional schools, however, there are 6 secondary professional schools classes established with Ukrainian as the language of instruction or Ukrainian language tuition.

In 1992/93 school year the classes were attended by 354 students of Ukrainian (but also Slovak) nationality.

– There are no apprentice schools with Ukrainian as the language of instruction.

– There is a Ukrainian Department at the Pedagogical Faculty in Prešov preparing teachers for schools with Ukrainian as the language of instructionor with Ukrainian language tuition.

Note: In comparison with previous school years, there has been a considerable reduction in the members of schools, classes and pupils as an inevitable consequence of the development mentioned above.

Romany Language

Romanies were granted the status of a national minority only recently (declared in The Principles of Governmental Policy of the Slovak Republic Towards Romanies, April 1991). Therefore, they are at the beginning of their, hopefully, full national life. There is not a real Romany national school system yet.

Romany children attend Slovak or Hungarian schools. However, some elementary schools in Košice experimented with bi-lingual Slovak-Romany tuition for Romany children in "zero classes" in 1992/1993 school year.

Moreover, the Department of Romany Culture was founded at the Pedagogical Faculty in Nitra in 1991.

German Language

Elementary schools for the children of German nationality (but also for the children of Slovak nationality) have been established in five Slovak towns with a significant concentration of ethnic Germans (Bratislava, Kežmorak, Medzev, Gelnica, Nitranske Pravno). There are German teachers there who teach intensive courses of German as well as music and creative arts from the first class.

*3.2. Culture*

Hungarian Language

– There are two Hungarian professional theatres in Slovakia. Moric Jókai Theatre in Komárno and Thalia Theatre in Košice and one professional Hungarian folk song and dance ensemble "Young Hearts."

– There are 17 Hungarian publishers out of which 10 operate within the territory of Slovakia and 7 publishers have regional character. Moreover, Hungarian literature is also published by Slovak publishers.

– Hungarian periodical press in Slovakia is represented by 26 Hungarian newspapers and magazines. 10 of them have regional character.

– Slovak Radio broadcasts daily in Hungarian language. The broadcasting time is 35 hours per week. Slovak Television broadcasts the news program "National Magazine" (Hirmagazin) 30 minutes per week except for the last week of each month, when there is a similar program broadcast (of the same duration) for Ruthenians and Ukrainians.

Ukrainian and Ruthenian Languages

– There is one Ukrainian-Ruthenian professional theatre in Slovakia. A. Duchnovič Theatre in Prešov and one professional Ukrainian-Ruthenian fork dance ensemble "Puls".

– The Ukrainian Department operates within the Slovak Pedagogical Publisher (SPN). It publishes literature in Ukrainian language (9 books per year in average). It also cooperates with the publisher Karpaty in Užhorod, Ukraine.

– Ukrainian and Ruthenian periodical press in Slovakia is represented by 7 Ruthenian and Ukrainian newspapers and magazines.

– Slovak Radio broadcasts in Ukrainian and Ruthenian languages 11 hours per week. Slovak Television has a news program for Ruthenian and Ukrainian which alternates every last week of each month.

Romany Language

– There is one Romany professional theatre in Slovakia called "Romathan".

– The Romany periodical press in Slovakia is represented by 6 Romany newspapers and magazines (also in Hungarian language for the Hungarian – speaking Romanies).

– In 1993 Slovak Radio started with broadcasting in Romany language.

German Language

– The German periodical press in Slovakia is represented by 1 German newspaper – "Karpatenblatt".

– In 1993 Slovak Radio started with German broadcasting for Germans in Slovakia.

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# Minoritas ante portas (ou: la Hongrie et la protection des minorités aux années 90)

PÉTER KOVÁCS

Le réveil des minorités nationales, linguistiques ou ethniques est un des facteurs les plus marquants de cette fin de siècle. Le droit international dont la vocation primaire est de réagir aux faits internationaux et non pas de les précéder, d'autant moins de les provoquer, tente d'y contribuer par la mise en place d'un système juridique de protection. Ce complexe instrumentaire *in statu nascendi* peut être perçu comme tentative de la communauté internationale visant à combler la lacune née avec la disparition du système de protection de la Société des Nations. Il est vrai que ce phénomène a non seulement plusieurs lectures mais aussi plusieurs perceptions. Le conflit des Balkans est incontournable et en lui-même révélateur: son éclatement a accéléré le processus jadis ralenti de la procédure de codification – initiée au sein des Nations Unies incontestablement par l'ancienne Yougoslavie – mais l'avortement des tentatives de paix a engendré de nouveau une tendance inverse: la sympathie pour une codification approfondie semble tourner vers une prise de conscience, imprégnée souvent de considérations stratégiques et de la "Realpolitik".

La modeste contribution que l'auteur des ces lignes prépare sur ce sujet au *Polish Yearbook of International Law* se divise en deux parties: dans la première, on essaie de donner un aperçu des étapes de la codification internationale – dans la deuxième, la position de l'Etat hongrois va être analysée en détail, et de deux points de vues: a. l'attitude de la Hongrie dans la codification constitutionnelle et législative interne ou en d'autre mots: la Hongrie et ses minorités linguistiques et b. l'attitude de la Hongrie dans le processus de la codification internationale.

## 1. Les minorités et le contexte des codifications européennes:

Est-ce nécessaire de poser la question portant sur la raison d'être de la protection des minorités?

En 1977, le fameux rapport de Capotorti a qualifié 9% des États comme étant ethniquement homogènes: en revanche, il a considéré 75 comme potentiellement conflictuels dont 35 menaçaient déjà la paix et la sécurité internationales. [1] On serait

[1] Doc. E./CN.4./Sub. 2 (384).

amené à prétendre ce pronostic trop optimiste car en 1988, Wallensteen a qualifié 99 conflits armés sur 111 où soit le séparatisme, soit l'autonomisme émergeait[2]. Une autre étude de 1989[3] a constaté que 99 nations sur 126 avaient utilisé une forme ou une autre de l'oppression d'une minorité ce qui dit *in toto* 261 cas! La revue *Réfugiés* éditée sous les auspices de l'UNCHR a découvert en juillet 1993 au total 25 conflits ethniques où on est témoin de l'utilisation des armes[4]. Ces chiffres sous-tendent la légitimité de l'intérêt que la communauté internationale porte à ce type de conflit.

Les considérations historiques peuvent également donner des motifs pour une approche de la prévention des conflits. Comme François Mitterrand l'a souligné en parlant – comme il les a appelés – de *"la paix des vainqueurs": "tous les traités de ce siècle, en particulier les traités issus de 1914 et 1918, à commencer par le traité de Versailles, mais aussi, le traité de 1945 et tous ceux qui s'en sont suivis, ont toujours été des traités d'injustice qui ont, pour satisfaire la gloire du vainqueur ou son instinct de puissance ou ses intérêts immédiats, toujours nié les réalités historiques, géographiques, spirituelles ou ethniques. Le drame de la future guerre était toujours inscrit dans le règlement de la paix précédente."* [5] On ne peut pas échapper le raisonnement d'Alain Lamassoure: *"Nous voyons bien aussi que, dans les problèmes que rencontrent beaucoup des pays d'Europe centrale, d'Europe orientale et les Républiques de l'ancienne Union Soviétique, nous avons besoin de garantir les droits des minorités ethniques en Europe. (...) L'Europe sera jugée notamment sur sa capacité à trouver une solution à ses problèmes de minorités."* [6]

Comment les différentes organisations ont-elles réagi à ce défi?

### 1.1. Les Nations Unies et la protection des minorités

Le 3 février 1993, suite aux travaux de plusieurs décades de la Sous-commission de la lutte contre les mesures discriminatoires et de la protection des minorités, l'Assemblée générale a adopté la résolution 135/47, intitulée *Déclaration sur les Droits des Personnes appartenant aux Minorités Nationales ou Ethniques, Religieuses et Linguistiques*. Dans ses neuf articles, la Déclaration énumère les droits et les principes qu'on a pu codifier au niveau universel. Son grand mérite réside essentiellement dans la consécration du concept de la discrimination positive, à savoir que *"les mesures prises par l'État afin de garantir la jouissance effective des droits énoncés dans la*

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[2] P. Wallensteen: States in Armed Conflict – 1988. Uppsala. (1989) – rapport n°30. cité par R. Stavenhagen: Les conflits ethniques et leur impact sur la société internationale – Revue Internationale des Sciences Sociales n°127, p. 123.

[3] Cité par D. Levinson: Conflits ethniques et réfugiés [in: Réfugiés – publié par le Service d'Information du Haut Commissariat des Nations Unies – août 1993]

[4] D. Levinson: op. cit. 4.

[5] Allocution prononcée par F. Mitterrand, président de la République lors du colloque "Les tribus ou l'Europe" Palais Chaillot, 29.2. 1992 – Service de presse – Présidence de la République p. 3.

[6] L'intervention d'A. Lamassoure, ministre délégué aux affaires européennes de la XIe Conférence des Cours constitutionnelles européennes (Paris – mai 1993) [dans: Tome II. des Actes de la Conférence: Protection constitutionnelle et protection internationale des Droits de l'Homme: Concurrence ou complémentarité? 1051–1053].

*présente Déclaration ne doivent pas a priori être considérées comme contraires au principe de l'égalité contenu dans la Déclaration Universelle des Droits de l'Homme."* [7]

Bokatola[8] est peut être trop optimiste quand il découvre de nouveaux droits collectifs dans la Déclaration, mais lui-même, il attire notre attention au fait *"qu'après avoir défini de façon restrictive les droits des minorités, les États se réservent une large liberté d'appréciation quant aux moyens à appliquer, aux buts à poursuivre et aux résultats à obtenir. Tout repose donc finalement sur le bon-vouloir des États et sur l'ardeur qui peut les animer pour mettre en oeuvre les droits des minorités."* [9]

### 1.2. La Conférence sur la Sécurité et la Coopération en Europe et la protection des minorités (1990–1994)

La protection des minorités est un des domaines où les avancées normatives de l'organisme[10] s'étendant de Vancouver jusqu'à Vladivostok – qui n'a acquis le qualificatif "organisation" qu'à la Conférence de Budapest de la CSCE des 5–6 décembre 1994, appelé dès lors Organisation de la Sécurité et la Coopération en Europe – ne sont point à négliger mais leur nature ambiguë de type programmatique et proche du soft law rend difficile l'implémentation. Dans l'euphorie de la chute du Mur de Berlin, la réunion de Copenhague sur les dimensions humaines de 1990 a consacré un chapitre entier – contenant 35 alinéas – à la protection des minorités. La déclaration de Copenhague – critiquée peut être trop sévèrement par M. Matscher,[11] juge à la Cour Européenne des Droits de l'Homme, et Chantal Charpentier[12] – a été suivie par la Charte de Paris du 21 novembre 1990 où les chefs d'Etat et de gouvernement ont affirmé *inter alia* leur *"conviction que l'identité ethnique, culturelle, linguistique et religieuse des minorités nationales soit protégée et que des conditions favorables à la promotion de cette identité soient créées"*.[13] Le document de la réunion des experts de Genève (le 19 juillet 1991) a stipulé que *"Les problèmes concernant des minorités nationales, de même que le respect des obligations et engagements internationaux relatifs aux droits des personnes appartenant à ces minorités, sont des conditions qui appellent à juste titre l'attention de tous les pays et ne constituent donc pas*

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[7] Article 8 § 3.

[8] Cf. J.O. B o k a t o l a: La Déclaration des Nations Unies sur les Droits des Personnes appartenant à des Minorités Nationales ou Ethniques, Religieuses et Linguistiques 97 *RGDIP* 746–765 en partic. 756–758 (1993).

[9] J.O. B o k a t o l a: op. cit. 761.

[10] Sur la CSCE en détail: cf. E. D e c a u x: La CSCE au lendemain du Conseil de Rome: un bilan de la transition institutionnelle 5 *EJIL (1994) e. Decaux-Sicilianos: La CSCE: Dimension humaine et règlement des différends (1993),* passim.

[11] *"Regrettablement faible en matière de la protection des minorités..."*. F. M a t s c h e r: Egy európai népcsoporttörvény esélyei (Les chances d'une loi européenne des "Volksgruppen") Európai Szemle 1992/3 p. 106.

[12] *"Le Document de Copenhague (...) apparaît beaucoup plus comme un constat d'échec que comme un embryon d'acte juridique inteernational destiné à accorder aux minotirés un véritable statut objectif."* Ch. C h a r p e n t i e r: Le principe mythique des nationalités: tentative de dénonciation d'un prétendu principe 25 *RBDI* 373 (1992).

[13] Charte de Paris p. 8 ("Orientations pour l'avenir").

*exclusivement affaire intérieure à chaque État.*"[14] En outre les États ont pris note "*avec intérêt que des résultats positifs ont été obtenus par certains d'entre eux, selon des voies démocratiques appropriées, entre autres par des organes de consultation et de décision dans lesquels les minorités sont représentées, en particulier pour ce qui est de l'éducation, de la culture et de la religion; par des organes et assemblées élus chargés des affaires des minorités nationales; par une administration locale et autonome, ainsi que par une autonomie sur une base territoriale, notamment grâce à l'existence d'organes consultatifs, législatifs et exécutifs constitués par voie d'élections libres et périodiques; par la gestion autonome, par une minorité nationale, des aspects relatifs à son identité dans les cas où une autonomie sur une base territoriale n'est pas applicable; etc.*"[15]

Suite au mandat formulé au sommet de Helsinki II,[16] à la réunion des ministres de Stockholm, la CSCE a institué le poste du Haut Commissaire pour les Minorités nationales, en transposant *grosso modo* la procédure onusienne n° 1503 dans le contexte spécifique de la protection des minorités. La réunion de Rome a élargi le mandat vers le suivi de tous les aspects du nationalisme agressif, du racisme, du chauvinisme, de la xénophobie et de l'antisémitisme,[17] et le sommet des chefs d'États et de gouvernement de Budapest a souligné l'importance des missions de M. Max van der Stoel, le Haut Commissaire.[18]

### 1.3. Le Conseil de l'Europe

La protection des minorités au sein de l'organisation à vocation paneuropéenne s'est développée progressivement[19] et les critiques du déficit minoritaire de la Convention européenne des droits de l'homme ont obtenu gain de cause. Il est vrai que la CEDH dans son article 14 interdit la discrimination,[20] fondée *inter alia* à l'appartenance à une minorité nationale, mais le caractère non autonome[21] de cet article a rendu difficile l'articulation de la problématique de la protection des minorités devant la Commission et la Cour européennes des droits de l'homme. Sur ce point,

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[14] Document de Genève p. 5.

[15] Document de Genève p. 7–8.

[16] CSCE Document de Helsinki: Les défis du changement Helsinki Decisions II. p. 7–14.

[17] Document de Rome ("La CSCE et la nouvelle Europe – notre sécurité est indivisible") p. 19.

[18] Budapest Document 1994 – Towards a Genuine Partnership in a New Era p. 28. „*The protection of human rights, including the rights of persons belonging to national minorities, is an essential foundation of democratic civil society. Neglect of these rights has, in severe cases, contributed to extremism, regional instability and conflic.*" p. 27.

The States "encourage the Chairman in Office to inform the Permanent Council of serious cases of alleged non-implementation of human dimension commitments, including (...) reports and recommendations of the Highg Commissioner on National Minorities (HCNM)..."

[19] Sur l'histoire de ce processus cf. F. A l b a n e s e: Ethnic and Linguistic Minorities in Europe 11 *YEL* (1991).

[20] "*La jouissance des droits et des libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.*"

[21] C'est à dire qu'on ne peut constater sa violation qu'en relation avec un autre article de la CEDH.

l'oeuvre prétorienne des juges et des commissaires n'a pas pu rendre le même service qu'elle rendait et rend toujours par rapport aux autres éléments de l'article 14 et en général aux articles de la Convention européenne des droits de l'homme.

De temps en temps et essentiellement dans les milieux de l'Assemblée parlementaire, on a évoqué la possibilité de compléter la CEDH par un protocole additionnel pour combler cette lacune, mais jusqu'à l'effondrement du mur de Berlin, ces initiatives ont reçu un accueil plutôt timide de la part du Comité des Ministres.[22]

C'est ainsi qu'est née l'idée au sein de la Conférence permanente des pouvoirs locaux et régionaux et à l'Assemblée parlementaire, de compléter non pas la CEDH mais tout le complexe instrumental du Conseil de l'Europe par un instrument de type conventionnel qui pourrait se concevoir comme un pilier propre: la *Charte européenne des langues régionales ou minoritaires.*[23]

Même si la genèse de la Charte a été liée au refus persistant du Comité des Ministres devant les tentatives d'amender la Convention européenne des droits de l'homme, l'Assemblée parlementaire a réitéré son souhait de voir la CEDH complétée par un protocole.[24] Le Conseil de l'Europe a aussi montré une certaine sympathie pour l'utilisation des documents d'autonomie locale à des fins de la protection des minorités: Dans cette optique, un des documents du Conseil de l'Europe a souligné à juste titre: *"La pratique de plusieurs pays européens montre que des problèmes de minorités peuvent se résoudre à travers le renforcement de l'autonomie au plan local ou régional.(...) Par ailleurs, la mise en oeuvre du principe de l'autonomie locale contenu dans la Charte européenne de l'autonomie locale, adaptée certes à la diversité des situations, pourrait se révéler un facteur puissant à la fois de protection des minorités et de cohabitation pacifique et civilisée."*[25]

Finalement, c'est le sommet des chefs d'Etat et de gouvernements du Conseil de l'Europe, tenu à Vienne les 8–9 octobre 1993 qui a opté en faveur de la continuation de la codification et en particulier en deux directions:[26] d'une part vers *"une convention-cadre précisant les principes que les Etats contractants s'engagent à respecter pour assurer la protection des minorités nationales"* et d'autre part vers *"un protocole complétant la Convention européenne des droits de l'homme dans le domaine culturel par des dispositions garantissant des droits individuels, notamment pour les personnes appartenant à des minorités nationales."*

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[22] P. ex.: Recommandation 285 (1961).

[23] P. K o v á c s: La protection des langues des minorités ou la nouvelle approche de la protection des minorités? (Quelques considérations sur la Charte européenne des langues régionales ou minoritaires) 97 *RGDIP* (1993).

[24] L'Assemblée parlementaire a multiplié ses efforts visant à améliorer la codification du droit des minorités. Parmi les résolutions récentes cf: les recommandations 1134 (1990), 1177 (1992) et la directive 474 (1992). Le 1[er] février 1993, l'Assemblée parlementaire a adopté dans sa recommandation 1021 (1993) le texte d'un protocole additionnel à la CEDH. En 1991, l'Autriche a aussi présenté un projet de protocole à la Convention européenne des droits de l'homme assurant la protection des goupes ethniques. Ce document a été distribué à la 89e session (26 novembre 1991) du Comité des Ministres: [CDDH (91) 46].

[25] Contribution du Conseil de l'Europe au séminaire de la CSCE sur la dimension humaine intitulé Etudes de cas concernant des minorités nationales: résultats positifs – Varsovie 24–28 mai 1993 Strasbourg, le 19 mai 1993.

[26] Déclaration de Vienne – Annexe II: Les minorités nationales.

Cette décision des dirigeants des pays membres semble trancher la question portant sur la nécessité de la continuation de la codification. Ceci a été important après que le Comité des Ministres n'a osé prendre qu'une décision dont la formulation se substituait à une décision de principe,[27] engendrant un travail d'analyse de droit comparé.[28]

A Vienne, les chefs d'Etats et de gouvernements sont arrivés à constater que: "*Les minorités nationales que les bouleversements de l'histoire ont établies en Europe doivent être protégées et respectées afin de contribuer ainsi à la stabilité et à la paix.(...) ces minorités apporteront une précieuse contribution à la vie de nos sociétés*".[29]

La Convention-cadre pour la protection des minorités nationales, élaborée par le groupe d'experts CAHMIN[30] et adoptée le 10 novembre par le Comité des Ministres est le premier résultat modeste du processus relancé de la codification. Cet instrument conventionnel – qui contient un amalgame des droits réitérés, une partie de l'acquis jurisprudentiel mais aussi des normes programmatiques – a été signé le 1 février 1995 par une vingtaine de pays. Le CAHMIN s'est penché ensuite sur le deuxième volet de son mandat, à savoir sur la rédaction d'un protocole additionnel à la CEDH des droits individuels applicables dans le domaine culturel.

### 1.4. La Conférence sur la Stabilité européenne

L'initiative de M. Balladur, premier ministre français, appuyée en 1993 par l'Union européenne a engendré un processus qui – sans devenir une nouvelle organisation européenne – a essayé de contribuer à une meilleure protection des minorités. Il est inutile de rappeler que les idées de base de l'initiative ont subi de nombreuses métamorphoses, liées soit au recul des initiateurs français devant les difficultés rencontrées de la part de certains pays, soit au fait que la Politique Étrangère Commune – qui a finalement chapeauté l'idée de M. Balladur – y a ajouté ses considérations bureaucratiques-eurocratiques.

L'idée originelle a été intéressante de plusieurs points de vues et essentiellement à cause:

[27] "N° CM/535/210592: (mandat confié au Comité Directeur des Droits de l'Homme): "Etudier la possibilité, ayant à l'esprit le principe de la complémentarité des travaux du Conseil de l'Europe et de la CSCE, de formuler des normes juridiques spécifiques relatives à la protection des minorités nationales dans l'esprit de la Convention européenne des droits de l'homme. Il tiendra compte également des travaux menés au sein des Nations Unies. Le Comité mènera ses travaux à la lumière du projet de Convention européenne pour la protection des minorités élaboré par la Commission Européenne pour la Démocratie par le Droit ainsi que de la proposition autrichienne pour un protocole additionnel à la Convention européenne des droits de l'homme et d'autres propositions pour des solutions juridiques.". Ce mandat a été complété par la décision n° CM/554/090393 par une référence additionnelle "au projet de protocole additionnel à la Convention européenne des droits de l'homme visé par la Recommandation 1201 (1993) de l'Assemblée" (parlementaire). Cf. Protection des minorités nationales – Rapport final d'activité du CDDH à l'attention du Comité des Ministres CM (93) 164, 3.

[28] Les documents adoptés d'après le mandat précité dans le Comité Directeur des Droits de l'Homme et au sein d'un comité *ad hoc* connu sous le sigle DH–MIN ont une valeur importante mais ils correspondent grosso modo à un bon recueil analytique des textes portant sur la protection des minorités. Le CDDH et le DH–MIN n'ont donné qu'un textbook de droits éventuels en indiquant que leur nature soit prochede ceux qui s'insèrent dans un protocole additionnel à la CEDH, ou plus propice à un autre instrument juridique spécial comme par exemple une convention-cadre.

[29] Cf. Document de Vienne – Annexe II: Les minorités nationales.

[30] L'auteur de ces lignes a participé aux travaux du CAHMIN, comme membre de la délégation hongroise.

– d'avoir fait le tri entre les problèmes de protection des minorités en Europe centrale/orientale et les problèmes similaires de l'Europe occidentale (immigration, l'émergence du fondamentalisme),

– de l'invocation d'un acte de nature de *pactum de contrahendo*,

– de l'admissibilité de l'approche collective dans la protection des minorités,

– d'avoir proposé la tissue des conventions et des approches bilatérales et subrégionales,

– du lien à établir avec les institutions européennes existantes quant au mécanisme de contrôle des engagements contractés.

L'approche au départ ambitieuse s'est résignée au fil des mois à la promotion des traités de bon voisinage bilatéraux: le document de la Conférence inaugurale de 26–27 mai 1994 a rendu clair que sous "Pacte" (de Stabilité), on n'entend qu'un document dépourvu du caractère du droit des gens,[31] que l'essentiel des obligations portant sur la protection des minorités trouvent leur place dans les documents sous codification du Conseil de l'Europe et des traités bilatéraux à rédiger et que l'approche complémentaire, collective de la protection des minorités se trouve cachée.[32] Enfin, la

[31] "Tous les accords et arrangements mis ou point seront inclus dans le Pacte de stabilité, au contenu duquel tous les pays qui auront conclu le Pacte se seront engagés à apporter leur entier soutien politique. Les pays qui ont déjà conclu avec leurs voisins des accords bilatéraux peuvent également, s'ils le souhaitent, les faire inclure dans le Pacte. Celui-ci deviendra, pour tous les pays qui l'auront conclu, une référence essentielle pour donner aux relations entre les peuples de l'Europe entière une qualité nouvelle fondée sur le respect des différences et sur les valeurs communes." [Document de conclusion de la Conférence inaugurale pour un Pacte de Stabilité en Europe: § 1.8]. Quant aux travaux préparatoires, le langage d'un document, préparé par l'Office du Premier Ministre de la République française est révélateur: "Les problèmes de minorités et de frontières seront réglés dans le cadre de la Conférence, par des méthodes et des solutions choisies par les pays eux-même. Ces accords seront réunis dans un Pacte de stabilité en Europe, qui sera l'aboutissement de la Conférence. Son approbation par toutes les parties sera la manifestation tangible de la volonté de tous les pays européens de régler leurs problèmes de minorités et de frontières. Il s'agira d'un engagement politique solennel et sans précédent." ["3. Document de base:" § 1 alinéa 3].

[32] La diplomatie française a transmis un aide – mémoire aux gouvernements des pays de l'Europe centrale. Ce document, reflétant plutôt la manière de penser d'un professeur que celle d'un fonctionnaire, a essayé de clarifier l'idée du gouvernement français: "Au niveau théorique, les règles juridiques existantes sont arrivées progressivement du concept des droits des personnes appartenant aux minorités, basé sur l'individu aux droits collectifs et à la prise en compte du fait que ceux-ci sont intimement liés aux problèmes de sécurité. (...) Le Haut Commissariat pour les Minorités nationales – à établir au sein de la CSCE – devra veiller au respect des droits collectifs des minorités:" aide – mémoire § 2.b. [retraduction du texte, publié en hongrois dans Magyar Szemle 10/1993, 1086–1091].

Les Conclusions de la présidence du Conseil européen des Douze (Copenhague, les 21–22.6.1993) a indiqué que "cette initiative vise à assurer dans la pratique l'application des principes retenus par les pays européens en ce qui concerne le respect des frontières et des droits des minorités."

Depuis le rapport synthétique de la présidence du Conseil européen de Bruxelles (11.12.1993), la référence aux droits collectifs s'est cachée derrière les formules plus diplomatiques: "Il devra tenir compte des accords déjà conclus et des efforts fournis par les États vis à vis de leurs minorités nationales." [rapport synthétique § 4.2.]. La documentation de base de la Conférence inaugurale indique que "les contributions pourront être des accords formels d'amitié et de coopération, des arrangements généraux ou particuliers, des dispositions unilatérales (lois, règlements), des projets d'intérêt commun, auxquels la Communauté internationale pourra apporter son appui." (3. documentation de base § 3 alinéa 2).

Le document de conclusion de la Conférence inaugurale stipule que "(...) des accords bilatéraux sur des relations de bon voisinage constituent des jalons dans ce processus. Mais il nous faut aller plus loin et rendre ces acquis irréversibles." [Document de conclusion § 1.2.].

Or, les lois hogroise, croate, slovène, ukrainienne sur les minorités, ainsi que les accords bilatéraux de ces pays utilisent d'avantage la complémentarité de l'approche collective de la protection des minorités.

Conférence sur la Stabilité en Europe (des 20–21 mars 1995) a chapeauté un grand nombre d'instruments bilatéraux dont le traité de bon voisinage, engagement juridique intéressant. Il est à noter 1q'en dehors de la consécration de certains principes (p.ex.: subsidiarité) et de l'énumération des droits individuels, dans une formulation plus "dure" que celle de la Convention-cadre, les deux parties se sont engagées à appliquer comme engagement juridique les normes et les "commitments" politiques de la résolution 135/47 de l'A.G. de l'ONO, du document de Copenhague de la CSCE et de la fameuse recommendation 1201 de l'Assemblée parlementaire du Conseil de l'Europe.

### 1.5. L'Initiative de l'Europe Centrale

Créé en fin 1989, à l'initiative de l'Italie, le Quadragonale est devenu l'Initiative de l'Europe Centrale qu'on peut qualifier comme un organisme dont les formes de la coopération sont plutôt diplomatiques que vraiment institutionnelles.[33]

La protection des minorités est un des domaines où les pays membres de l'Initiative de l'Europe Centrale ont essayé de mettre en place une coopération politique embryonnaire qui s'est manifestée dans la présentation d'un projet de texte commun à la réunion de Copenhague de la CSCE en 1990 et dans l'adoption d'un *instrument de protection des minorités*. Cet *instrument*, ouvert à la signature par les ministres des affaires étrangères lors de leur réunion des 18–19 novembre 1994 à Turin, a été initié au début comme un projet de convention subrégionale. Plus tard, les participants ont décidé de ne formuler qu'un instrument qui ne possède pas les caractéristiques d'un traité international. Le contenu de ce document montre bien des ressemblances avec la Convention-cadre élaborée sous les auspices du Conseil de l'Europe.

### 1.6. La Commission Badinter et son rôle dans l'approfondissement de la protection des minorités

L'une des réponses les plus avant-gardistes au défi du problème des minorités a été donnée par cette institution créée *ex nihilo*, étant un tribunal international *ad hoc*. Instituée pour vérifier la satisfaction des conditions de la reconnaissance étatique des États de l'ancienne Yougoslavie, posées par les Douze,[34] la Commission d'Arbitrage

[33] En fait, l'Initiative d'Europe Centrale n'a pas de personnalité juridique du point de vue du droit international. Les réunions annuelles des chefs de gouvemement, les rencontres (en général deux fois par an) des ministres des affaires étrangères sont complétées par une certaine dimension parlementaire et surtout par les rencontres trimensuelles des coordonnateurs nationaux qui essaient de concrétiser les modalités de coopération dans treize domaines concrets. Pour le moment, l'Initiative de l'Europe Centrale n'a ni institution permanente (la présidence rotative gère les affaires logistiques), ni budget. Puisque la Banque Européenne de Reconstruction et de Développement participe dans le financement de certains projets (projects), on a installé un secrétariat des projets-CEI à la BERD, sur la base des contributions volontaires des Etats membres dont l'Italie paie la majeure partie.

[34] En décembre 1991, dans la Déclaration concernant les lignes directrices sur la reconnaissance de nouveaux États en Europe orientale et en Union Soviétique, le Conseil des ministres des Douze précise que "les États candidats à une reconnaissance de la part de la Communauté européenne et de ses États membres, doivent

– respecter les dispositions des Nations Unies et de l'Acte Final d'Helsinki ayant trait à l'État de droit, à la démocratie et aux droits de l'homme;

– garantir les droits des groupes ethniques et nationaux ainsi que des minorités;

de la Conférence de Paix en Yougoslavie, appelée couramment d'après son président Commission Badinter a constaté que: "*si au sein d'un Etat, il existe un ou plusieurs groupes constituant une ou des communautés ethniques, religieuses ou linguistiques, ces groupes ont, en vertu du droit international, le droit de voir leur identité reconnue.*"[35] "(...) *en vertu de normes, maintenant impératives, du droit international général, il appartient aux Etats d'assurer le respect des droits des minorités.*"[36] Même si ce dictum a reçu un écho plutôt mitigé dans la doctrine,[37] sa répétition conséquente par la Commission Badinter a confirmé la qualité soigneusement mûrie de la thèse. Il est non moins vrai – comme P.M. Dupuy l'indique – qu' "*on est certes ainsi en présence d'une pratique dont il est encore trop tôt pour discerner la pérennité, en particulier au-delà du cadre européen. Si elle devait se confirmer et gagner en extension, elle amorcerait quoiqu'il en soit une évolution très sensible des traits classiques du droit international* (...)".[38]

## 2. La Hongrie et le problème juridique des minorités

### 2.1. La Hongrie et les minorités hongroises

Le peuple hongrois – donc les Magyars – s'étend largement au-delà des frontières de la Hongrie. Les frontières établies par le traité de paix de Trianon (1920) et rétablies par le traité de paix de Paris (1947), ont laissé ca. 3,5 millions de personnes de souche, de langue maternelle et de la culture hongroises dans les pays limitrophes. Les chiffres données par les recensements et par les estimations des organisations des minorités divergent, ce qui n'est pas surprenant dans cette partie du continent. A cause de l'histoire, des lacunes évidentes d'une protection internationale adéquate, des relations de famille et de l'intérêt général, la Hongrie ne peut pas faire abstraction du fait qu'une partie du même peuple vit de l'autre côté de ses frontières.

Quelle est la position constitutionnelle et diplomatique de la Hongrie en la matière?

**6.§ :** (1) La République de Hongrie refuse la guerre comme moyen de résoudre les différends entre les nations et s'abstient de recourir à l'emploi de la force ou à la menace de l'emploi de la force contre l'indépendance ou l'intégrité territoriale d'autres États.

(2) La République de Hongrie cherche à coopérer avec tous les peuples et tous les pays du monde.

– respecter l'inviolabilité de toutes les frontières, lesquelles ne pourront être modifiées que par des moyens pacifiques et par commun accord;

– reprendre à leur compte les engagements précédemment souscrits qui concernent le désarmememt et la non-prolifération nucléaire ainsi que la sécurité et la stabilité régionales." V. 96 *RGDIP* 261 (1992).

[35] Conférence Pour la Paix en Yougoslavie: Commission d'Arbitrage – avis n° 2 para 2, 1, v. 96 *RGDIP* 263 (1992).

[36] Ibid.; cf. également avis *n°* 9 para 2 (p. 2) et avis *n°* 10 para 4. (p. 2) 97 *RGDIP* 564 ss (1993).

[37] Les réactions froides ont été déjà pronostiquées par A. Pellet, lui même participant comme expert aux travaux de la Commission.

Cf. A. P e l l e t: The Opinions of the Badinter Arbitration Committee: A secound Breath for the Self-Determination of Peoples 3 *EJIL* 179 (1992).

[38] P.-M. D u p u y: Droit international public 67 (1992).

(3) La République de Hongrie se considère responsable du sort des Hongrois vivant en dehors de ses frontières et favorise le maintien de leurs relations avec la Hongrie."

Comment interpréter ces clauses?

La chute du Mur de Berlin a profondémement transformé la Constitution de la Hongrie. Bien que la Constitution – du point de vue de la numérotation législative – soit la même,[39] la réforme constitutionnelle de 1989 a profondémement transformé le *corpus juris*, le rendant capable de satisfaire les exigences de l'État de droit. Les changements ont aussi concerné les relations entre la Hongrie et les Magyars vivant au-delà des frontières. Tandis que la version communiste restait muette sur le sujet, la réforme y a ajouté la formule précitée, basée sur le consensus national et reflétant le concept de la solidarité.

La position de l'alinéa 3 montre déjà en elle-même, que cette stipulation est assujettie aux normes les plus importantes de la communauté internationale, considérées souvent comme étant de nature de *jus cogens* ou en d'autre termes, de normes impératives. Cette formule peut donner éventuellement l'impression d'une stipulation extraterritoriale – au moins l'auteur de ces lignes a été témoin du besoin d'éclaircissement à un colloque international. Sans que cela soit en lui-même un facteur déterminant, il est à noter que cette clause n'est pas du tout unique dans son genre en Europe centrale: les constitutions slovène,[40] croate[41] et roumaine[42] contiennent des règles analogues.

En ce qui concerne les dimensions conventionnelles, on peut se référer à la possibilité des recours interétatiques, garantie par les articles 41 (facultative) du Pacte International relatif aux Droits Civils et Politiques et 24 de la Convention européenne des Droits de l'Homme. D'ailleurs, certains articles des instruments internationaux relatifs à la protection des minorités sont encore plus pertinents: au Conseil de l'Europe la Charte européenne des langues régionales ou minoritaires,[43] la Convention-cadre pour la protection des minorités nationales[44] et sous les auspices de l'Initiative de

[39] La loi XX de l'an 1949 – plusieurs fois modifiée depuis.

[40] L'article 5: "The Republic of Slovenia shall protect human rights and fundamental freedoms. It shall care for autochtonous Slovenian national communities in the neighbouring states as well as for Slovenian emigrants, migrant workers and their families abroad and promote their contacts to their native country. It shall protect and guarantee the rights of the autochtonous Italian and Hungarian nationalities (...)." (Traduction anglaise officielle).

[41] Article 10: "The Republic of Croatia shall protect the rights and interests of its citizens living or staying abroad, and shall promote their links with the homeland. Parts of the Croation nation in other states shall be guaranteed special concern and protection by the Republic of Croatia." (Traduction anglaise officielle).

[42] Article 7: "L'État soutient le resserrement des liaisons avec les roumains vivant au-delà des frontières du pays et agit pour préserver, développer et exprimer leur identité ethnique, culturelle, linguistique et religieuse, avec le respect de la législation de l'État dont ils sont les citoyens." (Traduction française officielle).

[43] Préambule: "Conscients du fait que la protection et la promotion dees langues régionales ou minoritaires dans les différents pays et régions d'Europe représentent une contribution importante à la construction d'une Europe fondée sur les principes de la démocratie et de la diversité culturelle, dans le cadre de la souveraineté nationale et de l'intégrité territoriale."

[44] Préambule: "Considérant que les bouleversements de l'histoire européenne ont montré que la protection des minorités nationales est essentielle à la stabilité, à la sécurité démocratique et à la paix du continent,"

article 1: "La protection des minorités nationales et des droits et libertés des personnes appartenant à ces minorités fait partie intégrante de la protection internationale des droits de l'homme, et comme telle, constitue un domaine de la protection internationale;"

l'Europe Centrale, l'Instrument pour la protection des minorités[45] peuvent servir de guide pour l'interprétation de la clause "la République de Hongrie se considère responsable du sort des Hongrois vivant en dehors de ses frontières". L'autre partie de l'alinéa 3, à savoir "(elle) favorise le maintien de leurs relations avec la Hongrie" peut être, de la même façon, soutenue par le renvoi aux documents précités.[46]

Les régimes bilatéraux de la protection des minorités comme l'ukraino-hongrois[47] et le slovéno-hongrois[48] confirment le *"droit de regard"* des pays concernés par la mise en place des comités bilatéraux mixtes.

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article 18(1): "Les Parties s'efforceront de conclure, si nécessaire, des accords bilatéraux et multilatéraux avec d'autres États, notamment les États voisins, pour assurer la protection des personnes appartenant aux minorités nationales concernées."

[45] Préambule "bearing in mind that a very effective remedy to achieve stability in the region are good relations between neighbours, and being conscious of the need to avoid any encouragement of separatist tendencies of national minorities in the region,

confirming that issues concerning the rights of persons belonging to national minorities are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective state,

considering that respect for the rights of persons belonging to national minorities, as part of universially recognized human rights, is an essential factor for peace, justice, stability and democracy in the States."

[46] Charte européenne des langues régionales ou minoritaires:

article 7(1)i: les Parties fondent leur politique, leur législation et leur pratique sur (...) "la promotion des formes appropriées d'échanges transnationaux, dans les domaines couverts par la présente Charte, pour les langues régionales ou minoritaires pratiquées sous une forme identique ou proche dans deux ou plusieurs États,"

article 14(b): Les Parties s'engagent (...) "dans l'intérêt des langues régionales ou minoritaires, à faciliter et/ ou à promouvoir la coopération à travers les frontières, notamment entre collectivités régionales ou locales sur le territoire desquelles la même langue est pratiquée de façon identique ou proche."

Convention-cadre pour la protection des minorités nationales:

article 17(1) les Parties s'engagent à ne pas entraver le droit des personnes appartenant à des minoritès nationales d'établir et de maintenir, librement et pacifiquement, des contacts au-delà des frontières avec des personnes se trouvant régulièrement dans d'autres États, notamment celles avec lesquelles elles ont en commun une identité ethnique, culturelle, linguistique ou religieuse, ou un patrimoine culturel,"

article 18(2) le cas échéant, les Parties prendront des mesures propres à encourager la coopération transfrontalière."

L"Instrument pour la protection des minorités de l'Initiative de l'Europe Centrale:

article 23: "Every belonging to a national minority, while duly respecting the territorial integrity of the State, shall have the ritght to have free and unimpeded contacts with the citizens of another country with whom this minority shares ethnic, religious or linguistic features or a cultural identity. States hall not unduly restrict the free exercise of those ritghts. Futhermore States will encourage transfrontier arrangements at national, regional and local levels."

[47] Declaration on the principles of cooperation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic in guaranteeing the rights of national minorities (31.5.1991) § 16: "To monitor the implementation of the principles laid down in the present Declaration, as well as fulfilment of the commitments undertake, the Parties are to express their readiness to set up a Joint Committee composed of representatives from the two Parties' state bodies and national minorities. The mandate and set up of the Joint Committee will be defined in a separate intergovernmental protocol."

(L'article 17 du traité de base (6.12.1991) entre l'Ukraine et la Hongrie a conféré aux obligations de la déclaration et du protocole adopté le même jour la nature de droit international.) (traduction anglaise officielle).

[48] Convention sur la garantie des droits séparés attribués à la minorité nationale slovène vivant dans la République de Hongrie et à la communauté nationale hongroise vivant dans la République Slovène (6.11.1992):

article 15: "Les Parties Contractantes créent une commission minoritaire intergouvernementale séparée pour veiller à la réalisation des dispositions de la Convention présente. (...) Les gouvernements désignent les membres de la commission issus des minorités suite à la commission intergouvernementale sont les suivantes: la discussion portant sur les questions actuelles liées aux deux minorités; l'évaluation dé la réalisation des obligations découlant

Ceci dit: cette stipulation constitutionnelle n'est essentiellement autre que la déclaration *in abstracto* de l'utilisation en cas de besoin des différents droits de recours garantis par les instruments internationaux pertinents.

### 2.2. La Hongrie et ses minorités linguistiques ou ethniques vivant sur son sol

*2.2.1. La configuration des minorités de Hongrie: le problème des données inexactes et l'histoire qui est à l'arrière-plan*

Depuis la création de l'Etat dans le bassin des Carpates, la population du pays a été toujours composée de locuteurs de différentes langues dont le hongrois était le plus répandu. Vu l'énorme sacrifice en vies humaines de l'occupation turque et de la guerre libératrice menée par la Sainte Ligue, les souverains et notamment le roi Charles III et la reine Marie-Thérèse ont donné leur assentiment à l'idée de l'invitation massive de main d'oeuvre venant surtout des autres parties de l'empire Habsbourg et des territoires restés sous obédience turque. Cette mesure, connue dans d'autres pays féodaux aussi, a causé le renversement du taux des locuteurs de langues. Au cours du 19e siècle, la population Magyar se voyait en minorité (environ 42–48%) par rapport au nombre additionné des locuteurs d'autres langues.

Le traité de paix de Trianon a privé (1920) le pays des deux tiers de son territoire et a rendu la population Magyar nettement majoritaire sur la superficie de 93000 km². Vu cependant les conséquences psychologiques de la politique révisionniste de l'entre-deux-guerres, du génocide hitlérien, de la déportation de la communauté juive en 1944, de l'expulsion d'une partie de la population allemande après la guerre, et des réminiscences de la titophobie de Rákosi, le dictateur de 1949–1956, il est extrêmement difficile d'avoir un chiffre plus au moins exacte de la répartition de la population d'après les langues maternelles ou d'après l'appartenance ethnique.Il y une méfiance profonde envers les recensements et par souci d'autodéfense, les interrogés ont souvent tendance à cacher leur identité réelle: ceci est fondé *inter alia* sur le fait que les résultats des recensements de 1941 ont fourni la base juridique de la désignation des Allemands "expulsables" après la guerre. (A ce temps-là, les mêmes fichiers ont été utilisés en Tchécoslovaquie et en URSS – pour désigner cette fois-ci les Hongrois, privés de leur droits civiques et en masse déportés ou expulsés.) La prise en compte de la double identité pose également certains problèmes techniques.

Il est intéressant de voir les changements des chiffres:

a. d'après les réponses données à la question des recensements de 1980 et de 1990 portant sur la nationalité:

- Allemands: 11,310 (1980); 30,824 (1990)
- Slovaques: 9,101 (1980); 10,459 (1990)
- Croates, Slovènes ou Serbes 18,431 (1980)

de la Convention; la préparation et l'adoption des recommandations pour leur propre gouvernement liées à la réalisation de la Convention et en cas de basoin à sa modification.

Les prises de position de la commission sont adoptées à l'unanimité." (traduction française officielle).

Croates:13,570 (1990); Serbes 2,905 (1990)
Slovènes ou autres:1,930 (1990),
- Roumains: 8,874 (1980); 10,740 (1990),
- Tziganes: 142,683 (1990)

b. d'après les réponses données à la question portant sur la langue maternelle:

- Allemands: 31,231 (1980); 37,511(1990),
- Slovaques: 16,054 (1980); 12,745 (1990),
- Croates, Slovènes ou Serbes: 27,052 (1980),
  Croates:17,757 (1990); Serbes: 2,593 (1990),
  Slovènes ou autres: 2,627 (1990),
- Roumains: 10,141 (1980); 8,730(1990),
- Tziganes: 48,072 (1990)

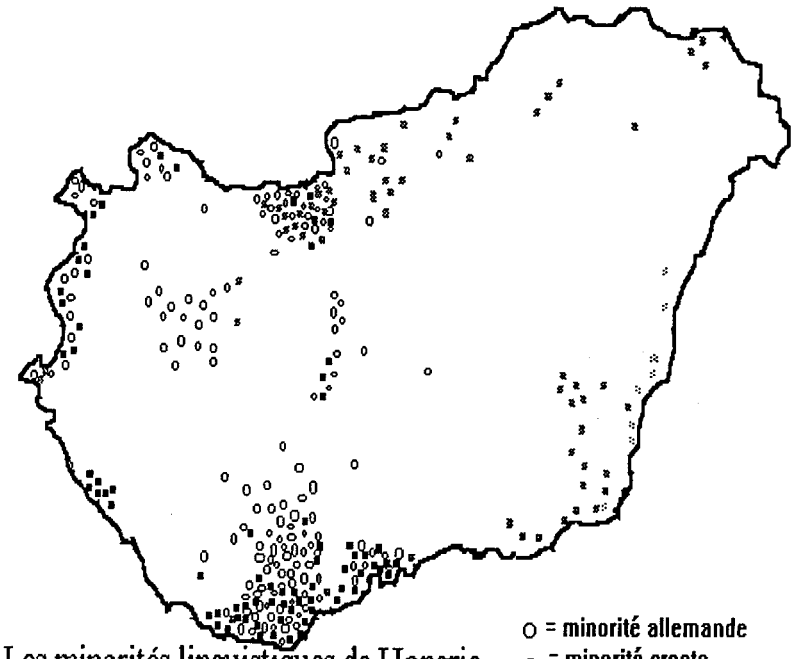
c. les estimations des autorités gouvernementales sur la base des examens empiriques additionnels, effectués dans 506 villages et villes (la méthode Hooz):

- Allemands: min. 95,000
- Slovaques: min. 50,000
- Croates, Slovènes et Serbes: min. 38,000
- Roumains: min. 10,000
- Tziganes: 400–600,000 (estimation globale, sans recherches empiriques)

d. les estimations des associations de représentations d'intérêt des minorités:

- Allemands: 200–220,000
- Slovaques: 110,000
- Croates: 80–90,000; Serbes: 5,000; Slovènes: 5,000
- Roumains: 25,000
- Polonais:10,000
- Bulgares: 3,000
- Grecques: 2,500–3,000
- Arméniens: 1,500
- Ukrainiens:451
- Ruthènes (Ruthéno-ukrainiens):1,000
- Tziganes: 600–800,000 ou 1,000,000

La carte montre en gros la configuration ethnique et linguistique de la Hongrie, en indiquant les communes dont la population peut être qualifiée comme (tantôt la majorité, tantôt la minorité significative) appartenant à une grande minorité linguistique.




( La loi n° LXXVII de 1993 sur les droits des minorités énumère les minorités suivantes: allemande, arménienne, bulgare, croate, grècque, polonaise, roumaine, ruthénienne, serbe, slovaque, slovène, tzigane, ukrainienne. Ce dessin montre l'établissement géographique des minorités linguistiques les plus importantes.)

*2.2.2. Le système juridique et constitutionnel des minorités de Hongrie*

Comment assurer un traitement adéquat et équitable à ces minorités tant différentes?

Outre les clauses relatives au rapport entre le droit international et le droit interne[49] ou celles qui garantissent dans le langage européen les droits de l'homme[50] et en particulier l'interdiction de la discrimination,[51] la Constitution consacre également les principes de base de la participation effective des minorités dans la vie publique:

[49] "§ 7. L'ordre légal de la République de Hongrie accepte les règles généralement reconnues du droit international et garantit l'harmonie entre ses engagements contractés dans le domaine du droit international et le droit interne."

[50] § 8: (1) La République de Hongrie reconnaît les droits fondamentaux, inviolables et inaliénables de l'homme; leur respect et leur protection sont une obligation primordiale de l'État.

(2) Dans le République de Hongrie, les règles relatives aux droits et obligations fondamentaux sont fixées par la loi qui cependant ne peut limiter le contenu substantiel d'un droit fondamental.

Les droits de l'homme sont énumérés dans le chapitre XII (Droits fondamentaux et obligations) entre les §§ 54–70/K).

[51] § 70/A: (1) Le République de Hongrie assure à toute personne séjournant sur son territoire les droit de l'homme et les droits civiques, sans discrimination aucune fondée sur la race, la couleur, le sexe, la langue, la religion, l'opinion politique ou autre, l'origine nationale ou sociale, la fortune, la naissance ou toute autre situation."

§ 68.: (1) Les minorités nationales et ethniques vivant dans la République de Hongrie font partie du pouvoir du peuple; elles sont des facteurs constitutifs de l'Etat.

(2) La République de Hongrie protège les minorités nationales et ethniques. Elle assure leur participation collective dans la vie publique, le développement de leur propre culture, l'utilisation de leur langue maternelle, l'enseignement dans la langue maternelle, le droit de l'utilisation de leur nom dans leur propre langue.

(3) Les lois de la République de Hongrie garantissent la représentation des minorités nationales et ethniques vivant sur le territoire du pays.

(4) Les minorités nationales et ethniques peuvent créer d'organes d'autogestion locaux et nationaux.

(5) L'adoption de la loi sur les minorités nationales et ethniques requiert la majorité des deux tiers des voix des députés présents.

La Constitution a mis un accent particulier sur l'institution de l'ombudsman des minorités.[52] Bien évidemment, la Constitution ne peut régler que les principes vraiment fondamentaux et les modalités sont légiférées à part, en particulier dans la loi sur les droits des minorités. Cette loi,[53] adoptée en 1993 associe le concept des droits individuels avec l'approche collective, se manifestant dans une autonomie personnelle. L'autonomie personnelle trouve sa raison d'être technique dans la configuration de l'établissement géographique des minorités de Hongrie. Sa raison d'être juridique se déduit des stipulations précitées de la Constitution et en partie de la loi sur les collectivités locales,[54] sa raison d'être politique s'explique par la volonté des minorités concernées – qui ont mené les négociations dans un bloc homogène: le gouvernement a eu comme partenaire et interlocuteur un corps *ad hoc* représentatif, composé des délégués des organismes de représentation d'intérêt[55] – et par la concordance de vue du gouvernement[56] et du parlement. (Ce fait est manifesté aussi dans la quasi unanimité[57] de l'adoption.) La longue procédure de l'élaboration dont le début et la première version

[52] "Chapitre V: Le commissaire parlementaire des droits civiques et le commissaire parlementaire des droits des minorités nationale et ethniques.

§ 32B. (1) La tâche du commissaire parlementaire des droits civiques est d'examiner ou de faire examiner les abus relatifs aux droits constitutionnels et parvenus à sa connaissance, ainsi que de prendre l'initiative de mesures générales ou individuelles pour y remédier.

(2) La tâche du commissaire parlementaire des droits des minorités nationales et ethniques est d'examiner ou de faire examiner les abus relatifs aux droits des minorités nationales et ethniques et parvenus à sa connaissance ainsi que de prendre l'initiative de mesures générales ou individuelles pour y remédier.

(3) Dans les cas fixés par la loi, quiconque peut proposer une démarche du commissaire parlementaire.

(6) Le commissaire parlementaire rend compte annuellement de ses expériences à l'Assemblée nationale.

Sur son élection cf.:

§ 19: (3) Dans ce pouvoir, l'Assemblée nationale (...)

(k) élit le président de la République, le premier ministre, les membres de la Cour constitutionnelle, le commissaire parlementaire des droits civiques ainsi que celui des droits des minorités nationales et ethniques, le président et les vice-présidents de la Cour des Comptes, le président de la Cour Suprême et le procureur général.

[53] La Loi n° LXXVII de 1993 sur les droits des minorités nationales et ethniques.

[54] Loi n° LXV (1990) sur les collectivités locales et Loi n° LXIV sur les élections des députés locaux des collectivités locales et des maires.

[55] La "table-ronde des minorités".

[56] M. Wolfart, secrétaire d'Etat et président de l'Office des minorités nationales ou ethniques a été chargé des négociations avec la table ronde des minorités.

[57] L'Assemblée nationale l'a adoptée avec 304 voix pour, 3 contre et 8 abstentions.

remontent à 1989–1990[58] témoigne aussi que les minorités considéraient les propositions fondées sur la liberté d'association classique[59] comme étant inadéquates.

Selon les termes de la loi, une minorité nationale ou ethnique est une communauté (»*Volksgruppe*«) en minorité numérique par rapport aux autres habitants de l'Etat, résidant au moins depuis un siècle sur le sol de la République de Hongrie et dont les membres – qui sont citoyens de Hongrie – se différencient des autres parties de la population par la langue, la culture et les traditions. En vertu de cette définition, manifestement inspirée par M. Capotorti, les communautés suivantes sont *a priori* considérées comme traditionnellement établies en Hongrie: les Allemands, les Arméniens, les Bulgares, les Croates, les Grecs, les Polonais, les Roumains, les Ruthènes, les Serbes, les Slovaques, les Slovènes, les Tziganes et les Ukrainiens.

Les minorités en tant que communautés ont le droit de créer des organisations sociales et des autonomies locales ou nationales. Elles ont le droit à la représentation garantie dans l'Assemblée nationale dont les modalités vont être régies dans la loi[60] sur les élections. L'Assemblée nationale élira un *ombudsman* (médiateur) pour surveiller et promouvoir l'assurance effective des droits des minorités nationales ou ethniques.

La loi considère la création et l'activité des autonomies des minorités – dans l'esprit d'une autonomie culturelle – comme la condition la plus importante pour que les minorités puissent faire valoir leurs droits. Elle rend donc possible que les minorités dans les communes, les villes et les arrondissements de la capitale établissent des autonomies communales ou qu'elles créent soit par la voie directe, soit par la voie indirecte des autonomies à vocation locale ou nationale. Une autonomie communale peut se déclarer autonomie communale de minorité si dans l' assemblée communale 50%+1 des représentants ont été élus comme candidats d'une minorité nationale ou ethnique. Si au moins 30% des membres d'une assemblée communale ont été élus en tant que candidat de la même minorité, ils peuvent constituer une autonomie locale de minorité dont le nombre sera minimum 3. ( Si le nombre de la population est inférieur à 1300, l'autonomie locale de minorité sera composée de 3 délégués. Leur nombre sera 5 dans une commune dont la population dépasse 1300 âmes. Dans les villes leur nombre sera 7, dans une ville à vocation départementale et dans les arrondissements de la capitale ils seront 9.) Il y a aussi la possibilité d'élire directement les autonomies locales, suite à l'initiative locale concrète. Telles élections ont été tenues le 11 décembre 94, parallèlement aux élections municipales. Dans le cas où la minorité ne peut pas constituer une autonomie locale de minorité, ses intérêts seront représentés par le porte-parole des minorités.

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[58] C'est à dire à la dernière année du gouvernement réformiste-socialiste où le vice-ministre Tabajdi a mené les négociations et les préparatifs dans le cadre du Collège des minorités nationales ou ethniques.

[59] Tels travaux ont été entrepris essentiellement dans les milieux des experts du ministère de justice (aussi bien dans la phase 1989–90 que 1990–1993) comme étant des alternatives législatives. Le Collège et plus tard l'Office se sont attachés conséquemment au principe de l'autonomie personnelle.

Sur l'histoire de la codification cf. J. B o d á n e-P á l o k: A magyar kisebbségi törvény megszületésének körülményei (Les circonstances de la naissance de la loi hongroise sur les minorités) Acta Humana n° 12–13/1993. (Revue du Centre Hongrois des Droits de l'Homme).

[60] La partie pertinente de la loi électorale n'a pas reçu cependant la majorité de 2/3. La Cour Constitutionnelle a constaté la carence constitutionnelle du législateur qu'on va analyser *infra*.

Dans la commune, l'opinion concordante de l'autonomie locale de la minorité est requise pour l'adoption d'un décret communal touchant la population minoritaire ou pour la nomination des dirigeants des établissements d'enseignement des minorités.

Une minorité nationale ou ethnique ne peut avoir qu'une seule autonomie à vocation nationale mais les minorités nationales ou ethniques peuvent associer leurs autonomies à vocation nationale. Ces autonomies nationales représentent et protègent les intérêts des minorités données au niveau étatique et territoriale. Elles formulent des avis sur les projets de règles juridiques quand celles-ci touchent d'une manière particulière les minorités qu'elles représentent et elles coopèrent avec les autorités étatiques dans le contrôle professionnel de l'enseignement primaire, secondaire ou supérieur des minorités. La loi stipule qu'au cours de la législation portant sur l'enseignement public et l'enseignement supérieur, de la définition de la structure et du contenu de l'activité éducationnelle et pédagogique et du contrôle de cette activité, les intérêts éducationnels et culturels correspondant à l'autonomie culturelle des minorités doivent être respectés en conformité avec les principes de la loi sur les minorités nationales ou ethniques.

Un chapitre spécial de la loi régit les questions de la gestion des autonomies des minorités et de l'assistance nationale des minorités. En vertu de ces dispositions, l'Assemblée nationale devra établir en un an après l'entrée en vigueur de la loi le Fonds pour les Minorités Nationales ou Ethniques pour aider les minorités ou les activités exercées en leur faveur.[61]

Les règles relatives à l'utilisation de la langue des minorités suivent le concept de la *Charte européenne des langues régionales ou minoritaires*.[62]

### *2.2.3. La Cour Constitutionnelle et sa jurisprudence en matière des minorités*

La Cour Constitutionnelle a aussi contribué à l'interprétation des règles constitutionnelles relative à la protection des minorités. Ses prises de position les plus importantes ont concerné deux questions: la carence constitutionnelle dans l'adoption de la loi sur les droits des minorités et le problème de la représentation parlementaire des minorités.

#### 2.2.3.1. La Cour Constitutionnelle et la loi sur les droits des minorités

Le parlement élu en 1990 et le gouvernement de M. Antall ont recommencé les consultations avec les représentants des associations des minorités. Pour des raisons différentes, ces consultations et les travaux des experts ont été menés avec une certaine lenteur dans les premiers mois. (Il est à noter que l'adoption parlementaire de cette loi a été prévue par une majorité de 2/3 dont la coalition conservaterice ne disposait pas.)

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[61] Dans les deux premières années après l'entrée en vigueur, le budget national devra prescrire un fonds spécial de compensation pour les minorités avec une valeur de 0,5 milliards forints pour chacune de ces années. Ceci servira à financer les coûts de l'installation des autonomies locales et nationales. Outre cela, une aide unique de 300 millions forints est prévue pour contribuer à la mise en marche des autonomies nationales des minorités.

[62] Cf. P. K o v á c s: A nemzetközi jogi kisebbségvédelem a 90-es években (IV) (La protection des minorités en droit international des années 90 – 4e chapitre) Magyarság és Európa 6/1994, 27–36.

A ce stade, le député (P.S.) Tabajdi, l'ex-ministre pour les minorités (89–90), a intenté un recours en carence devant la Cour, pour la non-adoption à temps de la loi. La Cour a accepté le recours, mais elle a suspendu ses délibérations en la matière jusqu'au 1janvier 1992, en donnant un délai de grâce à l'Assemblée nationale.

Le 10 juin 1992, puisque cette loi ne soit encore née, la Cour a constaté[63] la carence du législateur, en lui donnant la date butoir du 1 décembre 1992. Le parlement ne l'a votée finalement que – comme on l'a vu – le 7 juillet 1993. Dans son argumentation, la Cour a cité le § 68 de la Constitution et le renvoi du § 12 de la Loi n°LXV (1990) sur les collectivités locales et elle a précisé que *"la représentation est un sine qua non pour que les minorités nationales et ethniques puissent faire valoir qu' elles sont des facteurs constitutifs de l'Etat."* La Cour a constaté que *"l'institution d'une représentation générale par le législateur n'est pas encore faite par la méthode et la mesure requises par les dispositions de la Constitution."*

2.2.3.2. La Cour Constitutionnelle et la représentation parlementaire des minorités

L'autre décision importante de la Cour a été rendue en matière de la loi électorale.[64] La loi sur le droits des minorités a stipulé la représentation parlementaire des minorités, en faisant un renvoi "à une loi". Or, pour changer la loi électorale dans ce sens, la coalition conservatrice n'a pas obtenu la majorité de 2/3, malgré l'appui du PS, à ce temps-là en opposition. Le requérant a demandé la constatation de l'inconstitutionnalité de la loi électorale.

La Cour a refusé de se prononcer sur la constitutionnalité de la loi électorale. Elle a souligné *"qu'il entre dans la liberté du législateur de choisir si elle estime légiférer dans une ou plusieurs lois, en cas d'une obligation de législation"* En plus, la Cour, dans sa décision, faisant renvoi à la décision n° 35/1992 (VI.10.) AB précitée, a attiré l'attention sur le fait que dans cette décision, elle n'avait pas désigné la loi électorale comme unique possibilité d'assurer la représentation.

Et la Cour – après avoir noté la satisfaction partielle des obligations dérivées de la décision n° 35/1992 (VI.10.) AB, par l'adoption de la loi sur les droits des minorités, a constaté qu' "il découle de tout ce qui précède que la décision n° 35/1992 (VI.10.) AB *a déjà constaté la carence constitutionnelle en matière de la non-institution de la représentation des minorités dans l'Assemblée nationale.* Ainsi la Cour a constaté que le recours en espèce était *res judicata* et à ce titre elle l'a refusé sans examiner *in merito.*"

Or, rien de tel n'est écrit *expressis verbis* dans la décision n° 35/1992 (VI.10.) AB!

Là-bas, comme on l'a vu, la Cour a constaté la carence pour la non-adoption à temps de la loi sur les droits des minorités et elle a fait allusion à l'institution d'une représentation générale comme *conditio sine qua non.* Théoriquement, avant la décision n° 24/1994(V.6.) AB, on aurait pu croire que la carence en matière de la représentation parlementaire est une simple carence législative. Dès lors, il est évident que les autonomies nationales des minorités ne satisferont pas la Cour Constitutionnelle.

[63] Décision n° 35/1992 (VI.10.) AB.
[64] Décision n° 24/1994 (V.6.) AB.

On serait même tenté de dire que la Cour Constitutionnelle a conféré avec effet rétroactif la nature constitutionnelle au principe de la représentation parlementaire garantie des minorités.

Il reste à voir comment les réformes constitutionnelles, dont les travaux préparatoires ont été d'ores et déjà lancés par le nouveau gouvernement (de gauche: PS et SzDSz) vont répondre à ce défi, car c'était justement le SzDSz qui craignait le mieux l'émergence des phénomènes dits "corporatistes" dans le parlementarisme.

### 2.3. La Hongrie et sa position dans la codification internationale de la protection des minorités

Dans la première partie de cet article, on a brièvement parcouru les grands domaines de la codification de la protection des minorités. Quelle était et quelle est la position de la Hongrie en la matière?

Il est évident que la Hongrie est un des pays européens les plus intéressés dans l'approfondissement de la codification des minorités. Cet intérêt trouve ses racines *inter alia* dans les considérations qui ont influencé les Puissances alliées et associées lors du retracé des frontières en 1920. Comme la fameuse lettre d'envoi d'Alexandre Millerand, président de la République française, jointe au texte définitif du traité de paix de Trianon l'a souligné "*Les conditions ethnographiques dans l'Europe centrale sont telles qu'il est, en effet, impossible que les frontières politiques coïncident, dans toute leur étendue avec les frontières ethniques. Il s'ensuit, et les Puissances alliées et associées ne se sont pas résignées sans regret à cette nécessité, que certains noyaux de population magyare se trouveront passer sous la souveraineté d'un autre État. (...) Quant aux îlots de population magyare qui passeront sous une autre souveraineté, les Traités pour la protection des minorités déjà signés par la Roumanie et l'État serbe-croate-slovène et ratifiés par la Tchéco-Slovaquie garantissent leur entière sauvegarde.*"[65]

Or, ces instruments de protection des minorités de la Société des Nations ont été déclarés caducs par le Secrétaire général des Nations Unies dans son fameux – mais superficiel – rapport sur la validité de ces engagements contractés.[66] Mais – abstraction faite maintenant de la critique[67] de l'argumentation de M. Trygve Lie et surtout de ses prophéties restées voeux pieux – il est utile de citer une autre phrase de M. Millerand: "*Un état de choses (...) n'est pas fondé à subsister lorsqu'il est reconnu contraire à la justice.*"[68]

Le réveil des minorités et la réaction de la communauté internationale par les différentes tentatives de codification étaient inévitables et même prévisibles. Cette considération s'est manifestée aussi bien dans la fameuse phrase citée de M. François

[65] Conférence de la Paix: Lettre d'envoi au président de la Délégation Hongroise de la réponse des Puissances Alliées et Associées (Paris, le 6 mai 1920), signée par A. Millerand [in: Traité de Paix avec la Hongrie – publié par le Ministère Hongrois des Affaires étrangères – Budapest 1920 Hornyánszky, 3–5).

