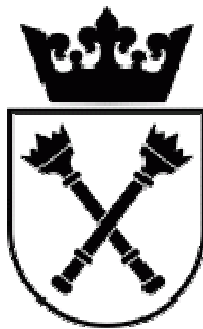


# MISCELLANEA IURIS GENTIUM

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# **Miscellanea Iuris Gentium**

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*Miscellanea Iuris Gentium* is a journal devoted to the problems of theory and practical application of Public International Law. We would also like to present some materials concerning the history of teaching of Public International Law at the Polish and foreign universities.

Scholars, practitioners and doctoral students are warmly encouraged to present their views in our journal.

The authors are kindly asked to send their papers in English or in French (printed and in electronic Word Program version) to the Secretary of the Chair of Public International Law, Jagiellonian University, 31-007 Cracow, Gołębia 9, Poland. The length of the paper should not exceed 30 pages of MIG format. The authors are asked to submit their data, including their current affiliations.

The materials sent will not be returned to the authors. The author will be notified of the acceptance, rejection or need of revision of the paper. The Chair of Public International Law will not provide any gratification to the authors, each author, however, will receive 5 pieces of the MIG Yearbook including her or his printed article.

## From the Editor

We would like to present our readers with the joint edition of *Miscellanea Iuris Gentium* (consisted of numbers twelve, thirteen and fourteen). Andrzej Zdebski's idea of publishing a series of academic papers, only two of which have appeared in print up until the year 2000 (in 1990 and 1991), was put into practice in the Jagiellonian University Chair of Public International Law, headed by Professor Stanisław Nahlik (†1991) and subsequently by Professor Gwidon Rysiak (†1996). The eighth/ninth joint edition was published in 2006. In this way, the current issue of *Miscellanea* is a continuation of the series started 21 years ago.

Authors with a recognized international academic standing have published their articles in *Miscellanea*. Among them, we find names such as: Manfred Lachs, Stanisław E. Nahlik, Jean Claude Gautron, Ulrich Beyerlin, Jerzy Makarczyk, as well as their colleagues. In the meantime, many of the junior authors have obtained professorships. We would like to continue this good tradition.

**K.L.**



**THE UN SECURITY COUNCIL  
ANTI-TERRORISM SANCTIONS:  
THE ROLE OF THE EU COURTS  
IN ASSURING COMPLIANCE WITH HUMAN RIGHTS**

by

**Juan Santos Vara<sup>\*</sup>**

**A. INTRODUCTION**

In recent years the European Union (EU) has adopted numerous measures to fight the constant threat posed by terrorism. Many of the decisions taken by the EU institutions respond to the need to implement the resolutions adopted by the UN Security Council with a view to freezing the assets of suspect terrorists and individuals and entities associated with them. Security interests and the respect for human rights present a potential tension in international law. This tension is particularly acute in the measures adopted by the UN and its Member States to ensure that assets belonging to those who are involved in terrorist activities or who support such activities are frozen. In several cases this issue has been brought to the attention of the Court of First Instance (CFI) and the European Court of Justice (ECJ).

On 3 September 2008, the ECJ issued its judgment in the *Kadi/Al Barakaat* case, a ruling which has far reaching consequences not only for the EU and its Member States, but

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<sup>\*</sup> Juan Santos Vara – Associate Professor of Public International Law, University of Salamanca (Spain). The present article has benefited from the support of the research project: “*Las relaciones entre la UE y NU: hacia la defensa del multilateralismo eficaz*”, DER2008-05419/JURI, Spanish Ministry of Science and Innovation. The author was a visiting fellow from January to June 2008 at the Watson Institute for International Studies (Brown University), with the financial support of the José Castillejo Program of the Ministry of Science and Innovation (*Resolución de 16 de mayo de 2007 de la Secretaría de Estado de Universidades e Investigación, BOE núm. 129 de 30 de mayo de 2007*). The author wishes to express his gratitude to Sue Eckert, Senior Fellow at the Watson Institute for her enlightened comments on targeted sanctions. This article was sent to the “MIG” editors in January 2010.

also for the entire UN system of targeted sanctions<sup>1</sup>. The ECJ held that the Community courts must ensure the review of the lawfulness of all Community acts in the light of fundamental rights protected by the EU legal order as general principles of Community law, “including the review of Community measures which (...), are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations”<sup>2</sup>. The Court concluded that, in the light of the actual circumstances surrounding the inclusion on the list of persons and entities whose funds are to be frozen, the appellants’ claims that the contested regulation violates the right to be heard, the right to judicial review and the right to property are well founded, and consequently the Court annulled the Council regulation in so far as it concerns the appellants<sup>3</sup>.

The implementation of the Security Council resolutions calling upon the UN Member States to freeze the funds and other financial resources of individuals and entities designated by the Committee established pursuant to Security Council Resolution 1267 (1999) has to overcome political and legal obstacles in several States<sup>4</sup>. Even though the States consider that the use of targeted sanctions is essential in order to effectively combat the financing of terrorism, many of them have expressed their concerns regarding the lack of protection of human rights<sup>5</sup>. The encroachment on the right to a fair trial and effective remedy therefore lies at the heart of the debate<sup>6</sup>. The present situation of the victims of such sanctions is unacceptable from the perspective of the international protection of human rights. In the

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<sup>1</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council*, not yet published in the report.

<sup>2</sup> The Court followed the Opinions of Advocate-General Poiares Maduro delivered on 16 January 2008, Case C-402/05 P, *Kadi v. Council and Commission*, and on 23 January 2008, C-415/05 P, *Al Barakaat International Foundation v. Council and Commission*. As both Opinions are almost identical, reference will only be made henceforth to *Al Barakaat*.

<sup>3</sup> Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9, “the contested regulation”).

<sup>4</sup> Seventh Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Doc. S/2007/677, paras. 8, 10 and 26.

<sup>5</sup> The Monitoring Team has recognized that the States seem less enthusiastic about the sanctions regime than they were. In some cases, the States consider that the proceedings that lead to listing and delisting are not fair (Seventh Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Doc. S/2007/677, paras. 8, 10 and 26).

<sup>6</sup> See B. Fassbender, *Targeted Sanctions and Due Process*, 20 March 2006 (final), [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/Public\\_international\\_law](http://www.coe.int/t/e/legal_affairs/legal_co-operation/Public_international_law) (visited 11 November 2009); I. Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Counter-Terrorism Sanctions*, Committee of Legal Advisers on Public International Law (CAHDI), Doc. CAHDI (2006) 22, <http://www.coe.int/cahdi> (visited 12 November 2009).

absence of an effective review mechanism at the UN level, some of the listed individuals and entities have initiated legal proceedings before national and regional courts<sup>7</sup>.

The aim of this contribution is to analyse the role of the EU Courts in assuring compliance with human rights. The implications of these cases go beyond the context of the fight against the financing of terrorist activities. The article will start by briefly recalling the legal challenges to the 1267 Sanctions Committee's list before the CFI in Part B, and Part C will be devoted to analysing the judgments of the CFI regarding the EU autonomous list of terrorists with the aim of highlighting those aspects which distinguish this line of case law from its previous judgments in *Yusuf/Kadi* of 21 September 2005, and the similarities with the *Kadi /Al Barakaat* case of 3 September 2008. Part D will focus on the main issues raised by the ECJ in *Kadi/Al Barakaat*: the lack of competence to review the compatibility of the Security Council resolutions with *jus cogens*, the relationship between the UN Charter and the Community legal order, the lack of protection of fundamental rights in the sanctions regime imposed by the UN and the breach of the appellants' fundamental rights. There is a divergence in opinion between the EU and international lawyers when confronted with the consequences of *Kadi/Al Barakaat*. It is the aim of the article to analyse where the differences between the two perspectives can be found. Obviously, the discussion on these issues does not pretend to be exhaustive. Finally, the article will discuss in Part E how the CFI's judgments on the EU autonomous list of terrorists may influence the EU institutions when confronting the implications of *Kadi/Al Barakaat*. The consequences of the CFI case-law as regards the EU autonomous list of terrorists should be borne in mind when faced with the implications of *Kadi/Al Barakaat*.

## **B. LEGAL CHALLENGES TO THE 1267 SANCTIONS COMMITTEE LIST BEFORE THE COURT OF FIRST INSTANCE**

On 21 September 2005, the CFI delivered its judgments on the *Yusuf* and *Kadi* cases<sup>8</sup>. The rulings of the CFI have substantially influenced the debate on the lack of legal safeguards

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<sup>7</sup> The measures implementing the decisions of 1267 Sanctions Committee have been challenged in, at the very least, Belgium, Italy, Switzerland, the Netherlands, Pakistan, Turkey, United Kingdom, the United States of America and the European Union. See Seventh Report of the Analytical Support and Sanctions Monitoring Team, paras. pp. 40-42 and Annex to Eight Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaeda and the Taliban and associated individuals and entities, UN Doc. S/2008/324, 14 May 2008.

<sup>8</sup> Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, and Case T-315/01 *Kadi v. Council and Commission* [2005] ECR II-3649. As the legal reasoning followed in both cases is similar, reference will only be made henceforth to *Yusuf*.

available to individuals and entities regarding the decisions adopted by the Security Council and the Sanctions Committees and on the jurisdiction of domestic and international courts to review their conformity with the rule of law. The applicants whose funds and other financial resources were frozen as a result of the Security Council sanctions regime against the Al-Qaeda network and the Taliban challenged before the CFI the lawfulness of the EC regulation implementing the Security Council resolutions<sup>9</sup>.

The CFI reached the conclusion that it has no jurisdiction to review the legality of the contested regulations regarding fundamental rights protected by the EU law, following an examination of the relationship between the obligations that the Charter of the United Nations imposes upon the EU Member States and their obligations under the EC Treaty<sup>10</sup>. The CFI begins its reasoning by pointing out that the obligations of the EU Member States under the UN Charter prevail over every other obligation of domestic or international law, including their obligations under the Treaty of the European Community<sup>11</sup>. The primacy of the Charter over other international treaties is explicitly recognized by Article 103 of the UN Charter, and it is generally understood that the primacy extends also to the Security Council resolutions by virtue of Article 25 of the UN Charter. The CFI also considers it appropriate to base the primacy of the Security Council resolutions on the EU legal order, referring in particular to Articles 307 and 297 of the EC Treaty. On the one hand, according to Article 307 EC, the international agreements concluded by the Member States before the entering into force of the EC Treaty or, for acceding States, before the date of their accession, shall not be affected as a

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<sup>9</sup> Council Regulation (EC) N° 881/2002, note 3.

<sup>10</sup> The reasoning followed by the Court has been widely criticized by the doctrine. See G. della Cananea, *Return to the due process of law: the European Union and the fight against terrorism*, 32 EUROPEAN LAW REVIEW, 896-907 (2007); A. Ciampi, *L'Union Européenne et le respect des droits de l'homme dans la mise en œuvre des sanctions devant la Cour Européenne des droits de l'Homme* (2006) 110 REUE GENERAL DU DROIT INTERNATIONAL PUBLIC, 85-116 (2006); C. Eckes, *Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgements of the Court of First Instance*, 14 EUROPEAN LAW JOURNAL, 74-92 (2008); P. Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit*, 3 EUROPEAN CONSTITUTIONAL LAW REVIEW, 183-206 (2007); N. Lavranos, *Judicial Review of UN Sanctions by the Court of First Instance*, 11 EFA REV., 471-490 (2006); J. Santos Vara, *La indefensión de los particulares frente a las sanciones del Consejo de Seguridad: el reconocimiento de la competencia de los tribunales internos para controlar las resoluciones del Consejo de Seguridad en relación con el ius cogens*, (2006) 11 REVISTA GENERAL DE DERECHO EUROPEO, 1-23 (2006); D. Simon and F. Mariatte, *Le Tribunal de première instance des Communautés: Professeur de droit international? À propos des arrêts Yusuf, Al Barakaat International Foundation et Kadi du 21 septembre 2005*, EUROPE, 6-10 (2005); P. Stangos and G. Gryllos, *Le droit communautaire à l'épreuve des réalités du droit international: leçons tirées de la jurisprudence communautaire récente relevant de la lutte contre le terrorisme international*, 42 CAHIERS DE DROIT EUROPEEN, 429-481 (2006); C. Tomuschat, *Case Law*, 46 CML REV., 537-551 (2006).

Case T-253/02 *Ayadi v. Council* [2006] ECR II-0000 and Case T-94/04, *Hassan v. Consejo* [2006] ECR II-0000. As the main legal reasoning followed in both cases is similar, reference will only be made henceforth to *Ayadi*.

<sup>11</sup> *Yusuf*, note 8, para. 231.



result of the EC Treaty<sup>12</sup>. On the other hand, the Court considers that Article 297 EC was introduced into the Treaty in order to allow the EC Member States to observe the obligations deriving from the Charter of the UN<sup>13</sup>. As a result of this reasoning, the CFI affirms that “pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member States may, and indeed must, leave unapplied any provision of Community law, (...) that raises any impediment to the proper performance of their obligations under the Charter of the United Nations”<sup>14</sup>.

Since the Community is not a member of the UN, the CFI admits that the Community as such is not directly bound by the Charter in terms of international law. However, the CFI argues that “the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it”, specifying Member States’ willingness to fulfill their obligations under the Charter<sup>15</sup>. Even though the CFI rules out the succession to the rights and obligations arising from the Charter by the Community itself, by analogy with the arguments used in relation to the binding nature of the GATT in *International Fruit Company*, the EC Treaty demonstrates the Member States’ will that the Community should be so bound<sup>16</sup>. The powers transferred to the Community by the Member States regarding the performance of their obligations under the Charter of the UN should be exercised in conformity with those obligations<sup>17</sup>. Consequently, the Community may not impede the Member States from implementing their obligations under the Charter and it is bound to adopt all the measures necessary to enable the Member States to fulfill those obligations.

The need to uphold the general framework of coexistence represented by the UN induces the Court to waive its right of control over the compliance of Community acts implementing the Security Council resolutions with the founding Charter represented by the EC Treaty<sup>18</sup>. In the Court’s view, the primacy of the Security Council resolutions implies that EU institutions do not have an independent discretionary margin when implementing targeted

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<sup>12</sup> *Id.*, para. 235. On the case law regarding Article 307 EC, see Case C-324/93, *Evan Medical and Macfarlan Smith* [1995] ECR I-563, para. 27; Case C-124/95, *Centro-Com* [1997] ECR I-81, para. 56; Case C-158/91, *Levy* [1993] ECR I-4287, para. 27.

<sup>13</sup> Article 297 EC reads “Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take (...) in order to carry out obligations it has accepted for the purpose of maintaining peace and international security”.

<sup>14</sup> *Yusuf*, note 8, para. 240.

<sup>15</sup> *Id.*, paras. 243-246.

<sup>16</sup> Cases 22-24/72, *International Fruit Company* [1972] ECR 1219.

<sup>17</sup> *Yusuf*, note 8, paras. 245-253.

<sup>18</sup> See Case 294/83, *Parti écologiste “Les Verts”* [1986] ELR 1339.

sanctions of this nature, whereby the annulment of the EU rules would imply that the Security Council resolutions are also in breach of fundamental rights. The CFI affirms that “any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions”<sup>19</sup>.

The CFI followed a monist approach according to which valid international law is immediately valid within the EU law and the relationship between European and international law is mainly determined by Article 103 UN Charter. Consequently, the Security Council resolutions are granted primacy over the EU law, including primary law. As it will be shown later, the line of reasoning followed by the ECJ is more consistent with the previous case law on the relationship between European and international and on the protection of fundamental rights than the CFI rulings.

### C. LITIGATION REGARDING THE EU AUTONOMOUS LIST

In its judgment in *Organisation des Modjahedines du peuple d'Iran (OMPI)*, the CFI returns to its settled case law regarding the protection of fundamental rights<sup>20</sup>. For the first time, the CFI annulled a decision of the Council of Ministers freezing the funds belonging to an entity that had been included on the EU autonomous list of terrorists<sup>21</sup>. The CFI held that the contested decision infringed the right to a fair hearing, the right to an effective legal remedy and the statement of reasons was not appropriate. Later, in its judgments in *Stichting Al-Aqsa* and *José María Sison* of 11 July 2007, and *Kongra-Gel* and *PKK* of 3 April 2008, the CFI showed a willingness to consolidate and develop the line of legal reasoning initiated in *OMPI*<sup>22</sup>. However, the CFI stresses the aspects which distinguish *OMPI*, *Stichting Al-Aqsa*, *José María Sison*, *Kongra-Gel* and *PKK* from its previous judgments in *Yusuf/Kadi* of 21

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<sup>19</sup> *Yusuf*, note 8, para. 266. Subsequently, the CFI has again had the opportunity to rule on this matter in the *Ayadi* and *Hassan* cases of 12 July 2006. Although the Court fully accepts the doctrine followed in the *Yusuf* and *Kadi* cases, it has tried to mitigate some of the more negative consequences of the judgments of 21 September 2005 (Case T-253/02 *Ayadi v. Council* [2006] ECR II-0000 and Case T-94/04, *Hassan v. Consejo* [2006] ECR II-0000. As the main legal reasoning followed in both cases is similar, reference will only be made henceforth to *Ayadi*).

<sup>20</sup> Case T-228/02, *Organisation des Modjahedines du peuple d'Iran (OMPI)*, [2006] ECR II-4665.

<sup>21</sup> Council Decision 2005/930/EC of 21 December 2005 implementing Article 2 (3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ L 340, 23.12.2005, p. 64).

<sup>22</sup> Cases T-327/03, *Stichting Al-Aqsa* [2007] ECR II-79; T-47/03, *José María Sison*, [2007] ECR II-73; T/253/04, *Kongra-Gel*, judgment of 3 April 2008, unpublished; T-229/02, *PKK*, judgment of 3 April 2008, unpublished.

September 2005 and *Ayadi/Hassan* of 12 July 2006. The Court wishes to make it clear that it has not changed its position<sup>23</sup>. Unlike the Al-Qaeda and Taliban sanctions regime, Security Council Resolution 1373 (2001) leaves to the EU and its Member States the decision to specifically determine those individuals and entities whose assets are to be frozen, thus involving the exercise of the Community's own powers and entailing a discretionary appreciation by the Community<sup>24</sup>. However, in *Yusuf/Kadi* – subsequently confirmed in *Ayadi/Hassan* – the EU institutions have no margin of discretion for applying the SC sanctions.

The CFI understands that, given that the contested decision compromises the claimant's interests, the Council of Ministers is obliged to uphold the fundamental rights and guarantees provided for in the EU's legal system<sup>25</sup>, unless prevented from doing so by "overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations (...)"<sup>26</sup>. As regards the right to a fair hearing, the CFI states that it must be effectively safeguarded in the first place by the national authority that examined the precise information or material at the root of the restrictive measure. Consequently, the right to a fair hearing has a relatively limited purpose at the Community level. It requires that the party concerned be informed by the Council on the specific information that indicates that a national authority has taken a decision according to the definition given in Article 1 (4) of the Common Position 2001/931 "in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds"<sup>27</sup>.

The CFI gives also great weight to the obligation to state reasons. Compliance with this obligation "is all the more important because it constitutes the sole safeguard enabling the party concerned (...) to make effective use of the legal remedies available to it to challenge

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<sup>23</sup> *OMPI*, note 20, para. 90 and following.

<sup>24</sup> Resolution 1373 (2001) was implemented by Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ L 344 of 28.12.2001) and Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ L 344 of 28.12.2001). The EU autonomous list has been regularly updated.

<sup>25</sup> *OMPI*, note 20, paras. 107-113.

<sup>26</sup> *Id.*, paras. 133, 147 and 156.

<sup>27</sup> *OMPI*, note 20, para. 129. See also paras. 121 and 126. In the case of a subsequent decision to freeze funds, the listed persons must be afforded the opportunity to make known their views on the matter in an effective manner. Article 1.4 of the Common Position 2001/931/CFSP reads that the list shall be drawn up "on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or the prosecution for a terrorist crime, (...)".

the lawfulness of that decision”<sup>28</sup>. This statement of reasons should not consist merely of a general, stereotypical formulation, but the Council of Ministers has to state the matters of fact and law which led it to the adoption of the decision<sup>29</sup>. In the *Stichting Al-Aqsa* case, the CFI subsequently states that neither the fact that it was known that the Dutch Foreign Minister took a decision whereby the claimant’s assets were frozen, nor the rejection of the appeal lodged against it before the domestic courts, could make up for the failure to mention the reasons why the claimant was placed on the list of individuals and entities whose assets should be frozen within the framework of the fight against terrorism<sup>30</sup>. In *Stichting Al-Aqsa*, the CFI understands that there was no explicit knowledge of the national decision that gave rise to the aforementioned listing. It considers the decision to freeze the assets of *José María Sison* to be similarly unfounded<sup>31</sup>.

The right to effective judicial protection means that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances used to adopt the contested decision and of the information on which that assessment is based<sup>32</sup>. Besides, since severe restrictions were imposed on the right to a fair hearing, the judicial review “is all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights”<sup>33</sup>.

The application of the aforementioned principles leads the CFI to annul the contested decision insofar as it affects the claimant<sup>34</sup>. The CFI stated that not even at the end of the oral proceedings was it in a position to review the lawfulness of that decision, because it did not know the evidence or information that led the Council to include OMPI on the list, nor even the national decision<sup>35</sup>. As a consequence of *OMPI*, on 25 April 2007 the Council of Ministers published a notice informing the listed individuals and groups that it intended to maintain them on the list, that it was possible to request the Council’s statement of reasons for

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<sup>28</sup> *OMPI*, note 20, para. 140.

<sup>29</sup> *Id.*, para. 143.

<sup>30</sup> *Stichting Al-Aqsa*, note 22, paras. 60-64.

<sup>31</sup> *José María Sison* had also made unsuccessful attempts to remedy his situation by requesting access to the Council documents. He filed three claims for the annulment of the Council decisions refusing him access to the documents underlying the Council’s decision to include him on the list. However, the CFI held that the disclosure of these documents would undermine the protection of public security and international relations (Cases T-110/03, T-150/03 y 405/03 *José María Sison* [2005] ECR II-1429. The appeal lodged before the Court of Justice was also unsuccessful (C-266/05 P *José María Sison*, 1 February 2007).

<sup>32</sup> *Yusuf*, note 8, para. 225.

<sup>33</sup> *OMPI*, note 20, para. 155.

<sup>34</sup> Council Decision 2005/930/EC of 21 December 2005 implementing Article 2 (3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ L 340, 23.12.2005, p. 64).

<sup>35</sup> *OMPI*, note 20, para. 173.

including them, and that they could submit a request to the Council to reconsider their listing<sup>36</sup>. In addition, the Council of Ministers declares that it has undertaken a full review of the list and introduced substantial improvements in the procedure regarding notification of the statement of reasons, listing and delisting, for the purpose of complying with the *OMPI* judgment<sup>37</sup>. It does not seem, however, that the listed individuals and entities are satisfied with the procedural improvements. The success obtained by OMPI has encouraged many individuals and entities to plead before the CFI that they have also been unlawfully blacklisted<sup>38</sup>. The procedural improvements adopted by the European institutions did not deter the same entity to lodge a new application before the CFI against Decision 2007/445<sup>39</sup>, which updated the list on 28 June 2007<sup>40</sup>. On 23 October 2008, the CFI held in the *PMOI* case that the Council satisfied the obligation that the subsequent fund-freezing measures adopted after the *OMPI* judgment were not vitiated by the same defects<sup>41</sup>. The CFI considers that the Council sent to PMOI a statement clearly and unambiguously explaining the reasons justifying its continued inclusion on the list and the applicant was allowed to make its case properly regarding the evidence incriminating it<sup>42</sup>. However, as regards the application for annulment of Decision 2007/868<sup>43</sup>, which replaced Decision 2007/445 on 20 December 2007, the CFI annulled the latter Decision in so far as it concerned PMOI<sup>44</sup>. Since the national decision, which led to the inclusion of the applicant on the list by the Council, was set aside,

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<sup>36</sup> Note for the attention of the persons, groups and entities on the list provided for in Article 2 (3) of the Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ C 90 of 25.4.2007, p. 1).

<sup>37</sup> Council Common Position 2007/448/CFSP of 28 June 2007 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2006/380/CFSP and 2006/1011/CFSP, OJ L 169 of 29.6.2007, p. 69; and Council Decision of 28 June 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC (OJ L 169 of 29.6.2007, p. 58).

<sup>38</sup> Application OJ C 95 of 28.04.2007, p. 43, *Fahas v. Council*, T-49/07; Joined cases T-37/07 and 323/07, *El Morabit v. Council*, not yet published in the report; Application OJ C 269 of 10.11.2007, p. 65, *El Fatmi v. Council*, T-363/07; Application OJ C 117 of 29.05.2007, p. 22, *Hamdi v. Council*, T-75/07; Application OJ C 269 of 10.11.2007, p. 66, *Hamdi v. Council*, T-363/07.

<sup>39</sup> Council Decision 2007/445/EC of 28 June 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC (OJ 2007 L 169, p. 58).

<sup>40</sup> Application OJ C 211 of 08.09.2007, p. 50, *People's Mojahedin Organization of Iran v. Council*, T-256/07. *Sison* and *Al-Aqsa* followed the same path (Application OJ C 269 of 10.11.2007, p. 58, *Sison v. Council*, T-341/07; Application OJ C 269 of 10.11.2007, p. 61, *Al-Aqsa v. Council*, T-348/07). The Council of Ministers' Decision 2005/930, which included OMPI in the EU list of terrorists, was annulled by the CFI as regards the applicant, but the organization has been kept on the list. The Council has argued that the annulled decision was replaced by Decision 2006/379/EC of 29 May 2006.

<sup>41</sup> Case T-256/07 *People's Mojahedin Organization of Iran v. Council (PMOI)*, not yet published in the report.

<sup>42</sup> *Id.*, paras. 142-144.

<sup>43</sup> Council Decision 2007/868/EC implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2007/445 (OJ 2007 L 340, p. 100).

<sup>44</sup> *PMOI* case, note 40, paras. 176-184.

the Council's statement of reasons is manifestly insufficient to provide legal justification for continuing to freeze PMOI's funds<sup>45</sup>.

In the *PMOI* judgment of 4 December 2008, the CFI was again called upon to rule on the same issue<sup>46</sup>. The CFI held that the Council had not communicated to the applicant the new information which, in its view, justified maintaining it on the list. Consequently, it was not in a position to make known its views on the matter in an effective manner prior to the adoption of the contested decision. The Council has not justified that the judicial inquiry opened by the anti-terrorist Prosecutor's office of the *Tribunal de grande instance* of Paris in April 2001 constitutes a decision meeting the definition of Common Position 2001/931. In the present case, the Court considered also that "the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorize its communication to the Community judicature"<sup>47</sup>. As a result of the ruling of 4 December 2008, on 26 January 2009 the Council adopted a new list of individuals and entities subject to the restrictive measures, and for the first time PMOI is not included in the list<sup>48</sup>.

The consequences of the CFI case-law as regards the EU autonomous list of terrorists should be borne in mind when faced with the implications of *Kadi/Al Barakaat*. If we accept that the facts of each case are similar, it is not justified that in the EU the level of legal protection afforded to those persons or entities affected by targeted sanctions should depend on the legal framework in which these measures have been adopted (UN or EU), or on the margin of discretion left to the EU Member States by the Security Council<sup>49</sup>.

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<sup>45</sup> On 30 November 2007, the Proscribed Organisations Commission (POAC) ordered the British Home Secretary to remove PMOI from the list of proscribed organizations. Subsequently, the POAC refused an application by the Home Secretary for permission to lodge an appeal before the Court of Appeal, arguing that none of the justifications advanced by the Home Secretary had a reasonable chance of succeeding. Consequently, on 24 June 2008, the Parliament of the United Kingdom withdrew PMOI from the national list of proscribed organizations. Nevertheless, on 15 July 2008, the Council of Ministers adopted Decision 2008/583 keeping PMOI in the EU terrorist list. On 21 July 2008 brought an action seeking annulment of that decision (Application OJ C 236 of 13.09.2008, p.16, *People's Mojahedin Organization of Iran v. Council*, Case T-284/08). On 24 January 2009, the CFI accepted the PMOI's pleadings.

<sup>46</sup> Case T-284/08 *People's Mojahedin Organization of Iran v. Council (PMOI)*, not yet published in the report.

<sup>47</sup> *Id.*, para. 73.

<sup>48</sup> Council Decision of 26 January 2009 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2008/583/EC (OJ L 23, 27.1. 2009, p. 25).

<sup>49</sup> On the *OMPI* case, see C. Eckes, *Case T-228/02, Organisation des Modjahedines du peuple d'Iran v. Council and UK (OMPI), Judgment of the Court of First Instance (Second Chamber) of 12 December 2006*, 44 CML REV., 1117-1129 (2007).

## D. THE JUDGMENT OF THE COURT OF JUSTICE IN THE *KADI* AND *AL BARAKAAT* CASES

On appeal the ECJ unequivocally stated that the CFI had erred in law by waiving to review the legality of the contested regulations with the fundamental rights guaranteed under the EC law. The ECJ categorically rejects, therefore, the immunity from jurisdiction for the Community acts implementing the Security Council resolutions, adopted on the basis of Chapter VII of the UN Charter, as regards ensuring their compatibility with fundamental rights. The ECJ points out that the Community is based on the rule of law and an international agreement cannot affect the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220<sup>50</sup>. The autonomy of the Community legal order in relation to international law is therefore highlighted, in particular as regards the UN Charter, and this paves the way for the adoption of a clearly constitutional approach in this case<sup>51</sup>. The constitutional dimension of the EC Treaty is linked to the idea that the Community is based on the rule of law, supported by a complete system of legal remedies<sup>52</sup>.

One of the key issues of the *Kadi* judgment is the understanding of the relationship between the UN Charter and the Community legal order. While the CFI considered that the UN Charter and the Security Council resolutions take precedence over the EC Treaty, the ECJ declares that those relations are governed in the same way as the relationship between international legal order and Community law. The ECJ followed the conclusions of the Advocate General Maduro, but the reasoning followed is different. The following sections are dedicated to a detailed analysis of the reasoning followed by the Court of Justice in *Kadi/Al Barakaat* and comment upon its wide implications for the EU and UN sanctions regime.

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<sup>50</sup> *Kadi/Al Barakaat*, note 1, paras. 281 and 282.

<sup>51</sup> See G. de Burca, *The European Court of Justice and the International Legal Order after Kadi*, 1 JEAN MONNET WORKING PAPER, 34 (2009); A. Gattini, *Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v Council and Commission, judgment of the Grand Chamber of 3 September 2008*, 46 CML REV., 213-239 (2009) at 213.

<sup>52</sup> The Court of Justice held in *Les Verts* that “the European Community is a community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty” (*Les Verts*, note 18).

*I. The lack of competence to review the compatibility of Security Council resolutions with jus cogens*

The ECJ points out that the review of lawfulness to be ensured by the Community judicature applies to a Community act implementing an international agreement, but not to the latter as such. Therefore, as regards a Community act which is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the UN Charter, “it is not, (...), for the Community judicature, (...) to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*”<sup>53</sup>. The ECJ unambiguously rejects, therefore, the legal reasoning developed by the CFI. The CFI recognized that the Community judiciary is empowered to check indirectly the lawfulness of the Security Council resolutions in question with regard to *jus cogens*, “understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”<sup>54</sup>. The judgment of the ECJ does not imply a lack of knowledge of the existence of peremptory principles of international law, which obligate both the Member States and the Security Council in discharging their responsibilities. The Court did not deny that there are, however, certain limits to the obligatory nature of the Security Council resolutions, limiting itself to stating that it is not the competence of the Community judicature to rule on the compatibility of such resolutions with *jus cogens*<sup>55</sup>.

The ECJ accepts, therefore, the arguments put forward by some commentators, who have maintained, in relation to the reasoning followed by the CFI, that a municipal court cannot assume the powers to rule on the legality of the Security Council resolutions as regards *jus cogens*, as it would, by so doing, set itself up as judge of the international community,

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<sup>53</sup> *Kadi/Al Barakaat*, note 1, para. 287.

<sup>54</sup> *Yusuf*, note 8, para. 277.

<sup>55</sup> On the limits to the Security Council powers, see N. Angelet, *International Law Limits to the Security Council* in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW (V. GOWLLAND-DEBBAS ED., 2001); B. Fassbender, *Review Essay: Quis judicabit? The Security Council, Its Powers and Its Legal Control*, 11 EJIL, 219-232 (2000); A. Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EJIL, 59-88 (2005); A. Reinisch, *Developing Human Rights and Humanitarian Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AJIL, 851-872 (2001); R. Wessels, *Debating the “Smartness” of Anti-Terrorism Sanctions: The UN Security Council and the Individual Citizen* in LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM. A TRANSATLANTIC DIALOGUE (C. FINAUT ET AL. EDS., 2004); E. DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004); E. de Wet, *The role of human rights in limiting the enforcement power of the Security Council: a principled view* in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES, 7-29 (E. DE WET, A. NOLLKAEMPER EDS., 2003).



undermining the system of collective security<sup>56</sup>. However, if the assumption by the Security Council of quasi-judicial duties with a direct bearing on individuals is not accompanied by the establishment of a judicial or equivalent review, municipal courts will be increasingly tempted to verify the legality of such actions<sup>57</sup>. Similarly, France, the Netherlands, the United Kingdom and the Council take the view that no review of the internal lawfulness of resolutions of the Security Council may be carried out by the EU courts in the light of *jus cogens*. This has led to the paradox that the arguments put forward as regards the main issue at stake by this group of countries and by the Council are not accepted by the ECJ, while the only criticism formulated regarding the reasoning of the CFI is accepted favourably.

## *II. The relationship between the UN Charter and the Community legal order after Kadi*

One of the great novelties of the *Kadi/Al Barakaat* ruling is that the ECJ considers the UN Charter and the resolutions of the Security Council to be equal to other international treaties in terms of the Community legal order. The ECJ attempts to compensate for this lack of privilege afforded to the UN Charter by making a great effort to express its respect for the UN legal order. Accordingly, the ECJ states that “any judgment given by the Community judicature deciding that a Community measure intended to give effect to a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law”<sup>58</sup>. The ECJ considers also that the powers of the Community must be exercised in observance of the undertakings given in the context of the UN in the sphere of maintenance of international peace and security<sup>59</sup>. In this respect, when the EU gives effect to resolutions adopted by the Security Council under Chapter VII of the UN Charter, it is necessary for the Community to attach special importance to the role conferred on the Security Council by Article 24 of the Charter. Consequently,

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<sup>56</sup> See J. P. Jacqu , *Le Tribunal de Premi re instance face aux r solutions du Conseil de S curit  des Nations Unies. Merci monsieur le Professeur*, 19 L’EUROPE DES LIBERT S (2005), available at [http://leuropedeslibertes.u-strasbg.fr/article.php?id\\_article=261&id\\_rubrique=51](http://leuropedeslibertes.u-strasbg.fr/article.php?id_article=261&id_rubrique=51) (visited 19 November 2009); L. Van den Herik, *The Security Council’s Targeted Sanctions Regimes: in Need of Better Protection of the Individual*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW, 797-807 (2007) at 801; R. Wessel, *Editorial: The UN, The EU and JUS COGENS*, 3 INTERNATIONAL ORGANIZATIONS LAW REVIEW, 1-8 (2006) at 4.

<sup>57</sup> This issue goes beyond the aim of this article. See E. Cannizzaro, *A Machiavellian Moment? The UN Security Council and the Rule of Law*, 3 INTERNATIONAL ORGANIZATIONS LAW REVIEW, 189-224 (2006); I. Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law* in ESSAYS IN HONOUR OF WANG TIEYA (R. ST. J. MACDONALD ED., 1994).

<sup>58</sup> *Kadi/Al Barakaat*, note, para. 288.

<sup>59</sup> The ECJ has recently held that the powers of the Community in the sphere of cooperation and development (Articles 177 EC to 181 EC) must be exercised in observance of the undertakings given in the context of the UN and other international organizations (Case C-91/05 *Commission v Council* [2008] ECR I-0000, para. 65).

when adopting the measures required to implement the Security Council sanctions on the basis of Articles 60 EC and 301 EC, the Community should take into account “that in drawing up those measures the Community is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the UN Charter of the United Nations relating to such implementation”<sup>60</sup>. If Community law is to be interpreted in the light of pertinent rules of international law, it would be illogical were this consideration not also to be extended to the observance of the resolutions of the UN organ, which has been entrusted with the function to take the measures necessary to maintain or restore international peace and security.

The ECJ extends for the first time the settled case law on the judicial review over Community acts intended to give effect to international agreements to the acts adopted to implement the Security Council resolutions. Consequently, the Court rejects the idea that any judicial review of the internal lawfulness of such acts in the light of fundamental freedoms is excluded<sup>61</sup>. The ECJ therefore follows the argument outlined by the Advocate General Poiares Maduro in his Conclusions in not accepting that the Community legal order accords supra-constitutional status to the Charter of the UN and the Security Council resolutions<sup>62</sup>. The Court held that if the hierarchy of norms within the Community legal order were applicable to the UN Charter “the latter would have primacy over acts of secondary Community law”, but “that primacy (...) would not, (...), extend to primary law, in particular to the general principles of which fundamental rights form part”<sup>63</sup>.

It must be recognized that there is a significant difference between the conclusion of international agreements and the implementation of the Security Council resolutions, since the Charter is not binding on the Community by virtue of treaty law. The Community is bound, in fact, to take the measures necessary to implement the Security Council resolutions adopted under Chapter VII of the Charter as a result of the adoption of a common position or joint

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<sup>60</sup> *Kadi/Al Barakaat*, note 1, para. 296. The Court of Justice has already held that in the interpretation of the contested regulation, the wording and purpose of Resolution 1390 (2002) must also be taken into account (Case C-117/06 *Möllandorf and Möllandorf-Niehuus* [2007] ECR I-8361, para. 65). Consequently, the Court held that the contested regulation must be interpreted as prohibiting the final registration of the transfer of ownership in the German Land Register, even though the contract for the sale of immovable property and the agreement on transfer of ownership of that property were concluded before the date on which the buyer was included on the consolidated list.

<sup>61</sup> Case C-122/95 *Germany v. Council* [1998] ECR I-973. The Court is also willing to annul the conclusion of an international agreement which does not respect the Community’s competences and the division of powers between institutions (see Case C-327/91 *France v Commission* [1994] ECR I-3641).

<sup>62</sup> Opinion of Advocate General Poiares Maduro, note 2.

