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Legal Nature of the 2003 Treaty of Accession to the European Union

ANNA WYROZUMSKA

1. The 2003 Treaty of Accession to the European Union in European Union Law

The legal nature of every international treaty can be examined at least on two levels: the international and the national. In various cases, i.e. when the international treaty is an element of a particular legal regime, e.g. a system set up in the framework of a distinct group of states, it is essential to define the place of such a treaty in the framework of that group as it may have a significant bearing on the nature of the treaty on the international and national planes. This is the case of the Accession Treaty of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union, signed in Athens on 16 April 2003. Though the Accession Treaty is of a particular nature and is submitted to a particular procedure within the EU and “for ratification by all the contracting States in accordance with their respective constitutional requirements,” which is explicitly stated in Article 49 of the Treaty on European Union (TEU) it is, nevertheless, concluded between states.

The Treaty is an instrument of a complex structure, modelled upon the structure of the accession instruments on which previous enlargements of the European Communities and the EU were based. The instruments of accession of the present enlargement consist of three fundamental elements:

1. The Accession Treaty to the EU¹ (the so-called Accession Treaty *sensu stricto*);

¹ It's full name is: Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (member states of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union.

2. The Act concerning the conditions of the accession² and its annexes and protocols (the Accession Treaty and the Act make up the so called Accession Treaty *sensu largo*);

3. The Final Act.

The Accession Treaty is thus an international agreement embodied in several instruments. It consists of the short (three articles) treaty on the accession of ten states to the EU (Accession Treaty *sensu stricto*) and the Act concerning the conditions of accession of those states and the adjustments to the treaties on which the EU is founded. The Accession Treaty *sensu stricto* regulates three basic issues. It admits ten applicant states, among them Poland, to membership of the EU, refers to the Act concerning the conditions of accession as far as the conditions of membership are concerned, stipulating that the Act constitutes an integral part of the treaty (Article 1(2)) and also confirms the primary law status of the Accession Treaty (Article 1(3)). The consequence is that by concluding the Accession Treaty the new member states become at the same time parties to the EU founding treaties as amended or supplemented (Article 1(1)) and that the provisions concerning the rights and obligations of the member states and the powers and jurisdictions of Union institutions as set out in the treaties referred to in para 1 apply in respect of the Accession Treaty. This means *inter alia* that the European Court of Justice, and not the national courts, has jurisdiction to interpret the treaty (by way of preliminary rulings) and that **claims of violations of the treaty may be made under** Article 226 or 228 of the EC Treaty. Article 2 of the Accession Treaty contains a ratification clause and specifies the conditions of its entry into force, with Article 2(3) stipulating that the adjustment measures envisaged in several detailed provisions, may be adopted by Union institutions before accession. These measures take effect only subject to, and as from, the entry into force of the Accession Treaty. Article 3 lists the authentic languages of the Treaty, with Polish being one of them.³

The Act concerning the conditions of accession to the EU and the adjustments to the founding treaties forms, in accordance with Article 1(2) of the Accession Treaty, an integral part of the Accession Treaty; its legal status is thus identical to the Treaty *sensu stricto* – it is a primary-law source of European law. Eighteen annexes and 10 protocols are attached to the Act.⁴ They form, in accordance with Article 60 of the Act, an integral part of the Act (having at the same time a legal status which is identical to the Act and the Accession Treaty itself). The Act consists of 62 articles divided into 5 parts: principles, adjustments to the treaties (Articles 11–19), permanent provisions, temporary provisions, and provisions relating to the implementation of

² Its full name is: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.

³ The depositary of the 2003 Accession Treaty is the Italian government.

⁴ Ten, not nine as stated in J. Barcz, A. Michoński: *Polska w Unii Europejskiej. Wybór dokumentów* (2003), p. 316. Protocol 10 concerns Cyprus.

the Act. One of the most significant provisions of the Act is Article 2 which stipulates that as of the date of accession the new member states are bound by the provisions of the original treaties and the acts adopted by Community institutions and the European Central Bank before accession; these provisions apply in new member states under the conditions laid down in those treaties and the Act. Consequently, the new member states are obliged to adopt and apply the entire *acquis communautaire* (the *acquis* of the Second and Third Pillars of the EU included), with certain exceptions specified in the Act. Furthermore, Article 10 specifies that the application of the original treaties and acts adopted by the institutions is, as a transitional measure, subject to certain derogations provided for in the Act.⁵

The provisions of Part One of the Act (Principles) regulate the participation of the new member states in the Schengen system, Economic and Monetary Union, EU agreements, EC agreements, mixed agreements, etc. From the point of view of the legal nature of the Act, Article 7 of the Act is of crucial importance, as it confirms the primary-law status of the Act stipulating that “unless otherwise provided herein, the provisions of this Act may not be suspended, amended or repealed other than by means of the procedure laid down in the original Treaties,” whereas under Article 8 acts adopted by the institutions to which the transitional provisions laid down in the Act relate retain their status in law; in particular, the procedures for amending those acts continue to apply.

The Act defines in detail the required adjustments in both the primary legislation, i.e. ones relating to the founding treaties and principally of an institutional nature (changes in allocation of seats and decision-making procedures within the institutions) and the secondary legislation, i.e. adjustments which concern specific domains, i.e. (free movement of workers, company law, agriculture, social policy, taxes, etc.) Temporary provisions contain transitional measures (Article 24 refers to the annexes; Annex XII concerns Poland), transitional provisions on the allocation of seats in the European Parliament, weighting of votes in the Council, the qualified majority decision-making procedure, financial issues (e.g. payments to the Community budget), temporary budgetary compensations and special lump-sum cash-flow facilities for the new member states (Articles 29–30). Articles 37–42 contain the so-called safeguard clauses (a general safeguard clause – Article 37 – and special safeguard clauses which relate to particular fields: the internal market, the third pillar, adoption of veterinary and phytosanitary rules).

Eighteen annexes contain detailed regulations. Annex I contains a list of the provisions of the Schengen *acquis* as integrated into the EU framework and the acts consequent or otherwise related to these arrangements, which are binding on and applicable to the new member states from the date of accession. The other annexes specify adjustments to the acts (permitted derogations from the *acquis*) and meas-

⁵ See also Title II “Applicability of the acts of the institutions,” Articles 53–59.

ures and lists of acts to which Articles 20,⁶ 21,⁷ 22,⁸ 24,⁹ 32 para 1,¹⁰ 52 para 1–3¹¹ refer.

Ten protocols are attached to the Act. They concern detailed issues, usually with respect to a particular state, e.g. amendments to the statute of the European Investment Bank, the Ignalina nuclear power plant in Lithuania, transit of persons by land between the region of Kaliningrad and other parts of the Russian Federation, abortion in Malta, or the restructuring of the Polish steel industry.

The Accession Treaty, the Act of Accession and the annexes and protocols attached thereto thus constitute, as from their entry into force, EU primary legislation. They take precedence over the secondary law, and the European Court of Justice will not have jurisdiction to review their legality.

2. The Accession Treaty *sensu largo* and the Final Act in International Law

As noted earlier, from the point of view of international law the Accession Treaty is an agreement concluded by states. It thus comes under the general rules of the law of treaties. These rules are set out in the Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1969.¹² Although not all parties to the Accession Treaty are parties to the Vienna Convention, the norms contained in the Convention apply when they reflect principles of customary law.¹³ This is the way the European Court of Justice applies the norms of the Convention. The Treaty of Accession takes legal effect as from its entry into force. Article 2 requires the Treaty to be ratified by the contracting parties in accordance with their constitutional requirements and the instruments of ratification to be deposited by 30 April 2004 at the latest. Article 2(2) states that the Treaty is to enter into force on 1 May 2004 provided that all the instruments of ratification have been deposited before that date. Though it is uncommon in treaty practice to insert a particular date to the text of an agreement, the law of treaties is based, in this field, on the principle of autonomy of the parties to an agreement. Furthermore, Article 2(2) stipulates that if not all the states have deposited their instruments of ratification in due time, the Treaty enters into force for those states which

⁶ The extensive Annex II sets out adjustments relating to free movement of goods, persons and services, company law, competition policy, agriculture, fisheries, transport policy, taxes, customs union, cooperation in the field of justice and home affairs, external relations, institutions, etc.

⁷ Annex III concerns free movement of persons, agriculture, fisheries, statistics, regional policy and coordination of structural instruments.

⁸ Annex IV concerns free movement of capital, company law, competition policy, agriculture, and customs union.

⁹ Annexes VI–XIV concern each of the acceding states; annex XII deals with Poland.

¹⁰ Annex XV.

¹¹ Annexes XVI–XVIII.

¹² Published in *Dziennik Ustaw* [Polish Journal of Laws], 1990, No 74, item 439.

¹³ The Vienna Convention entered into force on 27 January 1980; 94 states are parties to the Convention; France, Portugal and Ireland among EU member states and Malta among the acceding states have not yet signed up.

have deposited their instruments. This will require the necessary adjustments to the Treaty and the acts which form an integral part of it. Article 2(2) empowers the Council of the EU to unanimously make such adjustments.

As for the status of the international obligations undertaken under the Treaty, Article 30(1) of the Convention and Article 103 of the United Nations Charter apply to the Accession Treaty. Obligations of states resulting from the UN Charter take precedence over obligations resulting from the Accession Treaty. The Accession Treaty can be treated as a particular agreement on the international law plane even if it forms an element of a subregional legal system (which can be described as an integrating system or treated as a self-contained regime). Within this system, the Treaty acquires a particular position, the consequence of which is the primacy of the obligations resulting from the Treaty in relation to the other international obligations of the parties to the Treaty (except for obligations resulting from the UN Charter).

Article 49(2) of the Accession Treaty (i.e. the Act annexed to the Treaty and forming an integral part of it) defines “the conditions of admission” of the new EU member states and “the adjustments to the Treaties on which the Union is founded which such admission entails.” That particular function of the Accession Treaty clearly places it among the sources of primary law – not only of the European Communities, but also of the Second and Third Pillars of the EU – and determines its primacy in relation to the treaties amended by the Accession Treaty. Such a ranking results from the member states’ will, reflected in the Treaty itself, the amendment procedure and a general rule of the law of treaties set out in Article 30(2) of the Vienna Convention: “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” It should be pointed out that though the Accession Treaty contains provisions placing it in the hierarchy of EU law, it amends (adjusts) the treaties “on which the Union is founded.” According to Article 1, the 10 acceding states become members of the European Union and parties to the treaties on which the Union is founded “as amended or supplemented.”

The Accession Treaty contains various substantive provisions which can be divided into two groups: provisions amending or supplementing the founding treaties and provisions relating to the period between signature and accession to the Treaty. The legal nature of these two groups of provisions is not identical. For instance, with respect to the amending and supplementing provisions, Article 292 EC Treaty applies as from the entry into force of the Treaty. In the event of a dispute concerning interpretation or application of these Accession Treaty provisions, its resolution is to be pursued through procedures laid down in the EC Treaty (competence of the European Court of Justice). As regards the remaining provisions, traditional methods of settlement of international disputes may be employed, at least until the date of the Treaty’s entry into force.

The Accession Treaty will definitely influence each of the member states’ international obligations. It will entail changes in two types of relations: the old member states *vis-à-vis* the acceding states and the acceding states *vis-à-vis* third countries.

The Accession Treaty subordinates the international obligations of the acceding states to the obligations stemming from the Treaty. Article 307 EC provides for the adjustment of member states' obligations to the obligations arising from membership, and Article 6 of the Act of Accession sets out more detailed arrangements. The adjustments required in this sphere entail conclusion of new agreements and renegotiation or denunciation of a great many international agreements concluded earlier by the acceding states.

As from the date of accession, the acceding states enter into new contractual relations as a result of the accession itself or after the conclusion of the appropriate agreements. Several solutions can be distinguished:

1) New member states acquire the status of parties to agreements as a result of accession, as from the entry into force of the Accession Treaty (by virtue of the Act of Accession); the new member states become parties to agreements concluded by the Council of the EU in accordance with Article 6 of the Schengen protocol (Article 3(3)) of the Act), to agreements relating to the functioning of the EU or connected with its activities adopted by representatives of the governments of member states meeting as the Council (Article 5(1)), to partnership agreements between members of the African, Caribbean and Pacific group of states and the European Community and its member states, signed in Cotonou, Benin, on 23 June 2000 (mixed agreement, Article 6(4));

2) New member states commit themselves to accede to agreements (e.g. agreements forming part of the Schengen *acquis*), conventions opened for signature by the old member states or drawn up by the Council in accordance with Title VI of the TEU (Article 3(4) of the Act), agreements relating to the functioning of the EU or connected with its activities; and agreements concluded by the old member states (Article 5(1)); the same applies to the agreements referred to in Article 293 EC; Agreement on the European Economic Area¹⁴ (Article 6(5)); the Accession Treaty requires the conclusion of specific agreements and therefore constitutes a *pactum de contrahendo*, i.e. an agreement requiring conclusion of an agreement.

The broad list of mixed agreements referred to in Article 6(2) and (6), e.g. the kind concluded with Belarus, China, Chile, Mercosur, Switzerland, Algeria, Croatia, the Russian Federation, South Korea, etc., should be included in the above-mentioned group of agreements. The new member states accede to them by concluding special protocols through a special procedure. An agreement with a third party (a third state or states or an international organisation) is concluded by the Council acting unanimously on behalf of the member states (Article 6(2)).¹⁵ Such a procedure may raise

¹⁴ Article 6(5) stipulates that states accede to a mixed agreement on the conditions laid down in the Act, in accordance with Article 128 of that Agreement, that is through an agreement concluded between the EEA member states and the new member states.

¹⁵ The Commission negotiates these protocols on behalf of the member states on the basis of negotiating directives approved by the Council, acting by unanimity and in consultation with a committee comprised of representatives of the member states. The Commission submits drafts of the protocols to be concluded to the Council.

certain doubts on both the international and national planes. **The Council acts on behalf of the member states and, by implication, on their account.** The term “member states” can be understood from the definitions contained in Article 1 of the Act to include all parties to the Accession Treaty. As the Act provides definitions of “present” and “new” member states, it can be said that the term “member states” includes both present and new member states. The Council will thus act on behalf of Poland as well. If the protocol is concluded after accession, Poland will be able to express its opinion under the procedure in the Council. From the point of view of domestic law such a protocol is an international agreement and will be governed by the procedures provided by the Statute on International Treaties of 14 April 2000,¹⁶ which will have to be adjusted to the new state of affairs. The effect of Article 6 of the Act is that such protocols can be concluded before the date of accession as well. Article 6 should therefore be understood as containing consent to conclusion of an agreement in favour and/or to the detriment of a third party. It should be recognised that organs of international organisations are seldom empowered to conclude agreements on behalf of states. Such consent stems from Article 6 (see Article 35 and 36 of the Vienna Convention on the Law of Treaties of 1969). It is worth pointing out that the exchange of letters referred to in the Final Act provides, with respect to negotiation of temporary and adjusting protocols with states – parties to the agreements specified in Article 6(2) and Article 6(6) of the Act concerning conditions of accession, for a procedure of consultation and information under which representatives of the acceding states are to participate in EU proceedings as observers alongside representatives of the old member states.

The acceding states will thus become parties to already effective EC and EU agreements, mixed agreements, agreements concluded by the old member states or the old member states and third countries.

Another question is the duty to adjust the acceding state’s own obligations to the obligations resulting from EU membership. Several solutions have been adopted:

1. The EC takes over management of the new member states’ agreements: fisheries agreements concluded with third countries; these agreements will remain provisionally in force for periods probably not exceeding one year (Article 6(9)); decisions concerning continuation of activities resulting from the agreements are adopted by the Council; nevertheless, the rights and obligations of the new member states remain unchanged;

2. The new member states withdraw from certain agreements, e.g. free trade agreements, including the Central European Free Trade Agreement (CEFTA), with effect from the date of accession¹⁷ (Article 6(10)) and international fisheries agreements to which the Community is also a party (Article 6(12));

¹⁶ *Dziennik Ustaw* [Polish Journal of Laws], No 39, item 443.

¹⁷ This creates additional complications for Poland. Poland has been a depositary of the agreement. It must now delegate its function to another state because it is uncommon for a third state to be a depositary of an agreement.

3. The new member states adjust their agreements to the obligations resulting from the Act of Accession; this gives the acceding states indispensable flexibility as they can renegotiate their agreements. If, however, a new member state encounters difficulties in adjusting its agreements with third parties, it must withdraw from them before accession (Article 6(10)).

The Final Act to the Accession Treaty should also be mentioned when talking of the international legal nature of the Treaty. It does not constitute an integral part of the Treaty and it is not legally binding, either. The final act of a conference contains basic facts concerning the conference: its purpose, the states participating in the conference, how the debates were held, and who chaired the debates.¹⁸ The final act incorporates the agreements adopted by the conference and other documents related to them, i.e. resolutions and agreed or individual statements concerning interpretation.

As for the Final Act of the conference held in Athens, the plenipotentiaries of heads of states, parliaments (Hungary) and governments (Sweden) have been authenticated through the Final Act, the texts drawn up and adopted at the conference by the member states of the European Union and the 10 acceding states.¹⁹ The Final Act thus confirms the adoption of the Accession Treaty, the Act of Accession, the annexes and protocols to the Act, various statements, and exchanges of letters between the EU and the acceding states. At the same time, the Act includes the technical commitment of the parties. The latter undertake to communicate to the Commission and to each other all necessary information for application of the Act concerning the conditions of accession and adjustments to the Treaties. Where necessary, this information will be provided in such good time before the date of accession as to enable the full application of the Act from the date of accession, in particular as regards the functioning of the internal market. The Final Act also indicates that the Commission may inform the new parties of the time by which it considers it appropriate to receive or transmit specific information. By the day of signature, the parties were provided with a list setting out the information obligations in the veterinary domain. Though the commitment described above is not legally binding, it commits the states politically²⁰ and may produce legal effects and is subject to the principles of good faith or estoppel. This is an explicit commitment although it takes a simplified form (it does not take the form of a legal commitment, as it has been incorporated into the Final Act and not the Accession Treaty or the Act of Accession).

The Final Act contains various statements (44 altogether):

¹⁸ The Vienna Convention on the Law of Treaties of 1969 refers to final acts in Article 10(b). Under the Convention, the text of a treaty is also established as authentic by signature of the final act of the conference incorporating the text.

¹⁹ On behalf of Poland, the Final Act was signed by the President's plenipotentiary.

²⁰ Adoption of the Final Act on the domestic plane may indicate this. From the point of view of the Polish law it was the President, not the Government, who adopted the commitment. It can be assumed that if the President was not explicitly empowered to conclude this international agreement (no such power arises from domestic instruments), he would not have the power to assume a legal obligation. Such a conclusion can be drawn from the Constitution of the Republic of Poland and the Statute on International Treaties.

1) Two declarations adopted by the plenipotentiaries of both the old and the new member states: a joint declaration, "One Europe," and a joint declaration on the Court of Justice of the European Communities;

2) Two joint declarations issued by the old and the new member states: a joint declaration by the old member states and Estonia on the hunting of brown bears in Estonia; a joint declaration by the Czech Republic and the Republic of Austria concerning their bilateral agreement regarding the Temelin nuclear power plant;

3) Fourteen declarations by the old member states concerning detailed questions, e.g. a declaration on free movement of workers (Poland, Declaration 15);

4) Two joint declarations by various old member states, e.g. a joint declaration by the Federal Republic of Germany and the Republic of Austria on free movement of workers from the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia;

5) A general joint declaration by the old member states;

6) Two joint declarations by various new member states, e.g. joint declaration by the Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic on Article 38 of the Act of Accession;

7) Declarations by individual states acceding to the EU: the Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Latvia, Malta, Slovenia and Poland;²¹

8) Two declarations by the Commission of the European Communities: Declaration by the Commission of the European Communities on the general economic safeguard clause, the internal market safeguard clause and the justice and home affairs safeguard clause; Declaration by the Commission of the European Communities on the conclusions of the Accession Conference with Latvia.

The legal importance of the above declarations is clear and depends to a large degree on their content. Some of them – declarations clarifying states' statements, declarations heralding future actions by states – are of a political nature; others are interpretative declarations.²² The joint declaration "One Europe" is undoubtedly an important political one. It declares, "in a great moment for Europe" – conclusion of the accession negotiations – the full support of the contracting parties for the continuous, inclusive and irreversible enlargement process ("Our aim is One Europe"). The declaration confirms that accession negotiations with Bulgaria and Romania

²¹ Namely: Declaration 38 by the Republic of Poland concerning the competitiveness of Polish production of some fruit; Declaration 39 by the Republic of Poland concerning public morality; Declaration 40 by the Government of the Republic of Poland on interpretation of the derogation from the requirements laid down in Directive 2001/82/EC and Directive 2001/83/EC.

²² See Declaration 38 by the Republic of Poland concerning the competitiveness of Polish production of some fruit where Poland notes that including Poland in the EU common customs tariff could have an adverse impact outcome for the competitiveness of Polish producers of soft fruits, sour cherries and apples. If after accession difficulties arise which are serious and liable to persist in these sectors, Poland will request urgent application of the general safeguard clause and adoption of instruments allowing for permanent removal of disruption in competitiveness in the soft fruits, sour cherries and apples sectors.

will continue on the basis of the same principles that have hitherto guided the negotiations. The results already achieved will not be called into question. Depending on further progress in fulfilment of the membership criteria, the objective is to welcome Bulgaria and Romania as new members of the European Union in 2007. As for Turkey, the contracting parties welcome the important decisions concerning the next stage of Turkey's candidacy for membership of the European Union. Declaration 2 – a joint declaration on the Court of Justice of the European Communities – is also political. It concerns a question omitted from the Nice Treaty, i.e. a possible increase in the number of Advocates-General on account of the admission of new member states. The declaration states that if the Court of Justice does not request an increase in the number of Advocates-General under Article 222 of the EC Treaty and Article 138 of the Euratom Treaty, the new member states will be integrated into the existing system of appointment. The same is the case with Declaration 5, on rural development where the initial allocations from the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, are indicated, the declarations of the old member states on free movement of workers, where they express their will to grant increased labour market access to nationals of specified member states,²³ Declaration 31 by Latvia on the weighing of votes in the Council, where the Republic of Latvia reserves the right to discuss the issue of weighting of votes in the Council at the next Intergovernmental Conference.²⁴ There are many other political declarations by individual states, another example of which is Declaration 35 by the Republic of Malta on neutrality.²⁵

Various declarations are of an interpretative nature.²⁶ Among the interpretative declarations is Declaration 22 (Joint Declaration by the Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic on Article 38 of the Act of Accession) wherein the states declare that they “understand that the phrase ‘has failed to implement commitments undertaken in the context of the Accession negotiations’ only covers the obligations that are arising from the original Treaties” applicable to them, under the conditions laid down in the Act of Accession, and the obligations defined in this Act. Therefore, they “understand that the Commission will consider application of Article 38 only in cases of alleged violations of the obligations referred to in the preceding paragraph” and that “Article 38 is without prejudice to the jurisdiction of

²³ See Declarations 6–7, 10–11, 13–16; Declaration 15 concerns Poland.

²⁴ The background for the adoption of Declaration 31 was Declaration 20 annexed to the Nice Treaty which dissatisfied Latvia since it was allocated four votes out of a total of 345 votes in the Council (on the principle of appropriate, comparable and equal representation of member states in the Council, in accordance with their population) as from 1 January 2005 on the assumption of a Union of 27 member states.

²⁵ Malta reaffirmed that its participation in the European Union's common foreign and security policy did not prejudice its neutrality.

²⁶ According to the definition adopted by the International Law Commission (ILC), an interpretative declaration means a unilateral declaration however phrased or named, made by a State or by an international organisation whereby that State or that organisation purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions (*The Guidelines to the Practice of the ILC*, guideline 1.2.).

the Court of Justice as defined by Article 230 of the EC Treaty on actions taken by the Commission pursuant to Article 38.” Furthermore, the states understand that the Commission will, before deciding on whether to apply the measures provided for in Article 38 against them, give them an opportunity to express their view and position in accordance with the Declaration by the Commission of the European Communities on the general safeguard clause, the internal market safeguard clause and the justice and home affairs safeguard clause, annexed to the Final Act. As a matter of fact, the Commission in Declaration 43 committed itself to do so.²⁷

Declaration 40 by the Government of the Republic of Poland on interpretation of the derogation from the requirements laid down in Directive 2001/82/EC and Directive 2001/83/EC²⁸ and Declaration 39 by the Government of the Republic of Poland concerning public morality, are also interpretative declarations. “The Government of the Republic of Poland understands that nothing in the provisions of the Treaty on the European Union, of the Treaties establishing the European Communities and the provisions of treaties amending or supplementing those treaties prevents the Polish State in regulating questions of moral significance, as well as those related to the protection of human life.” The legal meaning of declarations of the kind that are concerned with public morality is difficult to define; they are of a political rather than legal nature, having to do with domestic relations. Their aim is rather to facilitate the conclusion of the treaty in the internal relations sphere by enabling stronger backing to be gained for agreement. They cannot, however, influence the substance of the relevant obligations. This is evident from the general joint Declaration 21 adopted by the old member states in which they underline that the declarations attached to the Final Act cannot be interpreted or applied in a way contrary to the obligations of member states arising from the Treaty and the Act of Accession. The old member states note that the Commission subscribes fully to the above declaration.

Nevertheless, some of the declarations bear more of a resemblance to reservations. The distinct nature of Declaration 26 by the Czech Republic concerning Article 35 TEU should be pointed out. Such Statements of this kind are provided for in the Treaty and their enactment gives rise to specific obligations. In its declaration, the Czech Republic accepted the jurisdiction of the Court of Justice of the European Communities in accordance with the arrangements laid down in Article 35(2) and (3)(b) TEU and chose, it would seem, the preliminary rulings procedure declaring: “The Czech Republic reserves the right to make provision in its national law that when a question concerning the validity or interpretation of an act referred to in Arti-

²⁷ Before deciding on whether to apply the internal market and justice and home affairs safeguard clauses, the Commission of the European Communities will hear the view(s) and positions of the member state(s) which will be directly affected by such measures and will duly take into account these views and positions.

²⁸ “Poland considers that the pharmaceutical products on the list in Appendix A to Annex XII of this Act with marketing authorisations can be marketed in Poland.” As Barcz and Michoński explain (*Polska w Unii Europejskiej...*, *op. cit.*, p. 65), Declaration 40 seeks to provide for protection against an interpretation contrary to the negotiation intentions of the Government concerning the conditions for marketing pharmaceutical products not fulfilling Community requirements. These products can be marketed in Poland until the end of the transitional period.

cle 35(1) of the Treaty on European Union is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter before the Court of Justice.”²⁹ The trouble is that Article 35 allows a declaration to be made only by a member state. A member state was free to make a declaration at the time of the signature of the Treaty of Amsterdam (this, of course, cannot be applied to the Czech Republic) or at any time thereafter. It seems, however, possible to accept the opinion, that such a declaration can also be made at the time of signature of the Accession Treaty, with legal effect from the entry into force of the Treaty. The Czech declaration can be treated therefore as one required by the Treaty and not as a reservation.

The same applies to other declarations which could be treated in fact as reservations (their actual nature may emerge upon confirmation when expressing consent to be bound by the Accession Treaty). For instance, Declaration 37 by the Republic of Malta concerning maintenance of a VAT zero-rate looks more like a reservation than an interpretative declaration: “Malta’s acceptance of a transition period until 1 January 2010 for the maintenance of its VAT 0% rate instead of the standard rate of 5% on supplies of foodstuffs and pharmaceuticals is based on the premise that the transitional period referred to in Article 28(1) of the Sixth VAT Directive would expire on that day.”

The last instrument annexed to the Final Act is an exchange of letters on the information and consultation procedure for the adoption of certain decisions and other measures to be taken during the period preceding accession. In the Final Act, the plenipotentiaries have taken note of such an exchange of letters between the European Union and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic. At first glance the letters seem to constitute an international agreement. The structure of a letter proposing the conclusion of an agreement or an accepting letter resembles an agreement concluded in a form of an exchange of documents. The letter proposal confirms that the European Union can agree to an information and consultation procedure for the adoption of certain decisions and other measures to be taken during the period preceding accession, in the terms set out in the annex³⁰ to the letter, which could be applied as from the date on which

²⁹ This is a modification of the option specified in Article 35(3)(a) which stipulates that any court or tribunal of the state against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it; the Czech declaration refers to the obligation of the court or the tribunal. The Czech Republic modelled itself, it is supposed, on Austria which adopted, as regards preliminary rulings, a similar solution.

³⁰ The annex prescribes the information and consultation procedure with new member states. Consultations take place pursuant to a reasoned request by an acceding state, which sets out expressly therein its interests as a future member of the Union and its observations (I.2). The procedure applies to the totality of decisions by EU institutions or bodies (I.1) and draft Council instruments under the Second and Third Pillars. The representatives of the acceding states, after the signing of the Accession Treaty, will be associated with the work as observers, alongside representatives of the old member states as far as the negotiation of draft conventions

the negotiating conference declares that the enlargement negotiations have been finally concluded. The letter, which is of a personal nature – written by one person to another person (unfortunately, it is impossible to determine who signed it either on behalf of the EU or of the addressee) contains a specific form of words: “I should be obliged if you would confirm that your Government is in agreement with the contents of this letter.” The responding letter repeats the text of arrangements (“I have the honour to acknowledge receipt of your letter which reads as follows...;” the full text of the annex is quoted) and confirms: “I have the honour to confirm that my Government is in agreement with the contents of this letter.” The letters specify the date from which the arrangements set out in the annex will be applied – namely, the date on which the negotiating conference declares that the enlargement negotiations have been finally concluded, which is at the same time the date of the signing of the Final Act and so the Accession Treaty.

Doubts appear where the question of the European Union as a party to the Treaty is concerned. The European Union does not as such have the power to conclude accession agreements, *inter alia* determining the position of a signatory of the Accession Treaty in the period preceding accession. They are negotiating parties which know what kind of agreement they have managed to negotiate; the legal character of the exchange of letters can be deduced from the government instruments presented in the domestic procedure employed when concluding the Accession Treaty. However, it is not fully clear at what date the letters were exchanged; if it was before 16 April 2003 and if the Polish Government treated the letters as an international agreement, a procedure envisaged under the 2003 Statute on International Treaties would be applicable to them. In that case the Statute would require prior consent granted by the Council of Ministers for the Republic of Poland to be bound by the agreement.

Since, however, the European Union is a party to the Treaty, even though it lacks treaty-making power and since the language differs from that normally used in exchanges of notes/agreements (e.g. the absence of a typical clause concerning entry into force) we can postulate that the analysed instrument is informal, i.e. an agreement which is not legally binding. Such instruments are commonly being used with increasing frequency in international practice, as they allow for greater flexibility than when an agreement is concluded. The memorandum of understanding is not submitted to the internal procedures envisaged for the conclusion of an agreement. It does not fall within the purview of the Vienna Convention on the Law of Treaties, either. It is easier to amend or denounce, etc. These features do not make it legally ineffective. A memorandum of understanding is as binding as a political agreement, and like a treaty, it is based on good faith and subject to the principle of estoppel.

referred to in the Act of Accession and the protocols of transition and of adjustment with the co-contracting countries referred to in articles 6(2) and 6(6) of the Act. The final arrangement laid down in the annex concerns the remit of the texts of the founding treaties and the acts of the institutions and bodies (referred to in Article 58 and 61 of the Act of Accession) in the acceding states’ languages, which will, from the date of accession, be authentic. Point VI of the annex states that the institutions will draw them up in due course.

Such a conclusion is not at odds with the findings of Barcz and Michoński.³¹ They suggest that the legal nature of the exchange of letters stems from the fact that since the exchange of letters has been acknowledged by the plenipotentiaries of the old member states it can be assumed that the EU acted on behalf of the old member states. Acknowledgment of a document by heads of state or government or a parliament strengthens its importance. The Final Act states that the Accession Treaty was drawn up and adopted at the conference, which does not influence its legal character. It is doubtful, therefore, whether the Final Act can change the legal nature of a political instrument and make it an instrument which binds the member states. As the arrangements included in the annex concern EU institutions and organs, and not the member states as such, one can suggest that a construction implying a commitment by these institutions and bodies to bring information to the knowledge of the new member states, to consult and to associate them as observers, and to transmit texts constituting *acquis communautaire* in new authentic languages (a commitment based on good faith) should be adopted rather than one implying legal obligation effective in respect of the member states.

The legal nature of the instruments included in the Final Act should be interpreted in the light of the Vienna Convention on the Law of Treaties of 1969. Barcz³² rightly states that the arrangements, declarations and statements included in the Act may be important the way in which the Accession Treaty is perceived and should be taken into account in the process of its interpretation in the context referred to in Article 31(2) of the Vienna Convention.³³

3. The Accession Treaty and Domestic Law – Conclusion Procedure

Two preliminary issues of Polish law are important for the Accession Treaty: the procedure for its conclusion and its position in the hierarchy of the sources of Polish law after its entry into force (the issue of primacy over the Constitution of 1997, etc.). We will confine ourselves to the procedural questions since the other problems have recently been quite broadly discussed in other studies.³⁴

³¹ "The character of this agreement is not clear as one of the parties is the European Union which does not have legal personality and lacks the capacity to conclude treaties. That is why – despite the fact that the formal criteria have been fulfilled (exchange of signed notes) – the agreement is, rather, of a political nature." (*Polska w Unii Europejskiej...*, *op. cit.*, p. 26).

³² J. Barcz: *Prawo Unii Europejskiej*, p. 441.

³³ Article 31(2) stipulates as follows: "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 the other parties as an instrument related to the treaty; 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

³⁴ See J. Barcz (ed.): *Czy zmienić konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej* (2001).

The specificity of the Accession Treaty lies in its transfer of the powers of state organs to an international organisation or organ (EC/EU). This is first and foremost a matter of the transfer of lawmaking powers. The acceding state is thus restricted in a certain sphere of its competence (especially within the so-called exclusive competence of the EC). The 1997 Constitution of the Republic of Poland provides in Article 90 for two alternative procedures for consent to ratification of a treaty by the President by virtue of which Poland "shall delegate the powers of organs of government in relation to certain matters to an international organisation or organ." It is beyond doubt that Article 90 was inserted in the Constitution in view of the prospect of Poland's accession to the EU and is applicable to the Accession Treaty of 2003. Article 90 allows such a treaty to be concluded whether by prior consent granted by an act of parliament (which has to meet a qualified majority-vote requirement in both chambers of Parliament) or by a national referendum.

However, in both cases the procedure for the conclusion of a treaty specified in Polish law by the Statute on International Treaties of 2000 has to be observed. Though the first stage of negotiations on the accession of Poland to the EU, including the opening of these and their conduct, began before the entry into force of the Statute, the Statute is, under Article 26, applicable to all acts concerning treaties that were commenced but not completed before the entry into force of the Statute. The procedure prescribed in the Statute should undoubtedly apply to the signing of the treaty, the granting of full power, etc.

The procedure prescribed in the Statute was applied to the signing of the Treaty of 2003. Under Article 6(3) of the Statute, the Council of Ministers adopted Resolution 96/2003 on 8 April 2003 in which it expressed consent for the signing of the Accession Treaty of the Czech Republic, the Republic of Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic to the European Union and empowered the Prime Minister and the Minister of Foreign Affairs to sign the Treaty. The Treaty itself constitutes an annex to the resolution; on 7 April 2003, as required by the resolution, it was submitted to the members of the Council of Ministers.

The resolution, however, contains no reference to authorisation of the President or his plenipotentiaries to sign the Final Act nor does it mention any declarations to be issued by Poland. When taking into account the content and nature of the Final Act to the Accession Treaty, it cannot be ignored that in the light of the division of powers enshrined in the Constitution the limited power of the President in respect of the conclusion of treaties³⁵ (Article 133 and Article 146(1) and (10)) and the Statute of 2000, the competent organ for signing the Final Act was not the President. Poland should follow the solution adopted by, for example, Sweden, i.e. the Final Act should be signed by plenipotentiaries of the Government, especially as the act contains obligations which could produce legal effects. The signing of a final act of a conference

³⁵ The President does not possess autonomous competence in this stage of the conclusion of an international agreement. The Constitution empowers the President to ratify and denounce ratified international agreements. The President must obtain the Government's consent to be able to act in the sphere which falls within the competence of the Government.

closes a negotiation stage and, in accordance with international practice, falls within the competence of the negotiating organ (since full power to sign a final act stems *inter alia* from full power to negotiate agreements and to adopt the text of an agreement).³⁶ The fact that heads of states or their representatives sign a final act is not a standard practice; the parties may, however, so agree.³⁷ At the domestic level, too, the Polish Government could agree to the signature of the Final Act by the President or his representative. It does seem, however, that this fact should be reflected in a Government resolution or at least in accompanying instruments.

The Statute on International Treaties states that when a treaty is signed consultations on the signed text of the treaty between the Ministers concerned and the consent of the whole Council of Ministers are required to start the ratification procedure (Articles 12 *et seq.*). The latter procedure is laid down in Articles 14 and 15 of the Statute and §§ 8, 9 and 10 of the Regulation on Implementation of Certain Provisions of the Statute on International Treaties of 28 August 2000³⁸ (hereinafter “the Regulation”). According to Article 15 of the Statute, the Council of Ministers “shall pass a resolution on submission of the treaty to the President of the Republic of Poland for ratification.” Article 15(3) refers to treaties transferring (or delegating) to an international organisation or an international institution the powers of government organs. It stipulates that: “The submission of a treaty to the President of the Republic of Poland for ratification shall be performed after obtaining the consent referred to in Article 89 para 1 and Article 90 of the Constitution of the Republic of Poland.” This express reference to Article 90 should leave no doubts that the Statute on International Treaties was to be applicable to these treaties.³⁹

It follows, therefore, that the Statute and the Regulation require that for the passage of the Government resolution the Government should seek the consent of the Parliament by submitting the relevant documents to the Parliament, including a draft of the statute authorising ratification, the Polish text of the treaty, the text of the treaty in at least one of the authentic languages, a draft of the document of ratification, and the reasons for supporting the Government’s legislative bill. This last document explains the need and the political and legal effects of the treaty and contains the arguments in favour of the chosen ratification procedure⁴⁰ (there are four ratification paths in Poland). When the treaty is submitted under Article 90, and if the issue of a referendum is raised by the Government or by the deputies, Article 90(4) provides that the

³⁶ A final act was annexed to, for example, the Rome Statute on the International Criminal Court of 1998 and was signed on behalf of Poland by a member of the Government.

³⁷ It should be noted, nevertheless, that in the case of Hungary, the Final Act to the Accession Treaty was also signed by a representative of the Parliament and a representative of the Government respectively, which seems to indicate that the parties left the issue to internal law requirements.

³⁸ *Dziennik Ustaw* [Polish Journal of Laws], 2000, No 79, item 891.

³⁹ See M. K r u k: “Konstytucja RP a procedura ratyfikacji traktatu akcesyjnego,” p. 69 ff; K. W ó j t o w i c z: “Konstytucja RP a przystąpienie Polski do Unii Europejskiej,” p. 77; A. W y r o z u m s k a: “Ratyfikacja traktatu akcesyjnego w drodze referendum,” pp. 84 ff in: J. B a r c z (ed.): *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej*, *op. cit.*

⁴⁰ Para 10 of the Regulation.

decision on the choice of the ratification procedure – whether with prior consent expressed by the Parliament by act of parliament or by referendum – is taken by the Sejm, the lower chamber of the Polish Parliament.

The Accession Treaty was signed on 16 April 2003 in Athens. On the same day the Sejm considered a motion by the Sejm Presidium brought under Article 65(3) of the Sejm Rules of Procedure to hold a national referendum on consent to ratification of the Accession Treaty of 2003. The motion contained a proposal regarding the wording of the referendum question and the date on which the referendum was to be held (7 and 8 June 2003).⁴¹ On 17 April 2003 the Sejm adopted two resolutions. The first one concerned the procedure of granting consent for ratification of the Accession Treaty, where the Sejm decided that the consent for ratification would be granted by the national referendum. The second concerned the order of the referendum on granting consent to the ratification of the Treaty concerning accession of the Republic of Poland to the European Union.⁴² In the former resolution the Sejm invoked Article 90(4) of the Constitution and Article 70(1) of the National Referendum Act of 14 March 2003 (hereinafter “Referendum Act”).⁴³

What is interesting, however, is when the Government secured the passage of the resolution on submission of the Accession Treaty for ratification to the President as required by Article 15 of the Statute on International Treaties or when the Government instruments on ratification of the treaty – the treaty itself signed on the same day, the annexes to the treaty, the draft ratification statute, the supporting arguments accompanying the text of the treaty as referred to in the Statute and the Regulation – were submitted to the Sejm. It is important to note that Article 90(4) grants the Sejm no autonomous competences. It seems logical that the Sejm acted after the Government had signed the treaty and expressed its position on ratification. The decision whether a treaty should be submitted for ratification to the President, belongs, in the light of the Constitution, exclusively to the Government (the Government is responsible for conducting the foreign policy of the state and to that end conclusion of international agreements requiring ratification (Article 146 of the Constitution)).

It may be supposed that the Sejm treated the notification referred to in Article 69 of the Referendum Act (*lex posterior* relative to the Statute on International Treaties) as an expression of the will of the Government and a proper element in the ratification procedure. Article 69 of the Referendum Act requires the Prime Minister to notify the Marshal (speaker) of the Sejm that a treaty, ratification of which requires consent within the meaning of Article 90(2–4) of the Constitution, has been signed and to submit the text of the treaty plus annexes to the Sejm. The next provision of the Statute, Article 70(1), stipulates: “Any resolution in respect of the choice of proce-

⁴¹ The motion was adopted on 16 April 2003 by 368 votes in favour to 6 against with 52 abstentions.

⁴² The text of the Treaty was not annexed to the resolution.

⁴³ The Sejm invoked Article 90(3) of the Constitution and Articles 71(1–2) of the Referendum Act when ordering the referendum. The clause to Article 71(2) saying that the Sejm may order a referendum on its own initiative does not on any account mean that the Sejm can also initiate the procedure for expressing consent to be bound by a treaty on its own initiative.

ture for obtaining consent to ratification of the treaty by a referendum shall be taken by the Sejm by an absolute majority of votes cast by at least half of the statutory number of Deputies.” It is worth noting that Article 70(1) only repeats the rule contained in Article 90(4) of the Constitution.

Firstly, it is unclear if notification as referred to in Article 69 actually took place as no official document exists. The likely conclusion is that there was no notification in any form since Article 69 requires not only notification of signing but also submission of the text of the signed agreement. It is difficult to assume that in matters relating to delegation of the powers of government organs to an international organisation or organ, the legislature would be satisfied with any text whatsoever of the treaty and so not the text authenticated by the signatory states. It is doubtful that the Government was able to submit a signed text on the same day that it was signed.⁴⁴ It is worth noting that the final version of the Accession Treaty differs from the one presented much earlier in the Sejm by the Government and distributed on a CD attached to copies of the newspaper *Rzeczpospolita* by the President of the Republic and the Robert Schuman Foundation. The earlier version (still with square brackets which suggest it was a working text) did not reflect the actual scope of the Polish obligations (for example, the provisions of the Accession Act and the protocols have a different numbering).

Secondly, even if the Sejm was notified, doubts remain whether Article 69 of the Referendum Act could amend the Statute on International Treaties. In the absence of an express provision to that effect in the Referendum Act and given the content of Article 69, this is doubtful. Article 69 could, at most, introduce an additional requirement, apart from the ones listed by the Statute on International Treaties. This new requirement remains outside the competence of the Government to take a decision on the submission of a treaty for ratification to the President, and on the choice of the ratification procedure.

This procedure, as laid down in the Statute on International Treaties, has two main stages: signing and ratification. The Government approves the text of the treaty, assents to signature of the treaty under the international procedure and then, once the treaty has been signed, when it is “double-checked” through inter-ministerial consultations and re-examination in the Parliament, submits it to the President for ratification. The domestic procedure reflects the international one, as well as the requirements of the legislative process. The ratified treaty is a source of generally binding

⁴⁴ It should be noted that the Accession Treaty was drawn up, in accordance with Article 3 thereof, in a single original in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish languages. The texts in each of these languages are equally authentic. The Treaty was deposited in the archives of the Government of the Italian Republic, which was required to transmit a certified copy to each of the governments of the other signatory states. Even if the depositary transmitted a certified copy to the signatory states on 16 April, it is almost impossible that a certified copy could reach the Sejm on the same day. The question is, which version did the Sejm use when assessing whether the Treaty delegated the competences of organs of government in relation to certain matters and which of the procedures referred to in Article 90(2) or 90(3) would be more suitable? In the ratification procedure it is both incorrect and risky to use a draft text liable to changes and not a text adopted by the states.

law in Poland and might be directly applicable, and that is also why it should be carefully drafted and analysed. Furthermore, international relations can spring surprises through sudden changes. When signing a treaty, states may formulate various reservations, declarations or statements which may influence another state's decision whether or not to be bound by the treaty. Every new political or legal situation created after a treaty has been signed should be considered by the Government. The procedure prescribed by the Statute on International Treaties allows the legislative initiative of the Government to be thoroughly studied. It is worth noting that the requirements listed in the Statute are not specific to the ratification procedure; they reflect the requirements contained in the Rules of Procedure of the Sejm relating to legislative proceedings.

The procedure requires from the Government a document stating the grounds for the proposed measure. In accordance with the implementing regulations of the Statute on International Treaties this document should:

- 1) explain the need for the Republic of Poland to be bound by the treaty and its purpose';
- 2) indicate the differences between the existing and the prospective legal situation;
- 3) present an estimate of the social, economic, financial, political and legal consequences of the entry into force of the treaty and identify the sources of financing it (§ 2(5));
- 4) explain the choice of the procedure for the Republic of Poland to be bound by the treaty and specify;
 - a) the subjects of domestic law to which the treaty applies, including the extent to which natural and legal persons are bound by the treaty;
 - b) how the treaty affects matters regulated by domestic law;
 - c) the legal measures to be adopted in order to implement the treaty (§§ 5(1) and (6)).

It is necessary to add that all these elements of the aforesaid document are required at all the main stages of the procedure for conclusion of an international agreement. The document should, therefore annexed to the request by the Minister considered competent by the Government for the passage of a resolution on assent to signature of the Accession Treaty. It is to be presumed that the Government carried out the analysis required by the Regulation because it presented in the Parliament reports on the state of preparations for membership in the EU and the results of the accession negotiations. But the document itself appears to be missing. An oral report to the Parliament can complement the procedure but does not substitute for it, especially as ratification of the Accession Treaty requires consideration of issues of fundamental importance such as, for example, the issue of conformity of the obligations imposed by the Treaty with the provisions of the Constitution (e.g. Articles 62, 67 or 55). Even if the Accession Treaty is an unusually lengthy document, the Government should present at least the most consequential obligations stemming from the Treaty and its views on how it might be implemented under national law. The importance of the explanatory document cannot be belittled as it is important from the political and legal points of view.

In addition to this, if one assumes that Article 69 of the Referendum Act derogates from Article 14 and 15 of the Statute on International Treaties, one has to acknowledge that the legislative initiative in the case of ratification of treaties delegating the powers of government organs to an international organ was transferred to the Sejm, which would be in breach of Article 146(1) and (10) of the Constitution.

Article 69 of the Referendum Act should, therefore, be interpreted only as stating an additional requirement in the procedure. The Government decides on the signing of an agreement. Once the treaty is signed, the Government is obliged to notify it to the Sejm and to submit the text of the treaty (it is worth noting that Article 69 only requires the submission of the text of the treaty and its annexes. It does not require the submission of the Polish translation when Polish is not an authentic text). In other words, the provision lacks necessary specificity for replacement of the procedure required by the Statute. The next provision, Article 70(1), relates to certain other issues and later steps in the procedure; it deals exclusively with decision-taking by the Sejm on the holding of a referendum without indicating what should happen in the meantime and without referring to the procedure which should be followed under the Statute on International Treaties.

Some of the other provisions of the Referendum Act also raise questions. In the event of the referendum producing a non-binding result, under Article 75 of the Statute,⁴⁵ the Sejm could decide on repeating the procedure and consent for ratification would be sought again. Article 75 stipulates that if the result of a referendum on assent to ratification of a treaty is not binding (if, for example, less than half those eligible to vote have not participated), the Sejm may again pass a resolution on the choice of procedure for consent to ratification of the agreement in question. The Marshal of the Sejm then informs the President, the Marshal of the Senate and the Prime Minister that the resolution has been passed. The upshot is that the Sejm decides either to hold a second referendum or to obtain consent by act of parliament. However, if we assume that the Referendum Act changed the provisions of the Statute on International Treaties, essential instruments would be lacking, namely the draft ratification act, the draft of the ratification document to be submitted to the President, the document stating the reasons for the measure, etc. It is unclear on what basis, in the later stage, the Sejm might request these instruments from the Government. In this respect the Referendum Act contains a significant gap and is inconsistent with the Statute on International Treaties. Moreover, the rationale of the procedure for a second decision by the Sejm is doubtful. Obviously, in the situation discussed here consent for ratification can be sought once again but it should, rather, be the Govern-

⁴⁵ The provisions of Article 125 of the Constitution are applicable to the procedure based on Article 90(3): Article 125(3) states that "the result of a referendum shall be binding if more than half the number of persons eligible to vote have participated in it." The Referendum Act specifies in Article 73(2) that "if the result of a referendum is binding and a majority of the valid votes was positive, the President of the Republic shall be granted consent to ratification of an agreement." On the other hand, "if the result of a referendum is binding and a majority of the valid votes was negative, the President of the Republic shall not be granted consent to ratification of an agreement" (Article 74). The Constitution does not regulate a situation where less than half the number of persons eligible to vote have participated in a referendum.

ment which re-applies the ratification procedure. Re-submission of a treaty to the Parliament is one of the Government's prerogatives and is justified *inter alia* by the nature of a treaty as a legislative act. On the other hand, a treaty is not in its entirety an act of national law; the Sejm, therefore, cannot act as "an international legislator." It cannot, as the Government can, influence changes in the treaty. If the Government is unsuccessful in its initiative because there is not a sufficient turnout in the referendum, it may try to remove the reasons for opposition to the treaty by, for example, renegotiating its provisions, seeking the agreement of the parties to a specific interpretation of its provisions, submitting unilateral interpretative declarations or gaining more political support through special media campaign, etc.⁴⁶

The solution which was chosen means reapplication of Article 90 (4) of the Constitution without, however, the requisite Government initiative. This solution was justified on the grounds that insufficient voter participation in the referendum signifies that the sovereign did not use its power (or did not want to use it), therefore the matter can be discussed within the Sejm.⁴⁷ The opposite could equally well be argued: that insufficient participation in the referendum is more akin to a negative vote. Observance of the division of powers stemming from the Constitution of 1997 is justified in such a situation; the Government has the power to conclude international agreements and it is for the Government to decide on their future, especially in the event of a negative result in the conclusion procedure. Article 75 seems, therefore, be inconsistent with the checks and balances between the powers of the different branches of government established in the Constitution.

The conformity of Article 75 of the Referendum Act with the Constitution has, however, been examined by the Polish Constitutional Court. The Court ruled on 27 May 2003 that Article 75 was consistent with the Constitution, emphasizing the consultative nature of an inconclusive referendum. The procedure offered by the contested provision is, according to the Court, necessary and acceptable. The judgment of the Court is binding, but its reasoning is not convincing. If a referendum is of a consultative nature, it is the Government which should draw conclusions from the "consultations," since it is still responsible for international relations. The situation created by a non-binding referendum result does not produce a constitutional deadlock as the Government can still submit the treaty to ratification; therefore conferring an extraordinary power to the Sejm is not necessary.

⁴⁶ The negative result of the first referendum on ratification of the Maastricht Treaty held in Denmark in June 1992 is a good example. As a result of endeavours by the Danish government, the European Council held in Edinburgh on 11–12 December 1992 agreed on the interpretation of several provisions of the TEU; a special decision by the heads of states and governments meeting in the European Council framework was adopted (Bull. EC 12-92, I-34-I-39); see also declaration of the European Council, I-40-I-41 and unilateral declarations by Denmark annexed to the Danish ratification document and taken cognisance of by the other 11 parties to the treaty (I-42-44). This allowed the government to submit the treaty to ratification for a second time and hold another referendum. The new interpretation of the treaty provisions led to a positive vote in the second referendum. See: Laursen, Vanhoonacker (eds): *The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications* (1994); Kaptein, VerLoren van Theemat: *Introduction to the Law of the European Communities* (1998), p. 39; Arnulf, Dashwood, Ross, Wyatt: *European Union Law* (2000), p. 16.

⁴⁷ See: case K/11/03 of 27 May 2003 of the Polish Constitutional Court.

The conclusion to be drawn is that the changes made in Polish law at almost the last moment before ratification of the Accession Treaty are not perfect and that the result may be questionable. The rule that "the end justifies the means" seems to have been followed rather than some other rationale. It is a rule that does not sound convincing in a democratic state. Non-observance of the procedure laid down in the Statute on International Treaties and the unconventional action adopted by the supreme authorities of the Republic of Poland are astonishing and cannot be accepted in the case of a treaty of such great importance. On the contrary, a treaty delegating state powers should require greater procedural care than ordinary treaties. Even if the incorrect procedure applied to the Accession Treaty cannot affect its validity in internal law (one could plausibly say that the consent expressed by the referendum remedied or validated the procedure), it may be important for how the Accession Treaty is perceived; it, therefore, seems worth emphasising that more attention should be paid to the procedural issues, especially as we face the prospect of ratification of the Treaty establishing a Constitution for Europe.

Universal International Standards of Human Rights Protection and the HIV/AIDS Pandemic

JAN SANDORSKI

1. Introductory Remarks

The UNAIDS report on the global HIV/AIDS epidemic published in July 2002 and the documents of the 14th AIDS International Congress held in Barcelona contain data which suggest that every ten minutes a human being is infected with HIV which will result in 69 million deaths from AIDS within 20 years in the 45 most afflicted states. This is first and foremost because of the lack of a vaccine. However, even if one is invented tomorrow, the pandemic effects will be visible for decades. Though it is true that antiretroviral treatment has helped many infected people, due to high costs only persons hailing from rich countries can be treated. Poor states struggle with the disease without sufficient financial support, often using unconventional methods (people are prohibited to have sex and told to masturbate instead; young girls are ordered to keep their virginity).

What can the international community do in order to minimize effects of the HIV/AIDS pandemic – the biggest health tragedy of the present day? Of course, great expectations should be placed in the development of medical sciences and hopes that it will lead to a revolution in prevention (vaccine) and therapy (curability). A breakthrough in medicine will not solve the AIDS problem. It must be accompanied by a breakthrough in the international community's mentality which should change its approach towards people with HIV/AIDS. There is still no global spirit of solidarity for redressing the imbalance between the world of wealth and the regions of poverty which are the ones mainly affected by the pandemic. People are not conscious of the fact that dignity is a person's supreme good and that the pandemic constitutes the most dangerous enemy of dignity for the whole of our civilization. International human rights, and in particular individual complaints, are the most effective tools for protection of human dignity; a person whose rights have been violated is entitled to bring their claims directly before international judicial or quasi-judicial bodies. An HIV/AIDS victim is also entitled to do so, in certain circumstances, but they must be conscious of their rights and know who are the proper addressees of their claims.

The rights of a victim of HIV/AIDS have not been codified in a single international instrument. They are spread over various international treaties and resolutions of international organizations. One can say that international standards aimed at com-

bating the effects of HIV/AIDS have already been formulated.¹ They can be divided into universal standards which cover the whole of the international community and the regional ones which cover our continent. The closest to us and the most effective at the same time are the standards formulated within the European system of the international protection of human rights. Its international judicial organs have developed an extensive case-law concerning infringements of the rights of the victims of HIV/AIDS. In order to protect sick persons, a Bioethics Convention has been signed to decide on conflicts between patients and national health systems.

There is no catalogue of the rights of persons living with HIV/AIDS. Such a catalogue could be set out in a general international convention of the rights of persons living with HIV/AIDS. Polish diplomacy, experienced in the field of the promotion and creation of norms protecting human rights, could propose the adoption of such a convention within the United Nations Organization. Its provisions should take into account the already existing universal international standards aiming at combating the effects of HIV/AIDS. This notion should be understood as a general guideline (*"étalon"*) for international protection of the rights of persons living with HIV/AIDS. It would constitute a recommended code of conduct as long as it was *soft law*, imply a moral appraisal of acts and be a measure of the ethics of the international community. It would not lose these features when transformed into a legal standard embodied in a conventional international law or domestic law, although it would then become a required code of conduct. The appraisal of universal international standards aimed at combating the effects of HIV/AIDS will be made from this point of view.

2. International Sanitary Cooperation and HIV/AIDS

The fight against the HIV/AIDS epidemic evokes former sanitary guidelines consisting of, *inter alia*, quarantine and international travel restrictions. International cooperation in the combating of dangerous epidemics has a long tradition dating back to the 19th century. The first health convention was concluded in 1853. A health code for combating plague, cholera and yellow fever was annexed to it. Further conventions widened the scope of cooperation (1894, 1897, 1903, 1912, 1926, 1938 conventions and a 1933 health convention on air navigation). Creation of conventional norms was accompanied by the shaping and improvement of institutional instruments of cooperation. The 1903 Convention was supplemented by a resolution creating the International Health Office in Paris. The Office was transformed into the International Office of Public Hygiene under a 9 December 1907 convention.

¹ On the concept of human rights and their standards, see: J. S y m o n i d e s (ed.): *Human Rights: Concept and Standards* (2000). In one of the essays published in that book, J. S h e s t a c k writes that human rights constitute a complex of norms and have their roots in justice (p. 33). J. G i l a s takes a standard of international treatment to mean a complete list of privileges, benefits and facilities granted by states in a well-defined area; see: J. G i l a s: "Standard traktowania międzynarodowego," 7–8 *Państwo i Prawo* (1974), p. 136. See also: J. S a n d o r s k i: *Międzynarodowa ochrona praw człowieka a HIV/AIDS*, Wydawnictwo Poznańskie, Poznań 2002, pp. 123–134; J. S a n d o r s k i: *Dochodzenie praw osób z HIV/AIDS. Standardy uniwersalne i dokumenty międzynarodowe* (2003), pp. 20–55.

The Paris Convention of 21 June 1926 replaced all previous conventions, thus covering the combating of plague, cholera, yellow fever, typhoid and smallpox. It did not, however, introduce institutional changes. The International Office of Public Health kept functioning, as well as the Hygiene Organization within the League of Nations created in 1923. The general provisions of the 1926 Convention required the governments of all states-parties of the conventions to be notified of cases of plague, cholera and yellow fever and an existence of typhoid or smallpox epidemic. The International Office of Public Hygiene was notified as well. Moreover, the convention detailed the necessary steps to be taken in the course of action to prevent transmission of the epidemic from infected areas to other regions. Until the adoption of the 1926 convention, quarantine (compulsory detention of means of transport arriving from abroad for fear of spreading a communicable disease) was established by a customary law, e.g. a ship was quarantined for forty days.² The convention introduced different periods of isolation for sick persons requiring hospitalization or healthy persons subjected to several days' observation.

Quarantine in the traditional approach should not be applied in relation to HIV/AIDS. Isolation of persons arriving from states with a high rate of incidence would be pointless as what is important is whether these persons are HIV carriers (not whether they will fall ill with AIDS), in other words whether they are likely to infect their sexual partners. To determine if this is the case, a valid medical certificate or a test done in a state whose frontier the person in question crossed would be needed.

A new stage of development in health cooperation began with the convening of a health conference in New York which, on 22 July 1946, adopted the Constitution of the World Health Organization (WHO).³ Among the objectives of the Organization are inter alia: stimulation and advancement of work to eradicate epidemic and endemic diseases,⁴ promotion of the improvement of nutrition, housing, sanitation and economic conditions, promotion of cooperation among scientific and professional groups which contribute to the advancement of health, development, establishment and promotion of international standards with respect to food, biological, pharmaceutical and similar products.

The supreme decision-making body of WHO is the World Health Assembly which meets once a year. Its main function is to adopt regulations concerning: international quarantine and sanitary requirements, standards and nomenclatures and other matters important for international health protection. Unlike the majority of resolutions, a two-thirds vote is required for the adoption of the regulations because of their particular importance.

² E. O s m a ń c z y k: *Encyklopedia ONZ i stosunków międzynarodowych* (1986), p. 294.

³ *Dziennik Ustaw* [Polish Journal of Laws], No 61/1948, item 477.

⁴ A global project for vaccination against black smallpox initiated in the sixties merits special attention. Thanks to it the last case of this disease was reported in Somalia in 1977. In 1996 the Assembly of the World Health Organization recommended destruction of the virus stored in laboratories but later abandoned this idea for fear of bioterrorism.

Of vital importance was the adoption of International Health Regulations by the World Health Assembly on 25 July 1969. They entered into force on 1 January 1971 and replaced all previous international health conventions. The member states are considered to be bound by the Regulations if they did not reject the whole of the Regulations or make reservations to a part of the provisions of the Regulations. This instrument determines the so-called maximum quarantine action to be taken by a state when cholera, plague, yellow fever or smallpox, diseases subject to the Regulations appear on its territory. The Regulations provide for the so-called maximum measures limiting international traffic which a state may adopt for the protection of its territory against other epidemic diseases.⁵

The Regulations do not refer to ideas included in the preamble to the WHO Constitution which created a modern approach to international health cooperation. In the light of that concept the objective of cooperation is not only short-term action to control an epidemic but also the achievement of the highest possible level of health by all people, health meaning lack of diseases and disabilities and a state of full physical, mental and social well-being.

3. Shaping of Universal International Standards in Relation to Cross-Border Movement of Persons with HIV/AIDS

Under the influence of the alarming news brought to public attention by the mass media and laboratories of scientists working on HIV/AIDS, certain states introduced restrictions as to the international movement of persons.

As from 1986 Saudi Arabia and Liberia required that persons residing in the United States presented, while crossing their borders, a medical certificate on the absence of HIV in their organisms. The Brazilian authorities also attempted to introduce certain tourist restrictions, alarmed by the fact that tourists, interested mainly in sexual relationships, participate in the carnival in Rio de Janeiro. Among passengers coming to Rio by plane questionnaires concerning sexual preferences and contacts with persons suffering from HIV/AIDS were distributed. Some airlines refused to distribute the questionnaires fearing the possible loss of customers. Representatives of health services explained their restrictive on the grounds of the risk of AIDS spreading in Brazil, as foreigners, mainly American homosexuals, participate in the carnival in large numbers.⁶

A question that has been raised is whether growing fears of the spread of the disease in areas with little or no incidence of AIDS might not result in states taking action which would restrict international travel. The question became even more important in the light of a phenomenon observed in the USA. Homosexuals and bisexuals inhabiting big cities with a high HIV/AIDS morbidity rate, such as New York, San Francisco, Seattle, Portland, Minneapolis or Pittsburg, were migrating to states with lower morbidity rates. The migration tide affected mainly North Dakota, Idaho, Wyo-

⁵ P. DeLeon: *The International Health Regulations. A Practical Guide* (1975), p.13.

⁶ *New York Times*, 9 February 1986, p. 9.

ming and Montana. Many HIV carriers hid their bi- or homosexual inclinations, refused to undergo the requisite tests and even contracted marriages in their new places of residence,⁷ which ended with the infection of their wives and children.

Health education activists engaged in explaining questions relating to AIDS were dismayed by the recklessness of homo- and bisexuals, who spread their disease without taking any precautions. Steps were therefore taken which aimed at introducing an obligation to undergo HIV/AIDS tests covering all persons wanting to contract a marriage.⁸

States' positions on restrictions on international movement of persons with respect to the necessity of counteracting AIDS are not homogenous. Some states ignored that danger for fear of losing the profits derived from tourism. In 1988 the private health service and social partners in Thailand claimed that AIDS was occurring on a much greater scale than was apparent from government statements. Officially only 200 persons were infected with HIV. It turned out, however, that only fifteen thousand (15,000) out of seven hundred thousand (700,000) Thai prostitutes had undergone tests. This is how the morbidity rates were lowered in order not to frighten away tourists.⁹ A non-governmental health service and groups of persons conscious of the seriousness of the issue and taking into account all these statistical swindles demanded honest and wide-ranging research. Moreover, they called for male applicants for visas to Thailand undergo obligatory blood tests.

In other states it was not private entities but government bodies who urged imposing restrictions on international movement of persons in order to diminish the AIDS risk. In April 1986, the Centers for Disease Control (CDC) at the US Public Health Service proposed that AIDS should be added to a list of seven other diseases justifying expulsion of foreigners. If this proposal were adopted by the Congress, the State Department would be entitled to reject a visa application and the Immigration and Naturalization Agency could bar persons with HIV from the territory of United States.

Expulsion of unwelcome aliens already constituted a matter of concern in the nineteenth century. It was in 1875 that the Congress adopted its first statute in this regard. Currently there are 33 grounds on which an alien may be expelled from the United States.¹⁰ Undesirable aliens can be divided into seven basic categories: 1) persons conducting subversive activities (anarchists and communists); 2) persons rendering services exceeding needs; 3) persons committing criminal offences; 4) persons violating provisions concerning entry; 5) persons requiring social assistance; 6) persons committing immoral sexual acts; 7) persons suffering from mental disorders or dangerous communicable disease.¹¹

⁷ E. S a l h o l z, R. S a n d z a: "The gay refugees," *Newsweek*, 8 May 1988, p. 24.

⁸ *Ibid.*, p.25.

⁹ L. H o w a r d: "AIDS fears in Bangkok," *Newsweek*, 30 November 1988, p. 7.

¹⁰ E. H u t c h i n s o n: *Legislative History of American Immigration Policy 1798-1965* (1981), pp. 441-442.

¹¹ "Development in the Law, Immigration Policy and the Rights of Aliens," 6 *Harvard Law Review* (1983), vol. 96, No 6, p. 1339.

The very frequent cases of expulsion of aliens on grounds not listed in these seven categories were considered to be acts of discrimination as a *double standard* was employed – aliens are expelled for act permitted to American nationals. The question of the inconsistency of legislative regulations with the principle of freedom of exchange of ideas across state borders and freedom of international travel as defined in the Helsinki Final Act¹² were raised.

American homosexual associations protested mainly against the expulsion of aliens who were suspected of homosexuality and thus falling into the sixth category. The fact that homosexuals were not allowed into the territory of the United States was considered discriminatory as well. Against this background a dispute between Lesbian and Gay Freedom Day Committee Inc. and the Immigration and Naturalization Agency arose in 1982. The District Court stated that the expulsion order of aliens with sexual deviations did not apply to homosexuals. The Congress, when adopting the Immigration and Naturalization Act in 1952, considered homosexuality a mental disease. As this turned out to be mistaken, there are no justifications for the Immigration and Naturalization Agency to expel homosexuals. The position of the Court was based on the assumption that the Congress intended to sanction the expulsion of homosexuals as long as homosexuality was considered a mental disease.

The question whether homosexuality is a mental disease has not been answered in the United States. The truth is that the American Psychiatric Association removed homosexuality from the list of mental diseases. An American author R. Bayer suggests that moral and not medical arguments came into play. He notes, however, that the majority of American psychiatrists considered it a mental disease.¹³

The Supreme Court of the United States dismissed the District Court judgment acknowledging that the clear intention of the Congress was the expulsion of sexual deviants, homosexuals included.

The judgment of the Supreme Court made the homosexual community even more sensitized to legislative initiatives directed against its members. That is why the CDC proposal of 1986 was considered another step towards greater discrimination of homosexuals and members of other “high risk” groups. They feared that their members – aliens with AIDS/HIV – would be subject to expulsion. The President of the National Lesbian and Gay Health Organization stated in *The New York Times* in 1986 that she was convinced the immigrant officers, for reasons of their own personal prejudice, would require a medical examination from homosexuals before admission into US territory.¹⁴ The same attitude would be taken by consular officers issuing entry visas to the United States.

In the light of international law decisions on who is granted permission to enter a state lie exclusively within the competence of that state’s authorities if international obligations do not come into play.

¹² *Select Common on Immigration and Refugee Policy* (1981), p. 348.

¹³ R. Bayer: *Homosexuality and American Psychiatry. The Politics of Diagnosis* (1981), pp. 167–168.

¹⁴ *New York Times*, 24 April 1986, p. A13.

In the practice of the United States far-reaching discretion by the consular service can be observed. Almost all aliens are obliged to apply for a visa if they want to enter the USA.¹⁵ The decision of a competent consular officer is final and cannot be undermined by the Secretary of State or a court. Only a superior is authorized to annul it or request the Visa Bureau of the Department of State for an advisory opinion. This has been criticized for several reasons. Lack of oversight may result in unavoidable mistakes. "Consular absolutism" infringes a fundamental principle of constitutional theory according to which a decision taken on an important matter should not be taken by an individual who is not supervised by anyone.¹⁶ Lack of uniformity is a common feature of consular decisions. Different consulates may give different decisions in identical cases. No wonder why the homosexual community fears prejudice and discrimination.¹⁷

The WHO view should be mentioned in relation to the United States position on cross-border movement of persons with HIV/AIDS. As early as 1951 the Director-General was of the opinion that health control of any kind cannot disturb trade and international movement. At the same time he stressed that even the most severe quarantine should not affect international movement the latter being of great importance to the economic development of states.¹⁸

A liberal approach to freedom of international travel has prevailed in the World Health Organization, one expression of which was a conference of directors of regional agencies held in Geneva in December 1985. The WHO has six regional offices: for Africa – in Brazzaville, for the Americas – in Washington, for South-East Asia – in New Delhi, for Europe – in Geneva, for the Eastern Mediterranean – in Alexandria, and for the West Pacific Region – in Manila. The directors are appointed by the Executive Board and the regional agencies are the executive organs of the regional committees which are composed of representatives of states belonging to a particular geographical region, states with dependent territories situated in that region, and associated members.¹⁹

A specific feature of the WHO is a great degree of decentralization. That is why the member states of the regional committees could ask the directors of the agencies whether they might require medical certificates stating that their holders were not infected with HIV and not suffering from AIDS from persons desiring to visit those countries. After carefully analyzing Article 8 of the International Health Regulations the directors came to the conclusion that there were no legal grounds for carrying out blood tests on travellers coming from abroad or requiring that they presented medical certificates.²⁰

¹⁵ F. Auerbach: *Immigration Laws of the United States* (1975), pp. 170–172.