[66] Study on the Legal Validity of Undertakings concerning Minorities doc. E/CN/4/367 (7.4.1950).

[67] Cf. D. T ü r k: Les droits des minorités en Europe [dans: H. G i o r d a n ed.: Les minorités en Europe (Droits linguistiques et droits de l'homme) 451–452 (1992).

[68] Conférence de la Paix: Lettre d'envoi..., 4.

Mitterrand que dans le document du sommet de Vienne et le préambule de la Convention-cadre du Conseil de l'Europe: "*les bouleversements de l'histoire européenne ont montré que la protection des minorités nationales est essentielle à la stabilité, à la sécurité démocratique et à la paix du continent...*".[69]

Deux aspects sont encore à examiner brièvement: le problème des droits collectifs et la question de l'autonomie dans les codifications.

*2.3.1. Les droits collectifs des minorités*

Avant qu'on n'entre dans le vif du sujet, il est utile de rappeler que le choix entre les droits individuels et les droits collectifs est moins lié aux traditions constitutionnelles qu'à la position de l'acteur social: en général, la majorité – et par conséquent l'Etat – a une tentation naturelle de s'ancrer auprès du concept individualiste, dûment complété par le principe de la non-discrimination, tandis que la minorité se penche objectivement vers l'approche des droits collectifs. Ceci produit des métamorphoses conceptuelles surprenantes mais logiques, si à cause des turbulences de l'histoire, la minorité d'antan devient majorité d'un pays nouveau.

Ainsi la Hongrie du XIXe siècle a codifié en 1868 une loi concernant les minorités dans l'esprit jacobin: "Tous les citoyens du pays forment en vertu des principes constitutionnels une seule nation, la nation hongroise unique et indivisible à laquelle chaque citoyen, abstraction faite de son appartenance à une nationalité, jouit des droits identiques."[70] Cette loi qui dans un esprit très libéral, a garanti l'utilisation des langues des minorités aussi envers les autorités, y compris l'obligation de rendre la réponse officielle en langue du recours, n'a pas satisfait les minorités qui voulaient être reconnues dans six nations de même droit: la motion législative rejetée des députés roumains et serbes a visé la mise en place d'une autonomie politique entière dans les départements retracés selon le principe ethnique; en plus l'autonomie culturelle partout dans le pays et le quota ethnique dans l'administration.[71]

Bien entendu, après 1920, la Roumanie, la Tchécoslovaquie et la Yougoslavie n'ont reconnu que les droits individuels. *Tempora mutantur....*

Puisque le concept juridique des pays socialistes a approfondi la thèse des droits collectifs, la chute du Mur de Berlin a effectué entre autres la recrudescence des néophytes, qui ne veulent entendre que des droits individuels.

Les limites inhérentes de cette contribution ne rendent pas possible de développer les fondements théoriques et juridiques de l'approche collective. L'auteur de ces lignes – dans sa conviction positiviste – se contente donc de rappeler les différentes apparitions d'une certaine ouverture internationale devant l'approche collective de la protection des minorités qu'on a pu déceler au début des années 90. Outre le retour multiple de la formule chère à la CSCE (mais en fait connue depuis l'article 27 du Pacte),

[69] Cf. le préambule de la Convention cadre (Version du sommet de Vienne: "Les minorités nationales que les bouleversements de l'histoire ont établies en Europe doivent être protégées et respectées afin de contribuer ainsi à la stabilité et à la paix").

[70] La loi XLIV de l'an 1868. (Magyar Törvénytár 1836–1868) (Recueil des textes législatifs) 1896, 490.

[71] Cf. la loi XLIV de l'an 1868. (Magyar Törvénytár 1836–1868) (Receueil des textes législatifs) 1896, 493 (motion Mocsonyi/Miletic, appuyée par 26 députés roumains et serbes de Hongrie).

"individuellement et en commun avec les autres membres de leur groupe"), les tentatives de solution du problème des minorités soit n'ont pas exclu *a priori* l'approche collective, soit elles ont expressément consacré sa complémentarité dans certains projets de codification, comme dans le cas du projet de Convention européenne pour la protection des minorités de la Commission de Venise ou – selon certains – la recommandation n° 1201 de l'Assemblée parlementaire du Conseil de l'Europe.

En plus, ce concept s'est manifesté dans le projet de Lord Carrington et en même temps, la communauté internationale semble quelquefois se conférer le droit de revendiquer le cas échéant l'approche collectiviste liée à la reconnaissance d'un Etat, sans que cette revendication ait le caractère *erga omnes*.[72] Les premières versions du plan Balladur ont – comme on l'a vu *supra* – également référé au concept collectif. Les législations croate, slovène, hongroise, ukrainienne, lithuanienne contiennent entre autres des règles de l'approche collective (comme le fait d'ailleurs la législation autrichienne) et cette communauté de pensée a contribué à l'apparition des différents régimes bilatéraux de protection.

Finalement, la Convention-cadre pour la protection des minorités nationales a opté pour une formule souple, apparue déjà dans d'autres instruments du Conseil de l'Europe. Cette formule qu'on pourrait appeler la protection pudibonde propose des solutions qui ne se chargent pas *expressis verbis* de la protection des minorités mais qui gèrent les problèmes connexes, intimemment liés soit à la protection des minorités, soit aux souhaits de celles-ci. Le droit positif en montre trois grandes formes:

La première se manifeste dans la protection des langues des minorités et à cet égard, son archétype est la *Charte européenne des langues régionales ou minoritaires*.

La deuxième est celle dont la philosophie est liée aux différentes formes d'autonomie locale ou régionale.

La troisième forme se manifeste dans une formulation qui évite également les références aux droits *stricto sensu* mais qui met l'accent soit sur les obligations positives, souvent programmatiques des Etats (*"l'Etat favorise*...), soit sur la nécessité de non-action: (*"l'Etat ne peut pas empêcher que*...") etc. C'est cette troisième qu'on peut observer dans la Convention-cadre.

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[72] Cf. l'avis n° 5 de la Commission Badinter sur la reconnaissance de la République de Croatie par la Communauté européenne et ses Etats membres: "La Commission a demandé le 10 janvier 1992 à la République de Croatie de confirmer son acceptation de toutes les dispositions du projet de Convention de la Conférence pour la Paix en date du 4 novembre 1991 et en particulier, les dispositions du Chapitre II, article 2-c ("Special status")

(...) la Commission d'Arbitrage est d'avis que

– la loi constitutionnelle du 4 décembre 1991 ne recouvre pas intégralement toutes les dispositions du projet de Convention du 4 novembre 1991, notamment celles inclues dans le chapitre II, article 2-c, sous le titre "Special status";

– il incombe par suite aux autorités de la république de Croatie de compléter la loi constitutionnelle du 4 décembre 1991 à l'effet de satisfaire aux dispositions susvisée du projet de traité;

– sous cette réserve, la République de Croatie remplit les conditions nécessaires à sa reconnaissance par les Etats membres de la Communauté européenne aux termes de la Déclaration sur la Yougoslavie et des Lignes directrices relatives à la reconnaissance des nouveaux Etats en Europe de l'Est et en Union soviétique adoptées par le Conseil des Ministres de la Communauté européenne, le 16 décembre 1991."

avis n° 5 paras 2–3, 2–3. V. 97 *RGDIP* 564 (1993), et 97 *RGDIP* 564 (1993).

*2.3.2. La Hongrie et la question de l'autonomie dans les codifications*

La Hongrie attribue en général une attention particulière à la question de l'autonomie, en partant du principe que le concept traditionnel de l'État-nation est inapplicable en Europe centrale: ses imperfections sont plus nombreuses que celles que l'Europe occidentale connaissait sur son sol. Or, même certains pays de la partie occidentale de notre continent effectuent de nos jours des changements constitutionnels pour parier ces imperfections. Pensons *inter alia* à la régionalisation de l'Espagne, aux réformes belge et italienne. Même la France a considérablement élargi l'autonomie de la Corse. A cet égard, la valeur des considérations du Conseil Constitutionnel de la France dépasse largement les limites de l'Hexagone. La décision sur la constitutionnalité de la loi sur le statut de la Corse précise que "*la Constitution (...) ne fait pas obstacle à ce que le législateur (...) crée une nouvelle catégorie de collectivité territoriale, même ne comprenant qu'une unité et la dote d'un statut spécifique.(...) dans l'exercice de sa compétence, le législateur doit se conformer aux règles et principes de valeur constitutionnelle et notamment de la libre administration des collectivités territoriales (...) qu'il doit également assurer le respect des prérogatives de l' Etat.*"[73] Au début des années 90, la communauté internationale a montré une attention particulière envers l'autonomie: on a déjà cité les documents pertinents de la CSCE, du Conseil de l'Europe et on ne peut pas oublier le projet de Lord Carrington qui est devenu l'élément-clé de la réforme constitutionnelle croate.

La recommandation n°1201 de l'Assemblée parlementaire du Conseil de l'Europe l'a inclue même dans son projet de protocole additionnel à la CEDH: "*Article 11: Dans les régions où elles sont majoritaires, les personnes appartenant à une minorité nationale ont le droit de disposer d'administrations locales ou autonomes appropriées, ou d'un statut spécial, correspondant à la situation historique et territoriale spécifique, et conforme à la législation nationale de l'État.*"

Lors des différentes tentatives de codifications européennes, la Hongrie a ancrée sa position dans le courant de la continuation de cette manière de pensée. On a pu cependant remarquer que les pays qui jouent un rôle accru dans les organisations européennes, devenaient beaucoup plus réticents en 1993/94: ceci s'est montré dans les métamorphoses du plan Balladur ou dans les préparatifs et les suites du sommet de Vienne. C'est ainsi qu'on n'a pas pu introduire dans la Convention-cadre pour la protection des minorités nationales même la référence timide de la Déclaration de Vienne, à savoir: "*une contribution importante doit être apportée par les collectivités régionales et locales.*"[74]

Le leitmotiv de la position hongroise a été lié aux deux aspects de la protection des minorités: d'une part, au niveau interne, sa législation a reconnu une certaine forme de l'autonomie, d'autre part, les minorités hongroise vivant dans les pays limitrophes ont aussi développé des concepts autonomistes, suite aux suggestions de la communauté

[73] Décision n° 91-290 DC du 9 mai 1991 (publ. ronéotypée, page 9), 18-19e considérants.

[74] "La création d'un climat de tolérance et de dialogue est nécessaire à la participationm de tous à la vie politique. A cet égard, une contribution importantee doit être apportée par les collectivités régionales et locales." [Annexe II – Déclaration de Vienne].

internationale, reflétées dans les différents instruments précités ou dans les propositions des politiciens de première vue. Il est vrai cependant que l'idée de Jacques Chirac[75] sur *le droit des minorités à une relative autonomie administrative* n'est pas arrivée sur la table des négociations des codifications.

On a vu quand même que les rapports bilatéraux comme la convention slovéno-hongroise peuvent compléter l'état de chose actuel de la codification européenne.

## 3. Conclusions

Il est difficile de conclure un article qui traite un domaine en pleine transformation. Il est évident qu' il est toujours délicat de jouer un jeu quand les règles du jeu sont en pleine mutation, aussi bien au niveau constitutionnel qu'à l'échelle de la codification internationale. Ce qui est très important c'est la cohérence d'une part entre les institutions du système constitutionnel et entre le droit interne et les instruments internationaux d'autre part.

Il est vrai que les chercheurs dans leur tour d'ivoire font aisément des critiques. L'auteur de ces lignes a cependant participé comme expert gouvernemental dans les différents "rounds" de codification et il a eu la possibilité de constater le gouffre qui sépare les analyses stériles de la *Realpolitik* (et quelques fois les impasses) de la codification. S'il n'y a pas de volonté d'exécuter de bonne foi les obligations, la meilleure codification internationale (dont on est loin) ou constitutionnelle reste lettre morte.

Ceci dit, en matière de la protection des minorités, la crédibilité de l'État est en cours et il est donc dans l'intérêt de la Hongrie de renforcer la cohésion entre ses positions constitutionnelles, législatives et les points de référence internationale. Tout en étant considérée comme membre du groupe des pays de l'avant-garde, la Hongrie trouve bel et bien de références internationales compatibles aussi bien en ce qui concerne ses minorités linguistiques que sa politique étrangère portant sur les relations avec les pays voisins, peuplés aussi par des minorités hongroises.

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[75] "Enfin, nous devons, je crois, réfléchir à un statut des minorités. (...) face au caractère dramatique de ce problème qui est et qui sera demain générateur de toutes sortes de conflit, ne faut-il pas aller vers un véritable statut des minorités, qui devrait, ensuite être appliqué? Ce statut ne présente pas d'immenses difficultés dans sa conception. Il devrait garantir un certain nombre de droits, et notamment l'égalité des droits civiques, politiques, économiques et sociaux, avec les autres citoyens d'un Etat donné. Il pourrait également prévoir, dans certains cas, le droit à une relative autonomie administrative."

Discours d'ouverture du Colloque sur la Lutte contre la Xénophobie, tenu à l'Unesco (Paris, le 14 octobre 1993)). [texte publié par la Mairie de Paris], 20.

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# Fundamental Rights and the European Union: a Selective Overview

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## I. Introduction

The protection of a sphere of individual fundamental rights,[1] founded on the worth of the human person, from encroachment by the organs of the state has long been a central concern of the legal order created by the Council of Europe. Subsequently, and for different reasons, the European Communities, now "European Union",[2] has also had to face the issue of safeguarding the fundamental rights of those who come within its constitutional system, whethe of Community or third-country origin. If the notion of imprescriptable rights in European political thinking may be traced back over many centuries, the more immediate origins of concern for their judicial protection in the context of the European Union may be found in the "Message to the Europeans", adopted at the Hague Congress of May 1948, which called for:

- a united Europe in which men, goods and ideas could circulate freely,
- a Charter of Human Rights, and a Court of Justice to supervise the respect for such rights,
- and a European Assembly, representing all the vital forces of the nations.

The Council of Europe was set up in 1949 following the Hague Congress; by Article 3 of its Statute, the Members accepted "the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms". These latter were defined in the European Convention of Human Rights (henceforth "ECHR") of 4 November 1950, which also established the European Court of Human Rights, at present charged with providing authoritative rulings on the interpretation or application of the Convention,[3] thereby fulfilling the second of the Hague objectives. The Convention is generally regarded as the most highly developed,

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* The views expressed are personal. Best thanks are due to Joseph Weiler for his comments on the draft text. This essay is dedicated to the memory of Jorge Campinos.

[1] The term "fundamental rights" is used throughout in preference, for example, to "human rights", as, in the context of the European Community, some of these rights have also been deemed to benefit legal persons; on problems of terminology in this area, see Clapham, *op. cit.*, fn 9 below, pp. 7–15.

[2] See section IV, below.

[3] The Court and Commission are destined to merge in the near future (Vienna Declaration of 9 October 1993); for details of the planned changes, see Schermers: "The European Court of Human Rights after the merger" 18 *ELR* 493 (1993).

and the most successful, attempt at establishing an international fundamental rights control over the actions of state authorities; one recent commentator, though sceptical of some of its achievements, nonetheless noted that "[it] is not improbable that the Court [of Human Rights] will emerge over time as a supreme court of Europe, at least so far as human rights are concerned".[4] The high regard for the Convention stems less from the range or definition of the civil and political rights which it guarantees, than from its scope of application *ratione personae*,[5] and the supervisory mechanisms it sets up; in particular, the right of individual petition[6] to the independent European Commission of Human Rights has given complainants a direct means of recourse against sovereign states, functionally equivalent to that available under some national constitutional systems, though at a supranational level.

The European Communities, created by the Treaties of Paris (1951) and Rome (1957), in effect address the other two goals set by the Hague Congress. In particular, the EEC Treaty sought to ensure the free movement of persons, goods and services[7] within the territory of its Member States, and established a European Parliament, which has been popularly elected at five-yearly intervals since 1979, and which participates extensively in the Community decision-making processes. The Treaties do not, however, contain either substantive provisions or procedural mechanisms expressly for the protection of fundamental rights, nor have the Communities acceded to the European Convention, despite a proposal to this effect submitted more than fifteen years ago;[8] yet the Member States and institutions of the Communities have, in successive Treaty amendments and political declarations, proclaimed their attachment to the respect for fundamental rights as they arise from the ECHR and the constitutional traditions of the Member States, most recently in the Treaty on European Union ("Maastricht Treaty") which entered into force in November 1993.

The subject of fundamental rights protection in the European Community has generated an extensive caselaw of the Court of Justice and a rich and voluminous academic literature.[9] In order to present a reasonably complete perspective on the topic without going over old ground more than is unavoidable, the present essay will concentrate on three topics: the origin and sources of such protection in the caselaw of

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[4] Gearty "The European Court of Human Rights and the Protection of Civil Liberties: an overview" 52 *Cambridge LJ* 89 (1993). Thirty of the 34 Members of the Council of Europe are parties to the Convention.

[5] The Convention benefits all persons present within the jurisdisction of a signatory state, regardless of their nationality or citizenship.

[6] Though optional (Article 25(1) ECHR), all the Member States of the Community have accepted such a right.

[7] The principle of the free movement of ideas is guaranteed as part of the freedom of expression protected under Article 10 of the ECHR, while transboundary movement of the material expression of ideas, in the form of goods and services, is dealt with in the context of the Community's internal market. This division of competences is not without its problems.

[8] Bull. EC Supp. 2/79; the ill-fated draft Treaty for the European Political Community of 1953 contained express provisions for the protection of fundamental rights, though this fell with the failure of the planned European Defence Community.

[9] Mendelson: "The European Court and Human Rights" is still a good introduction to the subject (1 *YEL* 125 (1981)); a relatively recent and comprehensive overview is provided by Cassese, Clapham and Weiler: *European Union – The Human Rights Challenge* (1991) (3 volumes). For further references, see Toth, *The Oxford Encyclopaedia of European Community Law*, 292–293 (1990).

the Court of Justice, judicial review of national action within the scope of the Treaty, and the value added, if any, to fundamental rights protection in the European Union as a result of the Maastricht Treaty. At a time when the division of competences between the Community and its Member States is a matter of political debate, fundamental rights protection will be considered principally from the point of view of the jurisdiction of the supervisory fora, rather than the content or level of protection.

## II. The Treaties and Fundamental Rights

### (a) Origins

The Community Treaties were primarily concerned with market integration in the principal areas of economic activity and the setting up of a common policy on foreign trade; though providing a relatively complete system of judicial remedies,[10] largely based on those of French administrative law,[11] they did not contain express provisions on the protection of fundamental rights, such as are found in many modern constitutions. The reasons for such absence are to a large extent a matter of speculation, as the *travaux préparatoires* are not available for inspection. It seems likely that the Member States considered that the protection afforded under the respective national constitutional systems would suffice to prevent or sanction violations of such rights arising from Community measures, which are for the most part implemented by the relevant authorities of the Member States, rather than directly by the Community institutions themselves. The differing levels of fundamental rights protection in the Member States, and the apparently clear limitations on the powers of the Community may also have discouraged the search for Community standards in this regard;[12] in any case, most of the original Member States were signatories to the ECHR, which provided a ready-made forum and appropriate procedures for the supranational supervision of respect for the principal civil and political rights, on which the Community might have had difficulty in improving.[13] It has even been suggested that if Community fundamental rights standards had been established, the Community institutions might have been tempted to exercise decision-making powers up to these outer limits, rather than within those set by the substantive grants of power in the Treaty, in disregard of the principle of enumerated powers on which the Treaty is based.[14]

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[10] This was first proclaimed by the Court in *Les Verts*, a case which brought to light a lacuna in the Treaty provisions in this regard, and where the Court first proclaimed explicitly that the Community was "based on the rule of law" (Case 294/83, *Les Verts* v *European Parliament*, *ECR* 1986, 1365).

[11] Schwarze: "The Administrative Law of the Community and the protection of Human Rights", 23 *CMLR* 401 (1986).

[12] Pescatore: "Les Droits de l'homme et l'intégration européenne" 16 *CDE* 629, 631 (1968), hereafter *Les Droits*.

[13] Though signed in 1950, the Convention did not come into force until 1953, by which time the European Coal and Steel Community was already in operation.

[14] Weiler: "Methods of Protection: Towards a Second and Third Generation of Protection" in Cassese *et al.*, *op. cit.*, Vol. II, p. 574 (hereafter *Methods*). The same author has argued elsewhere that the Community institutions did not in any case strictly respect these grants of legislative competence, at least as originally understood (Weiler, "The Transformation of Europe", 100 *Yale LJ* 2403 (1991)).

While fundamental rights provisions were absent, the EEC Treaty did contain a number of positive "Community rights" of a primarily economic character,[15] some of which have been dubbed "fundamental" by the Court of Justice, in the sense of being fundamental to the achievement of the objectives of the Treaty.[16] Certain rights of a kind normally associated with fundamental rights, such as the right to equal treatment between the sexes at the workplace or rights of residence, are bestowed by Community legislation, though, like Community rights arising directly from Treaty provisions, these will generally only benefit Community nationals.[17] More significantly in the present context, the Treaty vested the Court with the general duty to ensure that not just the provisions of the Treaty itself but "the law" is observed (Article 164 EC), a term the Court has interpreted to include "general principles common to the laws of the Member States".[18] Thus the Court, for example, has relied on the principle of proportionality, borrowed from German administrative law, as a test of the legality of duties imposed by Community law on individuals in virtually every field of regulation; indeed, this has recently been accorded the status of an express Treaty principle conditioning the validity of all Community legislation.[19] One other technique of fundamental rights protection worthy of special mention in this regard, is that of reading substantive obligations for the institutions and/or Member States into the opening articles of the Treaty, described as "Principles"; over the years, the express prohibition on discrimination on grounds of nationality found in Article 6 EC,[20] as well as a number of more specific Treaty provisions, have in effect been developed into a full-blown principle of equality before the law.[21] The importation of fundamental rights from other sources, particularly those enshrined in the ECHR, has proved rather more

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[15] For reasons of simplicity, the present study focuses primarily on the EEC, now EC, Treaty, except where otherwise indicated. This provides expressly, for example, the protection of industrial property (Article 36), the free movement of persons exercising an economic activity (Articles 48, 52 and 60), equal pay for equal work (Article 119), the protection of business secrecy (Article 214), and non-interference in national systems of property ownership (Article 222).

[16] The Court can on occasion provide an "incidental" protection for fundamental rights in its interpretation of these provisions; see for example Case C-168/91, *Konstantinidis, ECR* 1993, I-1191, where the interpretation of Article 52, on freedom of establishment for self-employed persons, effectively vindicated the applicant's right of personal identity (see the opinion of Advocate General Jacobs, pp. 1207–1213).

[17] C l a p h a m in C a s s e s e *et al., op. cit.*, Vol. I, *Human Rights and the European Community: A critical overview*, pp. 33–36.

[18] This concept was in fact only included in the Treaty as a source of Community law on non-contractual liability (Article 215(2)). Lenaerts discusses a number of other rights deriving from general principles of law which the Court has relied upon, which are not found in the ECHR, such as the right for a company not to incriminate itself ("Fundamental Rights to be included in a Community catalogue", 16 *ELR* 367, 381–384 (1991), hereafter "Catalogue").

[19] The most complete treatment of this subject is by S c h w a r z e: *European Administrative Law* 708–864 (1992); the constitutional principle is enshrined in the first paragraph of Article 3b EC.

[20] Formerly Article 7 EEC; a number of long-familiar Treaty articles have, unaccountably, been renumbered by the Maastricht Treaty.

[21] In *Klensch*, for example, the Court noted that the prohibition on discrimination between agricultural producers or consumers in Article 40(3) "is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law" which binds the Member States as well as the institutions (Joined cases 201 and 202/85, *ECR* 1986, 3507); see L e n a e r t s: "L'égalité de traitement en droit communautaire", 29 *CDE* 3 (1991), hereafter "Egalité").

problematic than reliance on such autochthonous doctrines of Community law, though it is often difficult to maintain watertight distinctions in this domain.

The political actors of the Community have not been indifferent to the necessity to protect fundamental rights at the Community level either; partly in response to the caselaw of the Court of Justice and some of the national courts (see section III(a) and (b), below), the European Parliament, the Council and the Commission adopted a Joint Declaration on 5 April 1977 stressing "the prime importance they attach to the protection of fundamental rights" as derived from national constitutions and the ECHR, and resolving to respect these rights in the exercise of their powers and duties.[22] A further Joint Declaration of 11 June 1986, in which the Member States also joined, condemns "all forms of intolerance, hostility and use of force" motivated by "racial, religious, cultural, social or national differences".[23] The Single European Act of February 1986, which modified the EEC Treaty in a number of respects, signals in its preamble the determination of the Member States "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the [ECHR] and the European Social Charter", a formulation which has been recognized by the Court of Justice as restating its caselaw.[24] The fundamental rights provisions of the Maastricht Treaty will be considered below (section IV).

The Community Treaties did share with the ECHR the recognition of the position of the individual at the supranational level, albeit that in the Treaties he is considered first and foremost as an economic actor. The direct application of the EEC Treaty to the situation of the individual was inherent in a number of its provisions and explicit in a few; of the latter, Article 189 is particularly significant, providing *inter alia* that "[a] regulation shall be binding in its entirety and directly applicable in all Member States", while a decision is "binding in its entirety upon those to whom it is addressed".[25] In order to demonstrate in *Van Gend en Loos*[26] that the Community constitutes "a new legal order ... the subjects of which comprise not only Member States but also their nationals", the Court relied on the direct concern of the functioning of the common market to interested parties, the reference in the preamble of the EEC Treaty to peoples as well as governments, and the participation of individuals in the functioning of this Community " through the intermediary of the European Parliament and the Economic and Social Committee". It concluded that Community law " not only imposes obligations on individuals but is also intended to confer upon them rights which become part

[22] *OJ* 1977 C 103/1. On 12 April 1989, the European Parliament adopted a Declaration of Fundamental Rights and Freedoms (*OJ* 1989 C 120/51)), which was cited repeatedly by Advocate General Van Gerven in his opinion in Case C-159/90, *SPUC* (considered further, section III(b), below); for an authoritative analysis of the Declaration, see Weiler, "Methods", pp. 621–628.

[23] *OJ* 1986, C 158/1.

[24] Case 249/86 *Commission* v *Germany* ECR 1989, 1290. Pescatore has described the reference to "la liberté, l'égalité et la justice sociale" in the French version of the preamble as "une variation de goût plutôt douteux sur la devise nationale d'un Etat membre" (in Matscher and Petzold, *op. cit.* fn 39 below, p. 447).

[25] This direct application was also evident in a number of substantive provisions, such as Article 85(2) which provides that agreements prohibited by virtue of Article 84(1) "shall be automatically void".

[26] Case 26/62, ECR 1963, 12.

of their natural heritage".[27] The potential for direct effect of provisions of Community law was complemented the following year, when the Court found that the legal system of the Community was an integral part of the legal systems of the Member States, and that Community law had precedence over conflicting national provisions.[28]

Though Pescatore considered as late as 1968 that the matter had not yet given rise to any practical problems,[29] the Court had in fact already been confronted with the question of alleged conflicts between national guarantees of fundamental rights and Community provisions, even before the precedence of Community law had been explicitly asserted, within the relatively limited legal order of the ECSC; once the primacy of Community law in general had been established, the risk of conflict became acute, particularly as certain of the Member States provide extensive protection for fundamental rights within the sphere of economic activity.[30] In *Stork*, the Court found that the main decision-making institution of the Coal and Steel Community, the High Authority, was required only to apply Community law, and was not empowered to take account in its decisions of rights protected under the German Basic Law.[31] The following year, the Court bluntly rejected any suggestion that it should "ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected".[32] The rationale of this rather peremptory conclusion was explained by the Court itself in a later judgment, in the following terms:

> "[the] introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community".[33]

The Court's attitude in *Stork* and *Ruhrkohlen* has been described as being motivated by the desire "to protect the *separation* of the ECSC and the Member States vis-à-vis national governments", rather than defending the primacy of Community law over conflicting national provisions, and as reflecting the Court's diffidence in the pre-*Van Gend* era.[34] Be that as it may, the refusal to entertain argument on possible violations of fundamental rights created something of a dilemma. To exclude any such protection would have been seen as a major retrogressive step in the hardwon struggle to ensure respect for fundamental rights, undermining the principle of the rule of law the Court was attempting to instil as a constitutional principle of Community law. On the other hand, the perceived threat to the uniform application of Community law from the application of divergent national standards was far from imaginary.

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[27] *Ibid.*, emphasis added.

[28] Case 6/64, *Costa* v *ENEL*, ECR '1964, 593–4.

[29] "Les Droits", p. 631.

[30] The German Basic Law, for example, guarantees rights to personal development, to pursue a trade and to enjoy personal property (Articles 2, 12 and 14 of the *Grundgesetz*).

[31] Case 1/58, *Stork* v *High Authority*, ECR 1959, 17.

[32] Joined Cases 36, 37, 38, and 40/59, *Ruhrkohlen* v *High Authority*, ECR 1960, 438.

[33] Case 44/79, *Hauer*, ECR 1979, 3744.

[34] W e i l e r: "Methods", p. 576, emphasis in original.

In 1969, the Court chose an option which enabled it to reconcile these imperatives, by recognizing, at first in a rather oblique fashion, that fundamental human rights were part of the general principles of Community law.[35] More directly, the Court indicated the following year that guarantees analogous to those provided in the constitutions of the Member States were inherent in Community law, and that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice", in accordance with Article 164 EEC. Significantly, the Court noted that the protection of such rights must be ensured "within the framework of the structure and objectives of the Community". This was explained in a subsequent case as meaning that the necessity to respect fundamental rights constitutes a limitation on all Community acts, and that directly effective provisions of Community law must be interpreted in accordance with such rights; the Court was not, on the other hand, empowered to apply a fundamental right recognized in Community law to a situation which, at the material time, was outside the scope of Community law.[36]

**(b) Sources**

The sources of "imported" Community fundamental rights have evolved over the years; in *Internationale Handelsgesellschaft*, the Court declared that it derived "inspiration" from the "constitutional traditions common to the Member States".[37] To this were added "guidelines" from "international treaties ... on which the Member States have collaborated or of which they are signatories";[38] though clearly the Court was referring primarily to the European Convention on Human Rights, it was not cited, as the judgment drafted before France had been ratified the ECHR.[39] The Convention was first expressly mentioned in *Rutili* in 1975; to date, Articles 6-11 and 13, and Article 1 of the First Protocol to the Convention have been cited in judgments of the Court.[40] The Convention is not the only international source of inspiration. In *Van Duyn*, the Court relied upon a principle of international law, that a state cannot refuse entry to its own nationals, derived from the 1948 Universal Declaration of Human Rights, which is not binding as such; the state which had requested the preliminary ruling had not ratified the Fourth Protocol to the ECHR which guaranteed this right.[41] In *Defrenne III*, the Court cited the European Social Charter and ILO Convention No. 111 to show that "the elimination of discrimination based on sex

[35] Case 29/69 *Stauder*, ECR 1969, 425.

[36] *Per* Advocate General Capotorti, Case 149/77 *Defrenne III*, ECR 1978, 1385.

[37] Case 11/70, ECR 1970, 1134; this case also came before the German courts (below, section III(a)). On the level of protection implied by the term *common* constitutional traditions, see Mendelson, *op. cit.*, pp. 154–155, Toth, *op. cit.*, p. 288, and Weiler: "Methods", pp. 588–589.

[38] Case 4/73, *Nold*, ECR 1974, 507.

[39] According to Pescatore, this explains the "luxe de prudences" ("La Cour de justice de Communautés européennes et la Convention européenne des Droits de l'Homme" in Matscher and Petzold (eds.): *Protecting Human Rights: the European Dimension*, 442 (1988); as rapporteur for the Court in *Nold*, his views should carry a certain weight.

[40] Case 36/75, *Rutili*, ECR 1975, 1219; Pescatore, in Matscher and Petzold, *op. cit.*, p. 447, fn 9.

[41] Case 41/74, ECR 1974, 1351; Mendelson, *op. cit.*, p. 134–5.

forms part of [the] fundamental rights" of which it ensures observance,[42] while the 1966 International Covenant on Civil and Political Rights has also been cited in recent judgments.[43]

Though it has frequently been suggested, both by the Commission in its observations on requests for preliminary rulings and by certain of the Advocates General, that the Community is bound by the Convention *per se*,[44] the Court has generally been wary of such reasoning; it has also been reluctant to refer to, let alone rely upon, the caselaw of the Commission or Court of Human Rights. Thus in *Hauer*, the Court of Justice itself proceeded to examine the right of property "guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the member States, which are also reflected in the first Protocol of the [ECHR]" without regard to the Convention caselaw.[45] In order to define the "general interest" which can justify limitations on this right, the Court turned to the "constitutional rules and practices" of the Member States; as this yielded the conclusion that restrictions on the exercise of the right of property were admissible in principle, the Court tested the validity of the restrictions complained of against the general interest of the Community, as distinct from that of a single state, and in the light of the principle of proportionality.[46]

The significance of the change in wording in a number of subsequent judgments is not entirely clear. In *National Panasonic*, the Court indicated that it ensures the observance of fundamental rights "*in accordance* with constitutional traditions common to the Member States and *with international treaties*".[47] In 1989, the Court stated without further qualification that the basic regulation on the free movement of workers within the Community "must ... be interpreted in the light of the requirements of respect for family life set out in Article 8 of the [ECHR] ... one of the fundamental rights ... restated in the preamble to the Single European Act ... recognized by Community law".[48] The unconditional terms of this affirmation has led some to speculate that the Court might rely on the Convention as a direct source of Community law, while others have concluded that "the passage of the SEA incorporates the [ECHR] into ... domestic law, where Community law is implicated, almost as if it had been directly enacted into [national] law".[49] In its most recent judgments, the Court has once again reverted to the language of "inspiration" from national constitutional

[42] Case 149/77, *Defrenne stet*, ECR 1978, 1378.

[43] Case 374/87, *Orkem*, ECR 1989, 3283 and joined cases C-297/88 and 197/89, *Dzodzi*, ECR 1990, I-3763; in *Konstantidis*, Advocate General Jacobs cited the American Convention on Human Rights (*ibid.*, p. 1208).

[44] M e n d e l s o n, *op. cit.*, p. 150; Toth, *op. cit.*, p. 289.

[45] Case 44/79, ECR 1979, 3745–3749.

[46] W e i l e r provides a detailed analysis of *Hauer* as a paradigmatic instance of the Court's "technique and the problems inherent in the Community jurisdiction", "Methods", pp. 582–593.

[47] Case 136/79, ECR 1980, 2057, emphasis added.

[48] Case 249/86, *Commision* v *Germany* ECR 1989, 1290.

[49] Respectively, Grief "The Domestic Impact of the European Convention on Human Rights as mediated through Community law" (1991) *Public Law* 555, 556, and C o l v i n: "*Society for the Protection of Unborn Children (Ireland) Ltd* v *Grogan*: Irish Abortion Law and the Free Movement of Services in the European Community", 15 *Fordham ILJ* 476, 490, fn 88 (1991–1992), and the references cited; see also L e n a e r t s: "Catalogue", p. 373, fn 24.

traditions and "guidelines" from international treaties, amongst which the ECHR nonetheless has a "special significance";[50] on the other hand, when providing criteria for interpretation for national courts, the Court refers to "rights of which it ensures respect and which derive in particular from the [ECHR]".[51]

## III. Fundamental Rights and Member State Action within the Scope of Community Law

The autonomous character of the Community legal order, and the relatively complete system of judicial remedies provided for by the EC Treaty, makes the Court of Justice the most, if not the only, appropriate forum for the direct supervision of respect for fundamental rights as regards the legislative and administrative activities of the Community institutions.[52] Community administration carried out by the national authorities, is however potentially subject to no less than three supervisory jurisdictions, viz. the national constitutional courts, the Court of Justice and the organs of the ECHR; in practice, each of these could be called upon to evaluate the compatibility with its own fundamental rights standards of the underlying Community rule.

### (a) Judgments of national constitutional courts - the Court of Justice on probation

In the wake of the *Stork* and *Ruhrkohlen* judgments, the protection of constitutional rights against encroachment by the Community was considered by various lower courts in Germany and Italy in the early 1960s.[53] In a judgment of 1965, the *Corte Costituzionale* had indicated that the level of legal protection of individuals provided by the ECSC Treaty satisfied the requirements of the Italian legal order.[54] Eight years later, the *Corte* was asked to consider whether the very extent of the legislative powers devolved on the Community, reflected in Article 189 EEC, was not such as to allow the Community "to legislate on practically any matter it considers relevant to the fulfilment of its functions ... possibly affecting even the fundamental rights of the citizens".[55] The Court took the view that the "exact and precise" character of the enabling provisions of the EEC Treaty provided a sufficient guarantee against the

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[50] Case C-260/89, *ERT*, ECR 1991, I-2963.

[51] For a list of the rights the Court has derived from the ECHR and national constitutional traditions, see Toth, *op. cit.*, p. 286–287; to this may be added freedom of expression as enshrined in Article 10, ECHR (C-260/89 *ERT*, ECR 1991, I-2925) and the right of non self-incrimination (Case 374/87 *Orkem* v *Commission* ECR 1989, 3283).

[52] This position appears to be accepted by national courts and the European Commission on Human Rights, though in some circumstances either could conceivably wish to exercise an indirect supervision over such acts; even the fiercest detractor of the Court's approach to fundamental rights matters in *Spuc* has proposed that the Court be vested with the task of protecting "special constitutional rights" from encroachment by the Community (P h e l a n: "Rights to Life of the Unborn v Promotion of Trade in Services: The Court of Justice and the Normative Shaping of the European Union", 55 *MLR* 688 (1992)).

[53] Pescatore, "Les Droits", pp. 634–636.

[54] *San Michele* v *High Authority* 1967 C.M.L.R. 160; the *CFDT* case considered below (section III(b)) showed up one lacuna in the judicial protection provided under the ECSC Treaty.

[55] *Frontini*, judgment of 27 December 1973, 1974 2 C.M.L.R. 382.

Community's acting *ultra vires*, so that it was even difficult to imagine a conflict with the Italian constitution. The Court, however, added a proviso to the effect that the limitation of sovereignty entailed by accession to the Community could not "give the organs of the EEC an unacceptable power to violate the ... inalienable rights of man"; while it would not control individual pieces of legislation, the Court undertook to control "the continuing compatibility of the Treaty with the ... fundamental principles" of the constitution.[56]

For its part, the *Bundesverfassungsgericht* took a more uncompromising stance in a 1974 judgment given added piquancy by the fact that the same matter had already been considered by the Court of Justice in answering a request for a preliminary ruling from the Administrative Court in Frankfurt.[57] While reaffirming its previous caselaw to the effect that it could not examine the validity of Community legislation as against the Treaty, the Constitutional Court found that Germany's accession to the Community could not encroach on the fundamental rights granted by the Basic Law, "an inalienable essential feature of the valid Constitution of the Federal Republic". Noting that "the Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level ... [and] a codified catalogue of fundamental rights the substance of which is reliably fixed for the future", the Court found that it had jurisdiction "in the hypothetical case of a conflict between Community law and ... the guarantees of fundamental rights in the Constitution" not to apply the offending Community provisions. This jurisdiction would only subsist, however, "as long as" (*solange*) the legal certainty of *sufficient* Community fundamental rights protection, which the caselaw of the Court did not provide, had not been achieved by further integration.[58]

The *Wünsche Handelsgesellschaft* case also reached the Constitutional Court via the Court of Justice; the latter had upheld the validity of a Commission regulation restricting the importation of preserved mushrooms from Taiwan in a preliminary ruling requested by the Federal Administrative Court.[59]

Before the Constitutional Court, the applicant complained not only that the regulation violated the principles of legal certainty and proportionality, but that it had been denied the right to a legal hearing before the Court of Justice. The Court used this opportunity to revise its finding in "Solange I", holding that "a measure of protection of fundamental rights has been established in the meantime ... which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the Constitution". The Court viewed the Joint Declaration of 5 April 1977 and the European Council's declaration on democracy of

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[56] *Ibid.*, p. 389.

[57] *Internationale Handelsgesellschaft mbH: Bundesverfassungsgericht* – [1974] 2 C.M.L.R. 542; Court of Justice – Case 11/70, ECR 1970, 1125. This latter was in fact only the second case in which the Court had explicitly recognized the necessity to protect fundamental rights in Community law.

[58] Ibid., p. 551.

[59] Case 126/81, ECR 1982, 1479.

8 April 1978[60] as constituting a "legally significant" acknowledgement that the institutions would be "guided as a legal duty by respect for fundamental rights" in the exercise of their powers; equally, the standards of fundamental rights protection which arise from the Member State constitutions and the ECHR had been "consolidated and adequately guaranteed" by the caselaw of the Court of Justice. So long as the Communities "generally ensure an effective protection of fundamental rights as against the sovereign powers of the Community ... substantially similar to [national constitutional protection] ... and in so far as they generally safeguard the essential content of fundamental rights', the *Bundesverfassungsgericht* declared that it would no longer exercise its jurisdiction to review Community legislation for compatibility with German fundamental rights.[61]

While generally welcomed in Community circles, "Solange II" displays a distinctly optative view of constitutional developments in the dozen years since "Solange I", as well as a few inconsistencies. The requirement of a democratically legitimized parliament to which the other political organs would be "fully responsible" was , in effect, distinguished out of existence; the Court explained that "there was no intention [in Solange I] ... of laying down a constitutional requirement that such a position must have prevailed before there could be any possibility of the withdrawal of the ... Court's jurisdiction [to review] derived Community law".[62] The most glaring inconsistency is the Constitutional Court's affirmation that the Court of Justice had taken "the essential step" in *Nold*, in declaring that it could not allow "measures which are incompatible with fundamental rights recognized and guaranteed by the constitutions of [Member] States"; not only had *Nold* been decided before "Solange I", but the judgment of the Court of Justice was even cited in that of the German Court in 1974. It is also difficult to subscribe to the view that the Community declarations on respect for fundamental rights cited are particularly "legally significant"; though a psychological boost to the Court of Justice in its fundamental rights caselaw, they do not define precise legal obligations which are incumbent on the political institutions of the Community and which the citizen could seek to vindicate through the legal process, equivalent to the remedies available under national constitutional guarantees. More recently, the Federal Constitutional Court has noted that, though the Community institutions could adopt measures affecting constitutional rights, "this situation does not entail a *significant reduction* in the level of fundamental rights protection" given the essential equivalence of Community and German protection, and reaffirmed by "Solange II".[63]

While the German Constitutional Court has pulled back from the brink, the matter is far from closed in Italy; in 1989, the *Corte Constituzionale* sought to evaluate the conformity with "the essential elements of the right to judicial protection" safeguarded

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[60] OJ 1977 C 103/1, and Bull. EC 3/78, p. 5, respectively.

[61] Ibid., p. 265.

[62] The court implicitly recognized that its earlier condition of the accountability of the Council to the European Parliament, whether before or after the Single Act (to which the court made no specific reference), had not been fulfilled.

[63] Faint praise, indeed, for the protection of fundamental rights at Community level; judgment of 12 October 1993, section B. 2a), unofficial translation, emphasis added see also [1994] I.C.M.L.R. 57, 79.

under the Italian constitution of a restriction imposed by the Court of Justice on the temporal effects of a preliminary ruling; the *Corte* felt that the requirements of the uniform application of Community law and legal certainty could not prevail against the possible violation of a fundamental right.[64] At around the same time, in the course of the *SPUC* v *Grogan* litigation before the Irish courts, the Supreme Court also displayed a certain reluctance to accept the notion that judgments of the Court of Justice could in any way affect the protection of fundamental rights guaranteed under the Irish constitution.[65] Unless the Treaty of Maastricht has reassured the national constitutional courts that the Court of Justice can and will enforce rights at least equivalent to those guaranteed under national constitutions (see IV, below), national review of Community law could once again prove a theatre of judicial conflict in the future.

### (b) The "Incorporation" of Fundamental Rights Standards into Community Judicial Review of National Action

The structural requirements of the uniform application of Community law led the Court of Justice to fashion a Community doctrine of fundamental rights protection as a requirement of the validity of the action of the institutions. The fact that Community law is for the most part implemented by the Member States inevitably threw up a related question, that of the existence and extent of a jurisdiction for the Court to supervise the respect by the Member States for fundamental rights in matters of concern to the Community.

The matter arose in *Rutili*, where the French authorities had prohibited an Italian national from residing in four *départements*, including his home *département* where his family lived;[66] under Article 48(3) EEC, restrictions on the free movement of workers were permitted on grounds of public policy, public security or public health. The Court of Justice began by stressing the importance of the protection of the individual: "*[inasmuch] as the object of the provisions of the Treaty and of secondary legislation is to regulate the situation of individuals and to ensure their protection, it is ... for the national courts to examine whether individual decisions are compatible with the relevant provisions of Community law*". Though recognizing the discretion enjoyed by national authorities in defining the concept of "public policy", the Court found that where it was "*used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers*", it must be strictly interpreted. In the present case, the relevant provisions of Community legislation clearly indicated the incompatibility of the French decision with the Treaty; the Court nonetheless look the opportunity to add that

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[64] G a j a: "New Developments in a continuing story: the relationship between EEC law and Italian law", 27 *CMLRev* 83, 94–95 (1990), and S c h e r m e r s, "The scales in balance: National constitutional court v. Court of Justice", *ibid.*, p. 97.

[65] 1989 *Irish Reports* 760, 768, *per* W a l s h J. (quoted in C o l v i n, *op. cit.*, 502; see further, below).

[66] Case 36/75, ECR 1975, 1219.

"the limitations placed [by Community law] on the powers of the Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the [ECHR],and which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests «in a democratic society»".[67]

Though significant as the first Court of Justice ruling in which the ECHR is expressly mentioned, the citation of the general restriction the Court derived from the Convention was not dispositive of the case, which turned rather on the interpretation of the relevant provisions of Community legislation defining the content of the notion of "public policy". The reference to the Convention has been described as being "for merely illustrative purposes".[68] It has plausibly been suggested, however, that the Court intended to imply that the member States are bound, not only by the "specific manifestations", but also by the general principle: "it further follows that a national practice which violated a general principle without violating a specific rule of the Community regime would violate Community law and by virtue of the principle of supremacy, be inapplicable".[69]

By this token, the *Rutili* dictum would constitute a kind of judicial depth charge, set to detonate at a later date, and shed a new light on the generality of the Court's finding in *Nold*, that the guidelines provided by international human rights treaties "should be followed within the framework of Community law", without distinguishing between the obligations incumbent on the institutions and the Member States.[70] That the "control of aliens" from other Member States is a matter within the Community framework was hardly open to doubt, in view both of Article 3(c) of the Treaty, which identified "the abolition, as between Member States, of obstacles to freedom of movement for persons" as one of the activities of the Community, and the other specific provisions intended to give this effect. Where, on the other hand, there was no rule of Community law governing the legal situation, the Court had no jurisdiction to apply its fundamental rights standards. Thus in *Defrenne III*, though clearly of the view that the elimination of discrimination on grounds of sex was part of Community fundamental rights protection, the Court was unable to apply this principle to a situation governed exclusively by national law; the Community directive applying equal treatment between men and women as regards working conditions had not yet come into force at the time of the discriminatory treatment complained of.[71]

Given the positive indications which could be derived from these judgments, the *Cinéthèque* decision[72] had something of the effect of a cold shower. The Court had been asked to examine the compatibility with the Treaty of a French law which imposed

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[67] *Ibid.*

[68] Mendelson, *op. cit.*, 150.

[69] Weiler: "Methods", p. 610, emphasis in original.

[70] Case 4/73, ECR 1974, 507.

[71] Case 149/77, *Defrenne III*, ECR 1978, 1378; Council Directive 76/207/EEC, *OJ* 1976 L 39/40.

[72] Joined cases 60 and 61/84, ECR 1985, 2605.

a waiting period between the cinema release of a film and its distribution on video, *a priori* a matter "within the Community framework". Having noted that the Treaty left the Member States free to determine the need for such a system, and that the system "does not have the purpose of regulating trade patterns", the Court nonetheless found that the application of the French provisions could create trade barriers in infringement of Article 30 EEC. The fact that these provisions were designed to encourage cinematographic production as such, rather than national production, was considered a sufficient justification to bring the French system outside the scope of Article 30, on the basis of the rule of reason developed in *Cassis de Dijon* and its progeny.[73] On the second question, of whether the French provisions constituted a breach of the principle of freedom of expression under Article 10 of the ECHR, and were therefore incompatible with Community law, the Court replied in the following terms:

> "[although] it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator".[74]

It has been pointed out that the expression "area which falls within the jurisdiction of the national legislation", presumably inspired by *Defrenne III*, is a rather fluid notion; in order to ensure the free movement of video cassettes within the Community, for example, the Community legislator could adopt a directive harmonizing the existing national provisions, in which case the area would, with no action on the part of the particular Member State, come within the Court's fundamental rights jurisdiction.[75] *Cinéthèque* can be explained in terms of the Court's unwillingness to examine the fundamental rights aspects of national legislation *per se*; as no Community provisions were applicable in the instant case, the Court considered it had no further jurisdiction.[76]

The *Cinéthèque* reasoning was substantially followed in *Demirel*, where a Turkish national who had come to Germany to rejoin her Turkish husband on the basis of a visitor's visa was threatened with expulsion on the expiry of the same. The Court first held that, in adopting national provisions on the admission into their territory of Turkish workers, the Member States were fulfilling, "within the Community system, an obligation in relation to the Community, which ha[d] assumed responsibility for the due performance of the Agreement" concluded between the Community and Turkey; the fact that the Agreement left the adoption of provisions concerning free movement

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[73] Case 120/78, *Rewe-Zentrale AG*, ECR 1979, 649; for a concise introduction to this topic, see Kapteyn and Verloren van Themaat: *Introduction to the Law of the EEC*, 2nd ed. (ed. Gormley), 375–405 (1989).

[74] ECR 1985, 2627.

[75] Weiler: "Methods", p. 602. With the benefit of hindsight, his "predominant jurisdiction" test is not without its own problems; in *ERT*, for example, the regulation of television services was *predominantly* within the jurisdiction of the national authorities (see below).

[76] Mancini and Di Bucci: "Le développement des droits fondamentaux en tant que partie du droit communautaire" in Clapham (ed.): *Collected Courses of the Academy of European Law* 1990, Vol. I, Book 1 (1992); in a similar vein, Pescatore in Matscher and Petzold, *op. cit.*, p. 446.

for workers to the Member States rather than the Council did not deprive the Court of jurisdiction to pronounce on their direct effect.[77] As the Agreement did not contain any provisions on family reunification, however, the German rules were deemed to be outside the scope of Community law and the Court declared itself without jurisdiction to examine their compatibility with the ECHR.[78] The *Cinéthèque* test of the demarcation of the Court's jurisdiction was nonetheless inverted, to exclude "national legislation lying *outside* the scope of Community law".[79]

Without developing on its reasoning, the Court held in sweeping terms in *Wachauf*[80] that "measures which are incompatible with the fundamental rights recognized by the constitutions of [the Member States] may not find acceptance in the Community" and that the requirements of the protection fundamental rights as defined in Community law are "binding on the Member States when they implement Community rules". In the instant case, the Court had been asked to interpret Community milk quota regulations which had been in turn implemented by national provisions; in finding that the Community regulations were deemed to leave the national authorities "a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with [fundamental rights protection] requirements", the Court was in effect condemning the national implementing rules.[81]

It was now clear that the Court's jurisdiction extended to national rules implementing Community provisions; but what of other national rules falling within the framework of Community law? An answer was provided by the Court's judgment in *ERT*.[82] Notwithstanding a Greek law of 1987 which granted ERT exclusive television and broadcasting rights on the national territory, a television company set up by the mayor of Thessalonika and a municipal information company began broadcasting in 1989. Questioned as to the compatibility of ERT's monopoly position with various Treaty provisions, the Court replied that, though the granting of a television monopoly for considerations of a non-economic nature relating to the public interest was not *per se* contrary to the Treaty, its organization and operation must not infringe on the free movement of goods and services or the rules on the maintenance of competition. In

[77] Case 12/86, ECR 1987, 3719.

[78] The Court's finding on this point has been convincingly criticized by W e i l e r, on the grounds that the Member States were acting on behalf of the Community ("Thou Shalt Not Oppress a Stranger: On the Judicial Protection of Human Rights of Non-EC Nationals – A Critique", 3 *EJIL* 65 (1992)). The question may, however, have been moot by the time the ruling was handed down (30 September 1987); the order for Mrs Demirel to leave German territory expired on 12 September 1987, as under the German rules on family reunification she could apply for permission to stay from the next day.

[79] *Ibid.*, p. 3754, emphasis added; somewhat inconsistently, the Court also refers in the same paragraph to "national rules which ... implement a provision of Community law", as if this narrower formulation were coterminous with national rules *within* the scope of Community law.

[80] Case 5/88, ECR 1989, 2639; echoing the constitutional jargon of another era, the Advocate General found it "self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator" (ibid., p. 2629). The conclusions to be drawn from this ruling may have to be qualified in the light of the case C-2/92 *ex parte* Bostock, ECR 1994, I-955.

[81] As noted, with characteristic restraint, by C o p p e l and O'N e i l l: "The European Court of Justice: Taking rights seriously?" 29 *CMLR*, 676 (1992).

[82] Case C-260/89, *ERT*, of *supra* fn 50.

what was clearly intended to constitute a major statement of principle, the Court recalled its earlier fundamental rights caselaw, from *Nold* to *Wachauf*, to the effect that "the Community cannot accept measures which are incompatible with the observance of the human rights ... recognized and guaranteed" as general principles of Community law. Distinguishing between national rules which do not fall within the scope of Community law (*Cinéthèque* and *Demirel*), and those which do, the Court found that where the latter are the subject of a preliminary ruling, it must "provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights". As the Greek provisions granting ERT's television monopoly were "likely to obstruct the exercise of the freedom to provide services", they could only be justified under derogations from the relevant Treaty rules, and "such justification, provided for by Community law, must be interpreted in the light of ... fundamental rights", by the national court and "if necessary" by the Court of Justice.[83]

Though the Court cited *Cinéthèque* as illustrating a situation where the national rules fell outside the scope of Community law, some doubt has been cast on the consistency between the two judgments.[84] In particular, the French law on video distribution of new films was just as likely to obstruct the free movement of those particular goods as the Greek law on television was to obstruct the freedom to provide services; the justification for the national provisions, *a priori* contrary to the Treaty, was equally "provided for by Community law", albeit that in *Cinéthèque* this had the effect of taking the national rule *outside* the application of the Treaty, rather than within a derogation.[85] Thus, if *Cinéthèque* and *ERT* are to be reconciled, it appears that the Court's jurisdiction to review national action depends on whether the Member State relies on a derogation expressly provided by the Treaty, which remains under Community supervision, or benefits from the application of a rule of reason developed by the Court of Justice, which precludes any further supervision by the Court. Such a fine distinction has not found favour with a number of well-placed commentators, who would prefer the Court's jurisdiction to embrace all "measures adopted by Member States which, in one way or another, fall within the scope of Community law".[86]

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[83] This suggestion may have been intended to lend moral support to the judges in those jurisdictions where the ECHR has not been incorporated into domestic law (such as Denmark, and the Ireland, United Kingdom); J a c o b s: "The protection of Human Rights in the Member States of the European Community", in O'R e i l l y (ed.) *Human Rights and Constitutional Law – Essays in Honour of Brian Walsh*, 250 (1992).

[84] Advocate General Van Gerven in Case C-159/90, *SPUC*, ECR 1991, I-4723; W e i l e r, argues that "*ERT* actually reverses the earlier decision in *Cinéthèque* on the issue of the Court's jurisdiction to review "Member State action for violation of human rights as an *exception* to positive provision of Community law' ("Thou Shalt Not Oppress a Stranger", p. 82, emphasis in original).

[85] "Article 30 of the EEC Treaty must be interpreted as meaning that *it does not apply* to the national legislation" in question: ECR 1985, 2605, 2626–7, emphasis added. In assessing the scope of *Cinéthèque*, Weiler had suggested, perhaps as a last resort, that "it may be possible to argue that the decision should not apply to situations where a State relies for its measure on Article 36", i.e., a derogation provided by the Treaty ("Methods", p. 608).

[86] J a c o b s, *op. cit.*, p. 249, referring to Advocate General Van Gerven in *SPUC*, ECR 1991, I-4732; see, however, D i B u c c i, entry on "Droits fondamentaux" in B a r a v and P h i l i p: *Dictionnaire juridique des Communautés européennes*, 416 (1993), citing the narrower formulation.

Probably the most sensitive fundamental issue raised before the Court to date was that submitted by the Irish High Court in its request for a preliminary ruling on the compatibility with the Treaty, and particularly the rules on the provision of services, of a national prohibition on the publishing of information on the availibility of abortion services in the United Kingdom; the carrying out of abortions in Ireland was, and still is,[87] contrary to Irish criminal law, backed by a constitutional protection both for the right to life of the unborn and "the equal right to life of the mother". While holding that "the medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60", the Court found that the link between the persons providing the information, three students' associations, and the performance of abortions in another Member State was "too tenuous" for the prohibition on information to constitute a restriction within the meaning of the Article 59 of the Treaty.[88] As the national provisions at issue did not restrict any Treaty freedom, it was found to lie outside the scope of Community law, à la *Cinéthèque*; the Court therefore held it had no jurisdiction to advise the national court as to the compatibility of such provisions with the freedom of expression enshrined in Article 10(1) of the ECHR.

The judgment in *SPUC* provoked a barrage of unfavorable criticism of a virulence and a variety beyond that which is normally reserved for unpopular rulings of national supreme courts on fundamental rights issues, probably unprecedented in the annals of the Court of Justice; even those who have a good word to say for certain aspects of the judgment contest the result and/or the reasoning. Thus, for some, the Court's finding that the termination of pregnancy as lawfully practiced in most of the Member States constituted a medical service within Article 60 of the Treaty, was "unproblematic",[89] while for one commentator, the Court had thereby substituted "the social legislation of the United Kingdom for the direct choice of the people of another Member State to protect the life of the unborn".[90] The Court was said to have adopted "an approach with enormous moral implications ... which denies the validity of the Irish constitutional position within the EEC",[91] though the adoption of any other approach, according to another view, would have been tantamount to imposing its own moral views, or those of the Irish Republic, on the rest of the Community.[92] Its finding that the particular situation of fact fell outside the ambit of the Treaty has been dubbed "opportunistic and unconvincing";[93] while the Advocate General's substantive investigation of the interplay of the various rights at issue has been praised,[94] his conclusions on the

[87] In a series of constitutional referendums carried out on 25 November 1992, the Irish electorate voted to allow the provision of information on abortion services available elsewhere, and affirmed the right to travel to receive such services.

[88] Case 150/90 *SPUC* v *Grogan and others* ECR 1991, I-4740.

[89] O'Leary, "The Court of Justice as a reluctant constitutional adjudicator: an examination of the abortion information case', 17 *ELR*, 144 (1992); along the same lines, Curtin, casenote on *SPUC*, 29 *CMLR* 591–3 (1992), and Gaudemet-Tallon, casenote on *SPUC*, 28 *RTDE*, 170 (1992).

[90] Phelan, op. cit., p. 673.

[91] Phelan, *op. cit.*, p. 675.

[92] Respectively, Gaudemet-Tallon, *op. cit.*, p. 170, and Colvin, *op. cit.*, (fn 49), at 513–515.

[93] Curtin, *op. cit.*, p. 596.

[94] Curtin, *op. cit.*, p. 588; Gaudemet-Tallon, *op. cit.*, pp. 174–175.

application of the principle of proportionality,[95] and on the jurisdiction of the Court to apply fundamental rights standards[96] have been condemned.

That *SPUC* was a constitutional quagmire is hardly open to doubt. The dispute set a corollary right to an economic freedom, and a fundamental civil right, defined in international agreements accepted by the Member State in question, against a constitutional provision of uncertain scope;[97] little wonder that the three supreme jurisdictions asked to evaluate the legality of the information ban came to different conclusions.[98] Apart from illustrating the common law saying that "hard cases make bad law", the judgment in *SPUC* adds little to the sum of human knowledge concerning the Court's general policy on the application of Community fundamental rights standards to national action. Whether or not the Court's line of least resistance was correct or not,[99] the issues thrown up by this case, and its sequel in the Irish courts, *Attorney-general* v. *X and others*[100] are a fair warning as to the kind of dilemma which may face the Court of Justice in the future, given the extension of Community regulatory jurisdiction, albeit within express material limits, into non-economic areas such, a voting rights, visa policy, public health, education and culture, as a result of the Maastricht Treaty.[101]

### (c) Strasbourg Supervision of Brussels and Luxembourg?[102]

Though the Community is not a party to the European Convention, the Commission on Human Rights has had to consider a number of complaints of alleged violations of fundamental rights both by the Community institutions and by Member States acting within the scope of Community law. The Commission's starting point is presumably the statement of principle contained in its decision of 10 June 1958, to the effect that "if a State contracts treaty obligations and subsequently concludes another international

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[95] O'Leary, *op. cit.*, pp. 149–150; Colvin, *op. cit.*, pp. 515–517.

[96] Gaudemet-Tallon, *op. cit.*, p. 179.

[97] The Supreme Court's extensive interpretation of Article 40.3.3 of the Irish Constitution in relation to the provision of information was convincingly overturned by the Irish people in the November 1992 referendums.

[98] In its judgment of 29 October 1992, *Open Door and Dublin Well Woman*, the European Court of Human Rights, by a majority of 15 to 8, found the restriction of the freedom of expression disproportionate to the aims it sought to attain.

[99] The refusal of fundamental rights review following the finding that the information ban fell outside the scope of the Treaty is at least consistent with the *Cinéthèque/ERT* rule identified above. There was also a disquieting absence of proximity between the rights guaranteed by the respective legal instruments and the parties to this case; SPUC could, for example, not have claimed to be "victims" within the meaning of Article 25 ECHR (Peukert in Matscher and Petzold, *op. cit.*, pp. 514–515), while Grogan *et. al.* were neither providers nor receivers of services, nor exercising any economic activity within the meaning of the Treaty.

[100] 2 CMLR 277 (1992); the injunction imposed by the Irish High Court on a fourteen year-old girl, allegedly a rape victim, from going abroad for the purposes of having an abortion brought the Irish constitutional situation into international prominence. The injunction was overturned by the Supreme Court, on the grounds of the girl's stated suicidal intent.

[101] This is not to say that the Community has not adopted measures in many of these areas before (see Cassese *et al.*, Vol. III, *The Substantive Law*).

[102] See Campinos: "La Commission européenne des droits de l'Homme et le droit communautaire", in *Jornadas; Jurisprudencia europea en materia de derechos humanos*, 259 (1991); Clapham, *op. cit.* fn 17 above, pp. 55–60; and Mendelson: "The Impact of European Community Law on the Implementation of the European Convention on Human Rights', 3 *YEL* (1984), hereafter "Impact".

agreement which disables its from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty";[103] fourteen of the fifteen Member States acceded to the European Convention before joining the European Community. It remains to be seen to what extent the Commission has been wholly faithful to those laudable sentiments in its dealings with Community law.

The first such complaint arose in 1976, under the regime of the ECSC. In appointing the members of the Consultative Committee of this Community, the Council had, over a period of ten years, failed to include any representatives of the CFDT, the second largest trade union in France, though three smaller French unions had been allocated seats on the Committee during this time.[104] The CFDT's annulment action against the Council failed before the Court of Justice, as the ECSC Treaty only allowed such actions at the suit of a Member State or the High Authority, and only on grounds of lack of competence or breach of an essential procedural requirement, neither of which was alleged in this case. Though holding the action inadmissible, the Court hinted, possibly in view of the proceedings then pending against the French authorities before the *Conseil d'Etat*, that "it remains possible for the Court to review the validity of acts of the Council at the instigation of a national court" under the preliminary ruling procedure. This possibility of a review by the Court of Justice proved illusory, as the *Conseil d'Etat* declared a year after the Court's judgment that it had no jurisdiction; such a decision was hardly surprising, given that the effects of the act complained of were entirely internal to the Community.

The CFDT's complaint to the Commission on Human Rights, alleging the absence of an effective remedy, a denial of justice and unjustifiable discrimination, fared no better. The complaint, directed against the Communities and the Member States, was deemed inadmissible *ratione personae*, as regards the Communities, because they were not party to the ECHR, as regards France, because it had not accepted the right of individual petition, and as regards the other Member States, because they had exercised no "jurisdiction" in the matter, within the meaning of Article 1 ECHR.[105] This finding has been sharply criticised, on the grounds that the Communities have succeeded to the obligations of the Member States under the ECHR in the areas of Community competence; by this token, the Court of Justice is a domestic tribunal over whose decisions the Commission and Court of Human Rights have jurisdiction.

Even if the succession theory, to which the Court of Justice has not expressly subscribed despite the efforts of the Commission of the Communities[106] does not apply, the decision is open to objection within the terms of reference set by the European

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[103] Application No. 235/56, *Yearbook of the European Convention*, p. 256, 300.

[104] Under Article 18 ECSC, the Council, rather than the Member State governments, designates the representative organizations which may submit lists of candidate members; in practice, the Council always acted on the recommendations of the governments.

[105] Application No. 8030/77, 10 July 1978, 13 *D & R* 231; a further claim against the Member States collectively was considered in reality to be directed against the Council of the European Communities, and hence also outside the Commission's jurisdiction *ratione personae*.

[106] Mendelson, *op. cit.* fn 10, pp. 150–151; Toth, *op. cit.*, pp. 288–289; Advocate General Van Gerven adopted a similarly cautious line in *SPUC*, ECR 1991, 4722).