<sup>63</sup> *Kadi/Al Barakaat*, note 1, paras. 307 and 308. The ECJ considers that this interpretation is supported by Article 300(6) EC, which provides that an international agreement may not enter into force if the Court has delivered an adverse opinion on its compatibility with the EC Treaty, unless the latter has previously been amended.

action by virtue of the CFSP, which provides for action by the Community<sup>64</sup>. However, stating that the Charter is binding is not equivalent to excluding judicial review of a Community act implementing a Security Council resolution<sup>65</sup>. The review of such acts in the light of fundamental rights protected as general principles of Community law was not unpredictable. In *Bosphorus* the ECJ examined whether a regulation implementing a Security Council resolution violated the claimants' fundamental rights<sup>66</sup>.

Turning to what *Kadi* implies for the relationship between European and international law, it is intended to contrast a European or constitutional law perspective with an international law perspective of the case. While the CFI shows the greatest respect for international law, the ECJ's position rests essentially on Community-based arguments. The CFI considers Article 103 of the Charter to be highly relevant as regards the articulation of the relationship between the obligations of Member States arising from the Charter and Community law, in such a way that the former would always have precedence in case of conflict. The ECJ, however, makes no mention of Article 103 of the Charter in *Kadi/Al Barakaat*. This is due to the fact that the ECJ considers that the obligations derived from the resolutions of the Security Council, adopted within the framework of Chapter VII of the Charter, may not impinge upon the constitutional principles of the Community legal order, including the respect for fundamental rights, and that it is the duty of the ECJ to guarantee the respect of these rights. This is a thoroughly constitutional solution, which is based on the autonomy of the Community legal order and on the primacy of primary law, in the opinion of the ECJ, over the UN Charter and the resolutions of the Security Council. The ruling is based on the idea that the possible international responsibility of the EU and of its Member States, should it prove impossible to impose selective sanctions on the appellants, does not affect the ECJ's obligation to review the acts implementing the Security Council resolutions as regards European standards in human rights<sup>67</sup>.

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<sup>64</sup> See Articles 301 and 60 EC.

<sup>65</sup> For a similar opinion, see Eeckhout, note 10, at 190; M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, 22 *EUI WORKING PAPERS*, 33 (2006).

<sup>66</sup> Case C-84/95 *Bosphorus* [1996] ECR I-3953. While the Court did not clearly express its opinion on this issue, the Advocate General Jacobs was unambiguous. The Advocate General held that "respect for fundamental rights is thus a condition of the lawfulness of Community acts" and that "the contested decision did not (...) strike an unfair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights" (Opinion, paras. 49-53).

<sup>67</sup> See De Burca, note 51, at 41. In this regard, the Advocate General declares that the impossibility of fulfilling the obligations derived from the resolutions of the Security Council on the part of the Community and of Member States "is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter" (Opinion of the Advocate General, note 2, para. 39).

Like the Advocate-General Maduro, the ECJ accepts to review the validity of the EU law by reference to the EU constitutional principles. However, the ECJ is less explicit than the opinion of the Advocate General on the relationship between international law and the EU law. According to Maduro, “the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community”.<sup>68</sup> The Advocate General adopts a dualist approach to the relationship between European and international law<sup>69</sup>. By contrast, the ECJ does not explicitly follow a dualist model. The ECJ states that the Charter of the UN does not impose the choice of a particular model for the implementation of the Security Council resolutions and hence the judicial review of the international law obligations under the Charter is not excluded<sup>70</sup>. This follows the ECJ’s considerations about the Court’s power to review the validity of any Community measure in the light of fundamental rights, which is a constitutional guarantee stemming from the EC Treaty as an autonomous legal system<sup>71</sup>.

Many commentators have expressed concern over the position adopted by the ECJ, suggesting that the Court might have taken advantage of the opportunity to proceed further with the process of constitutionalization of the Community legal system as a closed, self-contained model<sup>72</sup>. It has therefore been claimed that the Court’s reasoning has a negative effect on the unity and coherence of the international legal system, and that it has failed to establish an effective dialogue with other courts and international organizations. By according precedence to the EC Treaty over the UN Charter, the Court failed to acknowledge the hierarchy of norms in international law<sup>73</sup>. It is not justifiable that primacy be accorded to the values protected by the Community legal order over those common values represented in the UN Charter<sup>74</sup>. Should other countries or regional groups also decide that the application of the

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<sup>68</sup> Opinion of Advocate General Poiares Maduro, note 2, para. 24.

<sup>69</sup> Given Maduro’s views expressed in his writings, his approach to international law could be qualified as pluralist. See M. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, EUROPEAN JOURNAL OF LEGAL STUDIES, 1 (2007).

<sup>70</sup> *Kadi/Al Barakaat*, note 1, paras. 298-299.

<sup>71</sup> See *Kadi/Al Barakaat*, note 1, para 84.

<sup>72</sup> For some examples of this literature see De Burca, note 51; A. Gattini, note 51; L. M. Hinojosa Martínez, *Bad Law for Good Reasons: The Contradictions of the Kadi Judgment*, 5 INTERNATIONAL ORGANIZATIONS LAW REVIEW, 339-357 (2008); L. Van Den Herik, N. Schrijver, *Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat*, 5 INTERNATIONAL ORGANIZATIONS LAW REVIEW, 329-338 (2008).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* By contrast, others substantially agree with the Court’s reasoning. See D. Curtin, C. Eckes, *The Kadi Case: Mapping the Boundaries between the Executive and the Judiciary in Europe*, 5 INTERNATIONAL ORGANIZATIONS LAW REVIEW, 365-369 (2008); J. D’Aspremont, F. Dopagne, *Kadi: The ECJ’s Reminder of the Elementary Divide between Legal Orders*, 5 INTERNATIONAL ORGANIZATIONS LAW REVIEW, 371-379 (2008); G. Harpaz,

Security Council decisions is dependent on their compatibility with national or regional values, and in particular their own view on human rights issues, this could endanger the authority of the Security Council in the maintenance of international peace and security<sup>75</sup>.

In my opinion, *Kadi* does not involve any fundamental change in the traditional position of the ECJ as regards the protection of fundamental rights, or any breaking of the shackles of international law on the part of the Community judge. The ECJ recalled that an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty<sup>76</sup>, and the European Community must respect international law in the exercise of its powers and “that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law”<sup>77</sup>. The review of the validity of a Community measure in the light of fundamental rights is a constitutional guarantee stemming from the EC Treaty which can not be prejudiced by an international agreement<sup>78</sup>. The constitutional dimension of the EC Treaty is linked to the idea that the Community is based on the rule of law, supported by a complete system of legal remedies<sup>79</sup>.

From an international law perspective, in no way can the judgment of the Court be interpreted as questioning the authority of the Security Council in discharging its duties for the maintenance of international peace and security<sup>80</sup>. Even though it is not easy to strike a balance between the Security Council’s primary responsibility for the maintenance of international peace and security and the establishment of safeguards of fundamental rights in the sanctions regime against Al-Qaeda and the Taliban, it is unacceptable to systematically infringe the fundamental rights of persons and entities included in the black list drawn by the 1267 Sanctions Committee<sup>81</sup>.

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*Judicial Review by the European Court of Justice of UN “Smart Sanctions” Against Terror in the Kadi Dispute* (2009) 14 EUROPEAN FOREIGN AFFAIRS REVIEW, 65-88 (2009); B. Kunoy, A. Dawes, *Plate tectonics in Luxembourg: The ménage à trois between EC law, international law and the European Convention on Human Rights following the UN sanctions cases*, 46 CML REV., 73-104 (2009).

<sup>75</sup> De Burca, note 51; A. Gattini, note 51.

<sup>76</sup> *Kadi/Al Barakaat*, note 1, para. 285.

<sup>77</sup> *Kadi/Al Barakaat*, note 1, para. 291. The ECJ said that its reasoning is based on the settled case law regarding the relationship between the Community legal order and both treaty law and customary international law (See Cases C-286/90 *Poulsen* and *Diva Navigation* [1992] ECR I-6019, para. 9 and C-162/96 *Racke* [1998] ECR I-3655, para. 45).

<sup>78</sup> *Kadi/Al Barakaat*, note 1, paras. 316-317.

<sup>79</sup> The Court of Justice held in *Les Verts* that “the European Community is a community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty” (*Les Verts*, note 18).

<sup>80</sup> J. Santos Vara, *El control judicial de las sanciones contra Al-Qaeda y los talibanes en la Unión Europea: ¿un desafío a los poderes del Consejo de Seguridad* (2009) 32 REVISTA DE DERECHO COMUNITARIO EUROPEO, 116 (2009).

<sup>81</sup> *Id.*

The divergence in opinion between the EU and international lawyers as to the consequences of the *Kadi* judgment is likely to remain for the foreseeable future. In an effort to reconcile the two positions, it has been highlighted that Article 103 of the Charter should only be applied to those obligations derived from the Charter adopted in accordance with the purposes and principles of the UN, so that Member States would only be obliged to apply the resolutions of the Security Council if they are compatible with the respect for human rights<sup>82</sup>. As regards determining which human rights should therefore be respected, this would be based on those international obligations derived from customary international law and from the main international instruments promoting and respecting human rights, which are binding upon States<sup>83</sup>. Besides, the fact that the establishment of selective sanctions has not been accompanied by the introduction of mechanisms to protect human rights, the States are not automatically relieved of the duty to fulfill their international obligations as regards human rights when enacting the resolutions of the Security Council<sup>84</sup>. In my opinion, while this reasoning does have the merit of relating the Community legal order to international law, and in particular to the UN Charter, it would indirectly involve an examination of the limits of the powers of the Security Council, which are derived from human rights. It is an extremely delicate question both from a political and a legal perspective, and it could be argued that it goes beyond the role of the ECJ, namely, to safeguard respect for Community law.

Given that the ECJ expresses great interest in highlighting its respect for the legal order created by the Charter, it would have been reasonable to expect that it would have referred to the obligations of States as regards human rights derived from international law in general and its principal instruments in particular, among which the Universal Declaration of Human Rights occupies a prominent place. When examining the violations of the right to a fair hearing and the right to effective judicial protection, the ECJ could have mentioned General Comment No. 32 on Article 14 of the ICCPR, adopted in 2007, in which the Human Rights Committee affirmed that the guarantees of fair trial may never be subject to measures of derogation that would circumvent the protection of non-derogable rights<sup>85</sup>. The ECJ could have thus strengthened its reasoning by mentioning international law and avoiding, to a

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<sup>82</sup> P. Cardweell, D. French, N. White, *European Court of Justice, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission (Joined Cases C-402/05 P and C-415/05 P) Judgment of September 2008*, 58 ICLQ, 229-240 (2009) at 237.

<sup>83</sup> *Id.*

<sup>84</sup> See A. Bianchi, *Security Council's Anti-terror Resolutions and their Implementation by Member States*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, 1044-1073 (2006).

<sup>85</sup> Human Rights Committee, General Comment N° 32 on Article 14 of the ICCPR: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC 32 (2007), para. 6.

certain extent, the separation between the Community legal order and international law, in particular, the UN Charter, which has been the result of the *Kadi/Al Barakaat* ruling.

Furthermore, the ECJ held that the immunity from jurisdiction for a Community measure implementing a Security Council resolution adopted under Chapter VII of the Charter “cannot find a basis in the EC Treaty”<sup>86</sup>. As mentioned above, Articles 307 CE and 297 CE occupied a preeminent position in the reasoning of the CFI as regards justifying the primacy of the UN Charter over primary law. In this respect, the ECJ considered that Articles 307 EC and 297 EC cannot be understood “to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union”<sup>87</sup>. In other words, the acts adopted by the EU institutions must respect human rights protected in the EU as general principles of Community law. This issue was carefully examined by the Advocate General Poiares Maduro, because the United Kingdom alleged that such immunity from review can be derived from Article 307 EC. Unlike the CFI, which only mentions the first paragraph of Article 307 EC, Poiares Maduro also takes into account the obligations that arise from the second paragraph of Article 307, which states that the Member State or States concerned shall take all appropriate steps to eliminate incompatibilities between their prior treaty obligations and their obligations under Community law.

### *III. The UN sanctions against Al-Qaeda/Taliban and the EU fundamental rights*

As regards the lack of protection of fundamental rights in the UN sanctions regime against Al-Qaeda and the Taliban, the ECJ held that “the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, (...), cannot give rise to generalized immunity from jurisdiction within the internal legal order of the Community”<sup>88</sup>. Not even having regard to amendments recently made to it, the idea that the system of sanctions offers adequate protection of human rights appears justified. The Security Council has proceeded to make major modifications to the Guidelines of the 1267 Sanctions Committee in order to improve the procedures for listing and delisting as regards the Consolidated List of Al-Qaeda and the Taliban<sup>89</sup>. Resolution 1735 (2006) requires States

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<sup>86</sup> *Id.*, para. 300.

<sup>87</sup> *Id.*, para. 303.

<sup>88</sup> *Kadi/Al Barakaat*, note 1, para. 321.

<sup>89</sup> The Guidelines of the 1267 Sanctions Committee were adopted on 7 November 2002 and have been subsequently amended. They were updated for the last time on 9 December 2008 following the adoption of

to suitably justify the proposed inclusion of individuals and entities on the 1267 Committee's list, and Resolution 1730 (2006) creates a focal point within the Secretariat to which the individuals and entities included on the lists of the Sanctions Committees can directly submit requests for delisting<sup>90</sup>. Even though those amendments were made after the contested regulation had been adopted and, in principle, they cannot be taken into consideration in this case, the ECJ chooses to rule that even the current re-examination procedure does not offer adequate guarantees of judicial protection<sup>91</sup>. In my opinion, it would have been inappropriate to postpone to some future date its decision on this question, seeing as it is clear that fundamental rights are not adequately protected under the system of targeted sanctions imposed by the UN.

Even though today Member States are a great deal more rigorous as regards proposing the inclusion of individuals on the list than they were in the aftermath of the terrorist attacks of 11 September 2001, the 1267 Sanctions Committee is not obliged to communicate to the applicants the reasons justifying their appearance on the list<sup>92</sup>. The establishment of the Focal Point facilitated the submission of requests for delisting, since before the adoption of Resolution 1730 (2006) an individual blacklisted was entirely dependent on his State of nationality or residence for the submission of a petition for delisting. This triggered a consultation process between the government(s) of citizenship and residence and the government(s) that had originally proposed the listing of the petitioner. If these governments failed to agree on the delisting petition, the individual had no real chance of being delisted, since the 1267 Sanctions Committee takes its decisions by consensus<sup>93</sup>.

As it is pointed out by the ECJ, the procedure before the 1267 Sanctions Committee is still in essence diplomatic and intergovernmental and the persons or entities concerned have no real opportunity to assert their rights before the Committee or be represented for that

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Resolution 1822 (2008). The last version of the Guidelines is available at [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf) (visited 18 January 2010).

<sup>90</sup> UN Security Council Resolution 1735 (2006) of 22 December and UN Security Council Resolution 1730 (2006) of 19 December. The designating States should also indicate what portion(s) of the statement of case the Committee may publicly release or release to Member States upon request (Guidelines of the 1267 Sanctions Committee, note 79, para. 6(d)). Last June, Resolution 1822 (2008) adopted by the Security Council in order to extend the sanctions regime against Al Qaeda and the Taliban for a further period of 18 months does not address the concerns about the 1267 Sanctions Committee's procedures.

<sup>91</sup> *Kadi/Al Barakaat*, note 1, paras. 321-322.

<sup>92</sup> Only the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national will be notified by the Secretariat. The Guidelines state that this communication "shall remind such State(s) to inform, to the extend possible, and in writing where possible, individuals and entities included on the Consolidated List of the measures imposed on them" and that "a copy of the publicly releasable portion of the statement of case" shall be included with the notification (Guidelines of the 1267 Sanctions Committee, note 79, para. 6 (j)).

<sup>93</sup> See Guidelines of the 1267 Sanctions Committee, note 79, para. 8(d).



purpose<sup>94</sup>. The individuals and entities blacklisted continue to be denied the right to appear before a court or independent body that can issue an objective ruling on whether there were justified reasons for their inclusion on the Consolidated List. As regards the lack of fair and clear procedures, criticisms have been expressed by international institutions<sup>95</sup>, academics<sup>96</sup> and NGOs<sup>97</sup>. With the occasion of the 2005 World Summit Outcome, the General Assembly called upon the Security Council “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions”<sup>98</sup>.

The adoption of Security Council Resolution 1904 (2009) on 17 December 2009 might lead to an improvement in the state of defencelessness affecting those individuals and entities listed by the 1267 Sanctions Committee<sup>99</sup>. The resolution introduces several new elements relating to the procedures for the listing and delisting of individual and entities, most notably the introduction of an independent and impartial Ombudsperson to look into requests for delisting of individuals and entities<sup>100</sup>. The Ombudsperson will gather information in contact with the States when a delisting petition is presented and present a written update to the Committee to the progress to date. What is even more significant, the Ombudsperson may engage in dialogue with the petitioner. Once the period of engagement described is completed, the Ombudsperson lays out for the Committee the principal arguments concerning the delisting request. This an important step forward to ensure that fair and clear procedures exist for placing individuals and entities on the list. However, as long as substantial modifications are not introduced in the delisting procedures which allow those affected a

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<sup>94</sup> *Kadi/Al Barakaat*, note 1, paras. 323-325.

<sup>95</sup> Council of Europe, Parliamentary Assembly, Resolution 1597 (2008) and Recommendation 1824 (2008), both adopted 23 January 2008 and based on the Report (Doc. 11454) of the Committee on Legal Affairs and Human Rights (Rapporteur D. Marty, Switzerland) entitled *United Nations Security Council and European Union blacklists*; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/61/267, 16 August 2006.

<sup>96</sup> J. Almqvist, *A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions*, 57 ICLQ, 303-331 (2008); M. Bothe, *Security Council's Targeted Sanctions against Presumed Terrorists*, 6 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, 541-555 (2008); I. Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC JOURNAL OF INTERNATIONAL LAW, 159-214 (2003); P. Fitzgerald, *Managing Smart Sanctions Against Terrorism Wisely*, 36 NEW ENGLAND LAW REVIEW, 957-983 (2002); J. Santos Vara, *El control judicial de la ejecución de las sanciones antiterroristas del Consejo de Seguridad en la Unión Europea*, 15 REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES, 1-23 (2008), available at <http://www.reei.org> (visited 12 January 2009); C. Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 EJIL, 989-1018 (2004).

<sup>97</sup> Human Rights Watch, *U.N.: Sanctions Rules Must Protect Due Process*, 4 March 2002, available at <http://hrw.org/english/docs/2002/03/04/global5839.htm> (visited 4 November 2009).

<sup>98</sup> UN Doc. A/RES/60/1, 24 October 2005, para. 109.

<sup>99</sup> UN Security Council Resolution 1904 (2009) of 17 December.

<sup>100</sup> In the future, the Focal Point will not receive the request for delisting from the 1267 sanctions list, but will continue to receive request from individuals and entities seeking to be removed from other sanctions lists (Resolution 1904 (2009) of 17 December, para. 21).

genuine right to question the decisions of the 1267 Committee to freeze their financial resources, the Security Council will continue to be acting on the fringes of the human rights requirements derived from international obligations<sup>101</sup>.

#### *IV. The breach of the appellants' fundamental rights*

Finally, the ECJ proceeded to give final judgment in the actions for annulment brought by Kadi and Al Barakaat. Unlike the CFI, the ECJ held that the freezing of the appellants' funds and other assets infringed the rights of the defence, in particular the right to be heard and the right to effective judicial review. In this regard, the ECJ declared that the effectiveness of judicial review means that the Community authorities must communicate the grounds for listing to the persons or entities concerned "so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action"<sup>102</sup>.

As regards the right to a fair hearing, the Community authorities cannot be required to communicate those grounds nor hear the appellants before their names have been included on the list for the first time, because prior communication would be liable to jeopardize the effectiveness of the freezing of funds and resources<sup>103</sup>. The Court does not disregard the idea, defended mainly by the European institutions and the United Kingdom, that the encroachment upon the appellants' fundamental rights is justified for reasons relating to the suppression of international terrorism, but it does not accept that the restrictive measures can escape all

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<sup>101</sup> See E. Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AJIL, 745-763 (2004) at 752. A number of proposals have been put forward to address the weaknesses that characterize the delisting system. In the document produced by the Watson Institute for International Studies of Brown University, with the support of the governments of Switzerland, Germany and Sweden, there are a number of very interesting proposals for the creation of an organization of the kind (T. J. Biersteker, S. E. Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, White Paper, Watson Institute for International Studies, Brown University, 30 March 2006, available at [http://www.watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf), visited 19 January 2010). An updated version of this report was published in October 2009, available at [http://www.watsoninstitute.org/project\\_detail.cfm?id=4](http://www.watsoninstitute.org/project_detail.cfm?id=4).

The Monitoring Team stated that "it is difficult to imagine that the Security Council could accept any review panel that appeared to erode its absolute authority to take action on matters affecting international peace and security, as enshrined in the Charter. This argues against any panel having more than an advisory role, and against publication of its opinions, to avoid undercutting the Council decisions" (Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2008, 324, 14 May 2008, para. 41).

<sup>102</sup> *Kadi/Al Barakaat*, note 1, para. 336.

<sup>103</sup> *Id.*, paras. 338-340. This argument was also stated by the CFI in paragraph 308 of *Yusuf/Al Barakaat*.

review by the Community judicature<sup>104</sup>. Consequently, the specific needs related to the prevention of international terrorism have to be taken into consideration by the ECJ when exercising legal control, and sufficient protection should also be accorded to human rights<sup>105</sup>. The idea that the need to resort to smart sanctions to prevent terrorist acts does not exonerate the authorities from demonstrating that those measures are justified in respect of the person(s) concerned is, in my opinion, entirely convincing, and in any case the procedural safeguards afforded by the EU law should be respected. However, as a result of the fact that the Community institutions refuse to grant the appellants an opportunity to make their views known on whether the sanctions against them are justified or to dispute the grounds for their inclusion on the list, it followed that it was impossible for the applicants to exercise their right to effective judicial protection, because they could not adequately defend their rights before the Community courts<sup>106</sup>.

The arguments put forward by the ECJ are very similar to the legal reasoning employed by the CFI in *OMPI*, and later developed and consolidated in *Stichting Al-Aqsa*, *José María Sison*, *Kongra-Gel* and *PKK*. It is interesting to note that both the ECJ in *Kadi/Al-Barakaat* and the CFI in *OMPI* held that since the Council had adduced no evidence to justify the restrictive measures, the Community judicature was not able to undertake any review of the lawfulness of the contested acts<sup>107</sup>. By the same token, both courts considered inadmissible the argument that because the restrictive measures concern national security and terrorism, they are permitted to escape all review by the Community judicature. This, therefore, leads to the result that the conclusion arrived at by the ECJ in *Kadi/Al-Barakaat* is similar to that of the CFI in *OMPI* as regards the EU autonomous list. The *Kadi/Al Barakaat* judgment also highlights the fact that the judicial review as regards fundamental rights

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<sup>104</sup> Since the contested Community act was intended to implement a resolution adopted by the Security Council in the fight against terrorism, the ECJ accepted that “overriding considerations to do with safety or the conduct of the international relations of the Community and its Member States may militate against the communication of certain matters to the persons concerned” (*Kadi/Al Barakaat*, note 1 para. 342).

<sup>105</sup> The Advocate General stated that “the present circumstances may result in a different balance being struck among the values involved in the protection of fundamental rights but the standard of protection afforded by them ought not to change” (Opinion of Advocate General Maduro in *Kadi*, note 2, para. 46).

<sup>106</sup> See *Kadi/Al Barakaat*, note 1, para. 353. The shortcomings of UN Al-Qaeda and Taliban sanctions regime also came under scrutiny in a recent case from the British High Court. Justice Collins held that submitting a delisting petition without knowing the material used against the petitioner cannot be considered a satisfactory protection of the right to be heard, nor of the right of effective judicial review (*A, K, M, Q & G v. H. M. Treasury*, High Court of Justice, Queen’s Bench Division, Administrative Court, Justice Collins, 24 April 2008).

<sup>107</sup> *Kadi/Al Barakaat*, note 1, para. 351 and *OMPI*, note 20, para. 155. Poiares Maduro also declared that “there is a real possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected”. However, it is recognized that the Court has no way of knowing whether that is the case in reality (Opinion of Advocate General Maduro in *Kadi*, note 2, para. 53).

protected by the EU law leads to totally different results than that based solely on *jus cogens*<sup>108</sup>.

The ECJ analysed also whether the restrictive measures laid down in the contested regulation constitute a breach of the right to respect for property, as alleged by Mr Kadi. The Court was therefore faced with a question which has been the subject of much discussion in recent years. Whereas the EU institutions, the EU Member States, the 1267 Sanctions Committee and the UN Monitoring Team have constantly argued that the freezing of funds constitutes a temporary precautionary measure which does not amount to the deprivation of a person's property, the individuals and entities targeted by this type of sanctions have alleged that this measure entails a disproportionate and intolerable interference with property rights<sup>109</sup>. Both positions were taken into consideration to some degree by the ECJ, given that the response of the Court was relatively moderate<sup>110</sup>. In this respect, the ECJ recalled that it had already declared in *Bosphorus* that the importance of the aims pursued by a Community act giving effect to a Security Council sanctions regime may justify negative consequences for some operators, even if they are in no way responsible for the situation that led to the adoption of the measures in question<sup>111</sup>. In order to assess the extent of the fundamental right to respect for property, protected as a general principle of Community law, account was taken of the First Additional Protocol to the ECHR, which enshrines that right, and the case law of the European Court of Human Rights. Since the contested measures pursue an objective of general interest as fundamental to the international community as the fight against terrorism, the ECJ held that the freezing of funds, financial assets and other economic resources belonging to the persons identified or associated with Bin Laden, Al-Qaeda and the Taliban "cannot per se be regarded as inappropriate or disproportionate"<sup>112</sup>. These considerations and the fact that there are derogations and exemptions and a mechanism for the periodic re-examination of the general system of measures at the level of the UN led the ECJ to conclude

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<sup>108</sup> In all likelihood, the CFI was courageous enough to navigate the quicksand of *jus cogens* because it was convinced from the start that there was no breach of the peremptory norms of international law. Most commentators have criticized the approach of the CFI to the content of the *jus cogens* norms. See Tomuschat, note 10, at 545; Eeckhout, note 10, at 192.

<sup>109</sup> Third report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning Al-Qaeda and the Taliban and associated individuals and entities, UN Doc. S/2005/572, 9 September 2005, paras. 40-43.

<sup>110</sup> Judge Collins of the British High Court does not hesitate to admit the punitive connotation of the financial sanctions. This criminalization goes beyond the designated individuals and entities; the very wide definition of economic resources have made it impossible for the family of a designated person to know whether they are committing an offence or whether a license from the Treasury is needed (*A, K, M, Q & G v. H. M. Treasury*, note 102).

<sup>111</sup> *Bosphorus*, note 66, paras. 22 and 23.

<sup>112</sup> *Kadi/Al Barakat*, note 1, para. 363.

that “the restrictive measures imposed by the contested regulation constitute restrictions on the right to property which might, in principle, be justified”<sup>113</sup>. However, due to the fact that the Community institutions did not to grant the appellants an opportunity to make their views known to the competent authorities, and bearing in mind the significant restriction of their property rights, the imposition of the restrictive measures “constitutes an unjustified restriction of his right to property”<sup>114</sup>.

## **E. THE CONSEQUENCES OF *KADI***

The ECJ did not explicitly declare what its attitude would be towards the Community norms implementing the resolutions of the Security Council should the regime of sanctions established by the UN provide sufficient protection for fundamental rights. The Court simply highlighted that such immunity is unjustified, as it is clear that the re-examination procedure before the 1267 Sanctions Committee does not offer similar guarantees to judicial protection<sup>115</sup>. In contrast, the Advocate General expressed willingness to send a clear political message to the EU Member States and the Security Council: if the right to effective judicial protection were safeguarded at the level of the UN, the Community institutions could be released from the obligation to provide for judicial control over implementing measures that apply within the EU legal order<sup>116</sup>. This solution, which would involve taking up a similar position to that adopted by the ECHR in the *Bosphorus* case, should the judicial protection accorded within the framework of the Security Council be considered sufficient, was not agreed upon in the end by the ECJ<sup>117</sup>. It would have been useful if the ECJ had specified the conditions in which it would cede the exercise of its jurisdictional role to an international institution. This position would allow the Court to begin a constructive dialogue with other Community institutions and international organizations<sup>118</sup>.

In order to prevent any negative effects arising from the annulment of the regulation with immediate effect, the Court maintained the effects of the contested regulation for a period of no more than three months. Given that the possibility that the restrictive measures in question are justified cannot be excluded, the opportunity must be granted to the Community institutions to remedy the violations of fundamental rights. This opportunity was taken by the

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<sup>113</sup> *Id.*, para. 366.

<sup>114</sup> *Id.*, para. 370.

<sup>115</sup> *Id.*, para. 322.

<sup>116</sup> Opinion of Advocate General Maduro in *Kadi*, note 2, para. 54.

<sup>117</sup> See, De Burca, note 51, at 36.

<sup>118</sup> Gattini, note 51, at 325.

Commission and the Council, which adopted a regulation that has the effect of maintaining the appellants in the list, after communicating the reasons that led to their inclusion and granting them the opportunity to comment on these grounds<sup>119</sup>. The information that was communicated to Kadi and Al Barakaat was probably general in character, and did not include the real fundamental reasons which led to their inclusion on the list of the 1267 Sanctions Committee. In many cases, neither the European institutions nor the Member States are in any position to fulfill this obligation to a meaningful degree, as often only the State responsible for the initial designation is aware of this information. Since this is information which is generally the product of the intelligence services of some States, it is unlikely that the members of the 1267 Committee were willing to share with Kadi and Al Barakaat all the information they might need to prepare their defense before national courts and the ECJ. Kadi was not satisfied then by the procedural improvements made by the EU, and brought a new action on 26 February 2009 seeking the annulment of the Commission Regulation that keeps Kadi on the list<sup>120</sup>.

The consequences of the CFI case-law as regards the EU autonomous list of terrorists should be borne in mind when faced with the implications of *Kadi/Al Barakaat*. It could be expected that the CFI will come to the same conclusion in the new *Kadi* case should the information provided to the appellants prove insufficient, and especially if the Member States are not willing or in a position to communicate to the Community judge the information underlying the decisions to include them on the 1267 Sanctions Committee list. In these circumstances, the States would have to choose between refusing to fulfill the obligations derived from the resolutions of the Security Council or failing to comply with Community law. Should this situation arise, the best option that the Member States, and in particular the two permanent European members of the Security Council, France and the United Kingdom, could adopt would be to try to convince the other members of the Security Council of the need to introduce substantial modifications in the 1267 sanctions regime.

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<sup>119</sup> Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (OJ L 322 of 2.12.2008, p. 25).

<sup>120</sup> Application OJ C 90 of 18.4.2009, p. 37, Case T-85/09.

## F. CONCLUSIONS

The conclusions reached by the ECJ in *Kadi/Al Barakaat* are wholly convincing from the perspective of Community law. It is laudable that the usual interpretation of fundamental rights in Community law is applied and the minimum standard that flows from the norms of *jus cogens* is rejected. According to the Court's case law, all acts of the institutions are subject to judicial review on grounds of compliance with fundamental rights. The arguments put forward by the ECJ are very similar to the legal reasoning employed by the CFI in *OMPI*, and later developed and consolidated in *Stichting Al-Aqsa*, *José María Sison*, *Kongra-Gel* and *PKK*. Both Courts accepted also that the restrictive measures adopted by the EU institutions may in substance be justified for reasons relating to the fight against terrorism, as long as due process rights are respected. The EU institutions should bear in mind the consequences of the CFI case-law as regards the EU autonomous list of terrorists when confronting the implications of *Kadi/Al Barakaat*.

The divergence in opinion between the EU and international lawyers as to the consequences of the *Kadi* judgment is likely to remain for the foreseeable future. While international lawyers focus their analysis on the constitutional role of the UN Charter in international law, the EU lawyers seek to assert the autonomy and primacy of the EU treaties. The ECJ adopts a constitutional solution, which is based on the autonomy of the EC law and the primacy of primary law over, in the ECJ's opinion, the UN Charter and the Security Council resolutions. It is not easy to reconcile the two positions, but the ECJ could have reinforced its reasoning by mentioning international human rights instruments and avoiding as far as possible the separation between the Community legal order and international law, in particular the UN Charter.

Regardless of whether or not the ECJ should have adopted an approach that placed greater emphasis on the respect for international law, its obligation is to review the acts of European law with a view to ensuring their compatibility with fundamental rights. Moreover, recognition of the undoubted primacy of the UN Charter and the Security Council resolutions in international law is not equivalent to stating that there are no limits to the powers of the Security Council.

The need to resort to selective sanctions in the fight against the financing of terrorism does not exonerate the authorities from demonstrating that such measures are justified in relation to the individuals and entities included on the black list. Even though it is not easy to strike a balance between the Security Council's primary responsibility for the maintenance of

international peace and security and the establishment of safeguards of fundamental rights in the sanctions regime against Al-Qaeda and the Taliban, it is unacceptable to systematically infringe the fundamental rights of persons and entities included in the black list drawn by the 1267 Sanctions Committee.

There are compelling reasons to suggest that the ECJ had no option in *Kadi/Al Barakaat* but to depart from the previous judgments of the CFI. Firstly, the constitutional courts of the Member States have expressed their willingness not to review Community acts on the basis of domestic constitutional law as long as an adequate level of protection is guaranteed at the EC level (*Solange*). If the ECJ decided not to review the contested regulations in the light of the fundamental rights protected by the EC law, some constitutional courts might try to ensure the protection of human rights, and such a judicial intervention would negatively affect the primacy of Community law over internal law. Secondly, if the European Court of Human Rights were called to decide on the compatibility of the targeted sanctions regime with the ECHR, the presumption of equivalent protection of human rights developed in the *Bosphorus* case would probably not be maintained<sup>121</sup>. It does not seem reasonable to extend the presumption of compliance with the ECHR to the Security Council's targeted sanctions, as the UN does not offer any legal guarantee to the blacklisted individuals and groups. Finally, the Court's decision may encourage the Security Council to modify the targeted sanctions regimes substantially in order to overcome the current human rights deficits. The EU and its Member States should not only promote the respect of human rights in its relations with third States and in international forums, but its institutions should also lead through example.

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<sup>121</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* of 30 June 2005, *Reports of Judgments and Decisions* 2005-VI, § 155.



**THE RELATIONSHIP BETWEEN  
THE EUROPEAN COURT OF JUSTICE  
AND THE EUROPEAN COURT OF HUMAN RIGHTS**

by

**ALDONA MICHAŁEK-JANICZEK\***

**A. INTRODUCTION**

The aim of this article is to present the different links between the European Court of Human Rights (hereinafter “ECtHR”) – the institution created under the auspices of the Council of Europe (hereinafter “CoE”), and the European Court of Justice (hereinafter “ECJ”) – the institution of the European Communities (hereinafter “EC”). Formally, the EC were founded as an economic regime, while the CoE was established as a human rights regime. Hence, both regimes shared a similar *raison d’être*; namely, replacing the old world order with an order that would guarantee peace, stability and a high degree of protection of human rights<sup>1</sup>. The relationship between the two Courts is in some respects characterized by concurrence, but their functions are, in general, complementary<sup>2</sup>.

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<sup>1</sup> G. Harpaz, *The European Court of Justice and its relations with the European Court of Human Rights: the quest for enhanced reliance, coherence and legitimacy*, 1 COMMON MARKET LAW REVIEW, 105, 126 (2009).

<sup>2</sup> H. Aden, *Human rights before the courts: concurrence or complementary protection by the European Court of Human Rights, the European Court of Justice and by national constitutional courts?*, in HUMAN RIGHTS IN EUROPE: A FRAGMENTED REGIME?, 57 (M. BROSIG ED., 2006).

## B. DIFFERENCES AND SIMILARITIES BETWEEN ECtHR AND ECJ

There are certain differences that exist between the ECtHR and the ECJ in terms of historical background and normative apparatus. The two Courts also differ in their respective composition, jurisdiction *ratione personae*, their *locus standi* rules, as well as their objectives and political contexts in which they operate. Though the membership status of two Courts differ, there exists, nevertheless, a significant and growing overlap between the composition of these institutions. Such ever-growing membership overlap enables the two regimes to strengthen a common European standard in the area of human rights protection. Still there are forty-seven ECHR signatories to the EC's twenty seven Member States, which makes the geographical scope of jurisdiction of the ECtHR wider. The similarities exist also in terms of membership criteria and the manner in which persistent infringements of human rights by their Member States are addressed by them<sup>3</sup>.

The ECJ and the ECtHR are both Supreme Courts in their respective fields. Their jurisdiction is binding on the Member States / Contracting Parties and both are involved in the interpretation of one document – the European Convention on Human Rights (hereinafter “ECHR” or “Convention”)<sup>4</sup>.

In addition and more importantly, the EC has a number of objectives which are primarily economic, whereas the ECtHR has only one objective – the protection of human rights<sup>5</sup>. In particular, the ECtHR is called upon to supervise the obligations of the Contracting States as to whether they “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the [ECHR]”<sup>6</sup>. It is a unique international court entrusted with a compulsory jurisdiction and procedures giving an individual a subjective right to file an individual complaint about violations of his or her rights and freedoms set out in the Convention<sup>7</sup>.

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<sup>3</sup> Harpaz, note 1, 130.

<sup>4</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted in Rome on 4 November 1950, CETS No. 005 (available at: <http://conventions.coe.int/>).

<sup>5</sup> C. Turner, *Human rights protection in the European community, resolving conflict and overlap between the European Court of Justice and the European Court of Human Rights*, 3 EUROPEAN PUBLIC LAW, 453, 455 (1999).

<sup>6</sup> Article 1 of the ECHR

<sup>7</sup> The ECtHR can declare the violation of the provisions of the Convention by the State after the applicant has exhausted domestic remedies and within a period of six months after the last decision of the national court issued on the matter. Such declaratory judgment can contain an order of just satisfaction to be paid by the State to the applicant. The States are obliged to immediately refrain from any further violations in that case and to secure that similar violations are prevented in general, for example by making any necessary changes to the domestic legal order (Articles 35, 41 and 46 of the ECHR).

The role of the ECJ is quite different. The Court fulfills the task of reviewing the legality of the EC secondary law in relation to the primary law (provisions of the Treaties). It supervises also the duties of Member States in executing the EC law and fulfilling the duties arising from the EC law. The ECJ has therefore the judicial power of a constitutional court or supreme court in relation to matters that Member States have transferred to the European Communities<sup>8</sup>.