¹⁶ See: J. Jaffe, H. Hart (professors of Harvard Law School): *Hearings before the President's Commission on Immigration and Naturalisation*, 82 Congress, 2 Session, 1952, p. 1578.

¹⁷ The idea of establishing a unit within the Department of State whose task would be oversight of consular decisions seems to be right.

¹⁸ WHO Official Records 1951, No 37, p. 330.

¹⁹ W. Morawicki: *Organizacje międzynarodowe* (1965), p. 307.

²⁰ L.J. Nelson: "International Travel Restrictions and the AIDS Epidemic," 1 *AJIL* (1987), p. 231.

Article 8 of the Regulations stipulates that each health administration is to notify the Organization of the measures which it has decided to apply to arrivals from an infected area and of any change in its requirements as to vaccination for international travel. Once a year it sends to the Organization a recapitulation of these requirements. It also informs prospective travellers through cooperation with travel agencies, shipping companies and airline operators of its requirements and any modifications thereto.²¹

The term "diseases subject to the Regulations," referring to cholera, plague, smallpox and yellow fever, is not used in Article 8. It can be assumed that states can notify the Organization of restrictions on persons suspected of carrying other diseases, HIV/AIDS included. However, the term "infected area," which appears in Article 8, is not expressly defined as an area infected with cholera, plague, smallpox or yellow fever. This is not the case with the term "infected person," defined as a person suffering from "a disease subject to the Regulations" or incubating such a disease.

Interpretation of Article 8 of the Regulations involves serious difficulties. Are states obliged to notify restrictions on all diseases or only those which are subject to the Regulations? Can this obligation be accompanied with the introduction of restrictions only on diseases subject to the Regulations or also other diseases, AIDS included?

From the fact that Article 8 does not refer *expressis verbis* to "diseases subject to the Regulations" can be inferred implicit permission to introduce restrictions on travellers suspected of carrying diseases other than those listed in Article 1. The directors, however, took a different view saying that the Regulations lack a provision allowing states to require presentation of a certificate stating that its holder (a traveller crossing a state's border) is not infected with a specified disease.

Under Article 106 of the Regulations the directors' interpretation is binding on the member states. It also stipulates that any question or dispute concerning the interpretation or application of the Regulations or of any supplementary Regulations may be referred by any state concerned to the Director-General for settlement of the question or dispute. If such a question or dispute is not thus settled, the Director-General on his own initiative, or at the request of any state concerned, refers the question or dispute to the appropriate committee or other organ of the Organization for consideration. States have made use of this provision. The next step, in the event of a state not accepting the interpretation, is to refer the dispute to the International Court of Justice (Article 106(3)). No state has done this so far.

4. Influence of Concurrence of Human Rights On Shaping Universal International Standards Concerning HIV/AIDS

Against the background of the above-mentioned questions there arises the question of the concurrence of norms safeguarding the rights protected within the interna-

²¹ *International Health Regulations*, United Nations Treaty Series 1971, Vol. 764, pp. 4-105.

tional system of human rights. On the one hand, there is freedom of movement and a prohibition of all forms of discrimination. Freedom of travel was defined in the 1975 Helsinki Final Act in the broadest terms. Under Chapter I b – “Cooperation in Humanitarian and Other Fields: travel for personal or professional reasons” – states undertook “gradually to simplify and to administer flexibly the procedures for exit and entry” and “to ease regulations concerning movement of citizens from the other participating States in their territory, with due regard to security requirements.” This is a broader aspect of the idea contained in Article 12 of the International Covenant on Civil and Political Rights: “Everyone shall be free to leave any country, including his own. (2).” “The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant (3).” The protection of public health justifies restrictions on freedom of movement.

On the other hand, there is the right to life, which constitutes the starting point for international health cooperation. Its modern regulation is contained in Article 12 of the International Covenant on Economic, Social and Cultural Rights: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (1).” “The steps to be taken by the States to achieve the full realization of this right shall include those necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases (2).”

In the light of the above-mentioned provisions there are no international legal provisions allowing introduction of international travel restrictions in order to counteract the HIV/AIDS pandemic. It is acknowledged that domestic law or international law restrictions should not be of a discriminatory nature. Article 7 of the 1948 Universal Declaration of Human Rights stated that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” At the same time there are more and more acts of discrimination in relation to AIDS. American insurance companies refuse to insure homosexuals and even persons working as, for example, waiters, stylists or florists.²² Some time ago Russian experts officially warned against sexual contacts with Americans.²³ These reactions are easy to understand. However, discriminatory actions purportedly aimed at combating AIDS in the name of the law are contrary to the 1948 Declaration and Article 2 of the International Covenant on Civil and Political Rights.

To sum up, the WHO decisions on interpretation of Article 8 of the 1969 International Health Regulations elaborated an international standard under which refusal of admission of persons with HIV/AIDS the territory of a state is contrary to law. The objective was to provide for maximum measures of protection against the spreading

²² T. Jacoby: “Who will pay the AIDS bill?”, *Newsweek*, 11 April 1988, p. 50.

²³ M. Hager: “Enemies of the People,” *Newsweek*, 7 September 1988, p. 15.

of diseases, on the one hand, and maintenance of minimum restrictions on international movement of persons, on the other. The states belonging to WHO spoke in favour of elimination of quarantine and other measures constituting entry barriers for persons intending to visit a foreign country even when there was a risk that the pandemic could spread. The essential element of this approach – a counterbalance to the elimination of quarantine and refusal to grant an entry visa – was to be enhancement of epidemiological controls and the upgrading of health services in each WHO state.

The lack of drugs for suppressing the pandemic and the tendency of the disease to spread make the WHO standard difficult to implement by states.²⁴ Taking into account the international standards concerning prohibition of discrimination, states should decide in a multilateral international agreement whether they wish to enjoy the right to refuse admission of persons who are not in possession of a medical certificate stating they are not HIV carriers and the right to expel aliens with HIV.²⁵ Without such an instrument states will continue to employ different practices and persons with HIV/AIDS will bring actions against states accusing public authorities of discriminatory treatment.

5. Work of International Organizations On Recognition of the Significance and Formulation of International Standards for Protecting Persons with HIV/AIDS

Competent universal international organizations have not limited their research on HIV/AIDS-related to health cooperation and questions concerning the influence of the pandemic on international tourism. Their principal objective has been to establish an international legal system aiming at protecting all victims of HIV/AIDS and safeguarding respect of human dignity for them and their families.

The existence of a modern international system of protection of persons with HIV/AIDS, with such a person as a subject of rights, constituted a *sine qua non* of effective efforts to fight the pandemic. At the beginning, as noted above, legal international instruments already in force were used.

Comprehensive work aiming at the recognition of the significance of human rights for combating the effects of HIV/AIDS pandemic by the international community began in the late eighties.

In April 1988, a WHO conference, "International Consultations on Health Legislation and Ethics in the Fields of HIV/AIDS" was held in Oslo. In May 1988, the World Health Assembly adopted Resolution WHA 41/24 "Avoidance of discrimination in relation to HIV-infected people and people with AIDS." The keynote of the resolution was to make the world aware of the importance of respect for human rights

²⁴ A requirement of presentation of a medical certificate by aliens applying for a visa allowing them to reside in the country for a protracted period already exists; see: D.C. J a y a s u r i y a: *AIDS-Public Health and Legal Dimensions* (1988), pp. 49–50.

²⁵ See: J. S a n d o r s k i: "Prawo międzynarodowe a AIDS," in: A. S z w a r c (ed.): *Prawne problemy AIDS* (1990), pp. 331–332.

in national preventive policies and control programmes. It was stressed that states must avoid discriminatory action in provision of services, employment and travel.

In 1989, the UN Centre for Human Rights joined the campaign for combating the effects of HIV/AIDS. In July 1989, it convened, in cooperation with WHO, the first worldwide conference continuing the work of the International Consultations. The result of the first consultations was a report proposing elaboration of guidelines for states and governmental and non-governmental organizations, concerning the combating of the effects of HIV/AIDS. The first step towards framing international guidelines was World Health Assembly Resolution 45.35 of 14 May 1992 which laid down the principle that there was no public health rationale for any measures that limit the rights of individuals, notably measures establishing mandatory screening.

Apart from the idea of establishing international guidelines, the beginning of the nineties brought a proposal to prepare checklists evaluating the conformity of domestic regulations with the international standards concerning protection of the rights of people with HIV/AIDS. This idea originated during a regional workshop held by WHO in Seoul in 1990.²⁶ It was also discussed during the Pan-European Consultation on HIV/AIDS in the Context of Public Health and Human Rights held in Prague in November 1991 under the auspices of the WHO European Regional Office and the International Association of Rights and Humanity (IARH). Three other consultations on reform of the rights of people with HIV/AIDS were held by the European Office in 1995 and concerned Eastern European and Central Asian states.

It should be stated that UN Development Programme (UNDP) has made a significant contribution to the development of international standards relating to HIV/AIDS as it has organized a number of interstate consultations (Cebu, May 1993, Dakar 1994) and training workshops (Colombo, Peking, Nadi 1995), where declarations acknowledging the necessity of reform of the law in order to bring it in line with the requirements of contemporary human rights were adopted.

The UN General Assembly resolutions of 21 December 1990 and 20 December 1991²⁷ played a significant role in the whole process as they emphasized the need to counter discrimination and recognized that the most frequent effect of any discriminatory measures is to drive the disease underground, where it is more difficult to combat; they do not stop its spread. Within UNO a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities presented in 1990–1993 a series of reports containing proposals for elimination of discriminatory measures violating international law.²⁸

The UN Commission on Human Rights has since 1990 also adopted numerous resolutions concerning HIV/AIDS.²⁹ The Commission, composed of 53 states, is

²⁶ WHO Document RS/90/Ge/11(KOR).

²⁷ UNGA Res. 45/187, 46/203.

²⁸ See resolutions and decisions of the Sub-Commission: 1987/17, 1990/118, 1991/109, 1992/108, 1993/31, 1994/29, 1995/21, 1996/33, 1997/40, 1998/49.

²⁹ Resolutions: 1990/65, 1992/56, 1993/53, 1994/49, 1995/44, 1996/43. They were based on the UN Secretary-General's reports: E/CN.4/1995/45, E/CN.4/1996/44 and E/CN.4/1997/37.

a functional body of the UN Economic and Social Council and addresses questions concerning human rights by submitting recommendations to governments, elaborating and codifying new human rights standards and monitoring compliance worldwide (by means of fact-finding missions of independent experts). The Sub-Commission is the Commission's specialized agency.

The Commission on Human Rights has produced a significant interpretation of Article 2 of the 1948 Universal Declaration of Human Rights. It stipulates that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The Commission unambiguously stated that the expression "or other status" covers state of health as well. This means that it also covers HIV/AIDS infections. This had an enormous influence on making illegal all policies discriminating against anyone on the grounds of being retrovirus carriers.

An important influence on recognition of international standards and their formulation in the context of HIV/AIDS have been international and regional non-governmental organizations composed of physicians, lawyers, social workers and scientists. Notable examples are the International Federation of Red Cross and Red Crescent Societies or the Pan-American Health Organization (PAHO).³⁰ The same can be said of such national organizations as the British Medical Association Foundation for AIDS, the Center for Health and Human Rights at the Harvard School of Public Health, the Swiss Institute of Comparative Law, the Danish Centre for Human Rights or the Georgetown/Johns Hopkins University Program in Law and Public Health.³¹ All of them have lobbied effectively for antidiscriminatory legislation in their countries and helped to bring about changes in the Canadian, British, New Zealand, French, American and Hongkong legal systems which make for better protection of the rights of people with HIV. These changes are having a positive influence on the shaping and acceptance of international standards.

It should be remembered, however, that the adoption of new antidiscriminatory legal measures at the national level in relation to people with HIV has not affected the fact that there are still considerable disparities between declared policy and its implementation.

6. Joint United Nations Programme on HIV/AIDS (UNAIDS)

The gaps between principles formally embraced by states and the harsh reality made it necessary to establish a specialized international organ dedicated to combating the effects of the HIV/AIDS pandemic. In 1993 the Joint United Nations Programme on HIV/AIDS was established by WHO with the support of the UN Economic and Social Council (Resolution 1994/2). It came into operation, however, only

³⁰ PAHO, *Ethics and law in the study of AIDS*, Scientific Publications, Washington 1992, No 530.

³¹ L. Gostin, L. Lazzarini: *Human Rights and Public Health in the AIDS Pandemic* (1997), p. 12.

on 1 January 1996. The cosponsors of the Programme are: the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA), the United Nations Drug Control Programme (UNDCP), WHO, the World Food Programme (WFP), the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Bank. It is directed by a Programme Coordinating Board composed of representatives of 22 governments and representatives of non-governmental organizations. The Executive Director is responsible for administrative tasks.

The aim of the Programme is to prevent transmission of HIV, provide care and support, reduce the vulnerability of individuals and communities to HIV and alleviate the impact of the epidemic. To complete its tasks, the Programme has a – limited – annual budget of \$350 million.

The Programme focuses its activities on human rights. In its schedule for 1998–1999 activities in the sphere of human rights and ethics constituted an integral part of the Joint Programme.

Over a third of the staff works in selected countries co-operating with experts and advisers and attending what are called UN Theme Groups on HIV/AIDS.³² The Joint Programme does not possess implementing powers, but it provides technical aid to governments and by disseminating principles, strategies and actions providing for maximum protection of victims of HIV/AIDS it influences their policies towards HIV/AIDS.

7. Guidelines Concerning HIV/AIDS and Human Rights

Taking into account the remit of the Joint Programme, in 1996 the UN Commission on Human Rights proposed that the UN High Commissioner for Human Rights, acting in close cooperation with UNAIDS, elaborate guidelines for the promotion and protection of human rights in the context of HIV/AIDS.³³ This is how the Commission began to implement a proposal made by the UN Secretary General in his 1995 report: “the development of such guidelines or principles could provide an international framework for discussion of human rights considerations at the national, regional and international levels in order to arrive at a more comprehensive understanding of the complex relationship between the public health rationale and the human rights rationale of HIV/AIDS.”³⁴

In response to a request from the Commission on Human Rights, the High Commissioner and the Joint Programme convened the Second International Consultations on HIV/AIDS and Human Rights in Geneva from 23 to 25 September 1996 in which

³² H. Watchirs: *Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to Combat HIV/AIDS in View of its Devastating Human, Economic and Social Impact* (1999), p. 138.

³³ Commission on Human Rights, Res. 1996/4, 19 April 1996.

³⁴ E/CN.4/1995/45, §135.

35 experts participated.³⁵ The experts represented UN bodies and agencies, non-governmental organizations, national AIDS programmes, associations of people living with HIV/AIDS, university centres and health services combating the pandemic. Among them were two Polish representatives – Professor Janusz Symonides representing UNESCO and Jacek Tyszko representing the Permanent Mission of Poland to the United Nations Office at Geneva.

Some of the non-governmental and national organizations were requested to prepare background papers concerning the most important human rights principles and concrete measures that states could take to protect HIV/AIDS-related human rights. Papers were presented by: the Alternative Law Research and Development Centre (ALTERLAW) (Philippines), the Network of African People Living with HIV/AIDS (NAP+, Zambia), the Mexican Colectivo Sol, the International Community of Women Living with AIDS (ICW+), and the Global Network of People Living with HIV/AIDS (GNP+).

During the Consultations, the International Association of Rights and Humanity presented the results of a survey on existing strategies and other measures necessary to ensure protection of human rights in HIV/AIDS context. Of great importance were draft guidelines on HIV/AIDS and human rights presented by Helen Watchirs from Australia.

The participants were divided into seven working groups: theoretical framework, institutional responsibilities and processes, law review, reform and support services, promotion of a supportive and enabling environment, dissemination and implementation of the guidelines in states, intergovernmental and non-governmental organizations.

On 25 September 1996, after a thorough discussion the experts adopted a document: "International Guidelines on HIV/AIDS and Human Rights." The purpose is to translate international human rights norms into practical observance in the context of HIV/AIDS. To this end, the Guidelines consist of two parts: the human rights principles underlying a positive response to HIV/AIDS and action-oriented measures to be employed by the governments in the areas of law and practice that protect human rights and achieve HIV-related public health goals. The Guidelines reflect the experiences of people with HIV/AIDS and address a number of difficult and complicated issues which do not always emerge in all pandemic states. The main beneficiaries of the Guidelines are states (legislators, members of governments, public officials implementing national HIV/AIDS programmes, and the staff of health, foreign affairs, justice, internal affairs, labour, and education ministries). At the same time it was assumed that the Guidelines would also be of use to UN agencies and bodies and non-governmental organizations, self-governmental organizations, health services and the Persons Living with HIV/AIDS Association (PLHA).

Implementation of the Guidelines requires international cooperation in dealing with economic, social, cultural and humanitarian issues and propagating respect for

³⁵ The First International Consultations were organized by the UN Centre for Human Rights in cooperation with WHO in Geneva, from 26 to 28 July 1989.

law and the fundamental freedoms of all people. This is one of the United Nations Organization's objectives. For this reason, international cooperation covering *inter alia* technical and financial assistance is an obligation of states. Rich states in particular should, in the spirit of solidarity, grant developing states the assistance necessary to implement the Guidelines.

The Guidelines were adopted at a low level of international representation by a conference modestly called "a consultation" with a small group of experts representing mainly the non-governmental and national organizations participating in it. International organizations like WHO, UNICEF, UNDP, UNFPA, UNESCO or the Council of Europe were represented by observers. The representative of Poland, the only state representative, was not a participant as he was included to the group of "others," which is not a common practice in multilateral diplomatic relations. However, the content of the Guidelines is of a great value. They have not yet been translated into Polish; they need to be translated and popularized. If in future states decide to adopt an international convention on protection of human rights in the context of HIV/AIDS, the Guidelines will be a perfect basis for a draft convention.

The formal value of the Guidelines is marginal. The 1996 Consultation was not an international diplomatic conference as states did not participate in it and international organizations were granted observer status. The final product of the Consultation – the Guidelines – is not a recommendation by an international body, still less an international document binding on the states.

What are the Guidelines then? They can be classified as the recommendations of an international non-governmental conference of a non-binding nature, containing a catalogue of international standards protecting the rights and freedoms of people with HIV/AIDS and suggesting measures for exacting observance of these standards. For these reasons it is necessary to see that the Guidelines are propagated and pressure put on public authorities to comply with their requirements. In this context, the 1997 resolutions of the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities welcomed the Guidelines and demanded their broad dissemination.³⁶ In 1998, UNAIDS and the Office of the UN High Commissioner for Human Rights published the Guidelines in six official UN languages: Arabic, Chinese, English, French, Russian and Spanish.³⁷

The 1999 publication of UNAIDS and the Interparliamentary Union was of great significance for the dissemination of the Guidelines. On the basis of a resolution adopted on 10 April 1998 in Windhoek (Namibia) by the 99th Conference of the Interparliamentary Union a manual for legislators, containing the 1996 Guidelines, was elaborated, published and disseminated.³⁸ A part dedicated to practical steps to be taken by states in order to comply with the requirements of the Guidelines is of

³⁶ Commission on Human Rights, Res. 1997/33; Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Res. 1997/40.

³⁷ HIV/AIDS and Human Rights – International Guidelines, United Nations, New York–Geneva 1998 (HR/PUB/98/1).

³⁸ H. Watchirs, *op. cit.*

great importance.³⁹ It seems possible that compliance with the 1996 Guidelines will have a positive influence for people with HIV/AIDS under the condition, however, that they are correctly implemented.

8. Declaration of Commitment on HIV/AIDS

A Declaration of Commitment on HIV/AIDS was proclaimed by Heads of State and Government and Representatives of States and Governments at the 26th UN General Assembly Special Session (UNGASS), held in New York from 25 to 27 June 2001. The aim of UNGASS was explained by UN Secretary-General Kofi Annan: "For there to be any hope of success in the fight against HIV/AIDS, the world must join together in a great global alliance."⁴⁰ The central idea of the session became: "Global crisis needs global action." The author of the keynote speech was the executive director of UNAIDS Peter Piot. He said that preserving the existing state of affairs is tantamount to sentencing hundreds of millions of people to infection and death which will bring collective shame upon the whole world. The adoption of the Declaration of Commitment ought to constitute a starting point for a totally different approach towards HIV/AIDS pandemic.

What was the content of the Declaration of Commitment since it raised great expectations? In his foreword to the Declaration Kofi Annan wrote that the world needs from US\$7 billion to US\$10 billion a year to effectively fight the pandemic in low and medium-income countries. For these reasons, the General Assembly approved the creation of a Global AIDS and Health Fund which had succeeded in raising more than one billion dollars from governments, foundations, business corporations and individuals before the session. The Secretary-General wrote that "this is a very good beginning but much, much more is needed. I therefore appeal to Governments, civil society, the private sector, foundations and individuals to contribute to the fight against AIDS in any way they can."⁴¹ Financial issues play an important role in the Declaration. Its authors recognized that external debt and debt-servicing problems have substantially constrained the capacity of many developing countries, as well as countries with economies in transition, to finance the fight against HIV/AIDS.⁴² For these reasons the Declaration postulated that by 2005, through a series of incremental steps, an overall target of annual expenditure on the epidemic of between US\$ 7 billion and US\$ 10 billion in low and middle-income countries should be reached and that measures to ensure that required resources are made available, particularly from donor countries and also from national budgets should be taken. The Declaration urged the developed countries that have not done so to strive to meet the target of earmarking

³⁹ *Ibid.*, pp. 29–109.

⁴⁰ Declaration of Commitment on HIV/AIDS, United Nations Special Session on HIV/AIDS, 25–27 June 2001, United Nations Publications, p. 1.

⁴¹ *Ibid.*, p. 3.

⁴² *Ibid.*, para. 30, p. 13.

0.15 per cent to 0.20 per cent of gross national product as official development assistance for least developed countries.

Apart from financial issues, other important questions concerning the HIV/AIDS pandemic were discussed in the Declaration: leadership in combating HIV/AIDS at national, regional and global levels, prevention, care and treatment, reduction of the vulnerability of victims of the pandemic and children orphaned by it, alleviation of the damaging social and economic impact of the pandemic, research on HIV vaccines, reduction of the effects of the pandemic in regions affected by armed conflicts and natural disasters. Many proposals concern time-bound targets. In the part concerning the human rights of victims of HIV/AIDS the parties committed themselves to enact, strengthen or enforce legislation, regulations and other measures to eliminate all forms of discrimination against people living with HIV/AIDS by the end of 2003. By the end of 2005, the states should develop and accelerate the implementation of national strategies that promote the advancement of women in order to increase their ability to protect themselves from HIV infection.⁴³

The Declaration emphasizes the necessity of continuous monitoring of progress in combating of HIV/AIDS at national, regional and global levels. It declares that sufficient time and at least one full day of the annual General Assembly session will be devoted to reviewing and debating a report by the Secretary-General on progress achieved in realizing the commitments set out in the Declaration. For that reason, at the 56th session of the General Assembly Secretary-General Kofi Annan presented "Report on progress towards implementation of the Declaration of Commitment on HIV/AIDS."⁴⁴ The report was based primarily on replies to a questionnaire drawn up by UNAIDS and circulated to member states. It is not, therefore, fully objective. On the basis of the replies received from states, the Secretary-General came to the conclusion that the Declaration is an important framework and a critical tool for advocacy. However, he stated, "while political commitment continues to increase and additional resources are devoted to HIV/AIDS, the scale of country-level activities does not yet match the epidemic."⁴⁵

The Secretary-General considered a success the incorporation by several countries of time-bound targets in their national AIDS strategies. At the same time, however, overall funding was still one third of the amount required to meet the goal of annual expenditures of about \$10 billion by 2005. What is worse, although a growing number of countries acknowledged the importance of respect for human rights, most of them did not adopt enforceable measures to protect individuals affected by or infected with HIV from discrimination.⁴⁶

⁴³ *Ibid.*, para. 59, p. 25.

⁴⁴ Report of the Secretary-General on progress towards Implementation of the Declaration of Commitment on HIV/AIDS, United Nations General Assembly, A/57/227, 12 August 2002. The report was presented and discussed at a plenary session on 8 November 2002.

⁴⁵ *Ibid.*, p. 1.

⁴⁶ *Ibid.*, p. 4.

In spite of the Secretary-General's suggestions, the fact that the World Bank doubled its investment in its Multicountry AIDS Programme cannot be rated a success. The Programme provides concessional loans to countries to strengthen HIV/AIDS programmes. The poorest countries will not be able to participate in the Programme for fear of worsening their balance of payments. The Report itself found that many countries reported that their high debt burden impeded their capacity to allocate sufficient resources to fight HIV/AIDS.⁴⁷

The fact that the WHO has increased the number of staff working on AIDS from 69 to 130 in 2001 cannot be considered a success either. The strengthening of bureaucracy in international organizations may lead to situations where a considerable part of assistance funds will be assigned to their own needs.

From the point of view of the protection of rights of people with HIV/AIDS, the Declaration of Commitment is an imperfect international instrument as it is of a non-binding nature. Even its popular version is titled "Keeping the Promise." In fact, the Declaration is a collection of promises, binding only in the political sphere although it contains time-bound targets. It should, therefore, be classified as "soft law" in the sphere of international protection of human rights.⁴⁸ Its application depends exclusively on those states that signed the Declaration. At the same time, the political norms contained in the Declaration are addressed to these states. However, people with HIV/AIDS should be protected by international "hard law," bearing in mind the consequences of the disease they suffer from.

Another weak point of the Declaration of Commitment is that it lacks a catalogue of the rights of persons infected with HIV. The inclusion of one in the text of the Declaration would be of great importance for reinforcing global international standards of protection of HIV/AIDS victims.

At the time of its adoption, the Declaration of Commitment was considered a great success. However, a year later it turned out that its political influence falls far short of expectations.

9. Critics of Universal System of International Control of Respect of Human Rights in HIV/AIDS Context

In 1986, Professor Janusz Gilas wrote that the influence of ideas and moral principles on international law is determined *inter alia* by political factors, especially the international distribution of power scene and the policy strategies of particular states.⁴⁹

⁴⁷ *Ibid.*, p. 9.

⁴⁸ The notion "soft law" is of a metaphorical nature and is far from being generally accepted. See: R. Biczaneck, J. Symonides: *Prawo międzynarodowe publiczne* (1992), p. 107; W. Czaplinski and A. Wyrozumska are of an opinion that it is "confusing and should not be used;" W. Czaplinski, A. Wyrozumska: *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (1999), p. 6. While sharing fears lest "soft law," being more easily acceptable by states, might substitute for "hard law," it should be said that its moral and political norms contribute to the development of international customary law and thus strengthen the normative system regulating international protection of human rights.

⁴⁹ J. Gilas: "Prawo i moralność a polityka w stosunkach międzynarodowych," 3–4 *Kultura – Oświata – Nauka* (1986), p. 81.

It might have seemed that the political changes after 1989 when the communist system in Central and Eastern Europe and a part of Asia was dismantled, would contribute to the development of ideas and moral principles, the driving force behind development and respect for human rights. It turned out, however, that the United States, the only leader on the international scene after the fall of the Soviet Union, did not intend to realize the ideas followed by democratic states in their fight against totalitarian systems. The US keeps employing double standards which means that violations of human rights by this country and its political allies are treated differently than in the case of other states. A manifestation of this is its refusal to ratify the 1998 Rome Convention on the International Criminal Court for fear that American commanders guilty of war crimes in Vietnam, former Yugoslavia, Afghanistan or Iraq would be brought before that court.

In the present political climate the universal system of human rights oversight is in stagnation although steps are being taken to improve it. The Office of the High Commissioner for Human Rights aims at acceleration of the examination of complaints reminding us of an old English maxim, "Justice delayed is justice denied." Committees of experts have proposed that states apply interim measures of protection aimed at staying actions unfavorable to the rights of their citizens pending a judicial decision. Procedures are prolonged, complainants and their witnesses cannot participate personally in oral hearings, so called "*amicus curiae*" briefs by non-governmental organizations (e.g. Amnesty International) are inadmissible, precedents do not accelerate other proceedings, the work of various bodies is not coordinated nor do they cooperate with international regional organizations dealing with the same issues, and actions to require a state to comply with the recommendations concerning human rights of international bodies are not pursued.

A member of the Human Rights Committee, Professor Roman Wieruszewski, and Professor Zdzisław Kędzia, in an analysis of the evolution of the universal system of protection of human rights, stated, very accurately, that the scale and number of the violations of those rights are far from diminishing.⁵⁰ "Does this mean that the evolution of the UN system aiming at prevention of this phenomenon is not producing results? This appears to be obvious." And they continue, bitterly: "As long as governments do not have the will to cooperate with the international community to solve their problems, crises affecting their communities will, unfortunately, happen again and again."

In the present unhealthy political climate where states' interests (identified with the interests of political and financial elites) are considered more important than individuals' interests, it is impossible to establish a universal Court of Human Rights where victims of HIV/AIDS could pursue their rights. Such ideas have already been put forward in legal writings. Richard B. Bilder suggested, very cautiously, that states should consider the possibility of bringing the protection of human right within the

⁵⁰ Z. Kędzia, R. Wieruszewski: "Ewolucja ONZ-owskiego systemu ochrony praw człowieka," 3-4 *Studia Prawnicze* (2001), p. 173.

jurisdiction of the International Court of Justice (ICJ).⁵¹ This could enable individuals, non-governmental organizations, the UN Secretary General or the UN High Commissioner for Human Rights, and not only states as is the case today, to pursue their rights before that Court. Bilder rightly stated that if the ICJ is of the opinion that international human rights obligations are imperative (infringements are a violation of the international community's legal interest), the UN (the ICJ is a UN body) should be able to bring actions against states violating those obligations before the ICJ.

However, this would need a revision of the UN Charter and Article 34 of the ICJ Statute. This does not appear possible as a decision by the "great powers" requires unanimity. But these fear that amendment would unfavourably affect their position within the Organization. This is why expectations of involving the ICJ in the protection of human rights, and protection of HIV/AIDS victims more specifically, seems to be merely wishful thinking.

The objective of this assessment of the universal system of international supervision of the observance of human rights is not to discourage people from using the UN procedures. By bringing our claims before the Commission on Human Rights or any other quasi-judiciary UN body we focus the world's attention on irregularities occurring within states, hoping that they will be eliminated by the pressure of world opinion. Perhaps, given the protracted duration of the procedures, not for the claimant's good (AIDS victim), but for the good of those who in future happen to meet with the same misfortune.

⁵¹ R.B. Bilder: "Possibilities for development of new international judicial mechanisms," in: L. Henkin, J.L. Hargrove (ed.): *Human Rights: An Agenda for the next Century* (1994), pp. 334–335.

Legal Instruments of the Act of Accession

PRZEMYSŁAW SAGANEK

1. Introductory Remarks

On 16 April 2003 the Treaty concerning the accession of Poland and nine other European states to the European Union (hereinafter the Treaty) was signed in Athens. The text of the Treaty itself is quite short. The detailed provisions are contained in the Act of Accession attached to the Treaty and its 18 annexes. Moreover, 10 protocols are annexed to the Treaty. The other instruments of accession are: the Final Act, 44 declarations and an exchange of letters on the information and consultation procedure for the adoption of certain decisions and other measures to be taken during the period preceding accession.

The subject of this study are the legal instruments of the Act of Accession. However, the analysis should not be limited to the content of the act as such. It should be noted that the present act is only on the face of it the shortest of all Acts of Accession to the EC/EU so far. It contains only 62 articles. By way of comparison, the British, Irish and Danish Acts of Accession contained 161 articles, the Greek 153, the Spanish and Portuguese 403, and the last – concerning the conditions of accession of Austria, Sweden and Finland – 177. Due to the number of acceding states (historically without precedent) and the number of transitional periods, it was necessary to insert the majority of the substantive provisions concerning accession in the annexes to the Act of Accession. The annexes (or rather the legal instruments contained in them) are also analysed in the present study.

Attention should be paid here to the annexes specifying transitional periods. Article 10, the relevant one in this context, stipulates that application of the original treaties and acts adopted by the institutions are, as a transitional measure, subject to derogations provided for in the act of accession. Article 24 states that “(T)he measures listed in Annexes V–XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.” The number of annexes is not accidental as each of them corresponds to one of the new member states. They concern: the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic respectively. Annex XII concerns Poland, so it will be frequently cited in the present study. The numbers of articles cited below refer to the articles of the Act of Accession, unless otherwise stated.

2. Systematics of the Act of Accession

The Act of Accession is of great political, economic and legal importance.¹ As it is the fifth document of this kind, it is high time to make some comparisons. This is especially important in light of the fact that fears were expressed that in the process of the present enlargement certain arrangements which did not appear in the instruments of earlier accessions were imposed upon the acceding states.

When discussing the classification of the legal instruments of the Act of Accession it is necessary to cite the classification adopted in the present document which is divided into five parts:

1. principles;
2. adjustments to the treaties;
3. permanent provisions;
4. temporary provisions;
5. provisions relating to the implementation of the act and final provisions.

Part one (Principles) consists of 11 articles. It contains definitions (Article 1), specifies how the *acquis communautaire* is to be adopted in new member states (Article 2–6), and lays down the legal status of the provisions of the Act of Accession and the procedures for their amendment.

Part two concerns adjustments to the treaties. It primarily contains institutional provisions (Title I). These concern the European Parliament, the Council, the Court of Justice, the Economic and Social Committee, the Committee of the Regions, the Scientific and Technical Committee and the European Central Bank.

Part three (permanent provisions) relates to adaptations to acts adopted by the institutions. These adaptations are specified in annexes II, III and IV to the Act of Accession. Here, we can find a provision under which the Council may, before the date of accession, make the adaptations to provisions of the Act relating to the common agricultural policy which may prove necessary as a result of a modification in Community rules.²

One of the crucial provisions of part four (temporary provisions) is the aforementioned Article 24 providing for reference to the annexes concerning each acceding state. Part four also contains transitional provisions relating to: institutions, budget, Community funds (including pre-accession funds), protective measures and disciplinary measures.

Part five contains provisions relating to implementation of the Act. They concern the setting up of institutions and bodies (Title I) and the applicability of the acts of the institutions (Title II). This last question is strictly related to adoption of the *acquis*, but it also covers several provisions of a technical nature. Title III of part five contains final provisions.³ Article 60 of the Act of Accession is crucial here as it stipulates that

¹ See, for example, D. V i g n e s: "Un marathon danois pour la cinquième élargissement," 464 *Revue du Marché commun et de l'Union européenne* 7 (2003).

² Article 23, Act of Accession.

³ Articles 60–61.

annexes I to XVIII, the appendices thereto and protocols 1 to 10 attached to the Act of Accession form an integral part of the Act. This means that all annexes and protocols attached to the Act form an integral part of it.⁴

To sum up, the systematics of the Act of Accession makes for a complete and authentic classification of its instruments. At the same time, it can be discussed if there is no overlapping of subjects covered by the topics of that classification. For example, provisions concerning adoption of the *acquis* can be found in two parts of the act. Arguments in favor of the absence of overlapping (the closed character of the classification) could only have a theoretical justification which cannot be considered in terms of the theoretical classifications of the legal instruments of the Act of Accession. Its practical usefulness and didactic advantages are even more doubtful. For those reasons, various authors can propose their own classifications.

3. Proposed Classification of Legal Instruments of Act of Accession

The classification, proposed in the present study, will not be of a complete character; it will not cover all the provisions of the Act of Accession. In the author's opinion, however, it facilitates analysis and identifies the main elements of the act. What is more, it makes it possible to apprehend its multi-faceted nature.

The legal instruments of the Act of Accession can be classified into four basic groups:

1. provisions concerning the adoption of the *acquis communautaire* by the member states;
2. provisions concerning transitional periods;
3. provisions concerning the adjustment of the *acquis* to the accession of the new member states;
4. provision concerning crisis situations.

Firstly, we should distinguish the provisions concerning the adoption of the *acquis* by the new member states. The Act of Accession (or, more precisely, the Accession Treaty of which the Accession Act is an integral part) constitutes the equivalent, in relation to the new member states, of the treaties establishing the European Communities and the European Union. It is the basis of the binding force of Community/Union law with respect to their rights and obligations.

The second category of instruments are transitional periods. Their relationship to the principles governing the adoption of the *acquis* will be thoroughly analysed in later section of the present study.

Thirdly, the accession of new member states entails adjustments to Community and Union law.⁵ This will be especially evident when the institutional provisions come into operation and thus make it necessary to determine the number of votes in the Council or seats in the European Parliament, the Economic and Social Committee or

⁴ Under Article 1(2) of the Accession Treaty; the Act of Accession forms an integral part of the Treaty. The declarations do not, therefore, form an integral part of the Act of Accession or the Accession Treaty.

⁵ D. B o o s s, J. F o r m a n: "Enlargement: Legal and Procedural Aspects," CMLR 95-130 (1995).

Committee of Regions for each accessing country. The same applies to the acts of secondary law which regulate certain questions individually for each member state and could not be applied within an enlarged Europe without being analogously determined for the new member states. This is the case with the provisions which determine certain (e.g. production or financial) quotas for the new member states.

The fourth element are the provisions concerning procedures relating to crisis situations. They constitute a separate element of the classification because some of them have never been used before. They are also connected with two previously mentioned categories (1 and 3 to be exact). The provisions concerning crisis situations are covered by Articles 37–39 of the Act of Accession. Article 37 concerns difficulties on the common market and allows protective measures to be taken by old and new member states. Articles 38 and 39 govern situations where the new member states fail to make appropriate adjustments to the *acquis communautaire*. It can be stated that Article 37 concerns the pace of adaptation of the new member states to the *acquis* and the *acquis* to their accession. Articles 38 and 39 of the Act of Accession constitute an unprecedented instrument safeguarding the first element.

It has already been mentioned that the classification adopted in the present study does not claim to be complete. Of the omitted elements the transitional provisions seem to be of great importance (e.g. pre-accession funds). However, they will not be analysed in the study.

4. Provisions Concerning Adoption of *acquis communautaire* by Member States

4.1. Introductory Remarks

The term “provisions concerning adoption of the *acquis communautaire* by the member states” is so wide that it could cover apparently contradictory elements. Firstly, it covers provisions requiring compliance with Union (Community) law by the new member states. Article 2, fundamental here, stipulates that from the date of accession the new member states will be bound by the provisions of the original treaties and the acts adopted by the institutions before their accession. At the same time, the term *acquis sensu largo* is broader and, what is more, by making the situation of the new member states similar to that of the old as regards the other elements of the *acquis* requires a more sophisticated set of instruments. In consequence, the provisions concerning this matter form a very complicated structure which needs classification itself.

The term “provisions concerning adoption of the *acquis communautaire*” could also cover the rules determining the timetable for adoption of the *acquis*, in other words, the transitional periods. This conclusion might invite objections. A transitional period signifies a delay in the adoption of the *acquis*, that is an exception to Article 2 of the Act of Accession. We could imagine, theoretically, a new member state requesting and obtaining permanent exemption from the duty to apply a certain

Community rule. Such a provision would not be perceived as an element of transposition of the *acquis* by the new member states. Long transitional periods can be perceived, in the short or medium term, as negating adoption of the *acquis*. In fact, the economic conditions of some of the new member states differed from those in the old member states of the European Union. Thus, a transitional period can be the most effective method of efficient acquisition of the rights and obligations of a member of the European Union. Transitional periods can, however, protect not only the new but also the old member states, which makes them difficult to analyse as an element of adaptation of the new member states to the *acquis*. At the same time drawing a distinction between good periods (favouring the new member states) and bad (favouring the old member states) does not seem to be a good idea. For that reason, four categories of Act of Accession instruments have been distinguished and the rules governing adoption of the *acquis* on the one hand and the transitional periods on the other will be analysed separately.

4.2. Legal Set of Instruments for Adoption of *acquis* by New Member States

The fundamental instrument for adoption of the *acquis* by the new member states, namely adoption by the new member states of the primary and secondary law as required by Article 2 of the Act of Accession, has already been mentioned. The other elements of the *acquis* are covered by Articles 3–6 of the Act of Accession. The instruments stemming from these articles can be classified as follows:

1. certain elements of the *acquis* binding upon the new member states;
2. the provision requiring the new member states to adopt the same position as the old member states in relation to certain matters;
3. accession of the new member states to certain elements of the *acquis* by virtue of the Act of Accession;
4. application by the new member states of certain elements of the *acquis* pursuant to Council decisions;
5. commitment of the new member states to accession to international agreements.

The new member states' automatic obligation to accept certain elements of the *acquis* constitutes the most important instrument. This concerns:

1. the provisions of the original Treaties;
2. acts adopted by the institutions of the Communities and the European Central Bank;⁶
3. the Schengen *acquis*;
4. agreements concluded by the Community;
5. agreements concluded in the Schengen framework.

As regards the first two elements, the Treaty states expressly that the new member states are required to apply them. The scope of the Schengen *acquis*' applicability will be analysed later. It should be noted here that the automatic obligation of applica-

⁶ Article 2, Act of Accession.

tion from the date of accession relates only to a part of the Schengen *acquis*. As for the other two elements, the Act of Accession does not speak about their application. This should not be surprising with respect to agreements concluded by the Community as they are applied by the Community itself. It is hard to understand, however, why this is not the case with the last element.

The analysed instrument leaves no discretion to the new member states. It does not seem to leave any doubt about the binding nature of the elements to which it applies. This question and the scope of the automatic obligation resulting from the Act of Accession can be assessed after the remaining elements are analysed.

The second instrument is contained in Article 5(3) of the Act of Accession. This states that "The new Member States are in the same situation as the present Member States in respect of declarations or resolutions of, or other positions taken up by, the European Council or the Council and in respect of those concerning the Community or the Union adopted by common agreement of the Member States; they will accordingly observe the principles and guidelines deriving from those declarations, resolutions or other positions and will take such measures as may be necessary to ensure their implementation."

Two observations should be made in the context of Article 5(3). Firstly, it relates to instruments which are not binding either in the light of the EC Treaty or the EU Treaty. That is why, presumably, the formula of automatic obligation does not apply to them as it would constitute a *contradictio in adiecto*. On the other hand, a tendency, typical for acts of accession, to strengthen non-binding acts is evident. That is why Article 5(3) reads: "they will observe the principles and guidelines." It can be reasonably stated that this kind of obligation is not broader than that stemming from the instruments binding on the old member states; in other words, the said principles and guidelines affect the old and the new member states to an equal degree. A political commitment – the reasonable expectations of the other member states or the Commission – comes into operation.

The third instrument – accession of the new member states by virtue of the Act of Accession – concerns decisions and agreements concluded by the member states within the Council and under the Cotonou Agreement. As regards the former, the legal basis is Article 5(1)(1) which states that "the new Member States accede by this Act to the decisions and agreements adopted by the Representatives of the Governments of the Member States meeting within the Council." Article 5 differentiates the position of "other agreements" relating to the functioning of the Union or connected with the activities thereof. As regards the latter, under Article 5, the new member states undertake to accede to these other agreements (from the date of accession). Accession by virtue of the Act can be intuitively regarded as a stronger instrument allowing no leeway to the new member states. The new member states are considered co-authors of these documents despite the fact that the decisions or agreements adopted within the Council in question have not been signed by them.

The analysed provision applies only to binding documents such as acts provided in the Treaty itself (e.g. the acts by which judges of the ECJ are appointed) or other

acts adopted within the Council but part of the Treaty. The resolutions adopted by member states within the Council, as non-binding acts, would be covered by the already mentioned Article 5(3) of the act of accession.

The fourth instrument, namely the application, by the new member states, of certain elements of the *acquis* pursuant to a Council decision, relates to a part of the Schengen *acquis*. Under Article 3(1) “The provisions of the Schengen *acquis* as integrated into the framework of the European Union by the Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community (hereinafter referred to as the ‘Schengen Protocol’), and the acts building upon it or otherwise related to it, listed in Annex I to this Act, as well as any further such acts which may be adopted before the date of accession, shall be binding on and applicable in the new Member States from the date of accession.” Under Article 3(2) the remaining provisions of the Schengen *acquis* “as integrated into the framework of the European Union and the acts building upon it or otherwise related to it” are binding on the new member states from the date of accession, but will only apply in the new member state pursuant to a Council decision. The Council takes its decision acting with the unanimity of its members representing the governments of the member states in respect of which the provisions referred to in Article 3(3) have already been put into effect and of the representative of the government of the member state in respect of which those provisions are to be put into effect. The decision, thus, will depend on Poland.⁷

The whole of the Schengen *acquis* is binding on the new member states from the date of accession, although only a part of it will be applied. A legal construction whereby a state is bound by it and not required to apply certain provisions is rather Artificial. This does not mean that such an obligation lacks importance. A new member state cannot simply state that it does not intend to begin applying of a part of the Schengen *acquis* not listed in Annex I. However, the application of the whole of the Schengen *acquis* will not begin automatically as it depends on whether the old and new members express their will to do so. Although the Schengen *acquis* has thus been classified as an element of the first legal instrument (the new member states being bound by it), in fact two legal instruments are applicable.

The fifth element (accession of the new member states) applies only to international agreements, namely:

- agreements in the field of justice and home affairs;⁸
- conventions as referred to in Article 293 of the EC Treaty;
- conventions which are inseparable from the attainment of the objectives of the Treaty;
- the Agreement on the European Economic Area;⁹

⁷ Unanimity guarantees in this regard veto rights to Poland, to parties to Schengen agreements and to those states to which certain provisions will apply earlier than in relation to Poland.

⁸ E.g. the Convention on Europol and supplementary protocols.

⁹ Article 6(5).

– the aforementioned agreements between the member states governing the functioning of the European Union, other than agreements concluded within the Council.

The Act of Accession provides for accession of the new member states to mixed agreements. However, these will be analysed in section 4.4 as the new members are restricted by the provisions regulating them.

A few observations should be made regarding the legal construction of the obligation of accession. As is generally known, even a state which has signed a treaty is not obliged to ratify it. On the other hand, the scope of a member state's freedom of conventional regulation is limited only by *ius cogens* norms. None of these norms forbids a state to commit itself to concluding a treaty in the future (by analogy: accession to a previously concluded agreement). This commitment constitutes a typical *pactum de contrahendo*. The other question is the scope of responsibility for infringement of such a commitment. An interesting point is whether an action can be brought against a new member state before the ECJ for not acceding to an agreement which has not been ratified by all the old member states. From a formal point of view, the new member states take on duties which are not binding on the old member states (it can be said that after it acquires the status of a member state of the European Union, Poland – in relation to new agreements – will enjoy privileges which the old member states possess now). From a political point of view, an action against the new member states before the ECJ is unlikely, although not impossible.

Only in one case has a date of accession been established, namely in the case of agreements between the member states governing the functioning of the European Union, other than agreements concluded within the Council. The mere arrival of that date does not make these agreements binding on Poland. If the parties to the Treaty had wished such an effect, they would have used one of the legal instruments mentioned above. However, the mere fact of the state's failure to accede to the agreement would constitute an infringement of law and, in political terms, make it difficult to invoke non-accession to a certain international agreement as an excuse for non-compliance with its provisions.

4.3. Assessment of Legal Set of Instruments for Adoption of *acquis*

The provisions concerning the adoption of the *acquis* form a rather complicated structure. A fundamental question here is whether these provisions are complete, and whether they disadvantage the new member states when compared with previous enlargements.

As has been noted, Article 2 provides that “the provisions of the original Treaties and the acts adopted by the institutions” of the Communities will be binding on the new member states. The question is whether Article 2 applies to non-binding acts. On the one hand, the acts are mentioned without distinction and the new member states are bound by those acts. On the other hand, is it possible that the new member states can be bound by acts which are not binding on the old member states? None of the remaining provisions refers explicitly to recommendations and opinions. Do they

constitute the missing link between the analysed provisions? Can we accept that acts *sui generis* are clearly regulated and recommendations and opinions are not? The idea of being bound by a non-binding act is contrary to logic. In consequence it should be acknowledged that it is Article 5(3) of the Act of Accession which applies to recommendations and opinions, with both new and old member states in the same position in relation to these. The new member states are therefore required to comply with principles and guidelines stemming from those recommendations and opinions. The objective of the Accession Treaty is (except for clearly defined situations) equalization of the new with the old member states. It is an undeniable fact, however, that the Act of Accession lacks precision in some aspects.

Another question worth analysing is whether the described set of instruments was applied in previous enlargements. The answer is yes. These provisions constitute a standard, carried over from the first enlargement. Only two differences can be indicated in relation to previous acts of accession – one concerning the Schengen *acquis*, the other mixed agreements – in the first case simply because Schengen II has been applied since 26 March 1995 and the Schengen *acquis* was introduced into the European Union framework on 1 May 1999.

Since the provisions on mixed agreements constitute a new departure, they will be considered in next section.

4.4. Provisions Concerning Mixed Agreements

These are contained in Article 6(2), (3) and (6) and state that with reference to agreements or conventions concluded or provisionally applied by the present member states and the Community with third countries, the new member states will accede to them by the conclusion of protocols to such agreements and conventions between the Council acting unanimously and those third countries.

“Accession” will thus take place as a result of actions by subjects other than an acceding state. The relationship between Article 6(2) and 6(6) is not clear. Article 6(2) determines the procedure and stipulates that it applies to agreements with Belarus, China, Chile, Mercosur and Switzerland, as well as ones mentioned in paragraph 6. Paragraph 6 relates to the provisional application of mixed agreements with 27 third countries by the new member states “as well as the provisions of other agreements concluded jointly by the present Member States and the Community before accession.” This last statement covers all mixed agreements. The question is, does Article 6(2), referring to paragraph 6, refer to all mixed agreements or to those 27 states only. Literal interpretation implies the first possibility. If doubts arise, they stem from logic. If Article 6(2) concerns all mixed agreement, what is the point in including and identifying five mixed agreements (with Belarus, China, Chile, Mercosur and Switzerland). In fact, the drafting of the text of the Act of Accession leaves much to be desired. On the other hand, since paragraph 6 refers to the provisional application of all mixed agreements before the protocols referred to in paragraph 2 are concluded, it is hard to acknowledge that they would be concluded only in relation to the agree-

ments with 31 states and Mercosur. That is why the described procedure applies to the whole of the mixed agreements.

It is not hard to see that this solution could lead to possible future abuses. Theoretically, a new member state might be dissatisfied with the conditions of its "accession," but nevertheless become a party to an agreement. Unfortunately, the alternative would be that a new member state did not become a party to an agreement, resulting in subsequent fragmentation of law within the European Communities. However, the inherent risk in the adopted solution calls for it to be applied carefully and with tact. This way of interpretation is important for Poland and the other new member states; in the longer run it safeguards the interests of all the member states of the Union. It should be said that in the light of the Community principle of distribution of powers, Article 6 of the Act of Accession may seem rather surprising (a mixed agreement is concluded not only by a Community institution but also by its member states). That is why Article 6(2) of the Act of Accession stresses the fact that the conclusion of the described protocols by the Council by the Act of Accession cannot affect the member states' powers to conclude agreements in this field in the future.

Elements emphasising the new member states' rights can be easily indicated in Article 6. The phrase "on behalf of the Member States" is used twice. The last sentence of paragraph 2 states that the Commission negotiates these protocols on behalf of the member states on the basis of negotiating directives approved by the Council, acting by unanimity, and in consultation with a committee comprised of the representatives of the member states. Importantly, the Council acts on behalf of the member states when concluding agreements.

The term "Member States" refers to both new and old member states. The protocols are negotiated on their behalf and they are represented in a committee; what is of a great importance is that the protocols are concluded on their behalf. Logic requires that acting on behalf of a certain subject presumes at least non-inconsistency with the will of the represented subject. Consequently, at least on an informal plane, the new member states' opinions should be carefully taken into consideration, although they do not possess a formal veto in relation to draft protocols.

To sum up, although the Act of Accession foresees, theoretically, the accession of new member states to mixed agreements, the legal situation is, in effect, that they are automatically bound by the protocols concluded by the Council.

5. Provisions Relating to Transitional Periods

5.1. Substance of Transitional Periods

It has already been said why provisions concerning transitional periods cannot be regarded as part of the rules governing the adoption of the *acquis*. Although it is a fact that these periods determine the timeline of adoption of the *acquis*, they do this negatively: full adoption of the *acquis* will take place with the end of the specified period. What is more, the absence of a transitional period in a particular field would signify an obligation to adopt the whole of the *acquis* in this field; transitional periods are

not, therefore, necessary elements of the Act of Accession (unlike the rules governing the adoption of the *acquis*). As noted, Annex XII concerning Poland will be thoroughly analysed. It consists of 13 parts, as follows: 1) free movement of goods, 2) free movement of persons, 3) free movement of services, 4) free movement of capital, 5) competition policy, 6) agriculture, 7) fisheries, 8) transport policy, 9) taxation, 10) social policy and employment, 11) energy, 12) telecommunication and information technologies, 13) environment.

It is not possible to discuss the whole of the transitional periods in this study although aspirations to systematics are understandable. A terminological observation must be made. Linguistic accuracy would require use of the term "legal regulations in the domains covered by transitional periods." From this point of view, a transitional period is a period in which regulations diverging from the rules governing the European Union are applied. In the present study the term "transitional period" will mean a legal regulation of a transitional nature diverging from European Union law.

From the point of view of the clarity of juridical systematics it would be ideal if transitional periods consisting in authorisation and prohibition of actions could be identified. Such a classification is impossible. Transitional periods by definition authorize committing acts which would not be admissible if there were no such periods. They are, therefore, authorising provisions. Rights are correlated with obligations of the other party to tolerate the actions of the privileged subject. These obligations involve the inadmissibility of recourse to countermeasures (which is, however, a more general principle within the European Union) and the impossibility of effective questioning of the actions of the subjects of rights before the European Court of Justice.

Transitional provisions concerning free movement of workers may give rise to the question whether a transitional period can be based on an obligation. Under Annex XII, part 2(2) until the end of a two-year period following the date of accession, the old member states "will apply" national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. The fact is that the states themselves will determine these measures – they may be more restrictive or more liberal. What matters is that the old member states can introduce restrictions – and this constitutes a right, not an obligation.

Because it is impossible to classify the transitional periods according to the criterion suggested above, the question arises whether there are any other criteria. Because of a limited number of studies in this field, the terms used below are the present author's own proposals.

5.2. Simple and Compound Periods

Certain transitional periods are clearly based solely on an authorizing provision. Others, apart from an authorisation, contain supplementary elements. That is why a distinction between simple and compound periods is suitable. The best example of the first type are transitional periods concerning the environment which exempt Poland from the obligation to comply with requirements laid down in Community direc-

tives listed in the Annex.¹⁰ This is, in fact, the only element of the transitional period. Provisions concerning free movement of goods are a good example of a compound transitional period.¹¹ These allow pharmaceutical products not complying with Community requirements to be distributed on the territory of Poland. Nevertheless, the member states may prevent them being put on their own markets until such time as they are in conformity with the directives. Transitional periods concerning agriculture may also be regarded as compound transitional periods. They allow the marketing in Poland of drinking milk¹² not complying with the Community requirements. Such milk may not, however, be marketed in other member states.

A basic difference between these two types of transitional periods should be highlighted. In the first case, the right enjoyed by Poland corresponds to the right of other states; in the second, the obligation of non-marketing of agricultural goods in other states is imposed on all the states, including Poland (milk may be marketed only in Poland or exported to third countries). As we can see, although an obligation cannot constitute the only element of a transitional period, it can be an additional element.

These “accompanying” elements may be of interest from the point of view of classification of the legal instruments of the Act of Accession.

5.3. Mirror, One-sided and Mixed Transitional Periods

The second classification of transitional periods answers the question whether the basic rights resulting from a certain transitional period belongs to both states (the new and the old one: such a period could be called a “mirror period”) or to just one of them (“one-sided period”).

The transitional period concerning transport is a good example of a mirror period. Until the end of the third year following the date of accession, carriers established in Poland will be excluded from the operation of national road haulage services in the other member states. At the same time, carriers established in the other member states will be excluded from the operation of national road haulage services in Poland.¹³

However, the majority of transitional periods are not of a mirror nature. The question is, therefore, whether a certain transitional period is granted for the benefit of a new member state or of all (or some) of the old members. The term “benefit” should be understood technically – a state is entitled to act differently than specified by the general provisions of European Union Economic Law or social aspects are disregarded here.¹⁴ It is worth stressing that the majority of transitional periods have been negotiated for the benefit of the new member states. The only exceptions are restric-

¹⁰ Sec: Annex XII(13)(A.1) and (A.2) concerning air quality.

¹¹ Sec: Annex XII(1).

¹² Sec: Annex XII(6)(A2).

¹³ Annex XII(8)(2)(a).

¹⁴ As a rule, a benefit consisting in deferment of the realisation of a state's obligations signifies the possibility of planning costs and making use of preferences for a certain period. It sometimes turns out that such a “benefit” has negative effects. However, a transitional period grants only rights and a subject of rights does not have to make use of its right.

tions in the field of free movement of persons, which was demanded by the old member states.

That a certain transitional period has been granted to a definite member state must, however, be viewed in conjunction with whether that period is simple or compound. A compound period, even if it is formally for the benefit of a new member state, may grant the old member states significant instruments of pressure.

The aforementioned transitional period in the field of free movement of workers deserves special attention. It is a fact that it was negotiated for the benefit of the old member states. But at the same time, Poland is allowed to apply measures having equivalent effects.

It is not difficult to notice that such a transitional period cannot be assigned to any of the elements of the classification. It is neither a mirror period, nor a one-sided period. The difference in relation to the one-sided period is evident. The same restriction can be applied by both old and new member states. The difference in relation to the mirror period is that Poland cannot apply restrictions autonomously. They may be applied only as an answer to restrictions applied by the old member states. The described period is, therefore, of a mixed nature.

The phrase "measures having equivalent effects" should be briefly analysed here. It means a measure identical to one applied in relation to Poland. A really important question is whether measures not necessarily identical in relation to the restrictions applied by the old member states can be treated as equivalent. It could happen that Poland becomes a subject of restrictions specifically targeted at areas of social-economic life in which Poland is competitive and countermeasures against an old member state applying restrictions would not produce any effects for Poland. In other words, can Poland resort to a proportional response to restrictions introduced by an old member state, but concerning other categories of workers than those covered by the restrictions of the other party. In the view of this author it is possible, although such restrictions should be used carefully as it is difficult to assess whether the measure is equivalent or not. The ECJ might, however, take a different view in this regard.

5.4. Questions Concerning Classification of Transitional Periods

The relationship between these two proposed criteria (simple and compound, mirror – one-sided – mixed periods) constitutes a paradox. The chief question is whether a mirror period consisting of only two principal rights of both parties, without any additional elements, can be regarded as simple or compound. The mere coexistence of two identical rights (when there are no additional elements) cannot be regarded as excluding an assertion that the right constitutes the only instrument of the transitional period. Some may, however, consider the unity of the subject vested with a right, regardless of the scope of that right and its autonomous nature. They are, however, allowed to define other classification criteria (e.g. ones referring to the number of parties which can invoke a particular transitional period). In the opinion of this author what is decisive is the identity of the right.

Another important question is whether a mixed period (not containing any additional elements except the right of one of the parties and the right of the other to adopt equivalent measures) is a single or a compound period. In this author's opinion it is a compound period. It might seem that the rights stemming from a mixed period are identical for both parties. Having in mind the example of the free movement of persons, we could argue that both the old member states and Poland can apply restrictions on freedom of movement of workers. The identity of these two rights is apparent. In fact, the above-presented reconstruction gives a picture of the rights of the old member states. To reconstruct Poland's right it should be stated that it can apply restrictions only in response to restrictions applied by the old member states. Both parties' rights are, in fact, very similar, except that in one case it is autonomous, in the other, derivative.

It is a fact that it is sometimes difficult to establish whether we are dealing with a mirror, compound, one-sided or mixed period when one party's right resulting from a transitional period accompanies another party's right. The latter right may be similar to the former (a mirror period); it may, however, be part of a right or a right of a completely different scope and connected with the former thematically. The smaller the degree of similarity between those two rights, the more it seems obvious that the period in question is one-sided, with only certain elements added.

The sole and irreplaceable method of analysis of an act is analysis of each of the provisions; a general theory of transitional periods cannot be established. Certain classifications are flawless in certain situations but fallible in the others.

More useful seem to be classifications invoking each of the elements accompanying the principal rights stemming from the transitional periods. Some of them have already been mentioned. These are: the prohibition to market in other member states pharmaceutical products not complying with the Community requirements, the prohibition to market in old member states agricultural products not complying with the Community requirements, and the application of equivalent measures. In this context, provisions concerning the prolongation of the application of the restrictions play an important role. A good example are the provisions concerning free movement of workers which provide for the possibility of extending the restriction for a period of five years; moreover, "a Member State maintaining national measures or measures resulting from bilateral agreements at the end of the five year period may, in case of serious disturbances of its labour market or threat thereof and after notifying the Commission, continue to apply these measures until the end of the seven year period following the date of accession."¹⁵ An interesting point is whether framework provisions allowing the application of restrictive measures can be prolonged when these implementing measures were not applied directly before the end of the five-year transitional period. The same holds for suspended provisions. In this author's opinion, suspended provisions cannot be prolonged. It is far more difficult to evaluate the first situation. On the one hand, one can argue that the cited provision refers to the maintenance of measures as such, not restric-

¹⁵ Annex XII(2)(5).

tions. On the other hand, exceptions should be interpreted restrictively, whereas the analysed provision stipulates that application of measures will be maintained. In this author's opinion, the use of measures in force after the five-year period following the accession is possible, provided that formal requirements are observed (namely the disturbances of the labour market and the notification).

6. Provisions Concerning Adjustment of *acquis* to Accession of New Member States

Every accession requires adjustment of the treaties and secondary law to the enlarging Union. As has been mentioned before, accession entails the necessity of determining the number of representatives of the new member states in the institutions of the Community (Union) and decision-taking procedures in the Council. From our point of view, Poland's position is the most important. Poland was granted 54 seats in the European Parliament,¹⁶ 21 seats in the Economic and Social Committee,¹⁷ 21 seats in the Committee of Regions¹⁸ (each time the same number of seats as Spain). An amendment was introduced to the ECJ Statute under which the number of judges in the Court of First Instance was increased to 25. The number of members of the Commission may be altered by the Council, acting unanimously.¹⁹ Here, transitional provisions turned out to be sufficient. Under Article 45 of the Act of Accession, each new member state is entitled to have one of its nationals as a member of the Commission, Article 46 provides that ten judges will be appointed to the Court of Justice and ten judges to the Court of First Instance, Article 47 provides that ten judges will be appointed to the Court of Auditors.

From the Polish perspective, the provision granting Poland 27 votes in the Council is the most important.²⁰ It constitutes the implementation of a protocol to this effect attached to the Treaty of Nice. What is more, the Act of Accession modifies the number of votes and rules of decision-taking within the Council. Under Article 12(1)(a)(i) of the Act of Accession, acts of the Council require for their adoption at least 232 votes in favour cast by a majority of the members whereas the treaty requires them to be adopted on a proposal from the Commission. In other cases, for their adoption acts of the Council require at least 232 votes in favour, cast by at least two-thirds of the members.

Under Article 12(1)(a)(ii) of the Act of Accession, when a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the member states constituting the qualified majority represent at least 62% of the total population of the Union. If that condition is shown not to have been met, the decision in question is not adopted.

¹⁶ Article 11, Act of Accession.

¹⁷ Article 14, Act of Accession.

¹⁸ Article 15, Act of Accession.

¹⁹ Article 213(1), EC Treaty.

²⁰ Article 12(1)(a)(i), Act of Accession.

In the second and third pillars, acts of the Council require at least 232 votes in favour cast by at least two-third of the members. Here, too, verification that the member states represent at least 62% of the total population of the Union may be requested.²¹

Apart from the treaties, a large number of acts of secondary law need to be adjusted as a result of accession. Some of the adjustments are set out in Annex II.²² Annex IV lists the acts to be applied in accordance with the conditions specified therein. Last but not least, Annex III lists the acts to be adjusted by the institutions themselves in accordance with the procedure laid down in Article 57 of the Act of Accession.²³

The procedure is simple. Under Article 57(2) of the Act of Accession: "the Council, acting by a qualified majority on a proposal from the Commission, or the Commission, under which of these two institutions adopted the original acts, shall to this end draw up the necessary texts." The (rather awkward) term "necessary texts" simply means adoption of the adjusting act by the author of the principal act. As we can see, even if the act has been adopted unanimously, it is adjusted by a qualified majority. The described procedure is applied not only to the acts referred to in Annex III but also when the necessary adaptations of secondary law have not been provided for in the act of accession. This refers to acts adopted after the end of negotiations. At the same time the adopted solution eliminates the negative effects of omission of certain acts of secondary law in the Act of Accession.

Special mention should be made of the separate procedures for the amendment of specific provisions of the Act of Accession. Under Article 9, provisions of the Act the purpose or effect of which is to repeal or amend acts adopted by the institutions, otherwise than as a transitional measure, have the same status in law as the provisions which they repeal or amend and are subject to the same rules as those provisions. Amendments introduced to acts of secondary law (other than transitional periods) resulting from the Act of Accession (that is primary law) do not, therefore, constitute primary law. This raises hopes that the least favourable elements of the Act of Accession in the field of agriculture will be amended in favour of Poland.

7. Provisions Concerning Crisis Situations

The above observations must be supplemented with comments on provisions concerning crisis situations as some of them have aroused concern in the new member states.

In this context, special attention should be drawn to the procedures laid down in Articles 38 and 39 of the Act of Accession which will be discussed together with the procedures applied in the case of old or new member states experiencing economic

²¹ On institutional matters, see M. L e f e b v r e: "L'élargissement à l'est: un risque ou une chance?," 467 *Revue du Marché commun et de l'Union européenne* 217 (2003).

²² Article 20, Act of Accession.

²³ Article 21, Act of Accession.

difficulties (Article 37 of the Act of Accession). The third element is the procedure for the amendment of the Act of Accession in relation to the amendment of the *acquis* because it draws an analogy to procedures contained in Articles 38–39 of the Act of Accession, although there are several important differences as well.

7.1. Disciplinary Procedures

Articles 38 and 39 lay down what may be described as procedures disciplining new member states. Article 38 states: “If a new Member State has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after the date of entry into force of this Act, upon motivated request of a Member State or on its own initiative, take appropriate measures.”

In other words, failure to implement Community law may result in sanctions. The Commission’s power to impose such sanctions and a time-limit merit attention. The time-limit determines the date of imposition of sanctions as they may remain in force until the infringement is eliminated (that is, including after the period of up to three years after accession). They may be modified, and after the three-year period such modifications consist in easing these sanctions as the new member states adjust their legal systems to *acquis communautaire*.

Sanctions imposed by the Commission must be proportional and may not be invoked as a means of arbitrary discrimination or a disguised restriction on trade. Priority must be given to measures which least disrupt the functioning of the internal market. The measures must be lifted when the relevant commitment is implemented by the new member state. They may, however, be imposed before accession; in that case they are applied from the date of accession.

Article 38 does not specify these measures. They will probably consist in curtailment of benefits or imposition of duties. The first seem to be more likely.

As has been mentioned, such a provision has never appeared in an Act of Accession before. Article 38 may be perceived as an expression of paternalism towards the new member states, which invites objections. A Polish lawyer would probably perceive them differently than a Commission or old member states lawyer. The latter would probably argue that the analysed provision applies only when a law has been infringed. On the other hand, Community law has dealt with infringements of law a number of times. An analysis of ECJ jurisprudence shows that member states have maintained provisions inconsistent with Community law for decades. Different approaches to old and new member states resulting in the adoption of sanctions against the latter would constitute an evident infringement of the principle of equality of the member states. Defenders of Article 38 of the Act of Accession would argue that this provision is aimed at safeguarding adjustment in the event of serious infringements or structural non-adjustment. At the same time, the provisions of Article 38 would

constitute another argument in favour of acceleration of adjustments. It is beyond doubt that Commission decisions can be contested in the European Court of Justice and annulled by it.

Article 39 of the Act of Accession also provides for employment of disciplinary measures by the Commission. These are taken "if there are serious shortcomings or any imminent risks of such shortcomings in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law and Directives and Regulations relating to mutual recognition in civil matters." As we can see, some of the matters covered by this provision belong to the third pillar, and the rest was transferred to the first as a result of the entry into force of the Amsterdam Treaty. This is very important as the Commission does not as a rule adopt third-pillar acts. Thus, Article 39 constitutes a quite exceptional legal ground. Can a Commission decision be contested in the ECJ if a particular act concerns third-pillar matters? Acts concerning Community matters can be contested on the basis of Article 230 EC. This is also the case as far as decisions and framework decisions – third-pillar instruments – are concerned. Both are adopted by the Council. A principle deduced by the ECJ in *Les Verts*²⁴ would be applicable to Commission acts. Since European integration is based on law, there must be a possibility of appeal against binding acts of Community institutions even if there is no provision clearly foreseeing the possibility to contest these acts in the ECJ. In consequence, irrespective of whether the shortcomings concern criminal or civil law, Commission decisions adopted under Article 39 of the Act of Accession, as binding acts can be contested and annulled by the ECJ.