Commission of Human Rights for itself. It is clear, in the first place, that the remedy, if any, should have been available against the Council, rather than against France, and hence at the Community level; as a matter of Community law, the decision appointing the Consultative Committee was taken by the Council, which was in no way obliged to follow the recommendations of the governments in designating the representative organizations.[107] It is equally clear that the absence of such a remedy can be blamed on the rather limited jurisdictional system established by the ECSC - decisions appointing the members of the equivalent consultative body for the other two Communities are justiciable, at least at the suit of disappointed candidates[108] - rather than any failing by the Court of Justice. Whatever the possible merits of the claim,[109] under the 1958 decision, the Commission would in principle have had jurisdiction to examine whether, in creating the ECSC, the Member States could be held responsible for any *déni de justice* suffered by the CFDT;[110] having done the rounds of the available avenues of fundamental rights supervision, the CFDT had every good reason to feel aggrieved at having been refused its day in court.

The next case "appealed", as it were, from Luxembourg to Strasbourg was a complaint of unfair dismissal by a member of the temporary staff of the European Parliament; the Court of Justice had dismissed the application as being out of time, specifically stating in response to the applicant's reliance on Article 6 ECHR that the right to a fair trial "does not preclude the setting of time-limit for the institution of legal proceedings".[111] The applicant then lodged a complaint alleging a violation of Article 6 ECHR directed against the Communities and the Member States jointly and severally. While rejecting the claim against the Communities as inadmissible *ratione personae*, the Commission on Human Rights expressly left open the question of whether each of the Member States could be held responsible under the Convention for an act of a Community institution, preferring to rely instead on the non-exhaustion of domestic remedies. In assimilating the means of judicial recourse under the Treaties to "domestic remedies", the Commission seems to have been preparing the way for a possible future assumption of jurisdiction to supervise the Community legal order.[112]

The matter was settled, at least for the time being, by the Commission's decision of 9 February 1990 on Application No. 13258/87, *M & Co* v *Federal Republic of Germany*. The complainant company had incurred a hefty fine for breaching Community competition rules; the decision of the EEC Commission had been substantially upheld by the Court of Justice, though the amount of the fine was reduced.

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[107] This appears from the reasoning adopted by the Court in Case 297/86 *CIDA* v *Council*, ECR 1988, 3555, concerning appointment to the Economic and Social Committee of the EEC and Euratom.

[108] Case 297/86, *CIDA* v *Council* ECR 1988, 3531.

[109] CFDT's claim for its candidates to be appointed to the Consultative Committee may not be protected by Article 6 ECHR, in which case Article 13 would not be of any assistance; the question here is, however, that of the Human Rights Commission's jurisdiction to examine the complaint *ratione personae*, not *ratione materiae*.

[110] See also Mendelson: "Impact", pp. 112–117.

[111] Case 257/85, *Dufay* v *European Parliament* ECR 1987, 1574.

[112] Campinos, *op. cit.*, p. 277; for Schermers, the recognition of Member State responsibility would amount to "a denial of the Community's separate legal order" ("The European Communities bound by the European Convention on Human Rights", 27 *CMLR* 258 (1990)).

As required under the relevant provisions of Community law,[113] the German Minister of Justice issued a writ of execution for the judgment of the Court; the application alleged that, as the Court of Justice had violated the presumption of innocence and the rights of defence guaranteed by the Convention, the Minister should have refused to issue. The Commission on Human Rights rejected the argument that the national authorities were acting quasi Community organs and hence immune *ratione personae*; Member States "are responsible for all acts or omissions of their domestic organs allegedly violating the Convention", including those resulting from the necessity to comply with international obligations. A transfer of powers to an international organization "does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers"; the organization must guarantee "an equivalent protection" for fundamental rights, which the Commission, on the basis of the Joint Declaration of 1977 and the Court's caselaw, considered to be the case for the European Communities. The Commission recognized, furthermore, that "it would be contrary to the very idea of transferring powers to an international organization" if the Member State were bound to verify the conformity with the ECHR of each individual decision it was obliged to implement.[114]

One response to the problematic interface between Strasbourg and Luxembourg which has long been proposed is that the Communities *per se* accede to the European Convention.[115] In its 1990 communication, the Commission of the Communities noted that where a Member State implements a Community legal instrument, the Community, which bears responsibility for its adoption, cannot be impugned before the Commission on Human Rights, while its action will be outside the latter's jurisdiction if the Member State has no discretion in implementing Community obligations: "[there] is therefore a gap and an inconsistency in the protection of the rights of citizens and economic operators with respect to an instrument of Community law".[116] Given the state of the caselaw of the Court of Justice in respect of fundamental rights protection, the principal added value of Community accession is seen in terms of access for the citizen to the Convention's supervisory mechanisms.[117] The problems and desirability of accession have already been exhaustively treated in academic studies;[118] the matter is at present

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[113] Article 192 EC requires national authorities to enforce decisions of the Council or Commission imposing fines "without other formality than verification of the authenticity of the decision".

[114] The position adopted by the Commission on Human Rights is similar in effect to that of the *Bundesverfassungsgericht* in "Solange II", though the Commission does not envisage any possible future necessity to revise its decision.

[115] The Commission of the Communities submitted a proposal to this effect in 1979, and again in 1990 (respectively, Bull. EC Supp. 2/79 and SEC(90) 2087 final); the Commission's view has been consistently supported by the European Parliament, for example in its resolution of 18 January 1994, OJ 1994 C 44/92.

[116] SEC(90) 2087 final, para. 5, p. 3, citing *M.* v *Federal Republic of Germany*.

[117] This was expressly recognized in the report of the working party chaired by Professor Jacqué which preceded the Commission's 1990 communication (typed version of 15 October 1990, p. 18).

[118] The question tends to generate a wide spectrum of views; on the basis of a study of the Court's caselaw carried out by the Max Planck Institute, the Commission opined itself in 1976 that accession was unnecessary (Bull. EC Supp 5/76). For Pescatore, as the Community is already bound by the ECHR, accession is a false problem (in Matscher and Petzold, *op. cit.*, pp. 451–453), while Weiler considers the exercise as of little more than symbolic importance ("Methods", p. 620); for further references, see Toth, *op. cit.*, pp. 292–293.

squarely in the politicians" camp, though the Court of Justice has been asked to rule on the Communities' competence to conclude such an agreement.[119]

## IV. Fundamental Rights and the Maastricht Treaty

The Treaty on European Union (TEU), which was signed in Maastricht on 7 February 1992 and entered into force in November 1993, seeks to reinforce the features of the Community system of government which make it most resemble that of a federal state.[120] The existing Communities are subsumed into the new "European Union", which also embraces a common foreign policy and cooperation between the Member States on "home affairs" (primarily immigration policy and cooperation between courts and police forces), while the former EEC becomes the "European Community". The peoples of the new European Union are promised that the protection of their rights and interests will be strengthened through the introduction of a Union citizenship, including extended residence and voting rights, though the enjoyment of each of these is said to be dependent on the adoption of Community legislation.[121] Within the Community system of decision-making, the position of the European Parliament, the only institution whose composition is not the emanation of the will of the national governments,[122] has been enhanced by the introduction of new legislative procedures giving Parliament a much greater formal possibility of influencing the content of selected categories of legislation, with a parliamentary veto available in cases of serious disagreement with the Council.[123]

By virtue of Article F. 2 of the new Treaty, the Union undertakes, in all areas of its activity, to "respect fundamental rights, as guaranteed by the [ECHR] ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law". The indications which may be derived from this ringing affirmation are somewhat ambivalent, or even contradictory. On the one hand, as one of the "common provisions" of the European Union Treaty, respect for this principle is expressly not subject to the jurisdiction of the Court of Justice.[124] This feature has

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[119] Opinion 2/94, pending; OJ 1994 C 174/8.

[120] On the TEU in general, see O'Keeffe and Twomey (eds.): *Legal Issues of the Maastricht Treaty* (1994), esp. Twomey: "The European Union: Three Pillars without a Human Rights Foundation", p. 121; see also Krogsgaard: "Fundamental Rights in the European Community after Maastricht" (1993) *LIEI* 99.

[121] Articles 8a and 8b EC; in fact, rights of residence for students, workers who had exercised their right of free movement and those of independent means has already been guaranteed by legislation adopted in 1990. Voting rights in European Parliament elections were defined in Council Directive 93/109/EC OJ 1993 L 329/34).

[122] With effect from 7 January 1995, however, Parliament and the Member State governments will, in effect, be jointly responsible for the appointment of the Commission (Article 158(2) EC).

[123] See generally, Bradley: "»Better Rusty than Missin«?: The Institutional Reforms of the Maastricht Treaty and the European Parliament", in O'Keeffe and Twomey, *op. cit.*, p. 193. The citizen's right to submit petitions to Parliament is recognized, and Parliament is charged with appointing the Community Ombudsman (Articles 138d and 138e); given Parliament's past interest in fundamental rights matters, these procedures, though limited, may contribute to the level of protection enjoyed throughout the Community.

[124] Under Article L, "the provisions concerning the powers of the Court of Justice and the exercise of those powers" apply only to the titles of the Maastricht Treaty which concern the Community Treaties, and the "Final Provisions".

led one commentator to conclude that "the Treaty has failed to make the leap from the protection of fundamental Community rights to concern for human rights proper", though its siting outside the Community framework may have been motivated by a desire to emphasize that such rights (should) benefit all persons, and not just Community citizens.[125]

Perhaps more significantly, though Article F. 2 applies in principle to decisions on matters of foreign policy and cooperation on home affairs, these too are outside the Community framework, and hence outside the jurisdiction of the Court of Justice. That such decisions could affect the fundamental rights of both Community and third-country citizens is implicitly recognized in Article K.2, which enjoins the Member States acting in the framework of Home Affairs cooperation to comply with the ECHR, the Geneva Convention on Refugees and to "hav[e] regard to the protection afforded by Member States to persons persecuted on political grounds". In its judgment of 12 October 1993 on the constitutionality of the German law ratifying the Maastricht Treaty, the *Bundesverfassungsgericht* took the view that none of these new provisions allowed the adoption of legal rules having direct effect or primacy over national law, and that it would have constitutional jurisdiction to ensure that any measure taken by the German government on foot of common actions in these areas did not violate the fundamental rights protected by the Basic Law;[126] fundamental rights supervision of Union activities in these two areas would therefore fall within the exclusive jurisdiction of national courts.

Equally, Article M says in effect that nothing in the common provisions "shall affect the Treaties establishing the European Communities"; by this token, Article F. 2 would add nothing to the fundamental rights protection already recognized within the Community framework, being little more than a political signal to the Court of Justice to keep up the good work.

On the other hand, the fact that the Maastricht Treaty includes a specific provision on fundamental rights protection, as distinct from a preambular declaration, is in itself significant.[127] Article E of the Treaty enjoins the Court of Justice and the other institutions to "exercise their powers under the conditions and for the purposes provided for" not only by the provisions amending the Community Treaties, but also the "other provisions" of the TEU, including Article F. 2. The obligation which therefore arises for these institutions is to "respect fundamental rights ... as *general principles of Community law*". At least within the framework of Community law, the Court could be said to be constitutionally bound to ensure respect for the substance of the rights guaranteed by the ECHR and common constitutional traditions, which are no longer merely "guidelines" and "inspiration", though their definition is still left to the Court of Justice. Furthermore, though by virtue of Article L the various procedures by which

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[125] See, respectively, T w o m e y: "The European Union: Three Pillars without a Human Rights Foundation", in O'K e e f f e and T w o m e y: *Legal Issues of the Maastricht Treaty*, 123 (1994), and Cloos *et al.*, *Le Traité de Maastricht*, 118 (1993).

[126] Reported as *Brunner* v *The European Union Treaty*, 1994 I.C.M.L.R. 57.

[127] C a m p i n o s: "La protection des droits fondamentaux dans l'ordre juridique communautaire: le présent et l'avenir", in *Europako Elkarteko Zuzenbidea Derecho Comunitario*, Vol. 4, 353, 356 (1993).

the Court of Justice may be seised of a legal disputes do not apply outside the Community framework, this does not preclude the Court's having regard to such general provisions in the interpretation of the Community Treaties; in applying Article M, the Court can also ensure that decisions taken in the framework of the two outer pillars do not encroach on fundamental rights protected under the Community legal order.[128] Despite the ambiguities of the Treaty on European Union, it may be said to provide an express recognition of judicial review of respect for human rights within the scope of Community law.[129]

## V. Conclusions

Twenty-five years after the first hesitant steps in *Stauder*, it is fair to say that the principle of the protection of fundamental rights is firmly established in Community law. The Court of Justice has recognized a wide variety of such rights derived from a number of sources, particularly but not exclusively national constitutional traditions and the substantive provisions of the European Convention on Fundamental Rights. In recent times, however, both the Court's reasoning and the results it reaches have given rise to dissatisfaction in various quarters, for example, regarding its apparent reluctance to vindicate the rights of the individual which contradict the achievement of an objective fixed by the Treaty, and inconsistencies in its rulings.[130] Nonetheless, the caselaw and the declarations of the political institutions have persuaded both the national constitutional courts most concerned, and the European Commission on Human Rights, into a potentially durable truce. If its common provisions are to be taken at face value, the Maastricht Treaty should provide a solid constitutional foundation for the maintenance and extension of Community protection of fundamental rights in the future, though, ironically, it will require a further judgment of the Court of Justice to establish authoritatively the scope of Article F. 2.

Even post-Maastricht, there remains the question of the legal foundation of the judicial review by the Court of Justice of national action within the scope of Community law, regarding which the Court has hitherto maintained a discreet silence.[131] One underlying theme which may be discerned, woven like a golden thread through the pattern of many of the great constitutional judgments of the Court in this and other areas, is the notion of equality of treatment within the scope of Community law,

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[128] Notwithstanding an exclusionary clause in the Single European Act similar to Article L TEU, the Court referred to Article 1 SEA in defining "the objective of all the Community treaties as being to contribute together to making concrete progress towards European unity"; Opinion 1/91, ECR 1991, I-6120.

[129] The Court's caselaw, including its jurisdiction to review Member State action within the Community framework, also forms part of the *acquis communautaire*, protected by Article B, fifth indent, of the TEU.

[130] See, for example, C h u r c h i l l and F o s t e r: "Double Standards in Human Rights?", 12 *ELR* 430 (1987); F o s t e r: "The European Court of Justice and the European Convention for the Protection of Human Rights", 8 *HRLJ* 245 (1987); C o p p e l and O'N e i l l, *op. cit.*; "»Weiler and Lockhart, Taking Rights Seriously« Seriously", 32 *CMLR* (1995) 51 and 579.

[131] On the justifications for the Court's assuming such jurisdiction see W e i l e r: "Methods", p. 606–7, and S c h e r m e r s: "The European Communities bound by fundamental human rights", 27 *CMLR* 258 (1990).

a principle for which there is ample Treaty support,[132] where the interests of *homo economicus* and the rights of *homo politicus* converge. Both the uniform application of Community law, in defence of which the Court has refused to apply national guarantees of fundamental rights, and the doctrine of direct effect are manifestations of equality by any other name. Similarly, *ERT* and *Francovich*[133] pursue the same logic of a minimum Community standard as regards, in the one case, fundamental rights recognized as general principles of Community law, in the other, individual rights arising from Community directives, through decentralizing judicial review of their respect by Member States. If the principle of equality is not to be devoid of substantive content, it should be taken as implying that a situation which arises in one Member State should not be treated differently from the same situation in another Member States, as regards fundamental rights protection; national boundaries are, as it were, a "suspect classification", and this whether the individual in contact with Community law is a Community or of third-country national.

The duty on the Member States to apply a Community minimum standard, which in turn founds the Court's jurisdiction to review, arises from Article 5 EC, by which the Member States must "take all appropriate measures ... to ensure fulfilment of the obligations arising out of this Treaty [and] ... abstain from any measure which could jeopardize the attainment of the objectives of this Treaty", including respect for the principle of equality within the framework of Community law. This would not, of course, preclude the application of a higher standard of protection by individual Member States, which does not encroach upon the uniform application of Community law; the exercise of such jurisdiction would in fact no longer fall "within the scope of Community law".[134] In ensuring a measure of equal protection of fundamental rights throughout the Community, the Court is not only respecting a principle common to the constitutional traditions of the Member States and the European Convention, but pursuing an ideal of justice at least as old as that of Aristotle.

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[132] In particular, Article 6 EC provides that "within the scope of application of this Treaty ... any discrimination on grounds of nationality shall be prohibited"; on equality and the protection of the citizen, see L e n a e r t s: "Egalité", pp. 25–35.

[133] Joined cases 6 and 9/90, ECR 1991, I-5357; the Court found that in certain circumstances a Member State could be liable in damages for its failure to implement Community legislation.

[134] Thus, if the Court of Justice had been satisfied in *ERT* that the broadcasting restrictions did not infringe the freedom of expression guaranteed under Community law, it would still have been open to the Greek court to strike down the national law by applying stricter, national standards (W e i l e r, "Methods", p. 598).

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# Interpretation of Discrepancies in Russian and English Texts of International Treaties and Possible Impact on Implementation

**(a case study of the ABM Treaty)**

BAKHTIYAR R. TUZMUKHAMEDOV

## Preface

The origins of this paper can be traced back to an idea which was discussed in 1987 at an annual conference sponsored by the then Boston-based Lawyers Alliance for Nuclear Arms Control (LANAC), now called Lawyers Alliance for World Security (LAWS) with headquarters in Washington D.C., and the former Association of Soviet Lawyers. I think it was Professor Abram Chayes who proposed to conduct a bilateral study of the ABM Treaty interpretation issues. To the best of my knowledge the joint approach did not materialize. I, for one, have decided to do some ground-work for this future project, which in 1989 resulted in a report for in-office use with limited circulation in the Ministry of Foreign Affairs. To a considerable extent that report was a review of opinions of those who took part in the reinterpretation debate with my comments and conclusions.

It was then that I discovered discrepancies in authentic texts of the ABM Treaty, some quite striking. However, because of time constraints and since request for a report from the Foreign Ministry did not mention linguistical aspects of reinterpretation, I had to put aside any further research of the issue. I did, however, publish some of my findings in Moscow Journal of International Law.

My new encounter with Professor Chayes in September, 1993 prompted a renewed interest in the subject, resulting in this paper.

## Ackonwledgements

First and foremost I would like to thank Professor Abram Chayes who seven years ago unknowingly inspired my interest in the ABM Treaty and alerted to a more than academic significance of its interpretation, and later carefully and unobtrusively guided my research.

I would like to gratefully acknowledge counsel and comments I received at earlier stages of this research from the ABM Treaty negotiators Amb. Victor Karpov, John

Rhinelander, Vadim Chulitsky, Sidney Graybeal, as well as from Professor Vadim Sobakin, fmr.Soviet Permanent Representative at UNESCO, Amb.Valentin Lozinsky, First Deputy Representative of Russia at the U.N., Amb.Yuriy Kuznetsov, fmr. Soviet lead negotiator on space weapons at Soviet-U.S. Nuclear and Space Weapons Talks, Patricia A.McFate, senior research associate at SAIC, Amb.Ralph Earle II, fmr.Director of the U.S. Arms Control and Disarmament Agency and head of the U.S. SALT-I delegation, and other individuals within government agencies and non-government institutions who were most helpful in providing information on the issues examined in this paper.

Having focused my analysis on the discrepancies in the use of terms, I interviewed several individuals who, although preoccupied with matters more important than an LL.M. paper, have found time to respond to my questions. Let me mention them all: Amb.Yuliy Vorontsov, Russian Permanent Representative at the U.N. and fmr. head of Soviet delegations at SALT-II, START and INF Talks, Amb.Oleg Khlestov, fmr.head of Soviet delegations at a number of arms control talks, including Mutual Forces Reduction Talks in Central Europe and fmr.Soviet Permanent Representative at International Organizations in Vienna, Victor Prokofiev, senior language officer at the Russian Ministry of Foreign Affairs, John McNeill, Senior Deputy General Counsel (International Affairs and Intelligence) of the U.S. Department of Defense, Albert Carnesale, Dean of the John F.Kennedy School of Government and former advisor to the U.S. SALT-I delegation, and Jan Prawitz, fmr.Special Assistant for Disarmament of the Swedish Ministry of Defense.*

Needless to say that responsibility for conclusions in this paper rests solely with the author, and the views expressed are his own and not necessarily shared by institutions with which he is associated. Also, individuals mentioned above, all of whom shared their personal views and some wished to be not quoted directly, should not be held liable for any errors or misjudgements that might appear herewith.

## Introduction

On 13 July 1993, in a written statement to Senator Pell, Chairman of the Senate Foreign Relations Committee, the Acting Director of the U.S. Arms Control and Disarmament Agency stated that it was "a position of the Clinton Administration that

* This paper was completed as part of my studies at Harvard Law School in the 1993–94 academic year. Earlier some preliminary findings were published in Moscow Journal of International Law (1 Mos.J.Int'l L. 1992, at 50–70) and in Avoidance and Settlement of Arms Control Disputes, Volume II, 173–179 (Julie Dahlitz ed., 1994).

While no changes were introduced into the text prior to its publication in the Polish Yearbook of International Law, I wish to note that the status of some individuals whose assistance is acknowledged in the article, has changed.

Amb. Yuliy Vorontsov is now Russian Ambassador to the United States, Amb. Valentin Lozinsky is back in Russia and actively involved in conflict resolution in the fmr. USSR. Amb. Ralph Earle has returned back to the U.S. Government service as Deputy Director of Arms Control and Disarmament Agency. Albert Carnesale has been made vice-president of Harvard University. Finally, Victor Prokofiew left the diplomatic service to become the senior advisor to the president of a major bank in Russia.

the »narrow« or »traditional« interpretation of the ABM Treaty is the correct interpretation."[1] Senator Pell praised the decision as wise and said that it "closes, on a high note, a sad chapter in United States arms control treaty relations."[2]

Senator Pell was referring to a notorious attempt made in 1985 by the Reagan administration to reinterpret the basic provisions of one of the most important arms control treaties, that is the Soviet–American Treaty on the Limitation of Anti-Ballistic Missile Systems of 1972. That attempt led to stormy debates that focused on the declared intention of the US Administration to move over to active strategic defense with mobile, primarily space-based elements. The reinterpretation was necessary to do it without openly breaking away from the Treaty.

However, by the turn of the decade those debates have somewhat calmed down. Interim solutions that suited at least for a while the parties concerned were found both at the Geneva Nuclear and Space Talks and in the United States.

In the United States the ABM Treaty interpretation became a major political issue. The latter led to active involvement in the debate of many experts, including both academics and negotiators who, along with political, economic, military and technical aspects of the problem, paid particular attention to its legal side.

The contribution of what used to be the Soviet doctrine of international law into this debate has been more modest. One can think of various explanations, the basic ones being the lack of tradition of applied legal analysis in the intricate area of arms control, as well as restrictive information rationing. It would hardly be possible to conduct a well-argumented research in the absence of knowledge (or of willingness to make such knowledge public) of the circumstances of the conclusion of the ABM Treaty, all the more so since annexes to the Treaty, substantial for its interpretation, have been published in the former Soviet Union only about fifteen years after its conclusion, while some agreements, reached within the Standing Consultative Commission (SCC), pertaining to its interpretation and application, have yet to be declassified by both parties.

Besides, very few authors in the former Soviet Union were able to deviate from the pre-defined theme – search for evidence of the SDI illegality.[3]

However, if my knowledge serves me right, most contributors to the debate have overlooked a linguistical aspect of the problem, that is discrepancies in the use of terms that should correspond to each other in both authentic texts of the Treaty. Although English and Russian have been basic languages of disarmament, it seems that very few negotiators and other experts, though fluent in both languages, cared too much about nuances. Even professional interpreters serving summits and major arms control talks are sometimes prone to a degree of carelessness in use of terms.

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[1] Letter from Thomas Graham, Jr., Acting Director of the U.S. Arms Control and Disarmament Agency to Senator Claiborne Pell, Chairman of the U.S. Senate Foreign Relations Committee (13 July 1993) (on file with the author).

[2] *U.S. Abandons »Broad« Interpretation of ABM Treaty*, Wash. Post, 15 July 1993, at A21.

[3] One of exceptions worth mentioning is: V.S.Vereschetin, *Dogovor po PRO ih yegoh amerikanskiyeh "tolkovateli"* [*The ABM Treaty and its American "Interpretators"*], Sov. Gos. i Pravo, July 1987, at 91.

The major objective of this paper will be to analyze key provisions of the ABM Treaty and to identify and examine differences in usage of terms in its Russian and English authentic texts. Sometimes these differences are minor, but in certain cases they may become substantial. This might make desirable, though not absolutely necessary, some knowledge of the Russian language by the reader. Sources used and referred to in the paper were deliberately reduced to the Treaty text and that of the annexes, as well as to a number of documents related to its ratification and, finally, to statements by negotiators and other officials involved in its conclusion.

I shall deliberately avoid other, in fact, major issues of interpretation, such as positions taken by parties to the conflict between "traditional" and "new" interpretations, or accusations of the Treaty violations, since this has been considered at length in official documents, academic and journalistic writings.[4] For the same reason, and also since a number of issues that were not critical in 1972, but became such by mid-eighties, I avoided them too.

I am well aware that some of my conclusions may be challenged or refuted by those who are better informed about the circumstances under which the ABM Treaty was negotiated, ratified, attacked and defended.

## Rules of Treaty Interpretation

First, some remarks on the general rule of interpretation of treaties authenticated in different languages would seem to be appropriate.

The main purpose of treaty interpretation is to find its true meaning and substance in order to ensure complete and precise application of its provisions. Basic rules of interpretation are set forth in Section 3 "Interpretation of Treaties", articles 31–33 of the Vienna Convention on the Law of Treaties of 1969,[5] the principal of which is the following: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[6] These rules provide for a step-by-step interpretation procedure when inability to attain its purpose at one stage serves as a condition for initiation of the next one. However, this does not rule out the use of supplementary means of interpretation to confirm the already established meaning of a treaty provision.

Stage one consists of interpretation of a treaty context which comprises, in addition to the text, including its preamble and annexes any agreement relating to the treaty and

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[4] For an in-depth analysis of the ABM Treaty and related issues, including interpretation, *see* M. B u n n: Foundation for the Future: the ABM Treaty and National Security (1990); Defending Deterrence: Managing the ABM Treaty into the 21st Century (A.H. C h a y e s and P. D o t y eds.) (1989); R.L. G a r t h o f f Policy versus the Law: the Reinterpretation of the ABM Treaty (1987).

[5] For a discussion of treaty interpretation provisions of the Vienna Convention, *see* Sir I. S i n c l a i r: The Vienna Convention on the Law of Treaties, 114–159 (2d ed. 1973); E.S. Y a m b r u s i c: Treaty Interpretation. Theory and Reality, 169–238 (1987). Convenient guides to respective *travaux preparatoires* can be found in: Sh. R o s e n n e: The Law of Treaties. A Guide to the Legislative History of the Vienna Convention, 214–223 (1970); The Vienna Convention on the Law of Treaties. Travaux Preparatoire, p. 237–263 (1978).

[6] Vienna Convention on the Law of Treaties, 23 May 1969 U.N.T.S. 1155 (hereinafter "Vienna Convention") Art. 31 (1).

made in connection with its conclusion, and any instrument which was made in connection with the conclusion of the treaty and accepted as an instrument related to the treaty.[7] In our case the context should include the text proper of the ABM Treaty and annexes – Agreed Statements initialled by heads of delegations.

Besides that during negotiations the delegations have agreed upon a number of interpretations, which have not been formalized though. Five of those interpretations, later named Common Understandings, were submitted to the US Senate during ratification proceedings, but an official text in Russian has not been published. That is why I am somewhat reluctant to unconditionally refer Common Understandings to the ABM Treaty context.

The next stage should involve any subsequent agreement regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement regarding its interpretation; any relevant rules of international law.[8] Here, a subsequent agreement would be the 1974 Protocol to the ABM Treaty, as well as classified agreed interpretations reached in the SCC which are discussed in some publications.[9] As for subsequent practice, it definitely established the agreement. Even after the SDI was announced, budgetary constraints imposed by the US Congress on the "star wars" research have forced the Administration to stay within that practice. And, as noted above, in July 1993 the issue of reinterpretation was closed, at least formally and at least for the time being. Finally, relevant rules of international law may include a number of bilateral and multilateral arms control and disarmament treaties to which both the United States and the Russian Federation are parties.

If, despite application of the forementioned instruments, the meaning of the treaty remains ambiguous or obscure, or the interpretation leads to a result which is manifestly absurd or unreasonable, "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion".[10] Such means could include minutes or other joint records, had they been made during the negotiations. As it turns out, both delegations kept only their own records,[11] and those of the Soviet delegation remain classified, while US records have been made public very selectively. Some joint texts, *e.g.* draft articles, have been published by several US negotiators,[12] but their Soviet counterparts either remained silent, or did not go into details.[13]

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[7] Vienna Convention Art. 31 (2a, 2b).

[8] Vienna Convention Art. 31 (3a, 3b, 3c).

[9] *E.g.*, M. B u n n, *supra* note 4, at 81, 168–169; Durch W.J. The Future of the ABM Treaty, Adelphi Paper 223 (1987), at 67; T. L o n g s t r e t h et al.: The Impact of U.S. and Soviet Ballistic Missile Defense Programs on the ABM Treaty (1985), at 24.

[10] Vienna Convention Art. 32.

[11] The fact is quoted by members of both delegations. See, *e.g.*, V. K a r p o v: *Trudnyi "yubiley"*. [*An Arduous "Anniversary"*], Pravda, 26 May, 1987; R. G a r t h o f f, *supra* note 4, at 30.

[12] R. G a r t h o f f, *id.*, at 28–69; J. R h i n e l a n d e r, J. R u b i n: *Mission accomplished*, Arms Control Today, Sep. 1987, at 3–14.

[13] *See, e.g.* V. S e m y o n o v, B. S u r i k o v: *Dogovor po PRO – pregrada "zvezdnim voynam"*. [*The ABM Treaty – A Barrier to "Star Wars"*], Mezhdunarodnaya Zhizn', July 1987, at 20–29; Karpov, *supra* note 11.

Supplementary means may also include documents produced by legislative bodies that have reviewed the ABM Treaty as part of ratification proceedings, since under the Vienna Convention ratification is a part of a treaty conclusion process. In fact, the records of US Congressional hearings on the Treaty contain valuable evidence for interpretation purposes. As for the USSR Supreme Soviet, one could hardly expect that this body which at that time had merely rubber-stamping functions, could produce any similar evidence. But still, however meager were remarks on substantive issues made at sessions of foreign affairs commissions of both chambers of the Soviet parliament and of its Presidium, they too require attention.

The interpretation of treaties authenticated in different languages[14] is a special issue. In such cases, as a rule, the text is equally authoritative in each language. It is presumed that the terms of the treaty have the same meaning in each authentic text.[15] If, nonetheless, a comparison of the authentic texts discloses a difference of meaning which the application of the forementioned means does not remove, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".[16]

Naturally, the ABM Treaty has been done in two copies, each in the English and Russian languages, both versions being equally authentic. The problem is that comparing the two one cannot avoid noticing obvious discrepancies in use of corresponding Russian and English terms, which influence interpretation.

## The ABM Treaty Context

The following general outline of the ABM Treaty with some comments, where appropriate, may help the reader better understand the discussion of discrepancies in the text that follow.

[14] Vienna Convention Art. 33.

[15] Two episodes described to this author by O. K h l e s t o v and J. P r a w i t z are indicative of a phenomenon pertaining to linguistical discrepancies that deserve a special study. Khlestov, who in 1973–76 headed the Soviet delegation at the Vienna talks on mutual force reductions in Central Europe told me that there appeared to be two German translations of the final communique of the first stage of negotiations. The delegation of the former GDR used the Russian version to make a translation, while the delegation of FRG based its translation on the English version. That resulted in a discrepancy in a particular provision of a text in the German language. As Khlestov explained, "terms and expressions used in the Russian and English versions were not precisely identical, but that was a result of a certain compromise reached by negotiators." Interview with O.Khlestov, 28 December 1993 (on file with the author).

Prawitz, fmr. Special Assistant for Disarmament in the Swedish Ministry of Defense, discovered differences between official Swedish text of treaties Sweden was a party to, and the Swedish language texts that were used by Finland. In particular, he referred to the Sea-Bed Treaty. As Prawitz explained, "Swedish is an official language of Finland. The differences were small enough to be insignificant, however... The reason for the differences was said to be slightly different legal traditions." interview with J.Prawitz, 10 March 1994 (on file with the author).

[16] Vienna Convention Art. 33 (4). But consider a noteworthy – and sobering – comment by Mala Tabory: "Some divergencies will continue to appear as the product of the vagueness resulting from the lack of of full agreement between the parties, or as the intentional manifestation of real differences between them glossed over by draftsmen. Even where the agreement is genuine, problems of interpretation and inadvertent discrepancies may occur when a seemingly or initially »agreed upon« text is applied to a novel situation not foreseen when the terminology was originally chosen. Even in the case of an unintentional discrepancy, each party may subsequently insist on relying on that language version which best suits its purpose." M. T a b o r y: Multilingualism in International Law and Institutions, at 228 (1980).

Let us start with the preamble to the ABM Treaty. It defines the Treaty concept which is based on the interrelation between strategic offensive and strategic defensive weapons and is described as follows: first, the limitation of ABM systems is considered "a substantial factor in curbing the race in strategic offensive arms"[17] and in attaining the general purpose thereof – "a decrease in the risk of outbreak of war involving nuclear weapons"; second, the parallel limitations on ABM systems and on strategic offensive arms "would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms". That same interrelation is referred to in Art. XI, which contains the undertaking of the Parties "to continue active negotiations for limitations on strategic offensive arms".

Art. I is a key provision for the understanding and interpretation of the Treaty. It contains the basic commitment: not to deploy ABM systems for a defense of each Party's territory, to apply clear-cut limitations on ABM systems for defense of an individual regions, and "to adopt other measures in accordance with the provisions of this Treaty". The article defines the object and purposes of the Treaty, while consecutive provisions specify obligations concerning their attainment.

The term "ABM system" may be considered as being generic, in which case limitations and bans provided for by the Treaty should embrace any systems capable of ABM missions, as they are defined by the articles that follow. Since the purpose of the Treaty is "to limit anti-ballistic missile (ABM) systems..., not to deploy ABM systems for a defense of [each Party's] country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region", then any exception must be clearly defined.

Worth noting is the absence of the definition of the term "base" as it is used in the Article itself, as well as in other provisions of the Treaty. Also worth noting is the lack of ban on a similar "base" for defense of an individual region.

Fifteen years after the Treaty was signed, Ambassador Paul Nitze, who represented the Defense Department at the SALT–I, stated that Art. I "limits deployment, not testing, and limits ABM systems, not ABM components".[18] This opinion seems to be vulnerable from several points of view. Trying to interpret the substance of that article outside the Treaty context, Nitze misused rules of treaty interpretation. Indeed, Art. I says nothing about testing or components simply because it contains general obligations of the Parties specified elsewhere in the Treaty. This is made obvious by para.1 which commits the Parties "to adopt other measures in accordance with the provisions of this Treaty", and para.2 which refers to Art. III. That article sets forth conditions for deployment of an ABM system for defense of an individual region. Thus, the term "component" is described on Art. II, while Art. III clearly states that not only ABM systems, but their components too, are subject to limitations.

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[17] Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems 26 May 1972, 23 UST 3425.

[18] P. N i t z e: *Interpreting the ABM Treaty*, 1987 (Summer) Atlantic Q. 225. Nitze has taken a particular position in the dispute over the ABM Treaty interpretation, which is not shared by other US negotiators of the Treaty.

In an attempt to prove his point Nitze was trying to give special meaning to the terms "systems" and "components" in violation of the rules of the Vienna Convention which provides that "a special meaning shall be given to a term if it is established that the parties so intended".[19]

Article II defines an ABM system as a system "to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of": ABM interceptor missiles, ABM launchers, ABM radars. The following three factors are essential for the purposes of interpretation: universality of the definition; criterion of space; criterion of time.

Universality of the definition means that any system intended for, or capable of ABM mission is considered an ABM system and should be limited according to the Treaty provisions.[20] According to the criterion of space an ABM system is the one that counters missiles or their elements already in flight trajectory and not earlier than that. Criterion of time, embodied in the phrase "currently consisting of", makes the list of ABM components exemplary, reflecting the state of the art current as of the time when the ABM Treaty was negotiated and signed. To put it differently, any weapon system capable of countering launched strategic ballistic missiles or their elements (*e.g.* MIRVs) shall be considered an ABM system and as such should be subject to limitations under the Treaty. At the time of the signing of the ABM Treaty there were three known state of the art components enumerated in Art. II. However, the Parties were aware that signing a treaty of unlimited duration (this is provided for in Art. XV), thus establishing a permanent obligation, they could not fully foresee specific technological advances in this rapidly progressing branch of weaponry. That is why they decided to draw an illustrative, or exemplary, but not a comprehensive list of components.[21]

R.Garthoff, the executive officer and senior advisor to the US delegation at SALT–I wrote that he was the one to suggest that the phrase "currently consisting of" be included in the draft article. That "would mean that »components« would *not* be restricted to the familiar three that were then »current«."[22] He further quoted his own Memorandum of Conversation with his Soviet counterparts in which he argued that "the Soviet side, as well as the American, recognized that there could be *future* systems, and while the question of constraints on future systems would be settled elsewhere than in Article II, the correct way of indicating a valid connection between components and systems in Article II would be to include the word »currently«."[23] Such constraints are specified in succeeding articles of the Treaty, and in Agreed Statements D and E.

[19] Vienna Convention Art. 31(4).

[20] Universality of the definition contaned in Art. II is discussed by Karpov, *supra* note 11, Semyonov and Surikov, *supra* note 13, and by their US counterparts Rhinelander (*The Meaning of the ABM Treaty*, Arms Control Today, Sept. 1987, at 5) and Garthoff (*supra* note 11, at 39–48), who call this definition "functional". Korniyenko, a retired senior diplomat, involved in formulating the ABM Treaty, underscores an indefinite article »a« preceding the word "system" in the English text, which, too, indicates that the definition is functional (G. K o r n i y e n k o: *Vzglyad v proshloye radi buduschego. [A Glance into the Past for the Sake of the Future]*, 21 Novoye Vryemia 1987, at 4.

[21] As Albert Carnesale, Dean of the John F.Kennedy School of Government and fmr. advisor to the U.S. SALT–I delegation, put it: "That was the whole idea that the Treaty was to be written without having in mind any specific system". Interview with A.Carnesale, 29 November 1993 (on file with the author).

[22] G a r t h o f f, *supra* note 11, at 44.

[23] *Id.*

In particular, Agreed Statement D directly provides for activation of the Treaty mechanisms of consideration and adoption of amendments "in the event ABM systems... including components capable of substituting for" components listed in Art. II "are created in the future..." J.Rhinelander, the legal advisor to the US SALT–I delegation stated that "the fact that an ABM system could include components based on new technologies is implicitly referred to by the phrase »currently consisting of«."[24]

Article III establishes specific quantitative, geographic, as well as certain qualitative limits within which ABM systems made up of components listed in Art. II may be deployed. Specifically, it bans any deployment with the exception of two ABM systems to be deployed in two designated areas on the territory of each Party. There may be no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites within each ABM system deployment area, as well as a definite number of ABM radars with characteristics specified in the article itself and in Agreed Statements A, B and F.[25] Thus, Art. III defines concretely the exception from basic commitment not to deploy ABM systems for the defense of an individual region, provided for in Art. I.

Since "ABM system" is a generic term, embracing any means capable of "countering strategic ballistic missiles or their elements in flight trajectory", Art. III by implication bans any other ABM systems and their components "besides those known at the time the Treaty was signed". Garthoff, referring to his memoranda of conversations, stated that such understanding of the meaning of Art. III was shared by both negotiating teams involved in its formulation.[26]

Article III is supplemented by Agreed Statement D which is one of the key annexes to the ABM Treaty. It clarifies and reinforces the article itself by addressing the issue of future systems and their components based on physical principles that were unknown in 1972.

The origins of this Agreed Statement go back to the draft Art. V(3) proposed by the US delegation which said: "Each Party undertakes not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components.[27] V.Karpov recalls that "we reasonably argued that since we were unaware of specific characteristics of ABM components based on other physical principles that might appear in the future..., it would have been premature to set limits on new systems that should turn to be the same as the ones applied to existing systems. At the same time we thought that the Treaty should be supplemented by a provision introducing additional constraints on creation of ABM systems or their components based on new technologies."[28] That was how Agreed Statement D came to being.

[24] R h i n e l a n d e r, *supra* note 20, at 5.

[25] The 1974 Protocol to the ABM Treaty (27 UST 1645) reduced the number of permitted deployment areas to one for each Party, in fact, nullifying Agreed Statement C which provided that the centers of the two permitted ABM deployment areas should be separated by no less than thirteen hundred kilometers. It did not change the Treaty in any other way and as such does not pertain to the conflict of interpretations.

[26] G a r t h o f f, *supra* note 11, at 64–65.

[27] R h i n e l a n d e r, R u b i n, *supra* note 12, at 7.

[28] K a r p o v, *supra* note 11.

As an auxiliary to Art. III, which in its turn operates with an exemplary list of Art. II(1), the Statement refers to future systems and components that are exclusively fixed land-based since any mobile systems and components are unequivocally banned by Art. V(1). As for specific modes of fixed land basing, those should be defined as future systems and components are being developed, or "created", to use the Statement's language. Obviously, they may be different from basing modes of systems and components of 1972 for which prospective systems and components would be "capable of substituting", while not duplicating the former. The Statement also points out the method of expanding the list of components: as soon as it becomes clear what in particular would be capable of substituting for components available in 1972, the issue should first be discussed at the SCC and later presumably become a negotiated and ratified amendment to the Treaty.

Article IV authorizes the Parties to have, above limits prescribed by Art. III, "ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges". There should be no more than a total of fifteen ABM launchers at test ranges.

Textual analysis of this article leads to a conclusion that it permits fixed land-based systems located at test ranges. "Current or additionally agreed test ranges" are further specified in Common Understanding B which names US test ranges at White Sands, New Mexico, and at Kwajalein Atoll, and Soviet test range at Sary Shagan in Kazakhstan (a former Soviet republic, now an independent state). The list was later supplemented by another Soviet test range at the Kamchatka peninsula. Such direct geographical indication facilitates operation of the national technical means (NTMs) of verification stipulated by Art. XII. NTMs are observation systems positioned beyond territorial limits of a Party whose activities are being monitored. It follows from Common Understanding B that the availability of such means made it possible to agree upon a provision on "current test ranges". Hence, what the Parties had in their minds were fixed facilities observable by, and "known" to NTMs.

As a matter of fact, "observability" by NTMs is the basic feature of all but one constraints established by the Treaty. That only exception will be discussed further.

The reference to Art. III which deals with deployment of exclusively fixed land-based systems means that the exception provided for in Art. IV does not extend to the basing mode – it should also be a fixed land-based.

Finally, the ban on testing of any mobile-based systems and components contained in Art. V(1) leaves fixed land-basing mode as the only permissible basing mode for systems and components being tested.

At the same time Art. IV places no limitations on testing at test ranges of fixed land-based systems that did not exist in 1972. More than that, it establishes a well-defined exception from Art. III which in its turn refers to that list of components in Art. II(1). Since the list is exemplary, it may be assumed that development or testing using systems and components authorized by Art. IV may eventually result in "creation" of future devices that would expand the list leading to respective amendments to the Treaty. Thus Art. IV can reasonably be read as permitting the use of systems and

components located at test ranges for development or testing, no matter what technologies are employed, but only in a fixed land-basing mode.[29] The fact that a traditional component – ABM launchers, is mentioned in this article should not be misleading since its apparent destination is to prevent a buildup beyond agreed deployment areas of a substantial ABM potential under the guise of test ranges. Besides, those ABM launchers may well be used to test prospective, as well as currently produced interceptor missiles.

Article V commits the Parties "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based" (para.1). It also bans development, testing and deployment of ABM launchers for multiple launch or rapid reload of interceptor missiles (para.2). Art. V is supplemented by Agreed Statement E which explains that the provision includes a ban on MIRVed ABM interceptor missiles, and by Common Understanding C on such meaning of Art. V as banning ABM launchers and radars which are not permanent fixed types.

Since the term "ABM system" is generic, or functional, the ban rests on the basing mode of systems and components. That is how most of Soviet and US former negotiators treat the meaning of Art. V(1). Referring to that provision Karpov wrote that the Treaty "bans the creation of any ABM systems, but for fixed land-based";[30] Rhinelander emphasized that "because of the functional definition of an ABM system in Article II, this broad ban on space-based and other mobile systems applies to any ABM system, regardless of whether its components include interceptor missiles or high-powered lasers capable of substituting for such missiles".[31] This conclusion is corroborated by a detailed description of negotiations on this article provided by Garthoff[32] and Rhinelander.[33]

Nitze held on to a different opinion stating that "though the United States negotiators, including me, attempted to achieve a ban on the development and testing of space-based and other mobile devices capable of substituting for ABM components, we failed to do so with the degree of certainty that is necessary for important international agreements."[34] He argued that "the restrictions of article V of the treaty do not apply to ABM systems based on other physical principles and their components."[35]

But this conclusion is not supported by the negotiating record quoted, for instance, by Garthoff. He referred to a discussion between S.Graybeal, a US delegate who negotiated Art. V, and his Soviet counterpart, when both sides were unanimous that the provision would cover any type of present or future components of ABM systems.[36] Another proof may be found in the final Memorandum written by Rhinelander two

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[29] Rhinelander, *supra* note 20, at 5.
[30] Karpov, *supra* note 11.
[31] Rhinelander, Rubin, *supra* note 12, at 6.
[32] Garthoff, *supra* note 11, at 34–38.
[33] Rhinelander, Rubin, *supra* note12, at 7–9.
[34] Nitze, *supra* note 18, at 225.
[35] P. Nitze: *Permitted and Prohibited Activities under the ABM Treaty*, Dep't St. Bull., Jan. 1987, at 40.
[36] Garthoff, *supra* note 11, at 35.

days before the signing of the Treaty. This Memorandum which completed a series of Memoranda clarifying points of agreement and those that required further discussion, reflected the views of the entire US delegation. It said: "Paragraph 1 of Article V prohibits the development, testing, or deployment of... a device capable of substituting for an ABM interceptor missile, ABM launcher or ABM radar that is sea-based, air-based, or mobile land-based (such as an air-based "killer" laser)."[37]

Under Art. VI the Parties have agreed not to give missiles, launchers, or radars that are not ABM components, ABM capabilities, and not to test them in an ABM mode. They have also committed themselves not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of their national territories and oriented outward. There is an exception from the latter ban established by Agreed Statement F which permits the deployment of radars comparable in their potential to ABM radars, "for the purposes of tracking objects in outer space or for the use as national technical means of verification."

The purpose of Art. VI is to prevent circumvention of the Treaty by means of devices that are not ABM components but if properly modified may become ABM-capable. By applying the comprehensive definition used in Art. II, Art. IV reinforces the ban on deployment of the ABM system for a defense of the territory of a country under the guise of large-scale air defense or of anti-tactical missile defense system. For the same purpose it contains deployment of early warning radars so that they could not be effectively used as ABM radars.

Since the article is well-worded it does not pose any major problems from the point of view of the objectives of this paper. However, lack of sufficient technical criteria that would help define the stage at which an air defense system becomes ABM-capable, has already provoked a number of questions. It is not unlikely that there may be new ones, in particular, caused by advances in development of systems to counter missiles that are not strategic.

The same can be said in connection with Art. VII which authorizes modernization and replacement of ABM systems or their components subject to the Treaty provisions. Would a construction of a phased-array ABM radar in the vicinity or on the grounds of an older type ABM radar be considered a modernization?

There is some evidence that the Parties have agreed on a number of definitions that would give answers to questions posed above, but respective documents have not been made public.

The documents containing agreed proceedures of destruction and dismantlement of ABM systems or components that go beyond the Treaty constraints, as stipulated by Art. VIII, have not been made public either.

Articles IX and X complete the set of non-circumvention provisions of the Treaty. The latter article commits the Parties not to assume any international obligations which would conflict with the ABM Treaty.

Under Art. IX the Parties undertake not to transfer to other states, and not to deploy outside their national territories, ABM systems or their components. The article is

[37] R h i n e l a n d e r, R u b i n, *supra* note 12, at 13.

supplemented by Agreed Statement G expanding the ban to include "the obligation of the US and the USSR not to provide to other States technical descriptions or blue prints specially worked out for the construction of ABM systems and their components limited by the Treaty." The non-transfer and non-deployment obligations are explicit and do not require additional clarifications although questions similar to those posed above, *i.e.* on making air and anti-tactical missile defenses ABM-capable, may arise here as well.

NTMs appear in Art. XII which stipulates that they should be used in a manner consistent with generally recognized principles of international law. They shall not be interfered with; any deliberate concealment measures wich impede verification by NTMs are banned.

Article XIII establishes the Standing Consultative Commission to promote the objectives and implementation of the Treaty and, in particular, to consider questions concerning compliance with the obligations assumed, and possible proposals for further increasing the viability of the Treaty, including proposals for amendments in accordance with procedures set forth in Art. XIV. The latter provides for a regular review of the Treaty. Finally, Art. XV stipulates that the Treaty shall be of unlimited duration, though each Party may withdraw from it.

## Discrepancies

Now let us turn to a closer analysis of those provisions of the ABM Treaty that, in the opinion of this author, contain discrepancies that may complicate its interpretation. For the reader's convenience the discussion of each discrepancy will be preceeded by a respective quotation from the Treaty with particular terms highlighted and followed in parentheses by the English transcription of respective Russian terms, where appropriate.

Article II

1. For the purpose of this Treaty an ABM system is a system to **counter strategic ballistic missiles** or their elements in flight trajectory, currently consisting of:

(a) ABM interceptor missiles, which are interceptor missiles **constructed** (*sozdannimi*) and deployed **for an ABM role, or of a type tested in an ABM mode**;

(b) ABM launchers, which are launchers **constructed** (*sozdannimi*) and deployed for launching ABM interceptor missiles; and

(c) ABM radars, which are radars **constructed** (*sozdannimi*) and deployed **for an ABM role, or of a type tested in an ABM mode.**

2. The ABM system components listed in paragraph 1 of this Article include those which are:

(a) operational;

(b) under **construction** (*stroitel'stva*);

(c) undergoing testing;

(d) undergoing overhaul, repair or conversion; or

(e) mothballed.

The text of Art. II seems to make possible variations in interpretation. First of all, the ABM Treaty gives no definition to a "strategic ballistic missile", although the SALT–I negotiating history, text of the Treaty preamble and of the Interim Agreement on Certain Measures With Respect to the Limitation of Strategic Offensive Arms,[38] signed on the same day, clearly indicate that the term implies intercontinental ballistic missiles (ICBMs) and submarine-launched ballistic missiles (SLBMs). Agreed Statement A regarding the Interim Agreement specifies that ICBMs referred to in the Agreement should be "strategic ballistic missiles capable of ranges in excess of the shortest distance between the northeastern border of the continental U.S. and the northwestern border of the continental USSR."[39] Reference to distance makes it possible to avoid ambiguities inherent in any attempt to give a comprehensive definition. At the same time it reduces the sphere of application of the term "strategic ballistic missile" to Soviet–American, or, as a matter of succession, Russian–American arms control relations.

There is also a certain vagueness in the criterion of space. A ballistic missile trajectory can be roughly devided into active (boost and postboost) and passive (midcourse and terminal) phases, the first one being substantially shorter than the second. The lack in Art. II of a more precise definition of a trajectory phase at which a system can "counter" (which is also a very vague term) strategic ballistic missiles may be interpreted at the very least as a detriment to the ban on deployment of ABM systems for a defense of the territory of a country, since an early intercept is capable of that very mission. However, active phase intercept, as well as an intercept at any part of an ascending stage of flight, would require means explicitly prohibited by the Treaty.

Worth mentioning are certain discrepancies between authentic texts describing ABM components as interceptor missiles and radars constructed and deployed "for an ABM role, or of a type tested in an ABM mode". The corresponding phrase in the Russian text can be inversely translated into English as "for performing roles as part of an ABM system, or of a type tested in an ABM mode".[40] What is the purpose of the word "system", which does not appear in the English text, and why is the word "role" used in plural in the Russian text? There are no immediate answers for lack of access to recorded negotiating history. But a zealous pedant might interpret the Russian text preceeding "or" as referring to multipurpose components with only part of their functions being ABM-related, while the English text refers to interceptor missiles and radars with the only function which is "to counter strategic ballistic missiles *etc.*" This impression is intensified by the part of that phrase which follows "or" and deals with similar components which along with, say, air defense purposes may perform ABM functions. It turns out that according to such interpretation the Russian text addresses

[38] 23 UST 3462.

[39] TIAS 7504, p.3478. That distance was later specified as being equal to 5,500 kilometers. *See*: Art. II of the Treaty on the Limitation of Strategic Offensive Arms, 18 June 1979, 18 I.L.M. 1139 (1979).

[40] In fact, the Russian for "in an ABM mode" rather looks like "for ABM purposes", but this obvious discrepancy may be neglected in view of a classified Agreed Statement on application of the term "tested in an ABM mode", reportedly reached in 1978 at the SCC. For further details see B u n n, *supra note* 4, at 81, 168–169.

multipurpose components twice, avoiding dedicated ABM interceptor missiles and ABM radars. The outcome may be described, using the language of the Vienna Convention, as "unreasonable".[41]

The English version seems to be more precise: the opening part of the phrase deals with dedicated components with the only function of "an ABM role", while the concluding part talks about components which are capable of (or intended for) other roles, but have undergone testing which proved their ability to perform "an ABM role".

Another discrepancy worth noting is the term "*sozdannyi*" – "created" (past participle of the verb "*sozdavat'*" – "to create"), in the Russian text which is used as an equivalent to the English term "constructed" in Art. II (1a, 1b and 1c). The Russian term corresponding to the English term of the same root "construction" in Art. II (2b) is "*stroitel'stvo*" (noun derivative of the verb "*stroit'*" – "to construct") which is a perfectly adequate equivalent. It is logical to assume that the Russian text should have either used an equivalent to the term "constructed" in para. 1a, b and c, or "creation" in para. 2b.

In the Russian language the verb "*sozdavat'*", as well as its English equivalent – "to create", does not always refer to a specific material activity. But Art. II deals with quite tangible material objects – missiles, launchers, radars, which are results of construction, that is of making or forming by combining numerous parts. Thus, the Russian equivalent for "constructed" – "*postroyennimi*" (perfective participle of the verb "*stroit'*") would seem to be more appropriate than the term used in the Russian authentic text, all the more so since these very terms correspond to each other in Art. III of the Interim Agreement.

Article III

Each Party undertakes not to deploy (razmeshchat') ABM systems or their components except that:

(a) within one ABM system deployment area (rayona razmeshcheniya) having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area (rayona razmeshcheniya) having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

[41] Vienna Convention Art. 32(b).

Agreed Statement D

In order to insure fulfillment of the obligation not to deploy (razvertivat') ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created (sozdaniya) in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

Here, worth noting is the fact that in the lead-in phrase of Art. III ("each Party undertakes not to deploy ABM Systems or their components...") the Russian term corresponding to the English "to deploy" is "*razmeshchat'*", in paras. (a) and (b) "deployment area" is translated as "*rayon razmeshcheniya*", while in the opening phrase of Agreed Statement D which reproduces the basic obligation under Art. III the respective terms are "to deploy" and "*razvertivat'*". From the point of view of the Russian language the latter term would seem to be more precise and corresponding to the meaning of "to deploy/deployment".[42] As a matter of fact, this is the case in Art. I(2), Art. II(a), (b) and (c) and other provisions of the ABM Treaty, and in Art. II of the Interim Agreement. While such inconsistent use of Russian terms does not adversely influence the Treaty's object and purpose, it may impede accomplishment of the basic rule of interpretation set forth in Art. 31(1) of the Vienna Convention.

Article III provides for an exception from a ban on deployment and not on development and testing of fixed land-based systems, hence the term which is derivative of the verb "to create" (and of its adequate Russian equivalent "*sozdavat'*") used in Agreed Statement D is likely to embrace those two kinds of activity. That conclusion can be drawn from Karpov's statement quoted above; Nitze was quite explicit about it;[43] the same meaning of the term "to create" was implied, though unawarely, by members of the Presidium of the USSR Supreme Soviet and other officials involved in ratification proceedings.[44] Rhinelander, in his turn, seemed to equate the terms "to create" and "to develop" when writing that under Agreed Statement D "future fixed land-based systems can be developed but cannot be deployed unless the treaty is amended",[45] presumably proceeding from the meaning of the term "to develop/ development" that will be discussed later.

But if "creation" comprises development and testing, it is unclear why this term should not be used to describe both kinds of activity in other provisions of the Treaty where they are mentioned. On the contrary, if "creation" has some peculiar features

[42] Webster's New Collegiate Dictionary (1974, at 305) gives as one of meanings of "deploy" – "to place in battle formations or appropriate positions"; a similar description – "the placement of a weapon into a combat-ready position", may be found in another authoritative source (Arms Control and National Security. An Introduction. 1989, at 160).

[43] Nitze, *supra* note 35, at 40.

[44] Introducing the Treaty First Deputy Foreign Minister V.Kuznetsov said that "anti-missile launchers capable of launching more than one anti-missile at a time from each such launcher, shall not be created and deployed. Parties undertake not to create and not to deploy systems or components of anti-missile defense that are sea, air, space, or mobile land-based." Izvestiya, 23 August 1972 (emphasis added).

[45] Rhinelander, Rubin, *supra* note 12, at 6.

that make it different from development and testing, necessitating its use (though for its vagueness it would seem to be inappropriate in a legal document that requires precise definitions), then these features are not reflected in Agreed Statement D. Furthermore, the term "to create", as well as some others, is used inconsistently in the Russian text, and that may lead the interpretation to a result described in the Vienna Convention as "manifestly absurd or unreasonable."[46]

Article IV

The limitations provided for in Article III shall not apply to ABM systems or their components used for development **or** (*i*) testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

There are three remarks pertaining to interpretation that may be worth making in connection with this article.

First: logically, it should have consisted of two, rather than one, paragraphs. In that case para.1 would have dealt with systems and components used for development or testing, while para.2 would have set quantitative limits for ABM launchers located at test ranges. Thus, it seems, Art. IV would have been more suitable to embrace future technologies.

Second: while a function word "or" is used in the English text ("development *or* testing"), "*i*" which stands for "and" is used in the Russian text.[47] A semantical nuance is obvious, although this deviation doesn't seem to have any significant influence on interpretation, or have practical meaning from the point of view of activities covered by this article. However it should be noted that the Russian text might be construed as being more restrictive than the English text. The former relieves of constraints set forth by Art. III only those systems and components that are inseparably used for both kinds of activities, and not just for any of them. It follows that such systems and components may be used only for purposes related to new and prospective devices. A rhetorical question may be raised: where should operational systems development and testing be carried out? Hence, the word "or" in "development or testing" is more flexible, and is more adequate as far as the Treaty purposes are concerned.

Third and most essential: the Treaty text does not define the meaning of terms "development" and "testing" though it is more or less clear that they refer to a process preceding deployment of systems and components. But the substance of that process, the knowledge of which is quite important for the purpose of drawing up limits on permitted activities, remains vague, if analysis is confined to the text. Thus, a researcher may have to rely on other existing sources which, though reliable, have less legal weight than the Treaty text.

Incidentally, in this case the Russian term corresponding to "development" is adequate – "*razrabotka*".

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[46] Vienna Convention Art. 32(b).

[47] For a hairsplitting analysis of an interplay between those two words in another arms control treaty, see D.A.W i r t h: *Multilingual Treaty Interpretation and the Case of SALT-II*, 6 *Yale J.World Pub. Ord.* 429 (1980).

Article V

1. Each Party undertakes not to **develop** (*sozdavat'*), test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

2. Each Party undertakes not to **develop** (*sozdavat'*), test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, not to modify deployed launchers to provide them with such a capacity, not to **develop** (*sozdavat*), test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

First let us note that unlike in Art. IV here two phrases make two paragraphs each one having similar lead-in language. This underscores differences in focus of commitments: pâra. 1 definitely refers to essentially new types of ABM systems, while para.2 deals with improvement of systems and components that already exist.

Here again we come across discrepancies between two authentic texts: the Russian term corresponding to "to develop" in Art. V is "*sozdavat'*" which is an equivalent of "to create", even though in the preceeding article "development" has been adequately translated as "*razrabotka*". The following quotation from G.Korniyenko might serve as a circumstantial evidence that misleading nature of the term "*sozdavat'*" has been acknowledged by some on the Soviet side. Former First deputy foreign minister, who at the time of SALT–I was the head of the USA Department of the Ministry of Foreign Affairs, wrote that Art. V baned "creation (*development*), testing and deployment..."[48] As was noted earlier in this text, a Russian term "*sozdavat'*" corresponds to "to provide" (Art. I) and to "to construct" (Art. II) in the English text, while in Art. IV the English "development" is equivalent to the Russian "*razrabotka*". What we see is a violation of a rule of the Vienna Convention which says that "the terms of the treaty are presumed to have the same meaning in each authentic text".[49]

Now let us try to clear up the meaning of the term "to develop/development" using available sources.

During negotiations on Art. V the US delegation offered the following definition of the term "development": "By »development« we have in mind that stage in the evolution of a weapon system which follows research (in research we include the activities of conceptual design and laboratory testing) and which precedes full-scale testing. The development stage, though often overlapping with research, is usually associated with the construction and testing of one or more prototypes of the weapon system or its major components. In our view, it is entirely logical and practical to prohibit the development – in this sense – of those systems whose testing and deployment are prohibited."[50]

Some further details may be found in a written testimony prepared by Ambassador G.Smith, who led the US SALT–I delegation, and presented before the US Senate Armed Services Committee during the ABM Treaty ratification hearings. Smith stated that "the obligation not to develop such systems, devices, or warheads would be applicable only to that stage of development which follows laboratory development

[48] K o r n i y e n k o, *supra* note 20, at 4 (emphasis added).

[49] Vienna Convention Art. 33(3).

[50] Quoted *in*: R h i n e l a n d e r, R u b i n, *supra* note 12, at 8.

and testing. The prohibitions on development contained in the ABM Treaty would start at that part of the development process where field testing is initiated on either a prototype or breadboard model. It was understood by both sides that the prohibition on development applies to activities involved after a component moves from the laboratory development and testing stage to the field testing stage, wherever performed. The fact that early stages of the development process, such as laboratory testing, would pose problems for verification by national technical means is an important consideration in reaching this definition. Exchanges with the Soviet Delegation made clear that this definition is also the Soviet interpretation of the term »development«."[51]

These statements do not suffice for a comprehensive understanding of the meaning of "to develop/development" as this term is used in the Treaty[52] but they at least make clear that the ban embraces activities that may be discovered by NTMs of the other Party, in other words, that meet the requirement of "observability". Presumably, the same requirement should be applied to testing. Obviously, not any test should fall under constraints like various laboratory tests, but rather activities like interceptor flight tests.

Semantically the Russian terms adequately corresponding to the English "to develop/development" and "to test" should be "*razrabativat'/razrabotka*" and "*ispitivat'* ", but their specific meaning from the point of view of established usage of terms, relating to development and production, as well as to research may be different though close.

Under an appropriate standard meaning of the Russian term "*razrabotka*" it would embrace "the process of making of samples and/or of technological documents that are needed to set up an industrial production... The development phase is considered completed... on the condition of formal acceptance of an experimental sample or of an experimental batch and advice on approval for the production, as well as on the condition of introduction of necessary improvements that were recommended by the accepting board."[53]

The problem of terminology may probably be solved by negotiating an agreed statement containing a mutually acceptable definition of the term "to develop/ development".

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[51] *Quoted in*: J. R h i n e l a n d e r: *Arms Control in the Nuclear Age in*: J.N. M o o r e *et al.* (eds.) National Security Law 595–596 (1990).

[52] In fact, it would not be unreasonable to conclude that the parties gave a special meaning to the term "development", as stipulated by Art. 31(4) of the Vienna Convention. As Carnesale remarked, "the way we would normally use the word »development« in English was not the interpretation that was meant in the treaty. And that's why we had to go through all those discussions of what it was that we were talking about." Carnesale, *supra* note 21.

[53] The Russian version is the following: "Разработка (продукции) – процесс создания образцов и/или технологической документации, необходимых для организации промышленного производства ... Разработка продукции считается выполненной в соответствии с техническим заданием при условии утверждения акта приемки опытного образца или опытной партии, содержащего рекомендации о постановке на производство и выполнения указаний приемочной комиссии о необходимой дороботке." Terminologiya sistemi razrabotki i postanovki produktsii na proizvodstvo [A. V a k s m a n et al. (eds.): The Terminology Applied in Development and Production], at 22 (1985).

As for the Russian "*sozdavat'*" used in Art. V, that has already been discussed with respect to Art. II, it is by no means a precise legal or technical term and as such it may be interpreted as implying activities aimed not only at the bringing into existence of a particular component or system, but also directed toward the acquisition or expansion of knowledge that does not necessarily have potential ABM application. There is no provision in the ABM Treaty that may be read as prohibiting basic research. The only kind of research activities that are constrained by the Treaty (though the term "research" does not appear in the text) are those which are a part of "development" and are conducted outside the laboratories and are NTM-observable.

A noteworthy and seemingly careless statement by the then Soviet Defense Minister made during ratification proceedings should be mentioned at this point. He said that the ABM Treaty "does not set any limits on the conduct of research and experimental work directed toward solution of the problem of defense of the country against nuclear-missile means."[54] It is careless because it treats "experimental work" as an unconstrained activity though, the way this term is used in the Russian language, it may well include "test range testing of military hardware".[55] But such testing is strictly regulated by the Treaty. It is also careless because "solution of the problem of defense of the country against nuclear-missile means", if it was meant to apply to "experimental work", and not just basic research, may be construed as indicative of an intention to provide ABM defense of the territory of the country, which would undermine the object and purpose of the ABM Treaty.