### **C. THE DEVELOPMENT OF THE NORMATIVE BASIS OF PROTECTION OF HUMAN RIGHTS IN THE EC**

While the Council of Europe's Member States have built up the ECtHR since the 1950s and for the EC human rights are only a side topic in its fields of competence that are largely dominated by economic integration, fundamental rights issues have, nevertheless, grown in importance in the area of the ECJ case law and in the normative basis of functioning of the EC.

The Treaty of Rome of 1957<sup>9</sup> contained no provisions for safeguarding of human rights protection in the EC. But in 1987 the preamble to the *Single European Act*<sup>10</sup> introduced the concept of human rights protection to the EC Treaty, although it still remained outside the jurisdiction of the ECJ to decide on such matters, and therefore the change was of limited value. This was later reinforced by the Maastricht Treaty in 1993<sup>11</sup>, whose Articles B, F(2), J.1(2) and K.2(1) provided for the protection of human rights and referred explicitly to the ECHR. However, Article L of the Maastricht Treaty excluded these provisions from the jurisprudence of the ECJ. In 1999 the Treaty of Amsterdam<sup>12</sup> confirmed the respect for protection of human rights.

After the amendments introduced by the Maastricht Treaty and the Treaty of Amsterdam, the Treaty on European Union (hereinafter "TEU") states in its Article 6 (1) that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member

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<sup>8</sup> G. Ress, *The legal relationship between the European Court of Human rights and the Court of Justice of the European Communities according to the European Convention on Human Rights*, in GOVERNING EUROPE UNDER A CONSTITUTION: THE HARD ROAD FROM THE EUROPEAN TREATIES TO A EUROPEAN CONSTITUTIONAL TREATY, 279, 280 (H.-J. BLANKE, S. MANGIAMELI EDS., 2005).

<sup>9</sup> *The Treaty establishing the European Economic Community* signed in Rome on 25 March 1957, not published in OJ.

<sup>10</sup> *The Single European Act* signed on 28 February 1986, OJ L 169 of 29.06.1987.

<sup>11</sup> *The Treaty on European Union* signed on 7 February 1992, OJ C 191 of 29.07.1992.

<sup>12</sup> *The Treaty of Amsterdam* signed on 2 October 1997, OJ C 340 of 10.11.1997.

States”. Article 6 (2) TEU states that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”. The consequence of this reference is that the Convention is only applied indirectly within the common principles of Community law. The standard established by the common constitutional principles may well go beyond the level of protection of the Convention and may, in particular, have its own value in fields where the Convention does not contain any specific right. The ECtHR is therefore a minimum standard of protection of fundamental rights and freedoms<sup>13</sup>.

Article 6(2) TEU comes within the jurisdiction of the ECJ insofar as it concerns acts of the Community institutions under the EC Treaties or under the TEU<sup>14</sup>, thus reinforcing the legitimacy of the ECJ’s review of such acts. However, by not including a similar provision for review of Member States’ acts, it fails to endorse the jurisprudence of the ECJ in this regard. Although this provision does not prevent the ECJ from continuing its review in this area, it has the potential to limit any future developments by the ECJ in this respect<sup>15</sup>.

Concerning the review of Member States’ acts concerning human rights violations, the Treaty of Amsterdam introduced a non-judicial safeguard in this respect. Article 7(1) of the TEU allows the Council, voting unanimously and after the assent of the European Parliament, to state whether there has been a serious and persistent violation by the Member States of the principles found in Article 6(1). If Article 6(1) is violated, Article 7(2) gives the Council, by qualified majority voting, the power to suspend, for example, the violating Member State’s right to vote in the Council.

In 2000 the adoption of the Charter of Fundamental Rights<sup>16</sup> started a new period of “positivisation” of human rights at the EU level<sup>17</sup>. While this “positivisation” has not yet become complete due to the lack of the binding force of the Charter, it represented an attempt to produce a list of human rights corresponding to the legal and political developments of 50 years that had passed since the ECHR had been adopted. Then the Charter has been included

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<sup>13</sup> Ress, note 8, 283.

<sup>14</sup> Article 46 of the Treaty of Amsterdam.

<sup>15</sup> Turner, note 5, 455-456.

<sup>16</sup> *Charter of Fundamental Rights of the European Union* signed in Nice on 18 December 2000, OJ CE C 364/8.

<sup>17</sup> Lech Garlicki, *The relationship between the European Court of Justice and the European Court of Human Rights: the Strasbourg perspective*, in *DIE NEUE EUROPÄISCHE UNION = THE NEW EUROPEAN UNION = LA NOUVELLE UNION EUROPÉENNE*, 113 (J. ILIOPOULOS-STRANGAS AND H. BAUER EDS., 2006).

into the draft European Constitution<sup>18</sup> and once the Constitution enters into force – it will be transformed into binding legal instrument. If it happens, there will be two parallel systems of protection of human rights existing in Europe. At least in the Europe of 27 there will be two parallel instruments assuring protection of human rights of individuals, binding on their respective addressees. Both instruments are very similar in their substance due to the fact that the evolution of human rights on the Community level has always been inspired by the text of the ECHR and by the case law of the ECtHR<sup>19</sup>.

However, it has to be noted that according to the explanations to the Charter, the case law of the ECtHR is a guideline for the ECJ in interpreting the Charter but does not have legal force. Since the jurisprudence is not binding on the ECJ, there will not be any direct legal relationship between the judgments of the ECtHR and the judgments of the ECJ.

## **D. THE DEVELOPMENT OF THE PROTECTION OF HUMAN RIGHTS IN THE ECJ CASE LAW**

### *I. The references to the protection of fundamental rights in general*

As it follows from the precedent chapter, the normative basis for the protection of the human rights in the EC has been created relatively recently. Nevertheless, the ECJ guaranteed the protection of human rights in the EC before it was done by legislative means. The analysis of the ECJ's jurisprudence in this field demonstrates that this protection is *ad hoc* and limited due to the tenuous legal basis of its human rights jurisprudence, namely, the general principles of law<sup>20</sup>.

The starting point was *Stauder* case<sup>21</sup>, in which the ECJ stated that fundamental rights are enshrined in the general principles of Community law and protected by the EC. In order to strengthen the legitimacy of its decisions, the ECJ in *Internationale Handelsgesellschaft* case<sup>22</sup> stated that the rights protection is inspired by the constitutional traditions common to Member States. The *Nold* case<sup>23</sup> completed this by adding that guidelines could be taken from international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories. While in *Stauder* the ECJ did not mention any

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<sup>18</sup> Treaty establishing a Constitution for Europe signed in Rome on 29 October 2004, OJ EU 2004/C 310/01.

<sup>19</sup> Garlicki, note 17, 114.

<sup>20</sup> Turner, note 5, 455.

<sup>21</sup> Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, para. 7.

<sup>22</sup> Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125, para. 4.

<sup>23</sup> Case 4/73, *Nold*, 1974 E.C.R. 491, para. 13.

external sources, and in *Internationale Handelsgesellschaft* only referred to the constitutional traditions common to the Member States, the judgment in *Nold* case sets out a broader formula:

“As the Court has already stated, fundamental rights form an integral part of the general principle of law, the observance of which it ensures.

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”<sup>24</sup>.

The above mentioned cases concerned only the review of Community acts for violation of human rights. In the cases of *Klensch*<sup>25</sup> and *Wachauf*<sup>26</sup>, the ECJ extended its review to include Member States’ acts implementing the Community rules.

## *II. The role of the ECHR and the jurisprudence of the ECtHR in the ECJ case law*

All EU Member States are Contracting Parties to the ECHR. Every action taken by a Member State authority as an implementation of Community law should therefore be compatible with the ECHR. Several courts consider themselves competent to check that compatibility: firstly national courts and secondly the ECtHR. But when an act of a Member State authority comes within the framework of the EC law, the ECJ is also competent to enforce the ECHR as part of the general principles of Community law<sup>27</sup>.

Specific reference to the ECHR in the case law of the ECJ did not come until the last of the Member States, France<sup>28</sup>, had ratified the ECHR, and the case of *Rutili*<sup>29</sup>, in which in its judgment the ECJ cited for the first time individual provisions of the ECHR. Later the ECJ

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<sup>24</sup> See para. 13 of the judgment.

<sup>25</sup> Cases 201/85 and 202/85, *Klensch v. Secrétaire d’Etat à l’Agriculture et à la Viticulture*, 1986 E.C.R. 3477.

<sup>26</sup> Case 5/88, *Wachauf v. Germany*, 1989 E.C.R. 2609.

<sup>27</sup> K. Lenaerts, *The Court of Justice of the European Communities and the European Court of Human Rights: an old couple in a new setting*, in LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES: 1952-2002: BILAN ET PERSPECTIVES: ACTES DE LA CONFÉRENCE ORGANISÉE DANS LE CADRE DU CINQUANTIÈME ANNIVERSAIRE DE LA COUR DE JUSTICE, 89, 91 (2004).

<sup>28</sup> France ratified the ECHR on 3 May 1974.

<sup>29</sup> Case 36/75, *Rutili v Ministre de l’intérieur*, 1975 E.C.R. 1219.

started to characterize the ECHR as an instrument having “special significance”. The first such statement we can find in *Hoechst* case<sup>30</sup>.

Although the role of the ECHR in Community law was not discussed, the ECJ referred to specific provisions from the ECHR to show that the Community regulations and rules in question were a specific manifestation of the more general provisions of the ECHR. In the *Hauer*<sup>31</sup> case, the ECJ stated that the guidelines which derive from international treaties “should be followed within the framework of Community law”. However, in *Wachauf*<sup>32</sup> this obligation, which is based on the word “should”, was replaced by the wording “to which regard should be had in the context of Community law”. As such, there is no obligation to follow guidelines derived from international treaties, only the obligation to consider them in the first place. In the case of *ERT*<sup>33</sup>, the ECJ stated that it could interpret provisions of the ECHR when national legislation fell within the field of application of Community law.

The ECJ also referred to the ECtHR’s judgments and the European Commission of Human Rights’ (hereinafter “EComHR”) decisions. However, the ECJ did this in an *ad hoc* manner and only to back up its own conclusions. This can be seen from the case of *Grant*<sup>34</sup>, in which the ECJ referred to the Strasbourg organs to illustrate that stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the ECHR and that Article 12 of the ECHR applies only to the traditional marriage between two persons of opposite biological sex.

As we can see from the above analysis of the development of the protection of human rights, in the ECJ case law we can note the following stages in that case law in respect of the protection of human rights:

- fundamental rights outside the competence of the Court;
- fundamental rights as a part of the general principles of Community law (since 1969);
- explicit reference to the ECHR (since 1974-1975);
- characterization of the ECHR as having “special significance” (since 1989);
- reference to individual ECtHR’s judgments and ECommHR’s decisions (since the 1990s)<sup>35</sup>.

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<sup>30</sup> Cases 46/87 and 227/88, *Hoechst AG v. Commission of the European Communities*, 1989 E.C.R. 2859.

<sup>31</sup> Case 44/79, *Hauer v Land Rheinland-Pfalz*, 1979 E.C.R. 3727.

<sup>32</sup> Case 5/88, *Wachauf v. Germany*, 1989 E.C.R. 2609.

<sup>33</sup> Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 1991 E.C.R. I-2925.

<sup>34</sup> Case C-249/96, *Grant v South-West Trains Ltd.*, 1998 E.C.R. I-00621.

<sup>35</sup> A. Rosas, *International human rights instruments in the case-law of the European Court of Justice*, in *LAW IN THE CHANGING EUROPE: LIBER AMICORUM PRANAS KURIS*, 363, 372 (S. KATUOKA ED., 2008).

## E. THE LEGAL RELATIONS BETWEEN THE ECtHR AND THE ECJ

The legal relations between two Courts have up to now not been settled in the definite and clear manner. The question whether acts of the European Community or of the European Union can be contested directly before the ECtHR awaits an answer<sup>36</sup>. However, there are several judgments of the ECtHR which are important from the point of view of this relationship and have to be mentioned.

In *M & Co. v. Germany*<sup>37</sup> case the EComHR decided on a fine that had been imposed on the applicant by the Commission of the EC. The fine was confirmed by the ECJ and, in consequence, the German authorities issued a writ for execution of the ECJ judgment. Thus, while the substance of the case had been decided on the EC level, the implementation measure was taken by a national authority. The EComHR found that application incompatible with the provisions of the Convention *ratione materiae*, but it did not fully exclude its jurisdiction in such cases<sup>38</sup>. In this judgment, the EComHR established an “equivalent protection test”, stating that “the transfer of powers to an international organization is not incompatible with the Convention provided that within this organization fundamental rights will receive an equivalent protection”. This approach was later upheld by the ECtHR in three cases decided on 18<sup>th</sup> February 1999 (*Matthews v. the U. K.*; *Waite and Kennedy v. Germany*<sup>39</sup>; *Beer and Regan v. Germany*<sup>40</sup>).

In *Matthews v. The UK*<sup>41</sup> case, concerning the question whether the European Parliament can be considered a legislature in the sense of Art. 3 of the 1<sup>st</sup> Protocol to the Convention, the ECtHR found a violation of this provision because of the exclusion of the inhabitants of Gibraltar from the election to the European Parliament. The ECtHR stated that the Member States after the transfer of the competences to international bodies or organizations cannot avoid their responsibility under the Convention and that they remain

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<sup>36</sup> Ress, note 8, 281.

<sup>37</sup> Eur. Court H.R., *M & Co. v. Germany*, Decision of 9 February 1990, Application No. 13258/82.

<sup>38</sup> The Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the EC, the latter not being a Party to the ECHR. This does not mean, however, that by granting executory power to a judgment of the ECJ, the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the Convention organs. Under Article 1 of the Convention the Member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the acts or omissions in question are a consequence of domestic law or regulations or of the necessity to comply with international obligations.

<sup>39</sup> Eur. Court H.R., *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I.

<sup>40</sup> Eur. Court H.R., *Beer and Regan v. Germany*, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I.

<sup>41</sup> Eur. Court H.R., *Matthews v. The UK*, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I.



responsible even after such a transfer<sup>42</sup>. Since there were no effective remedies available at the EU level, the ECtHR found that the implementation of the 1976 Act<sup>43</sup> in Gibraltar by the U.K. authorities constituted a violation of the Convention.

The *Matthews* judgment demonstrated the basic problem faced by the national authorities. On the one hand, national authorities have to comply with international obligations and often the EU law does not leave them any discretion in regard to implementation of its acts. On the other hand, national authorities have to respect the guarantees provided for by the ECHR. In consequence, it can happen that the national authorities may be confronted with the following dilemma: if they comply with the EU commitments, they may violate the Convention; and if they comply with the Convention, they may break their obligations under the EU law<sup>44</sup>. It follows from the *Matthews* case that all primary EC law can be challenged in the ECtHR, because it cannot be the object of judicial review by the ECJ<sup>45</sup>.

Then, in 2005 in the *Bosphorus*<sup>46</sup> case, the ECtHR moved further and recognized its jurisdiction to control the lawfulness of the Community law in the light of the ECHR through the national measures implementing these acts. The ECtHR examining the responsibility of Ireland in the light of the national measure implementing the Community regulation questioned not only the primary EC law, as this was the case in *Matthews*, but also the secondary EC law.

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<sup>42</sup> In particular, the Court stated in *Matthews* that “acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer. In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act [...] Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a ‘normal’ act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty”, see para. 32 and 33 of the judgment.

<sup>43</sup> Act of 20 September 1976 concerning the election of the Members of the European Parliament by direct universal suffrage, OJEC L 278 of 08.10.1976.

<sup>44</sup> Garlicki, note 17, 123.

<sup>45</sup> Lenaerts, note 27, 95.

<sup>46</sup> Eur. Court H.R., *Bosphorus v. Ireland*, Judgment of 30 June 2005, Reports of Judgments and Decisions 2005-VI.

## F. THE PROBLEM OF DIVERGENCES IN THE INTERPRETATION OF THE PROVISIONS OF THE CONVENTION BY DIFFERENT COURTS

Since the ECJ started to develop a doctrine of the EC fundamental rights, the existence of conflicting rights have become possible. In the initial period, there was a factual division between these two European Courts<sup>47</sup>. Now, it may happen that a case in which at least one of the parties is invoking a violation of the ECHR could be dealt with by two, or even three different courts. That would be in the case of an individual challenging an act of an EU Member State implementing Community law on grounds of a violation of the ECHR. The first judge to deal with the case will be the competent national court. This court can itself interpret the ECHR or make a reference for a preliminary ruling to the ECJ. Once the proceedings in the Member State concerned are exhausted, the party may still bring the case before the ECtHR, which will give its own interpretation of the provisions of the ECHR.

Three courts may thus interpret and enforce the same standard of fundamental rights. When the interpretation of the ECHR by the national court departs from the case law of one of the European courts, the latter takes precedence. There is not, however, any hierarchical relation between the ECtHR and the ECJ. In case of diverging interpretations of the ECHR given by these two Courts, Member States may therefore be caught in between the principle of supremacy of Community law, on the one hand, and the obligation to comply with the ECHR, on the other<sup>48</sup>.

It has to be noted that the ECJ has always tried to follow the jurisprudence of the ECtHR<sup>49</sup>, even if some discrepancies can be noted in the application of Article 10 of the Convention or in relation to the equality of arms in Article 6(1) or the right not to be forced to incriminate oneself. Obviously, the sometimes different interpretation of the Convention is an expression of the different perspective of both Courts. The ECJ is therefore more focused on the efficiency of the internal market and legality of the acts of the European Communities, and the ECtHR is more concentrated on individual rights and freedoms.

To avoid these divergences as to the interpretation of the Convention, a few solutions have been envisaged. A controversial one, proposed by a British professor, A.G. Toth<sup>50</sup>, is

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<sup>47</sup> Aden, note 2, 63.

<sup>48</sup> Lenaerts, note 27, 92-93.

<sup>49</sup> J.-C. Bonichot, *Cour de justice des Communautés européennes et Convention européenne des droits de l'homme: vers un partenariat enregistré?*, in LE DROIT DANS UNE EUROPE EN CHANGEMENT: LIBER AMICORUM PRANAS KURIS, 95, 97 (S. KATUOKA ED., 2008).

<sup>50</sup> A.G. Toth, *The European Union and Human Rights: the way forward*, 34 COMMON MARKET LAW REVIEW, 491, 512 (1997).

that the Member States of the European Union should denounce the Convention, thereby making it possible to establish the ECJ as the only court for human rights questions within the European Union. This is undoubtedly unrealistic approach<sup>51</sup>.

Apart from this radical solution, two proposals have been intensively discussed in order to avoid the said divergences: the reference procedure and the accession by the EU to the Convention. The procedure of reference from the ECJ to the ECtHR would in principle be possible since already today the ECtHR has the competence to deliver advisory opinions (Article 47 of the ECHR). Nevertheless, it would not cover cases which do not fall under the competence of the ECJ. Furthermore, it would be for the ECJ to bring this reference procedure to the ECtHR, and not for the individual<sup>52</sup>. A possible weakness of this reference system is that the ECJ would be under no obligation to refer to the ECtHR. In consequence, it is doubtful if the ECJ would refer to the ECtHR<sup>53</sup>.

As to the accession of the EU to the Convention, while in an opinion published in 1996<sup>54</sup> the ECJ answered negatively to the question raised by the EC Council if the Community was entitled by the EC treaty to join the Convention, now the situation changed significantly<sup>55</sup>.

On the one hand, the text of the EU Constitutional Treaty opened the door for accession of the EU to the Convention<sup>56</sup>. Therefore, there exists now a legal basis for accession. For that to happen, unanimity is necessary. This authorization would be given with ratification of the Constitution by all EU Member States. On the other hand, the Committee of Ministers of the CoE adopted in May 2004 the 14<sup>th</sup> Protocol to the Convention<sup>57</sup>, which is now open to ratification by the Contracting States. Article 17 of this Protocol has inserted paragraph 2 to the Article 59 of the ECHR, which states that “The European Union may

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<sup>51</sup> Ress, note 8, 286.

<sup>52</sup> *Id.*, 287.

<sup>53</sup> K. Lenaerts, *Fundamental Rights to be Included in a Community Catalogue*, 16 EUROPEAN LAW REVIEW, 367, 380 (1991).

<sup>54</sup> Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1996 Reports of Cases before the Court of Justice and the Court of First Instance I-1759. For more details on this opinion see S. O’Leary, *Current topic: accession by the European Community to the European Convention on Human Rights – the opinion of the European Court of Justice*, 4 EUROPEAN HUMAN RIGHTS LAW REVIEW, 362 (1996).

<sup>55</sup> Aden, note 2, 58-59.

<sup>56</sup> Article 1-9 § 2 of the European Constitution stipulates that “The Union shall accede to the European Convention for the Protection of Human Rights and the Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Constitution”.

<sup>57</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No. 194 (available at: <http://conventions.coe.int/>).

accede to this Convention". This makes it possible that not only States, as it has been the case till now, may become contracting parties to the ECHR<sup>58</sup>.

Although the draft legal foundation for accession has been formulated on both sides, it belongs to politicians to decide on the speed of the process as well as to set the timetable of this accession. There are several steps which must be completed before the accession will take place. First of all, a necessary legal basis has to be adopted in both systems. For the Council of Europe, it will be done when the 14<sup>th</sup> Protocol enters into force, for the EU – when the European Constitution becomes a law. The next stage will be the negotiations concerning the accession, in particular, the legal form of accession. At the same time, additional amendments to the Convention will have to be prepared and adopted, most of them being of a technical character<sup>59</sup>.

It has to be pointed out that the accession of the EU to the Convention would not lead to the relation of formal subordination of the ECJ to the ECtHR. The competence of supervision of the ECtHR would exist only in cases with relation to human rights and fundamental freedoms guaranteed in the Convention, which still constitute a small part of all ECJ cases<sup>60</sup>. Accession of the EU to the ECHR would extend the protection offered by this instrument also to actions arising, directly or indirectly, from the EU law.

But it has to be noted that new conflicts are likely to happen if the EU Constitutional Treaty enters into force, bringing with it the EU Charter of Fundamental Rights. From then on, the ECJ will have to apply in its judgments fundamental rights as they are guaranteed by the Charter. At the same time, if the EU becomes a Contracting Party to the Convention, individual applicants will have the right to bring their cases to the ECtHR if they lose them before the ECJ. The ECJ will then have to accept that it does not have the right to pronounce the final decision concerning those fundamental rights that are guaranteed by the Charter and by the Convention. On the other hand, the accession to the Convention will open to the EU institutions the possibility of presenting their positions directly before the Court of Human Rights<sup>61</sup>.

On the whole, however, the UE's accession to the ECHR will be beneficial for the general level of protection of human rights in the entire Europe. It will allow harmonization of both basic instruments: the ECHR and the EU Charter/Constitution. It will also eliminate the existing gaps in the protection in respect to actions or omissions of the Community

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<sup>58</sup> Garlicki, note 17, 117.

<sup>59</sup> *Id.*, 118-119.

<sup>60</sup> Ress, note 8, 292.

<sup>61</sup> Aden, note 2, 63-64.

institutions which interfere with rights or liberties of individuals. At the same time, the accession may be beneficial for the ECtHR and its capacity to provide an effective protection of human rights. The accession will allow the ECtHR to profit not only from the new human rights provisions of the European Constitution (and it has to be pointed out that in many cases those provisions are more advanced and more extensive than the provisions of the ECHR), but also from the jurisprudence of the ECJ concerning human rights. It should be noticed that there are several areas in which the ECJ case law provides more extended protection of human rights, in particular, with respect to the equal protection clause and gender discrimination.

Additionally, the accession will offer to the ECtHR better possibilities to follow recent developments of the EU law and of its interpretation. A judge will be appointed on behalf of the EU. He will sit in all cases in which the EU appears as the responding party and his expertise will be reinforced by a team of registry lawyers possessing profound knowledge on the EU law. Furthermore, the EU will have all procedural rights to protect and to defend its legal position on all levels of the procedure before the ECtHR<sup>62</sup>.

## **G. FINAL REMARKS**

In general the fact that two high-ranking courts share the task of hearing human rights cases contributes to improving their implementation and prevents those rights from remaining pure theory. Inter-courts competition leads to forms of mutual influence through the adoption of rules and ideas that have been developed at other geographical levels or in other jurisdictions<sup>63</sup>. The case law of the ECtHR and the ECJ shows that the level of human rights protection tends to be higher where individuals have the possibility to have the intrusion into their fundamental rights checked by more than one high-ranking court. In this respect, concurrence between these courts is a kind of productive interaction<sup>64</sup>. Thus, on the one hand, overlapping fields between the two Courts open the field for a productive concurrence, but on the other, they make an interpretation of human rights more complicated. As long as there is no formal possibility for the ECJ in a case pending before it to ask the ECtHR for a preliminary ruling, it must itself interpret the ECHR at risk of occasionally departing from the

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<sup>62</sup> Garlicki, note 17, 127-128.

<sup>63</sup> Aden, note 2, 65.

<sup>64</sup> *Id.*, 64.

case law of the ECtHR<sup>65</sup>. The envisaged accession of the EU to the ECHR would guarantee a complete system of judicial protection of fundamental rights against all acts adopted by the institutions of the EU or by the EU Member States implementing the EC law. It would further subject the ECJ to the ultimate jurisdiction of the ECtHR in relation to the interpretation of the ECHR<sup>66</sup>.

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<sup>65</sup> Lenaerts, note 27, 96.

<sup>66</sup> *Id.*, 103.

**THE QUESTION OF APPLICATION  
OF THE INSTITUTION OF EXTRADITION  
IN POLISH LAW  
ON THE EXAMPLE OF RANDY C.'S CASE**

by

**Magdalena Makiela\***

**A. INTRODUCTION**

Extradition is the process of surrendering to the authorities of a foreign state a person pursued by these authorities for the committed crimes<sup>1</sup>. Apart from rendition – handing over of the pursuit and the sentence for execution – it is one of the three basic institutions serving international cooperation in criminal cases<sup>2</sup>. There is no common norm in international law which would forbid or prescribe extradition. Extradition is performed on the basis of an international agreement if the state applying for extradition ensures reciprocity. If there are no contractual obligations between the states, the authorities of each country, acting within their internal law and at their own discretion, decide whether to hand over a pursued person to the foreign state or not<sup>3</sup>.

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<sup>1</sup> Z. KNYPL, EKSTRADYCJA JAKO INSTYTUCJA PRAWA MIĘDZYNARODOWEGO, 27 (1975); W. GÓRALCZYK, PRAWO MIĘDZYNARODOWE PUBLICZNE W ZARYSIE, 274 (2001).

<sup>2</sup> P. HOFMAŃSKI ET AL., EUROPEJSKI NAKAZ ARESZTOWANIA W TEORII I PRAKTYCE PAŃSTW CZŁONKOWSKICH UNII EUROPEJSKIEJ, 30-31 (2008). Cf. M. Płachta, *Transfer of Proceeding and Transfer of Prisoners: New Instruments of Cooperation in Criminal Matters Among the Socialist Countries of Eastern Europe*, 3 CONNECTICUT JOURNAL OF INTERNATIONAL LAW, 311-344 (1988); M. PŁACHTA, KIDNAPING MIĘDZYNARODOWY W SŁUŻBIE PRAWA, 40 (2000).

<sup>3</sup> Góralczyk, note 1, 275.

In accordance with the Polish law, extradition treaties are international agreements located in the group of sources of mandatory laws of the Republic of Poland, which means that they are the source of national law<sup>4</sup>.

The application of extradition often causes difficulties, not only due to extradition obstacles, such as the rule not to hand over the state's citizens or political tensions between the state applying for extradition and the state receiving such a request, but also due to misunderstanding of extradition regulations or even the institution of extradition itself, which may lead to erroneous interpretation. The present article demonstrates an example of misinterpretation of legal regulations concerning the decisions of the District Court in K. in the matter of admissibility of the rendition to the United States of America of a Polish and American citizen, Randy C., wanted by the U.S. State Court for the Southern District of Florida for proceedings in the case regarding fraud with the use of a telegraphic transmission, postal fraud, false declaration and perjury.

## **B. RANDY C.'S CASE – DECISION OF THE DISTRICT COURT**

In the case in question, the District Court in K., in the decision of 11 July 2008, ruled that the rendition of Randy C. for the purpose of criminal proceedings was legally inadmissible. In the reasons of the decision, the Court stated that in the case in question there was an absolute negative extradition prerequisite specified in Art. 604(1) item 1 of the Code of Criminal Procedure, tilting the decision towards the impermissibility of Randy C.'s hand-over.

The District Court in K. asserted that "the amendment of 2006 to the Constitution of the Republic of Poland, its Art. 55(1) and Art. 604(1) item 1 of the Code of Criminal Procedure establish the general prohibition of extradition of a Polish citizen. The amendment to the Constitution of the Republic of Poland consisting in establishing in Art. 55(2) the exceptions to this prohibition, relating to the permission to extradite a Polish citizen upon the request of another state or an international court authority if such a possibility results from an international treaty ratified by the Republic of Poland or the act which executes a legal deed proclaimed by an international organisation of which the Republic of Poland is a member, in the opinion of the Court refers to the execution of the European Arrest Warrant and the

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<sup>4</sup> Art. 87 of the Constitution of the Republic of Poland of 1997.



fulfillment of international obligations related to the ratification of the Statute of the International Criminal Court”.

The District Court in K. indicated that “with reference to the provisions of the Extradition Treaty between the Republic of Poland and the United States of America<sup>5</sup> signed in Washington on 10 July 1996, from the perspective of the mandatory hierarchy of legal deeds, the application of the conflict of law rules from Art. 615(2)<sup>6</sup> of the Code of Criminal Procedure is dubious; according to the rule, the provisions of the Code of Criminal Procedure relating to extradition are not applicable if an international treaty to which the Republic of Poland is a party provides otherwise. The Court based this reasoning on the assumption that the Extradition Treaty between the Republic of Poland and the United States of America of 1996 was not ratified upon prior consent of the Parliament expressed in a legal act and in consequence it constitutes a legal deed of a lower rank than the parliament’s act, i.e. the Code of Criminal Procedure. The primacy of the regulations of the Code excludes the possibility of extraditing a Polish citizen pursuant to a bilateral extradition treaty. In the opinion of the Court, as a result, the provision of Art. 604(1) item 1 of the Code of Criminal Procedure which introduces the prohibition of rendering the state’s own citizens has precedence over Art. 4(1) of the Extradition Treaty between the Republic of Poland and the United States of America which states that <the Executive Authority of the Requested State shall have the discretionary power to do so [i.e. extradite its nationals]>. According to the District Court in K., only in case the treaty was ratified upon prior consent expressed in an act, its provisions would exclude the application of Art. 604(1) item 1 of the Code of Criminal Procedure and would break the general prohibition to extradite the state’s own citizens referred to in Art. 55(1) of the Constitution of the Republic of Poland”.

In further part of the reasoning, the District Court in K. stated that “even if it is assumed that Art. 615(2) of the Code of Criminal Procedure is applicable to the Extradition Treaty with the United States of America, the application of Art. 604(1) item 1 of the Code of Criminal Procedure shall not be excluded. It must be pointed out that Art. 4(1) of the treaty, which states that <neither Contracting State shall be required to extradite its nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if,

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<sup>5</sup> *Extradition Treaty between the Republic of Poland and the United States of America* signed in Washington on 10 July 1996 (Journal of Laws of the Republic of Poland of 1999, No. 93, item 1066).

<sup>6</sup> “Art. 615(1). In relations with international criminal courts and their bodies operating on the basis of international agreements to which the Republic of Poland is a party, or appointed by international organisations established by means of an agreement ratified by the Republic of Poland, the provisions of this section shall apply respectively. Art. 615(2). The provisions of this section shall not apply if an international agreement to which the Republic of Poland is a party or a legal act regulating the functioning of the international criminal court provide otherwise”.

in its discretion, it is deemed proper and possible to do so>, is conditional in nature and does not impose on the Requested State an obligation to extradite its citizen. This regulation complies with the unconditional prohibition to hand over the state's own citizens provided for in Polish regulations". In the Court's opinion, the above reasoning means that "the unclear and imprecise regulation of Art. 4(1) of the Extradition Treaty between the Republic of Poland and the United States of America may not exclude the application of the norm included in the Constitution of the Republic of Poland which provides for the prohibition of extradition of the state's citizens. The treaty was entered into with the view of ensuring its compliance with the legal status prior to the effective date of the amendment to the Constitution when it was impossible to extradite a Polish citizen"<sup>7</sup>.

### **C. CASSATION BY THE PUBLIC PROSECUTOR GENERAL**

The Public Prosecutor General demanded cassation of the decision of the District Court in K., challenging the decision to the disadvantage and accusing the court judgement of "a blatant violation of criminal law procedures – Art. 615(2) of the Code of Criminal Procedure – which affected the contents of the court decision; the violation consisted in expressing an erroneous legal opinion that the provisions of the Extradition Treaty between the Republic of Poland and the United States of America drafted in Washington on 10 July 1996 might not be applied in the case in question as the indicated international treaty, taking into account the mode in which it was ratified, constitutes a legal act of a lower rank than the Code of Criminal Procedure and consequently in the groundless judgement based on the provision of Art. 604(1) item 1 of the Code of Criminal Procedure concerning legal inadmissibility of Randy C.'s extradition"<sup>8</sup>.

The Prosecutor appealed for overruling the decision and transferring the case to the District Court in K. for judicial review and in the justification of cassation stated that "Randy C. received Polish citizenship on 21 January 2008 pursuant to the decision of the Governor of Małopolskie Province, so the regulation of Art. 604(1) item 1 of the Code of Criminal Procedure might not be applicable to him. In accordance with Art. 615(2) of the Code of Criminal Procedure, the aforementioned regulation is not applied when an international treaty provides otherwise. In the present case, the Extradition Treaty between the Republic of Poland and the United States of America states in Art. 4(1), that <neither Contracting State

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<sup>7</sup> See: Decision of the Supreme Court dated 3rd February 2009, IV KK 367/08.

<sup>8</sup> See: Decision of the Supreme Court dated 3rd February 2009, IV KK 367/08.

shall be required to extradite its nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it is deemed proper and possible to do so”<sup>9</sup>.

According to the Public Prosecutor General, this statement gives “grounds for the extradition of the state’s own citizens provided that two conditions imposed by the treaty are met: it is <proper> and <possible>. (...) The extradition treaty is an act of international law adopted in the proper form and the Republic of Poland is bound thereby in full scope”; therefore, “by applying the provisions of Art. 604(1) item 1 of the Code of Criminal Procedure, despite its exclusion due to the regulations of the international treaty”, in the opinion of the Prosecutor, the District Court in K. blatantly violated Art. 615(2) of the Code of Criminal Procedure<sup>10</sup>.

#### **D. DECISION OF THE SUPREME COURT**

In the decision of 3 February 2009 (file number IV KK 367/08), the Supreme Court referred in the following manner to the charge presented in the cassation filed by the Public Prosecutor General: “Despite the amendment to the Constitution of the Republic of Poland enacted by the Act of 8 September 2006 Concerning Amendments to the Constitution of the Republic of Poland (Journal of Laws of 2006, No. 200, item 1471), Polish law provides for the general prohibition of extradition of a Polish citizen. The amended Constitution introduced an exception to this general rule. Art. 55(2) of the Constitution allows for the extradition of a Polish citizen upon the request of another state or an international court authority if such a possibility results from an international treaty ratified by the Republic of Poland or from an act executing a legal deed of law established by an international organisation to which the Republic of Poland is a member. This may happen when two additional conditions are met: the unlawful act covered by the extradition request was committed outside the territory of the Republic of Poland and was a crime in the light of the laws of the Republic of Poland or would constitute a crime in accordance with the laws of the Republic of Poland if it was committed in its territory, both at the time it was committed and at the time of filing the request”<sup>11</sup>.

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

An important issue in the case in question is a response to the query posed by the Supreme Court whether the extradition of Randy C. met the conditions allowing for the application of a constitutional exception to the prohibition of extradition of a Polish citizen. In order to provide an answer, the legal regulations specified in detail by the Supreme Court must be analysed.

The analysis of regulations by the Supreme Court begins with the Extradition Treaty between the Republic of Poland and the United States of America of 10 July 1996 as its provisions allow for the extradition of a Polish citizen. In Art. 4(1) of the Extradition Treaty, it is stated that “neither Contracting State shall be required to extradite its nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it is deemed proper and possible to do so”. As it was accurately concluded by the Supreme Court, it may be deduced from the contents of this regulation that the extradition of Polish citizens is permissible “as the Polish authority <shall have the power to extradite such persons> if it is deemed <proper> and <possible>”. It is beyond any doubt that in Randy C.’s case the United States filed an extradition request compliant with formal requirements specified in Art. 9 of the treaty with regard to offences committed by the pursued person, specified in the catalogue in Art. 2 of the treaty. Thus, in Randy C.’s case, constitutional conditions allowing for extradition were met; despite the fact that in this case the pursued person is a Polish citizen there is an international treaty which provides for a possibility of extradition and two additional conditions ensuing from Art. 55(2) of the Constitution of the Republic of Poland are met”<sup>12</sup>. It must be pointed out that the Extradition Treaty with the United States was signed at the time when the Constitutional Act of 17 October 1992 on the Mutual Relations between the Legislative and the Executive Institutions of the Republic of Poland and on Local Self-government<sup>13</sup> was in effect.

Further on in its justification, the Supreme Court adjudicates what position is occupied by the Extradition Treaty in the order of the Polish laws and at the same time indicates the misinterpretation of the District Court in K., which stated that “the Extradition Treaty with the United States of America does not exercise the same privileges as the treaties entered into at the time of the Constitution of the Republic of Poland of 1997 being in effect. In consequence, it was stated that an exception to the prohibition of extradition of a Polish citizen might not result from the international treaty ratified in that mode”<sup>14</sup>. The Supreme

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<sup>12</sup> *Id.*

<sup>13</sup> Journal of Laws of the Republic of Poland of 1992, No. 84, item 426.

<sup>14</sup> Decision of the Supreme Court of 3 February 2009, IV KK 367/08.

Court points to Art. 33 of the Constitutional Act of 17 October 1992 and emphasises that the treaty was ratified on the basis thereof. “There are no arguments convincing enough to acknowledge that international treaties entered into at the time of the Constitutional Act being in effect are not proper in form and do not constitute grounds for applying Art. 55(2) of the Constitution and Art. 615 of the Code of Criminal Procedure”<sup>15</sup> as Art. 33 of the Constitutional Act states that it is the President who ratifies and terminates international treaties of which the Sejm and the Senate must be notified.