Sanctions imposed under Article 39 are narrower in scope from Article 38 sanctions. The second sentence of Article 39 states that such measures may take the form of temporary suspension of the application of relevant provisions and decisions in relations between a new member state and any other member state or member states, without prejudice to the continuation of close judicial cooperation. The question is whether appropriate measures are ones related to mutual recognition of judicial decisions. The systematics of the act, and the reference to close judicial cooperation and reasons of logic argue for such a limitation rather than a linguistic interpretation. Special caution is advisable when applying sanctions relating to shortcomings in the realisation of close cooperation as its undertaking is voluntary. Can subsidies from the Regional Fund be limited because of shortcomings in realisation of obligations not assumed by some of the member states? What is more, Article 39 of the Act of Accession does not make any mention of proportionality of measures. Article 39 uses the term "appropriate" in relation to the measures in question. The new member states may certainly invoke the general principle of proportionality applied in Community and Union law.

²⁴ Case 294/83, [1986] ECR 1339.

Here, too, a three-year time limit in relation to sanctions imposed by the Commission is applied as well as an obligation to lift those sanctions when the commitment is implemented by the member state.

7.2. Protective Clause and Adjustment Clause

Articles 38 and 39 have evidently been programmed against the new member states while Article 37 of the Act of Accession constitutes a protective clause which can be applied by both the old and new member states. It states that "if, until the end of a period of up to three years after accession, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area," a member state may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market. Here, too, the decision is taken by the Commission. In the event of serious economic difficulties and at the express request of the member state concerned, the Commission acts within five working days. The measures are applicable forthwith. They may involve derogations from the rules of the EC Treaty and from the act to such an extent and for such periods as are strictly necessary in order to attain the objectives. The measures do not entail frontier controls.

Article 37 of the Act of Accession is connected with the economic integration and abolition of trade restrictions. It is not, therefore, surprising that it has been included in the Act of Accession. Parallel solutions have been adopted in instruments which foresee a lower level of connections with the Communities or the Union, a good example of which is the Europe Agreement. The practical necessity of including protective clauses in these documents results from the fact that not all the economic implications of accession are foreseeable. If the clause is ever applied, the most probable field of its application seems to be trade in goods. Because most of the positive and negative effects of liberalisation of trade in goods manifested themselves after 1 March 1992, when the trade part of the Europe Agreement came into force, the most probable field of application of the protective clause is trade in agricultural goods.

It is not fully certain, whether the three-year period relates to the occurrence of difficulties or application of measures. A literal interpretation suggests that it relates to the occurrence of difficulties. However, the application for authorisation to take the measures may be lodged before or immediately after the end of the three-year period.

Mention should be made here of Article 23 which states: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may make the adaptations to the provisions of this Act relating to the common agricultural policy which may prove necessary as a result of a modification in Community rules. Such adaptations may be made before the date of accession."

It is hard to consider Article 23 of the Act of Accession as a provision relating to crisis situations. It constitutes an adjustment clause in the event of changes of secon-

dary law. At the same time, the adopted solution increases concern and is associated with the unequal arrangements contained in Articles 38 and 39 of the Act of Accession. Article 23 can be applied before the date of accession. After accession, the new member states will be represented in the Council and their assent will be a condition for adoption of adjusting acts. However, till 1 May 2004 there existed a risk that new arrangements in the field of agriculture (which was a subject of very difficult negotiations where the Union exhibited a desire to apply double standards) would be introduced.

It should be remembered that the clause in Article 23 has been used before.²⁵ It can be used in the event of a modification in the agricultural law of the Community. Decisions must be limited to what is connected with the modification. They are adopted by the Council, so the procedures are not as speedy as the procedures specified in Articles 38–39 of the Act of Accession.

The Act of Accession will probably attract the interest of legal scholarship and practice. The future will show whether the expectations relating to it are fulfilled and the fears aroused by some of its provisions will come true. What is certain is that it constitutes one of the most significant document in the contemporary history of Poland.

²⁵ Article 62(2) of the Act of Accession of Denmark, Ireland and Great Britain, Article 72(2) of the Act of Accession of Greece, Article 89(2) of the Act of Accession of Spain and Portugal, Article 148(2) of the Act of Accession of Austria, Finland and Sweden.

International Responsibility of Individuals for Breaches of Humanitarian Law

ELŻBIETA SOCHA

Introduction

Describing the international responsibility of individuals for breaches of humanitarian law involves analysis of two systems of law regulating this issue. First, there is humanitarian law¹ itself and, second, international criminal law developed due to many examples of humanitarian law violations in different armed conflicts. It is also necessary to make a distinction between international law and domestic law systems² which include provisions for repressing breaches of humanitarian law and consequently become its part.

The international character of responsibility is defined by the international legal basis and International Tribunals and the International Criminal Court established to prosecute, try and sentence individuals. The most important thing is to define “breach of humanitarian law” and to distinguish “grave breaches” for which individuals are responsible. The term “grave breaches” should be compared with the material jurisdiction of International Criminal Tribunals. And finally, the main rules governing the responsibility of individuals in international law established parallels to domestic criminal law. The description of the international responsibility of individuals will be based on the Geneva Conventions on the protection of victims of war signed in 1949 (GC), the Additional Protocols thereto signed in 1977 (AP) and the Statutes of International Criminal Tribunals and the International Criminal Court.

Distinction Between the Responsibility of States and of Individuals

In 1944, Albert Levy wrote that the element of individual responsibility was extraneous to international law.³ At that time, the doctrine of public international law stated that only States could be subjects of international law and consequently the

¹ The term “humanitarian law” as defined by H.-P. G a s s e r: *International Humanitarian Law. An Introduction* (1993), p. 3 (IHL).

² It is the domestic law system of each State Party to the Geneva Conventions and the Additional Protocols, which mainly refer to domestic criminal law.

³ A.G.D. L e v y: “Criminal Responsibility of Individuals and International Law,” 12 *UChicagoLR* (1945), p. 332.

only entity responsible according to the rules of that law.⁴ This theory has its roots in the so-called “judicial fictions” first developed by Friedrich Karl von Savigny⁵ who said that we legitimated something, for example a State, which is not a person, by investing it with the features of such a person.⁶ Some other authors argue that such persons are only fictions because nobody has ever seen a State sitting in the United Nations General Assembly.

However, the responsibility of States is still pre-eminent. As laid down in Article 91 of Additional Protocol I (AP I) “a Party to a conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensations. It shall be responsible for all acts committed by persons forming part of its armed forces.”⁷

The situation changed quite quickly after Levy’s publication, because on 8 August 1945 the London Agreement was signed. It provided for the responsibility of the major war criminals of the European Axis powers (Nuremberg Trial). General MacArthur proclaimed the International Military Tribunal for the Far East, better known as the Tokyo Tribunal. The Treaty of Versailles also provided in Article 227 for the responsibility of individuals – Heads of State – for violations of international morality and treaties. The Charter of the International Military Tribunal in Article 6 stated that the Tribunal had the power to try and punish *persons* who, acting in the interest of the European Axis countries, whether as *individuals or as members of organisations* committed any crimes.⁸ Those facts of historic importance gave the green light to new ethical tendencies, according to which an individual, acting as an organ of a subject of international law, must be held responsible for actions which violate the law despite the existing responsibility of States.⁹

At present, the doctrine of international law has been developing in this field. In 1993 and 1994 the United Nations Security Council established two Tribunals: the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia (ICTY)¹⁰ and the International Criminal Tribunal for Rwanda (ICTR).¹¹ Another date of historic importance is 17 July 1998 when the Treaty of Rome establishing the first

⁴ This theory was supported by: D. Anzilotti, G. Schwarzenberger, T. Gihl, M. Siotto-Pintor, G. Sperduti and others. See the analysis in: C.A. Norgard: *The Position of the Individual in International Law* (1962).

⁵ F.K. von Savigny: *System des heutigen Romischen Rechts*, vol. 2 (1840).

⁶ J. Nowacki, Z. Tobor: *Wstęp do prawoznawstwa* (1994), p. 165.

⁷ Article 91 of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; in: *International Committee of the Red Cross*, Geneva 1977, Revised Edition 1996, p. 69.

⁸ Article 6 of the Charter of the IMT in: M.-C. Roberge: “Jurisdiction of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda over Crimes against Humanity and Genocide,” 321 *International Review of the Red Cross* (1997), pp. 651–664.

⁹ See: J. Giebułtowski: *Odpowiedzialność przestępców wojennych w świetle prawa narodów* (1945), p. 49.

¹⁰ Resolution of the United Nations Security Council No. 827 adopted on 25 May 1993 www.un.org/ICTY.

¹¹ Resolution of the United Nations Security Council No. 955 adopted on 8 November 1994 www.un.org/ICTR.

permanent International Criminal Court (ICC) was signed. The Statute of that Court came into force on 1 July 2002.

The statutes of the ICTY and ICTR provide for personal jurisdiction¹² stating that the International Tribunal “shall have jurisdiction over natural persons.” Individual criminal responsibility¹³ is defined in four aspects. The first concerns the forms of commission of the crime: a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in the Statute, shall be individually responsible for the crime. The second aspect deals with immunities, providing that the official position of any accused person, whether as Head of State or Government or as a responsible Government official, does not relieve such a person of criminal responsibility nor mitigate punishment. The third regulates the responsibility of commanders and other superiors; under this provision the fact that any of the acts was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. The fourth aspect refers to the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

The Statute of the ICC additionally provides that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment¹⁴ and that no provision in the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.¹⁵ This provision has to be analysed in such a way that the implicit exclusion of States from criminal responsibility shall not preclude other kinds of responsibility of States, if so provided for by other customary international law or treaties. By limiting criminal responsibility to individual natural persons and by not attributing their acts to the legal persons they represent, the same holds true for cases in which the natural person acts as “an agent of the State” or “in the name of the State.”¹⁶

The Geneva Conventions (GC) provide mainly for the responsibility of States for breaches of humanitarian law. According to Article 51 “no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.”¹⁷

¹² Article 6, ICTY Statute and Article 5, ICTR Statute; Article 25 para 1, ICC Statute www.un.org/ICC.

¹³ Article 7, ICTY Statute and Article 6, ICTR Statute.

¹⁴ Article 25 para 2, ICC Statute.

¹⁵ Article 25 para 4, ICC Statute.

¹⁶ A. Eser: “Individual Criminal Responsibility,” in: A. Cassese, P. Gaeta, J.R.W.D. Jones: *The Rome Statute of the International Criminal Court: A Commentary* (2002), p. 779; Compare the analysis of prosecution of legal persons other than natural persons in: S. Bolet-Suominen: “Personal Jurisdiction: Nationality of the Perpetrator,” 837 *The International Criminal Tribunal for the Former Yugoslavia and the Kosovo Conflict, International Review of the Red Cross* (2000), pp. 217–252.

¹⁷ Article 51 GC I; Article 52 GC II; Article 131 GC III; Article 148 GC IV.

Summing up, we have to say that there are two subjects of responsibility for breaches of international humanitarian law: States and individuals. The second group, by virtue of the establishment of the direct responsibility of individuals under international law, has in effect, according to some authors,¹⁸ been made a subject of international public law and certainly brought into direct contact with that law. Frederic Harhoff expressed an interesting opinion on this subject in connection with humanitarian law: "Whatever the case may be regarding the position of the individual under international law after the Nuremberg trials, the fact remains that, by creating the two Criminal Tribunals for the Former Yugoslavia and Rwanda, the Security Council took a great leap forward and established beyond any doubt that individuals may now, in respect of international humanitarian law, appear as subjects bound by certain legal obligations directly under international law, and that they can be individually responsible before an international forum for their violations of these obligations. This is a remarkable development in international law with far-reaching implications for, *inter alia*, the concept of State sovereignty."¹⁹

Describing the personal aspect of individual responsibility, we have to mention the view taken by the Nuremberg Tribunal which stated "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes the provisions of international law can be enforced."²⁰ The Statutes of the ICTY and ICTR provide that they have the power to prosecute persons²¹, the same like ICC Statute which also states that it has the power to exercise jurisdiction over persons.²²

Notwithstanding some proposals to give the ICTY the power to designate organisations or groups criminal, the final choice was to prosecute only individuals, and the simple rationale behind this option was well explained by the Secretary-General of the United Nations in his Report on the establishment of the ICTY. The question arises, however, whether, a judicial person, such as an association or organisation may be considered criminal as such so that its members, for that reason alone, might become subject to the jurisdiction of the International Tribunal. The Secretary-General believes that "this concept should not be retained in regard of the International Tribunal. The criminal acts set out in this Statute are carried out by natural persons, such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups."²³

¹⁸ H. Kelsen, A. Verdross, Judge H. Lauterpacht, P. Guggenheim, A. Ross, J. Brierly, H. Briggs, P. Jessup, M. Sibert, Ch. Rousseau, J. Spiropoulos, S. Segal, G. Tenedides, M. Grassi, J. Rochette and others. The detailed analysis: C.A. Norgard, *op. cit.*

¹⁹ F. Harhoff: "The Rwanda Tribunal. A Presentation of some Legal Aspects," 321 *International Review of the Red Cross* (1997), pp. 665–673.

²⁰ International Military Tribunal (Nuremberg), Judgements and Sentences, October, 1 1946; in: E. Zoller: "International Criminal Responsibility of Individuals for International Crimes," in: G. Ginsburgs, V.N. Kudriavtsev: *The Nuremberg Trial and International Law* (1990), p. 101.

²¹ Article 1, ICTY Statute and Article 1, ICTR Statute.

²² Article 1, ICC Statute.

²³ M. Frulli: "Jurisdiction *ratione personae*," in: A. Cassese, P. Gaeta, J.R.W.D. Jones: *The Rome Statute...*, *op. cit.*, p. 531.

In the opinion of Cecile Aptel, "Above and beyond the major legal developments (notably the confirmation of the principle of individual criminal responsibility for violations of international humanitarian law committed in non-international conflicts), the activities of the Tribunal (ICTR) must permit the reconciliation of an entire people. Such national reconciliation will come about only if impunity is halted once and for all. Only the certainty that justice has been done will prevent feelings of revenge from developing. The Tribunal's mission has a part to play in that process by enabling the perception of collective political responsibility for crimes to be replaced by a clear identification of individual criminal responsibility."²⁴ A simple question comes to my mind when I read about five hundred thousand people being killed in Rwanda. It is not a question of what State committed those atrocities but simply who perpetrated them.

Domestic and International Criminal Law

The GCs do not provide for direct repression (sanctions) for breaches of humanitarian law. Their provisions impose legislative obligations on States. The GCs only provided that "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."²⁵ It is still domestic law which directly punishes violations or grave breaches of international humanitarian law. Most States include repression in their domestic penal codes as a transformation or incorporation of general norms of international law. The States-Parties are obliged to implement the GCs in their domestic criminal law. They should translate the texts of the Conventions into the national language, define special crimes in national criminal codes as a particular definition of "grave breaches" of the GCs and impose penalties for the commission of those crimes.

International humanitarian law also lays down the principle of universal jurisdiction in the field of investigation of instances of grave violations: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless to their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such Contracting Party has made out a *prima facie* case."²⁶ Here again is an example of a situation when international humanitarian law as a part of international law needs instruments of the domestic legal order to be enforced.

²⁴ C. Aptel: "The International Criminal Tribunal for Rwanda," 321 *International Review of the Red Cross* (1997), pp. 675–683.

²⁵ Article 49 GC I, Article 50 GC II; Article 129 GC III; Article 146 GC IV.

²⁶ *Ibid.*

AP I provides also for mutual assistance in criminal matters:²⁷ "The High Contracting Parties shall afford one another the greatest measures of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol. High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred." In all cases connected with investigation, prosecution, extradition or trial and punishment, the law of the High Contracting Party is applicable, which means the domestic criminal law.

International criminal law is parallel to domestic criminal legal orders (concurrent jurisdiction or complementary jurisdiction²⁸). In some cases, international law has primacy over national courts but the main difference between international humanitarian law and international criminal law lies in the structure of the norms of that law. International humanitarian law does not provide for direct repression while international criminal law does and directly punishes individuals for breaches of humanitarian law. International humanitarian law needs domestic criminal law institutions to punish individuals who violate its rules while international criminal law has its own instruments such as legislation of an international character, prosecutors or judges, and only in special circumstances co-operates with national prosecutors' offices in collecting materials and evidence or examining witnesses.

As M. Dutli and C. Pellandini wrote: "Additionally, the obligation to repress grave breaches is independent of the nationality of the person committing them and of the place where they are committed, pursuant to the principle of *universal penal jurisdiction*. This principle places all States Parties to the humanitarian law treaties under an absolute obligation to repress such breaches effectively; only their universal repression can ensure real respect for humanitarian law. [...] To that end, the GC specifically lay down the obligation to prescribe *effective penal sanctions* under national legislation. Thus while international humanitarian law qualifies those acts constituting war crimes, it is left to national jurisdiction to determine the sanctions to be imposed."²⁹

A very important aspect of the individual's responsibility in international law, which also involves the domestic legal order, is connected with the extradition and surrender of accused persons. Extradition is primarily an institution of domestic law but of international importance. The question concerns the admissibility of extradition/surrender of citizens which is forbidden by most constitutions.³⁰ For the purpose of the Statute of the ICC, Article 102 defines the term "surrender" as the delivering up of a person by a State to the Court pursuant to the Statute, while the term "extradition" means the delivering up of a person by one State to another as provided by a treaty, a convention, or national legislation. Article 102 was included in the Statute

²⁷ Article 88 AP I.

²⁸ See *infra*.

²⁹ M.T. Dutli, C. Pellandini: "International Committee of the Red Cross and the Implementation of a System to Repress Breaches of International Humanitarian Law," 300 *International Review of the Red Cross* (1994), p. 242.

³⁰ The Polish Constitution of 1997 in Article 55 states that extradition of Polish citizen is forbidden.

in order to make clear that the handing over of a person to the ICC is fundamentally different in nature from the handing over of a person within the framework of extradition between States.³¹

Legal Basis of the International Responsibility of Individuals

The term “legal basis of the international responsibility of individuals” refers to all legal acts and other sources of international law which define crimes and the rules and structure of organs (tribunals or courts) established to prosecute and punish individuals. In the literature of international law there can also be found the term “international legal basis”³² which serves to emphasise the international character of responsibility and the fact that it stems directly from the provisions of international law.

Starting the analysis with Article 38 of the Statute of the International Court of Justice, which is a catalogue of the formal sources of international law, the responsibility of individuals was mainly established in international law by international agreement, international custom and general principles of international law. As regards international agreements, only the Nuremberg Tribunal and the ICC have been established by this instrument. The International Military Tribunal for the Far East was proclaimed by General MacArthur. The ICTY and ICTR were established on the basis of UN Security Council Resolutions. This category refers to internal acts of organisations and their controversial binding effect has been widely discussed in the literature of international law. As legal acts of international subjects we have Charters (Charter of the International Military Tribunal and Charter of the International Military Tribunal for the Far East) and Statutes (Statute of the ICTY, Statute of the ICTR and Statute of the ICC). The difference in the names of the acts is connected with the subjects establishing these Tribunals. Usually, Charters are agreements signed by Heads of States. The tribunals established after World War II were based on the competence of States to prosecute individuals and their internal criminal jurisdiction. Statutes refer to conventions drawn up and signed on the initiative of international organisations and their aim is to establish separate organs, in this case judicial. In the opinion of Djiena Wembou, “the Statute is a guarantee of the Tribunal’s independence.”³³ These Charters and Statutes can be classified as a direct legal basis of individual’s responsibility in international law while the norms of international humanitarian law are an indirect legal basis because they do not establish international judicial organs (tribunals or courts) to prosecute individuals. National courts try individuals for breaches of humanitarian law on the basis of national penal codes.

International custom, as evidence of a general practice accepted as law, is certainly a second legal basis for the rule of individual criminal responsibility for inter-

³¹ B. S w a r t, “Arrest and Surrender,” in: A. C a s s e s e, P. G a e t a, J.R.W.D. J o n e s, *The Rome Statute...*, *op. cit.*, p. 1678.

³² E. M i k o s - S k u z a: “Odpowiedzialność osób fizycznych,” 1(10) *Edukacja Prawnicza* (1998), p. 28.

³³ D. W e m b o u: “The International Criminal Tribunal for Rwanda. Its Role in the African Context,” 321 *International Review of the Red Cross* (1997), pp. 685–693.

national crimes. Before the Nuremberg law, many national courts had already charged individuals with offences against the law of nations, and particularly the laws of war.³⁴ That is why the Nuremberg Trial rejected the violation of the principles *nullum crimen sine lege* and *nulla poena sine lege* and explained in substance that the framing of the Charter, and therefore the rule of individual criminal responsibility, was not an arbitrary exercise of power by victorious nations, but in the view of the Tribunal “the expression of international law existing at the time of its creation.”³⁵ According to Antonio Cassese, “[...] the major substantive provisions of the Genocide Convention have gradually crystallised into customary international law. The turning of the Convention into customary international law was acknowledged, although in somewhat questionable terms, by the International Court of Justice. In addition, it was reaffirmed by the Secretary-General in his 1993 Report to the Security Council concerning the establishment of the ICTY (according to the Report, ‘the Convention is today considered part of international customary law’). It should be noted that no member of the Security Council or the General Assembly ever disputed this proposition of the Secretary-General. [...] It is now widely recognised that those rules of customary law impose “community obligations”, obligations which are owed to all other member States of the International Community, and at the same time confer upon any State the right to require that acts of genocide be discontinued (‘community rights’).”³⁶ In the case of customary international law, the basis of its legal binding force boils down to at least presumed acceptance of a practice as an expression of law.³⁷

General principles of law as a basis of individuals’ responsibility in international law were invoked by the French Cour de Cassation in the *Klaus Barbie* case and described in the Nuremberg principles as being consistent with the general principles of law recognised by the community of nations.³⁸ In the *Eichmann* case, the Supreme Court of Israel said that such crimes violated universal moral values and humanitarian principles that lay at the heart of the criminal law systems adopted by civilised nations.³⁹

The Statute of the ICC provides a hierarchy of the legal grounds for individual responsibility and applicable law. In the first place come the Statute, Elements of Crimes and Rules of Procedure and Evidence; in the second, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. Failing that, general principles of law derived by the Court from national laws of legal systems of the world, including as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with

³⁴ E. Zoller, *op. cit.*, p. 104.

³⁵ IMT Judgement, *supra* n. 8, at. 216; in: *ibid.*, p. 105.

³⁶ A. Cassese: “Genocide,” in: A. Cassese, P. Gaeta, J.R.W.D. Jones: *The Rome Statute...*, *op. cit.*, pp. 337–338.

³⁷ K. Wolfke: *Custom in Present International Law*, 2nd ed. (1993), p. 161.

³⁸ Cass. (Ch. Crim.), 6 October 1983, Recueil Dalloz Sirey, Jr., 113, 120 (1984); E. Zoller, *op. cit.*, p. 105.

³⁹ *Ibid.*, p. 105.

international law and internationally recognised norms and standards. The Court may also apply principles and rules of law as interpreted in its previous decisions.⁴⁰

The most controversial basis for the responsibility of individuals in international law are UN Security Council Resolutions. The process of creating the ICTY and ICTR was quite complicated. The international community could not remain indifferent to grave breaches of international humanitarian law in the territory of the former Yugoslavia and Rwanda. The Security Council did not indicate how such an International Tribunal was to be established. It was left to the Secretary-General to examine the options. In his Report to the Security Council, the Secretary-General explained that the treaty approach would not be suitable as it would require considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications would be received from the the successor states of the former Yugoslavia) which should be parties to the treaty if the treaty was to be fully effective. The Secretary-General then suggested that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. He argued in his report that such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.⁴¹ In the *Dusko Tadic* case, the defendant argued that the Security Council had exceeded its powers under Chapter VII, because that Chapter did not authorize the Council to create a judicial tribunal as a measure to address a threat to international peace and security. In reply, the Appeals Chamber held that Chapter VII in general and Article 41 of the UN Charter in particular conferred on the Security Council a broad, although not unlimited, discretion regarding the measures which are appropriate to address a threat to international peace and security.⁴²

Material Jurisdiction of Responsibility

Describing the responsibility of individuals for breaches of humanitarian law we have to come back again to the comparison of international humanitarian law and international criminal law. These two systems punish "grave breaches" of the GCs and their APs but certain acts are not necessarily the same. Material jurisdiction mainly covers "international delicts." International criminal law punishes grave breaches of international humanitarian law as the most serious crimes are of concern to the international community as a whole.

GC I and II define "grave breaches" as acts committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, in-

⁴⁰ Article 21, ICC Statute.

⁴¹ See Report of the Secretary-General, pursuant to the paragraph 2 of UNSC Resolution 808 (1993), 3 May, S/25704, paras 4–11; and: S. Boelaert-Suominen: "The International Criminal Tribunal for the Former Yugoslavia and the Kosovo Conflict," 837 *International Review of the Red Cross*, pp. 217–252.

⁴² *Ibid.*

cluding biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁴³ GC III adds to this catalogue compelling a prisoner of war to serve in the forces of the hostile Power and wilful depriving a prisoner of war of the right of fair and regular trial prescribed in this Convention.⁴⁴ GC IV also includes unlawful deportation or transfer or unlawful confinement of a protected person and taking of hostages.⁴⁵

AP I prohibits subjecting persons to any medical procedure which is not indicated by their state of health and which is not consistent with generally accepted medical standards that would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.⁴⁶ As “grave breaches” AP I also includes physical mutilations, medical or scientific experiments, removal of tissues or organs for transplantation,⁴⁷ making the civilian population or individual civilians an object of attack, launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, making non-defended localities and demilitarised zones the objects of attack, making a person the object of attack in the knowledge that he is *hors de combat*, the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognised by the Conventions or this Protocol.⁴⁸

As an addition to grave breaches of the GCs, AP I enumerates: the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, unjustifiable repatriation of prisoners of war or civilians, practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, and making clearly-recognised historic monuments, works of art or places of worship objects of attack.⁴⁹

The GCs and AP I established a list of well known as “grave breaches” or acts which have been widely accepted as representing the most serious violations of international humanitarian law.⁵⁰ “Grave breaches” are regarded as war crimes. They are, however, the only crimes that fall within this category. “Other serious violations of international humanitarian law” are also recognised as constituting war crimes. They

⁴³ Article 50 GC I and Article 51 GC II.

⁴⁴ Article 130 GC III.

⁴⁵ Article 147 GC IV.

⁴⁶ Article 11 para 1 AP I in connection with Article 85 para 3 AP I.

⁴⁷ Article 11 para 2 AP I.

⁴⁸ Article 85 para 3 AP I.

⁴⁹ Article 85 para 4 AP I.

⁵⁰ T. P f a n n e r: The Establishment of a Permanent International Criminal Court,” 322 *International Review of the Red Cross* (1998), pp. 21–27.

encompass, for example, violations of treaties such as the Fourth Hague Convention of 1907 or of customary rules regulating warfare. To the list of “grave breaches” of the GCs and AP I, the International Committee of the Red Cross has proposed adding other serious violations of humanitarian law applicable in international armed conflicts. These include violations of the laws and customs of war concerning means and methods of warfare that are considered unacceptable or are regarded as clear violations of the rules of customary international law.⁵¹

Material jurisdiction in international criminal law covers the “grave breaches” designated by international humanitarian law. All such “violations of international humanitarian law” have been included in Article 2 of the Statute of the ICTY (“Grave breaches of the Geneva Conventions of 1949”), Article 3 (“Violations of the laws or customs of war”) and Article 5 (“Crimes against humanity”), and in Article 3 of the Statute of ICTR (“Crimes against humanity”) and Article 4 (“Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”). The ICTY, ICTR and ICC Statutes have distinguished, as a special category, the crime of genocide.⁵² The crime of genocide is here defined in the same terms as in the Convention on Prevention and Punishment of the Crime of Genocide signed in 1948. Genocide can be committed not only in the time of war but also in the time of peace. By defining the “grave breaches” of the GCs as war crimes for the purpose of the ICC Statute, paragraph 2(a) brings these violations within ICC jurisdiction.⁵³ ICC jurisdiction covers four categories of crimes: genocide, crimes against humanity, war crimes and the crime of aggression.

International Tribunals and Courts

The international character of individual responsibility is also recognised by the international judicial organs established to prosecute and punish individuals who violate international humanitarian law. The distinction between international and national judicial organs again seems to be difficult to describe because international humanitarian law does not create special organs to prosecute individuals. It authorises the States-Parties to the GCs to bring persons who commit such grave breaches before its national courts. The only organ of an international character established by international humanitarian law is the Fact Finding Commission.⁵⁴

The first aspect refers to the subjects which have created such judicial organs. According to some authors, the International Military Tribunals created after World War II were established by “victor States.” By virtue of prosecuting and punishing major war criminals these States were often charged with committing an act of vengeance. Today, it is the international community as a whole which seeks to bring perpetrators of genocide and other crimes against humanity, to justice. In doing so, the

⁵¹ *Ibid.*

⁵² Article 4 ICTY; Article 2, ICTR Statute and Article 6, ICC Statute.

⁵³ For the detailed analysis see: A. C a s s e s, *op. cit.*, p. 390 and M. L a c h s, *War Crimes* (1945).

⁵⁴ Article 90 AP I.

international community is acting through the United Nations.⁵⁵ It is still the obligation of national courts to punish grave breaches of the GCs and APs, including under the principle of universal criminal jurisdiction. Unfortunately, national courts have been often very slow in prosecuting and punishing war criminals who had acted as high-ranking functionaries of the state and, enjoying immunities under domestic law, could avoid punishment, despite States-Parties' agreement to waive immunities in such cases under national law as well. Without International Tribunals, before which such immunities definitely have been excluded, these individuals would never have been brought to justice.

By the summer of 1992, widespread and credible reports of atrocities in the former Yugoslavia prompted the UN Security Council to take four steps in succession: condemnation, publication, investigation.⁵⁶ Over 20 States provided the United Nations with reports containing substantiated information on violations of international humanitarian law in the former Yugoslavia. The United States submitted eight such reports up to July 1, 1993. The Council took a second step by publishing them. In Resolution 771 of August 12, 1992, the Council called upon States and other bodies to submit "substantial information" to the Secretary-General, who would report to the Council "recommending additional measures that might be appropriate." This action, taken at a time of intense international media coverage of "ethnic cleansing" and mass rapes, offered hope that the atrocities might subside once they were spotlighted for the international community and the principle of individual accountability emphasised.⁵⁷ The Council, on October 6, established a Commission of Experts⁵⁸ and eventually, on February 22, 1993, Security Council Resolution 808 heralded the punishment through due process of law, by creating an International Tribunal to prosecute persons violating international humanitarian law. In 1994, the next such Tribunal was established for Rwanda. In the Resolution 955 (1994) we read that the Security Council had "considered the reports of the Secretary-General [and] the Special Rapporteur for Rwanda of the United Nations Commission of Experts, which indicate that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed. Determining that this situation continues to constitute a threat to international peace and security, determined to put an end to such crimes [...] and bring to justice the persons who are responsible for them, [...] decides hereby, having received the request of the Government of Rwanda, to establish an International Tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed at the territory of Rwanda and Rwandan citizens responsible for genocide and

⁵⁵ See also the opinion of C.M. P e t e r: "The International Criminal Tribunal for Rwanda: Bringing the Killers to Book," 321 *International Review of the Red Cross* (1997), pp. 695–704, who analyses the beneficial role of the Tribunal in preventing States and individuals from the commission of serious violations of international humanitarian law.

⁵⁶ P. B e k k e r: "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," 87 *AJIL* (1993), p. 640.

⁵⁷ *Ibid.*, p. 639.

⁵⁸ Resolution 780 of the UN Security Council, adopted on 6 October 1992.

other such violations committed at the territory of neighbouring states, between 1 January 1994 and 31 December 1994.”⁵⁹

All those *ad hoc* Tribunals’ experiences became the base for establishing the first permanent organ, the International Criminal Court. The United Nations General Assembly decided to set up a Preparatory Committee on December 11, 1995. Its first two sessions were held from March 25 to April 12 and August 12 to 30, 1996.⁶⁰ The Preparatory Committee held its third and fourth sessions from February 10 to 21, 1997, and August 4 to 15, 1997, bringing the world a step closer to establishment of a permanent ICC. The United Nations General Assembly, on December 16, 1996, reaffirmed the mandate of the Preparatory Committee and decided that it would meet in two more sessions in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to a diplomatic conference. It also decided that “a diplomatic conference of plenipotentiaries will be held in 1998, with a view to finalizing and adopting a convention on the establishment of an ICC.” The conference was scheduled to open in Rome on June 15, 1998 and to last five weeks. The General Assembly urged participation in the Committee “by the largest number of States so as to promote universal support for an ICC” and requested the Secretary-General to establish a voluntary fund to facilitate participation in the Committee and the diplomatic conference by the least developed countries.⁶¹ The final session was held from March 16, to April 13, 1998, at the United Nations Headquarters in New York. At this session it completed its work of preparing a consolidated text of the Statute. The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC took place in Rome at the Headquarters of the Food and Agriculture Organisation. The participants numbered 160 States, 33 intergovernmental organisations and a coalition of 236 nongovernmental organisations. The Conference concluded by adopting the Rome Statute by a non-recorded vote of 120 in favour, 7 against and 21 abstentions. The United States elected to indicate publicly that it had voted against the Statute. France, the United Kingdom and the Russian Federation supported the Statute.⁶² Theodor Meron wrote that “Although the ICC will never be able to try more than a small number of defendants, its institutional importance lies in denying immunity to those responsible for serious violations of international humanitarian law, in fostering real deterrence of major violations, and in providing an effective criminal jurisdiction when state prosecutorial or judicial systems fail to investigate and prosecute in conformity with standards to be stated in the Statute. It is in the stimulation of national prosecutions under the relevant principles of jurisdictions, and in the development and clarification of the applicable law, that a standing interna-

⁵⁹ Resolution 955 of the UN Security Council, adopted on 8 November 1994.

⁶⁰ C.K. Hall: “The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,” 91 *AJIL* (1997), p. 177.

⁶¹ C.K. Hall: “The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,” 92 *AJIL* (1998), p. 124.

⁶² C.K. Hall: “The Sixth Session of the United Nations Preparatory Committee on the Establishment of the International Criminal Court,” 92 *AJIL* (1998), p. 548 and: M. Arsanjan: “The Rome Statute of the International Criminal Court,” 93 *AJIL* (1999), p. 22.

tional court's contribution will be particularly valuable."⁶³ In the opinion of Jonathan Charney, the adoption of the ICC Statute has advanced international law.⁶⁴

The international character of judicial organs, and consequently the international character of responsibility, is also expressed by the structure of the International Tribunals and the powers of the judges and prosecutors. The ICTY and ICTR consist of three Trial Chambers, an Appeals Chamber, the Prosecutor and a Registry, servicing both the Chambers and the Prosecutor⁶⁵ while the ICC consists of a Presidency, an Appeals Chamber, a Trial Chamber, a Pre-Trial Chamber, an Office of the Prosecutor and a Registry.⁶⁶ One of the main features of the International Tribunals is that the Office of the Prosecutor is an organ incorporated into the structure of the Tribunal despite working independently.⁶⁷

Another interesting point indicating the international character of the judicial organs is connected with the election of judges and their independence. Under Article 36.8 of the ICC Statute, "the State Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: the representation of the principal systems of the world, equitable geographical representation..."⁶⁸ As a required qualification, the judges should have experience not only in criminal law and procedure but also in international law, international humanitarian law and the law of human rights.⁶⁹

Article 9 of the ICTY Statute and Article 8 of the ICTR Statute state that "the International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal."⁷⁰ Some authors called this institution an authority *vis-à-vis* national courts.⁷¹ Accordingly, the International Tribunal may require States to co-operate fully in its action by identifying and seeking suspects, producing evidence, forwarding documents, and arresting and detaining persons against whom it has initiated proceedings.⁷² It is unfortunate, however, that co-operation should be of a one-way nature. For instance, neither the Statute nor the Rules of Procedure and Evidence indicate how the Tribunal should respond to a request for legal assistance by a Rwandan public prosecutor's office and courts, and yet the very nature of the crimes committed means that some cases being tried by one court or the other are

⁶³ T. Meron: *War Crimes Law Comes of Age. Essays* (1998), p. 304.

⁶⁴ J. Charney: "Progress in International Criminal Law?," 93 *AJIL* (1999), p. 454.

⁶⁵ Article 11, ICTY Statute and Article 10, ICTR Statute.

⁶⁶ Article 34, in connection with Article 39, ICC Statute.

⁶⁷ Article 42, ICC Statute.

⁶⁸ Article 36 para 8(a)(i) and (ii), ICC Statute.

⁶⁹ Article 36 para 3(b), ICC Statute and Article 13, ICTY Statute and Article 12, ICTR Statute.

⁷⁰ Article 9, ICTY Statute and Article 8, ICTR Statute.

⁷¹ S. Murphy: "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia," 93 *AJIL* (1999), p. 64.

⁷² O. Dubois: "Rwanda's National Criminal Courts and the International Tribunal," 321 *International Review of the Red Cross* (1997), pp. 717-731.

likely to be linked. It is unlikely that the structure of the Tribunal would have been fundamentally altered had such potential co-operation been formalised.⁷³

The highest judges of Bavaria have addressed the problems of international law and its relationship with German domestic law in a convincing manner. Nevertheless, they differ at times with the legal analyses of the ICTY; this divergence seems to be one of the main problems in a two-track system as it operates in the context of the former Yugoslavia, and as it can be expected to operate under any system in which municipal courts have concurrent jurisdiction.⁷⁴ This institution has a very important practical role. While the International Tribunal has primacy of jurisdiction over that of States, the ICTY's jurisdiction is *concurrent*, not *exclusive*. National authorities are expected to continue their own investigations, apprehensions and prosecutions and they have done so, in co-operation with the ICTY. For instance, in explaining the prosecutor's role in the arrest by the German authorities of two individuals, Novislav Djajić and Nicola Jorgić, charged with war crimes in the former Yugoslavia, the prosecutor stated that the Djajić and Jorgić cases were initiated and investigated by the German authorities which interacted with the Office of the Prosecutor of the International Tribunal. The Prosecutor assessed that it was not appropriate to seek a deferral of these cases and the decision was made that they continue to be prosecuted by the German authorities. There is on-going co-operation between the Prosecutor and the German authorities on this and other cases.⁷⁵

The jurisdiction of the ICC is described as complementary⁷⁶ to national criminal jurisdictions.⁷⁷ Creating this concept, the Commission had to analyse the question of unwillingness or inability with respect to the admissibility of cases before the ICC. In any event, there are three criteria by which the Court is to be guided: 1) proceedings undertaken for the purpose of shielding a person from criminal responsibility; 2) unjustified delay in proceedings which is seen as inconsistent with an intent to bring a person to justice; 3) proceedings that are not independent or impartial and were not conducted in a manner inconsistent with an intent to bring a person to justice.⁷⁸

The creation of judicial organs of an international character is very important for ensuring effectiveness and bringing persons who have committed serious violations of international humanitarian law to justice. Some authors have expressed the opinion that "by creating such Tribunals, the international community delivers a warning to those who do not value human life" and that "their existence sends a powerful message."⁷⁹

⁷³ O. Dubois, *op. cit.*, in connection with: D. De Beer et. al.: *The Organic Law of 30 August 1966 on the Organisation of the Prosecution of Offences Constituting the Crime of Genocide or Crimes against Humanity: Commentary* (1997).

⁷⁴ Ch. Schafferling: "International Decisions – War Crimes," 92 *AJIL* (1998), p. 532.

⁷⁵ S. Murphy, *op. cit.*, p. 65.

⁷⁶ Compare the analysis of O. Solera: "Complementary Jurisdiction and International Criminal Justice," 845 *International Review of the Red Cross* (2002), pp. 145–171.

⁷⁷ Article 1, ICC Statute.

⁷⁸ Criteria based on Article 17, ICC Statute; See: J.T. Holmes: "Complementarity: National Courts versus the ICC," in: A. Cassese, P. Gaeta, J.R.W.D. Jones: *The Rome Statute...*, *op. cit.*, vol. I, pp. 667–685.

⁷⁹ Ch.M. Peter, *op. cit.*

Summing up, International Tribunals, even those established *ad hoc*,⁸⁰ are of an international character, and their primacy⁸¹ over national courts is one of their defining features. As stated by the ICTY in the Tadić case: this principle “obliges States to accede to and accept requests for deferral on the ground of suspension of their sovereign rights to try the accused themselves and compels States to accept the fact that certain domestic crimes are really international in character and endanger international peace and that such international crimes should be tried by an International Tribunal, that being an appropriate and competent legal body duly established for the purpose by law.”⁸² The permanent ICC is complementary to national criminal jurisdictions, which means that national courts have primacy in prosecution. Under the principle of complementarity the ICC can exercise its jurisdiction only when national courts are unable or unwilling to investigate or prosecute or the case is not of sufficient gravity to justify further action by the Court. States-Parties to the ICC Statute would have never agreed to the primacy of international jurisdiction on the grounds of sovereignty which is recognised as the fundamental feature of domestic criminal jurisdiction including under the principle of universal jurisdiction.

Main Principles of the Responsibility of Individuals in International Law

This description of individuals’ responsibility under the rules of international law would not be complete without indication of the main rules which usually become the “last chance” of an accused who wants to avoid trial. As the *Tadić* and *Milosević* cases show, defendants usually accuse the Tribunals of being illegal and violating cardinal principles of criminal justice such as: *nullum crimen sine lege* and *nulla poena sine lege*. Most of the principles of the criminal responsibility of individuals are in international law the same as in domestic criminal law, for example: individual criminal responsibility, exclusion of jurisdiction over persons under eighteen,⁸³ the “mental element,”⁸⁴ grounds for excluding criminal responsibility,⁸⁵ mistakes of fact or mistakes of law⁸⁶ as well as *nullum crimen sine lege* and *nulla poena sine lege*.

The ICC Statute provides that a person shall not be criminally responsible under the Statute unless the conduct in question constitutes, at the time it took place, a crime within the jurisdiction of the Court.⁸⁷ This principle is supported by that of *non-*

⁸⁰ G. E r a s m u s, N. F o u r i e: “International Criminal Tribunal for Rwanda: Are all issues addressed? How does it compare to South Africa’s Truth and Reconciliation Commission?,” 321 *International Review of the Red Cross* (1997), pp. 705–715.

⁸¹ O. D u b o i s, *op. cit.*, compare with the principle: *non bis in idem* Article 10, ICTY Statute and Article 9, ICTR Statute.

⁸² IT – 94 – 1 – T Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the Tadić case, in: J.T. Holmes, *op. cit.*

⁸³ Article 26, ICC Statute.

⁸⁴ Article 30, ICC Statute.

⁸⁵ Article 31, ICC Statute.

⁸⁶ Article 32, ICC Statute.

⁸⁷ Article 22, ICC Statute.

*retroactivity ratione personae*⁸⁸ which states that no person shall be criminally responsible for conduct prior to the entry into force of the Statute. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted is to apply. A very important principle, which may differ from the provision of domestic criminal law, concerns the irrelevance of official capacity.⁸⁹ The Statute of the ICC applies equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

As many crimes within the jurisdiction of the International Tribunals are committed by military commanders, their Statutes include special provisions regarding the responsibility of commanders and other superiors⁹⁰ and superior orders and prescription of law.⁹¹ A military commander can be held criminally responsible for crimes committed by forces and subordinates under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces or subordinates. The fact that a crime has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, does not relieve that person of criminal responsibility unless: the person was under legal obligation to obey the orders of the Government or the superior in question, the person did not know that the order was unlawful, and the order was not manifestly unlawful, but orders to commit genocide or crimes against humanity are manifestly unlawful.

Conclusions

The international responsibility of individuals is based directly on the rules of international law created by States or international organisations. The jurisdiction *ratione materiae* of International Tribunals and the International Criminal Court encompasses the gravest crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Grave breaches of humanitarian law continue to engage the special attention of the international community as a whole and can be punished not only by domestic criminal courts but also by international judicial organs. It is worth mentioning and agreeing with the opinion of Djiena Wembou when she states that the ICTR has certainly been helping to enforce international humanitarian law ever since its hearings opened. Its task is above all to play a major role in disseminating and

⁸⁸ Article 24, ICC Statute.

⁸⁹ Article 27, ICC Statute.

⁹⁰ Article 28, ICC Statute.

⁹¹ Article 33, ICC Statute.

promoting humanitarian law in Africa as part of the battle to eliminate impunity and enhance national reconciliation and respect for human dignity.⁹²

International humanitarian law had to go a long way to be enforced as regards punishing individuals who are responsible for its breaches. The first States-Parties to the Geneva Conventions were obliged to incorporate the rules of international humanitarian law into their domestic legal orders but many domestic courts have not been able to punish individuals, especially ones who are the Heads of State or Government or high-ranking military officers. In this case international law has created international criminal justice as a special legal order necessary to exacting punishment of breaches of international humanitarian law.

⁹² D. W e m b o u, *op. cit.*

The Problem of Distinction and Different Treatment of “Old” (Autochthonous) and “New” (Allochthonous) Minorities

BORIS KRIVOKAPIC

1. Autochthonous and Allochthonous Minorities¹

A number of states, including the ones generally considered genuinely democratic, recognise as ethnic minorities in their territories only the so-called *autochthonous* (traditional, native, aboriginal) minorities. This is usually done through a statutory definition of ethnic minority (if there is one) including an additional requirement indicating the qualification “autochthonous,” or by adding to the list of recognised minorities such indication; it is also possible to imply such a requirement, so that in practice such states recognise the entitlement to minority rights only of those groups considered by them as autochthonous.

With such an approach, all other similar collectivities are treated as *allochthonous* (immigration-type) minorities; the list in this case is joined not only by aliens (mostly migrant workers) but also by the citizens of a state belonging to “new” minorities.² Since it is widely accepted in the theory that a state’s obligations in the sphere of protection of minorities concern only its own citizens,³ and that non-citizens in principle do not enjoy the range of rights otherwise accorded to aliens and/or stateless persons, and thus do not expect special minority-type protection,⁴ we are not going to deal with the

¹ Autochthonous (Greek *auto-chthonous*) denotes “indigenous,” “native,” “aboriginal;” allochthonous (Greek *allos* other + *chthon* country) means coming from another place or province.

² The terms “old” and “new” minorities are used here in a specific sense, namely as synonyms for the designation of “autochthonous” and “allochthonous” minorities. In another sense, only minorities that have appeared quite recently (e.g. as a consequence of the break-up of certain states) are termed “new,” and all minorities known up to a specific date (whether autochthonous or allochthonous) are termed “old.”

³ In spite of the fact that in the relevant international documents there is no reduction of minorities only to citizens of a given country (because there is no precise definition of the term), the requirement of domestic citizenship is one of the key elements of Capotorti’s, Deschene’s and almost all other suggested definitions of ethnic minorities.

⁴ Members of minorities who do not have citizenship of a given state undoubtedly enjoy at least the so-called passive rights, such as the right to free declaration of their ethnic origin, to private and public use of their own language, to profession of their religion, to protection against assault by a member of another ethnic or religious group, etc. Without entering into this issue, one should note that long-resident aliens (who are employed and pay taxes) should not have less rights to adequate education than members of the same language group who already have citizenship.

position of such persons, but while focusing on the status of allochthonous ("new") minorities, we shall begin with the assumption that they concern domestic citizens.

In accordance with the above classification, particular minority rights are accorded only to members of autochthonous minorities, while members of other (allochthonous) minorities, after meeting the requirement of citizenship of the state concerned, enjoy only general (fundamental) human rights and freedoms, just like all other citizens. In this way, they are all granted a status that is equal to that of the rest of the domestic citizenry, i.e. of the majority population. In other words, states following such a method reduce the concept of minority solely to "autochthonous" groups. The "allochthonous" groups, although also termed "minorities," are in fact excluded from the protection of minorities.

Requests for recognition of autochthony may be made in various ways. In the first place, they may be made by means of some general formulation pointing out that as minorities are considered to be only those groups which, in addition to other requirements, have a permanent and stable connection to the territory of the relevant state. Likewise, the 2002 Law on the Protection of Rights and Freedoms of National Minorities⁵ of the Federal Republic of Yugoslavia, defining in Article 2(1) what is to be included in the concept of "national minority," points, *inter alia*, to the requirement that it should be a group "belonging to one of the population groups *with continuous and strong ties*⁶ to the territory of the Federal Republic of Yugoslavia." Similarly, the 2002 Croatian Constitutional Act on the Rights of National Minorities⁷ establishes in Article 5 that a national minority is only a group "whose members are persons *traditionally inhabiting*⁸ the territory of the Republic of Croatia."

In spite of the above examples, it may be concluded that states that have adopted the policy of recognising only indigenous minorities, do not rest content with some general statement in this matter, but indicate explicitly (by name) which minorities are to be considered autochthonous. This can be done either by the constitution or by statute, or by specific international documents. Here are some examples.

The supreme legal act of Slovenia (Article 64/1), for instance, specifies as autochthonous only the Italian and Hungarian minorities,⁹ while also providing (in Article 65) that the status of the Roma (Gypsies) in Slovenia is to be regulated by stat-

⁵ *Službeni list Savezne Republike Jugoslavije* 11/2002.

⁶ Author's italics.

⁷ *Narodne novine* 155/2002. This document can also be found on the Internet: <http://dev.eurac.edu:8085/mugs2/do/blob.html?type=html&serial=1042624780615>.

⁸ Author's italics.

⁹ The term "ethnic (national) community" is used in Slovenia to denote ethnic minorities purportedly to avoid the negative connotation of the word "minority."

¹⁰ Strictly speaking, the constitutional text does not refer to Roma as autochthonous, as it does with the ethnic-Italian and Hungarian communities. However, Slovene experts explain that they are undoubtedly an autochthonous ethnic community in Slovenia and that this is the reason for mentioning them in the Constitution. See also "Information on the Position of the Roma in the Republic of Slovenia," adopted by the Government on 20 April 1995, which states that references to Roma living in the area of the present-day Slovenia first appeared in the sources as far back the fifteenth century, and that the entering of their names in registers of births and deaths began in the seventeenth century. See: Informacija o položaju Romov v Republiki Sloveniji – EPA 1102, *Poročevalec* No. 18/1995.

ute.¹⁰ In accordance with such an approach, relevant statutes and other regulations in Slovenia provide for a distinct legal status and special rights to be enjoyed only by the Italian and the Hungarian minorities and, to a degree, by the Roma, as so-called autochthonous entities, while leaving out all the other ethnic minorities, which are deemed immigrants, and consequently not entitled to special protection as minorities. And all this in spite of the fact that the "new" minorities are incomparably more numerous than the "autochthonous" ones: according to the 1991 census members of all three of the above autochthonous minorities totalled 13,869 (or about 0.71% of the total population of Slovenia), which is a negligible number compared to 238,968, or 12.16% of non-Slovenes (Croats, Serbs, etc.) who became overnight minorities through the fact of the independence of that country.¹¹ Besides, according to the latest census held in 2002, of the slightly over 1,964,000 citizens of Slovenia, minorities represented 17%, or 333,880 persons, while the total number of members of Italian, Hungarian and Roma minorities was only 11,747. Yet, only the three cited minorities enjoy the status of allochthons, i.e. are recognised and legally protected minorities.

In some other countries the means used to distinguish the so-called autochthonous minorities are special statutes which entirely cover the issue of minorities, either by including in the definition the requirement of autochthony or by a specific listing of the relevant groups which emphasizes their autochthonous character; other countries use a combination of these two approaches. Thus, Austria, in Article 1(2) of the Federal Law on the legal status of ethnic groups (1976) defines what are called "*Volksgruppe*" ("folk groups")¹² as "groups of Austrian citizens settled in, and native of, specific parts of the state territory, whose mother tongue is not German and who have their own nationality." Without entering into the details of such defining, it is possible to conclude that the "folk group" concept is narrower than the general concept of minority, and that it presupposes as one of the principal elements the autochthonous character of these collectivities, i.e. the requirement that the relevant group originates in the territory in which it is settled. Since the Austrian law fails to specify the "list" of autochthonous minorities, the question remains open as to what group can qualify as a minority. Austrian law, then, considers that the required criteria are satisfied by Croatian, Slovenian, Hungarian, Czech, Slovak and Gypsy minorities,¹³ which means that Turks, Serbs, Bosniaks, Albanians and others are excluded even if in possession of Austrian citizenship.

A somewhat different, though in essence the same, attitude is taken by Hungary, whose 1993 Law on the rights of national and ethnic minorities [Article 1(2)] also defines minorities as ethnic groups which have been settled in the territory of the Republic of Hungary for at least a century, and are minorities within the framework

¹¹ Quite a number of them have in the meantime acquired Slovene citizenship, so that they cannot be considered aliens (migrant workers) temporarily residing in that country.

¹² The Austrian Law introduces the concept of *Volksgruppe* in order to avoid the discriminatory overtones of the concept of minority (*Minderheit*). See: *Report by the Republic of Austria pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities*, Vienna, 30 June 2000, 3.

¹³ *Report by the Republic of Austria...*, 2.

of the population of the state, and whose members are Hungarian citizens, while differing from the rest of population in terms of language, culture, and tradition, and at the same time expressing awareness of a common spirit aimed at preserving the above-mentioned values, including expression and defense of their communities and which emerged in the course of history. Consequently, the Law, among other things, insists on the autochthonous character of minorities by requiring, for the purpose of recognition as a collective minority status, a continued stay in the territory of Hungary of at least a century.

In order to be as precise as possible, the Law explicitly specifies (although only in Article 61(1) which ethnic groups living in the territory of Hungary are considered, in terms of its text, as ethnic groups; these are: Bulgarian, Greek, Armenian, German, Polish, Rumanian, Ruthenian, Slovakian, Slovene, Serbian, Ukrainian, Croatian and Roma communities, a total of 13 minorities which meet the necessary requirements, including the element of autochthony, as defined in the text of the Law.

As mentioned above, the requirement that these should be autochthonous communities is also contained in a number of definitions incorporated in some of the recent statutory texts of certain states. Thus Article 2(1) of Yugoslavia's 2002 Law on the protection of the rights and freedoms of national minorities requires, *inter alia*, that it should be a group "belonging to one of the population groups with continuous and strong ties to the territory" of Yugoslavia, while Article 5 of Croatia's 2002 Constitutional Act on the Rights of National Minorities introduces, *inter alia*, the requirement that it should be a group whose members are persons traditionally inhabiting the territory" of that country.

The distinction between autochthonous and remaining minorities is in practice also made by means of international documents, i.e. treaties (peace treaties, for instance), or through reservations expressed upon adoption of international law obligations. A reservation of this kind was, for instance, transmitted by Germany to the Secretary-General of the Council of Europe, through a Declaration of 11 May 1995. Stating that there is no definition of the concept "national minority" in the Framework Convention for the Protection of National Minorities, Germany concluded that, consequently, states are free to determine which groups will benefit after the ratification from the rights provided for by the Convention. For its part, Germany specified that it recognised as minorities in its territory Danish and Wendish groups whose members were German citizens. In addition, Germany expressed in the Declaration its intention to apply the Convention to members of ethnic groups that are traditionally settled in Germany, such as Frisians, Synthies and Roma, provided they had German citizenship.¹⁴ Consequently, Germany has explicitly declined application of the Framework Convention to all other (unnamed) minorities, on the ground of their not being autochthonous.

¹⁴ Council of Europe, *Human Rights Information Bulletin*, No. 41 (July–October 1997), January 1998, p. 42.

Similar reservations have been made by some other countries. The effect has been to limit the scope of the Convention (and consequently the concept of national minority) to groups traditionally inhabiting the territory of those countries (e.g. Austria, Slovenia), that is to nationals "maintaining long-standing, strong and permanent relations" with the respective country (Estonia, Switzerland).¹⁵

2. Critical Review of Some Solutions

Although any generalization may be unrewarding, the above-mentioned arrangements, characteristic of typical representatives of Western democracies, such as Germany and Austria, and those of the countries in transition, such as Hungary and Slovenia, whose way of regulating this issue is, basically, positive, may still afford grounds for specific criticism. The relevant arrangements under some of the most recent provisions of certain countries (Yugoslavia, Croatia) have also been cited.

All these countries have adopted, as logical, the distinction between autochthonous and "new" minorities, so that they reserve adequate protection only for traditional minorities, and not for domestic citizens who belong to the so-called immigrant minorities.

It is easy to note, however, that regardless of the technique applied, the meaning of distinguishing between autochthonous and allochthonous minorities remains always the same. This is by no means an abstract desire to show that some minorities are more successful at living together with the majority population, but just an intention to treat as minorities only the specific groups that are recognised by a given state. Such a distinction is easy to understand. First of all, it introduces some kind of "order" in this area as well as reduces the number of minorities, which facilitates financial planning and performance of all the other duties of the state towards minorities. At the same time, should there be a political need not to recognise the existence of a minority, all that needs to be done is to deny it one of the requisite, ill-defined characteristics, such as "autochthonous character." Finally, this is a way of reducing the international obligations of states, since they can avoid these by implementing them solely as far as a specific and a narrow "autochthonous" minority is concerned.¹⁶

What is more surprising is that there are also authors who defend the conception of distinguishing between autochthonous and allochthonous minorities (although they come mainly from countries which have adopted the above practice).

One argument for not extending protection and a corresponding status to "new" minorities is that international law and the constitutions and statutes of modern countries guarantee a special status only to traditional and typical national (ethnic) minorities, so that there is no practical need for protection of the allochthonous category. Moreover, it is pointed out that it comprises persons who have come relatively re-

¹⁵ List of declarations made with respect to Treaty No 157, *Framework Convention for the Protection of National Minorities*, Complete chronology on: 24/10/02, <http://conventions.coe.int/treaty/EN/Declarc-List.asp?NT=157&CM=&DF=>.

¹⁶ The example of Germany is illustrative in this respect.

cently to a given country or that even if they have been living there for two or three generations, they usually do not have citizenship of that country, so that like all other aliens they enjoy only the fundamental human rights, but not those belonging to minorities. It is even a fact that naturalised immigrants who have thereby acquired all the rights of domestic citizens are still not officially granted the status of distinct immigrant communities; consequently, the fact of becoming a domestic citizen does not change anything in the minority status of the above categories.

Such reasoning, however, at once invites the objection that it reverses the order of things: the existing practice has proclaimed the rule, serving as a source of acceptable solutions, instead of primarily determining fair solutions.

The concept of distinguishing minorities along the above-mentioned lines and thus creating discrimination is unacceptable due to the following reasons.

A. Incompatibility of the Concept with International Law

The idea of classifying minorities into autochthonous and allochthonous and, consequently, recognising only the former category's entitlement to minority status is not compatible with international law. All international documents relating to human rights insist on equality and on prohibition of any kind of discrimination on the grounds of personal characteristics, and particularly ones having to do with ethnic origin, language, religion and the like, which are precisely the characteristics used as impartial criteria in discriminating between minority groups and the majority population. The relevant references are to be found in Article 2 of the Universal Declaration of Human Rights (1948), Articles 1–2 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 2 of the International Covenant on Economic, Social, and Cultural Rights (1966), Article 2 of the International Covenant on Civil and Political Rights (1966), Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950), Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000), etc.

In addition to these provisions guaranteeing in a general manner the prohibition of any kind of discrimination, all other relevant specific international documents also insist on equal treatment of minorities, both between themselves and in relation to domestic population, which certainly includes members of other (autochthonous, recognised) minorities. Thus, Article 4(1) of the 1995 Framework Convention on the Protection of National Minorities explicitly provides as follows:

“The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.”

Although this provision refers to non-discrimination of members of a minority as regards the majority population, it can also be applied in the matter of equal treatment and prohibition of discrimination between various actually existing minorities (regardless of the time dimension of their living on a given territory). Moreover, there is

no provision in the Framework Convention regulating the specific rights of minorities and their members¹⁷ and/or the duties of the member states that could be taken to reserve these rights and freedoms only for autochthonous minorities; such minorities are not even mentioned in the text—quite the contrary: the Convention in all its provisions almost always refers to a corresponding right of “every member of a national minority.”¹⁸

The only three provisions that could be interpreted as an indirect acknowledgement of the importance of the attribute of autochthony are to be found in Articles 10(2), 11(3) and 14(2) which refer to “areas inhabited by persons belonging to national minorities traditionally or in substantial numbers” where states are required, subject to certain conditions, to endeavour to ensure them the possibility of using the minority language (in relations between members of the minority and with the administrative authorities and/or in the sphere of the language used on road and other public signs) and to provide them with adequate opportunities for being taught the minority language or for receiving instruction in this language. Consequently, (i) in this case the element described as “inhabited traditionally” is linked to a specific area and not to any minority as such; (ii) this element is taken as an alternative, meaning that the relevant arrangements refer also to areas not inhabited by minorities, but which still have a substantial number of such groups; (iii) the rights connected to these additional requirements are only ones concerning the official use of language and the possibility of education in the mother tongue, which is entirely logical (in this way the aforementioned contractual obligations of the states are rightly limited to areas that objectively require such treatment).

All other international documents relating to minority rights, such as the 1966 International Covenant on Civil and Political Rights (Article 27), the 1992 UN Declaration of Rights of Members of National and Ethnic, Religious and Language Minorities, the main CSCE/OSCE documents, as well as other instruments in this field, envisage the rights of members of the minorities without making them dependent on the element of autochthony. Moreover, to be consistent to the end, one should acknowledge that, contrary to the widely accepted view that minority protection is enjoyed only by domestic citizens, the aforementioned legal sources do not reduce minorities to domestic citizens only! In other words, should one try to find the relevant ground only in international sources, it would be possible to conclude that there is no reason for not extending protection of minority rights to aliens as well! Viewed from

¹⁷ These provisions refer to: requirements guaranteeing the conditions necessary for preserving and fostering the culture of national minorities and preservation of the essential elements of their identity (Article 5(1)), refraining from policies and practices of assimilation of minority members against their will (Article 5(2)), freedom of peaceful assembly, freedom of association, freedom of expression and freedom of thought, conscience and religion (Article 7), freedom to manifest religion or belief and establish religious institutions, organisations and associations (Article 8), freedom to hold opinions to receive and impart information and ideas in the mother tongue, without interference by public authorities and regardless of borders (Article 9), freedom to use the mother tongue freely and without interference, privately and in public, orally and in writing (Article 10(1)), including the right to use their own surnames and first name in the minority language (Article 11(1)), the right to set up and to manage their own private educational and training establishments (Article 13(1)), etc.

¹⁸ Author's italics.

this angle, classifying the relevant domestic citizens as belonging to autochthonous and allochthonous minorities would seem even more absurd.

After all, not a single known definition of minorities, regardless of the number of words used to describe them, and regardless of the number of elements included, requires these communities and their members to fulfil anything like an autochthony criterion.¹⁹

Given the above arguments, one must conclude that contemporary international law (both universal and European) does not restrict minority rights and rights to protection only to minorities that are autochthonous in the states they live in; it also does not in any way encourage such a practice by states – quite the contrary: the very spirit of international law prohibits any kind of discrimination, including the sort that could be applied to specific minorities on the grounds of longer settlement than others in a given area.

B. Contrariety of the Concept to the Very Idea of Protection of Minorities

Differentiation of the legal status of various ethnic minorities exclusively on the grounds of permanent inhabitation of a given area is contrary to the very aim of protection of minorities. Rights are not granted to minorities as some sort of reward for having lived for a long time in a given territory, but for the purpose of ensuring the survival of these groups and for protecting their right to distinctness. In other words, if protection of minorities is aimed at ensuring the preservation of their language, culture and other specificities, and thereby making it feasible for them to feel as equal as possible with the majority population, then it is inappropriate to make all this dependent on the element of tradition; in any case such an element is most frequently open to arbitrary interpretation.

Thus the specific rights accorded to members of ethnic minorities should in no way depend on whether a group has been living on a given territory for 10, 50 or 500 years. Due to the aim of protection of minorities, such rights should be accorded to all domestic citizens who are members of such collectivities. Otherwise, there can be no doubt that discrimination does indeed exist and discrimination is prohibited both by the present-day international legal order and the legislation of all contemporary states.

C. Basic Immorality of the Concept

Recognising specific rights only in the case of chosen minorities (even if aboriginal), and at the same time failing to accord them to one which, save for the mainly

¹⁹ An exception to the above is found in a definition in Article 1 of the Proposal of the Additional Protocol to the 1950 Convention on Protection of Human Rights and Fundamental Freedoms relating to national minorities and their members. However, it too refers to persons maintaining “long-standing, strong and stable relations” with a given state. Even leaving aside the simple fact that this definition is but one of the possible solutions, it is not difficult to see that the formulation applied is rather flexible, so that it need not be understood strictly as denying minority status to groups which, while meeting other requirements, have not lived in a given territory since time immemorial.

undefined element of traditionalism, meet all other requirements (citizenship, ethnic distinctness, desire to preserve their identity and the like) means introducing two separate categories of minorities: privileged (which enjoy specific minority rights) and non-recognised and so victimised not only because of their minority position in respect not only to the majority population, but also to the recognised (autochthonous) minorities.

It is particularly difficult, if not impossible, to justify a situation that might frequently result from applying this concept in practice, i.e. on the one hand, granting minority rights to a numerically marginal group, while not recognising the minority status of a much more numerous group of domestic citizens possessing all the characteristics of an ethnic minority – simply because it is not of an autochthonous character.

The above-mentioned example of Slovenia, which granted rather wide rights to its Italian and Hungarian minorities due to their autochthonous character (which also applies to Roma, but not other ethnic minorities that emerged after the disintegration of the former Yugoslavia), is an appropriate illustration. What does such a solution mean in practice?

According to the 1991 census, Hungarians were only the fifth minority in terms of number, while Italians and Roma were ninth and tenth respectively. The three "autochthonous" minorities numbered only 13,869 members (0.71% of the total population of Slovenia) – as compared to Croats (54,212 or 2.76%) and Serbs (47,911 or 2.44%). In other words, special rights have been recognised only for an insignificant portion of the minority population (according to the 1991 census there were in Slovenia altogether 238,968 or 12.16% non-Slovenes). On the other hand, one must acknowledge that the majority of them did not then have citizenship of that country, although in the meantime quite a number of them acquired it, but were still not recognised as an ethnic minority.

The latest census (2002) showed a decrease in the Italian and Hungarian minorities (to respectively 2,258 and 6,243) and an increase of Roma (3,246). Although some other minorities (particularly Croats and Serbs) also declined significantly, the census showed the presence of as many as 38,963 Serbs, 35,963 Croats, 32,009 Bosniaks, 6,186 Albanians, etc. In other words, of a total of 333,880 non-Slovenians, only 11,747 (only 3.5%) are members of one of the three "allochthonous," i.e. protected, minorities.

Accordingly, granting minority rights only to numerically small minorities at the expense of far more numerous ones only because of some undefined "autochthony" is rather hard to justify on moral grounds.

After all, can a right to equal treatment be denied to the "new" minorities, if at the same time they are expected to be loyal citizens and, among other things, pay taxes, participate in political life, perform military service, defend the colours of the relevant country as members of national teams, etc.?

D. Illogicality of the Concept

There are also a few more dilemmas and they are again best illustrated by practical examples. In the course of the past few years, a considerable number of Chinese have settled in Hungary. If we suppose that several thousand of them have already acquired Hungarian citizenship (a realistic hypothesis), under the existing legislative they still cannot claim minority status and the corresponding protection because they do not meet one of the basic requirements, i.e. autochthony (more precisely, they have not been settled in that country for at least one hundred years).²⁰

However, even if such a solution was somehow accepted, an illogical situation would still remain since the thousands of Chinese, Vietnamese or Indians who find themselves in the same position around the world could not enjoy protection as minorities – while at the same time the 37 Armenians in Hungary (according to the 1990 census) are given such protection as a traditional ethnic minority.²¹

On the other hand, it is logical that, owing to the fact that a minority is recognised as “autochthonous,” all members of the parent nation of such a minority who subsequently acquire Hungarian citizenship will automatically enjoy all the benefits of minority protection. In this case, if we suppose that somehow another 100 or 1000 Armenians acquire Hungarian citizenship, these new citizens would, since the 37 Armenians have been recognised as an autochthonous minority, automatically acquire minority status with all the other rights, and all this in contrast to the situation of the above-mentioned several thousand Chinese who also are Hungarian citizens!

That such reflections are not groundless is witnessed by Yugoslavia's recent sad past. If for a moment we direct our attention to only one example, it may be noticed that, fleeing from the flames of the war raging in the territory of the former Yugoslavia, many Serbs found refuge in the territories of other states, including Hungary, and a number of these for various reasons obtained citizenship of the state they are living in. By applying the distinction between autochthonous and allochthonous minorities, these persons (new refugees), due to the fact that according to the 1990 census 2,953 Serbs (0.028% of the total population) have been living in Hungary under the status of a recognised (autochthonous) minority, were also able to enjoy certain rights reserved for minorities (for instance, education in their mother tongue). This is in contrast with the situation in Germany, with a far more numerous Serb population which has been living for generations in that country, as is the case with Austria, Slovenia and some other countries as well. Applying the above logic, all these persons continue to remain only “immigrants” with basically an unsettled status, in spite of the fact that they have citizenship of their new homeland.