Article IX

To assure the viability and effectiveness of this Treaty, each Party undertakes not to transfer to other States, and not to deploy outside its national territory, ABM systems or their components limited by this Treaty.

Agreed Statement G

The Parties understand that Article IX of the Treaty includes the obligation of the US and the USSR not to provide to other States technical descriptions or blue prints specially **worked out** (*razrabotanniye*) for the **construction** (*sozdaniya*) of ABM systems and their components limited by the Treaty.

It would seem that these provisions of the Treaty might pose a serious problem that goes beyond linguistical discrepancies. Article IX and Agreed Statement G do not provide for the following undertakings: (a) not to provide to other states documents related to ABM research; (b) not to accept such documents from other states; (c) not to provide such documents to each other. It is also unclear whether these provisions embrace computer software. And, unlike other Treaty constraints, the ban on transfer of technical descriptions or blue prints is not NTM-observable.

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[54] "[Договор] не ставит каких-либо ограничений на проведение исследовательских и экспериментальных работ, направленных на решение проблемы защиты страны от ракетноядерных средств." Izvestiya, 29 Sept. 1972.

[55] Voyenno-entsiklopedicheskii slovar'. [The Military Encyclopedic Dictionary] 829 (1986).

Incidentally, Agreed Statement G bears still another terminological confusion, though of a less serious nature. This time the Russian terms corresponding to "worked out" and "construction" are, respectively "*razrabotanniye*" and "*sozdaniya*".

Article XII

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of **verification** (*kontrolya*) at its disposal in a manner consistent with generally recognized principles of international law.

2. Each Party undertakes not to interfere with the national technical means of **verification** (*kontrolya*) of the other Party operating in accordance with paragraph 1 of this Article.

3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, **assembly**, conversion, or overhaul practices.

A remarkable feature of this article is that it mentions "assembly" as a state of a component, although Art. II(2) refers to components which are: (a) operational; (b) under construction; (c) undergoing testing; (d) undergoing overhaul, repair or conversion; or (e) mothballed. Should that mean that components under assembly are exempt from constraints? Hopefully, this does not pose substantial problems for the implementation of the Treaty.

Authentic texts of Art. XII contain still another discrepancy which has ever since been reproduced in a number of arms control and disarmament treaties. The English term "verification" (national technical means of verification) has "*kontrol'*" as its Russian equivalent. The meaning of that Russian word is essentially the same as that of the English "control" which does not seem to be equivalent to "verification". NTMs merely register facts related to the object and purposes of a treaty, while the decision on whether there is a violation and how to react to it, is the responsibility of political authorities. "*Kontrol'*", rather, has a function of enforcement, and as a term is neither an equivalent to "verification", nor an adequately used word in the context of Art. XII. It is worth mentioning that a more precise Russian word "*proverka*" has been used in Art. III(1) of the Treaty on the Non-Proliferation of Nuclear Weapons and in Art. III(1) of the Seabed Treaty as an equivalent to "to verify/verification".

In fact, it is not unlikely that the origin of the words "verification" and "*proverka*" can be traced back to the Latin "verus" – "true". However, arbitrary use of the Russian term "*kontrol'*" as an equivalent to "verification" has eventually led to a confusion in the Russian authentic text of the Treaty on Conventional Forces in Europe where it is used to translate both the term "verification" in the phrase "verification of compliance" in Art. XIII(1), and "control" in the phrase "conventional arms control" in the concluding paragraph of the preamble.

Remaining articles of the ABM Treaty do not seem to pose serious problems from the point of view of this paper's objectives.

## Conclusion

Some time ago I asked a high-skilled interpreter who, incidentally, holds a degree in international law, and has an extensive work experience at summit talks and at major arms control and disarmament negotiations, to give me a Russian equivalent to the English word "to develop". The answer came at once: "*Sozdavat'*". But an analysis of the term "*sozdavat'*" and its derivatives used in the ABM Treaty and their comparison with corresponding English terms would show that this term is used as an equivalent to the English terms "to provide" – Art. I(2), "to construct" – Art. II(1), "to develop" – Art. V, "to create" – Agreed Statement D. This is not the only deviation from the forementioned Vienna Convention requirement that "the terms of the treaty are presumed to have the same meaning in each authentic text."[56] Some of those are not essential, while others are quite important for the purposes of interpretation.

A "pure" review of the Russian authentic text of the ABM Treaty, including its annexes, leads to a conclusion that it is not perfect from the point of view of precision and consistency in the use of certain terms. Obviously, the English text may be criticized as well, but that could be done more convincingly by a native English speaker. Nonetheless, for an "outsider", unfamiliar with negotiating history and underlying motives of a particular usage, the latter might seem to be more precise and consistent. Would that be a sufficient argument to consider an option provided for by the Vienna Convention which says that "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted"?[57]

However, consider the following comment by M.Tabory: "The term »reconciles« and the reference to the »object and purpose of the treaty', which is common to all language versions, seem to deny giving preference to any single language version and to point to the continued regard, as far as possible, to all versions of the treaty."[58] Obviously, the Vienna Convention contains very general guidelines, at best, for dealing with linguistical discrepancies, making necessary a recourse to other, more specific tools of reconciliation of such discrepancies.

If, on the other hand, ambiguities and vagueness of the Russian text may be removed with the help of records made by the Soviet SALT–I delegation and other documents that can reasonably be declassified, why not give it a try? A senior Russian official whose work used to be related to the ABM Treaty implementation, including the SCC activities, told me that the negotiators were aware of at least some of the terminological discrepancies discussed in this paper but had some reasons not to press the issue. That

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[56] Vienna Convention Art. 33(3).

[57] Vienna Convention Art. 33(4). Ironically, Art. 33 itself seems to be inconsistent in the use of terms. As Tabory notes, "from the point of view of drafting or choice of language, it may be mentioned that whereas paragraph 1 of Article 33 refers to a 'divergence', paragraph 4 speaks of a 'difference of meaning'. This lack of uniform choice of expressions to refer to the same concept seems unjustified. The choice of the term 'version' in Article 33 instead of 'text' would have produced a more adequate construction..." Tabory, *supra* note 16, at 213.

[58] Tabory, *supra* note 16, at 202.

doesn't mean that the authors of the Treaty should not have been more careful. He continued: "Had the negotiators of the ABM Treaty been able to work out more precise wording, it might have been possible to make the conflict between »traditional« and »broad« interpretations less acute." He added that so far, those discrepancies have not ("Thank God!", he said rather emphatically) become a major issue in interpretation disputes at the SCC sessions and at Russian (Soviet)–American talks on nuclear and strategic weapons. However, that official's younger colleague, also with the SCC background, said that the Treaty's »grey zones« were not the result of negotiators« negligence, but rather a reflection of compromises.[59] But, he conceeded, even at that stage potential interpretation problems should have been foreseen by negotiators.

An experienced negotiator, John McNeill, Senior Deputy General Counsel of the U.S. Department of Defense, told this author: "I think [linguistical discrepancies] were left out of the debate in 1972 because, although the ABM Treaty at that time was of course signed as a treaty of indefinite duration, it was anticipated that as a result of progress on offensive weapons the ABM Treaty might be changed, and it was not viewed as something with great permanence at the time. That's my own impression. And I think that was one important reason why linguistic differences were set aside. It was not thought that they would ever be terribly important, at least then." However, "the work that was done in 1972 was not fully mature in terms of the treaty language... There was some terminology that was not completely understood, or even completely explored by the signatories during the negotiating phase."[60]

Obviously, what should be done is a meticulous perusal, analysis and coordination of terms used in authentic texts. SCC would seem a proper setting for such work which should be done with the assistance, where appropriate, of legal experts and other specialists, who should be masters not only of their own trades, but of both languages as well. This work may have already been done but the SCC's rules of confidentiality bar a researcher from first-hand information. I don't wish to dispute those rules but I think that they will not be compromised by publication of agreed statements reached in the Commission, as well as of annual reports containing brief description of its activities, points of agreement and issues on which positions differ. Incidentally, had this been done earlier the SCC could have avoided unjustified critical remarks made against it in the United States not too long ago.

Finally, dealing with an international treaty requires careful and deferential approach not only towards its "spirit" but to its "letter", that is words it is made of, as well. Juliet's lighthearted "What's in a name? That which we call a rose by any other name would smell as sweet"[61] does not apply here.

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[59] As Strobe Talbott wrote describing some »compromises« reached at another arms control negotiation, drafters of SALT–II Treaty "haggled over semantic distinctions between English and Russian, sometimes because of genuine linguistic anomalies but often to score political points or as a matter of negotiating tactics." Strobe Talbott, Endgame. The Inside Story of SALT–II (Harper & Row, 1979), at 94.

[60] Interview with J. M c N e i l l, 21 February 1994 (on file with the author). J. M c N e i l l, of course, was speaking in his personal capacity.

[61] W. S h a k e s p e a r e: Romeo and Juliet, 2.2.43–44.

# ANNEX 1. ENGLISH AND RUSSIAN LANGUAGE VERSIONS OF THE ABM TREATY

## TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILE SYSTEMS

The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the parties,

Proceeding from the premise that nuclear war would have devastating consequences for all mankind,

Considering that effective measures to limit anti-ballistic missile systems would be a substantial factor in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons,

Proceeding from the premise that the limitation of anti-ballistic missile systems, as well as certain agreed measures with respect to the limitation of strategic offensive arms, would contribute to the creation for further negotiations on limiting strategic arms,

## ДОГОВОР МЕЖДУ СОЮЗОМ СОВЕТСКИХ СОЦИАЛИСТИЧЕСКИХ РЕСПУБЛИК И СОЕДИНЕННЫМИ ШТАТАМИ АМЕРИКИ ОБ ОГРАНИЧЕНИИ СИСТЕМ ПРОТИВОРАКЕТНОЙ ОБОРОНЫ

Союз Советских Социалистических Республик и Соединненые Штаты Америки, ниже именуемые Сторонами,

исходя из того, что ядерная война имела бы для всего человечества опустошительные последствия,

учитывая, что эффективные меры по ограничению систем противоракетной обороны являлись бы существенным фактором в деле сдерживания гонки стратегических наступательных вооружений и привели бы к уменьшению опастности возникновения войны с применением ядерного оружия,

исходя из того, что ограничение систем противоракетной обороны, а также некоторые согласованные меры в области ограничения стратегических наступательных вооружений способствовали бы созданию более благоприятных условий для последующих переговоров по ограничению стратегических вооружений,

Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament,

Desiring to contribute to the relaxation of international tension and the strengthening of trust between States,

Have agreed as follows:

учитывая свои обязательства по статье VI Договора о нераспространении ядерного оружия,

заявляя о своем намерении по возможности скорее достигнуть прекращения гонки ядерных вооружений и принять эффективные меры в направлении сокращения стратегических вооружений, ядерного разоружения и всеобщего и полного разоружения,

желая содействовать смягчению международной напряженности и укреплению доверия между государствами,

согласились о нижеследующем:

**Article I**

1. Each Party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.

2. Each Party undertakes not to deploy ABM systems for a defence of the territory of its country and not to provide a base for such a defence, and not to deploy ABM systems for defence of an individual region except as provided for in Article III of this Treaty.

**Статья I**

1. Каждая из Сторон обязуется ограничить системы противоракетной обороны (ПРО) и принять другие меры в соответствии с положениями настоящего Договора.

2. Каждая из Сторон обязуется не развертывать системы ПРО на территории своей страны и не создавать основу для такой обороны, а также не развертывать системы ПРО отдельного района, кроме как предусмотрено в статье III настоящего Договора.

**Article II**

1. For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:

(a) ABM interceptor missiles, which are interceptor missiles constructed and

**Статья II**

1. Для целей настоящего Договора системой ПРО является система для борьбы со стратегическими баллистическими ракетами или их элементами на траекториях полета, состоящая в настоящее время из:

а) противоракет, являющихся ракетами-перехватчиками, созданными

deployed for an ABM role, or of a type tested in an ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.

2. The ABM system components listed in paragraph 1 of this Article include those which are;

(a) operational;

(b) under construction;

c) undergoing testing;

(d) undergoing overhaul, repair or conversion; or

(e) mothballed.

**Article III**

Each party undertakes not to deploy ABM systems or their components except that:

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometres and centered on the Party's national capital, a Party may deploy;

(1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and

и развернутыми для выполнения функций в системе ПРО, или того типа, который испытан в целях ПРО;

в) пусковых установок противоракет, являющихся пусковыми установками, созданными и развернутыми для пуска противоракет; и

с) радиолокационных станций ПРО (РЛС ПРО), являющихся РЛС, созданными и развернутыми для выполнения функций в системе ПРО, или того типа, который испытан в целях ПРО.

2. К компонентам системы ПРО, перечисленным в пункте 1 настоящей статьи, относятся:

а) находящиеся в боевом составе;

в) находящиеся в стадии строительства;

с) находящиеся в стадии испытаний;

д) находящиеся в стадии капитального или текущего ремонта либо переоборудования; или

е) законсервированные.

**Статья III**

Каждая из Сторон обязуется не размещать системы ПРО или их компоненты, за исключением того, что:

а) в пределах одного района размещения системы ПРО радиусом сто пятьдесят километров с центром, находящимся в столице данной Стороны, Сторона может развертывать:

(1) не более ста пусковых установок противоракет и не более ста противоракет на стартовых позициях и

(2) ABM radars within no more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometres; and

(2) радиолокационные станции ПРО в пределах не более шести комплексов РЛС ПРО, причем площадь каждого комплекса имеет форму круга диаметром не более трех километров; и

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometres and containing ICBM silo launchers, a Party may deploy;

в) в пределах одного района размещения системы ПРО радиусом сто пятьдесят километров, в котором расположены шахтные пусковые установки МБР, Сторона может развертывать:

(1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites,

(1) не более ста пусковых установок противоракет и не более ста противоракет на стартовых позициях,

(2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and

(2) две крупные РЛС ПРО с фазированной решеткой, сопоставимые по потенциалу с аналогичными РЛС ПРО, находящимися на дату подписания Договора в боевом составе или в стадии строительства в районе размещения системы ПРО, в котором расположены шахтные пусковые установки МБР, и

(3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

(3) не более восемнадцати РЛС ПРО, каждая из которых имеет потенциал меньший, чем потенциал меньшей из упомянутых двух крупных РЛС ПРО с фазированной решеткой.

**Article IV**

The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each party may have no more than a total of fifteen ABM launchers at test ranges.

**Статья IV**

Ограничения, предусмотренные в статье III, не относятся к системам ПРО или их компонентам, используемым для разработок и испытаний и находящимся в пределах существующих или дополнительно согласованных полигонов. Каждая из Сторон может иметь на испытательных полигонах в совокупности не более пятнадцати пусковых установок противоракет.

**Article V**

1. Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

2. Each Party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, not to modify deployed launchers to provide them with such a capacity, not to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

**Article VI**

To enhance assurance of the effectiveness of the limitations on ABM systems and their components provided by the Treaty, each Party undertakes:

(a) not to give missiles, launchers, or radars, other than ABM interceptor missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode; and

(b) not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward.

**Статья V**

1. Каждая из Сторон обязуется не создавать, не испытывать и не развертывать системы или компоненты ПРО морского, воздушного, космического или мобильно-наземного базирования.

2. Каждая из Сторон обязуется не создавать, не испытывать и не развертывать пусковые установки противоракет для пуска с каждой пусковой установки более одной противоракеты одновременно, не модифицировать развертные пусковые установки для придания им такой способности, а также не создавать, не испытывать и не развертывать автоматические или полуавтоматические или иные аналогичные средства скоростного перезаряжания пусковых установок противоракет.

**Статья VI**

Для повышения уверенности в эффективности ограничений систем ПРО и их компонентов, предусмотренных настоящим Договором, каждая из Сторон обязуется:

а) не придавать ракетам, пусковым установкам и РЛС, не являющимся соответственно противоракетами, пусковыми установками противоракет и РЛС ПРО, способностей решать задачи борьбы со стратегическими баллистическими ракетами или их элементами на траекториях полета и не испытывать их в целях ПРО; и

в) не развертывать в будущем РЛС предупреждения о нападении стратегических баллистических ракет, кроме как на позициях по периферии

своей национальной территории с ориентацией вовне.

**Article VII**

Subject to the provisions of this Treaty, modernization and replacement of ABM systems or their components may be carried out.

**Статья VII**

С соблюдением положений настоящего Договора могут производиться модернизация и замена систем ПРО или их компонентов.

**Article VIII**

ABM systems or their components in excess of the numbers or outside the areas specified in this Treaty, as well as ABM systems or their components prohibited by this Treaty, shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.

**Статья VIII**

Системы ПРО или их компоненты сверх количеств или вне районов, определенных настоящим Договором, а также системы ПРО или их компоненты, запрещенные настоящим Договором, должны быть уничтожены либо демонтированы в соответствии с согласованными процедурами в течение возможно короткого согласованного периода времени.

**Article IX**

To assure the viability and effectiveness of this Treaty, each Party undertakes not to transfer to other States, and not to deploy outside its national territory, ABM systems or their components limited by this Treaty.

**Статья IX**

В целях обеспечения жизнеспособности и эффективности настоящего Договора каждая из Сторон обязуется не передавать другим государствам и не размещать вне своей национальной территории системы ПРО или их компоненты, ограниченные настоящим Договором.

**Article X**

Each Party undertakes not to assume any international obligations which would conflict with this Treaty.

**Статья X**

Каждая из Сторон обязуется не принимать ни каких международных обязательств, которые противоречили бы настоящему Договору.

**Article XI**

The Parties undertake to continue active negotiations for limitations on strategic offensive arms.

**Статья XI**

Стороны обязуются продолжить активные переговоры об ограничении стратегических наступательных вооружений.

**Article XII**

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.

2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.

3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.

**Статья XII**

1. В целях обеспечения уверенности в соблюдении положений настоящего Договора каждая из Сторон использует имеющиеся в ее распоряжении национальные технические средства контроля таким образом, чтобы это соответствовало общепризнанным принципам международного права.

2. Каждая из Сторон обязуется не учинить помех национальным техническим средствам контроля другой Стороны, выполняющим свои функции в соответствии с пунктом 1 настоящей статьи.

3. Каждая из Сторон обязуется не применять преднамеренные меры маскировки, затрудняющие осуществление контроля национальными техническими средствами за соблюдением положений настоящего Договора. Это обязательсто не требует внесения изменений в существующий порядок строительных, монтажных работ и работ по переоборудованию.

**Article XIII**

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

(a) consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;

(b) provide on voluntary basis such information as either Party considers

**Статья XIII**

1. Для содействия в осуществлении целей и положений настоящего Договора Стороны неземедлительно создают Постоянную консультативную комиссию, в рамках которой они будут:

а) рассматривать вопросы, касающиеся выполнения принятых обязательств, а также связанные с этим ситуации, которые могут считаться неясными;

в) предоставлять на добровольной основе информацию, которую каждая из Сторон считает необходимой

necessary to assure confidence in compliance with the obligations assumed;

для обеспечения уверенности в выполнении принятых обязательств;

c) consider questions involving unintended interference with national technical means of verification;

с) рассматривать вопросы, связанные с непреднамеренными помехами национальными техническими средствами контроля;

(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty;

д) рассматривать возможные изменения в стратегической ситуации, затрагивающие положения настоящего Договора;

(e) agree upon procedures and dates for destruction of dismantling of ABM systems or their components in cases provided for by the provisions of this Treaty;

е) согласовывать процедуры и сроки уничтожения или демонтажа систем ПРО или их компонентов в случаях, предусматриваемых положениями настоящего Договора;

(f) consider, as appropriate, possible proposals for further increasing the viability of this Treaty, including proposals for amendments in accordance with the provisions of this Treaty;

ж) рассматривать по мере необходимости возможные предположения по дальнейшему повышению жизнеспособности настоящего Договора, в том числе о внесении в него поправок в соответствии с положениями настоящего Договора;

(g) consider, as appropriate, proposals for further measures aimed at limiting strategic arms.

з) рассматривать по мере необходимости предложения о дальнейших мерах, направленных на ограничение стратегических вооружений.

2. The Parties through consultation shall establish, and may amend as appropriate, Regulations for the Standing Consultative Commission governing procedures, composition and other relevant matters.

2. Стороны путем консультаций разрабатывают и могут по мере необходимости изменять Положение о Постоянной консультативной комиссии, регулирующее процедуры, состав и другие соответствующие вопросы.

**Article XIV**

1. Each party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.

**Статья XIV**

1. Каждая из Сторон может предлагать поправки к настоящему Договору. Согласованные поправки вступают в силу в соответствии с процедурами, регулирующими вступление в силу настоящего Договора.

2. Five years after entry into force of this Treaty, and at five-year intervals thereafter, the Parties shall together conduct a review of this Treaty.

2. Через пять лет после вступления в силу настоящего Договора и в последствии через каждые пять лет Стороны будут совместно проводить рассмотрение настоящего Договора.

**Article XV**

1. This Treaty shall be of unlimited duration.

2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

**Статья XV**

1. Настоящий Договор является бессрочным.

2. Каждая из Сторон в порядке осуществления своего государственного суверенитета имеет право выйти из настоящего Договора, если она решит, что связанные с содержанием настоящего Договора исключительные обстоятельства поставили под угрозу ее высше интересы. Она уведомляет другую Сторону о принятом ею решении за шесть месяцев до выхода из Договора. В таком уведомлении должно содержаться заявление об исключительных обстоятельствах, которые уведомляющая Сторона рассматривать как поставивше под угрозу ее высше интересы.

**Article XVI**

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. The Treaty shall enter into force on the day of the exchange of instruments of ratification.

2. This Treaty shall be registered pursuant to Article 102 of the Charter of the United Nations.

DONE at Moscow on May 26, 1972, in two copies, each in the English and Russian languages, both texts being equally authentic

**Статья XVI**

1. Настоящий Договор подлежит ратификации в соответствии с конституционными процедурами каждой из Сторон. Договор вступает в силу в день обмена ратификационными грамотами.

2. Настоящий Договор должен быть зарегистрирован в соответствии со статьей 102 Устава Организации Объединенных Наций.

Совершено 26 мая 1972 года в городе Москве в двух экземплярах, каждый на русском и английском языках, причем оба текста имеют одинаковую силу.

# ANNEX 2. ENGLISH AND RUSSIAN LANGUAGE VERSIONS OF AGREED STATEMENTS REGARDING THE ABM TREATY

## AGREED STATEMENTS REGARDING THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILE SYSTEMS

[A]

The Parties understand that, in addition to the ABM radars which may be deployed in accordance with subparagraph (a) of Article III of the Treaty, those non-phased-array ABM radars operational on the date of signature of the Treaty within the ABM system deployment area for defence of the national capital may be retained.

[B]

The Parties understand that the potential (the product of mean emitted power in watts and antenna area in square meters) of the smaller of the two large phased-array ABM radars referred to in subparagraph (b) of Article III of the Treaty is considered for purposes of the Treaty to be three million.

[C]

The Parties understand that the center of the ABM system deployment area CENTERED on the national capital and the center of the ABM system deployment

## СОГЛАСОВАННЫЕ ЗАЯВЛЕНИЯ В СВЯЗИ С ДОГОВОРОМ МЕЖДУ СОЮЗОМ СОВЕТСКИХ СОЦИАЛИСТИЧЕСКИХ РЕСПУБЛИК И СОЕДИНЕННЫМИ ШТАТАМИ АМЕРИКИ ОБ ОГРАНИЧЕНИИ СИСТЕМ ПРОТИВОРАКЕТНОЙ ОБОРОНЫ

[A]

Стороны исходят из того понимания, что в дополнение к РЛС ПРО, которые могут быть развернуты в соответствии с подпунктом "а" статьи III Договора, те РЛС ПРО без фазированной решетки, которые находятся в боевом составе на дату подписания Договора в пределах района размещения системы ПРО столицы, могут быть сохранены.

[B]

Стороны исходят из того понимания, что потенциал (произведение средней излучаемой мощности в ваттах на площадь антенны в квадратных метрах) меньшей из двух крупных РЛС ПРО с фазированной решеткой, упомянутой в подпункте "b" статьи III Договора, для целей Договора принимается равным трем миллионам.

[C]

Стороны исходят из того понимания, что центр района размещения системы ПРО с центром, находящимся в столице Стороны, и центр района

area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometres.

[D]

In order to insure fulfilment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

[E]

The Parties understand that Article V of the Treaty includes obligations not to develop, test or deploy ABM interceptor missile of more than one independently guided warhead.

[F]

The Parties agree not to deploy phased-array radars having a potential (the product of mean emitted power in watts and antenna area in square meters) exceeding three million, except as provided for in Articles III, IV, and VI of the Treaty, or except for the purposes of tracking objects in outer space or for use

размещения системы ПРО, в котором расположены пусковые установки МБР, для каждой из Сторон будут отстоять друг от друга не менее чем на тысячу триста километров.

[D]

В целях обеспечения выполнения обязательства не развертывать системы ПРО и их компоненты, кроме как предусмотрено в статье III Договора, Стороны согласны в том, что в случае создания в будущем систем ПРО, основанных на иных физических принципах и содержащих компоненты, способные заменять противоракеты, пусковые установки противоракет или РЛС ПРО, конкретные ограничения таких систем и их компонентов подлежали бы обсуждению в соответствии со статьей XIII и согласованию в соответствии со статьей XIV Договора.

[E]

Стороны исходят из того понимания, что статья V Договора включает обязательства не создавать, не испытывать и не развертывать противоракет для доставки каждой противоракетой более одной боеголовки индивидуального наведения.

[F]

Стороны соглашаются не развертывать РЛС с фазированной решеткой, обладающие потенциалом (произведение средней излучаемой мощности в ваттах на площадь антенны в квадратных метрах), превышающим три миллиона, кроме как предусмотрено статьями III, IV и VI Договора или кроме как в целях слежения за

as national technical means of verification.

[G]

The Parties understand that Article IX of the Treaty includes the obligation of the US and the USSR not to provide to other States technical descriptions or blue prints specially worked out for the construction of ABM systems and their components limited by the Treaty.

космическими объектами или использования в качестве национальных средств контроля.

[G]

Стороны исходят из того понимания, что статья IX Договора включает обязательство СССР и США не предоставлять другим государствам технические описания или чертежи, специально разработанные для создания систем ПРО и их компонентов, ограничиваемых Договором.

# ANNEX 3. EXCERPT FROM THE VIENNA CONVENTION ON THE LAW OF TREATIES

## Section 3. Interpretation of Treaties.

### Article 31

### General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty.

3. There shall be taken into account, together with context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

### Article 32

### Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when when interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

## Article 33

### Interpretation of Treaties Authenticated in Two of More Languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

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# The Role of International Dispute Resolution in Transboundary Air Pollution Law

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## I. Preconditions for the Solution of Transboundary Air Pollution Problems

Environmental pollution damage has become a serious problem of our century. The emissions of one state affect the natural environment within and beyond its borders, therefore necessitating regulation by international law. Although international law embraces border waters quality and their apportionment, international air pollution law was developed more recently, as this kind of environmental damages is more difficult to assess than e.g. contamination of rivers or lakes. Obviously, dirty water cannot be drunk or used by agriculture or industry, where people can breath with highly polluted air. For that reason, the investments in reduction of air pollution, especially of acid deposition,[1] do not arise as an economical necessity, but have to be performed for the future.

The nature of air pollution makes it a transboundary problem, which states can cope with only through successful cooperation within the framework of the international law. The pre-condition of this process is self-consciousness of governments. To open the way of limiting transboundary acid deposition each of them should first recognize the detrimental effects of it in its own territory and the lack of protection from a possible foreign air borne pollution.

Norway and Sweden were the first countries that discovered the impact of acid deposition on forests. Most of it came from territories abroad. These "net importers" initiated the process of recognizing damages caused by air pollution and started to call for development of international policies and strategies to deal with this transboundary issue.[2]

The situation differs with "net exporters," who chose to ignore the impact of their pollution on the natural environment of other states. This is due primarily because of

[1] The term "acid deposition" includes both wet and dry (direct) deposition ("acid rain"). It is mainly caused by sulphur dioxide, nitrogen oxides and their fluxes. See Wetstone & Rosencranz: Acid Rain in Europe and North America (Washington, D.C., 1983), prepared for the German Marshall Fund of the United States and the Environmental Law Institute; Pallenmaerts: Judicial Recourse Against Foreign Polluters: A Case Study of Acid Rain in Europe, 9 *Harv. L. Rev.* 143 (1985); Johnson & Finkle, Acid Precipitation in North America: The Case for Transboundary Cooperation, 14 *Vand. J. Transnat'l L.* 787 (1981).

[2] See Rosencranz: The Law and Politics of Transboundary Air Pollution: The European Experience, 5 *Can-US L.J.* 102 (1982).

economical calculations. The United Kingdom, Western Europe's largest emitter of sulphur dioxide, has been reluctant to agree to any reductions. "We see no point in making heroic efforts, at great cost, to control one out of many factors unless there is a reasonable expectation that such control will lead to real improvement of the environment."[3] The British officials stated that there is no evidence that their emissions are responsible for Scandinavia's problems. However, they agreed that the pollution is not confined to their territory, as they use tall stacks and there are strong winds over the islands.[4] The United States took a similar stance under the Reagan Administration pointing out that its past achievements in reducing air pollution and existing uncertainties in linking its emissions to Canadian damage justify the position of inaction.[5]

Nevertheless, the change in stance of West Germany, one of the main pollutants in Europe, was significant. The Conference held in Geneva, 13–16 November 1979 discussed new convention-multilateral accord on air pollution.[6] The German delegation resisted any binding limitation of sulphur dioxide emissions and considered itself not bound by the principle of responsibility to ensure that activities within its jurisdictional control do not cause damage to the environment of any other state.[7] This position was dramatically about-face changed during the 1982 Stockholm Conference on Acidification of the Environment. Germany started to support strongly the idea of imposing reductions on sulphur dioxide emissions, as its government discovered the influence of transboundary air pollution on its own forests.[8] About 16% of West Germany's forests were found to be damaged in 1983, and over 50% in 1985.[9]

Governments are reluctant to give up their sovereign control over natural resources and prefer loose cooperative arrangements over the creation of independent supranational pollution control system. However, there is some realization that some loss of sovereignty may be necessary. Protection of natural environment has become a political and economical necessity. A legal vacuum encourages economic waste,[10] therefore many countries have decided to participate in creation of international

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[3] Statement of the Delegation of the United Kingdom, Multilateral Conference on the Environment, Munich, 24–27 June 1984.

[4] Rosencranz, *supra* note 2, .

[5] Statement of William D. Ruckelshaus (then administrator of the US Environmental Protection Agency) before the Committee on Energy and Natural Resources, United States Senate, 30 April 1984; See Carroll & Mack: On Living Together in North America: Canada, the United States and International Environmental Relations, 12 *Den. J. Int'l. L.&P.* 35 (1982); Fraenkel: The Convention on Long-Range Transboundary Air Pollution: Meeting the Challenge of International Cooperation, 30 *Harv. Int'l L.J.* 447, 462 (1989).

[6] The Convention on Long-Range Transboundary Air Pollution, opened for signature November 13, 1979, TIAS No 10541, reprinted in 18 *ILM* 1442 (1979).

[7] Nordic states proposed standstill (agreement to hold the line against $SO_2$ emission increases) and rollback (pollution levels were to be abated by fixed percentages) to which Germans objected. The German representatives required introduction of words "economically feasible" (Article 6) to the Convention. They stated that the principle of responsibility expressed in the Preamble is not binding for their government. See Rosencranz, *supra* note 2.

[8] Wetstone & Rosencranz: Transboundary Air Pollution: The Search for International Response, 8 *Harv. Envtl. L. Rev.* 89, 108 (1984).

[9] Tiff:, Requiem for The Forests, *Time*, 16 September 1985, at 46.

[10] Sinclair: The Environmental Cooperation Agreement between Mexico and the United States: A Response to the Pollution Problems of the Border Lands, 19 *Cornell Int'l. L.J.* 87, 90 (1986).

regulations. The pre-condition of these changes is self-consciousness of governments and their good will to establish an international mechanism able to deal with problems of transboundary air pollution. This process was basically initiated by two agreements: the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP)[11] and the 1991 Agreement between the United States and Canada on Air Quality (Accord).[12]

## II. The Creation of International Treaty Law Framework

### A. The Convention on Long-Range Transboundary Air Pollution and its Protocols

The Convention on Long-Range Transboundary Air Pollution (LRTAP)[13] is the first multilateral treaty to address transboundary air pollution. Initiated by the Final Act of the Conference on Security and Cooperation in Europe,[14] it was created within the structure of the United Nations Economic Commission for Europe (ECE).[15] LRTAP was also the first agreement between Eastern and Western Europe. It embraced most of the industrialized areas of Europe and Northern America responsible for main emissions of sulphur dioxide, nitrogen oxides and other substances causing acid deposition.[16]

The Convention established institutional and technical framework, as well as initiated clarification of the legal one. Recognizing the need for pertinent cooperation of all the Parties, LRTAP instituted an Interim Executive Body (EB) composed of high-level officials of the Parties.[17] The Executive Body, which meets annually, is independent of the ECE: it does not answer to the Senior Advisers of the United Nations Economic Commission for Europe and excludes members of ECE, who are not signatories of the 1979 Convention on Long-Range Transboundary Air Pollution. The Convention provides for the Secretariat – a permanent staff, which supports the work program of the Executive Body both substantively and administratively.[18] The main task of the Executive Body is to govern the implementation of the Convention.

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[11] *Supra* note 6.

[12] Agreement between the United States and Canada on Air Quality, 13 March 1991, reprinted in 30 *ILM* 676.

[13] *Supra* note 6. Parties (34): Austria, Belgium, Bulgaria, Byelorussian SSR, Canada, Czechoslovakia, Denmark, Finland, France, German Democratic Republic, Federal Republic of Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, Ukrainian SSR, U.S.S.R., United Kingdom, United States, Yugoslavia, and EEC (signed also by Holy See, Romania, San Marino).

[14] 1 August 1975, 14 *ILM* 1292 (1975), invoked in the LRTAP Preamble paragraph 4.

[15] ECE is one of five regional commissions of the United Nations. This unique international body includes both Eastern and Western Europe, as well as the United States, Canada, Japan, New Zealand , and Australia. See Economic Commission for Europe (ECE) 1947–1987, U.N. Sales No.E.87.11.E.17 (1987). About the process and the reasons for which the framework of ECE was chosen for LRTAP see Wetstone & Rosencranz, *supra* note 8, at 100–1.

[16] About acid deposition in these areas see *supra* note 1.

[17] Article 10.1.

[18] Article 11. The Secretariat is maintained in the United Nations Economic Commission for Europe headquater in Geneva.

For this purpose it was given a broad mandate to determine the direction of work needed to be done.[19]

The Parties recognize in LRTAP not only the existence of adverse effects of transboundary air pollution, but the need to study their implications and to seek solutions for the identified problem as well. In this manner they fulfilled the pre-condition of self-consciousness and declared their willingness to reinforce active international cooperation to develop national actions in combating transboundary air pollution.[20] The states decided to cope with the pollution broadly. The purpose of the Conventions is not only to protect particular national interests, but to prevent and reduce air pollution as far as possible. Doubtless, the scope of LRTAP is worldwide and, although the number of parties is very limited, it can be easily expanded.

For these purposes the Convention emphasizes exchange of information,[21] development of scientific activities and technical measures aimed at combating the discharge of air pollutants.[22] In order to collect data and conduct the scientific cooperation LRTAP establishes the "cooperative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe" (EMEP) with its Steering Body, which shall be utilized by the Executive Body. The technical role of EMEP is substantial, as the cause-and-effect linkage is often extremely difficult to prove and the evidence is rarely clear and convincing. The contemporary understanding of adverse effects of air pollution is not only that of danger of damages caused by a single emitting source or by a group of them (smelter, power plant, factory, or industrial zone). An entire system of control and protection which will be able, first, to abate the likelihood of environmental dispute and second, to provide a broadly acceptable method of settlement is missing. The cooperative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe (EMEP) was established to secure the first system for maintaining monitoring and consultations of scientists, administrators and politicians.

The Convention on Long-Range Transboundary Air Pollution has two very important aspects. It establishes the definitions of air pollution and transboundary air pollution, which were discussed for a long time before the Convention was signed and ratified.[23] Basically the same approach was accepted by the United States – Canada Accord.[24]

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[19] Article 10.2.

[20] Preamble to the Convention, paragraphs 6, 8, 9.

[21] Article 8.

[22] Articles 4 and 7.

[23] See S p r i n g e r: The International Law of Pollution (Westport, Connecticut–London, England: Quorum Books, 1983). In Chapter 3 the author discusses different definition of "pollution." Pollution can be defined, according to past approaches, as an alteration of environment or clear damage, the right of territorial sovereign or interference with other uses of environment. It can be an amount of man-made substances that exceeds the assimilative capacity of the environment. Every approach has advantages and disadvantages. Every of them had its supporters in the past. The critics indicate that neither of them can be accepted as an universal understanding of pollution. Contemporary trends are less concerned about general or universal principles, but apply practical and meaningful pollution concepts. For example, the International Convention for Prevention of Pollution from Ships (London, 2 November 1973, 12 *ILM* 1320) identifies "harmful substances" with "any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources

Article 1 of the 1979 Convention on Long-Range Transboundary Air Pollution states "*air pollution* means the introduction by man, directly or indirectly, substances or energy into the air resulting in deleterious of such a nature as to endanger human health, harm living resources and ecosystems, material property and impair or interfere with amenities and other legitimate uses of the environment..."

Accordingly, "long-range transboundary air pollution means air pollution whose physical origin is situated wholly or in the part within the area under the national jurisdiction of the one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources."

The second achievement of LRTAP is that the "protocol system" has evolved in developing concrete pollution reduction agreements implementing the Convention. Four protocols were prepared and three of them are in force as of today. The earliest one – the 1984 Protocol on Long-Term Financing of the Co-operative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe[25] is a direct supplement to the Convention. It determines financial contribution and specifies sharing of costs by the States-Parties in order to maintain the basic technical programme – EMEP. The other three are fully assigned to reduction of substances that cause acid deposition.

The $SO_2$ Protocol[26] reduces national annual sulphur emission or its transboundary fluxes by at least 30 percent as soon as possible, and at latest by 1993, using the 1980 levels as the basis for calculation of reductions. The Parties[27] shall provide annually their levels of national annual sulphur emission and reduce it as far as it is only possible beyond the 30% level. To achieve these reductions the Parties are obliged to establish their national programmes, policies and strategies, and report it constantly to the Executive Body. The Protocol imposes clear and strict requirements and limits on states that agreed to sign and ratify it.

The $NO_x$ Protocol[28] concerns the control of emissions of other substances effecting in acid deposition – nitrogen oxides or their transboundary fluxes. This Protocol as

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and marine life, to damade amenites or to interfere with other legitimate use of the sea. Any modern, use-oriented definition is a combination of the proposed past approaches.

[24] See *supra* note 12, Article I.1, 2.

[25] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Long-Term Financing of the Co-operative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe (EMEP), opened for signature 28 September 1984, reprinted in 27 *ILM* 701. [entered into force 7 September 1987]. Parties (31): Austria, Belgium, Bulgaria, Byelorussian SSR, Canada, Czechoslovakia, Denmark, Finland, France, German Democratic Republic, Federal Republic of Germany, Greece, Hungary, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, Ukrainian SSR, U.S.S.R., United Kingdom, United States, Yugoslavia, and EEC.

[26] Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 Percent, opened for signature 8 July 1985, reprinted in 27 *ILM* 707 (1985) [entered into force 2 September 1987].

[27] (18) Austria, Belgium, Bulgaria, Byelorussian SSR, Canada, Czechoslovakia, Denmark, Finland, France, German Federal Republic, Hungary, Liechtenstein, Luxembourg, Netherlands, Norway, Sweden, Switzerland, Ukrainian SSR.

[28] 1988 Protocol on the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes, opened for signature 1 November 1988, reprinted in 28 *ILM* 214 [entered into force 14 February 1991].

well clearly restrains its Parties[29] adopting the two steps process. First, the States shall, as soon as possible, take effective measures to control and/or reduce their national annual emission of $NO_X$ so that these, at latest by December 31, 1994, do not exceed their national annual emissions of the level as for the calendar year 1987 or any pervious year. The Parties are obliged to apply national emission standards to new stationary and mobile sources, and introduce pollution control measure for major existing stationary sources. The second step imposes commencement of negotiations, within six months from the date of entry into force of the Protocol, on further steps to reduce the national emissions. The Parties are obliged to cooperate and exchange the best available scientifical and technological developments and internationally accepted critical loads. They shall make unleaded fuel sufficiently available, at minimum along main international transit routes. That has to be done no later than two years after the date of entry into force of the Protocol. The Parties must facilitate the circulation of vehicles equipped with catalytic converters, and notify all their national programmes, policies and strategies on the $NO_X$ reductions to the Executive Body. The recommendatory Technical Annex forms an integral part of the Protocol. It specifies the best available data on control technologies for $NO_X$ emissions from motor vehicles and stationary sources.

The new VOCs Protocol[30] was opened for signature November 18, 1991, and it is still not in force. It concerns the control of the volatile organic compounds (VOCs) emissions, which are all organic compounds of anthropogenic nature, other than methane, that are capable of producing photochemical oxidants by reactions with nitrogen oxides in the presence of sunlight.[31] Similarly to the $NO_X$ Protocol, it adopts two steps process. Each Party shall reduce its national annual emissions of VOCs by at least 30% by the year 1999, using 1988 levels as a basis or any other annual level during the period 1984–1990. Each state has to apply appropriate national or international emission standards to new stationary and mobile sources, and to products that contain solvents. It must promote the use of products that are low in or do not contain volatile organic compounds. The Parties shall foster public participation in emission control programmes through public announcements, encouraging the best use of all modes of transportation and promoting traffic management schemes. Every requirement of the first step should be accomplished within two years after entry into force of the Protocol. The recommendatory Annex II details technical information on control measures for emissions of volatile organic compounds.

As a second step the Parties shall commence negotiations on further reductions of VOCs emissions and their resulting secondary photochemical oxidant products. They

[29] (17) Austria, Bulgaria, Byelorussia, Czechoslovakia, Finland, France, Germany, Luxembourg, Netherlands, Norway, Sweden, Switzerland, Ukraine, Soviet Union, United Kingdom, United States.

[30] 1991 Protocol to the Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes, opened for signature 18 November 1991.

[31] Article 1.9. The Preamble to the VOCs Protocol elucidates that "...volatile organic compounds differ greatly from each other in their reactivity and in their potential to create tropospheric ozone and other photochemical oxidants and that, for any individual compounds, potential may vary from time to time and from place to place depending on meteorological and other factors." Preamble, paragraph 12.

should cooperate and detail information on individual volatile organic compounds, critical levels for photochemical oxidants,[32] and control strategies. To accomplish monitoring required by the Protocol each Party is obliged to provide information and annual reporting of the progress to the Executive Body. Article 3.3 introduces a special mechanism ensuring compliance with this requirement. When any Party has reason to believe that another Party is acting or has acted in a manner inconsistent with its obligations, it may inform the Executive Body and the Parties concerned. From that moment any Party can request the matter to be taken up at the next meeting of the Executive Body. However, it does not appear that any real sanction is at stake as the Executive Body can adopt resolutions only by consensus of the Parties present at its meeting.

It is worth noting that the VOCs Protocol creates areas of special regime called Tropospheric Ozone Management Areas (TOMAs). They can be established where the annual emission of certain Party contribute to tropospheric ozone concentration in areas under the jurisdiction of one or more other Parties, and such emissions originate only from areas under its jurisdiction. The Party has to reduce unconditionally its annual emissions from the specified TOMAs,[33] and ensure that the total national annual emissions do not exceed certain levels. Establishment of TOMAs is an interesting interference with sovereign jurisdiction, even if it happens only under condition of acceptance by the affected government.

The Protocols emphasize the demand for national programmes, which can be correlated within the framework of the Convention on Long-Range Transboundary Air Pollution to provide the control and successful reduction of existing air pollution. The Parties are also required to apply certain national and international emission standards to all new sources, and promote products that have low or contain no polluting substances. The Protocols impose on their Parties various restrictions and limitations: from simple reductions of emissions by 30% to the fixed year level "caps." They provide necessary technical information in Annexes, and call for an exchange of the best available scientific and technological developments.[34]

The Convention and the Protocols create the long-term system, where the protection from air pollution is developed through notice and consultations, negotiations and cooperation, national programmes, policies and strategies of the Parties. However, LRTAP permits its Parties to continue their existing environmental policies or change them at will, and requires the Parties only to pledge to "endeavor to limit and, as far as

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[32] The VOCs Protocol defines "critical levels" as "concentration of pollutants in the atmosphere for a specified exposure time below which direct adverse effects on receptors, such as human beings, plants, ecosystems or materials do not occur according to the present knowledge." Article 1.8.

[33] The mandatory Annex I specifies three TOMAs for the purposes of the VOCs Protocol: two in Canada (the Lower Fraser Valley in the Province of British Columbia and the Windsor-Quebec Corridor in the Provinces of Ontario and Quebec), and the total Norwegian mainland.

[34] The work is conducted mainly by EMEP, which arranges international conferences that lead to adoption of new protocols and further restrictions (e.g. Multilateral Conference on the Causes and Prevention of Damades to Forests and Water by Air Pollution in Europe, Munich, 24–27 June 1984, that had request the Executive Body to adopt a proposal for a specific agreement on the reduction of $NO_x$ and their transboundary fluxes). Various reports are prepared within the framework of the Convention. See Airborne Sulphur Pollution: Effects and

possible, gradually reduce and prevent air pollution."[35] Such a leeway can easily threaten the purpose of the treaty,[36] therefore several countries originally viewed the Convention as a document "without teeth."[37] Nonetheless, the Protocols are binding in the sense that they set up specific goals and outline responsibilities for participating states.

The Convention was accepted by many states as it created a broad, but flexible framework for reduction and prevention of transboundary air pollution. Although it does not require its Parties to sign protocols developed under its authority, this can be seen as an advantage rather than a shortcoming. Thus, as one official of the United Nations Economic Commission for Europe secretariat explains, "Paradoxically perhaps, the very openendness and generality of [the Convention's] provisions – frequently pointed out by its critics... may be one of its main assets, as new priorities for action continue to arise and are met in turn by the flexible 'protocol' system."[38]

Indeed, the development of the Convention on Long-Range Transboundary Air Pollution framework is significant, however the success of the Convention and its four Protocols depends not only on fixing strict limits, but on the efficient enforcement mechanism. The time had passed when a settlement of dispute was concerned with a single environmental catastrophe caused by pollution from a precisely defined area under a foreign jurisdiction, as in the *Trail Smelter* case.[39] The adjudication conducted on case-by-case basis is inadequate, as it takes place, by definition, after the fact, when the damage is caused. Such an *ad hoc* agreement, known as the "fire-brigade mentality,"[40] have had very limited general application. Non participation of other states, that have potential environmental impact, limits to a great extent its effectiveness.

The analysis of the 1979 Convention on Long-Range Transboundary Air Pollution shows that several claims can be risen: non observance of limitations, introducing new polluting sources, not setting up national limitation programmes, not securing certain facilities (e.g. unleaded fuel), no submission of information and reports to the Executive Body or any other Party etc. It indicates that the complex method of dispute resolution is essential for securing compliance with the Convention and its Protocols. Each of the documents contains only a short article concerning dispute settlement. According to it any dispute that arises between two or more Parties should be solved "by negotiation or any other method of dispute settlement acceptable to the parties to the dispute."[41] Negotiations are an integral part of the LRTAP framework, as the

Control, Air Pollution Studies No. 1, ECE, United Nations, New York, 1984 (Sales No. E.84.II.E.8); Air Pollution Across Boundaries, Air Pollution Studies No. 2, ECE. United Nations, New York, 1985 (Sales No. E.85.II.E.17).

[35] The Convention, *supra* note 6, Article 2.

[36] Developments-International Environmental Law, 104 *Harv. L. Rev.* 1484, 1559 (1991).

[37] S a n d: Regional Approaches to Transboundary Air Pollution 7 (paper presented at the US National Academy of Engineering Symposium: An Energy Agenda for the 1990s, Irvine, California, 11–12 May 1988).

[38] S a n d, *supra* note 37, see *also* F r a e n k e l, *supra* note 5, 457–8.

[39] *Trail Smelter Arbitral Tribunal Decision*, 3 *RIAA* 1905 (1941), 35 *AJIL.* 684 (1941).

[40] G o l d i e: Development of an International Environmental Law: An Appraisal, *in* Law, Institutions, and the Global Environment, ed. Hargrove (Dobbs Ferry, N.Y.: Oceana Publications, 1976), p. 143. About disadvantages of "ad hockery" see C a r r o l l & M a c k, *supra* note 2, 41; U t t o n: International Water Quality Law *in* International Environmental Law, ed. Teclaff & Utton (New York–Washington–London: Praeger Publishers, 1974) pp. 154–186, 171–2.

[41] Article 13 of the Convention, *compare* art. 8 of the $SO_2$ Protocol, art. 12 of the $NO_x$ Protocol and art. 12 of the VOCs Protocol.

Convention and Protocols can by amended and implemented by negotiations through the Executive Body.[42] Two Protocols literally require commencing certain negotiations on further steps in reducing emissions.

There are two main disadvantages to resolving disputes by negotiations. First of all, LRTAP demands the consensus[43] of the Contracting Parties. Any decision becomes binding only for the Party willing to agree on it: there is no sanction, therefore no enforceability. Second, negotiations are a very primitive form of dispute resolution, as they are built on the political process. Although they are convenient for diplomats as not binding and extremely flexible, commencement of negotiations does not guarantee that the resolution will be worked out. This inconclusiveness and perpetual dependence on good will of their parties causes their low significance as a successful method of dispute settlement. The VOCs Protocol attempts to strengthen the mechanism of compliance, but it does not ensure enforceability still leaving the problem for negotiations.

It is essential that the Parties should agree on practical and broadly acceptable method of dispute settlement that would provide for enforceability of the rules and requirements imposed by the international law of transboundary air pollution.

### B. The United States – Canada Accord

The Agreement between the United States and Canada on Air Quality (the Accord)[44] was signed and entered into force 13 March 1991. The Parties to the Accord, which are their own major trade partners, have a long shared, common frontier. Therefore, it is not surprising that they have had several controversies over transboundary pollution throughout their history. The United States – Canadian tradition of cooperation in coping with these issues is reflected in the Boundary Water Treaty of 1909 (BWT),[45] which established the International Joint Commission (IJC) in order to solve common water pollution problems within the framework of a bilateral convention. The Parties express their concerns about transboundary pollution of the natural environment in *Trail Smelter* case[46] and the Great Lakes Water Quality Agreement of 1978.[47] Both Canada and the United States are the Parties to the 1979 Convention on Long-Range Transboundary Air Pollution. Their cooperation in this area was spelled out in two documents: The Memorandum of Intent Concerning Transboundary Air Pollution of 1980[48] and the 1986 Joint Report of the Special Envoys on Acid Rain.[49] However, although the countries accepted the framework created by the Convention on Long-

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[42] Article 12 of the Convention, compare art. 7 of the $SO_2$ Protocol, art. 11 of the $NO_x$ Protocol, Art. 11 of the VOCs Protocol.

[43] Article 12.3.

[44] See *supra* note 12. The adoption of the new Clear Air Act by the United States Congress has paved the way for opening meaningful and fruitful negotiations.

[45] 36 Stat. 2108; TS 721; 6 Bevans 14; 43 LNTS 251.

[46] *Supra* note 39.

[47] 30 UST 1383; TIAS 9257; 1153 UNTS 187.

[48] 32 UST 2521; TIAS 9856; 1274 UNTS 235; reprinted in 20 *ILM* 690 (1981).

[49] Prepared by Drew Davis (United States Special Envoy) and William Davis (Canada's Special Envoy).

Range Transboundary Air Pollution, they did not ratify simultaneously the relevant protocols. Canada is only Party to the $SO_2$ Protocol, whereas the United States is Party only to the $NO_X$ Protocol.[50] The major controversies remained unresolved.

The Accord tends to fill this "blank space" by establishing "a practical and effective instrument to address shared concerns regarding transboundary air pollution."[51] It repeats, by and large, the provisions of LRTAP imposing similar requirements: notice, consultations, exchange of information,[52] monitoring[53] etc. However, instead of the Executive Body, the Parties establish and maintain a bilateral Air Quality Committee to assist in the implementation of the Agreement,[54] as well as they involve in this process the International Joint Commission of the Boundary Water Treaty.

The Accord sets up limitations and regulations, which are specified for each Party.[55] It fixes level of reduction and establishes a national cap for emissions of sulphur dioxide. The Accord also introduces levels of reduction, sets up standards or obliges them to be set up for emission of nitrogen oxides from stationary and mobile sources. It requires maintaining means for prevention of air quality deterioration and visibility protection, particularly in such areas as international parks, national, state or provincial parks, and designated wilderness zones.

The Agreement between the United States and Canada creates its own mechanism of dispute settlement.[56] Every matter of controversy raised by either Party is subjected to consultations, which shall commence not later than thirty days from the date of receipt of the request. If the dispute on interpretation or implementation of the Accord remains unresolved, the Parties shall seek the solution by negotiations. These should start not later than ninety days from the date of the request.[57] If the dispute is not resolved the Parties can agree on another form of dispute settlement, but they first should consider whether or not to submit it to the International Joint Commission.[58] The Commission is authorized "to examine into and to report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate..."[59] Nevertheless, such a report of the Commission shall be regarded neither as a decision nor as an arbitral award. In this instance the International Joint Commission has an advisory opinion. The dispute will be the object of other resolution mechanisms.

The situation varies when the question or matters of difference arising between the Parties involve the Rights, obligations, or Interest of the United States or Canada, either in relation to each other, or to their respective inhabitants. The request has to be

[50] Both Countries are Parties to the Protocol on Long-Term Financing of the Co-operative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe.

[51] Article II.

[52] Articles V, VII, XI.

[53] Annex 1.3 and Annex 2. According to Article XVI.4 the Annexes constitute an integral part of the Agreement.

[54] Article VIII.

[55] Annex I.

[56] There were no dispute under the accord as of today.

[57] Article XI.

[58] Article XIII.

[59] The Boundary Water Treaty of 1909, *supra* note 45, Article IX, paragraph 2.

referred by, consent, to IJC, where majority is required to render a decision. If the International Joint Commission is unable to achieve this, e.g. when it is equally divided, it is the obligation of the Commissioners to make either a joint or separate report to their respective governments. The Parties are obliged to submit the matter of controversy to an umpire, who renders a final decision, in accordance with the following procedure:

"If the votes are equally divided, the choice of the umpire is intrusted to the third power, selected by the parties by common accord.

"If an agreement is not arrived at on this subject, each party selects a different power, and the choice of the umpire is made in concert by the powers thus selected.

"If, within two months' time, these two powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court,[60] exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be umpire."[61]

The Boundary Water Treaty, to which the accord refers, distinguishes two kinds of matters of controversy attaching to the different procedures. The dichotomy becomes less clear, as "the rights, obligations, or interests" clause is broadly interpreted. For the purposes of the Accord the disputes will arise in regard to violation of limitations or requirements, which is always contrary to the interests of the other Party. Thus, the second procedure should be exercised.

The dispute settlement mechanism of the Air Quality Accord does not differ substantially from that of the Convention on Long-Range Transboundary Air Pollution. Every matter of controversy is first subjected to negotiations, which are a primitive form of dispute resolution. Any other steps are entirely within the discretion of the Parties, which can agree on them by consent. The Accord always obliges the Parties to consider the submission of a dispute to the conclusive process before the International Joint Commission, but it does not determine the choice.

The International Joint Commission is a body specific only for the United States – Canada environmental relations. It would not be possible to exploit it for dispute settlement in any broader context, even exclusively for the Western Hemisphere. The United States – Mexico treaty relating to the border rivers[62] establishes its own agenda: the International Boundary and Water Commission (IBWC).

In regard to sanctions for non compliance, the Parties to the agreement are in better position than those to the Convention on Long-Range Transboundary Air Pollution. The withdrawal of the United States or Canada causes the termination of the Accord and all the Annexes. Each Party is fully entitled to withdrawal upon one year's notice.[63] This is an ultimate solution, but it can be a successful instrument of

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[60] The Permanent Court of Arbitration created by the Hague Convention For the Pacific Settlement of International Disputes, 18 October 1907, 36 Stat. 2199; 1 Bevans 577; 54 LNTS 435.

[61] *Ibid.* article 45, paragraph 4, 5, 6. The author did not find any data indicating that the parties used this provision. Nevertheless, it remains an option for the settlement of future disputes.

[62] The Treaty Relating to Utilization of the Waters of the Colorado and Tijuana Rivers, and the Rio Grande (Rio Bravo), 14 November 1944, Mexico-United States, 3 UNTS 314.

[63] Article XVI.3 of the Accord.

pressure to overcome various deadlocks, as such withdrawal would affect important spheres of another Party's interests. A withdrawal from the Convention does not terminate the Convention, but affects only the acting state, not its adversary.

The 1979 Convention on Long-Range Transboundary Air Pollution, implemented and developed by its four Protocols and the 1991 Agreement between the United States and Canada, established broadly accepted and opened to access framework for international cooperation on air pollution protection. Its Parties undertake great efforts in monitoring and various consultations. Scientists, administrators and politicians from different countries work together in resolving of common problems. The purpose of the entire process is rather not to allow arising of any pollution than to assess responsibility and reparations for damages. Unfortunately, the process still depends exclusively on political negotiations and unaltered good will of all the participants. It lacks enforceability for limits and requirements imposed by the treaty, therefore the efficient international remedies are needed. A politically neutral, stable and ready to use at any time international dispute resolution method will play this role successfully. Such a universally acceptable dispute settlement mechanism is as important to enforcement of international norms of environmental law as state coercion is a sanction for a domestic norm. The Convention[64] has opened the way for adoption of such a mechanism.

However, before any proposal can be made we should examine which international norms, if any, may be applied for the purposes of adjudication in transboundary air pollution disputes.

## III. Norms of International Customary Law Applicable to Environmental Disputes

International customary law seems not to impose any liability for causation of environmental damage, therefore the foundation of the law of pollution should be sought in treaties rather than in custom.

Customary law is often perceived as slow to evolve and vague in any obligations it imposes.[65] Particularly in environmental matters, which have only recently become of significant concern, rules must be deduced from general state practice in the form of principles. However, there exist customary principles that are the bedrock of the international law of pollution: the principle of good neighborliness,[66] the maxim *sic utere tuo et alienum non laedas* (use your property in such a manner as not to injure that of another),[67] and the reasonable use of shared resources.[68] Although these

[64] See *supra* note 41, article XIII.2 of the Accord.

[65] See T e c l a f f: International Law and the Protection of the Oceans from Pollution, in International Environmental Law, *supra* note 40, at 104–39.

[66] S a n d, *supra* note 37, 1–3.

[67] B a r r o s & J o h n s t o n: *The International Law of Pollution* 75 (1974).

[68] See M c D o u g a l & B u r k e: The Public Order of the Oceans (1962), pp. 557–63 [discussion about the "reasonableness" standard].

principles are vague, they establish customary responsibility for environmental damages caused under one national jurisdiction, but effective under another. They are rarely invoked, because of national sovereignty claims in traditional international law.

For a long time national sovereignty and freedom of seas were *laissez-faire* principles of traditional international law. They explain the reality of correctly leaving to a state the plain jurisdiction and freedom of action within its own frontiers. The principle of national sovereignty emphasizes the exclusiveness of sovereign's power and prohibited interference with it from outside. Freedom of seas gave everybody an opportunity to use worldwide water. Doubtless, the uncritical application of these two principles to environmental law means allowing a state "to degrade its territory...[and] to inflict injury on areas of the planet outside national territory virtually without limit," being subjected only to fragmented and primitive rules of international responsibility.[69]

The physical ability to devastate the environment changed dramatically in the industrial era. An action performed within national borders influences significantly living conditions outside the sovereign jurisdiction, especially when it causes air pollution. The nature of air pollution indicates that some standards of international law should evolve. The two principles in their present form do not correspond to the reality and do not fit to the development of the modern world.

The significance of the principle of sovereignty grew in stature for centuries because of political reasons. The idea of "reasonable use" of shared resources started the transformation of the principle, showing that it could not be absolute. Nevertheless, the development of environmental law in general, and of the law of air pollution in particular, depends on the successful revision of this principle. The same process occurred in physics, where the Newton theory is valid only within a certain frame. It is not adequate in the plain description of reality, and thus the introduction of the Einstein system occurred.

Doubtless, the "physical frame" of international law has already changed dramatically during this century. The evolution of the well-settled principle of sovereignty is inevitable, and it takes place through the introduction of the principle of responsibility, requiring the state to ensure that activities within its national jurisdiction do not cause damage to the environment beyond the limits of their jurisdiction. The most influential international statement on this subject is the 1972 Declaration of the United Nations Conference on the Human environment in Stockholm. The Declaration provides that:

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction; and States shall cooperate to develop further the international law regarding liability and compensation for the victims of

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[69] Hargrove: Post-Stockholm: Influencing National Environmental Law and Practice through International Law and Policy *PASIL* (1972), 6; see Springer, *supra* note 23, at 31.

pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."[70]

A case frequently cited as demonstrative of this principle is that involving two British destroyers in the Corfu Channel by mines placed in this area of the Adriatic Sea by the Albanian government.[71] The International Court of Justice, holding that Albania had an obligation to warn the ships, declared that "it is every state's obligation not to allow knowingly its territory to be used for the facts contrary to the rights of other states."[72] It is an additional authority for the general proposition that nations must consider the extraterritorial impacts of actions taken within their borders.[73]

More clearly, the environment was the issue in the *Trail Smelter*[74] arbitration case regarding damages to farmers in the state of Washington from sulphur dioxide emitted by an iron ore smelter located in British Columbia. In an often quoted *dictum* the tribunal stated, that "no state has right to use or permit the use of its territory in such a manner as to cause injury...to the territory of another or the persons or property therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[75] Although the decision is not universally applicable, but limited to this very case and the idea was expressed in *dictum*, the statement can be regarded as a pronunciation of the customary responsibility – a basic legal principle applicable to environmental controversies.

This principle was expanded upon the Organization for Economic Cooperation and Development (OECD),[76] which adopted several principles regarding the responsibilities of countries with respect to air pollution control. The first says that the countries should control transboundary air pollution as stringent as pollution that has purely local impact (principle of non-discrimination). Second is the notion of equal access of foreign persons and countries to domestic courts for resolution of environmental disputes. The third states that countries should inform others when they plan a major new project that might have a transboundary impact (notification and consultation). Finally, the OECD adopted the "Polluter Pays Principle," which asserts that polluting sources rather than, for example governments should pay for the costs of polluting control. Therefore, the OECD principles give shape to the principle of responsibility.

There is a second principle that weakens the traditional theory of sovereignty. It says that nations should cooperate to serve mutual interests of their respective people.[77]

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[70] Stockholm Declaration on the Human Environment, U.N. Doc. A/Conf.48/14 (1972), reprinted in 11 *ILM* 1416 (1972), Principles 21 and 22.

[71] *Corfu Channel, ICJ Reports* 1949, case 244.

[72] *Ibid.*

[73] Wetstone & Rosencranz, *supra* note 8, at 121.

[74] *Supra* note 39.

[75] *Ibid.*

[76] The organization is composed of 24 industrialized nations (including the United States, Canada, Japan, New Zealand, and Australia). About principles see Wetstone and Rosencranz, *supra* note 8, at 93–99; Fraenkel, *supra* note 5, 453–4.

[77] See Caldwell: Concepts in Development of International Environmental Policies , *in* International Environmental Law, *supra* note 40, at 12–24, 13.

The earliest application of it to an environmental issue was in the Convention signed in Paris in 1902 concerning the conservation of birds useful to agriculture.[78] Although this principle is more political than legal in nature, it is difficult to overestimate the value of international cooperation in solving problems, especially in the law of pollution.

The new treaty law discussed above gives force to both of these principles. The Convention on Long-Range Transboundary Air Pollution incorporates the principle of responsibility into its Preamble.[79] The principle is accepted as binding by the Parties. Only the German delegation objected stating its government not to bound by anything in the Preamble. After the change of their stance, the delegation did not sustain this claim. Nonetheless, the principle of responsibility remains a part of customary law and is universally acknowledged by the family of nations. The declaratory and treaty provisions profoundly strengthened its significance. Therefore, this principle militates successfully against the principle of sovereignty in the realm of international environmental law.

The principle of cooperation is broadly applied by the convention and the Accord, which transformed it from political instruction into positive law. Notice, consultation, exchange of information and scientific cooperation are treaty requirements, what was especially reflected in the VOCs Protocol. According to it any Party can demand that an activity of another Party, which is inconsistent with the requirement of reporting and information exchange, may be taken up at the public forum of the Executive Body. Finally, the creation of Troposheric Ozone Management Areas in this protocol shows the scope of sovereignty claims to be considerably restricted, at least in the law of pollution.

## IV. The Key Role of Dispute Settlement Mechanisms for the Enforceability of Air Pollution Law

Customary and treaty law create clear obligations in transboundary air pollution law, but the enforceable dispute settlement mechanism is necessary in order to provide their efficacy. Negotiations are the only way to deal with matters of controversy proposed by the 1979 Convention on Long-Range Transboundary Air Pollution and its Protocols. "...The fact is that for all practical purposes the international community already has access to all the methods of dispute settlement it needs. ...The task is to improve the working of the present system."[80] Negotiations are an equitable and flexible way of dispute resolution, but this approach should be supplemented. Lauterpacht urges a radical revision of the conventional wisdom that consent of the parties is needed in order to resort to international settlement procedures providing "for a system of compulsory jurisdiction."[81] Negotiations as purely political and permanently dependent on good will becomes inconvenient, time consuming and basically primitive method.