The power provided for in Art. 33(2) of the Constitutional Act requires that ratification and termination of international agreements concerning the State’s borders, defensive alliances and agreements which entail the State’s financial obligations or the necessity to modify legislation must be authorised by virtue of an act. If an international treaty was entered into by the government on the basis of a general competence clause provided for in Art. 52(2) item 7 of the Constitutional Act concerning the matter specified in Art. 33(2) of the Constitutional Act, this treaty must be subjected to the ratification process<sup>16</sup>.

As it was stated by the Supreme Court, the Constitutional Act did not contain any resolution concerning the role of international treaties as the sources of law but gave a possibility of ratifying the treaty by the President without obtaining statutory authorisation<sup>17</sup>, which expressly results from Art. 33 of the Constitutional Act. Additionally, the Supreme Court emphasised that “the District Court in K. failed to take into account interim provisions and final provisions of the Constitution of the Republic of Poland which regulate the problem of the validity of international treaties made in the period preceding the adoption of the Constitution of the Republic of Poland. Article 241(1) thereof states that <International agreements, previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws of the Republic of Poland [*Dziennik Ustaw*] shall be considered as agreements ratified with prior consent granted by statute, and shall be subject to the provisions of Article 91 of the Constitution if their connection with the categories of matters mentioned in Article 89, para. 1 of the Constitution derives from the terms of an international agreement>”<sup>18</sup>.

In its judgement, the Supreme Court also stated that reference to the second stance of the District Court in K., *i.e.* concerning mutual relations between Art. 604(1) item 1 of the

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<sup>15</sup> *Id.*

<sup>16</sup> A. Wasilkowski, *Opinia dotycząca problemów prawnych w praktyce stosowania art. 33 i art. 52 ust. 2 pkt 7 ustawy konstytucyjnej z dnia 17 października 1992 r.*, Thesis no. 1, Lex 87231/1 (Prz. Leg. 1994.2.274).

<sup>17</sup> A. Wasilkowski, *Opinia dotycząca problemów prawnych w praktyce stosowania art. 33 i art. 52 ust. 2 pkt 7 ustawy konstytucyjnej z dnia 17 października 1992 r.*, 2 BIULETYN RADY LEGISLACYJNEJ, 274-280 (1994).

<sup>18</sup> Decision of the Supreme Court of 3rd February 2009, IV KK 367/08.

Code of Criminal Procedure and Art. 4(1) of the Extradition Treaty, was also justified. The Supreme Court acknowledged that “Article 604(1) item 1 of the Code of Criminal Procedure is consistent with the Constitution – in contrast to what was proven by the District Court in K. – in the scope in which the prohibition of extradition of a Polish citizen is provided for. The assumption of the mutual compliance of the two regulations is based on the adoption in the Polish law of two systems of international cooperation in criminal cases”<sup>19</sup>.

The former system is based on the regulations of the Code of Criminal Procedure while the latter is formed by international treaties. An international treaty may fully exclude the application of national regulations if a particular form of cooperation is established in it fully or to a certain extent. If a treaty does not specifically settle certain issues, the Polish court will be obliged to apply the regulations of national law which refer thereto. The subsidiary nature of national law is not restricted to the case when no international legal instrument is used. It is not permitted to adopt a general rule that with reference to the issues which are not regulated automatically by the treaty, the provisions of the Code of Criminal Procedure are applicable. It is more important to establish the will of the parties in a given respect rather than state the existence of a gap in the treaty. Therefore, the fact that a given issue has been omitted from a treaty or a convention does not always authorise application of the norms of local law in this case<sup>20</sup>.

Concerning the present case, the Supreme Court states in its judgement that “an independent regulation was entered into the extradition treaty which refers to the rendition of a citizen of the Requested country. The states which are the parties to the Extradition Treaty established the catalogue of situations in which extradition was inadmissible (*e.g.* in political crime cases). Therefore, it was stated that other situations not included in the catalogue might not give grounds for an extradition refusal”.

There exists the Extradition Treaty between the Republic of Poland and the United States of America which complies with the Constitution of the Republic of Poland of 1997. The treaty allows for extraditing a Polish citizen and the provisions of this treaty should be a legal basis for extradition procedures between the two countries. It was an obligation of the District Court in K. to consider the request for handover of a person pursued for the purpose of conducting criminal proceedings against this person submitted by the authority of the Requesting State and to verify whether that request could be taken into account with regard to extradition obstacles resulting first of all from the treaty.

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<sup>19</sup> *Id.*

<sup>20</sup> S. STEINBORN, KOMENTARZ DO KODEKSU POSTĘPOWANIA KARNEGO (VOL. III), ARTICLES 425-673 (2006).

It may be concluded from the above consideration of the Supreme Court that “the District Court in K. mistakenly evaluated the legal situation in Randy C.’s case. Article 4(1) of the Extradition Treaty allows for the extradition of a Polish citizen. In order for the court to make an extradition decision, pursuant to Art. 4(1) of the Extradition Treaty, two conditions imposed by the treaty must be complied with: extradition of a citizen must be <proper> and <possible>. Therefore, in each instance, it is the court’s obligation to verify the compliance with these conditions. The decision concerning rendition is facultative, so the court may agree to such an option stating, on the basis of objective and justified circumstances, that the extradition of Randy C. is in a given situation <improper> and <impossible>. However, it must be remembered that the Contracting Parties of the Extradition Treaty are bound by the principle of presumed good faith of the states. When this presumption is abandoned and it is stated that extradition is inadmissible, the Requested State must bear in mind that in this way the principle of reciprocity resulting from the treaty with the Requested Country is violated. Therefore, the refusal to extradite the state’s citizen should be justified with specific causes indicating, for example, that there is a real probability that human rights would be violated or that the extradition would be incompatible with the Polish legal order”<sup>21</sup>.

When making a decision concerning the rendition, the court must take into account Art. 4(2) which states that “if extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its competent authorities for a decision as to prosecution”. In this situation, the *aut dedere aut iudicare* principle must be applied – an offender must be extradited or prosecuted. The District Court in K. failed to implement this rule and thus, in the opinion of the Supreme Court, blatantly violated the provisions of the international treaty.

Finally, in its decision of 3 February 2009 (IV KK 367/08), the Supreme Court overruled the decision for cassation for which the Public Prosecutor General had applied and the case in the matter of admissibility of Randy C.’s extradition was submitted to the District Court in K. for judicial review.

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<sup>21</sup> Decision of the Supreme Court of 3 February 2009, IV KK 367/08; *cf.* decision of the Court of Appeals in Wrocław of 21 January 2004, II AKz 407/03, OSA 2004, no. 7, item 54.

## E. CONCLUSION

The Extradition Treaty between Poland and the United States of America, signed in Washington on 10 July 1996, is an international agreement ratified upon the consent expressed in an act.

The Polish law guarantees direct execution of the Extradition Treaty in the state law. The foregoing complies with Art. 87(1) and Art. 91(2) of the Constitution of the Republic of Poland of 1997, which directly define the catalogue of the sources of law that includes ratified international agreements which constitute a part of the national legal order and are currently applied. The ratified international agreements have precedence over an act, if the act is not in accordance with the agreement.

A constitutional complaint regarding this issue was lodged by Randy C., a Polish citizen, and it concerned the examination of conformity of Art. 4(1) of the Extradition Treaty between the Republic of Poland and the United States of America of 10 July 1996 with Art. 55(1) and 55(2) by virtue of Art. 2 and Art. 78 of the Constitution of the Republic of Poland<sup>22</sup>.

On 1 October 2009, by virtue of Art. 50 of the Constitutional Tribunal Act of 1997, the Constitutional Tribunal (hereinafter referred to as “the CT”) passed a temporary resolution on superseding the execution of a decision of the Minister of Justice concerning the extradition of *Randy C.*<sup>23</sup>, a citizen of Poland until the constitutional complaint was heard. It is worth mentioning that having made a temporary decision, the Court is obliged to observe it, and the temporary decision is limited, since it remains valid until the complaint is substantially settled<sup>24</sup>.

In the initial statement of reasons of the decision, the CT declared that “the fact that the execution of the decision on the extradition could trigger irreversible effects connected with considerable damage to the plaintiff weighs in favour of superseding the extradition of the suspect until the complaint is investigated”<sup>25</sup>.

The circumstances of this case, in particular the fact that the CT will consider the constitutional complaint within the scope of constitutionality of the bilateral Extradition Treaty (*i.e.* investigate the conformity of Art. 4(1) of the Extradition Treaty between the Republic of Poland and the United States of America of 10 July 1996 with Art. 55(1) and Art. 55(2) by virtue of Art. 2 and Art. 78 of the Polish Constitution) will exert significant influence

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<sup>22</sup> TK SK 6/10, Extradition of a Polish citizen, Randy Craig L., <http://www.trybunal.gov.pl/Sprawy/sprawy.htm>.

<sup>23</sup> Sygn. Ts 203/09.

<sup>24</sup> Z. Gromek, *Glosa do postanowienia TK z dnia 17 stycznia 2006 r.*, Ts 196/04. Teza nr 4, 56174/4.

<sup>25</sup> <http://www.pap.pl>.



on the regulations included in the Treaty, if the CT adjudicates non-conformity of the Treaty with the Polish Constitution of 1997.

It is worth mentioning that in 2006 Art. 55 of the Constitution was amended within the scope of extradition of Polish citizens under the European Arrest Warrant. Before the amendment in 2006, Art. 55(1) of the Constitution stated that the extradition of a Polish citizen was forbidden and thus the prohibition became a constitutional rule.

Due to the implementation of the framework decision of 13 June 2002 on the European Arrest Warrant (EAW), an amendment to the Constitution of the Republic of Poland of 1997 was crucial.

A conflict of the Code of Criminal Procedure and the Constitution of the Republic of Poland took place after the framework decision on the EAW had been passed, therefore, by virtue of the decision of 27 January 2005, file no. IV excerpt 23/04, the District Court in Gdańsk IV Criminal Division presented the Constitutional Tribunal with a legal question, concerning the conformity of Art. 607t of the Act of 6 June 1997 – the Code of Criminal Procedure<sup>26</sup>, whether the extradition of a Polish citizen to a European Union Member State was in accordance with Art. 55(1) of the Constitution of the Republic of Poland of 1997.

In its decision as of 27 April 2005, the Constitutional Tribunal claimed that article 607t(1) of the Code of Criminal Procedure did not comply with Art. 55(1) of the Constitution of the Republic of Poland<sup>27</sup> within the scope in which it allowed for the extradition of a Polish citizen to a European Union Member State by virtue of the European Arrest Warrant.

The Act amending the Constitution of the Republic of Poland of 8 September 2006 came into effect on 7 November 2007, and it allows for the extradition of a Polish citizen to another country or international judicial authority if such possibility results from an international agreement or an act which constitutes the execution of an act of law enacted by an international organisation, of which the Republic of Poland is a member.

The amendment of Article 55 of the Constitution of the Republic of Poland in the year 2006 provides for two exceptions. These are the following situations:

- the act that the request for extradition refers to was committed beyond the territory of the Republic of Poland and it constituted a crime by virtue of the law of the Republic of Poland, or would have constituted a crime by virtue of the law of the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment

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<sup>26</sup> Journal of Laws of the Republic of Poland of 1997, No. 89, item 555 as amended.

<sup>27</sup> Decision of the Constitutional Tribunal of 27 April 2005 (sygn. P 1/05).

as well as at the moment of filing the request; such an act does not require the fulfilment of conditions referred to in para. 2. subparas 1 and 2;

- the extradition is to take place upon a motion of an international judicial authority appointed by virtue of an international agreement ratified by the Republic of Poland, with reference to the crime of genocide which remains within the jurisdiction of the authority, crime against humanity, war crime or the crime of aggression<sup>28</sup>.

With reference to the foregoing, on 21 September 2011 the Constitutional Tribunal considered the constitutional appeal in question and adjudicated that Art. 4<sup>29</sup> of the Extradition Treaty between the Republic of Poland and the United States signed in Washington on 10 July 1996 is in compliance with Art. 55(1) and 55(2) by virtue of Art. 2 of the Constitution, and is not in compliance with Art. 78 of the Constitution. Furthermore, the Tribunal revoked the temporary decision of 1 October 2009, file no. Ts 203/09, which superseded the execution of the decision of the Minister of Justice of 24 August 2009 on the extradition and partial refusal to extradite the prosecuted person to a foreign country. In its justification, the Constitutional Tribunal stated that “Article 4(1) of the Extradition Treaty with the USA is an example of an optional clause which authorises a state to evade the extradition of its own citizen. The provision is to be interpreted in accordance with Art. 1<sup>30</sup> of the Extradition Treaty with the USA resulting in an obligation to extradite all persons prosecuted in a criminal procedure or found guilty of crimes which constitute the basis for extradition regardless of citizenship”. The Extradition Treaty with the USA results in a possibility of extradition of a Polish citizen which fulfils the condition referred to in Art. 55(1) and Art. 55(2) of the Constitution that the extradition of a Polish citizen is possible “if such possibility is the effect of an international agreement ratified by the Republic of Poland”<sup>31</sup>. The CT decided that the “power provided does not demand that the ratified international agreement order the extradition of a Polish citizen. By virtue of the constitutional regulations, a sufficient condition for the extradition of a Polish citizen is the

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<sup>28</sup> M. Makiela, *Basic differences between European arrest warrant and extradition procedures*, X-XI MISCELLANEA IURIS GENTIUM, 40 (2007-2008).

<sup>29</sup> Article 4. Nationality.

1. Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so.

2. If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its competent authorities for a decision as to prosecution.

<sup>30</sup> Article 1. Obligation to Extradite.

The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State seek for prosecution or have found guilty of an extraditable offence.

<sup>31</sup> SK 6/10.

regulation included in a ratified international agreement which results from such a possibility. In other words, the extradition of a Polish citizen is permissible not only when a ratified international agreement triggers such obligation, but also when such a possibility results from it”<sup>32</sup>.

The lawful decision of the court on the permissibility of extradition constitutes an opinion, since the final decision on the request of a foreign country to extradite a person shall be taken by the Minister of Justice. However, when the court decides not to permit extradition, the Minister of Justice must not extradite the persecuted person to a country that has filed the request. “Thus, the factual extradition of a persecuted person to the authorities of the country which files a proper request is not preceded by judicial proceedings, but by proceedings carried out by the Minister of Justice, by virtue of the Code of Criminal Procedure. Therefore, the adjudication of the Minister of Justice as an executive authority is not an administrative decision in accordance with the Code of Administrative Procedure, but adjudication by virtue of the provisions of the Code of Criminal Procedure, alternatively with reference to appropriate provisions of ratified international agreements. The Code of Criminal Procedure does not provide for any means of appeal against the adjudication”. The CT stated that “a possible objection of non-conformity with Art. 78 of the Constitution might be raised by the plaintiff against appropriate provisions of the Code of Criminal Procedure, and not Art. 4 of the Extradition Treaty with the USA which authorises the Minister of Justice to extradite the state’s own citizens prosecuted in a criminal procedure or found guilty of crimes which constitute the basis for extradition by the authorities in the requesting country if it deems it proper and possible”<sup>33</sup>. A question arises with reference to the court decision, whether the legal regulations provided for in our legal system protect a Polish citizen properly from extradition.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

**ADMISSIBILITY OF INTERFERENCE  
IN THE RIGHT TO FREEDOM:  
INTERNATIONAL REGULATIONS AND POLISH  
LEGISLATION.  
AN OUTLINE OF THE ISSUE**

by

**Krzysztof Kycik<sup>\*</sup>**

**A. GENERAL COMMENTS**

Legislation of most of the contemporary countries includes regulation stating that every man has the right to freedom. This right is numbered among the first generation of human rights. Though the notion of human rights is quite new in the development of policy and society, it is an important criterion deciding about the law-abidingness of a state. Human rights are fundamental principles and do not need justification. They belong to every individual, being a part of his humanity. However, any departure from law requires justification. It is known that there are situations when deprivation of a man's freedom is necessary on account of other equally important values. The point is that the interference in the sphere of personal human rights is not restricted to the cases earlier clearly described and is in accordance with principles of a law procedure.

Acknowledging admissibility of deprivation of freedom, it is to be remembered that lack of appropriate legal regulations concerning this issue may result in abuse of power. In a legal state, the constitution describes conditions on the basis of which other values are treated

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superior to human rights. The constitution also refers to ways and range of possible limitations, however, every case of this kind of activity has to be justified and based on legal rules.

## **B. INTERNATIONAL LEGAL REGULATIONS CONCERNING THE RIGHT TO FREEDOM**

Issues concerning the right to freedom for many years have been a subject of interest of legal science. For a few dozen years, a dynamic development of legal regulations concerning the right to personal freedom has been observed<sup>1</sup>.

The basic legal act standardizing the issue of human rights is the constitution. A presentation of human rights in this act provides a man with a solid protection. It is accepted that all kinds of restrictions, such as interference in the sphere of freedom, are permissible only when the constitution allows it and it is possible only in accordance with the act<sup>2</sup>.

Currently, within the range of the right to freedom, a very important role is played by international legal acts. They should be briefly discussed now. An essential international document concerning the right is the **Universal Declaration of Human Rights** of 1948. According to Article 3, every man has the right to freedom and security of his person. Being the first document of the kind, the declaration has inspired other international legal acts and it has had a great significance in the process of popularization of the idea of human rights protection all around the world, including the right to freedom. The Universal Declaration of Human Rights does not have a formal binding character, but it has had a significant role in the international law system since it was enacted. It has become a basis of many UN resolutions. Constitutions of numerous countries cite the declaration quoting its provisions. The declaration influences legislative and law practice of many countries. In accordance with a thesis predominating the science of international law, the Universal Declaration of Human Rights is legally binding as a result of its transformation into an international habit<sup>3</sup>.

**The International Covenant on Civil and Political Rights** enacted in 1966 should be mentioned as well. It includes many significant guarantees for people deprived of freedom. Article 9 thereof ensures the right to freedom and safety as well as prohibition of using

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<sup>1</sup> W. Studziński, *Prawo do wolności i bezpieczeństwa osobistego* (The Right to Freedom and Personal Safety) in *PRAWA I WOLNOŚCI I I II GENERACJI* (Rights and Freedoms of 1st and 2nd Generation), 91 (A. FLORCZAK, B. BOLECHÓW EDS., 2006).

<sup>2</sup> J. HOŁDA ET AL., *PRAWA CZŁOWIEKA. ZARYS WYKŁADU* (Human Rights. An Outline of Lecture), 33 (2004).

<sup>3</sup> R. BIERZANEK, J. SYMONIDES, *PRAWO MIĘDZYNARODOWE PUBLICZNE* (Public International Law), 268 (2002).

groundless detention and arrest. According to this act, a detained subject is to be informed about reasons of the detention and notified of the charges. A man deprived of freedom has to be brought before an official authorized to hear his case as quickly as possible. The right may be restricted by the legal actions of the state for protection, security, order, health and public morality reasons. Since the act was ratified by many countries, it has a considerable significance on an international ground<sup>4</sup>.

Legal regulations of the matter are included in another act, the **European Convention for the Protection of Human Rights and Fundamental Freedoms**. The Convention describes the issue of freedom in a broad manner since it enacts a detailed catalogue of grounds for imprisonment to be possible. Due to an effective protection mechanism the basis of which is constituted by the convention and many judgments, it may be recognized as the most important international legal act concerning personal freedom of an individual.

The acts were ratified by Poland and it should be remembered that in accordance with Article 87 (1) of the Constitution of the Republic of Poland they are the sources of law in effect on the territory of Poland.

After a general review of legal regulations, it is worth taking a closer look at the **Convention for the Protection of Human Rights and Fundamental Freedoms** due to its significant practical meaning<sup>5</sup>. **Article 5 thereof** enacts a principle by which everyone has the right to freedom and personal safety<sup>6</sup>. The regulation serves to protect an individual against arbitrary decision concerning short-time imprisonment. The notions of freedom and security refer only to physical freedom of a man and to safety of his person<sup>7</sup>. The mentioned Article 5 ensures protection only against imprisonment and not against other restrictions of an individual's physical freedom. The definition of imprisonment depends on circumstances developing in a given case.

Despite the fact that the Convention forbids imprisonment in principle, it describes procedural and material premises which, when fulfilled, allow a legal and permissible interference in the area of personal freedom. On the basis of Article 5 (1), there may be admissibility premises of applying imprisonment. These are: existence in the internal law system of a state legal regulations concerning deprivation of freedom, application of the regulations in a correct way by the organs of the state, or basing deprivation of freedom on

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<sup>4</sup> *Id.*, 271.

<sup>5</sup> Journal of Laws of the Republic of Poland of 1993, No. 61, item 284.

<sup>6</sup> HOŁDA, note 2, 118.

<sup>7</sup> M. NOWICKI, WOKÓŁ KONWENCJI EUROPEJSKIEJ (Around the European Convention), 119 (2006).

only one of the legal provisions listed in Art. 5 (1). Namely, a man can be deprived of freedom in the following circumstances<sup>8</sup>:

- on the strength of a sentence of an appropriate court;
- after not submitting to a decision issued by a court or to ensure performing a duty described by binding regulations;
- to bring somebody before a competent body if there are premises allowing to suspect a person of having committed a crime or there is an assumption of necessity to prevent him from committing a crime or escaping after having done so;
- in case of detaining a juvenile delinquent to establish parental supervision or in accordance to regulations to bring him before a competent body.
- in accordance with the regulations concerning a person who may transmit infectious diseases, or a person who suffers from mental disease, is an alcoholic, a drug addict or a vagrant.
- in case of detaining or arresting a person to prevent him from entering a country or against whom extradition proceedings have been instituted.

It is a reference to the law of a given state whose legislation has to possess appropriate regulations describing clearly the deprivation of freedom issues so that the results of its application in some specific cases may be known in advance. On the basis of its content, imprisonment which is against international law is also forbidden.

Taking into consideration the severity of interference in the sphere of the right to freedom, it needs to be discussed in the context of **the temporary arrest**. The possibility of imprisonment before the decision is final and binding has always been triggering off much controversy and debate. It happens that an accused towards whom preventive measures have been applied are later acquitted on the strength of a legally valid ruling.

While analysing statistics, it is visible that the number of people temporarily arrested and later acquitted makes a scanty percentage of the judged ones. In Poland within a few past years, the number of the cases has not changed by a considerable degree. In 1995 there were 195 imprisoned people to 251 019 judged, in 2002: 335 imprisoned to 449 227 judged, in 2003: 319 to 516 398 judged.<sup>9</sup> Despite the fact that it is a small number, every case in a particular way violates the right to freedom.

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<sup>8</sup> Studziński, note 1, 97.

<sup>9</sup> A. Kiełtyka, *Środki zabezpieczające w polskim procesie karnym a ochrona praw człowieka* (Precautionary Measures in Polish Penal Procedure and Protection of Human Rights) in EUROPEJSKIE STANDARDY OCHRONY PRAW CZŁOWIEKA A USTAWODAWSTWO POLSKIE (European Standards of the Protection of Human Rights and Polish Legislation), 233 (E. DYNIA, CZ. KŁAK EDS., 2005).

The temporary arrest is necessary to ensure the correct course of criminal proceedings. However, many of the accused, especially of felonies, might interfere in the investigation and make it significantly tougher to be carried out. The accused may escape, hide, urge others to give false testimony or in any other way make the conducted investigation difficult. In this situation, law enforcement bodies act at the brink of adhering to the rights of the accused and realization of the aims of the trials. On account of specific features of the temporary arrest and the importance of the issue, it was recommended to draw up application regulations on an international ground.

It is worth considering the matter with regard to **Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms**<sup>10</sup>. According to the Convention, the basis for a detention or an arrest may be a justified suspicion of having committed a crime, preventing a crime from happening or preventing a suspect from escaping after having committed a crime. Bringing a suspect before a ruling body is a *sine qua non* for application of deprivation of freedom. Against a background of the above-mentioned premises, the main problem is the definition of a justified suspicion. The judgments of the European Court of Human Rights are helpful at this point, in accordance with which it is required to present facts and information allowing to assume that a given person may have committed a forbidden act. Since it is difficult to formulate general principles, we may consider the existence of a justified suspicion only in a specific case.

A case when a person on the basis of a justified suspicion was detained and later released before he was brought to a governing body is considered to be in accordance with the Convention. It is essential that the governing body intended to do so<sup>11</sup>.

A temporary arrest is a permanent preventive measure in the case of which the Convention makes additional conditions as to the applied time. Apart from a justified suspicion there have to be some other promises explaining it. From the Court's rulings, it appears that in such a situation, it performs a detailed examination of the circumstances of a given case including the activity of a body conducting the investigation with respect to the conformity to the procedure.

Apart from setting the limits to the right to freedom, the articles of the Convention regulate many important rights that the detained or temporary arrested person is entitled to. As an example, it is worth mentioning the right to be informed about reasons of the detainment

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<sup>10</sup> Journal of Laws of the Republic of Poland of 1993, No. 61, item 284.

<sup>11</sup> Studziński, note 1, 102.



and charges levelled against the detainee, the right to a reasonable date of the trial, and the right to be released from custody while the proceedings are in progress.

The right to compensation an arrested person is entitled to as a result of law violation is worth mentioning. Adherence to the rules is supervised by **the European Court of Human Rights**. As shown above, the Court's judgments have a significant meaning in applying the Convention, which leads to crystallization of its decisions.

Other international legal acts include regulations of the issue to show that the right to freedom is one of the most important rights a man is entitled to and that it is widely considered so. It is confirmed by the regulations present in every area of the world. At this point other international, regional legal acts containing regulations of the issue may be found to show that the right to freedom belongs to the most important rights a man is entitled to and it is commonly considered so, which is proved correct by law regulations present in every area of the world.

As far as the Middle East and Africa are concerned, by way of introduction, the Arab League of Muslim States from the African continent should be mentioned<sup>12</sup>. The League is connected with coming into existence of the Arab system of human rights and freedom protection. Within its confines, a regional Arab Commission of Human Rights with representatives of each member states was established.

The Commission's activity contributed to acceptance of regional regulations of human rights. These are the Cairo Declaration on Human Rights and the Arab Charter on Human Rights. Provisions of the Cairo Declaration on Human Rights are based on the Muslim religion. As regards the issue concerning freedom in the Declaration, it is connected with historical experiences of the Arab countries and their fights to gain state independence. The content of the act in a clear way emphasizes the fact that every human being is born free and remains so for the whole life. From the formal point of view, the Declaration is an act of international law and has not a binding power. Yet it confirms exclusiveness of human status' regulations in the cultural area to legal norms of the religious law whose principles are an expansion of its provisions. It presents uniqueness of the law system of human rights protection and its otherness from a common protection model on the Continent. Apart from this, there is another document describing a basic set of guaranteed rights of an individual and observance of freedom and the rights included in the scope of protection. It is the Arab

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<sup>12</sup> A. BISZTYGA ET AL., SYSTEM OCHRONY PRAW CZŁOWIEKA (The System of Protection of Human Rights), 273 (2005).

Charter on Human Rights<sup>13</sup>. There is a reference to the Cairo Declaration on Human Rights in the preamble. Yet its content lacks reference to the religious law as clear as in the Declaration. It may be noticed that the aim of the Charter was to grant the act a character similar to basic documents legislating the range and principles of protecting the freedom and the rights of an individual<sup>14</sup>. The catalogue of rights a subject is entitled to mentions the right to freedom and personal safety in connection to an arrest or imprisonment without legal justification and being brought before court to hear the case. The rights are guaranteed to every man regardless of whether he is a citizen of an Arab country which is a Party to the Arab Charter on Human Rights or not.

**The African Human and Peoples' Rights Charter** acknowledges the right to personal freedom and safety. Yet a man may be deprived of freedom because of reasons and conditions provided for in a legal act. The Charter makes a legal deprivation of freedom conditional on the law of a state<sup>15</sup>. Its content lacks provisions concerning guarantees for the imprisoned or possibilities of seeking compensation for law violation by having been deprived of freedom.

While presenting international legal acts, the freedom and human rights protection system in Latin America is worth mentioning. The most important Latin American document in the field of human rights protection is the American Convention on Human Rights. The act was adopted in 1969 but implemented in 1978. According to the Convention, the basic human rights arise not due to being a citizen of a country but due to the characteristic of a human being<sup>16</sup>.

In comparison to the Convention for the Protection of Human Rights and Fundamental Freedoms, the act includes a higher number of better described rights of an individual, and it is also more thorough. The provisions of the Convention are under control of the Inter-American Court of Human Rights and Inter-American Commission on Human Rights. The document listing rights and freedoms of an individual points out to the set of the most important rights, namely, the right to freedom, the right to a fair trial and a great number of criminal guarantees aiming at protecting him. The Convention mentions situations when detention or arrest are in accordance with the law and refers to the legislation of Member States without describing the cases in its content. The solution is a significant, or simply

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<sup>13</sup> *Id.*, 291.

<sup>14</sup> *Id.*, 292.

<sup>15</sup> A. ŁOPATKA, JEDNOSTKA I JEJ PRAWA (The Individual and his/her Rights), 77 (2002).

<sup>16</sup> BISZTYGA, note 12, 303.

complete, way deprives international bodies formed to control the observance of it by individual states of a possibility of a substantial examination of domestic regulations<sup>17</sup>.

Presenting regulations of international acts and documents which standardize human rights, including the right to freedom as the most important one, the way the Catholic Church comprehends the issue is worth mentioning. On the grounds of a scope and influence of the Church's teaching on people in many states, its outlooks have a significant value. A groundbreaking event propagating the issue by the Catholic Church was the Second Vatican Council, during which a lot of time was devoted to human dignity and rights taken into account by the Dogmatic Constitution on the Church in the modern world. Another important statement of the Church concerning this matter is the Encyclical of John Paul II "*Redemptor Hominis*" which, among other things, states that peace ultimately comes down to respecting inviolable human rights. It is a particularly severe manifestation of a fight with a man if the human rights are violated during peace, which is difficult to be combined with any program describing itself as humanistic. However, in 1944 on the occasion of the 25<sup>th</sup> anniversary of declaration of the groundbreaking document in the field of human rights mentioned above, the Universal Declaration of Human Rights, the Pontifical Commission expressed its opinion. According to the Commission, experiences of the time pointed out how many Christians were far from bearing witness to the respect of their duties concerning the area of inviolability of human rights. These outlooks advocating the need for observance and protection of the human rights, including the right to freedom, are constantly present and valid in the teaching of the Church, especially in the modern times.

### **C. THE POLISH LEGAL REGULATIONS CONCERNING THE RIGHT TO FREEDOM**

As far as **the regulation of this issue in the Polish law** is concerned, the grounds are provided by **the Constitution of the Republic of Poland, and particularly Article 31** according to which freedom is protected by law and Article 41 stating that everyone is ensured with personal inviolability and personal freedom. Deprivation or restriction of freedom may take place only on the basis and according to rules described in the act<sup>18</sup>. It is also ensured that everyone deprived of freedom has the right to a court sentence, the right to appeal, the right to inform family and the right to be informed of the reasons of imprisonment

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<sup>17</sup> ŁOPATKA, note 15, 77.

<sup>18</sup> Journal of Laws of the Republic of Poland of 1997, No. 78, item 483.

in a given case. There are also provisions concerning imprisonment and temporary arrest. Namely, an imprisoned person should be within 48 hours handed over to a court's disposal. If the court's decision together with accusations are not delivered within 24 hours, a detainee is to be released. According to Article 41, every detainee should be treated in a humane manner. The Constitution guarantees the right to compensation.

In practice, a more important role is played by acts which meet requirements presented by the Constitution of the Republic of Poland and international law. In the context of the right to freedom, the most significant act in Poland is **the Code of Criminal Procedure**<sup>19</sup>, and particularly its provisions describing preventive measures, that is conditions of temporary detention, and the **Executive Penal Code**<sup>20</sup>.

The Polish law has many diverse possibilities of a governing body's interference in the freedom of a man. Taking into consideration the nature of an applied measure, the following types may be singled out:

- criminal measures - imprisonment as a result of a sentence;
- preventive measures – provisional arrest and detention;
- diagnostic, medical measures.

Human rights to freedom and safety in Poland are also protected by rulings of judicial bodies, such as the Constitutional Tribunal. In its rulings, it indicates that deprivation of freedom may only occur in cases described by legal acts and in cases concerning a citizen's right and freedom this kind of interpretation should be applied which leads to strengthen and expand rights and liberties<sup>21</sup>.

A proposal saying that Polish legislation within the scope of human rights and safety protection meets requirements of international acts and is appropriately applied may be put forward.

While discussing this topic, it has to be mentioned that there is the **European Committee on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** constituting a monitoring mechanism provided for by the European Convention on Human Rights and Fundamental Freedoms and another international document, the European Prison Rules. The European Committee to Prevent All Persons from Being Subjected to Torture and Other Cruel, Inhuman

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<sup>19</sup> Journal of Laws of the Republic of Poland of 1997, No. 89, item 555.

<sup>20</sup> Journal of Laws of the Republic of Poland of 1997, No. 90, item 557.

<sup>21</sup> ŁOPATKA, note 15, 78.

or Degrading Treatment or Punishment pays visits to prisons, including the area of Poland, and examines the way imprisoned people are treated.

**The European Prison Rules** were accepted by the Committee of Ministers of the Council of Europe. Provisions included there set standards for the prison system in most of European countries. On 11 January 2006 new European Prison Rules were implemented, which substituted quite old ones in effect since 1987<sup>22</sup>. They are a groundbreaking approach to imprisonment. The gravity of the rules consists in admitting that all that can be done is not to allow breaking of the law with regard to prisoners only on the grounds that they are prisoners. Prisoners have human rights and it should be kept in mind.

The right to freedom, along with the right to life, is one of the most significant rights of a man and it requires special protection which should be guaranteed by both international regulations and domestic legislation. As pointed above, there are many legal acts of international and domestic law providing for observance of the rights. Nevertheless, this field should be under special care in the legal system of every state.

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<sup>22</sup> M. Płatek, *Europejskie Reguły Więzienne z 2006 roku* (The European Prison Rules of 2006), 2 PAŃSTWO I PRAWO, 3 (2008).

## **THE CONDITIONS IN SOUTH AMERICAN PRISONS AND RESPECT FOR WOMEN'S RIGHTS**

by

**Anna Satława<sup>\*</sup>**

### **A. INTRODUCTION**

The women's rights in South America are very often violated; there is no exception for the imprisoned women. Although the international organizations have asked the South American countries many times to respect human rights, the situation of women there is still really bad. Not only are the basic human rights violated there but there is also no respect for the minimal standards, which should be guaranteed for the prisoners. To understand the essence of the problem it is essential to show the actual situation in South American countries and the reasons for committing crimes by women as well as to point out the examples of breaking rights of imprisoned women.

### **B. THE STATISTICAL DATA**

Women commit fewer crimes than men, which results from their nature. Unfortunately, there are some countries where the women's proportional share in the total number of prisoners is relatively high. Countries of Southern America fall into such a group. In 2008 and 2009<sup>1</sup>, the highest number of imprisoned women in South America was in Bolivia – as many as 12% of all imprisoned people there. The successive places were taken

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<sup>1</sup> All statistical data come from the website of King's College of London ([www.kcl.ac.uk](http://www.kcl.ac.uk)); according to the data of 2007, 9 % of prisoners in French Guiana were women, but because of the lack of the latest data, this country is skipped in the list above.

by Ecuador (9,8%) and Chile (8,2%). The proportional share of women in the remaining countries was higher than 5%. At this time, for example, in Poland the incarcerated women constituted only 3,1 % of all prisoners. It is noticeable that one of the countries which have the highest percentage of imprisoned women in Europe is Spain, and it amounts to 7,9%, while the average share in Europe is 4,8% (look at the diagram below). The reason for such a state of affairs can lie in the historical conditionings of South American countries. Most of them belonged to the Spanish colonial empire. Therefore, it is not a coincidence that women in these countries, like in Spain, commit more crimes than women in other countries.

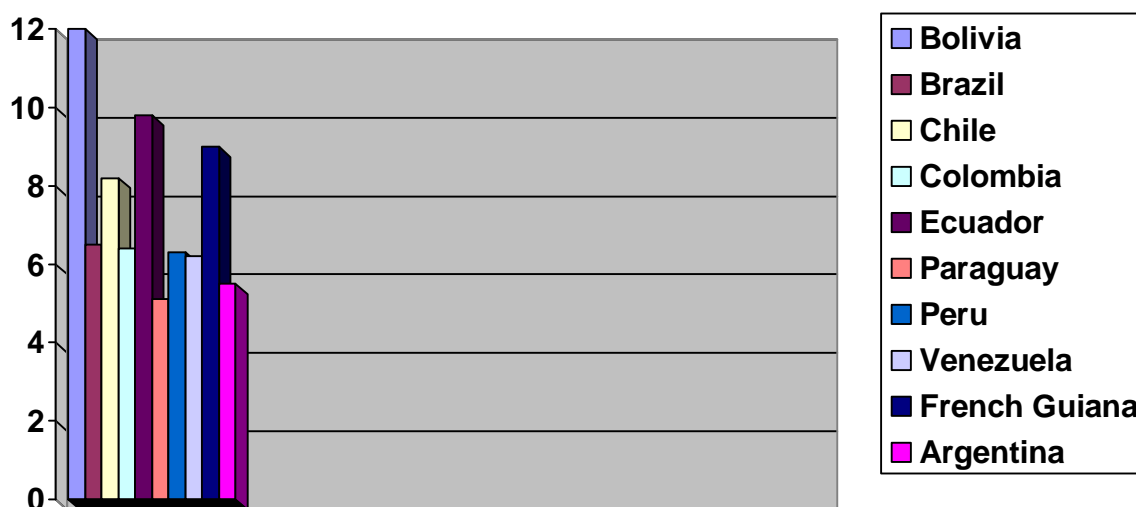


Diagram 1. Percentage of women within the total number of prisoners.

Argentina – 5,5% (31 December 2007);

Bolivia – 12% (2008);

Brazil – 6,5% (June 2009);

Chile – 8,2% (31 July 2009);

Colombia – 6,4% (June 2009);

Ecuador – 9,8% (August 2008);

French Guiana – 9% (1 October 2007);

Paraguay – 5,1% (12 December 2008);

Peru – 6,3% (June 2009);

Venezuela – 6,2% (19 September 2008)<sup>2</sup>.

The first diagram shows the percentage of women held in South American prisons within the total number of prisoners in 2007 – 2008.