²⁰ Worse still, such Chinese would not be able to acquire minority status even after a hundred years, since such status is granted only to minority groups that had settled in Hungary one hundred years *before the adoption of the relevant Law!*

²¹ MAPSTAT Hungarian Central Statistical Office, Budapest 1992. Quoted from: *Report No. J/3670 of the Government of the Republic of Hungary to the National Assembly On the Situation of the National and Ethnic Minorities Living in the Republic of Hungary*, Office of the Prime Minister, Budapest 1997, 57.

E. Lack of an Impartial Criterion in Determining Autochthony

Even if setting aside for a moment the essential reasons for making the above distinction minorities unacceptable, an analysis of the actual practice reveals that decisions on whether or not to apply it to the existing minorities are usually arbitrary and made dependent on the mind of a specific country or, more precisely, on the mood of the ruling political structure. This is also true even if the list of recognised (autochthonous) minorities is verified by the parliament and/or included in the constitutional text of a given country.

Specific example in this respect is Slovenia where Roma (Gypsies) are recognised as an autochthonous minority with the explanation that they are mentioned in historical sources as early as the 15th century. Without entering into the issue of the possibility of considering such a small group (0.12% of the total population in 1991), with a specific nomadic way of life, to be autochthonous in the first place, one still has to note that Serbs, too, when fleeing from the Turks began to settle in Slovenia in the 15th and 16th centuries (regions of Žumberak, Bela Krajina, Pivka, Kras, and others); moreover, there are several Serbian centuries-old monuments of historical and cultural value on the territory of that country, while a Serb school was founded in the town of Marindol as far back as in 1878. Is it then not true that the Serb minority (and, for that matter, some other minorities as well) is at least as autochthonous as the Roma community?

This problem has also been noted by some Slovene authors who admit that in addition to the three officially recognised minorities, other minorities exist in that country, too, such as autochthonous Croats, Serbs, Austrians, Jews, Valachs, etc. However, it is pointed out that these minorities are not numerous, which is probably intended to be an excuse for putting them into unequal position but, in fact, is evidence of a double-standard policy.²²

The purpose of the above example, at least in the context of the present paper, is not to stigmatise Slovenia because of its discriminatory policy towards minorities, but to point in general to the possible practical consequences of distinguishing minorities in such a way without firmer and more impartial criteria.

In order to avoid, as far as possible, arbitrariness in this field and to make matters clearer, Hungary, as already mentioned, has clearly determined in its 1993 law that ethnic minority status is to be granted only to groups that have been living in Hungarian territory for at least 100 years. At first glance, such a solution looks much better than one lacking any precise criteria for distinguishing between minorities. However, is a 100-year criterion sufficient as the time necessary to consider a minority autochthonous? It is probably a difficult requirement. In other words, why not 10, 20, 50 or, as the case may be, 200, 500 or 1000 years? Consequently, this numerical criterion

²² In other words, not only is the entire approach to protection of minorities in Slovenia such that it depends only on the autochthony of the minorities and not on the number of their members (which, as we see, is here being abandoned), but – which is more characteristic – the very Constitution of Slovenia (1991), in Article 64(5) explicitly provides that the rights of Italian and Hungarian autochthonous communities and their members are guaranteed *regardless of their number* (author's italics).

has been chosen arbitrarily. There can be no doubt that, should the 100-year criterion be used by some other countries, for instance Germany, that state would have to acknowledge as a full-fledged minority the Poles, who have been living in the Ruhr area since the end of the 19th century, while Slovenia would have to do the same with its Serb and some other minorities, etc.

The case of Hungary is interesting from another point of view as well. According to the interpretation of Article 1(2) of the 1993 law on minorities, the 100-year requirement is to be applied as from the adoption of this law rather than as from some future date (after the law's entry into force). That means that under such an arrangement some new minority which, say, has settled in Hungary in our times would not be considered solution as autochthonous, even after the lapse of the required 100 years!

Hungarian practice also offers other examples which point to the possibility of certain new controversial situations arising as a result of the (to our mind) really difficult problem of determining the autochthonous element as far as minorities are concerned. Thus, for instance, Article 61(1) of the cited law also lists, among the ethnic minorities living in the territory of Hungary (meaning ones which have been continually present for at least one hundred years) a Greek community, which according to the 1990 census comprised only 1,640 persons (0.016% of the total population). In order to substantiate the autochthonous character of that minority, Hungarian sources claim that they are descendants of Greek merchants who settled there in the 16th century (therefore, more than 100 years ago). The problem, however, is the relatively small number of these Greeks who have in the intervening centuries evidently undergone assimilation. The reality seems to be that today's Hungarian Greeks are descendants of the 10,000 Greeks who settled in Hungary in the period between 1948 and 1950, fleeing from the civil war in their native country. If correct, our thesis becomes but another example of use of the requirement of autochthony as and when it suits a given state;²³ while at the same time treating as "autochthons" "new" members of a particular minority, even in cases when there are considerably more genuine or presumed aboriginal members of the same ethnic group.

Despite adopting a more flexible approach, legislative systems which identify the autochthonous character of minorities with some kind of "long-standing and strong relations with the territory" of the relevant state (Yugoslavia, now Serbia and Montenegro)²⁴ or in "traditionally inhabiting the territory" of the relevant state (Croatia)²⁵ or in similar formulations, do not supply firm criteria of delimitation between traditional and new minorities. When is the above-mentioned connexion suffi-

²³ Oddly enough, Hungary in recent times, after applying a policy of strict assimilation and practically assimilating its minorities (barely 2.05 % of the total population in 1990), is eager, when presenting the relevant figures, to raise to the maximum the number of members of minorities. This is due to the fact that almost 2.8 million ethnic Hungarians live in neighbouring countries, so that this could serve as an argument for requesting equal treatment regarding the status of Hungarian minority in these countries. Moreover, in addition to official figures, the ones presented by minority organisations in Hungary (which are far from the reality) are also published in order to support the above-mentioned tendency.

²⁴ Article 2(1) of the Law on the Protection of Rights and Freedoms of National Minorities.

²⁵ Article 5 of the Constitutional Act on the Rights of National Minorities.

ciently long, and, particularly, firm enough? What does "traditionally inhabiting" mean? And, especially, who is authorised to judge the fulfilment of these requirements and who should an aggrieved party address and with what arguments in order to prove the right to call itself a minority?

Consequently, even should one accept the concept of autochthony of minorities, the practice still requires an impartial criterion for a more reliable delimitation of traditional and "new" minorities, thus preventing arbitrary categorization.

3. Concluding Considerations

Everything that has been said above makes us conclude that the distinction between autochthonous and allochthonous minorities is in fact a political and not a legal notion. If this was a legal category, in order to recognise minority status and the rights connected with it, it would suffice to have a set of basic impartial criteria applicable in every situation, no matter how difficult it would be to define them (citizenship, ethnic distinctness, desire to preserve identity, etc.). Accordingly, the status of a minority would have to be granted to every group meeting these requirements.

On the other hand, by introducing the elements of "permanency" and/or tradition as far as minorities are concerned, wide latitude would be opened up for manipulation and selective broad-mindedness towards them.

From this standpoint it is not difficult to see that the approach applied by the countries mentioned in the present paper – distinguishing between autochthonous and allochthonous minorities – does not help to achieve an equitable solution that is based on legally justifiable grounds; instead, in essence it is designed to satisfy specific political interests.

It is clear, for example, that the position of Germany, Austria and some other countries is largely determined by the problem of the so-called "guest workers" who have lived there for generations, many of whom possess citizenship, and whose requests for special minority rights might financially and in other ways place a strain on those societies. Such fears are quite understandable, but they may be easily resolved by selective granting of citizenship. In addition, it seems to have been forgotten that recognition of a certain ("new") minority does not entail the duty to provide it with a complete range of minority rights: exercise of some of these rights (e.g. instruction in minority languages) could be conditional on the number of the members of a group and their territorial concentration. It is, however, unacceptable to deny the existence of a minority as such, since this would mean, on the one hand, denying the actual state of affairs and attempting forcible assimilation, on the other, it would lead to preventing exercise of any, even elementary rights.

After all, it would probably be helpful to observe here that although the countries insisting on the autochthonous character of minorities (Germany, Austria, Slovenia, Hungary, etc.) have recently been joined by some other countries (Yugoslavia, Croatia), this is neither a general phenomenon, nor even a trend – quite the contrary: suffice it to point out that no requirements of this kind are contained in the relevant provisions

of many other countries, some of them (e.g. Ukraine, Moldavia, Czech republic) also quite recently enacted.²⁶

Based on the above reasoning, we believe that there is no question that, by invoking the element of autochthony, any state could by arbitrarily interpreting this requirement deny (usually for political reasons) the existence of a specific minority or minorities and by this means circumvent the whole system of protection of minorities. However, selective extension of rights is, essentially, no better than denying rights to everybody else – quite the contrary: it is even worse since it amounts to discrimination of certain minorities and creates an element of intolerance between them, when they are in fact entitled to the same status.

The idea of classifying minorities into autochthonous and allochthonous has direct consequences not only for members of the affected minorities but also as far as international relations are concerned. In other words, even where a government proclaims its recognition of a certain international agreement guaranteeing to minorities adequate protection, it would be rather easy for it, just by undertaking to recognise only so-called autochthonous minorities (the definition, of course, being left to the state itself), to get around its international obligations. Such a practice, however, would mean a violation of one of the fundamental rules of international law according to which treaty provisions have to be carried out in good faith (*pacta sunt servanda*).

Consequently, distinguishing between autochthonous and allochthonous minorities, even if carried out in an impartial manner (and we have seen that that is not an easy task), is acceptable only for academic and similar reasons. Making distinctions on that ground between domestic citizens and aliens is not necessary, since the latter enjoy an *a priori* different status and – at least at the level of present-day international relations – cannot expect the state in which they reside to recognise their entitlement to rights otherwise reserved for its own citizens, including the corresponding minority protection (at least not to the full extent). On the other hand, introduction of different treatment of domestic citizens belonging to minorities only on the grounds of arbitrarily determined “autochthony,” is not acceptable for the reasons discussed in this paper.

²⁶ See Article 3 of the 1992 Ukrainian National Minorities Act, Article 1 of the 2001 Moldavian Act on the Rights of National Minority Members and the Legal Status of their Organisations, Article 2 of the 2001 Czech Act on the Rights of the National Minority Members and Amendments of certain Acts. For the texts of these and other relevant provisions, see: <http://mineclres.lv/NationalLegislation/natleg.htm>

The Application of EC Law

BEDANNA BAPULY

1. Introduction

The member states of the European Union took a far-reaching decision when agreeing on the European Court and the Court of First Instance, each within its jurisdiction, to ensure that in the interpretation and application of the Treaty establishing the European Community the law is observed (Article 220 EC). That way the terms and principles of Community law were submitted to judicial control and at the same time it was recognised that European law is the basis for the economic and political integration of Europe.

Established by law, the European Communities – the European Community (EC), the European Atomic Energy Community (EAEC) and the former European Coal and Steel Community (ECSC) – have been developed and consolidated by law following their ramified integrationist aims in the framework of an autonomous, directly applicable and prevailing legal order. This legal order calls for uniform interpretation and application in all member states. The European Court of Justice (ECJ) has met this challenge: it has not stuck to the wording of provisions but opted for a dynamic interpretation thereof based on the spirit and the so-called *finalités* (“ultimate goals”) of the Treaties. Thereby the ECJ and later the Court of First Instance became the motors of European integration.

In order to guarantee a uniform jurisprudence, the authorities and courts of the member states have to apply EC law according to the latest interpretation of the European courts. Therefore, when making his/her decision, a national judge has to bear in mind the requirements of Community law for implementing the political aims of the European Union and for stimulating the emergence of a genuine European legal discourse. Only if the member states take all appropriate measures to ensure the fulfilment of their communitarian obligations, is a Common Market, and especially an Internal Market, rendered possible.

2. Community Law and National Courts

Currently, there is no uniform and common procedural law in the European Union. Generally, it is the member states which enforce Community law, and individuals have to have recourse to national courts in order to assert rights deriving from Com-

munity law.¹ From a communitarian point of view, the most essential task of national courts is the correct application of Community law.² Thereby, judges who have to resolve a case relating to Community law have to apply that law in its valid version and according to the interpretation given by the ECJ.

The Austrian legal order – like most legal systems³ – was developed over centuries as a self-contained regime and has been influenced not only by the legislature but also by the judiciary. That is why the jurisprudence of Austria's highest courts and the interpretation of Austrian law have broadly been accepted. With accession to the European Union (EU), the national legal order is complemented by the directly applicable and prevailing Community law.⁴ This imposes the duty on national authorities and courts to include Community law in their decision-making process. Consequently, national courts constitute an essential cog in the Community legal order. At the “cross-roads” of a number of legal systems, their role is to make an important contribution to the effective application of Community law and, eventually, to the development of the process of European integration.⁵

2.1. What are the Consequences Facing Courts?

The function of national courts involves a dual obligation: to interpret, as far as possible, its national law in accordance with Community law and, where that is not possible, to disapply the national law which is contrary to Community Law.⁶ As regards the obligation of interpretation in conformity with Community law,⁷ it has been established by the ECJ both in respect of primary Community law and secondary Community Law.⁸

The courts enforce Community law according to national procedural rules. Since Community law is directly applicable, there is an interplay of national, international and supranational rules. While enforcing EC law, national courts and authorities have to adhere to Community principles in order to fulfil the obligations arising out of the Treaty⁹ or resulting from action taken by the institutions of the Community. They are required to facilitate achievement of the Community's tasks (Article 10 EC).

¹ ECJ 17.7.1997, Case C-242/95, *GT-Link A/S*, [1997] ECR, I-4449, para 23 *et seq.*

² ECJ 17.5.2001, Case C-340/99, *TNT Traco SpA*, [2001] ECR, I-4109, para 35.

³ Comparative studies regarding the application of Community law are of utmost importance.

⁴ Whereas Community law prevails over the national law – even the Constitution – the law of the European Union (EU Law) is guided by principles of International Law, needs to be transposed into national law and is not part of the supranational legal order!

⁵ AG Léger, 8.4.2003, Case 224/01, *Köbler II*, [2003] ECR, I-0000, para 53.

⁶ ECJ 11.6.1987, Case 14/86, *Pretore di Salò*, ECR 1987, 2545, para 20; ECJ 26.2.1986, Case 152/84, *Marshall*, ECR 1986, 732, para 48; ECJ 7.3.1996, Case C-192/94, *El Corte Inglés*, ECR 1996, I-1281, para 16.

⁷ This means that decisions have to be in conformity with both primary and secondary Community legislation. See also: ECJ 10.4.1984, Case 14/83, *von Colson*, [1984] ECR, 1891; ECJ 10.4.1984, Case 79/83, *Harz*, [1984] ECR, 1921; ECJ 4.2.1988, Case 157/86, *Murphy*, [1988] ECR, 673; ECJ 13.11.1990, Case C-106/89, *Marleasing*, [1990] ECR, 4135. H. J a r a s s: *Richtlinienkonforme bzw. EG-rechtskonforme Auslegung des nationalen Rechts*, EUR (1991), p. 211.

⁸ AG Léger, 8.4.2003, Case 224/01, *Köbler II*, [2003] ECR, I-0000, para 54 *et seq.*

⁹ I.e. the Treaty establishing the EC.

The case law of the ECJ has played a large role in developing the function of the national courts, in reinforcing their authority within the state at the expense, in certain national legal systems, of constitutional developments.¹⁰ The autonomy of the Member States as to the making of procedural rules has been modified due to a number of principles established by the ECJ. Some of these principles might be known from the context of national law but they have been given a different meaning by the ECJ. Amongst these European principles are: the supremacy of EC law,¹¹ the interpretation of Community law in conformity with European law, the principle of non-discrimination,¹² equivalence,¹³ efficiency,¹⁴ judicial legal protection,¹⁵ legal certainty,¹⁶ protection of confidence (*bona fide*),¹⁷ proportionality,¹⁸ uniformity,¹⁹ interim relief,²⁰ ascertainment of rights conferred upon individuals²¹ and state liability.²²

The case law of the ECJ represents an important step forward in definition of the function of national courts. It entails that national courts must make the necessary effort to adapt to a legal environment which has been extended and made more complex as a result of the difficulties which may be caused by the relationship between domestic law and supranational law. However, it should be pointed out that the national courts are not left entirely to themselves; they may be assisted in their task by

¹⁰ AG Léger, 8.4.2003, Case 224/01, *Köbler II*, [2003] ECR, I-0000, para 60.

¹¹ ECJ 15.7.1964, Case 6/64, *Costa/ENEL*, Slg 1964, 585.

¹² See: Non-discrimination in the field of the fundamental freedoms and the respective jurisprudence of the ECJ in numerous cases; subsidiary: Article 12 EC; ECJ 17.7.1963, Case 13/63, *Italy versus Commission*, [1963] ECR, 357; ECJ 13.2.1985, Case 293/83, *Gravier*, [1985] ECR, 611; ECJ 17.10.1995, Case C-450/93, *Kalanke*, [1995] ECR, I-3051, para 18 *et seq*; ECJ 11.-11.1997, Case C-409/95, *Helmut Marshall*, [1997] ECR, I-6363, para 33.

¹³ ECJ 17.11.1998, Case C-228/96, *Aprile Srl*, [1998] ECR, I-7141, para 18 *et seq*.

¹⁴ ECJ 17.11.1998, Case C-228/96, *Aprile Srl*, [1998] ECR, I-7141, para 18 *et seq*; ECJ 1.12.1998, Case C-326/96, *Levez*, [1998] ECR, I-7835, para 44.

¹⁵ ECJ 19.6.1990, Case C-213/89, *Factortame I*, [1990] ECR, I-2433, para 19; ECJ 25.7.2002, Case C-50/00P, *Union de Pequeños Agricultores*, [2002] ECR, I-6677, para 41.

¹⁶ ECJ 21.9.1983, Case 205-215/82, *Deutsche Milchkontor*, [1983] ECR, 2633, para 30.

¹⁷ ECJ 3.5.1978, Case 112/77, *Töpfer*, ECR 1978, 1019; ECJ 21.9.1983, Case 205-215/82, *Deutsche Milchkontor*, [1983] ECR, 2633, para 30; ECJ 28.4.1988, Case 120/86, *Mulder*, [1988] ECR, 2321, para 23; ECJ 26.4.1988, Case 316/86, *Krücken*, [1988] ECR, 2213, para 22; ECJ 1.4.1993, Case C-31-44/91, *Lageder*, [1993] ECR, I-1761, para 22; ECJ 3.12.1998, Case C-381/97, *Belgocodex*, [1998] ECR, I-8153, para 26; ECJ 8.6.2000, Case C-396/98, *Schloßstraße*, [2000] ECR, I-4279, on 44; ECJ 11.7.2002, Case C-62/00, *Marks & Spencer*, [2002] ECR, I-6325, n0 44.

¹⁸ Article 5 EC; ECJ 26.6.1980, Case 136/79, *Panasonic*, [1980] ECR, 2033, para 19.

¹⁹ ECJ 29.1.1998, Case C- 315/96, *Lopez*, [1998] ECR, I-317, para 19.

²⁰ ECJ 19.6.1990, Case C-213/89, *Factortame I*, [1990] ECR, I-2433, para 19 *et seq*.

²¹ ECJ 6.10.1970, Case 9/70, *Leberpfennig*, [1970] ECR, 825; ECJ 5.4.1979, Case 148/78, *Ratti*, [1979] ECR, 1629, para 23 *et seqq*; ECJ 26.2.1986, Case 152/84, *Marshall*, [1986] ECR, 723, para 48; ECJ 25.7.1991, Case C-208/90, *Emmott*, [1991] ECR, I-4269, para 19; ECJ 14.7.1994, Case C-91/92, *Faccini Dori*, [1994] ECR, I-3325, para 20 *et seq*.

²² ECJ 26.2.1976, Case 52/75, *Commission v. Italy*, [1976] ECR, 277; ECJ 10.4.1984, Case 14/83, *Von Colson and Kamann*, [1984] ECR, 1891; ECJ 19.11.1991, Cases 6 and 9/90, *Franovich I*, [1991] ECR, I-5357, para 35, 40; ECJ 5.3.1996, Cases C-46/ and C-48/93, *Brasserie du Pêcheur*, [1996] ECR, I-1029, para 31, 51; ECJ Rs C-392/93, *British Telecommunications*, [1996] ECR, I-1631, para 38; ECJ 23.5.1996, Case C-5/94, *Hedley Lomas*, [1996] ECR, I-2553, para 24; ECJ 8.10.1996, Case C-178, 179, 188-190/94, *Dillenkofer*, [1996] ECR, I-4845, para 20; AG Léger ECJ 8.4.2003, Case 224/01, *Köbler II*, [2003] ECR, I-0000.

the ECJ, thanks to the system of judicial co-operation provided by the procedure of references for a preliminary ruling.

2.2. Co-operation of National Courts with the ECJ

Preliminary rulings have proved to be an important means of guaranteeing protection of rights derived from Community law for individuals who are not entitled to directly claim these rights or to challenge a measure taken by Community bodies before the ECJ.

It is up to the national administrative authorities and courts to ensure observance of directly applicable Community law and thereby guarantee the individual rights residing in Community law. So that there is a uniform European interpretation of Community law, only the ECJ is entitled to interpret European Law. National courts are entitled – and courts against whose decisions there is no judicial remedy are even obliged – to ask for an interpretation of particular questions regarding Community law which they have to resolve (Article 234 EC).²³ This holds true only if the case at issue is still pending and has raised specific points of European law. The ECJ does not answer general or hypothetical questions and does not provide legal opinions for the national judge. Apart from that, all national courts that intend not to apply a provision of secondary Community law because they believe it is contrary to the sources of primary European legislation have to ask the ECJ to rule upon the validity of the secondary norm in question.

The preliminary ruling – an interim procedure – imposes some challenging tasks on a national judge: he/she has to determine whether questions relating to Community law are relevant to the outcome of a case. If this is so, he/she has to filter the relevant points of Community law from the arguments submitted by the parties and to ascertain whether or not there already exists an interpretation of these particular questions by the ECJ.

If there is no such interpretation, the judge has to check whether he/she is obliged (this is the case if they are the last instance in a concrete matter) or entitled to refer questions to Luxembourg. In order to find the right answer the terms “court” and “tribunal” in Article 234 EC are to be taken into consideration. Under this provision, “court” or “tribunal” must possess the following characteristics: it has to be an independent, permanent body based on law, with obligatory jurisdiction, and one that decides according to legal norms.²⁴

The issue of the superfluity of a preliminary was decided by the ECJ in the case of *CILFIT*. Courts/tribunals are *not* obliged to refer to the ECJ a question concerning the interpretation of Community law raised before them only in the following circumstances:

²³ See also: Article 150 EAC and former Article 41 ECSC as well as Article 46 EU and treaties according to Article 293 EC.

²⁴ “Arbitration tribunals” do not meet these criteria.

- if that question is *irrelevant*, that is to say, if the answer, regardless of what it might be, can in no way affect the outcome of a case;²⁵
- when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a *similar case*;²⁶
- if the correct application of Community law may be so obvious as to leave *no* scope for any *reasonable doubt* as to the manner in which the question raised is to be resolved.²⁷

Only if those conditions are satisfied can a national court/tribunal refrain from submitting the question to the ECJ and take upon itself the responsibility for resolving it.²⁸ However, it must be borne in mind that Community legislation is drafted in several languages and that the different versions are all equally authentic. The interpretation of a Community law provision thus involves a comparison of the different language versions.²⁹ Even where the different versions are entirely in accord with one another, Community law uses terminology which is peculiar to it. It must be emphasised that legal concepts do not necessarily have the same meaning in national and supranational law. Every provision must be placed in its context and interpreted in the light of the provisions of Community law as a whole with regard to the objectives thereof and to its evolution at the date on which the provision in question is to be applied.³⁰

If a national judge, having taken into consideration all these criteria, comes to the conclusion that an interpretation by the ECJ is required he/she has to summarise the questions relevant to their decision in an abstract form and must also adduce the grounds for the request.³¹ Then the questions are sent (as a registered letter) by the national court³² to the Chancellor of the European Court of Justice in Luxembourg.³³ The Rules of Procedure of the Court of Justice of the European Communities³⁴ and the Protocol on the Statute of the Court of Justice³⁵ contain provisions governing procedure in the ECJ.³⁶

²⁵ ECJ 6.10.1982, Case 283/1981, *CILFIT*, [1982] ECR, 3415, para 21.

²⁶ *Ibid.*, para 10.

²⁷ *Ibid.*, para 16. Before it comes to the conclusion that such is the case, the national court/tribunal must be satisfied that the matter is equally obvious to the courts of the other member states and to the ECJ.

²⁸ *Ibid.*, para 16.

²⁹ *Ibid.*, para 18.

³⁰ *Ibid.*, para 19.

³¹ This submission has to cover both the factual (facts of the case, applications by the parties) and normative framework of the case for enabling the ECJ to determine whether answering the questions falls within its competence and to identify the usefulness of the requested interpretation to the outcome of the original case. The file of the original case should be attached. For further information see: M. D a u s e s: *Das Vorabentscheidungsverfahren nach Artikel 177 EG-Vertrag*, (1995), 123 *et seq.*

³² Article 20 para 1 Protocol on the Statute of the ECJ; ECJ 19.3.1964, Case 75/63, *Unger*, [1964] ECR, 395.

³³ Cour de justice des Communautés européennes, Bd Konrad Adenauer, L- 2925 Luxembourg.

³⁴ OJ 1991, L 176, 7.

³⁵ OJ 1988, L 319, 1.

³⁶ <http://curia.eu.int> (free of charge).

The original proceedings are adjourned and an answer from the ECJ is awaited.³⁷ The proceedings are resumed after a binding interpretation is received from Luxembourg. The national court then has to apply the so-interpreted Community law: the member states have, under Article 10 EC, the obligation to ensure enforcement of Community law.

Since preliminary rulings are formulated in a general manner, they have a far-reaching effect. Sometimes the ECJ creates law: following the publication of the preliminary rulings in the official languages of the European Union in the European Court Reports and several databases on the internet³⁸ judges in other member states benefit from the clarification as regards the interpretation or validity of Community law as well when coming across similar problems in their daily work.

3. Application of EC Law – A Challenge for Judges

The aim of a study carried out by the Research Unit for Institutional Change and European Integration of the Austrian Academy of Sciences was to find out how Austrian courts discharged their task of applying EC law after accession to the EU. In order to know more about what difficulties national courts might face in the application of Community law two questions had to be answered:

1. Do the courts' decisions conform with the interpretation given by the ECJ?
2. Have the courts fulfilled their obligation to ask the ECJ for a preliminary ruling?

The broad empirical analysis focuses on decisions of the Austrian Constitutional Court, the Administrative Court and the Supreme Court that dealt with Community law in one way or another. These decisions are accessible on the internet³⁹ and/or in print media. Although the Ministry of Justice decreed⁴⁰ that lower courts had to refer to the Ministry their cases dealing with Community law, no considerable number of cases from lower courts could be obtained and therefore the idea of covering even lower courts' decisions in the study was dropped.

The chosen and analysed data date from Austria's entry into the European Union on 1 January 1995 until mid-2002. The data comprises several hundred decisions.⁴¹ It was scrutinised in regard to the two questions mentioned above. Each and every case was summarised and evaluated from the Community point of view. The decisions were classified into the following groups: primary Community law, secondary leg-

³⁷ While the case is pending with the ECJ, the national court may withdraw its preliminary questions if it finds the questions are no longer relevant for resolving the case or initiation of a procedure under Article 234 EC was successfully challenged by a court of instance. The national court then has to inform the ECJ immediately about the withdrawal of the case and it is struck from the ECJ register.

³⁸ <http://curia.eu.int> (covers even very recent decisions); www.europa.eu.int/eur-lex and www.europa.eu.int/celex (currently free of charge).

³⁹ www.ris.bka.gv.at; www.rdb.co.at.

⁴⁰ JMZ 30.033/I.11/1999.

⁴¹ It can be assumed that the data does not cover all decisions related to Community Law, especially not one that made no mention of Community law but where European law should have been taken into consideration.

isolation, international agreements concluded by the EC and its Member States⁴² with third countries, and individual cases. The complete collection was published at Manz, Vienna, in the form of a handbook for judges, advocates, law officers and other lawyers.⁴³ The handbook contains registers of the European and national legal sources, and the European as well as Austrian decisions enable all those who have to apply European law to find reference cases quickly.

Apart from that, a database has been created comprising all preliminary questions that were referred to Luxembourg by Austrian courts/tribunals as well as the answers received from the ECJ and insofar as they already existed the decisions of the national court/tribunal following the preliminary ruling.

4. Potential Errors in the Application of EC Law

Remarkable findings were obtained: The majority of the analysed decisions were not contestable regarding either their reasoning or their result. More intense awareness and consideration of Community law show up in the reasoning of recent judgments. Proper scrutiny of Community law and the case law of the ECJ have been conducive to avoiding mistakes in the implementation of Community Law.

However, some decisions were correct in their effect but hid errors. These errors were of diverse gravity: some of them could be ignored, for instance, the lack of concrete references to the jurisprudence of the ECJ or incomplete reasoning. A few of the cases analysed showed that a request for a preliminary ruling would have been desirable. Isolated cases indicated that in crucial matters, when an interpretation was not yet by any means certain, the courts failed to ask the ECJ for preliminary ruling. The application of association agreements seemed to be particularly problematic.

These findings made it possible to draw up the following catalogue of potential errors in the application of EC law. Below are a few of the most common sources of error.

4.1. Omission of Relevant Aspects of the Case in a Decision

The ECJ has established the principle of equivalence⁴⁴ according to which it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions to protect rights which individuals derive from the direct effect of Community law. Such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.⁴⁵ It is for the national courts to ascertain whether the procedural

⁴² Meaning not only Association and Co-operation Agreements but also Europe Agreements which were concluded as the so-called "mixed agreements".

⁴³ B. Bapuly, G. Kohlegger: Die Implementierung des EG-Rechts in Österreich – Die Gerichtsbarkeit, 2003.

⁴⁴ ECJ 10.7.1997, Case C-261/95, *Palmisani*, [1997] ECR, I-4025, para 28 *et seq*; ECJ 1.12.1998, Case C-326/96, *Levez*, [1998] ECR, I-7835, para 39; ECJ 16.5.2000, Case C-78/98, *Preston*, [2000] ECR, I-3201, para 56. See also chapter I.1.

⁴⁵ ECJ 14.12.1995, Case C-430/–431/93, *Van Schijndel*, [1995] ECR, I-4705, para 17.

rules intended to ensure that rights derived by individuals from Community law are safeguarded under national law comply with the principle of equivalence. For applying this principle, each case which raises the question of whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features. In the light of this analysis, the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must – where appropriate – be taken into consideration.⁴⁶ The principle of equivalence would be infringed if a person invoking a right conferred by Community law was forced to incur additional costs and delay by comparison with a claimant whose action was based solely on domestic law. In order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules.⁴⁷

In a few of the analysed cases – maybe unknowingly in order to avoid dealing with Community law – judges have interpreted the arguments of the parties strictly and/or interpreted procedural rules restrictively.

4.2. Excursus: Association Council Decision 1/80.

There were a lot of cases pending before Austrian courts which related to the Association Agreement of the EC with Turkey. Application of the *acquis associatif* seems to have posed some problems in Austria. The international agreements of the EC, such as the Association Agreements of the EC and its member states,⁴⁸ form an integral part of Community law under the case law of the ECJ.⁴⁹ Association Council Decision 1/80 (based on the Association Agreement of the EC with Turkey) confers far-reaching rights on Turkish migrant workers in the EU: if lawfully employed in the EU for one year, Turkish workers are entitled have their work permits extended for employment by the same employer with a job still available for them. After three years, they are even free to look for the same job at a different employer. After four years, they can take up any employment (Article 6). Family members of a Turkish worker enjoying rights under Article 6 of Association Council Decision 1/80 who have obtained entry permits for the member state where the integrated worker is living are entitled to apply for any job offer after lawfully residing with the Turkish worker for three years (however, workers from EU member states may receive pre-

⁴⁶ *Ibid.*, para 19.

⁴⁷ ECJ 16.5.2000, Case C-78/98, *Preston*, [2000] ECR, I-3201, para 60 *et seq.*

⁴⁸ These are the so-called mixed agreements. For further information see: B. B a p u l y: *Die Implementierung der Assoziierungsabkommen der EG mit den Mittel- und Osteuropäischen Ländern im Lichte der Rechtsprechung der österreichischen Höchstgerichte* (2001).

⁴⁹ ECJ 30.4.1974, Case 181/73; *Haegeman*, [1974] ECR, 449, para 1; ECJ 30.9.1987, *Demirel*, Case C-12/86, [1987] ECR, 3719, para 7ff; ECJ 14.11.1989, Case 30/88, *Greece versus Commission*, [1989] ECR, 3711, para 12; ECJ 20.9.1990, Case C- 192/89, *Sevince*, [1990] ECR, 3461, para 8.

ferential treatment); after five years of lawfully residing with their Turkish relative, they have free access to any job (Article 7). Children of Turkish migrant workers who have completed vocational training in their parent's member state of residence have the right⁵⁰ – irrespective of the duration of their stay in this country – to apply for any job, if their parent has been lawfully employed in this State for at least three years (Article 7 para 2).

Example: a Turkish migrant worker applied in Austria for a work permit (after his old one had expired) under Association Council Decision 1/80. The working permit was refused based on provisions of the Employment of Foreign Workers Act. The applicant did not specify precise dates and places of employment. Therefore, the court did not examine the case under Article 6 of Association Council Decision 1/80. Community law does not require national courts to raise of their own accord an issue concerning a breach of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.⁵¹

In this case the context of the pleading allowed the Court to check whether rights conferred by the Association Council Decision 1/80 had been established.

4.3. Misinterpretation of the Jurisprudence of the ECJ

Example: existing case law was applied to cases which did not really correspond to a case decided by the ECJ. The jurisprudence on primary legislation was applied to the *acquis associatif*. Even if the wording of a Founding Treaty and the Association Agreement are identical, the interpretation might not be. Even if the provisions in the Agreement are based on Community freedoms.

4.4. Reasoning of a Decision Is a Duty Residing in Community Law (Effective Legal Protection)

In some cases, the courts gave no or an unsatisfactory reasoning or no or a wrong reference to the jurisprudence of the ECJ.

Example: a court excluded a right based on provision X, whereas the right could have been allowed under provision Y. The daughter of a Turkish worker did not possess an entry permit for the purpose of a family reunion; she was, therefore, refused a work permit. Should she have completed vocational training in the EU, no permit for family reunification would be required. This could be presumed since she had lived in Austria since her childhood. In the event of her not having completed vocational training in Austria, this fact should also have been mentioned in the reasons for the decision.

⁵⁰ Children do not need a permit to enter the country: ECJ 5.10.1994, Case C-355/93, *Eroglu*, [1994] ECR, I-5113, para 22.

⁵¹ *Van Schijndel*, *supra* n., para 20.

4.5. Ignoring the Terminology of Community Law

Terminology belonging to the context of national law is often confused with the terms used in Community law. Also, the latter do not necessarily correspond to the meaning of an identical or similar term in the Association Agreement.

4.6. Non-fulfilment of the Duty to Ask for Preliminary Rulings

The empirical work revealed that in a good many of cases courts against whose decision there is no judicial remedy did not comply with their obligation to refer questions concerning interpretation of EC law to the ECJ though the *CILFIT* criteria⁵² did not apply in these particular cases. "Courts" and "tribunals" in the sense of Article 234 EC⁵³ are only exempt from this obligation if the point of Community law is not relevant or if the ECJ has already ruled on that question in a similar case or if there can be absolutely no doubt about its interpretation.

The European Court of Justice has ruled on the temporary effect of Community law in a number of cases. In *Ciola*, it stated that a prohibition which is contrary to a Community freedom, laid down *before* the accession of a member state to the EU not by a general abstract rule but by a specific individual administrative decision that has become final, must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date of accession.⁵⁴

In *Saldanha*, the ECJ ruled that since the Act of Accession contains no specific provisions whatsoever with regard to the application of Article 12 EC of the Treaty – the principle of non-discrimination – this principle must be regarded as being immediately applicable and binding on the acceding member state from the date of its accession, with the result that it applies to the future effects of situations arising *prior* to that new member state's accession to the Communities. Therefore, from the date of accession, nationals of another member state can no longer be made subject to a procedural rule which discriminates on grounds of nationality, provided that such a rule comes within the *ratione materiae* of the EC Treaty.⁵⁵

Example: a Turkish migrant worker had been working in Austria long before this country became a EU member. Regarding the question as to whether the period prior to accession to the EU has to be taken into consideration for the family members of the Turkish migrant worker in order to be eligible for rights under Association Council Decision 1/80 a request for a preliminary ruling was necessary.

4.7. Questionable Withdrawal of Requests for a Preliminary Ruling

Since the ECJ has a heavy workload, national judges have to take their task as regards co-operation with Luxembourg seriously and should examine carefully whether

⁵² *CILFIT* Case, *supra* n., paras 10, 16, 21, 25.

⁵³ See chapter 2.1.

⁵⁴ ECJ 29.4.1999, Case C-224/97, *Ciola*, [1999] ECR, I-2517, para 34.

⁵⁵ ECJ 2.10.1997, Case C-122/96, *Saldanha*, [1997] ECR, I-5325, para 14.

an interpretation by the ECJ is really required in order to avoid withdrawals of their questions. In Austria, quite a considerable number of preliminary questions have been withdrawn. The withdrawal of requests for a preliminary ruling may have several reasons over which courts/tribunals do not necessarily have any influence. This is the case when parties withdraw an action or if proceedings are resolved by means of an amicable settlement or by acknowledgement. However, withdrawals by parties can be avoided as well: for instance, when identical questions have already been asked for many times or when courts misinterpret precedents that have been laid down by the ECJ.

4.8. Inadmissible Preliminary Questions

It is not unknown for courts to refer questions to the ECJ which did not fall within the ECJ's competence, questions which either concerned the compatibility of national law with supranational law or were hypothetical questions or questions which did not concern specific questions relating to the interpretation of Community law. In such cases the ECJ's reply consisted simply of a statement of incompetence.

4.9. Dispensable Multiple Preliminary References

In 2002, out of 216 requests for a preliminary ruling 59 came from Germany, 37 from Italy and 31 from Austria. Austria – in the last four years – has always been among the top three of member states with the largest number of references of cases to the ECJ. Austria even topped the list in 1999 and 2001. Compared to that, the other countries that joined the EU in 1995, Sweden and Finland, sent in this period between three and seven cases per year to the ECJ for interpretation.⁵⁶

However, not all the cases referred to the ECJ are decided. A look at the Austrian references for a preliminary ruling shows that there were quite a lot of multiple preliminary references: all in all, the Independent Administrative Tribunal at Salzburg sent 26 references for a preliminary ruling on the question as to whether the licence requirement under the law governing the acquisition of land (*Grundverkehrsgesetz*) is in conformity with the Community principle of freedom of movement of capital.

5. Sanctions for Non-Compliance with EC Law by the Judiciary

5.1. The Infringement Procedure Under Article 226 EC Treaty *et seq*

If the European Commission considers that a member state has failed to comply with its obligations under the Treaty or secondary Community legislation, the State concerned is given the opportunity to submit its observations before the Commission delivers a reasoned opinion. If the member state does not comply with the opinion within the allotted period of time, this may lead to an infringement procedure before the ECJ.

⁵⁶ <http://www.curia.eu.int/en/instit/presentationfr/index.htm>.

In the light of Community law, member states are liable for any violation of EC law committed by any State organ. A State can even be held liable for decisions of domestic courts which do not comply with Community law. In such cases, the State concerned is required to take the necessary measures to comply with the judgement of the ECJ. The infringement procedure is problematic for several reasons from the legal and the political point of view. It would be an over-reaction if the European Commission instituted such a procedure for any evident miscarriage of justice by courts against whose decisions there still is a remedy. It could be argued that the situation is different in the case of courts of last instance. In the past, the Commission tended not to initiate the infringements procedure even in cases where it was quite obvious that a national court had not pursued uniform application of Community law.⁵⁷

However, more recently the Commission brought an action before the Court of Justice against Italy⁵⁸ on the basis of the fact that application of the generally applicable rules of evidence within the Italian legal order renders it difficult, not to say impossible, for taxable persons who have paid levies contravening mandatory rules of Community law to recover such unduly paid amounts. These rules of evidence are interpreted by Italian judicial authorities and applied by Italian tax authorities in such a way as to require taxable persons to provide negative evidence to the contrary, that is, to prove that they have not passed on the unlawful charges to their customers. Advocate-General Geelhoed in his opinions argued that a member state must ensure that the objectives pursued by Community law are attained in the legal order, irrespective of which State agency by its acts or omissions has occasioned the failure in that regard. Therefore, the question arose whether national case law could constitute a ground for determining a Treaty infringement and the Advocate-General was of the opinion that this was possible under certain circumstances while also pointing out that such a finding would not encroach on the independence of the judiciary.⁵⁹

Under the following circumstances national case law may form the basis for a Treaty infringement:

(a) Status of the judicial decisions concerned⁶⁰

Discrepant national decisions by the highest courts which, within the national legal order, are to be regarded as binding on the lower courts, may undermine the effectiveness within the member state of the Community provision in question or lead to undesirable consequences for competition in the internal market or for interstate commerce.

⁵⁷ M e i c r: "Zur Einwirkung des Gemeinschaftsrechts auf nationales Verfahrensrecht im Falle höchstrichterlicher Vertragsverletzung," in: *EuZW* 1991, p. 11. At the beginning of the nineties, the Commission investigated an infringement complaint brought against the German Bundesfinanzhof, the Regional Court of Cologne and the Federal Court but the so-called "Pingo-Hähnchen" case was not brought before the ECJ and the procedure silted up. The Commission had in any event the right, but not the duty, to apply to the ECJ for a declaration that the alleged breach of obligations had in fact occurred.

⁵⁸ Advocate-General Geelhoed, 3.6.2003, Case C-129/00, *Commission vs Italy*.

⁵⁹ *Ibid.*, paras 56, 66.

⁶⁰ *Ibid.*, para 63.

(b) Structural nature of failure to fulfil Community obligations⁶¹

Where there is a trend in national case law which runs counter to Community obligations or where such case law has been maintained for a long period of time or a new development is upheld on appeal and/or on an appeal in cassation, a failure to fulfil Community obligations may be presumed structural.

(c) Effect of national decisions on attainment of objectives⁶²

If national decisions entail that persons who derive rights from Community law in a member state have to operate under different conditions than competitors or (legal) persons in comparable circumstances elsewhere in the Community, that clearly impinges on the uniformity of Community law, undermines effectiveness and disregards the rights of citizens.

Advocate-General Geelhoed concluded that the challenged Italian provision, by its vagueness,⁶³ had permitted the persistence or development of a legal practice which is not in concordance with the ECJ's case law⁶⁴ and therefore Italy had failed to fulfil its obligations under the EC Treaty by making it impossible or extremely difficult for taxable persons to exercise their right to recovery of charges imposed in breach of Community law.

Of course the Opinions of the Advocate-General are not binding on the ECJ; they merely propose a legal solution of the case. However, should the ECJ find a court of last instance in breach of EC law on the ground of non-compliance with the jurisprudence of the ECJ – or in the future even because of failure to request a preliminary ruling – this would have no direct effect on an individual who has been denied rights residing in Community law by a national court. It is true that the individual may request the Commission to commence an infringement procedure but he/she has no enforceable right for such a procedure to be initiated.⁶⁵

Ascertainment of a judicial violation of Community law has an effect *pro futuro*. Suppose the ECJ declares that a national court in its decision has committed such a breach, the legal consequences could no longer be altered since the judgement has already come into force. Therefore, only a fine can be imposed on the member state concerned in the course of a second infringement procedure for non-compliance.

⁶¹ *Ibid.*, para 64.

⁶² *Ibid.*, para 65

⁶³ In reality the burden of proof lies with the taxable person because the authorities basically interpret the provision in such a manner as to assume that the taxable person has passed on the unlawful charges to a third person/customers.

⁶⁴ According to the ECJ's settled case law (ECJ 9.11.1983, Case 199/82, *San Giorgio*, [1983] ECR, 3595, para 12; ECJ 14.1.1997, Case C- 192/95-C-218/95, *Comateb*, [1997] ECR, I-165, para 23; ECJ 9.2.1999, Case C-343/96, *Dilexport*, [1999] ECR, I-579, para 23; ECJ 8.3.2001, Case C- 410/98, *Metallgesellschaft*, [2001] ECR, I-1727, para 84; ECJ 11.7.2002, Case C-62/00, *Marks & Spencer*, 2002 [ECR], I-6325, para 30) a member state is obliged to repay taxable persons levies imposed by breach of Community Law. There is, however, one exception: a member state may resist a request for repayment of unduly paid amounts where it is established that the charge has been borne in its entirety by another person and repayment would constitute unjust enrichment.

⁶⁵ ECJ 14.2.1989, Case 247/87, *Star Fruit*, ECR 1989, 291, para 12 ff.

5.2. State Liability

Advocate-General Léger in an opinion of April 8, 2003 in *Köbler II*⁶⁶ argued that member states have an obligation to make good the loss or damage caused to individuals by an inexcusable breach of Community law by a court against whose decision there is no judicial remedy. This conclusion was based on the ECJ's broad interpretation of the principle of State liability for breaches of Community law and the decisive role of national courts in the implementation of Community law.

The principle that State liability is inherent in the system of the EC Treaty⁶⁷ was established by the ECJ in *Francovich*⁶⁸ in a situation where a member state failed in transposing a directive to give it direct effect, which prevented individuals from invoking before national courts the rights conferred on them by this directive. The ECJ underlined that just as Community law imposes obligations on individuals so it is also intended to create rights which arise not only where they are expressly granted by the EC Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the member states and the Community institutions.⁶⁹

Since national courts, whose task it is to apply the provisions of Community law in areas within their jurisdiction, must ensure that those rules take full effect and must protect the rights which they confer on individuals,⁷⁰ the ECJ deduced that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by breach of Community law for which a member state can be held responsible.⁷¹ According to Article 10 of the EC Treaty, member states are required to nullify the unlawful consequences of a breach of Community law.⁷² Therefore, Community law has *per se* imposed on the State an obligation to make reparations *vis-à-vis* individuals. This obligation constitutes a fundamental principle of Community law. Like the principles of the primacy of Community law and of direct effect the principle of state liability helps to ensure the full effectiveness of Community law through effective judicial protection of the rights belonging to individuals under the Community legal order. The principle of state liability constitutes an essential extension of the general principle of effective judicial protection and of the right to challenge a measure in the courts.

In order to obtain effective judicial protection of the rights stemming from Community law it is not sufficient for individuals to invoke Community law before a supreme court or for that court to apply Community law correctly. It is essential, if

⁶⁶ Opinion of Advocate-General Léger, 8.4.2003, Case 224/01, *Köbler II*, [2003] ECR, I-000.

⁶⁷ *Brasserie du Pêcheur*, Case, *supra*, para 31.

⁶⁸ ECJ 19.11.1991, Cases 6 and 9/90, *Francovich*, [1991] ECR, I-5357, para 41.

⁶⁹ *Ibid.*, para 31.

⁷⁰ *Ibid.*, para 32; ECJ 9.3.1978, Case 106/77, *Simmenthal*, [1978] ECR, 629, para 16, ECJ 19.6.1990, Case C-213/89, *Factortame*, ECR 1990, I-2433, para 19.

⁷¹ *Ibid.*, para 33.

⁷² *Ibid.*, para 36.

the supreme court delivers a judgement contrary to Community law, for individuals to be in a position to obtain redress, at least when certain conditions are fulfilled. Where there is no possibility of an appeal against a decision of a court (of last instance), an action for damages alone serves to ensure restoration of the infringed right and to ensure that the effective judicial protection of rights belonging to individuals derive under Community law is of an appropriate level.⁷³ However, reinstating the financial substance of an individual's right falls short of what is required; it is a minimum remedy compared with full substantive reinstatement, which remains the optimum means of protection.⁷⁴

In *Brasserie du pêcheur and Factortame* the ECJ held that the principle of state liability holds good for any breach of Community law, whatever the organ of the State whose act or omission was responsible for the breach.⁷⁵ This follows from the need for Community law to be uniformly applied throughout the European Union. Therefore, domestic rules as to the division of powers between constitutional authorities cannot, at the discretion of individual member states, alter the guarantee of compliance with Community law and consequently the liability of the state.⁷⁶

In Community law, unlike in international law,⁷⁷ actions for state liability can be brought directly by individuals. The ECJ has not expressly acknowledged, in the Community legal order, the principle of state liability for the acts or omissions of courts of last instance. In fact, it has also – implicitly, but necessarily – extended the principle of state liability to judicial acts.⁷⁸ Acknowledgement of state liability can be considered as the corollary of the responsibility imposed on courts of last instance for direct, immediate and effective protection of the rights belonging to individuals under Community law.⁷⁹

Damages must be claimed in the framework of the national law governing the state liability. Austria's law on state liability⁸⁰ excludes liability for decisions of the supreme courts. This provision has to remain unapplied in cases where decisions of courts of last instance cause injury and where three conditions are satisfied: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the loss or injury sustained by the aggrieved party.⁸¹ In deciding

⁷³ Opinion of Advocate-General Léger, in *Köbler II*, ECR 2003, I-000, para 38.

⁷⁴ *Ibid.*, para 39.

⁷⁵ *Brasserie du Pêcheur*, Case, para 31 *et seq.*

⁷⁶ Opinion of Advocate-General Léger, in *Köbler II*, para 43.

⁷⁷ In International law actions for state liability can only indirectly be brought by individuals.

⁷⁸ Opinion of Advocate-General Léger, 8.4.2003, Case 224/01, *Köbler II*, [2003] ECR, I-000, para 51. See also: B. B a p u l y, G. K o h l e g g e r: *Die Implementierung des EG-Rechts in Österreich – Die Gerichtbarkeit* (2003), p. 32; B a r a v: *Responsabilité et irresponsabilité de l'État en cas de méconnaissance du droit communautaire*, Liber Amicorum Jean Waline, p. 435; D. S i m o n: "La responsabilité de l'État législateur pour des dommages causées aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté," *RFDA* (May–June 1996), p. 585.

⁷⁹ Opinion of Advocate-General Léger, in *Köbler II*, ECR 2003, I-000, para 52.

⁸⁰ Article 2 para 3 AHG (Amtshaftungsgesetz).

⁸¹ ECJ 4.7.2000, Case C-424/97, *Haim*, [2000] ECR, I-3123, para 36; Case C-224/01, *Köbler II*, [2003] ECR, I-000, para 51.

whether the breach is sufficiently serious the national court has to take into consideration the particular role of judges when stating that a violation has been “obvious.” However, in *Köbler II* the ECJ concluded that a violation of Community law by a decision of the Austrian Administrative Court was not obvious and therefore was not sufficient grounds for the member state of Austria to be held liable.⁸²

Even if in the future cases arise where member states are held liable for judicial wrongs and national courts grant compensation for a violation of Community law by the highest courts, the compensation for the wrong does not, of course, remove the violation of individuals’ rights itself.

6. Conclusions

Finally, some brief remarks on the changes facing the judiciary faced after accession to the EU and some suggestions for making the application of Community law easier for lawyers.

Changes:

- a. Strict positivism of norms has to be given up;
- b. The hierarchy of norms will conflict with the principle of supremacy of EC law;
- c. Erosion of the “legal principle” according to which enforcement is strictly bound to acts;
- d. The case law of the ECJ has to be taken into consideration in decision-making;
- e. The dynamics of Community law will require permanent training in EC law;
- f. Finding the legal sources becomes more complex and difficult (non-consolidated versions);

Proposals:

- a. Elimination of shortcomings through intensified training in Community law that responds to the specific needs of judges;
- b. Continuous dialogue between legal science, the ministry of justice and the judiciary;
- c. Special departments in the highest courts dealing with Community law and appointment of specially trained judges;
- d. Databases on national decisions relating to Community law and on preliminary rulings initiated by one’s own country;
- e. Legislature: amendments of procedural rules and the Austrian State Liability Act.

⁸² ECJ 30.9.2003, Case C-224/01, *Köbler II*, para 126.

Interpretation of Treaties in the Light of the Relationship Between International Law and the Law of the European Communities (European Union)

ARTUR KOZŁOWSKI

I.

Interpretation of the law of the European Communities (EU law) causes controversy due to the legal nature of the European Communities (European Union¹) and the degree of autonomy exhibited by their evolving normative system. Differences in the assessment of the relationship between international law and EC/EU law have a direct impact on understanding of the nature of the interpretation of the treaties discussed in this paper.

The functioning of the EC/EU is rooted in international agreements.² They define the aims of the above entities, their powers, and the scope of their jurisdiction. The legal capacity of the European Communities in the area of international law is indisputable. As a result, acting on their own behalf, they can conclude treaties with third countries or other international organisation. However, the underlying principle of this legal capacity stimulates discussion. The ultimate result of interpretation of the founding treaties or treaties concluded by the EC/EU should be based on the assumption that the EC/EU is not a sovereign subject of international law.³ The practice of EC/EU member states regarding relations between the state and an international organisation has been reduced to unequivocal and unquestionable behaviour. The EC/EU

¹ The new Draft Treaty establishing a Constitution for Europe proposes the introduction of a uniform concept of the European Union. Under the current international agreements the EU covers 'two areas of a different legal nature', comprised of regulations specific to the European Communities and forms of direct international cooperation (J. B a r c z (ed.): *Prawo Unii Europejskiej*, 2nd ed. (2003), pp. 54-55).

² Article 281 of the Treaty establishing the European Community (further: TEC). See also opinion in this regard of the European Court of Justice (ECJ), provided in the case C-327/91 *France vs. Commission*, ECR [1994], p. I-3674. Certain controversies can relate to the legal capacity of the European Union. The new Draft Treaty establishing a Constitution for Europe formally settles such issues in favour of the subjectivity of the international law.

³ This article is to some extent a continuation of the discussion presented in A. K o z ł o w s k i: "Kontrowersje wokół prawnomiędzynarodowego charakteru Wspólnot Europejskich (Unii Europejskiej)," in: J. K o ł a s a, A. K o z ł o w s k i (eds): *Prawo międzynarodowe publiczne a prawo europejskie* (2003), p. 189 *et seq.*; see also: T. C. H a r t l e y: "International Law and the Law of the European Union – a Reassessment," 72 *BYIL* (2001), p. 1 *et seq.*

should fulfil its ambitions within the concept of an international organisation.⁴ There is still room for debate about its complexity and the multitude of goals and objectives. Even so, it seems unlikely that the above discussion will be able to break away from the theory of origin, i.e. to reject or remodel the legal basis of the sources which gave rise to the EC/EU. If we were to acknowledge that the EC/EU is already an example of a state entity, either in the form of a federation, a confederation, or a completely new format of cooperation among states equipped with an appropriate level of legal capacity under international law, this would have to influence directly the approach to the issue of interpretation of the related treaties. It would be necessary, then, to define a set of concepts for this new phenomenon. The re-evaluation would cover both the subjective aspect of the definition (who provides the definition or on whose behalf?) and the objective aspect (is the interpretation based on the treaty as such or on a source of laws and responsibilities of a different kind?).

The functioning of the European Communities (European Union) is closely related to the concept of autonomy. The European Court of Justice (ECJ) has stressed on many occasions that the legal order of the EC/EU is a new, autonomous system in the area of international law.⁵ In the light of this statement we should, however, also remember that the member states have defined the scope of autonomy. These states can also, acting unanimously, reshape that scope, both by expansion and limitation. The cited legal feature of the EC/EU means that in the discussed system there are specific rules of law and principles which, when legal requirements arise, should be followed first. This is a maximal effect. On the other hand, in the negative (minimal) approach, this autonomy can involve simply excluding the application of rules of law stemming from a wider set which includes the autonomous system. Such representation of the essence of the EC/EU law leads to a simple, but nonetheless important, conclusion: when there are no exclusions and when no specific rules of law have evolved, the theory of EC/EU origin still points to international law as the appropriate point of reference with regard to assessment of all factual phenomena of normative significance.

The cited autonomy feature can also apply to the issue of interpretation of treaties in the light of EC/EU law.

⁴ This idea is clearly emphasised e.g. by R. B e r n h a r d t: "Ultra Vires Activities of International Organisations," in: J. M a k a r c z y k (ed.): *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski* (1996), p. 600: "International Organisations are and remain for the foreseeable future legal persons with limited competences. This holds true also for so-called supra, national organisations like European Community; the recent discussion of the principle of subsidiarity is one example of the reluctance of States to sacrifice their residual sovereignty by conceding more or less unlimited powers to international institutions."

⁵ For example, in opinion I/91, ECR [1991], p. I-6102; see also the case 6/64 *Costa vs. ENEL*, ECR [1964], p. I-1141. In professional literature this autonomy is sometimes demonstrated on three levels: sources, jurisdiction, and structure. See on this subject: J.-C. G a u t r o n, L. G e r a r d: "Le droit international dans la construction de l'Union Européenne," in: *Droit international et droit communautaire, perspectives actuelles* (2000), pp. 21–29 (XXXIII Colloque de la Société Française pour le Droit International).

II.

Rudolf Bernhardt in *Encyclopedia of Public International Law* defines the concept of interpretation as a process as well as a result of endeavours to attribute the correct meaning to an international legal document.⁶ In one of the commentaries to the founding treaty of the European Community (the EC Treaty) the concept of interpretation is understood as an abstract examination of a body of law without direct references to the actual state of affairs. Also, this concept includes the filling of gaps in the legal order of the EC/EU.⁷ It is on the whole to be doubted whether *per analogiam* reasoning has attained normative status in international law, considering that in each case it is necessary to prove the existence of a link with the will of the subjects, which are bound by the appropriate rules if they happen to have contributed to their formation in a way specific to the system.⁸ Presumption supports logic and the resulting reasoning by analogy; however, the above presumption can be overruled by an unanimous vote of the subjects of international law.⁹ In the case of the EC/EU the filling of gaps in treaties by way of uniquely understood interpretation seems to have become a distinctive feature of the whole system.¹⁰ This does not mean that the ECJ, the body in charge of interpreting the EC/EU law (including the treaties), always takes action *intra vires*.¹¹

Therefore, although there is no confusion as to the distinction between the areas of "interpretation" and "making" of rules of law,¹² the status of "law-interpretation" and the "law-making" is contentious with regard to the interpretation of the relationship between the international and the EC/EU legal orders. The idea of widening the normative scope of rules by means of judicial interpretation is basically alien to inter-

⁶ R. Bernhardt: "Interpretation in International Law," in: R. Bernhardt (ed.): *Encyclopedia of Public International Law*, vol. II (1995), p. 1417: "In the present context interpretation means the process as well the result of endeavours to attribute the correct meaning to an international legal document."

⁷ H. von der Groeben, J. Thiesing, C.-L. Ehlermann: *Kommentar zum EU/EG-Vertrag*, vol. 4, 5th ed. (1997), p. 387: "Unter Auslegung ist die abstrakte, nicht ausdrücklich fallbezogene Ermittlung des Norminhalts zu verstehen [...] Der Begriff der Auslegung umfasst über die genaue Ermittlung des Inhalts geschriebener Worte und Sätze hinaus auch die Aufgabe, Lücken in der Gemeinschaftsrechtsordnung auszufüllen;" see also: J. Schwarze (ed.): *EU-Kommentar*, Article 220 EC Treaty (J. Schwarze) (2000), p. 1889 (hereinafter *EU-Kommentar*).

⁸ Cf. K. Wolfke: "Some Reflections on Kinds of Rules and International Law-Making by Practice," in: *Theory of International Law at the Threshold of the 21st Century*, *supra*, n. 4, p. 593: "The requirement of consent, whether we like it or not, remains not only a political, but also a solemnly accepted legal axiom, still resting on solid foundations of general state practice. The strong attachment of all states to their traditional sovereignty, manifested repeatedly on various occasions, confirm it. To neglect this fact in a debate on the question of consent would, therefore, inevitably result in its failure."

⁹ Julian Makowski inserted references to the rules of analogy in the systemic interpretation of the treaty, which is a derivative of the authentic interpretation provided on the basis of parallelisms, in which the same situation was explained in more detail (J. Makowski: *Podręcznik prawa międzynarodowego* (1948), p. 51). See also *Encyclopedia of Public International Law*, *supra*, n. 6, p. 1417.

¹⁰ See on this T. Tridimas: "The Court of Justice and Judicial Activism," 21 *ELR* (1996), pp. 199–210.

¹¹ See V. Constantinesco: "The ECJ as a law-maker: *praeter aut contra legem*?" in: D. O'Keefe: A. Bavaaso (eds): *Liber Amicorum in Honour of Lord Slynn of Hadley. Judicial Review in European Union Law* (2000), p. 77.

¹² "Unter Anwendung ist hingegen die Subsumption des konkreten Lebens Sachverhalts unter eine bestimmte Norm zu verstehen" (*EU-Kommentar*, p. 1890).

national law.¹³ Even if the special role and significance of international court rulings and the resulting interpretations is emphasised, it never leads to the conclusion that a court judgement constitutes a formal source of international law which results in general and abstract rules. Even though we are currently witnessing a renaissance of the international judiciary, the proposition that the interpretations of the International Court of Justice (ICJ) have legislative power still seems to be dogmatically untenable.¹⁴ Judges should interpret matters recognised as law in accordance with a given system. All rules of international law stem from the will of its subjects. The same principle applies to EC/EU law which after all springs from international treaties and within their constraints is developed as a complicated and complex derivative body of internal law.

In case of the European Court of Justice, the connection between interpretation and development of law understood as a change in the nature of a rule of law or the creation of a new rule of law necessary to the proper functioning of the whole EC/EU legal system meets with less opposition or even partial acceptance. For example, Ulrich Everling proposes the term “judge-made law” both for an extended interpretation (through application of the *effet utile* rule) and for direct intervention in the normative area (judicial updating of law).¹⁵

The professional literature presents various arguments in support of the special role of the ECJ in interpretation and development of law. These arguments include:

- a) the complex, sometimes unclear structure of the EC/EU treaties,¹⁶
- b) the significant number of original versions of the founding treaties,¹⁷
- c) the open nature of the founding treaties coupled with the presumption of ECJ jurisdiction,¹⁸
- d) the constitutional nature of the founding treaties emphasising the supremacy of purpose-oriented (teleological) determinants in their special form,¹⁹

¹³ Cf. G. Fitzmaurice: “The Problem of *non-liquet*: Prolegomena to a Restatement,” in: *Mélanges offerts à Charles Rousseau. La Communauté Internationale* (1947), p. 89 *et seq.*

¹⁴ See: M. Mendelson: “The International Court of Justice and the Sources of International Law,” in: M. Fitzmaurice, V. Lowe (eds): *Fifty Years of the International Court of Justice. Essays in honour of Sir Robert Jennings* (1996), pp. 81–83.

¹⁵ U. Everling: “On the Judge-made Law of the European Community’s Courts,” in: *Liber Amicorum in Honour of Lord Slynn of Hadley*, *supra*, n. 11, p. 30; a similar assessment is provided by M. Schweitzer, W. Hummer: *Europarecht*, 5th ed. (1996), p. 136: “Im Gegensatz zur üblichen deutschen Doktrin der Rechtswissenschaft, die Auslegung und ergänzende Rechtsfortbildung grundsätzlich unterscheidet – Kriterium ist dabei ‘Wortlautschränke’ – folgt der EuGH der französischen Doktrin und bezeichnet auch die Fälle klarer Rechtsfortbildung als Interpretation. Auch die exakte Abgrenzung von ergänzender Rechtsfortbildung und –findung ist ihm nicht geläufig, die nun aber gerade bei einer nicht geschlossenen, inhomogenen und unvollständigen Rechtsordnung, wie sie das Gemeinschaftsrecht (noch immer) darstellt, ins Gewicht fällt, da dieses einer ständigen Vervollständigung, Fortbildung und Lückenfüllung bedarf.”

¹⁶ T. Tridimas, *supra*, n. 10, p. 203; U. Everling, *supra*, note 15, p. 33; Th. Koopmans: “The Theory of Interpretation and the Court of Justice,” in: *Liber Amicorum in Honour of Lord Slynn of Hadley*, *supra*, n. 11, p. 55.

¹⁷ T. Tridimas, *supra*, n. 10, p. 203.

¹⁸ *Ibid.*, p. 204.

¹⁹ Ph. Manin: *Les Communautés européennes. L’Union européenne. Droit institutionnel*, 4th ed. (1998), p. 57; U. Everling, *supra*, n. 15, pp. 37–38; Th. Koopmans, *supra*, note 16, p. 54; cf. J. Klabbers: *An Introduction to International Institutional Law* (2002), p. 99.

e) the role of the ECJ as a constitutional court of justice;²⁰

f) the direct effect of the founding treaties (and EC/EU law in general) on the rights and obligations of natural persons.²¹

All things considered, the teleological determinants of EC/EU law should not lead to its systemic openness understood as obliteration of the differences between its law-making, interpretation, and application aspects; which in extreme cases could result in arbitrary law tantamount to lawlessness. In such cases, the normative limits of a regulation depend on the skills of the interpreter, his powers of persuasion, and authority. There is no need to grant such powers to the EC/EU. Their legal system can develop properly within the established framework of sources and principles of interpretation, whose constitutive element is an agreed manifestation of acceptance by the member states. The concept of sovereignty as such has not been rejected by the EC/EU member states. The supplements introduced by the EC/EU cannot be considered as a form of law-making because then, in accordance with the rules of the discussed state system, they should be wholly subordinate to such "new" law without the possibility of change or abolition. However, the EC/EU members still have access to the applicable legal instruments which allow them to influence the sources of such cooperation. Nonetheless, the effectiveness of such action depends to a large degree on unanimity on the part of the member states but unilateral acts are also permissible.²² Nor can we assume that the results of employing the interpretational methods preferred by the ECJ are limited to law-making as this would constitute a change in the legal nature of the EC/EU, and such a change has not in fact yet taken place. It is assumed that the interpretation of treaties by the ECJ must remain "clear" so as not to affect the delicate structure in which the final say, consistently with the principle of effectiveness, still belongs to the member states.²³ It is not wise to have too many Caesars. The behaviour of the ECJ with regard to interpretation cannot be associated with the concept of sovereignty; otherwise the EC/EU would present a rather odd picture of cooperation between states. Here, the member states make treaties to provide the foundations of the system, which is then extended through the particular interpretations of the ECJ. The states are bound by this legacy but they cannot abandon it even though they can abolish the whole system (*actus contrarius*). Such a model lacks a *raison d'être* resulting from presumption.²⁴ Its mainte-

²⁰ U. Everling, *supra*, n. 15, pp. 33–34; V. Constantinesco, *supra*, n. 11, p. 79.

²¹ U. Everling, *supra*, n. 15, pp. 33 and 43; cf. J. Klabbers, *supra*, n. 19, p. 99.

²² Especially in the light of the Draft Treaty establishing a Constitution for Europe, as it gives the member states the right to withdraw from the proposed form of cooperation.

²³ Cf. G. Ress: "Die Bedeutung der nachfolgenden Praxis für die Vertragsinterpretation nach der Wiener Vertragsrechtskonvention (WVRK)," in: R. Bieber, G. Ress (eds.): *Die Dynamik des Europäischen Gemeinschaftsrechts. Die Auslegung des Europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organen* (1987), pp. 61–64; *ibidem*, p. 76: "Interpretation is oriented on the identity of the treaty, whereas amendment is in principle unrestricted and without any specific limits. Interpretation is bound by the recognised methods of interpretation, the amendment of a treaty is not subject to any such confinement. Nevertheless, the differentiation between interpretation and amendment of the treaty becomes doubtful in case of an authentic interpretation. In such an event, when no rights of third parties are affected, differentiation may be neglected."

²⁴ See K. Skubiszewski: "Implied Powers of International Organisations," in: Y. Dinstein (ed.): *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (1989), p. 867.

nance would require a specific normative basis. However, even in that case an international agreement specifying the principles of such a legal system would most likely be opposed in the ratification procedure in the same way as a treaty which sought to give an international organisation unlimited powers to define its own jurisdiction.²⁵

Moreover, when analysing the teleological determinants of EC/EU law, we should remember that the objectives of the EC/EU stem from the treaties and are, therefore, the objectives of the member states, rather than the European Court of Justice. The ECJ is not charged with any particular mission other than keeping its interpretation within the defined scope of the founding treaties.²⁶ Concern about the future fortunes of the European Union as such goes beyond these limits.²⁷ When there is a need to determine and apply general rules of law common to the constitutional systems of the member states, the ECJ adopts an evaluating approach. It only chooses rules which match the EC/EU legal system and are actually present in national law.²⁸ In its interpretation, the ECJ should only cite objectives which actually stem from the treaties. If the interpretation oversteps the scope of the rules of law co-creating the system, such violation of its character and the associated axiology may be regarded as action *contra legem*.²⁹ This also applies to the practical application of the theory of implied powers. Admittedly, according to this theory the ECJ disposes of some freedom for teleological deliberations.³⁰ Still, the result of such inference cannot collide with manifestations of the will agreed by the member states; otherwise, in the long term it will lack the support provided by the principle of effectiveness.

In the light of deliberations on the nature of the interpretation of treaties performed by the ECJ, we can say that in the long term a natural person gains more from knowing for certain in what way the legal system is developing than from the direct effectiveness of EC/EU law and the growing judicial power. Obviously, this observation does not in any way question the guaranteed rights and freedoms offered by the system to an individual. It is only an attempt to determine the likely form of the EC/EU,

²⁵ R. Bernhardt, *supra*, n. 4, p. 600.