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[78] 102 BFSP 969; 31 Martens(2nd) 272.

[79] See *supra* note 6, Preamble paragraph 5.

[80] L a u t e r p a c h t: Aspects of the Administration of International Law (Cambridge, UK: Grotius Publications, 1991), p. xi.

[81] *Ibid.*, p. xii.

Several special tribunals were established in recent years.[82] Some of them are more effective than others. The creation of new environmental court, with all the political, financial, and procedural problems that such establishment entails, may not be the optimal solution. There are various institutions, which can provide the same assistance and utility without having all the disadvantages mentioned above. Therefore, I suggest that the Parties to LRTAP should introduce provision submitting disputes to the International Court of Justice. As the arbiters should have a special experience in the complex area of environmental law, the Court can decide to entrust this adjudication to Chamber formed according to Article 26.1 of its Statute.[83] It can consist of three judges representing "the principal legal systems of the world." The ultimate determination belongs to the Court, therefore it can consider that "under Article 31 of the Statute, the provisions about national judges are applicable to such a Chamber so that the Chamber could be composed of a judge of the nationality of each one of the parties, with a third judge elected by the Court very much as the President of the Court now often is authorized to appoint presiding arbitrators."[84]

The advantages of such a submission are expressed by the report of the Asian – American Legal Consultative Committee on the "Role of the International Court of Justice," which was circulated as a United Nations document in 1985. The report concludes:

"The submission of a dispute to a Chamber of the Court has the following merits *vis-a-vis* seeking settlements by *ad hoc* arbitration. The parties are afforded as much, if not more, recognition in the constitution of the Chamber as they are in composition of an arbitral tribunal or court of arbitration. Secondly, the specific rules of procedure to be applied are clear and distinct and are not left to be determined by the arbitral tribunal. The parties can save the enormous expenses involved in the fees of the arbiters and experts and in the establishment and maintenance of the Secretariat. The Registry of the Court ensures custody of records. The place of proceedings may be elsewhere than at the Hague and finally the judgment is final and binding on the parties."[85]

The chambers for dealing with the categories of cases were not used as of today, but there are substantial signs of interest in the international community in recourse to Chambers of the International Court of Justice. During the last decade the *ad hoc* Chambers were established four times to decide in particular cases technical in character

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[82] There are still efforts to create new tribunals, e.g. International Criminal Court. See B e n j a m i n R. C i v i l e t t i (Chair, Task Force on an International Criminal Court), ABA Task Force on an International Criminal Court-Preliminary Report to the House of Delegates, 17 January 1992.

[83] Statute of the ICJ, 26 June 1945, 59 Stat. 1055, TS No. 993, 3 Bevans 1179.

Article 26.1: "The Court may from time to time form one or more chambers composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labor cases and cases relating to transit and communications."

[84] J e s s u p: To Form a More Perfect United Nations, 129 *RCADI*, 21 (1970 I). All the Article 26.2 *ad hoc* Chambers consisted of five judges, elected according to clearly expressed wishes of the parties. The lack of representation of "the principal legal systems of the world" caused broad protests, therefore three other *ad hoc* Chambers were comprised of judges from three continents. See S c h w e b e l: Ad Hoc Chambers of the International Court of Justice, 81 AJIL 849 (1987).

[85] UN DOC. A/40/682 (1985); see S c h w e b e l, *supra* note 84, at 835–849.

(as in the *Gulf of Maine* [86] and *ELSI* [87] cases), or that has particularly regional aspect (as in the *Frontier Dispute* [88] and the *Land, Island and Maritime Frontier*[89]). The judgments proved to be impartial and were readily accepted by the parties. Additionally, the *Nicaragua* [90] case inspired greater confidence in the Third World countries *à propos* decisions of the International Court of Justice. The submission of transboundary air pollution disputes to the Chamber of the Court can be seen as an attempt to involve them in the environmental protection process. The acid deposition affects such increasingly industrialized countries like Brazil, China, and the Republic of Korea.[91] It is not true that states with serious economic problems are not willing to assign even big financial assistance in order to protect their natural environment.[92]

On the contrary, there may be some problems with the United States traditionally reluctant in accepting any foreign solution. Domestic law and the possibility of withdrawal from the Accord by Canada seem to be sufficient safeguards for the United States compliance with international transboundary air pollution law requirements, even if this country did not accept the compulsory jurisdiction of the International Court of Justice.

Environmental law in general, and the law of air pollution in particular, has not yet fully evolved. The International Court of Justice can, deciding in particular cases, foster this process, clearing the old and creating the new legal rules, not only by application of conventions and customs, but through interpretation of general principles of law and using the subsidiary means. Additionally, the Court can exploit the resources of the United Nations requesting information and specific data relevant to cases before it.

Transboundary air pollution is a global problem that requires a global solution. Although the role of private persons, or non-governmental organizations is growing, they are not in a position to conduct international environmental dispute according to the current stage of law. They do not have any territorial jurisdiction, or any efficient method to compel another party to settle a dispute. However, non-governmental organizations and various environmental movements are a perfect instrument of pressure on states. Such an action can be conducted in several states forcing the governments on both sides to commence negotiations or/and agree on dispute settlement mechanism. Then, the organizations can control in several ways the compliance with international obligations. Therefore, the provision that "only states may be parties in cases before the Court"[93] will not diminish substantially the scope of the International Court of Justice adjudication. The legal situation may evolve in the future, but the change will

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[86] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (US/Canada) ICJ Rep.* 1984, 246.

[87] *Case Concerning Elettronice Sicula S.p.A. (US/Italy) ICJ Rep.* 1987, 3.

[88] *Frontier Dispute (Burkina Faso/Mali) ICJ Rep.* 1985, 6.

[89] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) ICJ Rep.* 1987, 10.

[90] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua/United States of America) ICJ Rep.* 1984, 392.

[91] World Commission on Environment and Development, Our Common Future 180 (1987).

[92] Poland spent $885 million on environmental projects in 1991, more than 1% of its national product. Only highly developed countries (the Netherlands, Greece) assign so much money to environmental protection. 15 *International Environmental Reporter* 6.

[93] *Supra* note 83, Article 34.1.

not occur without introducing a dispute settlement mechanism with compulsory jurisdiction.[94]

Wetstone and Rosencranz[95] emphasize four major reasons why accepted notions of international law alone cannot compel major modifications in the energy and pollution control policies in the industrialized countries. First, such principles are not sufficiently defined to support ready application to specific controversies. Second, no effective mechanism for their enforcement currently exists, as no international agency can give force to environmental principles that are not incorporated in binding law. Third, the present international legal framework does not effectively foster preventive action and disputes arise only after damage has occurred. Fourth, claimants have been required to demonstrate that specific identifiable sources caused environmental injury. These objectives should be analyzed in light of the Convention on Long-Range Transboundary Air Pollution provisions and the submission of disputes to the International Court of Justice.

Obviously, a certain amount of pollution invariably accompanies industrialization and no claim is made of an international right to a completely pollution free environment. However, the principles of responsibility for actions adversely affecting the natural environment of other nations, offer sufficient guidance to impose limits on national emissions and define the allowed activities. Any non-compliance with treaty provisions can be seen as constituting a point at which concerns surrounding the environmental effects of tranboundary air pollution outweigh a nations' interest in industrial development. The International Court of Justice is entitled to define duties and clear legal rules well enough to apply them to specific controversies.

Secondly, the submission of matters of controversy to the International Court of Justice will enable the court to rule on any dispute arising between the LRTAP Parties. Therefore, one of the most respected bodies will give force not only to international environmental principles, but to the provisions of respective treaties as well.

It is true that the enforcement of the International Court of Justice decisions was not always successful. For example, the United Kingdom never has collected its damages from Albania in *Corfu Channel* case,[96] but that was possible because of the complicate political situation. Nowadays, when the "cold war" is finished, it becomes clear that nobody can live completely separated. The enforceability of the International Court of Justice awards does not depend only on the voluntary acquiescence of the loosing party, international pressure, or the United Nations Security Council action. Broad international economical relations require compliance with the International Court of Justice decisions in order to protect all the other economical and political interests of the loosing party.

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[94] About the possibilities of an individual or environmental organization suing a polluter for damages with the purpose of obtaining compensation and preventing future environmental harm on the example of the Nordic countries see Phillips: Nordic Co-operation for the Protection of the Environment Against Air Pollution and the Possibility of Transboundary Private Litigation, in *Transboundary Air Pollution*, Flinterman, Kwiatkowska & Lammers eds., (1986), pp. 153–180.

[95] Wetstone & Rosencranz, *supra* note 8, at 122–3.

[96] *Supra* note 71.

Thirdly, the new framework of the 1979 Convention on Long-Range Transboundary Air Pollution does foster preventing action introducing all the requirements of information exchange and cooperation. It establishes bodies, within which consultations and negotiations are conducted. The time of the "fire-brigade mentality" has irrevocably passed. Contemporary efforts are more focused on prevention than on estimation and compensation of air pollution damages.

Finally, claimants are not required to demonstrate the injury to the degree necessary in the past. The LRTAP framework creates monitoring system, therefore the organized scientific researches clarify the link between emissions and damages.

Even assuming that if the main obstacles indicated by Wetstone and Rosencranz are not overcome currently, their significance will be much diminished when the Parties accept the compulsory jurisdiction of the International Court of Justice. The full control of transboundary air pollution can be provided only through effective dispute settlement mechanism. Such a broadly acceptable method incorporated into the binding multilateral treaty will provide its enforceability. It would seem to be more efficient than many bilateral treaties such as the United States – Canada Accord.

The international community needs a global setting in the air pollution area, which will attract more countries than only those Parties to the Convention. The Convention on Long-Range Transboundary Air Pollution and its quickly developing framework already provide a strong foundation. The submission of disputes to the Environmental Chamber of the International Court of Justice will not only revitalize this highly regarded body. It will be one of the important steps toward more effective control of global air pollution and negotiators preparing for the "Earth Summit" in Rio de Janeiro should have taken it under consideration.

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# The Application of the General Provisions of the Rome Treaty to Agriculture

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The association of Poland with the European Communities and the future membership expected require the adaptation of the Polish law regulating agriculture to the European legislation. To this end it is necessary to know the latter and the rules of its application. This is partly a target of this article. The article is divided into 6 parts. The first one presents the basic rules of the Rome Treaty applicable in the common market organisations. The second one deals with rules applicable in lack of common market organisations. The third part presents the rules of competition in the field of agriculture, regard beeing paid to the rules of state aid. The fourth section is devoted to supplementary payments granted in the framework of the common market organisations. The subject of the following part is the status of the special rules regulating agricultural matters. In the last section we will deal with the legal requirements that must be fulfilled by the common market organisations.

## I. The Basic Rules of the Treaty Applicable in the Common Market Organisations

According to the basic rule contained in Art. 38 of the Rome Treaty, the rules laid down for the establishment of the common market shall apply to agricultural products "save as otherwise provided in Articles 39 to 46" of this Treaty. The latter articles will be presented later. Here it must be emphasized that, contrary to the solution applied in the European Free Trade Association (EFTA) that expressly excluded agricultural products from the scope of its system of free trade,[1] the integration in the EEC (now: EC) was not limited to industrial products, but comprised agricultural ones as well.

Consequently, the Council regulations creating common market organisations before the end of the transitional period (1 January 1970) took over the basic rules of the Treaty dealing with the free movement of goods, which prohibited expressly duties and quantitative restrictions in intra-EC trade. On the other hand, the Court of Justice maintained for a long time, that these rules had to be interpreted uniformly – irrespective

[1] Art. 21 of the EFTA Agreement.

of whether they were to be found in the Treaty itself or in the secondary legislation of the EEC.[2]

Still, the rules applicable in the field of agriculture sometimes went beyond what was expressly required by the Treaty. It was the case of the prohibition of duties (and measures of equivalent effect) not only in trade between Member States but also at the outside borders of the Community – with respect to goods imported from third countries.[3] The Treaty itself does not prohibit expressly the imposition of such charges on direct import from third countries and on goods not covered by the common agricultural market organisations. Such a prohibition forms part of the case law of the Court of Justice. Namely, in its judgment in the joined cases 37 and 38/73 *Sociaal Fonds voor de Diamentarbeiders v. Indiamex*[4] the Court of Justice ruled that a unilateral change of the level of market protection through the imposition of such charges was contrary to the foundations of the general system of duties and common commercial policy – binding for the Member States. In fact, in this case it was pointed at the fact that the regulations dealing with agriculture expressly prohibited such charges.

After the end of the transitional period it was no longer necessary to repeat the provisions of the Treaty in the agricultural secondary legislation of the Community. As it was put by the Advocate-General Warner with respect to the regulation of 1970 establishing the common market organisation in the sector of wine,[5] these provisions were directly applicable and since the aforementioned time physical persons could invoke them before national courts as bases of their claims. Accordingly, the amended acts in the field of agriculture[6] do not repeat the basic rules of the Treaty.

An amended regulation codifying the provisions regulating the functioning of the common market organisations, which did not repeat expressly the provisions of the Treaty prohibiting duties and quantitative restrictions, became an object of the Court's examination in the case 83/78 *Pigs Marketing Board v. Redmond.*[7] Strictly speaking, it was Regulation 2795/75[8] concerning the common market organisation in the sector of pork. The Court ruled that the provisions of the Treaty prohibiting duties and measures of equivalent effect and especially Art. 30 and 34 (prohibition of quantitative restrictions and measures of equivalent effect) should be treated as an integral part of the common market organisation. In the case 118/86 *Nertsvoederfabriek*[9] it was stated that while interpreting provisions reflecting Art. 30 and 34 of the Treaty, one should simply follow the latter.

On the other hand, it is obvious that neither the Council nor the Commission can derogate from the basic Treaty provisions in the field of agriculture, unless it is provided

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[2] For example: case 34/73 *Variola v. Italian Finance Administration, ECR* 1972, 89.

[3] See for example: case 84/71 *Marimex v. Italian Finance Administration, ECR* 1972, 89 concerning the regulation establishing common market organization for bovine meat and veal.

[4] *ECR* 1973, 1609.

[5] In his opinion given in the cases 80 and 81/77, *Ramel v. Receveur des Douanes, ECR* 1978, 927.

[6] In practice accepted since the judgment in case 48/74 *Charmasson, ECR* 1974, 1783.

[7] *ECR* 1978, 2347.

[8] OJ 1975 L 282/1.

[9] 6 October 1987.

by the Treaty itself in Art. 39-46. The best example thereof are to be found in the cases 80 and 81/77 *Ramel v. Receveur des Douanes*[10] connected with the additional provisions regulating the rules of functioning of the common market organisation in the wine sector. Although Art. 31(1) of the respective regulation repeated the prohibition of duties and measures of equivalent effects, Art. 31(2) derogated from the Treaty provisions and authorised Member States producing wine to take measures aimed at the prevention of disturbances in the functioning of their markets, unless administrative acts regulating trade in wine were applicable. The French party claimed that Italy had not applied its important administrative acts regulating trade in wine. Still, the basic problem to be solved by the Court was the conformity of the aforementioned Art. 31(2) with the Rome Treaty. According to the Court, the imposition of charges being an equivalent of duties after the end of the transitional period could only be based on a clause contained in Art. 39–46 of the Treaty prescribing or authorising the imposition of such charges. After a thorough examination of the Treaty the Court satisfied itself as to the lack of any such clause. What is more, the Court stated that, according to Art. 44, even during the transitional period and in so far as the abolition of customs duties and quantitative restrictions in trade between Member States might result – through the changes in prices – in the jeopardy to the attainment of the objectives of the Common Agricultural Policy, the Member States could only, under a few conditions, apply a non-discriminatory system of minimum prices.The Court ruled that the admission of more far reaching restrictions would be contrary to the Treaty.

Consequently, the Court ruled that after the end of the transitional period the institutions of the Community should exercise their powers in the field of agriculture only on the assumption of the integrity of the common market. They should not break the prohibition of duties, quantitative restrictions and measures of equivalent effect in intra-EEC trade. In the subsequent part of its judgment the Court ruled that Art. 31(2) of the Regulation 816/70[11] authorising Member States to impose charges equivalent to duties on goods covered by that regulation and imported from other Member States was contrary to Art. 13(2) and Art. 38–46 of the Treaty, and to this extent it was void.

One can infer from this judgment that the treatment of agricultural products in the Treaty is not as exceptional, as it seems to be. Especially, it would be very difficult to grant any special treatment of the interests of different Member States by taking these interests in consideration in the legislation of the Community. Actually, in case 288/83 *Commission v. Ireland*[12] the Court ruled that the Commission was not entitled, even in case of an express or implied approval of the measures taken unilaterally by a given Member State, to authorize that state to apply provisions contrary to the EEC law. The scope of the special treatment of agricultural products provided for in articles 39–46 of the Treaty will be discussed later.

[10] *ECR* 1987, 927.
[11] JO 1970 L 99/1.
[12] *ECR* 1985, 1761.

## II. The Basic Rules of the Treaty Applicable in Lack of the Common Market Organisations

According to Art. 40(1) of the Treaty, the common market organisations were to be established before the end of the transitional period. It was actually the case with the majority of the products. As exceptions we should mention alcohol, potatoes and mutton (as regards the latter, the respective organisation was established in 1980). All the same, we can say that at the end of the transitional period it was generally believed that, by virtue of Art. 43, 45 and 46 of the Treaty, the national market organisations should function till their replacement by the Community ones. Especially, according to Art. 43(3) the national market organisations were to be replaced by the EEC market organisations only if the latter offered Member States, which were opposed to that measure and which had their own organisations for the production in question, equivalent safeguards for the employment and standard of living for the producers concerned.

Such a view was accepted by both the Commission and the Advocate-General Warner – in case 48/74 *Charmasson v. Minister for Economic Affairs*,[13] but it was not shared by the Court of Justice. In the aforementioned case a merchant questioned the French system of import quotas for bananas. No common market organisation dealing with trade in bananas existed at the time. The Court did not deal with the question of the very status of the national market organisations after the end of the transitional period, as it simply pointed at the inequality of a simple system of quotas and a national market organisation. Still, the Court ruled that, as all the Community market organisations had had to be established before the end of the transitional period, the functioning of the national ones could have been guaranteed only till this very moment. Consequently, the national market organisations are subordinated to the general principles of the Treaty, especially those dealing with the free movement of goods. It was also pointed that Art. 33 providing for the abolition of quotas could be invoked in that case. Such a view was supported in the case 68/76 *Commission v. France*.[14] The proceedings were initiated by the Commission against France in connection with the lack of compliance of the latter with the Treaty requirement of the presentation of oficially confirmed export declaration for potatoes, even in the intra-EC trade. Following the case law of the time, the Court ruled that such a requirement, even treated as a formal procedure, had the effects similar to quantitative restrictions and could not, according to the Art. 39–46, justify unilateral derogation from Art. 34 (prohibiting quantitative restrictions and measures of equivalent effect), also in the lack of a common organisation.

A similar attitude was presented with regard to the end of the transitional period provided for in the 1972 Act of Accession of the United Kingdom. Art. 9 of the Act provided that the transitional period should come to an end in December 1977, subject to other terms, time limitations and special clauses. Art. 60(2) of the Act read that the

[13] *ECR* 1074, 1983.
[14] *ECR* 1977, 515.

general prohibitions: of measures with effects equivalent to the ones of duties, of quantitative restrictions and measures with equivalent effects were not applicable to products not covered by any common market organisations, if they were covered by a national market organisation at the time of the accession. This provision was to apply till the establishment of a common market organisation with respect to a given category of goods.

In the case 231/78 *Commission v. UK*,[15] in which the proceedings were initiated by the Commission on the basis of Art. 169 in connection with a ban on imports of potatoes, introduced by a British institution, recognized as a national market organisation, and kept by it in force after the end of 1977, the UK claimed that Art. 60(2) was a special provision derogating from the general frames of the transitional period. However, the Court decided that it was mandatory for provisions derogating from the generally prescribed transitional period, to determine exactly another time limit. It was not the case with Art. 60(2), which referred to a future and indefinite event. The Court also ruled that even during the transitional period the new Member States only could invoke Art. 60(2). It displayed the care of the lawmakers from the time preceding the Charmasson judgment about the functioning of the national market organisations between the end of the transitional period and the establishment of the common organisations. In this case the Court followed the Charmasson judgment, as it showed that the normal transitional period was applicable to the national market organisations. Consequently, the latter could not derogate from the general prohibition of quantitative restrictions and measures of equivalent effect after the end of the transitional period.

A similar judgment was delivered in the case 232/78 *Commission v. France*.[16] The proceedings were brought in connection with the imposition by France of some restrictions on imports of mutton and veal. In the light of the previous judgments no breach of the Treaty was found. The French government tried to justify its decision by invoking economical and social reasons. In result of those judgments, Art. 65(2) of the Greek Act of Accession prescribed the time limit of the protection afforded to the national market organisations. It was exactly 31 December 1985. The Acts of Accession of Spain and Portugal adopted 31 December 1995 as such a limit.

This line of the case-law was followed in case 288/83 *Commission v. Ireland*[17] with respect to the Irish restrictions on imports of potatoes being in free circulation in other Member States (e.g. according to art. 9 and 10 of the Treaty potatoes coming from third countries avail themselves of the freedom of movement after the compliance with the import formalities and the levying of customs duties). It was pointed out by the Court that general principles of intra-EEC trade are fully applicable to agricultural products not covered by any common market organisation.

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[15] *ECR* 1979, 1447.
[16] *ECR* 1979, 2729.
[17] *ECR* 1985, 1761.

## III. The Rules of Competition in Agriculture and the Rules of Governmental Aid

Putting aside a few provisions relevant only during the transitional period, we can say that only Art. 42 and 46 of the Treaty are examples of deviations in favour of agricultural products from the special rules of the Rome Treaty. According to Art. 42, the rules of competition should be applicable to agricultural products only within the scope to be determined by the Council in the framework of the Common Agricultural Policy. This very article clearly authorises the Council to give other persons its mandate with respect to certain forms of aid. It should be emphasized that the relevant chapter of the Rome Treaty refers not only to private (and public) enterprises, but also to the forms of aid granted by the Member States. In practice, Art. 46 allows the levying of import charges in so far as exporting Member States can grant their aid to agricultural products.

The basic principles in this field were prescribed in the Council Regulation 26/62[18] differenciating between private and public enterprises from the point of view of the forms of governmental aid. According to Art. 1 of this regulation, the general rules of articles 85–90 of the Rome Treaty should apply to any anticompetitive practices of private or public enterprises concerning production and trade in agricultural products. The exception is to be found in the first sentence of Art. 2(1), which provides that Art. 85(1) of the Treaty prohibiting certain agreements, decisions, practices and undertakings, shall not be applied to agreements, decisions, practices and undertakings forming an integral part of a national market organisation or being necessary for the achievement of the objectives of the common agricultural policy. Especially, according to the second sentence of Art. 2(1) of the regulation, Art. 85(1) of the Treaty does not apply to agreements, decisions and activities of farmers, their unions and associations of such unions from a single Member State concerning production or sale of agricultural products, utilisation of facilities destined for storage or processing of these products, if there is no obligation of determining uniform prices, unless the Commission finds that the competition is excluded as a consequence (the mere limitation thereof is not sufficient) or the achievement of the objectives of the common agricultural policy put into jeopardy. The Commission has an exclusive right of determining, which agreements are covered by this clause. As regards the achievement of the objectives of the common agricultural policy, it can be said that Art. 85–90 of the Treaty are to be interpreted in the light of the provisions establishing common market organisations.

The effect of all these provisions will be a sharp restriction of price competition (based, as we will see, on generally binding prices, regard being had of currency movements) and e.g. the imposition upon third countries of the obligation of respecting the rules of producers' organizations, as it was the case of Art. 7 of the Council Regulation 3796/81 dealing with the common market organizations for fisheries.[19] However, enterprises can further restrict the scope of application of the rules of

[18] JO 1962 L p. 993.
[19] OJ 1981 L 379/1.

competition, as is evident from the cases concerning the common undertakings on the sugar market,[20] though these cases demonstrate that the combination on the Italian market of the Community rules and the national ones can in fact completely eliminate competition, leaving very little freedom of action.

In cases connected with the other the other markets, the claimants were not able to demonstrate the necessity of their undertakings for the achievement of the objectives of the common agricultural policy. Similarly, in the case 71/74 *Frubo v. Comission*[21] connected with an agreement dealing with imports to the Netherlands of fruits from outside the Community, the Court ruled that such an agreement was not necessary for the achievement of the two first objectives of the common agricultural policy, that is the increase of agricultural productivity and ensuring of a fair standard of living for the agricultural community.This statement was of an utmost importance, as according to the claimants, the three other objectives were at stake, but both the Court and the Advocate-General Warner were of the opinion that all the objectives should be treated as an indivisible unity. Still, we can confront the latter with the other, completely different positions taken by the Court, which recognized that certain objectives could be given priority with respect to the others[22] (the conclusion that was drawn at the time of determining the validity of some Community acts) and which supported the legislation aimed at the achievement of only one of those objectives.[23]

The attitude of the Commission to the Regulation 26/62 at the time of putting into life of the rules of competition could have been seen in its decision in the *Meldoc* case[24] connected with an agreement between Danish diary producers. The Commission stated that, as since the adoption of the Council Regulation 804/68[25] the national market organizations had been replaced, it was no longer possible to conclude an agreement forming an integral part of the latter.

As regards the relation of the agreement in question to the objectives of the common agricultural policy, the Commission remarked that the measures to be applied in the diary sector had been prescribed in regulation 804/68, while the agreement introducing the system of quotas, compensation programme, consultations as to prices and sales and measures aimed at the protection from imports from other Member States amounted to a private intervention system, completely different from the one of the regulation. The Commission was of the opinion that the first sentence of the Art. 2(1) of the regulation was not applicable to the agreement, and the second sentence of that article (naming in detail agreements not covered by Art. 85 of the Treaty) referred exclusively to agreements excluded generally by virtue of the first sentence. This solution could be opposed to the negative decision given in relation to the French national organization trading in new varieties of potatoes.[26]

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[20] Cases 40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie and others v. Commission*, *ECR* 1975, at 1949–50.

[21] *ECR* 1975, 563.

[22] Case 5/73, *Balkan v. HZA Berlin-Packhof*, *ECR* 1973, 1091.

[23] Case 138/78, *Stolting v. HZA Hamburg-Jonas*, *ECR* 1979, 713.

[24] Decision 86/596 of 26 November 1986 (OJ 1986 L 348/50).

[25] JO 1968 L 148/13.

[26] OJ 1988 L 59/25.

If we can speak about practices forming an integral part of a national market organization, we should consider the very definition of the latter. In the *Charmasson* case[27] the Court defined a national market organization as a whole of legal measures giving the public authorities the control of trade in certain products, aimed to provide, through the growth of production and the optimal utilisation of the factors of production, especially labour, a fair level of life for producers, stabilisation of the market, ensuring the supply and appropriate prices for consumers.It is not difficult to identify aforementioned aims with the objectives from Art. 39 of the Treaty, what made it impossible for the national and common organizations to coexist, unless it was necessary or expressly provided for.

It should be also pointed that the regulation 26/62 does not derogate from the prohibition of abuse of a dominant position prescribed in Art. 86 of the Rome Treaty. So, in the case 27/76 *United Brands v. Commission*[28] dealing with the abuse of a dominant position on the bananas market the very involvement of agricultural products was irrelevant for the application of the normal rules of competition.

On the other hand, regulation 26/62 does not apply any crucial Treaty principles of governmental aid to agricultural products. According to Art. 4 of the regulation, only the the first and the third paragraphs of Art. 93 of the Treaty are applicable and additionally, the Commission is to survey the existing system of state aid and inform about any new forms thereof. So, the application of the principles of governmental aid with respect to trade in agricultural products depends upon the regulations establishing several common market organizations, though it should be remembered that national aid with regard to products covered by common market organizations may be treated as an ingerence in the functioning of the latter, leaving alone the possibility of a breach of the rules of governmental aid itself. Actually, in the majority of common market organizations Art. 92–94 of the Treaty are applicable, save as otherwise provided in the respective regulation.

As the Treaty rules of governmental aid were said to have no direct effect, it was ruled in the case 78/76 *Steinike und Weinlig v. Germany*[29] that the very act of inclusion of these rules into a directly applicable regulation is not sufficient for giving them direct effect. However the Court followed the opinion of Advocate-General Warner and ruled that such an inclusion did not change the character and scope of the rules and resulted in the elimination of barriers of their application, what was also the result of art.42 of the Treaty.

In consequence, it is up for the Commission to determine the rules of competition within the framework of the common market organizations for agricultural products, what took place for example in the decisions concerning the aid granted by the French government to farmers from mountainous regions,[30] the British subsidies for users of

[27] *ECR* 1974, 1396.
[28] *ECR* 1978, 207.
[29] *ECR* 1977, 595.
[30] Decision 608/81.

fishermen's boats[31] and preferential system of payments for gas for users of greenhouses in the Netherlands.[32]

As regards the obligation of informing about the governmental aid, it should be pointed that only the first sentence of Art. 93(3) of the Treaty is applicable to trade in agricultural products determined in Art. 4 of the regulation 26/62. It is not the case for the last sentence prohibiting the Member States from granting different forms of aid before the passing of an appropriate decision by the Commission and the recognition of its direct effect according to the criteria determined in the case- law, starting with the famous case 6/63 *Costa v. ENEL.*[33]

On the other hand, the Commission avails itself to a high degree of the principle declared in cases 15 and 16/76 *France v. Commission*[34] according to which the European Agriculture Guidance and Guarantee Fund could deny the payment of resources provided for a given Member State within the framework of common market organization, if that state illegally grants additional aid on its own. In this case the French authorities illegally added its own national aid to the common one, addressed to the destilation of wine. It was pointed that it was impossible to determine what amount of wine would have been destillated, had France not granted its own aid. Consequently, the Fund was not obliged to compensate any part of the French aid.

Still, the authorisation of national aid in the framework of the common organization can be granted by the Council. For example, Art. 3(1) of the Council Regulation 855/84 (regulating i.a. changes in the system of compensatory amounts) determins the destination of aid granted to the German farmers as a compensation for the revaluation of the German currency (which would result as such in the fall of the guaranteed prices expressed in DM). The aim to be achieved was the compatibility of this aid in the common market and its conformity with the Treaty principles inserted into a given common organization.

In all cases of the lack of common organizations, there are no general principles of governmental aid with respect to agricultural products. It was emphasized by the Court in case 114/83 *Société d'initiatives v. Commission*[35] concerning with the potatoes market. There can still be some difficulties, when the rule of free movement is applicable to products not covered by any common organization and in lack of common rules of governmental aid with respect to these products. It was just the subject of a famous (but not of the best fame) case 232/78 *Commission v. France*[36] concerning mutton. In this case France claimed that the British system of supplementary payments was in fact a form of state aid. The Court ruled however that France could neither ban nor limit imports of mutton availing itself of the aforementioned benefits. The Court only suggested that till the establishment of a common organization France should use its own system of benefits in this sector.

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31 Decision 315/83.
32 Decision 215/85.
33 *ECR* 1964, 585.
34 *ECR* 1979, 321.
35 *ECR* 1984, 2589.
36 *ECR* 1979, 2729.

A more universal solution was found in result of the frequent referring to Art. 46 of the Rome Treaty. According to this article, *(w)here in a Member State a product is subject to a national market organization or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State, a countervailing charge shall be applied by Member States to imports of this product coming from the Member State where such organization or rules exist, unless that State applies a countervaling charge on export.* As can be seen, countervailing charges are provided in the case of low (subsidised) prices of exported products resulting from national systems of pro-productivity measures.

Though the scope of application of this provision was narrowing in result of the establishment of several market organizations, it was still referred to after the end of the transitional period in several Commission regulations, i.a. the ones imposing countervailing charges on imports to Germany and Benelux of non-aromatised ethyl alcohol originating in France, though it was expressly put by the Commission (according to the annexes to the regulation 1407/78)[37] that the core of the problem lay in the lack of the common rules of state aid in that sector to be determined by the Council.

The application of Art. 46 of the Treaty was confirmed by the Court, which ruled in case 337/82 *St. Nikolaus Brennerei v. HZA Krefeld*[38] that the article could be referred to not only at the moment of the sanctioning of the national market organization but also in cases of incompatibility of national measures with the Community law. In the latter situation countervailing charges can be combined with the institution of proceedings against a given Member State on the basis of Art. 169.

Although countervailing charges resemble at the first sight duties on imports from other Member States, it must be remembered that they are not imposed by any state but by the Commission itself and then only put into life by a given Member State. In the aforementioned case of the mutton market it was put very clearly that France could not impose such charges unilaterally with respect to the alleged subsidisation of British mutton and veal exported to France. Still, what we can suggest is the broadening of the scope of governmental aid (taking into consideration social and regional aspects) and covering by it all agricultural products in general.

## IV. Supplementary payments in the framework of the common market organizations

According to Art. 40 (3) of the Rome Treaty common market organizations may include aids for the production and marketing and in some of them a system of subsidies is introduced as it was in the case of oil plants named in the Council Regulation 136/66[39] and wheat covered by the common market organization for cereals.[40] If such subsidies are used in the whole of the Community, there is no problem of intra-EC trade in such

[37] OJ 1976 L 170/24.
[38] *ECR* 1984, 1051.
[39] JO 1966 p. 3025.
[40] Regulation 2727/75 Art. 10 (OJ 1975 L 281/1).

products. Such problems may emerge if subsidies and intervention purchase function as alternative methods of support, because then the prices in the Member States tend to fall.

So, the Council Regulation 1837/80[41] on the common market organization on the mutton market, authorising the United Kingdom to choose flexible slaught premiums, and the Council Regulation 1347/86,[42] authorising exceptionally the UK to grant slaught premiums for horned cattle, require the return of premiums or special export payments before the leaving by the goods of the territory of the state, in which they have been granted. So, the system of Art. 46 is applied also with respect to common market organizations, if distortions of competition take place.

Still practical problems may occur if different methods of aid are used within the framework of a single common market organization, both with respect to costs or to prices. Though the regulation 1347/86 continued to authorise the UK to grant slaught premiums for horned cattle, it stipulated that only 40% of the costs could be covered from the sources of the European Agriculture Guidance and Guarantee Fund. The question of the compulsory return of premiums was examined by the Court, as the UK brought actions for annulment of two Council regulations to the extent in which they imposed an obligation of the refund of premiums with respect to such products of mutton which had neither qualified for, nor benefited of those premiums. In the opinion of the Commission such products benefited of premiums in an indirect way.[44] The Court found such a requirement to constitute an obstacle in intra-EC trade and ruled that it was justified only with regard to products directly benefiting of premiums.

## V. The Status of Special Rules Governing Agriculture

The provision of Art. 38 (2) of the Treaty according to which the normal rules of the common market are applicable to agricultural products "(s)ave as otherwise provided in Articles 39 to 46" can be interpreted as referring to deviations from the normal principles of the Treaty advantageous for the agricultural products, *i.a.*, Art. 42 as regards the rules of competition. We can interpret it also in such a way, that the general principles of the Treaty should be supplemented by special legislation regulating agriculture.

The first problem was considered in case 83/78 *Pigs Marketing Board v. Redmond*.[45] The case concerned the system of trade in pigmeat operated by the Pigs Marketing Board of Northern Ireland.This body, according to the UK, was to be classified as a "state monopoly" in the light of Art. 37 of the Rome Treaty, so the UK saw no necessity of changing the system in question before the end of the transitional period (31 December 1977) according to Art. 44 of the 1972 Act of Accession. The Court remarked that production and trade in pigmeat were regulated by a common market

[41] OJ 1980 L 183/1.
[42] OJ 1986 L 119/40.
[43] 2 *CMLRep.* 98 (1988).
[44] See additional provisions to the Commission Regulation 9/86, OJ 1986 L 2/14.
[45] *ECR* 1978, 2347.

organization (then in the Council Regulation 2759/75),[46] binding for the UK since 1 February 1973 due to Art. 60(1) of the Act of Accession. In the opinion of the Court the Treaty provisions regulating agricultural policy had priority over other provisions dealing with the common market, due to Art. 38 (2). So, a longer deferment of payments granted to state monopolies was not applicable in this case. The rules of common organization assumed free access of each producer to the market regulated exclusively by that organization, any national measures excluding the freedom of commerce in a given Member State being incompatible with those rules.

The principle of priority of the agricultural legislation was the subject of case 177/78 *Pigs and Bacon Commission v. McCarren*[47] dealing with payments collected by the Irish Pigs and Bacon Commission and used i.a. for the financing of export premiums. The aforementioned principle in the context of a state monopoly was considered in a case dealing with the provision of one of the regulations establishing a common organization, according to which Art. 92–94 of the Treaty were to be applied, save as otherwise provided by the regulation in question. It was stated that the application of the general rules of state aid (which admit some forms of aid, but may not form any bases of individual claims) was in conformity with the rules of functioning of common organizations. Though neither the Council regulation 2759/75 dealing with a common market organization for marketing of pigmeat, nor the rules of the free movement of goods (which are recognized as an integral part of the latter) prohibited granting of slaught premiums, in the opinion of the Court the principle underlying the regulation of the common organization required the preservation of the free movement of products covered thereof at the prices resulting only from the common market mechanism. So, neither states, nor their mandatories could benefit from any sales privileged in result of such financial instruments as premiums. Consequently, export subsidies cannot be paid when there is a common market organization, irrespective of the generally binding rules of governmental aid.

## VI. The Legal Requirements Binding upon Common Market Organizations

As it has already been noted, normal principles of the freedom of movement are applicable to agricultural products if there is no common market organization, the existence of any national one being irrelevant.[48] Still it is very important if we have to do with a so called legal vacuum (characterised by the lack of unilateral protective measures taken by the Member States). In case 68/76 *Commission v. France*[49] (dealing with French restrictions on imports of potatoes) France claimed that in lack of common market organization Member States could take measures based on Art. 39–46 of the Rome Treaty and derogating from the freedom of movement of goods. The Court

[46] OJ 1975 L 282/1.
[47] *ECR* 1979, 2161.
[48] Case 288/83 *Commision v. Ireland, ECR* 1985, 1761.
[49] *ECR* 1973, 515.

ruled that after the end of the transitional period Art. 39–46 no longer justified deviations from the prohibition of Art. 34, even in lack of common organizations. The Court ruled also that the situation in question was far from being a legal vacuum to be filled by Member States, as in result of the transfer of powers on the Community it was up for the latter to solve the problems (in that case – the shortage of potatoes) with the use of appropriate measures taken in the interest of the Community producers and consumers.

A similar view was expressed in case 232/78 *Commission v. France*[50] dealing with trade in mutton. The Court recognized the importance of the subject and repeated that after the end of the transitional period it was just the Community to incur responsibility for matters granted to it expressly. So, no activities can be based on unilateral decisions of interested Member States. It is also the case despite the existence of a national market organization contrary to the requirement of free movement of goods.

The fact of the exclusion of unilateral measures of Member States, save when they are in conformity with the Treaty, was emphasized once again in case 288/83 *Commission v. Ireland.*[51] According to the Court, Ireland could not hinder imports of potatoes from Cyprus to the United Kingdom. Fisheries is the best illustration of the principle of the abstention of Member States from taking unilateral decisions in lack of common organization or policy. According to Art. 102 of the 1972 Act of Accession of the United Kingdom common policy with respect to the preservation of the fisheries territories was to be determined till the end of 1978 (in fact, it took place in January 1983). The situation after 1978 was examined in case 804/79 *Commission v. the United Kingdom.*[52] The UK argued that even after the lapse of the aforementioned period Member States preserved their rights and dutics till the time of the full execution of the rights by the Community. However the Court ruled that Member States could no longer execute their rights with respect to the protection of the waters under their jurisdiction, at least as regards the resources to which fishermen from other Member States had equal right of access (this did not determine the character of waters under exclusive jurisdiction). What was more, the lack of measures taken by the Council did not as such return Member States their former powers of unilateral action in a given field. It was the result of the full and definitive transfer of powers on the Community. This judgment followed the one, given 10 years earlier in a case emerged in connection with the Euroatom Treaty.[53] The there Court ruled that the Community could not be deprived of its rights, save as otherwise provided by the Treaty itself. In effect, the measures of protection of the waters remained in their form from the end of 1978 and were said to undergo such changes as followed from the changes in the exploitation of the environment and in technology. However, Member States cannot introduce new rules for the protection of waters. As regards provisional measures and changes of

[50] *ECR* 1979, 2729.
[51] *ECR* 1985, 1761.
[52] *ECR* 1981, 1045.
[53] Case 7/71, *Commission v. France*, *ECR* 1971, 1003,.

these measures, Member States can only act on behalf of the Commission, consulting the measures in question with the latter, applying for the approval of the Commission and giving up these measures, which have not been accepted by the Commission.

Such an approach of the Court can be however understood as the consequence of the existence in this respect of the exclusive, external competence of the Community infisheries matters.[54] In this field both external and internal aspects are so strictly connected with each other that the exclusive character of the former must be reflected in the latter. So, the provisions regulating common market organizations or policies are accompanied by an actual necessity of their existence, especially if there is a need of intervention or protective measures.

[54] Joined cases 3, 4 and 6/76, *Kramer*, *ECR* 1976, 1279.

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# The EEC Convention on the Law Applicable to Contractual Obligations of 19 June 1980 as a "Model" of International Legal Regulations of Obligations in Domestic Legal System, with Special Regard to the Polish Law

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**1.** The Convention on the Law Applicable to Contractual Obligations, set out for subscribing on 19 June 1980 in Rome therefore called in short the Rome Convention, came into force on 1 April 1991, after a performance of ratification by the seventh State (Art. 29 of the Convention), which was the United Kingdom. Since then it has become the EEC[1] obligatory law of the States, which have ratified it.[2]

It is an interesting thing resolutions of the Convention have been observed in different countries of the Community as early as before the Convention's coming into force. In some States they have been adopted by internal law through a legislation (Denmark – 1984; Luxembourg – 1986; FRG – 1986; Belgium – 1987), becoming a part of their positive law. In other States (e.g. France and Holland) jurisdiction has been based on them; there has been recognized, that they have reflected principles generally accepted in all countries of the EEC.

Works on the Convention's preparation have lasted comparatively for a long time. They have been taken up within a space of the aim for unification of the law of courts' competences and an enforcement of judgments and also of the private international law (cf. the 2nd sentence of the preamble). After an elaboration of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, with the Luxembourg Protocol of 3 June 1971 concerning the Interpretation of this Convention by the ECJ done by the EEC Court of Justice in Luxembourg, it was recognized that it was the right time to unify the law of conflict of laws. On 8 September 1967 a representative of Belgium, on behalf of the States of Benelux, brought on an appropriate subject for discussion to the EEC Committee, proposing a draft of the private international law of Benelux, just as worked

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[1] After coming into force of the Treaty of Maastricht – since 1 November 1993 the European Union.

[2] E. J a y m e, Ch. K o h l e r: Das Internationale Privat und Verfahrensrecht der EG 1991 – Harmonisierungsmodell oder Mehrspurigkeit des Kollisionsrecht, IPRax, 1991, 6, p. 361 etc., G. H o h l o h (in:) Handkommentar zum BGB, 9th edition, Aschrendorff Münster, p. 2533–2535.

out, as a base for works of codification. In October 1969 it was admitted that it was advisable to prepare the uniform private international law in a shape of international convention for the States of the Community, containing a general part and law of property and obligations. It was considered by this means it prevented non-controlled regulations of rules of the law of conflict of laws in particular countries, which would cause further differentiation. A lack of the uniform law of conflict of laws, under great dissimilarities of a substantive law's regulation in particular Member States, has influenced a mutual turnover negatively. The unification of the private international law, according to its author's assumptions, has been to cause an increase of legal safety and simplify a commercial intercourse.

Experts, preparing the draft, have limited a range of their work to the problems of contractual and non-contractual obligations. The preliminary draft was elaborated and presented in September 1972.[3]

After an addition of representatives of the United Kingdom, Denmark and Ireland to a group of experts[4] it was decided specialists had to confine themselves to regulating of contractual obligations only in the Convention. Solutions of the preliminary draft, connected with non-contractual obligations, have met with a critique, especially of representatives of the United Kingdom.

After a finish of codifying works a final text of the Convention was set out for signature by the EEC Council on 19 June 1980. On the same day representatives of Belgium, FRG, France, Italy, Ireland and Luxembourg signed it; the UK joined them soon. The text was announced with motives (a statement) elaborated by two members of the group of experts – M. Guiliano and P. Lagarde.[5]

The Rome Convention, contrary to the Brussels Convention of 27 September 1968, has not become complete by a protocol, foreseeing a possibility of the interpretation of its regulations done by the EEC Court. This lack was in part removed by two protocols of 19 December 1988, in consequence of which law courts of the Member States can apply to the Court in Luxembourg for a performance of the interpretation of the Convention's resolutions,[6] though it is not obligatory. This is a question of great importance for an unified law. As a lack of an instance, authorized to perform the valid interpretation, can notably annihilate the aim, which is wanted to be achieved through the law unification.

**2.** It is not a task of the present notes to describe the whole of the legal problems connected with the Convention. Simply it is impossible. As all questions of the law of

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[3] W. P o p i o ł e k: Zobowiązania z umów w projekcie konwencji Europejskiej Wspólnoty Gospodarczej o prawie właściwym dla zobowiązań umownych i pozaumownych, *Problemy Prawne Handlu Zagranicznego*, 133 (1979), and the literature quoted there.

[4] After accession of these States to the EEC.

[5] *JOCE* 1980, L. 266 and C 282; cf. O. L a n d o: The EEC Convention on the Law Applicable to Contractual Obligations, 24 *CMLR* 159ff (1987), which contains the Convention's history and its solutions against a background of a legal state in the particular Member States.

[6] H. G a u d e m e t T a l l o n: Entrée en vigueur de la Convention de Rome du 19 join 1980 sur la loi applicable aux obligations contractualles, *RTDE* 637ff (1991) and Le nouveau droit international privé européen des conrats, 17 *RTDE* 9ff (1981).

conflict of laws, referring to contractual obligations, should be included in the works, what would exceed even a range of one monograph. Besides, so many papers have been made on the Convention, that in 1988 their list exceeded 20 pages.[7] It should be added, most papers in their considerations go beyond problems taken up in the motives (the statement), elaborated by M. Guiliano and P. Lagarde, but not much.

My purpose is a presentation of a couple of general notes, referring to the executed unification with coincident setting to work of certain particular questions, which can become important in practice. Besides, the right thing to do is to answer a question, if and on what scale rules of the law of conflict of laws, unified in the Convention, should have an influence on the Polish regulation of these problems.

**3.** A resolution of the Convention ought to be admitted to be a notable legislative achievement. As it is generally known, the regulation of questions of the law of conflict of laws with reference to contractual obligations affords a lot of problems. It is difficult to find the solution, which satisfies everyone. A discussion on this subject has gone on for decades; new conceptions are put forward permanently. It would be the best of all if, with reference to contractual obligations, it comes to as extensive as possible unification of substantial law. A good step in this direction are e.g. conventions, introducing the unified law of international sale of movable goods; the first – the Hague Convention of 1964 and the following – more adapted with needs of the moment – the Vienna Convention of 1980, which has been ratified by 28 countries.[8] Works at the codification of world commercial law[9] have been taken up at UNIDROIT's suggestion. Similar purposes are realized within the EEC, what is also conform to the resolution of the European Parliament of 26 June 1989 connected with an elaboration of a civil code for the Community.[10] At last, the discussion on the unified commercial law has been initiated within UNCITRAL.[11] A general unification of substantial law is still a question of the distant future. For the present it would be well if already elaborated conventions obtain more universal approval, e.g. the Vienna Convention of 1980, just mentioned.

Under the circumstances, the unification of rules of the law of conflict of laws has been a necessity, if within the Community it has been to come, at least on a certain scale, to harmonizing of decisions of the court, connected with the matters of contractual obligations, which serve the main aim of the Union – an economic co-operation.

[7] F. R i g a u x: Examen de quelques questions laissées ouvertes par la convention de Rome sur la loi applicable aux obligations contractuelles, 24 *CDE* 306 (1988). In the present elaboration I informs only of chosen items of the literature ot this subject. To continue to do it I would like to recommend the article of P. L a g a r d e: Le nouveau droit international privé des contrats apres l'entrée en vigueur de la Convention de Rome du 19 juin 1980, 80 *RCDIP* 287ff (1991).

[8] F.J.A. van der V e l d e n: Ratifikation des Wiener Kaufrechtsübereinkommens durch die Niederlande, IPRax 58/59 (1992).

[9] J. R a j s k i: Koncepcja stopniowej kodyfikacji prawa handlowego w skali światowej, *Problemy Prawne Handlu Zagranicznego*, 9ff (1987).

[10] W. T i l m a n n: EG-Kodifikation des wirtschaftlichen Zivilrechts, IPRax 62 (1991). O. L a n d o: Principles of European Contract Law, 40 *AJCL* 573ff (1992).

[11] F. D i e t r i c h: Chancen und Ziele von Einheitsrecht für den internationalen Handelsverkehr, IPRax 408 (1992); the article contains a report on the Congress "Uniform commercial law in the twenty-first century", which was held between 18–22 May 1992 in New York City.

However, there arises a question whether appropriate means have been chosen. The Treaty of Rome, creating the EEC, doesn't prefer any methods of unification; it puts up with law harmonizing, inclusive of – in case of need – the possibility of full unification. With reference to the rules of the law of conflict of laws an international agreement has been chosen as a form for unification, and that in a traditional shape, that is – regulations of the law of nations and the private law – in this case – of conflict of laws (traites-lois) are contained in the Convention. Therefore, one has rejected not only a form of a "standard" act (lois-modèles), but also – a form of a treaty, containing only the international obligation of introducing of an unified act, being an annexe of a convention, into the internal law (traites-contrats). The reason of this surely has been an inclination of a peculiar "discipline" of members of the Community through a deprivation of a possibility of changes' performance in unified regulations while incorporating of them into domestic legal systems, except those which result from a competence to perform conditions, provided for in the Convention (Art. 22).[12] Initiating works, it surely has been taken into consideration, a number of members of the EEC will increase and some countries, newly accepted, can display indisposition to adopt solutions proposed by the convention. Obviously, a passage of the convention in so rigorous shape does not exclude a possibility that it will be an example of performing of the codification within a field of the private international law for other countries.[13]

**4.** The Convention refers to contractual obligations only. However, it has been noticed[14] that during observing of the convention there can arise doubts, because a difference between obligations resulting from contracts and obligations, which come into existence from one-sided acts in law, often becomes obliterated; it can happen e.g. in case of a public promise.[15] A qualification will have to be made with regard to Art. 18, under which, while performing of the interpretation and using of uniform regulations, their international quality and an aspiration for attaining of an uniformity within the interpretation and the use of conventional rules should be taken into account. Such an expression is not new. It is used in, e.g., the Vienna Convention on International Sale of 1980 (Art. 7.1.) and the Hague Convention on the Law Applicable to International Sale of Goods of 22 December 1986 (Art. 16). It refers to a functional interpretation (qualification). But such a statement explains nothing at all, considering a natural inclination of law court to do the qualification according to *legis fori*. Most certainly, the Court in Luxembourg will have to express its opinion in these matters.

[12] It is characteristic that on the session of UNCITRAL in 1992, during debates on the uniform law for the international trade, it was stressed that an appropriate form of the unification is traité-contrat. The Vienna Convention of 1980 was given as an example, comparing it to the Hague Convention on International Sale of 1964; as it is well known the last one used a traité-loi and not a traité-contrat method; cf. F. Diedrich, *loc. cit.* Without prejudice of an usefulness of the unification's methods we should deep it in mind that for the most part substantial reasons have decided on the greater success of the Vienna Convention, and not – a type of the convention.

[13] H.U. Jessurun d'Oliveira: Universalisme ou regionalisme de la Conférence de la Haye, *RDIP* 363 (1966).

[14] Cf., e.g., H. Gaudemet-Tallon: Entrée..., 637.

[15] K. Zawada: Przyrzeczenie publiczne 154 (1987).

**5.** The Rome Convention applies only to treaties of an international nature. However, it doesn't use this designation surely in consideration of its small precision and ambiguity.[16] Art. 1.1. resolves that the Convention's regulations reefer to contractual obligations of factual states, which are connected with the law of other countries. Should it be accepted, this connection must have an objective character. So, it is not enough to choose on foreign law, even if this choice is connected with a designation of foreign court or arbitration (cf. e.g. Art. 1 of the Hague Convention IV on the Law Applicable to International Sale of Goods of 22 December 1986, in which this principle is provided expressly). However, the connection can bee whichever one; e.g. there is not an obligatory requirement of parties to have their seats in different countries (cf. e.g. Art. 1 of the Vienna Convention and Art. 1 of the Hague Convention of 22 December 1986). Such a solution is a result of existence of a special tie between the EEC Member States, which allows to conduct economic activities on the whole area of the Community, regardless of physical person's citizenship and a national status of corporate bodies.

**6.** Under Art. 1.2–4 the Convention excludes a number of obligation's contracts and states, and also – relations, belonging to the private law or being connected with it by functional connections, from its application. A detailed discussion of these matters would go beyond framework of this study. However, it is generally possible to divide excluded cases into a few groups in consideration of the reason of their extraction from the use of the Convention. First of all, it refers to questions of the status and legal capacity of natural persons (Art. 1.2a). Besides, under Art. 11 an important exception to the exclusion was declared in the interest of the trade safety. In case of a conclusion of a contract, performed by persons being in the same State, a physical person with the capacity according to the law of this State can quote a lack of the ability, resulting from the law of another country, only when the other party knew it at the moment of the conclusion of a contract or didn't know it because of a neglect. Here we meet a complete rule of the law of conflict of laws, based on similar ration legis as Art. 10 of the Polish conflicts of laws act, constructed as an *ex-parte* rule, moreover containing an additional condition in a shape of the place of performance in Poland. The application of the Convention is also excluded with reference to different types of corporate bodies, including of companies (Art. 1.2e). With regard to this question the separate Convention on Mutual Recognition of Companies and Bodies Corporate of 26 February 1969 was negotiated. Besides, on the strength of the Treaty of Rome a creation of an "European company" is provided. However, a question of the law applicable to a civil corporation can awaken doubts within this field.

Farther exclusion contains contractual obligations of the family law and the law of succession (Art. 1.2b). It results not only from the nature of things, but also from the Treaty of Rome, which refers to the economic problems.

The obligations, being amenable to a special convention's regulation, e.g. of bills of exchange and cheques (Art. 1.2c), and a special domestic regulation (an insurance contract – Art. 1.3 – but without re-insurance contracts – Art. 1.4) were excluded too.

[16] J. S k ą p s k i: Międzynarodowy charakter umowy sprzedaży (in:) *Studia Iuridica Silesiana* 210 (1979).

The Convention doesn't also contain the problems of a power to contract an obligation on behalf of a mandatory with reference to third parties and the problems of a range of competences of corporate bodies' organs (Art. 1.2f). Taking this into account, there can arise problems connected with obligation's contracts, which are, through a presumption of law, in the connection with the power or an oblique substitution (e.g. a commission or mandatory contract). Moreover, trust acts in law, inclusive the constitution of trusts, known in the Anglo-Saxon law especially, were excluded (Art. 1.2g).

Finally, contracts on the court of conciliation and contracts on the competence of a court (Art. 1.2d) and questions of the evidence and proceedings, in other words – procedural questions (Art. 1.2h), were excluded from the Convention's application. However, to avoid doubts article 14.1 provides the solution that legal presumptions and a problem of weight of evidence come under legis causae; so, these questions go into the range of obligation's statutes. Such a solution is correct most certainly. But the Convention doesn't confine itself to it. The Convention declares a possibility to produce evidence of the act in law as well according to legis fori as according to the law applicable to a form (Art. 9), if such producing of the evidence is possible before a court (Art. 14.1).

**7.** The meaning of rules of the law of conflict of laws, contained in the Convention, goes beyond borders of the Member States of the Community. As they substitute for the regulations of domestic private international law within a field regulated by the Convention. So, the Convention's law of conflict of laws indicates not only systems of the domestic law in the States – the parties of the Convention, but also in the third countries (Art. 12) as the applicable law. Such an extension of the application of regulations, uniformed by the treaty, contributes to their generalization and – indirectly – also to the unification of solutions. It is a method used in different conventions since a long time, especially – in the Hague conventions.[17] So it is good this method is used in the Rome Convention too.

**8.** The law of conflict of laws indicates the law applicable to an organ of the States, as a rule the law court observing the law in concrete case. It is a different situation, when a litigation is investigated by the court of conciliation.[18] As it is well known, the court of arbitration, even a permanent one, situated in the certain State, is not bound by rules of the law of conflict of laws, either by domestic rules or by conventional rules. And so e.g. according to Art. VII § 1 of the European Convention on International Arbitration of Trade of 21 April 1961, written out in Geneva, the parties can choose the applicable law. If they don't do it, arbiters should use a principle of the law of conflict of laws, which they admit to be most appropriate. But in both cases they should take resolves of a contract and commercial customs into consideration. It seems that within the Community arbiters will be disposed to observe the rules of the Convention. As these rules realize principles, which are common for all these countries and which warrant the regulations of the Convention. Besides, it should be accepted

[17] W. Popiołek, *op. cit.*, 35.
[18] F. Rigaux, *op. cit.*, 309ff.

the parties can indicate the Convention as a source of the solution of problems of the law of conflict of laws in the contract. I think they can do it, even when they have made their choice of the law. Then regulations of the Convention decide all other questions (e.g., a form of act in law, a range of obligation's statutes, a function of the rules positively obligatory, etc.). Because the choice of the law of conflict of laws, also – of the specified State, is completely independent of the choice of the law applicable to a contract.

**9.** How do the regulations of the Convention stand in a general design and a certain simplification? The choice of the law came to the fore. In case of a lack of this choice the contract comes under the law of the State, with which is connected closely of all. Then a presumption of an existence of the closest connection with the law of the State, in which a party, being to perform a specific obligation, has the permanent address at the moment of entering into the contract or, if it is a corporate body, headquarters have the seat, was provided. Here I leave out of account of more detailed solutions and special treatment of the application of the rules positively obligatory.

In its basic conception of the solution of problems within the law of conflict of laws the Convention doesn't show any innovation, if we take a legal state of countries, which have taken part in its elaboration, into consideration. As the choice of the law has been accepted everywhere, while it has been many a time only a decisive factor of a contract's "localization" or of finding the law applicable to it differently. In case of a lack of indication of the law, done by the parties, flexible methods of its finding, without the use of fixed points of contact, have been used; the only one exception to it has been the Italian law, using a point of contact called locus contractus.[19] Works in a small group surely have made works of codification easier, what does not mean that during resolving of different questions as well of a general nature as of a special one various difficulties haven't arisen.

However, a novelty has been the use of a notion of characteristic performance, first elaborated within the science and then adopted by the Swiss jurisdiction. Nowadays, it is a method accepted more and more commonly. To-day with the help of the theory of characteristic performance some people try to base detailed solutions, contained in some systems of the law of conflict of laws; clearly this theory was realized in the Swiss law (Art. 117 of the Act of 18 December 1987); the Austrian law also made use of it (§ 36 of the Act of 15 June 1978), though it didn't use this qualification clearly. However, we can doubt, whether the use of the notion of specific performance really advances a knowledge of resolving of problems of the law of conflict of laws within a field of contractual obligations.[20] Surely, it is an exaggeration to say that the theory of characteristic performance was made in Switzerland because performances of hotel-keepers and sale of the Swiss watches were taken into account first of all.[21] But it is also glaring the theory is not an universal solution of all problems of the law of conflict

[19] Art. 25 of the civil code of 1942.

[20] M.A. Zachariasiewicz: Teoria charakterystycznego świadczenia w doktrynie i orzecznictwie zachodnioeuropejskim, *Studia Iuridica Silesiana*, 51 (1978).

[21] H.U. Jessurun d'Oliveira: "Characteristic Obligation" in the Draft EEC Obligation Convention, 25 *AJCL* 328 (1977).

of laws within the field of obligation's contracts. A proof of the truth of this statement is a range of solutions used in the Rome Convention.

**10.** A principal method of the indication of the law applicable to contractual obligations is the choice of the law, done by the parties. So, here we deal with the choice of the law of conflict of laws.

According to the rules, laid down in this range years ago, the parties are not restricted in the choice of the law; so they can choose every regulation, even this one, which is not connected with the contract; they also need not prove a personal interest, which they have in the choice of definite law. In this situation, it cannot awaken any doubts, they can choose a "neutral law". But it has to be the law of the specified States. So, we can say that according to the Convention there cannot arise such a situation, when the contract doesn't come under any positive law. Therefore, authors of the convention separated themselves decidedly from a conception of autonomous business man's (commercial) law, existing apart from all legal systems. It is an important question, because a problem of legis mercatoriae reappears permanently and most certainly it still will be a question of the moment with regard to contracts connected with many countries.[22]

The choice of the law can be explicit or implied one; this second eventuality is formulated rather in detail: the choice has to result from solutions of the contract or from circumstances of a definite case sufficiently certainly. This formulation approximates a purview of Art. 7.1 of the Hague Convention on the Law Applicable to International Sale of Goods of 1986. From these it appears that the Rome convention does not permit of so-called hypothetical will of the choice of the law. However, this question can possibly arise on an assignation of the applicable law basing itself on the principle of "the closest connection". It was stressed clearly, just as in above-mentioned the Hague Convention, the choice can comprise the whole contract or its part only. Such a possibility has been permitted in the science and jurisdiction for a long time. Besides, the doubt arises if this problem should be regulated in the rule clearly. As it is a specific stimulus for a split of a legal relation. Nevertheless, the Convention is to be instrumental to the legal safety according to its authors. While an exposing of the obligation to two or three regulations does not serve this purpose. As the possibility arises we should aim at the uniformity of the obligation's statutes.

Under Art. 3.2 the convention, the choice of the law can be made also after an origin of the obligation and the applicable law can be changed through the later choice at all times (so-called the sequent choice of the law). From this fact it surely appears, that the choice can be done during legal proceedings too. There is an essential difference between these two situations. The choice, done during the legal relation, is "from then on". However, the choice, made during legal proceedings, as a rule aims at smoothing away of doubts connected with the applicable law, which should be used with reference to a question being a matter of dispute.[23]

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[22] A. K a p p u s: "Lex mercatoria" als Geschäftsstatut vor staatlichen Gerichten im deutschen internationalen Schuldrecht, IPRax 137 (1993).

[23] F. R i g a u x, *op. cit.*, 114ff.

The Convention does not give any advice regarding a delimitation of being in force of the statutes at that time. We should accept the parties can do it in their agreement, introducing the change. If they did not do it, we should use an universal intertemporal rule as a base, existing under the change of statutes. According to this rule the delimitation ought to be made under the principles of the intertemporal law, belonging to a legal order introduced by the sequent choice of the law.

However, under Art. 3.2 in fine we meet a rule that the change of a qualification of the applicable law, done after the conclusion of a contract, doesn't violate its force considering a form in the meaning of Art. 9. It is not a precise formulation. As it suggests the force of a contract can be shaken because of the other causes of its invalidity (e.g. its purport is incompatible with a new law). Such a conclusion would be difficult to be accepted and surely it would not consistent with a common sense.

Here directions appear, according to which the change of the applicable law cannot violate rights of the third parties. This formulation also can cause a lot of doubts in practice, at least it should be admitted that the precise formulation of this valid rule is not easy and even surely impossible.[24]

The force of the parties' agreement of the choice of law is estimated according to the applicable law (Art. 3.4). From this fact it appears that the Convention deals with the choice of the law as the contract, which admissibility results from the rule of the law of conflict of laws. This accepted solution should be admitted to be correct, but in the science it is often called in a question as impossible to be accepted logically. However, in the private international law we often meet a similar "lack of logic". Even so, practical reasons have to prevail. Such a solution was accepted in Art. 2 of the Hague Convention of 1955 on the Law Applicable to International Sale of Movable Goods. But it is characteristic that the Hague Convention of 1986, regulating the same problems, doesn't contain an equivalent of this regulation. Apparently, it was recognized that leaving this question in the science and jurisdiction is more appropriate. I do not consider it fitting.

The Convention, although refers to international treaties clearly, contains an additional protection against the choice of foreign law with reference to obligations of an internal nature i.e., situated within one State. The regulation of Art. 3.3 declares the performance of the choice of foreign law in such a situation cannot violate mandatory rules of the applicable law. For the safety it was added, following the example of Art. 1.4 of the Hague Convention of 1955, that an insertion of a resolve on competence of a foreign court in a contract of that kind is negligible.[25] Finally, the choice of the law, done in these circumstances, has only a substantive nature.

The Convention does not touch a problem of admissibility of the insertion of a clause connected with an invariability or a stabilisation of the law, done by the parties in the contract. A resolve of that type aims at submission of the contract to the law of the specified State and of the particular moment (e.g., of conclusion of the

[24] W. Popiołek, *op. cit.*, 139.

[25] In reference to the contract of international nature a principle *qui eligit iudicem, eligit ius* can be considered as one of elements indicating a performance of a choice of the law by implied means. But in no case it acts automatically.

contract). This clause can also refer to the law, provided directly by the rule of the law of conflict of laws. The parties aim at avoiding of results, which can arise as an effect of later changes, done in the applicable law, especially – within a range of mandatory rules.[26] In my opinion a manipulation of this kind shouldn't be efficient. As the obligation's statutes are part and parcel of the specified legal system and have to cast in its lot with it within the changes, which every law under-goes. An under-mentioned resolution of the Institute of International Law of 1991 contains, within this question, a separate resolve (Art. 8), according to which the stabilzing clause causes only results of the substantive choice of the law.