<sup>2</sup> Statistical data taken from: King's College of London ([www.kcl.ac.uk](http://www.kcl.ac.uk)).

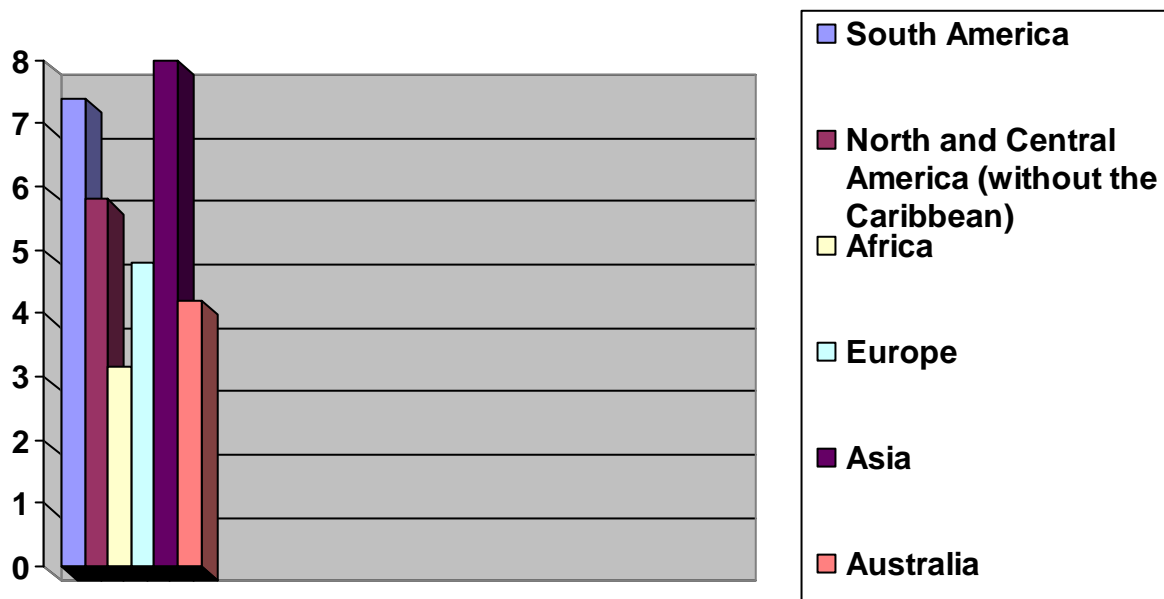


Diagram 2. Percentage of women within the total number of prisoners.

South America – 7,4%;

North and Central America (without the Caribbean) – 5,8%;

Africa – 3,17%;

Europe – 4,8%;

Asia – 8%;

Australia and Oceania – 4,2 %.

The second diagram shows the average proportional share of women within the total number of prisoners on each continent in 2007 – 2009 (the diagram does not include countries where the number of prisoners is fewer than 50 people, especially European “mini countries”, because the percentage of inmates is disproportionately high there). It is worth mentioning that the highest number of imprisoned women is in Asia. In Hong Kong, the percentage of imprisoned women is over 28%. In the rest of Asian countries, the number ranges from 1,5% to 15%. South America is the second continent in terms of the largest number of imprisoned women, but the percentage of women prisoners there is never lower than 5,5%<sup>3</sup>.

### C. THE REASONS FOR COMMITTING CRIMES BY WOMEN

In the literature there are a lot of analyses concerning the reasons why women commit crimes. One of the main causes is the violence used against them. The annual reports of

<sup>3</sup> Statistical data taken from: King’s College of London ([www.kcl.ac.uk](http://www.kcl.ac.uk)).



Amnesty International and other international organizations are full of the information about cases of violence when the victims are women from South America. This problem also touches several-year-old girls. The violence occurs not only as the domestic form of victimization but also as beatings and rapes of women. It is worth noticing that some of the Latin American countries (Nicaragua, Chile, El Salvador) implemented total prohibition of abortion, even when the child came from a rape<sup>4</sup>. In the case of South American countries the slogan: “Violence makes violence” can be applied. Beaten and humiliated women are more aggressive and are more often prone to break the law than the women who are not subject to ill-treatment. The researchers underline that women who were mistreated in their childhood or who participate in acts of aggression every day are more inclined to commit crimes<sup>5</sup>.

The main cause of violence in South American countries is the historical past of the region. The supremacy of men over women (*machismo*<sup>6</sup>) is generally accepted and it fixes the place of women in the social hierarchy. Therefore, violence used against them is not considered to be something unusual or wrong – it is a normal situation. Alcohol and drugs, which are often used there, intensify the negative reaction of men against women, increasing the aggression directed against them. It is very easy to obtain drugs in South American countries. The biggest drug cartels operate in this region. Narcotics not only stimulate people’s behaviour but they are also a potential cause of numerous crimes. Their availability and the easy money which can be made thanks to them constitute temptation for both men and women who live there.

The people from South America often commit drug-related crimes because they are forced by poverty to do so. The research on the economic and social conditions in South America shows that its countries show very poor economic development, which has negative consequences on people’s lives, especially during the crisis. There is also a disproportion between the well-situated higher social class and the poor one, especially from the rural areas. That situation makes the social difference deeper and intensifies aggression.

In the opinion of the researchers<sup>7</sup>, the high rate of criminality in South American countries is also caused by the unreliable political situation as well as by the lack of trust in judicature and justice administration. It is the reason for a large so-called “dark number” of

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<sup>4</sup> See Amnesty International Report 2008.

<sup>5</sup> H. Fair, *International review of women’s prison*, 184 PRISON SERVICE JOURNAL, 3-8.

<sup>6</sup> *Machismo* is prominently exhibited or excessive masculinity. As an attitude, *machismo* ranges from a personal sense of virility to a more extreme male chauvinism. In many cultures, *machismo* is acceptable and even expected (see: <http://en.wikipedia.org/wiki/Machismo>).

<sup>7</sup> ENCYCLOPEDIA OF CRIME AND PUNISHMENT, 1001-1007 (D. LEVINSON ED., VOL. 3, 2002).

the crimes<sup>8</sup>. The precise number of criminals and their victims stays unknown, especially because a lot of crimes are domestic violence cases. It is said that only 17% of the crimes are notified of to the proper organs. Women victims are afraid of being stigmatized so they do not report the violence acts committed on them. In Amnesty International Report of 2009 regarding Americas, the following words of one of the victims are quoted:

“Being raped, it makes you (...) a person without rights, a person rejected from society and now, in the neighbourhood I live in, it’s as though I am raped every day because every day someone reminds me that I should put myself in a corner, that I shouldn’t speak, I should say nothing” (Rose (not her real name), interviewed by Amnesty International in Haiti, March 2008)<sup>9</sup>.

There are a lot of women who have such problems. They do not count on the legal institutions so their aggression grows and finally they commit crimes.

Most crimes are drug offences (sometimes only petty crimes<sup>10</sup>), but apart from them women also commit crimes against property, especially robberies. The main reason is the difficult financial situation and great material disproportion between the people who live there. It is noticeable that the punishment administered for this kind of crimes is often not proportional to the action.

To sum up, the main reason why women perpetrate crimes is the omnipresent aggression that surrounds them every day as well as poverty and low economic development, unreliable political situation, lack of trust in the limbs of the law and availability of drugs. However, the first and foremost cause of the issue in question results from the historical past of South America.

#### **D. THE SITUATION IN SOUTH AMERICAN PRISONS AND THE STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS**

After the analysis of the reasons for committing crimes by women, it is essential to examine the situation in prisons for women in South America. The basic standards which should be in prisons were written in 1955 in the so-called “Standard Minimum Rules for the Treatment of Prisoners”, which were approved by the UN Economic and Social Council in

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<sup>8</sup> “Dark number of crime – the number which means the result between the number of crimes which were really committed and the number of crimes, about which the information came to the limbs of the law (police, public prosecutor’s office)” (translated by e-prawnik.pl).

<sup>9</sup> See: <http://report2009.amnesty.org/en/regions/Americas>.

<sup>10</sup> See: J. MARINER, J. CAVALLARO, BEHIND BARS IN BRAZIL (1998).

1977. The Standards were also recognized by countries of South America. The document contains a principle that women ought to be treated in an appropriate way and the state should guarantee them suitable conditions during imprisonment.

One of the main rules is the separation of men and women. It is not allowed to place them in the same cells (Art. 8 (a) of the Standard Minimum Rules). However, this regulation has been broken many times in the South American countries and women have been confined together with men. The Report of Human Rights Watch about Brazil is really terrifying. It is written in the document that in one of the states, named Para, in November 2007 an adolescent girl was locked with 20 men for 15 days at a police station and was brutally raped by them<sup>11</sup>.

The Report also states that in January 2008, 119 women were imprisoned in Sao Paulo in a jail designed for 12 people which did not have a part of the roof. There was 1 square metre per woman. According to the Standards of Minimum Rules, every prisoner must have his/her own cell; only exceptionally can he/she share it with an inmate. Everyone should also have their own bed. Unfortunately, in South America women do not have even mattresses to sleep on.

Furthermore, the said document states that criminals who committed different kinds of crimes should be isolated. Recidivists are not allowed to share cells with people who perpetrated a crime for the first time and it is forbidden for civil prisoners to stay in the same cells as criminal prisoners (Art. 8 of the Standards). Unfortunately, it is only wishful thinking. The imprisoned women in South America complain that there is no proper division of prisoners – all of them are treated as if they had committed the same crimes<sup>12</sup>.

There should be appropriate facilities and access to the hygienic and toilet articles and medical services. There ought to be also a possibility to borrow a book, which would guarantee personal development. Furthermore, Art. 11 of the Rules requires that prisoners stay in the cells with sufficient access to light

Pregnant women should be treated in a special privileged way. The Standards of Minimum Rules provide that women before and after delivery ought to receive medical care. The child born in a jail shall be registered in the proper office (Art. 32(1) of the Standards). Unfortunately, the situation in South American countries is far from the minimum standards also in this matter. In Sao Paulo case, mentioned in the Human Rights Watch Report, four of

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<sup>11</sup> *World Report 2009: Brazil Chapter* (Human Rights Watch – <http://www.hrw.org>).

<sup>12</sup> Maria Emilia Guerra Ferreira, *Carandiru Prison Sao Paulo. A producao Espaaeranca* (1996), from: *Brazilian Women's Prison Conditions*, SEJUP (*Servico Brasileiro de Justica e Paz*), 226 NEWS FROM BRASIL, 13 MARCH 1997.

119 women kept in inhuman conditions were pregnant; one of them was there with her newborn child<sup>13</sup>.

The South American prisons offer neither good conditions for childbirth nor proper care to a mother and her child. They must often sleep on the floor, without a bed or mattress. The women are refused the possibility to go to the bathroom or have some toilet articles. This can be the cause of women's illnesses<sup>14</sup>.

In publications about prisons in South America, the authorities are accused of treating the prisoners like a worse category of people or just like animals<sup>15</sup>. It is underlined that women are ill-treated, irrespective of the acts they committed. The aggression against them is often not proportional to acts they were condemned for. The examples of torture used on women prisoners are: kicking, forcing them to be naked, electric shocks, or walking on the abdomen of a pregnant woman<sup>16</sup>. The overfilled prisons are also conducive to aggression.

In opinion of the women who stay there<sup>17</sup> and the researchers of the issue, the prisons are not only full of aggression and violence but also of corruption – those who have money stand a chance either to have an advocate or to be treated better by the warders. Women without money are devoid of the proper legal aid<sup>18</sup>. There is no basis to talk about rehabilitation of prisoners and their social readaptation.

According to the Standards of Minimum Rules (Art. 71 and the next one/ones) prisoners should work and, if possible, they ought to work outside the prison<sup>19</sup>. Sometimes women from South American countries work but usually in the prison as cooks, washerwomen, charladies, which makes it difficult for them to come back to the society in the future.

One of the forms of women discrimination in South America is the limitation of the visits of the family and friends in the prisons. The research shows that the people who would like to visit women in prisons are much more controlled than those who wish to meet men. Not only is the family connection with imprisoned women checked but so is the visitors' health. There is no guarantee of proper conditions for conversation with imprisoned women. There is only a very little corner for them<sup>20</sup>.

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<sup>13</sup> *World Report 2009: Brazil Chapter* ( Human Rights Watch – <http://www.hrw.org>).

<sup>14</sup> See: J. EASTERDAY, HUMAN RIGHTS LAW IN LATIN AMERICA, CENTER FOR LATIN AMERICAN STUDIES, UNIVERSITY OF CALIFORNIA – TINKER SUMMER RESEARCH REPORT (2006).

<sup>15</sup> Ferreira, note 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Mariner, note 10.

<sup>19</sup> Easterday, note 14.

<sup>20</sup> *Id.*

## **E. CONCLUSIONS**

As shown above, the situation of imprisoned women in South America is really bad. On every step, the human rights are violated, and especially the Universal Declaration of Human Rights and the Standard Minimum Rules for the Treatment of Prisoners are not respected. It is worth underlining that standards set by the United Nations are only the minimum guarantees which the state should provide for the people who are imprisoned. Unfortunately, even this minimum is not respected. The appeals submitted to South American countries by the international organizations have not made the situation better. The Standard Minimum Rules require that women be treated better because of their physiological construction and the role they have in the society. Unfortunately, the historical past and the status of women in South American countries are far from the model. The change of law and the appeals to countries will not yield any results until people change their mentality, which is known to be very difficult to do.

**RECOGNITION OF KOSOVO IN THE CONTEXT  
OF ACCORDANCE WITH INTERNATIONAL LAW**

by

**Milena Ingelević-Citak<sup>\*</sup>**

**A. INTRODUCTION**

On 17 February 2008 provisional institutions of self-government of Kosovo enacted the Unilateral Declaration of Independence which caused a controversial worldwide debate. Many issues arose concerning the legality of Kosovo's declaration of independence; its unilateral secession from Serbia, and therefore the acceptability of Kosovo's recognition or non-recognition as a new state aroused doubts and disputes among the international community.

This article presents the analysis of the current process of Kosovo's recognition. Furthermore, it discusses premises supporting or opposing its recognition. Moreover, the article will analyze factors that may influence the decision of recognizing the independence of Kosovo.

It is worthwhile to mention that in order to make a proper analysis of this matter, it is necessary to introduce such issues as a process of state's birth, criteria of statehood, or legal principles significant for the creation of a new state, *e.g.* a nation's right to self-determination, the principle of state sovereignty and territorial integrity, or a problem of secession from a state. Moreover, for a more complete discussion of this issue, this article will include the explanation of the meaning of state recognition as an institution of international law and will consider theories and criteria of recognition.

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The proper analysis of this issue requires also comprehension of the historical background of the Serbian-Albanian conflict; therefore, the article presents the history of Kosovo's self-government and the evolution of its international legal status.

## **B. HISTORICAL BACKGROUND OF THE SERBIAN-ALBANIAN CONFLICT AND THE EVOLUTION OF KOSOVO'S INTERNATIONAL LEGAL STATUS**

In 1946 the communist dictator of the Socialist Federal Republic of Yugoslavia, Marshal Josip Broz Tito, granted Kosovo the status of an autonomous region within the borders of Serbia and gradually placed authority for the region in the hands of Albanian communists. This action was caused by the fact that apart from the Serb majority, Kosovo had a significant Albanian ethnic minority. Kosovo's political and cultural autonomy was, however, restricted. The year 1963 brought Kosovo the status of a province, but also further restrictions of its autonomy. In 1968 - 1974, in the time of decentralization of Yugoslavia, Kosovo's autonomy was significantly expanded, a fact that Serbia objected to. Under the resolutions of 1974 constitution, imposed by Marshal Tito, Kosovo obtained the status of a federal unit and, as a consequence, its position in the federal system was the equivalent of a republic's position. Kosovo obtained autonomous representative organs independent from Serbia. Internal competences of Kosovo's authorities were identical to the republic's institutions although Kosovo's institutions had to adjust their legislation to the law binding in Serbia. Therefore, a special constitutional court was instituted, consisting of the same number of judges from Kosovo and Serbia. This court was supposed to adjudicate in cases of a contradiction between Kosovo's and Serbia's legislation<sup>1</sup>.

Despite the considerable improvement of Kosovo's legal situation, still there was a feature distinguishing it from the other republics of Yugoslavia – lack of status as a republic and, in consequence, lack of possibility of secession<sup>2</sup>, which completely dissatisfied the authorities of Kosovo. For that reason, the attempt to achieve the republic status gained wide support among Kosovo Albanians. On the contrary, very few of them supported the idea of unification with Albania.

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<sup>1</sup> A. Balcer, M. Kaczmarek, W. Stanisławski, *Kosovo – przed ostatecznym rozwiązaniem. Proces uregulowania statusu międzynarodowego – uwarunkowania polityczne i historyczne, perspektywy rozwoju sytuacji* (Kosovo before the Final Decision. Regulating Kosovo's International Status – Historical and Political Conditions and Prospects for Future Development), PRACE OSW, 8-9 (2008).

<sup>2</sup> The second autonomous province within Serbia – Vojvodina – was also in a similar situation.

In the spring of 1981 after Marshal Tito's death, demonstrations among Albanians grew into an ethnic conflict. In the years of 1989 - 1990, after Slobodan Milosevic came to power, Kosovo's autonomy was significantly restricted. The dissolution of the Socialist Federal Republic of Yugoslavia in 1991 - 1992 caused Kosovo's stance to change – Kosovo's authorities stopped searching for good solutions for Kosovo within the borders of Yugoslavia and gave their support to the idea of the independence beyond the federation. As a result, more citizens supported the conception of Great Albania, which stated that in case of Yugoslavia's break-up, territories in which Albanians were in the majority should have the right to join Albania. However, in consequence of Western European countries' objection, this conception never gained a broad support in Kosovo<sup>3</sup>.

The events, mentioned above, caused the notification of independence enacted by Kosovo's authorities on 2 July 1990<sup>4</sup>. Kosovo's independence was introduced as a compromise solution between remaining within the borders of Serbia and the conception of Great Albania. Kosovo's independence was not recognized by Western European countries, as they hoped to restore Kosovo's status of power from the 1974 constitution, or as a maximalist solution they postulated its transformation into a third republic within Yugoslavia. The aim of the Democratic League of Kosovo, the main political power in Kosovo in that period, was to achieve a compromise with Belgrade; therefore, they were even ready to give up the idea of independence. However, the authorities of Serbia rejected the idea of the restoration of Kosovo's status stated under the 1974 constitution. Answering the initiative of Kosovo, Serbia came up with two proposals. The first one assumed dividing Kosovo to Albanian and Serbian parts, and in case of changes of borders, Serbian parts were supposed to be annexed directly to Serbia. The second proposal assumed Kosovo's cantonization. However, these proposals were unacceptable to Kosovo's authorities<sup>5</sup>.

The lack of agreement between Kosovo and Serbia contributed towards creation of the Kosovo Liberation Army (UCK). Initially, the leading idea of the UCK was creation of Great Albania; however, later this idea was given up and the main aim became obtaining independence. At the end of the year 1997, the UCK started a guerrilla war.

The years of 1998 - 1999 were the period of escalation of the conflict as a consequence of obstinate fighting between Yugoslavian and the Kosovo Liberation Army, during which Albanians accused Serbs of ethnic cleansing.

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<sup>3</sup> A. Balcer, *Kosowo – kwestia ostatecznego statusu* (Kosovo – the Question of Final Status), PRACE OSW, 19 (2003).

<sup>4</sup> P. RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW*, 198–199 (2002).

<sup>5</sup> Balcer, note 3, 19.



The international community became more and more aware of this situation of ethnic cleansing. Western European countries tried to alleviate the conflict with peaceful methods, but these methods failed. The United Nations Security Council on 23 September 1998 adopted resolution 1199 in which it considered that the lasting Serbian-Albanian conflict “constitutes a threat to peace and security in the region”, and “alarmed at the impending humanitarian catastrophe” stated that immediate actions were required<sup>6</sup>.

In the period of February – March 1999, the Rambouillet Conference was held. During the conference, Kosovo’s future legal status was discussed by the representations of Serbia and Kosovo Albanians. Serbia was in a disadvantageous position as the result of the anti-Western position of Slobodan Milosevic and his refusal to search for a compromise solution in the matter of Kosovo’s status, claiming that the case of Kosovo was Serbia’s internal problem. As a result, the Rambouillet Agreement included a statement that the final decision regarding Kosovo’s legal status would be made in 3 years. It is worthwhile to notice that the Rambouillet Agreement did not exclude any solution in this issue; therefore, obtainment of independence was also possible. Moreover, the agreement stated that the final decision in that matter had to be based not only on the will of people, but also on the opinions of relevant authorities and statements of the 1975 Helsinki Final Act which permitted a change of borders exclusively by means of agreement between both parties<sup>7</sup>.

The Rambouillet conference closed on 23 February, as planned; however, the agreement was not reached. Kosovo’s delegation accepted the statements adopted during the conference, but the objection of the Serbian representatives led to a break-up of negotiations. The second part of the discourse was planned to start on 15 March, meanwhile the Yugoslavian army started an offensive in Kosovo. As a consequence, negotiations were renewed in a considerably more negative atmosphere. Kosovo’s representatives signed the agreement without any delay; however, the Serbian delegation rejected the Rambouillet decisions, found the deployment of international troops in Kosovo unacceptable, rejected decisions concerning the position of the president and parliament, the judiciary system, and,

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<sup>6</sup> SC Res. 1199 of 23 September 1998, available at <http://www.un.org/peace/kosovo/98sc1199.htm>.

<sup>7</sup> Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, 23 February 1999, chapter 8 para. 1: “Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party’s efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures”; available at [http://www.state.gov/www/regions/eur/ksvo\\_ambouillet\\_text.html](http://www.state.gov/www/regions/eur/ksvo_ambouillet_text.html).

furthermore, demanded the removal of provisions concerning the final decision on Kosovo's legal status in 3 years' time. As a result, the agreement was not signed<sup>8</sup>.

The culmination of the Serbian-Albanian conflict occurred in 1999 after NATO's armed intervention and the bombing of Yugoslavia. As a consequence, Yugoslavia was forced to withdraw troops from Kosovo, which was transformed into an international protectorate.

On 10 June 1999 the UN Security Council on basis of chapter VII of the UN Charter adopted Resolution 1244, which established the United Nations Interim Administration Mission in Kosovo (UNMIK). The task of the UN mission was to administer the territory, while the Kosovo Force (KFOR) was responsible for order and safety in Kosovo.

Resolution 1244 authorised the international civil and military presence in Kosovo. Under the resolution Kosovo became the international protectorate and was placed under interim UN administration. However, the resolution did not contain the final decision on Kosovo's status or at least the deadline to make such a decision; furthermore, it emphasized the importance of Yugoslavia's territorial integrity preservation. The resolution's final goal was to return to the autonomous status of Kosovo from before 1989. To sum up, under Resolution 1244 Kosovo remained part of Yugoslavia which formally maintained power over Kosovo territory; nevertheless, the real power was in the hands of UNMIK and KFOR.

On 24 October 2005 the UN Security Council initiated the renewal of negotiations concerning Kosovo's final status. Martti Ahtisaari, the former president of Finland, was appointed the Special Envoy of the UN Secretary-General on Kosovo's future status. In February 2007 he delivered the draft Proposal for the Kosovo Status Settlement<sup>9</sup>.

Ahtisaari's plan provided granting Kosovo some attributes of a state (*e.g.* the right to conclude treaties and the right to apply for membership in international organizations) but without admitting the status of a state and factual independence<sup>10</sup>. The proposal included provisions concerning granting Kosovo Serbs expanded autonomy. The control over Kosovo had to be placed in the hands of NATO and the European Union.

Ahtisaari's settlement proposal was approved by Kosovo's representatives, United States, and the majority of the European Union Member States but rejected by Serbia, Russia and China. Therefore, there were several attempts to modify the proposal in order to get the

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<sup>8</sup> Balcer, note 3, 19-20.

<sup>9</sup> Comprehensive Proposal for the Kosovo Status Settlement of 26 March 2007, available at [http://www.unosek.org/docref/Comprehensive\\_proposal-english.pdf](http://www.unosek.org/docref/Comprehensive_proposal-english.pdf).

<sup>10</sup> R. Kwiecień, *Prawnomiędzynarodowe konsekwencje jednostronnej deklaracji niepodległości Kosowa* (International Legal Consequences of Unilateral Declaration of Independence of Kosovo) in *PRAWO MIĘDZYNARODOWE I WSPÓLOTOWE WOBEC WYZWAŃ WSPÓŁCZESNEGO ŚWIATA* (International and Community Law Facing the Challenges of Modern World), 116 (E. DYNIA ED., 2009).

support of all states. The changed proposal included provisions of granting Kosovo supervised independence until April 2008. However, the decision on factual Kosovo's independence was postponed for an undefined period of time and depended on the opinion of the UN Security Council<sup>11</sup>.

Negotiations between representatives of the Republic of Serbia and Kosovo's temporary institutions led by the United States, Russia and the European Union yielded no result and no final agreement was reached<sup>12</sup>. Despite engagement in resolving the Serbian-Albanian conflict, the international community appeared to be incapable of finding agreement.

### C. KOSOVO'S UNILATERAL DECLARATION OF INDEPENDENCE

As negotiations extended without any perspectives for the achievement of agreement, on 17 February 2008 the Assembly of Kosovo enacted the Declaration of Independence, which caused many disputes among members of the international community. It is worth mentioning that lack of agreement in the matter of Kosovo's status does not justify declaration of independence, especially considering the fact that both Serbia and some other states had clearly stated before the UDI that "the potential for negotiations was not exhausted and there was still substantial room for finding the agreed solution for the status of Kosovo"<sup>13</sup>.

Kosovo's Unilateral Declaration of Independence<sup>14</sup> is an interesting document which is worth more attention. According to the declaration, Kosovo is a democratic republic, "guided by the principles of non-discrimination and equal protection under law". In the preamble there is a statement that "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation". Including such statements in the declaration shows that its creators realized what a dangerous precedent it could be for the unity and integrity of other multi-ethnic states; furthermore, it shows that these creators were aware that the process of gaining independence was inconsistent with principles of

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<sup>11</sup> P. Czubik, *Niepodległość Kosowa – niebezpieczeństwo dla zjednoczonej Europy? Krótki zarys problemu* (Kosovo's Independence – Danger for the United Europe? A Short Outline of a Problem), in *BALKANY U PROG U ZJEDNOCZONEJ EUROPY* (Balkans on the threshold of the United Europe), 130 (P. CZUBIK ED., 2008).

<sup>12</sup> E. Dynia, *Uznanie Kosowa w świetle prawa międzynarodowego* (Kosovo's Recognition in the Context of International Law) in *PRAWO MIĘDZYNARODOWE I WSPÓLNOTOWE WOBEC WYZWAŃ WSPÓŁCZESNEGO ŚWIATA* (International and Community Law Facing the Challenges of Modern World), 20-21 (E. DYNIA ED., 2009).

<sup>13</sup> A. Orakhelashvili, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, 12 *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW*, 19 (2008).

<sup>14</sup> Kosovo Declaration of Independence of 17 February 2008, available at [http://www.assembly-kosova.org/common/docs/Dek\\_Pav\\_e.pdf](http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf).

international law<sup>15</sup>. It is worth noticing that such provision is ineffective, because it does not change the precedential character of Kosovo's situation and will not discourage secessionist movements in other countries from using Kosovo as an argument to declare independence on their own. On the contrary, it could encourage them to refer to the Kosovo casus<sup>16</sup>.

The authors of the declaration, along with the supporters of Kosovo's secession, try to justify the legality of its independence by an unprecedented and exceptional character of this case. However, is the Kosovo casus really *sui generis*? The supporters of this view declare that the exceptionality of the case is constituted by the historical background of this ethnic conflict and the long period of the UN mission administration of Kosovo. These factors are not present in other secession conflicts; therefore, the Kosovo case is unique and cannot be an argument for other secessionist territorial entities pursuing their independence<sup>17</sup>. However, the international community is not unanimous as to the exceptionality of the Kosovo's case. Furthermore, as rightly noticed by Orakhelashvili, "the argument of specificity necessarily implies applying international law to Kosovo differently from other entities, that is a discrimination as between the entities that aspire statehood"<sup>18</sup>.

Especially worth noticing is the fact that the declaration does not contain any statements referring to the principle of self-determination, which was often alleged to justify Kosovo's statehood. The authors of the declaration must have understood how controversial such an argument would be. A broader discussion on the principle of self-determination and its possibility to be applied or not to the Kosovo case is presented later in this article.

The Kosovo Declaration of Independence emphasizes the full accordance with the recommendations of the UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement. However, the Ahtisaari proposal does not include a "state" term as referring to Kosovo. Despite the fact that it grants Kosovo some statehood attributes, it still does not project independence for Kosovo. The proposal omits the Kosovo's independence issue and sets aside the question for an unspecified period of time.

The declaration states that Kosovo is obliged to comply with the principles of the UN Charter, the Helsinki Final Act, and other documents of the OSCE. Additionally, it expresses

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<sup>15</sup> Kwiecień, note 10, 120.

<sup>16</sup> The best example is the appeal for recognition of Abkhazia and South Ossetia delivered for the State Duma of Russian Federation, CIS, UN and world leaders on 6 March 2008, that is only a half month after the declaration of independence of Kosovo. Abkhazia Calls for International Recognition, available at <http://www.civil.ge/eng/article.php?id=17289>.

<sup>17</sup> Such stance presents also the government of the United States. United States Recognizes Kosovo as Independent State, available at <http://www.america.gov/st/peacesec-english/2008/February/20080218144244dmslahrellek0.9832117.html>.

<sup>18</sup> Orakhelashvili, note 13, 22.

a special respect for territorial integrity and sovereignty of the neighboring states, including Serbia. Finally, the declaration states that Kosovo will comply with the principles of international law, and with the resolutions of the UN Security Council, including Resolution 1244. However, as it was pointed out before, Resolution 1244 established international civil and military presence, created such a model of government in Kosovo which would enable a real autonomy, but it did not provide independence, and moreover, it emphasized that the future settlement of Kosovo's status would be based on the principle of the sovereignty and territorial integrity of Yugoslavia and neighboring states. We shall also observe that Resolution 1244 is still in force, as the period of its validity was not limited, and it has not been lifted by the UN Security Council. Therefore, the declaration expresses respect for a legal document while contradicting its provisions. The provisions of Resolution 1244 are quite different than the ones which would grant independent state status, which Kosovo declared.

Concluding the above, the declaration of independence is a very controversial document, referring to important international legal acts which, among others, restrict the changes of borders exclusively to cases of agreement of both parties, while Kosovo's secession was unilateral and has been firmly objected to by Serbia. Moreover, the declaration states respect for the principles of international law, for the sovereignty and territorial integrity of neighboring states, while violating these rules itself, the fact that will be presented in the next part of this article.

After Kosovo's declaration of independence, the government of Serbia expressed its firm protest and lack of consent for secession and independence of the part of its territory, based on the incompatibility with the international law, especially with Resolution 1244. On 23 September 2008 Boris Tadić, the president of Serbia, gave a speech to the UN General Assembly plenary meeting, in which he asked for support for the initiative of Serbia to apply to the International Court of Justice for an advisory opinion on the legality of Kosovo's independence<sup>19</sup>. It was a big success for Serbia that on 8 October 2008 the UN General Assembly adopted a resolution<sup>20</sup> containing a request for an advisory opinion of the International Court of Justice concerning "accordance with international law of the unilateral

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<sup>19</sup> Serbian President at UN General Assembly in New York, available at <http://www.srbija.gov.rs/vesti/vest.php?id=48840>.

<sup>20</sup> Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo's Independence, available at <http://www.un.org/News/Press/docs/2008/ga10764.doc.htm>.

declaration of independence by the provisional institutions of self-government of Kosovo”<sup>21</sup>. Unfortunately, the Court has not announced a verdict in this case yet<sup>22</sup>.

The reaction of the international community to Kosovo’s declaration of independence has been varied. The United States, France, United Kingdom, Turkey, Afghanistan, and Albania recognized Kosovo the next day after its declaration of independence. Soon, they were followed by more states – as for now (March 2010) Kosovo is recognized by 65 states, while 11 more states have declared the recognition in the near future<sup>23</sup>. However, the 2/3 of the 192 UN Member States have not recognized Kosovo yet, and some of them declare they have no intention to recognize it, based on the fact that its creation is a serious violation of international law. Among those states, besides Serbia, there are China, Russia, Spain, Romania, Israel, Georgia, Bosnia and Herzegovina, Greece, Slovakia, and many others.

International organizations have no competence to recognize a state; however, they have expressed their direct or indirect opinion on the subject. The UN Secretary-General declared that the UN will remain neutral on that issue<sup>24</sup>, and the European Union has stated that each Member State has a sole right to decide about Kosovo’s recognition. The European Parliament, however, in its resolution of 2 February 2009, calls for the countries that have not recognized Kosovo yet to grant the recognition<sup>25</sup>, so thus expresses a position favoring Kosovo’s independence.

Russia’s stance on Kosovo’s status has been firm for a few years. It has insisted on reaching a compromise by Belgrade and Pristina without forcing the parties to accept the solutions prepared by the international community<sup>26</sup>. The Ministry of Foreign Affairs of Russia issued a statement which reads: “On February 17, Kosovo’s Provisional Institutions of Self-Government declared a unilateral proclamation of independence of the province, thus violating the sovereignty of the Republic of Serbia, the Charter of the United Nations, UNSCR 1244, the principles of the Helsinki Final Act, Kosovo’s Constitutional Framework and the high-level Contact Group accords. Russia fully supports the reaction of the Serbian

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<sup>21</sup> The resolution was adopted by a recorded vote of 77 in favour to 6 votes against (Albania, United States, Marshall Islands, Federated States of Micronesia, Nauru and Palau) with 74 abstentions.

<sup>22</sup> International Court of Justice, request for advisory opinion on accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21>.

<sup>23</sup> Information available at <http://www.kosovothanksyou.com/>.

<sup>24</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 15 July 2008, chapter XI, par. 29, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/412/84/IMG/N0841284.pdf?OpenElement>.

<sup>25</sup> European Parliament resolution of 5 February 2009 on Kosovo and the role of the EU, available at <http://www.eusrinkosovo.eu/pdf/European%20Parliament%20resolutionKosovo.pdf>.

<sup>26</sup> Balcer, Kaczmarek, Stanisławski, note 1, 33.

leadership to the events in Kosovo and its just demands to restore the territorial integrity of the country”<sup>27</sup>.

Kosovo’s declaration of independence has been considered by Russia as a horrible precedent, which overturns centuries-long set of international relations. Moreover, referring to the states which recognized Kosovo, Russia expressed concerns about the outcome of such actions, which might in turn affect negatively those countries<sup>28</sup>. At some point of time, there were rumors, primarily coming from the government of Kosovo, that Russia was analyzing a possibility of recognizing Kosovo. But Russia’s reaction was immediate. The Foreign Affairs Minister, Sergey Lavrov stated that Russia stood firm on a position that Kosovo’s status should be settled in accordance with the UN resolution 1244, and again supported Serbia’s sovereignty and territorial integrity<sup>29</sup>.

China, like many other countries (*e.g.* Spain), expressed its objection to Kosovo’s independence also because of their own separatist movements active on their territories. China took a position similar to Russia, however, less uncompromising<sup>30</sup>.

A country that has exercised a great influence on Kosovo’s situation is the United States. Its support for Kosovo’s aspirations for independence had a major impact on the process of recognition of Kosovo. The U.S. have been supporting Kosovo’s independence uncompromisingly since the Ahtisaari proposals. Already in the 2007, the U.S. Assistant Secretary of State Daniel Fried declared that Kosovo would be independent regardless of the UN Security Council decision<sup>31</sup>. Such a position was reaffirmed by President George W. Bush during his visit to Albania in June 2007 by stating that the United States would support Kosovo’s independence under all conditions. Such an uncompromising position may be a result of a strategic significance of the Albanian-inhabited territories for controlling the Balkans, and the unwillingness for concessions for Russia, which presents an equally uncompromising position<sup>32</sup>.

Worth noting is the position of the Palestinian Autonomy, which did not express its clear support for Kosovo’s independence, but stressed the need for further negotiations on this matter. Yasser Abed Rabbo, Mahmud Abbas’s advisor, declared “Kosovo is not better than

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<sup>27</sup> Statement by Russia’s Ministry of Foreign Affairs on Kosovo, 17 February 2008, available at [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/d-ru20080313\\_/d-ru20080313\\_08.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/d-ru20080313_/d-ru20080313_08.pdf).

<sup>28</sup> Putin Calls Kosovo Independence “Terrible Precedent”, available at <http://www.eubusiness.com/news-eu/1203714121.65/>.

<sup>29</sup> Moscow on Kosovo: No Means No!, available at [http://rt.com/Politics/2009-02-20/Moscow\\_on\\_Kosovo\\_\\_no\\_means\\_no\\_.html](http://rt.com/Politics/2009-02-20/Moscow_on_Kosovo__no_means_no_.html).

<sup>30</sup> Balcer, Kaczmarek, Stanislawski, note 1, 36.

<sup>31</sup> *Id.*, 31.

<sup>32</sup> *Id.*, 32.

us. We deserve independence even before Kosovo and we ask for the backing of the United States and the European Union for our independence”<sup>33</sup>.

As interesting is the Holy See’s position on the subject. It was repeatedly declared that the Holy See would not recognize Kosovo. Moreover, during the meeting of Pope Benedict XVI with the Serbian president, Boris Tadić, in November 2009, the Pope stated that the Holy See supported the European integration of Serbia, its membership in the European structures, and supported its sovereignty and territorial integrity<sup>34</sup>.

Most of the other countries that have voiced objections to Kosovo’s independence are countries where there are active or potential problems with separatist movements or ethnic conflicts. Governments of these states are concerned about the possibility of growth of the conflicts on their territories due to the recognition of Kosovo’s independence, which may be an argument for secession movements in their countries.

After the declaration of independence, the main burden of administration in Kosovo was placed on the European Union. The European Union Rule and Law Mission in Kosovo (EULEX Kosovo) has taken power from the UN Mission and works towards accompanying and supporting the government of Kosovo in the process of democratization of the government, the judicial system, and the law enforcement institutions<sup>35</sup>.

On 9 April 2008 the parliament of Kosovo drafted the constitution of the state<sup>36</sup>, which evoked a negative reaction of Serbia and Kosovo’s Serb population. The constitution was modelled on the U.S. constitution. The sovereign in the constitution is the people and not the nation. The state is defined as a multi-ethnic community, while the ethnic minorities are guaranteed broad rights and representation in public institutions. Moreover, the constitution declares the superiority of international agreements over the domestic law<sup>37</sup>.