²⁶ E.P. Hexner: "Teleological Interpretation of Basic Instruments of Public International Organisations," in: S. Engel, R.A. Metall (eds): *Law, State, and International Legal Order. Essays in Honor of Hans Kelsen* (1964), pp. 123–124: "Thus even the widest interpretative range must permit a determination whether a specified meaning may or may not be covered by that text and context. The authority of an organ to interpret the text of a constituent instrument extends to the selection of one (authentic) alternative meaning among a number of possible alternatives within the interpretative range;" see also K. Skubiszewski, *supra*, n. 24, p. 860.

²⁷ Cf. U. Everling, *supra*, n. 15, p. 43; Th. Koopmans, *supra*, n. 16, p. 55: "The Court of Justice occasionally appears to be worried about the course of events in the Community: will the entire fisheries policy end in disaster because one Member State refuses to collaborate? Will the process of harmonisation of national law ultimately fail because one or two Member States are not able or willing to implement Community directives?" This problem is assessed differently by V. Constantinesco, *supra*, n. 11, p. 77: "A departure from the wording of a Treaty has to be justified by technical considerations (*i.e.* by legal values), not only by political preferences or choices;" *id.*, p. 79: "In other words, the Judge's mission is to respect the will of the constitutional Powers, but also to bring coherence to the articulations between principles and rules, establishing an order of preference and therefore contributing to the reconstruction of the normative system instead of deconstructing it."

²⁸ Th. Opperman: *Europarecht*, 2nd ed. (1999), p. 186.

²⁹ See V. Constantinesco, *supra*, n. 11, p. 77; differently T. Tridimas, *supra*, n. 10, p. 209.

³⁰ See K. Skubiszewski, *supra*, n. 24, p. 858.

the limits to transformation of the applicable law, and the consequent profile of the whole system. Do we want and fully understand the concept which says that the rights of an individual are better protected by an amorphous Organisation rather than by the State?³¹ If so, then the idea in its present form would require direct acceptance by the member states.³²

None of the arguments presented above justifies eliminating the division of EC/EU law into interpretation and law-making. This division must remain clear because it is one of the values of this system.³³ The specific division into law-making and interpretation is a value *per se* and has a fundamental importance for relations between a member state and the EC/EU, for instance, with respect to the basic internal market freedoms. If interpretation of the EC/EU founding treaties is conditioned by a certain range of values constituting the basis of this legal system, then it must also take the above values into account.

Therefore, when analysing the founding treaties of the EC/EU we should only look at proportions and analyse to what extent quantitative changes which fill out constitutional acts with purpose-oriented references have led to autonomy of interpretation principles rather than transformation of its legal nature.

III.

The above considerations demonstrate the problem of assessing ECJ judgements which are disputable from the point of view of the clear division between law-making and law-interpreting. All reservations in this regard are overcome if we can show that within the autonomy of the EC/EU legal system there has taken shape a principle of recognising the authority of the ECJ to adopt judge-made laws. However, the professional literature includes comments that in the cases of *Les Verts*³⁴ and *Tchernobyl*³⁵ the ECJ handed down interpretations going beyond the text of the founding treaties. In the first case, the Court delivered the judgement that acts of the European Parliament which have legal consequences for third parties could be recognised as invalid in the light of the Article 173 [230] of the EC Treaty, even though the provision referred explicitly only to acts of the Council and of the Commission.³⁶ In that case, the grounds cited were the constitutional nature of the EC founding treaty which was held to authorise the ECJ to fill gaps in the EC legal system.³⁷ In the second case, the Court ruled that the laws of the European Parliament must be protected by the recognition of the Parliament's authority to lodge a complaint for an annulment of a Coun-

³¹ Cf. U. Everling, *supra*, n. 15, pp. 33–34 and 43; G. Ress, *supra*, n. 23, pp. 76–77.

³² Unless it is a manifestation of actual deconstruction of the concept of the state and its accompanying functions.

³³ Cf. R. Streinz, *Europarecht*, 5th ed. (2001), p. 206: *Eine strikte Trennung zwischen Auslegung und Rechtsfortbildung ist fragwürdig*.

³⁴ C-294/83 *Parti Ecologiste 'Les Verts' vs. European Parliament*, ECR [1986], p. I-1339.

³⁵ C-70/88 *European Parliament vs. Council*, ECR [1990], p. I-2041.

³⁶ ECR [1986] p. I-1366.

³⁷ Such an assessment of the ECJ ruling can be found in V. Constantinesco, *supra*, n. 11, p. 76.

cil act that violates these laws.³⁸ In both cases, the interpretation was guided by a need to take into consideration the values that, according to the ECJ, are superior: the full extent of legal protection³⁹ and institutional balance.⁴⁰ Although the result of the applied interpretation and the judicial interference in law-making was approved by the member states, it does not seem to have been approved as a general and abstract rule of law, since later the parties introduced their own formal amendments to the founding treaties in keeping with the legal conclusions of the above judgements.⁴¹ If the modification of the EC founding treaty proposed by the ECJ had been law-making in the strict sense, there would not have been any necessity of a formal revision. However, the states decided that the treaty required changing instead of ambiguous inferences.⁴²

Obviously, here we are only discussing extreme, borderline cases, for which a clear evaluation system has, nevertheless, to be provided. When the ECJ interpretation of the treaties raises doubts as to its nature (a law-making effect is suspected), the Court's ruling can be improved by the member states acting in cooperation. Such cooperation is specific to each case because an ECJ judgement does not set a formal common law precedence. Theoretically, if the member states had long-standing, unequivocal and unconditional practice in this respect, it might be regarded as an authentic practice in the area of treaty interpretation or customary law-making practice. It must be kept in mind, however, that every result of this agreed member states' practice can be overruled by a subsequent version.⁴³ The member states, being themselves subjects of international law, can also unanimously reject an ECJ dictum. Such an act would not be unlawful because it would show the states' determination as regard enforcement of their rights which cannot be overridden by the autonomy of the EC/EU.

IV.

Taking into consideration the origins of the European Communities (European Union), the concept of autonomy, and the nature of the process of interpretation, it must be said that the primary source of the rules for interpretation of treaties in the

³⁸ ECR [1990], p. I-2073; see also: T. K o p m a n s, *supra*, n. 16, p. 54; T. T r i d i m a s, *supra*, n. 15, p. 209.

³⁹ In his conclusions, Advocate General M. v a n G e r v e n speaks of the necessity to interpret Article 173 [230] of the EC Treaty so as to take into account this principle. It is also not clear why in his opinion after the ruling in the *Les Verts* case the method of textual interpretation is no longer applicable to the evaluation of the authority and the objectives of the European Parliament. At that time, no new principle came into being and the founding treaty did not change either permanently or irreversibly (ECR [1990], p. I-2060).

⁴⁰ ECR [1990], p. I-2073.

⁴¹ See: T. K o p m a n s, *supra*, n. 16, p. 54.

⁴² Such relations between the activities of the ECJ and the reactions of the member states provide grounds for defining the functions of the ECJ with respect to pre-normative behaviour. See: J.-C. G a u t r o n, L. G e r a r d, *supra*, n. 5, pp. 24–25.

⁴³ This situation can easily turn paradoxical if some of the member states accept the result of the interpretation while others reject it. In keeping with the provisions of Article 292 of the ECJ Treaty such legal dispute would have to be resolved by the ECJ itself. Consequently, to some extent this court would adjudicate in its own case.

EC/EU system is the international law.⁴⁴ However, because of the dynamic nature of EC/EU law, the scope of the methods and modes of interpretation employed by the ECJ is sometimes regarded as a unique mixture of interpretative rules characteristic of both international law and the municipal law of the EC/EU member states.⁴⁵ There are also opinions connecting the paradigm of EC/EU law interpretation methods with the principles observed in the internal law of EC/EU member states.⁴⁶ Sometimes it is accompanied by negation of the interpretative value of the rules stemming from international law. Such opinions have been voiced by, among others, Advocate General Henri Mayras who, in the case of *Sogtiu vs. Deutsche Bundespost*, declared that the interpretation principles specific to international law were not applicable to the EC/EU founding treaties. According to him, such treaties, being instruments of economic and social integration, were of a different nature from traditional international conventions.⁴⁷ This is a controversial view as the founding treaties do not in international law lose their consensual character with respect to their object, purpose, or structure.⁴⁸ Such reasoning cannot be covered by the logic of presumption. Obliteration of the international legal nature of the treaties effective within the EC/EU would require something more.

V.

Lassa Oppenheim once wrote that in international law there are no rules of common or conventional law with regard to interpretation of treaties. There are only non-legal rules going back to Roman law whose applicability to international legal interpretation stems from their common sense nature.⁴⁹ Oppenheim's view on the nature of the principles governing interpretation of treaties differs from the contemporary doctrine of in-

⁴⁴ A. Bleckmann: "Zu den Auslegungsmethoden des Europäischen Gerichtshofes," in: E. Klein (ed.): *Studien zum Europäischen Gemeinschaftsrecht von Dr. jur. Albert Bleckmann o. Professor an der Universität zu Münster* (1992), p. 1; cf. Ph. Manin: "The European Communities and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations," 24 *CMLR* (1987) pp. 476-477; J.-C. Gauthron, L. Gerard, *supra*, n. 5, pp. 24-25. On the subject of interpretation of constitutional acts of international organisations see also: T. Sato: "An Emerging Doctrine of the Interpretative Framework of Constituent Instruments as the Conditions of International Organisations," 21 *HitoSubashi Journal of Law and Politics* (1993), pp. 1-63.

⁴⁵ Cf. H.G. Schermers, N.M. Blokker: *International Institutional Law: Unity within Diversity*, 3rd ed. (1995), p. 834.

⁴⁶ Such an opinion has been expressed by, for example, T. Oppermann, *supra*, note 28, p. 254: "Angesichts des 'Verfassungs'charakters der Verträge (oben Rz. 475) und dem ihnen insgesamt zu entnehmenden Ziel des Aufbaus einer kohärenten Gemeinschaftsrechtsordnung legt sich bei der Interpretation des EGR grundsätzlich eher das Vorbild der innerstaatlichen Auslegungsgrundsätze nahe."

⁴⁷ Case 152/73, ECR [1974], p. 168. H. Mayras rejected the principle of restrictive interpretation, according to which all disputes must be resolved in favour of state sovereignty if the subject matter of the treaty is ambiguous and contains gaps. In 1958, Lord McNair predicted the early demise of that principle in international law but so far observation of the behaviour of states in the area of international relations offers no evidence that this has already taken place (Lord McNair: "Treaties and Sovereignty," in: F.M. van A. S. Beck *et al.* (eds): *Symbolae Verzijl* (1958), p. 222; cf. *EU-Kommentar*, Article 220, EC Treaty, p. 1893.

⁴⁸ See: H.G. Schermers, N.M. Blokker, *supra*, n. 45, p. 835.

⁴⁹ L. Oppenheim: *International Law*, vol. I (Peace), 7th ed., H. Lauterpacht (ed.) (1948), p. 857.

ternational law and the body of rulings by the international courts in that, following the Vienna Convention on the Law of Treaties of 1969 (VCLT), it is no longer tenable to claim that there are no conventional rules on the interpretation of treaties. Moreover, the International Court of Justice has emphasised in its judgements that the general principle of interpretation laid down by Article 32 VCLT and auxiliary means of interpretation laid down in Article 32 consolidate the pre-existing international custom.⁵⁰ This view of the normative nature of the principles contained in the VCLT is further corroborated by the doctrine of international law.⁵¹ On the other hand, the common sense nature of these rules of law is currently covered by the institution of presumption.

With respect to the EC/EU, the question remains: to what extent are the above observations bound by unequivocal interpretation of rules of international law if the postulated autonomy of EC/EU law is to be accepted as an objective legal order. Thus, a consequence of autonomy in the area of interpretation is the need for specific interpretation rules exclusive to the EC/EU, belonging to a wider set of principles characteristic of international law or, in the negative approach, excluding the principles of international common law. Have, then, the EC/EU formulated its own rules in this aspect of treaty interpretation? This question is difficult to answer first of all because of the limited practice of the ECJ, which bears the biggest responsibility for correct interpretation of EC/EU law. In this regard, the ECJ exercises judicial review with respect not only to the other EC/EU institutions, but also bodies and courts in the member states.⁵² In fact, this power constitutes the basis for claims about the ECJ having a monopoly in the area of interpretation.⁵³ There seems to be no doubt that the Court's argumentation often lacks more thorough and further reaching reflection on the nature (essence and character) of interpretation of EC/EU law. The ECJ usually just cites a particular method, principle, or rule without excessive evaluation.⁵⁴ In the long run, well-thought decisions

⁵⁰ See: e.g. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, p. 184 (Sep. Op./Sette-Camara); *Elettronica Sicula*, ICJ Reports 1989, p. 71 (Diss. Op./Schwebel); *Arbitral Award of 31 July 1989*, ICJ Reports 1991, p. 70; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Reports 1994, p. 21 and 22; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)*, ICJ Reports 1995, p. 18; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion), ICJ Reports 1996, p. 75; *Kasikili/Sedudu Island*, ICJ Reports 1999, p. 18.

⁵¹ For example: S. Torres Bernárdez: "At the United Nations Conference on the Law of Treaties (1968–1969), States confirmed that in contemporary international law the interpretation of treaties is governed not only by considerations of logic or good sense and the practical guidance by discretionary canons, maxims and means, but also by legal principles, i.e. a certain number of general rules having a truly normative character ("Interpretation of Treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties," in: G. Hafner et al. (eds): *Liber Amicorum Professor Seidl-Hohenveldern – in Honour of his 80th birthday* (1989), p. 721); see also: S.M. Schwebel: "May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?," in: *Theory of International Law on the Threshold of the 21st Century*, supra, n. 4, p. 541; cf. Sir Robert Jennings, Sir Artur Watts (eds): *Oppenheim's International Law*, 9th ed., vol. I (Peace) (1992), p. 1269.

⁵² *EU-Kommentar*, Article 220, EC Treaty, p. 1895.

⁵³ See: M. Schweitzer, W. Hummer, supra, n. 15, p. 136; the same claim is made by T. Sato, supra, n. 44, p. 43.

⁵⁴ M. Schweitzer, W. Hummer, supra, n. 15, p. 136: "Seine Aussagen zur Wertigkeit der von ihm eingesetzten Auslegungs-, Rechtsfortbildungs- und Ergänzungstechniken – wie allgemeine Rechtsgrundsätze, Analogie, Rechtsvergleichung, Verweisung, Rezeption etc. – sind spärlich und verstehen sich in der Regel als bloss obiter dicta."

are arrived at by the application of the "pendulum principle," i.e. by an interpretation which often employs contrasting values.⁵⁵ So far, the member states have also not entered into any codification agreements which would cover the unique aspects of EC/EU law on treaties. In this case, customary law as well as the VCLT and the Vienna Convention on the Law of Treaties of 1986 (VCLT 1986) are of special importance. A simple rejection thereof would be inappropriate.⁵⁶ especially in the light of recognition of the resulting rules of interpretation in ECJ judgements.⁵⁷

Having accepted the above assumptions, the reasoning should be as follows. If there are no appropriate rules laid down by an organisation regarding interpretation of VCLT, it is fully applicable for the parties to any agreement.⁵⁸ The area not covered by codification should be assessed from the point of view of the principles governing international common law or autonomous community custom.

As regards interpretation of the EC/EU founding treaties, the VCLT should apply subject to Article 5 therein, which states that "The present Convention applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation."⁵⁹ It must be also noted that under Article 4 VCLT, the convention applies to treaties which are concluded by states after the entry into force of the VCLT with regard to such states. Thus, given the temporal issues, it will refer in part to the codification convention itself and in part to international custom. In both cases, equivalent rules of law will be referred to, which in the VCLT are specified in Articles 31–33. The ICJ's position as to the origin of those rules is clear. It was in accordance with the above rules that (citing the VCLT itself *expressis verbis*), the ICJ interpreted the agreement concluded in 1890 concerning Kasikili-Sedudu Island.⁶⁰

It must be noted that in its decisions the ECJ cites the interpretation rules set out in the VCLT but with regard to agreements concluded by the EC/EU on its own behalf with other entities. Strictly speaking, this type of agreement is covered by VCLT (1986).⁶¹ However, given the origin of the principles concerning interpretation

⁵⁵ See: T. Koopmans, *supra*, n. 16, pp. 56–57. The opinions of Advocates General seem much more detailed in this respect.

⁵⁶ Such a negative opinion is represented by, for example, Sir Gordon Slynn: "The use of subsequent practice as an aid to interpretation by the Court of Justice of the European Communities," in: R. Bieber, G. Ress, *supra*, n. 23, p. 144 and G. Roux: "Convergences et conflits, dans l'interprétation du Traité CEE, entre la pratique ultérieure des Etats Membres et la jurisprudence de la Cour de Justice des Communautés Européennes," in: R. Bieber, G. Ress, *supra*, n. 23, p. 158.

⁵⁷ Advisory Opinion 1/91, ECR [1991], p. I-6101; Case C-312/91 *Metalsa*, ECR [1993], p. I-3773; Case C-432/92 *Anastasiou*, ECR [1994], p. I-3132. The issue of subjugation of the EC/EU to the international custom was also mentioned in the following cases: T-115/94 *Opel Austria vs. Council*, ECR [1997], p. II-39, and C-162/96 *A. Racke GmbH & Co. vs. Hauptzollamt Mainz*, ECR [1998], p. I-3655, see also: e.g. A. Bertram: "L'application de la coutume internationale dans l'ordre juridique communautaire (L'arrêt Racke)," 36 *CDE* (2000), p. 253 *et seq.*; J. Klabbers: "International Law in Community Law: The Law and Politics of Direct Effect," 21 *YEL* (2002), pp. 288–292.

⁵⁸ See: H. F. Köck: "Zur Interpretation völkerrechtlicher Verträge," 53 *ZöR* (1998), pp. 234–236.

⁵⁹ Enclosure to *Dziennik Ustaw* [Polish Journal of Laws], No 74, item 439.

⁶⁰ Case concerning Kasikili/Sedudu Island (*Botswana vs. Namibia*), ICJ Reports 1999, p. 18.

⁶¹ See the judgement in C-327/91 *France vs. Commission*, *supra* n. 2. Here, the ECJ invoked *expressis verbis* the VCLT (1986) to assess agreements concluded by the EC/EU with third countries.

of treaties and their uniform wording in both conventions, this distinction is sometimes ignored.⁶²

It must be kept in mind that as regards EC/EU external relations with third countries and other international organisations, the EC/EU is bound by the rules of international common law (if nothing to the contrary stems from the mutual practice of the parties involved). As regards EC/EU internal relations, an autonomous custom may arise⁶³ but in principle it should not collide with the rules of common law if it was to infringe the rights of third parties. Thus, treaties concluded within the organisation may be subject to autonomous principles of interpretation if any such have evolved. On the other hand, international agreements concluded by the EC/EU with third parties are presumed to be subject to common principles because the binding interpretation always requires the other parties' consent. Unilateral interpretation presented only by the EC/EU cannot prevail automatically since this would lead to the violation of the principle of *pacta sunt servanda*.

Citation by the ECJ of the general rule of interpretation set out in Article 31 VCLT should result in the following presumption: citation of the general rule means that regarding the interpretation of treaties no unique (autonomous) principles have evolved. It must be also remembered that the effectiveness of the VCLT principles does not depend in the EC/EU legal system on the ECJ's favourable decision in this respect. The Court viewed as a normative (static) phenomenon reveals the area of autonomy but it does not create it directly. In the light of Article 5 VCLT such autonomous principles regarding the interpretation of treaties can be derived by the ECJ from the founding (initial) agreements and intra-organisation custom as well as the law-making resolutions passed by various bodies and their practice of modifying the EC/EU founding treaties as accepted by the member states, their practice of formal and informal changes to the treaties and the result of practical (usage-oriented) interpretation.⁶⁴ However, a reservation must be made that subsequent manifestations of the agreed will of all member states may lead to transformations of each rule of law stemming from the above sources.⁶⁵

The application of the concept of the autonomy of EC/EU law must take into account the limits which cannot be crossed since the system would then become separate and independent. It is expressed by the scope of the effective authority of the member states, considered both individually and collectively.

⁶² This convention has not yet come into force; cf. A. Berram d'ane, *supra*, n. 57, p. 253 and J.-P. P u i s s o c h e t: "La place du droit international dans la jurisprudence de la Cour de Justice des Communautés européennes," in: *Scritti in onore di Giuseppe Federico Mancini*, vol. II *Diritto dell'Unione Europea* (1998), pp. 786–787.

⁶³ J.-C. G a u t r o n, L. G e r a r d, *supra*, n. 5, p. 117.

⁶⁴ See: *Oppenheim's International Law*, *supra*, n. 51, p. 1268. It must be noted that certain relationships may sometimes exist among the cited sources of autonomous principles of interpretation. For example, Ervin Hexner makes a clear distinction between the legal result of the internal custom and informal changes resulting from the practice of the organisation itself (E.P. H e x n e r, *supra*, n. 26, pp. 130–131).

⁶⁵ Cf. G. R e s s, *supra*, n. 23, pp. 75–76.

VI.

The Vienna Convention on the Law of Treaties of 1969⁶⁶ stipulates in Article 31 that "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." Apart from the context, the interpretation must also take account of interpretation agreements, the subsequent practice connected with implementation of the treaty and all relevant rules of international law, applicable in relations between the states.

If after exhaustion of all the general rules of interpretation the meaning of a treaty remains ambiguous, unclear or absurd, supplementary means of interpretation must be used, such as preparatory works or the circumstances accompanying the conclusion of the treaty (Article 32 VCLT). The Convention also allows for application of an auxiliary rule to confirm the result of interpretation arrived at on the basis of Article 31. Thus, in the light of the codified principles, the interpretation of a treaty constitutes a process which combines linguistic, systematic and functional methods, with the assumptions of the objectivistic (textual) theory of interpretation coming to the fore.

If the above rules still do not lead to a satisfactory result, the object and the purpose of a treaty become crucial (Article 33 VCLT).

The Vienna Convention provides a broad base for eliciting the proper meaning of the provisions of an interpreted treaty. It introduces a specific hierarchy of the applicable means but on the whole offers a comprehensive rule whose implementation results in an "artistic" legal interpretation rather than just simple execution of the provisions of Articles 31–33 VCLT.⁶⁷ However, the law entails certain limitations. The interpretation of a legal text, even viewed as art, must result in a limited number of solutions. There is a formal limit to the number of potential interpretations of a given treaty, its parts, or individual articles.⁶⁸ Also, the foundations of the whole process, that is good faith and the principle of *pacta sunt servanda*, seem unquestionable.

The special role of the EC/EU and its autonomous nature with regard to international law shape ECJ decisions in which the assumptions of purpose-oriented and systematic interpretation are reflected to the fullest extent. It is widely accepted that the systematic and teleological method is typical for the interpretation of EC/EU law (including the law of treaties).⁶⁹ This method is known to interna-

⁶⁶ Unless stated otherwise, the following remarks also apply to VCLT (1986).

⁶⁷ See: E. P. H e x n e r, *supra*, n. 26, pp. 124–125.

⁶⁸ See: *ibid.*, p. 124.

⁶⁹ H. v o n d e r G r o e b e n, J. T h i e s i n g, C.-L. E h l e r m a n n, *supra*, n. 7, p. 387: "Dabei ist jedoch der Besonderheit der Gemeinschaftsverfassung Rechnung zu tragen, die nicht eine bestehende und vollständige Rechtsordnung umfasst, sondern auf die schrittweise Verwirklichung der Gemeinschaftsziele ausgerichtet ist. Dies erfordert eine besondere Gewichtung der Interpretationsmethoden, insbesondere eine verstärkte Heranziehung der systematischen und der theologischen Interpretation;" H. K u t s c h e r: "Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts aus der Sicht eines Richters," Begegnung von Justiz und Hochschule 27–28 September 1976, Luxemburg 1976, p. L-42: "Systematische und theologische Auslegung einer Norm sind in der Rechtsprechung des Gerichtshofs eng ineinander verschränkt und häufig nur schwer zu trennen; EU-Kommentar," Art 220, p. 1893; the same opinion is voiced by M. S c h w e i t z e r, W. H u m m e r, *supra*, n. 15, p. 136; see also: A. B l e c k m a n n:

tional law.⁷⁰ It would be difficult not to agree with the reasoning that every intelligent interpretation of the law is in some way purpose-oriented.⁷¹ However, even teleological interpretation based on systemic presumptions cannot go beyond the limited set of possible results of interpretations which are encoded in the text of the treaty. This principle applies with equal force to the founding treaties of international organisations.⁷²

In consequence, no functional assumption of an interpretation can violate the foundation of good faith and the principle of *pacta sunt servanda*. Interpretation of the treaties effective in the EC/EU legal system must take into account this requirement⁷³ since on both principles depends the proper development of both international law and EC/EU law.

When the ECJ states that good faith, which provides the basis for the proper implementation of Article 18 VCLT, codifies the customary principle of the international law recognised by the ICJ, which is also binding on the EC/EU, it seems to accept all the areas covered by its application and its results. This is a rational presumption. Citing good faith with reference to the obligation not to obstruct the object and the purpose of a treaty before it comes into force⁷⁴ must lead to the recognition that a treaty as a whole must be interpreted in good faith in keeping with the letter and the spirit of Article 31 VCLT. Good faith as a foundation of international legal regulations is indivisible but its substance can apply to many areas.⁷⁵ Similar reasoning is valid in the case of the statement that the principle of *pacta sunt servanda* is the foundation of understanding law as such, especially international law.⁷⁶

The general rule of interpretation stipulated in the Vienna codification emphasises the ordinary meaning of words as determined by their context and in the light of the object and purpose of a treaty. The ECJ's interpretation of treaties comes closer to a special meaning as defined in Article 31 par. 4 VCLT.⁷⁷ In the case of EC/EU law, this approach amounts to a search for an autonomous meaning devoid of any internal or international legal connotations.⁷⁸

"Teleologie und dynamische Auslegung des Europäischen Gemeinschaftsrechts," in: *Studien zum Europäischen Gemeinschaftsrechts*, *supra*, n. 44, p. 31; also, *id.*, "Die systematische Auslegung im Europäischen Gemeinschaftsrechts," in: *Studien zum Europäischen Gemeinschaftsrechts*, *supra*, n. 44, p. 56; S.M. Grun dm a n n: *Die Auslegung des Gemeinschaftsrechts durch den Europäischen Gerichtshof. Zugleich eine rechtsvergleichende Studie zur Auslegung im Völkerrecht und im Gemeinschaftsrecht* (1997), pp. 295–299.

⁷⁰ Cf. J. Kl a b b e r s, *supra*, n. 19, p. 98: "While the political and philosophical justification for teleological interpretation may well be that international organisations are generally a good thing, the legal justification is decidedly harder to find."

⁷¹ E.P. H e x n e r, *supra*, n. 26, p. 130.

⁷² See: G.I. T u n k i n: "The Legal Bases of International Organisation Action," in: R.-J. D u p u y (ed.): *Manuel sur les organisations internationales / A Handbook on International Organisations* (1988), p. 268.

⁷³ Cf. *Racke Case*, *supra*, n. 57.

⁷⁴ *Opel Austria vs. Council Case*, p. II-70.

⁷⁵ See: A.D'A m a t o: "Good Faith," in: *Encyclopedia of Public International Law*, *supra*, n. 6, p. 599.

⁷⁶ *A. Racke GmbH Case*, p. I-3705.

⁷⁷ See: A. B r a d i m a s: *Methods of Interpretation and Community Law* (1978), p. 37.

⁷⁸ See, for example, *Case C-278/93 Edith Freers, Hannelore Speckmann v. Deutsche Bundespost*, ECR [1996], p. I-1189.

For the purposes of a specific treaty or the legal system stemming from it, autonomous interpretation is a rule accepted in international law. However, its correct application requires the fulfilment of a basic condition: the need to give a special meaning to an expression requires manifestation of the agreed will of the parties to the agreement. This factor cannot be removed by the ECJ's own practice without the explicit consent of the member states. Violation of the above criterion would amount to a change in the legal nature of the EC/EU.

A certain tendency on the part of the ECJ to resort to the methods of purpose-oriented interpretation can be justified by the number of authentic versions of the EC/EU treaties. However, in this case, too, the VCLT sets limits which should be observed by the ECJ so that when a treaty has been drawn up in a number of "authentic" languages it is assumed that each such version of the text means the same,⁷⁹ and also, in the event of persisting doubts as to the result of the interpretation, the object and the purpose of the treaty become the crucial factors. The autonomous (uniform) interpretation requirement can then be fulfilled in EC/EU law since the VCLT provides the requisite legal foundations. There is no need here for overly complicated and far-fetched reasoning.

Determining the proper meaning of treaty formulations also requires taking into consideration the appropriate context. The ECJ recognises this principle.⁸⁰ The method to be applied in consequence is used mainly in two areas. The first consists in citing other paragraphs of the same article or other articles of the same treaty which fulfil the preconditions relating to mutual subject bonds.⁸¹ This construction is in every respect covered by the concept of context as understood by the VCLT. In the second case, in which the actual purpose of a treaty is to elicit the contextual rule, assumes the form of references to other parts of the agreement, the agreement as a whole, or even to the whole legal system.⁸² This last area is an example of going beyond the strict definition of context provided in the VCLT.⁸³ The crucial point is that the ECJ ignores in its practice references to the constitutive elements of the context in the form of various types of documents and agreements accompanying the conclusion of a treaty. Such action must be viewed in the wider perspective of a general reluctance

⁷⁹ The ECJ readily takes advantage of this assumption; see: G. van Calster: "The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in more than one Official Language," 17 *YEL* (1997), p. 369 *et seq.*

⁸⁰ See: J. Rida: *Droit institutionnel de l'Union et des Communautés européennes*, 3rd ed. (1999), p. 177; A. Bredimas, *supra*, n. 77, pp. 43–47; G. van Calster, *supra*, n. 79, pp. 387–389.

⁸¹ See, for example, Case C-187/87 *Land de Sarre and others v. Ministre de l'Industrie, des P et T et du Tourisme and others*, ECR [1988], p. I-5040.

⁸² See: R. Pender: "The Interpretation of Community Acts by Reference to the Intentions of the Authors," 2 *YEL* (1982), pp. 69–71; A. Bredimas, *supra*, n. 77, p. 43; S.M. Grundmann, *supra*, n. 69, pp. 300–310; M. Potacs: *Auslegung im öffentlichen Recht: eine vergleichende Untersuchung der Auslegungspraxis der Europäischen Gerichtshöfe des öffentlichen Rechts* (1994), pp. 71–75. Discussion of a broader, functional and contextual interpretation of treaties in the international law can be found in, e.g. M.S. McDougal, H.D. Lasswell, J.C. Miller: *The Interpretation of Agreements and World Public Order, Principles of Content and Procedure* (1967).

⁸³ More on this topic in: A. Kozłowski: *Interpretacja traktatu międzynarodowego w świetle jego kontekstu* (2002).

to resort to supplementary means of interpretation, if only in the form of the preparatory work.⁸⁴ This gives rise to the problem of assessment of the value of the will of the parties regarding the treaty but expressed outside its formal framework. Such an awareness of the need for caution can be sensed in the VCLT itself. However, the ECJ has adopted in this case a method which is too radical and disproportional. The VCLT in general prefers to rely on the text of the agreement as the primary source of the will of the parties to the agreement. At the same time, the VCLT fully recognises the principle of giving priority to manifestations of authentic interpretation. Every interpretation agreed on by the parties to a treaty can overrule even the application of the general rule of interpretation stipulated in the VCLT.⁸⁵ The professional literature explicitly concludes that the ECJ shows considerable restraint when taking into consideration in the process of interpretation manifestations of the subsequent practice of the parties to an agreement. Sometimes even rejection of this form of the agreed will is indicated.⁸⁶ The justification given for doing so is the autonomous nature of EC/EU law⁸⁷ or the special structure and the spirit of the founding treaties.⁸⁸

Recognition of the fact that the autonomous character of the EC/EU excludes the legal interpretative value of the subsequent practice of EC/EU bodies and the member states must necessarily lead to the conclusion that the EC/EU has lost the character of an international organisation, which, *prima facie*, does not seem a very convincing statement.⁸⁹

The cited subsequent practice of EC/EU bodies as a manifestation of authentic interpretation should be of vital importance for the interpretations of treaties,⁹⁰ but subject to the following basic conditions: all the member states constitute such a body and the practice results from implicit or explicit unanimity. Individual actions do not have in principle, direct legal value. This refers, of course, to the practice of bodies going beyond the framework of the founding treaties, but is linked to them in respect of subject (shows an appropriate interpretative value), because the legal nature of the resolutions adopted by particular bodies can be freely determined in the founding act of a given organisation. Consequently, the treaty can be held to authorise a particular body to make a binding authentic interpretation, e.g. by majority voting. It must be

⁸⁴ See *EU-Kommentar*, Article 220, EC Treaty, p. 1894; U. Everling, *supra*, n. 15, p. 37; J. Rideau, *supra*, n. 80, p. 176.

⁸⁵ *Oppenheim's International Law*, *supra*, n. 51, p. 1268.

⁸⁶ J. Rideau, *supra*, n. 80, p. 176; Sir Gordon Slynn, *supra*, n. 56, pp. 137–139, 144–145; W. Karl: "Die spätere Praxis im Rahmen eines dynamischen Vertragsbegriffs," in: R. Bieber, G. Ress, *supra*, n. 23, p. 96; T. Koopmans, *supra*, n. 16, p. 56; *EU-Kommentar*, Article 220, EC Treaty, p. 1893.

⁸⁷ W. Karl, *supra*, n. 86, p. 96.

⁸⁸ Sir Gordon Slynn, *supra*, n. 56, pp. 137–139. This observation is also made by T. Stein: "Die Rolle der späteren Praxis als Auslegungselement in der Rechtsprechung des Internationalen Gerichtshofes, des Europäischen Gerichtshofes für Menschenrechte und des Gerichtshofes der Europäischen Gemeinschaften," in: R. Bieber, G. Ress, *supra*, n. 23, pp. 113–116.

⁸⁹ More information on including practice in interpretation of the founding treaties of international organisations can be found in E. Lauterpacht: "The Development of the Law of International Organisation by the Decisions of International Tribunals," 152 *RCADI*, pp. 377–478.

⁹⁰ See: G.I. Tunkin, *supra*, n. 72, p. 269.

kept in mind, however, that the result of such interpretation can, in accordance with the temporal principle, be overruled by member states either within the organisation or outside of it.

In the light of the fact that every form of authentic interpretation of the treaty resulting from the agreed action of the member states (parties) or authorised bodies determines how terms are to be understood in a given, specific moment in time, there arises the question of the value, in this sense, of the interpretative rulings of the ECJ.

Under Article 7 of the EC Treaty, the ECJ is considered one of the main EC/EU bodies. It is composed of independent judges, elected unanimously, coming from every member state.⁹¹ As stipulated in Article 220 of the EC Treaty, this body is responsible for upholding the law in the process of its interpretation and implementation. Agreements falling within the jurisdiction of the ECJ are both the founding treaties and the agreements concluded by the EC/EU on its own behalf. As has been previously emphasised, how these are to be understood should spring from the text itself, but as subsequently supported by the agreed practice of the member states and the appropriate bodies. Can a way of understanding Article 220 of the EC Treaty determined in this fashion constitute a basis for introduction of the autonomous principle excluding the application of Article 31 par. 3 VCLT in the EC/EU system, thus making the ECJ the only body authorised to make authentic interpretations of the founding treaties?⁹² If this was really so – that the only understanding of a treaty presented by the ECJ should be the authentic reasoning and the sole permitted form of affecting the result of such an interpretation should be formal review of the treaty, and, what is more, only in the direction of expanded integration – then the limitation of the sovereignty of the member states would become a reality. The upshot of rejection of practice, if viewed as a permanent element of the EC/EU legal system, would be a major paradox: the very decisions of the ECJ become for this body a substitute for member states' actions that is to demonstrate how the founding treaties are to be understood, which understanding is, however, binding on the Court and the parties to the proceedings only in a particular case.⁹³ Strictly speaking, in the light of the consensual nature of the founding treaties such a solution is formally possible. However, the question can be raised whether this principle does indeed stem from the treaties, especially Article 220 of the EC Treaty. The member states are fully aware of this principle, as it would be difficult to assume the theory of implied powers to be the basis for its being in force. The solution to the above paradox seems to be simple. The ECJ should take into consideration the results of the authentic practice of the EC/EU member states; otherwise, the Court risks ultimate rejection of its judgement and the interpretation included therein. If two states as the parties involved in proceedings

⁹¹ H.G. Schermers and N.M. Blokker emphasise that purpose-oriented interpretation of the founding treaties of international organisations should be preformed by a body which is trusted by all member states (*supra*, n. 45, p. 833).

⁹² The EC/EU agreements concerning external relations require for their binding interpretation the consent of the other party.

⁹³ This theme could lead to further discussion on the role of judicial precedent in the EC/EU legal system.

before the ICJ unanimously decide not to comply with the judgment it delivers, that is a manifestation of exercise of their rights as subjects.⁹⁴ In the case of the EC/EU member states, such agreed action is, for political reasons, very difficult. Nevertheless, we are still dealing here with an area of their real powers.⁹⁵ As provided in Article 220 of the EC Treaty, the states agree to comply with ECJ judgements, respect the interpretation included in them, and do not accept the unilateral rejection of this interpretation. However, the conditions of this regime may change, if the parties to the founding treaties so decide unanimously with respect to the specific result of the interpretation, or, in general, with its future application, by a change in Article 220 of the EC Treaty.

If the practice of the EC/EU member states demonstrates a clearly agreed will (intention), then for the ECJ this should be a manifestation of the right itself or of its meaning, which in accordance with Article 220 EC Treaty should be taken into consideration when interpreting and applying EC/EU rules of law. The ECJ is not the only, and definitely not the ultimate, depositary of the correct understanding of treaties in the EC/EU legal system. On the other hand, the development of the EC/EU does not depend on pre-agreed objectives; its functional autonomy requires constant support on the part of member states.⁹⁶ A formal and legal regression in the development of the EC/EU is certainly possible because the will of international organisations does not have a normative effect in isolation from the intentions of their founders. This principle constitutes an element of EC/EU law even though this fact is sometimes concealed or downplayed. The presence of this relationship does not depend on any social or political evaluations by the EC/EU. Consequently, the above principle cannot be overridden by the reluctance of the ECJ to accept an authentic interpretation stemming from the practice of the member states. This is clearly demonstrated by the member states' position on crucial issues, e.g. in the case of the Luxembourg Compromise of 1966, which despite the passage of years has retained its significance to the present day. The Compromise gave the member states an alternative basis outside of the formal framework of the constitutional treaties to successfully modify the method of adopting resolutions by the Council as defined in such treaties.⁹⁷

⁹⁴ At each stage of the proceedings states can withdraw an action and seek a different resolution, even if the ICJ has already recognised its competence and initiated the main procedure.

⁹⁵ Of course, here we are discussing a hypothetical situation where all member states of the EC/EU dismiss the value of the ECJ's interpretation in the case in question. Rejection of a judgement by a state-party to the proceedings or by some member states would first of all violate the principle of solidarity (loyalty) laid down in Article 10 of the EC Treaty and would give rise to a legal dispute within the EC/EU.

⁹⁶ Cf. U. Everling, *supra*, n. 15, p. 33.

⁹⁷ More on this subject can be found in: I. Seidl-Hohenveldern: "Consensus in den Vereinten Nationen und in den Europäischen Gemeinschaften. Gedanken zur Luxemburg-Vereinbarung vom 29 Jänner 1966," in: G. Lücke, G. Ress, M.R. Will (eds): *Rechtsvergleichung, Europarecht und Staatenintegration. Gedächtnisschrift für Léontin-Jean Constantinesco* (1983), p. 695 *et seq.* See also: Th. Koopmans, *supra*, n. 16, p. 57; *EU-Kommentar*, Article 205 EC Treaty (J.-P. Hix), p. 1807; cf. J. Rideau, *supra*, n. 80, pp. 337–338, who sees the Luxembourg Compromise as a particular ingredient of the body of EC/EU law – *une sorte d'acquis communautaire* – despite doubts as to the legality of such agreement.

VII.

The extent of the actual autonomy possessed by the EC/EU does not justify any changes in the understanding of the relationship between the concepts of law-interpretation and law-making. Admittedly, in the case of subjects of international law the difference between law-making and the understanding of the law provided by authentic interpretation may be semantically difficult to grasp. Still, that does not mean that such a distinction is non-existent. The ECJ was called into being to interpret law. The member states can either reject or approve (whether explicitly or implicitly) an interpretation which goes beyond the scope of the treaty. They have the final say because every international, or even supranational, organisation remains a subordinate (derivative) entity with respect to its member states.

Since the form of interpretation with respect to the treaties is a derivative of the international law aspects of the EC/EU, in its interpretation the ECJ cannot ignore, or reject manifestations of, the significant elements defining the will of the member states of the organisation or the parties to the agreed form of co-operation.

Also, the interpretation of treaties by the ECJ cannot result in the annulment of the seemingly absurd principle of *ex injuria ius oritur* because such reasoning is permissible under international law due to lack of a recognised legislative body having authority over the individual states.⁹⁸ The states make laws for themselves. In this process they can even bypass previously adopted rules or procedures. This feature seems to be a constitutive element of international law as such. Therefore, the above principle must also apply to the law of international organisations as long as such organisations continue to evolve and function within the framework of international treaties. With respect to the EC/EU this unconstitutional trait of their "constitutional" law appears disagreeable, but it will remain vital to it as long as the theory of origin retains its potential.

⁹⁸ See: E.P. H e x n e r, *supra*, n. 26, p. 129.

Shifts in International Boundary Rivers

KLARA KAŃSKA, RAFAŁ MAŃKO

I. Rivers as Boundaries

Rivers have been used as boundaries since time immemorial. They have always divided private lands, provinces and kingdoms and they continue to fulfil this function today. This is because rivers have many features which are attractive to those who wish to use them as boundaries between their territories. First of all, a river boundary is clearly visible and discernible, since it is a natural boundary. Secondly, it is easier to control than a land boundary, especially in the case of large rivers. Thirdly, making the river a boundary allows both riparian states to use it for purposes of navigation without the need of entering into additional agreements.

However, it would be false to say that a river boundary has only advantages. The main disadvantage is that a river tends to change its course. Either gradually, through erosion and gradual accretion, or violently, by breaking through one of its banks and creating a new arm at some distance from its previous bed. These two phenomena have caused problems ever since people started using rivers as boundaries. No wonder, therefore, that we find Roman lawyers already addressing this problem and providing solutions which – as will be shown – are workable and practicable not only in the field of private law but also in relations between sovereign states.

The aim of this article is to present the rules of public international law relating to shifts in international boundary rivers, showing their historical origin and the legal basis of their binding character in the international legal order.

II. Analogies From Private Law in Public International Law

One may ask: why should we resort to private law to determine the rules of public international law regarding shifts of boundary rivers? Is reasoning *per analogiam* from municipal private law admissible?

1. Article 38 of the ICJ Statute

The adoption of the Statute of the Permanent Court of International Justice (PCIJ) resolved to a large extent the uncertainty surrounding permissibility of recourse to private law in international jurisprudence. The Statute, in Article 38(3), enumerated

the sources of law applicable to disputes brought before the World Court. The Statute of the International Court of Justice (ICJ) reiterated the same catalogue of sources in Article 38(1). Consequently, since 1920, the World Court can adjudicate on the basis of: international conventions, international custom and the general principles of law recognised by civilised nations. *In subsidio*, it can have recourse to judicial decisions and the teachings of the most highly qualified publicists of various nations. Article 38 of the Statute is regarded as an authoritative statement on the sources of international law in general, not only sources of adjudication.¹

Since the adoption of the Statute, with its closed catalogue of sources of international law, direct recourse to Roman private law could no longer be advocated. However, solutions based on Roman law can still be assimilated into international law in a number of different ways. The most important avenue through which Roman law infiltrates into modern international law is the notion of “general principles of law recognised by civilised nations.” In fact, the same formulation was frequently included in the *compromis* of arbitral tribunals in the 19th century.² On this basis, arbiters had recourse to principles of private law when confronted with legal *lacunae*. However, arbitral tribunals were entitled to do so only if the parties to the dispute expressly provided for such a source of adjudication in their *compromis*. It could, therefore, be said that the drafters of the Statute of the PCIJ took account of this practice and sanctioned the use of private law principles in international jurisprudence by means of the general principles of law formula.³

Beginning with the formative period, the writings of many highly regarded writers contain frequent analogies to private and Roman law. The same could be said of decisions of international arbitration tribunals.⁴ This chapter will address the issue of recourse to Roman law rules by analogy in the absence of express treaty provisions and customary law, i.e. through the avenue of general principles of law.⁵

¹ I. Brownlie: *Principles of Public International Law*, 5th ed. (1990), p. 3; M. Shaw: *International Law*, 5th ed. (2003), p. 66; W. Czapliński, M. Wyrozumska: *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (1999), p. 15; A. Łazowski, A. Zawadzka: *Prawo międzynarodowe publiczne*, 2nd ed. (2003), p. 10–11. See, to the contrary effect, authors preferring a rigidly positivist standpoint, e.g. R. Bierzanek, J. Symonides: *Prawo międzynarodowe publiczne*, 7th ed. (2002), p. 76, 112; W. Góralczyk, S. Sawicki: *Prawo międzynarodowe publiczne w zarysie*, 10th ed. (2004), pp. 61–63.

² I. Brownlie, *op. cit.*, pp. 15–19.

³ H. Lauterpacht: *Private Law Sources and Analogies in International Law with Special Reference to International Arbitration*, London 1927, pp. 67–68.

⁴ For examples of international arbitration in which recourse to private law was of significant importance see: H. Lauterpacht, *op. cit.*, pp. 215–296.

⁵ The authors, therefore, do not address the question of international treaties which deal with shifts of international boundary rivers. Neither do they occupy themselves with the question whether the said rules may be regarded as international customary law. The two problems are interconnected and require a comprehensive study.

2. "General Principles of Law" and Reasoning *per analogiam*

The concept of general principles of law allows for citation of private law only by means of analogy.⁶ Therefore Roman law principles cannot be directly applied by the Court, but only *per analogiam*, provided that they are incorporated into municipal law. The positivist school opposed such an interpretation of the concept of general principles of law and advocated its limitation to "general principles of international law" or to "principles inherent in every legal system." Major controversies arose as to the meaning and scope of the term "general principles of law" and their status in the hierarchy of sources of international law. Much has been written on the topic⁷ and it could be stated that most of the authors⁸ agree that the term relates to generally recognised principles of *municipal* law accepted by the principal legal systems of the world.⁹ However, the divergence of approach to private law analogies is still characteristic of the modern science of international law. While the rigid positivist approach is no longer predominant, most authors advocate caution and limited use of analogy in international law. The prevailing view is that analogy is permissible so long as it is applied *mutatis mutandis* only when adequate to relations between sovereign States.

As Anzilotti framed it, general principles of law represent a kind of "nuovissimo *ius gentium* nel senso classico" and "al nuovissimo *ius gentium* corrisponde un nuovissimo *praetor*, con poteri peraltro assai più limitati di quelli del pretore romano."¹⁰ Lauterpacht expressed a similar view: "[General principles of law] are the modern *jus gentium* in its wider sense. In the sense here suggested, they are no more than a modern formulation of the law of nature which played a decisive part in the formative period of international law."¹¹ Not only does the concept of general principles resemble *ius gentium* as applied by Roman praetors, but their substantive content can also be rooted in the Roman law tradition. One could without doubt agree with Rousseau who regards the passage of Roman law into many national legal systems as an example of common principles which can be applied in relations between States.¹²

⁶ Cf. K. Kańska, R. Mańko: "'Alluvio' i 'mutatio alvei'. Zastosowanie reguł rzymskich w prawie międzynarodowym publicznym" ['Alluvio' and 'Mutatio Alvei'. The Application of Roman Rules in Public International Law], 41 *Studia Iuridica* 131 (2003), pp. 135–136.

⁷ See in particular: B. Cheng: *General Principles of Law as Applied by International Courts and Tribunals* (1987) and the literature cited therein.

⁸ E.g. R. Jennings, A. Watts (eds.): *Oppenheim's International Law*, 9th ed. (1992), p. 37; G. Schwarzenberger: *International Law as Applied by International Courts and Tribunals*, 3rd ed. (1957), p. 45; H. Lauterpacht, *op. cit.*, pp. 70–71; M. Shaw, *op. cit.*, p. 94.

⁹ For a comprehensive discussion of different doctrinal opinions see B. Cheng, *op. cit.*, pp. 2–5.

¹⁰ D. Anzilotti: *Corso di Diritto Internazionale*, 4th ed. (1955), p. 107.

¹¹ H. Lauterpacht: *International Law. Collected Papers* (ed. by E. Lauterpacht (1970)), p. 74.

¹² C. Rousseau: *Principes généraux du droit international public* (1944), p. 890: "Il s'agit de principes que la conviction juridique des États civilisés considérée comme devant nécessairement faire partie de tout ordre juridique et qui rappellent dans une certaine mesure le *jus gentium* des Romains, au sens originel du mot (droit concordant appliqué chez des peuples de même civilisation)."

The status of “general principles” in the hierarchy of sources is generally said to be subsidiary in relation to treaties and custom.¹³ Therefore, they could be cited only in the case of the absence or uncertainty of treaty provisions or custom.¹⁴ When there is a gap in a treaty or customary law, general principles serve as a residual source.

As can be inferred from the above submissions, a rigid positivist approach denying any possibility of recourse to municipal law can no longer be convincingly advocated.¹⁵ According to Bassiouni “There is a well established consensus that ‘general principles’ are to be derived from national legal systems.”¹⁶ It is also generally agreed that the purpose of the general principles of law concept is to “close the gap that might be uncovered in international law and solve this problem which is known legally as *non liquet*.”¹⁷ The role of analogy with private law is particularly important if we take into account that “in the field of international law, where specific rules are relatively few, there is even more occasion for resorting to general principles than in municipal law.”¹⁸

However, most authors agree that rules of private law cannot be transposed mechanically to the sphere of international law. As Brownlie puts it: “An international tribunal chooses, edits and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law.”¹⁹ This approach is also evident from this passage in Judge McNair dissenting opinion in the case of *International Status of South-West Africa*: “The way in which international law borrows from this source [i.e. private law] is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules. The duty of international tribunals in this matter is to regard any features of terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and principles.”²⁰ According to Cheng “international courts and tribunals apply to international relations those principles underlying municipal rules of law which have been found to work substantial justice between individuals, whenever circumstances similar to those justifying their application in the municipal sphere exist.”²¹

The World Court used the concept of general principles sparingly and with much caution. Such an attitude should not be surprising given the long standing predominance of the positivist school in the science of international law and the subsidiary

¹³ W. Czapliński, A. Wyrozumska, *op. cit.*, p. 17.

¹⁴ H. Lauterpacht, *op. cit.*, p. 69; M. Shaw, *op. cit.*, p. 96.

¹⁵ H. Lauterpacht writes about “a definite rejection of the dogmatic positivist view” (H. Lauterpacht, *op. cit.*, p. 68).

¹⁶ M. Cherif Bassiouni: “A Functional Approach to ‘General Principles of International Law,’” 11 *Michigan J. of Int'l L.* (1990), p. 816.

¹⁷ M. Shaw, *op. cit.*, p. 93.

¹⁸ B. Cheng, *op. cit.*, p. xiii.

¹⁹ I. Brownlie, *op. cit.*, p. 16.

²⁰ 1950 *ICJ* 128, p. 148.

²¹ B. Cheng, *op. cit.*, 391.

character of the principles. However, the ICJ has referred on occasions to general principles of law,²² understood as rules generally accepted by municipal legal systems.²³

As already stated above, for a rule to constitute a general principle of law it must be recognised in all of the world's major legal systems. Consequently, Roman law rules on shifts of a boundary river cannot be directly applicable *per se* but rather on the basis that they have made their way into the major systems of private law in the world. Then it must be proven that these rules are capable of being applied *per analogiam* to international relations between sovereign states.

3. Analogy Between Private Law and International Law

Since the times of Grotius public international law has been treated as a "higher private law."²⁴ While public law *ad statum rei publicae spectat* and regulates relations based on a state of subordination, private law *ad singulorum utilitatem spectat* and regulates relations between subjects which are formally equal.²⁵ Consequently, as Lauterpacht puts it, "formally, international public law belongs to the *genus* of private law,"²⁶ as it is "from the point of view of the international community, distinctly individualistic."²⁷

This fundamental analogy between the legal orders could be referred to as a general analogy, opening up a series of more and more specific analogies. Various important differences between *dominium* and *imperium* notwithstanding, "the two notions [as Lauterpacht puts it] are essentially analogous on account of the exclusiveness of enjoyment and disposition which is in law the main formal characteristic of both private property and territorial sovereignty. They belong, in juridical logic, to the same class of rights."²⁸ A further insight reveals that there is still a more specific analogy, inferior to that between *dominium* and *imperium*. Lauterpacht underlines that recourse to analogy from private law is particularly evident in the modes of acquiring territorial sovereignty, owing to the "intrinsic similarity of relation"²⁹ between private *dominium* and statal *imperium*.

Descending even further, one discovers that there is also an even more specific analogy – that between *modi originarii acquirendi dominii* and *modi originarii*

²² E.g.: the notion of responsibility for damage (*Chorzów Factory*, 1928 P.C.I.J. Publ. Ser. A No 17, 29 – principle of international law to make reparation in case of breach); general rules on evidence, procedure and jurisdiction – *nemo iudex in causa sua* (*Mosul Boundary*, 1925 P.C.I.J. Publ., Ser. B. No 12, 32); litispence (German Interests In Polish Upper Silesia, 1925 P.C.I.J. Publ. Ser. A. No 6, 20); *res iudicata* (*Effect of Awards of the U.N. Administrative Tribunal*, 1954 HICJ Rep. 53); concept of the limited liability company (*Barcelona Traction*, 1970 ICJ 3).

²³ M. S h a w, *op. cit.*, p. 99

²⁴ *Ibid.*, p. 81 and the various authors cited therein.

²⁵ Cf. W. C z a p l i Ń s k i, A. W y r o z u m s k a, *op. cit.*, p. 3.

²⁶ H. L a u t e r p a c h t, *op. cit.*, p. 81.

²⁷ *Ibid.*, p. 82.

²⁸ *Ibid.*, pp. 95–96.

²⁹ *Ibid.*, p. 104.

adquirendi territorii.³⁰ Within that analogy further analogies can be indicated, namely, those concerning *occupatio*, *usucapio* and finally – fluvial accretions.

In accordance with what has been said about reasoning *per analogiam*, in order to prove that the rules of *alluvio*, *avulsio* and *mutatio alvei* are relevant to international law, it must be demonstrated that their *ratio legis* is applicable to similar situations arising between States.

States, as private subjects, have an interest in the protection of their territory, in maintaining access to a boundary river and in having a rational boundary line.

The Roman rules, which manage to strike a balance between these conflicting interests, are, therefore, the best solution that international law can provide as *ius dispositivum* for relations between sovereign nations. Should two neighbours, however, perceive those rules as inapplicable to them for some reasons,³¹ they can always modify them in a treaty. Nevertheless, the mere fact that in a given set of circumstances the interests of two neighbouring states are better protected by rules departing from Roman law is not an argument against the existence of a certain *ius dispositivum* on the subject which, being derived from general principles of law, serves to fill in the gaps in international law as created by international treaties and custom.

III. Shifts in Boundary Rivers in Private Law

1. Origins of the Rules

It is beyond doubt that we owe the legal classification and dogmatic analysis of the phenomena of the change of a boundary river to the Roman jurists.³² They were the first to distinguish between slow, gradual changes of a river, which they referred to as *alluvio*, from the situation when a river breaks its banks and forms a new bed. This latter figure does not have a technical name in the sources of Roman law; the modern Romanist doctrine usually applies the Latin term “*mutatio alvei*” and the authors will follow suit. However, it must be observed that some authors, especially in the United States, tend to use the term “*avulsio*” for what we will call “*mutatio alvei*.” This may lead to misunderstandings, since *avulsio* in the Roman sources refers to the rare situation when a piece of land is torn off from one bank and carried to the opposite bank.³³

In the Roman sources,³⁴ *alluvio* was defined as an accretion of land on the bank of a river which is gradual and imperceptible. The general rule is that such an accretion, in accordance with *ius gentium*,³⁵ becomes the property of the riparian to whose estate it

³⁰ Cf. *ibid.*, pp. 99–107.

³¹ For example, two countries might want to abolish the rule of *mutatio alvei* in an uninhabited area where loss of territory is not deemed important by them.

³² Cf. K. Kańska, R. Mańko, *op. cit.*, pp. 136–141.

³³ *Inst.* 2.1.21; *Dig.* 41.1.7.2.

³⁴ *Inst.* 2.1.20; *Dig.* 41.1.7.1; *C.J.* 7.41.1.

³⁵ For the Romans *ius gentium* signified the law which binds all men on the basis of reason. It was considered a subsidiary source of Roman law. Cf. *Inst.* 1, 2, 1; *Dig.* 1, 1, 9.

accrues, i.e. the boundary between the riparians continues to follow the river. A given phenomena is gradual and imperceptible if an observer watching the river cannot state how much sand or mud has been added to a river bank at a particular moment in time. This does not preclude an observer from being able to state that changes in the course of the river are taking place if he makes his measurements at two separate moments in time, e.g. if the observer watches the river once a month or once a week and is able to tell that certain changes have occurred. This creates a problem: how long should the intervals between the measurements be for the changes to occur *paulatim*? In other words, are the changes still imperceptible and gradual if an observer watches the river every two minutes and can tell that it is changing its course? It is submitted that regardless of the speed of erosion and deposit, *alluvio* takes place as long as the river does not create a new bed which can be distinguished from the old one.

The acquisition of ownership by way of *alluvio* took place *ipso iure* and there was no need of taking possession.³⁶ *Alluvio* and *avulsio* were examples of enlargement (natural growth) of a piece of land and not as an acquisition of a newly created thing.

Mutatio alvei was defined in the sources³⁷ as an instance of a sudden and violent change in the course of a river. The principle of *mutatio alvei* operates regardless of whether the old channel has been abandoned or not. If the river continues to use both channels, an island is formed and this situation is called *circumluvio*. The conclusion is that a change in the course of a boundary river which is an effect not of accumulation of alluvial deposits and erosion, but of the breaking-through of a new channel does not affect the rights of ownership. In other words, the boundary does not change and follows the old channel of the river.

In classical Roman law *agri limitati*, i.e. lands measured by *agrimensores*,³⁸ were excluded from the benefits of *alluvio*.³⁹ The opposite of *agri limitati* were *agri arcifinii* (otherwise known as *agri occupatorii*) which had natural boundaries, such as mountains or rivers. However, the rule was probably obsolete by the time of Justinian⁴⁰ and did not make its way into the European *ius commune*.⁴¹

However, in cases where the river itself is not the boundary (for example, if a boundary between States is determined according to geographical landmarks other than the river) but the boundary coincides with the river,⁴² an estate should be treated

³⁶ H. Dernburg: *System des Römischen Rechts*. 8th ed. by P. Sokolowski, Berlin 1911, p. 352.

³⁷ *Inst.* I. 2.1.22; *Dig.* 41.1.7.4; *Dig.* 43, 12, 1, 10; *C.J.* 7.41.1.

³⁸ P. Maddalena: *Gli incrementi fluviali nella visione giurisprudenziale classica*, Napoli 1970, pp. 50–69.

³⁹ *Dig.* 41.1.16. For a detailed exposition see L. Maganzani: "Gli incrementi fluviali in Fiorentino VI Inst." (*D.* 41, 1, 16), 59 *Studia et Documenta Historiae et Iuris* 207 (1993).

⁴⁰ To this effect see: A. Burdese: *Manuale di diritto privato romano*, 3rd ed., Padova 1964, p. 415. P. Voci: *Modi di acquisto della proprietà* (*Corso di diritto romano*) (1952), p. 254. To the contrary effect see: P. Maddalena, *op. cit.*, p. 119, n. 51; L. Maganzani, *op. cit.*, pp. 211–216.

⁴¹ L. Arnds von Arneseberg: *Lehrbuch der Pandekten*, n. 4 (9th ed. Stuttgart 1877, repr. Frankfurt am Main 1983), p. 237, n. 4; B. Windscheid: *Lehrbuch der Pandekten*, 9th ed. by T. Kipp, Frankfurt am Main 1906, Vol. I, p. 953, n. 1; J. Baron: *Pandekten*, 5th ed., Leipzig 1885, p. 233.

⁴² I.e. the boundary is defined in relation to different topographical objects. The most obvious example in the field of private law is a boundary following a wall which goes along the river. If the river is public then the

as *ager limitatus sensu moderno* and *ius alluvionis* (in the strict sense) held not to apply.⁴³ As we shall see later, this was the interpretation adopted by Grotius and it continues to be a rule of international law.

At least since *ius commune* the rule of *alluvio* has been treated as an instance of accession, in accordance with the maxim *accessio cedit principali*. Accession may be defined as acquisition of property through the physical or intellectual association of one thing with another, whereby the ownership of the less important thing goes to the owner of the principal thing. Accession is treated as one of the modes of acquisition of ownership. It is classified as one of the original modes of acquisition, as opposed to derivative ones.

Through the Roman-Canon *ius commune* the concept that cases of shifts of a boundary river ought to be resolved by application of the general principle of *accessio cedit principali* entered into the common legal heritage⁴⁴ and may be treated as a general principle of law. As will be shown below, the principle of accession as applied to fluvial accretions is accepted by all major legal systems and has been adopted by international law.⁴⁵

2. Modern Private Law

As has already been noted, municipal law is a source of international public law by way of analogy. The “general principles of law” mentioned in Article 38(3) of the Statute of the ICJ are, as has already been stated, derived from municipal law, mainly from private law. It is therefore necessary to examine the various legal systems of the world in order to see how the problem of changes in the course of a boundary river is solved in private law.⁴⁶

We must keep in mind that while rivers (and their beds) in public international law always form part of state territory, either *ad medium filum* or up to the *thalweg*, in municipal law the legal status of rivers varies. In some legal systems all rivers are public⁴⁷ but in most countries at least some rivers are private.⁴⁸ Whenever the river

insulae in flumine natae and alluvial deposits should remain *res publicae*. However, this case must not be confused with a situation when an estate is separated from the river by a road but the road is not its boundary. This problem was thoroughly examined in antebellum Louisiana jurisprudence.

⁴³ Cf. L. Arnds von Arnesberg, *op. cit.*, p. 237 n. 4; C.G. von Wächter: *Pandekten*, Leipzig 1880, Vol I, p. 281.

⁴⁴ P. Maddalena, *op. cit.*, p. 123.

⁴⁵ H. Lauterpacht, *op. cit.*, p. 104: “The rules concerning accession have been retained *in toto*, and their application has been extended from fluvial accessions to those arising on the seashore.” He adds “[t]hat many of these rules are simply the embodiment of common sense. It does not alter the fact that they have been taken over from private law” (*Ibid.*, note 3).

⁴⁶ The object of our analysis will be modern systems of municipal law; this is because general principles of law “are derived from systems of law actually in operation as distinguished from speculative and philosophical aspects of the classical law of nature” (H. Lauterpacht: *International Law. Collected Papers* (ed. by E. Lauterpacht (1970), vol. 1, p. 77)).

⁴⁷ Such a radical solution was adopted in the Polish Water Act of 1974. The new Water Act of 2001 allows for the private ownership of rivers in some cases.

⁴⁸ For example, in English law only tidal rivers are regarded as public navigable rivers and their beds are *prima facie* property of the Crown, see: Lord Hailsham of St. Marylebone (ed.), 49(2) *Halsbury's Laws of England* 65–66, para. 99; *id.*, 4(1) *Halsbury's* 408, para. 923; all other rivers, including navigable

bed is public, lawmakers are faced with a complicated situation with regard to *alveus derelictus* and *insula in flumine nata*. Most countries have followed the Roman rule but in others it has been modified or even abolished. International law cannot follow the legal systems which have modified or abolished the rule because the rules introduced by the countries concerned are based on the notion of the bed being public.

The Roman principle of *alluvio* is generally accepted both in legal systems derived from Roman law⁴⁹ and in common law.⁵⁰ Although all systems mention the rule as a principle, few of them state that *ius alluvionis* is limited only to *agri arcifinii*.⁵¹ The Roman principle of *mutatio alvei* is accepted by virtually all systems of municipal law, either tacitly⁵² or explicitly.⁵³ Notably, the rule is explicitly recognised in common law.⁵⁴

IV. Shifts of Interstate Boundary Rivers in the United States

One of the competencies of the Supreme Court of the United States is adjudication of disputes arising between the states of the Union. Such disputes very much resemble international disputes resolved by arbitration tribunals or the ICJ.⁵⁵

rivers, are private rivers and the public only has the right of navigation on them. The beds of such rivers are *prima facie* private property. If such a river divides two estates, the owners *prima facie* own the river *ad medium filum*, see: J. B u r k e (ed.): *Jowitt's Dictionary of English Law* (1977) s.v. *Ad medium filum* and *Rivers*; 4(1) *Halsbury's...*, pp. 408–409, para. 923.

⁴⁹ The Roman rule on *alluvio*, in public and private rivers alike, is adhered to in: Article 556 of the French Civil Code; § 411 of the Austrian Civil Code; Article 499–501 of the Louisiana Civil Code; Article 366 of the Spanish Civil Code; Article 1069 of the Greek Civil Code of 1940; Article 941 of the Italian Civil Code; Article 908 of the Mexican Federal Civil Code; Article 1328 of the Portuguese Civil Code; Article 1250 of the Brazilian Civil Code; the Roman rule is also observed in mixed jurisdictions – for instance, in Scottish law, see: e.g. *Stirling v. Bartlett* [1993] SLTR 763, at 767 which cites I. 2, 1, 20; Roman-Dutch law also maintains this rule, see: C.G. v a n d e r M e r v e: "Original Acquisition of Ownership," in: R. Z i m m e r m a n n, D. V i s s e r: *Southern Cross. Civil Law and Common Law in South Africa* (1996), p. 701. In some legal systems *alluvio* in a public river is public property, see: e.g. § 8 of the Baden-Württemberg Water Act of 1988; § 659 (1) of the Swiss Civil Code; Article 18 of the Polish Water Act of 2001.

⁵⁰ Cf. J. B u r k e, *op. cit.*, s.v. *Alluvion and Accretion*; 4 (1) *Halsbury's...*, p. 410, para. 925. The rule is also followed in the laws of American states, see: e.g., § 1014 of the California Civil Code; §§ 16–220 of the Annotated Code of Maryland – Environment; §§ 70–18–201 Montana Code Annotated; §§ 60–335 of Oklahoma Statutes Annotated.

⁵¹ In English law, the doctrine of *alluvio* does not apply when the piece of land is an *ager limitatus*, e.g. if the boundary on the waterside is a wall, or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or the other, cf. L i n d l e y, *LJ in Hindson v. Ashby* [1896] 2 Ch 1. In such cases, the *alluvio* belongs to the owner of the river. Hence, if the riparian owns *usque ad medium filum*, it must be assumed that it is indifferent whether his piece of land is an *ager limitatus* or not.

⁵² In those civil codes which do not formulate the principle explicitly it is possible to derive it by logical reasoning from the Roman principles of *alveus derelictus* contained in those codes.

⁵³ Article 562 of the French Civil Code; Article 503 of the Louisiana Civil Code; Article 374 of the Spanish Civil Code; Article 915 of the Mexican Federal Civil Code; Article 1073 of the Greek Civil Code; Article 1249 (III) of the Brazilian Civil Code, the same applies to mixed jurisdictions, in Scots law, *Stirling v. Bartlett*, *loc. cit.*

⁵⁴ Cf. J. B u r k e, *op. cit.*, s.v. *Avulsion*; 4 (1) *Halsbury's* 410–411 (para. 925). See also: § 1018 of the California Civil Code.

⁵⁵ Cf. M. S h a w, *op. cit.*, p. 105: "One may point to decisions by the highest courts of federal states, like Switzerland and the United States, in their resolution of conflicts between the component units of such coun-

The leading case dealing with shifts of interstate boundary rivers is *Nebraska vs. Iowa*⁵⁶ where the Supreme Court was faced with the issue of *mutatio alvei* as opposed to *alluvio*.⁵⁷ It has to be noted that the Court used the term “accretion” to denote *alluvio* and “avulsion” for *mutatio alvei*. The substantive part of Justice Brewer’s opinion in this case is as follows:

“It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as «accretion,» [i.e. *alluvio*] the riparian owner’s boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. It is equally well settled that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, «avulsion.» [i.e. *mutatio alvei*]. These propositions, which are universally recognised as correct where the boundaries of private property touch on streams, are in like manner recognised where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel.”⁵⁸

The Court in *Nebraska vs. Iowa* was fully aware of the Roman origins of the rules it applied – a large portion of Attorney General Cushing’s opinion explaining the passage of the Roman rules into common- and civil-law legal systems is quoted in the Court’s decision.⁵⁹ What is important from the point of view of the international lawyer is the fact that the Supreme Court applied the Roman rules as rules of international law – Justice Brewer stated clearly that they are “universally recognised as correct where the boundaries of private property touch on streams, are in like manner recognised where the **boundaries between states or nations** are, by prescription or treaty, found in running water.”⁶⁰

tries, as relevant to the development of international law rules in such fields as boundary disputes. A boundary disagreement between two US states which is settled by the Supreme Court is in many ways analogous to the International Court of Justice considering a frontier dispute between two independent states, and as such provides valuable material for international law.” It deserves particular attention that American Supreme Court cases on shifts of boundary rivers are frequently cited in treatises and handbooks on international law, not only those written by American authors; e.g. *Arkansas vs. Tennessee*, 310 U.S. 563 (1940) and *Kansas vs. Missouri*, 322 U.S. 213 (1944), where the rule of *Nebraska vs. Iowa* was applied, is cited by G. D a h m: *Völkerrecht* (1956), vol. 1, p. 596, n. 1. *Nebraska vs. Iowa* and *Kansas vs. Missouri*, 322 U.S. 213 are cited as evidence of international law on *mutatio alvei* by I. B r o w n l i e, *op. cit.*, p. 150; *Nebraska vs. Iowa* is also cited as evidence of international law in 45 *American Jurisprudence Second. International Law* § 29 (1999).