To sum up comments, refering to an autonomy of the parties' will within the private international law, it should be memorized that it is a problem, which still awaken a large interest of the science. A proof of it is, e.g., a fact that these problems were considered on the 65th Session of the Institute of International Law, held in Basel in 1991. There was passed a resolution, elaborated E. Jayme. It contains interesting solutions formulated very clearly.[27]

11. In case of a lack of the choice, the contract is governed by the law of the State, with which is connected closely of all.[28] However, if a part of the contract can be separated from the rest and shows its closer connection with another country, exceptionally – the law of this country can be used to it (Art. 4.1). It is accepted that this is a method of the objective indication of the law applicable to the contract. So, here we cannot use the hypothetical will as a medium of the connection of the obligation and a specified legal area.

This conception undoubtedly is derived from Savigny and his theory of a seat of legal relation. A problem resolves itself into giving of contents to this idea. The essence has changed many times for the last hundred and several dozen years. The central idea of this conception has been the discovering of an elastic canon, owing to which the real obligation can be ascribed to the definite law. However, there is no doubt about it in most of the fully developed countries of Europe the canon has been accepted in different shapes. In the U.S. it has been expressed in § 188(1) of the Restatement II, in a formulation "the most significant relationship". Later it has been used in Art. 117(1) of the Swiss law, under the influence of the Rome Convention partly. Thereby, a backward trend of fixed (geographic) solutions within the law applicable to contractual obligations, based on the whole system of subjective and objective points of contact, has begun. However, this is not the place for treating of this problem.

There arises a question, what the closest connection is, considering methods of the connection between the obligation's contract and the definite legal system. Most certainly, it is not a connecting factor according to the previous interpretation of this term.[29] The question is only to tell the court this means, by which it has to use the law

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[26] F. R i g a u x, *op. cit.*, 319ff.

[27] E. J a y m e: Die Parteiutonomie im internationalen Vertragsrecht auf dem Prüfstand – 65. Sitzung des Institut de Droit International, IPRax 429 (1991).

[28] P. L a g a r d e: Le principe de proximité dans le droit international privé, 196 *RCADI* 33ff (1986).

[29] F. J u e n g e r, *op. cit.*, 68ff; M.A. Z a c h a r i a s i e w i c z: Prawo właściwe dla zobowiązań z czynności prawnych w braku wyboru prawa w polskim prawie prywatnym międzynarodowym, 139 (1989).

applicable to the obligation's contracts. In consideration of the fact that it should be an objective method, an judge will have to inform of reasons, by which he has gone, admitting the used law to be connected with the obligation most of all. He has to the same if he uses exceptionally more than one legal system. Because it is not an judicial "choice of the law", being under his autonomous opinion. Therefore, I think the use of the definite law, as being with the contract in the closest connections, with reference to an estimation of the contract is under checking during the procedure, just as breaking of the substantive law.

Most certainly, it is the method, which – especially in case of a developed judicature and experienced judges – can conduct good solutions. It also allows to avoid an unending discussion on advantages and disadvantages of different objective connecting factor. But it is hard to accept that it ensures the legal safety.

**12.** The authors of the Convention surely have realized disadvantages, which this used conception contains. To make the conception real and – through it – to achieve at least a little larger legal safety, they introduced a presumption under Art. 4.2, finding that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of his contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. The exception to this, rule was introduced, according to which in some situations a local competence of the place of an enterprise, with which the characteristic performance is connected, is the only one. Farther exceptions of Art. 4.3 and 4 refer to the obligation's contracts connected with immovables (property) and contracts of carriage.

The use of the notion of the characteristic performance, nowadays so popular, raises a lot of doubts. A starting-point to accept it has been a conviction that in case of mutual contracts, in which the obligation of one of the parties consists in a payment, the performance different from a financial one should be stressed (such a resolve is clearly formulated in Art. 36 of the Austrian Act). However, this initial assumption can awaken some doubts. Why should an importance of the law applicable to the financial performance be reduced by this means? It is generally known, nowadays questions connected with the payment can exert a very large influence on the whole obligation. Besides, the theory of specific performance is based on quite ordinary, simply – primitive, obligation's contracts, e.g., contracts of sale. But even with reference to these types of contracts this theory will not always conduct satisfactory results under a developed international conversion. It will happen, e.g., when a producer of a final article exercises supplies of different subperformers, having their permanent residences or seats in different countries. On the other hand, it often can cause a preference of a powerful contracting party, which sells articles small purchasers of different countries. Naturally, a problem of the use of contracts of adherence is connected with it. Within the turnover we very often meet contracts, containing elements of different contractual relations, especially – complicated co-operative contracts in which it is very difficult to determine the specific performance. Examples can be propagated till a situation, when there is no such a performance in the contract.

During the works on the Convention it was obviously realized, a proof of which is Art. 4.5. Under this article it was told that presumptions should not be used, when the specific performance cannot be determined and when it results from the whole of circumstances that the contract shows stronger connections with the other State. This way we are in the starting-point; a circle has been closed. The judge has to decide the applicable law, investigating unaided, with which country the contract is connected most of all. So, basing on the theory of a characteristic performance does not lead us far away. We can venture an opinion that an attempt of the increase of the legal safety, through introducing of presumptions on behalf of the characteristic performance, has not succeeded and – anyhow – only in not many cases (e.g. of immovables) it has caused more precise designation of the applicable law. But we can cause the same result by introducing through some special regulations a solution of the law of conflict of laws appropriate to specified types of contracts, resigning an "intervention" of specific performance (e.g. in the Restatement II – § 189 etc.).

**13.** The Convention fairly initiated detailed rules, refering to consumer's contracts and to obligations of labour relations (Art. 5 and 6). These solutions meet inclinations of the moment within this field.

**14.** The law applicable to the contract contains the whole of its regulations, that is – including mandatory rules. But there is a problem of the use of regulations, which have to be used on a certain territory regardless of the fact, under which law the obligation's relation comes. These are sometimes qualified as rules of a direct influence.[30] They have a territorial nature and they "force" their competence because of a purpose, which they are to serve on the certain territory. With reference to this question the Convention contains a special regulation. Under Art. 7(2) rules of this type, being in force on the area of the adjudicating States, have to be used regardless of the law applicable to the contract. It is a correct solution. But the Convention moves on. According to para 1 of this article we can also use the regulations of this type, existing in the legal system of the other State (third), when the state of affairs shows the close connection with this States. Deciding the use of such rules, being in force immediately, their essence, subject and results, which can be caused by their regard or disregard, should be taken into consideration. It creates a possibility of far-reaching interference of the foreign law and awakens serious doubts. Surely, it could be explained only in such a situation, which is connected with protection of "the weaker party", especially during the use of contracts of adherence and of general conditions. Then the use of regulations – reducing absolutely the insertion of different clauses, unprofitable for "the weaker" contracting party, into such documents – would be explained. This rule has awakened serious doubts among the authors of the Convention, because under Art. 22(1) there was provided a possibility of a reservation of the rights of its non-use.[31] A number of countries has used this possibility.

[30] W. Popiołek, *op. cit.*, 148ff.

[31] D. Dieter Martiny: Der deutsche Vorbehalt gegen Art. 7 Abs. 1 des EG-Schuldvertragsüberkommens vom 19.6.1980 – seine Folgen für die Anwendung ausländischen zwingenden Rechts, IPRax 277 (1987).

**15.** Under Art. 10 p. 1 the Convention defines a range of the obligation's statutes very widely, including results of a non-performance, an expiration and a prescription and also an nullity of a contract; however, a valuation of the last things can be excluded through the reservation on Art. 22. A localization of the all possible results of the obligation in the obligation's statutes becomes worthy of praise.

Under Art. 10(2) it was provided that with reference to a manner of performance and means belonging to an obligee in case of defective performance of the obligation the law of the State, in which a place of performance is, must be taken into account. This regulation is useful because it warrants legally using of legis loci solutions. Without such a rule the law, being in force in the place of the execution, can be taken into consideration only as a factual circumstance within the obligation's statutes. This solution is suited to the needs of practice.[32]

**16.** The convention also contains number of regulations refering to the general part of the private international law (e.g. conclusion of a contract, a form, an incapacity, questions connected with a not uniform law, a clause of public order, an exception of retrospective effect). Besides, it regulates some problems closely connected with the obligation's relations such as a voluntary assignment and a statutory subrogation of a debt. Here we should notice one important question related to the conclusion of a contract (Art. 8).

The conclusion and an efficiency of a contract come under legis causea. But this general rule was broken down in the one direction duly. If it is resulted from the circumstances that the valuation of an effect of a behaviour of the one of the parties wouldn't be explained according to the law applicable to the contract, the party can quote the law of the State, in which its habitual residence is, regarding a statement the party hasn't agreed to the conclusion of the contract. In practice it is especially important for the valuation of legal effects of a silence.

**17.** The Rome Convention, just as every work of man, is a composition of its era. It contains the whole knowledge of the science and the jurisdiction of the recent decades in a shape of legal act. It realizes the rule of a flexible solution of problems of the law of conflict of laws within contractual obligations, what nowadays seems to be an issue, proper most of all and, in consideration of that, is called modern. We can agree with it, especially because basing on fixed connecting factors of contract has not resulted in success and in spite of appearances of a stability hasn't secured the legal safety. Most probably, such a safety won't be secured also through the method used in the Convention, of course except circumstances, when we meet the explicit choice of the law. However, a great contribution of the Convention is its function of the unification. On the one hand it "compensated", to a certain degree, differences between a continental system and methods used in the Anglo-American countries, on the other hand it took a clear position to a number of detailed questions, till now regulated or decided in particular countries differently. Therefore, it can exert a large influence on codifying

[32] Cf. with regard to this question: W. P o p i o ł e k: Wykonanie zobowiązania umownego a prawo miejsca wykonania, (1989), *passim*.

works undertaken in different States. Most certainly, the Convention does not bring an evolution of the private international law to the end. It is only one of its stages. So, solutions used in it should be observed critically.

Poland is in for undertaking of works on a reform of the private international law, also inclusive of a field of the law of contractual obligations. Some our solutions have been outdated as far back as at the moment of the Act. It is especially related to the reduction of the choice of the law. Certainly, there should be given some thought to elasticizing of the regulation, based on objective points of contact. At the present moment that is beside the question to adopt regulations of the Rome Convention directly into our law. Nowadays it is difficult to foresee, what its fate will be, and after all a membership of Poland in the European Union is still the very distant future.

Even so, we cannot ignore this Convention. After all, 60% of our export is sent to the member states of the Union. Besides, our rules of the private international law are really imperfect within this field.[33] So, I think, in the short possible time, introducing of appropriate changes in the Act, being in force, should be undertaken or a completely new act should be elaborated. Naturally, the Rome Convention ought to be used as a base, but – what I have already mentioned – we should refer to some constructions of it critically; we should also take new codifications of the pil and the whole knowledge of the science of the last dozen or so years into account. Such a responsible and well-organized work can be undertaken only within the framework of an institutionalised Committee of Codification and not – in casual and permanently changing committees.

[33] P. L a g a r d e, *op. cit.*, 25; according to him, the States of Eastern Europe, except Czechoslovakia, have got in comparison with the Western States very rigorous rules of the private international law, what is admitted to be a fault. Flexible solutions are admitted to be more correct.

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# The Basic Right of Asylum in Germany After the Reform of 1993

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## I. Introduction

"Persons persecuted on political grounds shall enjoy the right of asylum, but not in Germany."[1]

This short statement summarizes critical comments on the so-called asylum compromise of 6 December 1992[2] which lead to an amendment of the Basic Law[3] in June 1993 and to a corresponding adaptation of the Aliens and Asylum Act.[4] The right of asylum does basically remain in force with Art. 16 a (1), but – so the critics – the following sections have limited this right in such a way that granting asylum is to a large extent impossible. According to the president of the Federal Administrative Court (BVerwG), the new Art. 16a reads therefore less as a regulation to guarantee a basic right but rather as "a regulation to prevent a basic right".[5] Without going into this reproach further, supporters of the constitutional amendment stressed that the new regulation on this basic right was necessary to solve the so-called asylum problem.[6] Those groups of persons who do not need protection, they maintain, will be excluded from a lengthy procedure under this regulation and those who really are subject to political persecution will continue to be granted refuge.[7]

The new Asylum Act has been in force for over a year. It is an open question whether and in which way the change in the asylum law has been responsible for the considerable fall in the numbers of applications for asylum since July 1993. Of the 322,599 applications for asylum in 1993, 224,099 (69.47%) were placed in the first

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[1] Articles quoted without reference to a particular law or treaty are those of the Basic Law. Paragraphs quoted without reference are those of the Asylum Procedure Act. Translation by *cand. jur.* Mark Inston.

[2] See the contribution of Member of Parliament (MP) Weiß (BÜNDNISS 90/THE GREENS) to the debate in the Bundestag on 26 May 1993, printed in: Das Parlament from 11 June 1993, p. 4.

[3] Bundesgesetzblatt (Federal Law Gazette – BGBl.) 1993 I 1002.

[4] BGBl. 1993 I 1062.

[5] According to the president of the Federal Administrative Court, Franßen, 108 *DVBl* 300–301 (1993).

[6] See the exemplary contributions of MP's Marschewski (CDU/CSU), Klose (SPD) and van Essen (FDP) in the debate in the Bundestag on 21 January 1993 and printed in: Das Parlament of 5 February 1993, p. 2.

[7] So Marschewski.

half of the year and 98,500 (30.53%) were placed in the second half.[8] In the first five months of 1994 there were 53,898 asylum seekers registered, making a fall of 72% compared with the same period for the previous year (193,029 persons).[9]

The German asylum reform in 1993 has lead to further complication of the aliens and asylum law. The Basic Law and the Asylum Procedure Act have gained in length and lost clarity. The following will therefore try to present the content and provisions of the new basic right of asylum in the context of the corresponding regulations of asylum procedure law and with regard to rulings already made under Art. 16a.[10]

## II. The Background

Although seemingly a paradox, the discussion of an amendment to the basic right of asylum only began once claim was made of it. The promise of asylum according to the Basic Law was undisputed for as long as it was claimed by only few refugees.

Until the end of the seventies entry and leave to remain for refugees was neither a social nor a political problem as comparatively few aliens made claim to the right of asylum.[11] Apart from rulings of the Federal Administrative Court on inherent limitations to the basic right of asylum,[12] the judiciary, too, were rarely employed with the interpretation of the right of asylum.

After the number of asylum seekers had exceeded 100,000 in 1980 the first academic articles were published on an amendment to the now repealed Art. 16 (2) 2.[13] Now and then the view was even expressed that the repealed Art. 16 (2) 2 itself was unconstitutional.[14]

During the mid-eighties these considerations were taken up in the political arena. Attempts were made in the upper house of the German Parliament, the Bundesrat, by the Federal *Länder* Bavaria and Baden-Württemberg to restrict the right of asylum or to transform it to an institutional guarantee.[15] These efforts, favourably undertaken

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[8] See v. Pollern, 14 *ZAR* 32 (1994).

[9] See Innenpolitik No. III/1994, p. 6.

[10] On the new right of asylum see also Barwig et al. (editor), Asyl nach der Änderung des Grundgesetzes; Bethäuser, *ZAR* 169ff (1993); Classen, 108 *DVBl* 700ff (1993); Fliegauf, 46 *DöV* 984ff (1993); Göbel-Zimmermann in: Huber (editor), Handbuch des Ausländer- und Asylrechts, (1994) SystDarst IV; Gusy, *Jura* 505ff (1993); Haberland, ZAR 1994, p. 3 et seq, and 51 et seq.; Hailbronner, 13 *ZAR* 107 et seq. (1993); Hehl, 26 *ZRP* 301 (1993); Henkel, 46 *NJW* 2705 et seq. (1993); Huber, 12 *NVwZ* 736ff (1993); Kanein/Renner, Ausländerrecht, Kommentar, 6th edition, (1993) commentary to Art. 16a of the Basic Law; Marx, 13 *ZAR* 160 et seq. (1993); Renner, ibidem 118 et seq.; Renner, 13 *NVwZ* 452 (1994); Schoch, 108 *DVBl* 1161ff (1993); Selk, 14 *ZAR* 59 et seq. (1994); Voßkuhle, 47 *DÖV* 53ff (1994); Welte, Baden Württembergische Verwaltungspraxis (BWVP) 149 et seq. (1994); Wollenschläger/Schraml, 49 *JZ* 61ff (1994).

[11] See the statistics in Schiedermair/Wollenschläger, Handbuch des Ausländerrechts, as at February 1994, 3 E, No. 108.

[12] Decisions of the Federal Administrative Court, *BVerwGE* 4, 235ff and *BVerwGE* 49, 202ff; see also in this respect Wollenschläger, Immanente Schranken des Asylrechts, Dissertation 1971.

[13] At the time the claim for an amendment was made by Hailbronner, 13 *ZRP* 237 (1980), and Kanein, 33 *NJW* 1988 (1980), and 1 *ZAR* 39ff (1981).

[14] According to Philipp, 32 *NJW* 1857ff (1981). Against this, Sachs, 34 *NJW* 2609 (1981).

[15] See e.g. the applications made by Bavaria in Bundesratsdrucksache (BR-Drs.) 175/90 and Baden-Württemberg, BR-Drs. 684/90, 71/92, 625/92; for possible constitutional amendments see Even,

during election periods, were, however, from the outset doomed to fail since the necessary majority to effect a constitutional amendment could not be expected in the Bundestag, the lower house, nor in the Bundesrat.

In October 1991, the Federal interior minister at that time, Wolfgang Schäuble, called for an amendment to the Basic Law[16] within the framework of moves to amend the Asylum Procedure Act. On the basis of Schäuble's concept, the parliamentary parties of the Christian Democratic Union (CDU) and Christian Social Union (CSU) introduced a bill into the Bundestag on 18 February 1992, to create a new Art. 16 (3) and a new Art. 24 (2a).[17]

With the increase in the number of asylum seekers to over 250,000 in 1991 pressure grew on the Social Democratic Party (SPD) and the Free Democratic Party (FDP) who had until this time opposed a constitutional amendment. In October 1992 the Bundestag passed a resolution on asylum policy backed by the coalition parliamentary parties – including the FDP – which approved under item 9 an amendment to the now repealed Art. 16 (2) 2. After negotiations with the SPD agreement was reached in December 1992 on the so-called asylum compromise which made the way free for a constitutional amendment.

## III. Structure of the New Article to the Constitution

Pursuant to Art. 1 No. 2 of the act amending the constitution, Article 16a was inserted into the Basic Law as the new right of asylum rather than merely mending the now repealed Art. 16 (2) 2 in view of the length and scope of the new constitutional amendment as well as for legal and technical reasons.[18]

The wording of Art. 16a (1) is identical to that of the repealed Art. 16 (2) 2: "Persons persecuted on political grounds shall enjoy the right of asylum". This far-reaching »yes« is withdrawn to a large extent by numerous »but«'s in the following sections. Section (2) limits this asylum promise when entry is made from a so-called safe third country – the asylum seeker cannot then call upon section (1). In these cases the asylum seeker may be removed independent of any appeal made against his refusal. Section (3) assumes that an asylum seeker from a safe country of origin is not subject to persecution. If the asylum seeker cannot refute this assumption or if his application is clearly unfounded due to any other reason, his right to apply for a temporary injunction against removal is limited pursuant to Art. 16a (4). Finally, a conditional clause in section (5) of the new basic right concedes the precedence of international treaties over Art. 16a sections (1) to (4) provided the treaty regulates both the jurisdiction for processing the application for asylum and the mutual recognition of asylum decisions.

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Verwaltungsrundschau s. Mskrp. Unantastbarkeitsgarantie des Art. 79 (3) Grundgesetz für die Grundrechte, Dissertation, (1988), 220ff; Wollenschläger/Becker, 20 *ZRP* 326 (1987); Papier, *Der Staat* 33 (1988); Schenk, 25 *ZRP* 102ff (1992); Bierwirth/Göbel-Zimmermann, *ibid.*, 470.

[16] See Innenpolitik V/1991, p. 1 et seq.

[17] Bundestadrucksache (BT–Drs.) 12/2112; see also Huber, 102 *ZRP* 123ff (1992).

[18] See the explanation accompanying the bill, BT–Drs. 12/4152, p. 3; under Art. 1 No. 1 of the law amending the constitution, the former Art. 16 (2) 2 was revoked; under Art. 1 No. 3 an editorial amendment to Art. 18 (1) was made; Art. 2 stipulates the day on which the amendment to the constitution comes into effect.

## IV. Art. 16a (1): The Individual Right of Asylum under Public Law

### 1. "Persons persecuted on political grounds shall enjoy the right of asylum"

The constitutional legislator has retained the individual right of asylum under public law with Art. 16a (1). Those claiming a complete transformation of the right of asylum to an institutional guarantee were not able to push through their demands.[19] Also not able to push through its demands, however, was the United Nations High Commissioner for Refugees (UNHCR) which had tried to reincorporate into German asylum law the definition of a refugee under the Geneva Convention Relating to the Status of Refugees (the Geneva Convention).[20] The Basic Law retains the term for political persecution and the framework thereby continues to deviate from the legal position in other European countries.[21] In view of the only slight difference in the effect of protection of these terms, the retention of the German term for political persecution by the legislator is regrettable. It makes all the more difficult any future harmonisation of asylum law in Europe and has lead to a complication of the rules which may account for reservations based on the principle of legal certainty of asylum and refugee law prescribed in the constitution.[22]

### 2. Special Provisions for Refugees of War and Civil War[23]

The civil war on the territory of former Yugoslavia has caused many to leave their homes and seek protection in other European countries. In 1993 alone, out of 322,599 applications for asylum 93,716 came from Rump Yugoslavia and Bosnia Hercegovina.[24] Because of rulings of the Federal Constitutional Court that political persecution is only deemed to exist in exceptional cases for refugees of war or civil war,[25] it was agreed under the asylum compromise to create a special legal status for these refugees. Para. 32a of the Aliens Law constitutes the transformation of this agreement into law: therewith refugees from war and civil war territories are granted leave to remain when the Federal Government and its *Länder* have reached an understanding governing their stay.[26]

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[19] In particular the Bavarian state government, BR-Drs. 175/90; against an individual right of asylum under public law see also recently Brugger, 48 *JZ* 119 (1993).

[20] See e.g. Schriftenreihe der Zentralen Dokumentationsstelle der Freien Wohlfahrtspflege für Flüchtlinge (ZDWF), No. 53, Art. 16a GG und seine Folgen, p. 71, and Koisser, *DIE ZEIT* from 21 May 1993, p. 8.

[21] On similarities of these terms, see BVerwG from 18 January 1994, 13 *NVwZ* 497 (1994); *BVerwG* from 26 October 1993, *ibid.* 500.

[22] For the various matters of contention in asylum procedure see Bierwirth/Göbel-Zimmermann, 102 *ZRP* 470 (1992), see also in this respect the comments below on Art. 16a (2) to (4).

[23] For more details on the legal position of refugees from war and civil war see Nonnenmacher, Verwaltungsblätter für Baden-Würtemberg (VBlBW) 46 (1994), and Wollenschläger/Schraml, Humanitäres Völkerrecht 128 (1994).

[24] See v. Pollern, 14 *ZAR* 29, 32 (1994).

[25] BVerfG from 10 July 1989, BVerfGE 80, 315, 121 *BayVBl* 173 (1990) with comments from Wollenschläger/Becker; contrary to this – the more restrictive interpretation of the *BVerwG*, *BVerwG* from 3 December 1985, *BVerwGE* 72, 269.

[26] Critical of this is Pfaff in: ZDWF-Schriftenreihe, p. 75 et seq.

In order to avoid these refugees making claim to asylum procedure, numerous amendments to the Asylum Procedure Act were necessary. Those aliens, for example, granted leave to remain pursuant to para. 32a of the Aliens Act are not able to make a claim for asylum (para. 14 (3)). If an alien has already made a claim for asylum before being granted leave to remain pursuant to para. 32a of the Aliens Act, the asylum procedure is suspended as soon as and so long as he is granted leave to remain (para. 32a (1)). The asylum seeker granted leave to remain is therewith adequately protected against removal.[27] No intrusion is therefore made in the core of asylum law – the protection against removal and deportation. In so far as asylum law must guarantee the protection of a humanly dignified existence in the Federal Republic,[28] this requirement is also fulfilled since the alien is not withdrawn his right to personal and professional development once he has been granted the right to remain.[29]

However, use of this newly created possibility has not yet been made. Refugees from the former Yugoslavia are therefore in reality forced to continue to make an application for asylum.

## V. Art. 16a (2): Asylum Exclusion Clause "Safe Third Country"

The limitation of the right of asylum contained in Art. 16a (2) and para. 26a extends the grounds for exclusion from the right of asylum already prescribed in the Asylum Procedure Act. The sphere of protection of the substantive right of asylum is thereby limited under Art. 16a (2). The asylum seeker in fact remains the subject of political persecution despite his contact with the third country; because of this contact, however, it is supposed that the inherent protection of asylum law is not necessary so that he no longer possesses the right to asylum.[30]

### 1. Requirements: Entry from a Safe Third Country

Unlike the previous provisions governing safety from persecution guaranteed in another country (paras 29 and 27), which require an end to the applicant's flight[31] and now only applies to "other third countries", the requirements of Art. 16a (2) and para. 26a are fulfilled once the asylum seeker has entered via a "safe third country". Any mere contact with the territory of another country is therefore sufficient in the case of

[27] See e.g. para. 48 (1) No. 6 of the Aliens Act according to which removal as with those granted asylum may only be made for grave reasons of public order and security.

[28] BVerfG from 7 October 1975, BVerwGE 49, 202 = Entscheidungssammlung zum Ausländer- und Asylrecht (EZAR) 134 No. 1

[29] See e.g. para. 32a (6) of the Aliens Act according to which non-self-employed work may not be excluded as an emposed condition.

[30] Numerous precedents concerning third country regulations have already been made; see amongst others BVerfG from 22 July 1993; NVwZ-Beilage 2/1993, p. 12; BVerfG from 10 August 1993; NVwZ-Beilage 2/1993, p. 11; VG Regensburg from 2 September 1993; NVwZ-Beilage 2/1993, p. 13; BVerfG from September 13, 1993; NVwZ-Beilage 2/1993, p. 11; BVerfG from 28 September 1993; NVwZ-Beilage 3/1993, p. 17; BVerfG from 26 October 1993; NVwZ-Beilage 1/1994, p. 3; *BayVGH* from 28 October 1993; NVwZ-Beilage 1/1994, p. 4; VG Koblenz from 2 March 1994; NVwZ-Beilage 4/1994, p. 31.

[31] More recently BVerfG from 20 February 1992; 123 *BayVBl* 751, 752 (1992) with comments by Wollenschläger.

a transit journey. Safe third countries according to the constitution are the member states of the European Union. Further countries may be determined by a law passed in the Bundestag with the approval of the Bundesrat (Country List I) provided the application of the Geneva Convention and the European Convention on Human Rights (ECHR) in that country is guaranteed.[32] The legislator must establish whether this is the case "by examining the substantive and procedural legal position and practice in the country in question".[33] The country list act is an abstract judgement on safety from persecution and is not able to relate to whether the safety of a country for an individual case is actually guaranteed. In Schedule I to the Asylum and Procedures Act[34] Finland, Norway, Austria, Poland, Sweden, Switzerland and the Czech Republic have been designated safe third countries. To enable a swift reaction to changes in the legal or political situation of a country, the Federal Government is empowered and bound pursuant to para. 26a (3) to delete a country from Country List I by means of a statutory order with the approval of the Bundesrat if the requirements of Art. 16a (2) 1 no longer apply. The legislator has then six months to pass a bill to amend the Asylum Procedure Act; otherwise the statutory order is invalidated.

It remains unclear whether the Geneva Convention is considered as being guaranteed if the contracting state has imposed a geographic limitation on the application of the Convention. For Example, Hungary has imposed a limitation on the application of the Convention to refugees from Europe only.[35] Since the legislator has not included Hungary in Country List I, it is clearly considered – and rightly so – that such a limitation of protection against deportation and removal is not sufficient to fulfil the stringent requirements of Art. 16a (2) 1.[36]

Art. 16a (2) remains contradictory, however, for the fact that the application of the Geneva Convention and the European Convention on Human Rights does not necessarily guarantee protection against removal to all those subject to political persecution in a third country in accordance with Art. 16a (1). The European Human Rights Convention protects human rights; the Geneva Convention protects refugees according to Art. 33 of the Convention from removal and deportation. The sphere of protection of these international treaties overlaps but does not completely cover that of political persecution under asylum law.[37] Not all those subject to political persecution are protected against removal under the Geneva Conventions. Mskr. contains a catalogue of criteria relevant to persecution, while the definition of political persecution under German law includes all irreversible personal criteria.[38]

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[32] See para. 26a (2) in conjunction with Schedule I to the Asylum Procedure Act.

[33] According to the explanation given in BT–Drs. 12/4152, p. 4.

[34] *BGBl.* 1993 I 1070.

[35] *BGBl.* 1989 II 636: Hungary has stated it defines the term *refugee* only according to Art. 1 B (1) a). of the Geneva Convention.

[36] In contrast with this and the view of the CDU/CSU and FDP parliamentary party during the bill, see BT–Drs. 12/4450, p. 10.

[37] On the definition of political persecution and refugees under the Geneva Convention see Köfner/Nicolaus 6 *ZAR* 11ff (1986), and Bierwirth, *AVR* 295, 301ff (1991).

[38] See in particular the rulings of the Federal Administrative Court on homosexuality as grounds for asylum, BVerfG from 15 March 1988, EZAR 201 No. 13.

Against original intentions to exclude aliens from asylum protection who are no longer in danger of political persecution because of contact with a safe third country, Art. 16a (2) now merges these different provisions for protection against removal and deportation and thereby leading to the exclusion of the right of asylum in marginal cases. The assumption which forms the basis of Art. 16a (2) would at most be justified if the protection against political persecution covered in Country List I were to be based on that of Art. 16a (1).

Country List I is only constitutional if the countries listed fulfil the requirements of Art. 16a (2) 1. UNHCR[39] as well as Amnesty International[40] have both raised doubts in this respect with regard to Poland and the Czech Republic. Both countries have in fact signed and ratified the Geneva Convention and the European Human Rights Convention.[41] In view of the political and economic transition taking place in these countries it is, however, questionable whether these two countries already possess the legal and organisational framework to deal with asylum procedure effectively.[42] The practice of refusal of entry at the eastern border to Poland is currently unclear. According to statements made by UNHCR there is no absolute guarantee that entry will be granted to an asylum seeker if he does not possess the necessary travel documents. Czech procedure has also been criticised for its handling of so-called clearly unfounded applications whereby a decision is taken by a border policeman after a summary interview without the application being passed to the ministry of the interior, which is otherwise responsible for asylum cases. This practice is in direct contradiction to resolution No. 30 (XXXIV) of the executive committee of UNHCR which states that in fast-track cases a decision on the application must be made by the authority which is otherwise responsible for determining the status of a refugee.[43] Ultimately, the administrative court in Regensburg[44] has ruled in the course of a decision on temporary injuction, that due to the restrictive implementation of the two day period of limitation for lodging an application in the Czech Republic, adequate protection against deportation is not guaranteed.

Due to these unclear circumstances in Poland and the Czech Republic it cannot be assumed that the application of the Geneva Convention and the European Human Rights Convention is guaranteed there in sufficient measure pursuant to Art. 16a (2). The far-reaching consequences of Art. 16a (2) call for a restrictive interpretation; otherwise the essential content of the basic right to asylum will be encroached upon in contradiction to Art. 19 (2).

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[39] See Köfner in: Barwig et al. (editor), p. 307 et seq.

[40] See Gottstein in: ZDWF–Schriftenreihe, p. 92 et seq.

[41] *BGBl.* 1992 II 186 and 339 (Geneva Convention); *BGBl.* 1992 II 1064 (European Convention on Human Rights – Czech Republic); on this see Gottstein in: ZDWF–Schriftenreihe, p. 92 and *BGBl.* 1993 II 808, 930.

[42] For the situation of refugees in Poland see Sakson, *AWR–Bulletin* 1992, p. 206 et seq.; Henkel, 13 *ZAR* 79 (1993); Zimmermann, 46 *DöV* 559 (1993); Zimmermann in: Barwig et al. (editor), p. 319 et seq.; on the refugees law in the former Czechoslovakia see Hoskova, 11 *ZAR* 174 (1991).

[43] Printed in: Internationaler Rechtsschutz für Flüchtlinge, Bechlüsse des Exekutiv–Kommittees für das Programm des Hohen Flüchtlingskommissars der Vereinten Nationen, published by UNHCR, Geneva 1988, as at January 1991.

[44] Decision from 2 September 1993, NVwZ–Beilage 2/1993, p. 13.

### 2. Legal Consequences

*a) Refusal and Removal to a Safe Third Country*

Pursuant to para. 18 (2) No. 1, an alien is, in principle, to be refused entry if he enters via a safe third country. Has the alien already entered and if he is met by the border authorities in the vicinity of the border immediately following his illegal entry, he is to be removed (para. 18 (3)). Exceptions will only be made pursuant to para. 18 (4) if the responsibility for processing the application falls to the Federal Republic of Germany on the basis of a bilateral treaty with the safe third country[45] or by order of the Federal Ministry of the Interior for humanitarian reasons, or for reasons of international law or else for the protection of the political interests of the Federal Republic of Germany.

*b) Exclusion from Asylum Law*

Asylum applicants entering from a safe third country may not call upon asylum law (Art. 16a (2) 1, para. 26a (1) 1). They will not be recognised as having the right to asylum (para. 26a (1) 2).[46] Soley on the basis of contact with another territory the individual right to asylum under public law is no longer applicable to them. A mere declaration must be given in the refusal of the application that "the applicant is no longer entitled to the right of asylum due to his entry via a safe third country" (para. 31 (4)). In contrast to paras 29a and 30 the asylum application is, however, to be refused as only being "unfounded", not "clearly unfounded".[47]

It is sufficient for exclusion from asylum law once it has been determined that the asylum seeker has entered from no other country than a safe third country. Against the views of the SPD and FDP,[48] neither Art. 16a (2) 1 nor para. 26a (1) requires positive recognition of the third country in question for the return of the alien. According to the wording and aims of these provisions, the question whether and to which country the applicant may be deported concerns only the legality of the deportation order (para. 34a (1)) and the ability to carry this through under international law by means of a bilateral agreement to take the applicant back.[49] For cases where such an agreement has not been made the problem of *de facto* refugees will become acute: those subject to political persecution will not be recognised as having the right to asylum but cannot be removed because of the lack of a third country willing to take them back.

*c) Limitation of the Right to Judicial Review*

The central aim of the asylum reform was to achieve the most extensive exclusion possible from a temporary right to remain for those asylum applicants entering or who have already entered from a safe third country.[50] This is to be accomplished under

[45] See the remarks made below on Art. 16a (5).
[46] (s. Mskrpt.).
[47] VG Koblenz from 2 March 1994, NVwZ-Beilage 4/1994, p. 31.
[48] BT-Drs. 12/4450, p. 20.
[49] See below c bb.
[50] BT-Drs. 12/4152, p. 4.

Art. 16a (2) 3, according to which the removal of the applicant may be enforced independent of any appeal lodged.

aa) Refusal on Entry

The reform of asylum law has no effect on judicial review of the refusal on entry. In contrast with removal and deportation to third countries, which end the period of stay of the applicant – in some cases illegal – according to refusal of entry under para. 18 (2), "entry" is not considered to have been made at all since a period of stay in the country has not been established.

bb) Deportation

Art. 16a (2) 3 and para 34a (2) diverge from the general provisions of administrative procedural law with regard to deportation.

Once an application for asylum has been refused by the Federal Authority because the applicant has entered the country via a safe third country, a deportation order will be issued as soon as it has been established that it can be carried out in accordance with the law (para. 34a (1) 1). Since a deportation order can only be carried out in the Federal Republic, which is a state based on the rule of law, when the order conforms to the law, para. 34 a (1) 1 guarantees protection during the deportation procedure under the Aliens Act and under international and constitutional law. Before issuing the order minded to deport, the Federal Authority must examine the application for evidence of legal obstacles to deportation.

Deportation to a third country may only be carried out if that third country is willing to grant the alien entry. According to general legal opinion, a country is only obliged under international law to accept its own nationals.[51] Under customary international law, however, there is in principle no obligation to grant foreign nationals entry,[52] even if they have entered the Federal Republic via this country. In contrast to refusal on entry, according to which the asylum seeker has not yet (formally) entered the territory of the Federal Republic and not yet left that of the third country, the stay of the alien cannot be ended without the other country being prepared to take him back. The Federal German Government has proceeded and is proceeding to conclude bilateral treaties with the most important third countries laying down an obligation to take back asylum seekers who have entered illegally. Such agreements have now been concluded with all neighbouring countries of the Federal Republic. It was agreed in 1992, for example, between the parties of the Schengen Treaty and the Republic of Poland that persons not or no longer fulfilling the requirements for entry must be taken back without any formality.[53] Pursuant to Art. 1 (2) of the bilateral treaty between

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[51] Hailbronner/Renner, Staatsangehörigkeitsrecht, Kommentar, (1991), Einl. Rn. 58.

[52] Ipsen, Völkerrecht, (3rd Edition 1990), para. 46, Rn 3.

[53] Art. 1 (1) of the treaty (unpublished document of the ad hoc committee on Poland SCH Pologne (90) 4, final version); the treaty has not yet been ratified but applies temporarily. On the question whether this agreement also applies to aliens from third countries, see Zimmermann in: Barwig et al. (editor), p. 319, 323.

Germany and Poland from 7 May 1993[54] the obligation to take back such persons has been extended to expressly include all third country aliens. The treaty is not applicable if the alien has spent six months or longer in the territory of one of the treaty parties with the knowledge of the respective authorities. Similar agreements[55] to take back these nationals have recently been signed with Romania,[56] Switzerland[57] and Croatia.[58]

cc) Removal

If the asylum applicant is to be removed according to para. 18 section (3) in conjunction with section (2) No. 1 he may apply for judicial review in the form of an action to annul the administrative decision. Since removal is classed as a sovereign measure of the police authorities which cannot be delayed and at the same time an act of enforcement, the action cannot suspend the removal order.[59] The applicant would be refered to his right under para. 80 (4) and (5) of the Administrative Courts Act to apply for a temporary right to remain. In contrast to refusal on entry, removal of an applicant here ends his established period of stay; so the question of a temporary right to remain pursuant to para. 80 (5) of the Administrative Courts Act is raised in the same way as for deportation. Para. 34a (2) is not applicable, however, as this regulates only the case for a temporary injunction against a deportation order. The legality for removal pursuant to para. 18 (3) is derived directly from Art. 16a (2).

*d) No Disqualification of the Right to Judicial Review of the Refusal of the Application*

The asylum seeker will also not be prevented from applying for judicial review against a decision of the Federal Authority if he is to be deported and the asylum procedure has not yet been finally concluded.[60] The action taken be the asylum seeker, in some circumstances taken from abroad, can only be successful if the Federal Authority has unlawfully assumed that the applicant entered from a safe third country. In addition to this the court may reach the opinion that the third country has been adopted unlawfully in Country List I if the requirements of Art. 16a (2) 1 are not fulfilled. In this case the court must submit Country List I to the Federal Constitutional Court pursuant to Art. 100 (1) to test the constitutionality of the statute.

### 3. Legal and Political Reservations

In a legal and political sense it should be noted that the "safe third country policy" does not solve but merely pushes the problem of refugees to a large degree onto

[54] Treaty between the Federal Republic of Germany and the Republic of Poland on Cooperation on the Effects of Migratory Movements. See Innenpolitik, Nr. III/1993, p. 3.

[55] The treaties to take back asylum applicants are printed in Schiedermair/Wollenschläger, part three, E1 XI.

[56] See the German–Romanian agreement on the prevention of illegal immigrants from 24 September 1992 (see also Bulletin der Bundesregierung from 26 September 1992, No. 102, p. 963).

[57] See Innenpolitik No. I/1994, p. 7.

[58] See Innenpolitik No. III/1994, p. 5

[59] See para. 80 (2) No. 2 and paras 80 (2) No. 3, 187 (3) Federal Administrative Courts Act in conjunction with the corresponding provisions of the law of the *Land*. See also on this matter Kopp, para. 80, Rn 40 and para. 187, Rn 8 et seq.

[60] Expressly stated in BT–Drs. 12/4450, p. 23.

Germany's eastern neighbours. According to the amendment in asylum law the Federal Republic is surrounded by safe third countries so that asylum procedure is only open to those entering via air or sea routes. In conjunction with bilateral agreements to take back asylum applicants, a system has been created which shifts the emphasis of dealing with this social and organisational problem to the east while the Federal Republic merely makes a financial contribution. It is expected that Poland and the Czech Republic will follow our example and conclude agreements with their respective neighbours to take back refugees and thus shift the problem further to the east.

A refugee policy of this sort is not consistent with the basic principle of solidarity in a Europe in the process of unification[61] and basically ready to admit the new democracies of the East. For the framework of a European policy on asylum, a system of sharing and balancing the burden must be created which will harmonise the basic freedom of choice of the place of refuge along with the recognition of the necessity for equal burden sharing amongst the countries of Europe.[62]

## VI. Art. 16a (3) and (4): Asylum Exclusion Clause: "Safe Country of Origin"

A further emphasis of the new right of asylum is the exclusion clause based on the safe country of origin of the applicant. Following the example of Switzerland[63] and Belgium[64] and in compliance with the principle under German constitutional law of a state conforming to the rule of law, asylum procedure is limited to a minimum if the asylum seeker originates from a country which is considered "safe" according to general estimation.[65]

### 1. Requirements

The asylum exclusion clause in Art. 16a (3) applies when the asylum seeker originates from a safe country. Each safe country of origin is established soley by the Bundestag passing a bill requiring the approval of the Bundesrat. In contrast to section (2), the member states of the European Union are here not automatically "safe" under constitutional law.

The decisive factor for inclusion in this Country List II is the guarantee that neither political persecution, nor inhuman or degrading punishment or treatment takes place in the country. This judgement is made by assessing the legal situation, the application

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[61] See the preamble to the Treaty on European Union, Bulletin der Bundesregierung from February 12, 1992, No. 16/1992, p. 113: "... expressing the wish to strengthen solidarity between its peoples...".

[62] On the structure of a future European law of asylum see Wollenschläger, *AWR-Bulletin* 1992, p. 2 et seq.; Wollenschläger, Asylpolitische und asylrechtliche Aspekte der europäischen Innere Sicherheit in: Innere Sicherheit im Binnenmarkt, published by Bertelsmann-Stiftung, 321, 330 (1992).

[63] For the safe country regulation in Switzerland see Schmid, ZAR 1993, p. 81, 83 and Plüss-Pozzi, *AWR-Bulletin* 210ff (1992).

[64] For the controversal "2 x 5 percent clause in Belgium see Bierwirth/Göbel-Zimmermann, 25 *ZRP* 470, 471, footnote 15 (1992).

[65] For the modest effect on the relief of burden of such lists see Schenk, ibid. 102, 104ff.

of the law and the general political situation in the country. As criteria for establishing the risk of persecution the following are taken into account: the quota of asylum applications granted over a broad, comprehensive period of time;[66] the general political situation; the respect of human rights; the willingness of the country to grant access to independent international organisations to their territory to monitor human rights; and the stability of the country.[67] Country List I is not concerned with the question under section (3), as under section (2), whether the third country grants refugees adequate protection against deportation. Country List II refers directly to the situation in the (supposed) country in which persecution takes place.

Notwithstanding the lack of a justification in the legal materials accompanying the bill[68] it is not sufficient for the requirement that a country of origin is free of persecution that no political persecution actually takes place in that country. On the contrary, a country may only be included in Country List II when no inhuman or degrading punishment or treatment takes place there. Since according to rulings of the Federal Constitutional and Administrative Courts inhuman or degrading punishment or treatment does not necessarily establish political persecution, this additional criteria reduces the number of countries which may be included in Country List II.

Included in Country List II, enclosed as Schedule II to the Asylum Procedure Act,[69] are Bulgaria, Ghana, Poland, Romania, Senegal, Hungary and the Czech and Slovak Republics. Current reports by Amnesty International leave doubts as to the constitutionality of Country List II, in particular due to reports on the human rights situation in Senegal and in Romania, where in the latter attacks on members of the Romany ethnic group took place in 1992 were tolerated and actively supported by state organs.

### 2. Legal Consequences

*a) Assumption of the Absence of Persecution (Art. 16a (3) 2)*

One of the legal constitutional consequences of the origin from a safe country is prescribed in Art. 16a (3) 2, first sub-clause: an alien from a safe country of origin "is not considered as being politically persecuted". In contrast with the provisions governing safe third countries, the alien can refute the assumption of the absence of persecution: pursuant to Art. 16a (3) 2, second sub-clause, the assumption does not apply if the alien presents a case "which reveals that, against this assumption, he is subject to political persecution". No explanation is given why the refutation of this assumption does not take Art. 3 of the European Human Rights Convention into account, as when Country List II was drawn up; merely the existence of political persecution is examined.

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[66] According to the explanation in BT-Drs. 12/4152, p. 4.
[67] BT-Drs. 12/4450, 21 *et seq.*
[68] See BT-Drs. 12/4152, 4 and BT-Drs. 12/4450, 21 *et seq.*
[69] *BGBl.* 1993 I 1070.

*b) Limitation of the Right of Temporary Judicial Review (Art. 16a (4))*

The origin from a safe country causes, in addition to the burden of refuting this assumption, far-reaching limitations to the right of temporary judicial review.

According to Art. 16a (4) 1, first sub-clause, the execution of the removal order may only be suspended by the court "when grave doubts on the legality of the order exist". The legislator has reacted here to continuous court rulings according to which during the procedure for temporary legal protection an application must be comprehensively and not merely summarily reviewed in order to establish whether the application is clearly unfounded.[70]

With regard to the particular importance of a temporary right to remain for effective judicial review of asylum procedure, the necessity for grave doubts cannot be stretched too far. The administrative court must decide without restriction whether temporary judicial review should be granted, if there is a concrete possibility that the decision of the Federal Authority has been made unlawfully.

In addition to this the legislator is authorized in accordance with Art. 16a (4) 1, second sub-clause and section (4) 2, to restrict the examination of the application and order that information submitted after a certain point in time will not be considered. This procedural possibility, which constitutes a further intervention in the obligation of the court to conduct its own investigation into the case, was applied under the substantive preclusion clauses of para. 26 (4) 2 and 3. Facts and evidence not disclosed by the parties during the accelerated proceedings will not be considered unless they are already known to the court or are evident (para. 36 (4) 2). It remains the discretion of the court to decide whether evidence rejected by the Federal Authority as having been submitted after the stipulated period of time can be used as a basis for a decision. The same applies to facts and circumstances which are a bar to deportation or deportation to a particular country and which the applicant has not disclosed in the administrative court proceedings.[71]

*c) Entry and Temporary Right to Remain*

The consequence of being able to refute the assumption of the absence of political persecution in a particular country for the applicant's right to remain is that his origin from this country does not necessarily mean he will be refused entry. Asylum procedure and therewith the temporary right to remain is, however, to be shortened considerably for the accelerated proceedings at the administrative court by means of numerous restrictions. According to para. 36 (3) 1 an application for judicial review pursuant to para. 80 (5) of the Administrative Courts Procedure Act against the order minded to deport is, as previously, to be submitted within one week after the issue of the order.

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[70] BVerfG from 10 January 1990, Informationen zum Ausländerrecht (InfAuslR) 202 (1990).

[71] For the constitutionality of such preclusion clauses see BVerfG from 17 July 1980, BVerwGE 60, 297, 301 et seq.; BVerfG from 8 July 1982, BVerfGE 61, 82, 109 et seq.

*d) Special Provision for Entry via Air Routes (para. 18a).*

During the parliamentary legislative procedure the special provision of para. 18a was introduced for asylum applicants who enter via air routes from a safe country of origin.[72]

In these cases asylum procedure is to be carried out before a formal decision on entry is made if the applicant can be accommodated on the airport grounds during the proceedings. At the same time the requirements for temporary judicial review are further restricted.[73]

### 3. Critical Judgement

The provisions in the Basic Law and the Asylum Procedure Act on the safe country of origin also give rise to critical judgement.

Art. 16a (3) and para. 29a refer exclusively to the existence of political persecution under Art. 16a (1). An application for asylum pursuant to para. 13 is not only deemed to have been made if it has been established in the application itself that the alien seeks protection from political persecution, but also if it has been established that the applicant "seeks protection against removal or any other measure to return him to a country in which a risk exists as under para. 51 (1) of the Aliens Act" (paras 13 (1) and 1 (1)). Protection against these two further provisions, which corresponds to the protection prescribed in Art. 33 of the Geneva Convention, is neither of relevance according to Art. 16a (3) and para. 29a for the designation of a country as being of safe origin nor for the refutation of this assumption. The refusal of an asylum application is therefore made without consideration in individual or general terms of these two matters. Since the application of an alien from a country of safe origin must be examined (para. 29), the Federal Authority must at the same time establish whether the requirements of para. 51 (1) Aliens Act have been fulfilled. The establishment of this fact requires – following the organisational form of Art. 16a (3) and para. 29a and taking into account the obligations under international law pursuant to Art. 33 of the Geneva Convention – an individual examination of the application so that the origin from a safe country will not lead to the acceleration of asylum procedure.

## VII. Art. 16a (5): Conditional Clause

The conditional clause[74] in section (5) and the corresponding provisions of asylum procedural law[75] make possible Germany's full participation under the Schengen

[72] See BT-Drs. 12/4984, p. 75; details by Marx, 13 *ZAR* 160ff (1993).

[73] The BVerfG recently granted an asylum applicant from India a temporary right to remain by way of an interim injunction after entry had been refused him pursuant to para. 18a (3) and after the new asylum law came into effect. See BVerfG from 16 July 1993, NVwZ 1993, p. 766; also BVerfG from 22 July 1993, NVwZ-Beilage No. 1/1993, p. 1 and BVerfG from 22 July 1993 – 2 BvR 1508/93; applications for a temporary injunction were refused in the following procedures: BVerfG from 19 July 1993, NVwZ 1993, p. 768; BVerfG from 21 July 1993, NVwZ-Beilage No. 1/1993, p. 2; BVerfG 26 July 1993, NVwZ-Beilage No. 1/1993, p. 3.

[74] The asylum compromise from 6 December 1992 did not provide such a precedence clause.

[75] See paras 18 (4) No. 1, 22a, 26a (1) 2 No. 2, 29 (3), 35 (2), 71a.

Agreement[76] and the Dublin Convention on Asylum.[77] The obligations arising from these international treaties could, in fact, have been fulfilled in accordance with the constitutional position hitherto, since both treaties contained national reservation clauses.[78] Pursuant to the revoked Art. 16 (2) 2, the Federal Republic of Germany would, however, have had to deal with applications which would have fallen to the responsibility of another European country under the provisions of the treaties.[79]

### 1. Requirements

Art. 16a (5) concedes precedence to treaties under international law only and not therefore to EU secondary legislation.[80] Should asylum law be harmonised under community law[81] according to Art. K. 1 No. 1 and K. 9 of the Treaty on European Union, the law would take direct precedence in Germany over Art. 16a pursuant to Art. 23 (1).[82]

Regarding the parties to the treaties, Art. 16a (5) requires that the treaty has been concluded between member states of the European Union (with the participation of the Federal Republic of Germany) or by these with third countries. Bilateral treaties concluded between Germany and third countries do not fall under Art. 16a (5), but are subject to sections (1) to (4). In addition it must be guaranteed that all countries party to the treaty apply the provisions of the Geneva Convention and the European Human Rights Convention.

Treaties under international law only take precedence over asylum law when and in so far as they contain provisions governing the jurisdiction for examining the application and the mutual recognition of asylum decisions. These treaty provisions must have been concluded in accordance with the obligations of the Geneva Convention and the European Human Rights Convention.[83]

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[76] Treaty between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the Republic of France concerning the Gradual Dismantling of Controls at their Common Borders, Gemeinsames Ministerialblatt (GMBl.) 1986, p. 79 et seq. and the Supplementary Protocol on the implementation of this treaty, *BGBl.* 1993 II 1010 (henceforth called Schengen II).

[77] Treaty on the Establishment of the State Responsible for the Examination of an Asylum Application Lodged in a Member State of the European Community, *BGBl.* 1994 II 791 (henceforth called the Dublin Convention); see also Denkschrift zum Übereinkommen, BT-Drs. 12/6485, p. 13 et seq.

[78] Art. 3 (4) of the Dublin Convention and Art. 29 (4) of Schengen II; for the compatibility of the Schengen Supplementary Protocol with the revoked Art. 16 (2) 2, see Schraml, *AWR-Bulletin* 65 et seq. (1991).

[79] Critical of the necessity for ratification of the treaties: Gerlach, ZRP 1993, p. 164 et seq. and Wollenschläger, Nordrhein-Westfälische Verwaltungsblätter (NWVBL) 225, 230 et seq. (1992).

[80] A different view is presented by v. Nieding, Die politische und rechtliche Diskussion um das Asylrecht nach der Parteienvereinbarung vom 6.12.1992, Wissenschaftliche Dienste des Deutschen Bundestages, WF III-264/92, p. 21.

[81] For the pre-draft of an EC Asylum Directive see Wilke, 22 *ZRP* 225ff (1989); on asylum law in the EC in general: Hailbronner, 12 *ZAR* 51ff (1992); Huber, 12 *NVwZ* 618 (1992); Hummer, 32 *ZfRV* 129ff (1991); Schoch, 107 *DVBl.* 525 (1992); Tomuschat, 13 *HRLJ* 257; Weber, 26 *ZRP* 170 (1993) and 13 *ZAR* 11 (1993); Wollenschläger, *NWVBL* 225 et seq. (1992).

[82] For the relation of possible EC secondary legislation on asylum law to the asylum law of the Basic Law, see Wollenschläger/Becker, 17 *EuGRZ* 1, 7ff (1990).

[83] See Art. 28 of Schengen II and Art. 2 of the Dublin Convention.

### 2. Legal Consequences: Precedence of Treaties under International Law

Art. 16a (5) stipulates that the above treaty provisions take general precedence. Due to the restriction to these two treaties, a new amendment to the constitution will be necessary if further progress is made in coordination of asylum procedure under international law or in the harmonisation of European asylum law.

*a) Precedence of Provisions Governing Jurisdiction*

Where another party to the treaty is responsible for examining an application for asylum pursuant to Art. 30, 35 of Schengen II and Art. 4 et seq. of the Dublin Convention, and is this country a safe third country in accordance with para. 26a, the asylum application is not to be examined pursuant to para. 29 (3). In contrast with Art. 16a (2) and para. 26a the right of asylum is not only excluded in the case of contact with another territory. The application of an asylum seeker who, for example, is in possession of a visa of residence permit issued by a party to the treaty will also be refused even if he has not entered from a safe third country.[84]

Reservations may arise here in view of the decision for removal following the refusal of the asylum application as the principle of *non-refoulement* under Art. 33 of the Geneva Convention is not taken into account for individual cases. The general classification as a safe third country is just as insufficient as the treaty obligation under the Geneva Convention. The risk of a chain of removals is increased by the fact that Art. 29 (2) of Schengen II expressly stipulates that the obligation to examine an application for asylum does not necessarily mean "that in all cases the asylum applicant must be granted entry to the territory of a party to the treaty or that he may stay there". Even if Art. 16a (5) has been included in the Basic Law in order to exclude from the sphere of protection of asylum law those applications for asylum which could be granted elsewhere, the wording of this provision works not only as a disadvantage for the asylum applicant. Those asylum applicants which in fact enter from a safe third country, but for which the Federal Republic of Germany is responsible according to the Schengen Supplementary Protocol, may not be excluded from asylum law under Art. 16a (2).

*b) Mutual Recognition of Asylum Decisions*

The precedence of treaties under international law applies also to provisions governing the mutual recognition of asylum decisions. In accordance with Art. 16a,[85] para. 71a provides that for those asylum applications which have already been unsuccessfully concluded in another treaty country, the additional examination of the application is only to be carried out in the Federal Republic of Germany if the responsibility for examination of the application falls to Germany and the requirements to continue the examination procedure have been fulfilled.[86]

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[84] See Art. 30 (1) a) of Schengen II and Art. 5 (1) and (2) of the Dublin Convention.

[85] According to the explanation given in the bill, BT-Drs. 12/4450, p. 27.

[86] See para. 51 (1) to (3)

It is questionable, however, whether Art. 16a (5) and these treaties under international law are sufficient to provide the basis for empowerment of the provisions contained in para. 71a. Neither the Schengen Supplementary Protocol nor the Dublin Convention on asylum contain provisions governing the mutual recognition of asylum decisions.[87] As particularly shown by the national reservation clauses, the responsibility for examining a request for asylum established by the treaties is not exhaustive so that even in the case that the Federal Republic of Germany is not responsible for the application, the obligation to recognise asylum decisions of another country party to the treaty is not compulsory.

## VIII. Closing Remarks

The restructuring of the asylum law bears the trademark of a political compromise at the disadvantage of legal quality. Above all, the lack of agreement on protection against removal and deportation of asylum applicants not covered by asylum law shows that the consequences of the new asylum law have not been sufficiently considered. It is left to the decisions of the judiciary – who should not be influenced by criticism from the politicians responsible for the existing unclarity and ommissions in the law – to interpret the law in accordance with the constitution and treaties under international law.

An emphasis of this criticism must also be made, for, although the elements concerning asylum law in the compromise from December 1992 have been transformed into law, the remaining items of the negotiations – controlling the causes of flight, the admission of civil war refugees not included in asylum law, a bill governing immigration – have until now been neglected. An amendment to the nationality laws to change the provisions in paras 85 and 86 of the Aliens Act for increased acceptance of dual nationals or the introduction of *ius soli* elements continues to be rejected by the coalition parties.

An amendment to the basic right of asylum was politically unavoidable in view of the inflamed atmosphere in the Federal Republic of Germany in 1992. From a legal point of view, the amendment was in part not necessary since an acceleration of the procedure and the exclusion clauses under administrative procedure law could have been carried out under the revoked Art. 16a (2) 2. The authorities responsible should use the present calm to draft new national policies on immigration, controlling the causes of flight and on nationality law and initiate a common European policy of action. Only through active and well thought out planning and not by a series of hectic defence reactions can the problem of refugees be solved in the long term in a fashion satisfactory for society.

[87] Also Huber, 11 *NVwZ* 618, 621 (1992).

# POLISH PRACTICE IN INTERNATIONAL LAW

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## Selected Jurisprudence of the Supreme Court and the Constitutional Court Comprising Cases Pertaining to Public and Private International Law, decided in 1994

### I. The Resolution of the Polish Constitutional Court of 30 November 1994 (W. 10/94), published in the Jurisprudence of the Constitutional Court Part II/1994

The Polish Ombudsman has addressed the Constitutional Court with a request to deliver a generally binding interpretation of Art. 4 para. (1) of the Law on the Constitutional Court of 29 April 1985 (Official Journal No. 109/1991, item 470; amended in 1993, Official Journal No. 47, item 213). The requested interpretation of Art. 3 para. 1 of the Law on the Constitutional Court should, in the opinion of the Ombudsman, declare that:

1) The law authorising the President of the Polish Republic to ratify an international treaty which will entail financial encumbrances for the state budget, or make necessary the introduction of changes to Polish domestic legislation, is a normative act in the meaning of Art. 33 para. 2 *in fine* of the Constitutional Law of 17 October 1992 (Official Journal No. 84, item 426) and, in case of a positive answer to the first question, to establish that:

2) The Constitutional Court has the jurisdiction to declare, by virtue of Art. 7 of the Law on the Constitutional Court, that the law authorising the President of Polish Republic to ratify an international treaty:

– is inconsistent with Art. 1 of the Polish Constitution or with other provisions of the Constitutional Law of 17 October 1992, if the law of the Parliament authorises the President to ratify an international treaty containing provisions contradictory to the Polish Constitution or to the prior international obligations of the Polish Republic,

– is inconsistent with Art. 1 of the Constitution in the event that it authorises the President to ratify an international treaty which obliges the Polish state to carry out modifications in the Polish legal system which are contrary to the Polish Constitution or the modifications which destroy the cohesion of the Polish legal system as a whole or my of its particular parts.

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**The Constitutional Court has established that:**

1) The Law comprising the authorisation for the President to ratify an international treaty defined by Art. 33 para. 2 of the Constitutional Law of 17 October 1992 on the mutual relations between the legislative and executive powers of the Polish Republic and on the Local self-government (Official Journal, No. 84, item 462) is a normative act in the meaning of Art. 1 para. 1 point 1 in connection with Art. 4 para. 1 of the Law of 29 April 1985 of the Constitutional Court (Official Journal of 1991 No. 109, item 470, amended in 1993, O.J. No. 47, item 213), which is subject to the control of the Constitutional Court in view of its consistency with the Constitution.

2) The Constitutional Court, when examining by virtue of Art. 2 of the Law on the Constitutional Court, the above mentioned law (point 1), has jurisdiction to declare to be inconsistent with the Constitution the law comprising the authorisation for the President to ratify an international treaty also in the event that the above mentioned law authorises the President to ratify an international treaty containing the self-executing norms inconsistent with the Constitution.

3) The Constitutional Court cannot declare the law described in point 1 to be inconsistent with the Constitution solely because that law authorises ratification of an international treaty containing provisions inconsistent with the prior obligations of the Polish Republic arising from international treaties, or obliging the Polish state to introduce modifications to domestic legislation which might be inconsistent with the Polish Constitution in force or which might destroy the cohesion of the Polish legal system as a whole or any of its particular parts.

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**Reasoning:**

The Constitutional Court has examined Art. 33 para. 2 of the Constitutional Law of 1992 and has adopted the position that the law authorising the President to ratify an international treaty (called hereafter the authorising law) is a legislative act in the meaning of Art. 1 para. 1 point 1 and Art. 4 para. 1 of the Law on the Constitutional Court. This law came into force in the same procedure before the Parliament as ordinary laws and there is no reason to exclude the authorising law from the general category of the laws in Poland which may all be controlled by the Constitutional Court. However, the authorising law is a specific act because its contents are strictly limited to the authorisation of the President and the designation of the date of its entering into force. The authorising law is executed at the moment of the ratification of the international treaty by the President. The Constitutional Court concludes that since the authorising law is an act of lower rank than the Constitution, it must be, like all the other laws, consistent with the Constitution.

The Constitutional Court has stressed that the consistency of an international treaty with the Constitution must be supervised by all the state organs involved in the process

of its preparation, signature and ratification. As to its competence to verify the constitutionality of international treaties, the Constitutional Court admits that according to art. 33a al. 1 of the Constitutional Law of 1992 of stays outside its jurisdiction which is limited to "laws and other normative acts issued by the supreme and central state organs".

On the other hand, the competence of the Constitutional Court to examine the constitutionality of the authorising law cannot be denied. Art. 2 of the Law on the Constitutional Court provides that the supervision executed by the Constitutional Court concerns the conformity of the procedure applied during the elaboration of the controlled act and the consistency of its contents with the Constitution. When performing both stages of the verification of constitutionality of the authorising law the Constitutional Court has to examine the contents of the international treaty: in the first place – to find out if the adoption of the authorising law by the Parliament was necessary in this case – which is a matter of the proper procedure, and in the second place – to find our if the permission to ratify this treaty would not imply the implementation in the Polish legal system of self-executing norms of the treaty which are inconsistent with the Constitution. The Constitutional Court emphasises that the supervision performed by it in this case is not the verification concerning the international treaty in itself, which is outside the competence of the Court, but the verification of the material contents of the authorisation comprised in the law.

The scope of examination of the international treaty carried out by the Constitutional Court is limited to certain matters only, namely: which consequences of the implementation of the treaty, by way of ratification into the Polish legal system, would be inconsistent with the Constitution.

The Constitutional Court declares that it would not be contradictory to the Constitution to authorise President to ratify the treaty containing provisions in with former international treaties concluded by Poland, since it is a problem of international law and not of constitutional law.

One cannot recognise that the authorisation to ratify international treaties which obliges Poland to introduce changes into Polish domestic legislation, irrespectively of the result of the amendments, is inconsistent with the Constitution. The Constitutional Court cannot verify the constitutionality of future, expected, but undrafted laws. On the contrary, there is a common opinion that the amendments to the existing laws as a result of the conclusion of an international treaty by Poland are the normal consequence of the reciprocal obligations between the states.

It can not be *a priori* excluded that the adoption of an international treaty may lead to the introduction of amendments to the Polish Constitution. In practise all states adapt their legal systems to international standards included in the international agreements. The Constitutional Court regards this as a normal consequence of the international obligations undertaken by the state.

The only case where inconsistency of the authorising law with the Constitution would occur, in the opinion of the Constitutional Court, is when such law contains permission for the President to ratify a treaty which directly introduces to the Polish

legal system norms contradictory to the Constitution. This consequence is limited to those treaties which comprise self-executing norms, i.e., those norm which, by their character, can be directly applied in domestic relations, without prior amendments made by Polish organs to the Polish laws or to the Constitution.

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**Commentary:**

The presented Resolution of the constitutional Court is important because it refers to two problems of great significance. First is the problem of the competence of the Constitutional court, to supervise the consistency of international treaties concluded by Poland with the Constitution. The second problem is (treated indirectly by the Constitutional Court in this case) the question of the internal validity and applicability of international law. The importance of these two questions has been particularly obvious during the last few years since we can observe the progressive growth of the role played by international treaties in the regulation of internal relations in Poland. The natural consequence of this is the request addressed to the Constitutional Court to establish to what extent the laws authorising ratification of international treaties by the President can be called into question because of the inconsistency of the obligations contained in the treaty with earlier international agreements or with the Polish Constitution.