On 9 May 2009 Kosovo was accepted by the International Monetary Fund as an independent Member State<sup>38</sup>. Serbia and Russia expressed objection to accepting Kosovo as a Member State. However, 96 out of 138 voting states supported the acceptance of a new

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<sup>33</sup> Palestinians May Declare State, available at [http://news.bbc.co.uk/2/hi/middle\\_east/7254434.stm](http://news.bbc.co.uk/2/hi/middle_east/7254434.stm).

<sup>34</sup> Vatican Show Support for Serbian EU Integration, available at <http://www.ictmag.info/politics/vatican-shows-support-for-serbian-eu-integration/>.

<sup>35</sup> More information about EULEX Kosovo available at <http://www.eulex-kosovo.eu/>.

<sup>36</sup> Constitution of the Republic of Kosovo available at <http://www.assembly-kosova.org/?cid=2,100,48>.

<sup>37</sup> *Kosovo ma konstytucję* (Kosovo has the constitution), available at <http://www.osw.waw.pl/pl/publikacje/tydzien-na-wschodzie/2008-04-16/kosowo-ma-konstytucje>.

<sup>38</sup> Kosovo Becomes the International Monetary Fund’s 186 Member, available at <http://www.imf.org/external/np/sec/pr/2009/pr09240.htm>.



member. At the moment of voting, Kosovo was formally recognized by 58 states<sup>39</sup>. However, we can assume, that the states which supported the membership of Kosovo in the IMF performed the implied recognition of Kosovo<sup>40</sup>.

On 15 November 2009 Kosovo held local government election. That was the first election organized independently by the Kosovo administration. Surprisingly, some of the Kosovo Serbs took part in the election, despite the declared boycott. In the southern part of Kosovo, the attendance among the Serbs reached up to 35%. The election was considered a success for Kosovo, as it showed the strength of state institutions and the growth of stability and effectiveness in the new entity<sup>41</sup>.

#### **D. KOSOVO'S RECOGNITION AND THE PRINCIPLES OF INTERNATIONAL LAW**

State recognition is a unilateral political act, whereby a recognizing state declares, with all legal consequences, a certain entity as an independent state.

Recognition of a state is an issue of great importance in the field of international law and international relations. In practice, it decides whether a new territorial entity will function in the international community as its rightful member, or will obtain support of one or a few states-promoters and its functioning will be limited solely to factual control over a defined territory and this territorial entity will not be a member of a community of states. José Pedro De Andrade Barroso rightly concludes that a territorial entity which has not been recognized as a state or has been recognized by a few states only fulfills particular rights to which a state is entitled under international law with great difficulty<sup>42</sup>. This conclusion can be confirmed by the current situation in Kosovo – it has been recognized by 65 states; moreover, some states have announced that they will recognize it soon but still there are many states which declare that they will never recognize Kosovo, as it would mean an acceptance of the violation of international law which caused the unilateral secession of Kosovo. As a consequence, Kosovo still cannot function as a rightful member of the international community, has no access to a

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<sup>39</sup> *Kosowo przyjęte jako niepodległe państwo do MFW* (Kosovo admitted as an independent state to IMF), available at <http://www.osw.waw.pl/pl/publikacje/best/2009-05-13/kosowo-przyjete-jako-niepodlegle-panstwo-do-mfw>.

<sup>40</sup> The member of the International Monetary Fund can only be a state.

<sup>41</sup> *Wybory lokalne w Kosowie* (Local election in Kosovo), available at <http://www.osw.waw.pl/pl/publikacje/best/2009-11-18/wybory-lokalne-w-kosowie-udany-test-mlodej-panstwowosci>.

<sup>42</sup> J. P. DE ANDRADE BARROSO, *UZNANIE PAŃSTWA W ŚWIELE PRAWA MIĘDZYNARODOWEGO* (Recognition of States in the Context of International Law), 29 (1994).

membership in such organizations as the European Union or the United Nations, whereas the participation in these organizations would definitely strengthen the actual position of Kosovo.

First of all, we have to estimate whether Kosovo fulfills criteria for recognizing it as a state. The institution of recognition is a very complicated issue; therefore, the views in the doctrine of international law concerning it are discrepant as the practice of states is not consolidated. Differing opinions on this issue are caused undoubtedly by political background of the recognition process and by lack of proper regulations in international law. So far no compilation of legal principles and norms which would bind states in the process of the recognition has been created. Obviously, in some legal acts of international law we can find regulations regarding recognition of states; however, the majority of them are formulated very unclearly or constitute only some general phrases, therefore, recognizing states have absolute freedom of the use of criteria. The consequence of recognition or non-recognition of a newly created state is often used by other countries as an argument on the international forum in order to get some benefits for themselves – *e.g.* the United States for a long time refused to recognize People's Republic of China, but they did not deny that Chinese government effectively controlled its territory and people. The American authorities were convinced that recognition of People's Republic of China would have undesired legal results for the U.S.<sup>43</sup>.

In conducting the analysis of the institution of recognition, the moment of creating a state plays a very important role – whether it is constituted at the moment of actual creation, or at the moment of recognition by other states. The doctrine presents two theories: declarative and constitutive.

According to the declarative theory, the legal consequences of the state-creating process are generated at the moment of fulfilling the requirements of international law; therefore, a state exists since its origination and the recognition is just an affirmation of the actual status. The declarative theory is represented, among others, by G.G. Fitzmaurice. He states that “recognition then becomes the hand that welcomes the newcomer as he steps over the threshold, but even without it he has entered the room”<sup>44</sup>.

The adherents of the constitutive theory maintain that the factual existence of a state does not depend on the recognition; however, only at the moment of recognition can the legal consequences arise, therefore the recognition is the requirement necessary for obtaining the status of subject of international law. As a consequence, the territorial entity, which has not been recognized, is not a state in the meaning of international law.

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<sup>43</sup> M. SHAW, *PRAWO MIĘDZYNARODOWE* (International Law), 240 (2006).

<sup>44</sup> G.G. Fitzmaurice, *The General Principles of International Law*, 92 RCADI, 34 (1957).

One of followers of that view is a distinguished representative of the international law doctrine, L. Oppenheim, who declared that “state is and becomes a subject of international law only and exclusively as a result of a recognition”<sup>45</sup>.

The constitutive theory is also represented by C. Hillgruber. As he accurately observed: “(...) as a result of recognition, the recognized entity acquires the legal status of a state under international law. In this sense, a (new) state is not born, but chosen as a subject of international law. Only when the new state has been recognized does it become a subject of international law”<sup>46</sup>. The best example confirming that observation is the Kosovo casus. The lack of common recognition does not result in denying the existence of Kosovo as a state, which it declared itself; however, its ability to act in the international relations field or taking advantage of rights arising from the status of a subject of international law is presently very limited or impossible.

Despite the differing doctrinal views, the practice of states in the matter of recognition supports the constitutive character of this institution. Therefore, the sole declaration of independence of a state without an appropriate reaction of the international community remains an ineffective act. A good example of such a situation was the declaration of independence of Kosovo in 1990. The lack of recognition from other states turned out to be just a kind of manifesto, which did not bring Kosovo independence then.

A very important issue of the subject under discussion is the problem of requirements for recognition. Recognizing a new geopolitical entity follows defined subjective and objective criteria. The objective criteria are in fact the criteria of law. In the classical international law, the basic criterion for recognizing a state is effectiveness<sup>47</sup>, which means effective control of the territory and population of a new state by its government along with ability to act in the international field and sustaining the international relations<sup>48</sup>. In the contemporary international practice we can also find other requirements for recognition of a new territorial entity as a state. This may be compliance with the UN Charter provisions and with other important international legal acts, respecting democracy, human rights, ethnic and national minority rights, respecting the inviolability of borders, etc.<sup>49</sup>.

On 16 December 1991 the European Community adopted the declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union”, in

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<sup>45</sup> L. OPPENHEIM, INTERNATIONAL LAW, 116 (1912).

<sup>46</sup> Ch. Hillgruber, *The Admission of New States to International Community*, 9 EJIL, 492 (1998).

<sup>47</sup> BARROSO, note 42, 10-11.

<sup>48</sup> R. BIERZANEK, J. SYMONIDES, PRAWO MIĘDZYNARODOWE PUBLICZNE (Public International Law), 141-142 (2005).

<sup>49</sup> J. BARCIK, T. SROGOSZ, PRAWO MIĘDZYNARODOWE PUBLICZNE (Public International Law), 170-171 (2007).

which the Member States included common position on the issue of recognizing the newly emerging states. The prerequisites from the declaration were applied by the European Community countries to the matter of recognizing the countries which emerged on the territory of former Yugoslavia<sup>50</sup>.

In the guidelines the following requirements were mentioned:

- “respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights”,
- “guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE”,
- “respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement”,
- “acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability”,
- “commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes”<sup>51</sup>.

The above prerequisites go well beyond the traditional criteria of statehood. They constitute a kind of instruction for directions of new states’ political developments. Nevertheless, they were formulated to evaluate the candidates willing to enter the international community.

Before granting recognition, Kosovo should have been evaluated in regard to the above requirements. However, the European countries do not respect the criteria they themselves adopted in Kosovo’s case. If the Kosovo situation had been analyzed concerning the fulfillment of these requirements, Kosovo would have not received the recognition of these European countries because it does not meet the prerequisites.

Moreover, the fulfilling of a classical prerequisite – the effectiveness requirement is also doubtful. In the present situation it is difficult to admit that the government of Kosovo is effectively controlling its territory and population, as the functioning of Kosovo’s government relies on the support of the international community.

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<sup>50</sup> W. CZAPLIŃSKI, A. WYROZUMSKA, PRAWO MIĘDZYNARODOWE PUBLICZNE. ZAGADNIENIA SYSTEMOWE (Public International Law. The System’s Issues), 293-294 (2004). See also R. Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EJIL, 4-5 (1993).

<sup>51</sup> Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union” of 16 December 1991, available at <http://207.57.19.226/journal/Vol4/No1/art6.html>.

For more than 10 years, the territory of Kosovo has been administered and governed by international missions. It is difficult to determine if Kosovo would remain an independent entity without the UN or EU support. However, even now with the international help, regions, mostly in the northern part of Kosovo, are not under effective control of the authorities in Pristina<sup>52</sup>. In regard to Kosovo, the issue of effectiveness of control of the territory and population is partially abstract.

However, we must observe that decisions whether Kosovo has or has not met the prerequisites are within exclusive competence of particular countries. Each of them decides individually if in their opinion, Kosovo meets the above-mentioned requirements in a sufficient level to acknowledge that it really constitutes a stable territorial entity, which deserves independence status. As E. Dynia observes accurately, “carrying out recognition or refusal to carry out recognition belongs to a state’s competences”<sup>53</sup>.

The problem of state recognition is inseparably connected with the matter of creation of a state, as a subject for recognition shall be a territorial entity created in circumstances, which, in accordance with international law, result in creation of a state. Thus, to discuss the Kosovo problem we shall also analyze the definition of a state and the process of creation of a state, and examine if Kosovo fulfills the criteria of statehood and if it was created as a state in compliance with international law.

The sole international treaty in which we can find the definition of a state is the Montevideo Convention on Rights and Duties of States, adopted in 1933 during the VII International Conference of American States<sup>54</sup>. Other international treaties only use the term “state” while not defining it.

The Montevideo Convention norms, originally constituting a regional treaty, have gradually been transferred into a custom law, thus have obtained the value of generally binding norms. The doctrine of international law recalls Article 1 of this convention as a definition of a state<sup>55</sup>. The article constitutes the state as a person of international law possessing the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capability to enter into relations with other states<sup>56</sup>.

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<sup>52</sup> Orakhelashvili, note 13, 5.

<sup>53</sup> Dynia, note 12, 23. See also C. BEREZOWSKI, *PRAWO MIĘDZYNARODOWE PUBLICZNE* (Public International Law), vol. I, 98 (1966).

<sup>54</sup> CZAPLIŃSKI, WYROZUMSKA, note 50, 133.

<sup>55</sup> BARCIK, SROGOSZ, note 49, 127.

<sup>56</sup> Montevideo Convention on Rights and Duties of States, 26 December 1933, available at [http://www.cfr.org/publication/15897/montevideo\\_convention\\_on\\_the\\_rights\\_and\\_duties\\_of\\_states.html](http://www.cfr.org/publication/15897/montevideo_convention_on_the_rights_and_duties_of_states.html).

A definition of a state is to be found also in the Opinion No. 1 of the Arbitration Commission of the Peace Conference on Former Yugoslavia, called Badinter Commission. The document states that “the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority”<sup>57</sup>.

In conclusion, the majority of publications on international law as the basic criteria of statehood list: a defined territory, a permanent population, and organized government. Some authors point out a fourth factor, quoted in the Montevideo convention, *i.e.* capability for entering and sustaining relations with other states. However, according to A. Czapliński and A. Wyrozumska, this factor is rather “a consequence of the status of subject of international law than the reason for it”<sup>58</sup>.

We must observe that there are no specific requirements for a size of state territory and the number of population<sup>59</sup>. As to the third factor – the government, many representatives of the international law doctrine state that it shall realize the criterion of effectiveness; thus, it shall be stable and effective, and exercise real control over its territory and population.

However, this is not that obvious. A contradiction to such a requirement is a conception of “failed states”, according to which discontinuation of the government structures, or their complete collapse does not constitute lack of the status of a subject of international law, while the state can lose the factual ability to act in the international relations due to lack of relevant institutions<sup>60</sup>. We must notice that the “failed states” pose a threat to the international community, mainly because of spreading anarchy, dangerous for neighboring states, and also due to the risk of development of organized crime, which cannot be curbed by the failed states.

It is worth mentioning that as a result of decolonization, many new states have emerged, but some of them until today have not reached political stability, and are unable to function properly in the field of international relations, thus constitute weak and unstable subjects, still internationally recognized as states.

The effectiveness of government is not an evident or unquestionable issue. Especially today the traditional interpretation of effective government is a subject for change due to the

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<sup>57</sup> The Opinions of the Badinter Arbitration Commission: A Second Breath for the Self-Determination of Peoples, Opinion No. 1, available at <http://207.57.19.226/journal/Vol3/No1/art13.html>.

<sup>58</sup> CZAPLIŃSKI, WYROZUMSKA, note 50, 133.

<sup>59</sup> Some representatives of the international doctrine point out that the territory and population shall meet the self-sufficiency criterion, therefore the state should be self-sufficient. However, we must observe that foreign economic help does not strip a country of subject of the international law status. The example of such a situation may be when smaller states transfer some of their competences (mainly in foreign affairs and defence) to other states in exchange for providing their security and defending their territorial integrity.

<sup>60</sup> BARCIK, SROGOSZ, note 49, 131.

development of the right to self-determination. We can presently observe the lowering of standards and acceptance for a lower level of effectiveness of the government in a newly formed state. However, more attention is being paid to the democratic character of government and the observance of human and ethnic minority rights<sup>61</sup>.

Such is a lately observed practice, especially as regards the conduct of states after the dissolution of Yugoslavia. Bosnia and Herzegovina, and Croatia have obtained the recognition of the European Community states while large parts of their territories were not controlled by their governments<sup>62</sup>.

Analyzing the above criteria of statehood with respect to Kosovo, we shall observe that apart from the fulfillment of the territory and population criteria, the criterion of effective, stable and organized government is missing. As it was stated before, the Kosovo government is not completely in control of its territory and population, and its existence is based on the international missions support. Therefore, we shall acknowledge that Kosovo “would hardly qualify as a state under the criteria of effectiveness, which is profoundly missing in the case of Kosovo”<sup>63</sup>.

A state can be created by gaining independence by a dependent territory, by dividing one country to two or more states, by unification of two or more states, or by secession of a part of one state territory and creation of a new entity<sup>64</sup>. “Creation” of the Republic of Kosovo and its declaration of independence are based on secession from Serbia. We shall thus analyze if Kosovo’s secession was carried out in compliance with international law.

Secession is an acknowledged way of creating a new state, despite the fact that it is often controversial. In case of creating a new state by secession from a parent state, the key factor is not a declaration of a relevant territorial entity, but the effectiveness of a secession process. Certainly, the effectiveness should coincide with legality and not replace it. The legality of the secession requires concurrent fulfillment of three factors:

- 1) the secession process shall be carried on internally, without external intervention,
- 2) the *uti possidetis* rule shall be respected, and
- 3) sooner or later, the mother state shall grant its acceptance for secession of a part of its territory<sup>65</sup>.

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<sup>61</sup> SHAW, note 43, 139-140.

<sup>62</sup> D. Türk, *Recognition of States: A Comment*, 4 EJIL, 69 (1993).

<sup>63</sup> Orakhelashvili, note 13, 10.

<sup>64</sup> BARCIK, SROGOSZ, note 49, 135-138.

<sup>65</sup> Kwiecień, note 10, 114-115.

It is necessary to observe, that until today the unilateral secessions have not been recognized, as they contradict the principle of territorial integrity of a state<sup>66</sup>. Orakhelashvili states that “unilateral secession is the antithesis of territorial integrity” and, in consequence, “secession can only be allowed with the consent of the parent state”<sup>67</sup>. It was confirmed by the position of the UN and the European Community declared during the dissolution of the SFRY: “Neither the United Nations nor the EC have proclaimed their support for the independence on the basis of secession of the entity without the consent of the parent state”<sup>68</sup>.

In the case of Kosovo the secession does not comply with the above criteria. Primarily, Kosovo’s secession was not an internal process. It was possible due to an international intervention of international organizations and states. Additionally, Kosovo’s secession was carried out unilaterally, without Serbia’s consent, and is still contested by Serbia. As such, Kosovo’s secession cannot be considered compliant with international law and, to the contrary, it represents its violation<sup>69</sup>.

Concluding the above, Kosovo’s secession, due to its lack of legality, violates the international law and the territorial integrity of the Republic of Serbia.

The respect for the territorial integrity constitutes one of the rules of international law, which secures sovereignty and legal-political existence of a state. This rule is deep-rooted in the international law system. It is directly and indirectly protected by numerous international treaties and documents. Among those, the most important is the UN Charter, which in Article 2 forbids the use of force against the territorial integrity and political independence of a state. The article formulates an obligation to respect the territorial integrity in a broad aspect, as it not only protects the entire territory, but also prohibits unconditionally any territorial gains made with use of force, thus creating inviolability of a state’s territory<sup>70</sup>.

The 1975 CSCE Helsinki Final Act also has important value for respecting the territorial integrity of a state. The participating countries declared respect for the rights of states, and among those, also for every country’s right to territorial integrity. Moreover, the Helsinki Final Act addresses the issue with a separate article (IV), which states: “The participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or

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<sup>66</sup> Orakhelashvili, note 13, 8.

<sup>67</sup> *Id.*, 15.

<sup>68</sup> *Id.*, 8.

<sup>69</sup> Kwiecień, note 10, 115.

<sup>70</sup> BIERZANEK, SYMONIDES, note 48, 197-198.



the unity of any participating State, and in particular from any such action constituting a threat or use of force”<sup>71</sup>.

Concluding the above, the respect for the territorial integrity of a state is a very important issue of the international law and is a base for contemporary international relations, which was reaffirmed by the ICJ in the “Corfu Channel” case by declaring that: “between independent states, respect for territorial sovereignty is an essential foundation of international relations”<sup>72</sup>. For the reason of a great value, the territorial integrity of a state is specifically protected and its observance shall be restrictively executed by the international community.

However, the Kosovo case shows that countries which have recognized Kosovo, have placed political favors on a higher level than the value of the territorial integrity of a state. In the light of the above considerations, it has been clearly proven that the Kosovo’s Unilateral Declaration of Independence is an act that infringes upon international law, and violates the territorial integrity of Serbia. In result, by such recognition these countries infringe upon the mentioned rule and act in discord with international law, which orders not to recognize illegal situations. We must observe that the obligation not to recognize situations contradicting international law is, in the opinion of the ICJ, a custom norm<sup>73</sup>.

The continuing process of Kosovo’s recognition by a greater number of states is depreciating the value of territorial integrity of states. As it is obvious that the political situation in Kosovo represented a case of a serious and violent ethnic conflict, and still remains difficult, it does not justify the *de facto* partition of a sovereign subject of international law, which is being done without its consent.

Some states supporting Kosovo’s independence along with the Kosovo authorities have been trying to motivate the legality of Kosovo’s secession as a realization of the nation’s self-determination right. However, as it will be presented, such a view is erroneous.

The so-called “nationality principle” was proclaimed in the 19<sup>th</sup> century by P.S. Mancini. However, not till the beginning of the 20<sup>th</sup> century was it presented in legal documents, *e.g.* in Woodrow Wilson’s 14 points from 1918. Originally, that principle was considered only as a political conception. The principle of self-determination was, however, subsequently included in the United Nations Charter<sup>74</sup>. As the goals of the UN, the Charter

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<sup>71</sup> Conference on Security and Co-operation in Europe Final Act, Helsinki, 1 August 1975, available at [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf).

<sup>72</sup> ICJ Reports, 4 (1949).

<sup>73</sup> CZAPLIŃSKI, WYROZUMSKA, note 50, 298-302.

<sup>74</sup> SHAW, note 43, 165.

lists “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. Yet, Article 55 mentions “peaceful and friendly relations among nations based on respect for principle of equal rights and self-determination of peoples”<sup>75</sup>.

The principle of self-determination has become a norm of customary law as a result of including it in the UN Charter. Then the principle was included in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV)), and in the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations. Also both 1966 human rights pacts, adopted by the UN General Assembly, declare the right of all nations to self-determination<sup>76</sup>.

The principle of self-determination has with time been transferred from a political conception into a generally recognized rule of contemporary international law, which is reflected in the practice of states<sup>77</sup>.

According to the self-determination principle, a nation has a right to decide about its political status, so it can remain within a state, or decide about creating its own state organization, join a neighboring state, or choose another political solution<sup>78</sup>.

A question arises whether the creation of Kosovo’s statehood can be based on the realization of the self-determination rule. To analyze this issue we shall, at first, define which subjects are entitled to exercise this right. According to most of the representatives of the international law doctrine, subjects entitled to the right of self-determination are ethnic groups and nations, but not ethnic minorities<sup>79</sup>. Albanians as a nation have their own state – Albania. Albanians inhabiting most of territory of Kosovo constitute an ethnic minority, which is not entitled to the self-determination right.

However, there were also opinions aimed at justifying the right to self-determination for Kosovo. Their authors tried to claim that the inhabitants of Kosovo constituted a separate nation – the Kosovars. These claims are extremely controversial and difficult to accept. “The Kosovar Albanians are more generally perceived as an Albanian ethnic enclave, rather than a

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<sup>75</sup> The United Nations Charter of 26 June 1945, available at <http://www.un.org/en/documents/charter/>.

<sup>76</sup> SHAW, note 43, 165-168.

<sup>77</sup> International Court of Justice in the case of East Timor (Portugal v. Australia) stated that the right of people to self-determination is one of the main contemporary principles of international law. The High Court of Canada in 1998 in the case „Reference Re Secession of Quebec” also announced that the principle of self-determination is considered a general principle of international law.

<sup>78</sup> CZAPLIŃSKI, WYROZUMSKA, note 50, 141.

<sup>79</sup> *Id.*, 141-142.

nation unto themselves”<sup>80</sup>. Thus, the creation of Kosovo as a state cannot be recognized as a realization of right to self-determination of nations, as it does not apply to the Albanians inhabiting Kosovo’s territory. The best argument for such a view is the lack of mentioning the right to self-determination in the Kosovo Declaration of Independence of 17 February 2008. The Kosovo Assembly did not risk including the principle in the declaration, probably for fear of severe criticism that such a move would draw internationally.

We must also observe that the majority of representatives of the international law doctrine, along with the international law judgments clearly state that the right to self-determination cannot be a base for secession, as the territorial integrity of a state has a priority in this matter<sup>81</sup>. It was also stated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, which reads in paragraph 6 that: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”<sup>82</sup>.

The above statements were confirmed by M. Goodwin, who wrote: “it is well-established practice that existing States are entitled to respect for their territorial integrity and political unity. Self-determination does not allow for an automatic right of secession and self-determination claims are to be realized instead through autonomy regimes (...)”<sup>83</sup>.

The analysis of the Kosovo case shows that this entity does not meet the criteria for statehood and its creation constitutes a violation of international law. As a consequence, Kosovo does not fulfill the classic requirements for recognition. We shall observe, therefore, that “States should not recognize a new state if such recognition would perpetuate a breach of international law”<sup>84</sup>.

## E. CONCLUSION

The Republic of Kosovo was constituted in violation of international law, against the legitimate claims of Serbia to sovereignty over its province. However, the institution of state recognition has, with no doubts, also a political character; therefore, many countries, viewing

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<sup>80</sup> Ch. J. Borgen, *Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition*, 12 ASIL, Issue 2 (2008).

<sup>81</sup> CZAPLIŃSKI, WYROZUMSKA, note 50, 142. See also Kwiecień, note 10, 114, and Dynia, note 12, 25.

<sup>82</sup> SC Res. 1514 of 20 December 1960, Declaration on the granting of independence to colonial countries and peoples, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0152/88/IMG/NR015288.pdf?OpenElement>.

<sup>83</sup> M. Goodwin, *From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrines of International Law*, 8 GERMAN LAW JOURNAL, 3 (2007).

<sup>84</sup> Borgen, note 80.

their interest in following the positions of their allies or unwilling to represent opinions different from the dominant members of the international organizations they belong to, have recognized Kosovo's independence despite the lack of legality of Kosovo's secession from Serbia. The political process of recognizing Kosovo is being continued. Kosovo is gaining broader international recognition, so it is becoming less possible that Kosovo will remain a part of Serbia. It is probable that under the pressure from international organizations even Serbia may be forced to recognize Kosovo as a state, especially if the "price" for losing the province will be membership in the European Union and the benefits that the membership may bring.

However, it must be observed that such a situation would pose a serious risk, as it constitutes a worldwide precedent. The Kosovo case may become an argument for the separatist and secessionist movements in other states; thus, it would constitute a threat to international stability and peace. Already in January 2010 the Minister of the Autonomous Government of Greenland, Agathe Fontain, declared that the goal of Greenland was "to attain full independence"<sup>85</sup>. We may expect more cases of that kind.

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<sup>85</sup> Speech of Minister of Health of Greenland Agathe Fontain, available at [http://www.arctic-frontiers.com/index2.php?option=com\\_docman&task=doc\\_view&gid=197&Itemid=155](http://www.arctic-frontiers.com/index2.php?option=com_docman&task=doc_view&gid=197&Itemid=155).

**INTERNATIONAL ENVIRONMENTAL LAW  
AND THE RIGHT TO SUSTAINABLE DEVELOPMENT**

by

**Ewa Kozłowska \***

**A. INTRODUCTION**

The aim of this article is to show that the protection of the environment is a global issue which requires to be specially safeguarded by the international law. Today, it would be difficult to maintain that it is a matter of a local dimension only. It goes without saying that the world forms one ecosystem, which is global and has no boundaries. The protection of this ecosystem obviously requires close cooperation. Nowadays, the ecological safety, which is a value of its own, should be given the same treatment as life, health or peace. Therefore, the struggle to maintain peace and the respect for the right to live in peace should be treated together with the right to live in a clean and healthy natural environment<sup>1</sup>. The fast growing pollution of the environment contributed to the fact that the protection of the environment has become the topic for mutual discussion not only for scholars but politicians as well. It is a great challenge for the international community to safeguard the environment. The activities to be undertaken in this respect should make use of the international law broadly conceived. The international law for the protection of the environment regulates preventive actions undertaken to reduce pollution, and it makes the rights and duties of the subjects regarding the environment precise. The significance attached to the issue of the protection of the

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<sup>1</sup> See: J. A. HABER, POLSKA A MIĘDZYNARODOWA OCHRONA ŚRODOWISKA – WYBRANE MIĘDZYNARODOWE AKTY PRAWNE DOTYCZĄCE OCHRONY ŚRODOWISKA, KTÓRYCH STRONĄ JEST POLSKA (1992).

environment, and the environment itself, results from the fact that these problems belong to the canon of the human rights' legislation<sup>2</sup>.

The global policy for the international environmental law is formed on the basis of the international agreements, conventions, arrangements and resolutions made by international organizations. More and more frequent are the situations when local problems concerning one country only, due to various environmental interactions, transform into global problems. It turns out that the activities undertaken by one country, even if they totally fall under the domestic jurisdiction, may have a harmful effect on other countries, or other international territories. Individual ecological damages after some time accumulate and lead to global consequences. It is the policy of a given country, and its law-making constitutional organs, that play a decisive role in the prevention of such damages and holding the guilty responsible for them. The relevant regulations are contained in the domestic law, the Community law, and the international law<sup>3</sup>.

## **B. ENVIRONMENT AS THE OBJECT OF LEGAL PROTECTION**

The Polish definition of the environment comprises the elements identical to those found in the documents of the European as well as the international law. The notion of "environment" is understood as the totality of natural phenomena, including those transformed by human interference, in particular that directed at the surface of the earth, water, air, landscape, and climate. This concept also comprises the transformations caused by mining activities, as well as other diverse biological elements and the interactions among them<sup>4</sup>.

In 1969, in his report on the state of the human environment presented to the UN General Assembly, the UN General Secretary U Thant included into this notion both the physical and biological surroundings of human beings, regardless of the fact if they are of natural character, or if they are the result of human activity<sup>5</sup>. The Stockholm Declaration of 1972<sup>6</sup>, however, makes the notion of the environment more precise. It incorporates in the concept not only the natural elements, like the earth, and its resources, air, and the living

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<sup>2</sup> S. GIORGETTA, THE RIGHT TO A HEALTHY ENVIRONMENT, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT, INTERNATIONAL ENVIRONMENTAL AGREEMENTS: POLITICS, LAW AND ECONOMICS (2002), 172-194.

<sup>3</sup> J. CIECHANOWICZ-MCLEAN, PRAWO I POLITYKA OCHRONY ŚRODOWISKA (2009), 16.

<sup>4</sup> *The Law on the Protection of the Environment* of 27 April 2001, Article 3(39).

<sup>5</sup> *Człowiek i jego środowisko* – UN Report of the Secretary General U Thant, 26 May 1969 in: BIULETYN POLSKIEGO KOMITETU DO SPRAW UNESCO – SPECIAL ISSUE.

<sup>6</sup> K. KOCOT, K. WOLFKE (EDS.), DEKLARACJA W SPRAWIE NATURALNEGO ŚRODOWISKA CZŁOWIEKA in: WYBÓR DOKUMENTÓW DO NAUKI PRAWA MIĘDZYNARODOWEGO (1976), 581-588.

organisms, but also the elements created by human beings, such as working and living conditions, food, clothing, science, education, hygiene and health in particular.

The protection of the environment is one of the targets set in the European Union and the European Community treaties. In the Treaty establishing the European Community, the aims and tasks of the Community are provided for in Article 2. This article points out to the necessity to protect and improve the quality of the natural environment. Article 3(1) states, among others, that the tool to realize this aim is the environmental policy. The Treaty on the European Union, however, makes reference to the issue of the protection of the environment in the preamble only. Article 8 of the Treaty states the will to support the activities leading to the protection of the environment, and presents it as one of the motives of signing this agreement. This fact, however, due to the three-pillar construction of the European Union of which the Community was one (*e.g.* before the Treaty of Lisbon), does not diminish the significance of the environmental activities which figure prominently on the agenda of the EU<sup>7</sup>.

### **C. GENERAL ASSUMPTIONS OF THE ENVIRONMENTAL LAW OF THE EUROPEAN UNION**

Assuming that the objectives of the Union as set in the Treaty on the European Union comply with those set in the Treaty on the Functioning of the European Union, one can say that the general aims of the Union which are of social, economic, and political character, stipulate, each and every one of them, high level of environmental protection. This is in compliance with the integration rule as set out in Article 11 of TFEU.

The legal character of the European Union tasks and objectives is made clear by the judicial decisions of the Court of Justice of the European Union, which demonstrate that the regulations concerning the tasks and objectives of the Union are not just of a general type, but are legally binding.

In light of those regulations, one can name three main aims which ensue from the original European Union environmental law:

- high standard of the protection of the environment;
- improvement of the quality of the environment;
- permanent development of Europe and the Earth.

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<sup>7</sup> See: Z. BUKOWSKI, PRAWO OCHRONY ŚRODOWISKA UNII EUROPEJSKIEJ (2007).

These aims were made more specific in Article 191 of TFEU which states that the EU policy towards natural environment shall lead to the realization of such objectives as the following:

- preservation, protection and improvement of the quality of the natural environment;
- protection of human health;
- careful and rational exploration of the natural resources;
- international promotion of the methods used to solve regional and international environment-related problems, in particular those concerning the climate change;
- high standard of the protection of the environment with particular consideration given to the diversity of situations which may occur in various regions of the EU<sup>8</sup>.

The above mentioned objectives are likely to be successfully realized in practice provided that the energy safety is secured. Only then may one expect that the requirements of the international agreements on the preservation of clean air, earth and water (including drinking water) signed by the Republic of Poland can be met<sup>9</sup>.

Today, international environmental agreements are acquiring more and more significance as they provide the basis for the environmental law. It has to be added that there is a great number of various international environmental agreements in use at present.

#### **D. ACTIVITIES UNDERTAKEN BY THE EUROPEAN UNION TOWARDS SUSTAINABLE DEVELOPMENT**

Both the Treaty on the European Union, and the Treaty on the Functioning of the European Union – in the modified version of the Lisbon Treaty – mention the environment-related problems, namely, sustainable development of Europe and the sustainable development of the Earth. The term "sustainable growth" which occurs in a similar context in the text of the Maastricht Treaty, has been criticized and abandoned. It has been replaced by "sustainable development" deemed more useful, and better-known to the international legal community, since it can be found in such documents as the so-called Brundtland Report (the Report of the World Commission on Environment and Development), and the Rio Declaration on Environment and Development<sup>10</sup>. It has to be stressed that the targeted sustainable development is difficult to define, and the closest to grasp the content of this

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<sup>8</sup> M. M. KENIG-WITKOWSKA, PRAWO ŚRODOWISKA UNII EUROPEJSKIEJ – ZAGADNIENIA SYSTEMOWE (2011), 46-47.

<sup>9</sup> Bukowski, note 7, 113-142, 144-174.

<sup>10</sup> Kenig-Witkowska, note 8, 46-47.



notion is the Brundtland Report, according to which it is a kind of development which satisfies the needs of the present day generations without having to sacrifice the needs of the future generations<sup>11</sup>.

The international environmental law is claimed to be one of the fastest-developing areas of the international law. Therefore, more and more attention is being paid to the questions related to the sustainable development<sup>12</sup>. Sometimes, the sustainable development is also called eco-development, ecological development, permanent development, integrated development or sustainable growth. This causes terminological confusion, and the way to sort it out is to reach for the definition as it occurs in the UN norms and documents. It reads that by sustainable development of the Earth is meant such a development which satisfies basic necessities of all mankind, and preserves, protects and restores the healthy condition and integrity of the ecosystem of the Earth without menacing the possibility to satisfy those needs for future generations, and without going beyond the capacity of the ecosystem in a long term period of time<sup>13</sup>.

Sustainable development is of great interest to many international organizations, some of which are listed below:

- the United Nations Environment Program (UNEP),
- the United Nations Development Program (UNDP),
- European Institutions such as: the European Parliament, the European Commission, the European Economic and Social Committee.

Sustainable development should be considered an important element of the international law. The most significant international legal documents which discuss the said issue are as follows:

- Agenda 21,
- The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

In Poland, the principle of sustainable development has been raised to the rank of the Constitution. It can be found in Article 5 of the Constitution of the Republic of Poland, and the definition of the sustainable development is included in the Environmental Protection Act. According to it sustainable development is understood as a social and economic development

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<sup>11</sup> Report of the World Commission on Environment and Development (WCED), *Our Common Future*, 1987, <http://www.un-documents.net/wced-ocf.htm>.

<sup>12</sup> *The speech delivered by Elizabeth Dowdeswell, UNEP Executive Director* in: ENVIRONMENTAL LAW TRAINING MANUAL (1997), 9.

<sup>13</sup> See: *World Charter for Nature (Rio Proclamation)*, A/RES/37/7, 28 October 1982.

which contributes to the integration of political, economic and social activities, alongside the preservation of the balance of nature and the basic natural processes in order to guarantee satisfaction of basic needs for different communities and individuals of both contemporary and future generations”<sup>14</sup>.

Still, one of the major challenges for the governments and the international community is the problem of how to balance the economic development and the protection of the environment. This problem sheds light on conflicting interests which are generated in the situation when the interests of individual, sovereign states attempt to meet the requirements of the international law, the community law, and the majority of the internal environmental laws.

The European concepts of the sustainable development should be linked to the implementation in the regional localities of the regulations brought into existence by the international conferences (The Stockholm Declaration, The Rio Declaration, the Johannesburg Declaration). What also proves to be crucial is the cooperation on the local level and the internal policy towards the EU. The European concept of the sustainable development is based on the environmental policy established on the territory of the EU, that is: the first Environmental Action Program – EAP (1973-1976), the second EAP (1977-1981), the third EAP (1982-1986), the fourth EAP (1987-1992), the fifth EAP (1992-2000), the sixth EAP (2001-2010). It also makes use of the Lisbon and Göteborg Strategies<sup>15</sup>. The Lisbon Strategy was passed in March 2000, and it became the major economic program for the EU Member States. It aimed at turning the EU into the most economically advanced body. The Göteborg Strategy supplied the Lisbon Strategy with the idea that the sustainable development is to secure a long-term positive vision of the society for the EU – that is to say, the society which is richer, more just and has a clean, safe and healthier environment. The Göteborg Strategy lists possible threats to the sustainable development<sup>16</sup>.

The notion of the sustainable development was made more precise during the 70th Conference of the International Law Association which was held in New Delhi on 2-6 April 2002. The members of the committee, focusing on the problem of the sustainable development, pointed to the following major characteristic features of the notion<sup>17</sup>:

- sustainable use of natural resources,
- lack of acceptance for the unbalanced consumption and production,

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<sup>14</sup> *The Law on the Protection of the Environment of 27 April 2001* (Journal of Laws of the Republic of Poland of 2001, No. 62, item 627).

<sup>15</sup> R. Rosicki, *Międzynarodowe i europejskie koncepcje zrównoważonego rozwoju*, 4 PRZEGLĄD NAUKOWO-METODYCZNY (2010), 44-56.