⁵⁶ 143 U.S. 359 (1892).

⁵⁷ The first U.S. case to state the applicability of Roman rules of *alluvio* and *mutatio alvei* was *Mayor, Aldermen and Inhabitants of City of New Orleans vs. U.S.*, 35 U.S. (10 Pet.) 662, 717 (1836), where the rule was applied in a dispute between private parties.

⁵⁸ *Nebraska vs. Iowa*, 360.

⁵⁹ *Ibid.*, p. 360 *et seq.*

⁶⁰ *Ibid.*, p. 360; emphasis added.

Nebraska vs. Iowa is a good example of the practical application of *Corpus Iuris Civilis* to a modern case. The Court had to interpret the formulation of the Institutes of Justinian to decide where the boundary between Nebraska and Iowa should be. As is known, the Roman definition of alluvio encompasses the element of imperceptibility of the changes taking place. The Court held that imperceptibility and graduality refer only to the phenomenon of the deposition of material, and not to the element of erosion.⁶¹ *Nebraska vs. Iowa* has been cited as a precedent in subsequent cases⁶² and is still the law on the subject in the United States.⁶³ It has also been referred to in judicial decisions outside the United States.⁶⁴

V. Shifts of Boundary Rivers in International Law

1. Opinions of the Doctrine

A. Earlier Authors

The Roman principles regarding changes in the course of a boundary river were introduced to public international law by its very founder, Hugo Grotius.⁶⁵ One may say that Grotius transposed the rules of Roman private law (which was binding at that time in Holland⁶⁶) to public international law without any significant modifications.⁶⁷ Here, it should be noted that Grotius considered the doctrine of *agri limitati* to be useful for international law. According to him, a river boundary might coincide with an artificial boundary, e.g. one marked by walls or pillars. In that case any *alluvio* can be subject to occupation. This means that, although the boundary river gradually changes its course, the boundary itself stays where it was. This is because the river itself is not the boundary and the fact that the boundary at some point runs along the river is accidental, not substantial.

Grotius embraced the Roman doctrine of *mutatio alvei* giving it an original *ratio*. According to him, a river is not only water but, more specifically, it is water flowing over a certain bed and between certain banks (*aqua alveo tali fluens ripisque talibus inclusa*). Consequently, gradual changes resulting from erosion and accretion are instances of modification of existing banks and river beds. In the case of *mutatio alvei*, however, according to Grotius, the river ceases to exist, as it has a new bed and new banks and therefore the boundary stays where it was.

⁶¹ *Ibid.*, p. 369.

⁶² *Missouri vs. Nebraska*, 196 U.S. 23 (1904); *Arkansas vs. Tennessee*, 246 U.S. 158 (1918); *Arkansas vs. Mississippi*, 250 U.S. 39 (1919); *Kansas vs. Missouri*, 322 U.S. 213 (1944); *Arkansas vs. Tennessee*, 310 U.S. 563.

⁶³ See, e.g. *Mississippi vs. Arkansas*, 415 U.S. 289, 291 (1974).

⁶⁴ E.g., the 1992 Scots case of *Stirling vs. Bartlett* [1993] SLTR 763, 767-768. For reference to decisions to the contrary effect, see: K. K a ŋ s k a, R. M a ŋ k o, *op. cit.*, p. 150, n. 108.

⁶⁵ H. G r o t i u s: *De iure belli ac pacis libri tres* (curavit B.J.A. Kanter - Van Hettinga Tromp, Lugduni Batavorum 1939), 1.2 §§ 16-17 (pp. 163-164).

⁶⁶ Until the introduction of a civil code in 1806, Holland was subject to Roman-Dutch Law, a mixture of Roman private law, Dutch customs and elements of Canon law. For details see, e.g. R. Z i m m e r m a n n, "Roman-Dutch Jurisprudence and Its Contribution to European Private Law," 66 *Tulane L.R.* 1685 (1992).

⁶⁷ Cf. the analysis in K. K a ŋ s k a, R. M a ŋ k o, *op. cit.*, pp. 142-143.

Other important authors of the formative period, such as Pufendorf,⁶⁸ Wolff⁶⁹ and de Vattel⁷⁰ generally followed the opinion of Grotius, adhering to the Roman rules regarding shifts of international boundary rivers.

B. Modern Authors

The modern doctrine of public international law recognises the operation of Roman private law rules regarding shifts of boundary rivers in the field of the law of nations. The doctrine accepts *alluvio*⁷¹ – this mode of acquiring territory is often treated under the heading of “accretion”.⁷²

The rule of *mutatio alvei* is also widely accepted,⁷³ albeit with some exceptions. The most prominent opponent of recognition of *mutatio alvei* in international law was D. Anzilotti.⁷⁴ He was followed by Accioly,⁷⁵ who, while recognising *alluvio*, suggested that in the case of a sudden and violent change in the course of a river there were no precise principles and that the principle adopted by the majority of authorities (i.e. the Roman principle of *mutatio alvei*) did not seem reasonable. Accioly was

⁶⁸ S. Pufendorf: *De jure naturae et gentium libri octo* (1678, repr. Oxford-Cambridge 1934), pp. 405–406.

⁶⁹ C. Wolff: *Jus gentium methodo scientifica pertractatum* (1764, repr. Oxford-London 1934), p. 41–42.

⁷⁰ E. de Vattel: *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington 1916), vol. 1, p. 235–236.

⁷¹ H. Taylor: *A Treatise on International Public Law* (1901), p. 273, who admits that titles formations in water of boundary rivers are “determined by rules drawn from Roman jurisprudence” and cites *Inst.* 2, 1, 20–24 and *Dig.* 41, 1, 7, 29, 65; C. Hyde: “Notes on Rivers as Boundaries,” 6 *AJIL* (1912), p. 904; T.E. Holland: *Lectures on International Law*, p. 119 (ed. by T.A. Walker, W.L. Walker (1933), p. 119; I.A. Shearer: *Starke’s International Law*, 11th ed., London–Boston 1994, p. 152; R. Jennings, A. Watts, *op. cit.*, p. 665: “If a boundary river changes its course as a result of gradual accretion on one bank and destruction of the other, the general rule is that the boundary line continues to be the mid-channel or middle-line but shifts with the shifting course of the river,” G. D. a h m: *Völkerrecht*, Stuttgart, p. 596; P. Łaski: “Przyrost jako pierwotny sposób nabycia terytorium przez państwo,” 10 *Zeszyty Naukowe Uniwersytetu Szczecińskiego. Prace Prawnicze* 27 (1999); R. Bierzanek, J. Symonides, *op. cit.*, p. 205; W. Góralczyk, S. Sawicki, *op. cit.*, p. 182.

⁷² E.g. I. Oppenheim’s..., *op. cit.*, p. 696: “Accretion is the name for the increase of land through new formations.”

⁷³ C. Hyde, *op. cit.*, p. 904; V. A. d a m i: *National Frontiers in relation to International Law* (1927), p. 13; G. Hackworth: *Digest of International Law* (1940), vol. 1, p. 409: “in the absence of an agreement to the contrary, the middle of the old channel, if it previously marked the boundary, continues to do so even though the old bed may have been entirely abandoned by the stream”; 45 *Am. Jur. 2d International Law* § 29 (1999): “On the other hand, a change in territory by avulsion [i.e. *mutatio alvei* – K.K., R.M.] does not result in a change in a boundary line. Thus, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation through whose territory the river thus breaks its way suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed, in the absence of any convention to the contrary”; I. Brownlie, *op. cit.*, p. 150: “Even in the absence of applicable agreements, sudden, forcible, and significant changes in river courses (avulsion) will not be considered to have changed the frontier line, which is normally the centre line of the former main channel or thalweg”; Brownlie cites the American cases of *Nebraska vs. Iowa* and *Kansas vs. Missouri*, 322 U.S. 213; P. Łaski: *op. cit.*

⁷⁴ D. Anzilotti: “Intorno agli effetti delle modificazioni del corso di un fiume sul confine fra due stati,” in: D. Anzilotti: *Scritti di diritto internazionale pubblico* (Padova 1956), p. 685 *et seq.* Anzilotti’s views are discussed in more detail in the context of the *Chamisal* judgment.

⁷⁵ H. Accioly: *Tratado de Direito Internacional publico* (1934), vol. 2, pp. 26–27.

clearly influenced by Anzilotti in that he believed that States when adopting a river as their boundary do so because it constitutes a natural obstacle (more visible than a dried river bed) and because of the benefits of navigation. Rights of navigation would be subject to the good will of the States through which the river cuts its new course. He therefore suggested an inverse solution, that is, in the case of such violent changes, the boundary should follow the new course of the river. He also proposed that a State which lost territory as a result of that change should be entitled either to reasonable indemnification or to restore the river to its old course within a stated time limit. A more recent follower of Anzilotti's sceptical attitude to *mutatio alvei* is L. Bouchez,⁷⁶ who attempts to refute the Roman rules by giving examples of treaties stating the contrary; in fact this could be used as an argument against the opinion that the rules are customary. As has already been repeated, the existence of a general principle of law applicable by the ICJ does not require any practice of nations but only the acceptance of such a principle in their municipal legislation, a point to which Bouchez pays no attention.

The vast majority of authors dealing with the subject in their treatises on international law simply state the Roman rules as rules of public international law⁷⁷ without explaining their status.⁷⁸ Some authors follow Lauterpacht's view⁷⁹ and accept the fact that the Roman rules on shifts of boundary rivers are applied in public international law *per analogiam*.⁸⁰ Other authors, like Brownlie, tend to explain the presence of rules derived from Roman law concerning *alluvio* by logically inferring them from principles of international law.⁸¹ Brownlie further observes that: "[w]hatever the historical links, the Roman law cannot provide authoritative principles for law in the sphere **except when the particular principle may be said to represent a general principle of law** (or common sense). However, the texts on *alluvio*, *avulsio*, *insula nata* and *alveus derelictus* give insight into the types of problem which may be encountered."⁸² Thus, Brownlie accepts that Roman rules can be assimilated by way of the "general principles of law."

We must also keep in mind that, although the Roman rules embody common sense, this does not diminish the fact that it is Roman law (and not just common sense)

⁷⁶ L. J. B o u c h e z: "The Fixing of Boundaries in International Boundary Rivers," 12 *ICLQ* 789 (1963).

⁷⁷ Earlier authors made recourse to rules of Roman law without hesitation. Cf. S. B a k e r, *Halleck's International Law* (1893), pp. 57–58: "Deficiencies of precedent, usage and express international authority may be supplied from the rich treasury of the Roman Civil Law."

⁷⁸ E.g. W. W e n g l e r: *Völkerrecht* (1964), vol. 2, pp. 978–979; S. S u a r e z: *Derecho Internacional Publico* (1916), vol. 1, p. 206–207; P. Ł a s k i, *op. cit.*

⁷⁹ H. L a u t e r p a c h t: *Private Law...*, *op. cit.*, p. 104: "The same intrinsic similarity of relation explains also why the branch of international law which deals with acquisition of territorial sovereignty has, in addition to the requirement of effectiveness, retained both the classification and a number of other rules of the Roman law of property and possession. The rules concerning accession have been retained *in toto*, and their application has been extended from fluvial accession to those arising on the seashore." Lauterpacht observes that although "many of these rules are simply the embodiment of common sense [that] does not alter the fact that they have been taken over from private law" (*ibid.*, note 3).

⁸⁰ E.g. M. S h a w, *op. cit.*, p. 420.

⁸¹ I. B r o w n l i e, *op. cit.*, p. 150.

⁸² *Ibid.*, p. 172; emphasis added.

which is applied, naturally *per analogiam*. As Lauterpacht put it, “[i]t may or may not be accurate when some authors say that the adoption of rules governing fluvial accretion is not analogy to private law but simply application of common sense. But even granting the accuracy of such a statement, it does not say anything else than that it is a rule of private law which embodies here a principle of common sense.”⁸³ One can also find writers who suggest that the principles governing shifts of boundary rivers have the status of customary rules.⁸⁴

The majority of authors consider fluvial increments as an application of the general principle of accession,⁸⁵ an original mode of acquiring territory. However, some consider fluvial increments as a consequence of the growth of the territory and not a mode of acquiring it.⁸⁶

Although modern doctrine acknowledges that in acquiring territory by accession there is no need of taking possession,⁸⁷ it adds to the Roman rules a requirement typical of international law – the existence of sovereignty capable of extending to the area of the increment.⁸⁸

2. International Case-Law

A. Arbitration Tribunals

(a) The *El Chamisal* Case⁸⁹

In 1911, an *ad hoc* US-Mexican Arbitral Tribunal rendered a judgement which until now remains the most important international pronouncement on change of the course of an international boundary river. The case concerned the boundary between two countries on the Rio Grande river which, at the time, was characterised by very frequent changes of its bed, including both slow and rapid changes.

⁸³ H. Lauterpacht, *op. cit.*, p. 70, n. 2. The author further goes on to observe that “[m]ost rules of law embody a principle of common sense, but frequently it takes, within the society of nations, decades or centuries to strife to bestow upon an obvious principle of common sense the authority of a rule of law. It is private law which, by supplying in many cases the formulation of principles of legal reason and legal justice, smoothes the way and suggests the solution” (*ibid.*). One might add that what Lauterpacht says here on private law is *par excellence* applicable to Roman private law.

⁸⁴ E.g. R. Bierzanek, J. Symonides, *op. cit.*, p. 205. J.H. Verzijl: *International Law in Historical Perspective* (1970), vol. 3, p. 565 states that “[i]t has gradually become an established treaty practice to lay down the rule that in the case of shift of the *thalweg* in a boundary river – unlike the case of a shift of the whole river bed, the State boundary shifts together with the *thalweg*.” The author observes that the rule of *mutatio alvei* is also “instanced by many treaties, but there are exceptions” adding that “[i]nternational practice has, however, as rule continued to maintain the old abandoned river bed as the State boundary” (*ibid.*, p. 567). As it is known, state practice, followed by an *opinio iuris* are the constitutive elements of international customary law.

⁸⁵ H. Accioly, *ibid.*, p. 18; A. Verdross: *Völkerrecht*, 5th ed. (1964), p. 287.

⁸⁶ S. Baker, *op. cit.*, vol. 1, p. 172.

⁸⁷ T.E. Holland, *op. cit.*, p. 119.

⁸⁸ This requirement is taken from case-law – it was formulated by M. Huber in the *Palmas* arbitration who stated that *accessio cedit principali* is applicable only “where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity;” A. Verdross, *op. cit.*, p. 287.

⁸⁹ *El Chamisal (United States vs. Mexico)*, 11 *R.I.A.A.* 316.

The boundary was first established by the 1848 Treaty of Guadalupe Hidalgo under which the boundary was to follow the middle of the deepest channel of the Rio Grande. According to the Arbitral Tribunal and the parties, if "this provision stood alone it would undoubtedly constitute a natural, or arcifinious boundary between the two nations and that according to well-known principles of international law this fluvial boundary would continue, notwithstanding modification of the course of the river caused by gradual accretion on the one bank or degradation on the other bank; whereas if the river deserted its original bed and forced for itself a new channel in another direction the boundary would remain in the middle of the deserted river bed."⁹⁰

The Mexicans invoked the doctrine of *agri limitati*. The Treaty contained another provision which stated that the boundary should be designated "with due precision upon authoritative maps" and that landmarks should be established upon the ground to delimit the boundary. The parties also stipulated that "the boundary line shall be religiously respected by each of the two Republics, and no change shall ever be made therein, except by the express and free consent of both nations."⁹¹ Mexico argued that by virtue of these additional provisions, the boundary became an artificial and invariable one so that in accordance with the Roman law distinction between *agri limitati* and *agri arcifinii*, no right of *alluvio* existed. The Tribunal, however, observed that it was the custom to distribute *agri limitati* to Roman generals and legionaries, out of conquered territory as a matter of restriction of the ordinary rights appurtenant to riparian ownership. Thus, according to the Tribunal, this restriction is considered by the best authorities to have been an exceptional provision.

The Tribunal then wondered whether international practice as to boundary treaties could shed more light on this problem. It concluded that only a small number of treaties provided for a fixed boundary line notwithstanding the alterations which may take place in the river. Most of the treaties just made provisions for a boundary along the middle of the main channel of the river (or *thalweg*) without any further specifications. However, there was no case-law which could be an authority for the Tribunal (the single precedent that it cited was a French case⁹² in which the court held that if a river separates two departments, the boundary is fixed in an irrevocable manner along the middle of the bed of the river as it existed at the time of the establishment of the boundary notwithstanding any changes in the course of the river).

Mexico and the United States concluded another convention in 1884, after all the major changes in the river had already occurred. In this new treaty, the parties codified the rules of interpretation of previous treaties in such a way that they mirror the general principles of international law, i.e. the boundary was to follow the middle of the normal channel of the river notwithstanding alterations by "slow and gradual erosion and deposit of alluvium" but in the event of "any other change wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the bound-

⁹⁰ *Ibid.*, 320.

⁹¹ *Ibid.*, 319.

⁹² A decision of the *Cour de Cassation* reported in [1858] 1 *Rec. Dalloz* 401.

ary [...] shall produce no change in the dividing line but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.”⁹³ The treaty of 1884, according to the Tribunal, was entered into in order to remove the doubts arising from the interpretation of the two previous treaties.

The United States submitted an opinion by Attorney General Cushing,⁹⁴ which was judged by the Tribunal to be “a valuable contribution to the subject by an authority on international law.”⁹⁵ Cushing presented the Roman rules as rules of international law⁹⁶ and gave an insight into their origin and transmission into the municipal laws of various nations.⁹⁷

The Tribunal found that for the first couple of years there was a process of slow and gradual accretion and erosion (i.e. *alluvio*) and for the next four years erosion of the Mexican bank was very violent, although accretion still occurred slowly. The Tribunal concluded that the parties had contracted that not only accretion but also erosion must be slow and gradual.⁹⁸ This distinguished *El Chamisal* from *Nebraska vs. Iowa* (discussed earlier in this article) where the general rules of international law were applied without exception.

The Tribunal based its judgment on the relevant law in force during the shifts of the Rio Grande in question. However, because neither of the boundary treaties *in vigore* at that time (those of 1848 and 1853) regulated the problem of *alluvio* and *mutatio alvei*, the commissioners made recourse to the rules of *alluvio* and *mutatio*

⁹³ 11 *R.I.A.A.*, 316, 323.

⁹⁴ 8 *Opinions of Attorneys General of the United States* 175. Cushing’s opinion was prepared before the treaty of 1884 was concluded, i.e. in a situation in which the problem of the shift of the Rio Grande comprised a *lacuna* in relevant treaty law.

⁹⁵ 11 *R.I.A.A.*, 316, 322.

⁹⁶ “[W]hatever changes happen to either bank of the river by accretion on the one or degradation of the other, – that is by the gradual, and, as it were, insensible, accession or abstraction of mere particles – the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous functions, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

But, on the other hand, if deserting its original bed, the river forces for itself a new channel in another direction, then the nation through whose territory the river thus breaks its way suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river-bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real geographical boundary,” 8 *Op. Attys. Gen.* 175, 177. Cushing cited various classical authors of international law, including Puffendorf, Wolff and Wattel.

⁹⁷ “The doctrine is transmitted to us from the laws of Rome,” *ibid.* Cushing cited *Inst.* 2, 1, 20-24 and *Dig.* 12, 1, 1, 7, as well as writers of the *ius commune* (Voet, Heineccius, Struvius) and of the common law (Bowyers). Then he presented the ways of reception: “Don Alfonso transferred it from the civil law to the Partidas [...] Thus it came to be, as it still remains, an established element of the laws of Spain and Mexico [...] The same doctrine, starting from the same point of departure, made its way through the channel of Bracton, into the laws of England, and thence to the United States,” *ibid.*

⁹⁸ 11 *R.I.A.A.*, at 331.

alvei embraced by international law as well as to the subsequent behaviour of the parties, i.e. to the 1884 treaty.⁹⁹ Effectively, the judgment was based predominantly on the 1884 treaty (despite the non-retroactivity rule).

The *El Chamisal* judgement was given profound consideration in a note by Anzilotti.¹⁰⁰ He stated that *in abstracto* a norm of international *ius dispositivum* following the Roman rules is possible, but there would be a need to demonstrate its existence.¹⁰¹ According to Anzilotti, there is no precedent to confirm that in the absence of a treaty the states concerned would feel obliged to follow such a rule¹⁰² and therefore concluded that the putative rule of international law is only a doctrinal opinion.¹⁰³

Anzilotti criticised the judgement in *El Chamisal* because in his view, rather than basing its judgement solely on interpretation of the will of the parties, the tribunal acknowledged that there existed a rule of international law that governs shifts in boundary rivers¹⁰⁴ – which, according to him, it should not have done. He suggested that cases concerning river boundaries should be examined solely on a case-by-case basis with account taken of all the circumstances.¹⁰⁵

Anzilotti's demand for a demonstration of the existence of the rules of *alluvio* and *mutatio alvei* was a product of his positivist attitude to international law – he negated the existence of any other sources outside treaties and custom. This other source, previously named “law of nature,” is now encompassed by the “general principles of law” as cited in the ICJ Statute. As has already been underlined above, proof of the existence of general principles is not based on the behaviour of states but on the content of their legal systems and the adequacy of such a principle for international law.

According to Anzilotti, delimitation of a boundary is solely a product of the will of the States¹⁰⁶ which is not capricious and arbitrary but, rather, reflects practical needs. He goes on to examine the presumed will of the parties establishing a frontier on a river: if there are slow changes, it can be presumed that the boundary follows the

⁹⁹ Recourse to the subsequent behaviour of the contracting parties as a means of interpreting a treaty between them is a rule of customary law, now codified in the Vienna Convention on the Law of Treaties.

¹⁰⁰ D. Anzilotti: *Intorno agli effetti...*, *op. cit.*, p. 685 *et seq.*

¹⁰¹ *Ibid.*, p. 700.

¹⁰² *Ibid.*

¹⁰³ “La pretesa regola di diritto internazionale dispositivo é dunque, in realtà, una semplice opinione dottrinale, nulla di più,” *ibid.*, p. 701.

¹⁰⁴ *Ibid.*, p. 696.

¹⁰⁵ *Ibid.*, p. 703.

¹⁰⁶ The authors wish to reiterate that they do not assume that the Roman rules received by international law are to any degree a limitation of the contracting freedom of states which can choose to follow those rules or create rules of their own. However, it is assumed that in the absence of a treaty provision or customary rule on the subject, principles derived from Roman law operate. The difference between the authors' position and that of D. Anzilotti is that, according to the latter, in the case of a *lacuna* in the relevant treaty and in the absence of an applicable customary rule no international *ius dispositivum* could be applied. Therefore, if no will of the parties could be inferred, applying Anzilotti's point of view an international court or tribunal would have to pronounce a *non liquet*. This is exactly the situation which the drafters of the Statute of the PCIJ and ICJ wanted to avoid by adding the “general principles of law” to the catalogue of the sources of law applied by the World Court.

river because the convenience of having a boundary on a river prevails. However, according to Anzilotti, in the case of sudden changes it is impossible to presume that the parties would have wanted the boundary to follow the old course of the river because it could still be the case that, even though one of the states would lose territory, access to the river would be more important than the lost territory. This, though, could only hold true if the territory was of petty significance (e.g. an uninhabited strip of sand) but hard to imagine when a city or resources-rich land was at stake.¹⁰⁷

Anzilotti gives an interesting example of a dispute that had arisen between Italy and the United Kingdom over the river Juba, then a boundary river between Italian Somali and British East Africa. According to a protocol of 1891, the *thalweg* of the Juba was to be the boundary between the two powers. However, after the protocol had been signed, the river carved out for itself a new passage towards the sea, cutting through a strip of sand and leaving it on the Italian side of the river. Britain claimed sovereignty over both banks of the river basing its claim on the principle of international law derived from Roman law (*mutatio alvei*). The Italians argued that the protocol, by establishing the boundary on the *thalweg*, referred to the *thalweg* in general and not as it ran at that moment.

The Italian government asked some prominent lawyers for advice: Fusinato believed there was a rule of international law governing shifts in boundary rivers; however, in his view shift of the Juba could not be regarded as a change of its bed but only a minor shift of its course in the area near the sea. Catellani argued that although the rules in question exist, they are only subsidiary and the protocol has to be given priority. According to him the word *thalweg* meant the liquid mass of running water and not the river bed. Catellani also argued that the intention of the parties could be inferred from the fact that the protocol would have stated the same even if the river had then run according to its new course. In the end, the two governments settled the case by negotiations and established that the *thalweg* of the Juba would always constitute the boundary so that the right bank would always appertain to Britain and the left bank to Italy.

Anzilotti commented that if we imagined the river shifting in such as to leave on its right bank the city of Kisimayu, the outcome would have been different. He concluded that everything depends on the will of the parties in a given case and the questions which arise are only issues of interpreting that will.¹⁰⁸

This view cannot be accepted since it would create great uncertainty and in fact blur the difference between *ex aequo et bono* judgements and those based on general principles of law. A rule of international law concerning shifts of a boundary river cannot be based on the value of the piece of land between the old and new river bed, for this “value” is always subjective. Although in the case of the Juba the disputed strip of land was in fact of low value, it might have been regarded as possessing strategic value and then the attitude of the two governments would have been quite

¹⁰⁷ D. Anzilotti, *op. cit.*, pp. 702–703.

¹⁰⁸ *Ibid.*, p. 705.

different. The same would happen if oil or other minerals were discovered in that area.

(b) *The Island of Palmas Case*

A case which is frequently cited by the doctrine on the subject of *alluvio* is *Island of Palmas*.¹⁰⁹ The case itself was neither concerned with fluvial increments nor with shifts of boundary rivers, but with an island. Yet, the decision contains the famous *dictum* by Judge M. Huber in which he formulated the additional requirement of actual sovereignty over the alluvial deposit. Huber stated that “[i]n the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity.”¹¹⁰ Although the *dictum* was concerned with maritime accretions, the doctrine has extended it, *per analogiam*, to fluvial accretions and *ipso facto* to the problem of shifts of boundary rivers.

B. *International Court of Justice*

Until now, neither the PCIJ nor its successor, the ICJ, have had the opportunity to render a judgement concerning changes of the course of an international boundary river. The only case before the ICJ which has touched on the problem was *Land, Island and Maritime Frontier Dispute* involving El Salvador and Honduras¹¹¹ which was decided in 1992. After the two countries gained independence in 1821, the issue of their precise boundary line needed to be determined. A series of negotiations were carried out in order to determine what was the *uti possidetis iuris* as of 1821. During these negotiations, the parties came to an agreement that a part of their boundary was to follow the Goascorán river starting from its mouth on the Gulf of Fonseca. No mention was made of the precise point where the river flows into the Gulf. This did not cause any disagreement between the countries until 1970 when El Salvador claimed that the boundary was meant to follow the old course of the Goascorán which it abandoned in the 17th century, i.e. more than 200 years before the claims were brought!

This issue was brought before the Court as part of a broader dispute concerning the land and maritime frontier between the two states. El Salvador claimed that the boundary should follow the old course of the river Goascorán according to the principle of “avulsion” (i.e. *mutatio alvei*). Although the exact time of such a change could not be proven, it was estimated that it took place around the 17th century.

Unfortunately, the Court did not have to rule on the validity in international law of the Roman principles of *mutatio alvei*. The question could be determined simply by reference to the negotiations between the parties. The Court obviously ruled that the two countries, when conducting negotiations, could not possibly have had in mind

¹⁰⁹ *Island of Palmas (Netherlands vs. U.S.)*, 2 R.I.A.A., p. 829.

¹¹⁰ *Ibid.*, p. 839.

¹¹¹ *Land, Island and Maritime Frontier Dispute (El Salvador vs. Honduras, Nicaragua Intervening)*, 1992 ICJ 351, hereinafter referred to as *El Salvador vs. Honduras*.

the old bed of the Goascorán abandoned as far back as the 17th century. However, the Court did not rule out the possibility that if El Salvador had made its claims to the old river bed immediately after gaining independence in 1821, it might have succeeded. In that case, in the opinion of the Court, it would have been necessary to prove that the Roman law rules of *alluvio* and *mutatio alvei* applied under Spanish colonial law – at the time of the shift of the river it was only a border between two colonial provinces and not an international boundary.

Thus, the question whether Roman law rules of *alluvio* and *mutatio alvei* constitute general principles of international law was left open. The Court stated: “On this basis, what international law may have to say on the question of the shifting of rivers which form frontiers, becomes irrelevant: the problem is mainly one of Spanish colonial law. In fact, the alleged rule originated in Roman law as a rule applicable to private property, not as a rule relating to rivers as boundaries of jurisdiction and administration. Furthermore, whatever its status in international law – a matter to be determined, if necessary, by the Chamber, on the basis of the principle of *jura novit curia* – its possible application to the boundaries of Spanish colonial provinces would require to be proved.”¹¹²

The Court’s *dictum* in *El Salvador vs. Honduras* leaves the question effectively open but, unlike the vast majority of the doctrine, it remained sceptical about the Roman rule of *mutatio alvei*. The rule was described as “alleged” and the Court observed that in Rome it was applied “to private property” and not to public law boundaries, i.e. “boundaries of jurisdiction and administration.”

Those opinions require comment. First of all, it is most probable that the Romans did in fact apply the rules of *alluvio* and *mutatio alvei* to boundaries between *municipia* and provinces. Secondly, it is the rules of Roman *private* law that have passed into municipal legal orders.¹¹³ Furthermore, those rules, originating from private law, are applied to interstate boundaries (which are, of course, public law boundaries) by the US Supreme Court which applies them as rules accepted by international law. Thirdly, private law analogies have always been accepted by the doctrine of international law, as was been shown in chapter four. This leads us to the conclusion that it is irrelevant for modern international law whether or not ancient Romans applied the rules of *alluvio*, *avulsio* and *mutatio alvei* to rivers which constituted boundaries between provinces. This is a question of importance for legal historians and not international lawyers.

VII. Concluding Remarks

Despite the fact that the International Court of Justice has not, as yet, made any definite pronouncement on the issue of the shift of an international boundary river, it

¹¹² *Ibid.*, p. 547, para 311.

¹¹³ By expressing a want of applicability of the rule to boundaries between provinces in ancient Rome, the Court seems to treat Roman law as applicable directly and in its classical form, and not indirectly, *imperio rationis*, on the basis of analogy and in its form elaborated in later periods.

is assumed that the rules of *alluvio* and *mutatio alvei* are binding rules of public international law, applicable as “general principles of law” by way of analogy with municipal law. This proposition is supported by the (almost) unanimous opinion of the legal doctrine and by several judgments rendered by arbitration tribunals. Apart from that, the recognition of *alluvio* and *mutatio alvei* as general principles of law commends itself as the only reasonable rule of international *ius dispositivum*.

The arguments that can be adduced in favour of *alluvio* and *mutatio alvei* in private law and in international law are essentially the same.¹¹⁴ The fact that the *ratio legis* of the rules on *alluvio* and *mutatio alvei* in private law are similar to the reasoning behind the same rules in public international law supports the application of those rules *per analogiam*.

The first argument in support of the rules of *alluvio* and *mutatio alvei* is of an evidentiary nature. In situations of gradual and imperceptible changes of the river bed, should the boundary stay fixed regardless of the slow shift of the channel, it would be virtually impossible to trace the exact boundary line. Thus, such problems can be avoided by adopting the rule of *alluvio*. On the other hand, if a river changes its bed suddenly the old channel is easily recognisable and can continue to form the boundary, usually without causing major evidentiary problems.

Another argument is the predictability of changes of boundaries. Gradual erosion and sedimentation (*alluvio*) is easily predictable, by both riparians, be they private landowners or sovereign states, since it is an inherent feature of all unregulated watercourses. On the other hand, a sudden and violent *mutatio alvei* cannot be easily predicted and therefore it should not influence the boundary.

Thirdly, *alluvio* provides for “natural compensation.” On a given boundary river, the current causes erosion in some parts but at the same time compensates through sedimentation in other. This cannot be said of a sudden change in the course of a river when there would be no compensation for the injured owner or state.

Fourthly, should the rule of *alluvio* be abolished, the river would gradually leave its old bed. After some time this would lead to a situation in which the boundary would run at a very small distance away from the river and one of the riparians would have a thin stretch of land on the other side of the river. This piece of land would be difficult to access. Especially in international law, such a situation would be unacceptable, depriving one of the riparians of access to the river.

The fact that the rules in question originated in the private law of the Romans should not be viewed as an obstacle to their application in public international law. This is because those and many other precepts of Roman law are, as Brownlie pointed out, simply an embodiment of common sense. We refer to them as “Roman” not because they were peculiar to ancient Rome, but because Roman jurists were the first to formulate them and it was through their writings that those rules were received into modern legal systems.

¹¹⁴ Cf. R. Mańko, K. Kańska, *op. cit.*, pp. 138–140.

Charter of Fundamental Rights in the Legal and Political Practice of EU Institutions

DAGMARA KORNOBIS-ROMANOWSKA

1. Introduction

Since December 2000 the European Union has been equipped with a Charter of Fundamental Rights¹ ("the Charter"). The Presidents of the European Parliament, the Council of the European Union and the European Commission proclaimed the Charter in the name of these three institutions on 7 December 2000. However, the Heads of State and Government who met in Nice in December 2002 decided not to include any reference to the Charter in the Treaty. This means that, while they recognise its political value, the text has no binding legal effect, but at the same time the Charter is dedicated to the rights that, in the light of the constitutional law of the European Union, comprise the essence of the rule of law of the Communities and the Union and forms part of the principles which are considered "common to the member states."² The Charter gives a clear statement of the fundamental rights which the European Union institutions are committed to respect, both in their internal and external policies, as are the member states when implementing EU law.

The purpose of this paper is to present the attitude of the EU institutions towards the Charter; its legal implications, an evaluation of its content and the directions in which the EU institutions follow the standards laid down by the Charter in the implementation of Community law and in its legislative process.³

¹ The Charter of Fundamental Rights (hereinafter the Charter), *Official Journal* (OJ) C 2000, 364/01.

² Article 6 Treaty on European Union (TEU) in: *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, OJ C 2001, 80/01.

³ Apart from the articles referred to in the following footnotes, see: J. Dutheil de la Rochère: "La Charte des droits fondamentaux de l'Union européenne: quelle valeur ajoutée, quel avenir ?," 443 *RMEU* (2000), p. 674; C. Engel: "The European Charter of Fundamental Rights," 2001 *7 ELJ* (2001), p. 151; G. de Kerchove, C. Ladenburger: "Le point de vue d'acteurs de la Convention," in: J.-Y. Carlier, O. de Schutter (eds): *La Charte des droits fondamentaux de l'Union européenne – Hommage à Silvio Marcus Helmons* (2002); C. Ladenburger: "L'apport de la Charte dans le domaine des droits civils et politiques," in: *Hommage à Silvio Marcus Helmons*; J.B. Lissberg: "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law," 38 *CMLR* (2001), p. 1171; and editorial comments, "The EU Charter of Fundamental Rights Still under Discussion," 438 *CMLR* (2001), p. 1.; in the Polish literature: F. Jasicki: *Karta Praw Podstawowych Unii Europejskiej* (2003); J. Menkes: "Karta Praw Podstawowych Unii Europejskiej a konstytucja Europy," 5 *St. Europ.* (2001), No 2; R. Wieruszewski: "Karta Praw Podstawowych Unii Europejskiej w systemie międzynarodowych instrumentów ochrony prawnej," in: E. Popławska (ed.):

2. The Basis for Fundamental Rights Protection within the EU

The Treaty of European Union commits the Union to respecting the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and derived from the constitutional traditions common to the member states, as general principles of Community law.⁴ Thus both the internal legal systems of the member states and international law provide the basis of the system of protection of individuals' rights within the Community legal order. What is important, thanks to this solution the protection would have been effective even in the absence of an explicit provision in the founding Treaties.

Such protection has been put into effect since the early 1970s by the European Court of Justice (ECJ), the most important achievements of the Court's case law in this field being the celebrated judgments in *Stauder*,⁵ *Internationale Handelsgesellschaft*,⁶ *Nold*,⁷ *Rutili*,⁸ and *Johnston*,⁹ as well as many others.¹⁰ These judgments were subsequently embodied in Article F.2 of the Treaty of the European Union signed in Maastricht and then to Article 6.2 TEU signed in Amsterdam and Nice.

While the ECJ has played the major role in the recognition of fundamental rights, the other institutions have also been involved in this process, though starting much later. In particular, in a joint Declaration of 5 April 1977,¹¹ the European Parliament, the Council and the Commission undertook to respect, in the exercise of their functions, fundamental rights resulting from the constitutions of member states as well as from the European Convention. In 1979, the European Commission proposed, unsuccessfully, that the European Community accede to the European Convention.¹² From that time on, it was quite often argued by EC institutions, like the Commission or the Parliament, that there is a need for the Community to accede to the Convention since the Communities have expanded in certain areas, including also the field of human rights, that need its protection. However, in Opinion 2/94 issued in 1996,¹³ the ECJ considered the issue of Community accession to the European Convention. Though the ECJ accepted the important role of fundamental rights within the EC legal order, it decided that a Treaty amendment would be necessary before the Community could accede to the Convention. Thereby the ECJ

Konstytucja dla rozszerzającej się Europy (2000); K. K a ń s k a: "Karta Praw Podstawowych a przestrzeganie praw człowieka przez instytucje Unii Europejskiej," *Zeszyt Naukowy* 4/2003, Wydział Prawa i Administracji, Uniwersytet Warszawski, Warszawa 2003 and the literature cited therein.

⁴ Article 6.2 TEU.

⁵ Case 29/69 *Stauder*, [1969] ECR 419.

⁶ Case 11/70 *Internationale Handelsgesellschaft*, [1970] ECR 1125.

⁷ Case 4/73 *Nold*, [1974] ECR 491.

⁸ Case 36/75 *Rutili*, [1975] ECR 1219.

⁹ Case 222/84 *Johnston*, [1986] ECR 1651.

¹⁰ See e.g. the following cases: 44/79 *Hauer*, [1979] ECR 3727; 46/87 *Hoechst*, [1987] ECR 1549; 374/87 *Orkem*, [1989] ECR 3343; 260/89 *ERT*, [1991] ECR I-2925.

¹¹ OJ C 1977, 103.

¹² Memorandum of the Commission, EC Bull., Supp. 2/79.

¹³ Opinion 2/94, [1996] ECR I-1759.

put the emphasis on the need for a major political initiative, a partial reason explaining the subsequent debates in EU forums.

3. Drafting of the Charter

The effect of the Court's opinion was that the EC institutions seemed to promote a distinct, Community machinery of protection against infringements of fundamental rights. Such a view was quite often expressed by the EC institutions – for instance, by the European Parliament in a Resolution on drawing up a Charter of fundamental rights dated 16 March 2000¹⁴ or a Resolution addressed to the European Council in Feira.¹⁵ In the former and the latter the Parliament endorsed the idea of establishing a Charter of fundamental rights. It considered that such a Charter should be regarded as an indispensable prerequisite for equipping the European Union with a constitution. The Parliament wanted the Charter to reaffirm the indivisibility of fundamental rights in their application vis-à-vis all European Union institutions and bodies and in relation to all Union policies, including under the second and the third pillar. The Charter should be also binding for the member states in all areas where Community law was applicable. The Parliament proposed, moreover, that the States applying for accession be granted observer status in the proceedings of the convention set up to draft the Charter. It emphasised that the Charter should not replace or weaken member states' internal provisions concerning fundamental rights. It also called upon the Intergovernmental Conference to enable the Union to become a party to the European Convention on Human Rights so as to establish close cooperation with the Council of Europe and to give all persons protected under the Charter access to the Court of Justice of the European Communities.

The European Council expressed its views on what it expected of the Charter at the Cologne Summit on 3–4 June 1999.¹⁶ According to the "Conclusions of the Presidency," the aim was to affirm the exceptional importance of human rights and their relevance in a manner that could be seen and understood by EU citizens. In the opinion presented at that time by the European Council, the Charter should comprise fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention and stemming from the constitutional traditions common to the member states. The end-result of combining the substantive and procedural scope of protection could be a codification of the rights in question, but the European Council did not specify what legal form would be the most appropriate for the act eventually elaborated as the Charter, only signalling it solemn proclamation and possible incorporation into the founding treaties of the European Union.¹⁷ It anticipated that

¹⁴ Parliament Resolution on the drafting of a European Union Charter of Fundamental Rights, C5-0058/1999 – 1999/2064 (COS).

¹⁵ Resolution of 15.06.2000, OJ C 2001.

¹⁶ European Council's Conclusions, available on the internet at: www.europarl.eu.int/council/off/conclu/index.htm.

¹⁷ Ibidem.

the European Council would propose to the European Parliament and the European Commission that, together with the Council, "they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It would then have to be considered whether and, if so, how the Charter should be integrated into the treaties."

Meetings of the body responsible for preparing the draft Charter (renamed the Convention) took place from December 1999 until the autumn of 2000. Just after the completion of the text that would later be adopted in Nice, the Commission assessed the Charter as having a "great potential value added" that would be "the basis for [its] future success, *irrespective* of its ultimate legal nature."¹⁸ This was to be "a task of revelation rather than creation, of compilation rather than innovation." The Convention drafting the Charter followed the course of producing a text with a content that would allow for its integration into the Treaties, an approach that came to be known as the "as if" doctrine.¹⁹ In this sense, the relevant words came in a Communication addressing the role of the new Convention on the Future of Europe.²⁰ The Commission pointed out that integration was not a question to be addressed in theoretical or doctrinal terms but had to be addressed in terms of legal effectiveness and common sense. In practice, the real question is when and how it should be integrated into the Treaties.²¹

In other words, the Commission in its communications endorsed the preliminary draft of the Charter and highlighted the issue of the legal nature of this document, stating that the Commission believed the Charter would have the effect of a proclamation, irrespective of the legal value formally conferred on it. However, incorporating the Charter into the Treaties would remedy some of the shortcomings in the existing system of protection of fundamental rights in the Union. In this spirit, Mr. Romano Prodi, President of the Commission, stated:²²

"In the eyes of the European Commission, by proclaiming the Charter of Fundamental Rights, the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote. The citizens of Europe can rely on the Commission to ensure that the Charter will be respected..."

As is clear, the Charter's lack of binding force was intentional, a deliberate decision of the representatives of the gathered in Cologne and Nice. Jacques Chirac, President of the European Council, stated in Strasbourg on 12 December 2000:

"In Nice, we proclaimed the European Charter of Fundamental Rights, a text which is of major political importance..."

¹⁸ Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM (2000) 644, par. 2 and 3.

¹⁹ Expressly so-called by the Commission. See: Commission Communication on the Charter of Fundamental Rights of the European Union, COM (2000) 559 par. 7, and Communication from the Commission on the Legal Nature..., *op. cit.*, COM (2000) 644, par. 33.

²⁰ Commission Communication on the Legal Nature..., *op. cit.*

²¹ *Ibid.*

²² Romano Prodi, December 2000, Nice.

The Conclusions issued after the Nice Summit were quite concise in stating that the European Council welcomed the joint proclamation, by the Council, the European Parliament and the Commission, of the Charter of Fundamental Rights, combining in a single text the civil, political, economic, and social rights hitherto laid down in a variety of international, European and national sources. The European Council wanted to see the Charter disseminated as widely as possible amongst the Union's citizens. In accordance with the Cologne conclusions, the question of the Charter's legal force under Community law was to be considered later.²³

The future legal meaning of the Charter was described together with the draft of the proposed Constitutional Treaty of the EU at the European Council Summit held in Thessaloniki with participation by the newly acceding States.²⁴ In accordance with the draft, the Charter was to be incorporated into the Treaty as Part II.²⁵ The European Council expressed its belief that the presentation of the draft marked the completion of the Convention's tasks as set out at Laeken and, accordingly, the end of its work.²⁶ It was stated in the Presidency Conclusions that the draft Treaty was a good basis for starting an Intergovernmental Conference (IGC). The incoming Italian Presidency was requested to initiate, at the Council meeting in July, the procedure laid down in Article 48 TEU in order to allow this Conference to be convened in October 2003. The Conference should complete its work and reach agreement on the Constitutional Treaty as soon as possible and in time for it to become known to European citizens before the June 2004 elections to the European Parliament so that the Constitutional Treaty could be signed by the member states of the enlarged Union as soon as possible after 1 May 2004.²⁷

Today it can be noted that these plans failed because the 2003 IGC was unable to approve the draft Treaty. The European Council could only invite ministers to continue actively discussions at the political level. It took note of the Presidency's intention to conduct consultations with all participants with a view to finalising the draft Constitutional Treaty on the basis of the draft produced by the Convention and in the light of the discussions in the IGC, in preparation for the next meeting of the IGC at the level of Heads of State or Government.²⁸

To conclude this part of our considerations, it can be noted that, formally, the Charter is still an example of an interinstitutional agreement published in the *Official Journal*, the existence of which was for the first time officially recognised in the final act of the Nice conference,²⁹ in a declaration concerning Article 10 of the EC Treaty.

²³ Presidency Conclusions, Nice European Council Meeting, p. I. 2, available on the internet at: www.europarl.eu.int/council/off/conclu/index.htm.

²⁴ Presidency Conclusions, Thessaloniki European Council Meeting, 19 and 20 June 2003, available on the internet at: www.europarl.eu.int/council/off/conclu/index.htm.

²⁵ CONV 797/1/03, 12.06.2003.

²⁶ Presidency Conclusions, Thessaloniki..., p. 4.

²⁷ *Ibid.*, p. 5.

²⁸ Presidency Conclusions, Brussels European Council Meeting, p. I, available on the internet at: www.europarl.eu.int/council/off/conclu/index.htm.

²⁹ OJ C 364.

The Parliament, the Council and the Commission can conclude such agreements, provided that they make no amendments to the Treaties in order to facilitate the application of the EC Treaty. These agreements are binding for the institutions engaged in mutual relations. They are bound by them politically and morally, even when they do not involve any rights or obligations for third parties. That means that the Charter is deprived from the formal point of view of legally binding effect, and in consequence cannot impose "hard" legal obligations. On the other hand, there is an obligation, but of a political nature, that can develop into a legislative initiative. In this manner, the three institutions have indicated in the Charter the direction and the values that they are committed to respecting in their activities, including in the normative area.

4. Political Initiatives

Let us now switch to the three signatory political institutions of the EU. Since its proclamation, the EU Charter has been used by them and referred to in a variety of ways. The impact of the Charter on the activities of the European Parliament, the Commission and the Council will be considered first. After an overview of references to the EU Charter made by these EU institutions, some selected topics relating to the judiciary and showing the current position of the European Court of Justice toward the Charter will also be presented. Finally, in the conclusions, the implications this entails for EU citizens will be very briefly examined.

The European Parliament is the institution that has assumed over the years an ever greater role in making human rights one of the central concerns of the EU. The powers of the Parliament in this field have gradually increased, particularly since the entry into force of the Maastricht and Amsterdam Treaties. The European Parliament, which has become a recognised forum for discussion of human rights, maintains regular contacts with human rights organisations and human rights campaigners. It also undertakes human rights missions to countries outside the EU and draws up reports on specific human rights situations as well as topical issues.

The attitude of the European Parliament to the Charter was expressed by its President, Nicole Fontaine, during the signing ceremony. She said:

"A signature represents a commitment [...] I trust that all the citizens of the Union will understand that from now on [...] the Charter will be the law guiding the actions of the Assembly [...] From now on it will be the point of reference for all the Parliament acts which have a direct or indirect bearing on the lives of citizens throughout the Union."³⁰

Following the proclamation of the EU Charter, the European Parliament adopted on 5 July 2001 a resolution containing a report analysing the situation as regards fundamental rights in the EU in 2000 from the perspective of the rights laid down in

³⁰ Nicole Fontaine, 7 December 2000, Nice.

the Charter.³¹ The report was drafted by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs. The report follows the structure of the Charter, dividing rights into six separate chapters: respect for human dignity, freedoms, equality between citizens, solidarity, European citizenship, and justice. Each chapter contains an overview of the main legal instruments in each area, an overview of the current situation in the member states, which is based on reports by the Council of Europe, NGOs and other organisations, as well as a series of recommendations. It covers areas such as, *inter alia*, trafficking in human beings, protection of privacy, the right to asylum and the rights of nationals of third countries, equality between men and women, etc.

In its report on the situation of fundamental rights in the EU, the European Parliament asked for the establishment of a network of independent experts of recognised competence in the sphere of human rights for the purpose of assessing the implementation of each of the rights listed in the Charter. This network would have, obviously, to assist the Commission and the European Parliament by supplying these institutions with information on the implementation of the rights contained in the Charter. It would then be up to these institutions to take the initiatives required as and when situations of concern develop: institution of infringement proceedings against a State violating the Charter in its implementation of Community law; initiating legislation where this appears essential and respects the limits of the powers attributed to the Union institutions; and even, in the most serious cases, recourse to Article 7 TEU.³²

The European Parliament recommended making national courts responsible for enforcing decisions of the European Court of Human Rights, and that the decisions would be taken into account at the legislative level. It stressed the need to improve the efficiency of service to the public of justice, and to bring an end to procedural delays in accordance with the decisions of the European Court of Human Rights. It also asked member states to ensure that the national administrations conform with the decisions rendered. Finally, the European Parliament recommended opening access to legal aid, regardless of the dispute, nationality, or place of residence, and the improvement of conditions of the right to an interpreter.

The European Parliament has also adopted, by 344 votes in favour, 79 against and 28 abstentions, a report drawn up at its initiative by Andrew Duff which called for the EU Charter of Fundamental Rights to be included in the Union's new Constitutional Treaty.³³ In this report, the Convention was urged to enhance legal certainty and end political confusion over the Charter's scope and level of protection by giving it the status of primary law, thereby making it a central reference point for the Court of Justice and national courts. To this end, it was stressed that the Charter should be

³¹ A5-0223/2001. The rapporteur was Thierry Cornillet; available on the internet at: www.europarl.eu.int.

³² See: O. de Schutter: *The questions to be decided – Protecting fundamental rights, an issue in the Convention on the Future of Europe*, available on the Internet at: www.europa.eu.int/comm/justice_home/unit/charte/en/questions.htm.

³³ Resolution on the Impact of the Charter of Fundamental Rights of the European Union and its Future Status, 23 October 2002, A5-0332/2002, INI/2002/2139.

incorporated into the Constitutional Treaty of the EU.³⁴ At the same time, the Parliament warned against the dangers of refusing to make the Charter binding on all the EU institutions and on member states when and in so far as they implement EU law and policy, thereby disappointing the expectations of European citizens. However, it maintained that an increased status for the Charter was highly desirable in the context of enlargement because it would serve to enshrine a fundamental rights regime at the heart of the European integration process.

The Parliament stressed that making the Charter binding would initiate a new phase in the development of EU citizenship and that, in order to protect citizens from any abuse by the European Union of its enlarged powers, judicial remedies would need to be developed and, therefore, that the Convention, in close consultation with the Courts, should frame measures to improve direct access to the Court of First Instance (with a right of appeal to the Court of Justice) to enhance the legal protection of individuals.

In addition, it found it unthinkable to have a modern constitution of the European Union without a binding Bill of Rights, and took the view that if the Convention drafted a new Treaty without the Charter, it would fall short of having the constitutional effect that was both necessary and desirable.³⁵

In the abovementioned report, the European Parliament also acknowledged the good collaboration between the Court of Justice and the European Court of Human Rights. It confirmed its support for the opening of accession negotiations by the Union with a view to becoming a high contracting party to the European Convention and other international instruments in the field of human rights and noted that European Union accession to the European Convention would be a complement to and not a substitute for the granting of mandatory status to the Charter under EU law, both actions being necessary and timely.³⁶

4. Legislative Initiatives

Respect for fundamental rights and observance of the principles recognised, in particular, by the Charter of Fundamental Rights are to no less wide extent than in the European Parliament are a focus of interest of the Commission. It cannot dispense with the legal implications insofar as the Commission possesses the right of initiative in the legislative procedure. Examples of the EU legislation drawn up in conformity with the Charter are now quite numerous. Proposals that represent special links with the fundamental rights laid down in the Charter could be mentioned here.³⁷ The sub-

³⁴ *Ibid.*, p. 8.

³⁵ *Ibid.*, p. 7.

³⁶ *Ibid.*, pp. 11–12.

³⁷ See e.g. current legislative procedures: proposal of a regulation to establish the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national, Initial Proposal COM (2001) 447 of 26 July 2001. Proposal for a Council Decision adopting an action programme for administrative co-operation in the fields of external borders, visas, asylum and immigration (ARGO), Initial Proposal COM (2001) 567 of 16 October 2001.

jects are such problems as the social and economic rights of asylum-seekers in member states or of long-term residents, non-discrimination or the right to judicial protection as well as matters relating to police and judicial cooperation which have become priority concerns since the Tampere European Council (October 1999).

An example of an act in this category is the proposal for a Council Directive laying down minimum standards for reception of asylum-seekers in member states³⁸ or the proposal for a Council Directive concerning the status of third-country nationals who are long-term residents.³⁹ The latter serves to underline the point that the coverage of the Charter extends beyond citizens of the EU. In it, the Council states that the Charter enshrines a number of rights conferred not only on the nationals of the member states but also third-country nationals residing there. Most of the rights enumerated in the Charter are conferred on all persons regardless of their nationality or place of residence; in this sense, the Charter constitutes the very essence of the European *acquis* in terms of fundamental rights and respects the principle of universalism. To that extent, it reflects the European Union's traditions and positive attitude to equal treatment of citizens of the Union and third-country nationals.⁴⁰

Also, a legislative resolution by the Parliament of 28 August 2001 concerning a proposal for a Council directive on minimum standards for procedures in member states for granting and withdrawing refugee status⁴¹ relates to conformity with the Charter. The European Parliament in this resolution welcomed the proposal for a directive and endorsed many of the amendments proposed by the Commission. It called for a guarantee that international commitments and the European Union Charter of Fundamental Rights would be respected.

As far as secondary legislation is concerned, several directives have been adopted by the Parliament and the Council that conform with the Charter of Fundamental Rights and are in line with the case law of the Court of Justice. Some of the directives that respect fundamental rights and observe the principles specifically recognised by the Charter of Fundamental Rights of the European Union can be mentioned here.

The first of these is Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.⁴² Next, there is Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions (Text with EEA relevance).⁴³ Another example is Council Directive 2002/8/EC of 27 January 2003 on improvement of access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in

³⁸ COM(2001) 181 of 3 April 2001, OJ C 213.

³⁹ COM/2001/0127 final – CNS 2001/0074, OJ C 240 E.

⁴⁰ *Ibid.*

⁴¹ COM(2000) 578 – C5-0705/2000 – 2000/0238(CNS), A5-0291/2001.

⁴² Directive on privacy and electronic communications, OJ L 201, 31/07/2002 P. 0037–0047.

⁴³ OJ L 269, 05/10/2002 P. 0015–0020.

such disputes⁴⁴ or Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.⁴⁵

To conclude this analysis of the attitude which the three EU institutions, the Council, the Parliament and the Commission, represented until the Charter was officially adopted at Nice, it is clear that this attitude shows that at the time of the Nice Summit their intention was that the interinstitutional agreement should resemble other Community acts rather than a conventional international agreement. Now, more than three years later, the Charter seems to have grown in significance and, in the praxis of these three institutions, has obtained a new function. From being a solemn Declaration, an act of political significance, it has become a privileged tool of legislation and of dialogue between all the European Union institutions and also the member states for making progress in the sphere of the fundamental rights which it has consolidated.⁴⁶ This can be seen when legislative activity of the EC institutions is taken under consideration.

The Charter has obtained a new function in the activity of the institutions, and that can undoubtedly be called a success of the document. Thus far, however, though the Charter forms part of the new Constitutional Treaty, the Constitution for Europe, it has still to be given binding force within the European Union and its future, like the future of the Constitution, remains uncertain. From this point of view, it has not succeeded in replacing the contemporary *acquis* of the Union as far as fundamental rights are concerned. Nonetheless, it can be credited with making that *acquis* clearer, in accordance with the recommendations of the Cologne European Council.

One can ask if that is enough for the EU institutions aspire to. Maintaining the *status quo* does not seem any longer to lie in the interests of the representatives of the member states. Yet in the Nice Treaty's Declaration on the Future of the Union (Declaration 23),⁴⁷ the European Council called for further consideration of the status of the Charter. In the Laeken Declaration on the Future of the Union issued in December 2001, the Council agreed to convene a Convention on the Future of Europe, to pave the way for the next Intergovernmental Conference. The Convention was composed of the main parties involved in the debate on the future of the Union. Its task was to consider the key issues arising for the Union's future development and to try to identify the various possible responses. In the section of the Declaration headed "Towards a Constitution for European Citizens," the Declaration identified several questions that should be considered, including the need to consider simplification and reorganisation of the Treaties. In this context, the Declaration stated that "thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights."

This part of the abovementioned Declaration could be read as a suggestion that the protection of fundamental rights within the Union would still be incomplete if it only

⁴⁴ OJ L 026, 31/01/2003 P. 0041–0047.

⁴⁵ OJ L 031, 06/02/2003 P. 0018–0025.

⁴⁶ O. de Schutter, *op. cit.*

⁴⁷ OJ C 364, 18/12/2000.

involved incorporation of the Charter into the Treaties. Further to that, the Union's accession to the European Convention as a cumulative step is also recommended.⁴⁸

So much for the approach to the Charter of the EU institutions engaged in political and normative activities followed before and at the time of its signature and then after its proclamation. Now it is time to proceed with the next part of the analysis – the legal impact of the Charter and the position of the European Court of First Instance and the European Court of Justice as the institution responsible for enforcing observance of the law in the interpretation and application of the EC Treaty.

6. Judicial Impact of the Charter

In this part of the paper, the purpose is to indicate how the ECJ and the Court of First Instance have referred to the EU Charter after its proclamation despite the fact that it was explicitly adopted as legally non-binding. Since such references have been quite numerous, it should be pointed out that exclusive focus on the ECJ case law might not give a complete picture. An understanding of the total judicial impact of the EU Charter since its proclamation can also be gained by looking at cases involving fundamental rights at the national level and falling within the scope of EU law. It could also be very illuminating to get a sense of why and when the Charter is invoked by national jurisdictions in cases where obligations under EC law are applicable but that would considerably exceed the scope of this paper.

The first instance of reference to the Charter occurred in *Mannesmannröhren-Werke AG*⁴⁹ only a few days after the Nice Conference and concerned the right of defence and the right to a fair trial. In a fax received at the Registry of the Court of First Instance on 18 December 2000, the applicant asked the Court to have regard to the Charter of Fundamental Rights in determining his case on the ground that the Charter constituted a new point of law concerning the applicability of Article 6(1) of the Convention to the facts of the case. The Commission rejected the applicant's arguments in a letter of 15 January 2001, contending that the Charter was of no consequence for the purpose of the determination of the case. As regards the applicant's submission regarding the potential impact of the Charter on the assessment of this case, the ECJ stated that it must be borne in mind that that the Charter was proclaimed by the European Parliament, the Council and the Commission on 7 December 2000. It can therefore be of no relevance to a review of the contested measure which was adopted prior to that date.⁵⁰ On the contrary, a part of the Court of First Instance's ruling could justify a conclusion that institutions should comply with the provisions of the Charter as far as acts proclaimed subsequent to the Charter are concerned. The Court dealt with the purely procedural aspects of the case, but clearly left the door open for future applications.

⁴⁸ See: EPC Workshop: *The EU Charter of Fundamental Rights: Solving the Remaining Technical and Legal Issues*, EPC Working Papers, 18.10.2002, available on the internet at: www.theepc.be/europec/strand_one_detail.asp?STR_ID=2&REFID=928&TWS.

⁴⁹ T 112/98 *Mannesmannröhren-Werke vs Commission*, [2001] ECR II-729.

⁵⁰ *Ibid.*, p. 76.

Almost a year later, on 11 January 2002, the Court of First Instance, tacitly but very importantly, moved to integrate the Charter as an aid to interpretation in *Territorio Histórico de Álava*.⁵¹ In this ruling, the Charter was simply added to the list of sources on which the Court based its fundamental rights case law. More particularly, the Charter appeared on an equal footing with the other sources listed in Article 6(2) TEU and without mention of its formal non-binding status.

The Court of First Instance seems to have gone one step further in *Max.mobil Telekommunikation Service*,⁵² by using the Charter as a building block for the framework within which the admissibility and substance of a claim are to be considered. In this case, explicit reference to the Charter was used in regard to two different rights and its formally non-binding status has not been mentioned. The Court stated that it must be emphasised at the outset that diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a state governed by the rule of law and are common to the constitutional traditions of the member states. Article 41(1) of the Charter of Fundamental Rights confirms the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union and the fulfilment of that obligation must be amenable to judicial review.⁵³ Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the member states, as confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.⁵⁴

In *Jégo-Quéré et Cie vs. Commission*,⁵⁵ about the concept of individual concern under Article 230(4) TEC, the Court of First Instance seems to have gone yet another step further. In this case, Jégo-Quéré, a French fishing company, was seeking annulment of a regulation concerning requirements for fishing vessels operating in certain defined areas when fishing with nets. The applicant asserted that were its action for annulment to be dismissed as inadmissible, it would be denied any legal remedy enabling it to challenge the legality of the contested provisions since no act had been adopted at national level against which legal proceedings could be brought. Citing Article 6 of the European Convention, it requested the Court, in the light of that provision, to apply a broad interpretation to Article 230 TEC which provides that "any person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

⁵¹ Case T-77/01 *Diputación Foral de Álava and others*, [2002] ECR II-81.

⁵² Case 54/99 *Max.mobil Telekommunikation Service*, [2002] ECR II-313.

⁵³ *Ibid.*, p. 56.

⁵⁴ *Ibid.*, p. 57. The Court has applied that principle on numerous occasions in relation to infringements of Articles 85 and 86 of the EC Treaty, see, in particular: *Metro vs. Commission* 26/76, [1977] ECR 1875, p. 13.

⁵⁵ T-177/01 *Jégo-Quéré et Cie vs. Commission*, [2002] ECR II-2365.

The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the member states and on Articles 6 and 13 of the European Convention.⁵⁶ In addition, the Court has stated that the right to an effective remedy for everyone whose rights and freedoms as guaranteed by the law of the Union are violated was reaffirmed by Article 47 of the Charter of Fundamental Rights.⁵⁷ In that case, the Court ruled that the contested provisions were of individual concern to the applicant⁵⁸ and this statement provides grounds for the initiation of *actions for annulment in the collective interest* by a representative organisation in order to protect the social purpose pursued by that institution.

In this case, although the Charter is formally mentioned in parallel with other sources of human rights, its real influence appears to have been more important than in the other cases discussed. The first reason for reaching such a conclusion is that its legally non-binding nature goes unmentioned. But, more important, the Charter is for the first time referred to in a separate paragraph, which suggests that it is being used as a separate building block in the reasoning.

As we can see, the Court of First Instance is invoking the Charter more and more boldly. It is, though, very significant that the ECJ has not yet made any reference to the Charter, despite many opportunities and the fact that a number of advocates-general have based their submissions on the Charter being an expression of general principles of Community law.

One example was the judgement in *BECTU*,⁵⁹ delivered in February 2001, in a reference for a preliminary ruling from the High Court of Justice of England which submitted two questions under Article 234 TEC on the interpretation of Council Directive⁶⁰ concerning certain aspects of the organisation of working time. Basically, the national court wanted to ascertain whether, in the light of the Directive, the legislation of a member state may lawfully provide that a worker's entitlement to paid annual leave, or to the advantages associated with it, would start to accrue only after completion of a minimum period of employment with the same employer.

In his Opinion,⁶¹ Advocate-General Tizzano pointed out that the Charter of Fundamental Rights has not been recognised as having genuine legislative scope in the strict sense. In other words, formally, it is not in itself binding. However, he believed that the Charter could nevertheless produce legal effects, since the fact remained that it included statements which appear in large measure to reaffirm rights which are enshrined in other instruments.⁶² From this point of view, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored, in particular, to serve, where its provisions so allow, as a sub-

⁵⁶ Case 222/84 *Johnston*, [1986] ECR 1651, p. 18.

⁵⁷ *Jégo-Quéré*, *op. cit.*, p. 43.

⁵⁸ *Ibid.*, p. 53.

⁵⁹ Case C-173/99 *BECTU vs. Secretary of State for Trade and Industry*, [2001] ECR I-4881, p. 28.

⁶⁰ The "Working Time Directive" 93/104/EC of 23 November 1993.

⁶¹ Conclusions delivered on 8 February 2001.

⁶² *Ibid.*, p. 27.

stantive point of reference for all those involved – member states, institutions, natural and legal persons – in the Community context. Tizzano considered that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.⁶³

The Opinion of Advocate-General Jacobs in *Kingdom of the Netherlands* seems no less solid.⁶⁴ This was an action brought under Article 230 of the EC Treaty which sought annulment of Directive 98/44 on the legal protection of biotechnological inventions. In the opinion, Jacobs stated that there could be no doubt that the rights invoked by the Netherlands were indeed fundamental rights, respect for which must be ensured in the Community legal order. The right to human dignity was, in his view, perhaps the most fundamental right of all, and was now set forth in Article 1 of the Charter of Fundamental Rights, which states that human dignity is inviolable and must be respected and protected. The right to free and informed consent both of donors of elements of the human body and of recipients of medical treatment can also properly be regarded as fundamental; it is also now reflected in the Charter, in Article 3(2) which requires in the fields of medicine and biology respect for the free and informed consent of the person concerned, according to procedures laid down by law. It must be accepted that any Community instrument infringing those rights would be unlawful.⁶⁵ He considered, however, that although the requirement of consent to all potential uses of human material may be regarded as fundamental, patent law is not the appropriate framework for the imposition and monitoring of such a requirement. A patent simply confers the right to prevent others from using or otherwise exploiting the patented invention. The question of how the grantee of the patent uses or exploits that invention is regulated not by patent law but by national law and practice governing the field concerned.⁶⁶

Finally, on 20 September 2001, Advocate-General Mischo also made a reference to the Charter in *Booker Aquaculture*. In conclusions, he stated:

“I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.”

There is also the Opinion submitted by Advocate-General Léger in *Heidi Hautala* which concerned the right to the widest and fullest possible access to the documents of Community institutions, and the principle of protection of legitimate expectations⁶⁷ and in which he dealt with the Charter in a detailed way, as well as its formal

⁶³ *Ibid.*, p. 28.

⁶⁴ Case C-377/98 *Kingdom of the Netherlands vs. European Parliament and Council of the European Union*, [2001] ECR I-7079.

⁶⁵ *Ibid.*, p. 197.

⁶⁶ *Ibid.*, p. 211, AG. Jacobs' s references to the Charter also in the case C-50/00 *Z. vs. Parliament; Unión de Pequeños Agricultores*, [2002] ECR I-6677.

⁶⁷ Case C-353/99 *Council of the European Union vs. Heidi Hautala* [2001] I-9565.

non-status. In his view, the strength of the principle of access to documents derives from the fact that it is a fundamental right.⁶⁸ However, aside from any consideration regarding its legislative scope, the nature of the rights set forth in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the member states, which have chosen to make them more visible by placing them in a Charter in order to enhance protection. The Charter “was intended to constitute a privileged instrument for identifying fundamental rights”⁶⁹ and, equally undeniably, placed the rights which form its subject matter at the highest level of values common to the member states.⁷⁰

Further, Léger concluded that the sources of those rights, listed in the preamble to the Charter, are for the most part endowed with binding force within the member states and the European Union. It is natural for the rules of positive Community law to benefit, for the purposes of their interpretation, from the position of the values with which they correspond in the hierarchy of common values.⁷¹ As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law.⁷²

The references that the advocates-general make to the Charter are quite numerous.⁷³ They have referred to the Charter despite the fact that it was explicitly adopted as legally non-binding. Some of them have also persistently pointed to the formally legally non-binding status of the Charter. It has emerged that some advocates-general, although aware of the Charter’s controversial legal nature, have been quite progressive in their explicit references, stressing the democratic and substantive value of the text, quoting the rights contained in the European Convention (property rights, respect for private life) and so-called “new generation” rights (dignity, right to integrity of the person, social rights, right to good administration, right of access to documents, etc.). For them the Charter is used as evidence of confirmation and definition of the status and content of general principles and as a privileged instrument for identification of fundamental rights. As a result, the Charter seems to be a document without explicit legal force, but with legally binding content.

⁶⁸ Opinion of 10.07.2001, p. 77.

⁶⁹ *Ibid.*, 89.

⁷⁰ *Ibid.*, p. 80.

⁷¹ *Ibid.*, p. 82.

⁷² *Ibid.*, p. 83.