According to Art. 1 para. 1 point 1 and Art. 3 para. 1 of the Law on the Constitutional Court, this organ does not have the competence to supervise the constitutionality of international treaties. The dominant position of the doctrine and of the jurisprudence of the Supreme Court and the Constitutional Court was that, in the absence of the direct competence given to the state organ by existing law, this competence can not be presumed.

This lack of competence of the Constitutional Court to supervise the consistency of international treaties with the Constitution has often seen criticized and the drafts of the new Constitution provide for this new competence of this organ. However, *de lege lata*, in spite of the possibility to verify directly the constitutionality of international treaties, the new question appeared in 1992, together with the adoption on 17 October of the so called "Little Constitution". Art. 33 para. 2 of this act provides that four categories of international treaties require for ratification by the President prior authorisation contained in the law issued by Parliament. These four categories of treaties are: treaties concerning state borders, defense alliances, treaties which will entail financial encumbrances for the state budget and treaties making necessary the introduction of changes to Polish domestic legislation.

These authorising laws of Parliament cannot, as the Constitutional Court correctly observed, be inconsistent with the Constitution, and so they fall under the supervision of the Constitutional Court. There must be, however, limits to this supervision, so that the scope of the jurisdiction of the Constitutional Court is not broadened *in fraudem legis*.

The standpoint adopted by the Constitutional Court when determining the scope of its supervision of the authorising law is correctly limited. The Constitutional Court can only determine whether the international treaty belongs to one of the four categories enumerated in Art. 33 para. 2 of the Little Constitution.

When it refers to the substantive inconsistency of the treaty with the Constitution, other laws or international treaties adopted earlier by Poland, the Constitutional Court has rightly rejected the option of declaring unconstitutional the authorising law permitting ratification of an international treaty inconsistent with former international agreements. It has also soundly observed that the obligation to amend domestic legislation, resulting from the international treaty, is a normal consequence of its conclusion. The Constitutional Court cannot predict that the future tenor of these laws will be contradictory to the Constitution.

The only case where the authorising law is obviously inconsistent with the Constitution is the law authorising ratification by the President of international treaties containing self-executing norms which, at the moment of ratification, are contradictory to the Constitution. In this event the Constitutional Court has confirmed the direct applicability, and the direct effect in Poland, of the self-executing norms included in international treaties. It is also a very important consequence of this Resolution.

## II. The Decision of the Supreme Court, Administrative, Labour and Social Security Chamber of 15 June 1993 (IPRN 54/93), not published

The "Association of the Combatants of the II World War of Former German Soldiers in Polish Republic" has been registered by the decision of the Voivode Court in Bydgoszcz of 8 December 1992. The Minister of Justice brought an extraordinary appeal under Art. 417 of the Code of Civil Procedure (Law of 17 November 1964, Official Journal No. 43, item 296). After retrial the Supreme Court annulled the decision of the Voivode Court in Bydgoszcz and sent the case back to the Voivode Court for a new trial.

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**The Supreme Court decided:**

There are no provisions in the existing legal system which can give grounds to the opinion that restrictions can be imposed on the rights of a particular group of citizens because of their former membership of a foreign army.

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**Reasoning:**

The Supreme Court points out two faults in the decision of the Voivode Court in Bydgoszcz. The first problem refers to the Voivode Court's acceptance of the use of the term "combatant" with regard to the members of the new association. The Law of

24 January 1991 on the Combatants and some victims of the repressions of the time of war and the post-war period (Official Journal No. 17, item 197) define as combatants "persons who took part in wars, military operations and national insurrections, being members of the armed forces of organisations fighting for the sovereignty and independence of the Republic of Poland". This term, for obvious reasons, cannot include on Polish territory soldiers of the Wehrmacht, i.e. of the army of the III German Reich.

The second fault concerns the statute of the new association. This statute provides for the creation of regional branches without describing either their organisational structure nor the rules governing the creation of the regional branches. This is inconsistent with Art. 10 para. 2 of the Law of 7 April 1989 on associations (Official Journal No. 20, item 104 with the subsequent changes).

The Supreme Court does not share the opinion expressed by the Minister of Justice in the extraordinary appeal that the German soldiers are not entitled to enjoy extensive rights in order to develop their economic activity and to organise feasts or other demonstrations on Polish territory. The Supreme Court does not agree that events of the past can be a reason for limitation of the right to develop economic activity by former German soldiers.

Analysing the provisions of the Polish Constitution as well as of the laws, the Supreme Court has not found any normative basis for a limitation of the right to associate of the former German Soldiers except for a lack of grounds to create an association of combatants.

The Supreme Court has also rejected the accusation included in the extraordinary appeal that the District Court in Bydgoszcz has seriously infringed Art. 11(2) of the European Convention on Human Rights and Fundamental Freedoms of 1950. Art. 11(3) of the Convention contains authorisation for national legislative organs to introduce into the legal system limitations upon the freedom of association. This Article in fact constitutes a guarantee that this freedom will not be restricted in cases other than those described in its provisions. Hence, the Supreme Court has qualified the standpoint expressed in the extraordinary appeal as an error or abuse of law.

The Supreme Court has also declared that the international agreements on human rights should be applied directly in Poland, without transformation. The reason for this is that Poland is a state governed by the rule of law, which means that it fulfils its obligations contained in international treaties concluded and duly ratified. The convention on human rights belongs, in the opinion of the Supreme Court, to the category of international treaties which are concluded with the intention of the contracting parties to apply the treaty directly on their territories. This application cannot depend on evaluation or the recognition by the administrative organs of the contracting parties. The Supreme Court recalls also Art. 27 of the Vienna Convention on the Law of Treaties 1969, ratified by Poland in 1990, which provides that a state cannot refer to the provisions of its national law in order to justify the lack of execution of international treaties within its territory.

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**Commentary:**

The decision of the Supreme Court in the presented case, though controversial, is correct. The freedom of association provided for in Art. 84 para. 1 of the Polish constitution can be limited only in cases described in para. 2 of the same article. The freedom to associate can be restricted, according to this article, only when the aim or activity of the association threatens the political or the social regime as well as the legal system of the Republic of Poland. The freedoms of people are their natural capacities to undertake acts of their own volition and to realise them. They are different from rights which must have a normative basis in the positive law. Freedom is a natural feature of the human condition, which can be interfered with only if there is a provision of law imposing a restriction. Neither the Polish Constitution nor other laws contain any restriction concerning former German soldiers. On the contrary, Art. 67 para. 2 of the Constitution guarantees to all citizens the same rights, independently of their membership of a particular social group. Also, the Law on Associations, in Art. 1 para. 2 allows limitation of the freedom of association only in cases provided for by Polish laws and when these restrictions are necessary to protect the interests of state security or public order, as well as to protect public health or the rights and freedoms of other people.

Sending the case back for retrial the Supreme Court has recommended the District Court to examine carefully the statute of the association in order to exclude the possibility that the demonstrations or events organised by this association offend the feeling of other Polish citizens. This suggestion of the Supreme Court is generally sound, but may give rise to problems in its realisation. Associations in Poland are self-governing, which means also that the founders and subsequently the members decide on the aims of the association as well as on the methods of their realisation. The District Court, as a consequence, can only suggest the changes in the proposed statute and, in the event that these changes are not adopted – establish the inconsistency of the statute with the existing law and refuse to register the association (Art. 14 of the Law on Associations). It will be the task of the appropriate state organs to decide then whether the public demonstration organised by the association threatens the life or health of the people or a significant amount of property. It is a consequence of the democratic system in Poland, that no group of people living on Polish territory can be "preventively" restricted in their freedoms and rights solely because for some reason they do not "deserve" it. To conclude, it should be stressed that since international and domestic law are consistent on this point, the restriction of the freedom of association of former German soldiers in Poland is *de lege lata* impossible. Any other solution requires amendment of the current law.

This part of the reasoning of the Supreme Court, which concerns the application of international law in Poland, is very interesting. This problem has recently appeared in several cases in the jurisprudence of the Supreme Court and Constitutional Court. Both these organs, as well as the Prosecutor General, the Supreme Administrative

Court and the Polish Ombudsman have expressed opinions compatible with the view dominant in the doctrine, that duly ratified international treaties comprising norms of a self-executing character should by applied in Poland directly and *proprio vigore*. When it concerns the European Convention on Human Rights and Fundamental Freedoms or other international treaties protecting human rights, the direct application of these acts is also the consequence of the intention of the contracting parties to free the execution of their provisions of any obstacles which might appear during the process of transformation to the national legal system.

## III. The Resolution of 3 Judges of the Polish Supreme Court, Civil Chamber of 24 June 1993 (III CZP 76/93), published in the Jurisprudence of the Supreme Court (OSN) No. 1/1994, Item 10

The Supreme Court has answered the two following questions submitted to it by the Voivode Court of Katowice, Commercial Division, by virtue of art. 391 of the Code of Civil Procedure (Law of 17 November 1964, O.J. No. 43, item 296 with the subsequent amendments:

1) Whether a Polish citizen domiciled permanently abroad, proving his identity with the Polish consular passport and being at the same time registered as a permanent resident in Poland, is a foreign subject in the meaning of the Art. 3 para. 2 point 2 of the Law of 23 December 1988 on economic activity with the participation of foreign subjects (Official Journal No. 41/1988, item 325)?

2) Whether the lack of permission necessary to create a company with the participation of a foreign subject, which is required by Art. 5 para. 1 of the Law of 23 December 1988 on economic activity with the participation of foreign subjects, constitutes a significant error presenting an obstacle to the registration of the company in the commercial register and giving grounds to have a reparatory procedure initiated by the Registrary Court according to Art. 173 § 1 of the Commercial Code (Regulation of the President of the Polish Republic of 27 June 1934, Official Journal No. 57, item 502 with subsequent amendments), with all the consequences, including the dissolution of the company by the Court by virtue of Art. 173 § 3 of the Commercial Code?

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**The Supreme Court has passed the following Resolution:**

1) A Polish citizen proving his identity by means of a Polish consular passport, domiciled abroad, and being at the same time registered as a permanent resident in Poland, should have been considered under the Law of 23 December 1988 on economic activity with the participation of foreign subjects (O.J. No. 41, item 325) as a foreign subject (Art. 3 para. 2 point 2 of this Law).

2) The lack of permission of the President of the Foreign Treatment Agency, which should be attached to the application for registration (according to Art. 5 para. 1 of the above mentioned law) cannot provide any legal basis, after the entry into force of the

Law of 14 June 1991 on companies with foreign capital (Official Journal, No. 60, item 253 with subsequent amendments), for the Registrary Court to initiate the procedure provided for in Art. 173 § 1 of the Commercial Code aimed at imposing the sanctions stipulated for in § 2 and 3 of this article.

**Reasoning:**

1) The company with limited liability was registered by the District Court in Katowice on 15 March 1990. On 20 January 1993 the District Court called upon the board of directors of this company to rectify, in accordance with Art. 176 of the Commercial Code, the error consisting in the lack of permission of the President of the Foreign Investment Agency, which was necessary in order to create the company since one of the partners was a foreign subject in the meaning of the Art. 3 para. 2 of the Law on economic activity with participation of foreign subjects of 23 December 1988 (Official Journal No. 41, item 325).

The conclusion of the agreement creating the company, submission of the application for registration and the registration by the District Court took place under the Law 23 December 1988 on economic activity with participation of foreign subjects. According to this Law the creation of a company with the participation of foreign subjects required the prior permission of the President of the Foreign Investment Agency. This condition has not been observed.

The first question which had to be addressed was whether one of the partners really was a foreign subject and therefore whether the permission required by Law was necessary in this case. One of the partners, when signing the agreement creating the company declared that his domicile was abroad, not mentioning that he had permanent domicile in Poland. He was in possession of a consular passport which, according to the Law of 17 June 1959 on passports (Official Journal 1967, No. 17, item 81, with subsequent amendments) in force at the time, was issued to Polish citizens domiciled permanently abroad. Taking this into account this partner, in the opinion of the Court, should have been treated as a foreign subject. He was also defined as a foreign subject by the board of directors in its declaration of 20 August 1992.

2) As to the second question, the Court has established that the company was created under the Law of 23 December 1988, which is no longer in force. It has been replaced by the Law of 14 June 1991 on companies with foreign capital (Official Journal No. 60, item 253), according to Art. 44 of this Law, on 4 July 1991.

The Law of 14 June 1991 has disbanded the office of President of the Foreign Investment Agency and his competences have been transferred to the Minister for Possessional Transformations. All applications for permission to establish a company with the participation of a foreign subject which have been submitted but examined before the entry into force of the new Law will be considered under the rules and procedures of the Law of 23 December 1988. The new provisions of 14 June 1991 require permission only when the activity of the company deals with certain strictly limited fields (Art. 4 of the Law of 14 June 1991). This does not apply in this case.

In consequence the board of directors cannot actually submit the permission required by the District Court because the organ which delivered them before has been abolished.

At the same time the Minister for Possessional Transformations cannot grant the permission because the application was not deposited before 4 July 1991. The Law of 14 June 1991 in turn does not require permission for the kind of activity which is carried on by this company.

For these reasons the initiation of the reparatory procedure by the District Court is considered pointless. Since the board of directors cannot fulfil the order of the Court because of the change in the law, the application of the sanctions provided for in Art. 173 § 2 and 3 of the Commercial Code is excluded.

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**Commentary:**

The crucial problem which constituted the reason for the new decision of the District Court in this case was the lack of the permission required by the Law of 23 December 1988 in case of the foundation of a company with the participation of foreign subjects. The permission should have been granted because one of the partners of this company was a foreign subject. This problem was not examined by the Court at the time of registration.

The definition of "foreign subject" is given in Art. 3 para. 2 of the above Law. The following may be considered foreign subjects: moral persons having their seat abroad, physical persons having their domicile abroad and companies without legal personality created by these moral or physical persons. The problem in the present case arose when it turned out that one of the partners at the date of the conclusion of the agreement establishing the company had his domicile in Germany and was in possession of a Polish consular passport. These facts imply, according to the Law of 1988, that the partner was a foreign subject, and so the permission required by the Law was necessary. Even the fact that this partner was registered as a resident in Poland could not change this qualification since this registration is an administrative fact which is not to be identified with domicile. The term domicile used in Art. 3 para. 2 point 2 of the Law of 1988 refers to the Polish Civil Code, Art. 25 (Law of 23 April 1964, Official Journal No. 16, item 93) and means the place which the individual treats as his/her permanent residence. Art. 3 of the Law on companies with foreign capital of 14 June 1991 preserves the same definition of foreign subject as the Law of 1988, but this concept is completed in Art. 7, which provides that a moral person with the seat in the Polish territory can be considered a foreign subject if it so wiskes. Art. 7 para. 2 stipulates that a dependent subject is: 1) a subject which has directly or indirectly the majority of voices in the general assembly of partners, also when the majority is achieved on the basis of agreement with other partners or share-holders, or 2) a subject which is authorised to appoint and dismiss most of the members of the managing organs of this moral person. Art. 7 para. 3 adds that moral persons may also be considered dependent, when more than a half of the members of the board of directors of this moral person are at the same time members of the board of directors or the managing directors of the foreign subject or other subject staying in a relationship of dependence upon the foreign subject.

The concept of foreign subject cannot be confused with the notion of citizen which is fundamental for the Aliens Act of 29 March 1963 (unified text Official Journal No. 7/1992, item 30) or the Law of 24 March 1920 on the acquisition of immovable property by foreigners (Official Journal 1933, No. 24, item 202 with the subsequent changes).

In order to establish that the company falls under the scope of the Law on companies with foreign capital of 1991, now in force, it is sufficient to determine that among partners of the company, there is one partner who is a foreign subject in the meaning of Art. 3 and Art. 7 of the Law of 14 June 1991. This act, however, does not require permission for the establishment of a company except for the cases enumerated in Art. 4. The activity of the company in the present case does not fall under any of the provisions of this article and so, because the application for permission has not been submitted before the expiry of the Law of 1988, the procedure resulting from that Law cannot be applied and the position adopted by the Supreme Court in this case is correct.

EWA SKRZYDŁO-TEFELSKA

# BOOK REVIEWS

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R. SZAFARZ, ***Rozwój prawa międzynarodowego Europy. Z problematyki „europejskiej przestrzeni prawnej"***, *[The Development of the International Law of Europe. Some Problems of "the European Legal Space"]*, Warszawa 1994, pp. 253.

The author's aim is to identify and investigate the collection of all-European rules of international law. The first four chapters of the book treat of the all-European law originating in the CSCE, the Council of Europe (CE), the UN European Economic Council (UNEEC) and of a few other European Treaties. The last (V) chapter is devoted to European regulations of settlement of disputes. The book ends with 63 conclusions, 3 appendices, with lists of all-European treaties, and with a rich bibliography which confirms the author's well known care for a solid documentation.

In the disposition of the content somewhat surprising is the priority given to the CSCE, although R. Szafarz herself estimates its contribution to the all-European legal order as unimportant, consisting merely of two treaties and a few in fact already universally recognized principles. The importance of the CSCE, in the opinion of the author, is mainly reduced to an inspirational role of its practical agreements and to a catalysis of the evolution in Central and East Europe. She pays also attention to the contribution of the CSCE practice to the arising of all-European customary rules, rightly cautiously called "customary rules *in statu nascendi*."

An incomparatively greater role in European law-making than that of the CSCE is played by the CE. In the author's opinion, however, of the spectacular number of 152 CE treaties as many as 12 have no chance of final entering into force, among them those on the punishment of crimes against humanity and of war crimes. At the same time she rightly praises the CE for the control mechanism foreseen in its treaties.

A high position among the all-European law-making organs occupies the oldest of them, the UNEEC, whose achievement consist of 57 treaties in as many as 8 fields, the environmental protection inclusively. Although here also, in the author's opinion, 12 treaties have no chance of final acceptance, this organ, thanks to its long practice, has created a valuable framework for European law-making.

Among other "ordinary" treaties special importance has been rightly attached to those on disarmament and to the particularly promising Treaty on Open Skies of 1992.

Relatively much space has been devoted in the book to the European achievements in the field disputes settlement. Except the CE convention of 1950, other procedures have so far not found broader application however. Worth mentioning is here the author's opinion of the suitability of applying the European institution of directing disputes to the World Court also by the UN Security Council for disputes constituting a threat to international peace and security.

Numerous author's conclusions deserve of course special attention. They are all interesting and, with only few exceptions, convincing. E.g., one may doubt whether political agreements of the CSCE can cause an "impossibility" to assert that the questions regulated in such agreements belong to the exclusive jurisdiction of the participants at the CSCE, or if they can lead to a "necessity" to apply such agreements for the interpretation of other treaties on the same matter. One may fear that the acceptance such conclusions would rather contribute to the growth of uncertainty of international law.

An even graver consequence, it seems, might cause the proposed by R. Szafarz change in the CSCE Declaration of Principles concerning the limiting the still basic UN principle of sovereign equality to enable humanitarian intervention. Such a smuggling by means of political agreements, even in the noblest intention, rules that States are unwilling to accept as legal ones can only induce the stronger States to act on the margin of law, thus augmenting the anarchy in international relations.

Among the majority of just conclusions a particularly pertinent concerns the numerous European procedures of dispute settling. R. Szafarz rightly stresses that, instead of creating new procedures, one should aim at general acceptance and application of the already existing ones.The general value of the reviewed book falls out well. Based upon a rich, clearly presented material and containing interesting opinions, the book will certainly offer every reader a deeper insight into the problems of European law-making and thus stimulate him to his own reflections.

**Karol Wolfke**

R. MÜLLERSON, ***International Law, Rights and Politics. Developments in Eastern Europe and the CIS***, Routledge, London 1994, pp. 230.

Political turbulences amounting to a revolution and territorial changes in Central and Eastern Europe have posed a number of *new old questions* to international lawyers, leading to important modifications of international legal structures. Politics has mixed with international law and influenced traditional institutions, creating a necessity of a new approach towards many of them. R. Müllerson, who has personally experienced these changes (he started his career at the Soviet Academy of Sciences, subsequently he was member of the UN Human Rights Committee, then came back to his Motherland Estonia where he served as Deputy Foreign Minister, and finally he continues his research, actually as visiting professor in London), has attempted to present his position towards all these changes.

The first chapter presents effects of the Cold War. The author points out that a bipolar system existing in the world has had important consequences for the functioning of the United nations, in particular in the field of UN law (breaches of peace, aggression etc.); on the other hand, in certain domains it has played a supportive role for observance and implementation of international law, e.g. in respect of the international use of force. The conclusion is that during the Cold War era the importance of international law has been limited because the Western democracies and the Soviet bloc often disagreed as to the content of international legal norms and to their implementation. The notion of a *peaceful coexistence* has made its great career. The

end of the Cold War gives raise to new threats in international order: first of all, Müllerson indicates in this context the Islamic fundamentalism and possible North–South conflicts, as well as difficulties faced by Russia in the process of finding a new place in the world community. The author has appreciated new trends in the Russian foreign policy after 1993 positively; however, he has written his book before the war in Tchechenya and before the passing by President Yeltsin of his decree about the protection of the Russians abroad, amounting to the intention to intervene in domestic affairs of neighbouring countries. It seems to us also that the role of Russia in respect of the conflict in Bosnia (in fact supporting the Serbs) should be condemned. If these reminiscences of *old thinking* are not challenged, it will be difficult to implement new tasks of international law like a struggle against terrorism or a humanitarian intervention. Human rights occupy special place among the reflections of the author. Firstly, the author focuses upon a new approach to self-determination. He treats the dissolution of the USSR (and to a certain extent – of the Socialist Federal Republic of Yugoslavia) as a continuation of a decolonization process, but on the other hand he stresses also that the dissolution of Yugoslavia and Czecho–Slovakia could probably be avoided. The international community has been afraid of any attempt of secession, so it has decided to support the emergence of new states as it has realized that the maintance of the old states would have led to more difficult problems than the recognition of secession. However, the thesis by the author is not quite consequent. He states further that exclusively oppressed ethnic groups have a right to secede, but not groups living in democratic societies. Like many others contemporary authors, Müllerson seems to identify a right to self-determination with a right to democracy (which amounts in fact to internal self-determination), neglecting an external aspect of self-determination. Finally, auch an approach does not clarify the problem of subjects entitled to self-determination. Müllerson refers to populations of states as *peoples* entitled to self-determination, while reserving to minorities only a right to protection. It is hard to believe that the Croatian, Bosnian or Slovenian nations were so oppressed under the Yugoslav regime that they acquiered the right to self-determination. As to the scope of minority protection, the author seems to accept a customary character of Article 27 of the Covenant on Civil and Political Rights, positive duties of states towards minorities living in their territories, and a collective character of minority rights; finally, he confines minority rights to all residents of the state, and not only to citizens (this thesis certainly extends contemporary international law).

Following parts of the book are devoted to the institutions which have been to the greatest extent influenced by the changes in Europe: state succession and recognition. As to the latter, the author emphasizes strong constituent elements in the recognition of the Baltic states; we agree also with him that from the traditional theory of recognition, based upon the principle of effectiveness, the recognition of (at least) Croatia and Bosnia–Herzegovina has been premature. On the other hand, however, if such a step has been made by the international community, it should be followed by the full protection granted under Chapter VII of the UN Charter. This has not been done. Finally, in respect of the problems of succession and continuity of states, Müllerson decisively stresses the element of stability of international relations as a basic guideline for the third states in resolving these problems.

Manifestly, the study concentrates mostly upon personal experience of the author, and it concerns in many respects the situation in the former USSR which cannot be generalized (communist regimes in Poland and Hungary were certainly much less repressive that the Soviet one, in particular after 1956; also the ethnic situation in the USSR and former Socialist Federal Republic of Yugoslavia was particularly complicated; finally, the situation of the GDR within the Eastern Bloc was special because of its special connections with the FRG). It is very difficult to treat Central and Eastern Europe as a uniform unit as some publicists tend to do. Müllerson

has avoided this mistake but because of this special concern for the USSR his study does not present a full view of the situation of this part of Europe. We would like to emphasize that the book by Müllerson corresponds with many thesis elaborated by international authors as a response to the developments in Central and Eastern Europe. However, at the time of writing the author could not foresee the reaction (or – properly speaking – the lack of reaction) of the international community upon the events in Tchechenya and Bosnia which in fact negatively verify numerous issues discussed by him.

**Władysław Czapliński**

J. BARCZ, ***Udział Polski w konferencji 2 + 4. Aspekty prawne i proceduralne***, *[The Participation of Poland in the 2 + 4 Conference. Legal and Procedural Aspects]*, Warszawa 1994 (PISM), pp. 196.

Problems of external boundaries of united Germany and of the security of Germany's neighbours have belonged to key issues in the process of German reunification. Disputes concerning the status of the Oder-Nissa boundary and the former German Eastern territories have constituted an important element of East–West conflict. West German non-recognition policy towards the Western boundary of Poland was often utilized by Communist government in Poland as an important factor invoking the necessity of alliance and protection by the USSR, so it played an important internal political role.

Fortunately, all problems connected with the Polish–German boundary have been resolved by the "2 + 4" Treaty on the Final Settlement with Respect to Germany, as well as by two bilateral treaties between Poland and the FRG: the Boundary Treaty of 14 November 1990, and the Friendly Relations Treaty of 17 June 1991. Germany actively supports economic and social processes in Poland and acts in favor of Polish demands on membership in the European Union and NATO. However, the way towards new relations between Poland and Germany has not been easy. The book by J. Barcz, in the time of German unification official at the Polish Foreign Office and participant to negotiations with Germany, but also professor of international law and specialist in international legal aspects of the "German question" and Polish–German relations, offers a good look upon complicated political and legal processes which have ultimately led to a new era in the mutual relations between Poland and Germany.

J. Barcz has analysed antecedence of the dispute including the legal positions of the parties and the repercussions of the dispute in the West German legal system. The FRG has firmly presented an opinion that though it is legally identical with the German Reich within its frontiers of 1937, any final solution concerning its boundaries could be undertaken exclusively after the unification of the two German states. Such an attitude has played important role during the "2 + 4" negotiations, as the West German government has tried to secure a possibly convenient position in the eventual future negotiations with Poland. The author has emphasized, e.g., that the FRG did not agree to sign a bilateral treaty with Poland before the unification, though a treaty of comparable importance was concluded by it with the USSR. Then Barcz has presented Polish diplomatic efforts leading to the Poland's participation in the "2 + 4" conference (the

session of Paris), as well as the Polish demands which have been to a large extent taken into account while formulating Article 1 of the Moscow Treaty on the Final Settlement (in fact, Poland has not succeeded exclusively in introducing a clause dealing with the changes in the German legal system except Article 23 of the German Basic Law). Finally, the volume contains an interesting analysis of the rights and obligations of Poland as a third state to the Final Settlement Treaty, and the importance of the Boundary Treaty between Poland and the FRG for the Oder–Lusatian Nissa boundary.

We should indicate, however, some aspects of the problem which are not sufficiently taken into account by the author. First, the book lacks at least short presentation of the positions of Four Powers towards the German problem in the time of Cold War (in order to evaluate the consistency of their foreign policy), and secondly, it does not analyse the implementation of the 2 + 4 treaty by the FRG (though major problems including minority rights for Germans in Poland and Poles in Germany have been resolved, the question of German citizenship within the meaning of Article 116 of the Basic Law and its consequences remains actual).

The discussion of the merits of the problem is followed by a selection of documents on the aspects of the German unification process concerning Poland, including first publishing of certain diplomatic documents. The book is valuable for lawyers, political scientists, but also for laymen interested in diplomacy and Polish–German relations.

**Władysław Czapliński**

A. RANDELZHOFER, O. DÖRR, ***Entschädigung für Zwangsarbeit?***, Duncker & Humblot, Berlin 1994, pp. 135.

Problems of indemnities for victims of Nazi persecutions are still not regulated, though 50 years elapsed since the end of the second World War. They are discussed occasionally in Poland, in the FRG, and in other countries which suffered during the war. The number of persons entitled to such indemnities diminishes every year, but they still hope to be granted a redress for their suffering. A group of persons decided to claim a redress before German courts. The book under review contains a legal opinion presented by two German international lawyers at the Federal Constitutional Court in connection with these proceedings.

The problem of individual indemnities for war damages and personal sufferings is extremely interesting because normally such claims are regulated by international agreements between interested states. A number of such agreements have been concluded after the Second World War. However, the claimants in the proceedings before the courts of Bremen and Bonn have not been covered by these agreements. The authors point out correctly that payments of war indemnities have been realized with respect to certain categories of states, namely: the states recognized by the FRG on a particular day. However, they do not mention the principle of continuous nationality as a condition of granting indemnity.

The authors have discussed to possible kinds of claims based on international law and municipal law, respectively. They remark however, that the analysis of German law as possible ground of claims should be excluded, as the German law was extended upon the occupied Polish territories illegally. In our opinion, this fact does not exclude the applicability of German

law as binding *de facto* (the same construction was applied by West German Eastern territories after the Second World War – according to German thesis, these territories have not been subjected to Polish sovereignty, but Polish law has been valid *de facto* since 1945). Anyway, the authors exclude the possibility of basing claims upon German administrative, civil and labor law.

The most important statements by the authors concern the international legal grounds of indemnity claims. They state correctly that numerous acts of German armed forces and civil authorities in the occupied territories violated laws of was. However, the Hague regulations of 1907 could not constitute a basis for individual claims. Such a position is fully justified, as – taking into account international law as it was during the war – individuals were not regarded as subjects of international law and could not acquire rights directly under international conventions. On the other hand, we fully agree that the denunciation of all claims against Germany by Hungary and Romania in the peace treaties of 1947, and the denunciation of reparations by Poland in 1953, covered also all claims by individual nationals of the interested states. The activity of the Polish-German Foundation for the Victims of Nazi Persecutions established in 1991, and based upon *ex gratia* payments by the German government confirms such an attitude.

The book contains a cold and precise presentation of legal arguments *pro* and *contra* a possible responsibility of the FRG for the Nazi persecutions during the Second World War. It is difficult to agree emotionally with the statements like that the work in nazi concentration camps served German economic purposes (in fact, it often was totally senseless), ant that it was not contrary to the convention on the abolishing of slavery of 1926; or that claims cannot be based upon German private or labor law, as it was not valid with respect to former prisoners of concentration camps. Finally, it is regrettable that the authors have limited themselves to the purely legal analysis – it would be interesting to know their opinion about the legality of exclusion of certain kinds of claims out of the scope of the German Indemnities Act (in fact, such a solution made the claims impossible).

**Władysław Czapliński**

G. BURDEAU, B. STERN, ***Dissolution, Continuation et Succession en Europe de l'Est***, Montchrestien, Paris 1994, pp. 406.

The Universities of Paris have organized a series of seminars concerning different aspects of state succession. The proceedings of the first one have been published in the reviewed volume. They cover general problems of state succession (including state succession in respect of treaties), issues of state succession involving international organizations, and economic aspects of state succession.

The book starts with the paper presented by R. Müllerson concerning general problems of state succession, including a relationship between state succession and state identity. The author concentrates upon the dissolution of the USSR. He concludes that Russia is in fact identical with the former USSR, though its international position has changed comparing with that of the Soviet Union according to the rule *rebus sic stantibus*. He points out as well that the issues of

state succession in the former Soviet state still require negotiations and political solution. The author criticizes the position of the Baltic states as to a *restitution ad integrum*, treating it more or less as a legal fiction. Though Müllerson recognizes the importance of the *uti possidetis* principle, he finds difficult its application to the Baltic states as their boundaries have been changed under the illegal Soviet occupation. It is regrettable that the author has not discussed this question in a more detailed way (the case of Wilna area, illegally annexed by Lithuania in consequence of the Ribbentrop–Molotov Pact, seems to be extremely interesting). Finally, one could expect more detailed presentation of the position of the post-Soviet states under international law (Müllerson does not state in a clear way whether the dissolution of the USSR has amounted to a dismemberment or to a series of secessions).

Other presentations have been devoted to different aspects of state succession. H. Boko-Szegö has analysed the succession in respect of treaties and concluded that there is a general trend towards the application of predecessor's treaties by successor states. However, if the succession of general multilateral and bilateral treaties is based more or less upon the agreement problems connected with the succession in respect of state property (the rule of automatical transfer of the predecessor's state property to successor state(-s) seems to be one of the rare firmly established international legal rules relating to state succession). She has concentrated, however, on the issues of the succession in the former Yugoslavia which are not necessarily typical (problems of responsibility for war damages and activity of the Badinter Committee are involved). An interesting presentation by G. Burdeau deals with the monetary aspect of state succession, rarely presented by commentators. Finally, we would like to emphasize interesting reports on practice of different international organizations directly touched by the problems of state succession: IMF, World Bank, FAO, Council of Europe (including an interesting problem of succession by the Czech Republic to the European Human Rights Convention), European Communities, OECD etc., presented by both research works and practitioners, members of the staff of respective organizations. This practice shows that pragmatism, economic factors (in particular, expectancy to recover state debts owed to economic organizations) and political freedom dominates in elaborating solutions in this field. It seems that the part of the book containing reports by different international organizations is the most valuable for future research.

We fully agree with the conclusions by B. Stern that state succession is still governed mostly by customary rules which are neither numerous nor clear; factual situation and policy exigencies do not facilitate the creation of international legal rules in this field.

**Władysław Czapliński**

YEHUDA Z. BLUM, ***Eroding the United Nations Charter***; Martinus Nijhoff Publishers, Dordrecht–Boston–London 1993, pp. xxi + 285.

Professor Yehuda Z. Blum in his long and distinguished career has been able to combine features of a scholar and of a diplomatist. Being a recognized expert in the filed of international law, he also served for many years as a representative of Israel to the United Nations. Only that reason is sufficient to read his book on how the UN law is (mis-) interpreted by the United Nations themselves with great interest.

The book of Professor Blum is not a treatise, but rather a collection of essays (some of which were previously published) devoted to emergence and development of certain practices which constitute, in the author's opinion, a departure from law as embodied in the UN Charter. The following issues or cases are discussed in the book: legal character of rules of procedure, return of Indonesia to the United Nations, credentials procedure, participation of PLO in the work of UN, separation of functions of the General Assembly and the Security Council, convening special (or emergency special) sessions of the General Assembly, convening sessions of the General Assembly outside UN Headquarters, impartiality of Council and composition of the Trusteeship Council. The final chapter, which crowns the whole book, addresses the issue of possible transformation of the UN Charter through subsequent practice.

Needless to say, Professor Blum's book benefits a lot from the fact that its author was either a witness or even an actor in many events described therein. Many places throughout the book contain references not only to published sources, but also to the author's memory, which adds a significant value to the material collected.

Paradoxically, however, that asset has produced a feature that may be considered by some readers as a weakness (probably the only one) of the reviewed position. namely, cases and issues dispute between Israel (and the United States) and the Arab states (or, more generally, majority of the Third World). As supporters call "revision *de facto*", and contestants "abuse of Charter", e.g., qualification of a permanent member's abstention or absence in voting in Security Council, are given far less predominant position than they deserve.

The deliberate choice of examples of the "erosion of the Charter" produces also another result. As a whole, the book creates an impression of a fine attorney's work product, who argues with real and vigour on part of his principal. Just to illustrate that, in Chapter 7 Professor Blum argues convincingly that the meeting of General Assembly in 1988 could not be lawfully held in Geneva. On the other hand, he pays significantly less attention to the issue whether the United States could legitimately refuse visa to Mr. Arafat, which issue was a factual basis for the decision to move a part of the GA session outside the United States. In the reviewer's opinion, the book would benefit from a more balanced choice of the topics discussed.

Notwithstanding the foregoing critical remark, the value of the book by Professor Blum for any reader studying development of the United Nations in general, and rule of law in the UN in particular, is beyond and doubt. The author provides a meticulous analysis of legal aspects of a number of front page UN events. The method followed by the author is to stress the value of written rules of law, as opposed to a more liberal functional interpretation. This is particularly convincing when the author discusses various procedural rules. It is hard theoretical underpinning of the rules of procedure of international organizations is the principle of sovereignty and equality of nations, large and small (pp. 10–11). In consequence, room for a functional analysis should be broader, when substantive rules are considered, and narrower, when procedure is discussed.

On the other hand, one must admit that one of the United Nations features that have allowed that organization to perform a useful function of a global forum of exchange of political, social or cultural ideas is capability of UN to adapt to changing circumstances of world politics. While that stability of procedural rules, sometimes clashes between substance and procedure are not avoidable. Professor Blum shows in his very well argumented book that abuse of procedure occurs too frequently in the United Nations. The reviewer may only add that this may be easier understood in a political organization, motivated by political considerations. One may wonder whether the United Nations run by international lawyers would be an equally attractive forum for various nations of the world.

**Rudolf Ostrihansky**

## V. VADAPALAS, *La mise en oeuvre de la responsabilité internationale de l'Etat*, Lausanne 1994, pp. 196.

The book under review is a result of long studies of the author, head of the Chair of Public International Law at the University of Wilna, Lithuania, on the state responsibility. It constitutes also an interesting *novum*, as it is probably the first attempt of doctrinal elaboration of Part Three of the law of state responsibility, covering mechanisms of implementation of responsibility.

Two parts of the book deserve a particular interest: Chapter Three concerning a notion of an interest to act in international law (i.e. the right to institute a proceeding in the field of international responsibility), and Chapter Five dealing with selected procedural aspects of implementation of state responsibility.

The existence of a subjective right called *locus standi*, being vested to an injured state, is a necessary precondition of realization of international responsibility. The lack of legal interest precludes the realization of responsibility. The problem is, however, that the notion of the legal interest has not been precised under international law. It is not clear whether it is identical with the subjective right; an injury is nota sufficient premise of existence of such an interest. Vadapalas derives the interest to act under international law from the violation of a respective international legal obligation in force between a violating state and its victim (injured state). He bases his view upon Art. 5 of the Draft Articles on State Responsibility (Part Two). He rightly emphasizes that the same principles apply to unilateral acts of states (Art. 5 of the Draft is, in our opinion, based upon Art. 60 of the Vienna Convention on the Law of Treaties of 1968).

There are three special cases of international responsibility involving a possible reaction of states not directly involved in a dispute: violations of the obligations *erga omnes*, violations of *jus cogens*, and international crimes. However, the analysis of these problems by the author is very dogmatic, it is based upon the ILC draft and does not contain any reference to the actual practice of states (which seems to reject a possibility of claiming violations by third states). Finally, Vadapalas considers special forms of an "interest to act" under international legal instruments: the UN Charter, the Human Rights Covenants, the European Convention on Human Rights, the Treaty of Rome on the EC, and the GATT. It seems to us that these examples are not representative from the point of view of the "interest to act", as they involve the responsibility based upon the violation of particular treaties (i.e. cases covered by Article 60 of the Vienna Convention of 1968, mentioned above).

The final part of the book by Vadapalas contains an interesting discussion of instruments of implementation of international responsibility: a protest, an international accord, negotiations, and their role and effects. This part is extremely valuable, as it is based mostly upon the analysis of the jurisprudence of the Hague Court and of international arbitral awards. A great deal of work of the author is worth of an emphasis.

Finally, a general remark: it is highly regrettable that such an interesting work has been published in a limited number of copies and in practice it is not available to the wide public.

**Władysław Czapliński**

O. BRING, S. MAHMOUDI, ***Current International Law Issues. Nordic Perspectives. Essays in Honour of Jerzy Sztucki***, Dordrecht 1994, Nijhoff, pp. 217.

The book is interesting for both Polish and foreign readers because of two reasons. Firstly, it is devoted to Professor Jerzy Sztucki, scholar of Polish origin living and working in Sweden (he retired 1982 from his post at the Chair of Public International Law, University of Uppsala). Secondly, it contains a number of interesting studies presented mostly by Swedish authors – so it creates a good opportunity to become acquainted with the Swedish doctrine of international law and its position towards the most important current problems of international law.

It is difficult to review all studies included in the volume, co we can mention briefly some of them. M. Bogdan has analysed the Czecho-Slovak Customs Union. Created on the basis of an agreement concluded before the dismemberment of the Federation (what is interesting from the point of view of the law of treaties, as both parts of federation have not enjoyed a treaty-making power, so in fact the agreement has been governed by the Czecho–Slovak domestic law?), it has been supposed to enable either the easy partition of fruitful economic cooperation between the two new states. The author has expressed his surprise that both states have not been able to retain a degree of economic integration comparable with the one existing within the EC. His opinion is fully justified, as both states have often expressed their will to join the EC in future; in fact, they have proved that they have not been able to cooperate on a relatively narrow scale.

O. Bring has considered a question of the changing law of neutrality in contemporary world. He has rightly remarked that notwithstanding a certain practice under the UN Charter, the neutrality law has not been codified after 1945, what means that rights and obligations of neutral powers are not defined. However, the three European neutral states seem to interprete their obligations in a narrow way, what is understandable both under the Treaty on European Union and under the UN Charter (however, we cannot accept the view that two types of the UN action are contrary to neutrality: participation in an law enforcement action and participation in economic sanctions; the participation in such actions proclamed by the UN Security Council should be regarded as compulsory, as the obligations stemming from the Charter have primacy before any other international obligation).

B. Broms considers problems related to the UNSC Resolution 808, creating an international tribunal to prosecute war crimes in the former Yugoslavia. The most important part of the presentation is Broms' analysis of the legal basis of the Security Council competence to create such a court. The author sees a source of this competence in Chapter VII of the Charter, in particular, in the right to restore the peace and to keep the situation under surveillance. However, important doubts can be invoked against the legality of Resolution 808 – we are not convinced whether the Council has not transgressed its powers under Chapter VII (the establishing of the criminal court can hardly be seen as an element restoring or strengthening international peace and security). Politically, it should be seen as a substitute for a military action, undertaken to keep up appearance of activity in the Yugoslav crisis.

G. Lysen's paper deals with the international claims to territory. It has been divided into two parts: first concerning objects of international claims (different kinds of territories which can be subjected to sovereignty of existing states), second dealing with subjects claiming their title to territory. Within this context, the author refers to the right to self-determination as an important element of claims – he seems to identify territories entitled to self-determination with the population. It seems to us, however, that this question should be considered in connection

with the objects of claims rather than with the subjects claiming self-determination. Finally, Lysen presents different forms of acquisition of territory, linking them with the successful implementation of territorial claims.

S. Mahmoudi has devoted his study to the changing law of recognition in the context of events in the former Yugoslavia. He has remarked that although international practice after the Second World War has been more or less consistent as to the criteria of statehood required for recognition, the Yugoslav crisis has introduced at least two important modifications: firstly, an effective control has not been found as indispensable criterion for the recognition, and secondly, a number of requirements have been set up as necessary precondition of recognition. We fully agree with the author that the purpose of these modifications leading to the recognition of the post–Yugoslav states has been to put end to armed conflict in the former Yugoslavia. However, it is clear now that this aim has not been achieved. We do not accept the opinion that these events cannot contribute to the formation of a new law of recognition – on the contrary, we suppose that we observe deep changes in this field, connected i.a. with a suggested emerging right to democracy, and leading towards a constitutive concept of recognition.

R. Szafarz from Warsaw is the only scholar out of Scandinavia whose paper has been published in the present volume. She presents some reflections on new dispute settlement procedures in the framework of the CSCE. It is too early to appreciate fully their real importance. However, we are not very convinced as to the future growing role of the new OSCE, in particular in the light of attempts to make it a basis for a new European security system, in order to diminish the role of the NATO and the WUE.

Finally, we would like to notice that the late Judge Manfred Lachs has been invited to prepare a paper in honour of Professor Sztucki. However, his death has made the fulfilment of this commitment impossible.

**Władysław Czapliński**

K. GINTHER et al (eds.), ***Völkerrecht zwischen normativen Anspruch und politischer Realität. Festschrift für Karl Zemanek***, Duncker & Humblot, Berlin 1994, pp. 504.

Eminent Austrian international lawyer, Professor Karl Zemanek, has been honoured on his 65th Birthday by a volume containing essays in four fields of international law corresponding with his interests: law–making process, international organizations, responsibility of states and interdependence between international law and foreign policy. The essays has been presented by numerous leading theoreticians and practitioners.

As it is hard to mention all of them in a short review, we would like to concentrate upon some of them. J. Crawford and T. Viles have written en essay on international law on a given day, showing in fact an important aspect of creation of international custom – basing their study upon a role of the President Truman's declaration of 28 September 1945 on continental shelf. B. Simma has analysed also an important aspect of customary law and its role in contemporary world, emphasizing a new approach towards state practice (which in fact covers acts establishing and confirming an *opinio iuris* in traditional meaning – however, this theory does not explain

the importance of the *opinio iuris* as established by the ICJ, also in its recent decisions). The author has considered also the problem of the status of human rights norms under contemporary international law stating that they are of customary character, even if the state practice in not consistent and human rights are often infringed. Finally, he identifies general principles of international law as a form of treaty and customary rules. We accept such a thesis, however, the general principles should be regarded as a kind of "higher" law in such a context (there would be no reason to differentiate them from other rules – in fact, Simma suggests such a solution). G. Hafner has presented a fashionable problem of dispute settlement within the OSCE – though the system has just been created, it is too early to appreciate its real important for the practice (the CSCE has proved its full impotence with respect of a conflict in the former Yugoslavia, though as a regional organization it should deal with it first). This task of regional organizations has been discussed by J. Delbrück in his paper on the relationship between the UN and regional organizations in resolving international conflicts (he has concentrated upon the possibility of armed intervention in the conflict with and without an authorization of the UN organs). Ch. Schreuer has dealt with the binding force of treaties concluded by member states of an international organization for an organization itself, and he has distinguished several forms of an influence of such treaties: a formal accession by international organization, a unilateral declaration on the binding force of treaties, a functional succession, and an application of such treaties as "higher" law. I. Brownlie has presented a short paper dealing with the delegation of state responsibility. Although he indicates an importance of the topic for e.g. a problem of state succession with respect of state responsibility, he discusses only a part of this topic, concentrating upon the analysis of responsibility of "puppet states" in the period of the Second World War. R. Rosenstock criticizes a notion of international crimes of states within the meaning of Article 19 of the ILC Draft Articles on State Responsibility. We fully agree with the view that international practice do not give any reason for such a distinction. Two interesting presentations concern issues of relationship between international law and international policy. J.A. Frowein addresses a problem of democracy and international law – however, he does not discuss a disputable issue of emerging right to democratic government, very popular but not firmly established in customary international law (still based upon principles of sovereignty and non-intervention in domestic matters of states), but rather emphasizes changes in international law influenced by general trend towards democratization, in particular in Europe. K. Skubiszewski has presented problems connected with a political dialogue between Poland and the European Union, particularly interesting in the perspective of building up the Common Foreign and Security Policy of the Union, and of a future accession of Poland towards the Union (the active and strong political cooperation can be established in bilateral and multilateral relations relatively quickly, without awaiting an economic adjustment). Finally, we must mention an interesting paper by S. Torres Bernardez, who has analysed in a competent manner a problem of the *uti possidetis* principle in its historical development in Spanish Latin America; in fact, the author has criticized an absolute application of this principle in cases of state succession.

These and all others studies included in the book show clearly that Professor Zemanek's jubilee has been celebrated in the most valuable way.

**Władysław Czapliński**

H.-J. HEITZE, ***Selbstbestimmungsrecht und Minderheitenrechte im Völkerrecht***, Nomos, Baden–Baden 1994, pp. 254.

Both topics dealt with by the German author belong to the most important, but also to the most fashionable in the contemporary international legal writing. The mere combination of these topics is interesting. According to the traditional doctrine, minorities do not dispose of the right of self-determination. However, the substance of this right seems to have changed recently, exactly as the scope of minority rights. Heintze has decided to analyse these recent developments in their interdependence.

In fact, the book is composed of two parts. The first one deals with self-determination, the other – with minorities and their protection. Heintze accepts the view according to which the right of self-determination is customary in character; however, he treats it as a peremptory norm (at p. 23) what cannot be upheld in the light of contemporary developments, in particular in the former Yugoslavia. He adheres also to a traditional differentiation between external and internal self-determination. Since the very beginning of the decolonization within the UN system one can observe a conflict between the right to self-determination and the principle of territorial integrity of states. International practice testifies that in fact self-determination has strong territorial aspect. Heintze presents this problem in two aspects: a connection between self-determination and territory (including human rights aspect), and subjects of the right of self-determination. The former one concerns mostly the practices of ethnic cleansing as a form of discrimination contrary to self-determination – however, Heintze does not limit his study to the case of Yugoslavia, referring also to the earlier cases of Cyprus and Iraqi Kurds. Analysing the latter one, the author concludes that the notion of a "people" under international law is unclear and has been left for political decision *in casu*. Though minorities are not entitled to self-determination, the author is ready to make exception for national minorities as an intermediate stage between peoples and minorities.

The presentation of internal end external aspects of self-determination belong to the most interesting part of the book. Heintze concludes that the creation of a new state is not necessarily the only way of implementation of the right to self-determination, and that international practice is not very willing to accept it. The same remark concerns the secession. The author states that the international community can easier accept secession in the framework of federal states. In our opinion, the opinions of the Badinter Committee seem to petrify the existing boundaries and even to forbid secession. Finally, we agree with the author that notwithstanding certain recent developments (Haiti, Somalia) the right to democracy is still far from becoming international legal norm under extreme circumstances, when the internal right to self-determination (including a right to democratical participation in the government a right to autonomy) of a minority is violated, such a minority can claim external self-determination. We agree with such an opinion of the author, though perhaps the terminology should be modified. According to international law, one cannot speak of self-determination with respect to minorities. The logical conclusion seems to be that when minority rights are violated on a mass scale, and the identity or even the existence of a minority group is in danger, a minority gains the right to external self-determination (or the right to secession) what means that it becomes a "people". The lack of criteria of differentiation between minorities and peoples creates important difficulties for both theory and practice.

The second part of the study deals with the protection of minorities. Heintze adopts the definition of minority elaborated by F. Capotorti, which is based upon mixed, subjective and

objective criteria (recent practice seems, however, to suggest that the subjective factor is decisive in this respect). Then his passes to classification of minorities, and he mentions four categories of minorities: religious, linguistic, ethnic/national, and indigenous peoples. It seems to suggest that no other categories of minorities (including, e.g., sexual) are not protected under international law. Finally, he rejects a concept of group rights.

The book by Heintze is very valuable. It takes into account the recent developments of international law, including Yugoslavia (surprisingly, however, not too much space has been devoted to the analysis of the dismemberment of the USSR and the role of self-determination therein). It is interesting to emphasize also that the author generally is very traditional (or rather: very positivist) in his views; we agree with such an attitude, as the practice relating to new aspects of self-determination an minority protection is not rich and consistent anough to justify profound changes in international law, suggested by some eminent authors.

**Władysław Czapliński**

C. BRÖLMANN, R. LEFEBER, M. ZIECK (eds.), ***Peoples and Minorities in International Law***, Nijhoff, Dordrecht 1993, pp. 364.

University of Amsterdam has succeeded recently in organizing several conferences dealing with the most actual problems of international law. The book under review contains papers presented during this conference, divided into three sections: evolution of minority rights, position of different kinds of minorities, and enforcement of protection.

The first part concerns in fact the problem of distinguishing between minorities, entitled to international legal protection, and peoples, subjects of right to self-determination. Th. Franck has started his analysis of the development of the latter right with a discussion of relationship between uti possidetis rule and self-determination. He concludes that the uti possidetis rule and self-determination and territorial integrity of states (what means in practice that a people – a population of a given state – as subject of self-determination has been replaced by a population of a territory protected by uti possidetis). Then Franck, emphasized a neutral position of international law towards secession (in our opinion, modern developments, in particular the opinions of Badinter committee on Yugoslavia, seem to suggest that modern international law forbids secession, and that self-determination consequently is subordinated to the principle of territorial integrity of states). In any case, minorities are not entitled to self-determination. Finally, he concludes that the right to self-determination has evoluated towards the right to democracy (such a statement certainly goes too far, as one of the most important elements of self-determination is the right to decide freely about the external and internal status of the population concerned).

Newly appointed Judge of the ICJ, R. Higgins, commenting the presentation by T. Franck, has emphasized that the right to self-determination has developed. It is applied to all peoples, not only to colonial ones (what has been the idea at the beginning). She excludes the right to self-determination for minorities, except for opressed minorities; however, she mentions in this context Croatia and Bosnia–Herzegovina as not having an automatic right to secede; it is really

hard to believe that population of these parts of the SFRY was particularly oppressed to a degree justifying the secession. Finally, she distinguishes sharply between territorial integrity (applied to all peoples) and uti possidetis (applicable to decolonization).

Two following studies, by N. Lerner and M. Novak, have contributed towards the clarification of the scope of rights of minorities under contemporary international law. The former author has concentrated upon the catalogue of substantive rights (including the rights to life, to non-discrimination, to identity, to establish institutions, to communicate, to be represented in government, and to have some form of legal personality. Such a catalogue seems to go far beyond the scope of Article 27, and we really do not accept all these rights as belonging to the corpus of contemporary international law. The latter author has concentrated upon formal guarantees and possible future developments; however, some of his statements on substantive rights are much more restricted that the Lerner's ones, and much more correspond with the current international law. He emphasizes in particular an individual character of minority rights and – though limited – an obligation of affirmative action of state towards minorities.

We have presented in a detailed way the studies presented in the first part of the book, as they deal with problems of the most general interest for the readers of the book. It does not mean, of course, that the other papers do not deserve attention. R. Wolfrum has discussed the problem of "new minorities" formed of migrant workers, but his analysis concerns the scope of application of Article 27 of the CCPR to such minorities. M. Bothe has dealt with the possibility of the use of force to protect minorities, stressing a cautious approach of the Security Council to this question, notwithstanding recent developments in this field (however, the Council has allowed further interventions based upon the protection of fundamental human rights – like in Somalia; the exclusion of these interventions from the scope of Chapter VII would be contrary to the fundamental character of basic human rights under contemporary international law). Finally, we would like to mention an interesting paper by Y. Dinstein, who suggests the introducing of federal system in states possessing minorities, as the best way of protection (we not be very willing to grant a large scope of competence or autonomy to the federal units, fearing their eventual secession).

**Władysław Czapliński**

W. KAHL, ***Das Grundrechtsverständnis der postsozialistischen Verfassungen Osteuropas***, Duncker & Humblot, Berlin 1994, pp. 114.

An increasing respect for human rights in Central and Eastern Europe, contrasting with a former prudent position towards these rights in Communist states, has caused also growing interest for theoretical issues in this field. W. Kahl has devoted his dissertation precisely to the changing position of human rights in post-socialist states. The author has started with the general analysis of a concept of socialist human rights, emphasizing their class character, dynamism (the level of protection of human rights in a socialist state should be connected with a level of development of socialist society), a rejection of natural rights and replacement of human rights by citizen's rights, accentuating the role o obligations of an individual towards a state a condition of enjoying rights.

Then, Kahl continues with the presentation of political developments in Central and Eastern Europe, and their influence upon the modern human rights concept. He points out at certain common elements of the liberal and democratic revolutions: a rule of law, a primacy of international law over municipal law, a natural legal reference of human rights, a freedom for political parties, and a market economy. All (or nearly all) these postulates have been realized in domestic legal systems, including the introducing of international institutional mechanisms of human rights protection (the access to the European Court of Human Rights plays an important role) and constitutional systems of protection (including an important position of individual constitutional complaints and an institution of an ombudsman). Let us remark, however, that the Kahl's analysis is in some aspects simplified: the lack of constitutional complaint in Poland has not been – in our opinion – directly connected with the position of the ombudsman, but with the specific regulation dealing with the establishing of the Constitutional Court under the communist system. The author has forgotten in this context an important role played by the administrative courts in Poland.

The book by Kahl seems to be typical for a Western thinking about Communist system in general, and human rights in particular. The author approaches the problem with a certain idea on superiority of the Western concept of human rights (we are not convinced whether the population of the post-Communist countries shares such a view, in particular in the context of social rights guaranteed by the Communist governments). he neglects the differences between Communist states, treating the socialist model of human rights as uniform (in practice, a distinction can be drawn between human rights and freedoms in Poland and Hungary on one hand, and Romania on the other hand). he leaves aside a complex problem of minorities which has played important role in the human rights context in Central and Eastern Europe. Finally, although the bibliography collected by Kahl is imposing (because of a specific character of the topic and area convered), it is far from being complete, probably mostly because of the language bareer (authors coming from the former Communist states are underrated).

**Władysław Czapliński**

R. LAWSON, M. DE BLOIS (eds.), ***The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of H.G. Schermers***, vol. III, Martinus Nijhoff Publishers, Dordrecht–Boston–London 1994, pp. 416.

The book contains 19 essays dedicated to professor H.G. Schermers, a distinguished scholar and practitioner of the European Convention on Human Rights as well as the Community Law. The topics of these articles are very different. It is impossible to review all of them. Therefore, I shall make my remarks only for the selected contributions.

Thus, one study in the book pertains to the philosophical aspect of human rights (D.H.M. Meuwissen, Human Rights and the End of History; in fact, the author disputes with some interpretations of Hegel's doctrine of liberalism). He asserts that the central idea of human rights (their ultimate goal) is a human freedom. The only freedom is really universal one. Human rights in political and legal norms are devoted to protect it and they are dependent upon place and time. I have serious doubts as far as this liberal vision of the human rights and human

freedom is cprrect. Meuwissen does not take into account the others values, which are not less important than freedom: equality, security and solidarity of peoples which underlie inter alia the contemporary international human rights law. He also ignores a human dignity – the core of human rights. The ultimate human goal is not freedom but happiness in a worthy life.

The six other essays are concentrated on particular human rights or on the groups of rights (P. van Dijk, F. Ermacora and J.A. Frowein write about the asylum law and an extradition; R. Higgins touches the problem of minority rights and C. Flintermann makes some remarks on economic, social and cultural rights).

Two further articles deal with the relationship between different systems or documents protecting human rights (G. Cohen-Jonathan occupies with the relationships between the European Convention and other treaties concluded by States Parties; R. Lawson presents reflections upon the question of diverging interpretations of the European Convention by Strasbourg and Luxembourg Courts). The first one shows three problems: relations between the ECHR and the other human rights treaties (especially the UN Covenant on Civil and Political Rights) where the coordination and the divergencies are observed, relations between the ECHR and the Community law (the European Convention as a source of inspiration for fundamental Community rights, discrepancive interpretations of the Convention) and relations between the ECHR and other international obligations (e.g. extradition treaties or private international law). Lawson's study in turn presents the obstacles in inspiring of the ECHR by the EC Court of Justice resulting in diverging interpretations of that treaty. These articles belong tothe best studies in the book.

Two other contributions refer to the responsibility of the States for violations the ECHR (S.K. Martens writing on individual complaints under art. 53 of the Convention and Ch. Tomuschat dealing with the notion of breach of the ECHR). Martens thinks that there is a misunderstanding as far as the interpretation of the art. 25 of the Convention is concerned. In his opinion it should be possible to invoke the violation of the art. 53 because the art. 25 protects all the rights (not only in the section I). Thus, the Court also has the competence to control the execution of its judgments.

Tomuschat explains the notion of breach of the European Convention. He rightly proves that the division on positive and negative obligations is more practicable than the distinction on obligations of result and of means (although I am very far from the total rejection of the latter one) and that fault is of no importance (in my opinion, the principle of responsibility is closed by the risk). At the same time, I disagree with him that there is a rule that the State is not "directly (?) accountable for acts performed by private persons" (taking into account the principle of reasonableness, of course). One can observe that the characterization of the breach becomes more complicated when we include the time factor into consideration as well as we perceive that there are real and potential (responsibility in the case of the threat of violation), abstract (source of violations are laws) and concrete violations of the Convention.

The book also contains four studies on procedural issues (M. de Blois: the fundamental freedom of the European Court of Human Rights; M.W. Janis: fashioning a mechanism for judicial cooperation between the European courts; K. de Vey Mestdagh: reform of the ECHR; T. Zwart: standing to sue on human rights litigation; the last article is strongly linked with the problem of responsibility where the essential topic is the question of injury). Finally, there are several articles concerning the international action and national implementation of human rights (P.R. Beahr, Security Council and human rights; Th.C. van Boven, legal and diplomatic actions in urgent cases – especially conservative or temporary measures; E.A. Alkema, the implementation of human rights instruments in the Netherlands and H. Danelius, the status of the ECHR in the case-law of Supreme Court of Sweden).

To sum up, the book reviewed is a very interesting and valuable one. A lot of contributions may inspire to a further examination.

**Cezary Mik**

D.M. BEATTY (ed.), ***Human Rights and Judicial Review. A comparative Perspective***, M. Nijhoff Publishers, Dordrecht–Boston–London 1994, pp. 361.

As all the comparative law works, "Human Rights and Judicial Review" must call for attention. This book, however, is more interesting than the others because it offers us a theoretical reflection on the character and scope of constitutional and international judicial reviews in the field of human rights around the world.

The book consists of 9 contributions. Two of them, written by D.M. Beatty (Human Rights and the Rules of Law; The Last Generation: When Rights Lose their Meaning), do not only open and close the analysis but also constitute the theoretical core of a discourse. They have the most polemic nature. In the midst of them we can find seven articles concerning judicial review in the United States of America (A. Scalia), Canada (F. Iacobucci), Japan (I. Sanobe), India (B.P. Jeewan Reddy and R. Dhavan), Italy (E. Cheli and F. Donati), Germany (D. Grimm) and by the European Court of Human Rights (R. Bernhardt – the most disappointing contribution), These articles present in particular methods of judicial review and should be treated as an illustration of the main theoretical thesis.

I would like to concentrate on Beatty's articles, exemplifying my opinions by invoking the appropriate parts of the others contributions. In his first study, Beatty says that there are two phases of every judicial review. During the first one the courts identify rights and interests (interpret a content of norms), while during the second phase they control laws and other acts by comparing them with the defined norms. The Author tries to prove that the former part of judicial review loses its weigh because "the principles and boundaries of review that are embedded in the constitution are taken as given and the only issue is how they should be applied in a particular case". In this context the latter stage is much more important. Here two principles common for every court are applied: means oriented principle (or that of rationality or necessity) and ends oriented principle (that of proportionality or consistency). These principles allow them to rationalize the judicial review, to restrict an unfettered discretion of judges and, as a result, to isolate politics from law, according to the principle of a separation of powers. Thus a paradox how to reconcile law and politics can be solved during the second part of judicial analysis.

In my opinion, the paradox described by Beatty is false in itself. It is obvious that even constitutional courts cannot overtake a role of parliaments (their discretion is never unfettered). Moreover, an international court cannot do it. But especially the jurisprudence of the highest courts can not be separated from political and moral considerations.

The creative activity of constitutional and international courts is revealed when they apply theological, human-oriented methods of interpretation. It results in accepting a broad meaning of human rights norms (Iacobucci, pp. 109–114; Jeewan Reddy and Dhavan, p. 205; Cheli and

Donati, pp. 233–241; Grimm, pp. 274–275), in searching for extra-constitutional sources of information and abandoning old lines of jurisprudence (Scalia, pp. 65 and 68), in derivating quiet new rights and freedoms form existing rules (Cheli and Donati, pp. 236–237), in transyressing the original intentions of constitutional and international laws creators (Jeewan and Dhavan, p. 198; Grimm, pp. 274, 294, Bernhardt, pp. 306–307) and in taking into account the societal evolution (Cheli and Donati, pp. 233–234, 245–246). It is worth to accentuate that these elements appear in the first, not the second, phase of judicial review, and play very significant role in the protection of human rights.

Of course, the verification of constitutionality or internationality of laws realized during the second stage of judicial review (rationality and proportionality play here a determining role indeed) is more natural for the courts than the creative approach. It is, however, especially necessary to be creative when constitutions contain open concepts (it is rather a rule in the field of human rights), their normative quality is not very high (norms are not developed), they are silent dealing with a concrete question and courts have an appropriate competence. It is much more true for an international instruments (see Bernhardt). If constitutions are precise and well developed (e.g., Spain or Greek constitutions to some extent) and if parliamentary supremacy principle imposes it (Sonobe, pp. 167–171), the law-creating activity of supreme courts is weaker.

Thus, in my mind, both stages of human rights judicial review are still important. The fact that the second one is more complicated and therefore more manifest does not diminish the importance of the first phase. Perhaps, the first one in the course of which judges have to assume the legal protection of human rights is more essential. If so, it is vain to expect that moral or political influence on the human rights jurisprudence will disappear, and that it is possible to rationalize and make objectivize a judicial review.

And few remarks on Beatty's second contribution at the end. The author says that from earlier articles ensue that economic, social and group rights can be protected within the framework of traditional bills of rights. He opposes generation a approach to human rights. I agree with him that thinking in categories of generations is wrongful. I share his opinion that traditional legal (constitutional) tools should be useful for the protection of economic and social interests of peoples and that principles of rationality and proportionality can be used in the course of their judicial review. Nevertheless I am not convinced whether an exclusion from traditional bills of rights economic and social prolongations is sufficient for the protection of the human needs of that kind (the liberal bills usually do not contain economic, social and cultural rights even they are introduced into new constitutions; such a situation can be perceived as a proof of an insufficiency of a protection rather than of a perfect legal state). I am not sure whether the activity of the highest courts in creating, e.g. new economic or social rights is and should be eliminated either.

After the lecture of my review note the readers could have the impression, that this book is not worth of lecture. It would be, however, very misleading. Despite my critical observations and doubts this collective work is valuable. It presents a panorama of different cultures of judicial review and gives to every interested person a lot of impulses for further studies.

**Cezary Mik**

***Social Rights as Human Rights: A European Challenge***, edited by K. Drzewicki, C. Krause & A. Rosas, Turku/Abo, Abo Akademi University, Institute for Human Rights, 1994.