<sup>16</sup> *The Göteborg Strategy (Strategy for Sustainable Development for the European Union)*, COM/2001/264.

<sup>17</sup> Ciechanowicz-McLean, note 3, 42.

- joint attempts at solving economic and environmental problems,
- just and fair approach to the members of different generations,
- the time factor – since the sustainable development is a process,
- active participation of the public.

The sustainable development has become a basic objective for the EU after it was included into the Amsterdam Treaty as the major aim to be achieved by the EU. In 2001 the EU worked out the strategy for the sustainable development. It specifies the objectives leading towards the continuing improvement of the quality of life for the contemporary people and for the future generations. This is to be done by helping to bring into being communities which will develop in a balanced way, and which will be able to self-govern and to explore their natural resources in an efficient way. They should also be able to stimulate the ecological and social potential of their local economies. The activities resulting from this strategy were set forth with the time perspective reaching up to the year 2010. They take into consideration the seven key challenges: climate change and clean energy, sustainable transport, sustainable consumption and production, threats to public health, better management of natural resources, social inclusion, demography and migration, as well reducing global poverty. It is not clear if the above-listed aims and activities will be adequate to handle the situation after 2012 when increased climate changes are expected. Then this strategy is scheduled for revision.

## **E. THE STRATEGY FOR THE SUSTAINABLE DEVELOPMENT FOR POLAND**

The necessity to work out the Strategy for the Sustainable Development for Poland occurred when, on 2 March 1999, the Polish Parliament passed the Resolution which obliged the Government, with the deadline expiring on 30 June 1999, to present a document describing the course for the development of the country in the period up to the year 2025<sup>18</sup>. The Resolution stresses that the notion of “the sustained development” refers to such a model of the development which insists on the equal treatment of the current needs and the needs of the future generations (...). It also makes it clear that the Parliament expects that the Strategy will link the concern about the preservation of the natural and cultural heritage of the nation to the economic progress and the civilizing process which will be open for participation to all

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<sup>18</sup> See:

<http://www.access.zgwrp.org.pl/materialy/dokumenty/StrategiaZrownowazonegoRozwojuPolski/strategia1-3.html>.

social groups. The strategy formulated in this form aims at stimulating the developmental processes in such a way as to reduce the destruction of the environment. That is the reason why it focuses on a gradual elimination of the processes and economic activities which may be harmful to the environment and to the people. It promotes the methods which are “environmentally friendly” and speed up the restoration of the environment wherever it is damaged.

The most general task of the Sustainable Development Strategy for Poland is to maintain the present economic growth at the level of 5% .

The strategy indicates that it will be necessary to take into account the following aspects:

- territorial and ecological safety of the country,
- the country’s sovereignty,
- the state of health and the social well-being of every citizen,
- observance of the rights and duties as set out in the Constitution,
- respect towards the existing legal order, and the necessity for Poland to comply with the international agreements and declarations ratified by the Government.

The ecospace of Poland is neither as rich as that of Canada, Russia or China, nor as limited as that of Switzerland or the Benelux. The access to that space has been systematically reduced for dozens of years, mainly due to the “grab and run” type of economy and a total lack of consideration for the limitations of the environment to absorb more and more human interference. The major task of the Strategy for the Sustainable Development for Poland to be carried out until the year 2025 is to repair the negative effects from the past and to increase the said space<sup>19</sup>.

As already mentioned above, the legal ground for the sustainable development for Poland is to be found in Article 5 of the Constitution of the Republic of Poland which reads as follows: “The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development”.

In addition, the Constitution states in Article 74(1) that “Public authorities shall pursue policies ensuring the ecological security of current and future generations”<sup>20</sup>.

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<sup>19</sup> Strategy for Sustainable Development for Poland up to 2025, available at <http://www.nape.pl>.

<sup>20</sup> *The Constitution of the Republic of Poland* of 2 April 1997 (Journal of Laws of the Republic of Poland of 1997, No. 78, item 483).

The notion of the sustainable development was also defined in the above-quoted regulation enclosed in the document entitled “The Law on the Protection of the Environment”, dated 27 April 2001. This regulation states the rules to follow in the process of the protection of the environment and the conditions which allow to explore its resources. This document which is in compliance with the requirements of the sustainable development, replaced the former one, dated 31 December 1980. Its role is double: firstly, it provides for the general rules for the legal responsibility, introduces fines and penalties; secondly, it provides for the regulations concerning the so-called “law of emission”<sup>21</sup>.

The issue of ecological safety was also raised in the act passed on 18 July 2001 – The Law on Use and Conservation of Inland Waters, which regulates the use of water resources – their protection and management according to the principle of sustainable development<sup>22</sup>. This regulation introduces the principle of avoiding as much as possible the ecological degradation of waters and dependent eco-systems<sup>23</sup>.

The aims and priorities of this policy have been consistently carried out throughout the decade. This has given a solid foundation for the implementation of the Strategy for Sustainable Development for Poland up to the year 2025. The Ecological Policy of the Polish Government has been a success in several areas. As a result, it contributed to the existence of the following :

- legal basis for the rational use of the renewable, and non-renewable environmental resources and their protection against the economic activity of man,
- central, regional and local institutions for the management of the environment,
- economic management of the environment based on the principle that “the user and the polluter pay”, and the “win-win strategy”,
- efficient financial institutions for the funding of the protection of the environment which go beyond covering the cost of the protection itself, and are ready to finance the very activities undertaken towards the sustainable development,
- reduction of the quality and amount of pollutants and a noticeable improvement of the quality of the environment,
- significant change of the ecological awareness of the society due to which the society would acquire legal grounds for the participation in the management of the environment.

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<sup>21</sup> Ciechanowicz-McLean, note 3, 152.

<sup>22</sup> *Law on Use and Conservation of Inland Waters*, 18 July 2001 (Journal of Laws of the Republic of Poland of 2005, No. 239, item 2019).

<sup>23</sup> Ciechanowicz-McLean, note 3, 62.

Owing to the above-listed achievements, Poland belongs to the group of countries which are to take part in the global sustainable development program, thus, leaving behind those countries which are now barely on the way to elaborate their system for the sustainable development. Hence, in the Strategy for Sustainable Development for Poland up to the year 2025 only some chosen principles from the Rio Declaration have been singled out for further realization.

The Constitution of the Republic of Poland guarantees every citizen equal access to the environment, and, at the same time, it imposes on the state and its citizens the obligation to take on the responsibility for the changes introduced into the environment. It follows from this, that both the state and the individuals are fully responsible for the damages resulting from the economic and social activities.

It is obvious that the degraded environment has a negative effect on the health and the mental disposition of the society. The fact that the natural resources grow smaller and smaller, and the environment is less and less resistant to the damages, has a considerable impact on the economic activity, which means, in a long run, a limited chance for the future generations to prosper and develop. This has already become evident in the case of the countries much better economically developed than Poland. Therefore, the ecological dimension of the Strategy must guarantee that:

- every program of the economic development, and every economic activity be evaluated from the point of view of its impact on the environment,
- every program of the space management, both for the country or a region, contain the elements for the protection of the environment, health, cultural heritage, the biological diversity and the monuments of nature,
- the society have access to the information on the state of the environment, and the possible threats to it as well as to the decision making processes concerning the environment, and the agencies of justice to turn to in case of the breach of the environmental law,
- the government support pro-ecological activities, re-cultivation of polluted resources and terrains, active protection of the environment and biological diversity,
- both domestic and international ecological law be observed by all, the state and private parties in the same way,
- both the state and private parties as well as individuals have equal right to access the environment and its resources,
- every person exploiting the natural resources, and introducing changes to the environment be charged for it, and fined for breaking the environmental regulations,

- the funds from the charges for the exploitation of the environment, and the fines for the breach of the environmental regulations be spent on the repair of the damages to the environment, and the promotion of the pro-ecological activities,
- the pro-ecological activity, including the use of renewable energy resources, and the recycling of raw materials, be competitive in the market due to the proper fiscal and financial policies which will make the cost of the protection of the environment an integral part of the market price of the merchandise,
- there be support for the development of science, and the environmentally friendly technologies, and the protection for the intellectual property in case of such technologies;
- there be free transfer of technologies and pro-ecological investments, and support for the export of the Polish achievements in technology<sup>24</sup>.

## F. CONCLUSIONS

The article presents the type of environment-related problems, and discusses the development of the concept of the sustainable development from the perspective of the international law. The sustainable development has become the main indicator of how to implement the principles for the protection of the environment. It also contributed to the fact that the natural environment is thought about in a holistic way. Progressive degradation of the natural environment has given the issue of the natural environment the worldwide dimension. Attention is being paid to the rational exploration of the environment. This has an impact on the people's frame of mind regarding the environmental issues. This also contributes to the fact that people make an effort to spare the non-renewable resources. In this way, the ecological policy has become an element of the strategy for the sustainable development: it is a policy which protects the environment against bad influence. The law says unanimously that it is the duty of every person, both private and legal, of the state and the government administration in particular, to protect the environment<sup>25</sup>.

It has to be emphasized that the program for the protection of the environment has become even more imperative due to the fact that individual states are to be held responsible for environmental damages and noncompliance with the obligations ensuing from the treaties on the protection of the environment.

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<sup>24</sup> *Strategy...*, note 18.

<sup>25</sup> Ciechanowicz-McLean, note 3, 151.

**THE CHINESE *PERPETUUM MOBILE*?**  
**THE SHAPING OF US-EU-CHINESE RELATIONS**  
**THROUGH THE WTO**

by

**Bartosz Rogala\* & Stephen Aylward\*\***

*“There must be, not a balance of power, but a community of power;  
not organized rivalries, but an organized peace”<sup>1</sup>*

Woodrow Wilson, American President

**A. INTRODUCTION**

Empires have shaped the global reality since the early stages of civilization, from the Roman Empire to the Rashidun Caliphate and Victorian Britain. However, empires do not last forever. There have been many events which marked a turning point in the balance of power, regardless of whether they were recognized as such at the time. Examples include the fall of Rome in 476 A.D., the English victory in the battle of Blenheim, the 1929 economic crisis or the fall of the Berlin Wall. Violence, war and destruction are common characteristics of these developments, though they may also bring economic growth, technological innovation and a superior governance structure<sup>2</sup>. Having realized the global risks associated with periods of instability, governments established various regional and global international organizations and concluded numerous treaties to secure stability and development. In today’s world, where a worldwide conflict is almost unthinkable, international trade has become both the main

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<sup>1</sup> Edited by: L. COPELAND ET AL., *THE WORLD’S GREATEST SPEECHES*, 352 (1999).

<sup>2</sup> N. Ferguson, *Empires with Expiration Dates*, 156 *FOREIGN POLICY* (2006); P. Rahe, *Empires Ancient and Modern*, 28 *THE WILSON QUARTERLY* (2004).



point of international tension but also a way to foster growth and welfare. Are existing mechanisms to govern international trade structured well enough to tackle current and future challenges?

## **B. THE BALANCE OF POWER IS SHIFTING**

In recent years we have witnessed major changes in the global balance of power. The so-called “unipolar moment”<sup>3</sup> has passed; the US is no longer the sole superpower, as it was for years after the fall of the Soviet Union. The rise of China as a new player on the global scene coupled with the emergence of the EU as the world’s largest economy have altered this reality<sup>4</sup>.

Attempts by the US to pursue broadly unilateral policies, such as the invasion of Iraq, have met with frustration, leading to a more recent orientation towards multilateralism displayed in the Libyan intervention<sup>5</sup>. There are many reasons for this change, but economic and public debt constraints have played a vital role. Both Democratic and Republican administrations in Washington have consistently pursued a foreign policy which is a sophisticated mixture of ethical and moral guiding principles and *Realpolitik*. On one hand, the US puts a strong emphasis on democracy, human rights, and conflict prevention. Such a strategy contributes to peace and the development of the global economy. On the other hand, the US is uncompromising in attaining its strategic goals - the need for oil from the Persian Gulf has led to uncomfortable allegiances with ideologically antithetical regimes as well as controversial military entanglements<sup>6</sup>.

The US remains a close ally of most EU’s countries through NATO. Despite these cordial relations, the allies often have differing opinions, the American intervention in Iraq being the most blatant example of such a divergence<sup>7</sup>. What complicates the American-EU relationship is the compound structure of the Union, which is not a state, but a confederation of independent countries, which even after the Lisbon Treaty reforms creates problems for

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<sup>3</sup> F. ZAKARIA, *THE POST-AMERICAN WORLD*, 35 (2008).

<sup>4</sup> *The CIA Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/fields/2001.html> (accessed on 20/10/2011); R.J. Art, *The United States and the Future Global Order* in: *US-CHINA-EU RELATIONS*, 7-25 (R.S. ROSS, Ø. TUNSIØ, Z. TUOSHENG EDS., 2010).

<sup>5</sup> J. Favole, *U.S. Says Libya Costs at \$550 Million So Far*, *WALL STREET JOURNAL* – online edition, <http://online.wsj.com/article/SB10001424052748704471904576230730743552642.html> (accessed on 30/20/2011).

<sup>6</sup> R.J. Art, *Selective Engagement after Bush* in: *FINDING OUR WAY: DEBATING AMERICAN GRAND STRATEGY*, 23-43 (M. FLOURNEY, S. BRIMLEY EDS., 2008).

<sup>7</sup> R.C. Hendrickson, *Public Diplomacy at NATO: an Assessment of the Jaap de Hoop Scheffer’s Leadership Alliance*, 8 *JOURNAL OF MILITARY AND STRATEGIC STUDIES* (2005-2006).

coordinating a common foreign and security policy. The EU has no standing army of its own, as its Member States retain control over their national armed forces. These facts diminish the standing of the EU as a global military power<sup>8</sup>. The EU's core strength, however, is its economy. Crucially, it is precisely its economic prominence which is currently under threat as a result of massive public debt in a number of Member States, which potentially endangers the very existence of the Euro<sup>9</sup>.

Meanwhile, China continues to grow in a unprecedented manner. The end of the Cold War saw not only the collapse of the Soviet Bloc, but also the unexpected rise of China, following the economic reforms of the 1970s. China has the greatest foreign currencies reserve and is the biggest exporter of goods. However, it is experiencing many problems caused by huge discrepancies between its regions and environmental damage induced by rapid development. Taiwan and Tibet remain thorny issues and human rights abuses persist<sup>10</sup>.

However, the biggest problem China is currently facing are the challenges to the "Chinese social contract". For the past 30 years, the "deal" offered by the authorities saw the Communist Party provide the people with stable, dynamic growth, leading to increasing employment, tremendous technological development and the elevation of millions from poverty. The other side of the bargain was the acceptance of lack of democracy, occurrence of human rights abuses and the destruction of the natural environment. Threats to global economic growth could fundamentally challenge the basis of this contract<sup>11</sup>.

### C. "IT'S THE ECONOMY, STUPID"<sup>12</sup>

International trade between the leading powers is essential by reason of its sheer magnitude and influence on general world affairs. The US and the EU's economies are highly integrated and they account together for roughly half of the percentage of the total global

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<sup>8</sup> J. Paul, *EU Foreign Policy After Lisbon*, 2 CENTER FOR APPLIED POLICY RESEARCH, 19 (2008); W. Yizhou, *China-US-EU Relationship in a Changing Era* in: *US-CHINA-EU RELATIONS: MANAGING THE NEW WORLD ORDER* (R.S. ROSS ET AL EDS., 2010); R. Ross, *US-China-EU Relations: Towards a New World Order?* in: *US-CHINA-EU RELATIONS: MANAGING THE NEW WORLD ORDER* (R.S. ROSS ET AL. EDS., 2010).

<sup>9</sup> L. Knight, *Europe's four big dilemmas*, BBC NEWS BUSINESS, <http://www.bbc.co.uk/news/business-14934728> (accessed on 3/11/2011).

<sup>10</sup> W. Deckers, *Europe, US, China: the Past, the Present, the Puture – Who Will Benefit from the Triangular Relationship*, 24 UNISCI DISCUSSION PAPERS (2010); Ch. Buckley, *China jails activists outspoken on Tibet*, REUTERS, <http://www.reuters.com/article/2008/04/03/us-china-dissident-idUSPEK10194620080403> (accessed 7/11/2011); Anonymous, *Freedom of press in China Report*, FREEDOM HOUSE, <http://www.freedomhouse.org/template.cfm?page=251&year=2010&country=7801> (accessed 7/11/2011).

<sup>11</sup> M. Pei, *Beijing's Social Contract is Starting to Fray*, FINANCIAL TIMES, 3 June 2004.

<sup>12</sup> Bill Clinton's 1992 campaign slogan.

GDP<sup>13</sup>. Their mutual investment is much greater than that of all other parts of the world, including China. To deepen the already high level of convergence, in 2007 the US and the EU established the Transatlantic Economic Council (TEC). Its chief task is to stimulate competitiveness by dealing with non-tariff barriers and setting common standards, in areas like nanotechnology or electric vehicles. It could potentially lead to the establishment of the long-discussed Transatlantic Free Trade Area<sup>14</sup>. There are, of course, numerous trade disputes between the two powers, particularly concerning the agricultural and aerospace sectors, but they affect at most two per cent of the trade exchange. China is also of enormous importance for the EU. It is its second biggest trading partner, after the US. The European market counts in turn as the most substantial market for Chinese exports<sup>15</sup>.

Fostering cooperation between these three global powers on international trade is essential to the peaceful rise of China and continued global prosperity. Strategically speaking, the EU and China are more significant economic than military players and so for the short term, coordination of economic interests must be a higher priority<sup>16</sup>. Promoting international trade not only generates prosperity, but it also reduces military tensions and encourages international peace<sup>17</sup>.

Furthermore, greater trade integration between the three powers is ultimately in each of their own self-interest. China is pursuing an export-led growth strategy which depends for its success on favourable trade terms and sustained external demand for its exports<sup>18</sup>. The US and the EU share an ideological commitment to free trade which has underpinned the global economic system since the Second World War. Integrating China into this system would ensure a continued commitment to liberal principles in the international economic order.

However, there are serious challenges to the progressive integration of global markets. Owing to the global financial crisis of 2008-2009, there has been a marked increase in protectionist measures<sup>19</sup>. The lessons of history on the risks of protectionism in the face of a global economic downturn are clear and emphatic: the Smoot-Hawley round of tariffs

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<sup>13</sup> Anonymous, *United States, European Commission*, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/united-states/> (accessed on 7/11/2011).

<sup>14</sup> Anonymous, *Completing the transatlantic market – transatlantic policy network*, <http://www.tpnonline.org/TPN%20transatlantic%20market%20paper%20FINAL.pdf> (accessed 7/11/2011).

<sup>15</sup> European Commission, DG Trade, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/united-states/> (accessed on 7/11/2011); European Commission, DG Trade, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/china/> (accessed on 7/11/2011).

<sup>16</sup> Zakaria, note 3.

<sup>17</sup> PEACE AND PROSPERITY THROUGH WORLD TRADE (J.-P. LEHMANN ED., 2010).

<sup>18</sup> *China's Export-Led Growth Model*, EAST ASIA FORUM, 27 Feb 2011, <http://www.eastasiaforum.org/2011/02/27/chinas-export-led-growth-model/> (accessed 7/11/2011).

<sup>19</sup> RESOLVE FALTERS AS GLOBAL PROSPECTS WORSEN: THE 9<sup>TH</sup> GLOBAL TRADE ALERT REPORT (S.J. EVENETT ED., CENTER FOR ECONOMIC POLICY RESEARCH, 2011).

implemented by the US Congress in 1930 caused international trade retaliations and prolonged the depression worldwide<sup>20</sup>.

#### **D. US-EU LEADERSHIP: CHALLENGES AND OPPORTUNITIES**

The US and the EU share many common values with respect to the promotion of free trade internationally. However, there is also a tension between these two great economic powers as they simultaneously seek to coordinate their policies and compete with one another in emerging markets, such as China.

To be sure, the competition between these two players is sometimes bitter, and has played itself out in several epic trade battles, *e.g.* over alleged illegal subsidies of Boeing and Airbus and the notorious “banana saga,” which concerned the granting of preferential access to bananas grown in the former EU Member State colonies to the prejudice of South American banana producers (and American multinationals operating in those markets)<sup>21</sup>. However, the fact that both the US and the EU remain committed to the integrity of the WTO dispute settlement process even when this process is expensive, time-intensive and cumbersome, increases the WTO’s global legitimacy and also succeeds in removing trade disputes from the realm of politics and setting such disputes in a legal framework.

With regards to China, however, there may be a more substantial difficulty in coordinating a policy response. Both the US and the EU face serious public debt problems. However, notwithstanding the drama surrounding the debate on raising the debt ceiling in Congress in July 2011, the US faces a longer-term challenge to balance its books, compared with an acute crisis currently spreading through the EU. Several EU Member States are currently in tight financial straits, which puts them in a relatively weaker bargaining position relative to China. Since China is a large creditor, holding over \$900 billion in the US Treasury securities, it possesses powerful leverage over European governments<sup>22</sup>. Indeed, at the G20 summit in Cannes, the EU representatives approached the Chinese delegation asking them to extend them credit<sup>23</sup>. In order to preserve the current liberal trade regime, it is important that the two established powers be able to speak with one voice in ensuring Chinese compliance

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<sup>20</sup> B. Eichengreen, *The Political Economy of the Smoot-Hawley Tariff*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER (1986).

<sup>21</sup> T. COTTIER, *INTERNATIONAL TRADE REGULATION: LAW AND POLICY OF THE WTO, THE EUROPEAN UNION AND SWITZERLAND* (2005).

<sup>22</sup> W. M. Morrison, *China-US Trade Issues*, CONGRESSIONAL RESEARCH SERVICE, 14 (2010).

<sup>23</sup> L. Elliott, *Cannes Showed How Power has Shifted to Beijing*, THE GUARDIAN, 6 Nov 2011, <http://www.guardian.co.uk/business/economics-blog/2011/nov/06/economics-us-europe-china-crisis> (accessed 7/11/2011).

with its WTO obligations. However, if the EU is reliant on Chinese assistance in solving its debt problems it may not be in a position to apply as much pressure as the US.

The rise of China poses significant challenges to global free trade. The decline of the US manufacturing and the perception that American jobs are migrating to China create a risk of the US protectionist policies, particularly at a time where the US unemployment remains high. There have been accusations that the Chinese government is manipulating currency markets to devalue its own currency so as to favour exports, though the yuan has recently been appreciating at such a rate that this may be less of an issue in the future<sup>24</sup>.

Intellectual property rights enforcement in China is very weak, with large amounts of business software and entertainment media being pirated every year<sup>25</sup>. While there have been improvements in the enforcement of IP laws in recent years, the US and the EU, both of whose companies retain substantial intellectual property rights, have a common interest in seeing that IP laws are respected.

Another threat has been posed by China's resort to export restrictions on various raw materials such as zinc and manganese, and more recently including rare earth elements<sup>26</sup>. The US alleges that these export restrictions are a protectionist measure to artificially inflate profits while assuring preferential access to these raw materials for its domestic producers. China, on the other hand, has argued that the restrictive measures are necessary for the protection of its environment. In a July decision of a WTO panel, it was held that the export restrictions had been applied in a discriminatory manner and that no equivalent measures to protect the environment from Chinese producers had been applied; accordingly, the export restrictions were found to be illegal under the WTO<sup>27</sup>. China is currently appealing the decision.

Maintaining a liberal global trade regime is ultimately in China's interests as much as in the US and the EU's. However, as is frequently the case with trade law, the difficulty is to resist the pressures for short-term gains which China obtains through its firms having access to cheaper technology by disregarding IP laws or in temporarily inflating profits in its raw material extraction sectors. Such protectionist moves are ultimately self-defeating; in the former case, a lack of proper IP law enforcement will stifle the development of indigenous

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<sup>24</sup> *Trade with China*, THE ECONOMIST, 15 Oct 2011, <http://www.economist.com/node/21532288> (accessed 07/11/11).

<sup>25</sup> J. H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46(4) HOUSTON LAW REVIEW, 1115 (2009).

<sup>26</sup> *Nobody Should be Fooled – It's Protectionism*, NEW YORK TIMES, 18 July 2011 (accessed 7/11/2011).

<sup>27</sup> *China – Measures Related to the Exportation of Various Raw Materials*, DS394, DS395, DS398, Report of the Panel.

technological innovation while in the latter, export restrictions simply encourage foreign countries to diversify their input sources. However, such measures do pose a significant risk of triggering protectionist reactions and undermining the integrity of the global trading system as a whole.

The EU and the US must work together in order to address these issues. This will involve coordinating diplomatic strategies and will be most effective if the West can speak with a single voice on important trade issues to China. When both the US and the EU act in concert, as they did in bringing the “raw materials export” case before the WTO as co-complainants, they yield increased legitimacy to the dispute resolution mechanism and put increased political pressure on China to comply with its WTO obligations. Crucially, the US and the EU must also be prepared to restrict their own freedom of action by making genuine commitments to their professed liberal trade preferences; otherwise, the risk is that China would perceive the leading players as adhering to liberal principles only as a rhetorical strategy and abandoning these principles when it better suits their interests.

One of the most interesting periods of history was the Great French Revolution of 1789. It started a series of *coup d'états* in France itself and numerous wars lasting until 1815. Whilst bringing into reality some of the ideas of the Enlightenment, this period resulted in deaths of millions, destruction in most of the continent and prolonged instability. Luckily, the current shifts of balance of power happen in a world with clearly defined and effective rules. The WTO system provides a very useful venue where trade disputes can be dealt with in a positive manner. Furthermore, the WTO helps to foster the transatlantic cooperation, which has been weakened in the recent years. It is an important contribution to ‘the organized peace’ as originally foreseen by Woodrow Wilson.

## **E. CONCLUSION**

The rise of China, the implications associated with this change, the US and the EU’s public debt problem, human rights abuses, territorial disputes, the issue of aging population, immigration, the complexity of international trade, so on and so forth will not be solved by the WTO’s mechanisms. However, this organization and particularly its dispute settlement body provides a vital and tangible contribution to world peace and prosperity, regardless whether one supports or disagrees with the idea of global trade liberalization. The effectiveness of the WTO’s dispute settlement process contributes to the peaceful shaping of the world order. Moreover, as it was demonstrated, it can serve as a venue for cooperation

between the US and the EU, thus allowing to further the transatlantic cooperation in a meaningful manner. What is more, such a situation is not against Chinese interests, as Beijing also profits from their participation in the WTO. This is also a chance for the West to get what they deem as important – market access for their companies in China and recognition and enforcement of intellectual property rights. The idea is not to have trading blocs going against each other, but rather to have trading partners, who have a stable and effective venue to sort out their differences.

## **INTERNATIONAL TRANSPORT OF GOODS BY LAND IN PUBLIC INTERNATIONAL LAW**

by

**Łukasz Pałka**\*

### **A. INTRODUCTION**

In recent years, due to the rapid development of the technical side of transport, such as the increase of speed and reach of transport means, international agreements on international transport have become increasingly important. The agreements are usually concluded through procedures of international (inter-states) agreements. They address also some public law questions, so formally they belong to the public international law sphere<sup>1</sup>.

International transport is regulated by uniform rules of various types, which are introduced into practice by international legislation procedures. Conventions and other agreements on international transportation performed by various means of transport adopted by states concerned are usually complex and include great numbers of provisions. It is so because transport law is not an autonomous branch of law but consists of several elements of different law systems. This means transport law includes parts that refer to different types of transport activity. That is why some provisions vary significantly from others, and is not always justified by specific features of transportation systems and techniques. It should be stressed that the range of international agreements concerning road transport is notably wide. It must also be mentioned that both rail and road transport laws of existing international law systems include their own characteristic features and solutions. However, there are such types

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<sup>1</sup> M. PAZDAN, A. TYNEL, J. FUNK, W. CHWALEJ, MIĘDZYNARODOWE PRAWO HANDLOWE, 238 (2005).



of transport which cannot be incorporated into any specific branch, the prime example of which is multimodal transport – the one that uses both railway and road means of transport.

## **B. HISTORICAL CONDITIONS OF ROAD TRANSPORT GROWTH**

When addressing the public law side of road and railway transport, some general moments of their history, which have influenced modern transport of goods, should be discussed in the first place. The branch of transporting goods by land was created by and during historical evolution of the process of civilization<sup>2</sup>.

The first uniform systems of transport for territories of Europe, Asia and Africa were formed in the times of the Roman Empire. Later, in line with the growth of exchange of goods, existing trade routes started to be widened. Growing importance of the transport branch led to its organizational changes on a large scale. New technical solutions were introduced into practice in order to make transport of goods more effective. Closer trade relations resulted in unification of trade carts. Power-driven automobiles constituted the next milestone and turning-point in the history of international transport – they started such a growth of the sector that soon railways lost quite a large part of the market.

The revolution in the railway transport was initiated by the invention of the steam engine in the year 1825. It is worth reminding that the railway era in the world started at that moment. During the 19th century, efficient railway transport was finally developed and used by nearly all European countries and the United States of America. The second half of 19th century was the era of constant growth of railways in all industrialized parts of the Earth. Building long trans-continental railway routes, which usually resulted from international political competition of states, was the next really important point of history of railway transport. Due to its specific features and advantages, railways almost completely outdistanced and conquered road transport during the 19th century and took over much of its freight. However, mass production of motor vehicles in the 20th century finally gave these means of transport primacy over the railway.

As shown above the essential change in the world transportation system took place in the last two centuries. Competition between the railway and road transport branches resulted in creation of a new generation system called “multimodal” in the eighth decade of the 20th century, the system which combines qualities of both of them. First of all, it allows to

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<sup>2</sup> More information in: A. PISKOZUB, TRANSPORT W DZIEJACH CYWILIZACJI (1998).

transport goods to far destinations and fulfills the basic criterion of delivering goods: door-to-door service. Recently, the said inter-branch services have started to occupy an important position in the process of development of new technologies of transport and its name, “multimodal transport”, has been introduced into international law regulations more and more often.

### **C. GENESIS OF INTERNATIONAL LAW RULES CONCERNING PARTICULAR BRANCHES OF TRANSPORT**

The progress of international transport law has always been strictly related to the development of land transport means. Due to the fact that rail and road transport branches became popular and expanded not a very long time ago, the first law regulations thereof appeared not earlier than in the 19th and 20th centuries. The most important legal acts, particularly those of international significance, come from the years between the two world wars<sup>3</sup>. International transport law is mainly regulated by international agreements, which constitutes its specific character. Among a huge number of international conventions concerning land transport, there are ones that deal with road, railway and multimodal sectors. It is important that railway and road transport rules – among all transport law sections – were the ones which were standardized first.

#### *I. Railway transport*

International law agreements on land transport issues were first applied to railway system of transporting goods. In the year 1923, the Convention and Statute on the International Regime of Railways was adopted in Geneva. The document dealt with organizational issues of international railway system<sup>4</sup>.

A norm-setting act of transport issued by the Association of German Railway Companies (*Verein Deutscher Eisenbahnverwaltungen*) in the year 1850 constituted one of the first legal acts concerning transport of goods by railway. It regulated the matter in Germany, Austria, Luxembourg and partly in Romania, Belgium and Poland<sup>5</sup>. Although it was of regional character, the document included some features of an international agreement.

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<sup>3</sup> M. SOŚNIAK, PRAWO PRZEWOZU LĄDOWEGO, 9 (1974).

<sup>4</sup> Journal of Laws of the Republic of Poland of 1928, No. 73, item 663.

<sup>5</sup> M. SOŚNIAK, PRAWNE ASPEKTY MIĘDZYNARODOWYCH STOSUNKÓW PRZEWOZOWYCH, 9 (1980).

In 1890, the Convention concerning the Carriage of Goods by Rail (*Convention internationale concernant le transport des marchandises par chemins de fer*, CIM)<sup>6</sup> was concluded. It was the first multilateral agreement with provisions of international law character. Poland accessed to it in 1922. The document tried to address all questions of international railway law and to create a common system of organization of transport. The Central Office for International Railway Transport presided over by the Director – General and headquartered in the capital of Switzerland was formed. The Office’s task was to elaborate legal acts, issue legal opinions and resolve disputes arising from the convention.

In the year 1980, a convention in Berne was concluded. It is called the Convention concerning International Carriage by Rail (*Convention relative aux transports internationaux ferroviaires*, COTIF)<sup>7</sup>. It was accompanied by two annexes: the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) and Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM). The convention came into force in 1985.

Furthermore, the Intergovernmental Organisation for International Carriage by Rail (OTIF) was established in Berne. It was expected to facilitate international railway transport by creating a uniform law system in the sector – in the scope of transport of goods among other issues – and to supervise the observance of rules adopted by the Organisation. In 1999, the General Assembly of the OTIF was held in Vilnius and it decided that the convention be amended. The amendment was aimed at making principles of activity of railways closer to those of road transport.

It is worth noting that the Berne Convention applies to and operates in nearly all countries of Europe as well as some states of Northern Africa and Western Asia.

It should also be stressed that the COTIF Convention includes provisions of international public law character as it regulates relations between states which are subjects of international law. It also comprises provisions for settling disputes concerning jurisdiction in case of collision of law systems of the States Parties to the Convention.

Apart from the COTIF Convention, Eastern Europe countries that were Members to the Council for Mutual Economic Assistance, concluded a similar agreement in Warsaw in the year 1951 – a document known as the SMGS<sup>8</sup>. The agreement is still in use in Russia and

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<sup>6</sup> H. Goik *Niektóre węzłowe problemy międzynarodowego przewozu towarów w świetle konwencji transportu kolejowego i drogowego* in 5 PROBLEMY PRAWA PRZEWOZOWEGO, 48 (1983).

<sup>7</sup> Journal of Laws of the Republic of Poland of 1985, No. 34, item 158 with amendments.

<sup>8</sup> Journal of Tariffs and Transport Regulations of the Ministry of Transport of 1974, No. 15, item 81 as amended.

some of its former republics, the Baltic Sea states, as well as in Vietnam, China and Iran. Poland is a member of both of these systems of railway transport law.

## *II. Road transport*

As far as international road transport is concerned, its international regulation by law started after the First World War by adopting the International Convention relative to Road Traffic which was ratified in Paris in 1926. It was ratified by Poland, too<sup>9</sup>. The Convention concerning the Unification of Road Signals comes also from this period – it was adopted in Geneva in 1931. However, the present law system of road transport was created after the Second World War. It was the result of significant increase of international road traffic which forced countries to conclude new agreements. Particular countries presented different ideas on the necessity of international convention on transporting goods by roads. The ideas reflected diverse interests of the states in the matter. Some countries concluded bilateral agreements and some excluded the possibility of international road transport at all<sup>10</sup>.

In the last years of the fourth decade of the 20th century, the Inland Transport Committee<sup>11</sup> was established within the structure of the United Nations Economic Commission for Europe. Based on close co-operation of governments, it was expected to create a uniform law system for balanced growth of international transport.

The ITC elaborated numerous international conventions and agreements concerning road transport. The most important of them – the Convention on the Contract for the International Carriage of Goods by Road (*Convention relative au contrat de transport international de marchandises par route*, CMR)<sup>12</sup> – was adopted in Geneva in 1956. Nearly all European countries and some of North African ones have accessed to it. Poland ratified the agreement in the year 1962. It is worth mentioning that the agreement is largely based on the CIM Convention. Provisions of both of them: the CMR and the CIM, are binding for the States Parties to the said documents<sup>13</sup>, which has essentially influenced domestic law systems of the participating states. Thus, it should be underlined that the application of the convention laws makes national rules get closer to each other and stimulates harmonious growth of road transport.

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<sup>9</sup> Journal of Laws of the Republic of Poland of 1930, No. 21, item 177 as amended.

<sup>10</sup> Quoted after: Goik, note 4, 53.

<sup>11</sup> R. WALCZAK, MIĘDZYNARODOWY TRANSPORT DROGOWY, 8, (2006).

<sup>12</sup> Journal of Laws of the Republic of Poland of 1962, No. 49, item 238.

<sup>13</sup> The list of the CMR Member States can be found in: K. WESOŁOWSKI, KOMENTARZ DO KONWENCJI O UMOWIE MIĘDZYNARODOWEGO PRZEWOZU DROGOWEGO TOWARÓW (CMR), 145 (1996), see also Walczak, note 11, 9.

### *III. Multimodal transport*

It must be clearly stated that international conventions relating to particular branches of transport cannot regulate multimodal system of transporting goods and that attempts to apply typical solutions for transporting or forwarding goods to this recently emerged kind of transport have failed. The process of creating the new sector – as a phenomenon that requires its own rules – caused its own law rules to be generated.

During the seventh and eighth decades of the 20th century, the International Federation of Freight Forwarders Associations (FIATA) and the International Chamber of Commerce (ICC) undertook activities for unification of rules of combined transport. The multimodal transport of goods was created and developed in the eighties and nineties of the previous century.

The system has got a new element – a multimodal transport operator (MTO). Its role is to organize the whole service of transport of goods. In the years 1969-1970, the United Nations Economic Commission for Europe (UNECE) held a conference in Rome where unified rules of the combined transport were intended to be elaborated. The conference decided that a future convention would apply to multimodal transport – land transport only if it is performed on territories of at least two countries upon a specific document with the use of more than one means of transport. Further work of the Commission led to the adoption of a draft version of the Convention on the Combined Transport Contract (*Convention sur le transport international combiné de marchandises* – TCM) in 1971. It was the first version of the convention on multimodal transport of goods. It is significant that it can be applied by parties from all countries – both those which participated in the project and those which did not. Further, it was the first uniform document of international law on multimodal transport of goods. In 1973, the UNCTAD organization formed an Intergovernmental Preparatory Group whose task was to elaborate a new draft version of the convention. As a result of its six-year work, the United Nations Convention on International Multimodal Transport of Goods (the MTC) was voted for and adopted by a diplomatic conference held within the United Nations Conference on Trade and Development in Geneva in the year 1980. The Convention regulates transport of goods by various means of transport as well as accompanying or auxiliary services. However, the Convention has not come into force till now because of lack of required number of states which ratified it.

## D. THE CONCEPTION OF INTERNATIONAL TRANSPORT

The term of international transport<sup>14</sup> is not univocally defined in laws in force at the moment. At this point, it must be mentioned that the general notion of international transport is different from definitions of each type of transport found in conventions pertaining to them.

According to the last of the above-mentioned documents, transport is international if a state where transport is performed is one of the parties to the convention or if there is any other connection between parties<sup>15</sup>. It should be added that States Parties to a convention are usually enlisted in its final provisions.

It must be stressed that criteria and rules of interpretation of the term of international transport are different in legal acts of international laws discussed in this article<sup>16</sup>.