⁷³ See e.g. the following cases: C-340/99 *Poste Italiane*, [2001] ECR I-4109; C-94/00 *Commission vs. Italie*, [2002] ECR I-2965; C-131/00 *Nilsson*, [2001] ECR I-10165; C-413/19 *Baumbast et R. vs. Secretary for the Home Department*, [2002] ECR I-7091; C-313/99 *Mulligan e.a. vs. Minister of Agriculture and Food Ireland et Attorney General*, [2002] ECR I-5719; C-309/99 *Wouters*, [2002] ECR I-1577; C-270/99 *Opinions Z vs. Parliament*, [2001] ECR I-9197; C-208/00 *Überseering*, [2002] ECR I-9919; C-122/99 *D. vs. Council*, [2001] ECR I-04319; C-20/00 *Booker Aquaculture*, not publ.; C-459/99 *Commission vs. Trenker*, [2001] ECR I-2823; C-60/00 *Carpenter*, [2002] ECR I-6325; C-459/99 *MRAX*, [2002] ECR I-6591; C-210/00 *Käseri Champignon Hofmeister*, [2002] I-6453.

Thereby the Charter seems to have entered the case law of the Court of First Instance as an implicit authority "confirming" the two sources of the general principles of Community law mentioned in Article 6(2) TEU. However, for all this activity on the part of the Court of First Instance it must be remembered that the politically more important Court of Justice has not yet taken the opportunity to pronounce itself on the Charter although it has been explicitly invited to do so by advocates-general on a number of occasions.

7. Conclusions

To conclude, it can be recalled that it was the ECJ that has developed the concept of general principles in EC law and thanks to its case law determination of rights of a fundamental character for the Union is possible. This case law has developed over the decades not only on the basis of the primary legislation of the EC, but also under the influence of the constitutional traditions common to the member states, the European Convention on Human Rights and other international agreements safeguarding human rights of which the EU member states are signatories.

Almost four years ago, the EU Charter of Fundamental Rights was proclaimed, and there is no question that it will find itself a place amongst the sources of the general principles espoused by the EU. At a stage when the Charter has not acquired a clear legal status, it remains a new source of inspiration for the ECJ in its case law. The Charter offers a clear guide for the interpretation of fundamental rights by the Court of Justice which, until the Charter was proclaimed, had to rely on disparate, sometimes uncertain, sources of inspiration.

The Court of First Instance has now included the Charter, alongside the usual sources of inspiration, as a source of "confirmation." Some of the advocates-general have no hesitations about application of the Charter as a strict expression of the EU fundamental rights. In their conclusions, these rights form part of the general principles which the ECJ is committed to enforcing and are normally cited by Community judges in their rulings. This means that the fundamental rights are legally binding for the Union, and this has nothing to do with some interinstitutional agreement, even one of possibly conventional value.

But the Charter is going to serve as a point of reference not only for the Courts, but for all the actors on the Community stage, which means member states, institutions and also individuals. Consequently, it is reasonable to assume that the Charter produces all its effects, legal or otherwise, whatever its nature. As the Commission declared in the European Parliament on 3 October 2000,⁷⁴ it is clear that it would be difficult for the Council and the Commission, who proclaimed it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy

⁷⁴ Oral question 0-0115/00 by Giorgio Napolitano.

acting in concert. The analysis of the normative activity of the EC institutions presented above confirms this scenario.

For human rights protection within the Union in general, however, its potential impact should not be overestimated, since the Charter has not removed some well-known inherent drawbacks to effective human rights protection in the EU. Another question is whether or not legal certainty will thereby increase, as the Commission predicted that it remains to be seen, as it depends very much on how reference to the Charter by the Courts will develop.⁷⁵ Direct and exclusive reference to the EU Charter by individuals in an EU human rights case is unlikely to be successful because the Charter has made no changes in the redress procedures and the judicial architecture provided for by the Treaties, since it opens up no new procedures for seeking redress in Community courts.

⁷⁵ The doctrine expresses also the belief that the Charter offers the possibility of broadening the reach of fundamental rights protection beyond the sources defined in Article 6(2) TEU and the hope that thanks to the Charter and its formulation of new fundamental rights, the level of protection will be higher in the future.

An Alternative Look at State Succession

YULIYA NOGOVITSYNA

State succession is almost always accompanied by the appearance of new states. According to positivist views, a newly created state, by virtue of its sovereignty, is not bound by its predecessor state's liabilities, since it has never assumed such liabilities. The predecessor state's treaties are *res inter alios acta* for this newly created state.¹ Such conditions do not meet the requirements of modern international law or serve the interests of the international community. So how can international law impose certain liabilities on a newly created state?

One way has already been implemented: it consists in recognition of the imperative power of certain rules (*jus cogens*), which makes them obligatory for all states, both the newly created and the already existing. But there is also an indispensable interest in newly created states following not only a very limited number of imperative rules but also predecessor-states' treaty obligations. A conventional or customary rule of the compulsory nature of predecessor-state obligations is not sufficient for successor states, since without its consent to be bound by this rule a newly created state will always be able to object to its application. The establishment of an appropriate rule of *jus cogens* in the field of state succession is rather questionable because succession precedents are relatively rare and separate. For this reason, it is no good talking about continuous practice and the concerted *opinio juris* of the states.

The above-mentioned problem makes it clear why signing the Vienna Conventions of 1978 and 1983 did not clarify the situation with newly created states. In fact, adherence to these conventions and their rules is left to the discretion of newly created states. In the event of newly created states accepting the binding and retroactive force of the conventional rules, the latter will be applied, otherwise not.

In order to substantiate the compulsory nature of the rules governing state succession issues one could use a notion which is broader than *jus cogens* and which is general international law. But it still has not been decided exactly what rules other than the peremptory ones constitute general international law and what is the source of its binding force. It seems to have the ring of international legal order, which by its supreme legal force (supreme sovereignty) limits state sovereignty. D.P. O'Connell proposed such a structure: he suggested discarding international personality and so-

¹ N.Q. Dinh, P. Daillière, A. Pellet: *Droit International Public*, vol. 1 (2000), p. 339; E. Castrén: "Obligations of States Arising from the Dismemberment of Another State," 13 *ZaöRV* (1951), p. 754.

verignty criteria when dealing with state succession, and following, instead, the needs of the international community which has an interest in the legal continuity of international rights and obligations (legal continuity).²

Another approach has also been proposed, which suggests negating or limiting the possibility of the appearance, as a consequence of state succession, of a state which is entirely different from its predecessor. Matthew Craven, the advocate of this idea, considers it necessary to distinguish between state personality and state identity. Preservation by a successor state of a certain degree of identity with a predecessor state stipulates the continuity of the international obligations of the latter.

Let us analyse these two concepts more deeply.

International Legal Order or Preserved Identity?

D.P. O'Connell placed the need of the international community "for continuity and avoidance of disruption"³ higher than newly created states' interests. He believed that international legal order has supreme sovereignty, since it determines the nature and extent of state sovereignty. Thus, newly created states by virtue of international legal order can be bound by a principle of continuity of predecessor-states' rights and obligations. In O'Connell's opinion, when addressing the issues related to state succession, it is necessary to discard both a personality criterion and differentiation between continuity and state succession cases. Instead, it is necessary "to analyse the effect of change upon the treaty concerned."⁴ O'Connell came to such a conclusion on the grounds that the choice between state succession and continuity (which in this case is synonymous to disruption and continuation of international rights and obligations⁵) is "a matter of political technique or argument."⁶ It is impossible to determine, based on objective (material) factors, whether a predecessor state's personality has disappeared since the state territory and population both continue to exist. The only indicators left are the claims of the state concerned and recognition by third states, which cannot but be pragmatic and subjective. Therefore, in order not to leave the matter of continuity of international rights and obligations to the discretion of other states, O'Connell suggested using a principle of continuity subject to exceptions within the category of *rebus sic stantibus*.

Such a position can be understood, because a traditional approach to state succession presupposes that international obligations are attached to specific state sove-

² D.P. O'Connell: "Reflections on the State Succession Convention," 39 *ZaöRV* (1979), p. 735.

³ D.P. O'Connell: *State Succession in Municipal and International Law*, vol. I (1968), p. 34.

⁴ O'Connell, *supra*, n. 2, p. 734.

⁵ In spite of its name, which is associated with transition and, therefore, preservation of rights and obligations, the state succession principle, in fact, is a concept of "disruption." As a result of such disruption, treaty rights and obligations may or may not pass to a successor state depending on the legal regime that is applied to the specific state succession type. The concept of continuity is based on the continuation of state identity and the continuity of its international rights and obligations.

⁶ M. Craven: "The Problem of State Succession and the Identity of States under International Law," 9 *EJIL* (1998), No 1, Conclusion, http://www.ejil.org/journal/Vo9/No1/#P6_102.

reignty (that is to say, a sovereign, which is associated in the present circumstances with government). This is a remnant of a late medieval understanding of sovereignty as a monarch's sovereignty. But personal sovereignty has since been replaced by national sovereignty and sovereignty of the people or, better said, sovereignty of a state as a complex phenomenon. Since a state is not only its government but also its territory and population, which, at least partially, remain intact during changes in a state, international obligations must continue to saddle the population and territory in respect of which they were initially imposed. At present, such a situation is generally recognised in regard to treaties that set objective regimes (ones establishing border and other territorial regimes). There is also a tendency to apply the principle of continuity to human rights treaties, humanitarian treaties and treaties on disarmament and arms control.

An advocate of another approach, Matthew Craven, while agreeing with O'Connell on the necessity of continuity, states that it would seem untimely to discard a personality criterion. In his opinion, a general "need for order and stability"⁷ is not a sufficient excuse for applying the positive principle of continuity when dealing with state succession. Moreover, in Craven's opinion, O'Connell's concept does not explain, first, why state consent (will) is crucially important when creating international legal rules and is not taken into consideration when a successor state is being created, and, second, it does not solve the problem of state membership in international organisations, participation in international political treaties, and international responsibility relationships which are traditionally considered to be associated with state personality. Trying to avoid such drawbacks, Craven suggests another approach, which is to exclude or almost entirely limit the possibility of the appearance of new states free of international obligations in the course of state succession by means of differentiation between state personality and state identity. Personality (or statehood) consists of elements which characterise any state and are criteria of the fact of its creation and existence. These are: population, territory, government and independence. Personality elements are equally inherent to all states. Identity consists of the elements which characterise, precisely, this particular state and distinguish it from all others. Craven has not provided a list of such criteria, but he refers to "material" – social, cultural, and political – factors. It can be assumed from Craven's explanations that the notion of "personality" answers the question whether an entity is a state, and the notion of "identity," what type of state it is. These two notions can be correlated as form and content. Changes in state identity take place when changes in state territory, involving state succession, occur. Determination of state succession by changes in identity and not personality is explained by the fact that state personality cannot change: it either exists or does not. The personality of all states is the same. Territorial, political, social, and economic differences between states constitute their identity, not personality. If an entity has the status of a state, it can lose personality either when it ceases being a state, or ceases to exist at all. The former is possible with the loss of non-material elements of statehood, i.e. govern-

⁷ M. Craven, *ibid.*, Part 4.

ment and independence (for example, in cases of annexation or colonisation), the latter with the loss of its material elements, i.e. territory and population.

In Craven's opinion, in cases of state succession a certain degree of identity with a predecessor state is always preserved, which has to be reflected in application of the continuity principle to the rights and obligations of the predecessor state. The predecessor state's treaties are not *res inter alios acta* for the successor state, and they do not become void as a consequence of the very fact of state succession.

Craven's concept, built on the personality and identity distinction, follows O'Connell's idea of legal continuity, but is based on a different rationale. It does not postulate primacy of international legal order-related interests over state interests and allows for the possibility of disruption of international obligations due to substantial changes in state identity (for example, during decolonisation).

The author of this article shares the views of both scholars about the necessity of legal continuity following any changes in states. To reach a relevant result, we can try to reconcile the suggested concepts while more or less remaining within current international law and international law doctrine.

Alternative Aggregated Concept

In brief the outline of an aggregated concept looks like this:

Every state by virtue of its international personality has the basic rights and obligations that determine its status as a subject of international law. That is what it enjoys and is obliged to follow by virtue of and as from the moment of its creation. One of the basic state obligations is to adhere to the imperative rules and fundamental principles of international law, one of which is the principle of *pacta sunt servanda*. Continuity of treaty rights and obligations in cases when state identity changes as a result of state succession has to be recognised as part of the *pacta sunt servanda* principle. Continuity of the predecessor state's international rights and obligations is determined by a successor state's preservation of a certain degree of identity with the predecessor state which is reflected in at least partial survival of territory and population. Deviation from the continuity principle can only be tolerated in cases of proven changes of fundamental circumstances. The right to invoke a fundamental change of circumstances as justification for *suspension* of a treaty (but not termination or withdrawal from a treaty) has to arise if:

- such circumstances have been an essential condition for signing a given contract;
- the change of circumstances unexpectedly or disproportionately increases the outstanding obligations of the parties.

Suspension of a treaty on the grounds of *rebus sic stantibus* requires the state which makes such a claim to enter into negotiations and negotiate *bona fide* as to the further effect of the treaty – its suspension, alteration or renewal.

In the context of the suggested legal mechanism, the term “state succession” is used in the sense of state succession *de facto*, not *de jure*, namely as the *de facto* situation in which one state replaces another and takes over the responsibility for the international relations of the territory concerned. The terms “predecessor state” and

“successor state” acquire a new meaning, other than in the Vienna Conventions of 1978 and 1983. The time factor becomes a determinative criterion: a predecessor state means a state which existed up to the moment of state succession, and a successor state means a state which exists after the moment of state succession. Therefore the term “successor state” includes both new states created as a result of state succession and continuing states. Whether the successor states claim the status of new states or continuing states is of no significance since the predecessor state’s rights and obligations bind them by virtue not of preservation of the predecessor state’s personality, but of a certain degree of identity with the predecessor state.

For the implementation of the suggested legal mechanism it is necessary to interpret in broader terms the scope of the *pacta sunt servanda* principle and include therein the principle of continuity of treaty rights and obligations in cases of changes in state identity as a result of state succession. It is also necessary to reconsider the grounds and consequences of invoking fundamental changes of circumstances. In particular, a change in state identity which unconditionally necessitates revision of specific treaty obligations can be considered as a ground invoking fundamental changes of circumstances in cases of state succession. A *degree of identity* between predecessor and successor states can be used here as an index.

Determining the Degree of Identity

Determining the degree of identity is not an easy task and the result will always be relative. But it is possible to specify certain factors and criteria, which, when combined, can serve as an indicator of identity, viz.:

– **main factors:**

1. percentage ratio of successor state and predecessor state territory;
2. percentage ratio of successor state and predecessor state population;
3. claims of the state concerned (declared status);
4. position of third countries (recognition);

– **supplementary factors:**

– *political*

1. preservation of the political (state) system;
2. preservation of the predecessor state’s name;
3. integration level with the predecessor state;
4. preservation of the capital and central administration establishment;

– *economic*

1. control of the national stock of assets (financial, diamonds, gold);
2. share of GNP, imports and exports, state taxes;
3. preservation of the economic system;

– *military*

1. nuclear weapons allocation;
2. conventional weapons allocation;
3. military bases allocation;

- *geographic*
 1. geographical position (outlet to seas, rivers, oceans, presence of islands);
 2. territorial vicinity to the predecessor state's capital (nucleus);
- *demographic*
 1. ethnic and religious structure of the population;
 2. state language;
- *historical (in the case of secession and dismemberment):*
 1. date and method (forced or unforced, voluntary or under duress) of integration into the predecessor state;
 2. date and method of secession from the predecessor state;
 3. experience of existence as an independent state before the integration into the predecessor state.

Analysis of every successor state created on the predecessor state's territory according to the above-mentioned criteria allows us to draw conclusions as to both the general degree of identity and the degree of identity in certain fields. The higher the degree of identity in a certain field, the fewer grounds there are for invoking fundamentally changed circumstances for termination or revision of contractual commitments.

Determining the degree of identity is important for disposal of the consequences of state succession in regard to predecessor state relations with third countries (in the first place, these include international treaties, membership in international organisations, and international responsibility). It helps to determine the degree of changes in state identity and the corresponding degree of changes in its international rights and obligations. For example, as regards membership in international organisations, if there is a high level of identity and the will to continue the predecessor state's membership in an international organisation, the appropriate right is to be granted. Denial of such a right may occur if a state does not meet certain criteria of membership in that organisation (for example, it does not belong to the region that makes states eligible for accession to an organisation, or its economic indices do not meet the admission requirements of an organisation). In cases where several successor states have preserved a high degree of identity with the predecessor state and expressed their desire to continue its membership in an international organisation, all of them might be granted such a right on a *pro rata* allotment of the financial and other rights and responsibilities involved. An estimate of the degree of identity can be made by the international organisation members themselves with due consideration of the successor state's opinion. In the event of disagreement, the case may be referred either to an international judicial authority, or to arbitration, or to an *ad hoc* body authorised to settle the given issue.

Application of the degree of identity also provides the necessary continuity in the field of international state responsibility, which is traditionally perceived as being of a personal nature, i.e. it is not transferable to a successor-state as a result of state succession.⁸ It is commonly agreed that a successor state is a distinct state in respect

⁸ W. Czapliński: "State Succession and State Responsibility," 28 *Can. Y.I.L.* (1990), p. 339; N.Q. Dinh, P. Daillier, A. Pellet, *op. cit.*, p. 342; O'Connell, *supra*, n. 3, vol. 1, p. 482; Ch. Rousseau: *Droit International Public*, vol. III (1977), p. 505.

to the predecessor state and as such is not responsible for the predecessor state's actions except for cases where it assumes such responsibility.⁹ In other words, the main argument in support of the fact that there is no passing of international responsibility from a predecessor state to a successor state is that a predecessor state and a successor state are two different states that can be held responsible only for their own acts or acts which can be attributed to them.¹⁰ But if the degree of identity criterion is used the situation in this respect will somewhat change. In most cases, a successor state will preserve some degree of identity with a predecessor state. Consequently, responsibility relations will not be disrupted. They will be assumed by either the successor state which has preserved the highest degree of identity or by all of the successor states proportionately to the preserved degree of identity. Should a state whose interests have been infringed so consent, the successor states may agree upon a different approach to the division and assumption of international responsibility.

Determining the degree of identity is less helpful in ordering the legal relations among successor states themselves in respect of state property, archives, and debt apportionment. The following criteria, taken in part from the Vienna Convention of 1983, can be used to this end: the principles of territoriality and functional allocation – for state property, identifiable national debt, and local debt;¹¹ the principle of apportionment according to an aggregated index¹² – for state property abroad and non-identifiable national debt; the principle of provenance and of functional allocation – for state archives.

Relativity of Differentiation Between State Succession and Continuity

O'Connell's conclusion about the relativity of the differentiation between cases of state succession and continuity, and the inconsistency of legal continuity being dependent on the choice between these two categories, is sound. The relativity of the differentiation between continuity and succession, between a continuing state and a successor state, is demonstrated by the fact that in cases of succession *de facto* state extinction does not occur. Therefore, we cannot say for certain whether a predecessor state is extinct or not. To assert the *de facto* extinction of a state, one needs to prove the extinction of one of the statehood elements (territory, population, effective government or independence¹³). Moreover, we can refer to the *de facto* extinction of

⁹ *Lighthouses Case (France/Greece)*, R.I.A.A., p. 155, 236.

¹⁰ Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. A/RES/56/83 of 28 January 2002.

¹¹ For the classification of debts see: M. M r a k: *Apportionment and Succession of External Debts: the Case of the SFR Yugoslavia*, part III, <http://www.ef.uni-lj.si/predmeti/ml/cv/DEBT-%20PAPER.htm>.

¹² Such as, for example, has been used for apportionment of state property and debt in the USSR case. This aggregated index was derived from the shares of the former USSR republics in the USSR population, GDP, exports and imports.

¹³ Recent practice shows that there is another element of statehood – recognition by third countries. The fact that recognition is considered an element of statehood and a precondition of identity means an expansion of the constitutive, not declarative, theory of recognition. In the case of the Federal Republic of Yugoslavia, for example, all statehood elements and all preconditions of identity were present: the major part of the territory and

a state only if its material elements – territory and/or population – disappear. There are cases where the territory of a state has submerged for ever, or its population has emigrated or is extinct as a consequence of an ecological or man-made catastrophe. But even under such conditions a state may in future be restored, if its territory again becomes habitable and its population returns, or if the population of the state whose territory became uninhabitable is provided with other territory for further independent state existence.

The extinction of two other elements of statehood – effective government and independence – is hardly identifiable and recognised in practice. Extinction of central authority is usually accompanied, and commonly provoked, by the appearance of a new power which strives to establish its rule in a state. This is reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts when referring to attribution of responsibility to a state for the conduct of an insurrectionary movement which becomes the new government.¹⁴ As a rule, a change of government but not its extinction takes place – it is just that the period of time between the extinction of the previous government and the appearance of a new one may be shorter or longer. And, as we know, the change of government does not imply state succession. At the same time, in terms of identity change of government implies, to a certain extent, a change of identity, and thus may necessitate revision (but not automatic termination) of certain international legal relations. Such an approach is in view of the conflict between theory (in which change of government and social and economic formation is not considered grounds of succession) and practice (where revision or even termination of previous obligations takes place as a consequence of revolutionary changes) being eliminated.

Talking of the extinction of a state as a result of loss of independence is also not reasonable under the present circumstances. The forms of loss of independence have changed in today's world. Since conquest and annexation have been declared beyond the law, economic dependence has become the main form of dependence. Probably, none of the states in the world can be called independent. But this dependence is not so evident as, for example, colonisation, and is not governed by international law. And even when the loss of independence is obvious – for example, as currently in Iraq – no one refers to this as state extinction. The notion of independence has become relative.

De facto: creation of a successor state is no less relative than *de facto* extinction of a predecessor state. The *de facto* creation of a new state is possible only in a territory where no form of statehood has existed before, and which has not been subject to any state sovereignty, i.e. there is no state identity to preserve. At present this is hypotheti-

population, claims of the state as a continuing state of the SFR Yugoslavia, etc. But recognition as a continuing state by the successor states and third countries was missing. As a result, the FRY was not recognised as a continuing state of the SFR Yugoslavia and had to acquire UN membership as a new member. (General Assembly Resolution A/RES/55/12 of 1 November 2000, <http://www.un.org/Overview/unmember.html>; also see: Y.Z. Blum: "UN Membership of the 'New' Yugoslavia: Continuity or Break?," 86 *AJIL* (1992) 830, 833).

¹⁴ Article 10 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra*, n. 10.

cally possible on the open sea, the seabed, Antarctica, outer space and celestial bodies (leaving aside the actual possibility and legitimacy of such state-creation). In all other cases, a state is created on the territory which had already been under the sovereignty of a state and therefore should be deemed to be a continuation of this state, not a totally new one.

Practice

The string of state successions in Europe in the 1990s has proved the necessity of developing new approaches to state succession. Except for the comparatively unproblematic dismemberment of Czechoslovakia, none of the cases complied with the rules suggested by the Vienna Conventions of 1978 and 1983. In order to apply any of the legal regimes set forth in the Vienna Conventions, first and foremost it is necessary to designate the type of state succession. After that, opting for a relevant part of the Vienna Convention we can determine the rules that apply in a specific case. In practice insuperable problems arose: who was to determine the type of state succession? How to settle a dispute between states if there is no consensus on the issue among the states concerned? What is the function of recognition? At what stage and on what basis should a type of state succession be determined? These are only some of the questions that arise when attempting to apply the Vienna Conventions.

Let us take the following situation as an example: after the break-up of the USSR, the Russian Federation first acted as a USSR successor state as did all the other former Soviet republics. This was unambiguously declared in the Treaty on the USSR External State Debt and Assets of 4 December 1991. Later, the Russian Federation proclaimed itself to be a continuing state in some respects. Under the Vienna Conventions, it is impossible to implement a formula whereby the Russian Federation is at one and the same time a successor state and a continuing state of the USSR, since a successor state is a different entity from a predecessor state, while a continuing state is the same. The Vienna Conventions did not even introduce the term "continuing state," because they considered it to be a predecessor state. But in practice such a case took place: the Russian Federation nowadays is considered to be a continuing state with the purpose of continuing the USSR's membership of the UN and other international organisations, but acts as a successor state with the purpose of participating in some international treaties (the Treaty between the USSR and the USA on reduction and limitation of strategic offensive arms of 31 July 1991) and the apportionment of state archives, property and debts.

The discrepancies between the notions of "successor state" and "continuing state" could be avoided by means of the alternative aggregated model suggested above. As a result of the collapse of the USSR, every former Soviet republic preserved a certain degree or certain features of the USSR identity. This degree varies depending on historical, geographical, demographic, national, economic, social, and political factors. The Russian Federation, for example, has preserved the highest degree of identity with the USSR (the biggest territory and population, capital city, central authority,

resources, production, funds, armaments, etc.). Therefore, the number of exceptions to the continuity of rights and obligations has to be minimal. Ukraine has preserved a lower degree of identity compared to the Russian Federation, but a higher one than any of the other former republics. This is also explained by the territorial extent, size and ethnic structure of the population, participation in the Union treaty since 1922, and allocation of nuclear weapons on Ukraine territory after the USSR collapse. The Baltic states preserved the lowest degree of identity. They were annexed to the USSR only in 1940. This happened against their will, the annexation was not recognised *de jure* by the majority of states, they initiated the secession process earlier than other republics, they had existed as independent states until 1940, and do not consider themselves successor states. But the Baltic states' policy of total discontinuity of USSR rights and obligations is unjustified and does not answer the interests of international legal order. Some legal continuity by virtue of the preserved degree of identity should have been secured, at least as regards the treaty rights and obligations associated with the territory and population (for example, continuity of human rights treaties).

The identity concept, in spite of being unrecognised and not fully defined, is nevertheless implemented in practice. As mentioned more than once above, state succession is accompanied neither by 100-percent implementation of the theory of universal succession, nor by the application of the *tabula rasa* doctrine. Preservation of certain legal relations, termination of others and revision of the rest is the usual outcome. Which of these dominates – preservation, termination or revision – depends on the degree of changes in the inherited state identity.

Thus, following the unification of the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR), which in fact amounted to the absorption of the GDR by the FRG,¹⁵ the state that was created preserved a high degree of identity with the FRG which existed until the moment of state succession. The main changes were territorial and population increase and a corresponding change in the state boundary. At the same time, the successor state preserved a lower degree of identity with the GDR, as its political and economic system, internal legal order, and governing institutions changed and it became a part of the European Union. Analysis of the degree of change that took place in the identities of the FRG and the GDR explains why the international treaty obligations of the FRG have not changed; only their territorial application has expanded, while the treaty obligations of the GDR have been revised and consequently, in major part, terminated.¹⁶

¹⁵ Rapport final sur la succession en matière de traités. Committee on Aspects of the Law of State Succession (International Law Association) New Delhi Conference 2002. § 3.1 <http://www.ilahq.org/pdf/Aspects%20of%20State%20Succession/Aspects%20of%20State%20Succession%202002.pdf>.

¹⁶ *Ibid.*, § 3.1.

Summary

This essay provides an analysis of the non-traditional approaches to the problem of state succession suggested by D.P. O'Connell and Matthew Craven. Developing these approaches, their authors tried to ensure and substantiate the continuity of international rights and obligations in the case of state succession. O'Connell urged discarding the personality criterion and following the continuity principle to the benefit of international legal order. Craven suggested differentiating between the notions of state personality and state identity. Reducing state succession to changes in identity, he tried to ensure the continuity of international obligations. The author of this paper has suggested combining and developing these two approaches by recognising the continuity principle to be a constituent part of the *pacta sunt servanda* principle and making exceptions from it conditional on the preserved degree of identity.

The author realises that proposing to apply the continuity principle in cases where a new state is created as a result of state succession may encounter opposition on the grounds of obvious sovereignty limitation. But sovereignty in its traditional and full meaning has already become a myth. In fact, its limitation has already taken place. Practice proves that no successor state has ever fully abandoned a predecessor state's obligations invoking sovereignty. Incidentally, the Vienna Convention of 1978 itself opted for the limitation of sovereignty of the newly created states. Part 1 of Article 34 declares that when secession takes place the treaties of the predecessor state remain effective for the successor state. This clause was a sign of progressive development of international law and of a change in approaches to the sovereignty concept, as a traditional point of view stated in the UN Secretariat memorandum on the secession of Pakistan from India was as following: "...The territory which breaks off will be a new state; it will not have the treaty rights and obligations of the old state..."¹⁷

The author also realises that a degree of identity is not a clear and unambiguous category; it makes "a difficult subject more confused."¹⁸ But there are very few defined notions in the law of state succession, and the classification of state succession types provided in the Vienna Conventions of 1978 and 1983 did not help reaching definite conclusions either in the case of the USSR or the SFR Yugoslavia or the FRG and GDR cases. Is the USSR an example of dismemberment, multiple secession or even both – the Baltic states seceded, while the rest of the Union dismembered? Is it possible to consider the states which have been created in former USSR territory as quasi-new independent states? Why during the unification of the FRG and the GDR was the legal regime of cession applied? What is the difference between the Russian Federation and the Federal Republic of Yugoslavia and why was the former allowed

¹⁷ Reproduced in 2nd *Yearbook of the International Law Commission* 1962 (1964) 101 (as cited in: Y.Z. Blum: "Russia Takes Over the Soviet Union's Seat at the United Nations," 3 *EJIL* (1992) 354.

¹⁸ Ian Brownlie referring to the distinction between continuity and state succession. I. Brownlie: *Principles of Public International Law*, 4th ed. (1990), p. 83, in the Final Report On State Succession, Identity/Continuity and Membership in the United Nations submitted by Konrad G. Buhler, November 15, 1996, p. 3.

to retain UN membership, while the latter was not? International law does, not give explicit answers to these questions, and even when it does, they are not better reasoned than the opposite. That is why blaming the complexity of the suggested mechanism is pointless: a complex and rational mechanism is better than transient decisions which are adapted to the law *post factum*. No one repeals national taxation or mortgage laws because they were not simple enough.

Protection of Consumers' Freedom of Thought Under Domestic and International Law and Manipulation by Advertising

IZABELA GAWŁOWICZ, KINGA FLAGA-GIERUSZYŃSKA

Protection of the individual's autonomy in the sphere of possessing and manifesting their views is of exceptional value and necessary for individuals themselves, yet in the aspect of the functioning of the state, indispensable for efficient realisation of the democratic system. One of the democratic system's essential features is the functioning of free market competition, a component of which is the protection of consumers' rights.

There are significant disproportions between the achievements of consumers' rights protection in various spheres of public life. Psycho-manipulation in advertising belongs to the least controlled sphere, which follows indirectly from the wide range of privacy of the human sphere of thought and views and, consequently, entails the necessity of very delicate regulation of the said sphere, even if the aim is protection of the individual's freedom of thought against unwanted or unperceived external influences. The continually disadvantageous position of the consumer in relation to the business world still makes it possible to create and publish dishonest advertising, not in accordance with fair practice or even prohibited. Producers and service providers should be obliged precisely by international and domestic law to give honest information concerning the goods and services offered. Advertising containing elements of psycho-manipulation is not in accordance with these requirements; psycho-manipulation in advertising is, nevertheless, constantly and, we can say, obtrusively present in our life and is published in the media.

1. The Consumer and Advertising – Basic Ideas

These ideas permeate at least two spheres of science – mainly law [jurisprudence] and economics – and can be constructed in a different way. The problem is implementation in business practice of the model of a conscious consumer who is capable of taking proper advantage of the information imparted by advertisements, but above all, a consumer critical of efforts to manipulate the public or tell less than the whole truth and other symptoms of dishonest practice on the advertising market. This is not only a matter of knowledge of consumers' rights under civil law, but also of forming

a certain attitude to life and taking advantage of every person's psychological predispositions.

1.1. The Consumer in the Perspective of Economics and Jurisprudence.

The consumer is a specific participant in commercial relations and civil law affairs, whose position in relation to businesspeople is generally that of the weaker side exposed to negative influences by entities with a bigger economic and media potential.

In the economic perspective, the term "consumer" is often identified with the idea of "customer," which is not correct as consumers are principally perceived as persons following their own needs in a certain market, whereas a businessperson, an institution or other entity can be a customer as well. "Customer" is considered to be of wider scope than the definition of "consumer." The definition of consumer as a participant in commercial relations is based on the assertion that they are economic actors who consume (utilise) purchased products (services).¹ The consumer as a subject to be protected is perceived as the "end-link" in the economic process ranging from the production of goods through all the stages of exchange to the person who is to utilise, use up or employ the goods for a time, but not as goods on the market, capable of further exchange, but as goods to be used by the buyer personally or to be of use in their home.²

Viewed in the context of studying the behaviour of market participants especially important is market segmentation according to demographic criteria.³

For example: the youngest consumers are the most apt to be influenced by properly prepared advertisements and interference with their freedom of thought is particularly obtrusive, and, what is worst, successful.

Next, with respect to people with low incomes, promotion of goods of poor quality but quite cheap is most efficient; yet the segment of people in a stabilised or good financial situation is more exacting as regards quality, additional advantages from purchase, etc.

The market can also be classified according to criteria of sex. In their struggle for clients, advertising agencies and, in consequence, advertisers take advantage of the differences noticeable in perception of impulses by women and men. Manipulation in advertising very often depends upon making use, for instance, of women's natural inclinations to romanticism or seeking beauty, in the case of men, of building up their appearance of a strong, capable man.

The "consumer" in the context of a legal category is perceived as the object of "all actions" taken by actors offering goods for consumption with the intention of sale.⁴

¹ J. K u f e l, H. M r u k: "Konsument jako instytucja ekonomiczna i prawna," in: *Ochrona konsumenta w uregulowaniach publicznonprawnych*, Zeszyty Naukowe Akademii Ekonomicznej w Poznaniu, seria I, z. 263 (1998), p. 9.

² E. Ł ę t o w s k a: *Ochrona niektórych praw konsumentów* (2001), p. 88 et seq.

³ J. K r a m e r, *Konsumpcja* (1993), pp. 85–88.

⁴ M. A. D a u s e s, M. S t u r m: "Prawne podstawy ochrony konsumenta na wewnętrznym rynku Unii Europejskiej," *1 Kwartalnik Prawa Prywatnego* (1997), pp. 34–35.

Mostly (though not exclusively) this is a matter of persons acting beyond economic aims and activity for profit, although not only for developing their own consumption. European Community law also recommends protection suitable for consumers, including in situations where the consumer is not only a buyer of goods (services) for their own personal or their family's use, but where they are also subjects, professionals, although not experts in the sphere of the particular transaction or consumers operating "economically" as non-professional participants in the capital market. The *ratio legis* of such a conception may be stated as follows: "we protect them as they are the weaker party; their weakness consists in the fact that they are less informed."⁵

In Polish law, Article 22¹ of the Polish Civil Code⁶ defines a consumer as a physical person who performs a legal act not directly connected with his/her economic or professional activities. This regulation turns the status of the consumer towards the estimation of a certain situation – in this case signing a contract. This means that being a consumer, according to this regulation, is not a permanent state but estimated from the angle of a particular legal procedure.

1.2 Advertising and Related Ideas

There is lack of a general definition of a legal character which would embrace in its scope the whole of the advertising market. In Polish law, basically it is only the Radio and Television Broadcasting Act of 29 December 1992 that for the purpose of the TV and radio markets employs a definition, contained in Article 4.6, according to which advertising is considered to be every item of information not originating with the broadcaster and transmitted with the aim of promoting the sale or other forms of utilisation of goods or services, supporting particular matters or ideas, or achieving another effect desired by the advertiser, transmitted for a fee or some other form of consideration. Thus, in this context the promotion of an idea or support for particular views and attitudes by means of an advertisement is not advertising, as advertising has the aim of promoting services or goods strictly for marketing purposes and does not embrace in its scope of activity other activities than marketing. In consequence, it has to be stated that advertising is the act of communicating information of a persuasive character addressed to a potential recipient and the subject of which are goods or services offered on the market.⁷

In the doctrine, the oldest definition of advertising, from 1932, defines it as "publishing information concerning services and goods for the purpose of influencing the formation of demand." In 1964, in the journal *Advertising Age*, advertising was defined as "printed, written, spoken or graphic information about a person, goods, services or a social movement coming publicly from the orderer of the advertisement and paid by the same with the aim of increasing sales, winning more customers, gain-

⁵ E. Łętowska: *Prawo umów konsumenckich* (1999), p. 40.

⁶ *Dziennik Ustaw* [Polish Journal of Laws] 1964, No 16, item 93 (as amended).

⁷ J. Masioła: "Wolna reklama i jej normatywne ograniczenia," 2 *Ruch Prawniczy Ekonomiczny i Społeczny* (2000), p. 65.

ing votes or public acceptance.”⁸ There are two ways of defining the idea of advertising: a narrow one relating only to the sphere of the economy as a stimulus to purchase of goods or services (business advertising) and a wide one denoting all efforts at dissemination of information concerning the sphere of the economy as well as other spheres of life.⁹ Advertising consists of the following elements:

- utterances addressed to a particular or anonymous audience;
- direct or indirect connection of such utterances to goods or services;
- encouragement of potential recipients to purchase (stimulate the sale) or otherwise utilise goods or services.¹⁰

The scope of advertising services (so-called agencies of the *full service* type) embraces: preparing a creative strategy for advertising campaigns, producing advertisements (advertising messages) according to the accepted creative strategy of the campaign, determining the media (means of persuasion) to be used in publishing the advertising messages (for example, newspapers, radio, television, cinema, Internet, large billboards, leaflets and promotional pamphlets), reserving and purchasing time and space for advertising (intermediation in publishing advertisements, for example in television, radio, cinema, large billboards), creative supervision of the entire process of creation (which embraces the production of advertisements), as well as implementing the advertising campaign (so-called *account management*).¹¹

The tasks of an advertising agency in the wider aspect of its activity also include:

- conducting consumer research in order to determine the strong and the weak sides of utilisation of goods under natural conditions;
- conducting market research in order to determine the best potential buyers;
- formulating marketing strategy and budgeting;
- assistance, if necessary, in finding a name for the product and, possibly, devising a trade mark (symbol), and assistance in designing the packaging;
- devising a creative concept for the campaign and preliminary testing of audience reactions;
- drawing up a plan of presentation of the product for the sales (trading) sector;
- devising forms of presenting the creative concept in point-of-sale advertising and promotion materials;
- devising a plan of persuasive activities to capitalise on of novelty on the market;
- devising a plan of incentives for increasing interest in sales of goods among employees of points of sale.¹²

These elements of advertising activity may lead to interference in the sphere of freedom of thought, not only in a direct way (at the stage of the advertising cam-

⁸ M. G a j l e w i c z: “Reklama i pojęcia pokrewne,” 10 *Przegląd Ustawodawstwa Gospodarczego* (1993), p. 6.

⁹ B. J a w o r s k a - D ę b s k a: “Wokół pojęcia reklamy,” 12 *PUG* (1993), p. 21.

¹⁰ R. S k u b i s z in: J. S z w a j a (ed.): *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* (2000), pp. 428–429.

¹¹ M. R o m a n o w s k i: “Lcgitymacja procesowa agencji reklamowej,” 7 *Przegląd Prawa Handlowego* (2001), pp. 19–20.

¹² M. G a j l e w i c z: “Rady dla osób korzystających z usług agencji reklamowych,” 10 *PUG* (1993), p. 20.

paign), but also further down the line (for instance, at the stage of creation of advertising slogans or spots).

2. The Standard of Freedom of Thought in International Law

The present universal standard of material protection of freedom of thought and opinion has a simple solution, namely the prohibition of government control of the realisation of this freedom. At the same time, this standard allows for certain limitations, a least subjective, on exercise of this freedom and the possibility of using these limitations was left to the discretion of governments. Presently, there is no international standard of material freedom of thought of a kind that precludes the possibility of limiting the guarantee of using this law in respect to public order and public safety, health and morals, as well as protecting the rights and freedoms of other persons (example of subjective limitations). Generally speaking, the view is also accepted that certain limitations of freedom of thought and opinion appear sometimes in practice in relation to persons in particular situations or subjected to special conditions (principles of discipline) such as: soldiers, prisoners, students at certain educational establishments (example of subjective limitation); limitations of this kind are not considered as violating freedom of thought or opinion.

2.1 Protection of Freedom of Thought in the Universal System of Human Rights Protection

Freedom of thought as freedom of individual ideas, conceptions, views, etc., as well as freedom of opinion broadly defined as a certain complex whole forming the basis for *man's conception of life*¹³ has been regulated by Articles 18 and 19 of the International Covenant on Civil and Political Rights¹⁴ along the lines of similar provisions in the Universal Declaration of Human Rights.¹⁵ The International Covenant on Civil and Political Rights together with the International Covenant on Economic, Social and Cultural Rights¹⁶ formed the basis of the so-called universal (world) human rights protection system equipped with a specific mechanism of oversight. After adoption of the Optional Protocol to the Covenant on Civil and Political Rights,¹⁷ the Human Rights Committee was established to perform implementation and oversight of functions. Contrary to the initial proposals, it has not been incorporated into the system of United Nations bodies, although provision was made for close co-operation. Though the Committee's remit is of a conciliatory character and it has fact-finding powers, in practice, it has acted according to the model of a judicial body. The Committee is composed of nationals of the States Parties to the Covenant and consists of 18 members who have to be persons of high moral character and acknowledged competence

¹³ This term is very popular in the human right's doctrine.

¹⁴ *Dziennik Ustaw* [Polish Journal of Laws], 1977, No 38, item 167.

¹⁵ B. Gronowska, T. Jasudowicz, C. Mik: *Prawa człowieka. Dokumenty międzynarodowe* (1996), p. 15.

¹⁶ *Dziennik Ustaw* [Polish Journal of Laws], 1977, No 38, item 169.

¹⁷ *Dziennik Ustaw* [Polish Journal of Laws], 1994, No 23, item 80.

in the sphere of human rights; it is also though desirable that some of the members should possess legal experience. The members' term of office lasts for four years and there is the possibility of re-election. The Committee's activity is financed from UN funds which raises the members' independence of their home countries' governments. The essence of the Committee's activity is its neutrality, honesty and the method of achieving consensus in spite of many, sometimes considerable, cultural, political and jurisprudential differences between the members themselves. The rules require the Committee to hold three, principally open, sessions per year at which the Committee itself decides on the frequency of sessions according to needs. The principle of equal voting rights is obligatory and decisions are taken by a majority vote of the members present by open ballot. The powers of the Committee may be divided into three groups:

- examining communications submitted by States Parties to the International Covenant on Civil and Political Rights;
- considering States Parties' claims of violation of the human rights guaranteed by the Covenant committed by another State Party;
- considering individual claims submitted by persons asserting that their rights as guaranteed by the Covenant have been violated.

The Committee, when considering such claims, follows the principle that all available domestic remedies have been exhausted and offers its good offices to the parties involved with a view to achieving an amicable solution of the matter. It can also appoint an *ad hoc* Conciliation Commission. Beyond the results of the conciliation efforts, the Committee draws up a report containing a brief statement of the facts and of the reached solution, and submits it to the parties concerned. The text of a Committee decision concerning an individual claim is generally accessible to the public. During its activity, the Committee performs interpretations of the Covenant's rules and formulates general remarks.¹⁸

The Human Rights Committee is in principle the only mechanism of oversight in the universal system of human rights protection. The arrangements adopted give both countries and private persons the possibility of referring claims to the Committee. Given that implementation of the Covenant's rules is of interest to the entire international community, it was decided that the Human Rights Committee's documentation must be generally accessible and in practice precisely this is its real power which places at its disposal a singular sanction since it brings under public scrutiny all cases of violations of rights protected by the Covenant.

The Committee is not a political or judicial body nor is it, despite appearances, a "review panel." It is vested only with moral authority and the possibility of appealing to parties' good will and thus is, strictly speaking, a body that supports human rights but does not control observance of these. It has no authorisation to use any means of compulsion. The procedure of submitting complaints between countries according to the Articles 41 and 42 of the Covenant has not so far been applied as it is

¹⁸ A. M i c h a ł s k a: *Komitet Praw Człowieka – kompetencje, funkcjonowanie, orzecznictwo* (1994), pp. 11–20.

perceived as a politically unfriendly act and may be used as an instrument of compulsion. Moreover, there is always the possibility of applying other procedures in conflicts between countries.

Though the often employed procedure of individual complaints is of an optional character, it is being considered as a very effective way of mobilising countries in the field of respecting individual liberties, although the activities of the Committee are only of a persuasive, preventive and monitoring character. The views formulated by the Committee during consideration of a complaint produce no legal obligations, but do have the effect of requiring a government to take the relevant steps to the benefit of the victim of violations of the Covenant, including compensation, punishment of persons responsible for violations and measures to prevent further violations in the future, together with the appropriate legislative action.¹⁹

The practical dimension of the Committee's functioning affords grounds for optimism as governments respect its recommendations in a considerable degree, in particular modifying domestic laws. Finally, as an international body it plays only a subsidiary role in relation to domestic instruments – it cannot substitute for them but is supposed to support them effectively.

The Committee's effectiveness deserves acknowledgement, especially with regard to quite narrow entitlements. Moreover, the juridical construction of this instrument of protecting individual rights is akin in character to the European system which is the focus of the above considerations.²⁰

2.2 Protection of Freedom of Thought in the European System of Human Rights Protection

Effective realisation of freedom of thought is developed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950²¹ to which Poland is a party.

Against the background of the juridical regimes established by the various systems of human rights protection all over the world, the European system deserves attention in the context of protection of freedom of thought and freedom of opinion as at its disposal it has the most efficient legal instruments for protecting these values. This protection consists of a set of regulations which are mutually complementary. The said protection is not a matter of the provisions set out in Articles 9 and 10 of the European Convention which, despite significant similarities with provisions of this type to be found in other international act, are the most precisely constructed. Protection of freedom of thought is, however, enshrined not only in international conventions but also to a large extent in the provisions of domestic law. Freedom of thought is conceived of here as both freedom of individual ideas and freedom of opinion are a certain complete whole in the context of the rights to which the consumer is entitled. The consumer who often against his or her will or without his or her agreement

¹⁹ *Ibid.*, pp. 53–54.

²⁰ M.N. S h a w: *International Law* (2001), pp. 234–240.

²¹ *Dziennik Ustaw* [Polish Journal of Laws], 1993, No 61, item 284.

is subjected to the influence of various, not always honest, advertisements of products and services.

The provisions of Articles 9 and 10 of the European Convention, treated jointly as the basis for protection of freedom of thought and freedom of opinion, are complemented by the provisions of Article 6 (the right to a fair trial), Article 13 (the right to have effective judicial remedies) and Article 14 (prohibition of discrimination) of the Convention. The exclusiveness of the convention system is also evidenced by its equipment with effective means of control, that is, the possibility of submitting individual complaints and the presence of an oversight body in the form today of the European Court of Human Rights which has no equally effective equivalent among other juridical, institutional and political regimes anywhere in the world. The American system does not, in this respect, present any competition since, though it employs similar institutional arrangements, there is no comparison as regards the level and scope of actual and practical recourse to their remedies.

On human beings' quality of life, which after all is not only a matter of material circumstances, chiefly depend the possibilities for the individual's development, including the right to search for truth and space for inner decision-making. The individual's personal dignity requires respecting their perception of the world and relations to others, respect for forming these consciously, but at least tolerating adopted attitudes. These attitudes are often a derivative of a professed religion or the outcome of a consciously chosen atheistic attitude or simply a philosophical one. Aside from the religion-based outlooks, which are not the subject of these considerations, individuals' views are expressed in many different forms and spheres of life. Pacifism or vegetarianism are not only examples of presentation of a certain attitude towards the world, but also of choice of a model of diet or dress and voluntary acceptance of certain commands and prohibitions. One of the signs of freedom of thought is unquestionably the desire to insulate our thoughts and views from unwanted or unperceived external influences. This further results in the right to freedom from suggestions to which we do not want to be exposed.

People can freely develop their individuality only under conditions of inner freedom, the indispensable condition of which is the outward aspect. People cannot be forced to avow values alien to them. Yet, people are not entirely independent of external influences, indoctrination and various indirect factors. Thus it is essential to guarantee the people outward freedom and thanks to this the inner kind (a fundamental feature of which is that it requires outward expression). The outward and the inner spheres are reciprocally interpenetrating. The deeply individual sphere of views must not be invigilated by the public authorities. The role of these authorities should in this respect be limited solely to promoting and demanding respect for various views. Freedom of thought is indispensable in a democratic society. One of the consequences of pluralism is the possibility of many different views co-existing within the same society. Next, this entails the necessity of imposing certain limitations on this freedom to ensure the harmonious co-existence of the groups of people representing different beliefs. Law regulates only a part of the sphere of people's behaviours, excluding the

whole richness of their feelings, desires, dreams and considerations. Manifestation of avowed beliefs does not always, contrary to appearances, take an outward form. Analysis of human rights usually concentrates on their active form. Yet, the provisions of the European Convention make it crystal clear that the passive sphere – so-called “negative freedom” – also remains subject to protection. It embraces, *inter alia*, the right to remain outside any group of common views, the right to remain silent on the subject of one’s views and the right not to be exposed to certain influences.

The standards stemming from Articles 9 and 10 of the European Convention provide guarantees of inner freedom as well as outward freedom where the accent is on the protection of outward freedom, at the same time ensuring that this forms a kind of barrier to indoctrination in a broad sense, meaning any action taken with the aim of limiting inner freedom, which is the most important for everybody.

The relationship between inner freedom and outward freedom and the question of guaranteeing both has two dimensions: the individual and the social. The individual as a human being cannot fully enjoy freedom of only one kind; only guaranteeing of both as mutually complementary gives the desired effect. The social dimension of this relationship concerns elements “in touch” with the public authorities which we encounter either at the moment of manifesting beliefs or at the moment of choosing them.

It may be asserted that the freedom of thought to which everybody is entitled appears in the following forms:

- freedom of thought, meaning choice of beliefs, views, ideas;
- freedom to change beliefs and views;
- freedom of revealing (manifesting) thoughts, convictions, views;
- the right to remain silent on the subject of one’s beliefs;
- freedom to manifest beliefs individually or in community with others;
- the right to behave in accordance with the dictates of one’s adopted system of values in all spheres of private life (for example, in matters of dress, diet, forms of entertainment, resolution of ethical questions) as well as public life (for example, in matters of membership of associations);
- the right to disseminate information, principles, ideas;
- freedom of exposure to the influence of various unwanted or unperceived suggestions.

The range of the government’s interference, even authorised, does not relate to the first two of the above-mentioned elements. However, whatever limitations on manifestation of views are regarded as acceptable, they should be introduced by law in situations where this is required in the interests of protecting security or public order, health and morals or protecting other persons’ rights and freedoms, and when the introduction of such limitations is necessary in a democratic society with regard to the above-mentioned questions.

It has, however, to be pointed out that the immediate effects of the functioning of the European system, meaning the practical influence of the Court of Human Rights’ judgements on the results of a certain decision, are estimated in various ways and this

happens with regard to problems with implementation of the Court's rulings. On the other hand, the Strasbourg case law unquestionably provides a valuable standard for the policy-making and legislative practice of the countries concerned. From this jurisprudence should be drawn information concerning interpretation of the relevant regulations and, in the context of the present considerations, the essence of freedom of thought.

Freedom, which is the subject here, is the more problematic in that it involves freedom of the individual sphere impinging on this level of human consciousness the scale of which is hard to define or presented in the form of a record, especially a normative one. The above-mentioned problem has a double dimension. One concerns the individual and their sense of their own situation, as well as the characteristics of the legal state. The other poses a difficult task for the legislative authority which should provide the individual with protection by law against threats from other individuals, but at the same time is the body which can introduce laws restricting individual freedom.

Effective exercise of freedom of thought and beliefs, a consequence of which could be taking advantage of the right to submit an individual complaint for review under the European system of human rights or at least the right to bring a constitutional complaint, implies many complicated relations between the individual and the government.

Entitlement to seeking remedies under this law is vested principally in private persons, groups of persons or non-governmental organisations. However, this right is not unlimited, especially at the stage of executing a violation – the prohibition against abuse of the right to submit a complaint is the best example of this. If as a result of governmental bodies' actions, decisions made by them or instruments used there appears a violation of any of the individual rights guaranteed by the European Convention or under its additional protocols, an aggrieved individual, after exhausting the available and effective remedies of domestic law, is entitled to make a complaint to Strasbourg within the prescribed time limit.

However, such action is in effect justified when its aim is to seek discontinuation of the violations that have occurred, if so determined by a competent international judicial body, or to obtain the compensation due. No features of entitlement to exercise of the right to submit an individual complaint is shown by an action the purpose of which is to stir up public opinion, incite political unrest, secure advantages without entitlement or refer to the judgement of the international community a complicated situation between a complainant and public authorities. Complainants are obliged to exercise the right to submit applications in the best of faith and in their real individual interest.

The state in this relationship is a subject obliged to tolerate individuals taking advantage of their rights. This obligation in consequence creates further obligations such as, in the first place, the obligation of creating standards. The government is primarily responsible for preparing standards the realisation of which is indispensable to securing proper respect for the law stemming from Articles 9 and 10 of the European Convention – no less than what is due in the case of other laws.

It is good when protection of rights under domestic legislation exerts advantageous influences on respect and preservation of freedom of thought in relations between individuals or between participants in business transactions. In the context of legal regulation of advertising activity it is indispensable to frame the rules in a way that ensures producers and service providers the possibility of promoting the qualities of their products or services but, on the other hand, makes it impossible for them to misinform customers or induce them to purchase goods or services by using methods of psychomanipulation.

In the described relationship the attention paid to the individual is clearly emphasised. The government's situation is to a greater extent characterised by obligations. Thus one cannot speak of complete reciprocity or equivalence in this relationship which, after all, is grounded in the fact that the lack of such equivalence in relations between the individual and the state is in general one of their characteristic features. The individual, the weaker side in the very nature of things, is entitled to protection against governmental voluntarism and omnipotence. However, it has to be pointed out that the government side has plenty of time available and also the possibilities of reducing the risk of getting into a situation of having to bear the consequences of violations of individuals' rights by its organs, first through adoption of the appropriate legislation, next by supervising the proper use of domestic law and, lastly, with the European Court of Human Rights looming as an available remedy, by the possibility of amicable settlement.

The substance of the freedom protected by Articles 9 and 10 of the European Convention of Human Rights lies in principle in three elements: freedom of thought, freedom to change one's belief and freedom of conscience.²² Jointly, these components mean the right of every person to autonomous formation of their philosophy and individual ideas in conditions of freedom from external influences. These external influences which everybody faces everyday – from the media and advertising – are considered impermissible whenever their influence is connected with the use of any form of compulsion or the use of methods of psychological pressure. In this particular case, the concept of “compulsion” is to be regarded as embracing all hidden methods of manipulation.

The right to possess beliefs implies the right to change beliefs under conditions of complete free will and consciousness. However, this means that an inherent corollary of the right to possess beliefs is the right to undertake efforts to persuade other persons to accept these beliefs. Here, there arises a problem which the European Court of Human Rights has faced repeatedly, namely the necessity of deciding: what kind of action aimed at causing a change of somebody's beliefs does not deprive that change of its autonomous character? To what extent can people reveal their convictions, explain and propagate their values, philosophy or simply interests without it becoming a violation of another person's freedom of thought?

²² T. Hillier: *Principles of Public International Law* (1999), pp. 301–303.

2.3. The Extent of Government Control and Admissible Protection (Possibility of Limitation)

The problem of government control in the sphere of human rights appears in situations in which there arises a conflict between values, the full realisation of which is impossible. A decision assuming the possibility of control of individuals' rights is admissible when the protection of values which are precious from the society's point of view is indispensable. The introduction of limitations in the mechanism alone is not contrary to the principle of human rights protection; it does not damage its essence but only admits the exclusion of freedom to exercise a particular right within a certain time period and circumstances and in a precisely defined situation in relation to a certain person or a group of persons.²³

The reason for limiting freedom is that one of the distinguishing features of this freedom is that it is connected with some forms of expression, and so with freedom of expression as one of the instruments of influencing consciousness.

2.4. Freedom of Thought in a Democratic Society and Advertising Activity

The media, meaning radio, television and film enterprises are in their activity dependent upon obtaining a license, which is in no way contrary to the European Convention but justified on the grounds of such questions as confidentiality of certain kinds of information, protection of the public interests, protection of some persons' reputation and the like.

A threat to this freedom may lie in something that is natural in a democracy – the reciprocal exchange of various types of information. It is the responsibility of the government in such cases to see that propagation of beliefs and ideas does not lead to spreading hatred or enmity, or to violating anybody's freedom of thought.

The sanctioning by a democratic society of a multiplicity of different beliefs and ways of expressing them means, among other things, a variety of these, and so the broadcasting not only of views which in the estimation of society are good, fair or right but also ones which in the perception of some people or even all are offensive, shocking or even simply stupid. A separate question is public authorities' assessment of the consequences that might be caused or are caused by public expression of the latter kind. Given the relative nature of all subjective judgements, it is in effect difficult to determine the limits of admissibility. One criterion for erecting some kind of a barrier to full freedom of expression is the security of the state and public safety, territorial integrity, protection of order, health, morals, the reputation and rights of other persons, preventing disclosure of confidential information, and guaranteeing the solemnity and even-handedness of justice. Access to honest and full information is usually in society's interest. The problem of infringements of Article 10 of the European Convention most often appears when the public authorities for some rea-

²³ T. Jasudowicz: "Determinanty międzynarodowo chronionej substancji praw człowieka w systemie uniwersalnym i europejskim (na tle nauczania Profesor Anny Michalskiej)," in: T. Jasudowicz, C. Miki (red.): *O prawach człowieka w podwójną rocznicę Paktów: księga pamiątkowa w hołdzie prof. A. Michalskiej* (1996), p. 92.

son refuse to reveal some piece of information. Free media are one of the most important guarantees of democracy – any limitations in this regard may, therefore, be perceived as a possible threat to democracy, so that in such cases particular caution is necessary. On the other hand, freedom, as defined in Article 10 of the European Convention, must not be abused in a way that encroaches on the freedom of other people.

Exceptional delicacy is required in assessing whether freedom of expression has been abused by works of an artistic character. The possibility of differences in such cases in both the communication and its reception is the source of this difficulty. As an example one might cite the case of *Wingrove vs. United Kingdom*.²⁴ The complainant was the writer-director of a made-for-video movie entitled *Visions of Ecstasy* and alluding to the person of Saint Theresa of Avila, a Carmelite nun who lived in the 16th century. The film presented a singular mixture of sexual tension and religious ecstasy, making use of images of the wounded body of Christ, the effect intensified additionally by the lack of dialogues, the film consisting solely of pictures and music. Basically, the author of the screenplay left to the audience's intelligence the question of guessing who was the subject of the picture as it included only one very short scene that allowed them to identify the actress playing the main role of Saint Theresa. The British Board of Film Classification (BBFC) refused the film a distribution certificate on the grounds of the necessity of compliance with the Home Secretary's guidelines concerning the publication of visual material of an obscene character. The BBFC's central argument was that while it did not deny the right of artists to their own presentation of the subject matter in which they were interested, this did not extend to what it judged to be impermissible treatment of an object of worship. In the BBFC's view the film appealed solely to the audience's erotic sphere of experience, reducing a cult figure to the role of an object of desire; in consequence the BBFC categorised *Visions of Ecstasy* as blasphemy, saying it offended the religious feelings of Christians, which in Britain constitutes a criminal offence. Wingrove did not agree with changes proposed by the BBFC and consisting in removal of certain scenes. The Board's own review panel dismissed the director's appeal. The European Commission of Human Rights, examining the case following the filing of an individual complaint by Wingrove charging the BBFC with violation of Article 10 of the European Convention, stated that the existence of a procedure for screening films destined for public distribution did not in itself constitute a violation of Article 10 of the Convention. The religious feelings of citizens merit respect which justifies acceptance of such a legal arrangement; nevertheless, in view of the delicacy of the issue meticulous examination is required by every case of this type. In the Wingrove case, the Commission found an infringement of Article 10 of the Convention for a number of reasons. First of all, it pointed to the fact that the film was intended for relatively limited distribution, to an audience fully aware of its content. The BBFC's verdict had not been subjected to any kind of review by a judicial body and the parts of the film forming the subject of

²⁴ Case 17419/90, Commission report, 10 January 1995 cited in: M.A. Nowicki: *Orzecznictwo Europejskiego Trybunału Praw Człowieka*, Biuletyn No 5, Ośrodek Informacji i Dokumentacji Rady Europy, Warszawa 1997, pp. 162–166.

the dispute were for the most part incidental. The breach of Article 10 of the European Convention by a public authority indicated by the Commission was not a result of an unlawful action – the preventive censorship involved and the way in which it was implemented are provided for under British law.

The European Court of Human Rights, when it in turn considered this case, did not agree with the Commission's decision. In the Court's opinion a characteristic of videos is that the size of their potential audience cannot be precisely determined since they can be copied and lent. The government's interference with freedom of expression was in the Court's opinion justified under paragraph 2 of Article 10 of the European Convention. It was pointed out that the mere existence of the crime of blasphemy in the penal code is not unnecessary in a democratic society as the domestic authorities take into account the way in which anti-religious beliefs are expressed, not their substance.

As can be concluded just from the example of the *Wingrove vs. United Kingdom* case, freedom of expression, while absolutely indispensable, may also be dangerous and in a twofold dimension at that. On the one hand, abusing it may lead to spreading hatred or enmity, especially on racial, ethnic or religious grounds. It also may be used for the purpose of influencing peoples' consciousness against the interested persons' will and certainly without their agreement. It may be an instrument for inducing consumers to purchase products the actual quality of which they cannot ascertain prior to buying them. On the other hand, any limitation of freedom of expression must be applied with particular caution and in exceptional cases, as it is exceptionally easy to cross the thin line between limitation and violation of freedom.

3. The Standard of Protection of Consumers Freedom of Thought in the Polish Law

The standard of protection of consumers freedom of thought in the Polish legislative system is principally embodied in three Articles of the Polish Constitution,²⁵ namely Article 53.1 Article 54.1 and Article 76.

According to Article 53.1, freedom of conscience and religion is guaranteed to all. Article 54.1 ensures the right to express beliefs as well as the right to receive and impart information. Particularly important is the freedom of belief and conscience understood as public authorities' respect for the pluralism of ideological and philosophical, religious and moral convictions. Consumers have the right to protect themselves against interference not only with the sphere of their religion and conscience but also with the sphere of their intellect and feelings in the broad sense of these terms. These provisions protect the sphere of individual belief and embrace the whole of the consumer's life, including such systems of values as pacifism, vegetarianism, etc. Finally, and without doubt, a matter that affects the largest group of consumers, these provisions are designed to secure freedom of choice and the right to decide.

²⁵ *Dziennik Ustaw* [Polish Journal of Laws], 1997, No 78, item 483.

This last aspect is particularly difficult as consumers' principal weakness is usually their slight knowledge of the full offer and the specific features of the market they are entering. Manipulation, properly prepared and executed, can effectively narrow consumers' freedom since they may accept as true the contents of advertisements and decide to purchase a product or service which is not very advantageous for them. In this case, it is not a matter of providing the consumer with certain privileges but of equalising chances which are being reduced as a result of technological progress, development of the market and extension of offers addressed to respective groups of recipients. Protection of consumers' freedom of thought understood in this way consists in ensuring them the possibility of following their own opinion and independently making decisions based on honest information.

Furthermore, under Article 76 of the Constitution of the Republic of Poland public authorities are required protect consumers, users and tenants against actions that threaten their health, privacy and safety, and against dishonest market practices. The scope of this protection is determined by law. This provision has been framed in special terms for two principal reasons. In the first place, it elevates consumer protection into a constitutionally enshrined right, including in the sphere of privacy, though it does not specify the standard of such protection, on which point it refers to the provisions of the law. But this has not been regulated by a single comprehensive act, thus resulting in dispersal of the standards relating to protection of consumers' freedom of thought over a number of acts of statutory and inferior rank, which renders difficult a matter as crucial as education of consumers in the range of their rights. Secondly, even though Article 76 has been included in the chapter of the Constitution that deals with individuals' rights and freedoms, it does not amount to a provision establishing stipulating rights and freedoms in the strict sense of these terms, but only formulates the responsibilities of public authorities with respect to the scope of protection of a number of entities, one of these being consumers. Yet, no direct provision is made for the possibility of individuals to lodge complaints against authorities' actions or inactions as they can in the case of other rights and freedoms of a personal and political character.²⁶

As indicated above, the Constitution delineates only the foundations for laying down standards relating to citizens' freedom of thought; thus in this regard recourse has to be made to acts of statutory rank.

3.1. Advertising Contrary to the Law and Acceptable Conduct or Infringing Human Dignity

The first example of excessive interference with consumers' freedom of thought indicated in this case is advertising that contravenes the law. In this sphere of decisive significance are the specific provisions which forbid or limit the admissibility of advertising certain products or services. In this regard one can cite regulations already in force concerning the advertising of alcohol (including restrictions on the range of beer advertisements), tobacco products and some games of chance (including certain

²⁶ E. Łętowska: *Ochrona niektórych praw konsumentów* (2001), p. 88 et seq.

card games, such as baccarat, blackjack, poker), pari-mutuel betting and slot machines. It is also worth indicating an often overlooked sphere of our lives: similar restrictions apply to the collection and transplantation of cells, tissues and organs.

It needs to be stressed that the prohibitions in the sphere of advertising concern whole ranges and groups of products. The Pharmaceutical Law contains a catalogue of restrictions of an absolute character (for instance, prohibition of the advertising of prescription drugs and medicines containing intoxicating or psychotropic components or indication of groups to which advertisements may not be addressed, for instance children), and of a relative character, i.e. concerning the content of marketable advertising (for instance, addressed to persons licensed to issue prescriptions). Furthermore, under Article 30 of the Chemical Substances and Preparations Act of 11 January 2001 it is forbidden to advertise a hazardous substance²⁷ without mentioning the category of hazard associated with this substance. Any advertising of a hazardous substance that makes it possible for the consumer to purchase such a product without first examining the markings on the packaging must contain information about the kind or kinds of hazards indicated in the markings on the packaging. In this way there could be mentioned many other products or services that may be lawfully offered on the market for sale to consumers which are subject to restrictions of varying severity aimed at excluding cases of advertisers' employing undesirable arguments or ones irrelevant to the group of products advertised and ensuring an indispensable minimum of honest advertising.

The next criterion in analysis of an advertisement's admissibility, particularly essential for standards of freedom of thought protection, is the concept of "acceptable conduct." This ill-defined term raises many interpretative doubts as in the law on suppressing dishonest competition it was used frequently in various aspects, which might be evidence of the legislators' varying conceptions of the term. This was aptly by the Gdansk Court of Appeals²⁸ which in one of its judgements asserted that dishonest advertising – that is advertising which contravenes acceptable conduct – is advertising that by taking advantage of customers', in the circumstances justified, credulity and the average person's inability to arrive at complicated associations and conclusions based on a text accentuating the elements desired by the advertiser evokes a belief in the existence of facts that in reality have not taken place, and this arouses feelings of disappointment, of having been belittled or even cheated. As examples of contraventions of acceptable conduct in advertising, one might adduce allusions to religious symbols, the participation of a professional physician praising a drug not out of any conviction about its efficacy but simply reciting a text prepared for the needs of the advertisement, or abuse of sexual elements. What has to be evaluated here is not the good taste of the advertisement's creators or its artistic merit but violation of people's sense of propriety.²⁹ A similar kind of violation of acceptable conduct

²⁷ *Dziennik Ustaw* [Polish Journal of Laws], 2001, No 11, item 84.

²⁸ Wyrok Sądu Apelacyjnego w Gdańsku z 6.11.1996 r., I ACr 839/96, OSA 1997, z. 10, title 57.

²⁹ E. Nowińska, M. du Vall: *Komentarz do ustawy o zwalczaniu nieuczciwej konkurencji* (2001), p. 155.

is the use of giveaways to encourage sales of a particular product when the value of the giveaway is considerable in proportion to the purchased product. An advertising operation of this kind causes the consumer, when estimating the attractiveness of the price, to take into consideration both products jointly and fail to realise that they are paying in part also for the product that was supposed to be a free gift but which they certainly would have not bought under normal circumstances.

Under the provisions previously in force, human dignity was a value protected by the legislative within the framework of the criterion of "acceptable conduct," but morality as a standard in assessment of market phenomena has gained so much importance that in the field of advertising it has also emerged as a separate yardstick for the estimation of its honesty. It has to be pointed out that qualification of an advertisement based on this criterion must be made particularly carefully. In analysing the moral aspect, account has to be taken of an advertisement's audience (particularly some professional, religious or social groups, that may follow different moral standards), the content of the advertisement (for instance, the different meanings of gestures, formulations, etc.), and even the means of communication as some kinds of content can be received differently, for example in the form of a television commercial that offers more scope for creativity than, for instance, a newspaper advertisement. Yet, there is no doubt that the presentation in an advertisement of a picture of an individual who objectively does evil, is servile, dependent, deceitful or cynical, despises other people or treats them as objects, when these features are presented as parts of a normal and socially admissible style of life, must be considered as offending against human dignity.³⁰

3.2. Advertising that Misinforms Consumers and Thereby Aims at Influencing Their Decisions on Purchasing a Product or Service

With respect to this criterion, the first consideration is the level of perception of the persons to whom a particular advertisement is targeted. Of course the ideal in this regard would be the model of a consumer aware of certain phenomena in advertising, the indispensable features of a product of a certain kind, price movements in the market, etc., and possessing the amount of honest information necessary to critical reception of the advertisement. Yet, a consumer of this kind is not very frequently encountered in the practice of our trade. Of course, there exist in our country consumers who have an excellent knowledge of certain parts of the market (for example, connoisseurs of wines or self-taught computer scientists), but as for the remainder they show weakness and a need for honest information. Therefore, it is acknowledged that in view of the strong influence of advertising on the choices made by consumers, the model to be taken as the basis for the relevant assessments should be that of an inattentive recipient easily susceptible to suggestions. Another postulate is to acknowledge based on practice in developed countries that misrepresentation occurs when an advertisement may be understood not in accordance with the actual

³⁰ K. W o r y n a: "Reklama uchybiająca godności człowieka," 16 *Monitor Prawniczy* (2001), p. 825.

facts by a significant part of the audience amounting to no less than 10%. But at this point it has to be caveated that it is advisable to treat this index number as an approximate value but not a rigid one as to take the latter attitude would be doing an injustice to some consumers who, although in the minority, are also entitled to enjoy the protection of the law.