The book under review is a comprehensive collective study of problems regarding economic, social and cultural rights (hereafter – social rights) against the background of present transformational challenges in Central and Eastern Europe.

The first part of "Social Rights as Human Rights: A European Challenge" presents a critical view of the understanding of social rights in human rights' research and jurisdiction so far.

It includes the following essays: "Social Rights in a United Europe" (K. Drzewicki, A. Rosas), "The Legal Character of Social Rights From the Perspective of International law as a Whole" (T. Jasudowicz), "Abstention or Involvement? The Nature of State's Obligations Under Different Categories of Rights" (V.-P. Viljanen), "Some Comments Concerning the Concept of Economic and Social Rights" (R. Wieruszewski), "Direct Applicability of Economic, Social and Cultural Rights: a Critique of the Doctrine of Self-Executing Treaties (M. Scheinin).

According to the authors, provisions of the Universal Declaration of Human Rights, permanently introducing a distinction between political and social rights, simultaneously prove their philogenetic nature. The classification established for the sake of methodology and typology, and translated into legal language can often, however, deform the very essence of the matter.

At the level of the legislative process the difficulty lies in an appropriate articulation of norms-carriers of specific rights from the point of view of their effectiveness. In this context, M. Scheinin presented a most pertinent suggestion of referring to deontic logic. Subjecting social rights to its imperatives brings into light the complexity of their existence in correlation to any social structure whatsoever.

The legislator's perception of social rights as merely one of many acceptable sets of modality is equal to depriving them of their real basis to exist. The refusal of recognizing them in terms of legal claim may render them hard to implement, thus potentially useless for the right-holder. This feature of "incompleteness" makes a good will of the state under obligation a determinant factor for their implementation. Treaties and case-law of classical rights allude a way out of this deadlock. namely, direct access to a court or other proper supervisory organs in domestic and external legal order should be ensured to parties concered.

The formulation of social rights in self-executing rules, indispensable from the point of view of an individual, is not the only option reflecting the rights of the second generation because there remains the law in its objective meaning, regulating globally social policy of all states. An important point, however, is the removal of quantitative disproportion between permissible normative types of social rights, thereby making precise the interrelation between a citizen in the sphere of social rights.

The second part of this book is devoted to the examination of social rights supervision's compliance with international legal instruments. This part is composed of the following chapters: "Towards an Unofficial Petition Procedure: a Review on the Role of the UN Committee on Economic, Social and Cultural Rights" (M. Craven), "The Standard-Setting and Supervisory System of the International Labour Organisation" (K. Samson), "The European Social Charter: Its Role in Present – Day Europe and Its Reform" (K. Fush), "The Protection of Social Rights in the European Community: Recent Developments" (E. Lundberg).

There are three main forms of supervision connected with conventions of human rights: there which are contradictory in their character – a system of interstate complaints and individual applications system, and politically ambivalent recommendation system of reports.

These procedures in numerous variations are used successfully by the ILO. This system obviously points out the efficiency and advisability of settling disputes concerning the non-observance of social rights between the victim of an eventual violation and the potential perpetrator in the form of complaint or quasi-judicial procedures; such a settlement could not be reached through a reporting procedure due to its nature. Nonetheless, the authors are of the opinion that the international community still is convinced about the necessity of protecting social rights, as a group of programmatic norms through reports. According to M. Craven, this was one of the main reasons why the Committee of Human Rights was not granted the right to examine complaints concerning violations of the International Convenant on Economic, Social and Cultural Rights.

The specificity of matters submitted to the Committee prompted within its flexibile competence, the elaboration and adaptation of some constant elements of actions, thus allowing to propose a hypothesis that the Committee unofficially performs a quasi-judicial function. One can mention: receiving and investigating notifications from non-governmental organisations, ad hoc reporting procedures, the preparation of detailed recommendations for states and comments to the reports submitted by them. The lack of distinctive criteria and general inconvenience of reporting procedures cause that the Committee uses the above mentioned methods in a selective way.

There exist similar dilemmas about European Social Charter's system, which is also based on a duty of submitting reports. Moreover, proper functioning of supervisory mechanisms is hindered by the overlapping competence of participating organs. Drawing vicious circle – as F. Fusch comments – of adopting conclusions in relation to other conclusions of another body, the system has been made inefficient in spite of a developed substantial basis. The Protocol amending the ESC, adopted in 1991, is to reduce these drawbacks. Attempts to enter a complaints system into the Charter have been underway. This was reflected in the draft Second Additional Protocol.

E. Lundberg makes a note of the efforts made to establish a new regional system of social rights protection in European Union structures. In the Union, social issues are regulated by several highly detailed but fragmentary legal solutions (directives, regulations). As the Union has not passed any legally binding instrument exhaustively regulating the issues of social rights, any discussion on this issue is limited to emphasizing members states' ambitions to establish a common social area conditioned by the progress of economic integration and its consequences for the labour market.

The ILO is he only fully developed system of social rights protection, which includes well – functioning implementation mechanisms. The authors claim, therefore, that the reform of existing rights protection systems or setting up new systems of the second generation should be based upon the ILO patterns.

The third part is composed of articles: "Social Rights in the (Draft) Constitutions of Central and Eastern Europe" (Z. Kędzia), "The European Social Charter and Polish Legislation and Practice" (K. Drzewicki), "Economic and Social Rights as Justicible Rights" (M. Mikkola), "Social Rights in the Activity of the Commissioner for Citizen's Rights in Poland" (M. Wyrzykowski), "The Right to Education in Finland" (P. Arajarvi), "Social Rights in the Case-Law of the Supreme Administrative Court in Poland" (J. Grubba, A. Rochowicz), "Social Policy for a Europe in Transition" (K. Samson).

Irrespective of a form, nationals system of social rights protection take their characteristics, they will always depend on the degree of juridisation of social issues at the level of minimal standards and also on the current socio-economic policy of the state.

With the high costs of implementation of social rights, as requiring first of all positive activities of the government, it is clear that the greater the economic resources of the state, the bigger the chance of obtaining proper social benefits by citizens. However, there exists a danger, of creating an arbitrary social rights policy at the discretion of ruling coalitions which is based mainly upon the assessment of the state financial condition. There must be, therefore, some legal limits of such, somehow understandable, arbitrary attitude. Simultaneously the question emerges, at what level these rules should apply in order to secure the implementation of social rights.

From the standpoint of its impact on state's obligations, this problem should be considered separately at two legislation planes: domestic and international .

In the first case, P. Arajarvil's analysis of Finnish legislation in the field of the right to education has shown that social rights can, in particular conditions, have the rank of constitutional rights, like other human rights. Moreover, a constitution ought to define their implementability. Missing this, these rights will be a dead letter, as they were in Poland under the 1952 Constitution.

Gaps in the law can, to higher or lesser extent, be remedied in the framework of existing structures, which is confirmed by the activities of the Commissioner for Citizen's Rights, the Sumpreme Administrative Court, and other courts in Poland.

The book gives arguments against the theory that evolution to the market economy must mean a deep deconstitutionalisation of social rights. Since in many cases social rights are formulated as mature normative categories, a democratic state must consequently also refer to them. This is the issue of special importance in Poland and other post-communist countries, where extremely liberal concepts of state recognize the free play of economic forces as the sole factor regulating social issues.

From the point of view of international law, the way in which an international treaty of social rights will be transferred into domestic system becomes more significant. The lack of constitutional regulation defining the interrelationship between domestic and international law makes implementation even more complicated. This unclear status may cause the subordination of international law to municipal law, weakening its application in domestic law. Summing up the third part, it can be said that domestic and regional models illustrate a more profound juridisation of social rights in some legislative orders and jurisdictions than it would result from a national tradition of social rights.

The value of this book lies not only particular studies, but also in the fact of collecting in a single volume of 16 chapters, which introduce in a comprehensive and multifarious way the various aspects of problems connected with social rights. The volume under review occupies therefore an important place among the human rights studies.

**Katarzyna Łasak**

T. EWART, ***The Admissibility of Human Rights Petitions. The Case law of the European Commission of Human Rights and Human Rights Committee***, Martinus Nijhoff Publishers, Dordrecht–Boston–London 1994, pp. 246.

T. Ewart is an emminent expert in the human rights field. This time, he offers us his new book concerning the admissibility of human rights petitions before the international organs of two very important human rights treaties: the International Covenant on Civil and Political Rights and the European Convention on Human Rights. These instruments have a slightly different legal nature. Nevertheless, he decided to describe their practice together (a juxtaposition), according to the uniformed scheme. And this choice is rights because it makes possible to show the similarities as well as the discrepancies of the procedures described.

The book consists of nine chapters. After having read the short introduction, we enter into the general presentation of the procedures. Thus we can perceive better the following chapters which pertain the main problems of the admissibility of human rights petitions: competence *ratione personae* (*locus standi* of the victim, third part involvement, State responsibility), competence *ratione temporis* (i.a. very interesting questions of a continuing violation and the retroactive effect of jurisdictional clauses), competence *ratione materiae* (i.a. incompatibility ratione materiae, the allegations not substantiated, not appearance of a violation), problem of anonymous and abusive complaints, simultaneous examination under another international procedure and, finally, exhaution of local remedies (including six months rule). The conclusions are joined at the end.

Some observations are needed as to the title and the contents of Zwart's work. However, before I start, I would like to note that the Author was too modest writing in the subtitle that he based his analysis only on the jurisprudence of the UN ERC and of the European Commission of Human Rights. In fact, he quotes also very often and reasonably the judgments of the European Court. But making that he caused that the subtitle was not quite adequate to the contents.

My second observation is that the Author's logic is dictated by the Optional Protocol to the ICCPR and by the Convention itself and not by the jurisprudence recently confirmed (on the European level) in the Eleven Protocol to the European Convention of 1994 (art. 35). This attitude impedes the appropriate comprehension of the international practice and (what is perhaps even more important) the real weight of particular conditions of admissibility.

Thirdly, the basis of the Author's considerations is case law. It could not be otherwise. If we are reading his book, however, a critical appraisal is felt lacking. This lack is not sufficiently compensated by appraisals concluding every chapters, and by the general conclusions. Some interlinear commentary is necessary.

Fourthly, the essential idea of the book is not only to present the particular conditions of admissibility, but to show how international organs try to organize their work in order to assume the best overview of the individual petitions. Zwart proposes, i.a., a collection of fees for complaints declared abusive or when there is no violation or the complaint is not substantiated. A fee would indue the authors of petitions to rethinking their conduct. I think the idea is not appropriate because fee could be adjudicated after a petition has been declared inadmissible. The better one could be a relatively small general fee which would be suspended or reimbursed in exceptional cases (like poverty etc.). The idea of checklist for each State party of relevant domestic remedies is acceptable for a change.

Generally speaking, Tom Zwart's book is good, and an honest one. Although it is more factual than theoretical, it certainly is surely very useful. It should find its place in a library of every lawyer who works in the human rights field.

**Cezary Mik**

***The International Law of Youth Rights. Source, Documents and Commentary***, Edited by William D. Angel, Dordrecht–Boston–London 1995, Martinus Nijhoff Publishers, pp. XVIII 1143.

W.D. Angel is an employee of the United Nations Office in New York dealing with politics and youth programs. he has an access to all international documents regarding youth and is extensively prepared to comment them. he has also been provided assistance of local correspondents as well as people engaged in international youth organizations. His "International Law of Youth Rights" is a valuable work prepared with deep sense of full responsibility.

The book was published on the occasion of the fiftieth anniversary of the United Nations Charter, the thirty fifth anniversary of the United Nations Declaration on the Promotion among Youth, on Peace, Mutual Respect and Understanding between Peoples, and the tenth anniversary of the United Nations Youth Year. "The object of this book" – states the author – "is to provide in an easily accessible form documents on the rights and responsibilities of youth, which have either a global or regional significance" (p. VXIV). The book contains documents from the fields of both public and private law. It also includes recommendations and resolutions adopted by global and regional intergovernmental and non-governmental bodies. With the exception of a few conventions, most of the documents presented in the book are of a non-binding nature since the author claims that emerging international law on the global rights and responsibilities of youth contains both binding and non-binding instruments. he hopes that many of the provisions reproduced in the book may find their way into binding instruments in the future. He regards it useful and proper for the United Nations General Assembly to accept the United Nations Charter of Youth Rights and Responsibilities very soon (p. 37). The author also suggests the United Nations General Assembly should adopt World Youth Programme of Action to the Year 2000 and Beyond. Both projects are ready and their contents are presented in the book.-

W.D. Angel derives the beginnings of the law of youth from the 1158, the year when emperor Frederick Barbarossa bestowed rights and privilages upon students (p. 3). The further development of the law the author connects with privilages granted to students and universities. In the XIXth century students' demands were supported by political youth organizations and still later trade unions joined the movement. The book presents documents coming from League of Nations (1919–1942) and International labour Conference (1919–1937) as well as from other organizations of the League of Nations system (pp. 43–125). The largest part of the work, however, is devoted to instruments of the International Law of Youth as promoted by or related to the United Nations System (1946–1994). The documents reproduced here come from the General Assembly and other United Nations organs, from General Conference of the International Labour Organization, UNESCO and the World Health Assembly. There are also resolutions on

youth rights and responsibilities adopted by World Youth Conferences related to the United Nations System.

The following part of the book presents a survey of action taken by regional intergovernmental meetings and organizations, a survey of action taken by national governments to promote and protect youth rights, a survey of action taken by non-governmental youth organizations and a survey of the international youth law and human rights machinery of the United Nations System. The latter are included in the chapter titled "Towards a new and stronger international instrument, programme of action and machinery to promote and protect the rights and responsibilities of youth on a global basis".

A very detailed contents and six annexes including bibliography, index of instruments, index of ratifications, index of correspondents, index of subjects, index of countries and 28 tables constitute an invaluable guide to the rich material the book comprises. The work is perfectly edited in every aspect. Creating such a book demanded tremendous efforts indeed.

It is commonly known whom to classify as youth. There are also several different encyclopaedic definitions of youth. W.D. Angel applies the one adopted by the General Assembly in Guidelines to follow up International Youth Year in 1985. For statistical purposes the General Assembly has decided to classify as youth people between 15 and 24 year of age. This indicates that to youth we should include children aged between 15 and 18 and adults between 19 and 24, if we consider the United Nations Convention on the Rights of the Child and the definition of a child formulated there. People classified as youth study, receive professional education, begin their professional life, get married and begin to live on their own. During this particular period of their lives they decide on their future careers and types of living. Thus, youth consists of people who have special needs but are already able to demand they are satisfied as well as to bear responsibility for their conduct. People whom we regard as youth adapt to the world but also attempt to adjust the world to their own needs and perspective. Youth usually percepts the world in an innovatory way often showing dissaproval of the status quo in many aspects. hence it is well grounded to consider its rights.

Although W.D. Angel does not attempt to evaluate to what extent international, domestic, governmental and non-governmental efforts influenced the improvement of youth's plight in the world, the Draft United Nations Charter on the Rights and Freedoms of Youth (pp. 1022–1026) cited in the book clearly shows that youth needs and attempts remain unsatisfied. Issuing of the discussed book is a remarkable scientific and political event. Everyone who want to keep abreast of the subject of rights, freedoms and responsibilities of youth and be able to comment them – should read it.

**Adam Łopatka**

GERALDINE VAN BUEREN, ***The International Law on the Rights of the Child***, Martinus Nijhoff Publishers, Dordrecht–Boston–London 1995, pp. XXIII + 435.

The book written by G. van Bueren was issued as the 35th volume of the International Studies in Human Rights series. All works of this series are designed to shed light on current legal and political aspects of process and organization in the field of human rights. *The*

*International Law on the Rights of the Child* was published under the auspices of International Save the Children Alliance which believes that children are the best investment we, as a global community, can make. It is dedicated to making a reality of children's rights everywhere. These aims and beliefs clearly expressed in van Bueren's book.

The author is a Director of the Progamme on International Rights of the Child of University of London's Law Faculty. As a representative of Amnesty International she actively and constructively contributed to the works of a Working Group appointed by UN Commission on Human Rights to coordinate the project of Convention on the Rights of the Child. She is also Editor-in-Chief of *The International Journal of Children's Rights* edited by Marinus Nijhoff Publishers. *The Journal's* aim is to further children's rights in all parts of the world. G. van Bueren often participates actively in international conferences and many other campaigns undertaken in the United Kingdom and regarding the interests and rights of children. She is a scientist who is extensively prepared to write valuable and creative works on children's rights.

In the Foreward to the book, Dr. Hoda Badran, an Egyptian, Chaiperson of the UN Committee on the Rights of the Child, writes that drafting the Convention on the Rights of the Child in 1989 initiated by Poland, and ratification of it by over 160 countries was the first step in promotion and protection of children's rights. It is particularly important since children cannot and do not have the ability to protect themselves. According to Dr. H. Badran's well-grounded opinion, G. van Bueren's work "is a great contribution, and will assist all those working for children's rights' (p. XVI).

G. van Bueren claims that there is International Law on the Rights of the Child. It is composed of International Human Rights Law, International Humanitarian Law as well as provisions of Private International Law, where relevant. The author rightly points out that the principal children's treaty is UN Convention on the Rights of the Child. One of the Convention's achievements is that "it breaks new ground for a global human rights treaty, as it adopts a single method of monitoring for the protection of both civil and political and economic, social and cultural rights in peace and armed conflict" (p. 392). International Law on the Rights of the Child consists also of regional conventions and many other legally non-binding international instruments regarding children's rights. The author assumes that International Law on the Rights of the Child "is based upon the premise that international law is a valuable tool for those seeking to improve the daily lives of children (p. XIX). At the same time she admits however, that "central issue is not one of law, but of respect and recognition that children as human beings are entitled not only to care and protection, but also to participate in decisions involving their own destinies to a greater extent than is generally recognised" (p. XXII).

The main issues of the book under consideration, as well as its structure, are based on the Convention on the Rights of the Child, yet are not limited to its analysis. G. van Bueren considers all international instruments concerning interests and rights of the child, both universal, regional and partly national ones. She takes into account judicial decisions of international agencies monitoring realization of human rights with a special emphasis put on children's rights. She also deals with activities performed by various international organizations, especially by UNICEF. The author bases her thoughts on historical material and statistics. The method of comparative and legal-historical analysis is widely applied in the work. G. van Bueren often makes all-theoretical and philosophical analyses. Theses formulated in the book have been included in the world output in theory of law and philosophy of law. The author skilfully associates progress in adopting and observing children's rights with increase of respect for family and women's rights. Supporting the opinion that its the parents who take the responsibility for their child in the first place, she stresses the positive role of the state's control of the parents' realization of their rights and duties with regard to their children. She also notices other family

members' responsibility for the child if there are no parents. The author frequently places an accent on the significance of the child's participation in making decisions affecting him or her directly. She often adduces the principle that state shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Van Bueren's book, in a very competent way, presents the history of the international law on the rights of the child. The author derives the law from the Declaration on the Rights of the Child adopted by the Assembly of the League of Nations in 1924. Then she discusses the definition and status of the child in international law, describes the role of the family and the child's rights in it according to international law, considers the child's right to his/her identity, right to freedom of expression, right to freedom of thought, conscience and religion. She points out that in accordance with international law – the state should not allow religious indoctrination at schools and other public institutions. It should, however, provide wide access to learning about religions and beliefs. The author of *The International Law on the Rights of the Child* devotes much space and attention to discuss administration of juvenile justice and prevention of juvenile delinquency as well as to the rights of children deprived of their liberty. In a very profound way she presents the right of the child to education, the right to be protected against exploitation, the right to survival and development. She is particularly sensitive to observance of the right of children in armed conflicts. An individual chapter is devoted to the debate on the rights of children with special needs, in particular the disabled and refugees.

The author very thoroughly considers the mechanisms of implementation of the international rights of the child. She regards activities of the Committee on the Rights of the Child as very promising. She points out to impossibility of submitting individual petitions as the weakness of the so far existing mechanism of international monitoring of children's ritghts' observance. She also suggests adopting two additional protocols to the Convention on the Rights of the Child (pp. 410–411): the first one referring to children in armed conflicts inter alia raising the minimum age for recruitment and participation of children in armed conflicts to 18, and the other dealing with sale of children, prostitution and child pornography.

G. van Bueren's another proposal is to assign a UN Commissioner for Children, who would be a permanent body and be able to debate over individual cases with the government. His or her responsibility – in van Bueren's opinion – would be similar to that of High Commissioner for Refugees.

In her conclusion to the work the author emphasises among others that "the international rights of the child are standing at a cross-roads but the challenges and the obstacles to international protection must not be used as a pretext for failure to take appropriate measures at national level" (p. 413). She is aware of the fact that protection of the rights of the child depends upon resources which are not a matter of law but of political will. She believes however that political will can be positively influenced if the success of children's rights strategies are highlighted.

All theses presented in the book are thoroughly proved and supported by documents. Index of notions and names the book offers is invaluable for the reader.

Among numerous publications dealing with the subject of promotion and protection of the rights of the child issued up to date, G. van Bueren's *The International Law on the Rights of the Child* is the most serious monograph in the field of international law. Polish edition of the work would be precious for those who care for the improvement of the lot of Polish children.

**Adam Łopatka**

***Recueil des Cours. Academy of International Law***, vol. 236 (1992), pp. 459; vol. 240 (1993), pp. 498; vol. 242 (1993), pp. 433; vol. 243 (1993), pp. 417.

Four volumes have published recently in the framework of the collected courses of the Hague Academy of International Law. The first one is important for Polish readers because of one of the authors: Professor E. Piontek from the Faculty of Law, University of Warsaw. His lectures have dealt with some fundamental problems of international commercial law, likes different forms of economic integration, rules of origin of goods, and an extraterritorial jurisdiction in competition law of the USA and of the European Communities. They are particularly important for the Central and East European readers, who slowly become familiar with these problems. The interests of the other author of the same volume, U. Leanza, have been concentrated upon different aspects of law and economy of the sea. His study concerns the influence of the new law of the sea upon the situation of the Mediterranean Sea, taking into account the specific geographic conditions, the delimitation of maritime areas in the Mediterranean, special solutions concerning the exploitation and conservation of biological resources, and the protection of marine environment against pollutions.

The second volume contains the general course of public international law presented in 1993 by Professor Thomas M. Franck. The author has considered the international and institutional legal system from the point of view of a fairness, what corresponds with his recent interests and publications. The general course concerns the problems of: legitimacy of law and institutions, the fairness as a source of law (on the basis of equity), a significance of democracy in international law (reviewed in two aspects: as a right to participation in international decision-making process and as a right to self-determination), a fairness in the activities of international institutions, including different agencies of the UN (with special focus on the role and tasks of the Security Council and of the International Court of Justice, including the procedural guarantees of its impartiality), a differentation between just and unjust war and a collective security, finally – different aspects of international economic law (like terms of trade and conditions of investment). This particular, unusual approach to international law jointly with great erudition and passion of the author makes the volume the must position in the international legal bibliography of recent times.

The third volume contains two studies. N. Ronzitti from Pisa has considered the problems of humanitarian law applied during the armed conflicts on sea, and G.R. Moncayo from Buenos Aires has presented the Papal mediation in the dispute on the Beagle Canal. Professor Ronzitti has started with the presentation of the actors of the maritime warship, then has continued with the status of different maritime areas during the war, with the methods of conducting hostilities on sea, the neutrality and termination of hostilities. Last parts of his lectures are confined to the humanitarian aspects of the law of naval warfare: protection of human beings during the naval conflicts. Great attention has been put by the author to the changes in the traditional law of the naval warfare under the UN Charter. The second author, Professor Moncayo, has devoted his lectures to relatively unknown problems of the delimitation of frontier between Argentina and Chile in the Beagle Canal, presenting the territorial and legal background of the dispute, the role of the Pope John Paul II in the mediation between the two states, and the final solution of the dispute.

Finally, the last volume mentioned above contains two lectures again. Professor K. Siehr from Zurich has presented a large scope of different problems connected with the legal aspects of international art trade. The author is an eminent specialist in the field of conflict of laws, so

many questions touched by him refer to this field; however, some important problems belong also to the domain of public international law, in particular law of armed conflicts and law of state succession. The most important aspects of substantive law described by K. Siehr are: art trade in stolen works of art, trade in works of art removed in times of armed conflicts, trade in nationalized works, trade in works of art removed from territories before their independence, and trade in works of art removed from the former colonies before their independence. Professor M. Bernad y Alvarez de Eulate from the University of Zaragoza (Spain) has considered different aspects of the transboundary regional cooperation, starting with the interpretation of the very notion, through different levels and methods of regulation, up to the objects and limits of the regional cooperation under national and international legal systems.

**Władysław Czapliński**

D. O'KEEFE, P.Z. TWOMEY (eds.) ***Legal Issues of the Maastricht Treaty***, Wiley Chancery Law, London et al. 1994, pp. 374.

The book under review contains papers presented by leading British specialists in EC law during a seminar of the UK Association for European Law in March 1993. Materials presented have been divided into ten chapters, dealing with the most interesting problems of the Maastricht Treaty and its influence upon EC law. It is important, however, that certain problems have been dealt from different perspectives, showing the whole complexity of the European Union.

The most interesting presentations of the book concern different aspects of subsidiarity (A.G. Toth, J. Steiner, N. Emiliou), a division of powers between the Union, the Community and the Member States (S. Weatherhill), new constitutional questions including the citizenship of the Union (D. O'Keefe, P.M. Twomey, D. Macrae, W. Robinson, K. Bradley), and problems connected with the second and third pillars in the Union (M. Eaton, N. Neuwahl, M. Cremona, H. Jessurun d'Oliveira).

The principle of subsidiarity belongs to the notions which have made their great career during the recent years. Its meaning has not been expressly defined in the Maastricht Treaty, however, all commentators agree that it should be treated seriously. The most important element, which is often forgotten, is that subsidiarity can be involved in matters belonging to non-exclusive competence of the Community; the other interesting question is whether it is justiciable (contrary to different authorities, it is not – but the authors presenting their papers at the seminar are in fact unanimous that it cannot be excluded from the competence of the Court of Justice).

The most important conclusion presented by S. Weatherhill is that the fundamental principle of the Community law has been - up to Maastricht – a preemption, i.e. the Community legislation precludes any competence of the Member States in this field. This principle has been weakened by the acceptance of derogations in the field of technical directives. New approach to harmonization, i.e. Article 100(4) ,allows further derogations. So Wetherhill is entitled to ask where is the limit of derogations, beyond which the Union will lose its role as supranational body. In fact, the Maastricht Treaty does not give any answer to this question.

Institutional provisions of the Maastricht Treaty are important first of all for the European Parliament, whose role in the law-making process has increased. These provisions are of twofold

importance: they strengthen the role of democratical processes in the Union, and they allow to advance the legislation. The position of the Court of Justice has been altered in two ways: by defining the division of powers between the Court and the Court of First Instance, and by allowing to use the Chambers.

Authors of papers dealing with the European citizenship are unanimous that this notion does not play an important role under contemporary law of the Union. In fact, through the rules concerning its acquisition it is subordinated to the Member States. However, it can acquire more importance in future. In our opinion, it is too early to speak of the European citizenship, as it does not contain any obligations, and rights connected with it are more symbolic.

Finally, it has been pointed out in numerous papers that the second and third pillars (common foreign policy and cooperation in justice and home affairs), constitute important aspect of the European Union. However, at present stage the respective provisions of the Maastricht Treaty are mostly of procedural character and they provide certain consultation mechanism rather than solid institutional framework. These aspects might be of a great important, as Central European states could be involved in these mechanisms even before joining the Union.

Generally, one can sum up that the studies presented in the book concentrate upon inconsequencies of the Maastricht Treaty, which constitute an intermediate stage between the Community and the union within the meaning of traditional international law. Such an approach is not surprising, taking into account a generally hesitant position of the British towards the Union. From the perspective of Central Europe, tending to join the European Union in the forthcoming years, the book edited by Twomey and O'Keefe is of double importance. First, it shows numerous difficulties, which EC lawyers must confront while applying European law. Second, it helps to realize how much should lawyers coming from this area learn to become familiar with the EC law, and what a distance in approaching the problems must be overcome (in particular, in those fields in which the state of Community legislation is not clear). These questions seem to be underestimated.

**Władysław Czapliński**

R. DEHOUSSE (ed.), ***Europe after Maastricht. An Ever Closer Union?*** Law Books in Europe, Beck, München 1994, pp. 318.

The volume under review contains studies written by scholars from the European University Institute in Florence, connected with the Treaty on European Union. The presentations have been divided into four groups dealing with particular aspects of the Union.

R. Dehousse and E. Noël discuss the most important institutional changes. They concentrate upon new competences of the European Parliament, and upon the new role of harmonization of legislations. The Parliament has acquired important legislative powers (formerly, the Council played the decisive role in the Community law-making process) – what amounts to important step towards federalism, even if it is not admitted by observers. New competences of the Parliament govern also its relations to the Commission, what means a kind of political ties between the two organs. On the other hand, one has not succeeded in eliminating unanimity in

all important matters, and in replacing it by majority voting (what can play important role for the effectiveness and duration of the legislating process). The authors emphasize also the special importance of Article 100a for the integration.

Ch. Joerges has analysed new aspects of European law. The first part of his study deals with the basis of European economic law and seems to be a little too sophisticated; further he reviews new competences of the Community, in particular in the field of economic law and industrial policy.

The study by F. Snyder deals with the most important new element introduced by the Treaty of Maastricht: the monetary union (we agree that it amounts to the qualitative change in the system of the European integration). Snyder emphasizes two important elements: an attempt to reconcile a supranationalism (i.e. monetary union) with an intergovernmental approach (governing earlier an economic integration); and the role of new articles 2 and 3 of the Treaty of Maastricht in the evolution of the integration (of which the Union is a stage but not a target in itself).

Following studies deal with different developments not connected with the internal market (areas beyond economic integration). F. Dehousse discusses the changing division of powers within the Union, and the role of subsidiarity. He seems to see subsidiarity as a brake of integration. It shows that the states have not been willing to make a decisive step from economic integration towards federalism – in fact, it is very difficult to draw distinction between supranationalism and federalism, in particular in the light of growing competences of the Union. It must be reminded, however, that the role of subsidiarity is limited to the European Community (i.e., mostly to the economic integration), and to cases in which the Community does not enjoy exclusive competences. We agree also that, though the very notion of subsidiarity is politically connotated, there are no obstacles to submit it to judicial control by the Court of Justice.

H. Jessurun d'Oliveira has analysed problems of human rights and the Union citizenship. Though the Treaty of Maastricht contains a provision (Article f(2)) on the protection of human rights, it does not bring new elements to the rules established earlier in the practice of the European Court of Justice. As to the citizenship, it is still regulated by national legal orders of the member states, it is limited to the free movement within the Union. The author has expressed an opinion (fully justified) that the notion of the citizenship of the Union has been introduced mostly because of political reasons, in order to break a domination of member states.

Finally, the presentation of issues of foreign and security policies by R. Morgan shows that their regulation by the Maastricht Treaty consists mostly of procedural rules and of reservations which prove the lack of consensus of the member states as to the scope and forms of common policies.

The most important element of the book is an attempt (probably involuntary and unintended) to show different approaches by particular states in reconciling the protection of national identity and preservation of influence upon the formation of Union policies – with the leaning towards integration. From the Polish perspective, two remarks must be made. First, in Maastricht the member states have not decided about the directions of integration; second, if they decide at the 1996 "Maastricht Two" conference to deepen the integration, it will be difficult for Central European states to join the Union.

**Władysław Czapliński**

C.H. CHURCH, D. PHINNEMORE, ***European Union and European Community. A Handbook and Commentary on the Post-Maastricht Treaties***, Harvester Wheatsheaf Editors 1994, pp. 575.

The Treaty on European Union constitutes a challenge not only for member states of the Union but also for politicians, academics, students, journalists and – last but not least – book publishers. A number of books published on the Treaty of Maastricht by different is enormous (some of them have been reviewed in the present Yearbook). We have decided, however, to recommend the book by Church and Phinnemore. First of all, it contains a full text of the Treaty on the Union and modifications brought by it into the Community Treaty. Different aspects of the European integration have been discussed in a new way – referring to particular groups of problems (general principles, commercial and monetary policies including customs union and single market, social, cultural and industrial policies, changes in the other Community treaties, and new elements in the fields of foreign and security policies, and the cooperation in the field of justice and home affairs). Finally, the authors have shown the European Union in the context of other European organizations and institutions.

All regulations have been commented from the point of view of new elements introduced or occurred after Maastricht, so the reader can become familiar with the planned functioning of the Union in comparison with the functioning of the Community. Surprisingly, the commentary does not refer to judicial practice of the court of Justice (no judicial decision has been quoted); instead of them, many interactions in the field of international politics have been taken into account. Rich bibliography, annexed to each problem dealt with in the book, and cross-references make the book a very useful tool for different categories of users.

**Władysław Czapliński**

A.K. UHL, ***Der Handel mit Kunstwerken im europäichen Binnenmarkt. Freier Warenverkehr versus nationaler Kulturgutschutz***, Tübinger Schriften zum internationalen und europäischen Recht, Vol. 29, Berlin 1993, pp. 186.

The problems related to freedom of sale of works of art and its restrictions not from to-day on are a matter of disputes, in which political and legal arguments interlock with historical reasons. The fact keeps in the background that the international commerce of works of art exists time immemorial, contributing to a cultural growth as well of the States producing them as of these, in which works of art are at museums and collections, irrespective of a method of their accession. As well outstanding works of art and artistic handicrafts as many usable objects, valuable because of a passage of time, are under a legal protection in most of the States of the world. The majority of regulations, including the greater part of European legislations, formed in the beginning of the XXth century, contains similar definitions and object's criterions of protection against a destruction, a damaging, a devastation and reduces rights of possessors in

the implied public interest. One of such reductions is a ban on removal of objects, specified in groups, or individually. Because one of the purposes of the European Community is to promote close cultural relations between nations, a necessity of a new regulation of sale of works of art and objects classified as monuments or generally qualified as cultural values, results as well from an assumption of freedom of sale of goods and a cancellation of tariff walls.[1] However, contrary to the majority of other in the commerce, works of art and monuments have as a rule an individual and unrepeatable nature, while their historical, scientific, and often also artistic value identifies a nation culturally; it testifies to their rights to possess independent States and distinguishes its special contribution to the development of culture and civilization. For these reasons legislations of the European States differ considerably between themselves, especially in an approach to a concept, a subject and a limitation of freedom of sale of goods and even – to an individual control over objects produced in the past.[2] Therefore, it doesn't seem to be possible and proper to cancel all restrictions of the turnover of works of art and of free movement of goods, being under special protection by domestic legislation of the EC Member States, the more so as serious tendencies, exist claim to to objects, obtained legally or illegally in the past and nowadays adorning at the great European museums.

In this state of affairs a paper of Antje Katrin Uhl comes into a special prominence as a successful attempt of a consistent and clear statement of the majority of problems, for which everyone should be prepared, undertaking attempts of a regulation of sale of works of art and monuments. A scope of this paper is delimited especially by its sub-title: "Freedom of sale of goods against national protection of cultural values". These two contrasting tendencies are and will be a warrant for future regulations, not only in consideration of general rules of sale of goods, accepted by the member States, but because of an aim for an universality of the culture. In the first part of the treaties, presented in 1992 as a doctor's thesis, general principles of sale of goods, resulting from treaty resolutions, are characterized. An interpretation of a concept of "means of interaction" in relation to the removal of objects, in keeping in the State of which the authorities of this State are interested, is peculiarly interesting (p. 20–33). Considerations connected with the work of art as an article according to the interpretation of the Treaty of Rome are also worthy of notice. The authoress uses here the conception of a "cultural value" (Kulturgut), existing in the German legislation only in rules related to the removal,[3] but non-existent in domestic protective regulations.[4] She deduces an advisability of separate usage of works of art, usable objects, antiques and collector's objects from their specific artistic and historical nature and special forms of a permissible use, what after all has been expressed in Recommendations of the European Union Commission (p. 31–49). The second part of the paper contains legal regulations of the Member States of the EU: Germany (p. 43–73), Italy (p. 73–79), France (p. 79–85), Great Britain (p. 86–91), Holland (p. 92–94), expressed concisely and clearly, and a synthetic statement of protective problems in the other Member States: Belgium, Denmark, Spain, Portugal, Greece, Luxembourg and Ireland (p. 94–100). Informations are of

[1] A dualism, especially visible in the Polish Act on the protection of cultural values and museums of 15 February 1962 (Government Regulations and Laws Gazette, No. 10, item 48): "There are under legal protection ... the following cultural values, in the Act called monuments:" (art. 4); "a removal of cultural values abroad is forbiddem" (art. 41); cf. about this: J. P r u s z y ń s k i:„Wywóz zabytków i dóbr kultury w świetle prawa", Państwo i Prawo 1992.

[2] Cf. H. H i n g s t, A. L i p o w s c h e k: *Europäische Denkmalschutzgesetze*, Vol. II, Neumünster 1975.

[3] Cf. J. P r u s z y ń s k i: *Ochrona prawna zabytków w RFN. Teksty i komentarze*, Warszawa 1992, p. 167–170 (text), 177–178 (commentary).

[4] Cf. sources, part II – texts and commentaries of the Acts on the protection of monuments in particular countries of FRG.

"encyclopaedic" character, just as an appendix connected with the protection of monuments in Austria, Switzerland and the United States (p. 101–102!). However, a purpose of considerations of the authoress is not a comparative analysis of the whole of legal solutions on the monument's protection or even a presentation of restrictive rules, on the removal of works of art, but – a concurrence and a scope of possibilities of a mutual interaction between internal rules and a hypothetical, international and legal, regulation. She stresses differences in a definition of a "cultural values" in particular countries of the EU (p. 115–116), and the necessity of elaboration of one, common concept, resulting from this (p. 117–132). These considerations, though interesting, do not take into account that an ascription of possessional designations to the abstract notion (without a designation), which is the culture, is doubtful.[5] For that reason she also uses also the other notions used in domestic regulations: works of art, objects of artistic, historical and archaeological values, "national" works (p. 151–158). In the final part of the paper A.K. Uhl mentions a very important problem of a financial value of objects (p. 159–160), which is desicive for the existence of international market of works of art, just as a historical value – their internal protection. This double character of monuments and works of art requires the adaptation of general principles of the free market and a specificity of the turnover, resulting from a nature of a part of national cultural bequest (p. 169–174). The book is enriched by a comprehensive bibliography of the subject, containing special papers on the law of the monument's protection, on the protection of intellectual property, cultural exchange, legal and financial questions related to it, but also, restatements of the law and domestic reports, prepared under the auspices of UNESCO. In Poland any paper of this kind hasn't been made as yet, and the state of the law, within a range of sale of works of art, is more than unsatisfactory.[6] For these reasons as well specialists of the international law as persons being engaged in the problems of the monument's protection should be instructed to work at it.

**Jan Pruszyński**

J. KOLASA (ed.), ***European Communities. Selected Legal Aspects***, part I, Wrocław 1994, s. 261; ***European Communities (The Union). Selected Legal Aspects***, part II, Wrocław 1995, s. 197.

Until recently there have been generally very few works in Poland devoted to legal aspects of co-operation between EC Member States. moreover, their main emphasis has been on procedural and not substantive issues. That was the result of the fact that Poland[7] had a very

[5] More widely about this: J. P r u s z y ń s k i: „Zabytek – pamiątka czy dobro kultury?", *Ochrona Zabytków* 1993, No. 3, p. 261–264.

[6] In spite of a general rule, providing a ban of removal of "cultural values" (cf. FN 1), a base of an activity of customs officers is the internal order of the Minister of Culture and Art, so-called "decision No. 1", of 9 May 1973, and imperfect orders of the president of the Polish Office Customs.

[7] The efforts by Central and Eastern European states to initiate close and lasting co-operation with European Communities (sanctioned by international agreements) caused a reaction on the part of EC Member States and

little interest in any other aspects of the functioning of the European economic organisations which were seen as competitors in relation to the Council for Mutual Economic Co-operation.

Following rapid changes in Central and Eastern Europe broadly understood "European law" has become a core interest of both academics and practising lawyers. The entry into force of the Maastricht Treaty which provides legal basis for "Europe without borders" has also considerably increased the interest in EC law in Poland.

Polish publications devoted to the law of European Communities[1] have been very few indeed. Some of them were written by authors affiliated with Foundation of Promotion of European Law in Warsaw, some other by independent academics originating from various polish universities.[2]

In the light of the above a new publication on European Community consisting of two volumes attracts a particular interest. The publication was prepared by a group of lawyers from Wrocław under the guidance of Professor Jan Kolasa and its authors include public international lawyers (J. Kolasa, M. Lis, A. Cieśliński), constitutional lawyer (K. Wójtowicz), specialists in civil and administrative law (J. Frąckowiak, L. Kieres). Such interdisciplinary approach is worth pointing out since its outcome is very interesting both conceptually and in terms of a comprehensive summary of the knowledge of European Communities.

The first part consists of six dissertations presented in a logical order – from general issues involving constitutional and international law matters (by K. Wójtowicz, M. Lis, J. Kolasa and A. Cieśliński) to detailed analysis of particular fields of activity of the Communities (J. Frąckowiak, I. Kieres).

The article *Law of the European Communities and the Principle of Sovereignty in Constitutional Law of Member States* (p. 9–22 by K. Wójtowicz focuses on constitutions of Member States and examines the influence of the principle of sovereignty on the application of the law of the Communities. The problem has been presented in a highly competent way with frequent references to ECJ rulings and additionally supplemented with the presentation of the theory of the subject from Marsilius of Padova until present.

*Basic Institutions of European Law. The Outline.* (p. 23–73) by M. Lis is a comprehensive dissertation which deals with a whole range of issues: starting with an attempt to distinguish between a broad and narrow understanding of European law, the author then moves on to the history of the formation of European Communities to finish with a thorough analysis of primary and secondary EC legislation. A particularly interesting issue, especially from the Polish point of view, is the relationship between the law of the communities and domestic Member State's laws (p. 62–67). The author is critical in relation to generally accepted concept of supra-national character of Communities and presents an interesting approach to international legal personality of the Communities.

The editor of the whole book J. Kolasa has also presented his article *Internal law of European Communities-The* Outline (p. 75–135). The author, being a recognised specialist in internal law of international organisations, was in a particularly good position to deal with this subject. He

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the US, which intensified their search for an optimum (from their point of view) formula for such co-operation. This resulted in a number of international conferences and seminars, the creation of international schools and specialist research and documentation centres and thriving literature of the subject.

[1] The law of European Communities, also known as "Community law" is sometimes confused in Poland with "European Law", although the need for distinction between these two areas seems obvious. One of recent and successful examples of works devoted to this issue is *Development of International Law of Europe. The Problems of "European Legal Space"*. by R. Szafarz, Warsaw 1994.

[2] It should be noted that a new study devoted to the problems in question has been recently published (see: J. Galster and C. Mik, *Basis of European Community Law*, Toruń 1995).

approached the issue of the role and significance of international law in the system of procedural regulations of European Communities in a clear, concise and interesting manner. He starts with a description of the process of creation of procedural norms (in particular internal regulations), then analyses their scope and binding force and finally presents a critical approach to the view that *soft law* is "not fully binding". "Non-binding law does not exist" says the author (p. 135) and this statement can only be approved.

Internal relations within European Communities have been discussed by A. Cieśliński in his article *Association Agreements with European Countries* (p. 136–137), witch analyses the procedure of signing and contents of bilateral and multilateral agreements between the Communities and associated countries with particular emphasis on economic matters having a decisive influence on the intensiveness of mutual relations.

J. Frąckowiak is the author of a thorough and well-substantiated (212 footnotes) study *Sources and Forms of Harmonisation of Company Law in the EEC*. It appears that some finding presented in the study could be of much help in the process of approximation of Polish company law to the relevant laws of EC.

Administrative law issues relating to economic activity of foreign entities have been presented by L. Kieres in his article *Foreign Investment in Poland* (p. 225–261) which seems to be least compatible with the profile of the whole book, both in terms of its contents (no direct relationship with EC matters) and the method applied (a detailed description of relevant Polish laws does not result in any conclusions).

The second part of the book *European Communities* (with a sub-title *The Union*) is devoted to the presentation of amendments introduced by the Treaty of Maastricht, it stresses new institutions established under the Treaty and emphasises the distinction between the Communities and the Union.

The problems of the Union are dealt with by J. Kolasa in a study *The Treaty of Maastricht. The Outline of Basic Constitutional Issues*. (9–48), which lists institutions created by the Treaty and indicates new trends in procedures and methods of law-making with a stress on increased competence of the European Parliament (p. 34 *et seq.*). The article makes absolutely clear the distinction between the Communities and the Union, which was achieved thanks to concise and precise logical reasoning of the author combined with a profound analysis of relevant laws and literature.

*The Organisational Structure of European Communities* (p. 49–103) by M. Lis is an article devoted to the composition and competence of and procedures of taking resolutions by institutions of the Communities. Apart from discussing such well-established institutions as the Council, the Commission, the European Parliament and courts the author has also dealt with financial institutions and banks (e.g. the Court of Auditors and European Investment bank). It can be only regretted that no mention has been made of new financial structures established under Art. 41 of the Treaty establishing the European Community being the European Central Bank and the European System of Central Banks.

*The Principles of Application of the Law of European Communities in Domestic Laws of Member States* are the subject of an article by K. Wójtowicz (p. 105–134). For the sake of the clarity of reasoning the author started with a description of primary community legislation (including the examination of its direct and indirect effectiveness in Member States' domestic legal systems) and then discussed direct applicability of secondary community legislation i.e. regulations, directives and decisions. Clear and precise reasoning of K. Wójtowicz is well substantiated with references to both legal provisions currently in force and, which is particularly valuable, relevant case law of the ECJ.

In the second volume J. Frąckowiak continues considering potential amendments in Polish company law which may be required under the First and the Elevanth Directive of the Council of Ministers (p. 135–158). The author has made a number of suggestions as to the approximation of company laws, which obviously will be of practical relevance only after Poland joins the EC. however, as the author rightly pointed out, without such approximation Poland's company law will not become "and act of a modern European state".

The final item in the second volume of *European Communities* is an article by A. Cieśliński on *The Competence of the European Community to Enter Into International Agreements in the Light of the Case Law of the European Court of Justice* (p. 159–197). *Ius tractatuum* attributed to the Community under the Treaty of Rome is certainly characteristic of the legal personality of this organisation, although quite frequently it is seen as being separate from the Member states' capacity to conclude treaties. The author has examined the contents and the scope of this capacity on the basis of the analysis of selected ECJ rulings, which enabled him to determine the competence of the Community to enter into agreements as well as to present an interesting assessment of legal personality of this organisation.

The collection of dissertations covered by two volumes of *European Communities* is, as previously stated, a successful and useful venture, which fills in an apparent gap in Polish legal literature. A special tribute shall be paid to the editor's who made the whole book concise and uniform, which considerably facilitates its reading. Summing up it must be stressed that two volumes of *European Communities* provide a comprehensive summary of the type of knowledge which is nowadays very needed both by practising lawyers and academics.

**Genowefa Grabowska**

***Current Trends and Developments in the Case-Law of the Court of Justice of the European Communities***, Annual Review; vol. 1; Spyros A. Pappas (ed.); European Institute of Public Administration (Institut européen d'administration publique), Maastricht 1994, pp. xii + 242.

Out of any courts active in adjudication of cases exceeding territorial limits of a state, the European Court of Justice is undoubtedly the most loaded with settling disputes of various sorts, related to domain of Europan law. Due to the voluminous case law of this Court, it is hardly possible to follow developments of the Court's jurisprudence in all areas, in which it exercises jurisdiction, without a specific guide. For that reason, the initiative of the European Institute of Public Administration to provide a survey of the case law of the Court in various fields of European law has an undisputable value for all researchers and practitioners who are in need to understand curent developments of the European case law in given areas.

First volume of the survey covers the following subject matters: legal position of the European Parliament, the new commercial policy (Regulation No. 2641/84), principle of equal treatment of men and women, liability of the state for breaching its obligations under Community law, European public service, protection of intellectual property, free movement of lawyers, ordering

interim measures by national courts, protection of financial interests of the Communities and appeals before the Court.

All chapters (except the last one concerning appeals) consist of an introduction prepared by one of the authors and excerpts from the judgements of the court, which in the authors' opinion bear most relevance to the discussed subject. The chosen method allows the reader to confront easily comments of the authors with plain text of the judgements. It helps also to treat the survey as a handy reference book.

Comments of the authors concentrate almost exclusively on work of the court. Opinions of legal writers are rarely discussed, or even quoted in footnotes. Result of the chosen method of the committing is that one may say that the assessment of the work of the Court is subjective – the Court's judgments are confronted mainly with themselves. However, this method seems to be a deliberate choice of the authors of the book. The aim of the survey is much more to demonstrate the actual standard of the Court's jurisprudence in the given fields of law than to give (or deny) appreciation of that standard.

It is difficult to find out any in-depth motivation of choice of the particular subjects of the survey. The editor has acknowledged that the essays published in the book were originally presented on three colloquia. Accordingly, it cannot be stated that inclusion (or ommission) of any particular subject matter indicates the value of that matter from the perspective of Community law.

One cannot say that the book is *gound breaking*, but that was not an intention of the editor and the authors. If the purpose of the book was to start series of surveys helping practitioners to get the gist of the Court's case law in defined fields, and to do so in an easily readable manner, then this purpose has been fully achieved.

Usefulness of the book is beyond doubt. The editor and the authors deserve words of appreciation for the concept and for its implementation. Next volumes of that publication should be welcomed, particularly if the editor managed to organize choice of contents of each volume in a more systematic way than the book under review. However, even if that did not happen, still collection of the coming volumes of Current Trends and Developments in the Case-Law of the Court of Justice of the European Communities is highly recommended for all interested in understanding more and more in European law.

**Rudolf Ostrihansky**

## G. BENNETT (ed.), *Conserving Europe's Natural Heritage: Towards a European Ecological network*

The book "Conserving Europe's Natural Heritage: Towards a European Ecological Network", falls into the category of very valuable publications which appear in a series known as International Environmental Law and Policy.

Although the subtitle itself indicates that the book includes the proceedings of the International Conference held in Maastricht, 9–12 November 1993, the scope and form of the book advance far beyond the conference materials. As a matter of fact, the Conference "Conserving Europe's Natural Heritage" allowed for identifying tasks and initiatives which are

being taken by governmental and nongovernmental organizations in Europe. Thus, the publication under review proves to be an extremely useful guide which shows how a network of cooperating ecological organizations operates, and it becomes at the same time an important reference book.

The foundation of the Conference on setting a European Ecological Network was laid at the UNCED Conference in Rio de Janeiro, namely in its Resolution and Agenda 21. That was followed by the Conference "An Environment for Europe" held in Lucerne in April 1993.

Numerous initiatives of international organizations undertaken over the last years aimed at developing the European biodiversity strategy. Such a strategy should be well supported by an analysis of hazards the ecosystems are exposed to.

It should be stressed, however, that despite various efforts the assessment of European ecosystems is very difficult because of the incomplete availability of data (p. 98). It is estimated that there are 10,000 to 20,000 protected areas in Europe which vary enormously in their size and the degree of threat (p. 187). Therefore, one of the resolutions adopted by the Lucerne Conference was to invite the Council of Europe, in close cooperation with the European Commission, to prepare a pan-European inventory of zones already protected or which are worthy of protection, particularly for species which are becoming extinct. The concept to entrust the task to the Council of Europe and the European Commission was based on the achievements and experience of both organizations.

The Council of Europe had developed the European Conservation Strategy which was adopted by the 6th Ministerial Conference in 1990. The Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention), which has now 28 contracting parties, plays an important role among all instruments for the legal protection of nature.

A number of the Council of Europe's actions including information campaigns are designed to enhance the ecological awarness among people living in Europe (the year 1995 has been announced the European Nature Conservation Year).

Among numerous activities which have been initiated by the Council of Europe since 1962, those addressed to Central and Eastern European countries deserve special mention (expert missions, specialised courses, preparation of a Model Act on Environmental Protection).

The European Union's advancements in the area of the environment protection, in particular conservation of nature, justifies its involvement in pan-European activities. Its directive on the Conservation of the Wild Birds, complemented by the directive on the Conservation of Natural Habitats and the Wild Fauna and Flora (1992) as well as the Fifth Action Programme on the Environment (1993–2000) should be given special attention.

The World Conservation Union has joined international organizations in their activities. Its Commission on the national parks and Protected Areas has prepared together with governmental organizations the Action Plan for Europe aimed at supporting all actions and solutions concerning the most essential issues occurring in European countries.

While speaking about programmes and activities in the field of the environment protection, one cannot forget about an important role of nongovernmental organizations in encouraging societies to fight for conservation, rehabilitation and sustainable use of European habitats. Bearing this in mind, a private initiative to set up "Eco-Network for Ireland" seems to be very interesting. The initiative is addressed to private landowners, institutions such as the churches and semi-state corporate business with land of ecological values. The so called target groups can obtain advice on how best to deal with conservation issues on their land. The participation in the scheme is voluntary. Those who are involved in the scheme may use Eco-Net logo on some of the produce where this is sold. Although the initiative is implemented on a voluntary basis, it is a very important form of activity for conservation of nature. It should be stressed that Ireland

has the lowest area of land under legal conservation protection (approximately 1 per cent in comparison with 10 per cent of the territory of the United Kingdom).

The above-mentioned issues, thoroughly discussed in the book under review, have stimulated the development of a network whose name is already reflected in the title of the publication, namely a European Ecological Network (EECONET).

During the conference, main objectives of EECONET were discussed. They are as follows:

- to maintain and enrich species across traditional range;
- to support ecosystem health and ecosystem processes;
- to restore natural ecosystems, etc.

It was stressed that EECONET should be understood as both a network of sites and a network of cooperation intended to obtain better results in the area of nature conservation. The emphasis was also placed on the need for better use of such instruments as management agreements, regulations, permit system and so forth.

In six countries (Lithuania, Turkey, Slovakia, the Netherlands, Finland and Romania) three types of networks have been distinguished on which EECONET should be based:

- a network of protected areas (Romania and Turkey);
- ecological networks (Slovakia and the Netherlands);
- land use planning networks and zoning (Finland and Lithuania).

In general. EECONET should provide an organizational framework for cooperation and facilitate a long-term planning. It is essential, therefore to integrate all activities at the national and international levels, including information exchange and expert advice.

Attention was also tuned to hazards affecting nature conservation, associated with the development of agriculture. Therefore, it is a key issue to develop a strategy of sustainable development. Much attention has been devoted to developments in Central and Eastern Europe and to the need for reorientation of priorities in investments. Much more money should be allocated for nature conservation, advancements in ecological education and strengthening of nongovernmental organizations. Tensions and difficulties occurring during the privatization process and other issues were also discussed.

The Conference "Conserving Europe's Natural Heritage" gathered 270 participants from 31 countries and representatives of 26 international organizations. It will undoubtedly prove to be an important step towards integration of activities in the area of nature conservation.

As was stressed by the then Director-General of Environment, Nuclear Safety and Civil protection of the European Commission, Laurens Jan Brinkhorst, Maastricht II is the sign of hope and a civil society will be a pan-European ecological union.

The EECONET Declaration adopted by the end of the Conference is its practical development. It lays down tasks for the Council of Europe and the European Union as well as for regional, governmental and non-governmental organizations. The adopted document entitled: "A Conceptual Framework for Nature Conservation in Europe" stresses the rapid decline of the natural heritage of Europe and recognizes the need for wider use of the international law instruments and programmes designed by the Council of Europe and the European Union.

The development of a common strategy requires various activities, first of all, the assessment of functioning of Europe as an ecosystem. The need for the integration of nature conservation objectives into other policies (agriculture, forestry, structural and regional policies, transport, mining and mineral extraction, water polices, fisheries, tourism, physical planning, etc.) was strongly stressed.

The guiding principles for the strategy whose full name reads: the European Biological and Landscape Diversity Strategy, are as follows:

- the principle of careful decision making;
- the principle of avoidance;
- the precautionary principle;
- the principle of translocation;
- the principle of compensation;
- the principle of restoration and redevelopment;
- the principle of best available technology and best environmental practice;
- the polluter pays principle;
- the principle of public participation.

I have just listed the principles without discussing them because they are included in other documents of international organizations.

To sum up, the reviewed publication is a very useful reference book which provides broad information about activities undertaken and implemented by numerous international organizations. It also proves that the European dimension of thinking about nature conservation leading to the development of a common strategy and its application at a pan-European level does really exist.

**Hanna Machińska**

REINHOLD ERNST, ***Wechsel und Scheck im Wettbewerb der Zahlungsmittel. Untersuchungen und vergleichende Analysen zum notwendigen Einwendungsausschluß im Verhältnis kausal verbundener Parteien.*** Studien zum Handels-, Arbeits- und Wirtschaftsrecht 24, Nomos Verlagsgesellschaft Baden–Baden 1993.

1. It is a rule that the acceptor of a bill of exchange and the drawer of a promissory note (the original debtors) bind themselves by a bill of exchange in relation to the payee because of some other civil law relation that binds them to the payee: for example, (this is the most common case) a relation in which the acceptor of the bill of exchange or the drawer of the promissory note is obliged to pay the payee a sum of money for the goods received from the payee; then the bill amounts to the sum to be paid. Similarly, the drawer of a cheque binds himself in relation to the person whom he gave the cheque that the sum payable by the cheque will be paid because the drawer owes this person the sum stated in the cheque, for example by right of purchase or lease ect. Legal relation because of which the acceptor or the drawer of the bill of exchange bind themselves by the bill is called: legal relation on the basis of which the bill is issued. In the same way legal relation because of which the drawer of the cheque binds himself by a cheque is called: legal relation on the basis of which the cheque is issued. The problems of mutual influence of the legal relation on the basis of which the cheque or the bill is issued and of the liability on the cheque or on the bill are the most important issues in the legal field of cheques and bills. Many questions are asked, especially concerning the influence of the legal relation on the basis of which the cheque or the bill is issued upon creation of liability on cheque and on bill of exchange and the possibility of raising objections against the cheque creditor or bill creditor

based on the legal relation on the basis of which the cheque or the bill is issued. In Germany, as far as the first case is concerned, creation of liability on cheque or on bill of exchange between particular persons does not depend on the existence between them of legal relation on the basis of which the cheque or the bill is issued. According to the opinion, which was dominating at first, the independence of liability on cheque or bill of exchange from the legal relation on the basis of which the cheque or the bill of exchange was issued was considered to be decisive also in the matter of raising objections against cheque or bill creditor based on the legal relation on the basis of which the cheque or the bill was issued. Namely, it was assumed that this independence excludes in principle the possibility of raising objections based on legal relation on the basis of which the bill was issued by the parties liable against their contracting party. According to this opinion, parties liable could only refer to the imperfection of the legal relation on the basis of which the cheque or the bill was issued which justified the charge of unjust enrichment; that means not creating legal basis for liability on cheque or bill of exchange (legal action which should result in legal relation on the basis of which the cheque or the bill is issued was not valid) or the collapse of legal basis (legal relation liability was fulfilled or legal action which was the source of legal relation on the basis of which the cheque or the bill was issued was cancelled). They could also refer to the objections of peremptory character resulting from the legal relation on the basis of which the cheque or the bill was issued which were considered by § 813 of the German civil code. At the beginning of the 70s, Bundesgerichtshof (the Supreme Federal Court) supported criticism growing in the professional literature which pointed out that this opinion could have undeserved results. In its decisions of 24 November 1971, 9 February 1976, 8 November 1982, 30 January 1986, the court proclaimed itself in favour of the objections based on the legal relation on the basis of which the cheque or the bill was issued, between the parties of this relation, against liabilities on cheque and bill of exchange. Cheque or bill obligee cannot, as the court claims, have more rights towards their concractors than it results from the legal relations on the basis of which the cheque or the bill is issued.

2. The work by R. Ernst is the reaction to the above mentioned attitude presented by Bundesgerichtshof and a fraction of German professional literature that accepts it. This attitude means strengthening of the position of the acceptor of the bill, the drawer of the promissory note and the drawer of the cheque (parties liable) against weakening of the position of the person which was given the cheque or the bill (first cheque or bill creditor). This can have far reaching consequences: limitation or even decline of cheque or bill turnover. Strengthening of the position of the parties liable by general acceptance of their objections based on legal relations on the basis of which the cheque or the bill, is issued can make the cheque or the bill less competitive than new legal forms of transactions settlement. These forms which assume real time transaction settlement give the obligee position similar to the one he has when the payment is in cash, thus stronger than the one the creditor would have in the light of the above mentioned German jurisprudence and professional publications concerning cheques and bills. The above mentioned consequences which can be the result of such attitude made Ernst to verify it. In his work he evaluates relevantness of this attitude taking into consideration: cheque and bill settling functions, some provisions of the law on bills of exchange (especially article 17) and of the law on cheques (especially article 22), the results of comparative law studies, the importance of cheque and bill in economic turnover, the attitude of German government towards the possibility of raising objections and towards permissibility of the so called complementary expression of the agreement concerning payment by cheque and bill. His studies led him to the conclusion that the attitude of Bundesgerichtshof is inaccurate. According to him, in German law it is inadmissible to raise dilatory objections based on the legal relation between its parties on the basis of which the cheque or bill is issued against liability on cheque or on bill.

3. As one can see, the work which is reviewed touches very important practical and theoretical problems which are currently important in all legislations. That is why the ascertainments which this work contains, although concerning mainly German law, are worth to be considered also from the point of view of other legislations. Another important advantage of this work (it cannot be denied, no matter whether one shares the opinion of the author or not) is vastness and variety of its considerations combined with considerable methodologic discipline. Investigating particular problems, the author shows very precisely hitherto existing opinions, doctrines and judicial decisions, outlining tendencies and trends. Analising the information he gathered and formulating is own conclusions the author pays attention to the functions of the examined institutions and their usefulness in modern payment turnover. All the information gathered in Ernst's work seems to be of special importance for the readers from those countries in which, like in Poland and other countries of Central Eastern Europe, the research on law on cheques and bills was neglected for a long time.

**Kazimierz Zawada**

## BOOKS RECEIVED

***Beiträge zum humanitären Völkerrecht, zur völkerrechtlichen Friedenssicherung und zum völkerrechtlichen Individualschutz***, Universitätsverlag Bochum 1993, pp. 280.

The book published in honour of Georg Bock, contains a number of studies dealing with the most actual and acute topics of international law: humanitarian law, dispute solution, new role and competences of UN Security Council, recognition of new states and its importance for the international peace-keeping.

N. PEACH, G. STUBY, ***Machtpolitik und Völkerrecht in den internationalen Beziehungen***, Nomos, Baden–Baden 1994, pp. 878.

An interesting and exhaustive study on the role of international law in international relations, taking into account the historical development of law and extra-European perspective of the law-making and law-implementation.

***The Development of the Role of the Security Council. Peace-Keeping and Peace-Building***, Workshop Academy of International Law (1992), The Hague 1993, pp. 495.

Papers presented at the Hague Workshop, devoted to one of the crucial international institutions. The Workshop has been organized in the time of enormous growth of activities and tasks of the Security Council. Main topics handled by the authors are: the development of powers of the SC; the new elements in its activity connected with the new interpretation of Chapter VII of the UN Chapter (enlargement of the scope of a threat to international peace and security); procedural innovations, and perspectives of reform of the SC.

M. MCDOUGAL, F.P. FELICIANO, ***The International Law of War***, Nijhoff, Deventer 1994, pp. 872.

New edition of the book published first by Yale University Press in 1961, actualized by the authors after the War in the Gulf. It discusses permissible and impermissible use of force in international relations, the role of the UN organs, an implementation of international law through sanctions, neutrality, position of armed forces during a conflict, and a belligerent occupation.

H. POST (ed.), ***International Economic Law and Armer Conflict***, Nijhoff, Dordrecht 1994, pp. 215.

The book contains papers presented during an international colloquium at Utrecht in 1993. They deal with different aspects of influence of armed conflicts upon economic relations, taking into account the most recent developments in this field (including the Iraq–Iran war, the Gulf War, and the developments in the former Yugoslavia). The topics presented comprise the current status of prize law, the new law of neutrality, and the use of economic sanctions by the Security Council.

K. BARWIG et al. (eds.), ***Asyl nach der Änderung des Grundgesetzes***, Nomos Verlagsgesellschaft Baden–Baden 1994, pp. 411 + Annex.

Papers presented during a seminar on aliens law 1993 and 1994 deal with new elements in European refugee law, with different aspects of the reform of aliens and asylum law in Germany, with new legal regulations in this field in European states and in Africa, and with harmonization and formation of common standards in refugee law in Europe in the end of 20th century.

E. RUHRMANN, ***Reformen zum Recht des Aussiedlerzuzugs***, Duncker & Humblot Berlin 1994, pp. 239.

The authoress has devoted her dissertation to recent developments in German law. However, the book is of interest also for persons dealing with the Polish–German relations, as it shows the evolution of a German position towards persons claiming their German origin and wishing to immigrate to the FRG. Such persons often possess German citizenship (or the status of a "German" within the meaning of Article 116.1 of the German Basic Law) without having any links or ties to the German state. The policy of the FRG towards these persons has changed after 1989. The book by Ruhrmann shows different methods of limiting the admission of possible immigrants without changing the law in force in the FRG what leads to different artificial constructions.

**Władysław Czapliński**

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## Public International Law

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The Foundation has been founded in April 1993. Its tasks comprise disseminating of European legal standards established by the European Community, Council of Europe and other European institutions among Polish lawyers, initiating and supporting of studies on European law in Poland, and proposing different forms and models of changing the Polish legal system in order to harmonize it with European law.

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**Editorial activity:**

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- R. Szafarz, *Rozwój prawa międzynarodowego Europy*;
- R. Szostak, *Umowy o przejęcie obowiązku wykonywania świadczeń gwarancyjnych na tle konsumenckiego prawa europejskiego*;
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