International transport of goods by railway, as understood by the COTIF/CIM Convention, is defined in Article 1 thereof. It is a payable transport of goods if the place of reception of goods for transport and the place of their destination lie in two Member States irrespective of the place of business or nationality of the parties to the contract. Thus, if the place of taking over of the goods and place designated for their delivery are in the same country, the act of transport is not an international one<sup>17</sup>. From the above definition one may deduct that the Convention applies to States Parties to the Convention only. However, there is an idea to be found in the literature of the subject, that it is possible to apply the Convention to international transport of goods performed on the territory of a state which is not a party to the CIM Convention<sup>18</sup>. Z. Żółciński points out that there is such a possibility in those countries where provisions of the Convention are obeyed under these countries' internal law system or where the Convention is a contractual law due to relevant international agreements.

Thus, it is not necessary to actually transport goods on the territory of Member States to the Convention because the fact of conclusion of a contract with intention of transporting goods on territories of at least two States Members to the Convention is a decisive factor in such a case<sup>19</sup>. Furthermore, a railway transport service, to be considered international, must be

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<sup>14</sup> W. Nowina-Konopczyna, *Pojęcie przewozu międzynarodowego towarów* in 5 PROBLEMY PRAWA PRZEWOZOWEGO, 35 (1983).

<sup>15</sup> For example, A statement, contained in the consignment note, that the carriage is subject to the provisions of the CMR Convention, pursuant to Article 6 para. 1 (k) CMR.

<sup>16</sup> W. GÓRSKI, PRAWO TRANSPORTOWE, 28 (1982).

<sup>17</sup> J. GODLEWSKI, PRZEPISY UJEDNOLICONE O UMOWIE MIĘDZYNARODOWEGO PRZEWOZU TOWARÓW KOLEJAMI (CIM), 21-22 (2007).

<sup>18</sup> Z. ŻÓŁCIŃSKI, SYSTEMY PRAWNE REGULUJĄCE MIĘDZYNARODOWE PRZEWOZY TOWARÓW KOLEJAMI, 115, (1971).

<sup>19</sup> Quoted after: Żółciński, note 18, 114-115.

based on a payable contract. According to Article 6 para. 1 of the Convention, the carrier is obliged to perform payable transport of goods.

Thus, there is a principle saying that non-payable transport services – such as humanitarian aid transport for example – do not constitute international transport. The discussed provision does not say which transport law should apply to transporting goods between states. It is believed that, as an exception, parties to a contract may agree to apply the Convention provisions to non-payable services<sup>20</sup>.

Additionally, there is a principle in the COTIF/CIM Convention which rules that the Convention shall apply to all railway lines of a Member State. However, each country has the right to exclude some of the lines from international transport services. It should also be stressed at this point that the CIM does extend its application to those railway transport contracts which are directed to those countries which are parties to the SMGS Convention. According to Article 1 para. 2 of the CIM, it is possible to apply the said convention to these parts of the route which lie on the territory of the country where goods are to be loaded or delivered even if the state is not a party to the Convention. The rule does also apply to non-member states if goods are transported as a transit load (go-through) on their territory (CIM, Article 4 para. 2). Therefore, a state through which goods are transported, needs not be a party to the Convention.

The rules of the CIM Convention shall also apply to those contracts according to which goods are transported by road on the territory of a Member State as a supplement to international railway transport (CIM, Article 1 para. 3). The provision means that when goods are transported by train from one country to another and the service in the latter state is continued by a motor vehicle to a place of destination in that country, the condition of international transport is fulfilled. At this point it must be underlined that international transport by train is also regulated by the SMGS Convention which applies to those contracts in which both the starting and ending points lie in two countries and if at least one of the states is a party to the Convention.

The delivery route prerequisite is also included in the CMR Convention which applies exclusively to international transport and can be applied irrespective of the place of residence or business of the parties or their nationality or citizenship. It is worth underlining at this point that, according to Article 1 (1) of the CMR, international transport is defined as payable transport of goods performed by professional carriers with the use of motor vehicles if the

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<sup>20</sup> Quoted after: Godlewski, note 17, 21.

place of loading goods and the place of unloading goods lie in two different states of which at least one is a party to the Convention. Furthermore, it must be stressed that the decisive factor is the place defined by parties to the contract and not the place of real transport. If the place is changed during execution of transport to the place situated in a country which is not a party to the Convention, it shall not exclude the Convention provisions from being applied to the whole service (CMR, Article 12) because such a new place of loading goods is stated in an order made by authorised person – not by the parties in the form of a contract provision.

As a result, the Convention may apply to such transport events where goods do not cross a border of a country being a party to the Convention<sup>21</sup>. Furthermore, transport service may be qualified as international even if the carrier who signed the bill of lading for the whole route shall perform the service exclusively on the territory of his home country<sup>22</sup>.

International transport of goods is also a subject of TIR Customs Convention<sup>23</sup>, which applies to transporting goods without their reloading and without customs control at state borders if at least a part of the journey is performed by a road transport vehicle. It meets prerequisites of international transport when at least one border between States Parties to the Convention is crossed.

As far as a general definition of international transport is concerned (the general one which is independent from definitions included in branch conventions), it can be found in the Convention on International Multimodal Transport.

The type of transport mentioned above means, in brief, transporting goods (which are the subject of transport service) with the use of two or more means of transport of different transport branches. According to Article 1(1) and Article 2 of the MTC, the transport is international when a place of taking goods by a transport operator and a place of their delivery are situated in different countries and if one of these states has ratified the Convention or otherwise accessed to it.

When discussing the above-mentioned complex issues of international transport, it should be pointed that, as a rule, the term of international transport should not be joined with the question of deciding on the scope of binding force of the convention because, from methodical point of view, these are two different matters<sup>24</sup>.

In practice, however, the above problem results in it being necessary to separate the application of national law from the application of international provisions. Provisions of

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<sup>21</sup> Quoted after: Sośniak, note 5, 13.

<sup>22</sup> Quoted after: Wesołowski, note 13, 11.

<sup>23</sup> Journal of Laws of the Republic of Poland of 1984, No. 17, item 76.

<sup>24</sup> Quoted after: Sośniak, note 5, 17.



international agreements shall decide on the character – international or national – of each case.

## **E. INTERNATIONAL CO-OPERATION**

As shown above, the element of international (or national) character of transporting goods plays an important role. Quite a lot of agreements and other documents have been concluded by states. Furthermore, the process of growth of international co-operation influenced essentially the development of international legislation in the matter. The process has been continuing and obviously will due to unification of rules that regulate international transport. Undoubtedly, it will lead to closer co-operation in the transport sector.

As a result, many organizations of different character and aims have been established, mostly by state official organs or transport companies. The scope of their activity is diverse - it is not only one specific branch of transport as in the case of the Organization for Railway Cooperation (ORC) whose aim is to establish a uniform railway system of Europe and Asia. They deal also with all problems related to preparation of decisions and reports on transport in modern world, for example, the International Transport Forum (ITF). Some smaller ones operate on continents or their large parts, like the Inland Transport Committee of the United Nations Economic Commission for Europe which attempts to make European land transport sectors work better and to elaborate international agreements. Other organizations cover the whole world, such as the International Union of Railways (UIC) which deals with directions of further development of railways in the world.

What should be mentioned at this point are the international organizations which specialize in specific issues of one or more transport sectors or their infrastructure. This category encompasses, for example, the *Bureau Internationale de Containers* (BIC)<sup>25</sup>.

It is worth noting that membership and active participation in the work of international transport bodies does really strengthen the position of a state on the international arena. And it will also increase both efficiency of transport of goods by land and its competitiveness among other branches of the transport sector as well.

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<sup>25</sup> M. Ciesielski, A. Maryniak, E. Mendyk, E. Rzymyszkiewicz, *Transport międzynarodowy*, 464 SKRYPTY UCZELNIAŃ, 45-46 (1995); see also M. Muszyński, *Zagraniczna polityka transportowa Polski*, 9 PRZEGŁĄD KOMUNIKACYJNY, 6 (1993).

## **F. CONCLUSIONS**

As presented above, the legal aspect of transport is a really complex matter and creates much problems of interpretational nature and the recent rapid growth of transport of goods forces existing international law rules to be constantly amended. The need of unification of law is a consequence of important and profound differences between regulations in force in particular countries. This, in turn, makes functioning of international transport system really difficult.

Furthermore, it must be noted that – due to mass character of transport of goods in the world – it seems to be extremely necessary to introduce such legal solutions which will make participants of the business feel and really be sure of the legal system and which, in consequence, will affect positively the business of international transport of goods.

Moreover, one should always bear in mind the fact that unified provisions of conventions and of other international agreements concluded for transport sectors discussed above bind the States Parties and are applied in practice by economic units acting on the territories of the said countries. Therefore, the unification of rules of transport laws, particularly those of public character, is so important to further growth of transport of goods between countries.

**EXTRATERRITORIAL APPLICATION  
OF COMPETITION LAW OF THE EU  
AND THE FIELD OF MEDIA  
AND TELECOMMUNICATIONS MERGERS**

by

**Marcin Huczowski\***

**A. INTRODUCTION**

Mergers and acquisitions in the telecommunications and media field have become a booming business as large companies scramble to acquire new IP technology companies, ISP consolidation takes place, and carriers bulk up to head off or take on the competition. Nowadays it is common knowledge that telecom mergers and acquisitions are one of the hottest areas in the US and EU economy.

Only in 2006, the telecom industry faced several huge mergers<sup>1</sup>. Moreover, for the past years we have witnessed the developing concept of convergence which usually takes place between telecoms and media<sup>2</sup>. More and more telecom companies, which initially supplied the Internet and other online services, tend to be interested in extending the scope of their offers by merging with the companies that provide different media services.

There is no doubt that all of those facts mentioned above have a great influence on the market, particularly on the competition on the market. These days, however, we are being faced not only with national mergers but also with those mergers that have transnational

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<sup>1</sup> First, Cingular Wireless LLC acquired AT&T Wireless Services Inc. to form nation’s largest cellular phone company. Then, Sprint Corp. acquired Nextel Communications Inc. On January 10th, Alltel Corp. agreed to buy Western Wireless Corp., owner of the Cellular One brand.

<sup>2</sup> The best example of such a merger is the one made by AOL (America on line) with Time Warner in 2000.

dimension. The scope of the possible market effect of the transnational mergers obviously may concern the competition on more than one national market involved.

That particular fact gives rise to very important questions. How far can we go with the application of the EU competition law? Is it possible to apply the EU competition law extraterritorially? If yes, under what circumstances may that happen? Do telecom mergers fall under the possible extraterritorial application of the EU competition law?

This short paper aims at trying to answer all those questions stated above. The main research purpose of the paper is to introduce and describe the model of the extraterritorial application of the EU competition law, taking into account its possible use within the framework of media and telecommunication mergers. The indications of the references to the US competition law will sometimes be given as I personally believe that the extraterritorial model of the application of the EU competition law has been copied from the US model that existed well before.

## **B. EXTRATERRITORIAL APPLICATION OF THE EU COMPETITION LAW**

Literal analysis of the provisions of the EC Treaty concerning competition, particularly Articles 81 and 82 of the Treaty, and the Merger Regulation, would appear to indicate a clear possibility of extraterritorial application of the European competition law. These regulations state that **all activities which influence trade between Member States are subject to the Community competition law**. Both the origin of these activities and the “nationality” of the entity undertaking them are therefore immaterial.

However, neither the Treaty itself (the original source of Community law) nor any other instrument of secondary Community law provide a precise definition of the boundaries of the EU’s extraterritorial jurisdiction, which is why the establishment of these boundaries, as in the case of the USA, has been left to the Community bodies, headed by the European Court of Justice (ECJ).

As in the US antitrust case law and its application by the Supreme Court of the USA, a process of evolution has also taken place in the ECJ case law concerning its approach to the issue of extraterritoriality. However, in contrast to the situation in the US law, this particular process should only be divided into two main stages (bearing in mind the extensive nature of the second stage):

- **the period preceding the ruling in *the Wood Pulp Case (the Dyestuffs Case)*,**
- **the period following the ruling in *the Wood Pulp Case*.**

The Dyestuffs Case allowed the European Court of Justice to take a position on this issue for the first time. The Court unequivocally rejected the territoriality principle as well as the effects doctrine established in the US case law. Instead, it formulated a new doctrine of extraterritorial application of competition law: the **economic unity doctrine**.

This doctrine was greeted with widespread criticism, which is why in its next landmark ruling in the Wood Pulp Case the ECJ departed from it, proposing the **implementation doctrine** instead (which is similar to the American effects doctrine). The ECJ rulings in the cases of *Boeing/McDonnell Douglas* and *General Electric/Honeywell* also have great significance for the development of the Community model of extraterritorial application of competition law.

### *I. The Dyestuffs Case*

As mentioned above, *the Dyestuffs*<sup>3</sup> Case provided the first opportunity for the ECJ to take a stance regarding the possibility of extraterritorial application of the European Community competition laws. In this case, the Court rejected the traditional view of the territoriality principle, though without expressing its support for the effects doctrine widely accepted in the USA.

The possibility of extraterritorial application of the Community competition law was based on the **economic unity doctrine**, which rests on the assumption that for the EU competition rules to be applied extraterritorially, it is sufficient that the company to which it is to be applied (which has its registered office outside the territory of the Member States) has a branch within the Community through which it operates, though such a branch may also have its own separate legal personality as a subsidiary. The only requirement is that the subordinate entity must be subject to control, *i.e.* the possibility should exist for the parent company to control the subsidiary's operations, *e.g.* by way of a controlling shareholding.

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<sup>3</sup> Cf. Case 48/69 *Imperial Chemical Industries Ltd v. KE*, 1972, E.C.R. 619.

## II. The Wood Pulp Case

The ruling in *the Wood Pulp Case* perfectly illustrates the rejection by the ECJ of the previously developed economic unity doctrine as a basis for extraterritorial application of competition law.

The case concerned an action brought by two wood pulp manufacturers for the annulment of a decision of the European Commission. The Commission had previously found that the companies had breached Article 81 of the EC Treaty by engaging in unlawful pricing practices (for which it had imposed a fine on them). The companies, whose registered offices were outside the territory of the European Community, argued that by imposing a fine on them the European Commission had exceeded its territorial jurisdiction and that applying Article 81 of the EC Treaty in their case was contrary to international public law as it breached the principles of **non-interference, international comity, and state sovereignty**<sup>4</sup>. The Commission defended itself by arguing that Article 81 is applicable to anti-competitive behaviour which may affect trade between the EU members, even if the registered offices of the companies engaging in such behaviour are located outside the Community, and even if the anti-competitive activities in question also affect markets outside the Community. The European Commission's reasoning was clearly based on the effects doctrine, while the actual effect of the anti-competitive behaviour was described as serious, immediate and intended.

Having analysed the case, the European Court of Justice categorically ruled out the possibility of applying the economic unity doctrine as a basis for the Community bodies to justify extraterritorial jurisdiction. However, in its ruling the ECJ's position came close to that of the US effects doctrine which had been so ardently supported by the Commission, though it stopped short of clear adherence to the doctrine. Instead, it created a new doctrine, the so-called **implementation doctrine**. In its definition of the new doctrine, the Court stated that when deciding whether it is possible to apply competition laws extraterritorially in a particular case, the key issue is not the place of formation of particular anti-competitive activities, but the place where these activities are to be or have been implemented. The Court also found that the decision of the European Commission was in accordance with the **territoriality principle** of international public law because the implementation of the activities which were the

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<sup>4</sup> The comprehensive evaluation of all those principles can be found in almost all the presently existing publications on public international law as those rules are to be treated as main pillars the public international law is based on (i.e. J. KLABBERS, AN INTRODUCTION TO INTERNATIONAL LAW (2002); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, *RECUEIL DES COURS*, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1964); P. MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW (7<sup>TH</sup> EDITION, 1997).

subject of the Commission's proceedings had taken place within the Community territory. Furthermore, the decision of the European Commission had not, in the opinion of the Court of Justice, violated **international comity** as the case had not involved a breach of international jurisdiction, or the **non-interference principle**, because the conditions for its application in the case had not been fulfilled<sup>5</sup>.

The decision of the Court of Justice in *the Wood Pulp Case* was based on the assumption that every act which breaches competition rules can basically be divided into two stages:

- **the formation stage,**
- **the implementation stage.**

Pinpointing the formation stage of anti-competitive behaviour (action) has no significance for establishing the possibility of extraterritorial application of competition rules. As mentioned earlier, it is rather the implementation stage which must be considered, or, more specifically, the territory on which this implementation is to take place or has already occurred.

The ruling of the European Court of Justice in *the Wood Pulp Case* was greeted with a barrage of criticism. The fundamental question was raised of whether the Court had formulated an unprecedented, expanding interpretation of the principle of territorial jurisdiction or if it had accepted *de facto* the application of the effects doctrine with the modification concerning the requirement of implementation. The doctrine has repeatedly attempted to answer this question, though as yet no agreement or final verdict has been reached in this matter<sup>6</sup>.

### *III. The case of Gencor and Lonhro*

At least a partial answer to the above question regarding *the Wood Pulp Case* could be provided by the ruling of the Court of First Instance of the European Communities in *the case of Gencor and Lonhro*<sup>7</sup>. This particular ruling is an example of the Community policy resting on the application of the effects doctrine when dealing with the **concentration of companies**.

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<sup>5</sup> The European Court of Justice found that the criteria for applying the non-interference principle had not been fulfilled, as there was no conflict between actions required by states outside the Community and those required by the Community itself.

<sup>6</sup> *Goyder and Whish*.

<sup>7</sup> *Gencor and Lonhro*, T-102/96, 1999, ECR II-753.

Therefore, it should be treated as the free gate for all the other possible mergers (also telecom and media mergers) to be assessed similarly in similar circumstances.

The case concerned two EU companies, Gencor and Lonhro, which wanted to perform a concentration of their subsidiaries operating on the South African platinum market. The European Commission opposed this concentration, while the South African authorities gave their consent. The Court of First Instance of the European Communities found that the **European Merger Regulation was applicable** in that situation. The CFI also found that to justify the application of extraterritorial jurisdiction, it is sufficient to demonstrate the existence of a **reasonably foreseeable, substantial and immediate effect of such concentration** on the European Union market.

The case of *Gencor and Lonhro* differs from the *Wood Pulp Case* on two levels:

- firstly, in *the case of Gencor and Lonhro* the effects doctrine was clearly applied,
- secondly, *the case of Gencor and Lonhro* narrowed down the application of this doctrine to “substantial, immediate and reasonably foreseeable effects”.

The ruling of the CFI in the case of *G&L* is a perfect example of the European Union adopting a more rigorous approach to the application of extraterritorial jurisdiction. The two levels mentioned above, which were used as a basis for defining the difference between the case of *G&L* and the *Wood Pulp Case*, require a brief comment.

The interpretation of the effects doctrine by the CFI clearly indicates similarities to the US model of the interpretation of this principle<sup>8</sup>. The ruling in the case of *G&L* gave a positive response to the question posted earlier regarding the Community’s support for the clear application of the effects doctrine. However, it should immediately be added that for the time being this positive response only applies to the control of concentration of companies and should not necessarily also be applied to Articles 81 and 82 TCE.

## C. SUMMARY

As in the US case law, there has been a gradual evolution in the European Union case law of criteria for the application of extraterritorial jurisdiction. In its initial ruling (see the *Dyestuffs Case*), the ECJ unequivocally rejected the possibility of applying the effects

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<sup>8</sup> In fact there is no doubt that the European approach towards the issue of the extraterritorial application of its competition law has been based to a large extent on the similar model introduced by the US Supreme Court. Although the ECJ has never admitted it, the present extraterritorial scope of material application of the EU competition law is the same as the one in the US antitrust law.



doctrine as a criterion for extraterritorial jurisdiction in competition cases. Instead, the European Court of Justice created a new doctrine, the economic unity doctrine.

In the *Wood Pulp Case* the Community adopted a more rigorous approach to this issue. In this case, the ECJ came closer in its interpretation to the US effects doctrine. However, it did not directly accept its application, creating a new doctrine instead, the implementation doctrine, which in substance was only slightly different from the effects doctrine.

The turning point in the European Union's approach to the issue of extraterritorial application of competition law was the ruling of the Court of First Instance in the case of *Gencor and Lonhro* merger. In this ruling, the CFI gave clear support for a definition of the effects doctrine, which was almost identical to that developed by the US antitrust case law.

Both the ECJ and the CFI have already adopted a substantial number of decisions concerning the telecom industry and the competition law regulations<sup>9</sup>. As for now, all of them concerned the territorial application of competition law of the EU. It has already been shown above, however, that the extraterritorial application of the EU competition law (Articles 81 and 82 of the EC Treaty and the Merger Regulation) is acceptable. The extraterritorial application of competition law should be regarded as one of the crucial instruments aiming at influencing the global economy and foreign policy.

Nowadays we are faced with the great rivalry for domination between the USA and the EU<sup>10</sup>. Therefore, in my opinion, it is only the matter of time that the EU will start using its competition law extraterritorially in the area of telecom and media mergers, which became one of the key areas as far as mergers are concerned generally.

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<sup>9</sup> The general overview of the Commissions' decisions on the matter of competition law and telecom mergers can be found in G. DRAUZ, C. JONES, *EC COMPETITION LAW – MERGERS AND ACQUISITIONS* (VOL. 2, 2006).

<sup>10</sup> More information on the issue of globalization and rivalry for dominance can be found in E.M. Fox, *Globalization and Its Challenges for Law and Society*, 29 *LOYOLA UNIVERSITY CHICAGO LAW JOURNAL* (1998).

**“EUROPE HAS NOT PERISHED YET”.  
THE GOALS OF THE POLISH PRESIDENCY:  
A LEGAL ANALYSIS**

by

**Brygida Kuźniak\***

Poland took over the presidency of the European Union on 1 July 2011. The situation in which our country began the six - month term is complicated; firstly, due to reasons inherent to the Polish side, and secondly, due to generally European and partly global causes plus problems of the EU itself.

**I.**

Therefore, the so - called “Polish” problems are as follows:

1) Poland has made a 13-year effort aiming for the EU membership and, according to our international policy so far<sup>1</sup>, wants to be a country that is fully integrated. It does not want to be shunning certain institutions and the EU structures on an actual and/or formally

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<sup>1</sup> A confirmation of this fact can be seen especially clearly in numerous documents presented on the webpages of the Ministry of International Affairs – [www.msz.gov.pl](http://www.msz.gov.pl) and on the archived websites of the European Integration Committee Office – [archiwum-ukie.polskawue.gov.pl](http://archiwum-ukie.polskawue.gov.pl).

legislative level (as *e.g.* Great Britain<sup>2</sup> does), yet it has not fully bound itself with the Charter of Fundamental Rights and has become part of the so-called British Protocol. Such a circumstance (a presiding country formally distancing itself from a document being a catalogue of the fundamental rights inherent to an EU citizen) – expanded upon in the later part of this text – doubtlessly may have a bearing on how our presidency and the trust in the “unionness” of Poland is perceived.

2) Polish leadership may also be hindered by the parliamentary election taking place in our country right in the middle of our half-year term. It may create a temptation for the ruling parties to use the presidency primarily for national, instead of European, needs mostly taking on a political aspect that is to ensure themselves being re-elected. Polish political opposition is not free from the temptation itself for its postulated firmer promotion of Poland not to become a promotion of political clamour and lack of responsibility for one’s words (an unfortunate example of such a turn of events may be the debate, or rather the quarrel and *quasi*-electoral campaign of the Polish politicians – European MEPs during the inauguration of our presidency in Strasbourg<sup>3</sup>).

3) To the circumstances not making our presidency any easier one should add the fact that Poland is a country that has been an EU member for a relatively short time (the fifth expansion, 2004), and has taken over the presidency itself for the first time.

The circumstances mentioned in points 2 and 3 are more of a factual and political nature, instead of being a legal problem, therefore, they shall not be expanded upon in the following paper. Thus, we shall take up the issue of the Charter of Fundamental Rights.

The Charter of Fundamental Rights initially was an interconstitutional declaration of the European Parliament, the European Council, and the European Commission, proclaimed in Nice on 7 December 2000. It was a non-binding legal document, containing *de lege ferenda postulates*, and designed only as source material aiding the interpretation of European legal documents. Earlier, that is before the Charter’s proclamation, fundamental laws were protected within the EU structures on the basis of general Community rules. Human rights

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<sup>2</sup> *E.g.* not joining the Eurozone, the British Protocol to the Charter of Fundamental Rights or, in terms of initiatives that are not EU-exclusive, not becoming part of the Schengen Area.

<sup>3</sup> Source, *e.g.*:

[http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9900318,\\_Dlaczego\\_pan\\_udaje\\_\\_\\_i\\_\\_\\_Europa\\_nie\\_zginela\\_\\_\\_Awantura.html](http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9900318,_Dlaczego_pan_udaje___i___Europa_nie_zginela___Awantura.html) – access date: 10 September 2011.

protection was taken care of by the European Justice Tribunal, which did not have a written and fully defined catalogue of fundamental rights. It fell upon the Charter to finally contain a broad and comprehensive directory of human rights. The Treaty establishing a Constitution for Europe<sup>4</sup>, based on Article I-9, was supposed to make the Charter legally binding in such a way that it consisted of its second part and therefore was to be elevated to the rank of a treaty law. However, the European Constitution has never come into force due to the failures it has encountered during the ratification process. It was the Treaty of Lisbon<sup>5</sup> that finally gave the Charter of Fundamental Rights its primary law status. That, however, came to pass not through assimilating the Charter's resolutions but through the entries in Article 6(1) TEU in its new wording (that is, the Lisbon version)<sup>6</sup>. Along with the Treaty of Lisbon, 13 protocols were passed, including the so-called British Protocol (No. 7) according to which the laws guaranteed by the Charter are to take effect in Great Britain and Poland only so far as they stem from the respective domestic laws of these countries. The British Protocol does not prevent the use of the Charter of Fundamental Rights in Poland and Great Britain; it does, however, limit its application to the level of protection guaranteed by domestic law. The British, deciding on such a legal constitution, were led by fear of a broad range of welfare rights for workers. Poland's motivation for joining the Protocol was different, however. It was not about workers' rights but about the fear of the European Union's competence, through giving the Charter treaty law status, expanding to and upon moral issues. The motivation of the government at the time was clear – to block the possibility of resolving outside Poland, in a way that is binding for Poland, issues dealing with public morality. To that end, joining the British Protocol seems unnecessary since matters of morality and custom fall outside the Community's and the EU's competence, a fact that is clearly stated by the power of primary law.

Furthermore, Art. 6(2) of the Lisbon version of the TEU states: "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties", and Art. 51(2) of the Charter itself reads as follows: "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties"<sup>7</sup>. On top of all that, Poland is not entirely free from solving moral issues in a

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<sup>4</sup> Treaty establishing a Constitution for Europe – O.J. 2004 C310/1 .

<sup>5</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community – O.J. 2007 C306/1.

<sup>6</sup> Art. 6(1) TEU in the Lisbon version: „The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.” – O.J. 2008 C115/13.

<sup>7</sup> Art. 51(2) of the Charter of Fundamental Rights – O.J. 2007 C303/1.

binding way outside of the state itself, and that is due to it being a party to the European Convention on Human Rights. It also comes under the law of the European Court of Human Rights which, when interpreting the treaties, uses, among other things, the notions of the so-called “autonomous concepts” or “living instrument principle”. These methods of interpretation come down to the fact that the Court is not bound by the internal law of Poland, or of any other country regarding which it adjudicates, in defining terms such as “family”, “marriage”, *etc.*<sup>8</sup>. In the presented situation, it seems that there are no reasons for Poland not to commit itself fully to the Charter of Fundamental Rights, and the term of our presidency could be most suitable for taking such, somewhat corrective, action<sup>9</sup>.

The Minister of Foreign Affairs, Radosław Sikorski, when presenting the priorities of the Polish presidency in the EU, in an interview given to the Polish Press Agency on June 27, 2011 announced, among other things, a possibility of Poland becoming fully bound by the Charter of Fundamental Rights<sup>10</sup>.

## II.

When it comes to circumstances complicating the Polish Presidency of the EU which are located outside our country, one may include the following:

1) The European demographic crisis and the financial crisis, especially in Greece, Portugal, and Ireland, to which the political and legal reply ever more commonly comes as “less Europe in Europe”. It is interpreted as a justification for slowing down or even relaxing the European integration process.

2) After the Treaty of Lisbon coming into power, the significance of the presiding country is smaller than ever before, and one cannot measure the failures or successes of the EU in any half-year period according only to the quality of its presidency.

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<sup>8</sup> M. Kowalski, *Efektywność czy omnipotencja – uwagi dotyczące interpretowania i stosowania Europejskiej Konwencji Praw Człowieka na przykładzie gwarancji art. 8* in PRAWO MIĘDZYNARODOWE. KSIĘGA PAMIĄTKOWA PROF. RENATY SZAFARZ, 294 and following (J. MENKES ED., 2007)

<sup>9</sup> More on the topic of Poland joining the British Protocol and limiting the use of the Charter regarding our country in B. Kuźniak, *Polska a Karta Praw Podstawowych – skuteczność Protokołu brytyjskiego w świetle celu postawionego przez Polskę* in PRAWO MIĘDZYNARODOWE I WSPÓLNOTOWE WOBEC WYZWAŃ WSPÓŁCZESNEGO ŚWIATA (E. DYNIA ED., 2010).

<sup>10</sup> Source, e.g.,

[http://www.gazetaprawna.pl/wiadomosci/wywiady/526405,sikorski\\_nowy\\_plan\\_partnerstwa\\_wschodniego\\_na\\_szczycie\\_w\\_warszawie.html](http://www.gazetaprawna.pl/wiadomosci/wywiady/526405,sikorski_nowy_plan_partnerstwa_wschodniego_na_szczycie_w_warszawie.html) – access date: 10 September 2011.

The circumstance mentioned in point 1 is more of a factual and political nature, instead of being a legal problem, therefore it shall not be expanded upon in the following paper. Regarding the lessening of the role and prestige of the presiding country, it all comes down to the fact that until the Treaty of Lisbon came into power, the country's representative had presided not only over the Council of the European Union but also (ranked as head of government or head of country) over the European Council. Today that is not the case. According to the Lisbon version of the Treaty on European Union (Article 16), the European Council elects a permanent president for a two-and-a-half-year term. The said president, among other things, presides over the European Council and leads its efforts while, as part of his/her duties, representing the EU externally, not infringing additionally on any competence of the High Representative of the Union for Foreign Affairs and Security Policy, that is a quasi-Minister of Foreign Affairs of the EU. It is exactly due to the functioning of these two institutions – the President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy – that the presidency seems not to bear such significance as in the olden days (before the Treaty of Lisbon came into power). The country holding the presidency still plays an important organizational role and is a factor in reaching compromise by the Member States. It is worth noting that since the year 2007, the presidency has been held according to the so-called *trio* formula, i.e. three countries holding the presidency consecutively. These countries coordinate the main goals of the presidency with each other allowing them to be viewed in a broader, more long-term (that is not just half-yearly), perspective. We are the first country of the following trio: Poland – Denmark – Cyprus, and it is with these countries that we shall share any failures as well as successes of the presidency.

Back in July 2010, the Council of Ministers passed a preliminary plan of the Polish Presidency and since then, pretty much all the way to its inauguration, the list of priorities was worked on. The final and detailed Polish plan was formulated by the “Programme of the Polish Presidency of the Council of the European Union 1 July 2011 – 31 December 2011”<sup>11</sup>. The head of the Polish government, especially during the inauguration of the presidency, as well as the head of the Ministry of Foreign Affairs in his numerous appearances and texts

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<sup>11</sup> Programme of the Polish Presidency of the Council of the European Union 1 July 2011 – 31 December 2011 – <http://www.pl2011.eu> – access date: 10 September 2011.

published in a number of European newspapers<sup>12</sup> before and during the presidency, have presented its most important goals:

- deepening integration (it is European integration that is seen by our country as the source of growth, and the challenges and problems which Europe faces particularly require deepening integration), deepening of the internal market and situating integration policy at the helm of the EU politics;
- the EU openness towards new partners (finishing negotiations regarding the European Union Association Agreement with Ukraine; advancing negotiations with Moldova and Iceland; supporting the aspirations of the Balkan States; continuing negotiations with Turkey);
- developing the EU-Russian partnership towards modernization;
- supporting democracy in countries such as Belarus;
- supporting democratic transitions in North Africa;
- practical implementation of the Treaty of Lisbon, establishing precedence regarding, *e.g.*, the way the Minister of Foreign Affairs of the country holding the EU presidency cooperates with the High Representative of the Union for Foreign Affairs and Security Policy.

These goals reveal a full understanding of the legally prejudged essence of the task, which is holding the EU Council presidency, and express the actual danger of it becoming warped. In the light of these goals, it also does not seem possible for the presidency to be used for internal and political campaign-related gains. It also seems highly unlikely for it to be twisted by actions undertaken in the spirit of rivalry between the EU Member States, with only the personal interest of Poland in mind, and not how it should be, that is with the interest of the EU as a Community. Even Polish political opposition seems to understand that and expresses itself that way, though, of course, as it is the opposition's right, not completely without irony (*e.g.* *"My nie chcemy przeszkadzać. Nie chcemy, by nasza prezydencja zakończyła się kompromitacją. Ale będziemy się starać jasno mówić społeczeństwu, jaka jest rzeczywista ranga poszczególnych wydarzeń [...]. Nic nadzwyczajnego nas nie spotka w czasie polskiej prezydencji. Powód? Prezydencja jest rotacyjna, a po przyjęciu traktatu lizbońskiego ma jeszcze mniejsze znaczenie niż wcześniej [...]. Nie jesteśmy w stanie znacząco zarysować naszej pozycji"*) (We do not want to interfere. We do not want for our presidency to end in disgrace. But we shall try to tell the society clearly what the actual significance of

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<sup>12</sup> Source, *e.g.*,  
[http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9899921,Tusk\\_w\\_PE\\_\\_Dolozymy\\_duzo\\_polskiego\\_optymizmu\\_bo\\_wierzimy.html](http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9899921,Tusk_w_PE__Dolozymy_duzo_polskiego_optymizmu_bo_wierzimy.html) - access date: 10 September 2011; <http://wyborcza.pl/1,75478,9874109.html> - access date: September 10, 2011;  
[http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9884842,Minister\\_Sikorski\\_w\\_\\_La\\_Repubblica\\_\\_integracja\\_europejska.html](http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9884842,Minister_Sikorski_w__La_Repubblica__integracja_europejska.html) - access date: 10 September 2011.

particular events is [...]. We shall not be met with anything extraordinary during the Polish Presidency. The reason? The presidency is rotational and after adopting the Treaty of Lisbon it has even less of a significance than before [...]. We are not able to clearly present our stance”) – Jarosław Kaczyński<sup>13</sup>).

**The goals of the Polish presidency, though seemingly not very impressive or spectacular, focus distinctly, in a way that is currently necessary, on the plane of fulfilling the dispositions of primary European law and on establishing precedence regarding the practical implementation of the provisions of the Treaty of Lisbon. The effort of the Polish Presidency is largely focused on stabilizing the EU within its new treaty boundaries through enacting the provisions of the establishment treaties with their most up-to-date modifications.**

It would do well to recall here the preamble to the TEU to cite a passage from it: the signatories of the Treaty on European Union – the EU Member States – are “determined to **promote economic and social progress for their peoples, within the context of the accomplishment of the internal market**”; as well as stress certain resolutions of Article 174 TEU: **The Union “(...) shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion”**. It seems that it is exactly **these treaty clauses which are followed – and enacted – by the Polish Presidency**. Such is the Polish response in times of the European crisis and the stipulation mentioned in the first part of this text, which is a consequence of the crisis, “less Europe”. According to Poland, the best defence against the crisis is integration, *i.e.*, translating from political jargon to legal terms, enacting European law.

The Prime Minister of the government of Poland – Donald Tusk, during the inauguration of the Polish Presidency in Strasbourg, said: *“Nie mam przesadnych wyobrażeń o narzędziach, jakie prezydencja ma w swojej dyspozycji, znam traktat lizboński. Ale mimo skromnych narzędzi, mimo czasu kryzysu, jestem przekonany, że dołożymy dużo polskiego entuzjazmu, polskiej energii, polskiego optymizmu, który pozwolił nam przejść przez kryzys dość bezpiecznie, bo naprawdę wierzymy w Europę. Chcemy wspólnie z Wami – wykonując te praktyczne zadania – doprowadzić do tego, abyśmy otworzyli na nowo rozdział inwestycji w Europę, abyśmy wszyscy uwierzyli w Europę* (I do not overimagine the tools which the presidency has at its disposal for I know the Treaty of Lisbon. But, despite the modest tools,

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<sup>13</sup> Source, *e.g.*,

[http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9880792,Kaczynski\\_\\_Nie\\_chcemy\\_\\_by\\_nasza\\_prezydencja\\_z\\_akonczyła.html](http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9880792,Kaczynski__Nie_chcemy__by_nasza_prezydencja_z_akonczyła.html) – access date: 10 September 2011.



despite the time of crisis, I am certain that we shall add a lot of Polish enthusiasm, Polish vigour, Polish optimism, which has allowed us to go through the crisis in relative safety, for we truly believe in Europe. We want together with You – carrying out these practical tasks – to lead to the point where we open a new chapter of investment in Europe, so that we shall all believe in Europe)”<sup>14</sup>. From Martin Schulz – leader of the social democrats in the European Parliament – came the following reply: “*Wspaniałe wystąpienie! Jeszcze Europa nie zginęła, póki my żyjemy* (A wonderful speech! Europe has not perished yet, so long as we still live)”<sup>15</sup>.

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<sup>14</sup> Source, *e.g.*,

[http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9899921,Tusk\\_w\\_PE\\_\\_Dolozymy\\_duzo\\_polskiego\\_optymizmu\\_\\_bo\\_wierzimy.html](http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9899921,Tusk_w_PE__Dolozymy_duzo_polskiego_optymizmu__bo_wierzimy.html) – access date: 10 September 2011.

<sup>15</sup> Source, *e.g.*,

[http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9900318,\\_Dlaczego\\_pan\\_udaje\\_\\_i\\_\\_Europa\\_nie\\_zginela\\_\\_Awantura.html](http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,9900318,_Dlaczego_pan_udaje__i__Europa_nie_zginela__Awantura.html) – access date: 10 September 2011.



The logo of Polish Presidency displayed on the building of the Ministry of Foreign Affairs in Warsaw (photo: Marek Matczak)

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