In estimating whether an advertisement is misleading, account should be taken of all its elements, particularly those relating to quantity, quality, ingredients, manner of production, possible uses, provision for repair and maintenance of the advertised product or service but also the client's behaviour. In the case of the consumer, endangering or violating their interests may consist in the damage that may be suffered as a result of purchasing the advertised product (service), which is found not to possess the properties praised by the advertisement or possess them in a minimum degree (for instance a hair-dryer that instead of drying hair burns it).³¹

3.3. Advertising Playing on Customers' Feelings by Inducing Fear, Taking Advantage of Prejudices or Children's Credulity

In this case, we are faced with non-informative advertising that instead of presenting the product's essential features and values refers to unimportant features as regards the use of the product and unashamedly appeals to the audience's feelings in an unacceptable way, for example exploits consumers' altruism by making them believe that a part of the price is destined for charity, omitting the question of setting aside for the same purpose the advertiser's increased profit.

A criterion hard to define is fear. There exist groups of products where this feeling is a natural motive of consumers' behaviour which makes it impossible to reach them without showing the danger factor and the advertiser, defining an actually existing hazard. The dimensions of this fear may be different, fear of a mosquito attack to fear of headaches or toothaches, to the threat of burglary or death which accompanies advertisements for, for example, alarm systems and anti-burglary security systems, or the fear of a worsening of the standard of living felt by pensioners which is used in insurance company advertising (for instance, the famous advertisement for a retirement fund which comically portrayed elderly people spending their vacations at home). That is why one should accept the opinion that in order to implement a prohibition now under discussion it will be essential to find out whether in a particular case the employment of psychological pressure in the form of inducing or amplifying feelings of fear can have a direct influence on decisions to purchase a product (or service). It is not, however, essential to determine whether the purchase of the product or service has actually taken place.³² Thus, when we analyse advertisements for a drug that claims to help women get through the menopause what has to be determined is the

³¹ A. Ś w i s t o w s k a: "Nieuczciwa reklama jako przykład czynu nieuczciwej konkurencji," 7-8 *PPH* (1994), p. 22 *et seq.*

³² R. S k u b i s z, in: J. S z w a j a (red.): *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* (2000), p. 470.

degree to which the suggestive picture of the "dreadful" symptoms of this condition seen in the advertisement is likely to have an impact so that women who have reached a certain age in life will begin to feel fear for themselves and in this state buy the advertised drug.

A quite rare phenomenon in today's market is appealing to prejudice. With the rise of society's educational standards the possibilities in this regard fade considerably and do not have a particular character. But there is no reason to reject an advertisement which plays on such a "innocuous" superstition as the belief that chimney-sweeps bring good luck.

A group of consumers particularly vulnerable to non-informative advertising are without doubt children whose threshold of criticism and ability to separate reality from fiction are to a considerable degree lowered. This applies above all to children of kindergarten age and in the first grades of primary school. Analysis of this market is of great significance as children and young people form a large "slice of the cake" on the consumer services market. Adult consumers very often give up shopping for their own needs in order to meet the needs of their progeny or their family (cousins, godchildren). Moreover, with the ageing of the societies of the advanced industrial countries a phenomenon that is becoming increasingly visible is rising expenditures on children under 18 years of age. The smaller the number of children around us the more we pamper them. This also holds true for segments of the market which at the beginning of their development did not pay much attention to children and teenagers but now consider them their main customers (for example the computer or electronics industry). Nowadays, advertising campaigns targeted at consumers below the age of 18 are being devised not only for advertisers of typical children's goods such as toys or school accessories but also for industries like clothing, an example of which are the expensive activities of firms producing denims with the aim of stopping the retreat of teenage customers from their shops to sellers offering flamboyant clothes made of other materials. Such developments in advertising campaigns inevitably also generate advertising activities that should not take place. One example of inadmissible advertising of this type is advertising that suggests that the very fact of possessing or using some product will give the child a physical, social or psychological advantage over other children of the same age. Also unacceptable is addressing children directly and encouraging them to induce others to purchase the advertised product. Another thing advertising should not do is make generalised claim for a particular product ("all children already have one") or plug the necessity of buying it ("all boys/girls play with these toys"). Also impermissible is advertising that reduces the level of the skills required for using a product. If an advertisement shows or describes the results that a child can achieve by using the particular product then these results should be adjusted to the abilities of an average child of the group of age for which the product is designated.³³

³³ *Ibid.*, p. 22 *et seq.*

3.4. Advertising That Significantly Encroaches on the Sphere of Privacy, Particularly by Soliciting Custom in Public Places, Transferring to a Client's Account Good They Have Not Ordered or Abusing Media of Communication

Such advertising, which qualifies as a nuisance, is certainly is one of the most frequent kinds of dishonest advertising. It appears in various forms, beginning with the age-old activities of commercial travellers and door-to-door salesmen who gate-crash our homes and ending with the "spam" phenomenon, that is the flooding of our e-mailboxes with hundreds of unwanted advertisements. Generally, we can say that the essence of this kind of advertising is inducing in the recipient a feeling of embarrassment or psychological and physical distress which can only be relieved by buying a product or service.³⁴

It has to be pointed out that the term "sending" used in the regulation under discussion stands for any form of supplying the recipient with a particular product realised outside the premises of the enterprise and places usually associated with making sales contracts. In this group we can without a doubt include proposals to finalise a contract at the client's home in which the intermediaries are various kinds of salesmen.³⁵ The advertiser exceeds the boundaries set for honest competition if a particular form of advertising has the potential ability not only to limit but even exclude freedom in making marketing decisions. So this is already in itself a threat to the position of the potential customer, and so does not required application of the regulation in order that under the influence of dishonest methods of salesmanship they make a decision in accordance with the advertiser's expectations. The formulation mentioned above, marks a clear extension of the scope of legal protection of both consumers and other actors in the marketplace.³⁶ Consumers' interests may be threatened or violated when use is made of their person or picture (personal goods) without their agreement or in a way that humiliates them, advantage is taken of their credulity (children, young people), or seriously ill people are offered groundless hopes of recovery.³⁷

A separate problem is the so-called comparative advertising, i.e. advertising that makes it possible to identify directly or indirectly a competitor or goods and services offered by that competitor. This does not amount to unfair competition as long as it does not contravene acceptable conduct and fulfils the following conditions:

- it does not misinform;
- it compares goods and services that satisfy the same needs or are designed for the same purpose in a honest verifiable way verifiable by objective criteria;
- it objectively compares several essential characteristics which are verifiable and typical features of goods which may belong in the same price range;
- it does not cause on the market errors in distinguishing between the advertiser and their competitor, nor between other goods or services, trade marks, the enterprise's symbol or other distinguishing marks;

³⁴ E. Nowińska: *Zwalczanie nieuczciwej reklamy. Zagadnienia cywilno-prawne* (1997), p. 130.

³⁵ R. Stefaniński: "Reklama ingerująca w sferę prywatności," 8 *PUG* (2002), p. 23 *et seq.*

³⁶ *Ibid.*, p. 23 *et seq.*

³⁷ A. Świsłowska, *op. cit.*, p. 22 *et seq.*

- it does not discredit the products, services, operation, trade marks, company brand markings or other distinguishing marks, or circumstances relating to the competitor;
- with regard to goods with a geographical regional symbol it refers to goods with the same marking;
- it does not take advantage in a dishonest way of the trade mark's reputation, an enterprise's brand or other symbols distinguishing the competitor, nor the geographical regional symbol of the competitor's products;
- it does not present the product or service as an imitation or counterfeit of the product or service bearing a protected trade mark or another distinguishing mark.

From the considerations above, it can be seen that the scope for manipulation in advertising understood as influencing people without regard for their essential interests or even contrary to these and by the same token deliberate interference with the sphere of the target audience's freedom of thought is very extensive. There is no doubt that advertising intended to manipulate the addressees is very harmful. The harmfulness of some forms of manipulation may be recapitulated under several heads. In the first place, it unfairly and dishonestly elevates some common object to the rank of something extraordinary which is at least a transgression. Secondly, by use of superlatives it puts products that do not deserve them in the same class as products that are genuine market ground-breakers. Thirdly, by the same token it is suggested that since the product is a novelty and a sensation, implying that the competition is probably not using such means or products. Another dangerous but hardly perceptible method of manipulation is suggesting or implying a certain system of values.³⁸ Let us take a look at television commercials and we will certainly be able to describe an advertiser-created picture of a "good" housewife using a certain cleaning powder or detergent, a "loving" mother treating her children to sweets that are "good for them" or, on the other hand, "grouchy" parents-in-law or an extremely talkative wife from whom they must escape to another world clutching a bottle of beer.

Beliefs about legislation regulating the elimination of dishonest competition are evolving – not only in the literature of the object – towards not only extending protection only to businesspeople against competitors' dishonest actions, but also providing consumers with protection against businesspeople's dishonest actions. Such an extension of protection beyond the interests of respective competitors entails extending protection also to a certain segment of consumers as well as potential actors in the marketplace. Delineating the legal framework of admissible competition in different forms of engaging in competition in the field of extending distribution of products by the use of modern forms and techniques of marketing and in this way exerting an effective influence on an unlimited circle of consumers (for example in the form of advertising) means that the discussed provisions will also ensure the protection of public interests.³⁹

³⁸ M. Gajewicz: "Reklama a manipulacja," 10 *PUG* (1993), pp. 10–11.

³⁹ Postanowienie Sądu Najwyższego z 5.03.2002 r., I CZ 4/02, LEX no. 55233.

Conclusions

The idea of freedom of thought in its present form is in principle accepted by participants in international relations and in domestic law. The normative arrangements provided by the law are optimal and their efficacy depends in a wide measure upon the will of public authorities. Thus, there is no particular need to expand legislation activity in this field, but there exists a real need of effective supervision of the realisation of freedom of thought in public life.

Freedom of thought and freedom of belief are protected at the level of the international and domestic law by various mechanisms, thanks to which there has arisen, among other things, a rich body of international and domestic jurisprudence that makes it possible to determine the methods of realisation of this freedom. That being so, there arises the question of the reasons why governments violate their international obligations to preserve (and ensure the preservation of) the freedom of thought and freedom of belief. Among the causes of such a situation should be included the absence of any correlation between the application of provisions at the international level and the realisation of freedom of thought in domestic law and in practice. Full realisation of freedom of thought takes place only under conditions of honest observance by governments of the rules of democracy and pluralism, the rule of law and respect for human rights. Violation of any of these principles deforms the process of realisation of freedom of thought and conscience, sometimes in relations between the individual and the government, at other times in relations between individuals themselves.

It may be asserted on the basis of this analysis of domestic and European Community acts as well as the jurisdiction of the European Court of Human Rights that the degree of tolerance and consciousness of private persons concerning their entitlement to freedom of thought and belief is relatively high. Probably, what we can see here is the significant influence of the law-making tradition and culture of European countries. That does not mean that cases of infringements of the guarantees stemming from Articles 9 and 10 of the European Convention are marginal; however, they are already quite rare compared with violation of other laws. This may prove that the design of domestic law and its application are right, or that such cases do not find their way into European tribunals because they are blocked on the grounds of remedies under domestic law. The analysis of the jurisprudence nevertheless affords grounds for the first of the above-mentioned conclusions which further supports a fairly optimistic perspective in a wide, pan-social aspect. It seems that the present state of affairs, simultaneously assuming further development of the system of protection of human rights broadly defined, may be considered in the sphere of freedom of thought and belief as satisfactory only in the traditional understanding of this phrase. Because if we move away from the idea of freedom of thought as the entitlement of private persons and reduce its scope to the rights of private persons as consumers having at the same time the right to receive honest, full information concerning products or services, then we enter a sphere that is not so well protected. The specific difficulties

of ensuring such protection arising from the “intimacy” of thoughts and beliefs when they are present exclusively in the sphere of possession but not of expression, justify this principle only in part. Beyond that, the cause of weak protection of consumers’ freedom of thought is the lack of the appropriate action by public authorities or – if we cannot accuse them of inertia – measures which distort such action.

BOOK REVIEWS

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PATRICK BIRKINSHAW, *European Public Law*,
Butterworths Lexis Nexis, London 2003, 637 pp.

A book by Patrick Birkinshaw, a professor of public law at Hull University, appears in the "Law in Context" series, which certainly suits the broad and open character of this library edition. It is not a manual for beginners in European and comparative law, but rather a very stimulating invitation to discussion of numerous issues connected with the ever-growing relationships between different European legal systems.

Birkinshaw assumes a very broad understanding of the notion of public law. According to him, it covers constitutional, administrative and regulatory law as well as human rights. As to European public law, it encompasses both Community legislation and the law developed by the Council of Europe, mainly the European Convention on Human Rights. It is concerned with the influence of Community law and Convention law on European states. More specifically, Birkinshaw aims to show the influence of European, international and national law on the public law of the United Kingdom. His work examines, for comparative and illustrative purposes, the constitutional and administrative systems of France, Germany and the European Union. While depicting the interactions between European law and domestic laws, the work is not a comparative treatise on the public law systems of each European state. It is rather a study, as the author himself states "of the impact of European legal thought and practice, and on 'being in Europe,' on British and more specifically English public law, its thought and practice."

One of the main ideas accentuated in the work is the phenomenon of interaction between different European legal systems. The author uses various terms to describe this process, referring to it either as a sign of convergence of legal systems, or, less radically, as a sign of "cross-fertilisation" and "spill-over." The emergence of European public law is the main thesis of the work. While not giving it its final definition, Birkinshaw believes that a certain European legal culture is taking shape. Surprisingly for a continental reader, to whom the British system seems very different from any system in the continental tradition, Birkinshaw is convinced that English law is gradually changing because of the European influence. The fact of, as the author puts it, "Britain's being in Europe" is changing the face of the English legal system.

The scope of issues addressed in the work is monumental. The book is divided into three parts, subdivided into chapters. The first part aims at presenting a general panorama of European public law. The second part depicts more specifically certain institutions and principles of European public law. The third part concerns questions related to the future of European public law.

As for the first part of the study, it introduces the reader to the author's views on European public law as such. The first chapter constitutes an effort to define European public law. The following chapter reveals the relationship between law and government in the European Communities, France, Germany and United Kingdom. The different traditions and legal cultures

are briefly presented in order to explain the limitations on development of European public law. The next chapter examines the contributions of three major European legal systems, French, German and British, to the development of European public law. The following chapter assesses the influence of European integration on British law, providing numerous illustrations.

The second part of the book is more specific. It aims at providing illustrations for the various problems touched on more generally in the introductory part. It starts with a chapter dealing with the principle of subsidiarity which presents the differing constructions put on this notion in different member states, notably the United Kingdom, and then examining the Community interpretation. The next chapter examines the issue of openness, mainly by describing access to information within Europe. This is followed by an analysis of the role played by national parliaments and the questions of review of legislation. It mainly analyses the tasks of national parliaments within the European Union. The eighth chapter presents the principle of review, employing for the most part a number of examples from English courts. Chapter nine describes the contribution of human rights protection and the European influence on this issue. The next chapter discusses the accountability of public authorities in member states and the European Community. The influence of both the ECJ and the ECHR jurisprudence is analysed. Chapter eleven concerns the procedures for dealing with citizens' complaints in the European and the domestic context. It mainly concentrates on the European and national Ombudsmen. The following chapter examines the issue of provision of essential services from the point of view of freedom of competition and market regulation. The concluding chapter of Part Two is an invitation to further research and an explanation of why some issues have been omitted.

The closing part concerns the future of European public law. It analyses the various current initiatives within the European Union aimed at establishing a constitutional order. It also underlines the attractiveness of emerging European public law in the context of globalisation. While leaving many issues unanswered, Birkinshaw certainly succeeds in proving his point—that the European context in any European national legal system cannot be ignored.

Krystyna Kowalik-Bańczyk

EILEEN DENZA, *The Intergovernmental Pillars of the European Union*, Oxford University Press, Oxford 2002, 387 pp.

This work by a former legal adviser to UK Foreign and Commonwealth Office constitutes a useful and comprehensive analysis of the functioning of the European Union's intergovernmental "pillars." Its objective is to describe the evolution and present institutional structure of the second and third pillars. Although it presents the legal status of both pillars up to the Treaty of Amsterdam, it is still topical as the Treaty of Nice has not changed much in that respect. The book explains in a very lucid manner the reasons why the member states decided to set up these two intergovernmental pillars, underlining the sophistication of this arrangement. It is also very interesting because it uses the method of comparing the different pillars. It shows clearly how the second and third differ from the Community pillar and by juxtaposing the realities of the two intergovernmental pillars reveals interesting mechanisms.

The work consists of eleven chapters. After a brief introduction describing the structure and character of the European Union as such, it presents the origins of the intergovernmental pillars and their distinct characteristics in relation to the Community order. The pillar structure of the European Union was aimed at giving the EU flexibility and extending the influence of the Union to new areas formerly reserved for the member states. The author refers to the second and third pillars as "flanking" pillars of the central Community pillar. They made it possible to formalize multilateral cooperation and introduced law-making procedures in very sensitive areas, without the necessity of any major transfer of autonomy from the member states to the European Union. The author also compares the Community method and the international law method, indicating similarities and major differences. She presents the evolution of European Political Cooperation prior to the Treaty of Maastricht, underlining the influence of the historic changes in Central and Eastern Europe and the wars in ex-Yugoslavia as the main impetuses to creating a more structured European foreign and security policy. The author underlines how carefully the structure was to be created in order not to infringe on states' independence in the conduct of external relations as a defining element of statehood. She then presents the completely different attitude taken – although equally reluctant – by the member states towards cooperation in justice and home affairs. In her view, the main causes of the difficulties were the enormous discrepancies between national legal systems as well as the complexity of the issue. In the field of immigration policies and national criminal law there was also strong mistrust of any common rules or procedures. The gradual alteration of this attitude is interestingly explained, providing in the process some information on the reasons for transferring substantial portions of the third pillar to the Community pillar in the Treaty of Amsterdam.

The next section consists of a critical presentation of the achievements and weaknesses of the Common Foreign and Security Policy (CFSP). According to Denza, the second pillar cannot, and does not attempt to, substitute for the foreign relations of the member states, as this could only take place with the demise of distinct sovereign States. She does not believe in any "single" European Union foreign policy, accepting only the idea of a "common" foreign policy on which the member states may sometimes agree. She underlines that in contrast to the other two pillars, the second does not mainly consist of the legislative activity but depends largely on the achievement of shared understanding through the exchange of information and joint definition of the situation. As she states: "the outcome may not be susceptible to evaluation in terms of pages in the Official Journal and may indeed take the form of masterly inactivity" (p. 90). This very pragmatic opinion is followed by detailed analysis of the different activities undertaken by the European Union under the CFSP, with indications of the reasons for successes and failures. A very extensive commentary is provided on the provisions (article by article) relating to the second pillar in the Treaty of Amsterdam – which remains very useful to this day, as the Treaty of Nice has not changed much in this respect. The author next presents her view of the achievements and weaknesses of Justice and Home Affairs Cooperation. It is likewise followed by an extensive commentary on the provisions of the Treaty of Amsterdam.

The next part of the book concerns situations where cross-pillar action is necessary. It mainly presents examples of merging the application of the provisions of Community pillar with either of the two intergovernmental pillars. The author then analyses the possibility (rather limited) of scrutiny of activities undertaken under the intergovernmental pillars. Judicial review is mainly examined with respect to the third pillar. Parliamentary control of the pillars is presented by tracing the influence of national parliaments on actions under both pillars and the role of the European Parliament. According to Denza, there is "constructive dialogue" with member states in the Council rather than real powers of control.

The last chapter of the book concerns the European Security and Defence Policy. For a very long time, responsibility for the collective defence of Europe lay with NATO, but after the Single European Act there appeared hints of truly European ambitions in this respect. This is the only part of the work where the provisions of the Treaty of Nice are also analyzed as it was the first time that an initiative was launched to institute an operational security and defence policy. The beginning of the operational phase in 2001 is briefly presented.

The innovative character of Denza's work stems from an interesting arrangement of the features of the intergovernmental pillars and its emphasis on the analogies between them. While, quite naturally, revealing the major evident differences between the second and the third pillar of the European Union, Denza draws an interesting picture of common or similar features. The CFSP allowed the European Union to formulate an external identity without encroaching on member states' sovereignty. Cooperation in Justice and Home Affairs let the Union focus on issues too sensitive to be incorporated into the Community pillar, while creating the possibility moving forward the idea of a Community legal order. Most importantly, the author does not see the intergovernmental pillars as a sign of weakness or compromise by the European Union. She considers it to be a sign of its maturity and sophistication.

The book can certainly be recommended to everyone interested in the inner history of the European Union. The way it is written reveals not only an excellent lawyer but also an experienced politician, which makes it very pleasant reading indeed.

Krystyna Kowalik-Bańczyk

FABIEN TERPAN, *La politique étrangère et de sécurité commune de l'Union européenne*, Bruylant, Bruxelles 2003, 540 pp.

Fabien Terpan's book constitutes a coherent and complete analysis of the functioning of the second pillar of the European Union. It presents the history of European cooperation in security matters from the Treaty of Maastricht to the present day. The author stresses the influence of the 11 September 2001 on European understanding of security issues. From the start he reveals his scepticism about an effective security policy: "La PESC est; dix ans après sa création; une potentialité plutôt qu'un accomplissement, elle suscite des interrogations plus qu'elle n'apporte de certitudes" (p. 11). The author underlines the peculiarity of European diplomacy, as it is by definition a hybrid, a compromise between the positions of the member states. Still, Terpan treats the Common Foreign and Security Policy (CFSP) as an inevitable element in the evolution of the European Union.

The study sets out to establish the stage reached in the development of CFSP, providing a stocktaking of its ten years of existence. Terpan realistically admits that the second pillar has not transformed the European Union into an international power comparable to the United States. But he underlines that the achievements and the role of the European Union cannot be ignored. Therefore, comparing the European Union with America, he stresses that though a simple analogy is tempting, the two actors are completely different. They both contribute to

a new world architecture no longer based on a bipolar division, but their aims, methods and diplomacy are disparate.

Trepan first explains the historical background of European foreign policy. He underlines what he calls "le privilège de l'irresponsabilité," meaning that for forty years the European Community left questions of military defence to United States. He underlines that the European Union has to be equipped with an efficient institutional framework that will allow it to act swiftly and coherently. At present, the institutions serving the CFSP are not adequate to this role. Too much depends on the member states and the whole structure is not transparent enough for international partners. But an even bigger obstacle to the efficient functioning of the CFSP is the attitude of member states. Even though by creating the CFSP they expressed their will to act together, the reality of mutual relationships is much more complex. The differences between national policies are often far too substantial to formulate a coherent "European" policy. On the other hand, Trepan notes a certain advantage in this diversity, stating that in relations with the European Union, unlike in the case of the United States, there is always the possibility of dialogue.

The study is divided into two parts. The first concerns the emerging international power of the European Union. The second examines the operative side of the CFSP, trying to reveal the elements necessary for its efficacy. The question now emerging is whether the European Union can cross the frontier between a simple international actor and an international superpower. The elements laid down in the Treaty on European Union are considered by the author as providing the means necessary for this step. But what is lacking is the global dimension of European foreign policy as well as the will of member states. The military and economic elements of EU activities are not linked in the way they are in American politics.

In the first part of the book, the author underlines that the economic power of the European Union provides a perfect base for development of the CFSP. Security and defence are, according to him, the decisive areas for making the EU a "complete" international power. In order to develop in that direction, a clear operational structure must be introduced – so that the European Union can also be an "active" international power. The military dimension of the European Union is for Terpan a *sine qua non* of the credibility of Europe as an international actor. From his examination of the second pillar's ten years, Terpan concludes that CFSP cannot be considered either a success or a failure. He sees it as an ongoing process *in statu nascendi*, gradually allowing for the introduction of new dimensions. He does not criticise the evident hierarchy of priorities visible in European foreign policy, stating that this is a natural situation, present also in the activities of the United States.

The second part of Terpan's monograph concerns the operational side of the CFSP. It examines the conditions necessary for the European Union to be truly effective as an international actor. He underlines the paradox that the members states would like the European Union to be a significant international power but refuse to deliver the means necessary for it to become one. In order to change this situation, he even suggests the inclusion of the second pillar within the first – so as to use the Community method of decision-making. According to him, this would lead the EU towards federation and reduce the differences between national powers. On the other hand, he realistically admits that his suggestion is unlikely to be carried into effect in any immediate future. Still, an open-minded attitude by the member states towards security issues is a necessity, otherwise the second pillar will remain an empty phrase.

The book can be recommended to everyone interested in the political and legal aspects of the second pillar of the European Union. Apart from revealing a pragmatic and realistic view of European security issues, it is an indispensable source of concrete information on the mea-

asures hitherto undertaken by the European Union in the sphere of foreign policy and security, accompanied by an extensive commentary.

Krystyna Kowalik-Bańczyk

KAREL WELLENS, *Remedies against International Organisations*, Cambridge Studies in International and Comparative Law, vol. 21, Cambridge University Press, Cambridge UK, New York 2002, XIII + 295 pp.

During the second half of the 20th century international organisations have become, alongside states, major actors on the international scene. As the scope of their competences is constantly expanding, their activities (both actions and inactions) are capable of affecting not only other subjects of international law but individuals and companies as well. This may often result in violation of rights and interests or in damage on the part of a state, another organisation or a private party.

In *Remedies against International Organisations* Karel Wellens examines the existing mechanisms for remedial action against an international organisation and reflects on the possible solutions that could improve the efficacy of such action. The book is divided into four parts, of which the first is devoted to the general characteristics of remedies against international organisations, the second deals with specific procedural aspects in respect of various categories of claimants, the third focuses on the substantive outcome of a remedial action, and the fourth part contains suggestions, based on conclusions drawn from the preceding three, for alternative solutions and options for the future development of the remedial mechanisms against international organisations.

Wellens already shows the complexity of the problem when he demonstrates how different forms and levels of accountability of international organisations require different remedies, appropriate for implementation of such accountability in practice. Although his classification of these forms (he points to political, legal, administrative and financial accountability) and levels (he distinguishes three: first, monitoring of the functioning of an organisation, second, liability for damage and third, responsibility for breaches of obligations) is open to argument, it provides an essential starting point for determining the nature of remedies. As a consequence, he does not restrict his considerations solely to legal action, but also pays regard to other, non-legal, kinds of remedies.

The choice of an appropriate remedy, and sometimes even the existence of an effective remedy against an international organisation, also depends upon who the claimant is. Wellens examines very carefully the position of different categories of claimants in that respect in terms of both the internal dimension of their relations with an international organisation (situation of staff members and member states) and the external dimension (position of third states and non-state parties, including individuals). The main problem is the availability of a remedial mechanism of any kind at all, with special reference to remedies of a quasi-judicial or judicial character. Remedial mechanisms within the "internal dimension," if they exist at all, are usually established by specific provisions of the internal rules of a particular organisation in respect of

both member states and staff members. Within the "external dimension," it is possible for states to have recourse to the general rules of international law governing international responsibility or to particular treaty regimes. Regarding the situation of private claimants involved in contractual or delictual relations with international organisations, Wellens identifies jurisdictional immunity of organisations and their officials as the major obstacle for access to an effective remedy before national courts. Given the lack of *locus standi* in international proceedings, this category of claimants seems to face the greatest difficulties with bringing a remedial action against an international organisation. Thus, Wellens points to the "dual role" of states, which should in such cases exercise diplomatic protection against the organisation.

Wellens' analysis of the present state of development of remedial mechanisms against international organisations does not lead to optimistic conclusions. In many cases, aggrieved parties (irrespective of the category they belong to) have no effective remedy against an organisation and the existing mechanisms call for improvement. Of course, devising a comprehensive system of remedies must take into account the various aspects of this problem, such as the requirements within different levels of accountability, the needs of different categories of claimants, the nature of affected rights and interests, the specific features of the international and domestic legal order, etc. Wellens suggests a solution that consists in a combination of judicial review of the actions of organisations on the international level (where he sees an inevitable role for the reformed International Court of Justice) and of remedial procedures within the internal order of a particular organisation or before the domestic courts available to individual claimants affected by the actions or inactions of the organisation (or its officials). This system should be complemented by non-legal mechanisms appropriate at the "first level" of accountability for monitoring the everyday functioning of an organisation.

Karel Wellens' book is to be greatly welcomed as it contains not only a detailed diagnosis of a crucial problem, but a reasonable prescription for a cure as well. It is an excellent contribution to the studies on the accountability of international organisations, which for some time have been a subject of growing interest to the doctrine of international law and a number of eminent international bodies, the International Law Commission among them.

Anna Jasińska

DAGMARA KORNOBIS-ROMANOWSKA (ed.),
*Stosowanie prawa wspólnotowego w prawie wewnętrznym
z uwzględnieniem prawa polskiego* (Application of Com-
munity Law in Domestic Law, with Reference to Polish
Law), Dom Wydawniczy ABC, Warszawa 2004, 227 pp.

As the book's editor, Dagmara Kornobis-Romanowska, points out in her introduction, its aim is to "present in a concise way the most important legal issues connected with the application by national courts of Community law in the Polish legal order." On 1 May 2004, Poland became a member state and as from that date it is required to fully comply with the obligations of membership. Considering the particular nature of the Community law system, which contains rules addressed not only to member states, but also to individuals, issues relating to its

application in the internal, Polish legal system became of decisive importance upon accession. Therefore, the publication of this book could not be more timely.

The first chapter, by Dagmara Kornobis-Romanowska, is devoted to the "Community competence" of national courts. Under this title, the author presents the most important aspects of national courts' participation in the application and enforcement of Community law in the internal legal order, describing such principles as uniform application, and direct applicability and primacy of the Community law. As from Poland's accession to the European Union, Polish courts have become "Community courts" to which certain obligations have been entrusted. In this chapter, the author also indicates the specific relationship between national courts and Community courts (the European Court of Justice [ECJ] and the Court of First Instance): on the one hand, the obligation of cooperation by national courts with the ECJ in the preliminary rulings procedure and on the other, the autonomy of national courts, guaranteed and respected by the ECJ. This opening chapter should be treated as a comprehensive introduction to the following chapters of the book, defining the subject matter of the publication as a whole.

Dariusz Wojtczak describes one of the cornerstones of the Community legal order – the principle of the direct effect of Community law (Chapter 2). A lot of attention is paid to the origin of the direct effect of Community law, starting with the ECJ decision in *Costa vs. ENEL*, in which it stated that the Community legal order is applicable not only to the member states which signed the Treaty, but also to individuals who are entitled to derive rights and obligations directly from Community law. Moreover, the specific aspects of direct effect were thoroughly examined: in the context of Treaty provisions, international agreements, directives, regulations and decisions. The question of the direct effect of directives, which is of particular interest and importance, is dealt with very briefly. The reader might even get the impression that this topic has not been examined to the extent that it actually merits. However, the explanation for such treatment will be found in the next chapter, which is wholly devoted to this subject.

In it, Marcin Piechocki presents, based on the recent case law of the ECJ, the vertical, horizontal and incidental direct effect of directives. These issues, which go far beyond the basic framework of European law, may be of decisive importance for national courts, which are faced on a daily basis with a diversity of the legal relations and social-economic circumstances in which the Community element plays an important role, and which cannot be simply framed in the division between the vertical (between the State and the individual) and horizontal (between individuals) direct effect of directives. Although the ECJ has never explicitly accepted the horizontal direct effect of directives, in its case law the Court seems to have already made a considerable breakthrough in this principle.

Krzysztof Scheuring draws the reader's attention to procedural issues: cooperation by national courts with the ECJ in the preliminary rulings procedure (Chapter 4). Including such a chapter in a book on the application of Community law in the domestic legal order is all the most justified. When writing about application of the Community law by the domestic courts, the need for its uniform application should be always underlined. The preliminary rulings procedure serves this necessity. Presentation of the rules governing the preliminary rulings procedure, stemming from Community law provisions and the case law of the ECJ, has been complemented by the practical aspects of that procedure, aspects indispensable from the Polish courts' perspective, such as "the methodology of the conduct of national courts in the light of the procedural provisions of the Polish law." The author has also taken into account the recent case law of the ECJ regarding the negative consequences of non-compliance with the obligations of national courts to request a preliminary ruling. The ECJ decision in C-224/01 *Koebler* and the observations based on the facts in C-453/00 *Kuehne & Heitz*, not only shows the

proficiency of the author, but also reveals the constantly evolving nature of this subject. The ECJ decision in *Kuehne & Heitz*, delivered when the book was already at press (and for that reason not included in the book), have validated Scheuring's remarks.

Agnieszka Frąckowiak-Adamska (Chapter 5) describes the competence of national court with respect to non-application of a provision which is contrary to the Constitution (Polish) or to Community provisions. Here again, the Polish aspect has been highlighted by examining the situation on the basis of the existing Constitution of the Republic of Poland. Such a perspective serves to give the book a new quality. The author engages in a very interesting examination of the possibility of non-application by a national court of a national provision contrary to the Constitution and concludes that the national court should have the same competence, by way of analogy, in the context of a national provision contrary to the Community law (p. 193).

The last chapter, by Tomasz Tadeusz Koncewicz, contains a presentation of the recent case law of the ECJ, which on 30 September 2003 for the first time accepted that liability of a member state for infringement of Community law may arise also in the context of a decision of a national court of that State (C-224/01 *Koebler*). The importance of this decision lies in the fact that for the first time it was concluded that national courts are not as autonomous as they wish to be, since infringement of the obligation arising from Article 234 EC Treaty (obligation to request a ruling) may lead to the liability of the member state vis-à-vis an individual.

In summary it should be pointed out that the merits of this book come not only from the theoretical, but also the practical experience of its authors. Undoubtedly, it is also to be recommended for the broad use it makes of the case law of the ECJ. The table of cases cited in the publication, which has been included at the end of the book, enables the reader to find cases by himself and deepen his knowledge, when necessary.

The book is addressed in the first place to national judges, both of common and administrative courts, however it will also be of use to all legal professions and civil servants dealing with European law. It will enable them to acquaint with not only the theoretical, but also the practical aspects of application of Community law in a member state by its courts.

Monika Szwarc

MARK LATTIMER, PHILIPPE SANDS (eds.), *Justice for Crimes Against Humanity*, Hart Publishing, Oxford, Portland, Oregon 2003

The history of humankind is a history of the cry for "justice." Recent events such as the detention of Augusto Pinochet in Great Britain, the trial of Slobodan Milosevic before the International Criminal Tribunal for Former Yugoslavia, the case of *The Democratic Republic of Congo vs. Belgium* before the International Court of Justice (ICJ) and, last but not least, the establishment of the International Criminal Court (ICC) have had a great impact on international public law and our thinking about international justice in the context of the international community. These events have not only advanced development of international law, but also sparked debate about the immunity of heads of state; the nature of universal jurisdiction and finally the future of international criminal justice. The contributors to *Justice for Crimes Against*

Humanity seek to provide answers to these questions in terms of both international and national law and to create a broad perspective on the legal issues.

The book is divided into five sections. The first, titled "Atrocity, Impunity, Justice," starts with a chapter by Benjamin Ferencz who gives a personal account of developments in international law in the historical context – from the Nuremberg trials after World War II to the creation of the International Criminal Court in the Hague.

The second chapter, by Christopher Keith Hall, focuses on the principle of the universal jurisdiction: its history, the legal, philosophical and moral rationales for this principle, and critiques of the rule. Finally, through an analysis of recent developments it offers an answer about the prospects for universal jurisdiction: "The future of universal jurisdiction remains in danger."

The next chapter, by Brigitte Stern, concentrates on the issue of the immunities of heads of state. Describing the different meanings of immunity, the act of state doctrine, the rules granting immunity to heads of state, the author concentrates on the Pinochet and Congo versus Belgium cases underlining that heads of state must be accountable for their acts but in order to avoid political bias "this should be done before the ICC."

In the fourth chapter, Timothy McCormack reviews the reluctance of states to try their nationals for international crimes based on the actual situation in different parts of the world.

The second part of the book is titled "Justice in International and Mixed Law Courts." In the opening chapter, Graham T Blewitt describes the jurisdiction of the *ad hoc* criminal tribunals for former Yugoslavia and Rwanda, their early jurisprudence and impact on the establishment of the ICC.

In the next chapter, Judge Richard May sets out the procedures in courts trying war crimes, especially the collection and presentation of evidence.

In the next chapter, Cherif Bassiouni, who was the chairman of the Drafting Committee of the UN Diplomatic Conference on the Establishment of the International Criminal Court, describes in detail the creation of the Court, its statute, and the procedural aspects of hearings. He concludes that the "ICC is a necessary institution for the attainment of the goals of international criminal justice."

Diane F. Orentlicher discusses the future of transnational justice especially in the context of the growing number of criminal tribunals around the world.

The next part of the book is titled "Justice in National Courts." In the first chapter, William J. Aceves and Paul L. Hoffman focus on the great need to legislate and prosecute crimes against humanity in America, which is not a party to the ICC Statute and lacks a legal basis for prosecution of these crimes.

The second chapter, by Clare Montgomery, focuses on criminal responsibility for international crimes in Britain, describing the impact of the House of Lords judgment in *Pinochet no 3* on prosecution of international crimes within national jurisdiction.

The next chapter, by Fiona McKay, concentrates on civil reparation in national courts for victims of human rights abuses. The author describes recent cases involving the right of reparation under international law, noting "signs of movement towards emergence of 'civil universal jurisdiction'."

The third chapter, by Andrew Clapham, focuses on questions of sovereignty, diplomatic immunity and universal jurisdiction in the context of the Congo versus Belgium case before the ICJ. The questions addressed in this chapter are not only whether there is universal jurisdiction but also whether national systems are prepared to ensure a trial in accordance with international guarantees.

The next part of the book is titled: "Perspectives from Practitioners" and consists of personal accounts by people involved in developments relating to international justice. They share their experiences as prosecutors, counsellors and human rights activists working for truth commissions, tribunals, and national prosecutions.

In the last chapter, Mark Lattimer draws general conclusions in the context of an enforcement crisis in the international system for protection of human rights, noting that "those who rule will increasingly be held to account for what they do to their people."

The book also contains two appendices: the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment, and the Rome Statute of the International Criminal Court.

This book pinpoints recent developments in the law on crimes against humanity and problems connected with the enforcement of justice for those crimes. In the light of the legal developments in this field, this book will prove to be a welcome addition to the library of scholars, students and international legal practitioners.

Karolina Wierczyńska

PETER-TOBIAS STOLL, FRANK SCHORKOPF, *WTO-Welthandel und Welthandelsrecht*, Carl Heymanns Verlag KG, Köln, Berlin, Bonn, München 2002 (294 pp. + XVIII)

The law of international trade is one of the most important and difficult branches of international law. The emergence of the World Trade Organisation (WTO) on January 1, 1995 naturally gave a new impetus to interest in this field of law. The growing number of panel reports and the rulings of the Appellate Body make it both possible and necessary to undertake studies of WTO law. One of the most valuable items in this field is this new book by Peter-Tobias Stoll and Frank Schorkopf.

Perhaps every author writing on WTO law has to face two questions. The first is connected with the fact that WTO law forms only a part (even if the most developed part) of international economic law. The second has to do with the huge number of legal provisions in the WTO Agreement and its annexes. The simple fact that the volume comprising the documents resulting from the Uruguay Round of trade negotiations (excluding tariff schedules) is double the length of the present book (which can by no means be called a brief one) speaks for itself. Judicious selection of material is one of the most important preconditions of the success of books such as the present one.

One must objectively state that Stoll and Schorkopf have dealt with both these challenges in a very satisfactory way. Though their book is devoted only to the law of the WTO, they are at pains to place it in the perspective of the wider field of international economic law (including the rule-making of the UN, IMF, World Bank and so on). In that respect, they particularly deplore the failure of the UN, and more specifically ECOSOC, to play a sufficient role in this field. On the other hand, they have done their best to present WTO system itself in a concise and very competent way. In the undersigned's opinion, they have succeeded in this respect.

The authors divide the extensive topic of the WTO law into 10 chapters. The choice of subject of some of them is quite obvious and does not require any special comment. This applies in particular to those devoted to the dispute settlement system (Chapter VI), GATS (Chapter VII) and TRIPS (Chapter VIII). In fact, they discuss the problems of well-defined and relatively autonomous subsections of WTO law: respectively, Annex 2, 1B and 1C of the WTO Agreement. The same may be said about the chapter devoted to the principles of WTO law (Chapter I) and the structure of the new organisation and its law (Chapter II). The WTO Agreement is very precise as regards the structure, legal personality and powers of the organisation. These matters are carefully presented in the book and compared with the preceding situation of the quasi-organisation (GATT). One can only regret that the map of WTO bodies is not accompanied by a map of the annexes of the WTO Agreement, which itself requires explanation.

There is no doubt that in terms of the structure of the book, what is most interesting is the presentation of the rules of trade in goods (GATT 1994 and the other agreements of Annex 1A of the WTO Agreement). Presenting them "agreement by agreement" was impossible, so the authors have divided the subject into three chapters dealing with tariffs (Chapter III), non-tariff barriers (Chapter IV) and competition (covering dumping, subsidies and public procurement, Chapter V). To complete the picture, we have chapters devoted to the relationship between WTO law and municipal law (Chapter IX) and the new outlook for international trade law (Chapter X).

There is neither the need, nor the possibility to summarize the book here. Its main aim is to present the legal provisions of WTO law, including in most cases a synthesis of the system and brief analyses of the most important legal questions. The most analytical in this respect is the part devoted to the principles of WTO law. The authors emphasize the choice of free trade (p.30) as the basic aim of WTO. They analyse in detail the reciprocity underlying the WTO system (p.40 *et seq.*) and the principle of non-discrimination. In that regard, they present the Most-Favored Nation and National Treatment principles (respectively, p.45 and p.51). With respect to both, the authors discuss the principle itself and exceptions from it. One must evaluate very highly the frequent citations of panel reports and the rulings of the Appellate Body. One must also mention the inclusion (p.59) of a list of all the waivers from the WTO Agreement (in force as of May 2002).

The choice of tariffs as the subject of the third chapter is by no means incidental. They are the main instrument of regulation of international trade. Dealing of course with the famous triad of topics determining the price of imported goods (rates of tariffs, customs value, customs classification), Stoll and Schorkopf add to them the problems of rules of origin (in this regard the triad should be replaced by a quartet) and pre-shipment inspections.

Much more complex is the next chapter dealing with non-tariff barriers. The authors discuss in it Article XI of GATT 1994 and several deviations from it. In that respect, one can find very useful syntheses of the Agreements on Agriculture and on Textiles, and the Agreement on Technical Barriers to Trade.

Unlike the titles of the preceding chapters, the title of Chapter V may give rise to doubts. As Stoll and Schorkopf themselves make clear, there are no separate WTO provisions dealing with competition as such (p.117). One cannot, however, deny that dumping, subsidies and public procurement are connected with competition, so from that point of view the structure adopted by the authors is fully justified. One can only regret that the structure happened to be too tight to comprise the agreement on safeguards.

One should also evaluate very highly the chapter on the future of the WTO system. The authors rightly point to the questions of investment, competition, social policy and environ-

ment as possible fields of coverage by WTO norms. They also wonder if one can expect a democratisation of WTO (p. 262).

The book concludes with a review of recent developments in the Doha round of negotiations. The lack of any summing-up may happen to be axiomatic – the process is still ongoing and new changes in WTO law are to be expected.

One must say that the aim of the book is to give a very useful introduction to the field of WTO law rather than to discuss in depth all the possible questions arising therefrom. The former aim is achieved in a very satisfactory way in many respects. First of all, each chapter is preceded by an impressive list of books and articles on the topic. Secondly, there are very useful footnotes, often referring to panel reports. Thirdly, the authors provide instructions on consulting internet websites dealing with WTO law. There can be no doubt that Stoll and Schorkopf's book can be recommended as a very instructive and stimulating manual on the law of international trade.

Przemysław Saganek

ANDREAS F. LOWENFELD, *International Economic Law*, Oxford University Press, Oxford UK, New York 2002, 776 + XLIV pp.

Lowenfeld's book is one of the most important and impressive works written recently on international economic law. It covers several branches of that law, especially the law established by the WTO, international investment law, the International Monetary Fund and economic sanctions. In the preface, the author promises he will "teach not preach" (p. VII). There is no doubt that he keeps his promise. The book is a source of information the value of which cannot be overestimated by students, academic teachers (like the undersigned), civil servants, diplomats, politicians and their economic and legal advisers. One must say that the book cannot be, and is not, about everything that might be more or less closely connected with economic law, but within the very broad scope of the topics chosen by the author none of them is skimmed over but each is truly examined and explored. That is why it is best read not necessarily from the first to the last chapter, but by beginning with whichever is the most directly connected with the reader's own field of study or business and then proceeding to the others (for comparison, inspiration and search for interrelationships which are carefully explored by the author). One can even trace a tendency to put some matters (Agreement on Agriculture, Agreement on Textiles, INCOTERMS, UNCITRAL treaties and draft treaties) entirely or almost entirely outside the scope of the study rather than skate over them. In that respect one can be referred to other works on the topic and the documents themselves. Lowenfeld is fully aware of this when he writes in the afterword that his book makes "less of flat normative statements than might have been expected from a treatise." (p. 765) But, as he argues, "This approach reflects the author's belief that the answers cannot be understood without the questions and that abstract statements cannot be comprehended without awareness of the underlying facts and the continuing controversies" (p. 765). Actually, no comment is necessary in that respect. It is not the task of the author to recapitulate all the provisions (in particular that

applies to the WTO law), but with respect to those which are discussed the reader is confronted with questions, answers and their possible alternatives.

Though himself a lawyer, Lowenfeld addresses his book (on law) not only to lawyers (p. VI). This causes him to devote a lot of attention to underlying economic processes and the economic and (*nollens vollens*) political interests of states and specific disputes between them. He does not hesitate to show their influence on the provisions adopted within the framework of the Uruguay Round of international trade negotiations, which reflects a courage rarely met among lawyers who have a tendency to show the provisions of international law as sacrosanct creations which are good in themselves. It has also a lot to do with another of Lowenfeld's observations "international economic law – like all law but perhaps more so – is a process. Any attempt to define the law as of a given moment cannot help but distort" (p. 765). To make a slight correction, the author pays a lot of attention to both – the law and the process of its formation and transformation.

As was said, the book is not addressed only to lawyers but this does not mean that one has to be an economist to understand it. In fact, the references to economics are of such a nature as to help, not preclude understanding of the book by the lay reader. The position of the economic sciences is, however, emphasized, as the first part of the book is devoted to laws of economics: comparative advantages, the basic notions and solutions connected with money and exchange rates and the notion of the balance of payments. This makes it possible to predict the two main topics discussed later: law relating to international trade and law relating to money.

Dealing with the law of international trade, the author presents the history of GATT, its structure, main principles and the negotiating rounds. Later, he overviews the legal solutions adopted within the framework of the Uruguay Round, special attention being paid to TRIMs, TRIPS, customs valuation and technical barriers to trade. A very detailed analysis is undertaken with respect to GATS, both as regards the specific character of trade in services and its incorporation into the Marrakesh Agreement. Lowenfeld specially emphasizes the lack of application of national treatment with respect to services despite the evident references to it in the GATS provisions (p. 116).

A separate part of the book is devoted to the GATT and WTO dispute settlement system. After discussing this the author devotes a separate section to a detailed examination of the chosen rules of international trade. The topics chosen are subsidies and antidumping. The choice is by no means incidental. These two topics have a long tradition of regulation in separate agreements (codes), both are strictly connected with the economic and political considerations, and the solutions chosen with respect to dumping and subsidies are (at least with respect to the so-called second track of anti-subsidies measures) similar to each other. Lowenfeld presents the history of regulation of both topics in the GATT and their present regulation in the WTO. He also notes the division of subsidies into red, yellow and green varieties (pp. 236–237). In that respect, one can make only the minor observation that the very notion of green subsidies is of historical importance only, as this category was to apply till 31 December 1999, unless prolonged and prolongation has not taken place.

Though the very idea of eliminating subsidies is not questioned by the author, with respect to dumping, he cites both the pros and cons (p. 245 *et seq.*). The author also considers the question of whether antitrust regulations might replace antidumping laws (p. 273). Keeping in mind his perception of the law as a process, the author does not make categorical statements in that respect, confining himself to recalling the controversial character of the extraterritorial application of antitrust law by the U.S. and the necessary modifications of antitrust if it were to replace antidumping.

In that regard, one should draw attention to the only chapter written not by Lowenfeld but by another author, Eleanor M. Fox (pp. 340–383). It is devoted to competition law. One must note that 80 % of this chapter deals with internal law (perceiving EU law as the internal law of the Union and not as a part of public international law), principally that of the U.S., the EU and Japan. The remaining 20% deals with international cooperation in the field of competition – whether already in effect or about to be put into effect. Fox presents an even more optimistic view as regards the future inclusion of antitrust provisions into the framework of the WTO law than Lowenfeld (p. 383).

Part VI of the book, devoted to international investment, is in fact a 100-page fascinating book within a book. It is of the utmost significance, especially in the context of the different claims that emerge from time to time in Europe (even if they are not necessarily connected with investments as such). Lowenfeld presents the treatment of foreign investments before 1910, which were marked by respect for the interests of foreigners, and the fundamental denial of these principles by the Mexican revolution (1910) and the Soviet, as well as by the Calvo doctrine. In that perspective, Lowenfeld presents the emergence of the famous Hull doctrine. He concedes that the practice following World War II cannot be seen as a confirmation of the Hull doctrine, though “wholly uncompensated expropriation of the property of aliens was rarely seen” (p. 406).

In that respect, one might add that such facts as complete denial of compensation cannot be ignored when one wonders if there is (was) a customary obligation to pay compensation in all cases of expropriation of foreigners. Also the very fact of concluding agreements on compensation may serve more as an illustration of the pressure for regulation of this issue than of the *opinio iuris sine necessitatis* of such a customary norm (if it is proven). One can also wonder whether compensation at a ridiculously low level is a confirmation or, rather, a denial of the practice of compensating expropriated foreigners. One must also conclude that in some cases the lack of compensation must be perceived as a result of a deliberate decision; this refers in particular to the states which were victims of World War II, and whose fate (post-war included) was often decided without their participation. It is arguable that the losses suffered during the war were of such magnitude that it would be both impracticable and immoral to pay for abandoned property at the expense of a country’s own starving people who were also deprived of their homes.

Lowenfeld looks for a rule governing compensation in cases of expropriation and (if any is to be paid) the amount thereof (full, partial, adequate). He presents in that respect the UN resolutions devoted to sovereignty over natural resources, the awards of arbitral tribunals, the judgments of the ICJ (not very instructive in that respect) and national judgments. Decisive importance is attached to none of these. The perception of the law as a process is in the case of this particular field truly of the greatest importance and assistance for the author. He is not by the inherent lack of certainty in this field and analyses the different “trends and countertrends,” “precedents, models and warnings” (p. 454). In the opinion of the author, there has been a substantial shift in this field. Though it does not guarantee full certainty in cases of expropriation, there is a tendency towards the requirement of adequate compensation for expropriation. Behind this change, the author identifies three items: the ICSID Convention, the jurisprudence of the Iran-US Claims Tribunal and the conclusion of Bilateral Investment Treaties (BITs). The author himself feels that the pertinence of those items may give rise to controversies. In that respect, at least, he is right. First of all, the automatic significance of the judgments of the Iran-US Claims Tribunal for the world’s remaining 189 states requires a very good explanation. As regards BITs, one faces the fundamental question connected with customary law – do

you conclude a treaty because there is a customary norm consonant with it or because there is no such customary norm. Perhaps the alternative itself may give rise to protests but the search for a customary rule in such a controversial field nevertheless has the look of "mission impossible." One can, however, only be grateful to the author for undertaking once again that mission. There is no doubt that his work will be one of the main points of reference for other authors dealing with international investment law.

One must also mention another "book within a book" – the part devoted to the IMF in which a very detailed history of the world monetary system is presented. What deserves special attention is that it also includes an examination of recent crises (in Mexico, in Asia and in Russia).

One cannot have any doubt that within only a few years of its publication can already be rated a classic work and compulsory reading for people specializing in public international law.

Przemysław Saganek

CHRISTOPHE HILLION (ed.), *EU Enlargement: A Legal Approach*, Hart Publishing, Oxford, Portland, Oregon 2004, 230 pp.

In May 2004 the European Union faced its fifth enlargement. The reviewed book's intention is to reflect the significant challenges which had to be confronted by both the acceding countries and the European Union, mainly the legal ones.

The reviewed book consists of nine papers presented at a conference organized by the Cambridge Law Faculty and held in July 2002. However, the authors of the contributions all hail from academic communities in the old member states which might be acknowledged as a disadvantage of the book.

The book opens with an analysis by Christophe Hillion of the Copenhagen Criteria and their results. The author concludes that they were initially established in relation to the countries of Central and East Europe but with the passing of time evolved into standard accession criteria. An essay by Geoffrey Edwards focuses on the fact that the 2004 enlargement required the adoption of institutional reforms which were eventually effected by the provisions of the Nice Treaty. Alan Dashwood discusses the impact of the enlargement on the Union's institutions. To this end, he analyses the provisions of the draft Constitution for Europe (in its version of June 2003). Anneli Albi deals with the implications of the referendum procedures and constitutional amendments in the candidate countries for the EU Treaty amendment procedure. She presents the provisions concerning the sovereignty and independence of the ten acceding countries' constitutions (it should be said that the author has already used the table grouping these provisions in at least one of her previous articles) and comes to the conclusion that the amendment procedure of the EU Treaty should be facilitated. Kirstyn Inglis examines the transitional arrangements of the Accession Treaty. She analyses the nature of these provisions and their purpose concluding, pessimistically, that they extend the conditionality of the pre-acces-

sion strategy to the post-accession period, as the Treaty provides for a three-year transitional period and the safeguard measures lay down grounds for discriminatory treatment of the new member states. A good example is free movement of persons (workers, to be precise). Michael Dougan, who gives a great many examples and formulates some reasonable conclusions, discusses this topic in the context of enlargement and warns us that the transitional periods in this area will result in differentiating the position of the acceding countries. Alan Mayhew puts forward some interesting ideas on the impact of enlargement on the EU budget. The large number of tables included in his essay make it easier to comprehend. Three far-reaching conclusions are drawn, one of them being that in the longer term the budgetary outcome should be satisfactory for both old and new member states. John R. Spencer comments on the impact of accession on the criminal law and procedures of the new member states. In this regard, he focuses readers' attention on three groups of legal rules: human rights provisions, provisions concerning crime, and mutual legal assistance and judicial co-operation. He also provides information on the practical assistance delivered through pre-accession programmes (e.g. twinning projects). In his long contribution on common strategies on Russia and Ukraine in the EU enlargement perspective, Marc Maresceau describes the history of co-operation with those two countries. He starts, however, with a legal analysis of the common strategy introduced by the Amsterdam Treaty as an instrument adopted by the European Union and, regrettably, not of a very important character. Its implementation is even less transparent. Both analysed instruments are thought to develop the so-called strategic partnerships, although this term is not defined precisely. None of them, however, make any mention of the future membership of those countries in the EU.

The book ends with some final remarks by Allan Rosas who sits on the bench of the European Court of Justice. It also contains a detailed index, a table of cases and a table of legislation. All in all, it is an important and rewarding contribution to the already abundant literature on enlargement.

Katarzyna Strąk

NEIL WALKER (ed.), *Sovereignty in Transition*, Hart Publishing, Oxford, Portland, Oregon 2003, 556 pp.

This book contains discussion papers from a workshop held at the European University Institute in September 2001, although there are several contributions from the authors who did not participated, in it.

The book consists of twenty-one contributions grouped in three parts. The first presents disciplinary perspectives beginning with Neil Walker introducing the concept of late sovereignty with four characteristics, namely continuity, distinctiveness, irreversibility and transformative potential. Bert Van Roermund presents two arguments against sovereignty which he calls the redundancy and the incoherence arguments and concludes his article with an alternative account based on the philosophy of language in which the first person plural plays a fundamental role. Martin Loughlin expounds sovereignty as a political concept. To this end, he discusses ten tenets which, in his opinion, "define the essence of the modern concept of sovereignty." Bardo Fassbender

analyses sovereignty as a legal notion from the international legal perspective. He discusses both its internal and external dimensions. He points to the concept of sovereign equality (Art. 2(1) UN Charter) as a cornerstone of contemporary international law by which states co-existence is ensured. Ernst-Ulrich Petersmann's contribution is devoted to the international relations law of the European Union. He focuses readers' attention on the role played by human rights in this regard and argues for the necessity of strengthening their impact on the discipline of law under discussion. A political science perspective is presented in Michael Keating's contribution. One of the questions raised here is the problem of stateless nations (the cases of Canadian Quebec, Basque Country, Catalonia or Scotland are discussed) in the context of their possibly challenging the idea of sovereign nation-states. Gover Buijs's contribution focuses on a theological approach, not very frequently presented in the area of sovereignty studies. The author explains *inter alia* the etymology of the word and he concludes that its first known use was probably "secular." He presents various ideas concerning sovereignty, e.g. Schmitt's that sovereignty is a secularised theological concept and Dooyeweerd or Maritain's, two Christian thinkers who openly criticized the notion of sovereignty itself.

Parts B and C focus on constitutional perspectives (the view from states and the view from the EU) presenting sovereignty in France (Jacques Ziller), Germany (Miriam Aziz), Italy (Marta Cartabia), the United Kingdom (Kenneth Armstrong), Belgium, the Netherlands (Bruno de Witte) and Poland, the only one of the then acceding countries (Cezary Mik). The Netherlands is a special case as the word "sovereignty" does not, for historical reasons, even appear in its Constitution. Moreover, European Community law, like all international treaties duly approved by the Parliament, has a privileged status. Anneli Albi analyses and contrasts the two different ways in which sovereignty is perceived in the EU and the candidate countries. The author, after presenting constitutional provisions concerning sovereignty and independence in the candidate countries, concludes that the different approach of the Central and East European countries is due to long histories of political dependence. Gráine de Búrca examines the relationship between the supremacy of EU law, a doctrine developed by the European Court of Justice, and the sovereignty of EU law, one of the central questions being whether supremacy entails a claim of abandonment or loss of sovereignty on the part of states. Jo Shaw explores the issue of determination of the boundaries of the suffrage in the context of EU electoral rights and Miguel Poiars Maduro offers an in-depth analysis of the question of ultimate authority, examining possible ways of resolving the conflict between the EU and internal legal orders.

The importance of the subject is beyond doubt. However, the strength of this book of essays lies in the fact that the majority of the authors set out to introduce absolutely new theoretical solutions.

Katarzyna Strąk

JOANNA APAP (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Edward Elgar Publishing, Cheltenham UK, Northampton USA 2004, 339 pp.

One of the objectives of the EU, introduced by the Treaty of Amsterdam after its entry into force in 1999, is the creation of an Area of Freedom, Security and Justice (AFSJ). This treaty commitment was reflected in the proceedings of Tampere, Seville and Laeken European Councils.

This book offers twenty-one essays grouped in three parts. They are preceded by a general overview of progress and obstacles in the area of justice and home affairs (JHA) in the context of an enlarging Europe by Joanna Apap and Sergio Carrera. To this is appended a list of instruments proposed or adopted as of May 2003, based on the biannual scoreboard of the Commission. The authors highlight the main reasons why the expected level of development has not been reached. This is due to, for example, weak legitimacy in that area, different police practices or even the risk of corrupt practices.

Part One, entitled "Fundamentals of the EU Justice and Home Affairs Policy Post Enlargement" contains three contributions, the first of them, by Sarah Ludford, being devoted to the fundamental question, namely what JHA policy should comprise. The author, a MEP, uses this opportunity to present her group's position on that matter. First of all, equal regard should be given to freedom, security and justice, which is not easy since, as Ludford rightly states, the EU Council of Ministers is composed mainly of ministers of internal affairs who prefer to discuss questions of public order from the perspective of control and not human rights or race equality. Her attention is also focused on the fact that JHA should be managed with democracy and openness. Jorg Monar discusses post-enlargement aspects of JHA policy. Among these are the challenges resulting from enlargement of the EU – structural, political or implementation capability diversities. Paul de Hert gives an account of the division of competencies between national and European levels in the JHA area or, more precisely speaking, the division between the internal and European legal orders on the one hand, and the division between the first and third pillar on the other. The author analyses these issues in the context of the subsidiarity principle.

Part Two is entitled "Scenarios for Crime, Law and Justice in an Enlarged European Union" and consists of seven articles. Of interest are Jörg Polakiewicz's essay which provides a detailed account of the contribution of the Council of Europe to JHA as well as Jacob Söderman's description of the role of the European Ombudsman in this area. Bernard Hemingway, in his short article, assesses the impact of Stability Pact programmes on JHA. Jorge Costa compares, very scrupulously, the institutions of Eurojust and the European Public Prosecutor. To this end, he presents the powers of these two bodies and an analysis of their similarities and differences. He also makes an attempt to assess the complementary character of those two institutions. Luc Schaerlaekens examines the activities of the European Anti-Fraud Office and its cooperation with the new member states.

The third part, the most extensive, deals with immigration and asylum policies in Europe. It contains eleven articles, the first of them being a contribution by Joanna Apap about European immigration policy in the context of an enlarged Europe. After presenting its history and main principles, the author addresses several questions concerning its future. No less important is an article by Elspeth Guild devoted to the topic of labour migration in the EU by third-

country nationals as it explains the essence of authorization for employment. Doris Schmidt examines the new German immigration law which seems to be more hospitable, especially to working immigrants on the one hand, and asylum seekers on the other (as it provides for the speeding up of the asylum procedures). Johannes van der Klaauw analyses the future common asylum policy emphasizing the member states' capacity and will to introduce amendments to their aliens laws. Ryszard Cholewiński focuses on the issue of the right to family reunification for third-country nationals which constitutes one of the elements of the European asylum system. The central question in the author's contribution is whether family reunification can be treated as a constitutional right. The next essay, by Marek Adamczyk, presents the case of Poland and its management of the border controls. Olga Potemkina examines the views of Russia on the impact of new member states' adoption of the Schengen acquis with special emphasis on the Kaliningrad case. In her short conclusions Joanna Apap seeks to give answers, in the form of recommendations, to sometimes sensitive questions relating to JHA.

The editor of the book has managed to gather a group of eminent scholars, officials and politicians, which is not without importance for the whole of the project. It is beyond doubt that the book is of a high scholarly standard although it would have benefited from the inclusion of chapters on, for example, civil cooperation.

Katarzyna Strąk

N. FERNÁNDEZ SOLA (ed.), *Unión Europea y derechos fundamentales en perspectiva constitucional*, DYKINSON, S.L., Madrid 2003, 353 pp.

This book focuses on two subjects: the evolution of protection of human rights in the EU and collision of the protection systems within Europe on the one hand, and the meaning and importance of the Charter of Human Rights on the other. All of the eleven articles were originally presented at a conference devoted to human rights and fundamental liberties held at the University of Zaragoza in November 2002.

Alvaro Rodríguez Bereijo analyses the Charter in the context of protection of human rights. One of the central questions raised by the author, to which an exhaustive answer is given immediately, is why Europe needed this kind of instrument. The author's second step is to examine the content and significance of the Charter from the legal point of view. Angel G. Chueca Sancho deals with the question of the accession of the EU to the European Convention on Human Rights. Here, the author states that accession will stop, as he calls it, a judicial war between these two systems of protection. He also analyses the possible impact of the Charter on the existing situation. In the next essay, Susana Sanz Caballero presents the accomplishments of the Council of Europe in the field of the protection of human rights. To this end, their mutual relations are analysed. The Charter is also thoroughly analysed in Agustín José Menéndez's article. He discusses the legal value of the Charter as well as its political consequences which the author describes as mainly symbolic. Montserrat Pi Lloréns provides information about the interpretation of fundamental rights in the jurisprudence of the European Court of Justice, while Miriam Aziz discusses the role of national courts in the protection of

rights as exemplified by the German Federal Constitutional Court's judgments on European integration. Natividad Fernández Sola provides a very detailed analysis of the asylum policy of the EU. The author's main aim is to compare the level of protection of refugees with the protection resulting from other international obligations binding on each member state of the EU and the EU as a whole. Some attention is given to the impact of the Charter on asylum policy. The author observes, however, that EU asylum policy is still concentrated on member states' interests rather than values. Paloma Biglino Campos provides us with an analysis of Article 51 of the Charter. One of the questions the author addresses is the difficulties that the Charter might create in states' internal legal orders when it becomes a binding instrument. The division of competences is also examined in the context of Article 51 of the Charter. Of great apparent interest is Miguel Poiarés Maduro's article as in the author's opinion the interpretation of the Charter can be twofold. And Emanuela Lombardo, in the last contribution, focuses on the provisions in the Charter which concern equality between men and women. On closer analysis, they are found not to guarantee the same level of protection as the Community *acquis* does.

Today the Charter of Fundamental Rights constitutes an element of the new treaty and after its ratification by all the member states of the EU it will become a binding instrument. That was not so clear when the articles in the book were written, yet the authors did not intend to duck presentation of their visions of the functioning of the Charter in future.

Katarzyna Strąk

M. ANDENAS, J.U. USHER (eds.), *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform*, Hart Publishing, Oxford, Portland, Oregon 2003, 440 pp.

The reviewed book, the third after volumes on the Maastricht and Amsterdam treaties, analyses legal issues related to the Treaty of Nice and other instruments of European integration and the consequences of their implementation. It is the fruit of cooperation between two academic centres, namely the British Institute of International and Comparative Law in London and the Europa Institute at the University of Edinburgh.

The book is divided into four parts. The first part deals with the European Constitution. Peter Oliver describes, in detail, the proceedings of the Convention on the Future of Europe. Jacqueline Dutheil de la Rochère and Ingolf Pernice look at the relationship between the constitutions of the member states and EU law. The authors analyse the national reports prepared for the 2002 FIDE Congress (it should be said that these are still available on the Internet and constitute a source of useful information for researchers). They also draw practical conclusions and propose recommendations for the Convention and the Intergovernmental Conference. Udo di Fabio considers the issue of the distribution of powers between the EU and the member status. He states that these powers must be regularly reviewed. Ingolf Pernice advocates the need to draw up a new catalogue of EU competences and he presents the various proposals put forward by different member states. It must be stressed that although both di Fabio's and Pernice's contributions were written at the end of 2001, they remain valuable as

they present never-ageing ideas. The same can be said about Daniel Thym's article which examines different aspects of European constitutional theory in the context of the post-Nice process.

The second part provides an analysis of certain problems arising from the Nice Treaty. John A. Usher assesses the treaty in the light of its institutional reform. The author presents the history of amendment of the founding treaties. He makes the following comment on the enhanced cooperation provisions: why were they revised if the earlier ones regarding enhanced cooperation remained in abeyance? And the amendments in this area were considerable. The next article deals more precisely with the issue of enhanced cooperation. Jo Shaw characterises them as technical in nature. However, in the author's opinion, closer examination of the issue reveals important points which are further analysed. The conclusion is that enhanced cooperation must be interpreted in the political context. Haris Kountouros examines the social policy provisions or, more precisely speaking, the amendments to Article 137 EC in the context of its new wording. The author points to the fact that a legal basis for the use of the open method of coordination in this area has been incorporated. Joseph A. McMahon discusses issues relating to the Common Agricultural Policy.

Part Three is devoted to questions concerning the European Court of Justice (ECJ). Piet Eeckhout comments on the changes introduced in this area. His conclusion is that the EU runs the risk of gradual judicial starvation. Francis G. Jacobs focuses on the judicial protection of individuals and Anthony Arnall deals with the changes introduced to the preliminary rulings procedure. He also makes some comments on what the ECJ expects of national courts when they ask for a ruling. Liz Heffernan writes about the possible functioning of so called *certiorari* jurisdiction within the EU. This is a procedure used by the US Supreme Court and it gives the Court the discretion to determine which cases to hear and decide. The author reflects on the potential application of this procedure within the EU.

The short fourth part examines the Charter of Human Rights. It contains three contributions, one of them being an article by Lord Goldsmith QC, the UK Attorney General, who presents the origins and legal nature of that instrument. In Sionaidh Douglas Scott's contribution, the central question is whether the Charter is capable of strengthening democracy and citizenship within the Union. Jürgen Schwarze's article on the German view of the Charter (where its effects on the Federal Constitutional Court are analysed) is especially valuable as he presents his personal opinion on the matter. He concludes that the Charter is widely accepted in Germany and by the FCC in particular. He argues, however, that certain rights need clarification.

The book constitutes an important collection of essays whose authors have managed to address many specific questions. Despite the fact that most of the articles were written in 2001–2002, this book is still of current interest.

Katarzyna Strąk

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